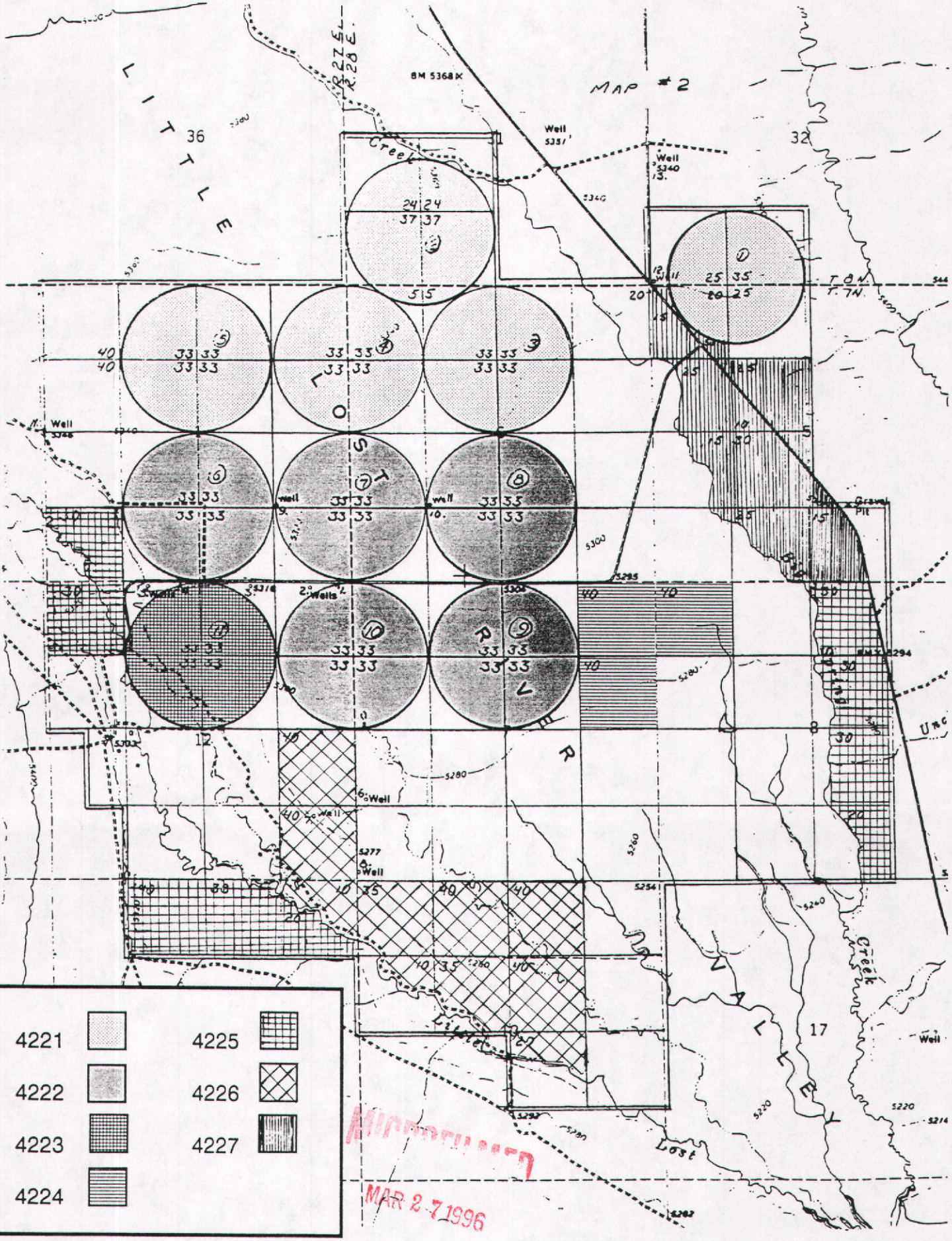
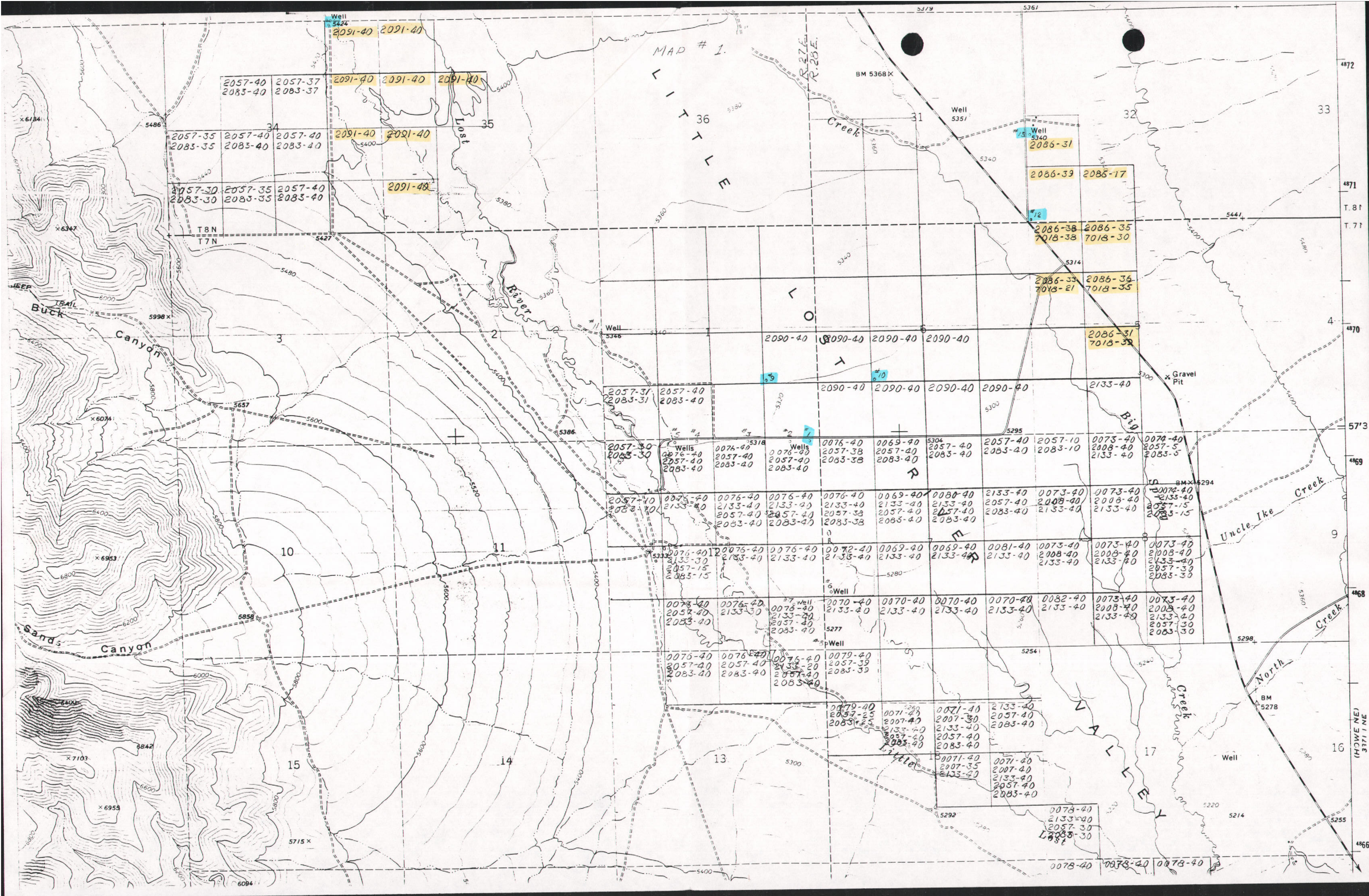
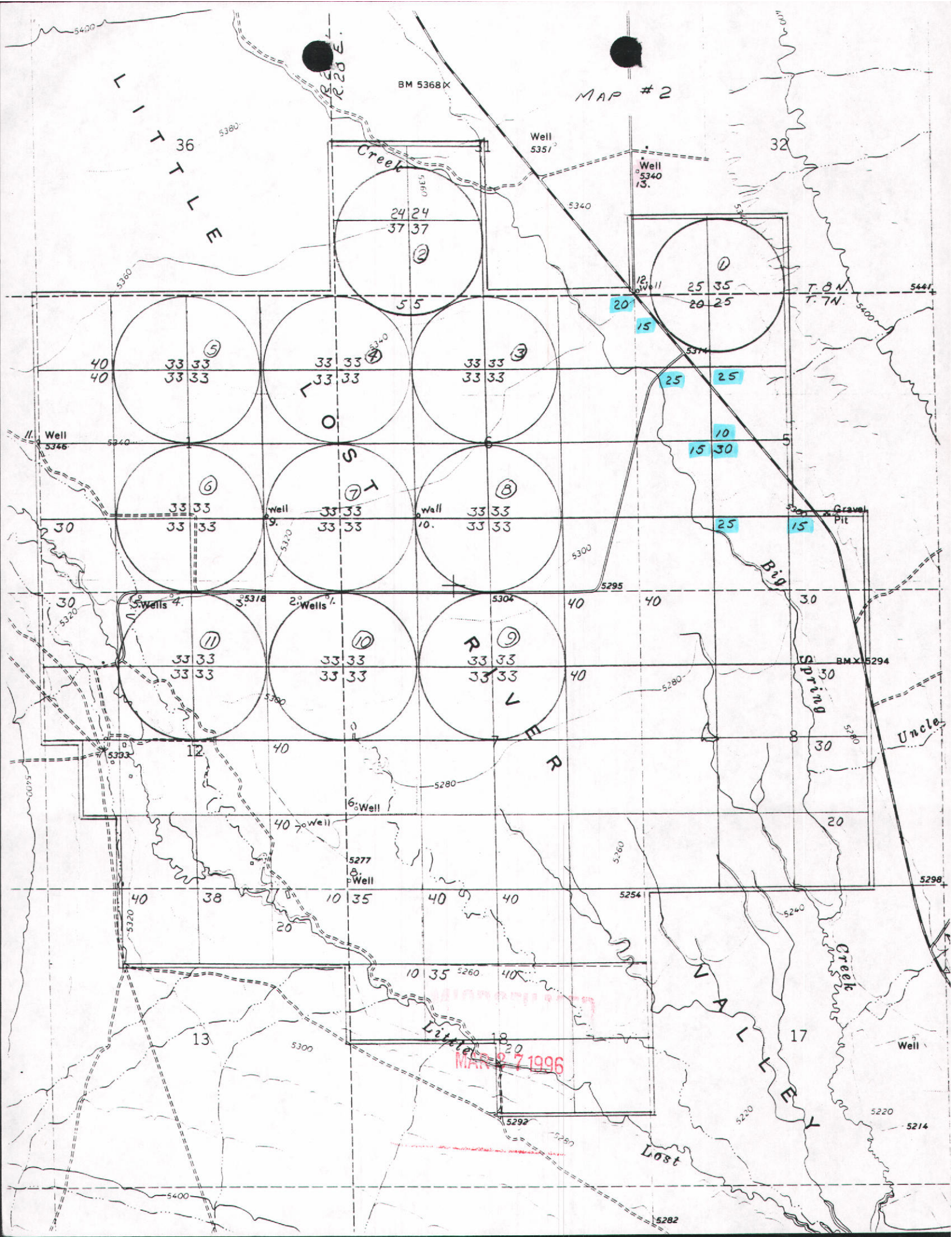


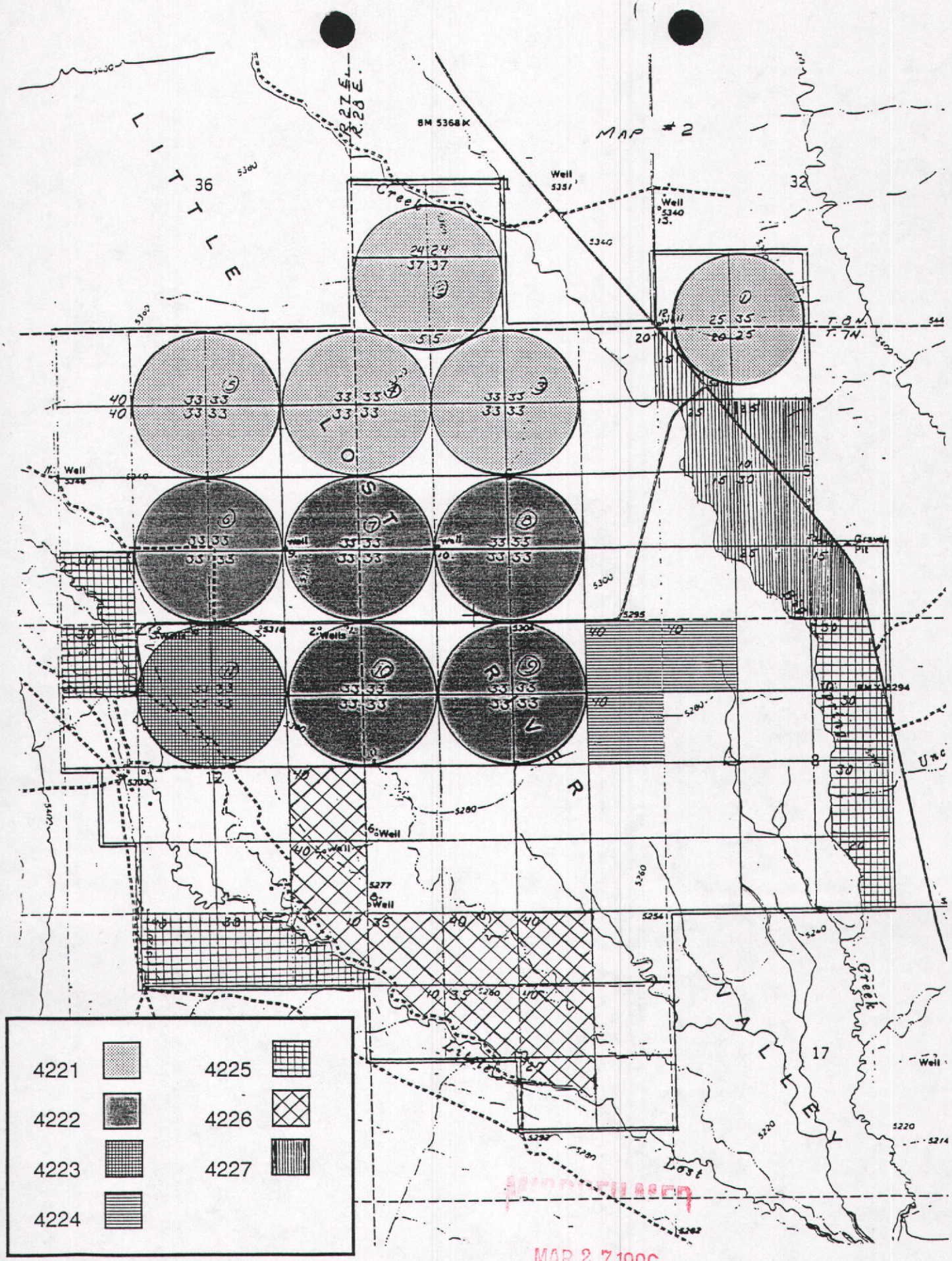
MAR 2 7 1996

ATTACHMENT No. 1


MAP # 1
LITTLE LOST RIVER VALLEY
Lost River
Buck Canyon
Sands Canyon
Little Lost
Creek
Big Spring Creek
Uncle Ike Creek
North Creek
JEEP TRAIL
T 8 N
T 7 N
R.27E.
R.28E.
Gravel Pit
BM 5368
BM 5278
BM 5294
(HOWE NE)
3371 I NE

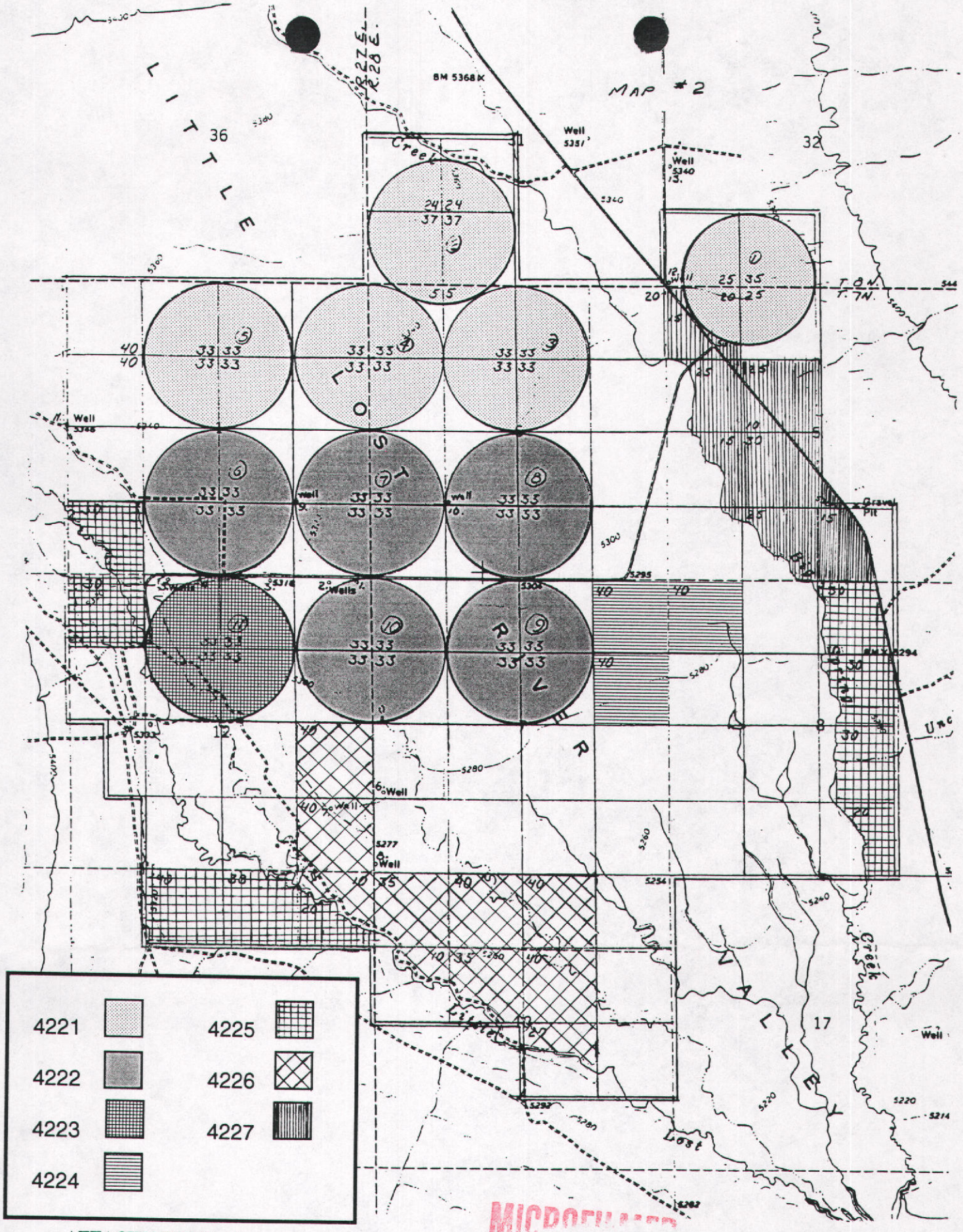

MAP #2
R.23 E.
T.8 N.
T.7N.
LITTLE
LOST
RIVER
Creek
Well
Gravel Pit
Big Spring
Uncle
Little
VALLEY
Lost
BM 5368
BM X 5294
5441
5400
5380
5360
5340
5320
5300
5280
5260
5240
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5282
5292
5298
5295
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MAR 27 1996



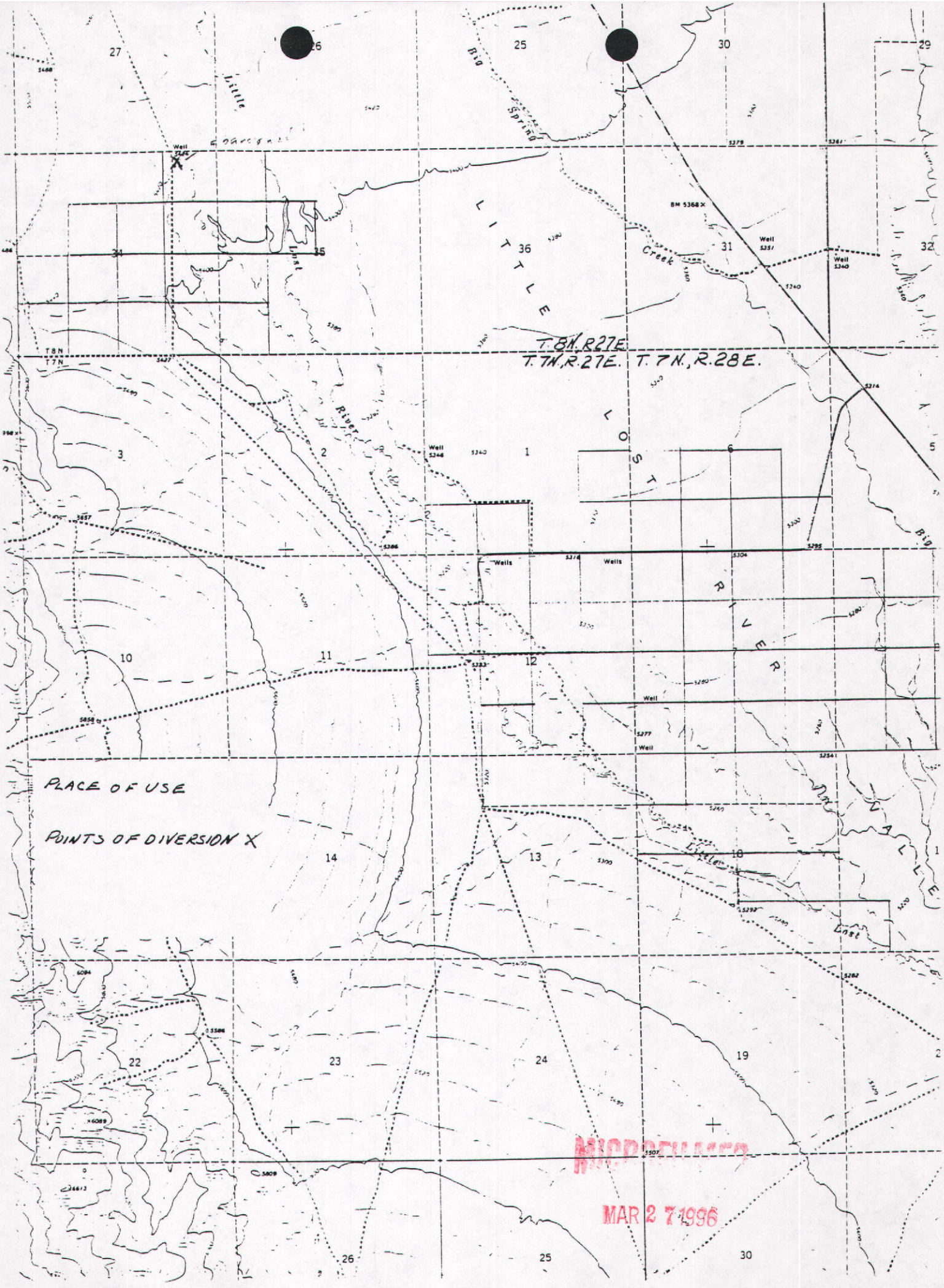
ATTACHMENT No. 1

MAR 2 7 1996



ATTACHMENT No. 1

MICROFILMED
MAR 2 7 1996

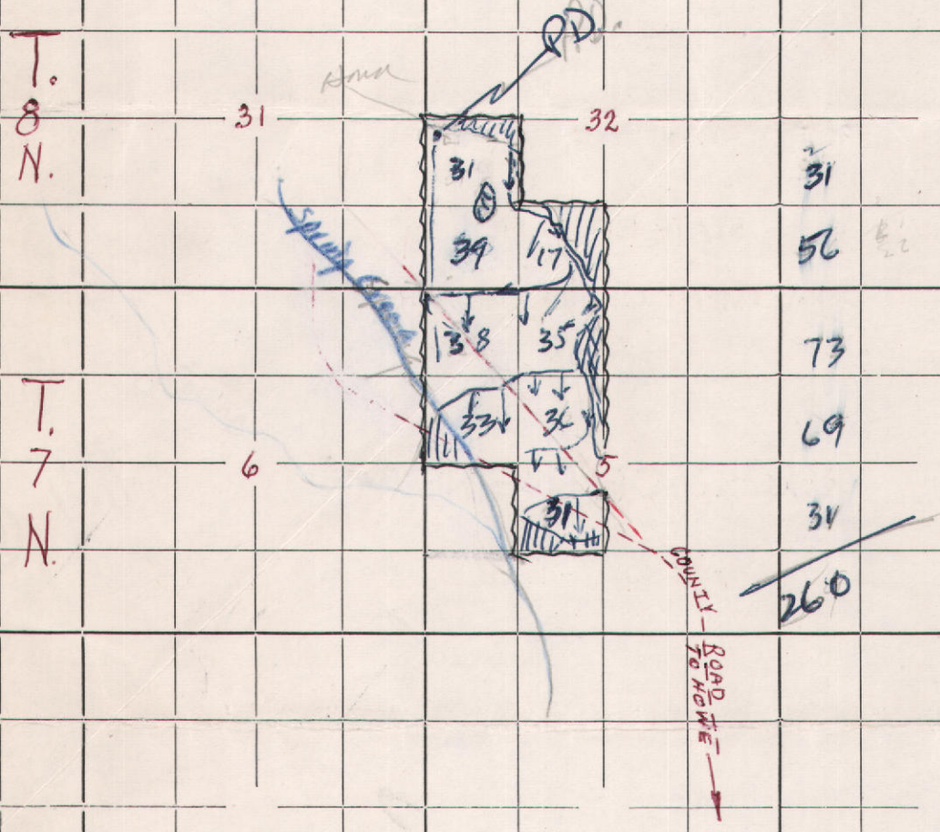


MICROFILMED
MAR 27 1996

R 28 E.

T. 8 N.

T. 7 N.



Subdivisions 8

AREA 260 acres

Q 4.10 cfs or 205 inches

Scale: 2 Inches Equals 1 Mile. Draw Map In Ink.

27717

Affidavit of Publication

I, Dolly Cross, 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 4 (four) consecutive weeks, commencing with the issue dated Feb., 28, 1963 and ending with the issue dated March 21, 1963

Dolly Cross

Subscribed and sworn to before me this 21 day of Mar., 1963

Betty J. Mayo
Notary Public.

Residence: Arco, Idaho.
My commission expires 2-4, 1965

RECEIVED
APR 8 1963
Department of Reclamation

PUBLIC NOTICE

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

Notice is hereby given that at 10 a. m., on the 5th day of April, 1963, at Arco, County of Butte, State of Idaho, before O. T. Jones, Notary Public, at Arco, Idaho, Final proof will be submitted of the completion of works for the diversion of 4.4 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-27717, 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 Clarence G. Hawley, Howe, Idaho.

2. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conveying to the place of use is 4.4 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 4.4 cubic feet per second.

4. The point of diversion of said water is NW¼SW¼, Sec. 32, Twp. 8 N., Rge. 28 E.B.M.

5. The place where said water is used is Sec. 32, NW¼ SW¼, S½SW¼, Twp. 8 N., Rge. 28, E.B.M.; Sec. 5, Lot 3, Lot 4, S½NW¼, NE¼SW¼, Twp. 7 N., Rge. 28 E. B. M.

6. The date of priority which said user is prepared to establish is January 12, 1959.

GEO. N. CARTER,
State Reclamation Engineer.

Pub. Feb. 28 thru Mar. 21, 1963.

27717

IN REPLY REFER TO:
LO:VSS
Idaho 09991

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

RECEIVED
APR 2 0 1960
Department of Reclamation

APR 19 1960

NOTICE OF ALLOWANCE

Hawley.

Clarence Glen Hawley

Rowe,

Idaho

Dear Sir:

Your Desert Land Entry, Serial No. Idaho 09991,
Receipt No. 833035, for Lot 4, S½NW¼, NE¼SW¼,
, Section 5,
Township 7 N., Range 28 E., Boise Meridian, Idaho,
containing 158.65 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.

27717

Sincerely yours,

Donald I. Bailey
Manager

cc: BM, 1-3
LAM
State Recl. Engr.

A2ILO-20
(Nov., 1958)

27717

IN REPLY REFER TO:
LO:VSS
Idaho 09992

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

RECEIVED
APR 20 1960
Department of Reclamation

APR 19 1960

NOTICE OF ALLOWANCE

Florence Glen Hawley
Rupe,
Idaho

Dear Sir:

Your Homestead Entry, Serial No. Idaho 09992,
Receipt No. 039034, for NW¼SW¼, S½SW¼, Sec. 32;
T. 8 N., R. 28 E., and Lot 3, Section 5,
Township 7 N., Range 28 E., Boise Meridian, Idaho,
containing 158.75 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.

Sincerely yours,

Donald I. Bailey
Manager

27717

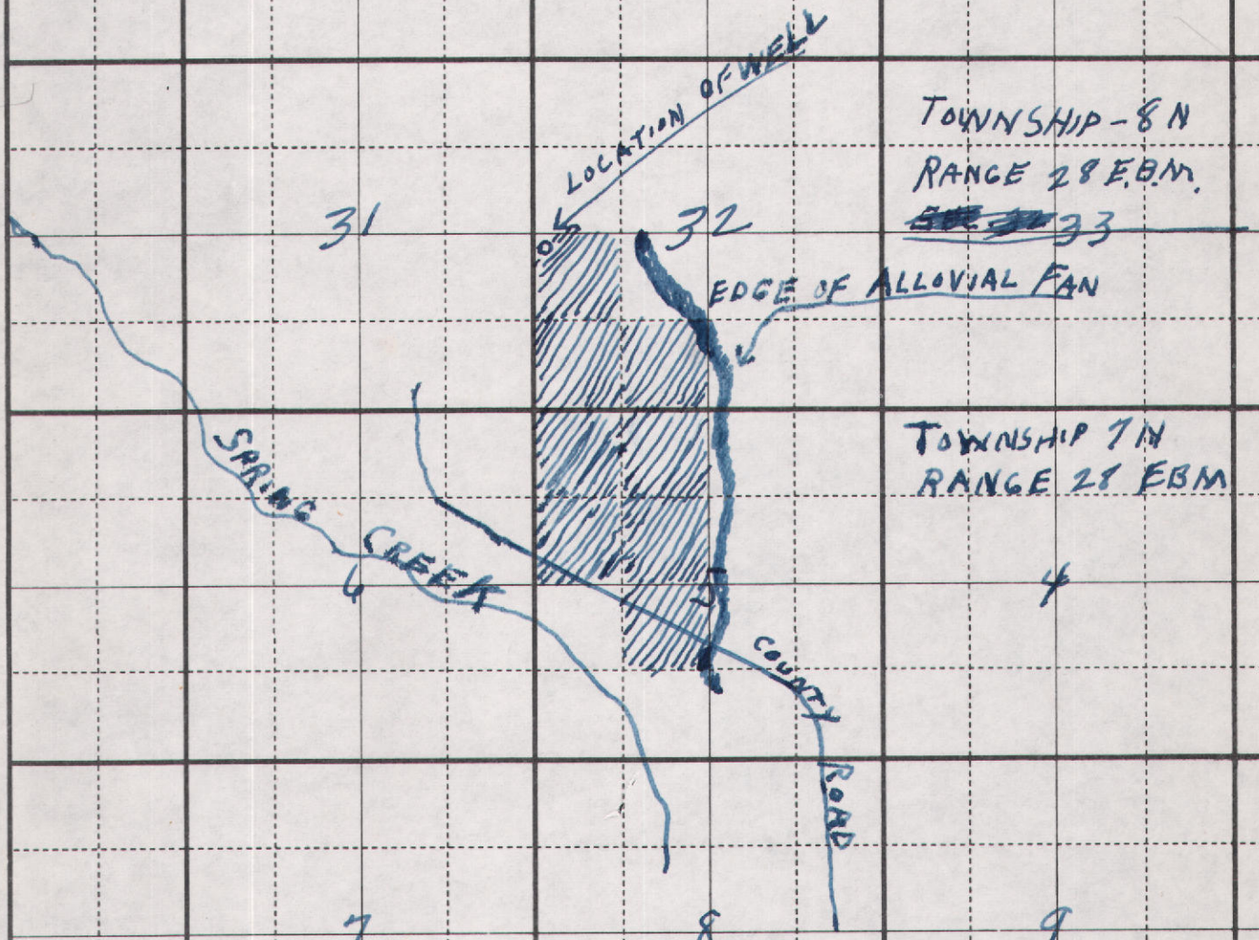
cc: DM, I-3
LM - State. Recl. Engr.

A2 ILO-20
(Nov., 1958)

27717

NAME OF APPLICANT Clarence Hawley

Form No. 0



Permit Map No. M-27717
As Approved
JAN 20 1959
GEO. N. CARTER
Reclamation Engineer

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

27717

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

Gary Spackman

RECEIVED

MAR 27 1995

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

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

Gary Spackman

MAR 2 7

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

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

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

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

Kris Rhodes
Kris Rhodes

MAR 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 GRANTING PETITION TO AMEND PROTEST

On December 3, 1993, James Mays and Mays Land & Livestock (Mays) protested applications for transfer filed be 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 intervener 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

1-12-1995

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

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

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

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

Kris Rhodes

Kris Rhodes

RECEIVED
JUL 1 [illegible] 2003
Department of Water Resources

[illegible] IN CHAMBERS AT BLACKFO[illegible]
[illegible]INGHAM COUNTY, IDAHO
7/14/03
4:30p
JAM[illegible]S 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., Plaintiff, -vs- IDAHO DEPARTMENT OF WATER, RESOURCES, JAMES MAY, MAYS LAND AND LIVESTOCK, BLAINE COUNTY CANAL COMPANY, Defendants,	**CASE NO. CV-1996-39** **ORDER OF REMAND**

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
District Judge

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JUL 14 2003

CERTIFICATE OF SERVICE

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

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

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

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

MICHAEL CREAMER ESQ
PO BOX 2720
BOISE IDAHO 83701-2720

TRILBY McAFFEE, Clerk of the Court

By _____
Deputy Clerk

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NOV 14 2003

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.	)))))	**AMENDED FINAL ORDER**

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 theDepartment 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

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NOV 14 2003

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.

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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.

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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

Water Right No.	CFS	Priority	Source
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

Water Right No.	Acre-Feet	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

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Total Number of Acres Irrigated

Year	Sage Willow's Estimate	Mays' Estimate
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

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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.

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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

MICRO

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

MICROFILMED
APR 1 4 2003

WATER RIGHT NUMBER	NAME	CFS
33-02086		
	Split into 33-02086A/B by Trans. Nos. 4221/4227.	
33-02086A	SAGEWILLOW INC	1.37
33-02086B	SAGEWILLOW INC	2.73

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

COPY

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

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 theDepartment 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

Water Right No.	CFS	Priority	Source
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

Water Right No.	Acre-Feet	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

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Total Number of Acres Irrigated

Year	Sage Willow's Estimate	Mays' Estimate
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

MAR 2 7

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

MAR 2 7 1995

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.

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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 2 7 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

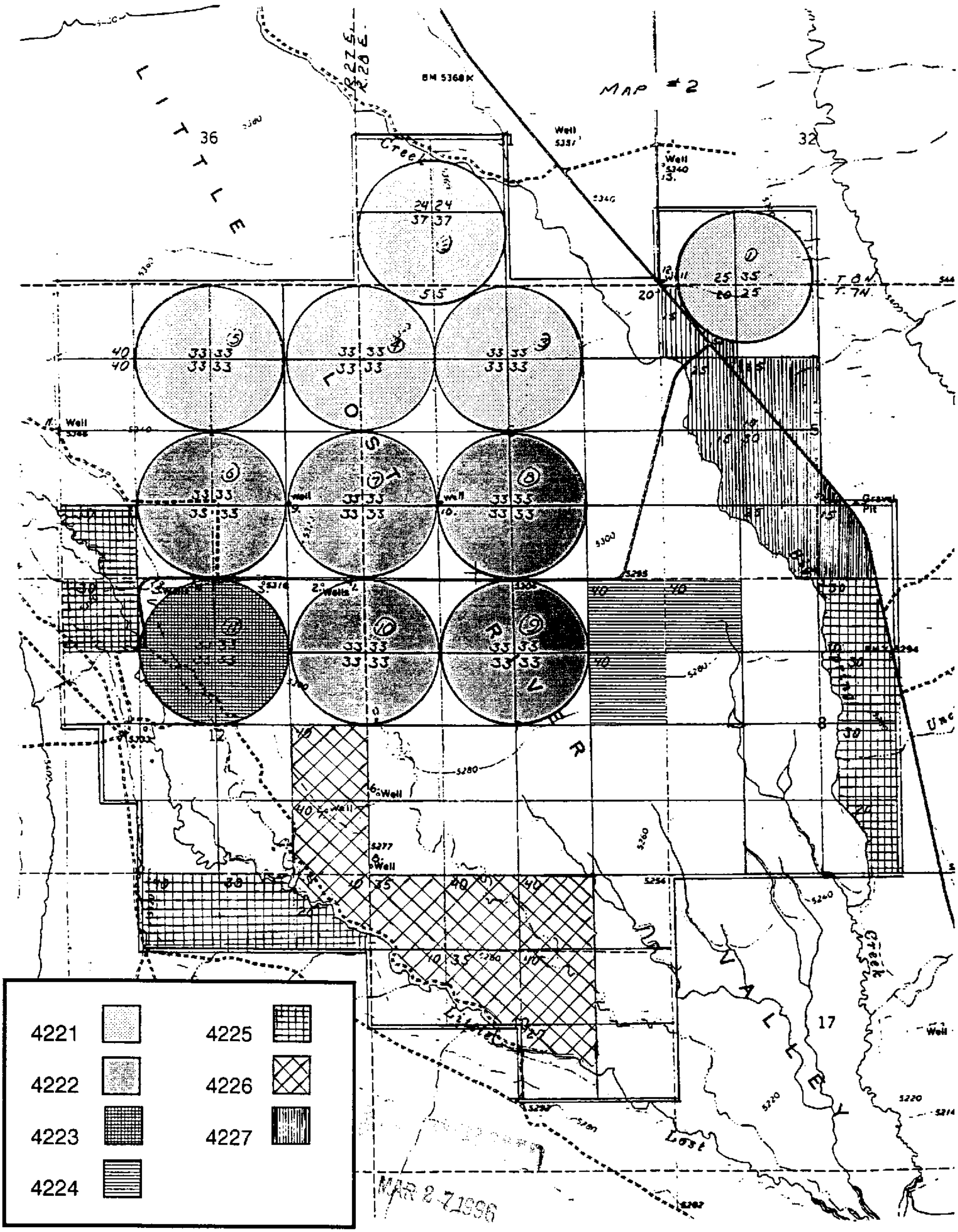
Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

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
Deborah Drew-Ellis
Legal Secretary

MAR 2 7 1996



ATTACHMENT No. 1

Form 222
1-87

RECEIVED
2 0 1993
Department of Water Resources

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 4221

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

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

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

MAR 2 7 1990

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 X 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

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, 19 96

Karl J. Dreher, Director

MAR 27 1996

SAGEWILLOW INC TRANSFER SUMMARY
TRANSFER NO. 4227

WR NO.	PRIORITY	ACRES PER RIGHT	RATE	VOLUME
33-02086B	01-12-1959	173.1	2.73	605.9
33-02091B	01-12-1960	7.4	0.10	25.9
33-07018	09-12-1972	163.0	3.26	570.5

TOTALS PER TRANSFER = 180.0 ACRES 6.09 CFS 1202.3 AFA

6.09 CFS / 180 ACRES = 0.03383 CFS PER ACRE

VIR = 180 ACRES X 3.5 AF = **630 AF**
VDR = 6.09 CFS X 184 DAYS X 1.9835 = 2222.6 AF

DIVERSION RATE PER ACRE > 0.02 CFS PER ACRE
MAXIMUM VOLUME EXCEEDED BY TOTAL VOLUME OF RIGHTS
IRR OVERLAP/**R30**

MAR 2 7 1996

Form 222
1-87

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STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

Transfer No. 4227

APPLICATION FOR TRANSFER OF WATER RIGHT

PART 1

RECEIVED
SEP 20 1993
Department of Water Resources

Name 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 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	
33-02086B	01/12/1959	2.73 cfs	Irrigation	04/01	to 11/01
33-02091B	01/22/1960	.01 cfs	Irrigation	04/01	to 11/01
NE 33-07018B	09/12/1972	3.26 cfs	Irrigation	04/01	to 11/01
					to

2. Total amount of water being transferred 6.09 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	¼	¼	¼	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 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	28E	5						15	25	35	30	15		25			15		160
		6	20																20

4227

Total acres 180

Transfer No. _____

PART 1

6. 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 X No. If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.

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

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

d. Remarks:

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

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, 19 96

Karl J. Dreher, Director

MAR 27 1996

Transfer No. _____

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. 33-02086 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 _____

3. Source of water ground water tributary to _____

4. Date or priority 01/12/1959

5. Water is used for the following purpose:

   amount 4.1 cfs (cfs/ac-ft) for Irrigation purposes from 04/01 to 11/01
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____

6. Total amount of water under right 4.1 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
	NW	NW	SW	32	8N	28E	Butte	Well No. 13

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	
7N	28E	5					35	38	33	36	31								173
8N	28E	32									31	39	17						87

Total acres 260

9. Describe any other water rights used for the same purpose as described above 33-07018 is appurtenant to 163 acres of the lands in Section 5, Township 7 North, Range 28 East.

PART 2

Transfer No. _____

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

No 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 2.73 cfs for Irrigation purposes from 04/01 to 11/01
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
	NW	NW	SW	32	8N	28E	Butte	Well No. 13

3. 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	28E	5					35	38	33	36	31								173

Total acres 173

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

1. amount 1.37 cfs for Irrigation purposes from 04/01 to 11/01
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)
   amount _____ for _____ purposes from _____ to _____
   (cfs/ac-ft)

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
	NW	NW	SW	32	8N	28E	Butte	Well No. 13

3. 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	28E	32										31	39	17					87

Total acres 87

Transfer No. _____

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. 33-02091 (See Transfer #3785) 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 _____

3. Source of water ground water tributary to _____

4. Date or priority 01/22/1960

5. Water is used for the following purpose:

   amount 4.36 cfs (cfs/ac-ft) for Irrigation purposes from 04/01 to 11/01

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

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

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	SW	6	7N	28E	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	
7N	27E	1													40			40	80
7N	28E	6									40	40	40	40		40	40		240

Total acres 320

9. Describe any other water rights used for the same purpose as described above _____

PART 2

Transfer No. _____

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

No 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 .10 cfs (cfs/ac-ft) for Irrigation purposes from 04/01 to 11/01
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
		NE	SW	6	7N	28E	Butte	

3. 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													40			40	80
7N	28E	6									~~40~~	~~40~~	~~40~~	~~40~~		~~40~~	~~40~~		~~240~~

7

Total acres ~~320~~ 7

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

1. amount 4.26 cfs (cfs/ac-ft) for Irrigation purposes from 04/01 to 11/01
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion
		NE	SW	6	7N	28E	Butte	

3. 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													~~40~~			40	80
7N	28E	6									40	40	40	40		40	40		240

73

Total acres ~~320~~ 313

Transfer No. _____

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. 33-07018 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 _____

3. Source of water ground water tributary to _____

4. Date or priority 09/12/1972

5. Water is used for the following purpose:

   amount 3.26 cfs (cfs/ac-ft) for Irrigation purposes from 04/01 to 11/01

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

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

6. Total amount of water under right 3.26 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
	SW	SW	SW	32	8N	28E	Butte	Well No. 12

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	
7N	28E	5					30	38	21	35	39								163

Total acres 163

9. Describe any other water rights used for the same purpose as described above A portion of 33-02086 is appurtenant to some 173 acres which contains most of this 163 acres

PART 2

Transfer No. _____

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

No 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) for _____ purposes from _____ to _____
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____
   amount _____ (cfs/ac-ft) for _____ purposes from _____ to _____

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion

3. 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	

Total acres _____

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

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

2. Point(s) of Diversion:

Lot	¼	¼	¼	Sec.	Twp.	Rge.	County	Local name for diversion

3. 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	

Total acres _____

Transfer No. _____

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.

SEE ATTACHED MAPS

Map #1 shows former points of diversion highlighted in blue and places of use highlighted in yellow.

Map #2 shows proposed point of diversion highlighted in pink and acreages to be irrigated highlighted in blue.

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

Transfer No. _____

PART 3

B. CHANGES IN NATURE OF USE

1	New Nature of Use	Amount (cfs/ac-ft)	Hours/days/year	Period of Use
	None			_____ to _____
				_____ to _____

2. Quantity and quality of return flows and location of discharge:
No change

3. Describe effects on other water uses resulting from the proposed change:
We anticipate no significant effects.

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.

Sagewillow Inc
Edward N. Dennis Pres
(Signature of Applicant)

Subscribed and sworn to before me this 16th day of September, 19 93.

Della VanSciel
(Notary Public)

My commission expires 8/8/96

FOR DEPARTMENT USE ONLY

Transfer contains _____ pages and _____ attachments

Received by JVansant Date 9-21-93 Protest filed by _____

Prelim. check by _____ Fee 50.00 _____

Receipted by JV CO28624 Date 9-21-93 _____

Published in _____ Copies of protest forwarded by _____

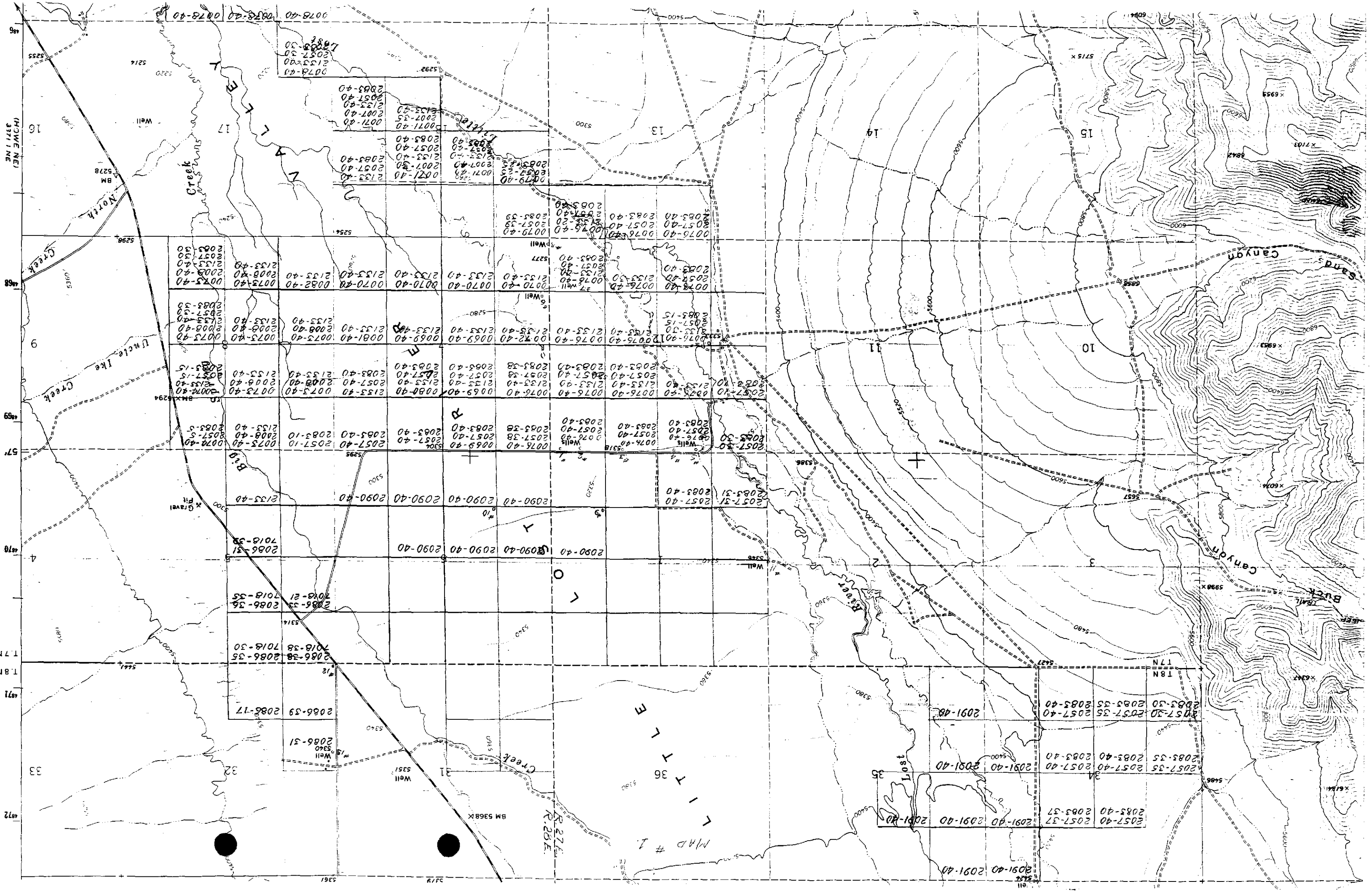
Pub. dates _____ Hearing held by _____ Date _____

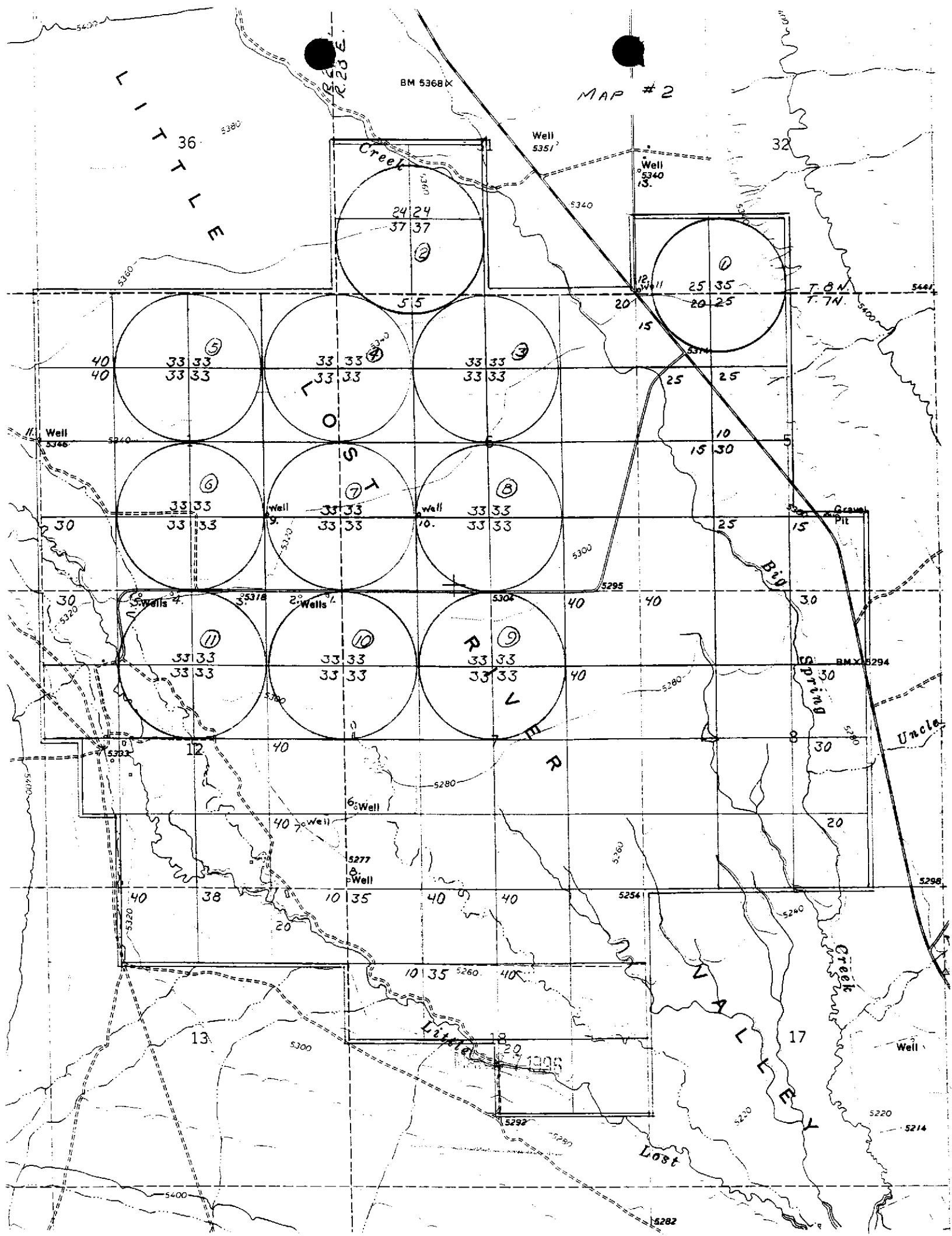
Watermaster recommendation requested on _____ Recommended for ☐ approval ☐ denial

_____ rec'd. _____ by _____

Copy of transfer sent to lien holder _____

RECEIVED 1996


Valley
North Creek
Uncle Ike Creek
Big Creek
Beaver Creek
Sand Canyon
Buck Canyon
Well
Wells
Gravel Pit
BM 5278
BM 5368X
MAP # 1
T 17 N
R. 25 E.
T 18 N
R. 27 E.
T.17
T.18
9
10
11
12
13
14
15
16
17
31
32
33
34
35
36


MAP #2
LITTLE
LOST
RIVER
VALLEY
Creek
Well
Gravel Pit
Spring
Uncle
Lost
BM 5368
BM X 5294
T. 8 N.
T. 7N.
R. 20 E.
R. 21 E.

NO. 26671

FILED

MAR 12 1993

A.M. 12:00 P.M.

BUTTE COUNTY RECORDER

CORPORATION WARRANTY DEED

THIS INDENTURE, made this 9 day of ~~February~~ March, 1993, between **PANCHERI, INC.**, an Idaho corporation, Grantor, and **SAGEWILLOW, INC.**, Grantee, whose mailing address is 2416 Plaza Del Grande, Las Vegas, Nevada 89102.

WITNESSETH, That Grantor having hereunto authorized by resolution of its Board of Directors, for and in consideration of the sum of Ten Dollars ($10.00), lawful money of the United States of America, to it in hand paid by Grantee, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm unto Grantee, and to its heirs and assigns forever, all the following described real estate situated in Howe, county of Butte, State of Idaho, to wit:

Township 7 North, Range 27, E.B.M., Butte County, Idaho
Section 1: Lots 1-4 inclusive, and S½N½

Township 7 North, Range 28, E.B.M., Butte County, Idaho
Section 5: W½SW¼
Section 6: Lots 1-5 inclusive, S½~~NW¼~~ NE¼, SE¼NW¼ & NE¼SE¼.

Township 8 North, Range 28, E.B.M., Butte County, Idaho
Section 31: Lots 3 and 4 and E½SW¼

ALL SUBJECT TO highway right-of-ways, easements for utilities, real property taxes and irrigation assessments for 1993 and subsequent years, reservations and exceptions in state deeds and federal patents, and building and zoning laws, ordinances, and regulations of governmental agencies.

MAR 8 7 1996

TOGETHER With all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate

right, title and interest in and to the said property, as well in law as in equity, of Grantor.

TO HAVE AND TO HOLD, All and singular, the above mentioned and described premises, together with the appurtenances, unto Grantee, and to its heirs and assigns forever. And the Grantor, and its successors, the said premises in the quiet and peaceable possession of the Grantee heirs and assigns against Grantor, and its successors, and against all and every person and persons whomsoever, lawfully claiming or to claim to same, shall and will warrant and by these presents forever defend.

IN WITNESS WHEREOF, The Grantor has caused its corporate name to be hereto subscribed by its President and its corporate seal to be affixed by its Secretary in pursuance to said resolution the day and year first above written.

PANCHERI, INC.

By: _____
Its President

STATE OF IDAHO)
) ss.
County of Bingham)

On this 9 day of ~~February~~ March, 1993, before me, the undersigned, a notary public in and for said State of Idaho, personally appeared Jerry Pancheri known to me to be the President of PANCHERI, INC. the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL)

_____
Notary Public for Idaho
Residing at: Blackfoot
My Commission Expires: 5/20/94

MAR 2 7 1993

NO. 026677
FILED

WARRANTY DEED 930021D.DOC

A.M. 12:05 P.M.
BUTTE COUNTY RECORDER

FOR VALUE RECEIVED Terry Hawley, a single person dealing with his sole and separate property; David E. Hawley, a/k/a David Hawley, and Connie Hawley, husband and wife, the Grantors, do hereby grant, bargain, sell, and convey unto Sage Willow Inc., the Grantee, whose current address is 2416 Plaza Del Grande, Las Vegas, Nevada, 89102 the following described premises, to-wit:

DESCRIPTION OF A PARCEL OF PROPERTY
Within: SEC. 32, T8N, R28E, B.M., the S1/2SW1/4
and a portion of NW1/4SW1/4 and
Within: SEC. 5, T7N, R28E, B.M., the NE1/4SW1/4
and a portion of the NW1/4
Little Lost River Valley, Butte County, Idaho

A single parcel of property to be described by metes and bounds:

Commencing at a 1/2" rebar marking the SW Corner of Sec. 32, T8N, R28E, B.M., and the NW corner of Sec. 5, T7N, R28E, B.M., Butte County, Idaho, said corner lying S 00°19'15" E, 5264.79 feet from a 1/2" rebar marking the NW Corner of Section 32, and said Corner being the True Point of Beginning.

Thence N 00°19'15" W, 1316.20 feet along the Westerly boundary of said Sec. 32 to the S 1/16 Corner common to Sections 31 and 32; thence N 00°19'15" W, 990.00 feet along said section line;
thence N 90°00'00" E, 40.00 feet;
thence S 00°19'15" E, 990 feet, more or less, to the northerly 1/16 boundary line of the SW1/4 SW1/4 of said Sec. 32;
thence Easterly, 1280 feet, more or less, along said northerly 1/16 line of the SW1/4 SW1/4 to the SW 1/16 corner of said Sec. 32;
thence Easterly, 1320 feet, more or less, along the northerly 1/16 boundary line of SE1/4 SW1/4 to the CS 1/16 Corner of said Sec. 32;
thence Southerly, 1320 feet, more or less, along the easterly 1/16 boundary line of SE1/4 SW1/4 to the 1/4 Corner common to said Sec. 32 and Sec. 5, T7N, R28E, B.M.;
thence S 00°04'18" W, 3895.50 feet to the CS 1/16 Corner of Sec. 5; thence S 89°54'05" W, 1321.30 feet to the SW 1/16 Corner;
thence N 00°11'50" E, 1316.47 feet to the CW 1/16 Corner;
thence S 89°48'09" W, 391.71 feet along the 1/4 section line;
thence N 31°41'39" W, 149.59 feet;

MAR 2 7 1996

thence N 03°42'07" W, 442.43 feet;
thence N 21°07'24" W, 283.84 feet;
thence N 39°11'32" W, 176.63 feet'
thence N 27°52'36" W, 266.90 feet;
thence N 50°23'36" W, 58.75 feet;
thence N 39°08'42" W, 656.73 feet;
thence N 89°52'48" W, 9.70 feet to the westerly boundary of said Section 5;
thence N 00°19'27" E, 826.90 feet along the westerly boundary of said Section 5 to the True Point of Beginning.

Also contained within this description are 2 60-foot wide roads: 1) The Howe Northwest Highway 2) A county road within the NW1/4 Sec. 5.

Said described property contains 252 acres, more or less, minus 6.5 acres, more of less, within said roads for a net acreage of 245.5 acres, more of less.

(Note: The parties intend by this description to include an irrigation well and sufficient area surrounding said irrigation will for access, operation, use, maintenance and repair of the well. As soon as the weather permits, grantor shall obtain a formal survey of the land intended to be conveyed where the irrigation well is located. If this description needs to be corrected the parties agree to make such corrections.)

EXCEPTING THEREFROM Oil and Gas rights, and particularly Oil and Gas Lease and Assignment thereof.

TOGETHER With all water and ditch rights appurtenant thereto, including, but not limited to: State of Idaho Water Rights License Nos. 33-2086 and 33-0718.

TOGETHER With all irrigation equipment including the following:

1. Motor, U.S. Motors, 50 HP #882566
2. Pump, Berkley, Mod #1200SH-3, with panel #5110301
3. Pump, G.E. Motor, 50 HP Model #5K6248XH4A, #FHJ628450
4. Pump, Verti Line Layne Bowler, Model 14RL, #18 2110

Together with tenements, hereditaments, appurtenances, ditches and ditch rights and water and water rights thereunto belonging or in anywise appertaining.

Subject to reservations in United States patents and State deeds or other restrictions imposed by law, easements and right-of-way, zoning and building ordinances, use restrictions of record, and taxes and assessments for the year 1993 and thereafter.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, it's heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantee, that they are the owners in fee simple of said premises; that said premises are free from all encumbrances and that they will warrant and defend the same from all lawful claims whatsoever.

DATED and signed this 9 day of ~~February~~ March 1993.

David Hawley

Connie Hawley

Terry Hawley

STATE OF IDAHO)
) ss.
County of Bingham)

On this 9 day of ~~February~~ March 1993, before me, the undersigned, a notary public in and for said state, personally appeared David Hawley and Connie Hawley, husband and wife, known to me to be the person whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

REED NOTARY PUBLIC

Notary Public for State of Idaho
Residing at ~~Blackfoot~~, Idaho
My cmn exprs: 3-12-99

MAR 2 7 1998

STATE OF IDAHO)
) ss.
County of Bingham)

On this 9th day of ~~February~~ March 1993, before me, the undersigned, a notary public in and for said state, personally appeared Terry Hawley, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Anita McQuarrey
Notary Public for State of Idaho
Residing at Blackfoot
Comm Exp 5/20/94

My cmn exprs:

ANITA MCQUARREY
NOTARY
PUBLIC
STATE OF IDAHO

MAR 8 1993

"HED BY FIRST AMERICAN TITLE COMPANY
MERLY THE BINGHAM TITLE & TRUST CO.

WARRANTY DEED

For Value Received VENICE HAWLEY, a widow, and VENICE HAWLEY as personal representative of the estate of Lawrence R. Hawley aka L. R. Hawley aka "Slim" Hawley, whose full name was Lawrence Roy Hawley

the grantor s . do hereby grant, bargain, sell, and convey unto SAGEWILLOW, INC., a Nevada corporation aurhorized to do business in Idaho,

the grantee , whose current address is

the following described premises, to-wit:

Those lands in Butte County, Idaho, described on the attached Exhibit "A".

SUBJECT TO taxes and assessments for the year 1989, to easements, roads and rights of way, to building and zoning ordinances and use regulations and restrictions, to reservations in federal patents and state deeds, and to any liens suffered or created by the grantees.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee , its successors heirs and assigns forever. And the said Grantor s do hereby covenant to and with the said Grantee , that they are the owners in fee simple of said premises; that said premises are free from all incumbrances except as hereinabove set forth and that t he y will warrant and defend the same from all lawful claims whatsoever.
Dated:

Venice Hawley
Venice Hawley, a widow

Venice Hawley
Venice Hawley as personal representative of the estate of Lawrence R. Hawley aka L. R. Hawley aka "Slim" Hawley, whose full name was Lawrence Roy Hawley.

STATE OF IDAHO, COUNTY OF Bingham
On this 26th day of April, 1989, before me, a notary public in and for said State, personally appeared Venice Hawley, a widow,

MAR 2 7 1995

known to me to be the person who se name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Robert M Kerr
Notary Public
Residing at Blackfoot, Idaho
Comm. Expires 1/19/92

STATE OF IDAHO, COUNTY OF BINGHAM
On this 26th day of April, 1989, before me, a Notary Public in and for said State, personally appeared Venice Hawley, known or identified to me to be the person whose name is subscribed to the within instrument as personal representative of the estate of Lawrence R. Hawley aka L. R. Hawley aka "Slim" Hawley, whose full name was Lawrence Roy Hawley, deceased, and acknowledged to me that she executed the same as such personal representative.

Robert M Kerr
Notary Public
Residing at Blackfoot, Idaho
Commission expires 1/19/92

INSTRUMENT No.

Exhibit "A"

The property referred to is situated in the State of Idaho, County of Butte and is described as follows:

In Township 7 North, Range 27 East of the Boise Meridian:

Section 1: The South half.

Section 12: The North half; the East half of the Southwest Quarter; the Southeast Quarter; and the East half of the Northwest Quarter of the Southwest Quarter.

Section 13: The North half of the Northeast Quarter and the Northeast Quarter of the Northwest Quarter.

In Township 7 North, Range 28 East of the Boise Meridian:

Section 5: The Southeast Quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter.

Section 6: Lots six and seven (W2SW4); the East half of the Southwest Quarter; the West half of the Southeast Quarter; and the Southeast Quarter of the Southeast Quarter.

Section 7: All.

Section 8: The West half of the East half; and the West half.

Section 18: The North half; and the North half of the Southeast Quarter.

In Township 8 North, Range 27 East of the Boise Meridian:

Section 34: The east half of the Northeast Quarter; the Southwest Quarter of the Northeast Quarter; the Southeast Quarter of the Northwest Quarter; the Southwest Quarter; the West half of the Southeast Quarter; and the Northeast Quarter of the Southeast Quarter.

Section 35: The West half of the West half; the Southeast Quarter of the Northwest Quarter.

Together with all water, water rights, ditches, ditch rights of way, wells, pumps, motors, panels, and irrigation equipment and structures, all appurtenances and easements, and all grazing privileges and permits with the Bureau of Land Management and the U.S. Forest Service in so far as they are applicable to the above described property and livestock thereon.

MAR 2 7 1996

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR TRANSFER NOS. 4221, 4222, 4223, 4224, 4225, 4226, AND 4227, IN THE NAME OF SAGE WILLOW, INC.	ORDER DENYING PETITION FOR RECONSIDERATION

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

ORDER

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

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

Dated this 5th day of December, 1995.

Gary Spackman
Hearing Officer

MAR 27 1996

CERTIFICATE OF MAILING

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

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

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

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

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

Julie L. Yarbrough
Senior Secretary

DEC 7 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

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

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?

MAR 27 1996

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

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

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

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

ANALYSIS

Approval of Transfer No. 3785

The order granting reconsideration stated:

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

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

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

MAR 2 7 1996

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

> Where an administrative forum has the essential procedural characteristic of a court, . . . it's 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

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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. SENW - 36 ac. 142 acres	NW¼ - 115 ac. 115 acres	NW¼ - 120 ac. 120 acres
T7N R28E Sec. 5	NESW - 32 ac. (SESW - 40 ac.)* 32 acres	SW¼ - 85 ac. 45 acres**	100 ac. 45acres**
T8N R28E Sec. 32	NWSW - 31ac. SWSW - 39 ac. SESW - 17 ac. 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

Water Right No.	CFS	Priority	Source
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.

Water Right No.	Acre Feet	Priority	Source
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.

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

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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 descrepancy 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:

	Total Number of Acres Irrigated	
Year	Sage Willow's Estimate	Mays' Estimate
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

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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

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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 aquired 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

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

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

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

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

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

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

73 Idaho at 159.

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

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

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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

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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

GARY SPACKMAN, Hearing Officer

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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

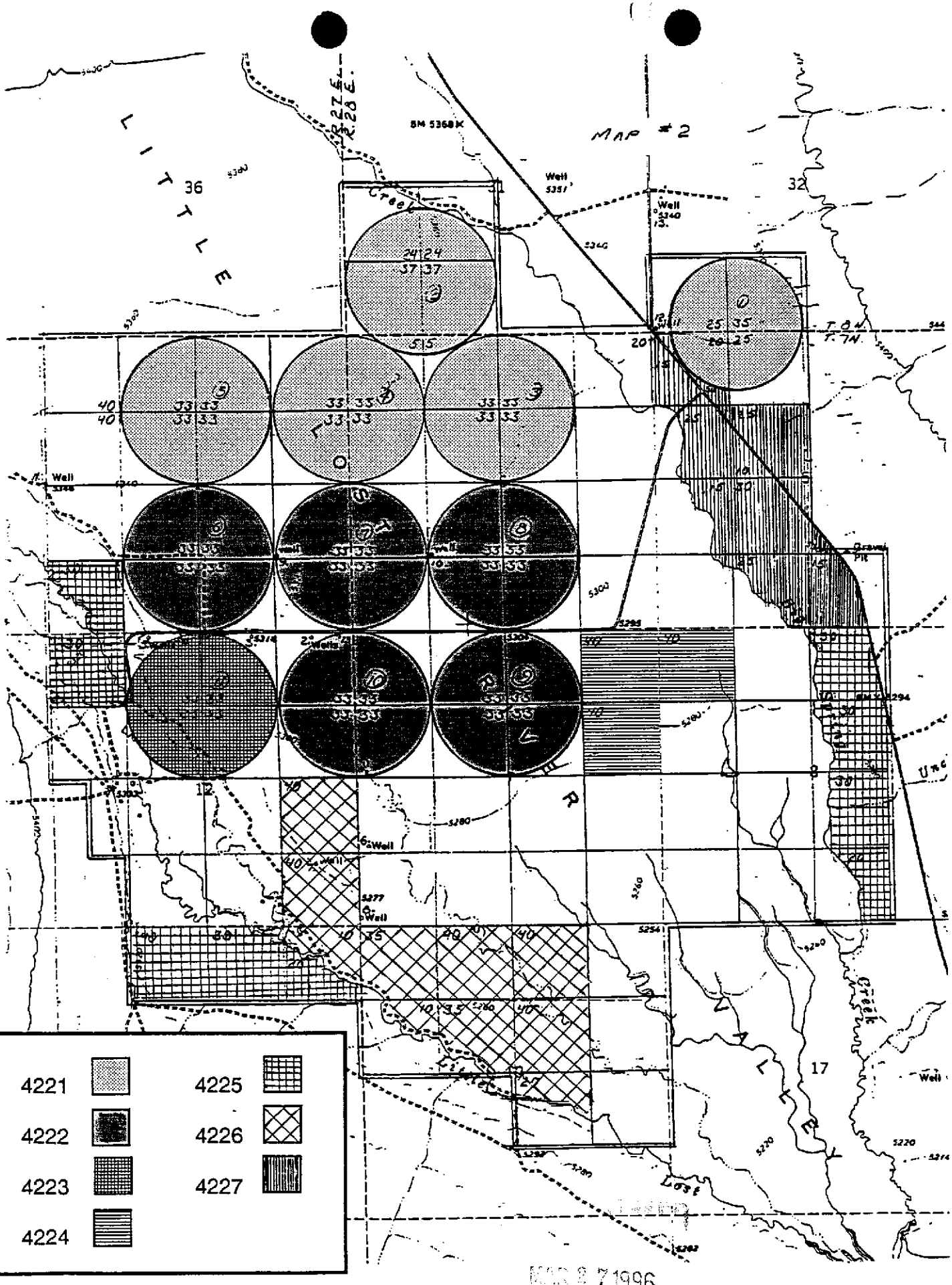
Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

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

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

MAR 2 7 1996



ATTACHMENT No. 1

MAR 2 71996

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 23rd day of June, 1995, I mailed a true and correct copy of the foregoing ORDER GRANTING PETITION FOR RECONSIDERATION to the following.

Kris Rhodes
Secretary

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

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

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

Eastern Region

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

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

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

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

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

	Irrigation Rights		
Water Right No.	CFS	Priority	Source
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.

Water Right No.	Acre Feet	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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:

Water Right No.	CFS	Priority	Source
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.

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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:

Year	Total Number of Acres Irrigated Applicant's Estimate	Protestant's Estimate
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

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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 deliver to [the old place of use], so the water must have been, and two of the exhibits show the water was, delivered to the [proposed place of use].

73 Idaho at 159.

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.

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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.

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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 he 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

GARY SPACKMAN, Hearing Officer

MAR 2 7 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

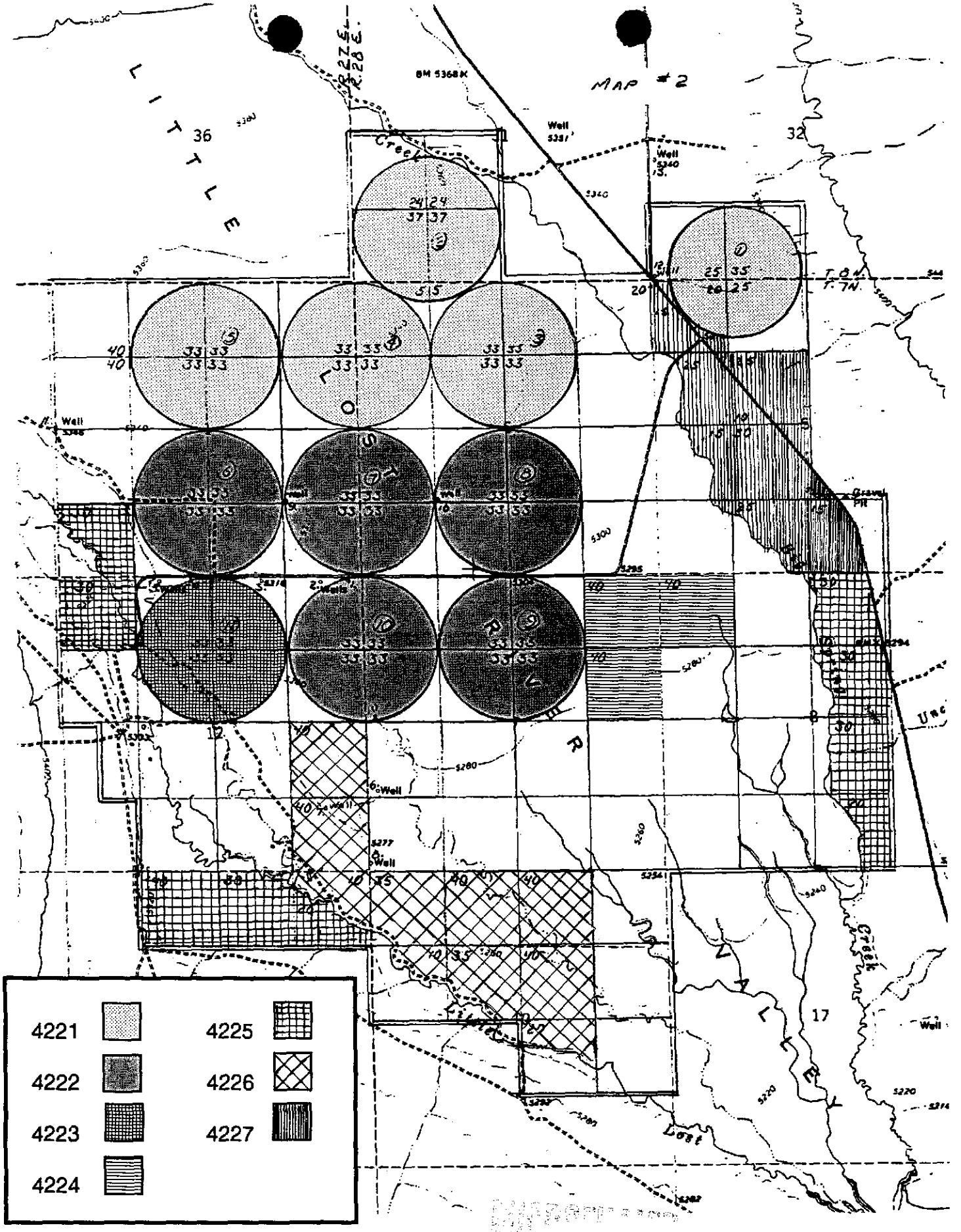
Blaine County Canal Co.
HC 65 Box 1018
Howe, ID 83244

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

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

MAR 8 7 1996



ATTACHMENT No. 1

MAR 2 7 1996

State of Idaho
License and Certificate of Water Right

Water License No. G-27717 Amount 4.10 c.f.s.

Water District No. Priority January 12, 1959

THIS IS TO CERTIFY that CLARENCE HAWLEY of Howe, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated January 12, 19 59; that Permit No. G-27717 was issued under said application; that Certificate of Completion of works, with a carrying capacity of 4.10 second feet, was issued thereunder on January 2, 19 64, showing that said works were completed on the 5th day of April, 19 63; and that on the 5th day of April, 19 63, CLARENCE HAWLEY of Howe, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of the right to use the waters of a well, a tributary of subterranean flow, for the purpose of irrigation, under Use Permit No. G-27717 of the Department of Reclamation and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 12 of Licenses at page 7805, on the 2 day of January, 19 64;

The right hereby confirmed dates from January 12, 19 59;

The Point of Diversion is located

in the NW ¼ SW ¼, Sec. 32, Tp. 8 N, R. 28 E, B. M. Butte County

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 4.10 cubic feet per second.

Description and location of use:

Twp.	Range	Sec.	Forty-acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
7 N.	28 E.	5	NE¼ NW¼	40	35
			NW¼ NW¼	40	38
			SW¼ NW¼	39	33
			SE¼ NW¼	40	36
			NE¼ SW¼	35	31
8 N.	28 E.	32	NW¼ SW¼	40	31
			SW¼ SW¼	40	39
			SE¼ SW¼	35	17
			Total number of acres to be irrigated:		260

The right to the use of the water aforesaid 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 2nd day of January, 19 64.

/s/ RALPH W. THOMAS
Deputy State Reclamation Engineer.

(SEAL)

33 20 8E

+7806 ✓

State of Idaho
License and Certificate of Water Right

Water License No. G-27293 Amount 4.66 c.f.s.

Water District No. Priority March 26, 1958

THIS IS TO CERTIFY that GEORGE R. LAKE - Assignee - LEONARD J. STEINKE of Roberts, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated March 26, 19 58; that Permit No. G-27293 was issued under said application; that Certificate of Completion of works, with a carrying capacity of 4.66 second feet, was issued thereunder on January 15, 1964, showing that said works were completed on the 2nd day of April, 19 63; and that on the 2nd day of April, 19 63,

LEONARD J. STEINKE

of Idaho Falls, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of the right to use the waters of a well, a tributary of subterranean flow, for the purpose of irrigation, under Use Permit No. G-27293 of the Department of Reclamation and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 12 of Licenses at page 7806, on the 15 day of January, 19 64;

The right hereby confirmed dates from March 26, 19 58;

The Point of Diversion is located

in the NE ¼ NW ¼, Sec. 8, Tp. 3 N., R. 37 E., B. M. County Bonneville

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 4.66 cubic feet per second.

Description and location of use:

Twp.	Range	Sec.	Forty-acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
3 N.	37 E.	8	NE¼	160	160
			N½ NW¼	80	80
			SW¼ NW¼	40	26
			SE¼ NW¼	40	40
			Total number of acres to be irrigated:		306

The right to the use of the water aforesaid 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 15 day of January, 19 64.

RALPH W. THOMAS
Deputy State Reclamation Engineer.

(SEAL)

Remarks: All land in application is U. S. Gov. owned. Written numbers on tabulation sheet indicate irrigable acreage in each 40 acre subdivision.
Well to be located approximately 300 ft. south thence 40 ft. east from N. W. corner of NW¼ of SW¼ Sec. 32, Twp. 8 N., Rge. 28 E.

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.

/s/ Clarence Hawley
Applicant.

By *Agent.*

Date of first receipt at Department of Reclamation: 8:00 A. M. January 12, 1959

Returned to applicant for correction:

Corrected application received:

Approval of State Reclamation Engineer

The number of this permit is G—27717

Recorded in Book 98 Page 27717 Approved January 20, 1959

This is to certify that I have examined the within application for a permit tc 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 deligently 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 July 20, 1961

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 January 20, 1964

Witness my hand this 20th day of January, 1959

/s/ GEO. N. CARTER
STATE RECLAMATION ENGINEER.

IN TESTIMONY WHEREOF, We, ROBERT E. SMYLIE, Governor of the State of Idaho, and ARNOLD D 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 20th day of January, 19 59

Countersigned:

(SEAL)

By /s/ ARNOLD WILLIAMS
Secretary of State.

STATE OF IDAHO

By /s/ ROBERT E. SMYLIE
Governor

12.

Twp.	Range	Sec.	NE¼ NE¼	NE¼ NW¼	NE¼ SW¼	NE¼ SE¼	NW¼ NE¼	NW¼ NW¼	NW¼ SW¼	NW¼ SE¼	SW¼ NE¼	SW¼ NW¼	SW¼ SW¼	SW¼ SE¼	SE¼ NE¼	SE¼ NW¼	SE¼ SW¼	SE¼ SE¼	Totals
8 N	28 E	32										40	40	35					115
7	28 E	5					40	40	39	40	35								194
																			309

Permit No. G-27717
CERTIFICATE OF COMPLETION OF WORKS

TO ALL WHOM IT MAY CONCERN:

This is to certify that CLARENCE HAWLEY of Howe, County of Butte, and State of Idaho, the holder of Permit No. G-27717, issued upon Application No. G-35635 bearing date of priority of January 12, 1959, authorizing the diversion of 6.0 second feet of waters of a well County of Butte, State of Idaho, for irrigation purposes, has fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit; that said works are adequate for diverting and conveying to the place of intended use 4.10 second feet of the waters of a well from subterranean flow; that the point of diversion of said waters NW¼SW¼, Sec. 32, T. 8 N., R. 28 E.,B.M. and that the lands porposes to be irrigated by the use of said water are described as follows, to-wit: 260 acres in the NW¼, NE¼SW¼, Sec. 5, T. 7 N., R. 28 E.,B.M.; W½SW¼, SE¼SW¼, Sec 32, T. 8 N., R. 28 E.,B.M.

Witness my hand this 2nd day of January, A. D. 1964.

/s/ RALPH W. THOMAS
Deputy State Reclamation Engineer

Proof of Completion of Works Made: April 5, 1963

LICENSE ISSUED FOR 4.10 SEC. FT.
Page 7805

33-2086 G-27717

Notify FHA of any change effective mortgage dated 12/7/61

APPLICATION FOR PERMIT

To Appropriate the Subterranean Waters of The State of Idaho

Application No. G- 35635
Permit No. G- 27717
District No.

Clarence Hawley
Home, Idaho
Howe

1. Name of Applicant: CLARENCE HAWLEY

   Postoffice address: Home County: Butte State: Idaho

2. Quantity of water claimed: 300

   (a) Rate of withdrawal in cubic feet per second 6. or Idaho Miners' inches 300 or gallons per minute 2700

   (b) Annual withdrawal in acre feet per annum

3. Source of water supply: Deep well

4. Location of point of diversion or well is in the NW ¼ of the SW ¼ of Section 32 Twp. 8 N , Rge. 28 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 ¼ of the ¼ of Section , Twp. Rge. , B. M.

   (b) Waste water or sewage effluent is to be returned to at a point in the ¼ of the ¼ of Section , Twp. , Rge. , B. M.

7. Kind of works: Deep well

8. Estimated cost of works: $ 7,000

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

HEARING
FOR
SAGEWILLOW, INC.

9:30 A.M.
JANUARY 31 & FEBRUARY 1, 1995
IDWR OFFICE
900 N. SKYLINE DR.
IDAHO FALLS, ID 83402

NAME	REPRESENTING	ADDRESS
Rick Williams	Blaine Canal Co	HC 65 Howe Id 83244
Terry Scanlan	Scanlan Engineering (Mays)	600 E. River Park Lane #105 Boise 83706
Michael C Creamer	Mays Land + Livestock	P.O. Box 2720 Boise 8370
Bill Stauffer	Blaine Canal Co	Howe Idaho 83244
David Andreason	Water Master Dist #33	PO 31 Howe 83244
George Wardle	Blaine County	HC 65 - Box 1018 Howe
Nancy Hawley	Self	578 E, 4900 S, Idaho Falls 83404
Don Callister	Callister Dairy, Ltd	1496 W 3780 N Howe, ID 83244
CW Dunde	Sagewillow Inc	Las Vegas, Nv 89102
KENT W. FOSTER	SAGE WILLOW, INC.	IDAHO FALLS, ID 83405
C.G. BROCKWAY	Sagewillow Inc.	706 Sorrel N. Twin Falls ID 83301
James L. Mays	Mays Land & Livestock	BOX 1 Howe, Idaho 83
Myron Haight		Box 1051 Howe Ida
Earl Worthey		HC 65 Box 140 Howe
[illegible]	Sagewillow	Howe Idaho

MAR 27 1996

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\PLEADING\NOS
Attorneys for Protestants

RECEIVED
JAN 27 1995
Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**NOTICE OF SERVICE OF MAYS' EXHIBITS**

Protestants James Mays and Mays Land & Livestock ("Mays") hereby give notice of service of their Exhibits in this matter. Said Exhibits were provided to Kent Foster, at Holden, Kidwell, Hahn & Crapo, 330 Shoup Avenue, Idaho Falls, Idaho 83405, via Federal Express, on the 26th day of January, 1995.

DATED this 26th day of January, 1995.

GIVENS PURSLEY & HUNTLEY

BY: Jeffrey C. Fereday
for Michael C. Creamer
Attorneys for Protestants James Mays and Mays Land & Livestock

MAR 27 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	____ HAND DELIVER ____ U.S. MAIL __X__ OVERNIGHT MAIL ____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Ronald D. Carlson Regional Manager Idaho Department of Water Resources 900 N. Skyline Dr. Idaho Falls, ID 83402-1718	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)

Jeffrey C. Fereday

MAR 8 7 1995

GARY G. ALLEN
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
MICHAEL C. CREAMER
ROY L. EIGUREN
JEFFREY C. FEREDAY
JULIE KLEIN FISCHER
RAYMOND D. GIVENS
L. W. GRANT, III
JUDITH K. HOLCOMBE
ROBERT C. HUNTLEY, JR.
DAVID R. LOMBARDI
KENNETH R. McCLURE
CHRISTOPHER H. MEYER
L. EDWARD MILLER
PATRICK J. MILLER
JUDSON B. MONTGOMERY
TERRY L. MYERS
RAMONA S. NEAL
STEVEN L. OLSEN
W. HUGH O'RIORDAN
KENNETH L. PURSLEY
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

LAW OFFICES
GIVENS PURSLEY & HUNTLEY
SUITE 200, PARK PLACE
277 NO. 6TH STREET
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BOISE, IDAHO 83701

JAMES A. McCLURE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492

January 24, 1995

RECEIVED
JAN 26 1995
Department of Water Resources
Eastern District

Mr. Harold Jones
Idaho Department of Water Resources
Eastern Region
900 North Skyline Drive
Idaho Falls, ID 83402-1718

Re: Sagewillow Transfers
Our File: 3314-6

Dear Mr. Jones:

Enclosed is a subpoena issued by Hearing Officer Gary Spackman in the matter of the Applications for Transfer by Sagewillow. I am serving this by mail, in the hope that you will not require personal service. If personal service is required, please notify me and the Hearing Officer immediately. Thank you for your consideration.

Sincerely,

Michael C. Creamer

Michael C. Creamer

MCC:mc
Enclosure

RECEIVED
MAR 27 1996

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

RECEIVED
JAN 26 1995
Department of Water Resources
Eastern District Office

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

THE STATE OF IDAHO TO: **HAROLD JONES**

YOU ARE HEREBY COMMANDED to appear before the Director of the Department of Water Resources at the Idaho Department of Water Resources, Eastern Regional Office, 900 N. Skyline Dr., Idaho Falls, Idaho, on the 31st day of January, and the 1st day of February, 1995 at 9:30 o'clock a.m. as a witness in the above entitled matter.

DATED this 23rd day of January, 1995.

By order of the Director.

R. KEITH HIGGINSON, Director

APR 27 1996

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P. O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Telefax: (208) 523-9518

RECEIVED
JAN 26 1996
Department of Water Resources
Eastern District Office

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

Case No. _____

APPLICANT'S EXHIBIT LIST

Applicant proposes to introduce some or all of the following exhibits at the hearing scheduled herein:

1. Maps.
   a. Portion of USGS "Howe NW" quadrangle map, attached to applications as "map #1".
   b. Portion of USGS "Howe NW" quadrangle map, attached to applications as "map #2".
   c. Portion of USGS "Howe NW" quadrangle map, containing Dr. Charles E. Brockway's designation of location of ponds and some ditches.

2. Photographs.
   a. 9x9 color aerial photo showing entire ranch including Bird Ranch, HAP 84 1 9-13-84.
   b. 9x9 black and white photo showing entire ranch including Bird Ranch, HAP 84, 9-13-84.
   c. 17x20 black and white photo showing ranch including Bird Ranch, blow up of HAP 84, 9-13-84.
   d. 9x9 color photo showing entire ranch including Bird Ranch, NAPP375-79, 7-15-87.

MAR 27 1996

e. 24x24 black and white photo showing Bird Ranch, NAPP4942 7CB,8-27-92.

f. 24x24 black and white photo showing lands east of highway, NAPP4938 225A, 8-27-92.

g. 24x24 black and white photo showing north ½ of Knollin Ranch NAPP4938 225L, 8-27-92.

h. 24x24 black and white photo showing east 2/3 of Knollin Ranch, NAPP4938 225CB, 8-27-92.

i. 24x24 black and white photo showing southeast ¼ of Knollin Ranch, NAPP4938 224L, 8-27-92.

3. Well driller's logs of Sage Willow wells furnished by USGS (part of IDWR files).

4. Howe Station Consumptive Use Summary from "Consumptive Use For Crops In Idaho" by Allen and Brockway, 1983.

5. "A Study of Water Transfer Losses Little Lost River" by C.E. Brockway, P.E., February, 1983.

6. Bargraph of flow of Little Lost River at USGS gage near Howe.

7. Consumptive use work sheet prepared by Dr. C.E. Brockway in January, 1995.

8. Golden West Irrigation, memo 1/10/94, re Sage Willow, Inc. well information.

Copies of the exhibits numbered under 1 and 5 have been sent to counsel for Protestant, Mays, with this list. The three maps have been blown up and mounted on a stiff board to be used as exhibits at the hearing.

The photographs are the only copies we were able to obtain. They are in the possession of Dr. C.E. Brockway and have been reviewed by protestant's expert Mr. Terry Scanlan. Copies of Exhibits 4, 6, 7 and 8 have been sent directly to counsel for Protestant, Mays, by Dr. Brockway.

MAR 27 1996

The name of one possible additional rebuttal witness has come to Applicant since we reviewed the potential witness list. His name is Mr. Robert R. Jensen and he resides at 938 East 600 North, Firth, Idaho 83236. His telephone is (208) 346-6120. Mr. Jensen was employed by Mr. L.R. "Slim" Hawley from 1982 until 1989 and was responsible for operation and irrigation of the Knollin and Bird Ranches during that period of time.

DATED this 26th day of January, 1995.

Kent W. Foster

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 26th day of January, 1995.

DOCUMENT SERVED: APPLICANT'S EXHIBIT LIST

ATTORNEYS AND PERSONS SERVED:

Mr. Gary Spackman (overnight delivery)
IDAHO DEPARTMENT OF WATER
RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

MAR 2 7 1995

IDAHO DEPARTMENT OF
WATER RESOURCES
900 N. Skyline
Idaho Falls, Idaho 83402-1718

(hand delivery)

Pat Woodie
BLAINE COUNTY CANAL
HC 65, Box 1018
Howe, ID 83244

(mail)

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

(overnight delivery)

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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MAR 2 7 1996

BEFORE THE DIRECTOR OF 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.	)))))	SUBPOENA

THE STATE OF IDAHO TO: **VANCE HAWLEY**

YOU ARE HEREBY COMMANDED to appear before the Director of the Department of Water Resources at the Idaho Department of Water Resources, Eastern Regional Office, 900 N. Skyline Dr., Idaho Falls, Idaho, on the 31st day of January, and the 1st day of February, 1995 at 9:30 o'clock a.m. as a witness in the above entitled matter.

DATED this 23rd day of January, 1995.

By order of the Director.

R. Keith Higginson

R. KEITH HIGGINSON, Director

MAR 2 7 1996

BEFORE THE DIRECTOR OF 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.	)))))	SUBPOENA

THE STATE OF IDAHO TO: **DAVID ANDEASON**

YOU ARE HEREBY COMMANDED to appear before the Director of the Department of Water Resources at the Idaho Department of Water Resources, Eastern Regional Office, 900 N. Skyline Dr., Idaho Falls, Idaho, on the 31st day of January, and the 1st day of February, 1995 at 9:30 o'clock a.m. as a witness in the above entitled matter.

DATED this 23rd day of January, 1995.

By order of the Director.

R. KEITH HIGGINSON, Director

BEFORE THE DIRECTOR OF 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.	)))))	SUBPOENA

THE STATE OF IDAHO TO: **HAROLD JONES**

YOU ARE HEREBY COMMANDED to appear before the Director of the Department of Water Resources at the Idaho Department of Water Resources, Eastern Regional Office, 900 N. Skyline Dr., Idaho Falls, Idaho, on the 31st day of January, and the 1st day of February, 1995 at 9:30 o'clock a.m. as a witness in the above entitled matter.

DATED this 23rd day of January, 1995.

By order of the Director.

R. KEITH HIGGINSON, Director

MAR 2 7 1996

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JAN 18 1995
Department of Water Resources
Eastern District Office

BLAINE COUNTY CANAL COMPANY

Howe, Idaho

January 16, 1994

Blaine County Canal Company has a great deal of concern about the Sagewillow water transfers and we wish to amend our protest against the transfer to add the following points to the original protest.

1. We oppose the expansion of water and land.

2. We oppose pumping more water than has historically been pumped in this "rising" area of the river.

3. We oppose drying sub irrigated land by transferring the water to dry land that has not been farmed. We fear that the water will not percolate back into the river system and will also reduce the recharging of the underground aquifer.

4. We oppose the activation of wells and licenses which has been abandoned for forty years.

5. We also oppose the pumping of ground water in the winter months which we feel is depleting the underground aquifer.

Wade Williams, Chairman Wade Williams

John McDonald, Director John L McDonald

William Stauffer, Director Bill Stauffer

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\PLEADING\EXHIBITS.DES

Attorneys for Protestants

RECEIVED
JAN 17 1995
Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**MAYS' DESIGNATION OF EXHIBITS**

Protestants James Mays and Mays Land & Livestock hereby designate the following exhibits which may be introduced at trial:

1. ASCS aerial photograph/map of Hawley property, Little Lost River Basin;

2. Set of three infrared satellite photographs of relevant portions of Little Lost River Basin obtained from Idaho Department of Water Resources, showing land cover changes from 1986 to 1991.

3. Howe NW Quadrangle, 7.5 minute series orthophotoquad, of relevant portions of Little Lost River Basin;

MAR 27 1996

4. Overlays for orthophotoquad showing areas irrigated by groundwater and surface water before and after proposed transfer.

5. Table summary of power records and pumping volumes for the years 1985 to 1994 showing power consumption and diversion volumes by month and year;

6. Table summary of consumptive use before and after proposed transfer;

7. Hydrographs of selected wells in the Little Lost River Basin;

8. Basin 33 Watermaster Records for 1988 to 1990;

9. Area map of Little Lost River Basin, Plate 2 to Water Supply Paper 1539Q;

In addition, Protestants may introduce, or request official notice of, all or portions of the following reports, studies or documents:

1. The Availability of Water in the Little Lost River Basin, Idaho. Water Information Bulletin #37, Idaho Department of Water Resources;

2. Allen & Brockway, Estimating Consumptive Irrigation Requirements for Crops in Idaho (August 1983);

3. Hubble Engineering and Associated Earth Sciences, Inc., Guidelines for the Evaluation of Irrigation Diversion Rates (October 1991).

4. Hubble Engineering and Associated Earth Sciences, Inc., Evaluation Workbook for Irrigation Diversion Rates (October 1991).

5. Any and all records or files of the Idaho Department of Water Resources.

Pending obtaining further information from Sagewillow's expert witness Dr. Brockway, or an order by the Department providing otherwise, Mays reserves the

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MAR 2 7 1996

right to designate and introduce additional or alternate exhibits on or before January 27, 1995.

DATED this 16th day of January, 1995.

GIVENS PURSLEY & HUNTLEY

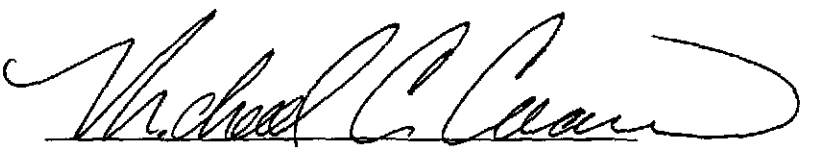
BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson c/o Gary Spackman, Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Gary Spackman Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL __X__ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	____ HAND DELIVER __X__ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)



MAR 2 7 1996

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JAN 1 1 1995
Department of Water Resources

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
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3314\6\PLEADING\RESCHEDU.MOT

Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANTS' MOTION TO AMEND PRE-HEARING SCHEDULE**

Protestants James Mays and Mays Land & Livestock ("Mays") hereby move for amendment of the pre-hearing schedule previously established in this matter. Specifically, Mays requests that Mays be permitted until January 27, 1995, to serve its exhibits on Sagewillow. The reason for Mays' request is that Mays' has yet to obtain information from Sagewillow that it needs to conclude Mays' analysis of the facts, and prepare and serve exhibits.

At the pre-hearing conference held on November 29, 1994, the parties agreed to a pre-hearing schedule for briefing, serving exhibits and for a hearing to commence

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on January 31, 1995. In agreeing to this schedule, Mays assumed that its consultant, Terry Scanlan, would be able to meet with Sagewillow's consultant, Charles Brockway, and obtain necessary information about the Sagewillow proposal, wells, pumps and land uses in time to complete preparation of Mays' case prior to the January 31, 1995 hearing date. In fact, immediately after the pre-hearing conference, arrangements were made through counsel, and between the parties' respective consultants for Mr. Scanlan and Dr. Brockway to meet on December 13, 1994, to exchange information. This meeting, and several subsequently scheduled meetings, were canceled by Dr. Brockway. On January 9, 1995, Mr. Scanlan and Dr. Brockway were able to meet and determine certain facts about the Sagewillow wells and pumps, but they were not able to complete their tasks because Dr. Brockway had scheduled another appointment for the same day. As a result, as of the filing of this Motion, Mays still has not received all of the information that it believed it would obtain from Sagewillow.

Dr. Brockway indicated on January 9th that he will not be available to meet with Mr. Scanlan again until January 13th or January 19th. The current deadline for serving exhibits is January 16, 1995. If the meeting can take place by January 19th, and if the information sought by Mays can be obtained, Mays should be able to prepare and serve its exhibits on all parties by January 27th, which is four days before the scheduled hearing.

The delay in obtaining this information, and being able to prepare exhibits, is not due to any lack of diligence on Mays' part. Mays has sought this information

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since March of 1994.[1] Sagewillow will not be prejudiced by this change in the schedule since it will have the exhibits immediately after they are available to Mays.

In the event Sagewillow objects to the requested change in deadline for serving exhibits, or if Dr. Brockway is unable to meet with Mr. Scanlan by January 19, 1995, Mays hereby prospectively moves, in the alternative, for an order vacating the hearing date and rescheduling it to commence on a date sufficiently far in the future to allow reasonable notice of the deposition of Dr. Brockway and for service and answer of formal written discovery requests to be made.

DATED this 11th day of January, 1995.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

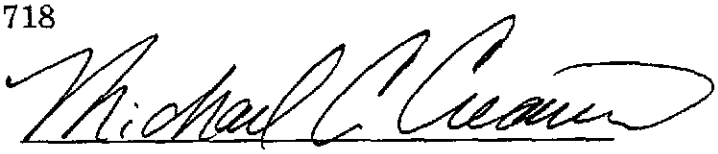
[1] If any blame for delay can be placed with Mays, it lies in the fact that Mays has sought to obtain information informally, and through mutual cooperation, rather than through the use of formal discovery. Mays' intent in seeking information through informal means was to avoid inconvenience to Sagewillow, and unnecessary expense to all parties in preparing and responding to written interrogatories, requests for production and/or depositions.

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
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Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Ronald D. Carlson Regional Manager Idaho Department of Water Resources 900 N. Skyline Dr. Idaho Falls, ID 83402-1718	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL __X__ TELECOPY (FAX)



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Attorneys for Protestants

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Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANT'S REPLY BRIEF TO APPLICANT'S RESPONSE ON AMENDED PROTEST ISSUE**

Protestants James Mays and Mays Land & Livestock (collectively "Mays"), by and through their attorneys Givens Pursley & Huntley, hereby reply to the Applicant's brief on the issues of Mays' Motion to Amend Protest and the scope of issues before the Department in this proceeding. By reply, Mays states that its pleadings are proper, they apprise Sagewillow of the issues that will be raised at the hearing, and the amendment of Mays' initial Protest should be allowed so that the injurious effects of all seven proposed Sagewillow transfers may be addressed at the hearing.

MAR 2 7 1996

I. INTRODUCTION

In its opening brief, Mays stated the issue before the Department as follows:

> Whether the Department may allow Mays to amend its Protest to state objections to additional Sagewillow transfers that inadvertently were not objected to in Mays' initial Protest, but that are interrelated to those Sagewillow transfers to which Mays objected?

By response, Sagewillow frames the issue as follows:

> . . . what must the pleadings of the parties contain with respect to notice of the nature of the contest a protestant wishes to make in the hearing on protests to an application for transfer under Idaho Code 42-222?

Sagewillow then expands the issue somewhat by asking three largely rhetorical questions:

> . . . what are the applicable rules relating to requirements for stating defenses or raising issues in the protests that apply in this case? How do we refine, in an orderly, efficient, certain and timely manner, the issues that will be tried at the hearing? How does the applicant prepare to address or introduce evidence relevant to issues that are not stated in a protestant's formal pleading?

Response Brief at 10.

The answer to the first of these three queries is straightforward enough, and was addressed in Mays' opening brief. Idaho Code Title 42, the Department's rules of procedure, and where appropriate, the Idaho Rules of Civil Procedure, set out the requirements for stating claims and defenses in a transfer protest. The answer to the second question depends on Sagewillow's understanding of the legal concepts of "material injury", "expansion", "enlargement" and "increase in consumptive use" in the water law context, and whether and how Sagewillow chooses to use available procedures such as discovery in preparing its case. The third question is

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disingenuous in that it requires the reader to assume, along with Sagewillow, that the allegations in Mays' Protest and Motion to Amend do not give it notice of where this case is going.

In any event, Sagewillow offers no suggestion of how *it* believes the questions it raises should be resolved. Sagewillow concedes that the Department may allow Mays' requested amendment to protest all seven Sagewillow transfers. Response at 9. Since both parties agree the Department may allow amendment, this should be the end of it.

However, to address Sagewillow's Response in this reply, Mays states unequivocally that the historical use of the Sagewillow water rights is central to this proceeding, and Mays intends to submit evidence on such historical use to establish expansion or enlargement of the use of the water rights, an increase in the historical consumptive use of the water rights, and the resulting material injury to Mays' water rights. The legal implications of the historical use or nonuse of the Sagewillow rights is for the Department ultimately to decide, and forfeiture or abandonment certainly are possible legal conclusions that might be reached on such evidence. Other possible legal conclusions may be reached on the facts that may be adverse to Sagewillow, but under modern notice pleading it is not Mays' obligation to advise Sagewillow what they might be. That is for Sagewillow and its counsel to apprehend.

II. MAYS PLEADINGS ARE SUFFICIENT TO PUT SAGEWILLOW ON NOTICE OF THE ISSUES TO BE RAISED AT HEARING.

In its response brief, Sagewillow suggests that neither Mays' Protest, nor its Motion to Amend Protest, pleads an objection to the transfer on the ground of

MAR 2 7 1996

forfeiture, and therefore that issue should not be addressed by Mays at hearing. This argument is faulty on at least two counts. First, under Idaho Code § 42-222, the Department's rules of procedure, or by analogy, the Idaho Rules of Civil Procedure, Mays is not required to precisely identify the issues of forfeiture or abandonment in a protest. Rather, a protestant is required to state the basis of his or her right to object, refer to the provisions of controlling law upon which the objection is based, and state any proposed limitations sought. Second, the issues of forfeiture and abandonment clearly are raised in any objection premised on "material injury," "expansion" or "increase in consumptive use" of a water right, all of which are stated in Mays' pleadings.

A. Mays' Pleadings Adequately State the Grounds Upon Which the Protest Has Been Made.

Mays' pleadings put Sagewillow on notice that the historical exercise of the Sagewillow rights will be subject to scrutiny at the hearing. Thereafter, Sagewillow, being the owner of the water rights, has the best knowledge of all the parties as to what the facts might tend to show regarding the historical use of its rights the legal conclusions they might lead to, and the steps it should take to deal with them.

In its Protest, Mays is not required to plead more than is required by the Department's rules. While Mays does not concede that a contested case before the Department under its administrative procedures is a "judicial" proceeding, reference to the rules of procedure in civil actions before the courts can provide guidance on how to address the issue of the sufficiency of a party's pleadings, particularly where, as in Idaho, the administrative rules and court rules parallel each other on many

MAR 2 7 1998

substantive matters.

Under the Idaho Rules of Civil Procedure, like the Department's Rules, amendments to pleadings are to be liberally allowed. In court, this is carried to the extent that amendments can be made at virtually any time, including the close of the evidence at trial. *See e.g., Pennsylvania-Coeur d'Alene Mining Co. v. Gallagher*, 19 Idaho 101, 112 P. 1044 (1910) (court may permit amendments of pleadings at any stage, almost as of course, to make the proceedings correspond with the proofs). Under modern notice pleading, a party need not anticipate and identify every conceivable matter that might arise before or during trial, or be barred from raising it. If that were so, pleadings would again be the cumbersome, technical exercise that has been long-abandoned in American jurisprudence.

Sagewillow quotes the fourth edition of Black's Law Dictionary, and provides a definition of "common law" pleading, which has not been carried over in Idaho. Idaho courts, and the IDAPA adopt "notice pleading," which is less formal. This sharp distinction is recognized in the modern version of Black's Law Dictionary (5th ed.), which states as follows:

> Pleadings. . . . *Rules or Codes of Civil Procedure.* Unlike the rigid technical system of common law pleading, pleadings under federal and state rules or codes of civil procedure have a far more limited function, with determination and narrowing of facts and issues being left to discovery devices and pre-trial conferences. In addition, the rules and codes permit liberal amendment and supplementation of pleadings. . . .

In fact, the Department's rules of procedure specifically adopt the Idaho Rules of Civil Procedure with respect to the use of discovery, thereby recognizing discovery's role in narrowing issues in a contested case under modern notice pleading. IDWR Rule

MAR 2 7 1996

of Procedure §§ 520-527.

A tribunal is entitled to construe pleadings before it liberally, and to include facts or allegations that may be presumed or inferred thereby. *Bates v. Capital State Bank*, 18 Idaho 429, 110 P 227 (1910) (presumptions or inferences, whether of law or fact, need not be pleaded); *Reynolds v. American Hdwe. Mut. Ins. Co.*, 115 Idaho 362, 766 P.2d 1243 (1988)(court permitted to draw all plain inferences from the facts pled when determining question of sufficiency of pleading). This is so because, under notice pleading, a pleading need only contain a concise and direct statement which fairly apprises the opposing party of the claims and objections being made. *See e.g., Meyers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988);[1] and Department Rules 210 and 250. Thus, where a party's complaint prayed for monetary relief for breach of an employment contract, it was sufficient to put the Defendant on notice that unpaid wages could be awarded. *Whitlock v. Harvey Seed. Co.*, 114 Idaho 628, 759 P.2d 919 (Ct. App. 1988). By the same reasoning, courts will not deem a pleading insufficient if it contains a clerical error, or if the caption is incorrect or incomplete, where when taken in its entirety, the pleading apprises the other party of the charges. *See Archer v. Shields Lumber Co.*, 91 Idaho 861, 434 P.2d 79 (1967)(incomplete caption); *McCormick v. Smith*, 23 Idaho 487, 130 P. 999 (1913)(clerical error in pleading disregarded where pleading as a whole indicates true intent). The Department's rules of procedure and pleading on these matters are not

[1]In court proceedings, only certain enumerated claims and defenses such as capacity, fraud, mistake, the statute of frauds, and the statute of limitations must be pleaded with specificity. *See* I.R.C.P. 9. And where a pleading is deemed so vague or ambiguous that a party cannot reasonably respond, the court rules allow a party to move for a more definite statement. I.R.C.P. 12(e).

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materially different from those of the Idaho courts.

Mays' Protest, and Motion to Amend allege *inter alia* material injury, expansion of the Sagewillow water rights and increase in consumptive use. At the hearing, Mays intends to put on evidence that will support those claims. This evidence will include facts establishing the historical use of the rights sought to be transferred. Mays believes the evidence will show places of use that historically have not been irrigated with the Sagewillow rights for numerous years. Mays also intends to establish the volumes of water actually diverted under these rights historically. If at the close of the evidence, the Department determines these facts establish forfeiture or abandonment of all or a portion of some water rights, or that the transfers will expand the rights, increase the consumptive use or enlarge the amount of land irrigated beyond historical levels, such findings all would be entirely consistent with the allegations raised in Mays' pleadings.

B. Abandonment and Forfeiture are "Part and Parcel" of Objections Based Upon Material Injury, Enlargement and Increased Consumptive Use.

The issues of forfeiture and abandonment already are squarely presented to Sagewillow by May's Protest and Motion to Amend. The resumption of use of an extinguished water right necessarily will result in material injury to junior water rights. It will expand or enlarge the use of water beyond its historical beneficial use and, unless the use is nonconsumptive, will increase the consumptive use of water. This was expressly recognized in *Jenkins v. State Department of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982). There, the Court held that

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> The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights. . . Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right.

In *Jenkins*, the Department had ruled after hearing that "to allow a resumption of use of the [forfeited] right would represent an enlargement of the use over the prior 18 years, [and] that the water users would be injured thereby. . . ." The District Court and the Idaho Supreme Court agreed with the Department on appeal. *Id.* 103 Idaho at 386.

C. The General Issues that Will be Brought Before the Department at the Hearing are Fairly Stated in Mays' Outline of Issues for the March 22, 1994 Pre-Hearing Conference.

The pleadings have put Sagewillow on notice of the claims it must defend. How Sagewillow chooses to present its case, and defend against Mays' claims is up to Sagewillow. Moreover, on March 17, 1994, Mays submitted a letter to Mr. Ron Carlson in anticipation of the March 22, 1994 pre-hearing conference, and intended to facilitate that process. That letter addresses the matters outlined in the Notice of Pre-Hearing Conference as subjects for discussion. Although the March 22nd conference ultimately was vacated because Mays still had not received pump numbers for Sagewillow's wells, the March 17, 1994 letter put Sagewillow on further notice as to the kinds of issues it would face at hearing.[2]

---

[2]Sagewillow's presentation of the facts in its response, which state that the previously scheduled pre-hearing conferences were vacated at Mays' request, obviously are intended to suggest that Mays has delayed this proceeding. On the contrary, Mays has attempted to make this process as efficient as possible, by submitting a pre-hearing memorandum to Mr. Carlson and the parties, by attempting to obtain

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III. CONCLUSION

The rules governing pleading, notice and amendment are well established? A party must plead concisely so as to give other parties notice of the claims it must defend against. A party apprised of the claim is necessarily on notice of the kinds of facts that may be produced to support them, and consequently, of their various legal implications. If this is not apparent to a party, he may make use of the liberal discovery provisions available in the Department's rules. Pleadings are to be liberally construed, and amendments to be liberally allowed to do justice to all parties.

Sagewillow implies that the Department should adopt a formalistic, wooden approach to pleadings in general, and protests specifically. Such an approach would require all legal and factual issues to be discovered, refined, and precisely articulated prior to the commencement of a contested case, based upon the abstracted, and often cryptic information contained in a transfer application and public notice. If such clairvoyance were a prerequisite to a protest, there would be no need to provide for pre-hearing discovery, pre-hearing conferences, motions in limine, or amendment of pleadings. Sagewillow's suggested approach is contrary to the rules in Idaho whether an action is administrative or judicial.

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necessary facts without resort to formal discovery, and by attempting to engage in a pre-hearing conference only after important information had been obtained and Mays' consultant had been able to evaluate it. Mays obviously has been reluctant to limit itself on the facts or issues it may present at hearing until that information was obtained and reviewed. Any delays in this matter result from Sagewillow's failure to make the information sought available. Mays has only recently received the pump numbers from Sagewillow which it asked for in March of 1994, and which would permit review of power records for the Sagewillow wells. Mays continues to attempt to meet with Sagewillow's consultant, Dr. Charles Brockway, to obtain additional facts regarding the Sagewillow wells which are necessary to formulate Mays' case. Accordingly, Mays continues to reserve the right to state additional grounds for protest and/or amend any other pleading, if the forthcoming information requires.

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Mays' Motion to Amend its Protest should be granted. As written, Mays' Protest and Motion to Amend are sufficient to state an objection to all seven proposed Sagewillow transfers, and they put Sagewillow on notice of the claims and issues against which it may reasonably be expected to defend.

DATED this 3rd day of January, 1995.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _X_ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



MAR 2 7 1996

RECEIVED
DEC 27 1994
Department of Water Resources
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER APPLICATION FOR TRANSFER NOS. 4221, 4222, 4223, 4224, 4225, 4226, AND 4227 IN THE NAME OF SAGE WILLOW, INC.	Case No. _____ APPLICANT'S BRIEF IN RESPONSE TO PROTESTANT'S BRIEF ON AMENDED PROTEST

This Brief is submitted by counsel for the applicant, Sage Willow, Inc., to assist the Idaho Department of Water Resources (hereinafter "IDWR") with respect to its determination as to the scope of the protests and the hearing which came into question at the prehearing conference held November 29, 1994.

FACTUAL BACKGROUND

On September 21, 1993, applicant, Sage Willow, Inc., filed with IDWR seven applications for transfer. The proposed transfers affect six groundwater rights (33-02057, 33-02083, 33-02086, 33-02090, 33-02091, and 33-07018) and 15 surface water rights (33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, and 33-02133).

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The seven transfer applications further propose division of several of the rights into parts, each part designated by an upper case letter immediately following the right number as follows: 33-02057A, B, C, D, E and F; 33-02083A, B, C, D, E and F; 33-02086A and B; 33-02091A and B; 33-00069A, B and C; 33-00070A, B and C; 33-00071A, B and C; 33-00072A, B and C; 33-00073A, B and C; 33-00074A, B and C; 33-00076A, B and C; 33-00078A, B and C; 33-00079A, B and C; 33-00080A, B and C; 33-00081A, B and C; 33-00082A, B and C; 33-02007A, B and C; 33-02008A and B; and 33-02133A and B. So there would be, counting each of the separate parts, as they might be divided by the proposed transfers, some 61 water rights involved.

At some point in time, the seven transfers were assigned transfer numbers 4221, 4222, 4223, 4224, 4225, 4226 and 4227. Notice of Proposed Change of Water Rights was published in November of 1993, setting a final date of December 6, 1993, for the filing of protests.

The protestant, Blaine County Canal, by Marc Hansen, Chairman, and Keith Nickerson, Director, sent a letter to the Idaho Falls office of IDWR, which was apparently received December 2, 1993, protesting "the recent Application for Transfer submitted by Sagewillow specifically for the portion that addresses rts 33-00069B, 33-00071B, and 31-02007A and B". This protest states that Blaine County Canal "contests that it is the owner of all or part of these rights and has filed claims in the recent Snake River Basin Adjudication to that effect".

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The protestants, James Mays and Mays Land & Livestock, (hereinafter referred to as "Mays") filed a protest on December 3, 1993, listing in the caption, water rights nos. 33-02025, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, and 33-02133. These numbers include all 15 of the surface water rights, only one of the groundwater rights, and a right number that is not the subject of any of the seven transfer applications, no. 33-02025. The document specifically protests transfers nos. 4224, 4225, and 4226.

The protest of Mays states as grounds:

1. Protestant owns surface and groundwater rights in the Little Lost River and its tributaries which may be materially injured by such transfers.
2. The transfers may result in an expansion of the water rights sought to be transferred.
3. The transfers may result in an increase in the consumptive use of the water rights sought to be transferred.
4. The transfers, as proposed, are not consistent with the conservation of water resources.

The protest also includes a statement that "protestants reserve the right to state additional grounds as facts are adduced [sic] through discovery or otherwise." A protest was also filed by Simplot Land & Development but that protest was subsequently withdrawn and is not discussed in this brief.

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The matter of the protests was scheduled for prehearing conference on February 9, 1994, but was continued by agreement pursuant to the request of counsel for Mays. The matter was again scheduled for prehearing conference on March 22, 1994, but was continued a second time, again at the request of counsel for Mays, in order for that protestant to obtain power usage records.

Then, on about March 18, 1994, protestant, Mays, filed a "Motion to Amend Protest". This time the caption of the document lists two of the groundwater rights, 33-02057 (the erroneous number 33-0205 has apparently been replaced by 33-02057) and 33-02083, and the same 15 surface water rights. The motion requests leave to object to all seven of the proposed transfers, not just the three listed in the December 3, 1993, protest. To our knowledge, the motion was never granted or denied, nor was it scheduled for hearing.

At the prehearing conference, held November 29, 1994, we asked a question about the status of the motion and what issues were appropriately raised for hearing. We understand a decision will be made by IDWR after the filing of briefs. At the prehearing conference, as we understood it, Mays expressed an intent to raise the issue of forfeiture with respect to groundwater rights nos. 33-02090 and 33-02091. There was no significant discussion of the issues actually raised in the protest filed by Mays, and applicant is somewhat perplexed that even at this late date, there is no pleading which has been filed by Mays which raises the issue of forfeiture of rights nos. 33-02090 or 33-02091.

Likewise, the protest of Blaine County Canal raises only the issue of ownership of four specific rights or portions thereof. However, when asked at the prehearing conference

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if that was in fact the issue the Blaine County Canal wanted to raise, one of the spokesman indicated they wanted to address other issues as well. The other issues were not articulated, but presumably such issues as forfeiture, injury and enlargement are among those with respect to which Blaine County Canal desires to be heard at the hearing.

ISSUE

We have asked for a determination of the scope of the protests which have been filed herein. Perhaps a better way to state the issue is what must the pleadings of the parties contain with respect to notice of the nature of the contest a protestant wishes to make in the hearing on protests to an application for transfer under Idaho Code §42-222?

ARGUMENT

This proceeding is a legal proceeding. It is of course an administrative proceeding, but it is also very much a judicial proceeding in the sense that the director is charged with the judicial responsibility of resolving a dispute. It is a contested case and there are at least some procedural rules for the purpose of directing a reasonable course of action which will result in a final decision by the director. The applicable procedural rules are patterned, to a great extent, after traditional and fairly typical American procedural rules which have evolved over a long time with the object of promoting an orderly process leading to a just resolution of disputes based on facts and according fairness to all sides as they undergo the process.

The applications were filed under the provisions of Idaho Code §42-108 and §42-222. Section 42-222 provides for publication of notice and opportunity for "any one who desires to protest the proposed change" to file "notice of protests" with the department. In

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compliance with the statutory provision therefore, both Mays and Blaine County Canal filed documents which give "notice of protests". The statute doesn't provide further insight into what such "notice of protests" must contain.

The applicable departmental rule, promulgated under the Idaho Administrative Procedures Act appears to be Rule No. 250 of "Rules of Procedure of the Department of Water Resources" which provides:

> 250. PROTESTS -- DEFINED -- FORM AND CONTENTS (Rule 250).
>
> 01. Defined. All pleadings opposing an application or claim or appeal as of a matter of right are called "protests".
>
> 02. Form and Contents. Protests should:
> a. Fully state the facts upon which they are based, including the protestants' claim of right to oppose the application or claim,
> b. Refer to the particular provision of statute, rule, order or other controlling law upon which they are based, and
> c. State any proposed limitation (or the denial) of any right, license, award or authority sought in the application."

Neither the protest of Mays nor Blaine County Canal complies very strictly with the provisions of Rule 250, although one can gather from each a reason or reasons why the respective protestant "desires to protest the proposed change" as provided by Idaho Code §42-222. But what is the breath or scope of the protest, and what if the reason or reasons later change or other additional reasons are discovered? In order to raise, argue and adduce evidence as to a particular reason for protest or issue, must the issue be raised by the pleadings? And if so, what is the procedure for amending pleadings?

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Again, the relevant statute, §42-222, does not refer to pleadings. However, the department's rules of procedure do contain an applicable rule. Rule 210 provides:

> 210 PLEADINGS LISTED -- MISCELLANEOUS (Rule 210). Pleadings in contested cases are called applications or claims or appeals, petitions, complaints, protests, motions, answers and consent agreements. Affidavits or declarations under penalty of perjury may be filed in support of any pleading. A party's initial pleading in any proceeding must comply with Rule 200, but the presiding officer may allow documents filed during informal stages of the proceeding to be considered a partyies initial pleading without the requirement of resubmission to comply with this rule. All pleadings filed during the formal stage of a proceeding must be filed in accordance with Rules 300 through 303. A party may adopt or join any other party's pleading. Two or more separately stated grounds, claims or answers concerning the same subject matter may be included in one pleading."

Where there is no provision otherwise, and since we are discussing a legal proceeding, we presume that general principals of common law apply to the use of legal terms in the department's Rules of Procedure. A general definition of the meaning of the term "pleading", as well as a statement of the purpose of pleadings is found in Black's Law Dictionary, Fourth Addition, at page 1311:

> PLEADING. The peculiar science or system of rules and principals, established in the common law, according to which the pleadings or responsive allegations of litigating parties are framed, with a view to preserve technical propriety and to produce a proper issue.
>
> The process performed by the parties to a suit or action, in alternately presenting written statements of their contention, each responsive to that which precedes, and each serving to narrow the field of controversy, until there evolves a single point, affirmed on one side and denied on the other, called the "issue," upon which they then go to trial.

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> The act or step of interposing any one of the pleadings in a cause, but particularly one on the part of the defendant; and, in the strictest sense, one which sets up allegations of fact in defense to the action.

This general statement seems applicable here. A protest, filed under Idaho Code §42-222 is a pleading, and its specific purpose must be to articulate the "issue" upon which the hearing will be held.

Next we wish to comment on the matter of amending pleadings. Protestant Mays argues that because a formal "answer" was not filed within 14 days to the Motion to Amend Protest, the Motion must be granted. As we understand the rules and laws applicable to the disposition of motions, the presiding officer must exercise the appropriate judgement and discretion in disposing of them in every case, whether an "answer" to the motion is filed or not. We do not understand the law to be that the presiding officer must automatically grant a motion just because an "answer to motion" is not filed. In any event, as we will endeavor to illustrate, we do not believe the most important question in this matter would be answered merely by granting or denying the Motion to Amend.

The department's Rules of Procedure do contain a statement regarding the amendment of pleadings in Rule 305 as follows:

> 305. AMENDMENTS TO PLEADINGS -- WITHDRAWAL OF PLEADINGS (Rule 305). The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. A party desiring to withdraw a pleading must file a Notice of Withdrawal of the Pleading and serve all parties with a copy. Unless otherwise ordered by the presiding officer, the notice is effective fourteen (14) days after filing.

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Apparently then, the decision whether to allow amendment of a protest (a pleading) is within the sound discretion of the presiding officer. The rule says he may allow amendment, correction or an omission to be supplied. Presumably, in the exercise of that discretion, he must be guided by the same considerations that would apply to judicial officers in general in such circumstances. Typically, the presiding officer exercises such discretion using a standard of fairness; will the amendment result in delay or other circumstances that will prejudice the other party or parties? (See, for example, *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank*, 119 Idaho 171, 804 P.2nd 900 (1991).

In the pleading matter, we think one question to be answered is whether, after allowing amendment, there would be adequate time before the hearing for applicant to properly prepare to present relevant evidence on the issues.

Also, in this case, the matter is further complicated by the fact that, for both protestants, there is, as yet, no pleading, or proposed amended pleading, which raises the issue of forfeiture, much less with respect to water rights nos. 33-02090 or 33-02091. It is true that counsel for Mays has stated, both orally and in a letter, that what his client is concerned about is forfeiture of such rights, but neither his protest, nor his proposed amended protest, say so. Must not the pleadings raise the relevant issues?

In this case, the matter is even further complicated by the protest and the motion to amend protest which have been filed. The protest says the issues are injury, expansion, increase in consumptive use, and conservation of water resources. The Motion to Amend Protest does not raise additional issues, it merely seeks to have the protest apply to the four

transfers not listed in the protest. Are the pleadings in administrative actions not required to state the specific defense or issue to be relied upon as is required under rules that apply to other judicial proceedings? (See Idaho Rules of Civil Procedure, Rule 12(b)).

With respect to the protest of Blaine County Canal, it raises only the issue of ownership of four rights, and there is no proposed Motion to Amend in any manner.

In conclusion, our question is what are the applicable rules relating to requirements for stating defenses or raising issues in the protests that apply in this case? How do we refine, in an orderly, efficient, certain and timely manner, the issues that will be tried at the hearing? How does the applicant prepare to address or introduce evidence relevant to issues that are not stated in a protestant's formal pleading?

Respectfully submitted this 27th day of December, 1994.

Kent W. Foster

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 27th day of December, 1994.

MAR 2 7 1995

DOCUMENT SERVED: APPLICANT'S BRIEF IN RESPONSE TO PROTESTANT'S BRIEF ON AMENDED PROTEST

ATTORNEYS AND PERSONS SERVED:

IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

(facsimile)

IDAHO DEPARTMENT OF WATER RESOURCES
900 N. Skyline
Idaho Falls, Idaho 83402-1718

(hand delivery)

Pat Woodie
BLAINE COUNTY CANAL
HC 65, Box 1018
Howe, ID 83244

(mail)

Michael C. Creamer
GIVENS, PURSLEY & HUNTLEY
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Boise, Idaho 83701

(facsimile)

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO

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MAR 2 7 1996

December 14, 1994

Idaho Department of Water Resources
Mr. Ron Carlson
900 North Skyline
Idaho Falls, Idaho 83402

RECEIVED
DEC 19 1994
Department of Water Resources
Eastern District Office

Blaine County Canal Company
Wade Williams, Chairman
HC65 Box 1032
Howe, ID 83244

Re: Blaine County Canal Company protest of Sage Willow water transfer.

Dear Mr. Carlson

I am writing in reference to our phone conversation on December 13 in which I let you know that Mr. Don Isham will be the spokesman for Blaine County Canal Company in the upcoming hearing on the Sage Willow water transfer. Don's address is: HC65 Box 1034 Howe, ID 83244 and his phone number is 767-3443. Feel free to contact me also if there are any questions which might come up. My phone number is 767-3358.

Sincerely,
Wade T. Williams
Wade T. Williams

MAR 27 1996

RECEIVED
DEC 1 3 1994
Department of Water Resources

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3314\6\AMEND.MT1

Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANT'S BRIEF ON AMENDED PROTEST**

James Mays and Mays Land & Livestock, (collectively "Mays") by and through its attorneys Givens Pursley & Huntley, hereby submits its brief addressing the issue of whether the Idaho Department of Water Resources ("Department") may allow Mays to amend its Protest to state objections to additional Sagewillow transfers that inadvertently were not objected to in Mays' initial Protest, but that are interrelated to those Sagewillow transfers to which Mays objected.

I. INTRODUCTION

On December 3, 1993, Mays filed with the Department, and served on Sagewillow, its Protest of certain transfers proposed by Sagewillow involving surface

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and groundwater rights in the Little Lost River drainage. The Protest was prepared as a result of inquiries made to the Department about the existence and nature of the transfers. Mr. Creamer, Mays' counsel, met with Mr. Jim Johnson of the Department's Boise office on December 2, 1993 to discuss the transfers, which involved numerous water rights. It was apparent from that discussion that the Sagewillow applications represented an integrated and complex plan involving the change of numerous water rights on the Sagewillow properties. At the conclusion of the meeting, Mr. Creamer requested Mr. Johnson provide him with copies of all the applications so that they could be reviewed by Mays, and if necessary, protested within the time allowed. When Mr. Creamer received notice from Mr. Johnson that copies of the Sagewillow transfer applications had been made and were available pursuant to his request, he arranged to have them picked up from the Department's Boise office. The only transfer applications that were included in the documents provided by Mr. Johnson were Transfer Nos. 4224, 4225 and 4226.[1]

At that time, Mays was not aware that additional transfer applications affecting other Sagewillow water rights also had been filed by Sagewillow. As a result, when Mays filed its original Protest in December, 1993, the Protest objected only to Transfer Nos. 4224, 4225 and 4226. Mays Protest alleged that the transfers would cause material injury to his water rights, result in an expansion of existing water rights and an increase in their consumptive use, and that the transfers would be inconsistent with water conservation. Mays' Protest also stated that

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[1]The water rights listed in the Transfer Nos. 4224, 4225 and 4226 include 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 and 33-02133.

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> The transfer applications fail to provide enough information to permit a complete evaluation of the potential injurious effects of such transfers on Protestants' water rights. Therefore, Protestants reserve the right to state additional grounds as facts are adduced through discovery or otherwise.

Protest at 2.

Mays thereafter retained hydrogeologist, Terry Scanlan, as a consultant to review the Sagewillow transfers. After reviewing the transfers, speaking with personnel at the Department and Sagewillow's hydrology consultant, Mr. Scanlan advised Mr. Creamer that in addition to applications 4224, 4225 and 4226, Sagewillow also had submitted applications 4221, 4222, 4223 and 4227, which, together with Transfer Nos. 4224, 4225 and 4226, were all part of a single, comprehensive plan of transfer affecting water development on Sagewillow's property, the Knollin Ranch.

On March 18, 1994, after obtaining and reviewing copies of the additional four transfer applications, Mays filed its Motion to Amend Protest, and served the same on Sagewillow, to protest all seven applications, or the entire Knollin Ranch project, as originally intended. The Motion to Amend inadvertently retained the caption from the original Protest, and therefore did not specify water right numbers 33-02086, 33-02091, 33-02090 and 33-07018, which are additional water rights affected by Transfer Nos. 4221, 4222, 4223 and 4227. However, the Motion itself makes it clear that Mays intends "to object to Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227, all of which pertain to the transfer of Sagewillow water rights on the same grounds as stated in Mays' original Protest." Motion at 2. Mays' Motion to Amend also included a proposed order, which would make Mays "a party to all proceedings" on all seven transfer applications.

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No Answer to the Protest was ever served on Mays by Sagewillow. In addition, no objection was ever made by Sagewillow until the issue of the propriety of Mays' Motion to Amend was raised orally by Sagewillow at a pre-hearing conference held on November 29, 1994, more than seven months after the Motion to Amend had been filed and served. The parties stipulated that they would brief the issue to the Department.

In this brief, Mays demonstrates that it properly has moved to amend its Protest, that by failing to timely object to the Motion to Amend, Sagewillow has waived its right to object, that the Department has full discretion and authority to allow such amendment, and that such amendment should be granted.

II. ARGUMENT

A. Sagewillow has Failed to Timely Object to Mays' Motion to Amend

Sagewillow's oral objection to the Motion to Amend, or Mays' right to so move, was a surprise to Mays, coming as it did more than seven months after the Motion had been filed. If Sagewillow had any objections to the Motion, it had fourteen days from the date of service of the motion to object. IDAPA 37.01.01.270.02 (Rule 270.02) provides that

> Answers to motions may be filed by persons or parties who are the object of a motion or by parties opposing a motion. The person or party answering a motion must do so with all deliberate and reasonable speed. In no event is a party entitled to more than fourteen (14) days to answer a motion or to move for additional time to answer.

Sagewillow has waived any right to object to Mays' motion.[2] Sagewillow did not answer the Motion to Amend within fourteen days, and waiting until November 29,

[2]In orally stipulating to brief the issue of whether Mays may amend its Protest, Mays never agreed to waive *its* right to assert the protections of Rule 270.

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1994 to raise an objection does not amount to "deliberate and reasonable speed." "In no event" then, is Sagewillow entitled to object now, and on this basis alone, Sagewillow's objection must be denied.

B. Idaho Code Section 42-222 Does not Prohibit Protest Amendment After the Deadline for Filing an Initial Protest.

The Department's rules unequivocally allow pleadings to be amended, provided no statute prohibits the same. The applicable statute, I.C. § 42-222 is silent as to the issue of amending a protest, or stating additional protests once a party has been joined, regardless of whether the time for filing an initial protest has expired. Mays timely filed its' original Protest with the Department, pursuant to I.C. § 42-222, by fax, on December 3, 1993. The Protest was mailed to the Department that same day, and was date stamped as received on December 7, 1993. A Notice of Receipt was returned to Mays by the Department on December 13, 1993. Once Mays' original Protest was filed, Mays became a full party and subject to all requirements and benefits of the Department's rules.

Idaho Code § 42-222 allows any person to protest an application to transfer an existing water right within 10 days of the last date of publication of the application. I.C. § 42-222(1). Once a protest is filed, the Director must investigate the protest by "examin[ing] *all* of the evidence and available information," and determine, among other things, whether the proposed change would injure other water rights or not be in the "local public interest." I.C. 42-222(1). If the proposed change injures other rights or is not in the local public interest the Director has the discretion to deny the application.

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I.C. 42-222(1) does not prohibit amendment of a protest to expand its scope to cover other related transfers once the initial protest has been filed. Rather, the statute demonstrates intent that all available information should be reviewed by the Department. In applying this statute, the Department is entitled to draft and implement rules that carry out this intent by liberally allowing amendment of pleadings if doing so would reveal relevant evidence and information that bears on the issue of whether a transfer should be approved. The Department has done just that in adopting its rules of practice and procedure.

B. Department Rules Specifically Allow Amendments to Pleadings.

The Department's rules carry out the intent of I.C. § 42-222(1) by providing that they are to be liberally construed to achieve an airing of all issues and an equitable result of any proceedings. IDAPA 37.01.01.052 reads, in part:

> The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest.

It is certainly not unusual that pleadings, including Protests, should be amended to state additional facts, grounds, and objections once the initial pleading has been filed, and a party has had an opportunity to conduct discovery or further investigation of the facts. Allowing amendment is essential to securing a "just, speedy and economical determination" of all issues.

In fact, Rule 305 gives the Department's presiding officer discretion to allow any pleading to be amended, and provides that pleadings are also to be liberally construed. Rule 305, IDAPA 37.01.01.305 reads:

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> The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. (Emphasis added).

These rules intentionally permit the Department's presiding officer to allow amendments or corrections to pleadings, and specifically authorize their liberal construction to ensure all issues are addressed. Nothing in the applicable statutes contained in Idaho Code, Title 42 prohibit allowing such amendments by rule or otherwise.

In the instant case, the Department should exercise its discretion by allowing Mays' Protest to be amended and by ordering that Mays is a full party entitled to litigate all issues relating to Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227. Mays' Motion to Amend was filed as soon as it was discovered that not all of the relevant transfers had been provided to Mays, as requested. Sagewillow has been aware of the Protest, and Motion to Amend since March, 1994 and has failed to object. Any right Sagewillow had to object, has therefore been waived. The Motion to Amend states the same grounds for protest of the additional transfers as were stated in the initial Protest. No substantial rights are affected by allowing the amendment.

All of the Sagewillow Transfers are intimately interrelated and rely, one upon the other, for their utility. Sagewillow cannot reasonably claim that it must respond to new issues that could not have been anticipated by a reading of Mays' initial Protest, or that Sagewillow will be prejudiced by allowing the Amendment. Granting the amendment will allow a full airing of facts relevant to the issues required to be

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determined by the Director before approving or disapproving the pending transfer applications.

Moreover, in reliance on the fact that no objection had been filed to its Motion to Amend Protest, Mays has proceeded with investigating all of the transfer applications, and the water rights involved therein and has retained a hydrogeologist who has developed facts relevant to the issues required to be determined by the Director. Mays has incurred considerable expense in doing so. While granting the Motion to Amend will not harm Sagewillow, Mays would be severely prejudiced if its Motion were denied.

Mays intended to protest the Sagewillow Transfers in their entirety, and the omission of Transfer Nos. 4221, 4222, 4223 and 4227 was not due to a lack of diligence on Mays' part. Mays' original Protest listed all of the transfers Mays was aware of when the protest was filed. Mays' is not attempting to assign blame for the incomplete set if applications it obtained. However, Mays should not be denied the opportunity to correct the resulting omission now. This is precisely the kind of situation anticipated by the Department's rules, by which pleadings may be amended, corrected or any omission supplied.

C. Sagewillow has Not Complied With Contested Case Procedures

Sagewillow has done more than miss the deadline for objecting to Mays' Motion to Amend. It has failed to Answer Mays' Protest. Under the Department's Rules, Sagewillow was required to file an Answer within twenty-one days of being served with Mays Protest and either admit or deny the allegations contained therein. IDAPA 37.01.01.270.1 reads:

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> Answers to applications, claims or appeals, complaints, petitions or protests must be filed and served on all parties of record within twenty-one (21) days after service of the pleading being answered....When an answer is not timely filed under this rule, the presiding officer may issue a notice of default against the respondent pursuant to Rule 700... Answers...must admit or deny each material allegation of the applications or claims, complaint, petition or protest.

Therefore, Mays is entitled, under Rule 700, to move for default judgment with respect to its initial Protest, and reserves the right to do so.

Presumably, the Department has the discretion under Rule 700 to allow a late-filed answer by Mays. However, it would be inequitable and prejudicial to Mays for the Department to exercise such discretion inconsistent with its exercise of discretion regarding Mays' Motion to Amend. In other words, the Department certainly should not bar Mays from protesting all of the Sagewillow Transfers, and yet permit Sagewillow to avoid default on those protests that have gone unanswered. Particularly where Sagewillow is the party asking for the strictest reading and application of I.C. § 42-222 and the Department's rules of procedure.

III. CONCLUSION

The Department has the authority and the discretion to allow Mays to amend its original Protest to state objections to additional transfer applications. Allowing Mays to do so would be consistent with the intent of I.C. § 42-222(1), which requires the Department to investigate and review all available evidence and information pertaining to a proposed transfer. Mays' omission of four of the Sagewillow Transfers from its initial Protest was excusable, the Motion to Amend the Protest was timely filed, and no objection was filed by Sagewillow within the required fourteen days. Sagewillow therefore has waived its right to complain now. Furthermore, allowing Mays to include Transfer Nos. 4221, 4222, 4223 and 4227 will not prejudice

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Sagewillow because it has been on notice of the full range of issues Mays intends to litigate at the hearing in this matter.

In the interests of ensuring that all issues, evidence and information regarding Sagewillow's proposed transfers are adequately and fairly aired, and in the interest of equity to the parties, Mays' Motion to Amend Protest to state Mays' objections to Transfer Nos. 4221, 4222, 4223 and 4227 should be granted.

DATED this 13th day of December, 1994.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 2 7 1995

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 1994, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER ____ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL _X_ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)



MAR 2 7 1995

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\PLEADING\AFFIDAVI.MCC

Attorneys for Protestants

RECEIVED
DEC 13 1994
Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**AFFIDAVIT OF MICHAEL C. CREAMER**

STATE OF IDAHO)
) ss.
County of Ada)

MICHAEL C. CREAMER, being first duly sworn upon oath and based upon his own personal knowledge hereby deposes and states as follows:

1. I am one of the attorneys of record representing the Protestants James Mays and Mays Land & Livestock ("Mays") in the above-captioned proceeding.

2. In my representation of Mays in this matter, I had occasion to meet with Jim Johnson, an employee of the Idaho Department of Water Resources

MAR 2 7 1996

("Department") on or about December 2, 1993 for the purpose of inquiring about the existence and nature of transfer applications affecting water rights belonging to Sagewillow, Inc. in the Little Lost River valley.

3. In the course of my conversation with Mr. Johnson, I learned that numerous Sagewillow water rights were proposed to be moved from their original points of diversion and places of use to new points of diversion and places of use. I also understood that as a result of discussions between the Department and Sagewillow, the transfers had been applied for through more than one application, but that all of the transfers were interrelated as part of a comprehensive plan to place the Sagewillow rights to use on an area of land known as the Knollin Ranch.

4. At the conclusion of my meeting with Mr. Johnson, I requested that I be provided copies of each of the transfer applications affecting the transfer of Sagewillow water rights. Mr. Johnson motioned towards a substantial stack of documents on his desk and indicated that they were the Sagewillow applications. He then informed me that they would be copied, and I could pick them up when the copy work was complete.

5. I do not recall on what date I was informed by the Department that the copies of the Sagewillow transfer applications were ready to be picked up, or whether I or someone from my firm in fact retrieved them from the Department's office at 1301 Orchard Street, in Boise. However, I did review the transfer applications that were obtained from IDWR, confirmed that they in fact involved numerous water rights claimed by Sagewillow, and that they requested that the points of diversion

MAR 2 7 1996

and place of uses for such rights be changed to conform with a plan for irrigating new lands under sprinklers.

6. My review of the applications, and other information available to me, indicated that the proposed transfers had the potential to impact the water rights of belonging to Mays.

7. The certificate of service for the Mays Protest indicates that it was filed with the Department by telecopier on December 3, 1993, and that an original was forwarded the same day by mail. The Certificate also indicates that copies also were served December 3, 1994 on Sagewillow and Phillip J. Rassier, Deputy Attorney General for the Department.

8. I was not aware that additional transfer applications affecting the rights initially protested, and other rights, had also been filed by Sagewillow as part of its water rights plan for the Knollin Ranch. I learned of this fact in approximately February of 1994, after Mr. Terry Scanlan had been retained by Mays to evaluate the potential impacts of the Sagewillow Transfers on Mays' water rights. Mr. Scanlan advised me that in conversations with Sagewillow's consultant, Chuck Brockway, and with Vic Conrad, representative for J.R. Simplot, he had discovered that four other transfer applications were implicated.

9. At my direction, Mr. Scanlan obtained copies of the additional Sagewillow transfer applications, numbers 4221, 4222, 4223 and 4227, and reviewed them. On March 18, 1994, based on my discussion with Mr. Scanlan regarding his preliminary review and conclusions regarding these transfers, I filed on Mays' behalf

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a Motion to Amend Protest, to state Mays' objections to these additional transfer applications.

10. In preparing the Motion to Amend, I inadvertently did not include several water rights involved in transfer numbers 4221, 4222, 4223 and 4227, namely water right numbers 33-02086, 33-02090, 33-02091 and 33-07018, in the caption of that pleading. However, it was my intent that the Motion for Amendment accomplish the Protest of all water rights proposed to be affected by Sagewillow Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227, and I so stated that intent within the body of the Motion to Amend, and in the language of the proposed order included therewith.

11. Since March 18, 1994, I have had several communications with counsel for Sagewillow regarding the Mays' Protest generally, and about Mays' concerns with water right nos. 33-2090 and 33-2091 specifically. These communications include my letter of March 14, 1994, which is attached hereto as Exhibit A. These rights are two rights proposed to be transferred in Transfer Nos. 4221 and 4222. However, at no time prior to the pre-hearing conference on November 29, 1994, had I ever been informed by Sagewillow that it objected to Mays' Motion to Amend to state protests against applications affecting these or other rights.

Further your affiant sayeth not.

Dated this 13th day of December, 1994.

MICHAEL C. CREAMER

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STATE OF IDAHO)
) ss.
County of Ada)

On this 13 day of December, 1994, before me, the undersigned, a Notary Public in and for said State, personally appeared MICHAEL C. CREAMER, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public for Idaho
Residing at Boise
My commission expires: 1-24-99

MAR 27 1996

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 1994, I caused a true and correct copy of the foregoing to be served upon:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER ____ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL _X_ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)

by the method noted above.



MAR 2 7 1996

GARY G. ALLEN
REBECCA W. ARNOLD
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
JOANN C. BUTLER
MICHAEL C. CREAMER
ROY L. EIGUREN
JEFFREY C. FEREDAY
JULIE KLEIN FISCHER
RAYMOND D. GIVENS
L. W. GRANT, III
JUDITH K. HOLCOMBE
ROBERT C. HUNTLEY, JR.
DAVID R. LOMBARDI
KENNETH R. McCLURE
CHRISTOPHER H. MEYER
L. EDWARD MILLER
PATRICK J. MILLER
JUDSON B. MONTGOMERY
TERRY L. MYERS
STEVEN L. OLSEN
W. HUGH O'RIORDAN
KENNETH L. PURSLEY
RAMONA L. SCHWEHR
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

LAW OFFICES
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POST OFFICE BOX 2720
BOISE, IDAHO 83701

JAMES A. McCLURE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492
(208) 342-8920

March 14, 1994

Kent Foster
Holden, Kidwell, Hahn & Crapo
West One Building
P.O. Box 50130
Idaho Falls, ID 83405

VIA TELECOPY

Re: Mays Land & Livestock - Sagewillow Transfer
Our File: 3314-6

Dear Kent:

I had an opportunity to meet with James Mays and Terry Scanlan on March 10 to discuss the proposed Sagewillow water right transfer. This letter sets out what we believe to be the issues raised by the transfer application that will need to be resolved between Mays Land & Livestock and Sagewillow or at a hearing.

1. Forfeiture

As I mentioned in our last telephone conversation, all the available evidence shows that water right nos. 33-2091 and 33-2090 have been abandoned and forfeited by non-use. These rights apparently were developed solely to obtain land patents from the United States, and never were diverted thereafter for use on the original lands or any other lands. Our review of satellite and aerial photographs, and other information shows conclusively that the authorized place of use for these rights have not received water since at least 1976.

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EXHIBIT A

The purported transfer of an abandoned water right (33-2091) from the eastern portion of the Bird Ranch to lands to the north of the Knollin Ranch in 1992 cannot breath life into this right, and there is no evidence to show that Sagewillow has subsequently diverted water under the 1992 transfer. I also do not see how the revival doctrine would apply in this instance. Idaho law does not recognize revival of an abandoned water right on lands other than the original place of use, by someone other than the original appropriator, and where subsequent appropriators such as Mays have intervened.

Consequently, Mays will object strenuously to any attempt by Sagewillow to divert water under either of these rights, by transfer or otherwise.

2. Historical Consumptive Use

The Sagewillow transfers propose to "dry up" at least 600 acres of land that have not received irrigation water in over 40 years. Terry Scanlan's preliminary estimates are that the transfers therefore would increase consumptive use by as much as 900 acre-feet per year. Mr. Scanlan also has identified approximately 30 acres in the SW1/4, SW1/4 of section 17, and additional lands on the west side of the Little Lost in sections 17, 18 and 20 that have not been irrigated under the claimed water rights.

Even though some of the groundwater rights are proposed to be moved off of land in the southeast portion of the Knollin Ranch, these lands will continue to be subirrigated, and consequently will not be "dried up." To the extent that such lands would continue to have significant consumptive use after the transfer, Mays will argue that the Department should reduce the quantity available for transfer from these lands to prevent an increase in the consumptive use.

3. Diversion Rate and Volume

The transfers appear to seek approval of diversion rates that exceed the stated capacity of the wells, and the 1" per acre statutory maximum. Mays will propose that the Department limit the cumulative diversion rate after the transfer to 1" per acre or the capacity of the wells, whichever is less. We also are investigating the historical diversions from the Knollin Ranch wells. This will involve a review of available records, including UP&L power records. Mays likely will urge the Department to limit the annual diversion volume to the historical consumptive use

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of the valid rights (minus the continuing consumptive use on subirrigated lands) or the historical annual diversion volume, based on whichever is less.

4. Other Conditions Mays May Seek to Have Imposed

May also can be expected to ask the Department to impose the following additional conditions on the Sagewillow transfers:

a. Require installation of totalizing flow meters on wells to allow monitoring of total annual diversions after the transfer.

b. Require that old wells at points of diversion for the forfeited rights 33-2091 and 33-2090 be capped and/or abandoned according to Department rules.

c. Retained jurisdiction over the transfers to modify or add conditions as necessary to prevent injury to Mays' water rights.

d. No waiver of senior surface and groundwater right holders' right to make a delivery call against the Sagewillow wells.

I think it would be useful to stipulate to as many facts as possible prior to the hearing. Principal facts that might be addressed by stipulation include:

a. The history of right nos. 33-2090 and 33-2091 and the year when they were abandoned;

b. Sagewillow's understanding of what these transfers would accomplish if they were approved as requested by Sagewillow;

c. The number of acres of various land types, and their consumptive use before and after the transfer;

d. The well capacities and historical rates and volumes of diversions from the Knollin Ranch wells, and the maximum rate and volume to be allowed by any transfer approval.

I would appreciate hearing from you regarding your thoughts on these or other issues that may need to be addressed in this hearing. Also, I would like to know

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whether and how you might like to approach discovery. For example, I expect that James Mays, Terry Scanlan and Vance Hawley could be called as a witnesses for Mays, and I suspect that you may want to call Chuck Brockway, Jerry Pancheri and possibly others. Will we need to ask the Department for approval to conduct discovery, or would you be prefer to make your people and exhibits available informally? Also, do you believe that the scheduled pre-hearing conference would be productive?

I look forward to hearing from you soon.

Sincerely,

Michael C. Creamer

MCC/mc

cc: James Mays
Terry Scanlan
Vic Conrad (via telecopy)

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MAR 2 7 1996

PREHEARING CONFERENCE
FOR
SAGEWILLOW, INC.

10:00 A.M.
NOVEMBER 29, 1994
IDWR OFFICE
900 N. SKYLINE DR.
IDAHO FALLS, ID 83402

NAME	REPRESENTING	ADDRESS
George H Woodie	BLAINE COUNTY	HC 65 BOX 1018 Howe
Wade Williams	Blaine Co. Canal	HC 65 Box 1032 Howe
Pat Woodie	Blaine Co. Canal	HC 65 Box 1018 Howe Id. 83244
Rod Ranchu		HC 65 Box 2164 Howe, Id 83244
Rick Ranchu		HC 65 Box 3163 Howe, Id.
R. P. Mays		HC 65 Box 2105 Howe
Dean Mays		HC 65 BOX 2115 Howe Id
		Howe, Idaho
E W Durnle		Las Vegas, NV.
James A. Mays		Howe, Idaho
John L. McDonald		HC 65 Box 1032 Howe ID
KENT W. FOSTER	Applicant	P.O. Box 50130, I.F.
Charles Brockway	Applicant	706 Sonora Blvd N. Twin Falls
Bill Stauffer	Blaine Canal	Howe Idaho

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Department of Water Resources

8C SERVICES

RETURN OF SERVICE

PLAINTIFF: Idaho Dept Water Resources

DEFENDANT: Utah Power - Light

CASE # 3314-C

STATE OF IDAHO)
:ss
County of Bannock)

I Gilbert Bloom hereby certify that I am over the age of 18 years and that I received the within Summons and Complaint on the 12th day of Nov, 1994 and personally served the same on the 14th day of Nov, 1994, on Utah Power & Light Glen Pond, the Defendant, by delivering to Same at 25 E Main Rexburg Idaho, in the county of Madison.

DATED this 14th day of Nov, 1994

Gilbert Bloom
GILBERT BLOOM

1994 SUBSCRIBED AND SWORN TO BEFORE ME this 14 day of Nov.

Claudia Allen
NOTARY PUBLIC FOR IDAHO
Residing at Pocatello, Idaho
My commission expires:7/13/93

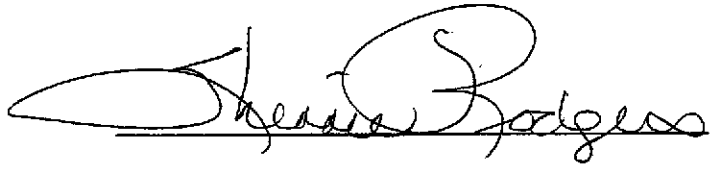
(SEAL)

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of November, 1994, I caused to be served a true and correct copy of the foregoing Return of Service of Subpoena by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_X_ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



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Department of Water Resources

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\SUBPOENA

Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 AND 33-02133	**SUBPOENA**

TO: Utah Power & Light Company, c/o Glen Pond, Customer Service Manager, Idaho Region, Rexburg Service Center, 25 East Main Street, Rexburg, Idaho 83440.

Please take notice that pursuant to the IDAPA § 37.01.01, you are hereby directed to produce within fifteen days of service of this Subpoena, the following information for inspection and copying:

Power consumption records for the following accounts for the years 1985 to 1994:

4085-01700.002
4085-10750.002
4085-01950.002
4380-12698.001
4380-12386.001

MAR 2 7 1996

4085-02000.001
4085-02050.003
4085-02100.004

Compliance with this Subpoena may be accomplished by, within the time specified above, producing the above-referenced documents or information at 25 East Main Street, Rexburg, Idaho 83440, and providing written notice of their availability for inspection and copying, to the following:

Michael C. Creamer
Givens Pursley & Huntley
P.O. Box 2720
Boise, Idaho 83701

Kent W. Foster
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
330 Shoup Avenue, Third Floor
P.O. Box 50130
Idaho Falls, Idaho 83405

Jim Johnson
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

If any of the above-referenced documents or information cannot be produced, you are further directed to provide written notice of same, and the reasons for their unavailability, to the above persons within the time specified above.

DATED this 3rd day of November, 1994.

R. Keith Higginson, Director
Idaho Department of Water Resources

MAR 2 7 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

November 3, 1994

Michael C. Creamer
Givens, Pursley & Huntley
P. O. Box 2720
Boise, Idaho 83701

Re: Applications for Transfer of Water Rights
In the Name of Sagewillow, Inc.

Dear Mr. Creamer:

Enclosed is the signed Motion for Order Allowing Discovery. Note that an Order portion was added to the second page for Keith's signature. The signed Subpoena is enclosed also.

Sincerely,

RITA I. FLECK
Legal Secretary

Enclosures

PREPARED
MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 1994, a true and correct copy of the foregoing MOTION FOR ORDER ALLOWING DISCOVERY and ORDER was mailed, postage prepaid to:

Kent Foster, Esq.
Holden, Kidwell, Hahn & Crapo
P. O. Box 50130
Idaho Falls, Idaho 83405

Michael C. Creamer
Givens, Pursley & Huntley
P. O. Box 2720
Boise, Idaho 83701

Rita L. Fleck
Legal Secretary

FILED
MAR 3 7 1995

GARY G. ALLEN
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
MICHAEL C. CREAMER
ROY L. EIGUREN
JEFFREY C. FEREDAY
JULIE KLEIN FISCHER
RAYMOND D. GIVENS
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KENNETH R. McCLURE
CHRISTOPHER H. MEYER
L. EDWARD MILLER
PATRICK J. MILLER
JUDSON B. MONTGOMERY
TERRY L. MYERS
RAMONA S. NEAL
STEVEN L. OLSEN
W. HUGH O'RIORDAN
KENNETH L. PURSLEY
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

LAW OFFICES
GIVENS PURSLEY & HUNTLEY
SUITE 200, PARK PLACE
277 NO. 6TH STREET
POST OFFICE BOX 2720
BOISE, IDAHO 83701

JAMES A. McCLURE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492

November 2, 1994

RECEIVED
NOV 0 3 1994
Department of Water Resources

R. Keith Higginson
Director
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

Re: Protest by James Mays and Mays Land & Livestock
Our File: 3314-6

Dear Mr. Higginson:

Enclosed please find protestants' Motion for Order Allowing Discovery and Subpoena. If the Motion is acceptable to the Department, please sign the Subpoena and return to me for service.

Please call if you have any questions or concern.

Sincerely,

Michael C. Creamer

MCC/mc
Enclosures

MAR 2 7 1996

RECEIVED
NOV 0 3 1994
Department of Water Resources

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\DISCOVER.MOT

Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 AND 33-02133	**MOTION FOR ORDER ALLOWING DISCOVERY**

Protestants James Mays and Mays Land & Livestock, by and through their attorneys Givens Pursley & Huntley, and pursuant to IDAPA 37.01.01.521, hereby request the Department to issue an order authorizing Protestants to engage in discovery. Specifically, Protestants request that they be allowed to serve Utah Power & Light Company ("UP&L") with a subpoena commanding UP&L to produce power records for the pumps serving the wells involved in the transfers referenced above. A copy of Protestants' proposed subpoena is attached hereto as Exhibit A.

In support of their Motion, Protestants represent that their counsel has been advised in writing by Kent W. Foster, counsel for the Applicant, that the Applicant does not object to the Protestants obtaining the records requested in the Subpoena.

MAR 2 7 1996

UP&L has advised Protestants' counsel that such records can be produced, but only in response to a subpoena directed to Mr. Glen Pond, who is UP&L's representative in Rexburg.

The power records will be reviewed by Protestants' consultant to determine the historical diversions of water rights sought to be transferred in the above-captioned matter. The Protestants agree to pay UP&L's costs to locate and produce the records. All parties otherwise would be responsible for obtaining their own copies and evaluation of such records.

WHEREFORE, Protestants respectfully request that their Motion for Order Allowing Discovery be granted.

DATED this 2nd day of November, 1994.

GIVENS PURSLEY & HUNTLEY

BY: _____
Jeffrey C. Fereday
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

O R D E R

It is so ordered.

Dated this 3rd day of November, 1994.

_____
R. Keith Higginson
Director

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 1994, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _X_ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO.'S 4221, 4222)
4223, 4224, 4225, 4226, & 4227)
IN THE NAME OF SAGEWILLOW, INC) NOTICE OF PREHEARING
) CONFERENCE

On September 21, 1993, Sagewillow, Inc., filed with the Department of Water Resources applications for transfer of water right No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227. The applications were protested by J.R. Simplot Company (which was later withdrawn), Michael C. Creamer of Givens Pursley & Huntley on behalf of their clients James Mays and Mays Land & Livestock, and the Blaine County Canal Co.

The Department has scheduled the matter for conference on November 29, 1994, at 10:00 a.m. in the conference room of the Idaho Department of Water Resources, 900 N. Skyline, Idaho Falls, ID, in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources.

Agenda items for this prehearing conference will include:

1. Identify spokesman and/or counsel representing the protestant.
2. Review of the application.
3. Identify issues of protest.
4. Designate date for identifying witnesses.
5. Designate target date for conducting administrative hearing if resolution is not possible during conference.

The hearing will be conducted in a facility which meets the

MAR 2 7 1996

accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within ten (10) days prior to the conference.

Dated this 28th day of October 1994.

RONALD D. CARLSON
Eastern Regional Manager

I hereby certify that on the 28th day of October 1994, I mailed a true and correct copy, postage prepaid, of this document to the applicant(s) and protestant(s) listed below:

Secretary

CERTIFIED MAIL

SAGEWILLOW, INC.
C/O 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

Law Offices
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS, P.A.
DALE W. STORER
MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
FREDERICK J. HAHN, III
JAMES K. SLAVENS

WEST ONE BANK BLDG.
330 SHOUP AVENUE, THIRD FLOOR
P.O. BOX 50130
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

Arthur W. Holden
(1877-1967)
Robert B. Holden
(1911-1971)
Terry L. Crapo
(1939-1982)
William S. Holden
(1907-1988)

RECEIVED
OCT 20 1994
Department of Water Resources

October 18, 1994

Mr. Jim Johnson
IDAHO DEPARTMENT OF WATER
RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Applications for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226, and 4227 in the name of Sage Willow, Inc.

Dear Mr. Johnson:

This letter is to advise that we have finally been able to obtain the information regarding Utah Power & Light Company account numbers for the various wells involved in this Application for Transfer. We have given that information to Mr. Creamer and request that this matter be scheduled for a prehearing conference at the earliest opportunity. Thank you for your continued attention to this matter.

Very truly yours,

Kent W. Foster

G:\WPDATA\SANDRA\KWFLETTE\00SAGE10.LTR:sjw

29-Mar-1994

VIC CONRAD
SIMPLOT LAND & DEVELOPMENT
PO BOX 27
BOISE ID 83707

RE: App. for Transfer of Water Right No. 4221, 4222, 4223, 4224, 4225, 4226, & 4227 SAGEWILLOW INC

Dear Mr. Conrad:

This letter acknowledges receipt of the withdrawal of protest against the above referenced application.

If you have any questions, please feel free to contact this office.

Very truly yours,

Harold W. Jones rb

HAROLD W. JONES
Water Right Supervisor

HWJ/rb

MAR 27 1996

29-Mar-1994

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

RE: App. for Transfer of Water Right No. 4221, 4222, 4223, 4224, 4225, 4226, & 4227 SAGEWILLOW INC

Dear Applicant:

This letter is to advise you that the protests filed by J. R. Simplot against approval of the above referenced transfer has been withdrawn.

If you have any questions, please feel free to contact this office.

Very truly yours,

Harold W. Jones rb

HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS
DALE W. STORER
MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
JAMES K. SLAVENS

WEST ONE BANK
P.O. BOX 50130
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TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

KEY FINANCIAL CENTER
702 W. IDAHO SUITE 910
BOISE, IDAHO 83702

TELEPHONE (208) 343-0620
TELEFAX (208) 343-8078

BOISE OFFICE

TODD J. WILCOX
FREDERICK J. HAHN III
RONALD D. CHRISTIAN

ARTHUR W. HOLDEN
(1877-1967)
ROBERT S. HOLDEN
(1911-1971)
TERRY L. CRAPO
(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

March 21, 1994

VIA FACSIMILE

Ronald E. Carlson
IDAHO DEPARTMENT OF WATER
RESOURCES
900 N. Skyline Dr.
Idaho Falls, Idaho 83402-1718

Re: Sagewillow Applications for Transfer/Pre-hearing Conference Scheduled for March 22, 1994

Dear Mr. Carlson:

This letter will follow up on our telephone conversation. Since Mr. Creamer on behalf of James Mays, Mays Land and Livestock, has recently raised the forfeiture issues, we have attempted to gather documentation and data relative to that matter. None of that information has come to us yet and we will not have it available either for the pre-hearing conference or for Mr. Creamer in advance of that time. Based on these circumstances and the potential that the pre-hearing conference will be of little use, we have requested that it be continued for the time being until we contact you and indicate that we are ready to proceed further.

Thank you for your kind consideration.

Yours very truly,

Kent W. Foster

#8149.00/KWF:kep
1825g (11)

cc: Michael Creamer

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS
MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
[illegible] L. TAYLOR
JAMES K. SLAVENS

WEST ONE BANK
P.O. BOX 50130
330 SHOUP AVENUE
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TELEPHONE (208) 523-0620
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KEY FINANCIAL CENTER
702 W. IDAHO SUITE 810
BOISE, IDAHO 83702

TELEPHONE (208) 343-0820
TELEFAX (208) 343-8078

BOISE OFFICE

RANDALL B. REED
TODD W. WILCOX
FREDERICK J. HAHN III
RONALD D. CHRISTIAN

ARTHUR W. HOLDEN
(1877-1967)
ROBERT B. HOLDEN
(1911-1971)
TERRY L. CRAPO
(1939-1992)
WILLIAM B. HOLDEN
(1907-1998)

FAX TRANSMITTAL SHEET

DATE: 3-21-94 **TIME:** _____

TO: Ron Carlson/Michael Creamer **FAX:** 525-7177, 342-6571

FROM: Kent Foster **FAX:** (208) 523-9518

RE: Sagewillow Applications for Transfer/Pre-hearing Conference

ITEMS SENT:

1. _____
2. _____
3. _____

NO. OF PAGES INCLUDING TRANSMITTAL SHEET: 2

COMMENTS: _____

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE AT (208) 523-0620.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR DISTRIBUTION OF THIS COMMUNICATION TO OTHER THAN THE INTENDED RECIPIENT IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY COLLECT CALL TO (208) 523-0620, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.

TELECOPIER OPERATOR

2339m/srs

Simplot

CORPORATE HEADQUARTERS

P.O. BOX 27
BOISE, IDAHO 83707

RECEIVED
MAR 2 2 1994
Department of Water Resources

Confirmation copy for Norm

March 21, 1994

TELEFACSIMILE
Hard Copy to Follow in Regular U. S. Mail

R. Keith Higginson
State of Idaho
Department of Water Resources
1301 N. Orchard
Boise, ID 83706
208-327-7866 (Fax)

Kent Foster, Esq.
Holden Kidwell, Hahn & Crapo
P.O. Box 50130
Idaho Falls, ID 83405
208-523-9578 (Fax)

Michael C. Creamer
Givens Pusley & Huntley
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, ID 83701
208-343-9492 (Fax)

George Woodie
Blaine County Canal Company
HC 65, Box 1018
Howe, ID 83244

Re: Withdrawal of Protest of Applications of Sagewillow, Inc. for Transfer Numbers 4221, 4222, 4223, 4224, 4225, 4226 & 4227.

Gentlemen:

The J. R. Simplot Company hereby withdraws its protest of the applications of Sagewillow, Inc. for transfer of water rights referenced above.

Sincerely,

Vic Conrad
Associate, Simplot
Land and Development

cc: J. Johnson IDWR 208-327-7866 (Fax)
R. Carlson & H. Jones, IDWR 208-525-7177 (Fax)
R. Robertson, Simplot 208-349-5513 (Fax)
J. Hoover, Simplot
T. Uhling, Simplot

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\AMEND.MOT

Attorneys for Protestants

RECEIVED
MAR 3 1 1994
Department of Water Resources
Eastern District Office

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 AND 33-02133	**MOTION TO AMEND PROTEST**

James Mays and Mays Land & Livestock, ("Mays") by and through their attorneys Givens Pursley & Huntley, and pursuant to IDAPA 37.01.01.305, hereby request that the Department recognize Mays' Protest of the transfers of the above-captioned water rights as a Protest of all pending transfers affecting such water rights. Mays intended that its Protest apply to all of the simultaneous transfers affecting the above-captioned rights, and therefore requests that it be permitted to amend its Protest so as to object to Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227, all of which pertain to the transfer of Sagewillow water rights on the same grounds as stated in Mays' original Protest. Because the same issues of law and fact

MAR 2 7 1996

will apply to all of the transfers, Sagewillow will not be prejudiced by such amendment.

DATED this 18th day of March, 1994.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays and Mays Land & Livestock

* * *

Protestants James Mays' and Mays Land & Livestock's ("Mays") Motion to Amend Protest is granted and Mays is hereby recognized as a party to all proceedings on Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227.

DATED This _____ day of March, 1994.

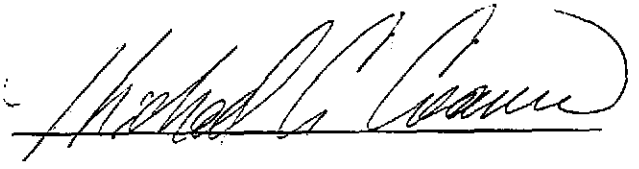
_____
R. Keith Higginson, Director
Idaho Department of Water Resources

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1994, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Mr. Vic Conrad J.R. Simplot Company P.O. Box 27 One Capital Center 999 Main Street, Suite 1300 Boise, Idaho 83707-0027	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



MAR 21 1994

GARY G. ALLEN
REBECCA W. ARNOLD
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
JOANN C. BUTLER
MICHAEL C. CREAMER
ROY L. EIGUREN
JEFFREY C. FEREDAY
JULIE KLEIN FISCHER
RAYMOND D. GIVENS
L. W. GRANT, III
JUDITH K. HOLCOMBE
ROBERT C. HUNTLEY, JR.
DAVID R. LOMBARDI
KENNETH R. McCLURE
CHRISTOPHER H. MEYER
L. EDWARD MILLER
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GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

LAW OFFICES
GIVENS PURSLEY & HUNTLEY
SUITE 200, PARK PLACE
277 NO. 6TH STREET
POST OFFICE BOX 2720
BOISE, IDAHO 83701

JAMES A. McCLURE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492
(208) 342-8920

RECEIVED
MAR 1 1994
Department of Water Resources
Eastern Region Office

CONFIRMATION COPY

March 17, 1994

Ronald Carlson
Idaho Department of Water Resources
900 North Skyline Dr.
Idaho Falls, ID 83402-1718

VIA TELECOPY

Re: Mays Land & Livestock - Sagewillow Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227.
Our File: 3314-6

Dear Mr. Carlson:

This letter outlines the issues that Mays intends to raise with respect to the proposed transfers of Sagewillow water rights, and contains Mays' suggestions for proceeding with discovery and hearing.

Forfeiture.

In the past several weeks, Mays has obtained and reviewed complete copies of all the proposed Sagewillow transfers. Based on this review, Mays will argue that water right nos. 33-2090 and 33-2091 have been abandoned and forfeited by nonuse, and therefore, no portion of these rights may be transferred for use on other lands without injury to Mays' water rights. The lands to which these rights originally were appurtenant amount to approximately 600 acres. In addition, we have identified several smaller tracts that have not been irrigated for over five years under several other of the water rights.

MAR 2 7 1996

Revival of Abandoned Rights.

I anticipate that the issue of whether Sagewillow revived these rights under the doctrine set out in *Zezi v. Lightfoot* and *Carrington v. Crandall*, or through the 1992 transfer involving these rights will be raised by Sagewillow. Mays will argue that the revival doctrine is not applicable under the instant facts.

Consumptive Use.

Mays intends to show that if water right nos. 33-2090 and 33-2091 are allowed to be diverted at the proposed new place of use, the consumptive use after the transfer will be increased significantly. This increased consumptive use would reduce the amount of water available to surface and groundwater supplies downgradient from the Knollin Ranch, which will result in injury to Mays' water rights and those of others.

Diversion Rate and Volume

Mays is evaluating the historical pumping rates and volumes associated with these rights, and will offer evidence supporting conditions that limit any post-transfer diversions to prevent an enlargement of the right above historical rates and volumes. I have asked Mr. Kent Foster, counsel for Sagewillow, to provide me with the Utah Power & Light account numbers for the Sagewillow wells so that Mays can obtain power records for the wells. I expect to receive this information soon, and will ask the Department to issue a subpoena directing UP&L to produce the records.

I believe that the relevant years for establishing the historical use under these rights should be the five years immediately preceding the 1992 transfer (No. 3785) of water right 33-2091 to the lands north of the Knollin Ranch. Mays will argue that this transfer was ineffective, and could not authorize diversions under either right no. 33-2091 or 33-2090. However, it appears that after the 1992 transfer, two pivots to the north of the Knollin Ranch were operated using groundwater pursuant to Transfer No. 3785). Because we believe that such use could not have been authorized, Mays would argue that the historical use evaluation should be based on the years 1987 to 1991, corresponding to the most recent five years where pumping not involve use of the forfeited rights.

MAR 27 1996

Other Conditions.

Mays may request that the Department also include the following conditions in any transfer approval:

1. Require installation of totalizing flow meters on all Sagewillow wells to allow monitoring of total annual diversions after the transfer.

2. Require that old wells at points of diversion for water right nos. 33-2091 and 33-2090 be abandoned in compliance with Department rules.

3. Retained jurisdiction over the transfers to modify or add conditions as necessary to prevent injury to Mays' water rights.

4. Approval in whole or part of the Sagewillow transfers cannot be construed as limiting Mays' rights as a holder of senior water rights, to make a delivery call against the Sagewillow wells and to request regulation of the Sagewillow wells by conjunctive management or otherwise.

5. Approval, in whole or part, of the Sagewillow transfers does not bar Mays' right to object to the transfer and/or the exercise of the individual rights in the Snake River Basin Adjudication.

I expect that Mays could be prepared for hearing within two weeks of obtaining the UP&L power records. Assuming I can receive the account numbers for the wells and have the subpoena served on UP&L early next week, and assuming the subpoena would give UP&L seven days to produce the records, Mays could be prepared to proceed with a hearing as of April 13, 1994.

Mays could make its exhibits available to opposing counsel within 1 week of the hearing date.

Mays may call James Mays, Terry Scanlan, the District 33 Watermaster, Jerry Pancheri or Vance Hawley as witnesses at the hearing. Depending on the extent of the administrative record that exists regarding Transfer No. 3785, Mays also may need to call the IDWR employee who reviewed and recommended that transfer for approval.

MAR 2 7 1996

Because of the distance and expense to Mr. Mays if I were to travel to Idaho Falls to attend the March 22nd pre-hearing conference in person, I would appreciate you letting me know whether I may participate by telephone conference, and if so, how the teleconference would be initiated. If a telephone conference is not an option, I will make arrangements to attend in person. I also would appreciate knowing who will be assigned as hearing officer in this matter.

Sincerely,

Michael C. Creamer

MCC/mc
cc: James Mays
Kent Foster, Esq.
Vic Conrad, J.R. Simplot Co.
George Woodie, Blaine County Canal Co.
Terry Scanlan
Harold Jones, IDWR

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO.'S 4221, 4222,) NOTICE OF
4223, 4224, 4225, 4226, & 4227)
IN THE NAME OF SAGEWILLOW INC) PREHEARING CONFERENCE

On September 21, 1993, Sagewillow, Inc. filed with the Department of Water Resources applications for transfer of water rights No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227. The applications were protested by J.R. Simplot Company, Michael C. Creamer of Givens Pursley & Huntley on behalf of their clients James Mays and Mays Land & Livestock, and the Blaine County Canal Co.

The Department has scheduled the matter for conference on March 22, 1994, 10:00 a.m. in our conference room at 900 N. Skyline, Idaho Falls. The conference will be held in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources.

Agenda items for this prehearing conference will include:

1. Identify spokesman and/or counsel representing the protestant.
2. Review of the application.
3. Identify issues of protest.
4. Designate date for identifying witnesses.
5. Designate target date for conducting administrative hearing if resolution is not possible during the

MAR 2 7 1994

prehearing conference.

The conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within fourteen (14) days prior to the conference.

Dated this 16th day of February 1994.

Regional Manager

MAR 27 1996

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of February, 1994, I mailed a true and correct copy, postage prepaid, of this document to the applicants(s) and protestants(s) listed below:

Lita Bodell
Secretary

Certified Mail

SAGEWILLOW INC.
C/O 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

VIC CONRAD
JR SIMPLOT COMPANY
P.O. BOX 27
BOISE, ID 83707-0027

ACTION REQUIRED

2-7-94

FROM: H.W. JONES

TO: Sagewillow file

Applicants attorney, Kent Foster agreed to postpone Conf. Need to re-schedule.

HWJ

DEPARTMENT

MAR 2 7 1996

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS
DALE W. STORER
MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
JAMES K. SLAVENS

WEST ONE BANK
P.O. BOX 50130
330 SHOUP AVENUE
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

KEY FINANCIAL CENTER
702 W. IDAHO SUITE 810
BOISE, IDAHO 83702

TELEPHONE (208) 343-0820
TELEFAX (208) 343-8078

BOISE OFFICE

TODD J. WILCOX
FREDERICK J. HAHN III
RONALD D. CHRISTIAN

ARTHUR W. HOLDEN
(1877-1967)
ROBERT B. HOLDEN
(1911-1971)
TERRY L. CRAPO
(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

February 4, 1994

RECEIVED
FEB 7 1994
Department of Water Resources
Eastern District Office

Mr. Harold Jones, Water
Rights Supervisor
IDAHO DEPARTMENT OF WATER
RESOURCES
900 N. Skyline
Idaho Falls, Idaho 83402-1718

RE: Applications for Transfers Nos. 4221, 4222, 4223, 4224, 4225, 4226, & 4227 in the Name of Sagewillow Inc.

Dear Mr. Jones:

Pursuant to our telephone conversation of February 2nd, this letter is to confirm that Mr. Mike Creamer, attorney for James Mays and Mays Land and Livestock, a protestant herein, called February 2nd and indicated they had hired an expert witness to review the transfer documents and that it would be necessary for him to have some additional time. We agreed to continue the matter, so long as it was acceptable to the department, from the date the pre-hearing conference is presently scheduled of February 9th. As we understand it, you will advise Mr. Jim Johnson of the Boise office of this stipulated continuance and inquire of him what possible date it might be rescheduled. Mr. Creamer had originally suggested February 23rd and that is certainly fine with us if it is acceptable to you and Mr. Johnson.

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FEB 7 1994

In any event, we will look forward to hearing from you as soon as the matter is reset. Thank you for your kind attention to this matter.

Yours very truly,

Kent W. Foster

#8149.00/KWF:kep
1825g (27-28)

cc: Blaine County Canal Co.
Michael C. Creamer
Vic Conrad, JR Simplot Co.

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO.'S 4221, 4222,) NOTICE OF
4223, 4224, 4225, 4226, & 4227)
IN THE NAME OF SAGEWILLOW INC) PREHEARING CONFERENCE

On September 21, 1993, Sagewillow, Inc. filed with the Department of Water Resources applications for transfer of water rights No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227. The applications were protested by J.R. Simplot Company, Michael C. Creamer of Givens Pursley & Huntley on behalf of their clients James Mays and Mays Land & Livestock, and the Blaine County Canal Co.

The Department has scheduled the matter for conference on February 9, 1994, 10:30 a.m. in our conference room at 900 N. Skyline, Idaho Falls. The conference will be held in accordance with the provisions of the adopted Rules of Procedure of the Department of Water Resources.

Agenda items for this prehearing conference will include:

1. Identify spokesman and/or counsel representing the protestant.
2. Review of the application.
3. Identify issues of protest.
4. Designate date for identifying witnesses.
5. Designate target date for conducting administrative hearing if resolution is not possible during the

MAR 2 7 1996

prehearing conference.

The conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the Department within fourteen (14) days prior to the conference.

Dated this 5th day of January 1994.

Ronald D. Carlson
Regional Manager

MAR 2 7 1996

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of January, 1994, I mailed a true and correct copy, postage prepaid, of this document to the applicants(s) and protestants(s) listed below:

Lita Bodell
Secretary

Certified Mail

SAGEWILLOW INC.
C/O HOLDEN KIDWELL HAHN & CRAPO
P.O. BOX 50130
IDAHO FALLS, ID 83405

BLAINE COUNTY CANAL CO.
~~HC 65 BOX 1018~~ Box 1079 HC65
HOWE, ID 83244 c/o Mark Houser

MICHAEL C. CREAMER
GIVENS PURSLEY & HUNTLEY
P.O. BOX 2720
BOISE, ID 83701

VIC CONRAD
JR SIMPLOT COMPANY
P.O. BOX 27
BOISE, ID 83707-0027

BUREAU OF RECLAMATION
MAR 27 1996

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 – (208) 525-7161 – FAX: (208) 525-7177

EASTERN REGION 1993

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

MICHAEL C CREAMER
GIVENS PURSLEY & HUNTLEY
PO BOX 2720
BOISE ID 83701

RE: Application for Transfer No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227

Dear Mr. Creamer:

This letter acknowledges receipt of the protest filed by you in your area against the above referenced application for transfer. The following are the principle items considered by the Department at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?
2. Does the change constitute enlargement in the use of the original right?
3. Is the change consistent with the conservation of water resources within the state of Idaho?
4. Does the change conflict with the local public interest?

The protestant must be prepared to present proof of the allegations involving one or more of the items. You will be notified at a later date as to the time and place set for conference and/or hearing.

In addition, Rule 302 of the Department's Rules of Procedure requires a protestant to send a copy of the protest to the applicant in question. The address is as follows:

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

If we may be of further assistance, please contact us.

Respectfully submitted,

Harold W. Jones rb
HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

cc: IDWR - State Office

RECEIVED
MAR 27 1996

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - FAX: (208) 525-7177

EASTERN REGION 1993

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

VIC CONRAD
JR SIMPLOT COMPANY
PO BOX 27
BOISE ID 83707-0027

RE: Application for Transfer No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227

Dear Mr. Conrad:

This letter acknowledges receipt of the protest filed by you in your area against the above referenced application for transfer. The following are the principle items considered by the Department at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?
2. Does the change constitute enlargement in the use of the original right?
3. Is the change consistent with the conservation of water resources within the state of Idaho?
4. Does the change conflict with the local public interest?

The protestant must be prepared to present proof of the allegations involving one or more of the items. You will be notified at a later date as to the time and place set for conference and/or hearing.

In addition, Rule 302 of the Department's Rules of Procedure requires a protestant to send a copy of the protest to the applicant in question. The address is as follows:

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

If we may be of further assistance, please contact us.

Respectfully submitted,

Harold W. Jones rb

HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

cc: IDWR - State Office

MAR 27 1996

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - FAX: (208) 525-7177

EASTERN REGION 10 Dec 1993

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

BLAINE COUNTY CANAL CO
HC 65 BOX 1018
HOWE ID 83244

RE: Application for Transfer No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227

Dear Protestants:

This letter acknowledges receipt of the protest filed by you in your area against the above referenced application for transfer. The following are the principle items considered by the Department at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?
2. Does the change constitute enlargement in the use of the original right?
3. Is the change consistent with the conservation of water resources within the state of Idaho?
4. Does the change conflict with the local public interest?

The protestant must be prepared to present proof of the allegations involving one or more of the items. You will be notified at a later date as to the time and place set for conference and/or hearing.

In addition, Rule 302 of the Department's Rules of Procedure requires a protestant to send a copy of the protest to the applicant in question. The address is as follows:

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

If we may be of further assistance, please contact us.

Respectfully submitted,

Harold W. Jones rb
HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

cc: IDWR - State Office

MAR 27 1996

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - FAX: (208) 525-7177

10-Dec-1993

EASTERN REGION

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

MICHAEL C CREAMER
GIVENS PURSLEY & HUNTLEY
PO BOX 2720
BOISE ID 83701

RE: Application for Transfer No.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227

Dear Mr. Creamer:

This letter acknowledges receipt of the protest filed by you and others in your area against the above referenced application for transfer. The Department of Water Resources has designated you as the contact person for all protestants. The following are the principle items considered by the Department at a conference and/or hearing in either approving or denying an application for transfer:

1. Are other water rights injured by the transfer?
2. Does the change constitute enlargement in the use of the original right?
3. Is the change consistent with the conservation of water resources within the state of Idaho?
4. Does the change conflict with the local public interest?

The protestants must be prepared to present proof of the allegations involving one or more of the items. You will be notified at a later date as to the time and place set for conference and/or hearing.

In addition, Rule 302 of the Department's Rules of Procedure requires a protestant to send a copy of the protest to the applicant in question. The address is as follows:

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

If we may be of further assistance, please contact us.

Respectfully submitted,

Harold W. Jones rb

HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

cc: IDWR - State Office

RECEIVED

DEC 27 1996

State of Idaho
DEPARTMENT OF WATER RESOURCES
900 N. Skyline Dr., Idaho Falls, Idaho 83402-1718 - (208) 525-7161 - FAX: (208) 525-7177

EASTERN REGION

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

10-Dec-1993

SAGEWILLOW INC
C/O HOLDEN KIDWELL HAHN & CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

RE: Applications for Transfer NO.'s 4221, 4222, 4223, 4224, 4225, 4226, & 4227

Dear Mr. Foster:

Enclosed please find copies of the protests filed against the above referenced applications for transfer. You should be aware that the following are the items we can consider at a conference and/or hearing in either approving or denying an application for transfer:

1) Are other water rights injured by the transfer?
2) Does the change constitute enlargement in the use of the original water right?
3) Is the change consistent with the conservation of water resources within the state of Idaho?
4) Does the change conflict with the local public interest?

The applicant must be prepared to present evidence and/or testimony addressing each of the four items should an additional hearing be necessary. You will be notified at a later date as to the time and place set for conference and/or hearing.

If we may be of further assistance, please contact us.

Respectfully submitted,

Harold W. Jones rb

HAROLD W. JONES
Water Rights Supervisor

HWJ/rb

cc: IDWR - State Office

MAR 2 7 1996

SAXTON KA

J.R. SIMPLOT COMPANY ONE CAPITAL CENTER 999 MAIN STREET SUITE 1300
P.O. BOX 27 BOISE, IDAHO 83707-0027 (208) 336-2110 FAX (208) 389-7515

RKA NCY

CORPORATE HEADQUARTERS

RECEIVED
DEC 0 6 1993

R. Keith Higginson
Director, State of Idaho
Department of Water Resources
1301 North Orchard Street
Boise, ID 83720-9000

Hand Delivery
December 6, 1993

Re: Protest of Application of Sagewillow, Inc. for Transfer of Water Right Numbers: 33-00069A, 33-00070A, 33-00071A, 33-00072A, 33-00073A, 33-00074A, 33-00076A, 33-00078A, 33-00079A, 33-00080A, 33-00081A, 33-00082A, 33-02007A, 33-02008A, 33-02057D, 33-02083D, 33-02133A.

The J. R. Simplot Company ("Simplot") owns a farm located near the town of Howe, in Butte County, Idaho near Sagewillow Inc.'s ("Sagewillow") proposed points of diversion and proposed place of use. Simplot's farm is irrigated with water diverted from several wells. Simplot is concerned that the application of Sagewillow to transfer the above referenced water right numbers will reduce the quantity of water available to Simplot for irrigation purposes.

Simplot protests the application of Sagewillow for transfer of the above referenced water right numbers on the grounds that the proposed transfer may reduce the quantity of water available to Simplot and the application may be an attempt to transfer water rights that have been forfeited or abandoned. In addition, Simplot reserves the right to state additional grounds for protest on the basis of Simplot's evaluation of the Sagewillow's application.

For these reasons Simplot requires additional time to determine if the proposed transfer will reduce the quantity of water available to Simplot for irrigation purposes and if the application proposes to transfer water rights that have been forfeited due to non-use over a period of five consecutive years.

Sincerely,

Vic Conrad
Associate, Simplot
Land and Development

cc: T. Basabe
R. Robertson
J. Hoover
T. Uhling

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MAR 27 1996

DEBRA ALSAKER-BURKE
REBECCA W. ARNOLD
JOSEPH H. BAIRD
CHRISTOPHER J. BEESON
JOANN C. BUTLER
MICHAEL C. CREAMER
JEFFREY C. FEREDAY
JULIE KLEIN FISCHER
RAYMOND D. GIVENS
JUDITH K. HOLCOMBE
ROBERT C. HUNTLEY, JR.
DAVID R. LOMBARDI
KENNETH R. McCLURE
CHRISTOPHER H. MEYER
L. EDWARD MILLER
PATRICK J. MILLER
JUDSON B. MONTGOMERY
TERRY L. MYERS
STEVEN L. OLSEN
KENNETH L. PURSLEY
RAMONA L. SCHWEHR
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

LAW OFFICES
GIVENS PURSLEY & HUNTLEY
SUITE 200, PARK PLACE
277 NO. 6TH STREET
POST OFFICE BOX 2720
BOISE, IDAHO 83701

JAMES A. McCLURE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492
(208) 342-8920

December 3, 1993

RECEIVED
DEC 07 1993
Department of Water Resources
Eastern District Office

Mr. R. Keith Higginson
Idaho Department of Water Resources
150 West Shoup Street, Suite 15
Idaho Falls, Idaho 83402

Re: Transfer Nos. 4224, 4225 and 4226 - Protest by James Mays and Mays Land & Livestock
Our File: 3314-6

Dear Mr. Higginson:

Enclosed please find an original and one copy of the Protest of James Mays and Mays Land and Livestock regarding Transfer Nos. 4224, 4225 and 4226 proposed by Sagewillow, Inc.. Please return a conformed copy to me in the enclosed, stamped and self-addressed envelope.

Sincerely,

Michael C. Creamer

Michael C. Creamer

MCC/mc

MAR 27 1996

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\PROTEST

Attorneys for Protestants

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DEC 07 1993
Department of Water Resources
Eastern District Office

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 AND 33-02133	**PROTEST**

James Mays and Mays Land & Livestock, by and through their attorneys Givens Pursley & Huntley, and pursuant to I.C. § 42-222 and Idaho Department of Water Resources Rule 3,1, hereby protest Transfer Nos. 4224, 4225 and 4226, by which Sagewillow, Inc. proposes to transfer the above-captioned water rights. The grounds for this Protest are as follows:

1. Protestant owns surface and groundwater rights in the Little Lost River and its tributaries which may be materially injured by such transfers.

2. The transfers may result in an expansion of the water rights sought to be transferred.

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MAR 27 1996

3. The transfers may result in an increase in the consumptive use of the water rights sought to be transferred.

4. The transfers, as proposed, are not consistent with the conservation of water resources.

5. The transfer applications fail to provide enough information to permit a complete evaluation of the potential injurious effects of such transfers on Protestants' water rights. Therefore, Protestants reserve the right to state additional grounds as facts are adduced through discovery or otherwise.

DATED this 30th day of December, 1993.

GIVENS PURSLEY & HUNTLEY

BY: _____

Jeffrey C. Fereday
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 27 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 1993, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources Eastern Region 150 West Shoup Street, Suite 15 Idaho Falls, Idaho 83402	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL __X__ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL __X__ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL __X__ TELECOPY (FAX)



RECEIVED
DEC 7 1993

Keith Higgenson, Director
C/o Dept. of Water Resources
900 N. Skyline
ID Falls, ID 83402

Dec. 2, 1993

RECEIVED
DEC 02 1993
Department of Water Resources
Eastern District Office

Mr. Higgenson:

We the undersigned do protest the recent application for transfer submitted by Sagewillow specifically for the portion that addresses #s 33-00069B, 33-00071B and 33-02007A+B. Blaine County Canal contends that it is the owner of all or part of these rights and has filed claims in the recent Snake River Basin Adjudication to that effect.

Marc Hansen Chairman

Keith Nickerson Director

MAR 2 7 1996

Sagewillow has filed on three water permits that historically belong to Blaine County Canal. The permit numbers are as follows: 00069, 00071 and 02007. They were filed on by Blaine County Canal on July 20, 1993. The late filing was due to an oversight error in the adjudication process. The previous secretary, Bryce Contor, overlooked the permit numbers as belonging to Blaine County Canal.

Blaine County Canal Co. opposes ~~opposes~~ the expanded right or usage. The proposed plan of Sagewillow indicates that water is to be used on ground that has never been irrigated before.

These water permits from Spring Creek and Little Lost River have not been delivered in the past due to the late priority dates. It is our concern that Sagewillow will attempt to exchange these worthless rights for pump rights and cause the irrigated area below Sagewillow's Knollin Ranch to dry up.

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DEC 0 2 1993
Department of Water Resources
Eastern District Office

MAR 2 7 1996

NOTICE OF PROPOSED CHANGE OF WATER RIGHTS

Notice is hereby given that Sagewillow Inc. have applied to the Department of Water Resources for a change of point of diversion and place of use of groundwater and surface water rights. Licenses and Decreed water rights to be changed authorize diversion of water from wells, Little Lost River, and Big Spring Creek are for the irrigation of 2383 acres, located approximately 15 miles northwest of Howe, Idaho. The water rights are recorded as follows:

NUMBER 33-00069; PRIORITY 06-01-1908; CFS 3.20; ACRES 160
NUMBER 33-00070; PRIORITY 10-01-1906; CFS 2.80; ACRES 160
NUMBER 33-00071; PRIORITY 03-15-1909; CFS 3.20; ACRES 160
NUMBER 33-00072; PRIORITY 05-01-1908; CFS 0.80; ACRES 40
NUMBER 33-00073; PRIORITY 04-01-1912; CFS 6.40; ACRES 320
NUMBER 33-00074; PRIORITY 08-06-1913; CFS 1.60; ACRES 80
NUMBER 33-00076; PRIORITY 04-01-1913; CFS 6.80; ACRES 680
NUMBER 33-00078; PRIORITY 10-15-1913; CFS 3.20; ACRES 160
NUMBER 33-00079; PRIORITY 04-01-1912; CFS 1.60; ACRES 80
NUMBER 33-00080; PRIORITY 05-01-1908; CFS 0.80; ACRES 40
NUMBER 33-00081; PRIORITY 05-01-1908; CFS 0.80; ACRES 40
NUMBER 33-00082; PRIORITY 05-01-1908; CFS 0.80; ACRES 40
NUMBER 33-02007; PRIORITY 02-15-1909; CFS 2.90; ACRES 145
NUMBER 33-02008; PRIORITY 06-12-1909; CFS 6.40; ACRES 320
NUMBER 33-02057; PRIORITY 02-01-1950; CFS 24.00; ACRES 1483
NUMBER 33-02083; PRIORITY 08-23-1957; CFS 5.00; ACRES 1483
NUMBER 33-02086; PRIORITY 01-12-1959; CFS 4.10; ACRES 260
NUMBER 33-02090; PRIORITY 12-21-1959; CFS 5.93; ACRES 320
NUMBER 33-02091; PRIORITY 01-22-1960; CFS 4.36; ACRES 320
NUMBER 33-07018; PRIORITY 09-12-1972; CFS 3.26; ACRES 163
NUMBER 33-02133; PRIORITY 06-02-1949; CFS 2960.0 AF; ACRES 2960

TO BE CHANGED AS FOLLOWS

Water will be diverted and used within T07N, R27E, R28E; T08N, R38E; B.M. to irrigate 2383 acres.

Any protest against approval of the above proposed change of water rights must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, on or before December 6, 1993.

R. KEITH HIGGINSON
Director

'shed: November 17, 24, 1993

MAR 2 7 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

November 3, 1993

The Idaho Statesman
P.O. Box 40
Boise, ID 83707

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the required publication dates. If time allows, please submit a galley proof for review before publication.

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

In order to receive payment, an affidavit of publication must be submitted to the Department along with the publication bill.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

Enclosure

MAR 2 7 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

November 3, 1993

Times News
P.O. Box 548
Twin Falls, ID 83301

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the required publication dates. If time allows, please submit a galley proof for review before publication.

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

In order to receive payment, an affidavit of publication must be submitted to the Department along with the publication bill.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

Enclosure

MAR 2 7 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

November 3, 1993

Lewiston Morning Tribune
P.O. Box 957
Lewiston, ID 83501

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the required publication dates. If time allows, please submit a galley proof for review before publication.

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

In order to receive payment, an affidavit of publication must be submitted to the Department along with the publication bill.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

Enclosure

MAR 2 7 1996

NOTICE OF PROPOSED CHANGE OF WATER RIGHTS

Notice is hereby given that Sagewillow Inc. have applied to the Department of Water Resources for a change of point of diversion and place of use of groundwater and surface water rights. Licenses and Decreed water rights to be changed authorize diversion of water from wells, Little Lost River, and Big Spring Creek are for the irrigation of 2383 acres, located approximately 15 miles northwest of Howe, Idaho. The water rights are recorded as follows:

NUMBER	PRIORITY	CFS	ACRES
33-00069	06-01-1908	3.20	160
33-00070	10-01-1906	2.80	160
33-00071	03-15-1909	3.20	160
33-00072	05-01-1908	0.80	40
33-00073	04-01-1912	6.40	320
33-00074	08-06-1913	1.60	80
33-00076	04-01-1913	6.80	680
33-00078	10-15-1913	3.20	160
33-00079	04-01-1912	1.60	80
33-00080	05-01-1908	0.80	40
33-00081	05-01-1908	0.80	40
33-00082	05-01-1908	0.80	40
33-02007	02-15-1909	2.90	145
33-02008	06-12-1909	6.40	320
33-02057	02-01-1950	24.00	1483
33-02083	08-23-1957	5.00	1483
33-02086	01-12-1959	4.10	260
33-02090	12-21-1959	5.93	320
33-02091	01-22-1960	4.36	320
33-07018	09-12-1972	3.26	163
33-02133	06-02-1949	2960.0 AF	2960

TO BE CHANGED AS FOLLOWS

Water will be diverted and used within T07N, R27E, R28E; T08N, R28E; B.M. to irrigate 2383 acres.

Any protest against approval of the above proposed change of water rights must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, on or before December 6, 1993.

R. KEITH HIGGINSON
Director

Published 11/18/1993 & 11/25/1993

MAR 2 7 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

November 3, 1993

Post Register
P.O. Box 1800
Idaho Falls, ID 83401

Gentlemen:

Enclosed you will find a legal notice which we wish to have published once a week for two consecutive weekly issues of your newspaper. We have inserted the required publication dates. If time allows, please submit a galley proof for review before publication.

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

In order to receive payment, an affidavit of publication must be submitted to the Department along with the publication bill.

Sincerely,

JIM JOHNSON
Water Rights Supervisor

Enclosure

MAR 2 7 1996

NOTICE OF PROPOSED CHANGE OF WATER RIGHTS

Notice is hereby given that Sagewillow Inc. have applied to the Department of Water Resources for a change of point of diversion and place of use of groundwater and surface water rights. Licenses and Decreed water rights to be changed authorize diversion of water from wells, Little Lost River, and Big Spring Creek are for the irrigation of 2383 acres, located approximately 15 miles northwest of Howe, Idaho. The water rights are recorded as follows:

NUMBER	PRIORITY	CFS	ACRES
33-00069	06-01-1908	3.20	160
33-00070	10-01-1906	2.80	160
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33-00072	05-01-1908	0.80	40
33-00073	04-01-1912	6.40	320
33-00074	08-06-1913	1.60	80
33-00076	04-01-1913	6.80	680
33-00078	10-15-1913	3.20	160
33-00079	04-01-1912	1.60	80
33-00080	05-01-1908	0.80	40
33-00081	05-01-1908	0.80	40
33-00082	05-01-1908	0.80	40
33-02007	02-15-1909	2.90	145
33-02008	06-12-1909	6.40	320
33-02057	02-01-1950	24.00	1483
33-02083	08-23-1957	5.00	1483
33-02086	01-12-1959	4.10	260
33-02090	12-21-1959	5.93	320
33-02091	01-22-1960	4.36	320
33-07018	09-12-1972	3.26	163
33-02133	06-02-1949	2960.0 AF	2960

TO BE CHANGED AS FOLLOWS

Water will be diverted and used within T07N, R27E, R28E; T08N, R28E; B.M. to irrigate 2383 acres.

Any protest against approval of the above proposed change of water rights must be filed with the Idaho Department of Water Resources, 150 Shoup, Suite 15, Idaho Falls, ID, on or before December 6, 1993.

R. KEITH HIGGINSON
Director

Published 11/17/1993 & 11/24/1993

MAR 2 7 1996

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
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MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
KUMEN L. TAYLOR
JAMES K. SLAVENS

WEST ONE BANK
P.O. BOX 50130
330 SHOUP AVENUE
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

KEY FINANCIAL CENTER
702 W. IDAHO SUITE 810
BOISE, IDAHO 83702

TELEPHONE (208) 343-0820
TELEFAX (208) 343-8078

BOISE OFFICE

RANDALL B. REED
FREDERICK J. HAHN III
RONALD D. CHRISTIAN

ARTHUR W. HOLDEN
(1877-1967)
ROBERT B. HOLDEN
(1911-1971)
TERRY L. CRAPO
(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

September 17, 1993

RECEIVED
SEP 2 0 1993
Department of Water Resources

Jim Johnson, Water Rights Supervisor
IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Jim:

Pursuant to our telephone conversation, we have revised and are enclosing for filing the seven applications for transfer on behalf of Sagewillow, Inc. We have also enclosed our check in the amount of $350.00 for the filing fees.

Please let us know how we can be of assistance and we look forward to hearing from you soon.

Yours very truly,

Kent

Kent W. Foster

#8149.00/kep

Enclosures

MAR 8 71996

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

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(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

August 12, 1993

RECEIVED
AUG 16 1993
Department of Water Resources

Jim Johnson, Water Rights Supervisor
IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Jim:

I have revised and am enclosing drafts of possible Applications for Transfer for Parts D, E and F, each of which now contain proportions of the 15 surface water rights which would basically be treated as being supplemental to the groundwater rights for the lands to be irrigated under each. Please review these and let us know what additional adjustments need to be made so that we can file them for processing. I will plan to call you in about a week. Thank you for your continued assistance.

Yours very truly,

Kent

Kent W. Foster

#8149.00/srs

Enclosure

MAR 27 1996

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

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(1939-1982)
WILLIAM S. KIDWELL
(1907-1988)

July 20, 1993

RECEIVED
JUL 22 1993
Department of Water Resources

Jim Johnson, Water Rights Supervisor
IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Jim:

Following our telephone conversation, I checked our file to see why we might have missed filing an SRBA claim for Water Right No. 33-2091. What I have found suggests that we did file such a claim and so I am not sure why it did not appear in your records. I am enclosing a copy of the full claim as we filed it back in 1989. I also have a copy of a first page of the claim with a "RECEIVED" stamp dated October 3, 1989, from the Eastern District Office and a copy of a Receipt which appears to receipt the filing of Claim No. A33-02091.

Would you please check and see if perhaps there is something further we need to do or some mistake we need to correct. Thank you again for your continued assistance.

Yours very truly,

Kent

Kent W. Foster

#8149.00/srs

Enclosure

MAR 27 1996

RECEIPT
For Monies Paid
to the
IDAHO DEPARTMENT OF WATER RESOURCES

COPY 8149

RECEIVED **Receipt No:** E010978

Date: 10/06/89
Time: 13:29:23

Received
From: HOLDEN,KIDWELL,HAHN & CRA

Type of Payment	Program Acct Class	Amount
ADJUDICATION FEE FOR SAGE WILLOW, INC.	0410162 9337 6490	$3,478.00
	Total	$3,478.00

CHECK 44190

WR/NO:	A33-10009	A33-02057	A33-02090	A33-00081	A33-00082
	A33-00073A	A33-02008	A33-02007	A33-00069	A33-00080
	A33-02083	A33-10008	A33-02091	A33-00070	A33-00072

Idaho Department of Water Resources

Region: EASTERN Signature: Tony Olenichek

HOLDEN, KIDWELL, HAHN & CRAPO
P.O. BOX 50130
IDAHO FALLS, ID 83405

RECEIVED
MAR 27 1996

Form No. 42-1409(2)a 1/

370 22

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-A~~ 33-02091
Date Received _____
Receipt Number _____

RECEIVED
OCT 03 1989
Department of Water Resources
Eastern District Office

NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s) Sage Willow, Inc. Phone (208) 522-7784

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.

MAR 27 1996

Form No. 42-1409(2)a 1/

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 ~~A33-2091~~ o2091
Date Received _____
Receipt Number _____

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1. Name of Claimant(s) Sage Willow, Inc. Phone (208) 522-7784

Mailing Address 545 Shoup Avenue, Idaho Falls, Idaho Zip 83402

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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.

MAR 27 1996

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

_____

_____

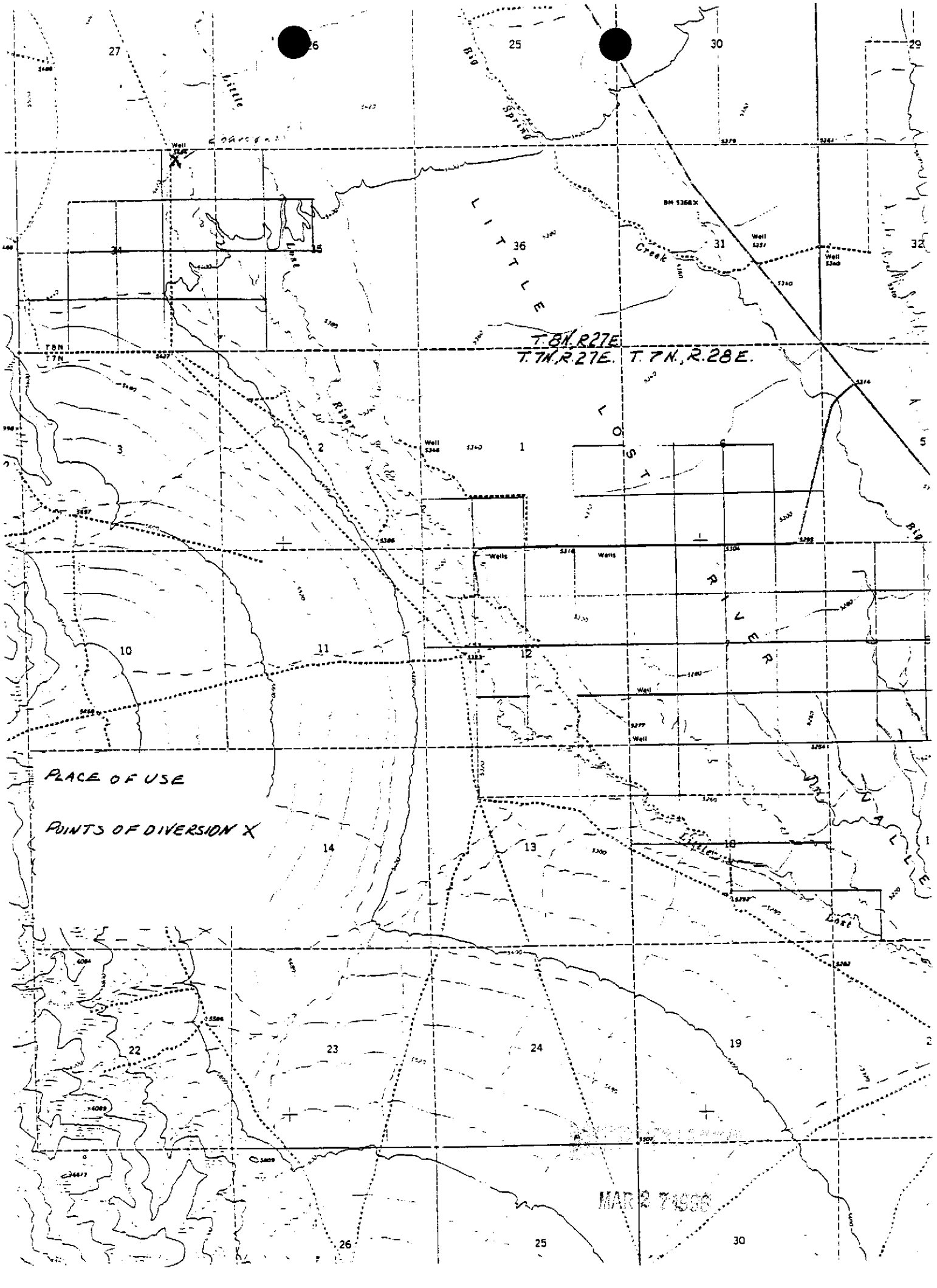
_____

_____

_____

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

MAR 2 7 1996


T.8N.R.27E.
T.7N.R.27E. T.7N.R.28E.
PLACE OF USE
POINTS OF DIVERSION X
LITTLE
LOST
RIVER
Creek
Big Spring
Little
Wells
Well
MAR 2 7 1986

15. Basis of Claim (ck 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 ___ (Title) of Sage Willow, Inc. (Organization), that I have signed the foregoing document in the space below as ___ (Title) of Sage Willow, Inc. (Organization) and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent Edward W. Trueba President

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

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

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

Notary Public Suzanne W. Campbell
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 Kent W. Foster
Address P.O. Box 50130, Idaho Falls, Idaho 83405
Date 10/2/89

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

MAR 27 1996

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
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WEST ONE BANK
P.O. BOX 50130
330 SHOUP AVENUE
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

KEY FINANCIAL CENTER
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BOISE, IDAHO 83702

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ROBERT B. HOLDEN
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TERRY L. CRAPO
(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

June 30, 1993

RECEIVED
JUL 0 1 1993
Department of Water Resources

Jim Johnson, Water Right Supervisor
IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Jim:

I have now received some engineering information from Mr. Dale Petersen of Golden West Irrigation which I am enclosing with this letter. You may feel free to contact Mr. Petersen directly if you have additional questions, or we will be happy to try to obtain anything else you may require. The locations of the existing and proposed mainlines are shown by the red lines on the map enclosed with the information from Mr. Petersen.

In addition, we have prepared and enclosed some rough drafts of seven possible transfer applications, essentially as they were described in our letter to you of April 6, 1993. We have prepared them assuming each of the six groundwater rights to be affected are as shown in the existing licenses (with the exception of course of Right No. 33-02091 which was the subject of last year's Transfer No. 3785).

As soon as possible, will you please let us know how each of these needs to be modified and adjusted to be acceptable for filing. We are already about two months behind our original optimum schedule and will appreciate anything that can be done to expedite the matter.

We appreciate your continued assistance and attention to this item.

Yours very truly,

Kent W. Foster

#8149.00/srs

Enclosure

MAR 2 7 1996

SAGE WILLOW INC.

IRRIGATION SYSTEM NUMBER THREE

PUMP

PUMP NUMBER TWO

WELL DEPTH	NOT AVAILABLE
WELL DIAMETER:	NOT AVAILABLE
STATIC WATER LEVEL:	NOT AVAILABLE
ESTIMATED DISCHARGE	900 TO 1200 GALLONS PER MINUTE

PROPOSED CHANGE

INSTALL NEW SET OF PUMP BOWLS

INSTALL NEW 50 H.P. VERTICAL TURBINE MOTOR & PANEL

DESIGN: 900 GALLONS PER MINUTE
180 FEET TOTAL DYNAMIC HEAD

PIVOTS

PIVOT NUMBER ELEVEN

VALLEY MODEL 6000 CENTER PIVOT

9 TOWER 1300 FEET RADIUS

900 GALLONS PER MINUTE

45 PSI INLET PRESSURE

MAINLINE

PUMP NUMBER TWO AND PIVOT NUMBER ELEVEN TO BE CONNECTED BY 10" IPS PVC MAINLINE

RECEIVED
MAR 2 7 1996

SAGE WILLOW INC.

IRRIGATION SYSTEM NUMBER TWO

(PROPOSED)

(PUMPS)

PUMP NUMBER ELEVEN:

WELL DEPTH:	NOT AVAILABLE
WELL DIAMETER:	NOT AVAILABLE
STATIC WATER LEVEL:	NOT AVAILABLE
PUMP--EXISTING	OPEN FLOW FLOOD PUMP
150 H.P. DEEP WELL TURBINE PUMP	
ESTIMATED DISCHARGE	3580 GALLONS PER MINUTE

PROPOSED BOOSTER PUMPS:

100 H.P. AURORA SPLIT CASE
6X8X15--81.5 % EFF.
DESIGN: 1800 GALLONS PER MINUTE
165 FEET TOTAL DYNAMIC HEAD
75 H.P. AURORA SPLIT CASE
5X6X15-- 81% EFF.
DESIGN 1300 GALLONS PER MINUTE
165 FEET TOTAL DYNAMIC HEAD

PUMP NUMBER TWELVE :

WELL DEPTH	NOT AVAILABLE
WELL DIAMETER	NOT AVAILABLE
STATIC WATER LEVEL	33 FEET
50 H.P. DEEP WELL TURBINE PUMP	

PROPOSED CHANGE:

INSTALL NEW SET OF PUMP BOWLS
INSTALL NEW 100 H.P. VERTICAL TURBINE MOTOR & PANEL
DESIGN: 1800 GALLONS PER MINUTE
205 FEET TOTAL DYNAMIC HEAD

MAR 2 7 1996

PIVOTS

PIVOT NUMBER ONE

VALLEY MODEL 6000 CENTER PIVOT

7 TOWER--1122 FEET RADIUS

LOW PRESSURE SPRAYS WITH 5 H.P. BOOSTER PUMP

700 GALLONS PER MINUTE

40 PSI INLET PRESSURE

PIVOTS NUMBER TWO,THREE,FOUR,AND FIVE

VALLEY MODEL 6000 CENTER PIVOTS

9 TOWER--1300 FEET RADIUS

LOW PRESSURE SPRAYS WITH 5 H.P. BOOSTER PUMPS

45-50 PSI INLET PRESSURE

MAINLINE

PUMPS 11 & 12, AND PIVOTS 1,2,3,4,& 5 WILL BE CONNECTED TOGETHER WITH A COMMON PVC MAINLINE,CONSISTING OF 15" PIP PVC, 12" IPS PVC, 10" IPS PVC,AND 6" IPS PVC. EACH PIVOT WILL HAVE AN ELECTRICALLY OPERATED CONTROL VALVE.

WHEEL LINES

TWO--1280 FEET 4" X 5" X 7' CENTER MOVE WHEEL LINES WILL OPERATE WEST OF PIVOT NUMBER FIVE.

DESIGN: 6.0 FLOW CONTROL NOZZLES

TOTAL GALLONS PER MINUTE: 384

MAR 2 7 1996

COPY

IRRIGATION SYSTEM NUMBER ONE

PIVOTS

PIVOT NUMBER SIX:

VALLEY MODEL 6000 CENTER PIVOT
9 TOWER— 1300 FEET RADIUS
LOW PRESSURE SPRAYS—WITH 5 H.P. BOOSTER
900 GALLONS PER MINUTE
45 PSI INLET PRESSURE

PIVOT NUMBER SEVEN

VALLEY MODEL 4791 CENTER PIVOT
9 TOWER— 1300 FEET RADIUS
LOW PRESSURE SPRAYS WITH 5 H.P. BOOSTER
900 GALLONS PER MINUTE
45 PSI INLET PRESSURE

PIVOT NUMBER EIGHT:

VALLEY MODEL 4971 CENTER PIVOT
9 TOWER — 1300 FEET RADIUS
LOW PRESSURE SPRAYS WITH 5 H.P. BOOSTER
900 GALLONS PER MINUTE
45 PSI INLET PRESSURE

MAR 2 7 1996

IRRIGATION SYSTEM NUMBER O

PIVOTS CONT.

PIVOT NUMBER NINE:

VALLEY MODEL 6000 CENTER PIVOT

9 TOWER 1316 FEET RADIUS

900 GALLONS PER MINUTE

45 PSI INLET PRESSURE

PIVOT NUMBER TEN:

VALLEY MODEL 6000 CENTER PIVOT

7 TOWER— 1088 FEET RADIUS

600 GALLON PER MINUTE

36 PSI INLET PRESSURE

MAINLINE

PIVOTS NUMBERS 6,7,8,9 AND 10 AS WELL AS PUMPS NUMBER 1,9,AND 10 ARE CONNECTED TOGETHER BY A COMMON 10" IPS PVC MAINLINE. A SERIES OF GEAR OPERATED BUTTERFLY VALVES CONTROL THE FLOW OF THE WATER.EACH PIVOT ALSO HAS ITS OWN ELECTRICALLY OPERATED CONTROL VALVE.

MAR 27 1996

SAGE WILLOW INC.

IRRIGATION SYSTEM NUMBER ONE

PUMPS

WELL NUMBER ONE:

WELL DEPTH:	58 FEET
WELL DIAMETER:	16 INCHES
STATIC WATER LEVEL:	23 FEET
PUMP DESIGN:	1000 GALLONS PER MINUTE
	208 FEET-TOTAL DYNAMIC HEAD

75 H.P. DEEP WELL TURBINE PUMP:
10" DISCHARGE HEAD
50 FT. 10" X 2" 1 3/16" COLUMN,TUBE & SHAFT
4 STAGE 12R BOWL ASSEMBLY-- 85% EFFICIENCY

WELL NUMBER NINE:

WELL DEPTH	172 FEET
WELL DIAMETER	18 INCHES
STATIC WATER LEVEL:	20 FEET
PUMP DESIGN	1800 GALLONS PER MIMUTE
	190 FEET TOTAL DYNAMIC HEAD

100 H.P. DEEP WELL TURBINE PUMP
10" DISCHARGE HEAD
130 FEET 10" X 2½" X 1 11/16" COLUMN,TUBE & SHAFT
3 STAGE 14M BOWL ASSEMBLY--83% EFFICIENCY

WELL TESTED JULY 5,1991
G.P.M. 2400
PUMPING LEVEL: 60 FEET
PUMP SET: 120 FEET

MAR 2 7 1996

WELL NUMBER TEN:

WELL DEPTH:	150 FEET
WELL DIAMETER:	18 INCHES
STATIC WATER LEVEL:	20 FEET
PUMP DESIGN:	1400 GALLONS PER MINUTE 250 FEET TOTAL DYNAMIC HEAD

100H.P. DEEP WELL TURBINE PUMP
10" DISCHARGE HEAD
130 FEET 10" X 2½" X 1½" COLUMN,TUBE AND SHAFT
3 STAGE 14" BOWL ASSEMBLY

WELL TESTED
G.P.M. 1400
PUMPING LEVEL: 120 FEET
PUMP SET 140 FEET

MAR 2 7 1996

33-7205

RECEIVED
APR - 8 1993
Department of Water Resources

LAW OFFICES
HOLDEN, KIDWELL, HAHN & CRAPO

IDAHO FALLS OFFICE

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS
MARIE T. TYLER
JOHN G. SIMMONS, P.A.
ROBERT M. FOLLETT
KUMEN L. TAYLOR
JAMES K. SLAVENS

WEST ONE BANK
P.O. BOX 50130
330 SHOUP AVENUE
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

KEY FINANCIAL CENTER
702 W. IDAHO SUITE 810
BOISE, IDAHO 83702

TELEPHONE (208) 343-0820
TELEFAX (208) 343-8078

BOISE OFFICE

WM. LYMAN BELNAP, P.A.
RANDALL B. REED
RONALD D. CHRISTIAN
FREDERICK J. HAHN III

ARTHUR W. HOLDEN
(1877-1967)
ROBERT B. HOLDEN
(1911-1971)
TERRY L. CRAPO
(1939-1982)
WILLIAM S. HOLDEN
(1907-1988)

April 6, 1993

Jim Johnson, Water Rights Supervisor
IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Jim:

I am writing and enclosing the referenced information pursuant to our telephone conversation of Thursday, April 1, 1993. We appreciate you taking time to review this and your assistance in helping us to prepare an acceptable application for transfer to accomplish our client's objectives.

We represent Sagewillow, Inc., the owner of some 4,580 acres of land in Butte County, Idaho, located on the Little Lost River and Big Spring Creek. The land appears to have been used for many years primarily for cattle ranching purposes. There are two parcels, the larger of which is often referred to locally as the "Knollin Ranch" and the smaller as the "Bird Ranch".

When Sagewillow originally acquired the land a few years ago, the irrigation systems, buildings and fences were somewhat rundown. Sagewillow has made numerous improvements. The old diversion and headgate structures have been replaced with new concrete structures, dikes have been strengthened, ponds cleaned, and much fencing has been replaced. In some areas, attractive jack fences now keep cattle away from the creeks, except in designated drinking access areas. Much of the native grasses have come back, the pheasant, chukar, deer and other

MAR 2 7 1996

wildlife populations have dramatically increased, and certain of the ponds which can be supplied year-round from springs have large fish populations.

Sagewillow has, in recent weeks, acquired an additional small ranch of about 250 acres adjacent to the Knollin Ranch on the northeast, with 2 wells, and through a multiple party exchange, some 920 acres of former BLM land adjacent on the north. The objective is to use the existing groundwater rights more effectively to produce hay and pasture for the cattle ranching operation and to also utilize the high water rights, when available, to enhance pasture and the fish and wildlife habitat which the ranch enjoys as well.

There are no surface water rights appurtenant to the ranch which have early enough priorities to provide much dependable water. There is a ditch system from both Little Lost River and Big Spring Creek which can be, and is, used for some flood irrigation, but surface water available from such rights is generally most valuable for filling the system of ponds, which has the effect of keeping sufficient soil moisture in the surrounding acres to produce beautiful stands of native grasses. We will discuss and provide additional information regarding the surface water rights later in this letter because it seems relevant to our proposal regarding the existing groundwater rights.

We basically propose to reconfigure the place of use and points of diversion for 6 existing groundwater rights. It will result in removing portions of these rights from some lands to which they are presently appurtenant, and making them appurtenant to others. We believe this proposal would not result in the irrigation of more acres with such rights than the acres to which they are presently appurtenant, and we believe there will be no more acres irrigated or which will have more rights appurtenant, even considering the groundwater rights in combination with the surface water rights.

First, we will discuss the groundwater rights with respect to which we wish to make the changes. There are 6 licensed rights, which, considering the overlapping acreage, appear to be appurtenant to a total of 2,383 acres:

RECEIVED
MAR 2 7 1996

ID NO.	AMOUNT IN CFS	PRIORITY	POINT OF DIVERSION	PLACE OF USE
33-02057	24.0	02/01/1950	8 Wells (2 in the NENE, 1 in the NWNE, and 2 in the NENW, and 1 in the SESE of S.12, T.7N, R.27E, and 1 in the NWSW and SWSW of S.7, T.7N, R.28E).	1,483 acres (Shown on Map No. 1)
33-02083	5.0	08/23/1957	8 Wells (2 in the NENE, 1 in the NWNE, and 2 in the NENW, and 1 in the SESE of S.12, T.7N, R.27E, and 1 in the NWSW and SWSW of S.7, T.7N, R.28E).	1,483 acres (Shown on Map No. 1)
33-02086	4.1	01/12/1959	1 Well in the NWSW of S.32, T.8N, R.28E	260 acres (Shown on Map No. 1)
33-02090	5.93	12/21/1959	1 Well in the NWSW of S.1, T.7N, R.27E	320 acres (Shown on Map No. 1)
33-02091	4.36	01/22/1960	1 Well in the NENE of S.34, T.8N, R.27E	320 acres (Shown on Map No. 1)
33-07018	3.26	09/12/1972	1 Well in the SWSW of S.32, T.8N, R.28E	163 acres (Shown on Map No. 1)
TOTALS	46.65			4,029 acres

MAR 2 7 1996

However, Rights Nos. 33-02057 and 33-02083 are appurtenant to the identical 1,483 acres, and the 163 acres under Right No. 33-07018, is for the most part, also part of the 260 acres covered by Right No. 33-02086. We have enclosed a map (Map No. 1) showing where each of these rights were appurtenant under the licenses, including the acreage in each 40-acre subdivision. (In each 40-acre square, we have shown the last four digits of the right number, then a hyphen, then the acreage).

We should also note that last year (1992), Sagewillow decided to drill some new wells to be tied to an existing well to operate 5 pivots. The local office of IDWR prepared an Application for Transfer (Transfer No. 3785) to change the place of use for Right No. 33-02091. We think there was some confusion between the individual who manages the Sagewillow operation (Mr. Jerry Pancheri) and the officials at IDWR who prepared the application form. At least no one now seems to know why the transfer form was prepared the way it was. The place of use for Right No. 33-02091 was moved down to land, most of which was already covered by Right No. 33-02090. Apparently, Mr. Pancheri indicated a desire to abandon the irrigation well in Section 34, Township 8 North, Range 27 East, and to drill a new well in Section 6, Township 7 North, Range 28 East, and no one bothered to discover the fact that Right No. 33-02090 already covered most of the land to be put under the pivots.

In fact, 2 new wells were drilled in order to obtain sufficient water to operate the pivots, and we need to straighten that whole matter out in this proposed transfer. On Map No. 1, we have ignored the 1992 transfer because the stacking of water rights, 33-02090 and 33-02091, appears to have been inadvertent and was certainly neither necessary nor intended. We also have 1 extra well unaccounted for on paper.

In any event, it appears to us that the total number of acres irrigated under the combination of the 6 rights has historically been 2,383. We would propose the transfer so that the maximum number of acres to be irrigated under the combination of the 6 groundwater rights will still not exceed 2,383. Map No. 2 shows the additional pivots planned and the acres that will be irrigated. The 13 existing wells have been

MAR 2 7 1996

numbered and highlighted in pink. Each of the pivots (including the 6 additional ones proposed) have been numbered (the pivot number is circled) and highlighted in yellow. The maximum acreage to be irrigated with these groundwater rights within each 40-acre subdivision has been written in and highlighted in blue.

In designing the system for the most efficient use of the groundwater, it was necessary to measure the capacities of each of the 13 wells. That information may or may not be important to you, but it certainly was to us. The well capacities determine which wells need to be connected to common mainlines or pumped into the existing ditches in order to most economically provide adequate irrigation of the lands to be served. The present capacities appear to be as follows:

Well No. 1	2.5 cfs -- 125 miner's inches -- 1,125 gallons per minute.
Well No. 2	2.6 cfs -- 130 miner's inches -- 1,165 gallons per minute.
Well No. 3	4.4 cfs -- 220 miner's inches -- 1,975 gallons per minute.
Well No. 4	5.6 cfs -- 280 miner's inches -- 2,510 gallons per minute.
Well No. 5	5.6 cfs -- 280 miner's inches -- 2,510 gallons per minute.
Well No. 6	3.2 cfs -- 160 miner's inches -- 1,435 gallons per minute.
Well No. 7	2.5 cfs -- 125 miner's inches -- 1,125 gallons per minute.
Well No. 8	2.5 cfs -- 125 miner's inches -- 1,125 gallons per minute.
Well No. 9	4.0 cfs -- 200 miner's inches -- 1,796 gallons per minute.

MAR 2 7 1996

Well No. 10 3.2 cfs -- 160 miner's inches -- 1,435 gallons per minute.

Well No. 11 7.4 cfs -- 370 miner's inches -- 3,320 gallons per minute.

Well No. 12 4.8 cfs -- 240 miner's inches -- 2,155 gallons per minute.

Well No. 13 4.2 cfs -- 210 miner's inches -- 1,885 gallons per minute.

One possible way to do this transfer, and this would be our preference, would be to make all 6 rights appurtenant to the same place of use (the 2,383 acres), and to have each of the 13 wells serve as a point of diversion for each of the 6 rights. That approach probably provides the greatest flexibility and it should be easy enough to insure that the total number of cfs to be diverted, and the total number of acres to be irrigated is never exceeded. It seems to us this could then be done in a single application for transfer and would be best designed to permit potential protestors to understand what is actually being proposed.

If there is a necessity to do it some other way, the following information may be helpful to you:

(a) Wells Nos. 11 and 12 will be connected with a common mainline to irrigate the land under Pivots Nos. 1, 2, 3, 4 and 5, and 2 siderolls for 80 acres in the W1/2 of the NW1/4 of Section 1, Township 7 North, Range 27 East. The 2 wells can supply up to 610 miner's inches for this 713 acres.

(b) Wells Nos. 1, 9 and 10 are already connected to a common mainline which supplies Pivots Nos. 6, 7, 8, 9 and 10, and provides up to 485 miner's inches for some 660 acres.

MAR 2 7 1996

(c) Well No. 2, which can supply up to 130 miner's inches would be used to operate Pivot No. 11, another 132 acres.

(d) Well No. 3 pumps into an existing ditch system which can also accommodate water pumped from Wells Nos. 4 and 5, and further to the south also picks up the water pumped from Wells Nos. 6, 7 and 8. Well No. 3 has a capacity of some 220 miner's inches. The ditch system can provide water to the east to flood irrigate the 120 acres in the E1/2 of the NE1/4 of Section 7 and the NW1/4 of the NW1/4 of Section 8, all in Township 7 North, Range 28 East, or to the west into the river (for an exchange to permit irrigation of lands as will be discussed under (e) below), or to the south (into the ponds and ditch system for flood irrigation of the lands discussed under (f) below).

(e) Wells Nos. 4 and 5 can produce up to 560 miner's inches and they presently pump water into the ditch system referenced in (d). They are closest to the river and could be used primarily as exchange wells. There are two headgates on the river (one in the SW1/4 of the NE1/4 of Section 2, and the other in the SE1/4 of the NW1/4 of Section 12, Township 7 North, Range 27 East) which supply ditches for flood irrigation of some 150 acres in the SW1/4 of the SW1/4 of Section 1, the NW1/4 of the NW1/4 of Section 12, and the N1/2 of the NE1/4 and the NE1/4 of the NW1/4 of Section 13, Township 7 North, Range 27 East. There is one headgate on Big Spring Creek in the NW1/4 of the SW1/4 of Section 5, Township 7 North, Range 28 East, which supplies a ditch for flood irrigation of some 110 acres in the W1/2 of the NE1/4 and the W1/2 of the SE1/4 of Section 8, Township 7 North, Range 28 East. Water diverted through the headgates on the Little Lost River can also be used to augment the supply to the ponds and the ditch system for the lands near Wells Nos. 6, 7 and 8 as discussed in (f) below.

MAR 2 7 1996

(f) Wells Nos. 6, 7 and 8, can supply up to 410 miner's inches through a ditch system for flood irrigation of some 310 acres in the E1/2 of the SE1/4 of Section 12, the NE1/4 of the NE1/4 of Section 13, both in Township 7 North, Range 27 East, and in the W1/2 of the NE1/4, the NW1/4, and the NW1/4 of the SE1/4 of Section 18 in Township 7 North, Range 28 East. They can also be used to augment supplies for the pond system.

(g) Well No. 13 will be used primarily to flood irrigate some 180 acres of land on the east side of Big Spring Creek in the NE1/4 of the NE1/4 of Section 6, the NW1/4 of the NW1/4, the S1/2 of the NW1/4, the N1/2 of the SW1/4, the SE1/4 of the SW1/4 and the SW1/4 of the SE1/4 of Section 5 in Township 7 North, Range 28 East. This well can produce up to 210 miner's inches.

There are, of course, transmission losses through the ditch and pond systems, and some transmission loss charge will probably be made by the watermaster for the exchange wells pursuant to the resolution adopted by the waterusers at the Annual Meeting of District 33 this year. (Time Luke is working on this matter and can probably provide the most accurate detail at this time). Much more water per acre is required for the lands flood irrigated with the open ditch systems than for the lands sprinkled through the closed conveyance systems. However, it seems clear that the entire 2,383 acres can be adequately watered as described with the total of the 46.65 cfs under the 6 rights.

Now we would like to mention in more detail the other irrigation rights appurtenant to portions of this land. As we indicated, they are all high water rights and are available, if at all, generally only quite early in the season. There is a license, 33-02133, for 2,960 acre-feet of water, in equal amounts from Little Lost River and Upper Spring Creek, for "soil root zone storage" with a priority of June 2, 1949. It was made appurtenant to 1,480 acres of land. The pond system on the ranch appears to have been constructed pursuant to the permit that resulted in this license.

MAR 2 7 1996

There is almost never water available from the river or the creek under the 1949 priority, but there are 14 high water rights, 12 decreed and 2 licensed, which cover some 1,960 acres, much of which is coterminous with the land list for Right No. 33-02133. When high water is available, it is used for some flood irrigation, but primarily to help fill the ponds, which seem to result in many acres of lush grass. During these recent drouth years when there has been little high water available, groundwater has often been used to augment the flows into the ponds with better results in some areas than flood irrigating. There are also some small springs which provide year-round water to some of the upper ponds and sustain the fish populations.

The 14 high water natural flow rights in the Little Lost River and Big Spring Creek are as follows:

ID NO.	SOURCE	AMOUNT	PRIORITY DATE	ACREAGE
33-00069	Little Lost River	3.2 cfs	06/01/1908	160
33-00072	Little Lost River	.8 cfs	05/01/1908	40
33-00074	Little Lost River	1.6 cfs	08/06/1913	80
33-00076	Little Lost River	6.8 cfs	04/01/1913	680
33-00078	Little Lost River	3.2 cfs	10/15/1913	160
33-00079	Little Lost River	1.6 cfs	04/01/1912	80
33-02007	Little Lost River	2.9 cfs	02/15/1909	145
33-00070	Spring Creek	2.8 cfs	10/01/1906	160
33-00071	Spring Creek	3.2 cfs	03/15/1909	160
33-00073	Spring Creek	6.4 cfs	04/01/1912	320
33-00080	Spring Creek	.8 cfs	05/01/1908	40
33-00081	Spring Creek	.8 cfs	05/01/1908	40
33-00082	Spring Creek	.8 cfs	05/01/1908	40
33-02008	Spring Creek	6.4 cfs	06/12/1909	320

MAR 2 7 1996

As we said, 12 are decreed and 2 are licenses. Each of the licenses appears to completely coincide in place of use with 2 of the decreed rights. Together, the 14 rights appear to be appurtenant to a total of 1,960 acres. As we have also said, many of these are the same acres as those covered by the land list for License No. 33-02133. And, as you might have guessed, there is a good deal of overlap in the places of use shown under the groundwater licenses as well. As we have computed it, it appears that the combination of the high water rights, the "soil root zone storage" right, and the 6 groundwater rights, covers some 3,486 total acres as they were all decreed and licensed. Under our proposal, after the transfer, the combination would be appurtenant to 3,474 acres, so the transfer would not result in the irrigation of more acres than was possible even under a combination of the surface and groundwater rights, if that is relevant.

We see no need for the surface water rights to be involved in this proposed transfer; we do not seek to change the place of use or points of diversion from what is claimed in the Snake River Basin Adjudication. It seems like the SRBA would be the appropriate forum for dealing with 33-02133 and the 14 high water rights.

We would be happy to try to supply any additional information that might be helpful. When you have had an opportunity to review this proposal, we would be anxious to receive your counsel as to how best to proceed to complete the application forms to properly accomplish the objectives of the client. Thank you very much in advance for your kind assistance and consideration.

Yours very truly,

Kent W. Foster

#8149.00/srs

pc: Mr. Ed Dumke
Mr. Jerry Pancheri
Dr. Charles Brockway

MAR 8 7 1996

May 29, 1969

Re: Permit No. G-27717

COPY

U. S. Dept. of Agriculture
Farmers Home Administration
P.O. Box 700
Idaho Falls, Idaho 83401

Attn: Mr. Henry E. Jenkins

Dear Mr. Jenkins:

As you are probably aware, licensed water rights are appurtenant to the land and pass with the conveyance of the land unless otherwise provided. If you will supply us with a copy of the decree conveying the land and water right to Veda E. Hawley, we will be most happy to record that information in the water right file.

If you have any further questions, please feel free to call upon us.

Very truly yours,

C. Stephen Allred, Assistant
State Reclamation Engineer

CSA:kh

G7717
33-2086

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION
P. O. Box 700
Idaho Falls, Idaho 83401

RECEIVED
Department of Reclamation

May 27, 1969

State Reclamation Engineer
State House
Boise, Idaho 83702

Re: Hawley, Clarence G.
(deceased)
License No. G27717

Dear Sir:

I have been advised by our Regional Attorney that the water license and certificate should be changed from the name of Clarence G. Hawley to Vada E. Hawley, his wife. Mr. Hawley passed away May 27, 1968. The estate has been probated and on June 9, 1969 all assets and title to all property will be set over to Vada E. Hawley. If there are any forms to be signed or such, please advise me as the above license is mortgaged to the Farmers Home Administration.

Sincerely,

Henry E. Jenkins

Henry E. Jenkins
County Supervisor

27717
33-2021

January 2, 1964

RE: Permit No. G-27717

Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

Enclosed are the Certificate of Completion of Works and License and Certificate of Water Right on the above numbered permit.

Also enclosed is departmental receipt No. G-8677 of $21.00 covering the fees.

Very truly yours,

CARL E. TAPPAN
State Reclamation Engineer
By

(Mrs.) Edna P. Rule
Chief Clerk

EPR:mr

Enc. license
receipt
certificate

27717

500 - June 20-62

State of Idaho

DEPARTMENT OF RECLAMATION

Boise, Idaho

June 13, 1963

Re: Permit No. G-27717

Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

Our field engineer's report on his inspection of proof of completion of works and application of water to beneficial use under the terms of Permit No. G-27717 shows the well is (are) capable of conveying 205 miner's inches, or 4.10 c.f.s. of water for the irrigation of 260 acres.

Upon receipt of the statutory fees, totaling $ 21.00, which consists of a Completion of Works fee of $ 5.00 and License and Certificate of Water Right fee of $ 16.00 - based at the rate of $2.00 for each 40-acre subdivision - we will issue the Certificate of Completion of Works and the License and Certificate of Water Right confirming the right, with priority of January 12, 1959 to the use of 4.10 second feet of subterranean water with the point of diversion in the NW¼SW¼, Sec. 32, T. 8 N., R. 28 E.,B.M.; Irrigation of 260 acres in the NW¼, N½SW¼, Sec. 5, T. 7 N., R. 28 E.,B.M.; NW¼SW¼, S½SW¼, Sec. 32, T. 8 N., R. 28 E.,B.M.

Very truly yours,

CAR. E. TAPPAN
Acting State Reclamation Engineer
By

(Mrs.) Edna P. Rule
Chief Clerk

EPR:mr

27717

Form 23

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE

REPORT OF ENGINEER

PERMIT NO. G-27717

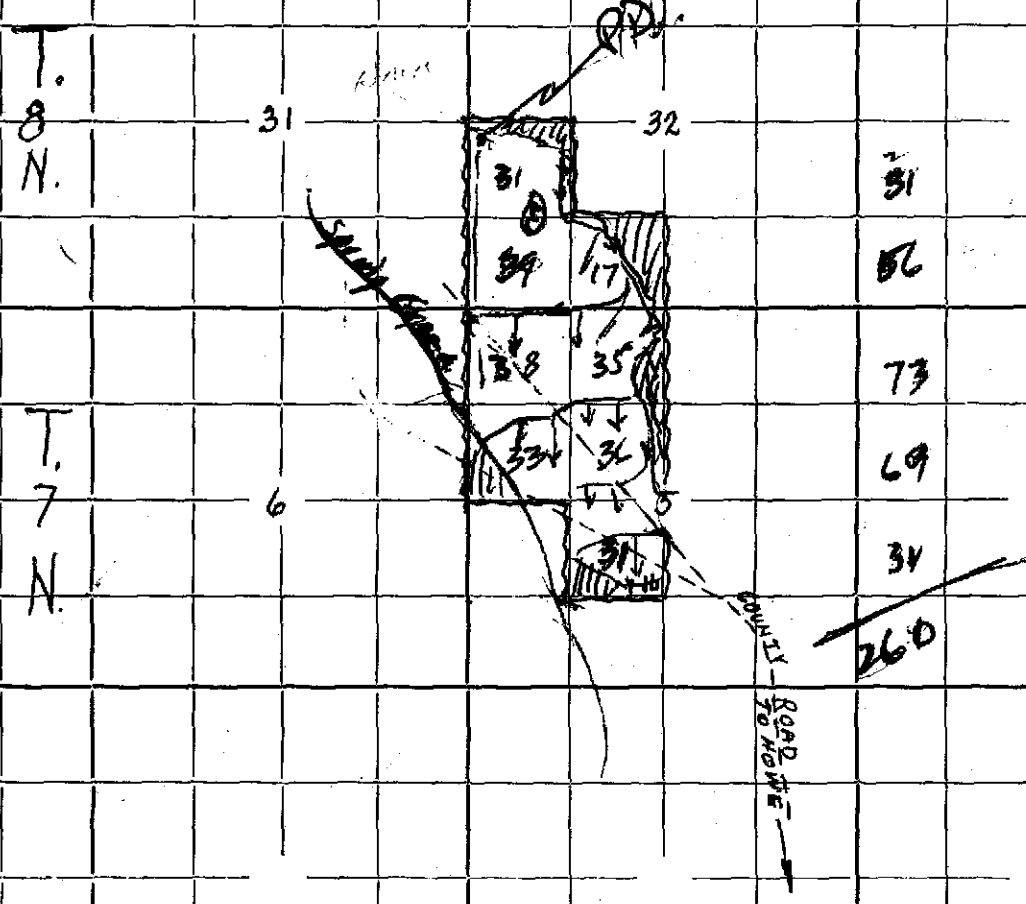
REPORT ON PROOF OF Completion of Works& Beneficial Use

Clarence Hawley

Howe, Idaho

27717

R-28 E.



Subdivisions 8

Area 260 acres

Q 4.10 cfs on 205 inches

Scale: 2 Inches Equals 1 Mile. Draw Map In Ink.

27717

Form 23

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

REPORT OF ENGINEER

Permit No. G-27717

This proof is for Completion of Works & Beneficial Use In Water District No.

1. Name of applicant Clarence Hawley, Howe, Idaho

2. Source of water supply: 6.0 c.f.s - subterranean water

3. Location of point of diversion: Is in the NW¼SW¼ of Section 32

T. 8 N. R. 28 E. County of Butte

4. Describe works as they exist, giving dimensions and capacities of same: 50 HP OS Motor #882566, Berkeley Pump 5110301. 10" discharge into concrete distribution box to open ditches - 142'x10" Column. Well 150'x16" cased to bottom - perforated. (h:32' with 43' dd Reported)

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):

NW¼, NE¼SW¼, Sec. 5, T. 7 N., R. 28 E.; W½SW¼, SE¼SW¼, 32, T. 8 N., R. 28 E.

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

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

Remarks: Mr. Clarence Hawley along.

Couldn't measure depth to water.

Measured by Sparling Meter - 5 Rev. 1 Min 56 Sec. = 432 Gpm x .95 = 410 Gpm

This examination was made on the 10th day of June, 1963

(Signed) Lagon Johnson

Examiner.

27717

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.

RECEIVED
JUN 12 1963
Department of Reclamation

Clarence Hawley
Howe, Idaho

Permit No. G-27717

notified for proof 6-4-63

Completion of Works
Examination for and Beneficial Use

County Butte

Quantity: 6.0 cfs. Sec. 32 T. 8N R. 28E

Source: Well

P. D.: NW. SW., Sec. 32, T. 8N.-28EBM.

Use: Irrigation

Filed: Jan. 12, 1959

Due: Jan. 20, 1964

Extension: —

Protest: —

Completion of Works: —

Other Rights: none

1M April 1962

April 11, 1963

Re: Permit No.
G-27717

Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

We acknowledge receipt of the depositions of holder and two witnesses, also affidavit of publication in the Arco Advertiser Arco, Idaho, all submitted in proof of completion of works and beneficial use on Permit No. G-27717

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 and contact you at the time he makes the examination so that arrangements may be made to show him over the grounds.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer

By:

(Mrs.) Edna P. Rule
Chief Clerk

EPR:

27717

June 3, 1963

Re: Permit No. G-27717

Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

This is a follow up of the notice from the Department of Reclamation office that an inspection would be made on your water filing as soon as possible.

I will plan to inspect your permit on or about the week of June 4, 1963.

Please arrange to be on the premises so that you can accompany me over the work.

Very truly yours,
CARL F. TAPPAN, Assistant
State Reclamation Engineer
By

Field Engineer

LHJ:mr

27717

Howe Idaho
April 9-43

State of Idaho
Department of Reclamation
Mr Ralph N. Thomas
Deputy Reclamation Engineer

Dear Mr. Thomas

In regard to your letter of April 8.

The true location of the well on Permit No. G-27717 is NW¼ SW¼ SEC 32 - T. 8 N R. 28 E.

Thank you kindly for your letter in regard to same.

Sincerely yours
Charles G. Hawley
Howe Idaho

27717

April 8, 1963

Re: Permit No. G-27717

Clarence G. Hawley
Howe, Idaho

Dear Mr. Hawley:

We received the depositions and affidavit of publication in regard to your permit.

The three depositions all show the well to be in $NW\frac{1}{4}NW\frac{1}{4}$, Sec. 32, T. 7 N., Rge. 28 E., whereas the permit shows the $NW\frac{1}{4}SW\frac{1}{4}$, Sec. 32, T. 8 N., R. 28 E.

Kindly advise the true location of the well at your earliest convenience.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer

By:

RALPH W. THOMAS, Deputy
State Reclamation Engineer

RT:ew

27717

Form 16.

RECEIVED
APR 8 19[illegible]
Department of Reclamation

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
BOISE, IDAHO

Permit No. G-27717

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.

Ans. CLARENCE G. HAWLEY, Howe, Idaho, Farmer

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

Ans. none

Ques. 3. State number and date of permit, and date of priority you propose to establish under the permit.

Ans. G-27717, January 20, 1959, Date of Priority Jan 12, 1959

Ques. 4. State source of water supply and give exact location of point of diversion.

Ans. Subterranean Flow (irrigation Well) NW¼NW¼ NW SW Section 32, Twp 8 North Range 28 E B M in Butte County, Idaho. (see letter 3 2)

Ques. 5. Describe your works of diversion, and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use. If a well, state depth of well, depth and size of casing and depth to water. If pump is used, state discharge of pump and tell how it was measured or determined. If sprinkler irrigation, give number and size of nozzles and operating pressure.

Ans. irrigation Well 150 feet deep, 16 inch casing, Private ditch conveys water to place of use, Electric Motor 50 H P, delivering 4.4 Cubic feet of water per second, Weir Mearurement. also there is cement discharge drops.

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have actually been irrigated with said water.) State whether cultivated or natural meadow land and the nature of all improvements which have been made as a direct result of said use.

Ans. irrigation purposes, NW¼SW¼, S½SW¼, Sec 32, Twp 8 North, Range 28 E B M, in Butte County, Idaho. Lots 3 and 4 and S½NW¼, NE¼SW¼, Sec 5, Twp 7 North, Range 28 E B M in Butte County, Idaho, most of the said lands are now in crops, and made available by the use of the waters from this permit, and is used for Hay, Grain and Potatoes.

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

Ans. R. P. Cope, Idaho Falls, Idaho

Log in

27717 RT

Ques. 7. If for other than irrigation purposes; state how applied, amount of horse power generated, etc.

Ans. none

Ques. 8. What is the minimum amount of water required for the purpose specified above?

Ans. none

Ques. 9. 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.

Ans.

Ques. 10. State when, how, in what amount and to what extent the water diverted under above mentioned permit has been used.

Ans. irrigation only, 4.4 cubic feet for the past 3 seasons to water the lands herein described

Ques. 11. State when, how, in what amount and to what extent waters other than those diverted under the above mentioned permit have been diverted and applied to beneficial use upon the lands herein described. Give full particulars regarding such other appropriations and rights claimed thereunder.

Ans. The waters under this permit are the only waters claimed by the applicant (Owner) upon the lands herein described.

(Sign) Vaney G. 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 Butte, State of Idaho, on this 5th day of April, A. D. 19 63.

O. R. Jones

My commission expires Nov 6, 1966

27717

Form 17A
1.5 M 7-31-62

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

Permit No. G-27717

* * * * * * * *

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:

TOM HOCKING, 61 , Howe, Idaho, Farmer-Rancher

Ques. 2. Are you acquainted with Clarence G. Hawley (Yes), the holder of Permit No. G-27717 ? How long have you known him and where does he reside:

Howe, Idaho. I have known Mr Clarence G. Hawley for 25 Years

Ques. 3. Have you read or heard said Permit No. G-27717 read, and are you familiar with its provisions and conditions: Yes: yes No:

Ques. 4. State source of water supply: Subterranean Flow

State place of diversion: NW¼NW¼ Sec 32, Twp 7 North, Range 28 E B M in Butte County, Idaho.

Describe works for conveying water to place of use: irrigating Well, with electric Motor, and cement drops, and ditches.

Ques. 5. How many second feet of water do you estimate said works will safely conduct to place of use: 4.4 cubic feet per second How much water have you seen being so conveyed: 4.4 Cubic feet per second

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

~~NW¼SW¼, S½SW¼, sec 32, twp 8 North, Range 28 E B M in Butte, County, Idaho Lots 3 and 4, and S½NW¼, NE¼SW¼~~ Sec 5, Twp 7 North, Range 28 E B M in Butte County, Idaho which is mostly all watered and in Crops, all watered with the waters from this permit.

27717

Ques. 7. If for power or other purposes than irrigation, state how water has been used:

none

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:

Sandy Loam Soil 3/4 of one miners inch per acre

Ques. 9. Have you any interest in the works, water or lands above mentioned? If so, in what way and to what extent: none

Ques. 10. When did you first see this water used: 1960

Other times you have seen such use: 1961, 1962

(Signed) Tom Hocking

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 ~~5th~~ day of April, A. D., 1963.

Notary Public for State of Idaho

Residing: Arco, Idaho

My commission expires: Nov 6, 1966

27717

Form 17A
1.5 M 7-31-62

RECEIVED
APR 9 1962
Department of Reclamation

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

Permit No. G-27717

* * * * * * * * *

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:

ORVILLE NICHOLSON, 37, Howe, Idaho, Farmer-Rancher

Ques. 2. Are you acquainted with Clarence G. Hawley (Yes), the holder of Permit No. G-27717 ? How long have you known him and where does he reside:

Eleven years, Howe, Idaho

Ques. 3. Have you read or heard said Permit No. G-27717 read, and are you familiar with its provisions and conditions: Yes: Yes No:

Ques. 4. State source of water supply: Subterranean Flow, irrigation well

State place of diversion: NW¼NW¼ Section 32, Twp 7 North, Range 28 E B M in Butte County, Idaho.

Describe works for conveying water to place of use: irrigation Well with cement drops and ditches , Pump has electric motor 50 H P private ditches conveys water to lands

Ques. 5. How many second feet of water do you estimate said works will safely conduct to place of use: 4.4 cubic feet per second How much water have you seen being so conveyed: 4. 4 cubic feet per second

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

~~NW¼SW¼, S½SW¼ sec 32, Twp 8 North,~~ Range 28 E B M in Butte County, Idaho Lots 3 and 4, and S½NW¼, NE¼SW¼ section 5, Twp 7 North, Range 28 E B M in Butte County, Idaho. Which is mostly all watered and in Crops with the waters from this permit.

27717

Ques. 7. If for power or other purposes than irrigation, state how water has been used:

none

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:

Sandy Loam soil, 3/4 of one miners inch per acre

Ques. 9. Have you any interest in the works, water or lands above mentioned? If so, in what way and to what extent: none

Ques. 10. When did you first see this water used: 1960

Other times you have seen such use: 1961 and 1962

(Signed) Orville Nicholson

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 5th day of April, A. D., 1962.

O. F. Jones

Notary Public for State of Idaho

Residing: Arco, Idaho

My commission expires: Nov 6, 1966

27717

Affidavit of Publication

I, Dolly Cross, 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 4 (four) consecutive weeks, commencing with the issue dated Feb., 23, 1963 and ending with the issue dated March 21, 1963

Dolly Cross

Subscribed and sworn to before me this 21 day of Mar., 1963

Betty J. Mayo
Notary Public.

Residence: Arco, Idaho.
My commission expires 2-4, 1965

[illegible] NOTICE
NOTICE OF PROOF OF COM[illegible] AND APPLICA[illegible] OF WATER TO BE[illegible]CIAL USE

Notice is hereby given that at 10 a. m., on the 5th day of April, 1963, at Arco, County of Butte, State of Idaho, before O. T. Jones, Notary Public, at Arco, Idaho, Final proof will be submitted of the completion of works for the diversion of 4.4 cubic feet per second [redacted] ground water from a well [redacted] the application to bene[redacted]e of said water, in accord[redacted]e with the terms and conditions of Permit No. G-27717, 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 Clarence G. Hawley, Howe, Idaho.

2. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conveying to the place of use is 4.4 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 [redacted] cubic feet per second.

4. The point of [redacted]on of said water is [redacted] Sec. 32, Twp. 8 N., Rge. [redacted]

5. The place where [redacted] is used is Sec. 32, N[redacted] S½SW¼, Twp. [redacted] N., [redacted] E.B.M.; Sec. [redacted] Lot 3, [redacted] S½NW¼, NE¼SW¼, Twp. [redacted] Rge. 28 E. B. M.

6. The date of priority which [redacted] said [redacted] to establish is January [redacted]

GEO. N. CARTER,
State Reclamation Engineer.

Pub. Feb. 28 thru Mar. 21, 1963.

27717

February 21, 1963

Re: Permit No. G-27717

Mr. Clarence G. Hanley,
Howe, Idaho.

Dear Mr. Hanley:

This acknowledges the Notice of Proof of Completion of Works and Application of Water to Beneficial Use under Permit No. G-27717. The proofs are to be made at 10:00 'clock A.M., on the 5th day of April, 19 63, before O. T. Jones, Arco, Idaho, Notary Public.

As of this date we have mailed the Notice to the Arco Advertiser, Arco, Idaho, 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,

GEO. N. CARTER
State Reclamation Engineer

By:

(Mrs.) Edna P. Rule
Chief Clerk

Enc.
EPR:pmk
cc: Notary

27717

1200
6-28-61

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

Boise, Idaho

Re: Permit No. G-27717
Clarence G. Hawley

Date: **February 21, 1963**

Arco Advertiser,
Arco, Idaho.

Gentlemen:

Enclosed you will find notice for publication, once a week for four consecutive weeks prior to **April 5, 1963** the date set for proof; the expense of the publication is to be paid by the applicant **Clarence G. Hawley** of **Howe, Idaho** to whom you should furnish proof of publication on or prior to the date set for proof.

Please acknowledge receipt of this notice and furnish this office with a copy or tear sheet of the first publication.**

Very truly yours,

Geo N. Carter

GEO. N. CARTER
State Reclamation Engineer

** If the first copy is not received in this office for checking purposes and errors appear in subsequent issues, it is possible that re-publication of corrected copy will be at your own expense.

Encl.

27717

No. 36

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

Notice is hereby given that at 10 A M., on the 5 th day of April ~~1963~~ 1963, at Arco, County of Butte, State of Idaho, before O.T.Jones, Notary Public, at (address) Arco Idaho

Final, proof will be submitted of the completion of works for the diversion of 4.4 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-27717, 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 Clarence G. Hawley Howe Idaho

2. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conveying to the place of use is 4.4 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 4.4 cubic feet per second.

4. The point of diversion of said water is N.W $\frac{1}{4}$, S.W.$\frac{1}{4}$ Sec. ~~32~~ 32. Twp.8N. Rge.28 EBM.

5. The place where said water is used is Sec. 32 NW$\frac{1}{4}$ SW$\frac{1}{4}$, S$\frac{1}{2}$SW$\frac{1}{4}$; Twp8N, Rge 28 EBM Sec. 5, Lot 3, ~~Twp 7 N, Rge 28 EBM~~ Lot 4, S$\frac{1}{2}$NW$\frac{1}{4}$, NE$\frac{1}{4}$SW$\frac{1}{4}$; Twp. 7N Rge. 28 EBM

6. The date of priority which said user is prepared to establish is ~~April 5, 1963~~ Jan. 12, 1959.

Geo. N. Carter
State Reclamation Engineer

27717

Form No. 11
2M - 10/60

NOTICE TO ACCOMPANY THIS LETTER MUST BE MADE IN DUPLICATE

(Date) Feb. 19 1963

(P. O.) Howe Idaho

TO THE STATE RECLAMATION ENGINEER:

Boise, Idaho

Dear Sir:

You are hereby authorized to have the attached notice published at my expense in the Arco Advirtiser of Arco Idaho published in the county in which the works are situated. Butte Co.

Clarence L. 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.

27717

Howe Idaho
Feb , 19 1963

Department of Reclamation
Geo . N. Carter
State Reclamation Engineer
Dear Sir

At this time I wish to notify you that I intend to submit final proof on my water permit No G 27717 on April 5.1963 at Arco Idaho BeforeMr.O .T. Jones
Would you please send me the cost of the proceedure to do this.
Copy of Form No .36 alsoForm No.11. is enclosed.
If there is any farther requirements on this would you please notify me as soon as possible.

Sincerly yours

Clarence Hawley
Howe Idaho

27717

PUBLIC NOTICE

NOTICE OF] OF OF COMPLETION O. /ORKS AND APPLICATION OF WATER TO BENEFICIAL USE

Notice is hereby given that at 10 a. m., on the 5th day of April, 1963, at Arco, County of Butte, State of Idaho, before O. T. Jones, Notary Public, at Arco, Idaho, Final proof will be submitted of the completion of works for the diversion of 4.4 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-2717, 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 Clarence G. Hawley, Howe, Idaho.

2. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conveying to the place of use is 4.4 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 4.4 cubic feet per second.

4. The point of diversion of said water is NW¼SW¼, Sec. 32, Twp. 8 N., Rge. 28 E.B.M.

5. The place where said water is used is Sec. 32, NW¼ SW¼, S½SW¼, Twp. 8 N., Rge. 28, E.B.M.; Sec. 5, Lot 3, Lot 4, S½NW¼, NE¼SW¼, Twp. 7 N., Rge. 28 E. B. M.

6. The date of priority which said user is prepared to establish is January 12, 1959.

GEO. N. CARTER,
State Reclamation Engineer.

Pub. Feb. 28 thru Mar. 21, 1963.

November 6, 1962

Re: Permit No. G-27717

Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

Enclosed are Forms 36 and 11, with instructions, as requested in your letter of November 2nd.

Your Desert Entry was allowed April 19, 1960 and an extension can be allowed to April 19, 1965, if you request such an extension.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer

By:

RALPH W. THOMAS, Deputy
State Reclamation Engineer

RT:sw

Enc. 36 and 11
instructions

27717

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION
Box 700
Idaho Falls, Idaho

December 13, 1961

State of Idaho
Department of Reclamation
George N. Carter, State Reclamation Engr
Boise, Idaho

Dear Mr. Carter:

This is to advise you that on December 7, 1961, Clarence Hawley of Howe, Idaho, mortgaged to the Farmers Home Administration his rights to permit number G27717. He agreed not to assign or amend the permit without consent of the Farmers Home Administration.

Would you please make this notation in your files so this permit will not be transferred, assigned, etc. without the consent of the Farmers Home Administration.

Sincerely yours,

Henry E. Jenkins

Henry E. Jenkins
County Supervisor

27717

NOV 5 1962
Departm... ...rmation

Howe Idaho
Nov 2 - 1962

State Reclamation Engineers

Mr. Geo. N. Carter

Dear Mr Carter

Several weeks ago I wrote in regard to obtaining the proper forms and procedure so that I may get the final license on my irrigation well.

As yet I have not had any word from your office and am wondering if you might be able to give the matter your attention at this time.

My permit No is G-2771

This water right is on Homestead Entry No. 09992 & Desert Land Entry No. 09991

I feel confident that we have enough land under cultivation to take care of all the water that the well puts out.

If there is any other information that I might furnish you on this matter, please let me hear from you.

Yours sincerely

Clarence Hawley

Howe Idaho

27717

IN REPLY REFER TO:
LO:V&S
Idaho 09991

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

RECEIVED
APR 2 0 1960
Department of Reclamation

APR 19 1960

NOTICE OF ALLOWANCE

Hawley.

Clarence Glen Hawley

Rowe,

Idaho

Dear Sir:

Your Desert Land Entry, Serial No. Idaho 09991,
Receipt No. 835035, for Lot 4, S½NW¼, NE¼SW¼,
, Section 5,
Township 7 N., Range 28 E., Boise Meridian, Idaho,
containing 158.65 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.

Sincerely yours,

Donald I. Bailey
Manager

27717

cc: [illegible], -3
[illegible]
State Col. Engr.

A2ILO-20
(Nov 1958)

27717

IN REPLY REFER TO:

Idaho 09932

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

RECEIVED
APR 20 1960
Department of Reclamation

APR 19 1960

NOTICE OF ALLOWANCE

Clarence Glen Hawley

Ham

Idaho

Dear Sir:

Your Homestead Entry, Serial No. Idaho 09932,
Receipt No. 839034, for NW¼SW¼, S½SW¼, Sec. 32;
T. 8 N., R. 28 E., and Lot 3, Section 5,
Township 7 N., Range 28 E., Boise Meridian, Idaho,
containing 158.75 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.

Sincerely yours,

Donald I. Bailey
Manager

cc. SM, I-3
LM - State. Acl. Engr.

A2ILO-20
(Nov., 1958)

77717

January 22, 1959

Re: Permit No. G-27717
Clarence Hawley

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

Gentlemen:

We enclose four copies of Permit No. G-27717, two of each having been certified, to be used in connection with Homestead Entry No. 09992 and Desert Entry No. 09991, filed in your office by Permit Holder, Clarence Hawley, Howe, Idaho.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer
By

(Mrs.) Edna P. Rutledge
Chief Clerk

EPR/lw
Encls. (4)
cc: Clarence Hawley

27717

January 22, 1959

Re: Permit No. G-27717

Mr. Clarence Hawley
Howe, Idaho

Dear Mr. Hawley:

We enclose Permit No. G-27717 in which we direct your attention to the limitations and conditions as given on the fourth page under approval of the State Reclamation Engineer.

As of this date we have sent to the Bureau of Land Management, four copies of this permit, two of each having been certified, to be used in connection with your Desert Land Entry No. 09991 and Homestead Entry No. 09992, filed in that office. A copy of that letter is enclosed.

We also enclose departmental receipt No. G-3815, which was issued covering payment in the amount of $10.25, which includes $6.25 for the filing fee and $4.00 for the copies sent to the Bureau of Land Management.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer
By

(Mrs.) Edna P. Rutledge
Chief Clerk

EPR/lw
Encls. (3)

27717

Address all communications to:

(Form No. 3)

P. O.

APPLICATION FOR PERMIT

TO APPROPRIATE THE SUBTERRANEAN WATERS OF THE STATE OF IDAHO

Application No. G

Permit No. G

District No.

1. Name of applicant: CLARENCE HAWLEY

Post office address HOWE County BUTTE State IDAHO

2. Quantity of water claimed: 300

(a) Rate of withdrawal in cubic feet per second 6. or Idaho Miner's inches 300 or gallons per minute 2700

(b) Annual withdrawal in acre feet per annum 2160

3. Source of water supply: Deep Well

4. Location of point of diversion or well is in the NW ¼ of the SW ¼ of Section 32, Twp. 8 N, Rge. 28 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 ¼ of the ¼ of Section, Twp., Rge., B. M.

(b) Waste water or sewage effluent is to be returned to

at a point in the ¼ of the ¼ of Section, Twp., Rge., B. M.

7. Kind of Works: DEEP WELL

8. Estimated cost of works: $7,000.00

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.

27717

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:

(Give irrigable acreage in each 40-acre subdivision)

Twp.	Range	Sec.	NE¼				NW¼				SW¼				SE¼				Totals
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
8	28	32										40 X	40 X	35 X					120
7	28	5					40 X	40 X	34 X	40 X	35 X								200
																			320

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

27717

Remarks: All land in application is U.S. Gov. owned
written numbers on tabulation sheet indicate
irrigable acreage in each 40 acre subdivision

Well to be located approximately 300 ft South thence
40 ft East from N.W. corner of NW¼ of S.W¼ - SEC. 32 - T8N.
R. 28E.

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

Clarence Hawley
Applicant

By _____, Agent

27717

Approval of State Reclamation Engineer

The number of this permit is G_____.

Recorded in Book_____ Page_____ Approved _____ _____

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 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 _____
The whole of said work to be completed and beneficial use of water appropriated in accordance herewith, to be made on or before _____.

Witness my hand this_____ day of_____, 195____.

_____
State Reclamation Engineer

IN TESTIMONY WHEREOF, We_____, Governor of the State of Idaho, and_____, 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_____ day of_____, 195____.

Countersigned: STATE OF IDAHO

By _____ By _____
Secretary of State *Governor.*

No. G_____

PERMIT

Date of first receipt at office of State Reclamation Engineer

Returned to applicant for correction

Corrected application received

Fees, $_____

FILING FEES FOR USE PERMIT:

For the first Sec. Ft._____ $5.00

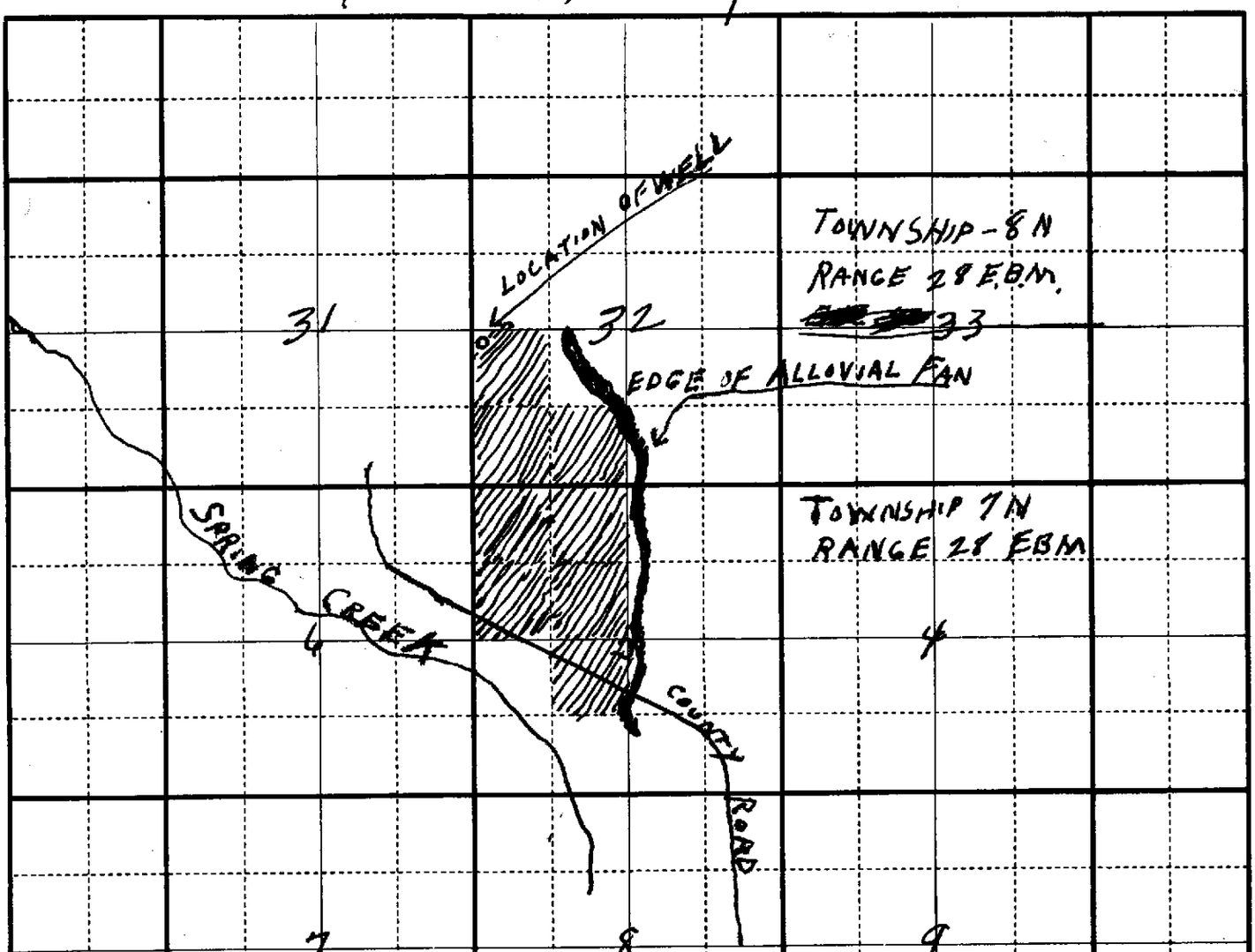
For each additional Sec. Ft. or Fraction Thereof _____ .25

8-26-49 M
1-12-59

27717

NAME OF APPLICANT Clarence Hawley

Form No. 0



Permit Map No. 27717
As Approved
JAN 20 1959
GEO. N. CARTER
Petroleum Engineer

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

27717

January 2, 1959

Mr. Clarence Hawley
Howe, Idaho

Re: Application for Permit

Dear Mr. Hawley:

We are enclosing two Applications for Permit to Appropriate the Subterranean Waters of the State of Idaho.

You state you have filed a homestead entry and a desert entry consisting of 320 acres. You will be allowed to file a water right for one inch per acre on land proposed for irrigation.

Your application for permit can be accepted for filing to include both for homestead entry and desert entry filings, provided filings with the Bureau of Land Management are in your own name. If not, separate filings for water permit will be preferable. Evidence of a water right will suffice for both entries from the one well.

In addition to the filing fees, a fee of $4.00 will be required for furnishing two copies to the Bureau of Land Management as evidence of a water right, one certified and one un-certified, for each entry.

Upon receipt of the application for a water right, the writer will notify the Bureau of Land Management that you have filed an application for permit as evidence of a water right on the entry No. I-09992 and I-09991, which will be notification to allow you in excess of 30 days if necessary, to keep your entries in good standing.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer
By

ROY W. THOMPSON
Supervisor of Water Distribution

RWT/lw
Encls. (2) - Application For Permit

27717

RECEIVED
DEC 2 6 1958
Department of Reclamation

Howe Idaho
Dec 22 - 1958

State Reclamation Dept.

Dear Sir.

At this time, I am writing you in regard to obtaining the proper forms for permits for water development on Homestead application No. I-09992 and Desert Land Application No. Idaho 09991. Each containing 160 acres or total 320 acres.

This development will be from underground sources and will be from a deep well or wells sunk on the land itself.

As I was not aware that

it was necessary to obtain a water permit in advance of filing on the land, I submitted my applications first and consequently am in error.

My applications are being held for Rejection 30 days from Dec 18-1958. So it seems necessary to use all possible haste in submiting the water permit.

would it be possible for you to send me the proper forms along with all instructions at your earliest convenience?

Also I am sending a drawing of the land along with a

description of the land in my application.

Now in order to avoid the additional cost of extending the power line I am hoping that one well on the highest corner of the land will furnish adequate water for both parcels of land. This high corner is located on the Homestead entry.

Is it permissable to develope water for both the Homestead and the Desert land in this manner?

How many inches or second feet of water will be required for each acre

87717

of land?

There is a well 1¼ mile directly North of my intended location that delivers 180 miners of water from a depth of 63 ft. Now as my location is approximately 20 ft lower in elevation than this well, I feel confident that a well on my location will be a good risk.

Awaiting your reply I am

very truly yours

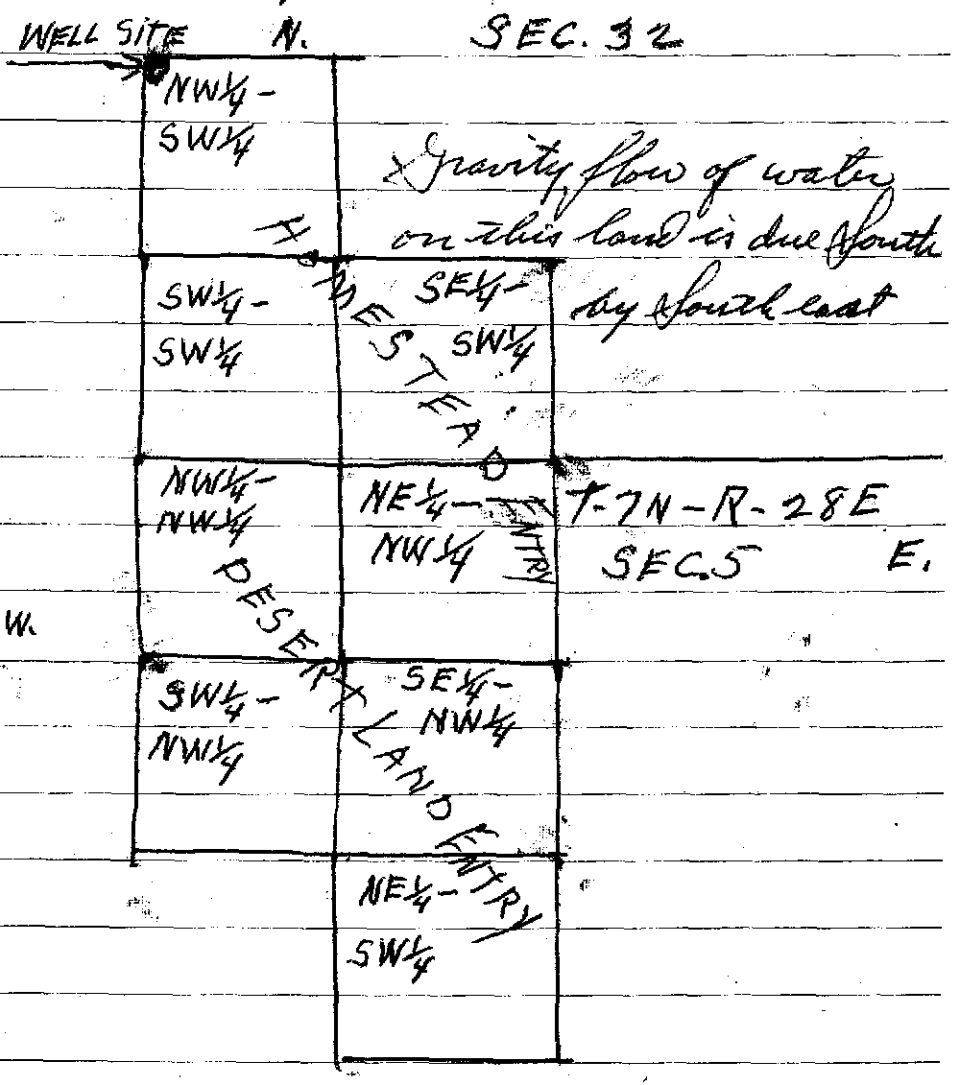
C. Lorenz Hawley

Boise Idaho

P.S. Would you please send me 2 sets of forms in duplicate. 27717

BUTTE COUNTY

Township 8 N. RANGE 28 E



5.

27717

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

COPY

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

April 8, 1996

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

Re: Sage Willow, Inc. Application for Transfers

Gentlemen:

After additional review of *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952), I have amended the portion of the analysis section of the Final Order for the Sage Willow transfer application that discusses *Boyer*. The amendment is limited to the fourth paragraph on page 4.

Sincerely,

Karl J. Dreher
Director

KJD/dde
Encl.

MICROFILMED
NOV 1 4 2003

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

COPY

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

April 8, 1996

Dear Interested Parties:

The accompanying order is a **"Final Order"** issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) the petition for reconsideration is disposed of; or
(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

MICROFILMED
MAY 1 4 2003

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,

Gary Spackman

Encl.

MICROFILMED
NOV 14 2003

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

COPY

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

March 15, 1996

Re: In the matter of Application for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 in the name of Sage Willow, Inc.

Dear Interested Party:

The accompanying order is a **"Final Order"** issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

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(b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

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MAR 27 1996

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

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i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,

GARY SPACKMAN

Encl.
cc: Southern Region

MAR 27 1996

LAW OFFICES

GIVENS PURSLEY & HUNTLEY, LLP

A LIMITED LIABILITY PARTNERSHIP

277 NO. 6TH STREET • SUITE 200

P.O. BOX 2720 • BOISE, IDAHO 83701

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JULIE KLEIN FISCHER
RAYMOND D. GIVENS
L. W. GRANT III
J. BART GREEN
ROBERT C. HUNTLEY, JR.
KARL T. KLEIN
DAVID R. LOMBARDI
KIMBERLY DAWN MALONEY
KENNETH R. MCCLURE
CHRISTOPHER H. MEYER

L. EDWARD MILLER
PATRICK J. MILLER
JUDSON B. MONTGOMERY
TERRY L. MYERS
RAMONA S. NEAL
STEVEN L. OLSEN
W. HUGH O'RIORDAN
ROBERT L. PHILLIPS
KENNETH L. PURSLEY
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
STEPHANIE C. WESTERMEIER

JAMES A. MCCLURE
JUDITH K. HOLCOMBE
OF COUNSEL

RECEIVED

JAN 16 1996

Department of Water Resources

January 16, 1996

via HAND DELIVERY

Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706
Attention: Debbie Ellis

Re: Protestant's Response To Sagewillow's Exceptions to Amended Recommended Order
Our File: 3314-6

Dear Debbie:

Enclosed please find the original and one copy of the Protestant's Response To Sagewillow's Exceptions to Amended Recommended Order.

Thank you for your assistance.

Sincerely,

Kimberly D. Maloney

KDM:ehk
enclosures
3314\6\CORRESPO\IDWR.L01

MICROFILMED

MAR 27 1996

Michael C. Creamer
Kimberly D. Maloney
GIVENS PURSLEY & HUNTLEY LLP
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 388-1200
3314\6\PLEADING\EXCEPT.BRF

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JAN 16 1996
Department of Water Resources

Attorneys for Protestants
James Mays and Mays Land and Livestock

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS.33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018

PROTESTANT'S RESPONSE TO SAGEWILLOW'S EXCEPTIONS TO AMENDED RECOMMENDED ORDER

I. INTRODUCTION

James Mays and Mays Land & Livestock ("Mays") hereby submits its Response to what now is Sagewillow's third round of objections to the Department's proposed determination that Sagewillow may transfer only those water rights which it lawfully holds. Sagewillow's brief brings nothing new to the discussion about the forfeiture of its rights by non-use, the lack of historical use of its water rights, or the Department's duty in a transfer proceeding to deal with the public's water resources

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MAR 27 1996

so as to prevent injury to vested water rights. Rather, Sagewillow merely extends its prior arguments, which have been twice rejected.

Sagewillow remains intractably oblivious to the evidence in the record demonstrating that Mays and others have acquired intervening rights to use the water sources of the Little Lost River basin, and to the evidence which shows any renewed use of the Sagewillow rights would injure Mays' water rights. Sagewillow also continues to dismiss the Department's responsibility in the administration of a public resource such as water, and the Department's duty and authority to void its prior approval of Transfer 3785 where its continuance would be adverse to the public, and to the water rights of others. The case for voiding the prior transfer is even more compelling considering that the Department made no inquiry into the factors enumerated in I.C. §42-222(1). The doctrines of *res judicata*, collateral estoppel, and the other equitable doctrines alleged by Sagewillow to bar the Department's action all are inapplicable where, as here, the State of Idaho, through the Department, acts in its sovereign capacity to regulate use of the public water resource.

Sagewillow's refusal to acknowledge the evidence produced at the hearing is remarkable. Indeed, Sagewillow even now will admit "*only for the sake of argument* [!] that there had been a period of non-use of water right nos. 33-02090 and 33-02091, and a portion of water right nos. 33-02057 and 33-02083, of five or more years". Sagewillow's repeated suggestions throughout its brief that the law or facts "clearly" are in its favor, only emphasize those areas where they clearly are not.

The Department's Amended Recommended Order is correct as written and should be made final.

MAR 27 1996

II. ARGUMENT

A. Sagewillow Continues to Misstate the Resumption Doctrine, and its Applicability to the Facts in this Case.

Sagewillow would have the Department construe Sagewillow's unauthorized "use" of water between 1989 and 1994 as a legally valid "resumption of use". For the Department to do so, it would have to ignore the fact that much of the "use" occurred on lands under pivots that were not authorized to be irrigated by any existing water rights or transfers. The Department also would have to ignore the existence of water rights belonging to Mays and others that were perfected in the same source of supply as the abandoned Sagewillow rights. Sagewillow never attempted at the hearing to show that Mays' rights were not fully valid rights, or that they were derived from some different source than that of the abandoned rights.

The Department could reverse itself and conclude that a valid common law resumption of use of the abandoned rights has occurred only if it ignored large segments of the record; particularly that portion demonstrating the existence of intervening water rights, acquired under Idaho's statutory application, permit and license procedures. Mays always has understood that its water right licenses, issued by the Department, were a sufficient basis to confirm any "claim of right" in the water resource. Sagewillow's suggestion that the elements of adverse possession have any place in the Department's analysis of Mays' intervening rights therefore is off-base. The facts go against Sagewillow on every element of the common law doctrine of resumption.

Also, as noted in Mays' prior response briefs, Idaho Code § 42-222(2) speaks directly to the issue of forfeiture of a water right, and the means by which its use

MAR 27 1996

lawfully may be resumed following forfeiture. Sagewillow has not complied with this statute, which requires an application requesting an extension of time to avoid forfeiture to be submitted to, and approved by, the Department. No application for extension exists for the Sagewillow rights.[1] Under I.C. § 42-222(2), Sagewillow's rights have been forfeited, and no valid resumption of use has occurred.

B. The Department May Properly Void its Prior Incorrect Approval of Transfer 3785.

1. *Res Judicata* Does Not Prohibit the Department from Voiding Transfer 3785.

The crux of Sagewillow's *res judicata* argument is that the public interest exception to *res judicata* either is not consistent with Idaho law, or was misapplied by the Department in this case. *See* Sagewillow Exceptions, p.10-11. Sagewillow first suggests that because the public interest exception to *res judicata* is not expressly applied in any Idaho case, it is invalid. Yet, in *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Idaho App. 1983), the Idaho Court has expressly adopted the Restatement (2d) of Judgments' treatment of claim preclusion and the exceptions set forth therein.[2] Two of the exceptions contained in the Restatement are applicable here:

---

[1]Idaho Code § 73-116 provides that the common law is the law of Idaho, except to the extent that it is inconsistent with the Constitution or Idaho statutes. The resumption doctrine is a feature of the western common law doctrine of prior appropriation, which has been superseded by, and now is inconsistent with I.C. § 42-222(2). Mays contends that under a correct application of Idaho law, the provisions of I.C. § 42-222(2) control, and provide the exclusive means by which any resumption of use of a forfeited right may occur. Mays also is aware that several of the Idaho cases that discuss common law resumption were decided *after* the statutory resumption provision was enacted. However, the Department correctly has recognized that the references to resumption of use in those cases was, at best, dicta, since none of those cases turned on whether a resumption had occurred. In any event, under the facts in this case, Sagewillow cannot satisfy the requirements of resumption of use under either the common law doctrine or I.C. § 42-222(2).

[2] Idaho has adopted the Restatement (Second) Judgments (1982) ("Restatement") interpretation of the doctrine of *res judicata*. *Aldape supra* at 135; *See also, Houser v. Southern Idaho Pipe & Steel, Inc.*, 108 Idaho 441, 649 P.2d 1197 (1982); *Ramseyer v. Ramseyer,* 98 Idaho 544, 569 P.2d 358 (1977) (both cases

MAR 2 7 1996

1. *Res judicata* will not bar a subsequent action where the judgment in the first action was inconsistent with the implementation of a general statutory or constitutional scheme.

2. *Res judicata* will not bar a subsequent action where there are extraordinary reasons for allowing a second action.

The approval of Transfer 3785 was improper for the very reason that approval of the instant transfers would be improper—a significant portion of the rights Sagewillow seeks to transfer have been forfeited or abandoned. To permit the transfers would contravene the prior appropriation doctrine as framed in a comprehensive statutory and constitutional scheme that requires continued beneficial use of water, and that protects subsequent right holders who have applied the water to beneficial use. The Idaho water code, implements article XV of Idaho's Constitution, which abhors waste more than it abhors forfeiture.

Moreover, this is no "ordinary" case involving contract rights, or some cause of action for damages. Specifically, the State's unique duties with respect to a special and limited public resource. This case concerns the State's duty to protect and hold the vested rights of those like Mays, who put the public's water to use, above the singular interests of one whose rights have gone long unused.

Sagewillow argues that, even if the public interest exception *res judicata* is valid in Idaho, it was misapplied in this case because

---

citing tentative drafts of the Second Restatement of Judgments with approval). Protestant's Brief on Reconsideration, p.5.

MAR 2 7 2006

> the approval process for Transfer No. 3785 included consideration of the impacts on, and protection of, other water users. The Department had to determine whether other water rights would be injured and whether the transfer was in the local public interest.

Exceptions, p. 11. Here is a leap of faith. While the Department might be entitled to the presumption that it made this inquiry because Idaho Code § 42-222(1) requires the Department to do so; that presumption evaporates in light of the testimony of the Department's own employee, Harold Jones. Mr. Jones' testimony is devoid of any suggestion his evaluation of the Transfer 3785 application included any consideration of the transfer's impacts on other water users, or of the protection of other water rights or the local public interest.

Mr. Jones testified that he made no inquiry into the actual beneficial use of the rights or the existence of a means of diversion. The reason no inquiry was made was that the Department had chosen to leave any such examination to the SRBA Court. It is implicit in the Department's Recommended Order, that Transfer 3785 should be voided, in large part, because the application did not receive the scrutiny required by I.C. § 42-222(1). Also, in any transfer proceeding, historical beneficial use of the water right sought to be transferred is perhaps the single-most relevant issue in determining whether injury to other rights will occur. Mays, therefore, was fully entitled in this case to present whatever evidence it had of the historical non-use of Sagewillow's rights, and the potential injury that would result if the rights were allowed to be transferred as proposed. The Department was fully entitled and required by statute to consider this. If that evidence also demonstrated that Transfer 3785 should never have been approved, so be it. That result cannot form the basis

MAR 27 1996

for Sagewillow to contend that Mays should have been precluded from making its case at all.

Res judicata does not bar Mays from demonstrating the historical non-use of the Sagewillow rights in this transfer proceeding, nor does it bar the Department from voiding Transfer 3785 where the facts relating to the historical use of the Sagewillow rights, and the Department's actual review of that transfer, show that the subject rights had been forfeited for non-use.

B. Collateral Estoppel Does Not Bar Mays or the Department from Voiding Transfer 3785

The Supreme Court has recognized the following to be the appropriate test for whether collateral estoppel (issue preclusion) will preclude litigation of issues in a subsequent proceeding:

> (1) Did the party "against whom the earlier decision is asserted ... have a 'full and fair opportunity to litigate that issue in the earlier case?'"
>
> (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?"
>
> (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was "necessary to [the prior] judgment."
>
> (4) "Was there a final judgment on the merits?"
>
> (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

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

MAR 27 1996

To begin with, Mays was not a party to the Transfer 3785 proceeding. Additionally, as previously shown, the issues of forfeiture or abandonment of the Sagewillow water rights were never decided in Transfer 3785. While that transfer was approved, it is apparent that there was no decision "on the merits" of whether the rights were still valid. In fact, Sagewillow, through its attorney, proposed to ignore Transfer 3785 in the instant proceeding because its result was to stack two claimed rights, which "appears to have been inadvertent and was certainly neither necessary nor intended." Sagewillow also stated that it intended to "straighten that whole matter out in this proposed transfer." Foster April 6, 1993 Letter at 4. This is an admission by Sagewillow that the merits of Transfer 3785, to the extent they may have been decided, were improperly decided, that Transfer 3785 ought to be ignored by the Department as it was being ignored by Sagewillow, and that the whole matter of the transfer of water right 33-2091 was appropriately the subject of consideration in the present transfer proceedings.

The fact that Sagewillow never attempted to address the problem of unstacking rights 33-2090 and 33-2091 in the present proceeding points to the conclusion that it *was* ignoring Transfer 3785, and was trying to start over with the transfer of those rights here. Sagewillow's applications, and its case at the hearing, were presented to the Department as if Transfer 3785 never had occurred. Sagewillow cannot legitimately argue on the one hand (by way of defense) that the validity of the transfer of 33-2091 was an issue foreclosed to Mays because it was finally concluded in Transfer 3785, while arguing on the other hand that Transfer 3785 was

"inadvertent" and "unintended", and that Sagewillow intended to "straighten that whole matter out in this proposed transfer."

Mays is not collaterally estopped to raise the issue of forfeiture or abandonment of right 33-2091 because the issue was never decided in Transfer 3785, and because Sagewillow itself made the validity of Transfer 3785 an issue in the instant case.

Even if Sagewillow could make out the essential elements of collateral estoppel, including a final judgment on the merits, that doctrine does not bar the voidance of Transfer 3785 now, because a specific exception to collateral estoppel applies to the facts here. The Second Restatement delineates the exceptions to collateral estoppel.[3]

> 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 interests of persons not themselves parties in the initial action*, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

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

The public interest is harmed where a forfeited or abandoned water right is permitted to be revived after other rights in the source have accrued. That is the

---

[3] The Second Restatement's treatment of issue and claim preclusion have been adopted by Idaho courts. *See* Note 2, p. 5, *supra*; Protestant's Brief on Reconsideration, p. 5.

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reason the common law resumption doctrine, and later the statutory resumption provision, were worded to protect intervening rights. The harm to the public that would result from Transfer 3785 outweighs the policy against relitigating issues already decided.[4] *See e.g., State v. Gusman*, 125 Idaho 810, 874 P.2d 1117 (Idaho App. 1993). In *Gusman*, Gusman was arrested for driving under the influence. She refused to submit to an alcohol concentration test and her license was suspended by the Idaho Department of Transportation. A hearing was held concerning the administrative suspension and the magistrate found that Gusman was not the driver of the car, and that there had been no probable cause to stop the car. *Gusman*, 874 P.2d at 1118.

At the criminal trial Gusman sought to dismiss the government's case based on the doctrine of collateral estoppel. Gusman argued that the issues concerning the driver's identity and probable cause already had been determined. The court held that collateral estoppel did not bar the litigation of the state's case because

> Even though we might conclude that the five elements enumerated in *Anderson* and quoted in *Powell* are present here, we nevertheless decline to apply collateral estoppel because to do so would undermine the legislative purpose and effect of the existing statutory scheme. As the Oregon Supreme Court has stated:
>
> [The] principles of collateral estoppel and the other principles of *res judicata* are not to be applied in the abstract; they have validity only if their application will carry out the policy which these principles were designed to express. It is necessary, therefore, to examine ... the nature of the proceedings ... and to determine what ends would be served by permitting or denying further litigation on the issue [sought to be precluded].

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[4] *See* Protestants' Response to Sagewillow's Petition for Reconsideration, p. 6-7.

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Gusman, 874 P.2d at 1120 (quoting *Griffin v. City of Roseburg*, 255 Or. 103, 464 P.2d 691, 693 (1970)). *See also Dana's Housekeeping, Inc. v. Department of Labor & Industr.*, 886 P.2d 1147, 1154 (Ct.App.Wash. 1995) ("While administrative agency adjudications may be accorded preclusive effect in subsequent litigation, issues will not be precluded when the benefits of finality are outweighed by adverse impact on public interest."); Restatement (Second) of Judgments § 28(5)(a); Protestant's Brief On Reconsideration, p. 13-14.

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

C. Equitable Estoppel Does not Prohibit the Voiding of Transfer 3785.

Equitable estoppel does not prohibit the voiding of Transfer 3785 because (1) equitable estoppel can be applied to a government agency only where required by justice and fair play *and* where there is no damage to the public interest, and (2) even if equitable estoppel might be applicable to a state agency such as the Department, Sagewillow has failed to establish all the elements for such relief.[5]

As always, one who invokes equity must do so with clean hands; justice and fair play require it. What justice would there be in rewarding Sagewillow for submitting an application that was incomplete as to the critical issue of beneficial use? Can one who developed and irrigated lands without the required approvals argue that equity should reward him? On the facts, Sagewillow must concede that

[5]Mays refers the Department to its argument concerning estoppel contained in Protestants' Brief On Reconsideration, p. 8-19.

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over 130 acres of land under two different pivots in Section 1, T7N, R27E have been irrigated since 1991, without the benefit of any appurtenant water right whatsoever. How should the benefits Sagewillow continues to derive from this unauthorized use weigh in the equity scales? Does it comport with justice and fair play for Sagewillow to contend that Transfer 3785 should be treated in these transfers as if it never occurred, yet object when the Department agrees? Sagewillow has presented no facts or argument that would compel the Department, or a court, to ignore the public policies that Idaho's water code was designed to serve. The equities in this case all weigh in favor of the public and the Department's Amended Recommended Order.

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

Although Sagewillow correctly notes that equitable estoppel "*can* apply to a government agency acting in its sovereign capacity," Exceptions, p. 17, the cases it cites in support of that point actually establish that the doctrine is to be applied against a government only in exceptional cases. For example, Sagewillow cites *Brandt v. State*, 126 Idaho 101, 878 P.2d 800 (Idaho App. 1994), which provides that "[e]stoppel, which is an equitable doctrine, cannot ordinarily be applied to a governmental agency acting in its sovereign capacity." 126 Idaho at 105, 878 P.2d at 804. And while the *Brandt* decision did discuss applying equitable estoppel to a governmental agency, the court never actually reached the merits of that issue because *Brandt* did not raise the issue before the magistrate. Moreover, the equitable estoppel discussion in *Brandt* confirms how rare a situation it would be for estoppel to apply to a governmental agency:

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

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

Sagewillow also points to *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952) to support its theory that equitable estoppel should apply in this case. But *Boise City* indicates only that equitable estoppel *may* be invoked against a municipality, and then, only under exceptional circumstances. In *Boise City*, the City granted Sinsel a permit to build a structure which encroached on Front street in 1927. In 1949 the City Council canceled and revoked the permit and sued for an injunction against Sinsel. The Supreme Court refused to apply equitable estoppel against the City, stating,

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

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

Sagewillow has failed to show that this is such an "exceptional case" that it would warrant the application of equitable estoppel to the Department. The Department must be able to void those of its prior decisions governing use of the

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State's water that subsequently are shown to have been in error and to be adverse to the rights of others.

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

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

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

Young v. Idaho Dept. of Law Enforcement, 123 Idaho 870, 853 P.2d 615, 619 (Idaho App. 1993). In *Young*, the plaintiffs sought to estop the Department of Law Enforcement from denying their liquor license after they failed to comply with the Department's notice procedures. The court could not reach the question of whether estoppel could be applied against the government agency because the plaintiffs did "not allege that the Department made any false statements or concealed material facts." *Young*, 853 P.2d at 620. Here, Sagewillow has likewise failed to assert that the Department engaged in misrepresentation or concealed facts which would permit equitable estoppel to be applied.[6] Moreover, if any "concealment" is evident by the facts in this case, it could be attributable only to Sagewillow.

[6] For further discussion, See Protestants' Brief On Reconsideration, p. 15-18.

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

Sagewillow also contends that the doctrine of quasi-estoppel prohibits the Department from changing its position and voiding Transfer 3785. Again, Sagewillow's argument fails to address two elements of the doctrine of quasi-estoppel. First, the person to be estopped must have had full knowledge of the facts, *see, KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971); and *Young, supra*, 853 P.2d at 620, and second, the doctrine applies only when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position. *See Mitchell v. Zilog, Inc.,* 125 Idaho 709, 874 P.2d 520 (1994) (citing *KTVB, supra*); *see also Willig v. Idaho Department of Health and Welfare,* ____ Idaho ____, 899 P.2d 969 (1995) (a showing of hardship and not "irreparable harm," is insufficient; unconscionability is required). "Unconscionable Conduct" has been defined as "conduct that is monstrously harsh and shocking to the conscience." Black's Law Dictionary (4th ed., West Publishing Co., 1968). Here, Sagewillow has not alleged and cannot establish that voiding Transfer 3785 amounts to unconscionable conduct. Sagewillow argues that it has suffered hardship because it expended resources developing sprinklers. However, these funds were expended prior to the approval of Transfer 3785. Moreover, Sagewillow received the benefit of crops raised under the sprinklers for four years to the detriment of Mays and other water right holders who were adversely impacted by Sagewillow's use of the water.

Sagewillow also cites to *Alder v. Mountain States Telephone & Telegraph Co.*, 92 Idaho 506, 446 P.2d 628 (1968) in support of its quasi-estoppel argument. But *Alder* is authority for the proposition that "the party relying upon the acts of the

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

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

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

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

> [t]he public trust doctrine takes precedent even over vested water rights. Grants, even if purporting to be in fee simple, are given subject to the trust and to action by the state necessary to fulfill its trust responsibilities. Grants to individuals of public trust resources will be construed as given subject to the public trust doctrine unless the legislature explicitly provides otherwise.

Kootenai, 671 P.2d at 1094 (emphasis added); *See also Idaho Conservation League v. State of Idaho*, Slip Op. 116, Docket No. 21144 (August 31, 1995); *reh'g denied* November 8, 1995. ("The water rights adjudicated in the SRBA, as with all water rights, are impressed with the public trust"). Therefore, under the rule adopted by the Idaho Supreme Court in *Kootenai*, and reaffirmed in *Idaho Conservation League*, the Department can void the transfer if it finds that its initial approval was and remains inconsistent with the public trust.

E. *Keller v. Magic Water Co.* Does Not Prohibit the Department From Voiding Transfer No. 3785

Mays believes that the Supplemental Authority Citation submitted by Sagewillow lacks the level of candor that the Department and the parties are entitled to in this proceeding. The use of ellipses in long quotes from court opinions usually is of no consequence where they are used merely to be brief and concise. Still, they

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invite the reader to confirm what has been omitted, and Mays assumes that the Department, like Mays, made that inquiry with respect to the case of *Keller v. Magic Water Co., Inc.*, 92 Idaho 276 (1968) cited by Sagewillow. That review shows that Sagewillow omitted from its quote the very language that bears most on this issue before the Department -- language that undercuts Sagewillow's position.

Keller involved a permit to appropriate water from Salmon Falls Creek. Evergreen Canal Company ("Evergreen"), Magic Water Company's ("Magic") predecessor, obtained the permit in 1953. Evergreen's application for permit did not include the required financial information, but the permit was issued nevertheless, and Magic ultimately developed the water right and submitted proof of application to beneficial use. The application was challenged eleven years after its approval on the ground that the required financial information had been omitted. The court held that the challenge was untimely. *Keller*, 92 Idaho at 279-80. However, the *Keller* court specifically recognized that the omission of financial information from the application did not result in any injury to other parties. The language omitted from Sagewillow's quote was: "The trial court specifically found that no one was damaged by the omission of such financial information from the application." *Keller*, 92 Idaho at 280. It is apparent from a reading of *Keller* that this lack of injury was a critical factor in the outcome. It is not hard to see why, out of three full paragraphs quoted, Sagewillow chose to replace this important sentence with ellipses.

Here, the Department has found that the waters of the Little Lost are limited and interconnected, and that approval of the transfer of any of the forfeited or abandoned rights, including the right covered by Transfer 3785, will reduce the

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amount of water available to other water right holders. That likelihood of injury is the basis for the voiding of Transfer 3785, and the denial of the instant transfers, not simply a finding that Sagewillow failed to fill in the blank regarding the historical use or non-use of the right.

Also, *Keller* involved an application to appropriate unappropriated waters. There never was an issue, either at the application stage or 11 years later, regarding whether approval of the permit would harm valid, existing rights. The challenger in *Keller* simply argued that as a procedural matter, some information had been omitted on the application, and that the Department could not approve the right. But it was apparent from the moneys subsequently expended by Magic, that it did have the financial resources. The court even noted that Magic "had expended large sums of money on the basis of the permit to appropriate." *Keller*, 92 Idaho at 280. Thus, the objector was attempting to place form over substance. *Keller* does not prohibit the Department from voiding Transfer 3785.

CONCLUSION

For the reasons set forth above, Mays respectfully requests the Department to affirm its Amended Recommended Order as the Final Order in these proceedings.

DATED this 16th day of January, 1996.

GIVENS PURSLEY & HUNTLEY

BY: Kimberly D Maloney
Michael C. Creamer
Kimberly D. Maloney
Attorneys for Protestants James Mays and Mays Land & Livestock

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1996, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Karl Dreher Director Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	_X_ HAND DELIVER _____ U. S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Norman M. Semanko, Esq. Rosholt, Robertson & Tucker, Chartered P.O. Box 1906 Twin Falls, Idaho 83303-1906	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER _X_ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)

Kimberly D Malony

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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 SAGEWILLOW, INC.	))))))	**SUPPLEMENT TO AUTHORITY CITED IN EXCEPTIONS TO AMENDED RECOMMENDED ORDER**

I. DESCRIPTIVE SUMMARY

Applicant Sagewillow files this Supplement to Authority Cited in Exceptions to the Amended Recommended Order, providing additional legal authority for the arguments provided in the Exceptions regarding the voiding of transfer no. 3785.

II. SUPPLEMENT TO EXCEPTIONS

In compliance with Rule 720.02.b. of the IDWR Rules of Procedure, IDAPA 37.01.01.720.02.b., the Applicant, Sagewillow, Inc., through its joint counsel, filed Exceptions to the Amended Recommended Order in this matter on December 26, 1995.

Included in the Applicant's Exceptions was an argument in opposition to the Amended Recommended Order's conclusion that transfer no. 3785, could, and should, be voided. See, Exceptions to Amended Recommended Order at 10-18 (December 26, 1995). Specifically, the Applicant noted that one of the reasons listed by the hearing

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officer for voiding transfer no. 3785 was failure to respond to the forfeiture question on the transfer application. Exceptions at 11; ARO at 4. The Applicant argued that it was entitled to rely on the Department's approval of transfer no. 3785, despite the Applicant's failure to answer this single question on the transfer application.

As further, and we think dispositive, authority on this proposition, we direct the Department to the Idaho Supreme Court case of Keller v. Magic Water Co., 92 Idaho 276 (1968). In that case, a permit applicant was granted a permit to appropriate water. Several years later, another party sought to challenge the applicant's permit on the basis that it had failed to set out its financial condition in the original permit application and thus did not comply with the law. After finding that the Applicant had indeed failed to set out this information on the permit application, the Court nonetheless refused to find that the permit should be voided. The Court's reasoning is set forth below:

> The application having been approved, and no showing to the contrary having been made, it is to be presumed that proof of publication of the notice was made as required by I.C. Sec. 42-203, and that in passing upon the application the state reclamation engineer complied with statutory provisions concerning filing of protests to granting of the application. Mosman v. Mathison, 90 Idaho 76, 408 P.2d 450 (1965); Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959); Meservey v. Guilliford, 14 Idaho 133, 93 P. 780 (1908).
>
> The record fails to disclose that any notice of deficiency in the application was ever served. . .or endorsed in the records of the Department of Reclamation. No timely objection was filed thereto as required by I.C. Sec. 42-203. . .Appellants . . .appeared in the transactions at bar long after respondent. . .had expended large sums of money on the basis of the permit to appropriate.
>
> It is thus concluded that under the circumstances, appellants have no ground to contest the alleged defect in the original application for permit, upon which respondent now bases its arguments. In addition to the statutory requirements, which alone would constrain us to rule in favor of respondent on this issue, principles of equity militate against the requested declaration of forfeiture, which is now being sought for the first time eleven years after original approval of the application. See Holmberg v. Armbrecht, 327 U.S. 394, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Idaho Farms Co. v. North Side Canal Co., 24 F.Supp. 189 (D.Idaho 1938);

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Shive v. Barrow, 88 Cal.App.2d 838, 199 P.2d 693 (1948); Ainsworth v. Roubal, 74 Neb. 723, 105 N.W. 248 (1905).

Keller, 92 Idaho at 280.

It would be difficult to imagine a case more similar to this one. As previously noted in the Exceptions, application for transfer no. 3785 was approved in 1992, despite the fact that question no. 10 in Part 2 of the application was left blank. Pursuant to I.C. Sec. 42-222, publication of the application was made, no timely objection was filed, the application was processed and scrutinized, and it was ultimately approved. It was only after the transfer had been approved and completed, including the necessary capital expenditures, and all time for appeal had expired, that the Protestants sought to have a forfeiture declared.

Therefore, as in the case described above, the Protestants have no ground to contest the alleged defect in the original application for transfer, and the Department has no right to void transfer no. 3785.

DATED this 29th day of December, 1995.

J. Evan Robertson
ROSHOLT, ROBERTSON & TUCKER

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of December, 1995, I served a copy of the foregoing **SUPPLEMENT TO AUTHORITY CITED IN EXCEPTIONS TO THE AMENDED RECOMMENDED ORDER** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (via fax and mail)
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Department of Water Resources

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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 SAGEWILLOW, INC.	**EXCEPTIONS TO AMENDED RECOMMENDED ORDER**

I. DESCRIPTIVE SUMMARY

Pursuant to the notice accompanying the Amended Recommended Order of November 7, 1995 and Rule 720.02.b. of the IDWR Rules of Procedure, IDAPA 37.01.01.720.02.b., the Applicant, Sagewillow, Inc., through its joint counsel, hereby submits the following Exceptions to the Amended Recommended Order (ARO).

In short, the exceptions taken to the Amended Recommended Order are summarized 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 no. 3785 can, and should, be voided; and (3) The ARO improperly

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concludes that only 230 acres have historically been irrigated on the Frew Place, rather than 260.

II. EXCEPTIONS TO THE AMENDED RECOMMENDED ORDER

An Amended Recommended Order was issued by the hearing officer in this matter on November 7, 1995. The ARO concludes that water right nos. 33-02090 and 33-02091 have been completely forfeited, and that water right nos. 33-02057 and 33-02083 have been partially forfeited. ARO at 13-14. It also concludes that Transfer No. 3785, previously approved by the Department in 1992, should be voided, and that portions of water right nos. 33-02086 and 33-07018 have been forfeited.

The Applicant, Sagewillow, filed a Petition for Reconsideration of the Amended Recommended Order on November 28, 1995. An Order Denying Petition for Reconsideration was subsequently issued on December 5, 1995. Pursuant to IDWR's Rules of Procedure, the Applicant hereby files these Exceptions to the Amended Recommended Order. IDAPA 37.01.01.720.02.b.

The Applicant takes exception to both legal and factual conclusions contained in the Amended Recommended Order and respectfully requests that the Director correct the errors set forth below in issuing a Final Order in this matter. See, also, Brief in Support of Petition for Reconsideration of Recommended Order and Exceptions to Recommended Order (June 5, 1995).

A. The ARO Misinterprets and Misapplies the Resumption of Use Doctrine.

Simply stated, the ARO misinterprets and misapplies the law of this state with regard to the resumption of use of a water right. These errors should be corrected in the Final Order by recognizing the undisputed, and valid, resumption of use that has occurred in this matter.

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1. The Resumption of Use Doctrine Allows the Revival of Sagewillow's Water Rights.

The long-established rule with regard to resumption of use is that "forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water right prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 531-32 (1944); Zezi v. Lightfoot, 57 Idaho 707, 713 (1937); Wagoner v. Jeffery, 66 Idaho 455, 459-60 (1945); Application of Boyer, 73 Idaho 152, 160 (1952). No Idaho appellate court has stated otherwise in the past half-century and Idaho's use of the doctrine has been well-documented. See e.g., National Water Commission, A Summary-Digest of State Water Laws at 270 (1973) ("[In Idaho,] [e]ven if there has been a non-use for 5 years, if the owner of the right resumes the use of the water prior to the appropriation thereof by a third party, there will be no forfeiture of the water right and it will not inure to the benefit of a later claimant.").

An examination of the resumption of use doctrine, as detailed below, makes clear that it is fully applicable in the present case.

In Application of Boyer, a transfer applicant held decreed appropriations with dates of priority from 1888 to 1897. The transfer was applied for in 1946. Protestants to the transfer asserted that the rights had been abandoned and forfeited by non-use for periods of more than five years. Application of Boyer, 73 Idaho at 155-56.

The Protestants introduced evidence showing that no water had been used on respondent's lands for some 30 or 40 years prior to the 1946 transfer application, or as far back as 1916 or even 1906. Id. at 158. The transfer applicant put on evidence indicating that use of the water rights had been resumed, but only as far back as 1941. There was no indication that water had been delivered between 1906 or 1916 and 1941,

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Despite this apparently unrefuted period of non-use of as many as 35 years, the Idaho Supreme Court found that the transfer applicant had not abandoned or forfeited his water rights. The reasoning was that the decreed water had "in part at least [been] used by respondent. . .before it was claimed it had been forfeited." Id. at 160. Because the use of the water rights had been resumed, even after as many as 35 years of non-use, and it was done prior to anyone claiming that they had been forfeited, the forfeiture was not effective.

The ARO attempts to explain away the result in Application of Boyer by stating that "[t]he court seemed to be concluding that the water right was not forfeited because it was delivered to other lands", somehow suggesting that there had been no real five-year period of non-use. ARO at 14. This is simply a misreading of the case. As explained above, it seems clear that a 25 to 35 year period of non-use of the decreed rights was established in the case. It is the fact that the use was apparently resumed in 1941, albeit on other lands, and before anyone claimed that it had been forfeited, that led the court to conclude that forfeiture was not effective even after as many as 35 years of non-use.

Application of Boyer is directly applicable to Sagewillow's resumption of use. Assuming only for the sake of argument that there had been a period of non-use of water right nos. 33-02090 and 33-02091, and a portion of water right nos. 33-02057 and 33-02083, of five or more years, it is clear that use of the water rights was lawfully resumed. The ARO itself states that the parties agree about the "expanded use of Sage Willow following its acquisition". ARO at 13. As suggested by the findings of fact, irrigated acres increased between 1989 and 1993, prior to the present transfer applications being filed or any claim of forfeiture being made by the Protestants in this

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matter. ARO at 10. Precisely falling under the ruling in Application of Boyer explained above, then, the Director should rule that the Applicant has not forfeited its licensed water rights because they were used by the Applicant before anyone claimed they had been forfeited.

2. Sagewillow's Resumption of Use is Effective Because There has Been No Intervening Claim of Right by a Third Party.

Despite the clear resumption of use established by Sagewillow, the ARO concludes that the Applicant's resumption of use is not effective as a defense to forfeiture because "senior surface water users and other water right holders have relied on related ground water not diverted by Sage Willow's predecessor." ARO at 15. Again, this is based on a misreading of the law.

In construing the resumption of use doctrine, the ARO states that "[t]he 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. . .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." Instead, the ARO concludes, "[t]he establishment of a[n] [existing] water right is sufficient claim to the water" and junior water rights holders automatically "[move] up the priority ladder" to prevent any valid resumption of use. ARO at 15.

However, an examination of the case law makes clear that junior appropriators do not automatically move up the priority ladder to fill a senior appropriator's shoes after a five-year period of non-use by the senior appropriator. There must be some affirmative, intervening claim of right. In Idaho, the rule has been stated as follows:

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> [I]f subsequent to such five-year periods, and prior to respondent's appropriation, appellants or their predecessors in interest under claim of right and continuity of interest of diversion and application. . .rediverted and applied water, there would be no abandonment which would inure to the benefit of the respondents.

Zezi, 57 Idaho at 713 (emphasis in original). See also, Wagoner, 66 Idaho at 459-60 (holding that forfeiture is not effective if use is resumed "prior to the initiation of any right therein or claim thereto by [another]").

It is also evident that any claim of right must be established pursuant to existing law. Jackson v. Indian Creek Reservoir Ditch & Irrig. Co., 18 Idaho 513, 518 (1910) (holding that after a five-year period of non-use by an appropriator someone else "might acquire the right to use the water either by appropriation or application to a beneficial use"); Tucker v. Jones, 19 P. 571, 572-73 (Mont. 1888) (holding that "when a party abandons his water-right, and ceases to use it for some beneficial purpose, it. . .is thereafter subject to reappropriation); Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 40 P. 1066, 1068 (holding that resumption of use is effective unless "some party intervenes, and makes a valid and legal appropriation of the water"); Helvey v. U.S. Bldg. & Loan Assoc. of L.A., 184 P.2d 919, 921-22 (Cal. App. 1947) (holding that "[w]hen water rights have been abandoned they may be claimed by other persons... subject to appropriation. . .in the manner provided by law").

Existing law in Idaho requires that an "appropriation" of water be made. Of course, this can only occur by following the "application, permit and license procedure" set forth in Title 42, Idaho Code. I.C. Sec. 42-103. No such "appropriation" of Sagewillow's water rights, or the water represented by those rights, has been made.

Also, in the context of adverse possession, where "claim of right" is often an issue to be determined, it has been held that "a claim of right [must be] brought

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home . . . either by express notice to that effect or by conduct so notorious and unequivocal as to imply such notice." McGlochlin v. Coffin, 61 Idaho 440, 446-47 (1940). Therefore, even if an actual "appropriation" is not required to establish a "claim of right", there must be some express notice or notorious and unequivocal conduct implying such notice directed toward the original water right owner. No such express or implied notice exists in this case and, therefore, no "claim of right" existed prior to the resumption of use and forfeiture is not effective.

In addition, Idaho law on the subject has been interpreted by other state courts. For example, it has been observed that "Idaho and Colorado permit revival as long as no junior appropriators have obtained a right to use the water." In Re Cancellation of the Stabio Ditch Water Right on Spearfish Creek, 417 N.W.2d 391, 395 (S.D. 1987) (emphasis added). See also, Long on Irrigation, Sec. 180 (stating that a water user may resume use if "no adverse interest having been in the meanwhile acquired"). This supports the conclusion that a "right to use" the senior appropriator's water right must be "obtained" or "acquired" through some permission, such as a water right permit, before it can be said that a "claim of right" exists to the senior water right or the water represented by it.

Finally, the intervening claim of right must be a new right, not an existing water right. Ramshorn Ditch Co. v. U.S., 269 F. 80, 84 (holding that "[t]he appropriator who has abandoned his rights to water may at any time resume the possession and exercise of them, if no new rights have intervened") (emphasis added); Smith v. Green, 41 P. 1022, 1024 (Calif. 1895) (holding that "upon abandonment of the use of any part of the water, that part was subject to [a] new appropriation") (emphasis added); Long on

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Irrigation, Sec. 180 (1916) ("Where a water right has been thus lost by abandonment, the water is subject to a new appropriation.") (emphasis added).

Despite these authorities to the contrary, the ARO suggests that no new appropriation or other claim of right is necessary. An otherwise valid resumption of use may be defeated, concludes the ARO, by merely holding an existing water right. As explained above, however, this simply is not the law.

In addition, the argument that has been made in this matter and embraced in the ARO has been rejected by the Idaho Supreme Court. For example, in Jackson v. Indian Creek Reservoir Ditch & Irrig. Co., 18 Idaho 513 (1910), the Court rejected respondent's argument that "water rights. . .were extinguished the moment abandonment occurred." Jackson, 18 Idaho at 514-18. The following passage from an 1895 Colorado case best explains the type of rationale stated in the ARO -- and why it should be rejected:

> The logic of appellant's contention seems to be that appellee and its grantors, by failing to [apply water to beneficial use] from 1882 to 1890, forfeited its rights; and, although no intervening rights of appropriation attached during the existence of such inactivity, a resumption and vigorous prosecution of the enterprise was ineffectual; the theory, in effect, being that by reason of the former negligence the title was so lost that all that was necessary to vest the title in another was to lie by and watch. . .Such claims can receive no countenance in a court of equity.

Beaver Brook Reservoir & Canal Co. v. St. Vrain Reservoir & Fish Co., 40 P. 1066, 1069 (Colo. App. 1895).

It is undisputed that Sagewillow resumed the use of its water rights between 1989 and 1993. There was no intervening claim of right established prior to 1989 and no declaration of forfeiture was sought until 1993, after Sagewillow's water rights had been put back to beneficial use. As a result, the Director should rule that the previous five-

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year period of non-use, if any, is not effective as a forfeiture because of Sagewillow's lawful resumption of use.

3. Forfeiture May Not be Declared after Resumption of Use has Occurred.

For forfeiture by five-years of non-use "to be effectual, the default must be followed with a declaration of forfeiture by some competent authority" Wagoner, 66 Idaho at 460. In the Wagoner case, forfeiture of the rights in question was found not to be effective, even after five years of non-use, where the user "again took possession of the right of way and the wells in question" and no competent authority had yet "declared a forfeiture", nor had a lawsuit been commenced to obtain a decree of forfeiture. Id. Despite the fact that there had been no beneficial use of water between 1930 and 1943, the Idaho Supreme Court found that forfeiture was not effective in the following passage:

> [I]n the month of December, 1943, before any intervening right had attached, respondent again took possession of the. . .canal, right of way and wells; in other words respondent went back into possession of the same and began cleaning out and enlarging the wells for the purpose of again using the said right of way and the said wells for irrigation purposes; that it was not until after respondent had so taken possession, and while he was so in possession, that appellants ordered him off the property.

Wagoner, 66 Idaho at 461; see also, Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1965) (holding that non-use does not automatically result in forfeiture and that a formal declaration by someone in authority must be made before forfeiture can be operative).

Similarly, in the instant case, it was not until after Sagewillow had put its water rights back to beneficial use that the Protestants sought to have a forfeiture declared. However, consistent with the above, the resumption of use having been accomplished, it is too late now to have a forfeiture declared. Therefore, water right

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nos. 33-02090, 33-02091, 33-02057 and 33-02083 should be recognized as licensed in the Final Order.

B. Transfer No. 3785 Cannot Lawfully be Voided by the Department.

After stating that "Sage Willow should be able to rely on the Department's decision [on Transfer No. 3785] in proceeding with the project" in the June 23, 1995 Order Granting Reconsideration, the hearing officer has backtracked and now concludes that the previous decision has no binding effect. This decision has been reached through a number of legal errors and omissions which are explained below. As a result, the Final Order should recognize that Transfer No. 3785 cannot be voided, pursuant to the doctrines of res judicata, collateral estoppel and equitable estoppel.

1. The Doctrine of Res Judicata Prohibits the Department from Voiding Transfer No. 3785.

After properly concluding that res judicata applies to approved transfer applications, the Amended Recommended Order states that "[r]es judicata is subject to a public interest exception." ARO at 3. The application of this "public interest exception" is based on a number of legal authorities. Unfortunately, none of them are Idaho cases. The most recent Idaho case law does not refer to a "public interest exception". See e.g., Aldape v. Akins, 105 Idaho 254, 259 (wherein no reference is made to a "public interest exception" and the court states: "There are exceptions to the bar of claim preclusion. However, they are narrowly defined. . ."). In addition, the authority cited in the ARO is either not on point or inconsistent with Idaho law. For example, Dana's Housekeeping, Inc. v. Department of Labor & Industr., 886 P.2d 1147 (Ct. App. Wash. 1995), is a case involving issue preclusion, or collateral estoppel, and not a res judicata case at all. Similarly, Section 28(5)(a) of the Second Restatement of Judgments,

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listed as additional authority for the "public interest exception", is not among the exceptions noted by the Idaho courts. See e.g., Aldape, 105 Idaho at 259 (noting that the exceptions to res judicata, or claim preclusion, are narrowly defined in Section 26 of the Second Restatement). Since the Department is bound only to follow Idaho law, some Idaho case must be cited to support the "public interest exception" cited in the Amended Recommended Order.

Even if some Idaho authority exists to apply the "public interest exception" to res judicata decisions, the exception is misapplied and misinterpreted in the Amended Recommended Order. In essence, the exception is utilized to completely eliminate the binding nature and finality of an administrative approval.

The "public interest" or "public policy" cited in the ARO is the consideration of impacts on, and protection of, other water users. In addition, the ARO suggests additional reasons why res judicata should not apply. These reasons include a lack of reliance on the previous transfer approval, overlapping places of use, and failure to respond to the forfeiture question on the transfer application. ARO at 4. However, these "reasons" do not rise to the level of the "public interest exception" expressed in the cases cited by the hearing officer and, as explained below, cannot serve to negate the binding effect of the transfer approval.

Of course, the approval process for Transfer No. 3785 included consideration of the impacts on, and protection of, other water users. The Department had to determine whether other water rights would be injured and whether the transfer was in the local public interest. I.C. Sec. 42-222. The issue of forfeiture was also within the Department's jurisdiction during the transfer. Jenkins v. State, 103 Idaho 384, 387

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(1982); ARO at 2. The decision on these criteria was made final when the transfer was approved and no appeal was made.

Allowing these determinations to be reconsidered completely defeats the purpose of res judicata. Despite the Amended Recommended Order's concern for protecting other water users, the transfer process adequately took these concerns into account. Notice of the transfer was provided and an opportunity for protest was provided. A decision was made by the Department after considering the criteria of section 42-222, Idaho Code, including injury to other water users and the local public interest. In short, the impact on water users was adequately considered at the time of the transfer approval. Therefore, the "public interest exception" stated in the Amended Recommended Order is a non-issue and should not be used as a means to avoid the application of res judicata to Transfer No. 3785.

In addition, as water users notified of the transfer application, the Protestants had ample opportunity to protest the transfer application and chose not to. The "public interest exception" should not be utilized to allow the Protestants to contest the application so long after the time to appeal has expired. Such an application of the exception would not serve to benefit other water users, but would only benefit the Protestants by allowing them to, in effect, maintain an untimely protest or appeal against approval of the transfer. "It should be remembered that [the Protestants] had a plain, speedy, and adequate remedy" in the transfer process which they chose not to pursue. Moyes v. Moyes, 60 Idaho 601, 610 (1939); see also, Glenwood Irrigation Dist. v. Myers, 465 P.2d 1013, 1015 (Utah 1970) (holding that allowing plaintiff to assert forfeiture where "plaintiff did not avail itself of the statutory review and sat idly by" while the defendant

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relied on the state engineer's decision would result in "a circumvention of the orderly statutory procedure").

To say that Sagewillow did not rely on the Department's approval of Transfer No. 3785 in purchasing and installing irrigation equipment is a gross oversimplification of the matter and ignores reality. As the record clearly establishes, Application for Transfer No. 3785 received no protests and there was no reason to believe that it would not be approved. A Department "transfer analysis sheet", dated as early as January 2, 1991, indicates that the transfer application was reviewed, found to be complete, and recommended for approval. In anticipation of the expected transfer approval, drilling permits were applied for and obtained prior to the formal transfer approval. These drilling permissions were granted by the Department and were expressly conditioned on the Applicant's understanding that the transfer may or may not ultimately be approved. Of course, the transfer was ultimately approved during 1992. While this does not excuse Sagewillow's "jumping the gun", the subsequent approval of the transfer certainly sanctioned what was done. Therefore, while Sagewillow took a risk by acting early on the expected transfer approval, the transfer was nonetheless approved and was certainly relied upon as the basis for proceeding with the change. We do not understand this to be a departure from the Department's ordinary procedures. In fact, the condition placed on the drilling permits seems to indicate just the opposite.

In addition, the fact that Transfer No. 3785 moved water onto land that was already identified as a place of use by another water right is of no relevance whatsoever to the issue of whether Transfer No. 3785 should be voided. The fact is that the transfer was approved and those acres were irrigated pursuant to the transfer.

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Finally, far too much is made in the Amended Recommended Order of the fact that the Applicant did not respond to the forfeiture question in the transfer application. The Applicant did not lie by leaving the question blank. If anything, it is an indication that the Applicant did not know the correct answer. Certainly, the Department could have returned the application to the Applicant requesting that this question be answered. During consideration of the application itself, the Department could have asked the Applicant whether there was any knowledge of forfeiture. If anything, the fact that the question was left unanswered and that the Applicant had been familiar with the property for less than five years should have served as a "red flag" to the Department that further investigation of the forfeiture issue might be warranted. However, the Department chose to do none of these things, instead noting the application's completeness and recommending the application for approval every step of the way. The Applicant is entitled to rely on this approval and the finality of the process. The transfer cannot be voided simply because a blank on the application was not filled in. Again, we do not understand this to be a departure from the Department's ordinary operating procedures and it should not be utilized as an excuse to void transfer no. 3785.

For all of these reasons, Transfer No. 3785 cannot be voided under the doctrine of res judicata.

2. Collateral Estoppel Prohibits the Voiding of Transfer No. 3785.

Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are recognized as two separate and distinct legal concepts by the Idaho courts. Aldape, 105 Idaho at 256. Yet, the ARO fails to analyze the issue of collateral estoppel or explain why it does not bar the Department or the Protestants from seeking to have Transfer No. 3785 voided. The same issue of forfeiture is before the Department that

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was within its jurisdiction during the proceedings on Transfer No. 3785. The issue that is being raised by the Protestants now is the same issue that could have been raised by them in the Department's consideration of Transfer No. 3785. Therefore the legal concept of issue preclusion, or collateral estoppel, applies. Moreover, as explained below, application of the rule against collateral attacks prohibits the Department from voiding transfer no. 3785.

A collateral attack is an attempt to avoid, defeat or evade a judgment, or to deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. This is the case where the judgment forms a part of the evidence by which a claim is supported. 49 C.J.S. Sec. 408. In effect, the Protestants in this matter seek to collaterally attack transfer no. 3785, upon which the Applicant relies. For the reasons set forth below, this collateral attack is impermissible.

In Idaho, the general rule is that a judgment, unless annulled or reversed in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, in any collateral action or proceeding. Rogers v. National Surety Co., 53 Idaho 128, 132, 22 P.2d 141, 142 (1933) (quoting from 49 C.J.S. Sec. 401). The rule has been followed in a number of other Idaho cases. See e.g., Tingwall v. King Hill Irrig. Dist., 66 Idaho 76, 155 P.2d 605 (1945) and Gordon v. Gordon, 118 Idaho 804, 800 P.2d 1018 (1990).

The rule against collateral attack applies to all varieties of valid judgments, including proceedings relating to water rights. 49 C.J.S. Sec. 402; see e.g., McLean v. Row, 56 Idaho 646, 57 P.2d 689 (1936). Moreover, in quasi-judicial actions, the rule applies to decisions of state boards and officers acting judicially or when called on to act

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judicially in matters of administration. 49 C.J.S. Sec. 407.d. As a result, there is little doubt that the rule should apply to orders and judgments of the Department.

There are very few exceptions to the rule against collateral attacks. They include lack of subject matter or personal jurisdiction or extrinsic fraud appearing on the face of the judgment. Tingwall Irrig. Dist., 66 Idaho at 82-83. None of the exceptions exist in this case.

In addition, the rule applies to all parties to the proceedings in which the judgment was rendered. The term "parties", in the sense of those concluded by a judgment, includes all those who had the right to control or defend the proceedings and appeal. 49 C.J.S. Sec. 413. Even a stranger to the record, who was not a party to the action in which judgment was rendered, cannot object to the judgment because of errors or irregularities or for any matters which might have been set up in defense to the original action. 49 C.J.S. Sec. 414. There can be no doubt that, under the provisions of section 42-222, Idaho Code, including its publication and protest provisions, along with the right to appeal any administrative determination, the Protestant had the right to get involved with the earlier transfer proceedings and raise the issue of forfeiture at that time. However, they chose not to do so and must be bound by that decision.

Consistent with section 42-222, Idaho Code, the application for transfer no. 3785 was published. No protests were received. The Department evaluated the transfer under the criteria of section 42-222 and concluded that the transfer should be approved and finalized. Sagewillow proceeded accordingly.

As a legal matter, transfer no. 3785 cannot be collaterally attacked by the Protestants to the current transfer proposal. The current transfer cannot be denied on

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the basis of an impermissible collateral attack on a transfer that was, subject to the ability of others to protest, approved and finalized years ago.

Whether water right no. 33-02091 had been forfeited or abandoned prior to the previous transfer is immaterial. The opportunity to raise those issues in the previous transfer proceeding, and prove them through clear and convincing evidence, has long since passed. The Protestants are collaterally estopped from bringing the issues up in the current proceedings.

Simply put, the Protestants must live with the fact that the previous transfer was legally approved and completed. Again, "[i]t should be remembered that [the Protestants] had a plain, speedy, and adequate remedy" in the previous transfer proceeding. Moyes, 60 Idaho at 610.

3. Equitable Estoppel Prohibits the Voiding of Transfer No. 3785.

The ARO states that "[e]stoppel cannot be applied to the Department of Water Resources in this case" because "[c]onsideration of an application for transfer is part of the sovereign responsibility of the Department." ARO at 4. Unfortunately, this conclusion is based on an improper reading of the law. In addition, application of equitable estoppel in this case prevents the voiding of transfer no. 3785.

Equitable estoppel can apply to a government agency acting in its sovereign capacity. Estoppel can be applied "if the effects of estoppel do not unduly damage the public interest." Brandt v. State, 126 Idaho 101, ___, 878 P.2d 800, 804 (Ct. App. 1994) (especially n.4, listing other jurisdictions that have applied estoppel to the government in its sovereign capacity); United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973;) see also, Boise City v. Sinsel, 72 Idaho 329, 338 (1952) ("equitable estoppel will

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lie, but. . ."); 31 C.J.S. Sec. 138. The Amended Recommended Order failed to recognize this possibility, stating instead that estoppel simply cannot apply.

Application of equitable estoppel to transfer no. 3785 would not "damage the public interest". As argued above in the context of res judicata, refusal to void Transfer No. 3785 would not be adverse to the public interest. The local public interest was considered during the transfer process itself.

In addition, in the context of forfeiture, other state courts have held that the government, and private parties, can be estopped from declaring a forfeiture. See e.g., Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1965) ("right to declare forfeiture waived if not "promptly asserted"); Glenwood Irrigation Dist. v. Myers, 465 P.2d 1013, 1015 (Utah 1970) (holding that plaintiff was estopped from asserting defendant's forfeiture where "plaintiff did not avail itself of the statutory review and sat idly by while defendant in reliance on the [state] engineer's decision materially altered his position. This action constitutes a circumvention of the orderly statutory procedure"); Kinney on Irrigation and Water Rights, Second Edition, at 2040 (1912) (observing "that it is the duty of one, where he sees his rights about to be invaded by another to speak out and lay claim to the same; otherwise he will be estopped from afterward setting them up and claiming them. . .By reason of his failing to speak when he should have spoken, he was estopped from thereafterward asserting or claiming the right.")

Where a party consents to an act that could not have been lawfully done without his consent, and thereby induces others to do that which they might have otherwise abstained from, that party cannot question the legality of the action to the prejudice of those who acted on such consent. Murtaugh Highway Dist. v. Twin Falls Highway Dist., 65 Idaho 260, 267, 142 P.2d 579, 582 (1943). This legal doctrine of quasi-

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estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him or her." KTVB, Inc. v. Boise City, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). The person invoking the estoppel must have been induced to change his position. Id., 94 Idaho at 281. He must also have a right to rely upon the other's actions. Alder v. Mountain States Telephone & Telegraph Co., 92 Idaho 506, 511, 446 P.2d 628, 633 (1968).

The very definition of estoppel indicates its applicability in this case. The Department considered and approved transfer no. 3785, thereby granting its consent to the proposed changes to water right no. 33-02091. Subsequently, Sagewillow's position was changed. In reliance on transfer no. 3785, the Applicant made a substantial investment and completed the indicated changes, in compliance with the conditions of the approved transfer. Sagewillow certainly had a right to rely upon the Department's approval and voiding of the transfer at this late date would work a serious injustice to Sagewillow. As a result, the Department is precluded from asserting, to Sagewillow's disadvantage, a position inconsistent with that previously taken. This includes any challenge to the legality of the transfer.

The fact that 320 acres are irrigated pursuant to transfer no. 3785 is undisputed. As a result, the Final Order should recognize the continued irrigation of 320 acres under water right no. 33-02091.

C. The Department Must Recognize the Irrigation of 260 Acres Under Water Right Nos. 33-02086 and 33-07018.

In the ARO, the hearing officer concluded that the total number of acres authorized for irrigation under water right nos. 33-02086 and 33-07018 is 230 acres. This was based on the testimony of Terry Scanlan and, according to the ARO, corroborating

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information prepared by C.E. Brockway. The Applicant suggests that a clarification of the facts in this matter will show that irrigation of 260 acres, rather than 230 acres, should be recognized.

Some additional farmland, often referred to as the Frew Place, was acquired by Sagewillow from Terry and David Hawley in the spring of 1993. Sagewillow actually purchased only about 229 of the 260 irrigated acres. However, the purchase did include all of the water rights appurtenant to the entire farm, two water rights licenses, nos. 33-02086 and 33-07018, both of which were then made the subject of the pending transfer proceeding. The hearing officer has consistently tried to reduce the number of acres irrigated under these two rights to approximately 230.

While 30 acres is not a large increment relative to this entire proceeding, we still think the facts have been confused and misunderstood and that the matter must be addressed again. In the first "recommended order," the hearing officer relied on an estimate by Terry Scanlan, which, in issuing his "Order Granting Petition for Reconsideration," he admitted did "not rise to the level of clear and convincing evidence justifying a reduction in acreage." However, in the "Amended Recommended Order," the hearing officer purports to have reviewed the irrigated acreage estimates prepared by Dr. Charles E. Brockway. He found as a fact (Findings of Fact No. 23 in Amended Recommended Order) that Dr. Brockway's estimates support Scanlan's estimate that the irrigated land on the Frew Place consisted of 230, rather than 260 acres. Dr. Brockway's irrigated acreage estimates support no such finding.

First, we reiterate that Scanlan's estimate was based upon a single, difficult to read, and very small scale aerial photograph. He was never present personally on the land, and made no examination during any irrigation season or even an on-site attempt

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during any non-irrigation season, to determine whether any land appeared to have been previously irrigated or not. The latest field examination done by Department personnel in 1980 determined that 260 acres were irrigated under the combination of the two water rights. There was no evidence that acreages had been reduced or that irrigation practices had changed in any manner between 1980 and 1993. The only evidence to support a finding that irrigated acreage had been reduced by 30 acres for five consecutive years prior to the filing of the application for transfer was Scanlan's estimate derived from the aerial photograph.

The determination that somehow Dr. Brockway's acreage estimates corroborate a finding of five consecutive years of non-use on 30 of the 260 acres is astounding. Dr. Brockway's assignment and effort was to analyze consumptive use of irrigation applications within acreage on lands owned by Sagewillow, Inc. only. As we said earlier, the lands purchased by Sagewillow, Inc. from Terry and David Hawley in 1993, (commonly referred to as the Frew Place) contain only about 229 of the total irrigated acres on the Frew Place. The land retained by the Hawleys in the sale transaction consists of most of the Northwest Quarter of the Southwest Quarter of Section 32, Township 8 North, Range 28 East. A review of the water rights license, 33-02086, and the field examiners reports prepared during the licensing of water right no. 33-07018 in 1980, indicate that there were approximately 31 acres of irrigated lands within the Northwest Quarter of the Southwest Quarter of said Section 32, the land retained by the Hawleys and not purchased by Sagewillow. Sagewillow purchased all of the water rights, but not all of the land, and it was contemplated that Sagewillow would transfer the place of use of the two water rights and dry up the 31 acres formerly irrigated within the quarter-quarter section retained by the Hawleys.

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Dr. Brockway's analysis of consumptive use on lands irrigated by Sagewillow did not include the 31 formerly irrigated acres retained by the Hawleys. However, there was no evidence that said 31 acres, or any portion thereof, had not been irrigated for five consecutive years prior to the filing of the applications for transfer. If the 31 formerly irrigated acres within the referenced quarter-quarter section were added to Dr. Brockway's estimates, we would be back to the total of some 260 irrigated acres under the two rights.

Dr. Brockway's estimates were, of course, based on actual visits to and on-site observations of the land during the irrigation season, not merely on a review of a small scale aerial photograph, which, even if it had been clear and easy to interpret, would capture only a single moment in time anyway. We do not understand the desire of the hearing officer to find a forfeiture of 30 acres under these two rights. Not only is there no clear and convincing evidence of non-use for five consecutive years prior to the filing of the application for transfer, but the best, and most creditable, evidence is entirely to the contrary.

Even if it can be established by clear and convincing evidence that some portion of water right nos. 33-02086 and 33-07018 were not used for five continuous years, the Applicant asserts that the use of the water rights has been fully, and lawfully, resumed. Consistent with the arguments presented above regarding water right nos. 33-02090 and 33-02091, this resumption of use was accomplished prior to any claim of right or any claim of forfeiture and should be recognized as a lawful resumption of use.

Therefore, the Director should recognize the irrigation of 260 acres pursuant to water right nos. 33-02086 and 33-07018.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons listed above, the Applicant respectfully requests that the Director correct the errors noted in the Amended Recommended Order of November 7, 1995 and issue a Final Order to:

1. Recognize the lawful resumption of use of water right nos. 33-02090, 33-02091, 33-02057, and 33-02083 which has occurred;

2. Recognize the validity and binding effect of transfer no. 3785 and authorize the continued irrigation of 320 acres pursuant to water right no. 33-02091;

3. Recognize the irrigation of 260 acres pursuant to water right nos. 33-02086 and 33-07018; and

4. Grant Applications for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226, 4227, consistent with the transfer applications and these Exceptions to the Amended Recommended Order.

DATED this 26th day of December, 1995.

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

J. Evan Robertson
ROSHOLT, ROBERTSON & TUCKER

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CERTIFICATE OF MAILING

I hereby certify that on this 26th day of December, 1995, I served a copy of the foregoing **EXCEPTIONS TO THE AMENDED RECOMMENDED ORDER** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (hand delivered)
222 Shoshone Street East
Twin Falls, ID 83301

Idaho Department of Water Resources (via fax and mail)
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720

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

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Department of Water Resources

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 SAGEWILLOW, INC.	)	**PETITION FOR RECONSIDERATION OF AMENDED RECOMMENDED ORDER**

I. DESCRIPTIVE SUMMARY

Pursuant to the notice accompanying the Amended Recommended Order of November 7, 1995 and Rule 720 of the IDWR Rules of Procedure, IDAPA 37.01.01.720, the applicant, Sagewillow, Inc., through its joint counsel, hereby submits the following Petition for Reconsideration of the Amended Recommended Order (ARO).

In short, the Petition requests reconsideration of the following issues by the hearing officer: (1) whether the use of water right nos. 33-02090 and 33-02091 was resumed prior to claim of right by a third party; (2) whether transfer no. 3785 can lawfully be voided by IDWR; and (3) whether irrigation of 30 of the licensed 260 irrigated acres on the Frew

Place has been forfeited and, if so, whether the use was resumed prior to a claim of right by a third party.

II. ISSUES PROPOSED FOR RECONSIDERATION

The purpose of reconsideration is to allow for the correction of errors of fact and law, thereby providing a mechanism for corrective action short of an appeal. First Security Bank v. Neibaur, 98 Idaho 598, 603 (1977). By this Petition, it is the Applicant's intent to bring legal errors and omissions to the hearing officer's attention so that they can be corrected. The issues proposed for reconsideration are stated below.

A. Whether the Use of Water Right Nos. 33-02090 and 33-02091 was Resumed Prior to Claim of Right by a Third Party.

Simply stated, the Amended Recommended Order misinterprets the law of this state with regard to the revival of a forfeited right and should be reconsidered.

The long-established rule with regard to resumption of use is that "forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water right prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 531-32 (1944); Application of Boyer, 73 Idaho 152, 160 (1952). No Idaho appellate court has stated otherwise in the past half-century.

Therefore, when considering whether a lawful resumption of use has occurred, there are three questions which must be asked: (1) was their a five-year period of non-use; (2) was the use resumed by the original owner; and (3) was the use resumed prior to the claim of right by a third party?

As correctly noted in the Amended Recommended Order, Sagewillow does not agree that clear and convincing proof exists to show a five-year period of non-use for any

of the water rights involved in the pending transfers. However, assuming for the sake of argument that there has been such a period of non-use, the next question is whether the use has been resumed. Clearly, the testimony of Jerry Pancheri, indicating an increase in the number of acres irrigated between 1989 and 1993, is evidence of such resumption of use.

Assuming a five-year period of non-use, and given the fact that the use of the water rights was resumed, the only remaining question is whether the resumption of use occurred prior to the claim of right by a third party. Necessarily, this determination requires that "claim of right by a third party" be defined.

On this point, the Amended Recommended Order concludes that "[t]he 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. . .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." ARO at 15. In other words, the Amended Recommended Order concludes that a "claim of right by a third party" to another's water right includes any existing water right which is junior to, and at least partially unfulfilled or as a result of, the forfeited water right. It does not take much analysis to conclude that such a definition would completely eliminate the resumption of use doctrine. In virtually every case of non-use and resumption in Idaho there will be such an existing water right and, therefore, a "claim of right by a third party." However, the Amended Recommended Order cites no direct statement of law for this definition. Perhaps it is because none exists.

Fortunately, some meaningful guidance on the term "claim of right" does exist in Idaho law and in the interpretation of Idaho law by other state courts.

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Idaho law makes abundantly clear that once water rights are lost through forfeiture they revert to the state and are again subject to appropriation by others. I.C. Sec. 42-222; Jenkins v. State, 103 Idaho 384, 387-88 (1982); Idaho Power Co. v. State, 104 Idaho 575, 588-89 (1983). Of course, "appropriation" in Idaho can only occur by following the "application, permit and license procedure" set forth in Title 42, Idaho Code. I.C. Sec. 42-103. No such "appropriation" of Sagewillow's water rights, or the water represented by those rights, has been made. Therefore, no "claim of right" existed before, or even after, the use of Sagewillow's water rights was resumed and "forfeiture is not effective" under the Carrington v. Crandall/Boyer rule.

Also, in the context of adverse possession, where "claim of right" is often an issue to be determined, it has been held that "a claim of right [must be] brought home . . .either by express notice to that effect or by conduct so notorious and unequivocal as to imply such notice." McGlochlin v. Coffin, 61 Idaho 440, 446-47 (1940). Therefore, even if an actual "appropriation" is not required to establish a "claim of right", there must be some express notice or notorious and unequivocal conduct implying such notice directed toward the original water right owner. No such express or implied notice exists in this case and, therefore, no "claim of right" existed prior to the resumption of use.

In addition, Idaho law on the subject has been interpreted by other state courts. For example, it has been observed that "Idaho and Colorado permit revival as long as no junior appropriators have obtained a right to use the water." In Re Cancellation of the Stabio Ditch Water Right on Spearfish Creek, 417 N.W.2d 391, 395 (S.D. 1987)(emphasis added). This supports the conclusion that a "right to use" the senior appropriator's water right must be "obtained" through some permission, such as a water right

permit, before it can be said that a "claim of right" exists to the senior water right or the water represented by it. See also, Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1965)(holding that non-use does not automatically result in forfeiture and that a formal declaration by someone in authority must be made before forfeiture can be operative).

The law makes clear that it is not enough to merely hold a junior water right. One does not automatically fit into the shoes of the senior right holder upon forfeiture. Therefore, the Amended Recommended Order's interpretation and application of the law regarding resumption of use is incorrect and should be reconsidered.

B. Whether Transfer No. 3785 can Lawfully be Voided by the Department.

After stating that "Sage Willow should be able to rely on the Department's decision [on Transfer No. 3785] in proceeding with the project" in the June 23, 1995 Order Granting Reconsideration, the hearing officer has backtracked and now concludes that the previous decision has no binding effect. This decision has been reached through a number of legal errors and omissions which are explained below.

1. The Amended Recommended Order Improperly Applies the Public Interest Exception to Transfer No. 3785.

After properly concluding that res judicata applies to approved transfer applications, the Amended Recommended Order states that "[r]es judicata is subject to a public interest exception." ARO at 3. The application of this "public interest exception" is based on a number of legal authorities. Unfortunately, none of them are Idaho cases. The most recent Idaho case law does not refer to a "public interest exception". See e.g., Aldape v. Akins, 105 Idaho 254, 259 (wherein no reference is made to a "public interest exception" and the court states: "There are exceptions to the bar of claim preclusion. However, they

are narrowly defined. . ."). In addition, the authority cited in the Amended Recommended Order is either not on point or inconsistent with Idaho law. For example, Dana's Housekeeping, Inc. v. Department of Labor & Industr., 886 P.2d 1147 (Ct. App. Wash. 1995), is a case involving issue preclusion, or collateral estoppel, and not a res judicata case at all. Similarly, Section 28(5)(a) of the Second Restatement of Judgments, listed as additional authority for the "public interest exception", is not among the exceptions noted by the Idaho courts. See e.g., Aldape, 105 Idaho at 259 (noting that the exceptions to res judicata, or claim preclusion, are narrowly defined in Section 26 of the Second Restatement). Since the Department is bound only to follow Idaho law, some Idaho case must be cited to support the "public interest exception" cited in the Amended Recommended Order.

Even if some Idaho authority exists to apply the "public interest exception" to res judicata decisions, the exception is misapplied and misinterpreted in the Amended Recommended Order. In essence, the exception is utilized to completely eliminate the binding nature and finality of an administrative approval.

The "public interest" or "public policy" cited in the Recommended Order is the consideration of impacts on, and protection of, other water users. In addition, the Amended Recommended Order suggests additional reasons why res judicata should not apply. These reasons include a lack of reliance on the previous transfer approval, overlapping places of use, and failure to respond to the forfeiture question on the transfer application. ARO at 4. However, these "reasons" do not rise to the level of the "public interest exception" expressed in the cases cited by the hearing officer and, as explained below, cannot serve to negate the binding effect of the transfer approval.

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Of course, the approval process for Transfer No. 3785 included consideration of the impacts on, and protection of, other water users. The Department had to determine whether other water rights would be injured and whether the transfer was in the local public interest. I.C. Sec. 42-222. The issue of forfeiture was also within the Department's jurisdiction during the transfer. Jenkins, 103 Idaho at 387; ARO at 2. The decision on these criteria was made final when the transfer was approved and no appeal was made.

Allowing these determinations to be reconsidered completely defeats the purpose of res judicata. Despite the Amended Recommended Order's concern for protecting other water users, the transfer process adequately took these concerns into account. Notice of the transfer was provided and an opportunity for protest was provided. A decision was made by the Department after considering the criteria of section 42-222, Idaho Code, including injury to other water users and the local public interest. In short, the impact on water users was adequately considered at the time of the transfer approval. Therefore, the "public interest exception" stated in the Amended Recommended Order is a non-issue and should not be used as a means to avoid the application of res judicata to Transfer No. 3785.

In addition, as water users notified of the transfer application, the Protestants had ample opportunity to protest the transfer application and chose not to. The "public interest exception" should not be utilized to allow the Protestants to contest the application so long after the time to appeal has expired. Such an application of the exception would not serve to benefit other water users, but would only benefit the Protestants by allowing them to, in effect, maintain an untimely protest or appeal against approval of the transfer. Again, "[i]t should be remembered that [the Protestants] had a plain, speedy, and adequate

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remedy" in the transfer process which they chose not to pursue. Moyes v. Moyes, 60 Idaho 601, 610 (1939); see also, Glenwood Irrigation Dist. v. Myers, 465 P.2d 1013, 1015 (Utah 1970)(holding that allowing plaintiff to assert forfeiture where "plaintiff did not avail itself of the statutory review and sat idly by" while the defendant relied on the state engineer's decision would result in "a circumvention of the orderly statutory procedure").

To say that Sagewillow did not rely on the Department's approval of Transfer No. 3785 in purchasing and installing irrigation equipment is a gross oversimplification of the matter and ignores reality. As the record clearly establishes, Application for Transfer No. 3785 received no protests and there was no reason to believe that it would not be approved. In anticipation of the expected transfer approval, drilling permits were applied for. These drilling permissions were granted by the Department. While this does not excuse Sagewillow's "jumping the gun", the subsequent approval of the transfer certainly sanctioned what was done. Therefore, while Sagewillow took a risk by acting early on the expected transfer approval, the transfer was nonetheless approved and was certainly relied upon as the basis for proceeding with the change.

In addition, the fact that Transfer No. 3785 moved water onto land that was already identified as a place of use by another water right is of no relevance whatsoever to the issue of whether Transfer No. 3785 should be voided. The fact is that the transfer was approved and those acres were irrigated pursuant to the transfer.

Finally, far too much is made in the Amended Recommended Order of the fact that the Applicant did not respond to the forfeiture question in the transfer application. The Applicant did not lie by leaving the question blank. If anything, it is an indication that the Applicant did not know the correct answer. Certainly, the Department could have

returned the application to the Applicant requesting that this question be answered. During consideration of the application itself, the Department could have asked the Applicant whether there was any knowledge of forfeiture. If anything, the fact that the question was left unanswered and that the Applicant had been familiar with the property for less than five years should have served as a "red flag" to the department that further investigation of the forfeiture issue might be warranted. However, the Department chose to do none of these things and the application for transfer was ultimately approved. The Applicant is entitled to rely on this approval and the finality of the process. The transfer cannot be voided simply because a blank on the application was not filled in.

For all of these reasons, reconsideration should be granted to determine the Idaho authority, if any, for the "public interest exception", and its particular application, or misapplication, in this matter.

2. The Amended Recommended Order Fails to Analyze the Collateral Estoppel Issue.

Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, are recognized as two separate and distinct legal concepts by the Idaho courts. Aldape, 105 Idaho at 256. Yet, the Amended Recommended Order fails to analyze the issue of collateral estoppel or explain why it does not bar the Department or the Protestants from seeking to have Transfer No. 3785 voided. This is significant because, if it applies, there are very few exceptions to the rule against collateral attacks. They include lack of subject matter or personal jurisdiction or extrinsic fraud appearing on the face of the judgment. Tingwall v King Hill Irrig. Dist., 66 Idaho 76, 82-83 (1945). As suggested previously, none of the exceptions exist in this case.

The same issue of forfeiture is before the Department that was within its jurisdiction during the proceedings on Transfer No. 3785. The issue that is being raised by the Protestants now is the same issue that could have been raised by them in the Department's consideration of Transfer No. 3785. Therefore the legal concept of issue preclusion, or collateral estoppel, applies and must be analyzed by the hearing officer. The failure to do so is of obvious significance and this legal error should be corrected through reconsideration of the Amended Recommended Order.

3. The Amended Recommended Order Improperly Concludes that Equitable Estoppel Cannot be Applied to the Department.

The Amended Recommended Order states that "[e]stoppel cannot be applied to the Department of Water Resources in this case" because "[c]onsideration of an application for transfer is part of the sovereign responsibility of the Department." ARO at 4. Unfortunately, this conclusion is based on an improper reading of the law.

As stated in the Applicant's Response to the Order Granting Reconsideration, equitable estoppel can apply to a government agency acting in its sovereign capacity. Estoppel can be applied "if the effects of estoppel do not unduly damage the public interest." Brandt v. State, 126 Idaho 101, ___, 878 P.2d 800, 804 (Ct. App. 1994)(especially n.4, listing other jurisdictions that have applied estoppel to the government in its sovereign capacity); United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973;) see also, Boise City v. Sinsel, 72 Idaho 329, 338 (1952)("equitable estoppel will lie, but. . ."); 31 C.J.S. Sec. 138. The Amended Recommended Order failed to recognize this possibility, stating instead that estoppel simply cannot apply.

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At a minimum, then, the issue of equitable estoppel should be reconsidered for a determination of whether its application would "damage the public interest". As argued above in the context of res judicata, refusal to void Transfer No. 3785 would not be adverse to the public interest. The local public interest was considered during the transfer process itself.

In addition, in the context of forfeiture, other state courts have held that the government, and private parties, can be estopped from declaring a forfeiture. See e.g., Sturgeon v. Brooks, 281 P.2d 675, 683 (Wyo. 1965)("right to declare forfeiture waived if not "promptly asserted") and Glenwood Irrigation Dist. v. Myers, 465 P.2d 1013, 1015 (Utah 1970)(holding that plaintiff was estopped from asserting defendant's forfeiture where "plaintiff did not avail itself of the statutory review and sat idly by while defendant in reliance on the [state] engineer's decision materially altered his position. This action constitutes a circumvention of the orderly statutory procedure.")

For all of these reasons, reconsideration should be granted on the issue of whether Transfer No. 3785 can be lawfully voided by the Department.

C. Whether a Portion of the Water Rights on the Frew Place Have Been Forfeited and, if so, Whether Their Use Was Resumed Prior to Claim of Right by a Third Party.

In the Amended Recommended Order, the hearing officer concluded that the total number of acres authorized for irrigation under water right nos. 33-02086 and 33-07018 is 230 acres. This was based on the testimony of Terry Scanlan and, according to the Amended Recommended Order, corroborating information prepared by C.E. Brockway. While the Applicant reserves the right to challenge this finding upon appeal, an additional facet of the issue was not addressed by the hearing officer and should be reconsidered.

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Given the fact that two licenses were granted for 260 acres on the basis of a department field examination, it is clear that 260 acres have actually been irrigated in the past. This constitutes prima facie evidence of the acres irrigated and is also supported by SRBA claims filed three years before Sagewillow acquired the property. There is also evidence that 260 acres have been irrigated in the recent past.

Therefore, even if the hearing officer will not reconsider the issue of whether 260 acres have continually been irrigated on the Frew Place (i.e., that 30 acres have been forfeited through non-use for five consecutive years), he should nonetheless analyze whether the use of these rights has been lawfully resumed by subsequent irrigation of 260 acres. This necessarily involves the same legal issues regarding resumption of use and "claim of right by a third party" that are raised by the applicant above in the context of water right nos. 33-02090 and 33-02091.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons listed above, the applicant respectfully requests that the hearing officer grant the Petition for Reconsideration of the Amended Recommended Order of November 7, 1995.

DATED this 28th day of November, 1995.

for

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

J. Evan Robertson
ROSHOLT, ROBERTSON & TUCKER

MAR 2 7 1996

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of November, 1995, I served a copy of the foregoing **PETITION FOR RECONSIDERATION OF THE AMENDED RECOMMENDED ORDER** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (via fax and mail)
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720

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

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

Norman M. Semanko

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

November 14, 1995

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

RE: Sage Willow Order

Dear Mr. Semanko:

I have enclosed a copy of the Amended Recommended Order in connection with the Sage Willow Transfers. I have updated the mailing certificate to reflect you and your firm as a party in this mater.

I apologize for any inconvenience this may have caused you.

Sincerely,

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

Encl.

MAR 2 7 1996

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of November, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **AMENDED RECOMMENDED ORDER** to the following:

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

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

MAR 2 7 1996

ROSHOLT, ROBERTSON & TUCKER
Chartered
ATTORNEYS AT LAW

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J. EVAN ROBERTSON
JAMES C. TUCKER
GARY D. SLETTE
JERRY V. JENSEN
BRUCE M. SMITH
JOHN K. SIMPSON
PATRICK D. MADIGAN
PAUL W. SAMUELSON
TIMOTHY J. STOVER
NORMAN M. SEMANKO

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BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034

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Department of Water Resources

November 13, 1995

Gary Spackman, Hearing Officer
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83720

VIA FACSIMILE

Re: Sage Willow, Inc. Transfers -- Service of Documents

Dear Gary:

It is our understanding that a decision was recently issued regarding reconsideration of your recommended order in this matter. Unfortunately, we have not received a copy of any such decision.

By Notice of Representation, dated July 11, 1995, the department was informed that the law firm of Rosholt, Robertson & Tucker had joined the Law Offices of Holden, Kidwell, Hahn & Crapo in the representation of Sage Willow, Inc. The notice requested that both representatives receive service of documents in the transfer proceedings.

We thought the matter had been taken care of when the July 13, 1995 Order Extending Time for Filing Briefs on Reconsideration was correctly served to both co-representatives/counsel. (See enclosed Certificate of Service).

Please serve a copy of any decision recently made in this matter to our office consistent with the July 11 Notice of Representation and July 13 Certificate of Service. Consistent with the law, we will consider the date of such service to be the critical date for any applicable judicial, statutory or administrative filing deadlines.

Thank you for your cooperation.

Sincerely,

NORMAN M. SEMANKO

11139503.NMS
Enclosure

MAR 27 1996

CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of July, 1995 I caused to be served a true and correct copy of the following described document upon the person(s) listed below by the method indicated and addressed to the following:

Document served: ORDER EXTENDING TIME FOR FILING BRIEFS ON RECONSIDERATION

Kent W. Foster
HOLDEN KIDWELL HAHN & CRAPO
P.O. Box 50130
Idaho Falls, ID 83405
Fax: (208) 523-9518

✓ U.S. Mail
___ Hand Delivery
___ Express Mail
✓ Facsimile

J. Evan Robertson
Norman M. Semanko
ROSHOLT ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906
Fax: (208) 736-0041

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Blaine County Canal Co.
HC 65, Box 1018
Howe, ID 83405

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7 1996

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
Boise, ID 83701
Fax: 343-9492/342-8920

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___ Express Mail
✓ Facsimile

Deborah Drew-Ellis
Deborah Drew-Ellis

ROSHOLT, ROBERTSON & TUCKER
Chartered
ATTORNEYS AT LAW

JOHN A. ROSHOLT
I. EVAN ROBERTSON
JAMES C. TUCKER
GARY D. SLETTE
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P.O. BOX 2139
BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034

DATE: 11-13-95

FAX TO: Gary Spackman FAX NO. 327-7866

FROM: Norm Semanko

RE: Sage Willow, Inc. Transfers

NUMBER OF PAGES INCLUDING THIS ONE: 4

IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL US BACK AS SOON AS POSSIBLE AT (208) 734-0700.

THE INFORMATION CONTAINED IN THIS FACSIMILE COMMUNICATION IS ATTORNEY/CLIENT PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS COVER PAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION OR THE INFORMATION CONTAINED HEREIN IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY CALL AT (208) 734-0700, AND RETURN THIS FACSIMILE TO US BY MAIL AT THE ABOVE ADDRESS. WE APPRECIATE YOUR COOPERATION.

ADDITIONAL MESSAGE:

MAR 2 7 1996

ROSHOLT, ROBERTSON & TUCKER
Chartered
ATTORNEYS AT LAW

JOHN A. ROSHOLT
J. EVAN ROBERTSON
JAMES C. TUCKER
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November 13, 1995

Gary Spackman, Hearing Officer
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Sincerely,

NORMAN M. SEMANKO

11139503.NMS
Enclosure

MAR 27 1996

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FILED
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Deborah Drew-Ellis
Deborah Drew-Ellis

State of Idaho
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Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

November 8, 1995

RE: In the matter of Application for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 in the name of Sage Willow, Inc.

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

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ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,

L. Glen Saxton

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

AUG 07 1995

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Department of Water Resources

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 SAGEWILLOW, INC.	))))))	**APPLICANT'S RESPONSE TO ORDER GRANTING PETITION FOR RECONSIDERATION**

I. DESCRIPTIVE SUMMARY

Pursuant to the June 23, 1995 Order Granting Petition for Reconsideration and the July 13, 1995 Order Extending Time for Filing Briefs on Reconsideration in the above-captioned matter, the applicant, Sagewillow, Inc., through its joint counsel, hereby submits the following response. In short, the response requests that the hearing officer revise the Recommended Order of May 22, 1995 to: (1) recognize the validity and binding effect of transfer no. 3785 and authorize the continued irrigation of 320 acres pursuant to water right no. 33-02091; (2) authorize the continued irrigation of 260 acres pursuant to water right nos. 33-02086 and 33-07018; and (3) recognize that water rights no. 33-02090 and 33-02091 were not abandoned.

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II. ISSUES ON RECONSIDERATION

The June 23 Order defines the issues on reconsideration before the hearing officer as follows:

(1) whether use of water pursuant to right no. 33-2091 should be authorized because of the approval of transfer no. 3785; and

(2) whether the number of acres authorized for irrigation pursuant to rights no. 33-02086 and 33-07018 (Frew Place) was correct.

The June 23 Order also states that the conclusions of law contained in the Recommended Order of May 22, 1995 regarding forfeiture and the resumption of use defense would not be reconsidered by the hearing officer. As a result, consistent with Rule 720 of the Rules of Procedure, IDAPA 37.01.01.720, and section 67-5244, Idaho Code, the applicant hereby reserves the right to file exceptions to the recommended order, or any modified recommended order, with the director within twenty-one (21) days after the hearing officer has reconsidered the issues outlined above and rendered a decision. We will not further address the forfeiture/resumption legal issues in this response. However, because the abandonment issue was not specifically addressed in the June 23 Order, we feel compelled to address the alternative finding in the May 22 Order that water right nos. 33-02090 and 33-02091 have been abandoned.

Presented below is our response to the issues on reconsideration, as defined by the June 23 Order, as well as the abandonment findings of the May 22 Order.

A. The Hearing Officer Inappropriately Concluded that Transfer No. 3785, and the Continued Use of Water Right No. 33-02091, Should Be Voided.

The Recommended Order in this matter concluded that Transfer No. 3785 should be voided. However, in the June 23 Order Granting Reconsideration, the hearing officer correctly concludes that "the Department approved transfer no. 3785, and

Sagewillow 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." While the proper term for this concept is more likely one concerning "collateral attack" than "res judicata", we could not agree more. In addition, Sagewillow has detrimentally relied on the department's previous approval of transfer no. 3785 in its use of water right no. 33-02091 and the department should be estopped from voiding transfer no. 3785.

1. Transfer No. 3785 Has Been Approved by Final Agency Action and Cannot be Voided through Collateral Attack.

A collateral attack is an attempt to avoid, defeat or evade a judgment, or to deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. This is the case where the judgment forms a part of the evidence by which a claim is supported. 49 C.J.S. Sec. 408. In effect, the protestants in this matter seek to collaterally attack transfer no. 3785, upon which the applicant relies. For the reasons set forth below, this collateral attack is impermissible.

In Idaho, the general rule is that a judgment, unless annulled or reversed in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, in any collateral action or proceeding. Rogers v. National Surety Co., 53 Idaho 128, 132, 22 P.2d 141, 142 (1933)(quoting from 49 C.J.S. Sec. 401). The rule has been followed in a number of other Idaho cases. See e.g., Tingwall v. King Hill Irrig. Dist., 66 Idaho 76, 155 P.2d 605 (1945) and Gordon v. Gordon, 118 Idaho 804, 800 P.2d 1018 (1990).

The rule against collateral attack applies to all varieties of valid judgments, including proceedings relating to water rights. 49 C.J.S. Sec. 402; see e.g., McLean v.

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Row, 56 Idaho 646, 57 P.2d 689 (1936). Moreover, in quasi-judicial actions, the rule applies to decisions of state boards and officers acting judicially or when called on to act judicially in matters of administration. 49 C.J.S. Sec. 407.d. As a result, there is little doubt that the rule should apply to orders and judgments of the department.

There are very few exceptions to the rule against collateral attacks. They include lack of subject matter or personal jurisdiction or extrinsic fraud appearing on the face of the judgment. Tingwall Irrig. Dist., 66 Idaho at 82-83. None of the exceptions exist in this case.

In addition, the rule applies to all parties to the proceedings in which the judgment was rendered. The term "parties", in the sense of those concluded by a judgment, includes all those who had the right to control or defend the proceedings and appeal. 49 C.J.S. Sec. 413. Even a stranger to the record, who was not a party to the action in which judgment was rendered, cannot object to the judgment because of errors or irregularities or for any matters which might have been set up in defense to the original action. 49 C.J.S. Sec. 414. There can be no doubt that, under the provisions of section 42-222, Idaho Code, including its publication and protest provisions, along with the right to appeal any administrative determination, the protestant had the right to get involved with the earlier transfer proceedings and raise the issue of forfeiture at that time. However, they chose not to do so and must be bound by that decision.

Consistent with section 42-222, Idaho Code, the application for transfer no. 3785 was published. No protests were received. The department evaluated the transfer under the criteria of section 42-222 and concluded that the transfer should be approved and finalized. Sagewillow proceeded accordingly.

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As a legal matter, transfer no. 3785 cannot be collaterally attacked by the protestants to the current transfer proposal. The current transfer cannot be denied on the basis of an impermissible collateral attack on a transfer that was, subject to the ability of others to protest, approved and finalized years ago.

Whether water right no. 33-02091 had been forfeited or abandoned prior to the previous transfer is immaterial. The opportunity to raise those issues in the previous transfer proceeding, and prove them through clear and convincing evidence, has long since passed. The protestants are collaterally estopped from bringing the issues up in the current proceedings.

Simply put, the protestants must live with the fact that the previous transfer was legally approved and completed. "It should be remembered that [the protestants] had a plain, speedy, and adequate remedy" in the previous transfer proceeding. Moyes v. Moyes, 60 Idaho 601, 610, 94 P.2d 782, 786 (1939).

2. The Department is Estopped from Voiding Transfer No. 3785 and the Continued Beneficial Use of Water Right No. 33-02091.

Where a party consents to an act that could not have been lawfully done without his consent, and thereby induces others to do that which they might have otherwise abstained from, that party cannot question the legality of the action to the prejudice of those who acted on such consent. Murtaugh Highway Dist. v. Twin Falls Highway Dist., 65 Idaho 260, 267, 142 P.2d 579, 582 (1943). This legal doctrine of quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him or her." KTVB, Inc. v. Boise City, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971). The person invoking the estoppel must have been induced to change his position. Id., 94 Idaho at 281. He must also have a right to rely upon the

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other's actions. Alder v. Mountain States Telephone & Telegraph Co., 92 Idaho 506, 511, 446 P.2d 628, 633 (1968).

While estoppel may not ordinarily be invoked against a government or public agency functioning in its governmental capacity, a federal, state or municipal government or agency may be estopped where the necessary elements or grounds of estoppel are present, as where an inconsistent position has been assumed, or where the governmental body or agency has induced or permitted improvements or expenditures on the strength of its express or implied representations. 31 C.J.S. Sec. 138; see Murtaugh Highway District, supra (holding that quasi-municipal highway districts are subject to estoppel). This is especially true "if the government's wrongful conduct threatens to work a serious injustice". United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973). In addition, estoppel has been applied to the government in the context of water rights. See e.g., Tubbs v. Custer City, 218 N.W. 599, 52 S.D. 458 (holding that a governmental body previously recognizing a possessory right to take water cannot later question title in a suit to restrain interference with water supply).

The very definition of estoppel indicates its applicability in this case. The department considered and approved transfer no. 3785, thereby granting its consent to the proposed changes to water right no. 33-02091. Subsequently, Sagewillow's position was changed. In reliance on transfer no. 3785, the applicant made a substantial investment and completed the indicated changes, in compliance with the conditions of the approved transfer. Sagewillow certainly had a right to rely upon the department's approval and voiding of the transfer at this late date would work a serious injustice to Sagewillow. As a result, the department is precluded from asserting, to Sagewillow's

disadvantage, a position inconsistent with that previously taken. This includes any challenge to the legality of the transfer.

The fact that 320 acres are irrigated pursuant to transfer no. 3785 is undisputed. As a result, the findings of fact and conclusions of law contained in the Recommended Order should be modified to allow the continued irrigation of 320 acres under water right no. 33-02091.

B. The Hearing Officer Inappropriately Concluded that Thirty Acres of Irrigation Use Had Been Forfeited on the Frew Place.

In the May 22 Recommended Order, the hearing officer concluded that the total number of acres authorized for irrigation under water right nos. 33-02086 and 33-07018 is 230 acres. This was based upon a finding that 230 acres were historically irrigated in the Frew Place and, apparently, that 30 of the 260 licensed acres had been forfeited by five or more years of continuous non-use. The hearing officer's findings on this point were based on the assumptions of Protestant Mays' expert witness, Terry Scanlan, which the Recommended Order states were supported by direct evidence and testimony presented by Vance Hawley and a careful review of aerial photography. However, the June 23 Order Granting Reconsideration correctly notes that "[Vance] Hawley did not testify about irrigation of the Frew Place, and, without the supporting evidence, the estimate by Scanlin [sic] may not rise to the level of clear and convincing evidence justifying a reduction in acreage." This is indeed true and, as a result, the findings and conclusions regarding water right nos. 33-02086 and 33-07018 and the Frew Place should be revised to authorize the irrigation of 260 acres.

As made clear by the hearing officer at the hearing on this matter, the burden of proof is on the protestant to prove forfeiture by clear and convincing evidence. Hearing Transcript, Vol. I, p. 173, l. 6. Simply put, this burden has not been met. The record is quite clear on the fact that Terry Scanlan's estimates regarding the Frew Place were based solely on an evaluation of ASCS aerial photography. Hearing Transcript, Vol. II, p. 91, l. 16; p. 95., l. 15. These photographs, and thus Scanlan's testimony, did not cover any five-year period during which non-use can be shown. There was no corroborating evidence introduced at the hearing that any circumstances had changed in the operation of the Frew Place since the issuance of the second license in 1980.

The figure of 260 total acres under the two licenses came from a department field examination. This constitutes prima facie evidence of the acres irrigated and is also supported by the SRBA Claims filed by David and Terry Hawley and William Frew on April 4, 1990, some three years before Sagewillow's acquisition of the property. This evidence was not overcome by Scanlan's testimony and certainly cannot constitute clear and convincing evidence of any forfeiture. See Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976)(holding that, where the record did not identify any measurable five-year period of non-use, the trial court was correct in finding that no forfeiture occurred).

Moreover, the Order Granting Reconsideration inaccurately characterizes Dr. Charles Brockway's testimony stating that it was based on "what could be physically irrigated" rather than "historical use". During the direct and cross examinations of Dr. Brockway at the hearing on this matter, it was made clear that Dr. Brockway used both aerial photographs and field observations to determine beneficial use. Determining the acres that could be physically irrigated was only part of this analysis, not the end product.

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See e.g., Hearing Transcript, Vol. I, p. 122, l. 5 (Brockway explaining that he was asked to render an opinion regarding beneficial use); p. 128, l. 10 (Brockway explaining that he looked for "evidence of beneficial use of the water"); p. 133, l. 9 (Brockway explaining his findings regarding "beneficial use" before 1989); and p. 154, l. 4 (Brockway explaining that he included acres in his flood irrigation estimates only if "there was some evidence that there had been irrigation and beneficial use"). As a result, it is incorrect to conclude that Dr. Brockway testified only as to "what could be physically irrigated" and not actual "historical use".

In sum, the licenses and field examination, as well as the SRBA claims and Dr. Brockway's testimony, indicate that 260 acres was, and has been, flood irrigated on the Frew Place. There was presented at the hearing, and exists presently, no clear and convincing evidence proving otherwise. Therefore, the applicant requests that the Recommended Order be revised to authorize 260 acres of irrigation, rather than 230.

C. The Hearing Officer Inappropriately Concluded that Certain Water Rights Had Been Abandoned.

In the May 22, 1995 Recommended Order, the hearing officer indicated that clear and convincing evidence exists that water right nos. 33-02090 and 33-02091 have been forfeited. It was also concluded, alternatively, that the water rights were abandoned. Finally, it was ruled that the defense of resumption of use could not be utilized to revive these rights. While we do not agree with the findings regarding forfeiture and resumption of use, we understand that they are not at issue on rehearing and will await a later opportunity to raise them again. However, because the June 23 Order did not deal specifically with the issue of abandonment, we raise it again here for further consideration. See also, Applicant's Brief in Support of Petition for

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Reconsideration of Recommended Order and Exceptions to Recommended Order, pp. 18-19 (June 5, 1995). Of course, this issue is important as to water right no. 33-02091 only if the hearing officer chooses not to recognize the binding effect and validity of transfer no. 3785, as argued above.

Abandonment is a question of intention and must be evidenced by a clear and decisive act. Idaho Farms Co. v. North Side Canal Co., 24 F. Supp. 189, 197 (D. Idaho 1938). It must be proved by clear and convincing evidence of unequivocal acts. Jenkins v. State, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). Finally, it must be demonstrated that the two elements -- intent and a decisive act of abandonment -- existed in unity, at the same moment in time. Kinney on Irrigation and Water Rights, Second Edition, Vol. 2, Sec. 1101, pp. 1979-83 (1912). Abandonment is a question of fact to be decided by the trier of fact on the basis of the record. Jenkins, 103 Idaho at 389.

Simply put, there is no clear and convincing evidence in the record of any intent to abandon or a clear, decisive and unequivocal act of abandonment, let alone that the two existed in unity. Indeed, there is no specific finding in the Recommended Order that clear and convincing evidence of abandonment exists.

According to the Recommended Order, Vance Hawley testified that the Homestead Place and the North of Road Place were irrigated with water pursuant to water right nos. 33-02091 and 33-02090 "only for the purpose of gaining a patent for federal ground" and that the properties were never irrigated thereafter. Based on these factual findings, the hearing officer concluded that the water rights were abandoned.

Whether Vance Hawley's testimony is unreliable hearsay or a permissible admission against interest may be less important than the question of whether it, in itself,

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is clear and convincing evidence of abandonment.[1] It certainly is not. Dr. Brockway testified that the 33-02091 lands had been irrigated and that the water rights were beneficially used. While numerous references were made during the hearing regarding the difficulty of irrigating the lands, there was no conclusive proof submitted of any decisive act to abandon the rights.

Vance Hawley's testimony falls far short of the kind of clear and convincing evidence necessary to establish abandonment. While recollections of his testimony may differ, the black and white of the transcript is clear: Vance Hawley was not sure whether there existed any intent to abandon and could point to no decisive and unequivocal act of abandonment.

For example, when examined on the question of potential abandonment of water right no. 33-02091, Vance Hawley testified only that he was "reasonably sure" that the lands were not irrigated after 1970, expressed "doubt" that they were irrigated any more than was required to obtain the patent, admitted that he "never saw what was going on before 1970", could only "guess" why his parents would prove up on the well and then not use it anymore, and did not even know what the water use requirements for patenting the land were. Hearing Transcript, Vol. II, p. 10, l. 14. Also, Vance Hawley admitted:

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[1] The applicant does not agree with Protestant Mays' assertion that Vance Hawley's testimony was admissible as a statement against interest and, thus, as an exception to the hearsay rule. See Protestant's Response to Sagewillow's Petition for Reconsideration, p. 2, n.2 (June 22, 1995). The department's own rules of procedure state: "The presiding officer at hearing is not bound by the Idaho Rules of Evidence." IDWR Rules of Procedure, Rule 600, IDAPA 37.01.01.600. As a result, Mays' citation to the Rules of Evidence is not dispositive of the issue. Moreover, the alleged statement of Slim Hawley is not properly construed as a statement against interest at all. It meets none of the criteria of Rule 804(b)(3), Idaho Rules of Evidence. Finally, it is irrelevant that no objection was raised to Vance Hawley's testimony. "The presiding officer, with or without objection, may exclude evidence . . ." Id.

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"[B]efore 1970 my personal knowledge is very limited." Hearing Transcript, Vol. II, p. 39, l. 6.

Moreover, the hearing officer fails to note that Vance Hawley testified that the well at the north of the Bird Ranch was located on the highest possible ground so that the most water possible could be obtained. Hearing Transcript, Vol. I, p. 10, l. 6. This decisive and unequivocal act is wholly inconsistent with any intent to later abandon the water right. For purposes of obtaining "title" to the land, the water right could have been perfected, and then abandoned, with far less effort. However, the Hawleys chose instead to locate the well "on the highest possible ground" in order to obtain "the most water possible". This serves to negate any evidence of intent.

Even if Vance Hawley's testimony can be regarded as clear and convincing evidence of (1) intent and (2) a decisive act of abandonment, there was no attempt made at the hearing to show that the two elements existed in unity, at the same moment in time. It is not enough to show each of the two elements existed at some time in the past. The protestant also bears the burden of showing that the decisive act of abandonment, whatever it might have been, was coupled with the requisite intent, or vice versa. This simply has not been done. It was not shown that these two elements existed in unity -- at the same moment in time -- as required by the law.

If Vance Hawley's testimony regarding water right no. 33-02091 failed to establish abandonment, his testimony regarding water right no. 33-02090 is even less compelling. During the hearing, Hawley stated that his "testimony on that [33-02090] land is not much different than on [the 33-02091 lands]". This hardly serves to show intent, a decisive act of abandonment, or any unity of the two.

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In addition, as an "alternative" finding, the Recommended Order's conclusion that the water rights have been abandoned is unnecessary. The hearing officer's findings regarding forfeiture and the resumption of use doctrine, and refusal to reconsider them, are dispositive of the status of water right nos. 33-02090 and 33-02091, at least at this stage of the administrative proceeding. The alternative findings of abandonment amount, therefore, to no more than an advisory opinion and should be stricken from the Recommended Order.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons listed above, the applicant respectfully requests that the hearing officer modify the Recommended Order of May 22, 1995 to:

1. Recognize the validity and binding effect of transfer no. 3785 and authorize the continued irrigation of 320 acres pursuant to water right no. 33-02091.

2. Authorize the irrigation of 260 acres pursuant to water right nos. 33-02086 and 33-07018 (Frew Place).

3. Recognize that water right nos. 33-02090 and (if not held valid under transfer no. 3785) 33-02091 have not been abandoned.

DATED this 1st day of September, 1995.

Norman M. Semanko
for Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Norman M. Semanko
for J. Evan Robertson
ROSHOLT, ROBERTSON & TUCKER

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CERTIFICATE OF MAILING

I hereby certify that on this 1st day of September, 1995, I served a copy of the foregoing **APPLICANT'S RESPONSE TO ORDER GRANTING PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (via fax and mail)
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Blaine County Canal Co.
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Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANTS' BRIEF ON RECONSIDERATION OF TRANSFER NO. 3785 AND THE FREW PLACE**

Protestants James Mays, and Mays Land & Livestock ("Mays") hereby submit their Brief on Reconsideration of Transfer No. 3785 and the Frew Place ("Brief").

I. INTRODUCTION

On June 5, 1995, Applicant ("Sagewillow") filed a Petition for Reconsideration of Recommended Order and Exceptions to Recommended Order in the above-captioned matter. The Idaho Department of Water Resources ("Department") in its June 23, 1995 Order Granting Petition for Reconsideration ("Order") granted Sagewillow's request for reconsideration of two specific issues. The two issues under reconsideration as defined by the Department's Order are:

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1. Whether use of water pursuant to right no. 33-2091 should be authorized because of the Department's approval of transfer no. 3785; and

2. Whether the number of acres authorized for irrigation pursuant to right nos. 33-02086 and 33-07018 (the Frew place) was correct.

In this brief, Mays argues that the Department's findings and conclusions contained in its Recommended Order are correct as written, and should not be modified.

II. ARGUMENT

The issues on reconsideration, as posed by the Department, are of very narrow scope. The only issues to be addressed on reconsideration are whether Sagewillow ought to be allowed to resume the use of abandoned water right 33-2091 because the Department previously had approved its use in Transfer 3785, and whether the Department correctly determined that the use of water right nos. 33-02086 and 33-07018 should be limited, following transfer, to their historical use. The Department's Order is clear in reaffirming the Hearing Officer's findings of abandonment and forfeiture, and the unavailability to Sagewillow of the resumption defense given the existence of intervening rights. Mays stands on its prior arguments that a conclusion of abandonment was required by the undisputed evidence of uninterrupted, and unexcused nonuse of right nos. 33-2090 and 33-2091. Mays also stands on the arguments contained in its Response to Sagewillow's Petition for Reconsideration regarding the resumption doctrine and the Department's justified voiding of Transfer No. 3785.

Mays argues herein that no legal or equitable grounds would countenance the

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Department fashioning a contemporary version of the resumption doctrine, based on estoppel or otherwise, to allow the revival of an abandoned water right, in the face of intervening rights and injury. The Department is the agency entrusted with the duty of administering the public's water resource. In that capacity, it cannot be estopped or otherwise prevented from revoking or voiding a prior order that is unsupported by the facts, that results in injury to other water rights, and that is patently contrary to public policy, Idaho statutes, Department procedures, and the interests of other water users.

While the Department's evaluation of abandonment and forfeiture is required by Idaho law in every water right transfer proceeding, that evaluation, and its effect on the Department's decision whether to grant or deny the transfer application, is *not* an adjudication of the water right. As such, clear and convincing evidence of forfeiture or abandonment of water on the Frew Place was not necessary to support a limitation of the amount of water that can be used on the Frew Place following transfer. The Recommended Order correctly observes that *historical use*, which the law does not require to be established by clear and convincing evidence, is the correct focus of its transfer evaluation of the Frew Place transfer. There was substantial credible evidence in the record to warrant the Department's findings in that respect.

A. <u>The Department's Approval of Transfer No. 3785 Cannot be the Basis for Allowing Resumed Use of Water Right No. 33-2091.</u>

The first question presented on reconsideration is what is the effect of the Department's approval of Transfer 3785 on the *abandoned water right no 33-2091.*[1]

[1] Accordingly, any discussion by Sagewillow regarding policies against abandonment or injury to other water rights is irrelevant to the Department's reconsideration of this first issue.

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The Department's Order invites discussion of whether Sagewillow might be entitled to rely on the prior approval, and suggests that "[p]erhaps 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 objection." Order at 4. Three legal issues appear to be raised in this respect: 1) the applicability of *res judicata* as against Mays; 2) the applicability of estoppel or some other equitable remedy as against the Department; and 3) the applicability of the resumption doctrine to circumstance where abandoned rights have been improperly authorized to be transferred to a new place of use. None of these "remedies" are applicable to this case.

1. The Doctrine of Res Judicata is not Applicable in this Case.

The doctrine of res judicata does not bar Mays or the Department from asserting that Transfer 3785 is void. First, the elements of res judicata were not met in the prior proceeding; and second, even if they were, this case falls squarely within the exceptions to the application of res judicata.

Res judicata precludes the relitigation of a matter previously adjudicated, and is premised upon the entry of a valid and final judgment. For res judicata to prevent subsequent actions, there must have been a prior adjudication, *on the merits*, of the issue being raised; the prior adjudication must have involved the *same parties* and the same claim; and, there must be a *valid final judgment*. *Capps v. Wood*, 117 Idaho 614, 790 P.2d 395) (Ct.App. 1990) (res judicata precludes the relitigation of a matter previously adjudicated and is premised upon the entry of a *valid* and final

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judgment). *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (1983) *citing* Restatement (Second) Judgments. None of these elements have been met in this case.

Idaho has adopted the Restatement (Second) Judgments (1982) ("Restatement") interpretation of the doctrine of res judicata. *Aldape supra* at 135; *See also, Houser v. Southern Idaho Pipe & Steel, Inc.*, 108 Idaho 441, 649 P.2d 1197 (1982); *Ramseyer v. Ramseyer*, 98 Idaho 544, 569 P. 2d 358 (1977) (both cases citing tentative drafts of the Second Restatement of Judgements with approval).

The Restatement carves out several exceptions to the bar of res judicata. Two of these exceptions to the doctrine are applicable to this case, and are as follows:

1. Res judicata will not bar a subsequent action where the judgment in the first action was inconsistent with the implementation of a general statutory or constitutional scheme.

2. Res judicata will not bar a subsequent action where there are extraordinary reasons for allowing a second action.

Restatement (Second) Judgments §§ 24, 26(d), 26(f) (1982). Additionally, comment (j) to § 26 refers to an exception involving a misrepresentation or fraud, and states, "A defendant cannot justly object to being sued on a part or phase of a claim that Plaintiff failed to include in an earlier action because of the Defendant's own fraud."[2]

The action of the Department in negligently approving Transfer 3785 did not rise to the level of an *adjudication* sufficient to invoke res judicata. While administrative hearings have in some cases been held to bar subsequent actions on the same issues previously heard, these facts do not support that conclusion. This is true because there was no adjudication of the transfer application -- and there

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[2] While Mays does not allege Sagewillow fraudulently omitted from its transfer application information regarding non-use of the water, its omission, for whatever reason, must prevent the operation of res judicata.

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certainly was no adjudication on the merits of the case. The Department's approval of Sagewillow's incomplete transfer application came without any review of issues such as historical use, abandonment, or forfeiture. In fact the Department file for Transfer 3785 reflects that the required recommendation of the water master prior to approval of a transfer was not obtained. *See Idaho Code* § 42-222.

Mays is not barred from now raising the invalidity of Transfer 3785 because the issues and facts relevant to the validity of that transfer have never been the subject of a prior adjudication. The Department's approval of the transfer application was nothing more than a ministerial act and a procedurally improper one.

The Idaho statutes governing water right transfers require *the Department* to make certain findings in connection with transfers and appropriations of water. *Idaho Code* § 42-222. Had the Department complied with § 42-222, it would have discovered that water right no. 33-2091 long ago had been abandoned and could not be validly transferred. Mays was entitled to rely on the Department to comply with Idaho law in reviewing Sagewillow's transfer application. To bar Mays from now questioning that action would be unconscionable, and is not the purpose of res judicata.

Finally, there is no valid final judgment barring this action. The mere approval of a transfer application without a hearing or a cursory investigation by the Department is not the equivalent of a judgment. However, even if the approval could constitute a final judgment, it was not *valid*. The Department did not follow its own procedures in approving the application when it failed to solicit a recommendation

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from the watermaster[3]; the Department violated the statutory directive of I.C. § 42-222 to consider, among other things, injury and enlargement. The Department's approval of Transfer 3785 was invalid and cannot bar subsequent litigation on the transfer issue.

Even if the Department's approval was deemed a valid final judgment, this case is exactly the kind of situation in which the exceptions to res judicata are meant to apply.

Res judicata does not bar subsequent actions where the judgment in the first action was inconsistent with the implementation of a general statutory or constitutional scheme. Restatement (Second) of Judgments § 26. Similarly, res judicata does not bar subsequent actions when there are extraordinary reasons for allowing a second action. Several courts have echoed the exceptions to res judicata outlined in the Restatements. In *Yarnell v. City Roofing, Inc.* 812 P.2d 1199 (Haw.App. 1991) *citing Jacobs v. Teledyne, Inc.* 529 N.E.2d 1255 (1988), the Hawaii court stated:

> While res judicata does apply to administrative proceedings, it should be applied with flexibility. The doctrine should be qualified or rejected when its application would contravene an overriding public policy or result in manifest injustice. Fundamental fairness requires that claims be determined on their facts, not on legal technicalities.

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[3] Idaho Code 42-222(1) requires the director of the Department "[A]dvise the watermaster of the district in which such water is used of the proposed change and the watermaster *shall* notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources *shall not finally determine the action* on the application for change until he had received from such watermaster his recommendation thereof, which action of the watermaster *shall* be received and considered as other evidence." As discussed herein, no recommendation was entered. This is not only fatal to the transfer application, but operates to render the Department's actions on the transfer *not-final*. As discussed above, res judicata can only apply to final determinations. Since the Department could not finally determine the transfer without a report from the watermaster, there can be no final determination effective to bar subsequent actions involving the transfer.

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Idaho Code § 42-222, and Idaho Constitution art. 15, § 1 operate to prevent the approval of a transfer of water where such transfer would injure other appropriators, or would be contrary to public policy. Allowing Transfer 3785 clearly subverted the state's policy to regulate and control the beneficial use of water and to insure no injury to other appropriators. Because the Department's approval of the transfer issue is inconsistent with this general statutory and constitutional scheme in Idaho, res judicata *cannot* bar subsequent hearings on that issue.

Moreover, there are extraordinary reasons why approval of Transfer 3785 should be open for hearing, *i.e.* a public resource is involved. The local public interest has been and will be severely prejudiced by the Department's negligent approval of Transfer 3785, or a finding now that such prior approval allows the right to be resumed.

In summary the prior "proceeding" regarding Transfer 3785 was not sufficient to bar subsequent action by the Department voiding the transfer. However, even if the Department determines the elements sufficient to establish res judicata have been met, the doctrine cannot be applied here as to do so would contravene public policy and would be inconsistent with Idaho's statutory and constitutional scheme.

2. The Department is not Estopped from Voiding Transfer 3785.

The Department, in reviewing Sagewillow's Application for Transfer 3785, was acting pursuant to Idaho Code § 42-222, in the disposition of the public's water, on behalf of the public. This is true regardless of whether the Transfer Application had been protested. As such, the Department was exercising its police power, acting in its sovereign capacity, and may not be estopped today from voiding

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its prior approval of the transfer where the public interest has been, and continues to be harmed by the improper transfer approval. And as an equitable doctrine, estoppel cannot apply where, as here, Sagewillow has "unclean hands."

a. Estoppel cannot ordinarily be applied to a governmental agency such as the Department acting in its sovereign capacity.

i. Idaho courts do not apply estoppel against government agencies acting in their sovereign capacity.

Sagewillow has argued that because the Department negligently granted Transfer 3785, the Department may not subsequently find that water right 33-2091 is abandoned. In other words, Sagewillow's position appears to be that the Department now is estopped from determining water right 33-2091 was abandoned. However, estoppel does not apply under the instant facts.

Estoppel is an equitable doctrine, and Idaho courts have recognized that ordinarily, it is not applicable to a governmental agency acting in its sovereign capacity. *Brandt v. State of Idaho*, 126 Idaho 101, 878 P.2d. 800, 804 (Idaho App., 1994); *Hubbard v. Canyon County Commissioners*, 106 Idaho 436, 437, 680 P.2d 537, 538 (1984); *Harrell v. City of Lewiston*, 95 Idaho 243, 247-48, 506 P.2d 470, 474-75 (1973); *State ex rel. Williams v. Adams*, 90 Idaho 195, 201, 409 P.2d 415, 419 (1965). This is true even when a party relies to his or her detriment on an act or omission of the governmental agency.

Governmental or sovereign functions are those "functions exercised as arm of state, and for public good, generally." Blacks Law Dictionary (5th ed. 1979). Governmental functions, as contrasted to proprietary functions, are those functions or duties which involve a general public benefit, whereas proprietary functions are

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in the nature of corporate or business undertakings.

In *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952), the Idaho Supreme Court held than an abutting landowner, who had erected and maintained a building on a portion of a public street under a permit granted by the city counsel, for a period of twenty-five years, did not acquire a right to such occupancy, and the city was not estopped to cancel the permit and require removal of the building. The Court recognized that where the City was dealing with public property, it had the authority to revoke its prior authorization if the use was a public nuisance, and to enforce that revocation by way of a mandatory, permanent injunction. *Id.*, 72 Idaho at 336-37. The court went on to observe that estoppel applies "only in exceptional cases", and is not applicable to the exercise by a city of its police power. *Id.*, 72 Idaho at 338.

When estoppel is asserted against the government acting in its sovereign capacity, the courts rule in favor of the public interest despite allegations of substantial reliance by the private claimant. For example, in *Brandt, supra*, the Idaho Court of Appeals held that a prisoner who had been granted parole, which later was revoked, could not invoke the doctrine of equitable estoppel against the parole board. The Court was not swayed by the fact that the prisoner had relied on his tentative release by finding a residence and applying to numerous drug and alcohol treatment programs. Instead, the Court reaffirmed that estoppel "cannot ordinarily be applied to a governmental agency acting in its sovereign capacity." *Brandt*, 878 P.2d at 804. *Brandt* distinguished several federal decisions which have applied estoppel against the government acting in its sovereign capacity by emphasizing that the public interest must be the overriding factor:

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

Id., 878 P.2d at 804 (emphasis added).

In Idaho, the doctrine of equitable estoppel has been held applicable as against governmental agencies only where the agency has acted in its proprietary rather than sovereign capacity. *See Curry v. Ada County Highway District*, 103 Idaho 818, 654 P.2d 911 (1982); *Kootenai County v. Sowder*, 88 Idaho 556, 401 P.2d 813. In *Boise City v. Wilkinson*, 16 Idaho 150, 102 P. 148 (1909), the concurring justice wrote:

> We recognize the fact that ordinarily the doctrine of laches and estoppel may not be invoked against a municipality on account of the action or inaction or conduct of its public officers. This, however, is more especially true with reference to their acts and conduct in governmental and purely municipal affairs. It has never been held with the same strictness in reference to *purely business and proprietary matters and transactions*. (Emphasis added).

Indeed, even in the case of the government acting in its proprietary capacity, Idaho Courts have been extremely reluctant to apply estoppel. *Mann v. City of Jerome*, 92 Idaho 194, 439 P.2d 928 (1968) (equitable estoppel must be invoked with caution and only in exceptional cases, and its application is the exception and not the rule); *Kleiber v. City of Idaho Falls*, 110 Idaho 501, 716 P.2d 1273 (1986) (application of estoppel against municipality in the exercise of its police power is prohibited).

ii. <u>The Department's review and administration of water appropriations and transfers is an exercise of the sovereign police power</u>.

Idaho's Constitution declares that the use of water is a public use, and subject to the regulation and control of the State. Idaho Const. art. 15, sec. 1. The State

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supervision of water use usually is attributed to the police power, controlled by the Department in its role as trustee for the benefit of the public. *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985) (citing *Kootenai Envt'l Alliance v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983)).

The Idaho State Water Plan, Policy 1A, states that:

> It is the policy of Idaho that the State has sovereignty over decisions affecting the development and use of its water resources, and that the state opposes any attempt by the federal government, its management agencies, *or any other entity* to usurp the State's role in these areas.

State Water Plan, Policy 1A - State Sovereignty (1987). The State Water Plan goes on to state that:

> It is the policy of Idaho that changes in the nature of use of a water right be allowed if other water rights are not injured.

State Water Plan, Policy 1E - Nature of Use. *See also* Idaho Code § 42-101:

> water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

Unquestionably then, the duties of the Department to regulate the beneficial use of water, including approving various uses and changes, is a sovereign, governmental act, which under Idaho law, is wholly immune from claims of estoppel. Therefore, the Department has no legal or equitable duty to ignore the facts of abandonment established for Right No. 33-2091, or to amend its decision to void Transfer 3785.

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b. Estoppel cannot be invoked against a governmental agency if the public interest will be prejudiced.

Even if the Department were to determine that estoppel could be applied as against the Department acting in its sovereign capacity as trustee of the public water resource, Sagewillow still cannot appropriately use estoppel as a defense because the result would contravene public policy. As demonstrated by the express state policies embodied in the State Water Plan, Idaho's Constitution, and those comprehended in statutes such as I.C. § 42-101, the public interest lies in the water's "just apportionment to, and economical use by, those making a beneficial application of the same. . . ." This policy is the premise of Idaho's abandonment and forfeiture law, which favors the person who would put the state's water to beneficial use. This policy is fundamentally implicit in the revival or resumption doctrine itself which allows resumption of use only where others, who have made significant investments of their own in reliance on the availability of appropriable water, have not intervened and established rights in the water source.

The public interest would be entirely defeated if the Department could be precluded from reversing a prior, procedurally and factually incorrect decision affecting the interests of numerous other water right holders in the Little Lost Basin such as Mays.[4] It would contravene public policy to allow a water right, long given up to the stream and to subsequent appropriators, to be revived through an erroneous transfer. Doing so subverts the state's policy to regulate the control and beneficial use of water in Idaho, and to ensure no injury to other appropriators. *Idaho Code* 42-

[4] And as the Order Granting Consideration correctly observes, the scope of the interests in this case, extends beyond those in the vicinity of the Knollin Ranch, to include those areas with hydrologic connection, which in this case, includes the Snake Plain Aquifer.

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222 and Idaho Const. art. 15, sec. 1.[5]

Mays knows of no Idaho Court ever allowing the equitable doctrine of estoppel to be used against a public agency acting for the public health and welfare, particularly if estoppel would subvert public policy. Jurisdictions that have directly addressed the issue, even jurisdictions where estoppel can be used as against a governmental agency, have specifically disallowed the use of estoppel against the government where, if invoked, the public interest would be significantly prejudiced. *VECO Intern., Inc. v. Alaska Public Offices Comm'n*, 753 P.2d 703 (Alaska 1988), *appeal dismissed* 488 U.S. 919; *State v. Superior Court of Placer County*, 623 P.2d 256 (Cal. 1981) (estoppel will not be applied to government if the result would nullify rule of public policy adopted for benefit of the public); *Bib'le v. Committee of Bar Examiners of State Bar of California*, 606 P.2d 733 (Cal. 1980) *cert denied* 449 U.S. 860; *State Highway Comm'n of Wyoming v. Sheridan-Johnson Rural Elec. Ass'n*, 784 P.2d 588 (Wyo. 1989) (estoppel does not apply to governmental or sovereign functions, especially where it would defeat the public interest); *Big Piney Oil & Gas Co. v. Wyoming Oil and Gas Conservation Comm'n,* 715 P.2d 557 (Wyo. 1986); *Norman v. State*, 597 P.2d 715 (Mont. 1979) (estoppel may not be asserted where it would interfere with protection of public interest in lands).[6]

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[5] On a different level, the Department also must consider the public policy implications of the precedent the Department would create if it were to yield its continuing jurisdiction over the use of the State's waters, or to concede that it lacked authority to, *sua sponte*, modify decisions that subsequently have been discovered to be incorrect, and that impair vested water rights and the public interest.

[6] Conversely, equitable estoppel occasionally has been allowed against the government where its invocation furthers a broad public policy or interest. *See Burdick v. Independent school Dist. No. 52 of Oklahoma County*, 702 P.2d 48 (Okla. 1985).

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c. Sagewillow has not demonstrated, nor do the facts show, that the elements establishing estoppel have been met.

Even assuming that estoppel were available to Sagewillow as a defense against revocation of Transfer 3785, Sagewillow has not alleged, argued or introduced evidence necessary to successfully assert estoppel against the Department. Recently in *Young v. Idaho Dept. of Law Enforcement*, 123 Idaho 870, 853 P.2d 615 (Idaho App. 1993), the Idaho Court of Appeals succinctly set forth the elements which must be proved to successfully assert equitable estoppel. The elements are:

(1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth;

(2) the party asserting estoppel did not know or could not have discovered the truth;

(3) the false representation or concealment was made with the intent that it be relied upon; and

(4) the person to whom the representation was made or from whom the facts were concealed relied and acted upon the representation or concealment to his prejudice.

Young, 123 Idaho 875, 853 P.2d at 620. *See also Twin Falls Clinic and Hospital Bldg. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982).

These elements were again cited with approval in *Willig v. State Dept. of Health & Welfare*, WL 401093 (July 10, 1995). In *Willig*, the Court of Appeals elaborated on the meaning of reliance and indicated that prejudicial reliance short of "irreparable harm" is not sufficient to demonstrate the fourth element of equitable estoppel.

The first and third elements relate to alleged acts or omissions by the Department. Sagewillow, has alleged no facts whatsoever to demonstrate that the

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Department ever made any false representations, knowingly, with the intent that they be relied on, or otherwise. If there were any misrepresentations or concealments of facts they are to be found in Sagewillow's own application as signed by Mr. Dumke. It was the Department that relied on the records of the rights in its files, and those acknowledged representations of Mr. Dumke contained in the transfer application, in approving the application. In its Brief in Support of Petition for Reconsideration, at page 12, Sagewillow states "We do not understand how there is evidence of misrepresentation by anyone, either in the preparation of the application or its processing." Brief at 12. This must be read as an admission that Sagewillow cannot establish this element of estoppel.

Even if Sagewillow could prove that the Department concealed or misrepresented facts which it intended Sagewillow to rely on, Sagewillow still cannot prove it has met the second and fourth elements relating to Sagewillow's acts and or omissions.

Sagewillow cannot establish that it did not know or could not have discovered the truth regarding the abandonment of water right 33-2091. The Recommended Order correctly recognizes that "[t]he applicant should bear the responsibility of properly completing an application, and when signing a document, know what is being represented." Order at 4. But the Order also should recognize that Sagewillow reasonably had the responsibility and best opportunity to learn the facts surrounding the abandonment of its water right. In other words, that Sagewillow knew or should have known when it submitted its application for Transfer 3785 that right no. 33-2091 had been abandoned.

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Sagewillow does not satisfy this element of estoppel merely by claiming that it was unaware that water right no. 33-2091 had been abandoned or forfeited, or that it could not have determined the same on its own. Sagewillow owned the subject property for approximately one year prior to making application to transfer water right no. 33-2091. Sagewillow must be presumed to have had direct knowledge of the state of the property it purchased and subsequently operated.

Moreover, Sagewillow left blank the section of the transfer application asking for information of forfeiture or abandonment of the right sought to be transferred. Given the patent condition of the land, the diversion works and the water right at the time of the application, the answer to that question should have been obvious to the property owner, Sagewillow. The Department must consider whether equity ought to allow Sagewillow to bind the Department and intervening water right holders to a prior incorrect decision, which was based on Sagewillow's incorrect representations and material omissions, particularly where Sagewillow knew or should have known the true facts. In the balancing of equities, Sagewillow does not come to the table with "clean hands".

Additionally, Sagewillow did not prejudicially rely or act upon the Department's approval of Transfer 3785. Sagewillow claims it relied upon the transfer by making a substantial investment in "sprinkler equipment, wells, pumps, and the electrical lines and panels" in addition to bringing additional acreage under production during the past four years. Brief at 12. However, the evidence is undisputed that by July of 1992, the new well had been drilled, the center pivot, pumps, electrical lines and panels had been installed, and the new place of use

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requested by the transfer application (and approximately 132 acres of other lands not covered by license or transfer) were being irrigated. But, the application for Transfer 3785 was approved on October 8, 1992. The fact that Sagewillow's financial expenditures took place prior to the Department's approval of the transfer application demonstrates no reliance whatsoever on the Department's approval of Transfer 3785.

Moreover, while Sagewillow would have been free to purchase and install expensive irrigation equipment, and prepare its lands in anticipation of the Department's approval of a transfer, it would have done so at its own risk. The public cannot be made to assume that risk on behalf of Sagewillow.

Moreover, Sagewillow subsequently has received the benefit of four years of irrigation and crops from the lands approved for irrigation by Transfer 3785 (and from lands not approved). This amounts to a windfall for Sagewillow, not detrimental reliance.

In any event, Idaho courts have been unpersuaded by financial reliance on representations by governmental agencies. *See Willig v. State Dept. Health & Welfare*, 95.14 ISCR 605, 1995 WL 401093 (Idaho July 10, 1995) (overpayment by Health and Welfare to plaintiff, which was spent on necessities for the beneficiary children, was not sufficient to establish the reliance element of equitable estoppel); *Brand S Corp. v. King*, 102 Idaho 731, 639 P.2d 429 (1981) (Court refused to estop a creditor from collecting an unpaid loan even though the creditor had told the debtor it would forego the collection).

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d. Estoppel cannot be raised at this stage of the proceedings

Sagewillow should not be permitted to raise the defense of estoppel against the Department at this stage of the proceedings. Doing so unjustly prejudices Mays. In civil courts in this state, estoppel must be raised as an affirmative defense or be lost forever. IRCP 8(c). The reason for this rule is to allow the opposing party to obtain discovery and prepare a case in opposition to the defense *prior* to a hearing.

Although the Idaho Rules of Civil Procedure do not necessarily apply to proceedings conducted before the Department, IDAPA 37.01.01.052, the rationale for Rule 8(c) is equitable and may be followed by the Department in its discretion. The Departments rules are to be "liberally construed to secure just, speedy and economical determination of all issues" and "[u]nless prohibited by statutes, the agency may permit deviation from the rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. IDAPA 37.01.01.052.

Sagewillow was fully aware of the possibility of a claim that some of its water rights had been forfeited far in advance of the hearing on this matter. The fact that Mays believed that Transfer 3785 was void was raised in pleadings and in the pre-hearing conferences. Sagewillow should not be allowed to raise an equitable defense, for the first time, after a ruling by the Department on all issues of the case.

3. The Department's Erroneous Approval of Transfer No. 3785 Did Not Revive the Abandoned Water Right No. 33-2091.

In the Order Granting Reconsideration, the Department poses the question whether "the resumption of use doctrine should be invoked if the Department approved [Transfer 3785], and the wateruser resumed the use prior to an objection." Order at 4. The answer is a clear "No".

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As the Department has correctly noted in previous decisions, and in its Recommended Order, the resumption doctrine must be narrowly construed so as not to impair intervening water rights. Any attempt to broaden the resumption doctrine to accommodate the unusual facts of this case will negate the Department's prior rulings, and will defeat the most basic element of the right, which requires that there be no intervening rights in the water supply. The Department already has concluded that there are in fact intervening rights in the Little Lost Basin, developed, and dependent on the availability of the water that Sagewillow now wishes to reclaim. Thus, any exception or application of the resumption doctrine to the instant case in an attempt to fashion some sort of "fair" result, would swallow the rule, and defeat the public interests embodied therein and in I.C. § 42-222.[7]

Mays contends that fashioning some exception to the resumption doctrine for Sagewillow would not be "fair" in any event. It was Sagewillow who applied to transfer a right it did not have. It was Sagewillow who invested in pumps and pipes, and began diverting water before a transfer even had been approved. It is Sagewillow that has, apparently for the past 4 years irrigated 4 quarter-quarter sections in section 1, T7N, R27E, totalling 132 acres, without the benefit of any water right or approved transfer. *See* Protestant's Post-Hearing Brief at 18; Pancheri Cross, Vol. I, p. 105, l. 12 to p. 109, l. 16. It was the Department, which as a matter of

[7]If the Department were to create an exception to the common law resumption of use doctrine in this case, what would it look like? If it were narrowly confined to the facts in this case perhaps it would read as follows: The Department will permit a resumption of use, and transfer of abandoned water rights through the mechanism of a transfer application, if and only if, it can be shown that the Department has wrongfully failed to fulfill its statutory duty to investigate the same as required by I.C. § 42-222, and if it can be shown that if such investigation had been conducted, the Department would have found abandonment, and denied the transfer application. Merely framing the exception reveals its fault.

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policy, made no investigation into the bona fides of the application, or of the elements required by I.C. § 42-222.

Resumption of use of right no. 33-2091 will impact the Little Lost Basin to the extent of 320 acres of diversion, irrigation and associated consumptive use. David Andreason, the District 33 Watermaster, testified that its takes only a small reduction in streamflow for him to begin cutting the most senior water rights on the stream, including the early priority rights of Mays and others. Thus, while all the omissions were committed by others, all of the harm will fall on Mays and similarly situated water users.

And as Mays previously has argued, regardless of what the common law doctrine of resumption of use may have permitted, the Idaho legislature has since enacted I.C. § 42-222(2) which requires: 1) application to the Department for an extension of time to resume beneficial use; a proper showing of good and sufficient reason for the non-use; and 3) an opportunity for objection and hearing by any person. The Department's files for water rights 33-2091 and 33-2090 do not contain any request for an extension of time to resume beneficial use, or an order granting such exception. Thus, a mechanism was available, at least as to Sagewillow's predecessor, to avoid the harsh result of forfeiture, but that opportunity also was ignored. The Department should not attempt to fashion an "exception" to the common law resumption doctrine where the legislature already has provided a statutory scheme.

4. Transfer 3785 is void for failure to obtain the recommendation of the Watermaster.

Idaho Code § 42-222(1) requires, in connection with the processing of any

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application for a change in place of use of water, that the director of the Department:

> [A]dvise the watermaster of the district in which such water is used of the proposed change and the watermaster *shall* notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources *shall not finally determine the action* on the application for change until he had received from such watermaster his recommendation thereof, which action of the watermaster *shall* be received and considered as other evidence.

The watermaster for Water District 33, at the time Sagewillow filed its transfer application, was David Andreason. The Department's records for Transfer 3785, kept at the Boise office, contain no recommendation from the watermaster, David Andreason. Harold Jones, the Department's water right supervisor for the Eastern Regional office testified at the hearing, "If the water master had commented it would be in that file in Boise." Jones Dir., p. 128.

The failure of the watermaster to report or make a recommendation regarding this transfer is a fatal flaw in the transfer application process which invalidates the transfer. It is a clear violation of Idaho Code § 42-222 which must necessarily void the transfer.

B. <u>The Findings and Conclusions of the Recommended Order Regarding the Correct Acres of Historical Use on the Frew Place are Supported by the Evidence.</u>

The Recommended Order properly relies on the testimony of Terry Scanlan regarding the historical place of use of water right nos. 33-02086 and 33-07018. In fact, Mr. Scanlan provided the only testimony dealing specifically with these lands. Scanlan Dir., Vol. II, p.91, l.16-20; p. 95, l15-120. Mr. Scanlan based his findings on his evaluation of the ASCS photographs which show 230 acres of irrigated land

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within the designated places of use. Mr. Pancheri provided no testimony regarding the historical irrigation of these lands, and although Dr. Brockway was called as a direct and rebuttal witness by Sagewillow, he did not testify to his estimates of irrigated acres on the David Hawley or Frew Place, or attempt to dispute the basis for Mr. Scanlan's estimates.

Dr. Brockway did testify that his estimate of historically irrigated acres was based on three factors: the existence of a distribution system; whether the soil was suitable to raise a crop, and whether there was "some evidence" that would indicate that the land had either recently or in the past been irrigated or could be irrigated. Brockway Dir., Vol. I, p. 128, l. 10-21. Yet, Mr. Pancheri admitted that the fact that a ditch was present on the land did not necessarily mean that he was able to irrigate the land. Pancheri Cross, Vol. I, p. 88, l. 10-13. Dr. Brockway's spreadsheet, Applicant's Exhibit 7, which estimated consumptive use on the Sagewillow properties was developed in part relying on aerial photos—the same information that Sagewillow faults Mr. Scanlan for using.

The hearing officer had the benefit of the testimony, and of the aerial photos and other information reviewed by the parties' experts, and as the trier of fact was entitled to conclude which acreage estimates for the David Hawley or Frew Place he found to be the most reasonable and credible. There is substantial evidence in the record to support the Recommended Order's findings and conclusions on this issue and they need not be revised.

III. CONCLUSION

For the reasons set forth above, Mays respectfully requests the Department

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affirm its Recommended Order as the Final Order in these proceedings.

Dated this 1st day of September, 1995.

GIVENS PURSLEY & HUNTLEY

BY: _____

Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Gary Spackman Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)

Michael C. Creamer

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JUDSON B. MONTGOMERY
TERRY L. MYERS
RAMONA S. NEAL
STEVEN L. OLSEN
W. HUGH O'RIORDAN
KENNETH L. PURSLEY
GREGORY J. VIETZ
CONLEY WARD
STEVEN R. WEEKS
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LAW OFFICES
GIVENS PURSLEY & HUNTLEY
SUITE 200, PARK PLACE
277 NO. 6TH STREET
POST OFFICE BOX 2720
BOISE, IDAHO 83701

JAMES A. McCLURE
JUDITH K. HOLCOMBE
OF COUNSEL

DAVID E. MABE
LEGISLATIVE SPECIALIST

TELEPHONE
(208) 342-6571

FACSIMILE
(208) 343-9492

July 24, 1995

Debbie Ellis
Idaho Department of Water Resources
1301 North Orchard Street
Boise, ID 83706-2237

Re: Mays Land & Livestock - Sagewillow Transfer
Our File: 3314-6

Dear Debbie:

This is to confirm our conversation last week in which I indicated that Mays Land & Livestock has agreed to split the cost of preparation of the hearing transcript and requests that it receive a copy of the transcript at the same time as Sagewillow.

I understand that the transcript is tentatively scheduled for completion by approximately the second week of August.

Thank you for your assistance.

Sincerely,

Michael C. Creamer

MCC/mc

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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

June 19, 1995

Kent W. Foster
PO Box 50130
Idaho Falls ID 83409

Re: Request for typed transcript of Sage Willow hearing

Dear Mr. Foster:

Rule 651 (IDAPA 37.01.01.651) of the Department's Rules of Procedure states that "[a]ny party may have a transcript prepared at its own expense. If the transcript is prepared at the expense of the party is deemed by the hearing officer to be the official transcript of the hearing, the party shall furnish the agency a transcript without charge."

A gross estimate of the cost of transcript preparation is $600.00. Upon remittance of $600.00 to the Department, we will contract to have the transcript prepared. The transcript can be completed in approximately one month. The cost of transcription could exceed the initial payment. If additional money is required, the Department will bill you for the remaining amount due.

Because the transcript is being prepared prior to final disposition by the Department, and because the hearing officer anticipates lengthy argument which may refer to specific testimony of witnesses, perhaps by page and line number in the transcript, I will deem the typed transcript the official transcript of the hearing, and ask that a copy of the transcript be provided to the Department without charge.

If the protestants desire a copy of the transcript, they can arrange with you for payment of their share of transcription costs.

Sincerely,

Gary Spackman

cc: Michael C. Creamer
Blaine County Canal Co
Eastern Region

MAR 2 7 1996

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	0356
CONNECTION TEL	6p912087360041
CONNECTION ID	
START TIME	07/13 13:54
USAGE TIME	00'57
PAGES	3
RESULT	OK

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 3

To J. Evan Robertson	From Debbie Ellis
Co. or-Norman Semanko	Co. IDWR
Dept. Kasholt Robertson	Phone # (208) 327-7920
Fax # (208) 736-0041	Fax #

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 EXTENDING TIME FOR FILING BRIEFS ON RECONSIDERATION**

The applicant, Sage Willow, Inc., having moved the department for an order extending the July 14, 1995 deadline for filing briefs in response to the order granting petition for reconsideration, and good cause appearing therefor;

IT IS HEREBY ORDERED that the deadline for filing briefs in response to the Order Granting Petition for Reconsideration is extended until fourteen (14) days after service by the Department of the requested transcript of the agency hearing in this matter.

DATED this 13TH day of July, 1995.

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	0354
CONNECTION TEL	6p912085239518
CONNECTION ID	
START TIME	07/13 13:48
USAGE TIME	01'03
PAGES	3
RESULT	OK

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 3

To Kent Foster	From Debbie Ellis
Co. Holden Kidwell	Co. IDWR
Dept.	Phone # 327-7920
Fax # (208) 523-9518	Fax #

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 EXTENDING TIME FOR FILING BRIEFS ON RECONSIDERATION**

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DATED this 13TH day of July, 1995.

****
*** ACTIVITY REPORT ***
****

TRANSMISSION OK

TX/RX NO.	0350
CONNECTION TEL	6p93439492
CONNECTION ID	
START TIME	07/13 13:42
USAGE TIME	00'58
PAGES	3
RESULT	OK

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 3

To Attn: Julie Fisher	From Debbie Ellis
Co. Mike Creamer	Co. IDWR
Dept. Givens Pursley	Phone # 327-7920
Fax # 343-9492/342-8920	Fax #

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 EXTENDING TIME FOR FILING BRIEFS ON RECONSIDERATION**

The applicant, Sage Willow, Inc., having moved the department for an order extending the July 14, 1995 deadline for filing briefs in response to the order granting petition for reconsideration, and good cause appearing therefor;

IT IS HEREBY ORDERED that the deadline for filing briefs in response to the Order Granting Petition for Reconsideration is extended until fourteen (14) days after service by the Department of the requested transcript of the agency hearing in this matter.

DATED this 13TH day of July, 1995.

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Telefax: (208) 523-9518

J. Evan Robertson
Norman M. Semanko
ROSHOLT, ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906
Telephone: (208) 734-0700
Telefax: (208) 736-0041
07109504.NMS

RECEIVED
JUL 13 1995
Department of Water Resources

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.	))))))	**MOTION TO EXTEND DEADLINE FOR FILING BRIEFS IN RESPONSE TO ORDER GRANTING PETITION FOR RECONSIDERATION**

Pursuant to Rule 260 of the Idaho Department of Water Resources' Rules of Procedure, the applicant, Sage Willow, Inc., through its joint counsel, hereby moves that the department extend the July 14, 1995 deadline for filing briefs in response to the Order Granting Petition for Reconsideration.

The grounds for the instant motion are as follows:

1. The applicant, through counsel's letter of June 22, 1995 (Exhibit "A"), has requested that the department "expedite the completion" of the transcript in this matter. In order to properly respond to the Order Granting Petition for Reconsideration, the applicant, and its joint counsel, must first receive and have adequate

MAR 2 7 1996

time to review the transcript. Applicant understands that the process of completing the transcript could take a month or more and will certainly not be complete before the July 14 deadline.

2. By NOTICE OF REPRESENTATION filed with the department concurrent with this motion (Exhibit "B"), the applicant has advised the department and other parties to these proceedings that it has retained additional counsel. Adequate time is necessary for said counsel to review the documents filed in this matter, in addition to the yet-to-be-completed transcript, and to aid in the preparation of a responsive brief.[1]

3. Granting of this motion will not result in prejudice to the other parties or unreasonably delay the proceedings. To the contrary, it is necessary in order for the applicant, and its joint counsel, to prepare an adequate responsive brief.

For the reasons listed above, the applicant respectfully requests that the deadline for filing briefs in response to the Order Granting Petition for Reconsideration be extended from July 14, 1995 to a date 14 days after the service date of the transcript. The applicant further requests expedited consideration of this motion.

[1] The need for counsel to review the transcript is especially apparent in view of the issues raised on reconsideration. For example, examination of the issue of how many irrigated acres exist on the Frew Place is so interwoven with the testimony given by Terry Scanlin that a review of the transcript is essential.

MAR 27 1996

DATED this 11th day of July, 1995.

for Norman M. Semanko
Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

for Norman M. Semanko
J. Evan Robertson
ROSHOLT, ROBERTSON & TUCKER

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of July, 1995, I served a copy of the foregoing **MOTION TO EXTEND DEADLINE FOR FILING BRIEFS IN RESPONSE TO ORDER GRANTING PETITION FOR RECONSIDERATION** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (facsimile and mail)
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720

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

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

Norman M. Semanko

MAR 27 1995

EXHIBIT A

COPY

Law Offices
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

FRED J. HAHN
KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
STEPHEN E. MARTIN
CHARLES A. HOMER
GARY L. MEIKLE
GAYLE A. SORENSON, P.A.
DONALD L. HARRIS, P.A.
DALE W. STORER
MARIE T. TYLER
JOHN G. SIMMONS
ROBERT M. FOLLETT
FREDERICK J. HAHN, III

WEST ONE BANK BLDG.
330 SHOUP AVENUE, THIRD FLOOR
P.O. BOX 50130
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
TELEFAX (208) 523-9518

Arthur W. Holden
(1877-1967)
Robert B. Holden
(1911-1971)
Terry L. Crapo
(1939-1982)
William S. Holden
(1907-1988)

June 22, 1995

Mr. Gary Spackman
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Mr. Spackman:

We are enclosing a check in the amount of $600 for the typed copy of the transcript pursuant to your letter of June 19, 1995. Anything that can be done to expedite the completion of this transcript would be greatly appreciated. In fact if it could be done in less than one month it would very helpful to the lawyers who did not have the opportunity to participate in the hearing.

Thank you for your kind assistance.

Very truly yours,

Kent W. Foster

Enclosure
G:\WPDATA\KWF\8149\IDWR0622.LTR:sjw

JUN 27 1995

EXHIBIT B

J. Evan Robertson
Norman M. Semanko
ROSHOLT, ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906
Telephone: (208) 734-0700
Telefax: (208) 736-0041
07109503.NMS

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.	)	**NOTICE OF REPRESENTATION**

Consistent with Rules 200 and 205 of the Idaho Department of Water Resources' Rules of Procedure, the applicant, Sage Willow, Inc., hereby provides notice that the law firm of Rosholt, Robertson & Tucker, by and through the above-listed counsel, has been retained as a representative in the above-captioned transfer proceedings. This representation is in addition to the previous and ongoing representation by the Law Offices of Holden, Kidwell, Hahn & Crapo, by and through Kent W. Foster. The two representatives/counsel will be jointly representing the applicant during the remainder of these proceedings. As a result, the applicant hereby requests that both of its representatives receive service of documents filed in these transfer proceedings.

MAR 2 7 1996

DATED this 11th day of July, 1995.

ROSHOLT, ROBERTSON & TUCKER

By: Norman M. Simantov
for J. Evan Robertson

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of July, 1995, I served a copy of the foregoing **NOTICE OF REPRESENTATION** by depositing same in the United States mail, postage prepaid, in a envelope, addressed to the following:

Idaho Department of Water Resources (facsimile and mail)
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720

Kent W. 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

Norman M. Semanko

J. Evan Robertson
Norman M. Semanko
ROSHOLT, ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, ID 83303-1906
Telephone: (208) 734-0700
Telefax: (208) 736-0041
07109503.NMS

RECEIVED
JUL 12 1995
Department of Water Resources

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.	)	**NOTICE OF REPRESENTATION**

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RECEIVED
MAR 27 1996

DATED this 11th day of July, 1995.

ROSHOLT, ROBERTSON & TUCKER

By: Norman M. Semanko
for J. Evan Robertson

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

Norman M. Semanko

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
P.O. Box 2720
277 No. 6th Street, Suite 200
Boise, Idaho 83701
Telephone: (208) 342-6571
3314\6\PLEADING\RECONSID.BRF

Attorneys for Protestants

RECEIVED
JUN 22 1995
Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	PROTESTANT'S RESPONSE TO SAGEWILLOW'S PETITION FOR RECONSIDERATION

Protestants James Mays and Mays Land & Livestock ("Mays") hereby submit their Response to Sagewillow's Petition for Reconsideration in the above-captioned matter. For the reasons stated herein, Sagewillow's Petition for Reconsideration ("Petition") should be denied.

I. INTRODUCTION

In its Petition, Sagewillow states that its primary concern is with the Recommended Order's application of the law of "resumption of use" of an abandoned or forfeited water right. This issue was fully addressed by both parties in post-hearing briefing, and Mays will not rehash that issue other than to reiterate that

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both abandonment and forfeiture were amply demonstrated by the evidence, and that the revival or resumption of use doctrine, whatever its vitality, is to be construed narrowly, and so as to protect intervening rights such as those held by Mays and others in the Little Lost system. Sagewillow's Petition offers nothing new regarding the application of the resumption doctrine, nor does it direct the Department to any particular facts that were overlooked by the Hearing Officer in his consideration of the case. As such, the Petition raises no substantial ground for reconsideration on this issue.

The Petition raises another issue that should be addressed, however: the assertion that Sagewillow and its principals are not responsible for knowing and/or preserving the state of title to their own real property, or for the accuracy and completeness of the documents they execute. Implicit in this argument is Sagewillow's position that by providing assistance in the preparation of transfer applications, and thereafter accepting them for processing, the Department somehow becomes the guarantor of the title of the applicant's water rights, and must approve the applicant's proposal despite compelling evidence, upon later application for transfer, showing there are no water rights to transfer. That result is unsupportable by law or policy and must be rejected.

II. ARGUMENT

A. The Evidence Amply Supports a Finding of Abandonment or Forfeiture of Right Nos. 33-2090 and 33-2091.

The policy which holds that abandonment and forfeiture are not favored is clear in Idaho water law. Yet, while every "intendment" is to be indulged against finding abandonment or forfeiture, this is merely another way of stating that a

MAR 27 1996

presumption exists in favor of preserving the right, which, when overcome by clear and convincing evidence, must yield to the truth.[1] In other words, the policy against forfeiture does not consume the policy and the statutes that provide for automatic forfeiture for non-use, and it does not compel the Department to ignore the plain facts, their natural inferences or their legal implications.

The evidence is undisputed that the Bird Ranch and "North of the Road" lands had not been irrigated since the 1960s; that no other lands were irrigated in their stead; and that the wells and ditches serving those lands had been long abandoned. Vance Hawley's testimony that his parents told him they had intended to abandon the water rights upon acquiring patents to those lands was not objected to, nor was it objectionable.[2] Vance Hawley's testimony on this point provided the only plausible explanation for why the wells, pump motors, and ditches had been abandoned, and why the lands had been left to revert to unirrigated rangeland. The Recommended Order correctly considers the evidence and concludes that right nos. 33-2090 and 33-2091 were abandoned and/or forfeited.

B. No Valid Resumption of the Sagewillow Rights can be Found.

There was no resumption of the forfeited and abandoned water rights by Sagewillow. The Department must be careful to distinguish the two doctrines—non-injury and resumption—which are freely intermingled by Sagewillow's Petition. The

---

[1]The definition of "intendment" is "the true meaning, the correct understanding or intention of the law. A presumption or inference made by the courts." Blacks Law Dictionary (5th ed. 1979).

[2]The Idaho Rules of Evidence provide an exception to the hearsay rule for out-of-court statements made by any person, where the statement is against the interest of the declarant. *See* I.R.E. 804(b)(3). Certainly, statements by Slim Hawley that indicated his intent to abandon valuable property rights, or subject them to forfeiture for non-use, qualify as statements against his interests. The inherent reliability of such statements warrant their consideration by the Hearing Officer.

MAR 27 1996

resumption doctrine does not permit revival of a lost right where intervening rights have accrued, regardless of whether injury results. In a *transfer* proceeding, *injury*, and the extent thereof, is an issue, but that inquiry is separate and distinct from the one that asks merely whether intervening rights have accrued. In any event, the Recommended Order's findings and conclusions that other rights have intervened, and that the transfer, without conditions, would injure these rights, are supported by the evidence. The Order requires no reconsideration or further justification.

Sagewillow observes that the Recommended Order's application of the resumption of use doctrine renders it "effectively non-existent." Petition at 3. Correctly applied, the resumption doctrine is archaic, and concurrently, extremely limited in its applicability. In a largely unsettled land, on largely unappropriated streams, the doctrine may have had some vitality, although apparently it rarely was actually used in Idaho or elsewhere. Conceivably, resumption could still be possible for mining or other claims in areas such as the Middle Fork of the Salmon, or the Clearwater (presuming certain large instream claims prove invalid). But in the Little Lost River Basin, where the lands and waters have been fully appropriated, the resumption doctrine necessarily has been "squeezed out" by modern circumstances. If it is allowed to operate today in places like the Little Lost, injury to existing water rights would result.

Only a strained construction of the leading Idaho cases on resumption of use could support Sagewillow's fanciful interpretation of that doctrine at pages 9-11 of its Petition. Regardless of the accuracy of Sagewillow's summary, the facts are that intervening rights exist, and that Sagewillow did not comply with the requirement

MAR 2 7 1996

of the doctrine that the resumed use be the same as the original use.

C. The Recommended Order Correctly Concludes that Transfer 3785 is a Nullity.

There was no factual basis whatsoever for approving Transfer No. 3785, which proposed to move water right no. 33-2091 from the Bird Ranch to the North of the Road property. Sagewillow argues that the Department cannot unwind the process that resulted in the approval on the theory that Department employees assisted Sagewillow in its applications. The Department has appropriately rejected this theory.

In the first place, facts regarding who filled out the transfer application or what specific representations were made by the Department or Sagewillow regarding its contents or accuracy, are not in the record as we recall it. Second and contrary to its assertion, Sagewillow did not rely on the approval of Transfer 3785 in developing its irrigation system—the evidence showed that Sagewillow developed *and operated* that system before a final order on Transfer 3785 even was issued. Third, Sagewillow was the applicant, whose principal Mr. Dumke, verified the application's contents. Sagewillow therefore, and not the Department, must assume responsibility for its completeness and correctness.

Sagewillow may be correct in stating that it had no legal obligation when it bought the Hawley property to inquire whether the associated water rights actually had been used; the law does not require persons to exercise due diligence and reasonable prudence in conducting their own business affairs. But clearly it is Sagewillow who must bear the consequences of its own decision not to investigate the validity of claimed water rights. Even the most cursory inspection of the land, the

MAR 2 7 1996

wells, the pumps and ditches and the tax rolls would have provided notice that no water had been applied to the Bird Ranch and North of the Road properties. If Mr. Dumke chose not to personally inquire into the prior use of water rights that he apparently intended to purchase and transfer, or to confirm the accuracy or completeness of the documents he executed in seeking to transfer those rights, then he and Sagewillow must accept the consequences, not Mays, the Department or the public.

Also, even if Department personnel provide advice in the preparation of transfer applications, or they suggest changes to them prior to acceptance and publication, that does not place the Department in the position of guarantor of the validity of the applicant's water rights, or of the ultimate approval of the transfers. Each transfer application is subject to protest and hearing, and review by the Department, regardless of who was involved in its preparation. If the facts show that the rights have been abandoned or forfeited, they must be declared so. It would be arbitrary and capricious, an abuse of discretion, and an actionable violation of law for the Department to do otherwise.

D. The Department has Broad Authority in a Transfer Proceeding to Grant, Deny or Condition its Approval.

This is not a case where the Department or the watermaster has determined to turn off Sagewillow's diversions, or unilaterally determine the nature and extent of Sagewillow's water rights. This is a transfer proceeding. Idaho Code § 42-222 provides the Department with broad responsibility to consider each transfer application, and to either grant the transfer, deny it, or grant it with conditions. A transfer proposes a change in how actual, valid water rights are exercised, and I.C.

MAR 27 1996

§ 42-222 provides important protections to insure that others are not injured by that change. In other words, the statute protects the status quo on the stream. To exercise the privilege of changing his water right, the transfer applicant first must lay the right bare on the table for a thorough inspection by the Department and the parties. In a transfer proceeding every infirmity, blemish and wart the water right may have is subject to review. If the water right is dead on arrival (as several of Sagewillow's were), they cannot be transferred or revived through the transfer process.

Thus, it does not matter what the Department's records indicate the beneficial use was when a license or decree was issued, or whether a court has or has not formally decreed that a right has been lost—the Department has the full authority to give the right a hard look and decide *whether it will approve the transfer.* Graham v. Leek, 65 Idaho 279, 144 P.2d 475 (1944). This necessarily includes the authority to impose whatever conditions protection of other water rights and the public interest require. The Recommended Order's limitations of the annual volume of diversion or consumptive use are examples of a proper and necessary exercise of this authority.

III. CONCLUSION

Given the state of the law and the record in this case, disappointment might be a more appropriate reaction than shock for Sagewillow. But if Sagewillow was not braced for that outcome, it was because it either neglected or refused to make its own evaluation (at the time it purchased the Hawley properties and prior to the hearing) of the facts surrounding the prior use of the water rights it was dealing with. Regardless, neither Mays nor the Department can be required to share in the

MAR 2 7 1996

consequences of Sagewillow's failure to make a reasonable inquiry.

In a transfer proceeding the Department is required to review the subject water rights, and to place conditions on any transfer approval. In this case, the evidence indicated that right nos. 33-2091 and 33-2090 had been abandoned and/or forfeited, that the remainder of the Sagewillow rights also should be limited upon transfer to their historical use, and that Transfer 3785 was improperly approved and should be voided.

The Recommended Order's findings and conclusions are amply supported by the evidence presented at the hearing. Sagewillow's Petition has not stated any substantial grounds for reconsideration and should be denied.

DATED this 22nd day of June, 1995.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Gary Spackman Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL __X__ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



MAR 3 7 1996

AND
RESS
NDER

Indicate type of mail
☐ Registered ☐ Return Receipt For Merchandise
☐ Insured
☐ COD
☑ Certified ☐ Express Mail

Check appropriate block for Registered Mail:
☐ With Postal Insurance
☐ Without Postal Insurance

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

POSTMARK AND DATE OF RECEIPT

Number of Article	Name of Addressee, Street, and Post-Office Address	Postage	Fee	Handling Charge	Act. Value (If Regis.)	Insured Value	Due Sender If C.O.D.	R. R. Fee	S. D. Fee	S. H. Fee	Rest. Del. Fee / Remarks
1190	Sagewillow Inc PO Box 50130 Idaho Falls 83405	.29	1.00					1.00			Sagewillow Inc Prehearing Conference
1191	Blaine County Canal HC 65 Box 1018 Hawe 83244	.29	1.00					1.00			
1192	Michael C. Creamer P.O. Box 2720 Boise ID 83701	.29	1.00					1.00			
1193	Vic Conrad PO Box 27 Boise ID 83707-0027	.29	1.00					1.00			
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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

Sage Willow Inc. petitions the hearing officer in the above entitled matter for reconsideration of the recommended order upon the grounds and for the reasons set forth in the brief filed in support hereof.

DATED this 5th day of June, 1995.

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 5th day of June, 1995.

DOCUMENT SERVED: PETITION FOR RECONSIDERATION
PARTIES SERVED:

IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720 (facsimile and mail)

IDAHO DEPARTMENT OF WATER RESOURCES
900 North Skyline
Idaho Falls, Idaho 83402 (hand delivery)

Michael C. Creamer
GIVENS PURSELY & HUNTLEY
P.O. Box 2720
Boise, Idaho 83701 (mail)

Blaine County Canal Co.
c/o Wade T. Williams
HC 65 Box 1032
Howe, Idaho 83244 (mail)

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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MAR 2 7 1996

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(1907-1988)

June 5, 1995

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JUN 07 1995
Department of Water Resources

Mr. Gary Spackman
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Sage Willow, Inc.

Dear Mr. Spackman:

Enclosed is a Petition for Reconsideration and supporting Brief in the above entitled matter.

Mr. Dumke has retained the services of an additional law firm to assist in this matter and we wonder if it would be possible to obtain a typed transcript of the hearing for their review even prior to formal commencement of the appeal?

We would appreciate hearing from you regarding this request as soon as it is convenient.

Very truly yours,

Kent W. Foster

Kent W. Foster

Enclosure
pc. Ed Dumke
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MAR 27 1996

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER APPLICATION FOR TRANSFER NOS. 4221, 4222, 4223, 4224, 4225, 4226, AND 4227 IN THE NAME OF SAGE WILLOW, INC.	)	BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER AND EXCEPTIONS TO RECOMMENDED ORDER

With all due respect, applicant is shocked by the Recommended Order issued in the above entitled matter, and feels compelled to request reconsideration. We have always understood that forfeiture and abandonment are not favored in our law and that every intendment is to be indulged against such. The recommended order seems to indulge every intendment in favor of forfeiture and abandonment, and in addition appears to purport to dramatically change the law relating to the primary defense to forfeiture and abandonment, i.e., resumption of use.

The issue in this case is not whether there has been a period of five or more years of non-use of one or more of the water rights. For some water rights that seems to be obvious; the only evidence available shows that the total acreage irrigated for several years prior to 1989 approximated 1,200. The issue raised by the facts of this case is the legal effect of the resumption of use which occurred after applicant acquired the land in 1989. We submit that

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the most important facts relevant to application of water to beneficial use pursuant to the rights which are the subject of the pending transfer applications are those which have occurred since 1989.

It is not a light thing to abrogate a long and well established doctrine of law. Resumption of use was established in Idaho as a defense to forfeiture and abandonment by the Idaho Supreme Court in a number of cases over several decades, and we think it cannot be effectively eliminated from the law by an administrative agency. We understand the law to be that legal principles established by the State's Supreme Court are binding, not only upon the rest of the courts of the state, but also upon administrative agencies of the executive branch of the state government. If the doctrine of resumption of use is dead or has become so narrow as to have essentially no application in Idaho, we believe that pronouncement must be made by the court.

Even though there are a number of items in the Findings of Fact and Conclusions of Law of the "Recommended Order" upon which we need to comment, the basic problem with the Recommended Order is the inaccurate characterization of the application of the doctrine of resumption of use.

The hearing officer appears to rely, finally, for authority that the doctrine of resumption of use does not apply in this case, upon *Zezi v. Lightfoot* and *Jenkins v. State* (Conclusions of Law nos. 14 and 15). It is true that *Zezi* holds the use must be resumed prior to other appropriations, as stated in the Recommended Order, but it is also clear that the subsequent appropriation referred to by the court was of the very same water covered by the

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resumed right and not just other appropriations in general. There was no evidence introduced in our case that any appropriations had occurred during any period of nonuse, much less of the very same water. The rights about which we are most concerned are groundwater rights and there was not even any evidence that other groundwater rights are affected by Sage Willow's resumption of use, whether earlier or later in priority. Some of the Blaine County Canal Company stockholders expressed this concern, but the experts agreed any impacts from resumption of use on groundwater supplies in the basin would be so small as to not be measurable.

If the reference in the Jenkins case to junior appropriators moving up the ladder of priority when a senior right has abandoned or forfeited really means what the hearing officer suggests, then legal resumption of use of a water right after forfeiture is not just narrowly limited, it is effectively nonexistent. We suppose that in Idaho there would be almost no water district or water system where there are not both junior and senior water rights. Is it the conclusion of the hearing officer that only the most junior of all water rights in any such district or system could ever be forfeited or abandoned and then legally resumed?

While we concede that the referenced statement of the court in the Jenkins case could be confusing, we think it can be put in proper perspective when that decision is analyzed, keeping in mind the appropriate relationships between the doctrines of prior appropriation, injury to other water rights, forfeiture and abandonment, and resumption of use.

First, and most importantly, when the Jenkins' court made the statement regarding junior appropriators moving up the ladder of priority, it was "discussing" the issue of injury,

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not resumption of use. Completely unlike the Jenkins case, the applicant in this case does not seek to move the point of diversion and place of use of an unused water right from one stream system subject to a list of water rights having various priorities to an entirely different stream system subject to its own separate list of water rights having various priorities. Jenkins sought to reinstate his unused rights through a change in point of diversion from Cottonwood Creek to Ching Creek and in place of use from lands once watered near Cottonwood Creek to entirely different lands which could only be served by a diversion from Ching Creek. Ching Creek waters were already appropriated, and to insert another right into the Ching Creek list, would clearly have injured every right holder on Ching Creek whose priority was subsequent to the priority of the right claimed by Jenkins. The court's statement comprises part of its holding that junior appropriators on Ching Creek would have been injured by the specific resumption in use proposed by Jenkins in his application for transfer. The court's statement is not a general holding that once a five year period of non-use of a water right has occurred, (or even that once the use ceased coupled with evidence of intent not to recommence use), the use can never again be resumed if there are junior priorities on the system.

Under the doctrine of prior appropriation, junior priorities are usually affected or impacted in a negative way by a senior priority. It is the nature of most streams in Idaho that the amount of water carried in them diminishes as the irrigation season progresses, and the whole purpose of priorities is to permit the watermaster to allocate insufficient water supplies among the appropriators in a legally recognized fashion. Of course, whenever a senior

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appropriator stops using the water, those junior to him move up the priority ladder, and for whatever period during which the non-use persists, may be benefited by the senior's non-use of the water. On the other hand, when the senior resumes his use, the juniors move back down the priority ladder, and may not have adequate water for their desired use. That may very well be detrimental to the interests of one or more junior appropriators, and in that sense could be called an injury.

But such a use of the word "injury", is not the definition of the injury contemplated by Idaho Code §42-222, or applied by the court in Jenkins. The injury referred by Idaho Code §42-222 and found by the court in Jenkins is that which would result from the change proposed by the transfer. In Jenkins, the change proposed was not just in the place of use and point of diversion but would have required a resumption of use under the old unused right as well. That specific proposal, which included resumption of use, the court said, would have injured other water rights (specifically junior rights held by other landowners on Ching Creek) in contravention of Idaho Code §42-222.

The court in Jenkins did not say that the doctrine of resumption of use is not available as a defense to forfeiture or abandonment. Nor did the court say that if junior appropriators had moved up the ladder of priority during the period of non-use by the senior, they therefore could not, even after the statutory period, or after cessation of use coupled with sufficient evidence of intent not to use again in the future, be moved back down that priority ladder by a senior's resumption of use. Indeed, later in the same opinion, the Jenkins' court again

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restated the available defenses to abandonment and forfeiture, independently of its discussion of the injury issue, including the defense of resumption of the use, in these words:

> Further, if use of the water right is resumed after the five year period, but before any third parties make a claim in the water, the courts will decline to declare a forfeiture. (emphasis added)

For the foregoing proposition, the court cited the Boyer, Wagoner and Carrington cases. As the court pointed out, Jenkins did not raise this defense, and the facts, as determined by the trial court, did not contain evidence to support such a defense.

In our case, although the issue of injury was raised by the Protestants, we did not perceive that there was any evidence of such injury, and we do not see any finding or conclusion in the Recommended Order that there would be any injury to any water right or group of water rights as a result of the proposed changes in points of diversion or places of use. Unlike the applicant in the Jenkins case, Sage Willow has already resumed the use and whatever impacts (not a 42-222 injury) there might be to junior appropriators because of their relegation back down the ladder of priority, have already occurred. Our recollection is that such impacts are so minor as to be unmeasurable.

As we understood the evidence presented by protestants regarding injury, it related primarily to consumptive use. The argument was that consumptive use would be increased (and the experts disagreed over exactly how much) because of the more efficient farming methods proposed, and there would therefore be an increased depletion in ground and surface water supplies downstream. We thought the experts agreed in their testimony that there would be no measurable impact on groundwater supplies from the increase in consumptive

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use. But, depending upon which expert's estimate of increased consumptive use is used, the potential impacts on stream flows could vary from an almost immeasurable amount to something more.

We concur with the decision of the hearing officer not to try to regulate water use or diversions based on a microscopic consumptive use analysis. Conclusion of Law number 18 states that "there is a maximum consumption which the water right should not exceed." The hearing officer did not tell us what that maximum consumption is or how it may be determined, and we confess we do not know what legal authority the hearing officer may have had in mind for this proposition. However, we do remember statements from court decisions which may suggest that use of water must be reasonable within the context of what is customary in the affected area. There certainly was no evidence that the uses contemplated by the proposed transfer are not within such reasonable parameters, and, as the hearing officer points out, there is no consumptive use limitation or maximum contained in the licenses confirming such water rights.

There was no evidence introduced or finding made in this case to support a conclusion that any water right, junior or senior will be injured by the proposed transfer. If not, then how can one conclude that the use cannot legally be resumed based on the Jenkins case? As we say, the use has already been resumed, it is not just a proposal, as it was in Jenkins.

The hearing officer, in Conclusions of Law numbers 9 through 17, makes what appears to be an attempt to distinguish the fact situations of several Idaho cases from the case at bar to avoid the only correct conclusion, which is, that the use of each of the water rights

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which are the subject of this transfer proceeding was fully resumed during the period from 1989, when applicant purchased the ranch and appurtenant water rights, to the date of the filing of the applications. Of course, none of those fact situations from the old Idaho cases are identical to this one, but to suggest that the principles of law relating to the doctrine of resumption of use enunciated by the court in those decisions are therefore not applicable any more seems to us to be both improper legal analysis and beyond the scope of the authority of the administrative agency. One of the issues in the Jenkins case was whether the Department has jurisdiction to determine that forfeiture or abandonment has occurred. In deciding that IDWR does have that authority, however, the court did not also confer upon it the power to change or reverse principles or doctrines established by the court, regardless of whether such principles are merely recited as dicta in given cases, or are specifically relied upon to formulate the holdings therein.

If one wishes to discern the legal principles governing the doctrine of resumption of use as a defense to abandonment and forfeiture of water rights in the State of Idaho, surely the appropriate place to look (they are not to be found in a statute) is in the decisions of our Supreme Court. State agencies are bound not only by the specific holdings of the court in such cases, but also by legal principles cited with approval in such decisions. We know of no other pronouncements relating to this Idaho resumption of use doctrine than those contained in the cases cited in the various briefs of the parties and the Recommended Order.

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We think it is reasonably clear that, when considered together, either direct statements or appropriate inferences from the above decisions collectively establish the following principles relating to resumption of use:

1. Resumption of use is a defense created by the court to further its policy disfavoring forfeiture and abandonments.

2. If every intendment is to be indulged against forfeiture or abandonment, every intendment must also be indulged in favor of an accomplished resumption of use as a defense, even when clear and convincing evidence of forfeiture or abandonment has been presented.

3. Neither forfeiture nor abandonment is automatic under the law; in order for forfeiture or abandonment to legally prevent future use, there must be a formal determination of such by a court, or in an appropriate case, by IDWR.

4. Until there has been an appropriate formal determination of abandonment or forfeiture, the holder of the record right can always resume its use.

5. Watermasters do not have power or authority to declare forfeitures, nor does the water right holder. Watermasters must deliver rights which are of record when a call is made. Likewise, for rights such as groundwater rights which have not depended upon a watermaster's delivery, the holder of the right may divert the water and apply it to beneficial use pursuant to his license, decree or permit, until there is a formal order to the contrary.

6. There is no legal duty placed by law upon the purchaser of land with water rights of record to investigate the historic use of such rights to determine whether there has

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been any period of non-use which might constitute evidence of abandonment or forfeiture. He is entitled to rely on the existing records of such rights in his use of water pursuant thereto.

7. Use of a water right after five or more years of non-use or after abandonment cannot be resumed if, during the period of use, any third parties make a legal claim "in the water" which was not being used by the holder of the unused right. The making of such a claim might be pursuant to a new appropriation. Or, before 1969, or in an area outside the boundaries of the water district having a duly elected watermaster, such a claim could possibly be based on adverse possession. We suppose such a claim might even be made upon a theory such as quasi-estoppel, equitable estoppel or waiver. But we disagree with any conclusion that such legal claims refer to junior rights moving up the ladder of priority under the doctrine of prior appropriation.

8. A resumption in use, to be effective and defeat a forfeiture or abandonment, must be a bona fide and real use. We are aware of an unwritten perception by some portion of the public and even within the legal community that all the water right holder needs to do to protect a water right from forfeiture or abandonment is to divert water once every five years, even if only for a brief time, such as a day or a week, as we have sometimes heard "to reset the statutory clock". In our view, the resumed use, in order to overcome a statutory forfeiture or an abandonment, must consist of an actual diversion and application to beneficial use in a manner similar to that contemplated by the original water right. For example, if the right was for irrigation purposes, then we assume the resumption effort must

at least require a good faith attempt to raise a customary crop with some commercial value, and not just amount to a wasting of water.

The above list is not intended to be a comprehensive compilation of all the principals of the doctrine of resumption of use ever stated by the Idaho court, or which might be appropriately inferred from such statements. But we submit that such principals are to be found within the body of law provided by the court in the various cases cited and relied upon by the parties hereto and the hearing officer, and are applicable in this case.

Also, in this case, the evidence is clear that the use of water, as resumed, was made in a bona fide, successful effort to bring the acreage authorized under four of the groundwater licenses (33-02057, 33-02083, 33-02090, and 33-02091) under proper irrigation for economic purposes, to produce pasture grass, alfalfa hay and small grains. It was not a new appropriation; it was done pursuant to properly licensed water rights of record, and was completed prior to the filing of the applications for transfer. We submit that in the light of such actually completed resumption, the water rights sought to be transferred by the applicant are valid, and are no longer subject to a determination of forfeiture or abandonment which occurred, if at all, many years ago, and have been fully and legally overcome and defeated. If one makes the necessary analysis under the court directive that forfeitures and abandonments are abhorred, and that every intendment must be indulged against them, we do not believe one can reach any conclusion other than the use of the water rights was legally resumed prior to the filing of the applications for transfer.

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We also need to comment on a number of additional concerns we have with other portions of the Recommended Order:

1. **TRANSFER No. 3785**. We cannot see why the earlier transfer, No. 3785, must be voided, or why it is perceived to present such a difficult problem. We are certainly unaware of any legal authority for the department to do so. Indeed, in reliance upon that transfer, a very substantial investment has been made in sprinkler equipment, wells, pumps, and the electrical lines and panels, additional acreage has been brought under production, water has been diverted and applied to beneficial use, and crops have been raised on this particular land for at least four years. The hearing officer concludes as a matter of law, that there was no fraud or intent to mislead in the filing of such application, but apparently bases the determination to void the transfer on the grounds of misrepresentation.

We do not understand how there is evidence of misrepresentation by anyone, either in the preparation of the application or its processing. Applicant's farm manager, Mr. Jerry Pancheri, went to the Idaho Falls office of IDWR and the application form was completed by department personnel. Mr. Pancheri supplied all information requested by the department employee, but no one ever requested him or the applicant to make an investigation regarding a five year period of non-use. Applicant had only owned the land for a little over one year when the application was filed; if it was important to determine, at that point, whether there had ever been a five year period of non-use, we assume department personnel would have requested or directed that the same be done. There is no independent legal duty on the part of an applicant to affirmatively make such an investigation. Please, let us keep in mind that

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according to Idaho law, the burden of proving forfeiture is upon the one asserting it; the applicant is not obligated to prove there has been no such forfeiture.

In any event, the department instructed Mr. Pancheri to obtain the signature of the holder of the water right sought to be transferred. Mr. Dumke, as president of the corporation owning the land and holding the right, Sage Willow, Inc., signed the application on October 11, 1990. Surely we are all aware that corporate officers rely on agents and employees to conduct the business of the corporation. Mr. Pancheri presented to Mr. Dumke for signature a document which had been prepared by IDWR personnel pursuant to directions from such personnel. Both relied upon the department for its expertise in properly completing the form. Where, exactly, is the misrepresentation?

We assume that the hearing officer is very much aware that it is common practice for applicants to rely upon department personnel for their expertise in completing application forms. In this writer's own personal experience there have been occasions when either he or a client has attempted to complete an application for transfer form and has had it returned by IDWR for modifications or additional information before it is accepted for filing and processing. It has become this writer's common practice to advise clients to seek department assistance in preparation of the forms in the first instance in order to avoid delay, misunderstanding and confusion.

In this very case, counsel for the applicant approached Mr. Harold Jones of IDWR before ever beginning the preparation of any application forms in order to review with him the client's objectives and to seek advice, direction and assistance in preparing the necessary

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application or applications. Mr. Jones was gracious, but responded that he felt uncertain about how best to prepare the forms in a manner that would be acceptable to his supervisors in the Boise office. He referred us to Mr. Jim Johnson whom we then contacted for further assistance. The process of characterizing the proposal and preparing the forms in a manner acceptable to Mr. Johnson for filing and processing took over six months and involved numerous telephone discussions and a good deal of correspondence. For the hearing officer to now essentially order that applicant must start all over again is really quite frustrating. Does the left hand not know what the right hand is doing? There was no secret, at any point in the entire effort, that there had been long periods in the past of reduced acreage irrigated under the rights prior to applicants acquisition of the ranch property, or that since that first acquisition in 1989, applicant had caused use of water under such rights to be resumed to essentially the total acreage authorized under the licenses. Based upon this effort, the applications in this case were finally signed by Mr. Dumke (once he had received confirmation from his attorney who relied upon Mr. Johnson's representation that they were in satisfactory form), filed and processed.

Filing an application for transfer ought not to be tantamount to the rolling of dice. While we do not suggest that a hearing officer must be completely bound by actions of other department employees in preparing such applications, there ought to be more consistency between the recommendation of department personnel in the preparation process and in the ultimate outcome of a hearing officer's decision. We suggest that ranchers and their lawyers do not desire and cannot afford to gamble in this manner. We have attempted to assure

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predictability of the outcome as best we know how. We sought and relied in good faith upon assistance and advice of department personnel from the outset, as did Mr. Pancheri, and his principal, Sage Willow, Inc., in the 1990 transfer, No. 3785.

After the filing of the application for transfer, No. 3785, in October of 1990, it appears that notice was published on December 6th and 13th of the same year, and that no protests were filed. Then, on February 19, 1991, Mr. Pancheri sought and obtained a drilling permit to drill a well. Mr. Pancheri had submitted a written statement requesting the issuance of an expedited drilling permit because the well driller was then available. The written request made it clear that the well would "be used for the summer of 1991". After that well was drilled, it became apparent that it would not produce enough water and so a second drilling permit was sought and received on May 8, 1991, pursuant to which a second well was drilled. For reasons unknown to us, when department personnel completed the two drilling permits, they showed the proposed well location at the location of the abandoned well in section 34 for which the water right was sought to be transferred. The two wells actually drilled pursuant to these permits are the wells numbered 9 and 10 on attachment No. 1 to the Recommended Order.

The signature of Mr. L. Glenn Saxton appears to have been affixed to the transfer document on October 8, 1992. We have no idea why so much time elapsed between the final date for filing of protests and Mr. Saxton's signature, but we know of no fraud or misrepresentation which would have caused it and it was certainly not delayed at the request or due to the fault of the applicant. Again, we ask, what misrepresentation was ever made

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by applicant in the entire process? We cannot accept that the leaving blank of the answer to one question on the form by an IDWR employee, the information for the completion of which was not even known to applicant's agent at that time anyway, constitutes a misrepresentation. The department fully processed that application, issued two drilling permits, and after the completion of the investment by applicant in the wells, pumps and sprinkling equipment, finally approved the transfer. Doesn't a conclusion that such a transfer must now be voided seem a little unconscionable?

We reiterate that the transfer, No. 3785, must be viewed as one of the actions of applicant in resuming the use of water pursuant to the rights appurtenant of record to the ranch property. We 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. But the correction of that possible oversight was not one of the objectives of the pending applications for transfer. It is true that this fact was pointed out and caused some question when counsel for applicant was conferring with Mr. Jim Johnson, but each transfer can stand alone and is independent of the other. These 1993 applications do not seek to reopen the previous transfer proceeding. Instead, they accept it as an accomplished fact, and propose a new set of changes relying on that transfer as completed.

If the analysis of this transfer had been done from the standpoint that forfeitures and abandonments are not favored in the law and that all intendments must be indulged against them, we believe the issue would not have been nearly so difficult.

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2. **FREW PLACE**. We are also puzzled by the Recommended Order's reduction of the place of use under rights Nos. 33-02086 and 33-07018 to 230 acres. It appears to be based upon Terry Scanlan's testimony that from one aerial or satellite photograph, he estimated this figure. We do not recall to which particular photograph he may have been referring, but we thought Dr. Brockway had suggested it was quite difficult to be precise on irrigated acreage from aerial or satellite photographs of such small scale and poor quality anyway. We do not doubt that Mr. Scanlan may have made his best estimate, but why are the department's own field examinations, made when the licenses were issued, not better evidence? There was no coroborating evidence that anything had changed since the issuance of the second license in 1980. As we review rights Nos. 33-02086 and 33-07018, it appears to us that the combined authorized place of use under both licenses is 260 acres. The difference of 30 acres is not very great, but we wonder why Mr. Scanlan's estimate from a difficult to read and small scale photograph would be adequate to overcome the following considerations:

a. His estimate was for one moment in time, when the photo was taken. How does that furnish evidence of five for more years of non-use, or cessation of use coupled with an intent to abandon?

b. The latest photo reviewed by Mr. Scanlan predates Sage Willow's acquisition of the property in 1993. Why is Mr. Pancheri's testimony that he irrigated the same 260 acres in 1993 and 1994 that has historically been irrigated under these rights less credible than an estimate from whatever photograph Mr. Scanlan reviewed?

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c. As we calculate the possible discrepancy (30 acres of a total of 260) that appears to be about 11% to 12%. We wonder if the accuracy of even an expert's review of either an aerial or satellite photograph could be significantly better than that?

3. **ABANDONMENT OF RIGHTS 33-02090 and 33-02091**. We question whether there is really an independent factual basis for finding intent to abandon rights Nos. 33-02090 and 33-02091. Conclusion of law No. 3 contains references to testimony of Vance Hawley. We don't disagree that his testimony was unrefuted, but we understood him to give it as his opinion based on hearsay, and his subsequent consideration of the matter, that the family members who acquired the patents probably had no intention of seriously irrigating the land so acquired. While this may well be a logical conclusion on his part from his own observations and understanding, does such speculation amounting only to opinion based on hearsay really rise to the level of clear and convincing evidence upon which the hearing officer may find abandonment? This was not a jury trial and of course the hearing officer heard evidence that might well have been objectionable and not admitted if offered to a jury. But the hearing officer is trained, like a judge, to differentiate between direct evidence of observations made by witnesses and their speculations, based upon hearsay.

Of course the intent required to support a finding of abandonment is not a subjective intent anyway; it is to be determined objectively from all the surrounding facts and circumstances. Often such things as substitution of an alternative water supply or irrigation system, or conversion of land to a different use than agriculture, or complete elimination of an established means of diversion and irrigation system, can provide such objective evidence.

But non-use, even for a significant number of years, is not alone sufficient. We doubt that non-use for more than five years coupled with nothing more than speculation based on inadmissible hearsay is adequate evidence of intent to abandon a water right. Also, we reassert that use of water under these rights was legally and properly resumed prior to anyone properly raising the issue of abandonment anyway.

4. **USE OF GROUNDWATER IN PONDS**. If we understand correctly, the Recommended Order prohibits the use of groundwater through the pond system. There is no explanation that we can find and we don't understand why.

5. **CREDIBILITY OF WITNESSES**. Of probably lesser significance, but very disconcerting to applicant anyway, is the apparent emphasis given by the hearing officer to the "credibility" of the testimony of Vance Hawley, James Mays and Terry Scanlan. Are we to infer that such testimony was more credible than that given by Mr. Jerry Pancheri or Dr. Charles E. Brockway, or that Mr. Pancheri and Dr. Brockway's testimony was incredible? And if so, why? As the first conclusion of law states, "the parties agree about most of the facts pertaining to traditional use prior to Sage Willow acquiring the property, and the expanded use of Sage Willow following its acquisition." We thought so too. But there almost seems to be a flavor from such references that something about applicant's evidence was not reliable or acceptable.

CONCLUSION

In conclusion, and without any intention to be personal or demeaning in any manner, we submit that the recommended order misses some very critical points, and seems to us to

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proceed from the opposite premise of that required by the courts, that forfeitures and abandonments are not favored by the law and that every intendment is to be indulged against such. We respectfully plead for reconsideration.

Submitted this 5th day of June, 1995

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

MAR [illegible] 96

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 5th day of June, 1995.

DOCUMENT SERVED: BRIEF IN SUPPORT OF PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER AND EXCEPTIONS TO RECOMMENDED ORDER

PARTIES SERVED:

IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720 — (facsimile and mail)

IDAHO DEPARTMENT OF WATER RESOURCES
900 North Skyline
Idaho Falls, Idaho 83402 — (hand delivery)

Michael C. Creamer
GIVENS PURSELY & HUNTLEY
P.O. Box 2720
Boise, Idaho 83701 — (mail)

Blaine County Canal Co.
c/o Wade T. Williams
HC 65 Box 1032
Howe, Idaho 83244 — (mail)

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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not resumption of use. Completely unlike the Jenkins case, the applicant in this case does not seek to move the point of diversion and place of use of an unused water right from one stream system subject to a list of water rights having various priorities to an entirely different stream system subject to its own separate list of water rights having various priorities. Jenkins sought to reinstate his unused rights through a change in point of diversion from Cottonwood Creek to Ching Creek and in place of use from lands once watered near Cottonwood Creek to entirely different lands which could only be served by a diversion from Ching Creek. Ching Creek waters were already appropriated, and to insert another right into the Ching Creek list, would clearly have injured every right holder on Ching Creek whose priority was subsequent to the priority of the right claimed by Jenkins. The court's statement comprises part of its holding that junior appropriators on Ching Creek would have been injured by the specific resumption in use proposed by Jenkins in his application for transfer. The court's statement is not a general holding that once a five year period of non-use of a water right has occurred, (or even that once the use ceased coupled with evidence of intent not to recommence use), the use can never again be resumed if there are junior priorities on the system.

Under the doctrine of prior appropriation, junior priorities are usually affected or impacted in a negative way by a senior priority. It is the nature of most streams in Idaho that the amount of water carried in them diminishes as the irrigation season progresses, and the whole purpose of priorities is to permit the watermaster to allocate insufficient water supplies among the appropriators in a legally recognized fashion. Of course, whenever a senior

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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

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

May 23, 1995

RE: In the matter of Application for Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227 in the name of Sage Willow, Inc.

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

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CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,

L. Glen Saxton

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

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Department of Water Resources

Michael C. Creamer
GIVENS PURSLEY & HUNTLEY
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Telephone: (208) 342-6571
3314\6\PLEADING\REPLY.BRF

MAR 27 1995

Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANTS' REPLY BRIEF**

Protestants James Mays, and Mays Land & Livestock ("Mays") hereby submit their Reply Brief in the above-captioned matter. In the interest of brevity, this Reply does not repeat the relevant facts, quotations, or citations to authority already set forth in Mays' Post-Hearing Brief.

ARGUMENT

I. The Revival Doctrine Cannot Rescue the Sagewillow Rights from Abandonment or Forfeiture.

Sagewillow's Reply to May's Post-Hearing Brief focuses on whether water rights that have gone unused for many years prior to Sagewillow's purchase of the

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underlying property may be revived by resumption of use prior to the proposed transfers and thereby be rescued from a finding of abandonment or forfeiture. Mays contends that the answer must be "No". This conclusion is founded upon the language contained in Idaho Supreme Court opinions recognizing what Mays has termed the "revival doctrine". The three elements of that doctrine, as summarized by Mays, are derived from the Idaho cases cited at pages 38-38 in Mays' Post-Hearing Brief. The facts developed at the hearing in this matter satisfy none of the three.

Sagewillow's assertion that the revival doctrine is "clearly favored by the courts" is unsupported by any authority. On the contrary, Mays understands the law to favor and protect the person prepared to use the water; i.e., the subsequent appropriator who takes up the abandoned water and applies it to beneficial use. This promotes the dual policies of beneficial use and certainty.

> Because water is so scarce and essential, the fullest beneficial use of water is not advanced where a right holder is permitted to continue to hold a water [right] through long periods of nonuse when other persons could make valuable use of the water to which the dormant right is related. Similarly, new appropriators who make substantial investments in reliance on another's nonuse are afforded little certainty if long unused appropriative rights. . . are suddenly exercised and, as a result, the junior priority appropriators' supplies of water are cut off. The development of the law with respect to the loss of water rights is, therefore, very much influenced by these two dominant themes in western water law: (1) the goal of full beneficial use of water; and (2) the need to afford vested water right holders certainty as to the value of their rights.

Roe and Brooks, *Loss of Water Rights—Old Ways and New*, 35 Rocky Mtn. Min. L. Inst. 23-1, 23-3 (1989), quoted in 2 Waters and Water Right § 17.03 (Beck 1991).

Moreover, the revival doctrine has its genesis in the mining laws that

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developed as a matter of local custom on the public lands over a century ago. These customs developed in the legal vacuum that existed in the West before even the common law could be brought to bear on the unique circumstances the miners faced in asserting their rights to mining claims, water and land on the largely vacant and unclaimed public domain.[1] As a result, if this arcane doctrine has vitality at all, it must be applied very narrowly. *See e.g., In the Matter of Application for Transfer of Water Rights Nos. 65-03103, 65-10746, 65-10747 and 65-02540 in the Name of Double Diamond, Inc.*, Final Order, IDWR (Jan. 30, 1995) ("*In re: Double Diamond*") (revival doctrine must be applied narrowly). Because of the unique circumstances under which the revival doctrine developed, care should be taken not to read more into the leading Idaho cases such as *Ramshorn*, *Carrington* or *Waggoner* than their plain language allows; hence the three elements of the revival doctrine summarized at page 38 of Mays' Post-Hearing Brief include the requirement that revival be made by the original appropriator.

However, the parties' arguments regarding who may revive become largely academic given that revival or resumption is not possible where there have been intervening rights. As shown in Mays' Post-Hearing Brief, intervening water rights

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[1]*See* 1 Wiel, Water Rights in the Western States §§ 66-78 (3d ed. 1911). Custom being the jealous older brother of the law, arguably the "homemade" law of the mining districts should have yielded to the 1933 amendment to Idaho's forfeiture statute. That amendment required a grant from the State of an extension of time to resume use to avoid forfeiture. *See* 1933 Idaho Sess. Laws Ch. 193 ("Provided, further, that upon proper showing before the Commissioner of Reclamation of good and sufficient reason for non-application to beneficial use of such water for such term of five years, the Commissioner of Reclamation is hereby authorized to grant an extension of time extending the time of forfeiture of title for nonuse thereof to such waters for a period of not to exceed five years.") In 1969, this provision was amended to require an application for extension of time to resume use of a water right. 1969 Idaho Sess. Laws Ch. 303; I.C. § 42-222(2). Since there is no evidence that a request for extension of time to resume use was ever made or granted, the revival doctrine should not even apply in the instant case.

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abound in the Little Lost River Basin, and these are rights that will be affected by the reduction in water available in the system due to the increased consumptive use of the Sagewillow rights. The Department can take official notice of Mays' licensed groundwater rights, the rights of persons included in Blaine County Canal Company's Exhibit 1, and the rights of others who undoubtedly would be revealed by a perusal of the Department's records. Each of these rights obtained the benefit of the water relinquished to the system by Sagewillow's predecessor, Slim Hawley.

When nonuse was coupled with intent, as with rights 33-2090 and 33-2091, or when rights 33-2057, 33-2083 and 33-2133 went partially unused for five consecutive years, the junior appropriators in the Little Lost River Basin "moved up the ladder". They cannot be knocked down a rung now without injury. Their use of the surrendered water was not transient. They enjoyed its availability for more than just a few weeks each year while the hay was being put up on the Knollin Ranch. These junior appropriators in the Little Lost system had full use of this water, and established their reliance on its availability throughout the irrigation season for upwards of twenty years.

That Mays' junior groundwater water rights are "intervening" rights should be beyond dispute. Sagewillow's argument that an intervening right exists only where a claim has been made in the very same water, or by adverse possession, is incorrect. *See* Sagewillow Reply Brief at 12. Sagewillow cites no authority supporting this

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constricted interpretation.[2]

The Department has recognized that intervening rights are "later in time appropriations from the stream. . . ", and that "[f]or streams with appropriations of water junior to the right for which forfeiture is alleged, when the right is forfeited, the junior priority rights advance in their order of priorities." *In re: Double Diamond, supra* at 6. *See also Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 386, 647 P.2d 1256 (1982) (approving Department's determination that on overappropriated stream, where right had not been used for eighteen years, to allow resumption would represent an enlargement and other water users would be injured). Also, one wonders how adverse possession might be accomplished, or how "some type of specific injury to a specific right" could occur, where no superior right in the water is being asserted or defended by the original appropriator.

Sagewillow contends that unless there has been a formal determination of abandonment or forfeiture by the Department or the courts, a party is free to resume the use of a water right. Mays is aware of no cases that so hold. Such a rule would foster suspicion among neighbors, and would compel them to bring repeated declaratory judgment actions just to protect their own vested water rights. That is not the orderly and open process by which allocation of private rights in public

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[2]Sagewillow correctly observes that under Mays' interpretation the revival doctrine virtually never would apply if any junior appropriator could claim to be an intervening right. But as discussed previously, the revival doctrine arose out of a unique set of circumstances that arose when miners and settlers found the public domain unoccupied and unregulated. Opportunities to assert revival by resumed use probably were always limited, but no doubt they were greater in those days when there still was wilderness enough for all. Given the present level of development of water resources in Idaho, it is difficult to imagine a set of circumstances where revival could serve as a viable defense to abandonment or forfeiture.

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resources is intended to proceed. To the extent that Idaho cases recognize the revival doctrine, it is based on the objective criterion of whether intervening rights have accrued. These intervening rights are automatically protected from impairment because, regardless of the existence of a formal determination of abandonment or forfeiture, the lost senior rights may not thereafter be resumed. In any event, *Jenkins* holds that a transfer proceeding such as this is an appropriate opportunity for a formal determination of abandonment or forfeiture. In the instant case, the Department can and should declare the extent of abandonment and forfeiture of the Sagewillow rights, and declare that Sagewillow's attempt to revive such rights by resumption of use at the expense of Mays' intervening rights has been totally ineffective.

II. The Period Prior to Sagewillow's Purchase of the Hawley Property is the Proper Period for Analyzing Abandonment, Forfeiture, Expansion and Injury to Other Water Rights.

Sagewillow contends that *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992) means that the only relevant period for evaluating beneficial use or forfeiture of a right is the five-year period immediately preceding a hearing on a transfer application. Mays contends that the relevant period depends on the facts of each case, and in this case includes the years leading up to 1989. In *Dovel*, the Department considered an application to transfer water from three fields. *Dovel* did not involve the issue of forfeiture and subsequent revival by resumption of use. There was uncontradicted evidence that the portion of the water right appurtenant to one field

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had been totally forfeited, and never resumed. *Id.* 122 Idaho at 63. With respect to the second field, the evidence showed that the water had been diverted to its full rate when the water was available, and the land had been irrigated "each year except 1987." *Id.* Since the facts supported that this second portion of the water right had not previously been abandoned or forfeited, but had been fully diverted when available, the Department evaluated the historical consumptive use of the right as exercised during the five years preceding the transfer hearing. The Department's evaluation period turned on the fact that the right had not previously been forfeited. That is not the case here. Evidence of nonuse in excess of five years is uncontradicted, and such nonuse occurred long before the hearing. The issue for the Department is whether all or portions of the Sagewillow rights have been revived by resumption of use. As such, the evaluation period used in *Dovel* is inapplicable.

The Department has the discretion to determine the appropriate period for determining whether a forfeiture has occurred, and if so, how much water has been lost. In *Enterprise Canal Co. v. Idaho Dept. of Water Resources*, Case No. 96371 (Fourth Judicial District 1993)(attached), the court affirmed the Department's determination of a relevant five-year analysis period that ended thirteen years before the transfer hearing. Judge Duff McKee held that while I.C. § 42-222(2) does not state what period or measure of nonuse is to be examined by the Department in determining forfeiture, "it clearly gives the Department broad discretion to resolve forfeiture and transfer issues." *Id.* at 7. Again, the facts of the *Enterprise* case, as with every transfer case, were unique, and the appropriate period used is fact-driven.

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The criterion for determining forfeiture remains the same, however; has there been a continuous period of five or more years of nonuse? If so, the right is forfeited.

In any event, the evidence at the hearing shows that much of Sagewillow's use from 1989 to 1994 was inconsistent with the terms of the original licenses. As discussed in May's initial briefing at pages 40-42, new or different wells were used, groundwater was diverted in the winter months in the place of surface water (presumably because, according to Sagewillow's witnesses, the ditches for delivering surface water to some areas have been obliterated), two pivots were operated to irrigate ground that was covered by no identifiable water right, and Sagewillow "tried" to irrigate some areas, but with dubious success. Thus, the evidence of actual resumption during the period 1989 to 1994 is jumbled and inconsistent with the water licenses. In two days of hearings, and two legal briefs, Sagewillow did not attempt to sort these problems out for the hearing officer. Because there is no reliable evidence regarding use during the years 1989 to 1994, the Department has no basis to approve the transfers based on water diversions and use during this period.

In determining abandonment or forfeiture, the Department must look at the entire history of the rights, not just a particular year or set of years. Abandonment is instantaneous when nonuse and intent are joined, and for rights 33-2090 and 33-2091, that occurred as early as the late 1960's, or at least by 1970, which was when Vance Hawley was on the property and observed the unused wells and the extent of nonirrigation. For rights 33-2057 and 33-2083 and 33-2133, the entire period from

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at least 1970 until 1989, when the properties were sold, is relevant to the determination of forfeiture. Because the use of these rights did not change appreciably during that entire period, it could be concluded that partial forfeiture of rights 33-2057 and 33-2083 and 33-2133 occurred by at least 1975.

Mays' expert, Terry Scanlan, used the years 1985 to 1989 for his evaluation of *historical consumptive use*, because, as the evidence showed, those years were representative of prior years going back to the 1970s, and because power records, aerial photos, Landsat imagery and testimony covering those years were available to conduct the analysis. In other words, Mays does not contend that the forfeiture or abandonment occurred between 1985 and 1989 (they occurred much sooner), but that that period is appropriate for determining the historical use of the rights to evaluate potential injury.

III. The Licenses Issued to Sagewillow's Predecessors Confirmed Only the Level of Beneficial Use That Had Been Accomplished at the Time They Were Issued.

Mays' Post-Hearing Brief does not suggest that the licenses issued to Sagewillow's predecessors were obtained by fraud, or that beneficial use had never been "proved up" consistent with the terms of the licenses. Nor does Mays pass judgment on Slim Hawley's decisions to cease using various rights after the license and land patents were issued. Presumably those were business decisions Slim made after attempting to irrigate "some of the poorest ground there was", or in recognition that the federal land laws could not compel him to continue irrigating unproductive

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ground. As stated clearly in Mays' brief, a water right license or decree represents what the right was *when the instrument was issued*, but does not establish that water continued to be applied to beneficial use thereafter. This must be contrasted with Sagewillow's unqualified statement of the law to be that "[i]ndeed the licenses are conclusive proof of the diversion of water and its application to beneficial use in the amounts and in the acreages set forth therein."

IV. Historical Consumptive Use Defines the Limit of What May Be Transferred.

The licenses tell us what the rights were when the licenses were issued, but that is not even half the story. The uncontradicted testimony of Mays' witnesses, and the extensive photographic exhibits, provide a clear and complete record of use spanning from the early 1970's to 1994. For the period up until 1989, the record is consistent, year-to-year. This evidence tells us that all or portions of various Hawley rights had gone unused, and that much of the Hawley property had gone unirrigated. The testimony and exhibits Mays offered regarding consumptive use tell us the impact of Sagewillow's proposal on the Little Lost and the water rights when compared to this history of nonuse.

Consumptive use is not an "element" of a water right; it is an important attribute that attaches to the right through its exercise, and which thereafter limits the extent of its transferability. The Sagewillow water rights are affected and defined by the way they have been used. Other right holders in the Little Lost have come to rely on a definition of those rights based on their historical use, and the Department

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is obligated to insist that Sagewillow not increase the consumptive use of its water rights through these transfers beyond their historical level.

Consideration of historical use and consumptive use is elementary to water right transfers, and the time and evidence devoted to that issue by Mays was well-warranted. The unfortunate circumstance of this proceeding was that Mays was required to devote so much effort to countering Sagewillow's arguments on such basic issues as the evidentiary import of licenses, the relevance of historical and consumptive use, and the nature and existence of intervening rights.

V. Conclusion

Sagewillow essentially asks the Department to turn its head from long-standing judicial precedent, prior Department precedent and common sense, and to allow resumption of use of Sagewillow's lost water rights to the injury of Mays' intervening water rights. Sagewillow asks the Department to discount the fundamental principles of maximum beneficial use and certainty that pervade Idaho's water law and policy. Mays asks the Department to recognize the law of abandonment and forfeiture, the importance of historical use and historical consumptive use in analyzing transfers, and the great injury that would result to Mays and other right holders in the Little Lost Valley if Sagewillow is allowed to breath new life into long-dead water rights by its untimely resumption of use. On the basis of clear and convincing evidence of abandonment and forfeiture, the law foreclosing revival under the instant facts, and Sagewillow's failure to overcome

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either by way of direct or rebuttal evidence, Sagewillow's transfer applications must be denied.

DATED this 27th day of March, 1995.

GIVENS PURSLEY & HUNTLEY

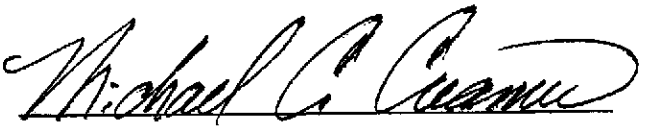
BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



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ATTACHMENT NO. 1

Memorandum Decision
(December 17, 1993)

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

FILED
AM 11:20 PM
DEC 17 1993
J. DAVID NAVARRO, CLERK
BY Deanna Lempesis
DEPUTY

ENTERPRISE CANAL COMPANY, Appellant, vs. IDAHO DEPARTMENT OF WATER RESOURCES, NORTH SIDE CANAL COMPANY and CANYON VIEW IRRIGATION COMPANY, Respondents.	Case No. 96371 MEMORANDUM DECISION

This matter is before the Court on administrative appeal from a decision of the Idaho Department of Water Resources granting an application pertaining to the rental of a designated water right to and from the state water supply bank. For the reasons stated herein, the decisions of the department are affirmed.

I. Facts and Procedural History

Enterprise Canal Company ("Enterprise") appeals from the decision of the Idaho Department of Water Resources ("Department") construing the water right remaining under right number 01-0023, approving the lease of that remaining part by Canyon View Canal Company ("Canyon View") to the water supply bank, and approving the subsequent rental of the remaining right to North Side Canal Company ("North Side").

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Water right no. 01-0023 was decreed in 1910 to the American Falls Canal and Power Company with a February 6, 1895 priority date, granting the right to divert 1,250 cubic feet per second (cfs) from the Snake River near Blackfoot. This right was eventually acquired by the Aberdeen-Springfield Canal Company ("Aberdeen") Aberdeen carried the water via the Aberdeen Canal for use by its shareholders on approximately 58,000 acres of land.

The Rockford Canal Company ("Rockford") as an entity was a minority shareholder in Aberdeen, holding shares representing a 6.23192 percent interest in Aberdeen's water right. This interest equated to an undivided ownership of 77.9 cfs of Aberdeen's 1,250 cfs right. Rockford's 77.9 cfs natural flow right was carried by the Aberdeen Canal and was applied by its shareholders to approximately 3,900 acres of land within the Aberdeen system.

In 1970, the Rockford shareholders discontinued irrigating their lands with the Rockford right and converted to groundwater sources for sprinkler irrigation. Witnesses testified that when the Rockford shareholders ceased drawing their water from the canal, Aberdeen began using it to supplement its existing water rights for the benefit of its remaining shareholders.

In November of 1975, the Rockford shareholders determined, with the consent of Aberdeen, to sell the Rockford right to Canyon View. A contract was signed, subject to approval of the Department. Until approval by the Department, and with no objection from Canyon View or Rockford, Aberdeen was permitted to continue to use the Rockford right to supplement existing supplies.

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In July of 1976, Canyon View filed an application to transfer the Rockford right to serve land proposed for development near Twin Falls and to be diverted at Milner dam. This application was opposed by several parties, including the Twin Falls Canal Company which owned the canal by which Canyon View sought to carry the Rockford right. Resulting litigation eventually gave Canyon View the right to condemn a right of way in the Twin Falls canal to carry this water. See Canyon View Irrig. Co. v. Twin Falls Canal Co., 101 Idaho 604 (1980).

In April of 1981, while the transfer application was still pending before the Department, Canyon View filed an application for extension of time with the Department to avoid forfeiture of the Rockford right. It contends this was a precautionary measure because Aberdeen had continued to use the Rockford right, or some of it, since 1970. The extension was granted conditioned upon Canyon View putting the right to beneficial use by April 1, 1988.

By 1988, Canyon View had determined not to use the right itself, but to sell or lease it to another. In April of 1988, Canyon View applied to the Department to lease the Rockford right to the Upper Snake River water supply bank. This application was subsequently withdrawn. In June of 1990, Canyon View filed a lease application with the Department and the Rockford right was subsequently accepted into the water bank by resolution in September of 1990.

In May of 1991, North Side Canal Company ("North Side") applied to rent this water from the water supply bank. Many

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protests were filed including a protest by Enterprise Canal Company. All but the protest of Enterprise were withdrawn.

On October 30, 1992, the Department determined how much of the Rockford right had been forfeited due to nonuse, and how much water could be leased to, and subsequently rented from, the water supply bank without injury to other water rights. The rate of flow associated with the rental was deemed to be 77.9 cfs and the volume of water transferable was calculated as follows:

1. Total headgate volume on Rockford lands (maximum amount which could be diverted under the right) equalled 15,680 acre-feet (3,920 acres x 4 acre feet per acre annually).
2. The largest annual volume diverted by Aberdeen during the five year period from 1976 through 1980 was 8,996 acre-feet.
3. The amount forfeited due to nonuse was therefore 6,714 acre-feet (15,680 acre-feet - 8,996 acre-feet).
4. Of the amount <u>not</u> forfeited (8,996 acre-feet), 6,725 acre-feet (3/4 x 8,996 acre-feet) could be transferred without injury to other water rights.[1]

As a result, North Side's application to rent the Rockford right from the water supply bank was approved to the extent of

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[1]The consumptive irrigation requirement (CIR) is typically utilized by the Department to determine the actual volume of water consumed as opposed to that diverted, which takes into account that some water will be lost due to seepage and evaporation. The use of the CIR ensures that downstream users continue to receive return flows which contribute to their existing water rights. The Rockford lands have a CIR of 3 acre-feet per acre per year, while the general field headgate requirement is 4 acre-feet per acre per year.

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6,725 acre-feet per year. An order by the Department was entered to this effect. Enterprise Canal Company now appeals the Department's approval of this transfer.

II. Standard of Review

As the Department's order was issued prior to the effective date of the recent amendment to the Idaho Administrative Procedures Act, the standard of judicial review of the Department's action is governed by former I.C. § 67-5215(g). As provided therein, this Court must affirm the action of the Department unless the Department's findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

III. Discussion

Enterprise has raised the following issues on appeal:

A. Did the Department erroneously conclude that the period from 1976 through 1980, rather than 1982 through 1986, was relevant for purposes of analyzing partial forfeiture of the Rockford right?

B. Did the Department grant Canyon View a seven year extension in

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which to avoid forfeiture, thereby exceeding its statutory authority?

C. Did the Department erroneously conclude that Aberdeen had placed the water to a beneficial use, thus preventing forfeiture?

D. Did the Department erroneously conclude that the lease of the Rockford right to the water supply bank, and subsequent rental to North Side, would not injure other water rights if limited to the transfer of 6,725 acre-feet per year?

E. Upon approving the transfer, should the Department have required that Aberdeen cease irrigating 3,920 acres within the Aberdeen system?

A. Period in which to determine the amount forfeited

Petitioner argues that Aberdeen's nonuse of the Rockford right from 1982-1986 should have been the measure of the amount forfeited. Instead, the Department determined that Aberdeen's nonuse during the period from 1976-1980 was relevant to this determination.

The Department has jurisdiction to determine the question of forfeiture and is required to do so as a preliminary step to determining whether a proposed water transfer would injure other rights. Jenkins v. Idaho State Department of Water Resources, 103 Idaho 384, 389 (1982). Further, the director may determine that a water right has been partially forfeited. Dovel v. Dobson, 122 Idaho 59, 63 (1992).

This case is not typical, however, because Canyon View never

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applied the water to a beneficial use. Instead, Aberdeen continued to use a varying amount of the Rockford right as a supplemental source to its natural flow rights, after the contracts between Rockford and Canyon View were executed, just as it had been doing since the Rockford shareholders discontinued using the Rockford right in 1970. The Department determined that such partial use by Aberdeen prevented complete forfeiture of the Rockford right by Canyon View. See Zezi v. Lightfoot, 57 Idaho 707, 714 (1937) (holding that a water right for mining purposes had not been forfeited even though the owner had not used it for a consecutive five year period because another water user had used the right with the permission of the right holder); Reynolds Irrigation District v. Sproat, 70 Idaho 217, 223 (1950). However, the Department found that Aberdeen had not continuously used all of the Rockford right since 1970, and concluded that some of that right must be forfeited.

I.C. § 42-222(2) does not state what period or measure of nonuse is to be examined by the Department in determining partial forfeiture after a five year extension period has lapsed without resumption of use. Jenkins discusses the concept of historical consumptive use to measure a forfeiture, however it does not set forth any guidelines for its application. Although I.C. § 42-222 lacks specific instructions on how to resolve such an issue, it clearly gives the Department broad discretion to resolve forfeiture and transfer issues. Furthermore, it makes no sense to construe section 42-222(2) as requiring the Department to examine use during

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the extension period, and this period only, to determine how much of the right must be forfeited. Section 42-222(2) demands forfeiture of a water right in the event it is not applied to beneficial use for a continuous five year period. The Department correctly determined that the most recent, and only, continuous five year period of partial nonuse after Canyon View acquired the Rockford right, not protected from forfeiture due to the extension, was from 1976-1980. Therefore, this period was used to measure partial nonuse and determine the amount forfeited.

I find that the Department's decision to use this period was reasonable given the facts in this case. It cannot be characterized as arbitrary, capricious, or an abuse of discretion. Therefore, I decline to disturb the Department's conclusions on this issue.

B. Seven year extension

Enterprise argues that the Department granted Canyon View a seven year extension in which to avoid forfeiture, exceeding its statutory authority under I.C. § 42-222(2). This argument is based on the rationale that the five year extension should have run from the date of application, not the date the statutory forfeiture period expired. Accordingly, because the application was made in 1981, the Department's grant of an extension until April of 1988 constituted a seven year extension. I disagree.

Canyon View, in its application for the extension in 1981, requested that a five year extension be granted. Canyon View requested that the extension run through the 1987 irrigating season

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because it believed that the Rockford right was last placed to beneficial use in October of 1977, meaning 1978 was the first season of nonuse. Canyon View reasoned, and the Department concurred, that (1) the five year statutory forfeiture period began to run after October of 1977; (2) Canyon View had until the end of 1982 to place this water to a beneficial use before a forfeiture would occur under the statute without an extension; and (3) a five year extension would then begin to run in 1983 and end in 1987, thus requiring that the right be put to a beneficial use before the 1988 irrigating season.

An application must be made before the initial five year term elapses, however, the statute does not require that the date of application be used to measure the length of the extension. Given the strong policy disfavoring forfeiture, as expressed in Jenkins, and the statutory language, it makes better sense to allow applicants for an extension to utilize all of their automatic five year grace period, rather than terminating this period on the date of the extension application.

Considering the language of I.C. § 42-222(2), the strong policy disfavoring forfeiture and the ruling in Jenkins, I think that the Department had the discretion to declare that extensions should begin with the end of the statutory period, rather than from the date of any application for an extension. I find the Department's construction and interpretations reasonable and consistent, and therefore decline to disturb its decision on this issue.

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C. Beneficial use by Aberdeen

Enterprise next argues that the evidence below does not support a finding that Aberdeen beneficially used the Rockford right after 1970, as evidenced by the fact that Aberdeen never increased its irrigated acreage when Rockford ceased using the Rockford right in 1970. However, the testimony of Aberdeen officers indicate that portions of the Rockford right continued to be placed to beneficial use on other lands within the Aberdeen system from 1970 to the present.

There was no evidence or testimony to refute these statements, other than mere allegations. Enterprise has the burden to show that the substantial evidence below does not support the Department's finding on this issue. I think this burden has not been met. Instead, I believe that the Department's finding is supported by substantial evidence on the record as a whole, and therefore, under Zezi v. Lightfoot, 57 Idaho 707 (1937), and Reynolds Irrigation District v. Sproat, 70 Idaho 217, 223 (1950), Aberdeen's continued beneficial application of the Rockford right, first with Rockford's consent and later with Canyon View's, was sufficient to prevent complete forfeiture before the transfer to Canyon View.

D. Injury to other water rights

Enterprise next argues that the proposed transfer would injure the water rights of others, including Enterprise. The transfer here involves a lease to the state and subsequent rental rather than a direct transfer between two entities. I.C. § 42-222(1) is

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applicable, and provides, in relevant part, that:

> The director of the department of water resources shall examine all evidence and available information and shall approve the change [in point of diversion, place of use, period of use or nature of use] in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code; . . . The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. . . .

Enterprise is a junior upstream user in relation to Aberdeen, therefore, Enterprise cannot rely on any return flow from the use of the Rockford right. As a result, Enterprise cannot, and does not, claim that any of its existing water rights will be affected by the transfer of the Rockford right further downstream. Rather, Enterprise's claim of injury in this case results from the contention that it was able to use some of the Rockford right when Aberdeen chose not to divert all of it. Approval of the transfer of the Rockford right further downstream, to a user which will divert all of it, would then make the water unavailable for Enterprise's use in the event of a water shortage, thereby increasing the likelihood that Enterprise would be forced to purchase storage water.

Idaho courts have held that in order to defeat the right to change the place of use of a water right, the injury caused thereby must be to a water right, and the injury must be actual and substantial. See Colthrop v. Mountain Home Irr. Dist., 66 Idaho

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173, 180-81 (1945); Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 7-8 (1944). I find that the windfall Enterprise may have received in the past over the years cannot be termed a water right under I.C. § 42-201 et seq..

Enterprise has acquired no legal interest in the Rockford right merely because it occasionally applied some of Rockford's water to beneficial use when Aberdeen failed to divert all of the right. One may not acquire a water right merely by another's forfeiture. Rather, in the event of forfeiture, the forfeited right reverts to the State for later appropriation. Furthermore, a water right may not be acquired by adverse possession, prescription or some similar theory, as such theories are not recognized under Idaho law.

While Enterprise may have some claim to the water deemed forfeited and now available for appropriation, Enterprise has no legal interest in the unforfeited water remaining in the Rockford right. Further, Enterprise has failed to establish that its existing water rights will be injured by the transfer. Finally, Enterprise has failed to offer any evidence that any other water right will be injured by the transfer of the Rockford right to the water supply bank, and by the water supply bank to North Side. Given this failure, I find that the Department's approval of the transfer, pursuant to I.C. § 42-422(1), was not arbitrary, capricious or an abuse of discretion, and I decline to disturb its decision on these grounds.

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E. Requirement that Aberdeen cease irrigating 3,290 acres

Finally, Enterprise argues that Aberdeen should be forced to cease irrigating 3,290 acres of land within its system -- the amount of land originally irrigated by the Rockford right. Enterprise contends that the lease of the right to the water supply bank, and subsequent rental to North Side, would result in an expansion of use. An expansion of use occurs where the "duty of water," the amount of land that a given amount of water is expected to serve, is increased. The purpose behind disallowing expansion is to prevent an increase in the consumptive use of the water and any resulting injury to junior users from decreased return flows. See Steffens v. Rinebarger, 756 P.2d 1002 (Colo. 1988).

Canyon View argues that there is no expansion of use because the 3,920 acres irrigated by the Rockford right have already been withdrawn. It points out that the Rockford shareholders' land is no longer irrigated by the Rockford right, and instead is sprinkler irrigated. As a result, Aberdeen has used the Rockford right solely as supplemental irrigation water within its system, and has actually decreased the consumptive use of the right.

I think Canyon View's position is correct. Because the 3,920 acres have already been withdrawn, and there is no showing of any additional acreage within the Aberdeen system which is being irrigated by the Rockford right, no enlargement in use would occur. Therefore, there is no need to require Aberdeen to discontinue irrigating an additional 3,920 acres within its system.

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IV. Conclusion

For the reasons stated, the decision of the Department is affirmed in all respects. Costs, but no attorney fees, are awarded to the respondents.

Dated this 16th day of December, 1993.

D. Duff McKee, District Judge

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Department of Water Resources

March 16, 1995

Mr. Gary Spackman
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Mr. Spackman:

We have now completed our review of Protestants' Post-Hearing Brief in response to applicant's closing argument, and have prepared the enclosed reply which we desire to file herewith.

Thank you for your kind and continued consideration.

Very truly yours,

Kent W. Foster

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

IN THE MATTER APPLICATION FOR TRANSFER NOS. 4221, 4222, 4223, 4224, 4225, 4226, AND 4227 IN THE NAME OF SAGE WILLOW, INC.	)	REPLY TO "PROTESTANTS' POST-HEARING BRIEF AND RESPONSE TO APPLICANT'S CLOSING ARGUMENT"

This is a reply to "PROTESTANTS' POST-HEARING BRIEF AND RESPONSE TO APPLICANT'S CLOSING ARGUMENT". Protestant, Mays, would apparently have us accept that (a) the history of how the six groundwater rights reached the licensed stage is either irrelevant or the field examinations made by the department personnel and upon which the licenses were based were grossly inaccurate or falsified, and (b) the historical use of such water rights after 1989 was illegal and totally irrelevant.

From a review of the statements or recitations of fact by the applicant and the protestant, it doesn't appear to us that there is so much disagreement as to what the record, testimony and exhibits show, as there is disagreement over which facts are legally relevant, and what the applicable Idaho law is. Protestant focuses a great deal of its attention on the irrigation practices engaged in by Applicant's predecessor in interest prior to 1989. Applicant

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believes the most important events regarding use of the subject water rights have occurred since Sage Willow acquired the ranches and the water rights, beginning in 1989, or to put it in the language of the Idaho Supreme Court in *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992), at pg. 63 of the Idaho Report, "within the five years prior to the hearing" (referring to the hearing before IDWR on the protests to the application for transfer).

We reemphasize that Protestant's evidence regarding use of the water rights consisted of (1) Vance Hawley testifying from his knowledge that between 1970 and 1981, some 1,200 acres of the Knollin and Bird Ranches received surface applications of water by his father and himself, and (2) Terry Scanlan testifying he had reviewed a few aerial photographs for three or four different years prior to early 1991, and from such photographs estimated irrigated acreage on the Knollin and Bird Ranches without having ever been personally on the land or even having seen the land except from outside the fence on the west side during January of 1995 when the land was covered with snow. Now Protestant wants the hearing officer to accept that in 1993 and 1994 even water rights nos. 33-02086 and 33-0708, or one or both of them, were used on 27 or 30 acres less than the total to which they are by license appurtenant, even though Protestant introduced no evidence regarding use of such rights for 1993 or 1994. The only evidence we recall regarding use of these two rights is that Mr. Pancheri testified a total of 260 acres received applications of water from diversions from the two wells under these two rights during both 1993 and 1994.

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What is certainly of greater legal significance than the period of use testified to by Mr. Vance Hawley, or Mr. Scanlan's incredibly detailed estimates from a few photographs which don't really show very much detail, is (1) the nature and extent of the six rights as they were originally licensed, and (2) then the manner in which such rights were used within the five years prior to the hearing. We suggested in our first brief that the six groundwater rights licenses are prima facie evidence of the water rights, including, under the *Crow v. Carlson* case, the nature and extent of each element of each such water right, as of the date of issuance of each such license. Mr. Creamer tells us this suggestion "is disingenuous at best". Our dictionary tells us that "disingenuous" means "not straight forward", "crafty", or in other words, we suppose, dishonest. If our suggestion is disingenuous at best, we wonder what it might be at worst. We confess that we do not appreciate Mr. Creamer's accusation. We have attempted to state our understanding of a legal principal established in the cited case in as straight forward and honest a manner as we know how. We concede that it is appropriate for Mr. Creamer to disagree with our interpretation of a legal principal established by the cited case, but we think that might have been done in a more honorable manner.

We do believe that the nature and extent of the various elements of the six groundwater rights, as shown in the licenses, is important. Those licenses not only fix the limits of the diversion and application to beneficial use pursuant thereto, they constitute conclusive proof or evidence that the full amounts listed therein were, in fact, being diverted at the time of issuance, and at that time were also being applied beneficially to the total

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acreage specified. The licenses do not provide any written perameters as to "consumptive use", which seems to be so important to Protestant. We presume each license was issued in good faith by IDWR or its predecessor agency, and not just to assist Applicant's predecessors to obtain a patent, as Protestant claims. Does Protestant mean to infer that the licenses, or some of them, were obtained fraudulently, and are therefore not entitled to the same presumptions as an unfraudulent license? If so, we do not agree that there was sufficient evidence to support any such inference or conclusion.

While there does appear to have been some significant number of years when less than the total number of acres authorized under the licenses were fully irrigated, Protestant did not offer any direct evidence that during all of such time, Applicant's predecessors failed to use the water when it was both needed and available. More importantly, to our understanding of the relevant legal doctrines which apply in this case, within the five years prior to the hearing herein, the only evidence introduced demonstrated that applicant did divert and apply the full amount of water authorized under the six groundwater right licenses to the full number of acres authorized thereby.

It is of course the position of Applicant that such facts clearly establish a resumption of use which defeats both common law abandonment and statutory forfeiture under Idaho law. As we understand Protestant's argument, although devoid of any citation to statutory authority or case law precedent, there are three elements to the "classic revival doctrine". We assume this is a reference to what the courts have referred to as the resumption of use

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doctrine or defense to abandonment and forfeiture. In Protestant's words, the three elements are:

> "First, an abandoned right may not be revived except by the original appropriator, which in this case was Slim Hawley. Second, an abandoned right cannot be revived even by the original appropriator if there are intervening claims to the water supply. Third, an abandoned right cannot be revived in a manner inconsistent with its original use.

Although this gratuitous statement has been created by Protestant's attorney, and is not found in any cited authority, we wish to address each of these proposed elements individually.

1. Can an abandoned right really only be revived by the original appropriator?

We assume this argument is based upon such language as that contained in the case of *Carrington v. Crandall*, 56 Idaho 525, 147 P.2d 1009 (1944), at pages. 531 and 532 of the Idaho report:

> It is also true that, although statutory abandonment did actually occur, the forfeiture is not effective if, after the five year period, the original owner or appropriator resumed the use of the water prior to a claim of right by a third party.

First, we note that the language does not say that only the original owner or appropriator can resume use and defeat a forfeiture. The Idaho Court cites the case of *Ramshorn Ditch Co. v. United States*, 269 F.80 (8th Cir. 1920). The above cited language from the Idaho case is not a direct quote from the older Ramshorn case, but it is clear from a review of the *Ramshorn* case that the holder of the right in question was still the original

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appropriator. Citing a number of Colorado case, the Federal Court stated, at page 83 of *Ramshorn Ditch Co., supra*:

> The appropriator who has abandoned his rights to water may at any time resume the possession and exercise of them, if no new rights have intervened.

There was no issue present in either the *Ramshorn* case or the *Carrington* case as to whether only the original appropriator, as opposed to a successor in interest, could resume use and thus avoid abandonment or forfeiture. Indeed, in the Idaho case, *Carrington v. Crandall*, supra, the rights alleged by Plaintiff to have been abandoned or forfeited were no longer held or owned by the original appropriators, but rather by their successors in interest. Nevertheless, the court declared that resumption of use by the successors in interest of such rights would defeat Plaintiff's claim of statutory abandonment.

A better statement of the applicable principal regarding who (whether only the original appropriator, or, instead, also a successor in interest) has power to avoid an abandonment or forfeiture through resumption of use is found in two other Idaho cases: *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); and *Wagoner v. Jeffery*, 66 Idaho 455; 162 P.2d 400 (1945). In the *Zezi* case, we find the following at page 713 of the Idaho report:

> . . . And even though forfeited and abandoned for five-year periods prior to the time respondents initiated their appropriation, if subsequent to such five-year periods, and *prior to respondents' appropriation,* appellants or their predecessors in interest under claim of right and continuity of interest of diversion and application of the noble water, as such, for mining purposes to the amount applied, rediverted and applied water, there would be no abandonment which could inure to the benefit of respondents.

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In *Wagoner v. Jeffery, supra*, at pages 459 and 460, a case subsequent to both *Zezi* and *Carrington*, the court stated the rule this way:

> Abandonments and forfeitures are not favored, and even though forfeited and abandoned for five year periods, if subsequent to such five year periods, respondent again took possession of the right of way and wells in question, as found by the trial court, under a claim of right and continuity of interest, prior to the initiation of any right therein or claim thereto by appellants, there would be no abandonment which could inure to the benefit of appellants.

It appears then that in order to effect a resumption of use of a right, thus overcoming an abandonment or forfeiture, such resumption must be accomplished by or pursuant to the direction of the holder of the right, either the original appropriator, or a successor in legal interest, under a claim of right and continuity of interest, such as the applicant in this transfer proceeding, Sage Willow, Inc. The claim of right of Sage Willow, Inc., consists of the licenses and decrees establishing the water rights for which there neither were nor are any determinations by IDWR or any court of competent jurisdiction that such rights have been lost or forfeited or abandoned. The continuity of interest is of course based upon the Warranty Deed from Vance Hawley and the Estate of L.R. "Slim" Hawley.

Protestant refers only to "Slim" Hawley as the original appropriator. However, the licenses show that while Lawrence R. (also know as "Slim") Hawley was the applicant for the permits which resulted in licenses nos. 33-02057, 33-02083, and 33-02090, Clarence Hawley was the applicant for the permit under which license no. 33-2086 was issued, Vance H. Hawley under license no. 33-02091, and William Frew under license no. 33-07018.

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Protestant argues that neither the original appropriator nor any of his successors in interest can ever convey any more than what they have, and that if the water rights they once had have been abandoned or forfeited, in whole or in part, no successor in interest can revive the right, or, as we prefer to say, resume use of the right. As we have already pointed out, this theory is contrary to Idaho case law. But, in addition, it doesn't take much further analysis to see, that such theory makes little sense; we will attempt to explain our view.

We think it is fair to conclude that Protestant concedes that the original appropriator can revive a right or resume its use, even after it has been abandoned or forfeited. Assuming that no such abandonment or forfeiture has ever been formally declared and that other rights have not yet intervened, would that power (or right or possibility coupled with an interest) not still remain with the original appropriator until the time he conveys the real property? If so, when he conveys the property, why would that power or right not also go with the conveyance to the new owner? Whether the original appropriator warrants the conveyance or only quitclaims whatever right, title and interest he may have, surely his right, title or interest that might permit him to resume using the water rights appurtenant of record also transfers with the real property and all of the other appurtenances. If the water rights are automatically conveyed with the land to which they are appurtenant, even though not specifically mentioned, wouldn't each and every right or entitlement that may be part of or connected with the water rights go as well? We know of no authority for the proposition that the act of conveying the land and/or the water right in the standard manner by Warranty Deed

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or Quitclaim Deed, somehow cuts off, terminates or eliminates any particular aspect or incident of real property ownership. On the contrary, the intent of the law is that unless specific provision is made to the contrary, by reservation or otherwise, every right or interest of the grantor relating thereto passes with a conveyance of the real property.

Consider some of the strange issues that might arise if the right to resume using a water right did not automatically pass to the successor in interest with a conveyance of the real property: If the applicant for permit and the owner of land when the license is issued is not the same person, who is the original appropriator? Does the right to resume use terminate when the original appropriator dies, or only when the property is conveyed? Or what if the original appropriator becomes disabled or incompetent; can his wife, son, employee, agent, attorney-in-fact, etc., resume the use? After a few years (perhaps even by now for most water rights in the state of Idaho is it no longer possible for anyone to resume use of a water right and thus avoid abandonment and forfeiture? We submit that Protestant's first suggested element of the "classic revival doctrine" is just not the law in Idaho.

2. Can an abandoned right be revived if there are intervening claims?

There is a statement in *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), at page 389, as follows:

> Further, if use of the water right is resumed after the five year period, but before any third parties make a claim in the water then the courts will decline to declare a forfeiture. (Emphasis added).

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But what kind of "claim" must be made by third parties, and how must it be made in order to prevent resumption in use of a right? What ever the requisite nature and extent of such a claim, we submit there was no evidence in this case that any such claim was ever made prior to the resumption of use by Sage Willow, and no one claimed abandonment or forfeiture of any or all or any portion of the rights which are the subject of this transfer proceeding before the full resumption of use was completed. See application of Boyer, 73 Idaho 152, 238 P.2d 540 (1952).

But, we think this issue deserves some more discussion and analysis because it may not be clearly understood. From some of the old cases, such as *Zezi v. Lightfoot*, *Carrington v. Crandall* and *Wagoner v. Jeffery*, it seems clear that if, after forfeiture or abandonment (and reversion to the state to become again available for appropriation as provided by the statute, I.C. §42-222(2)), someone does in fact complete a formal appropriation of a right to use the same water (although of course not with the same priority), the right to resume use of the forfeited or abandoned water right would no longer be available. This also appears to be true if the right had been acquired by a third party through the doctrine of adverse possession. (See application of Boyer, Supra).

There is an explanatory statement in the Jenkins case at pages 387 and 388 of the Idaho report which is both helpful and potentially confusing:

> . . . if a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. I.C. §42-222(2); *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1943). Other parties may then perfect a water right

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> in those waters. *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, *Sears v. Berryman*, *Supra*, and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. . .

In the Jenkins case, the holder of the right which was the subject of the transfer proceeding, Mr. Jenkins, was not claiming to have reinstated the right or rather to have defeated the forfeiture or abandonment by resumption of use. Instead, he claimed to have never stopped diverting water and applying it to beneficial use under the old decreed water right. The court was explaining its holding that even though he did not claim or show resumption of use, he could not reinstate the forfeited or abandoned right through the transfer proceeding.

There is a potential danger of carrying this logic of injury to junior water rights too far. While in the Jenkins case, it may have worked an injury to junior appropriators to allow reinstatement of the older right through the transfer proceeding, it must be kept in mind that when the water supply is not sufficient for all rights, use of a senior right always injures the junior right holders, or some of them. And of course whenever, under such conditions, the senior right is not exercised (for whatever reason, even for short periods such as when the hay is being harvested), there can be a benefit to some or all junior water rights. They do indeed move up the priority ladder.

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But, the cases all seem to be clear that until there is a formal determination by IDWR or the court that abandonment or forfeiture has occurred, use of the right may be resumed before a third party makes a claim. We do not accept that the very existence of junior priority rights constitutes the making of an appropriate claim by a third party. Otherwise, the doctrine of resumption of use, which is clearly favored by the courts, as abandonments and forfeitures are not favored, would virtually never be possible. We think that some type of overt action must be taken by a third party in order to raise a legitimate cognizable "claim" under the law, such as subsequent appropriation of the right to use the very same water, acquisition of the right by adverse possession, or perhaps even an estoppel theory, or at least some type of injury to a specific right or rights before resumption of use of the right in question occurred or was effected.

In this case, no such claims have been made, except as protests to the transfer application, which came after the resumption of the use was an accomplished fact. We also reiterate that there was no evidence introduced by anyone to show that after the transfer there will or can be any use, or injury to junior water rights, greater than was authorized by the original licenses and decrees, or than has occurred since the former authorized use under such licenses or decrees was resumed by Sage Willow.

3. Can an abandoned right be revived in a manner inconsistent with its original use?

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We do not disagree that the resumption of use cannot legally be accomplished in a manner inconsistent with its original use. But Protestant seems to insist that the use which occurred during the time testified to by Vance Hawley (1970 to 1981) equates to the original use of the rights. As we have stated, the licenses themselves are the best evidence or proof of the original use. If the principal for which we have cited the case of *Crow v. Carlson*, supra, applies to licenses, as we believe, the licenses themselves are conclusive as to the original use.

Although Protestant provided substantial amounts of analysis and numerous alternatives which show that "consumptive use" after the transfers will undoubtedly exceed "consumptive use" during the period of 1970 to 1981, and probably other years as well, it did not provide any analysis of what "consumptive use" may have been under the original use as authorized by the licenses. We reiterate that the licenses and decrees do not establish any specific parameters for "consumptive use", and most of the testimony and exhibits relating to "consumptive use", are (1) legally irrelevant, and (2) therefore meaningless. In any event, there was no persuasive showing that even "consumptive use", after the proposed transfer, will be significantly or unreasonably different or greater than whatever it may have been under the original use, or after completion of the resumed use.

We will also comment further on two additional matters addressed in Protestants' Post-Hearing Brief. First is the matter of transfer number 3785. Protestant argues that transfer number 3785 is a nullity. We fail to see why or how it could be a nullity. It was

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filed, advertised and processed by IDWR pursuant to Idaho Code §42-222. It was sought by applicant in good faith and approved by IDWR exercising that same good faith.

It is true that the water right thereby transferred is proposed to be further affected by the pending transfer proceeding, but there is no legal theory nor procedure for determining that transfer number 3785 is a nullity. Protestant may wish it had protested that application as well, but it is now too late. The transfer is completed; it is an accomplished fact.

It is also true that as applicant's attorney was working with Mr. Jim Johnson of IDWR to prepare the pending applications for transfer, it was discovered that transfer number 3785 had been completed and had changed the place of use for right number 33-02091 to a number of acres which were already shown as part of the place of use for right number 33-02090. Applicant's attorney confirmed with Mr. Johnson that there was no intent to legally "stack" the two water rights, and Mr. Johnson approved the seven new applications for processing in the form in which they now appear.

Finally, it appears to us that the Protestant, Mays, has misunderstood both the evidence and the proposal of the application for transfer with respect to subirrigation. It is true that there are a number of acres on the Knollin Ranch which receive benefit in terms of growing grass by means of natural subbing in the areas of the springs and spring ponds. We believe it is also true, as Dr. Brockway testified, that the proposed transfer will have little or no effect on these particular acres. We assume that since this phenomenon is a result of no human activity of which we are aware but only natural conditions, it will continue, regardless

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of what Sage Willow may do, until there is a change in the natural conditions of sufficient magnitude to affect this natural phenomenon. Neither the proposed transfer, nor any of the water rights listed in the seven applications, is pertinent to this phenomenon. None of these acres are now irrigated in the sense that anyone diverts or applies water thereto, and none are proposed to be irrigated under the transfer. They will remain exactly as they are unless something beyond Sage Willow's control changes them.

However, there is an additional area of the Knollin Ranch not included in the acreage which benefits from the natural phenomenon, but which is subirrigated from the man made ponds. While Dr. Brockway made no attempt to separate or distinguish between the acres affected by the natural conditions and the acres intentionally subirrigated by means of the ponds, Mr. Jerry Pancheri did testify that the number of acres which are subirrigated by filling of the ponds comprise about 250. These very acres are the subject of one of the applications for transfer and are not in addition to, but rather a part of the total of 2,383 acres.

It is proposed that water would be diverted during the irrigation season under some of the groundwater rights to fill the ponds as much as is feasible because it results in about 250 acres of additional pasture for the cattle operation.

During the nonirrigation season, to the extent available and possible, water would continue to be diverted, pursuant to right number 33-2133, and directed to the ponds with the hoped for result of "root zone storage", pretty much as Mr. Hawley apparently formerly did it.

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We have previously stated the relevant facts as we understand them to be in the current record, including the documents filed and the testimony and the exhibits introduced at the hearing. We have also previously stated the law of the state of Idaho which we believe is applicable to the relevant facts. Our further review, in light of Protestants' Post-Hearing Brief, has convinced us that we cannot materially improve our previous statements of fact or of law. We have attempted to respond to matters addressed in Protestants' Post-Hearing Brief in a manner that might assist the hearing officer to clearly understand applicant's position and intent. We again request the granting of the Applications for Transfer.

Respectfully submitted this 16th day of March, 1995.

Kent W. Foster
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

MAR 2 7 1996

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 16th day of March, 1995.

DOCUMENT SERVED: REPLY TO PROTESTANTS' POST-HEARING BRIEF AND RESPONSE TO APPLICANT'S CLOSING ARGUMENT

PARTIES SERVED:

IDAHO DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

(mail)

Michael C. Creamer
GIVENS PURSELY & HUNTLEY
P.O. Box 2720
Boise, Idaho 83701

(mail)

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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Telefax: (208) 523-9518

RECEIVED
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Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

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

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 17th day of March, 1995.

DOCUMENT SERVED: APPLICANT'S CLOSING ARGUMENT AND REPLY TO "PROTESTANTS POST-HEARING BRIEF AND RESPONSE TO APPLICANT'S CLOSING ARGUMENT"

PARTIES SERVED:

Blaine County Canal Co. (mail)
c/o Wade T. Williams
HC 65 Box 1032
Howe, Idaho 83244

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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MAR 2 7 1996

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Attorneys for Protestants

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MAR 18 1994
Department of Water Resources

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008 AND 33-02133	**MOTION TO AMEND PROTEST**

James Mays and Mays Land & Livestock, ("Mays") by and through their attorneys Givens Pursley & Huntley, and pursuant to IDAPA 37.01.01.305, hereby request that the Department recognize Mays' Protest of the transfers of the above-captioned water rights as a Protest of all pending transfers affecting such water rights. Mays intended that its Protest apply to all of the simultaneous transfers affecting the above-captioned rights, and therefore requests that it be permitted to amend its Protest so as to object to Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227, all of which pertain to the transfer of Sagewillow water rights on the same grounds as stated in Mays' original Protest. Because the same issues of law and fact

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will apply to all of the transfers, Sagewillow will not be prejudiced by such amendment.

DATED this 18th day of March, 1994.

GIVENS PURSLEY & HUNTLEY

BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

* * *

Protestants James Mays' and Mays Land & Livestock's ("Mays") Motion to Amend Protest is granted and Mays is hereby recognized as a party to all proceedings on Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227.

DATED This _____ day of March, 1994.

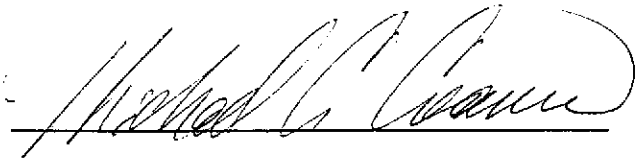
_____
R. Keith Higginson, Director
Idaho Department of Water Resources

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MAR 21 1994

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 1994, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	__X__ HAND DELIVER _____ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
Mr. Vic Conrad J.R. Simplot Company P.O. Box 27 One Capital Center 999 Main Street, Suite 1300 Boise, Idaho 83707-0027	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	_____ HAND DELIVER __X__ U.S. MAIL _____ OVERNIGHT MAIL _____ TELECOPY (FAX)



Wade T. Williams
Blaine County Canal Co.
HC 65 Box 1032
Howe, Idaho 83244
Telephone 208-767-3358

Spokesman for Protestant

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Department of Water Resources

In the matter of the applications of Sage Willow Inc. for transfers of water Numbers; 4221, 4222, 4223, 4224, 4225, 4226 and 4227.

Blaine County Canal Company protestants of the Sage Willow transfers wish to respond to Sage Willows closing argument. We are submitting this response, respectfully recognizing that it is past the date set for response. The reason for our lateness is due to the fact that we were omitted from Mr. Fosters service of the document and we only received the applicants closing argument after contacting the hearing officer. We did receive a copy on March 2.

As irrigators in the Little Lost River Valley and Butte County we have watched many problems develop around us over the past nearly ten years of drought. We have observed the severe water shortage and depleted ground water in the Big Lost River and have suffered similar but less dramatic problems in the Little Lost River drainage. Blaine Canal exhibit #1 is a partial list of ground water users in the valley who have experienced problems filling their licensed ground water rights over the past few years. Of the 14 (fourteen) water users there are 37 (thirty seven) irrigation wells represented with many of them either dry or pumping

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only a small fraction of their licensed amounts. There are 9 (nine) domestic wells which are nearly dry or have been deepened. We don't want to become the next Big Lost Disaster. We have no intention of ignoring the effect of the years of drought on the water levels nor do we presume to imply that we feel the resumption of pumping on the Knollin Ranch, since Sage Willows acquisition of the property is solely responsible for our wells preforming below their licensed capacity. We do make the claim that the capacity of the aquifer in the Little Lost is licensedto capacity or beyond its ability to supply, especially during drought years. We also know that many junior water rights were granted when wells on the Knollin Ranch had been abandon or the licences had been being used to a much reduced extent than originally appropriated for.

The applicant refers to (Jenkins V. State Dept. of Water Res. Supra; "if use of the water right is resumed after the 5 year period, but before any third parties make a claim in the water then the courts will decline to declare a forfeiture." We believe that many parties have made claim on this water when they appropriated water licences during the many years of non-use which occurred when L.R. Hawley owned the property, as testified to by Vance Hawley.

We feel that the many exhibits by Mays and the testimony of Mr. Vance Hawley gives a very good picture of the land that was actually irrigated on the Knollin, Bird and

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Homestead farms during the 40 plus years that L. R. Hawley owned the property. It is quite apparent that Mr. Hawley acquired several pieces of property through homesteading and did develop the water and irrigation systems only to make these acquisitions and then did abandon the water and irrigation systems and turned the land into dry range for his cattle.

The storage water right on the Knollin Ranch was discussed in great detail at the hearing and Mr. Hawley testified about how his father diverted water into the ponds from surface sources in the winter. However it appeared from the testimony that Sage Willow uses ground water as a major source for these ponds now. This winter pumping seems to be an extreme enlargement of the ground water licences. Mr. Pancheri testified that they ran the pumps for stock water but he also mentioned as did Dr. Brockway that they had some aerators in the ponds to prevent freezing. This leaves a big question as to the purpose of the aerators, do they keep the ponds open for livestock to drink or do they operate them for another reason such as keeping the stocked fish alive? It would seem to us that the flowing water in the ditches from the pumps to the ponds would be adequate for livestock watering.

In the matter of the 3 (three) surface water rights which Sage Willow had included in their transfers specifically numbers 33-00069B, 33-00071B and 33-02007A & B. Both Blaine Canal and Sage Willow agree that these junior

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rights are of little or no value and the paper trail for these rights is very poor. Blaine Canal has considered them to belong to them since the transfer of surface rights off the Knollin Ranch in the 1940's. Both Sage Willow and Blaine Canal have filed claims on them in the SRBA.

Blaine Canal Co. opposes any resumption of the abandon water rights, or the forfeited portion of any right by Sage Willow on the former Knollin Ranch. We feel that it would result in loss of stream flow and ground water recharge resulting in a direct loss to Blaine Canal and the other water users in the Lower Little Lost River.

Blaine County Canal Company

Wade T. Williams

Wade T. Williams
Spokesman

Copies sent on March 15, 1995 to the following by Mail:

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MAR 8 7 1996

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Arthur W. Holden
(1877-1967)
Robert B. Holden
(1911-1971)
Terry L. Crapo
(1939-1982)
William S. Holden
(1907-1988)

March 8, 1995

VIA FACSIMILE: (208) 327-7866

Mr. Gary Spackman
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Re: Applications for Transfer by Sage Willow, Inc. Nos. 4221, 4222, 4223, 4224, 4225, 4226, and 4227

Dear Mr. Spackman:

We received Mr. Creamer's brief on March 6, 1995. According to our original schedule, I believe our response to that brief would have been due about March 8. I see that the brief is some 52 pages long and I suspect will take me some time to read and prepare an intelligent response. I was in Preston on Monday, March 6, when the brief arrived and have been involved in a number of appointments and hearings. I will be out of town on March 9, 10, and 11 and will not be back in the office until Monday, March 13th. It may be the end of next week before I am able to get a reply filed and so hope and trust that everyone will be patient until we are able to get the response prepared.

Very truly yours,

Kent W. Foster

pc. Mike Creamer
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Department of Water Resources

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Attorneys for Protestants

BEFORE THE DIRECTOR

IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF THE APPLICATIONS OF SAGEWILLOW, INC. TO TRANSFER WATER RIGHT NOS. 33-02057, 33-02083, 33-00069, 33-00070, 33-00071, 33-00072, 33-00073, 33-00074, 33-00076, 33-00078, 33-00079, 33-00080, 33-00081, 33-00082, 33-02007, 33-02008, 33-02133, 33-02086, 33-02090, 33-02091 AND 33-07018	**PROTESTANTS' POST-HEARING BRIEF AND RESPONSE TO APPLICANT'S CLOSING ARGUMENT**

Protestants James Mays, and Mays Land & Livestock ("Mays") hereby submit their Post-Hearing Brief and Response to Applicant's Closing Argument in the above-captioned matter. For the reasons stated herein, the Idaho Department of Water Resources ("IDWR") either should deny Transfer Nos. 4221, 4222, 4223, 4224, 4225, 4226 and 4227, or impose conditions to limit the permissible acres irrigated, and the permissible rate and volume of diversion to conform with the historical use of the Sagewillow water rights prior to 1989.

I. INTRODUCTION

This matter comes before the Department following 8 years of drought, during

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which the reality of water shortage, and the importance of careful water management and administration have become starkly apparent to irrigators in the Little Lost River Valley ("Little Lost"). The Prior Appropriation Doctrine is specifically designed to deal with the allocation of water during such shortages. The foundation of prior appropriation in Idaho is that actual beneficial use is the basis, the measure and the limit of any water right. Mays' Protest of the Sagewillow transfers, and the evidence introduced by Mays at hearing, therefore, are premised on the basic principle that Sagewillow holds, and may transfer, at most, only such water as had actually been beneficially used under the rights historically.

If this case is unique, it is for two reasons. First, the seven transfers are quite complex; they propose to shuffle 21 ground and surface water rights over more than 3000 acres. Second, Mays has laid before the Department a comprehensive set of facts by which the Department now may take the necessary "hard look" at the Sagewillow transfers. This hard look must include careful scrutiny of the facts showing abandonment and/or forfeiture of the Sagewillow rights.

Forfeiture is not favored under the law, but that axiom is not a license for would-be transferors to attempt to move water rights that have long-since been given up to the stream and to subsequent appropriators. Clear and convincing proof of forfeiture or abandonment is required, but that standard is far from one of "absolute proof." The Department must not shirk its duty to find forfeiture or abandonment where the evidence is uncontroverted, and well-documented, as it is here.

In looking at the historical beneficial use of the rights proposed to be transferred, the Department's focus should be on the longstanding use of the rights

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as they were developed and used by Slim Hawley, his son Vance, and their hired men from the late 1940's to 1989 when the property was purchased by Sagewillow. Whatever Sagewillow purchased from the Hawleys in 1989 in the way of land or water, it could have been no more than what Hawley had to sell. A survey of the use of water on the Bird Ranch and the Knollin Ranch from 1989 to the time Sagewillow applied for transfers is relevant to the Department's inquiry, but only inasmuch as it demonstrates the dramatic contrast between the amount of land irrigated and water pumped on the Knollin Ranch and the historical use of the water rights. The Sagewillow transfers improperly attempt to preserve these unauthorized increases, and then some. If the transfers are approved, they will result in injury to the numerous water rights that have come to rely on the water Slim Hawley surrendered to the Little Lost and the aquifer years ago.

The issues before the Department are:

1. Whether there has been a total or partial forfeiture or abandonment of any Sagewillow water rights?

2. What is the relevant period of use for determining the extent of forfeiture or abandonment?

3. Whether a water right once abandoned or forfeited by five or more consecutive years of nonuse, may be revived or resumed by someone other than the original appropriator where there have been intervening rights?

4. Whether the transfer will result in an expansion in the acres irrigated?

5. Whether the transfer will result in an enlargement of the historical use of the rights?

6. Whether the transfer will result in material injury to other water rights?

Preliminary

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users involved, the chronic shortage of water has spawned more than its share of litigation.[1]

Although the interrelationships between surface and groundwater throughout the Basin are not completely understood, the authorities agree that in the area of the Knollin Ranch and upstream, these two sources represent a common supply. Mundorff, at 13 (surface and ground water are so closely related in this basin that neither can logically be considered a separate source of supply); Clebsch, Waite & Decker, *The Availability of Water in the Little Lost River Basin, Idaho*, Idaho Department of Water Resources, Water Resources Bulletin No. 37 (July 1974) ("Clebsch") (ground water in the basin is intimately related to surface flow). Both Mays' expert, Mr. Terry Scanlan, and Sagewillow's expert, Dr. Charles Brockway, agreed with this conclusion, particularly with respect to areas above the geologic "feature" located in sections 21, 22, 23 and 24, T7N, R28E, B.M. These same authorities and witnesses agree that increased consumptive use at the Knollin Ranch will reduce streamflows and downgradient aquifer recharge. Mundorff states that

> The effect that withdrawal of ground water will have on the surface water and ground-water supply of the basin is an important consideration. No water can be pumped and consumed without lowering the water level and reducing outflow from the basin in accordance with consumptive use. . . Because ground water discharges into the river in at least three reaches upstream from the hydrologic barrier in T.7 N., R.28 E., pumping of groundwater upvalley from that locality will reduce

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[1]See e.g.: *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917); *Basinger v. Taylor*, 36 Idaho 591, 211 P. 1985 (1922); *Mays v. District Court*, 40 Idaho 798, 237 P. 700 (1925); *Blaine County Canal Company v. Hansen*, 49 Idaho 649, 292 P. 240 (1930); *Blaine County Invest. Co. v. Mays*, 49 Idaho 766, 291 P. 1055 (1930); *Blaine County Invest. Co. v. Mays*, 52 Idaho 381, 15 P.2d 734 (1932); *Blaine County Canal Co. v. Faris*, 55 Idaho 632, 45 P.2d 796 (1935); *Blaine County Canal Co. v. Mays*, 65 Idaho 190, 142 P.2d 589 (1943); *Kyle v. Hawley*, (Fifth Jud. Dist. Sept. 14, 1903); and *Kyle v. Hawley*, (Fifth Jud. Dist. July 31, 1907).

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> streamflow to some extent. In general, the greatest reduction during the irrigation season will be caused by pumping wells in areas where the water table is higher than the water in the stream, particularly if the wells are very near the area of discharge to the stream.

Mundorff at 31-32.

Clebsch points out that reductions in streamflow from pumping groundwater in the Basin are likely to be most pronounced during drought years. Clebsch at 51. The only disagreement between Mr. Scanlan and Dr. Brockway on this point regarded the extent of impact of pumping on the streamflow and recharge.

A. Historical Development and Use of the Sagewillow Rights

L.R. "Slim" Hawley developed the groundwater rights for the Knollin Ranch after the senior surface water rights had been transferred away to the Blaine County Canal Company. Slim's son Vance, whose early life was steeped in the background and operation of the Knollin and Bird properties, provided extensive testimony regarding the historical irrigation of the Bird Ranch and the Knollin Ranch during the years 1970 to 1984, and in 1988 when Vance had lived and worked on the properties.

1. The Knollin Ranch

The Knollin Ranch was assembled from numerous smaller parcels originally homesteaded by others. Under Knollin's ownership, the Knollin Ranch was irrigated with relatively senior surface water rights diverted from the Little Lost and Big Spring Creek. Knollin ran into financial troubles, and the Ranch was taken over by the Merchant's Bank & Trust. The property was then sold to the Blaine County Canal Company ("BCCC"), which transferred the senior surface water rights to its

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point of diversion further downstream, and sold the land to Slim Hawley sometime in the late 1940's or early 1950's.

After acquiring the Knollin Ranch, Slim Hawley proceeded to redevelop the Knollin Ranch by obtaining licenses to appropriate groundwater. During that period, Slim also acquired what is known as the Bird Ranch. Water licenses 33-2057 and 33-2083 are appurtenant to the Bird Ranch and to portions of the Knollin Ranch. Although these licenses are for use of groundwater, at some point the Bird Ranch began to be irrigated with surface water obtained through an exchange involving pumping groundwater into the Little Lost at the Knollin Ranch.

Vance Hawley testified that during the years he lived and worked on the property, and the years he leased it, he irrigated the Knollin and Bird Ranches according to his father's wishes, which, as Vance Hawley understood, was the way his father, Slim, had always irrigated them. Vance Hawley described the wells and ditches that were used to irrigate various fields, and testified that he generally understood there to be approximately 1200 acres of ground actually flood irrigated between the Knollin Ranch and the Bird Ranch. This testimony is substantiated by field acreage notations made by the ASCS on Exhibit 3. His testimony regarding the acres irrigated on the Bird Ranch is substantiated by Mays' Exhibits 2, 6, 7, 9, 10, 11, 12 and 13, and by the testimony of Jerry Pancheri, who accounted for no more than approximately 280 acres of irrigation on the Bird Ranch.

Vance Hawley testified that the following acres historically were irrigated on the Knollin Ranch during the years he was familiar with the property:

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a.	West of Little Lost River		
	(1)	Cattleguard Piece	70 acres
	(2)	Behind the House	20
	(3)	Junkyard Field	13
	(4)	South of the House	8
	(5)	South Southwest Field	68
	(6)	South Companion Field	16
b.	East of River		
	(1)	Upper, Middle and Lower Shed Fields	208
	(2)	Brown Field	64
	(3)	West Steer Pasture	196
	(4)	East Steer Pasture	216
TOTAL KNOLLIN RANCH ACRES			**879**

Of the above 879 acres that Vance Hawley testified were actually flood irrigated during his tenure on the property, all but the West and East Steer Pastures were hay fields. Mays Exhibit 20, based on Mr. Scanlan's review of the aerial photo exhibits, indicates a total of 885 estimated acres irrigated on the Knollin Ranch. This tracks closely with Vance Hawley's testimony.

Hawley also testified that the majority of the hay fields generally received only one irrigation per year, and yielded approximately 1 to 1.5 tons per acre per year.

Sagewillow offered no evidence to rebut Vance Hawley's testimony regarding the historical irrigation of the Knollin Ranch prior to its purchase by Sagewillow. In

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fact, Jerry Pancheri's testimony substantiates that of Hawley. Pancheri testified that when he took over the farming of the Knollin Ranch, much of it could not be effectively irrigated using the then existing irrigation system.[2]

2. North of the Road Property

Water right no. 33-2090 was licensed with a priority date of 1959 to irrigate lands that Vance Hawley testified were homesteaded by his family. The licensed place of use for 33-2090 is in Section 1, T7N, R27E and Section 6, T7N, R28E, situated north of what previously had been an east-west county road on the north end of the Knollin Ranch. This area is referred to hereafter simply as the "North of the Road Property". The source of water for this land originally was well no. 11, which is located in SW1/4, NW1/4 Section 1, T7N, R27E. Vance Hawley had never seen the North of the Road Property irrigated using well no. 11, or any other water source during the years he lived and worked on the property. He understood from talking with his parents over the years that the property originally was irrigated solely to obtain a patent from the United States, and that thereafter, it was intended to be used as uncultivated private rangeland adjacent to the public lands. Hawley stated that well no. 11, was rarely pumped because of its size and expense, but when it was pumped, it was for short periods to irrigate lands other than those

[2]Although Pancheri and Brockway testified that there were ditches throughout the property, their testimony also was that many of these ditches were not functional. No doubt many of the ditches were remnants of those developed by the original homesteaders who developed the land with surface water rights to obtain patents before selling out to Knollin. These surface rights ultimately were sold off the land to BCCC. As such, the presence of ditches on much of the Knollin Ranch are not necessarily an indication that the land had been irrigated with the Hawley groundwater rights.

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covered by License No. 33-2090, or as part of the above-referenced exchange with the River.

Mays' Exhibit Nos. 3, 5, 6 and 13 confirm the total lack of beneficial use of water right 33-2090 on the North of the Road Property for the years 1976 through 1990. Thus on the basis of these exhibits alone, water right 33-2090 had gone unused for at least 14 years. If the land had been allowed to go dry in the 1960's when the Hawleys obtained their patents, the nonuse would have been for closer to 25 years. Sagewillow offered no contradictory evidence on this point, and in fact its own aerial photos confirm such continuous nonuse.

3. The Bird Ranch

Hawley testified that the Bird Ranch, which is located in Section 34, T8N, R27E, historically had been irrigated with surface water obtained through an exchange with well water pumped into the Little Lost on the Knollin Ranch. The rights appurtenant to the Bird Ranch are 33-2057 and 33-2083. Hawley testified that approximately 297 acres of the Bird Ranch, which is the full licensed acreage, could be irrigated with some effort. Jerry Pancheri's testimony confirms that no more than the 297 acres could be irrigated. He testified that in 1989 he was able to accomplish some irrigation within 7 quarter-quarter sections on the Bird Ranch and the Homestead. He also testified that he did not necessarily irrigate a full forty acres in each of the quarter-quarters. Even if there were full irrigation of each quarter-quarter section, this would have amounted to no more than 280 acres. The Sagewillow transfer applications themselves indicate no more than 297 acres of licensed place of use in section 34.

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Vance Hawley testified to the poor nature of the hay ground on the Bird Ranch. He stated that the annual hay yield was approximately one-half ton per acre. Mr. Pancheri's testimony supports this. Mr. Pancheri testified that the ditches were "eroded and deep", that the Bird Ranch was "the poorest ground there was", and that "an inch of rain would do more good than irrigation."

4. The Homestead

Water right no. 33-2091 was licensed with a priority date of 1960 to irrigate 320 acres of land known to Vance Hawley as the "Homestead", because it had been homesteaded by his mother, who obtained a patent for the ground from the United States in 1966. The Homestead parcel is located in sections 34 and 35, T8N, R27E, adjacent to the Bird Ranch parcel. The Homestead originally had been irrigated using a well located in the NE1/4 of Section 34. Mr. Hawley understood from talking with his father, Slim, that once the patent had been obtained, the well was never pumped again and the Homestead was allowed to revert to range. Again, Mr. Hawley understood that his parents' intent was to prove-up on the Homestead property to obtain additional private rangeland adjacent to the public lands. To his knowledge, the Homestead was never irrigated thereafter. Vance did state that he had occasionally seen wastewater from the irrigation of the Bird Ranch running in what was described by Jerry Pancheri as a "gully" in the SE1/4, SE1/4 of Section 34.

Vance Hawley's testimony regarding the nonuse of water right 33-2091 was supported by other witnesses, including Sagewillow's. No witnesses had ever seen the Homestead well operated. In fact, no witnesses had ever seen an

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operational motor in place at the wellhead by which the pump could have been operated.

James Mays testified that he had driven through the Bird Ranch and Homestead properties over the years prior to their purchase by Sagewillow, and had driven around the property since, but had never seen any evidence of irrigation of the Homestead property. Mays stated that he had seen some evidence of ditching that could have served the Homestead property at one time, but that the ditches had grown in with sagebrush.

Jerry Pancheri, who operated the Knollin and Bird Ranch properties after Sagewillow purchased them, testified that he "tried" to irrigate the Homestead piece in 1990, 1991 and 1992 with the exchange water that also was being used to flood irrigate the Bird Ranch. However, despite his efforts he was only able to get some water into the "gully", and onto several acres southwest of the gully.

The aerial photo maps and exhibits show that most of the "gully" referred to by Mr. Hawley and Mr. Pancheri, and any lands to the southwest of it, are located on land belonging to the United States, and are not included in the licensed place of use for water right no. 33-2091. Mays' Exhibits 11, 12 and 13 directly contradict Pancheri's testimony that he irrigated any portion of the Homestead during the years 1990 through 1992 since they show no evidence of irrigation water being, or having been, applied to the place of use for license 33-2091 during the years the land has been owned by Sagewillow. Further, Sagewillow's own evidence establishes no more than that the deep gully and adjacent BLM ground received any water after 1989.

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Sagewillow's exhibits substantiate Mays' evidence showing the lack of irrigation of the Homestead property. Vance Hawley's testimony, taken in conjunction with the aerial photos offered by both parties establishes at least 22 years (1967-1989) of nonuse of water right 33-2091 by the time Sagewillow purchased the Homestead property.

5. David Hawley Property

Sagewillow purchased the David Hawley property in 1993. Mr. Scanlan testified that his review of the various aerial photos indicated that approximately 27 acres less land had been irrigated on that property than was authorized by license nos. 33-7018 and 33-2086. This would bring the total historical beneficial use of these water rights to 230 acres. This reduction in acres irrigated based on evidence of historical use is included in Mays Exhibits 15, 19 and 20. Sagewillow did not attempt to rebut Mr. Scanlan's testimony regarding the historical irrigation of this property.

Including the approximately 885 acres of flood irrigation on the Knollin Ranch and the 297 acres of flood irrigation on the Bird Ranch, the undisputed testimony is that prior to Sagewillow's purchase of these properties, the Sagewillow water rights, which on the face of the licenses authorize irrigation of 2,383 acres, historically had been beneficially used only on approximately 1,182 acres. Including the 230 acres historically irrigated on the David Hawley property, the total historically irrigated acres amount to 1,412 acres.

Subsequent to Slim Hawley obtaining the groundwater licenses for the Bird and Knollin Ranches, numerous other groundwater appropriations have been made in the Little Lost River Basin downgradient from the Knollin Ranch. Also, several

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wells have been drilled into the aquifer that use groundwater for exchange. Protestant Mays uses two such wells under licenses 33-2107 and 33-2103 with priorities of 1961. Protestant Blaine County Canal Company ("BCCC") also introduced testimony and exhibit regarding numerous groundwater rights developed both subsequent to Slim Hawley's licenses, and subsequent to the time that water right nos. 33-2090 and 33-2091 were abandoned or forfeited by Slim Hawley. *See* BCCC Exhibit 1.

6. Subirrigation

Slim Hawley also obtained a unique license (no. 33-2133) from the Department in 1949 which authorized diversion of water during the non-irrigation season for purposes of "winter root zone storage" on the Knollin Ranch. Vance Hawley testified that there were three different ways by which this winter water could be diverted to the Knollin Ranch. One was by means of a diversion from the Little Lost in the northwest corner of the Knollin Ranch, which directed water into a series of ponds constructed by Slim Hawley primarily in Section 12, T7N, R27E, and Section 7, T7N, R28E. Water was allowed to run through the ponds and then would dissipate into the ground in the area of the south end of Section 7 and in Section 18, T7N, R28E. Another means was a diversion from Big Spring Creek in Section 5, T7N, R28E by which water could be run to the southwest into the area of what was known to Vance Hawley as the East Steer Pasture. The third means was another diversion from Big Spring Creek located further upstream, that directed water essentially due south through the rangelands north of the Knollin Ranch. Vance Hawley testified that this third method was rarely if ever used. Winter water was diverted as available, given

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yearly flow and icing conditions. The effect of these diversions apparently was to raise the "sub" in the vicinity of the areas of application, to increase the flow of area springs, and the production of grass.

Sagewillow claims that those portions of the 2,383 licensed acres that historically have not been flood irrigated under the various groundwater licenses, have benefitted from irrigation through the raising of the "sub". Brockway's testimony was that he included subirrigated areas within his definition of "beneficial use" when determining which areas had been "irrigated" under the Sagewillow licenses, which resulted in him finding approximately 2,383 acres of beneficial use prior to transfer.

Mr. Terry Scanlan also looked at the subirrigated ground, and included it in his consumptive use analysis. Except for several particular areas that Dr. Brockway attributed to flood irrigation rather than subirrigation, Mr. Scanlan's and Dr. Brockway's designations of irrigation types was the same. However, Scanlan's designation of subirrigated areas was made to evaluate both pre- and post-transfer consumptive use, and Mr. Scanlan made no subjective call on whether subirrigation established beneficial use.

Significantly, on cross-examination, Dr. Brockway agreed that the areas that he had designated as subirrigated ground would continue to be subirrigated after the transfer. Indeed, statements made by counsel in correspondence to the Department, and at the hearing, as well as the testimony of Mr. Pancheri, indicate that the areas benefitting from subirrigation, and the amount of grass produced thereon will be increased after the transfer over historical levels. Mr. Scanlan also testified that in

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part because the transfers would not "dry up" areas receiving subirrigation, the consumptive use under the Sagewillow licenses would be greater after the transfers than it had been before the transfers.

B. **Post-1989 Sagewillow Water Use and Land Development**

1. Knollin Ranch. The history of water right use on the Knollin Ranch since 1989 has been one of aggressive and dramatic development involving the pumping of large amounts of water, and its diversion to lands that previously had not been irrigated under any existing water rights for many years. Ditches and ponds were constructed, new wells were drilled and new pumps were installed. Large center pivot sprinklers were put in place.

Sagewillow acquired the Knollin and Bird Ranches on April 26, 1989 by warranty deed from Venice Hawley, representing herself and her deceased husband "Slim." The warranty deed conveyed the Bird Ranch and Homestead properties, and the Knollin Ranch proper "together with their appurtenances". The legal description of the property so conveyed included the following:

> Together with all water, water rights, ditches, ditch rights of way, pumps, motors, panels and irrigation equipment and structures, all appurtenances and easements, and all grazing privileges and permits with the Bureau of Land Management and the U.S. Forest Service in so far as they are applicable to the above described property and livestock thereon.

See Warranty Deed attached to Sagewillow Transfer Application No. 4225.

Jerry Pancheri testified that in 1989, which was the first year he worked the Knollin Ranch for Sagewillow, he was able, using the existing irrigation system, to irrigate portions of certain identified quarter-quarter sections, which if fully irrigated,

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would account for only 1,400 acres.[3] Mr. Pancheri also testified that in 1989 he obtained 47 tons of hay from the entire Knollin Ranch.

By constructing new delivery structures in 1990, Mr. Pancheri was able to flood irrigate another approximately 240 acres on the south end of the Knollin Ranch that year, bringing the total for the Sagewillow property to a maximum of 1,740 acres, assuming 40 acres out of each quarter-quarter actually received water.

In 1991, Sagewillow installed three center pivots, and irrigated approximately 264 additional acres of ground under pivots 6 and 7 on the Knollin Ranch. This brought the total acres being flood or sprinkler irrigated to approximately 2,004 acres. During that same year, Sagewillow reconstructed several ponds and began diverting surface and groundwater into them.

In 1992, Sagewillow irrigated approximately 110 acres of additional ground. By 1994, Mr. Pancheri had developed ditches, headgates and sprinkler irrigation sufficient to irrigate 2100 acres, an increase of more than 700 acres over historical levels, and he harvested over 1000 tons of hay. The reconstruction of old ponds and dikes had the effect of "keeping sufficient soil moisture in the surrounding acres to produce beautiful stands of native grasses." *See* Letter from Kent W. Foster to Jim Johnson, Water Rights Supervisor, Idaho Department of Water Resources dated April 6, 1993 (hereafter "Foster April 6, 1993 Letter", on file with the Department as part of Sagewillow Transfers).

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[3] Mr. Pancheri testified that in 1989 he irrigated portions of 7 "forties" on the Bird Ranch, 20 forties of pasture from wells 2, 3, 4 and 5, 120 acres on the Knollin Ranch out of Big Spring Creek, and that he "tried" to irrigate another 5 forties. Giving Sagewillow the benefit of the doubt by assuming all of each forty was fully irrigated, the total acres would be 1,400.

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2. Transfer No. 3785. In October, 1990, Sagewillow, through its president, Edmund Dumke, applied to transfer water right 33-2091 from the Homestead property to rangeland located in the SE1/4 of Section 1, T7N, R27E, and the SW1/4 and SE1/4 of Section 6, T7N, R28E. In 1991, two new pivots (pivots 6 and 7) were installed on the lands in Sections 1 and 6, and irrigation was commenced that same year. *See* Mays Exh. 13, 1991 Landsat Image and testimony of Mr. Pancheri and Mr. Scanlan.

Although the pivots were installed and operated in 1991, the record indicates that approval of Transfer 3785, which authorized license no. 33-2091 to be used in Sections 1 and 6, was not obtained until October of 1992. Transfer 3785, even as ultimately approved in 1992, did not authorize irrigation of the lands located under pivot 6 in Section 1.

Even if Sagewillow intended in 1991 to instead use water right no. 33-2090 to irrigate land under pivots 6 and 7, license no. 33-2090 does not include the following portions of those pivots, all in Section 1:

Pivot 6	NE1/4,SW1/4	33 acres
	NW1/4,SE1/4	33 acres
	SW1/4,SE1/4	33 acres
Pivot 7	SE1/4,SE1/4	33 acres
TOTAL		132 acres

In fact, nothing in the record shows that Sagewillow holds authority, by license, transfer or otherwise to irrigate anything but the southwest quadrant of pivot 6 (SE1/4, SW1/4 Sec. 1), which is covered by license nos. 33-2057 and 33-2083. Attempts by counsel for Mays to determine which, if any, rights Sagewillow was

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using to operate pivots 6 and 7 since 1991 were met by objection on the ground that they called for a legal conclusion. In its Closing Argument, Sagewillow still does not identify what rights it contends were, or are, being used to operate those pivots, and to irrigate the 264 acres beneath them.

3. Power Records

To evaluate the historical use of the water rights proposed for transfer, Mays obtained and analyzed power records for the various wells on the Knollin Ranch to estimate annual pumping volumes.[3] Mays Exhibit 16 illustrates several important facts. First, Exhibit 16 shows that during the years 1985 to 1989, the highest volume pumped was approximately 5,183 acre-feet. During that period, no more than approximately 337 acre-feet of water was ever diverted during the non-irrigation season. The pumping summaries also substantiate Vance Hawley's testimony that well no. 11 was rarely if ever used. In fact, pages 2-3 of Mays Exhibit 16 confirm that well no. 11 was never pumped during the four years prior to Sagewillow's ownership. Second, the pumping summaries illustrate the dramatic increase in diversions that has occurred since 1989. Annual diversions more than doubled by 1994, when they reached a high of nearly 12,000 acre-feet. Exh. 16 at 1. Using these figures, and assuming that all of the licensed acres had been flood irrigated in 1994, it would have resulted in an application rate of 5.0 acre-feet per acre. Third, Mays

[3]In analyzing power records for the Sagewillow wells obtained from Utah Power and Light, Mr. Scanlan and Dr. Brockway met and agreed upon the essential parameters to be used to estimate pumping volumes.

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Exhibit 16 shows that winter pumping also increased dramatically, with nearly 2000 acre-feet of water being pumped during the non-irrigation season of 1993.[4]

C. Evaluation of Pre- and Post-Consumptive Use

Both Mays' and Sagewillow's experts prepared summaries of their estimates of pre- and post-transfer consumptive use. In their evaluations, both Mr. Scanlan and Dr. Brockway assumed that evapotranspiration ("ET") approximated consumptive use. Because ET varies according to land use type, Mr. Scanlan and Dr. Brockway met prior to the hearing and agreed upon various ET values to be used for four different land use types: range, flood irrigated, subirrigated and sprinkler irrigated. The values agreed upon assumed that typical irrigation practices were used and that typical yields were obtained.

At the time Mr. Scanlan and Dr. Brockway met, Mr. Scanlan had only been able to review a 1976 orthophotoquad (Exh. 6) and the Landsat imagery (Exh. 13) for the Knollin and Bird Ranches. Based upon this information, Mr. Scanlan assumed the following pre-transfer vegetation types for the lands affected by the Sagewillow transfers:

[4]Arguably some of the power usage during the non-irrigation season may have been attributable to aerator operation. However, a 3-5 hp aerator could not reasonably be expected to draw the level of kilowatts indicated at Mays Exhibit 16, pgs. 7 and 9.

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Irrigation Type	Pre-Transfer	Post-Transfer
Sprinkler Irrigation	0	1505
Flood Irrigation	2000	878
Subirrigation	977	1192
Rangeland	3263	2665

Using the agreed upon ET values, Mr. Scanlan estimated in Mays Exhibit 15, that as of 1989, the annual consumptive use resulting from historical irrigation practices and use of the Sagewillow water rights was 9,672 acre-feet. This analysis assigned a rangeland ET value to the pre-transfer Homestead lands and to the North of the Road Property. Mr. Scanlan's analysis indicated that the post-transfer annual consumptive use would be 10,530 acre-feet, which would be an increase of 858 acre-feet over historical levels.

Importantly, Mr. Scanlan also testified that after having subsequently reviewed ASCS aerial photos taken in 1989 (Mays Exhibits 5 and 9-12), and information from Vance Hawley, he did not believe Exhibit 15 reflected the actual on-the-ground situation, because it attributed primarily a "flood irrigation" designation to those areas that were red (green) on the Landsat imagery, and that Dr. Brockway had told Mr. Scanlan had some form of ditches on them. Thus, Mays Exhibit 15 reflects a "best case" scenario for Sagewillow.

Mays introduced Exhibits 19 and 20 which were based on this additional information reviewed by Mr. Scanlan, including the color ASCS aerial photos taken in 1989, information obtained from Vance Hawley regarding actual irrigation practices, and his own observations of the Knollin, Bird and Homestead properties

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prior to the hearing. Mays Exhibit 19 reflects the following acres and irrigation types pre- and post-transfer:

Irrigation Type	Pre-Transfer	Post-Transfer
Sprinkler Irrigation	0	1505
Flood Irrigation	1412	878
Subirrigation	1510	1229
Rangeland	3318	2628

Thus, compared to Exhibit 15, Exhibit 19 reflects a significantly reduced area designated as flood irrigated, and a larger subirrigated area, but it uses the same ET coefficients for each designated irrigation type that were used in preparing Exhibit 15. Exhibit 19 reveals that, assuming typical irrigation practices and crop yields, if the Sagewillow transfers are approved as proposed, they will increase consumptive use from the Little Lost system by approximately 1,504 acre-feet annually.

However, Mr. Scanlan further testified that he believed this estimate also was low since the testimony of Mr. Hawley, which was substantiated by Sagewillow's witness, Mr. Pancheri, was that the lands were difficult to cover with flood irrigation, and that their yields were low. The typical hay yield in the Howe area is three to four tons per acre. This substantially exceeds the .5 to 1.5 tons per acre testified to by Vance Hawley. Both Mr. Scanlan and Dr. Brockway agreed that where yields and irrigation practices are less than typical, the evapotranspiration associated with a given area will decrease. In Mays Exhibit 20, Mr. Scanlan adjusted the ET value for the flood irrigated acres to reflect this fact.

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Exhibit 20 therefore reflects Mr. Scanlan's adjustments in the ET coefficient for the flood irrigated ground to take into account the fact that much of that ground was irrigated only once per season, and produced sub-typical yields. Exhibit 20 demonstrates that if actual historical use and historical yields are taken into account, the Sagewillow transfers will increase the annual consumptive use in the Little Lost by approximately 1809 acre-feet.

Mr. Scanlan testified that based on his review of all the aerial photos admitted into evidence by Mays, the testimony of the witnesses, and his own observations of the Knollin, Bird and Homestead properties, Exhibit 20 was the closest approximation of the historical use of the Sagewillow water rights, and provided the best estimate of the impact of the proposed transfers on the Little Lost hydrologic system.

The increases in consumptive use projected by Mays Exhibits 15, 19 and 20 all reflect the expansion in historically irrigated acres that would result from diversions under licenses 33-2090 and 33-2091, and the fact that there would be no decrease in subirrigated acres. In other words, the Sagewillow transfers propose to "dry up" 640 acres of historically non-irrigated range land on the Homestead and North of the Road properties, and to "move" water rights such as 33-2057, 33-2083, 33-0076 and 33-0079 off of licensed places of use on the Knollin Ranch without ceasing the historical subirrigation. Thus, "increased consumptive use" is not so much the ill that must be remedied, as it is the manifestation of the illegal expansion in irrigated acres proposed by Sagewillow.

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Mr. Scanlan's consumptive use calculations allow estimates of the potential physical impacts of the expansions on streamflows and groundwater recharge downstream of the Knollin Ranch. Mays Exhibit 17 portrays the potential level of reduction in Little Lost River stream-flow that would result from varying increases in consumptive use at the Knollin Ranch if averaged over 180 and 365 days. Dr. Brockway testified that the transfers would result in a 137 acre-foot per year increase in consumptive use, and that this could be expected to result in a 0.2 cfs decrease in streamflow over 365 days. Mr. Scanlan's estimate of increased consumptive use of 1809 acre-feet shown in Exhibit 20 would translate to approximately a 2.5 cfs decrease in streamflow over 365 days, or 5.0 cfs over 180 days. *See* Mays Exh. 17. The Clebsch and Mundorff reports estimate that wells such as those on the Knollin Ranch which are drilled in close proximity to the Little Lost or Big Spring Creek may draw up to 90 percent of their pumpage volume from the surface flows within 100 days of pumping. *See* Clebsch at 50; Mundorff at 31-34, including Figure 6. Wells farther from the River or Spring Creek would have a less rapid impact on surface flows. However, Mundorff indicates that all groundwater consumptively used above the barrier will decrease basin outflows on an acre-foot for acre-foot basis.

Based on the above conclusions, Mr. Scanlan prepared a set of recommendations for conditions to be imposed on the individual Sagewillow transfers that would limit the diversion rates and volumes, and acres irrigated, to reflect historical use. Mays Exhibit 18. These recommendations take into account actual acres irrigated under the rights prior to their purchase by Sagewillow, and prorates the necessary reductions over those transfers involving the same water rights. The

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recommendations also provide for zero diversions or acres for licenses 33-2090 and 33-2091.

D. Facts Surrounding Approval of Transfer No. 3785

Transfer No. 3785, as approved in 1992, authorized a change in place of use for water right license no. 33-2091 from the Homestead property to lands on the north end of the Knollin Ranch, that for the most part, overlapped the place of use for license no. 33-2090.

The transfer application was signed by Mr. Dumke as president of Sagewillow. Part 1 of the transfer application requests the applicant to "[d]escribe the affect [sic] on the land *now irrigated* if the place of use is changed pursuant to this transfer." (Emphasis added). The response is that "[w]e will dry farm this old place of use." There is 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 or more consecutive years of non-use?" Mr. Dumke thereafter 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."

Mr. Dumke testified at the hearing that he had no personal knowledge regarding water right license no. 33-2091. He did not personally know whether a well actually was located at the licensed point of diversion. He did not know what, if any, irrigation had occurred pursuant to that license on the licensed place of use. Instead, Mr. Dumke stated that he relied entirely on others to prepare the application, and he merely signed it.

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Mr. 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 if no protests are filed. Therefore, in reviewing the Sagewillow application, Mr. Jones made no independent inquiry into the existence of a well and pump at the licensed point of diversion, or of actual diversion to beneficial use on the licensed place of use for license 33-2091. Mr. Jones did not review power or pumping records, or aerial photos of the Bird Ranch or the North of the Road lands. The facts attested to in the application were assumed true and the transfer was summarily approved.

At some point after Transfer 3785 was approved, Sagewillow apparently realized that the transfer had "stacked" license 33-2091 on top of license 33-2090. In a letter dated April 6, 1993, Mr. Kent Foster wrote to the Department regarding the instant Sagewillow transfers and noted the following regarding Transfer 3785:

> . . . last year, (1992), Sagewillow decided to drill some new wells to be tied to an existing well to operate 5 pivots. The local office of IDWR prepared an Application for Transfer (Transfer No. 3785) to change the place of use for Right No. 33-02091. We think there was some confusion between the individual who manages the Sagewillow operation (Mr. Jerry Pancheri) and the officials at IDWR who prepared the application form. At least no one now seems to know why the transfer form was prepared the way it was. The place of use for Right No. 33-2091 was moved down to land, most of which was already covered by Right No. 33-02090. Apparently Mr. Pancheri indicated a desire to abandon the irrigation well in Section 34, Township 8 North, Range 27 East, and to drill a new well in Section 6, Township 7 North, Range 28 East, and no one bothered to discover the fact that Right No. 33-02090 already covered most of the land to be put under the pivots.
>
> In fact, 2 new wells were drilled in order to obtain sufficient water to operate the pivots, and we need to straighten that whole matter out in this proposed transfer. *On Map No. 1, we have ignored the 1992 transfer because the stacking of water rights, 33-2090 and 33-*

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2091, appears to have been inadvertent and was certainly neither necessary nor intended. . . .

Foster April 6, 1993 Letter at 4.

The above stated facts, taken together support the conclusion that the proposed Sagewillow transfers will result in injury, expansion and enlargement, and therefore, the transfers must be denied, or only approved with conditions to limit the use of the rights to the levels consistent with their historical use.

III. ARGUMENT

Idaho Code § 42-222 governs both transfers of water rights and forfeiture. This circumstance is logical since in a transfer proceeding the two principal questions that must be answered are 1) what is the nature and extent of the right being transferred, and 2) whether such right can be changed without injury to other water rights. Whether all or a portion of a water right has been lost due to nonuse, therefore, is central to the Department's inquiry in a transfer proceeding.

As recognized by the Idaho Supreme Court, statutory forfeiture is distinct from abandonment of a water right. *See e.g., Crow v. Carlson, 107 Idaho 461, 466, 690 P.2d 916 (1984); Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982).* Whereas, 42-222(2) provides that mere nonuse for five consecutive years will forfeit a water right, abandonment requires both nonuse and the intent to abandon; the lapse of time is irrelevant. Given the potential difficulty in establishing "intent" abandonment is often difficult to prove. However, nonuse for an unreasonably long period, or the destruction or disabling of diversion and delivery devices, is relevant and material evidence giving rise to a presumption of the intent

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to abandon a water right. *Upper Harmony Ditch Co. v. Carwin*, 539 P.2d 1282 (Colo. 1975) (Nonuse for a long period is evidence of intention to abandon that can be rebutted by acts, conditions or circumstances that show reasonable justification for nonuse.)

Mays contends that the evidence establishes that water rights 33-2091 and 33-2090 were in fact *abandoned* by L.R. "Slim" Hawley. Testimony and exhibits conclusively show that the points of diversion, and the distribution systems for these two water rights were never used for from 14 to 24 years. Vance Hawley testified that the well drilled to irrigate the Homestead property was allowed to fall into disrepair, and had never been operated while he was familiar with the place. Well 11, which originally was used to prove up on the North of the Road Property, was large, and expensive to run, and was never used to irrigate its designated place of use since approximately 1966. Mr. Hawley also testified that he understood that his parents obtained patents on the Homestead and North of the Road properties with the intent of using the land for non-irrigated range, not for cultivation. Slim Hawley proved up on these water rights to, in turn, prove up on homestead entries made by him and his wife. Upon obtaining patents from the United States, Slim Hawley allowed the land to revert to rangeland to form essentially a base property from which his cattle could be moved on and off of the adjacent public lands. While this was not the intended result of the federal homestead laws, it certainly was not an unusual practice on desert land entries.[5]

[5]The history of abuse of the homestead and desert land laws is long, and well-documented. Many public land entries were made for speculative purposes and by persons who held lands for grazing without settlement, and with no intention of ultimately cultivating it. *See e.g.*, Paul W. Gates, *History of Public*

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On these facts, both prongs of the test for abandonment—nonuse and intent to abandon—can reasonably be found to be satisfied. The many years of unexcused nonuse of these two rights on the 640 acres is itself probative and objective evidence of Slim Hawley's intent to abandon them.

The Department therefore reasonably can conclude that water rights 33-2090 and 33-2091 have been abandoned. In arguing abandonment, however, Mays does not waive the issue of forfeiture as it applies to these two rights since the facts that support abandonment, also support statutory forfeiture under 42-222(2). As to the remaining groundwater rights Sagewillow proposes to transfer, Mays contends that partial statutory forfeiture has occurred for failure to fully divert the water to beneficial use during the statutory period.

The Sagewillow rights are not exempt from forfeiture. Sagewillow offered no evidence to show that prior to its purchase of the Knollin, Bird and Homestead properties, Hawley could not divert water under his water rights due to circumstances beyond his control. Mr. Pancheri testified that the lands were not in a federal set-aside program. Mays is aware of no application filed with the Department to obtain an extension of time in which to resume the full use of any of the rights. There is no excuse for the long period of nonuse of the subject water rights.

A. Historical Beneficial Use is the Basis, Limit and Measure of a Water Right.

It is axiomatic that the appropriation doctrine is based on beneficial use, and

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Land Law Development, Public Land Law Commission at 638-643 (U.S.G.P.O. 1968).

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that beneficial use is the basis, the limit and the measure of any water right. *Albrethsen v. Wood River Land Co.*, 40 Idaho 49, 60, 231 P. 418 (1924) (well-settled rule of public policy is that the right to use the public water can only be claimed where it is applied to beneficial use). In its Closing Argument, Sagewillow loses sight of this fundamental premise, and suggests that what was typewritten on the face of its paper licenses conclusively establishes what its water rights are. From its inception, the appropriation doctrine recoiled from such an approach:

> No matter how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to beneficial use at some time within the period by which his right would otherwise be barred for nonuser.

Smith v. Hawkins, 120 Cal. 86, 88, 52 P. 139 (1898). Continuance of title to a water right is entirely dependent upon continuing beneficial use. *See*, Long, *The Law of Irrigation* § 83 2d ed. (1916) (continuance of a water right depends upon continued beneficial use); Charles B. Roe, Jr. and William J. Brooks, *Loss of Water Rights - Old Ways and New*, 39 Rocky Mtn. Min. L. Inst. 23-1, 23-11 (1989)(forfeiture statutes serve to "clean up" paper rights so they conform to what an appropriator is actually authorized to put to beneficial use).

The mere fact that a right has been licensed or decreed does not affect its susceptibility to loss for nonuse. *St. John Irrig. Co. v. Danforth*, 50 Idaho 513, 516, 298 P. 365 (1931); *Albrethsen v. Wood River Land Co.*, *supra* (a decreed right is not immune from a showing that it has been abandoned where the evidence regarding abandonment relates to a time subsequent to the decree); *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944)(quoting *Albrethsen*). Once a water right is acquired, it must

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be maintained by beneficial use or it will be lost. As such, the significance of historical beneficial use begins the moment the appropriative right is perfected, and continues until such time as the right either is abandoned or forfeited, at which point the right ceases to exist. *Albrethsen, supra* (abandonment begins at the time the appropriator claiming under a decree fails to apply the water to beneficial use, and when such failure continues for the statutory period, the right may be lost). In this way, it is the historical beneficial use of the Sagewillow rights that defines what they are, and what Sagewillow has to transfer.

Sagewillow's suggestion that the licenses (or a decree) are conclusive and somehow bind the Department today is disingenuous at best. *Crow v. Carlson*, 107 Idaho 461, 690 P. 916 (1984), cited by Sagewillow, does not go as far as Sagewillow suggests. In *Crow*, the Plaintiff had brought an action seeking to prevent the watermaster from delivering 40 inches of water to an 80 acre parcel of land. The plaintiff alleged that water had never been used on the 80 acres, but instead always had been used, along with another 80 inches, on the Plaintiff's 160 acres. The Idaho Supreme Court held that the Rexburg Decree, which determined that the 120 inches was appurtenant to the combined 240 acres was conclusive, and *res judicata*, as to the issue of whether the right had been so used when the decree was entered. *Crow*, 107 Idaho at 465-66. The Court went on, however, to state that "[a]ccepting the validity of the Rexburg decree, the water right in question here is in some proportion appurtenant to the [80 acres], unless that right has at some time been transferred to other property, abandoned, or negated in some other way." *Id.*, 107 Idaho at 466. The Court also pointed out in a footnote that although it is real property, "a water

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right does not have all the attributes of a real property interest, in that the water may be conveyed without a complete legal description and lost through non-use." *Id.* This again confirms the principle that a license or decree is conclusive only as to what a water a right *was* when the document was issued. Subsequent beneficial use defines what the water right becomes thereafter.

Crow is consistent with *Jenkins*, *supra* at 1261, where the Idaho Court, in evaluating whether a decreed water right had been abandoned or forfeited subsequent to the decree, stated that a "decree does not establish that the 2.4 cfs of water has continued to flow from one creek to another, nor does it establish that Jenkins or his predecessors continued to apply that water to beneficial use on the land following the 1930 decree."

Another case on point is *Graham v. Leek*, 65 Idaho 279, 144 P.2d 475 (1944). In *Graham*, the appellant Leek brought suit against Graham seeking an order that Leek's decreed and licensed rights were superior to Grahams. Leek had purchased a particular tract of land known as the Thorp property and the "appurtenant" 1907 water right license from the original appropriator. The evidence showed that water under the license had not been diverted since the issuance of the license until 1940, when Leek attempted to redivert the water to the Thorp property. Leek relied in part on the argument that the license established the existence of the right and his priority to it. Graham argued, and the trial and appellate courts agreed, that regardless what the license said, where the evidence established that the right had been abandoned (statutory forfeiture) by nonuse long prior to the commencement of the suit, Leek had no basis for his claim of priority.

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Importantly, the court in *Graham* sustained a finding of abandonment in the face of conflicting testimony regarding the history of use of the rights in question. The testimony of a witness who had lived on and farmed an adjacent tract of land for many years was certainly decisive on the question of abandonment of one of Leek's water rights. This witness testified that the subject land "had not been irrigated, that the [former owner] during the time he was the owner of the place had never irrigated it, and that there were no ditches up to the time of the litigation, constructed to that land; that the . . . tract was grazing land and raised a little wild hay, which grew without irrigation." *Id.* 65 Idaho at 293. The appellate court would not disturb the trial court's finding of abandonment of this right.

The likelihood of one's licensed or decreed water right being "requantified" to reflect historical beneficial use is especially real in the context of a transfer. Once a right holder proposes to change the right, he or she opens it up to the full scrutiny of the Department and other right holders. As stated by the Colorado Supreme Court:

> [O]nce an appropriator exercises his or her privilege to change a water right. . . the appropriator runs the real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right. . . which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited historical use of the right.

Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conserv. Dist., 717 P.2d 955,959 (1986). This principle is as true for senior rights that have been abandoned or forfeited in whole or part, as it is for junior rights that, because they are continually subject to call, historically have not been fully used.

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Thus, when Sagewillow proferred its licenses for transfer, it "opened the books" on those licenses and subjected them to careful Departmental review and the likelihood that they would be requantified based on their historical use.

B. Sagewillow Only Purchased What Slim Hawley Had to Sell in 1989.

One of the most fundamental principles of property law is that a grantor can convey only what the grantor owned at the time of the execution and delivery of the deed. Thus, a grantee acquires no greater title or interest in the real property conveyed by warranty deed than his grantor had. *McDaniel v. Jones*, 235 Kan. 93, 679 P.2d 682 (1984).

Because Sagewillow's 1989 deed from Slim Hawley's widow Venice Hawley granted land and appurtenant water rights, Sagewillow obtained only whatever water rights were appurtenant to the Hawley property, and to which Hawley had title to in 1989. Abandoned or forfeited water rights are not appurtenant to the land. They have reverted to the state, and become subject to appropriation again. I.C. § 42-222. Thus title to rights abandoned or forfeited by Hawley was in either the state or subsequent appropriators. Where rights that once were appurtenant to Hawley's land had been lost by abandonment or forfeiture prior to Sagewillow's purchase, they could not be made appurtenant by the mere recitation in the deed. *Stanley v. Shierry*, 322 P.2d 502, 504 (Cal. 1958) (grant deed conveyed only what the grantor owned at the time of its execution, and grantor cannot convey what belonged to someone else merely by including it within the legal description).

Part of the analysis in this case must be "what rights does Sagewillow hold that may be changed?" But the analysis in the first instance must be "what rights

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did Venice Hawley own in 1989 that could have been conveyed to Sagewillow?" The undisputed evidence is that from the time Slim Hawley acquired the various groundwater rights for the Knollin, Bird and Homestead properties, he made only limited use of them. It was only when Sagewillow obtained the properties in 1989 that diversions or irrigation approaching the amounts allowed on the face of the licenses occurred. The many years of unexcused nonuse of the water rights when they were in Hawley's hands, extinguished and relinquished his title in them to the extent of that nonuse. *Colorado Land & Water Co. v. Rocky Ford Canal, Reservoir, Land Loan and Trust Co.*, 3 Colo. App. 545, 34 P. 580 (1893) (where work of appropriator is begun and abandoned, all incipient rights acquired are forfeited and revert to the public, and cannot thereafter be sold or transferred). As stated by an eminent authority on western water law

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

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

That there are rights in the water supply other than, and subsequent to, those claimed by Sagewillow is undisputed.[6] Mays has rights with priorities of 1961 located downstream. Mays Exh. 22. These are junior to the Sagewillow rights.

[6]Mays owns water right license nos. 33-02107 and 33-02103, both of which have a priority date of 1961.

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Moreover, as BCCC's Exhibit 1 demonstrates, there are numerous other water right holders in the Little Lost that are junior to the Sagewillow rights.[7] These represent rights perfected in the water source long before Sagewillow came onto the Little Lost.

Essentially, it is these junior appropriators who have obtained the "title" to the water Hawley lost through his nonuse. Idaho Code § 42-222(2) states that ". . . when any right to the use of water shall be lost through non-use or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; . . ." In a water-short system such as the Little Lost, upon abandonment or forfeiture, the juniors obtain the benefit of, and claim to, the water:

> . . . upon cessation and extinction of an appropriative right to divert and use water of a stream as a result of forfeiture, the quantity of water thereby left flowing in the stream instantaneously either (1) ceases to be appropriated water and instead becomes unappropriated water available for reappropriation, or else (2) it becomes part of the supply to which existing junior rights theretofore not fully satisfied immediately attach to the extent of their lawful requirements. . .
>
> [In overappropriated streams] all or part of the water released by consummation of forfeiture does not become unappropriated, because the stream is already *overappropriated.* Therefore, part or all of such released water, as the case may be, instantly and automatically, with no lapse of time, inures to the benefit of junior appropriators who have first claim upon the increment for the purpose of "feeding" their rights up to the maximum to which they are entitled when water is available therefore.

Hutchins, *supra* at 315.

The Idaho Supreme Court has stated that

> If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further

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[7] *See e.g. letters of W.T. Williams, Woodie Land and Livestock, Don Isham, Earl Worthy, Keith Nickerson* contained in BCCC Exhibit 1.

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> appropriation. Other parties may then perfect a water right in those waters. . . If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority.

Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256, 1260 (1982).

Thus, the appropriate years for evaluating the issues of abandonment or forfeiture are those between the issuance date of Hawley's licenses and April 26, 1989, when Sagewillow obtained its deed from Venice Hawley. If there was abandonment or forfeiture during that period, then Hawley lost title to the water rights to the extent of his nonuse, the lost rights inured to the benefit of intervening right holders, and Venice Hawley could not have granted them to Sagewillow.

The evidence establishes conclusively that rights 33-2090 and 33-2091 had undergone far more than five consecutive years of complete nonuse prior to April 26, 1989. There was no attempt to rebut this evidence or the evidence bearing on Slim Hawley's intent to abandon the use of these rights. The evidence establishes conclusively that rights 33-2057, 33-2083 and 33-2133 had for the years leading up to 1989, been exercised only to the extent of irrigating approximately 1,412 acres. Sagewillow made no attempt to rebut this evidence. Thus, while the water right licenses may be prima facie evidence of a water right, Sagewillow has not gone forward with its burden of rebutting the clear and convincing evidence showing that subsequent to the issuance of those licenses, Hawley lost through nonuse some or all of the rights they represent.

Sagewillow's evidence of its development from 1989 forward is relevant only to the extent that it confirms its illegal expansion of use, enlargement of existing

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water rights and the resulting injury to other water right holders.

C. Sagewillow May Not Revive Water Rights Abandoned or Forfeited by Hawley.

Sagewillow argues that even if the water rights it proposes to transfer were lost through nonuse, its development of an irrigation system capable of irrigating the full 2,383 acres authorized on the face of the licenses has revived the water rights to their full licensed amounts. Sagewillow puts more faith in the common law revival doctrine than warranted under the circumstances. The classic revival doctrine as recognized in Idaho has three elements, of which Sagewillow can satisfy none. First, an abandoned right may not be revived except by the original appropriator, which in this case, was Slim Hawley. Second, an abandoned right cannot be revived even by the original appropriator if there are intervening claims to the water supply. Third, an abandoned right cannot be revived in a manner inconsistent with its original use.

A leading case on the issue of revival is *Ramshorn Ditch Co. v. United States*, 269 F. 80 (1920), which involved a claim of abandonment of seepage and waste water. In holding that a ditch company's seepage water had not been abandoned, the court stated that [t]he appropriator who has abandoned his rights to water may at any time resume the possession and exercise of them, if no new rights have intervened. *Id.*, 269 F. at 84. By definition, "the appropriator" is the person who has first initiated the right by perfecting the diversion to beneficial use. This conclusion is confirmed by subsequent Idaho case law.

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Ramshorn was cited with approval by the Idaho Supreme Court in *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944). In *Carrington*, the Court held that "forfeiture is not effective if, after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party". The same rule was announced in *Application of Boyer*, 73 Idaho 152, 248 P.2d 540 (1952) (quoting *Carrington*), and in *Wagoner v. Jeffrey*, 66 Idaho 455, 162 P.2d 400 (1945).

That the resumption of an abandoned or forfeited right must be by the original appropriator is apparent. As shown previously, a grantee takes title only to what the grantor had to sell. In the case of abandonment or forfeiture, particularly in a fully appropriated or overappropriated system, title to the water reverts automatically to the public and goes to fill junior rights which instantly move up the priority ladder. *Jenkins, supra.* Put another way, someone other than the original appropriator lacks the requisite continuity of interest *in the water right* to permit resumption. Sagewillow clearly was not the original appropriator of the rights proposed to be transferred, and it therefore could not revive those rights or portions of rights that had been abandoned or forfeited by Hawley.

With respect to license 33-2091, even if Sagewillow were the original appropriator and owner, the evidence shows that after 1989, waste water, or other water that was appurtenant to but not needed to irrigate the Bird Ranch was used on the Homestead, and only to the extent of running water down a deep gully for a short distance, and to water lands belonging to the United States to the southwest of the gully. Running waste water down a deep gully, or watering an unlicensed

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place of use not owned by Sagewillow does not have the ring of "beneficial use" that could revive license 33-2091 to any extent, let alone to the tune of 320 acres as proposed by Sagewillow.[8]

As to the second element of the revival doctrine, intervening rights are abundant in the areas of the Little Lost that share a common water supply with the Knollin Ranch. Mundorff, Clebsch, Scanlan and Brockway all agree that surface water and groundwater are interconnected in the reach of the Little Lost in the vicinity of the Knollin Ranch, that pumping from wells will reduce streamflows in the River and Big Spring Creek, and that this will translate into reduced streamflows downstream and reduced recharge to the aquifer that supports the intervening water rights of Mays and the water users included in BCCC's Exhibit 1.

Finally, by definition, revival of an original right requires a renewed exercise of the right consistent with the original appropriation. In other words, one must divert from the original source at the original point of diversion and deliver water to the original place of use for the original purpose. The evidence shows that this condition has never been met by Sagewillow.

License 33-2091 authorized diversion of water from a well located north of the Bird and Homestead properties to irrigate the Homestead. Sagewillow's attempt to irrigate the Homestead from 1989 to 1992 were through a ditch with its heading on

[8]The same must hold true for license 33-2090, which was appropriated by Hawley for use on the North of the Road property. If, as Sagewillow argues at page 20 of its brief, water under license 33-2091 was used on the North of the Road property after 1989 pursuant to Transfer 3785, there could have been no revival of 33-2090. And as discussed in the above Statement of Facts, at least 132 acres of the ground that Sagewillow has been irrigating under pivots 6 and 7 have no water rights, either abandoned, forfeited, licensed or otherwise, appurtenant to them.

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the Little Lost, using water that historically had been diverted and used only on the Bird Ranch. At best Sagewillow succeeded in irrigating a few acres of public lands, not the Homestead.

License 33-2090 authorized diversion of water from well 11 located on the westernmost boundary of Section 1, T7N, R27E, to irrigate lands in Section 1, T7N, R27E and Section 6, T7N, R28E. Sagewillow's alleged revival of this licensed right was with water pumped from wells 9, 10 and 1, which was applied to lands with no appurtenant water rights under pivots 6 and 7, and did not include lands in the SE1/4, SE1/4, Section 6, T7N, R28E which were included in the originally authorized place of use for 33-2090.

At the hearing, and again in Sagewillow's Closing Argument, Sagewillow suggested that its pumping of large amounts of water in the winter months was consistent with "domestic use" authorized under license 33-2057. However, Mr. Pancheri's testimony was that Sagewillow maintained 400 head of cattle on the Knollin Ranch. The current definition of "domestic use" includes livestock watering in conjunction with a home "if the total use is not in excess of thirteen thousand (13,000) gallons per day, or B. Any other uses if the total does not exceed a diversion rate of four one-hundreths (0.04) cubic feet per second, and a diversion volume of twenty-five hundred (2,500) gallons per day." I.C. § 42-111 (enacted in 1990). Sagewillow's winter diversions for stockwatering related to domestic use far exceed either of these alternative limitations.

Prior to the enactment of I.C. § 42-111, Idaho statutes defined "domestic purposes" as "water for the household, and a sufficient amount for the use of domestic

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animals kept with and for the use of the household." I.C.A. § 41-111 (1932). A reasonable reading of this statute would provide for the watering of a dog, a cat, and assorted "barnyard" animals such as riding or draft horses, a milk cow and calf, a sow hog and farrow, a handful of laying hens and friers, etc. Watering such livestock which directly support the household is a far cry from watering 400 head of cattle on winter pasture. It likely was because of such potential for abuse that this earlier statute was replaced by I.C. § 42-111. In any event, I.C.A. § 41-111 does not reasonably support Sagewillow's contention that its significant winter diversions for stockwater since 1989 are consistent with the purposes or actual use of the original license 33-2057, and cannot constitute a revival of that original right to the extent of watering Sagewillow's entire overwinter herd.

D. The Sagewillow Transfers Will Result in an Illegal Expansion in Use.

Inasmuch as licenses 33-2090 and 33-2091 were abandoned prior to Sagewillow's purchase from Venice Hawley, and portions of the remaining groundwater rights were forfeited due to nonuse, Sagewillow's proposed transfers will result in an unlawful expansion in use of the subject rights. Approximately 1,412 acres were irrigated on the Knollin and Bird Ranches in the years up to and including 1989. Sagewillow proposes now to sprinkler or flood irrigate 2,383 acres *and* maintain subirrigation on at least 250 acres associated with the ponds and claimed as prior beneficial use under licenses 33-2057 and 33-2083. *See* Pancheri testimony and Applicant's Closing Argument at 6.

Moreover, the requisite "dry up" of lands from which water rights 33-2090 and 33-2091 are to be transferred will not occur. This is so because these lands are and

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have been dry, uncultivated rangeland.

Sagewillow wants the Department to credit it for all of the subirrigated lands in establishing revival and full beneficial use of its water rights. However, Sagewillow simultaneously attempts to distance itself from the subirrigated acres *post*-transfer since its sprinkler and flood irrigated ground alone, after transfer, will total 2,383 acres (1,505 acres under sprinkler and 878 under flood) *See* Mays Exhibit 20. This 2,383 acres is all that Sagewillow would be permitted to irrigate if the face value of all its licenses were fully honored by the Department. But as Dr. Brockway testified, this subirrigation is intended to continue. Mays Exhibit 20 shows the amount of continuing subirrigation to be 1,299 acres. If the Department applies Sagewillow's "subirrigation = beneficial use" argument consistently pre- *and* post-transfer, Sagewillow's transfers will result in at least 690 acres of expanded use.[9] If the Department is consistent in not crediting subirrigation to beneficial use, then Sagewillow's transfers would result in 971 acres of expansion.[10] Mays contends that the latter figure of 971 acres is the appropriate one for the Department to use.

Sagewillow cannot have it both ways. And either way it chooses, a significant expansion of acres irrigated will result. Such an expansion is prohibited by I.C. § 42-222(1), and the Sagewillow transfers must be denied or conditioned to limit the number of acres irrigated after the transfer to the amount historically irrigated before

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[9]Exhibit 20 illustrates that pre-1989, there were 2,922 acres under either the sprinkler, flood or bottomland categories. Post-transfer there would be 3,612 acres under the same categories. 3,612 - 2,922 = 690.

[10]Exhibit 20 demonstrates that pre-1989, 1,412 acres were flood irrigated. Post-transfer, there would be 878 acres under flood irrigation and another 1,505 acres under sprinkler. ((878 + 1,505) - 1,412) = 971.

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Sagewillow purchased the properties.

E. The Sagewillow Transfers Will Result in an Enlargement of the Use of the Rights.

Revival of rights that have long been abandoned or forfeited will result in an enlargement of the use of the water rights Sagewillow seeks to transfer. Previously, the Department has deemed such attempts to resume a lost right through a transfer proceeding to be improper on the basis of enlargement of use. For example, in *Jenkins, supra*, 103 Idaho at 386, the Department concluded that "to allow a resumption of the use of the [forfeited] right would represent an enlargement of the use over the prior 18 years, that the water users would be injured thereby, and that I.C. § 42-222 authorized denial" of the application. The Idaho Supreme Court did not disturb this finding. Yet, such an enlargement of use is precisely what Sagewillow has attempted since 1989. It now seeks the Department's after-the-fact approval of this enlargement.

F. The Sagewillow Transfers Will Result in Injury to Other Water Rights.

The Sagewillow transfers propose changes in water use that will injure the water rights of Mays and others, both legally and factually. Legally, Mays will be injured because the resumption of abandoned and forfeited rights will affect the relative priorities of his water rights in the Little Lost. Factually, Mays will be injured to the extent that approximately 1,809 acre-feet more water will be lost from the system, and unavailable to service his water rights.

The holding of *Jenkins* is oft-cited, and appropriately so:

> [I]t is clear that when a water right is sought to be transferred and protestors allege that it has been abandoned or forfeited, and that to

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> allow resumption of that right would cause some injury, a determination of abandonment or forfeiture is necessary for the performance of his powers of determining injury. The Director is statutorily required to examine all the evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited is probative as to whether that transfer would injure other water rights. If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. Other parties may then perfect a water right in those waters. *Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right.* If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, and the junior appropriators move up the ladder of priority. *If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.*

Jenkins, 103 Idaho 384, 647 P.2d 1256, 1261 (1982) (citations omitted, emphasis added).

Sagewillow argues that despite the increased consumptive use after the transfers, the impacts to other water right holders will be insignificant, and therefore there will be no injury. However, both Mr. Scanlan and Dr. Brockway agreed that pumping upstream of the geologic barrier will affect streamflows below it. As Mundorff puts it, "if [for example] 120 acre-feet of water is pumped each year from Well B and consumptively used, streamflow would be reduced by 10 acre-feet per month." Mundorff at 32.

Injury will result to downstream water right holders as a result of the reduction in streamflows caused by pumping on the Knollin Ranch. These streamflows serve both surface water rights and recharge the aquifer. Mays Exhibit

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17 shows that the 1,809 acre-feet increase in consumptive use resulting from the expansion of irrigated acres will reduce streamflows in the Little Lost by as much as 5 cfs if the impacts of pumping occurred within 180 days. The Mundorff report estimated that Knollin Ranch wells situated close to the River could draw as much as 90 percent of their water from the streamflow within 100 days.

At page 21 of its brief, Sagewillow misrepresents the testimony of the expert witnesses in stating that they agreed that there essentially would be no changes in downstream flows as a result of the transfers. Dr. Brockway did not testify that surface water flows downstream from the Knollin Ranch will remain essentially unchanged. His testimony was that approximately 137 acre-feet of increased consumptive use at the Knollin Ranch could reduce streamflows by up to 0.2 cfs. That is enough water to irrigate 10 acres of ground. And in a stream where even the two most senior rights (1879 and 1881) are cut, 0.2 cfs is nothing to scoff at. Mr. Scanlan's expert testimony was that the transfers would cause as much as a 5.0 cfs impact on downstream surface flows. Again, this clearly is not an insignificant amount of water in a water-short system like the Little Lost.

On the facts presented, it is not apparent that the Sagewillow's pumping could be regulated so as to avoid harming both senior and junior surface rights.[11] The facts establish the impact of the transfers on the stream, whether it be 0.2 cfs or 5.0 cfs. Sagewillow produced no evidence regarding how such injury might be mitigated or avoided. On this basis alone, Sagewillow has failed to rebut evidence of injury to

[11]David Andreason, the District 33 Watermaster, testified that, except with respect to the implementation of the water right exchange for the Bird Ranch, he does not have the authority to regulate the Sagewillow wells to honor a call by senior surface water right holders.

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other water rights, and its transfer should be denied.

With respect to impacts on groundwater, both Mr. Scanlan and Dr. Brockway testified that increased consumptive use above the geologic feature would have an effect on recharge to the groundwater supply downstream from the feature. Neither expert could state precisely how that effect would manifest itself with respect to any particular well owner. However, in the context of a transfer proceeding, where expansion and a correlative increase in consumptive use has been established, it should not matter whether a downgradient well sees a decline in water levels of one-half inch, or 50 feet. In a transfer, junior water right holders are entitled to the maintenance of conditions as they found them. *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912).

Transfers may not result in expansions in acres irrigated precisely because such expansions will increase consumptive use, and consequently decrease the overall water supply for all. If each transfer applicant had to show only that the despite significant increases in consumptive use, water levels in affected wells would not decline significantly, juniors (and the Department) would be forced to stand by as one-by-one, individual transfers causing incrementally minor affects on the hydrologic system, were allowed to have cumulatively significant impacts. The inherent problem with this approach is in part the lesson taught by the Swan Falls litigation.

BCCC's Exhibit 1 emphasizes the fact that all the "slack" has been taken out of this hydrologic system. Significant declines in well production and water levels are occurring throughout the Little Lost. Many Little Lost groundwater users, with rights junior and senior to the Sagewillow licenses, have been able to obtain less

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water during each of the years that Sagewillow was drilling new wells, irrigating new lands, and doubling its groundwater diversions upgradient. These water users, who have lost the use of wells, cut back on acres irrigated, and experienced increased pump lift costs, are entitled to expect that the Department will not allow anyone to change the use of an existing water right in a way that will reduce even further, the common water supply. Any transfer that is allowed to do so will necessarily injure other water rights.

F. Transfer No. 3785 is a Nullity, and Neither Revives License No. 33-2091, Nor Binds the Department in This Proceeding.

Sagewillow undoubtedly would have the Department conclude that since Transfer No. 3785 had never been protested, and was ultimately approved, it now is *res judicata* for both the Department and Mays. This argument must fail for several reasons. First, the facts conclusively show that license 33-2091 had been abandoned or forfeited at the time the application for transfer 3785 was submitted. As such, the transfer approval flies in the face of the evidence. Second, the application itself misrepresents the facts, and was incomplete in that, conveniently for Sagewillow, no response was made to the question regarding nonuse of the right. Third, the Department relied solely on the representations (and misrepresentations) made by the applicant, and did not perform its statutory duty under I.C. § 42-222 to "examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement." *Jenkins*, 647 P.2d at 1259. Fourth, the testimony of the applicant, Mr. Dumke, was that he had no personal knowledge of the facts contained in the transfer application when he signed it. Fifth, Sagewillow has attempted to

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unwind Transfer 3785 because it stacked 33-2091 on top of the place of use for 33-2090. Sagewillow admitted that it considered the transfer to have been "inadvertent", and "certainly neither necessary nor intended." Foster April 6, 1993 Letter at 4.

Transfer 3785 must be considered a nullity because it has absolutely no basis in fact. Therefore, it does not inhibit the conclusion that license 33-2091 has previously been abandoned or forfeited. It does not revive that license from abandonment or forfeiture. It does not require the Department to allow use of water under license 33-2091 as approved in the Transfer 3785 approval. And it does not prevent the Department from denying the Sagewillow transfer applications on the ground that they seek to transfer a right that has been lost by nonuse.

G. The Department Must Deny the Sagewillow Transfers, or Condition Them to Prevent Injury, Expansion and Enlargement of Use.

With the substantial, clear and convincing evidence now before it, the Department clearly is justified in denying the Sagewillow applications outright. They are so interrelated, and dependent upon the change of rights that are abandoned or substantially forfeited, that it would be difficult to unravel them. Idaho Code § 42-222 permits the Department to approve a transfer with conditions so as to prevent injury, expansion or enlargement of use, and to protect the public interest.

Mays asserts that there is room for public interest considerations in this proceeding, in that the public interest would be served with an order that minimizes the likelihood that Sagewillow, the Protestants, or others in the Little Lost will find themselves embroiled in future disputes over the validity or use of these same water rights.

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The public interest may be served only by an order containing conclusive findings on *all* issues raised by the parties, and either denying the transfers or approving them pursuant to conditions that limit the total permissible irrigated acres, and the total rate and volume of diversions, to those identified in Mays Exhibit 18. These limitations necessarily would require a further condition of ongoing measurement and reporting of diversions. District 33 Watermaster, David Andreason testified that collection and reporting of this information would be useful to him, and likely will be required in the future anyway. The Department also should retain jurisdiction over the transfer to modify the conditions of approval as necessary.

IV. CONCLUSION

Mays has met its burden of providing clear and convincing evidence of the abandonment or forfeiture of license nos. 33-2090 and 33-2091. Mays has also met its burden of proof regarding the partial forfeiture of the remaining groundwater rights sought to be transferred by Sagewillow. Historically, ground water had been diverted to beneficial use on only 1,412 acres of land between the Bird, Homestead, Knollin and David Hawley properties. When Sagewillow purchased these properties, it obtained no better title to the land, and the water rights than its grantor held. Since Sagewillow was not the original appropriator of the subject water rights, it is not permitted to revive the abandoned or forfeited rights by resuming beneficial use. When the rights were lost by Vance Hawley due to their continuous nonuse for many years, they accrued to the benefit of subsequent appropriators in the common water supply such as Mays.

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Resumption of use of the abandoned or forfeited rights now, will result in real and substantial injury to Mays by reducing the water available to fill his rights, and by affecting his relative priority to divert what water remains. The resumption of the rights will expand the acres historically irrigated under the rights by approximately 971 acres. The resumption of these rights also will enlarge the amount of water diverted and consumptively used above their historical use. Such expansion in acres and enlargement in use will increase the consumptive use by 1,809 acre-feet per year, and will reduce streamflows and recharge to the aquifer supplying Mays' water rights as demonstrated by Mays Exhibit 20.

For the foregoing reasons, the Sagewillow transfer applications must be denied, or approved with conditions to limit the rate and volume of diversions, and total acres irrigated to levels consistent with the historical beneficial use of the rights.

DATED this 2nd day of March, 1995.

GIVENS PURSLEY & HUNTLEY

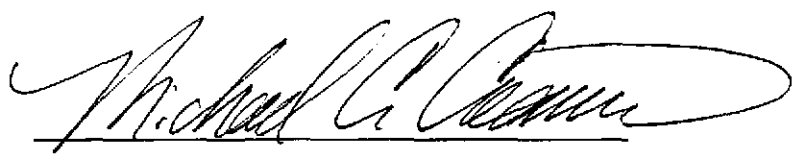
BY: _____
Michael C. Creamer
Attorneys for Protestants James Mays
and Mays Land & Livestock

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

R. Keith Higginson c/o Gary Spackman, Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	X HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Gary Spackman Hearing Officer Idaho Department of Water Resources 1301 N. Orchard Boise, Idaho 83706	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
Kent Foster, Esq. Holden, Kidwell, Hahn & Crapo P.O. Box 50130 Idaho Falls, Idaho 83405	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL _X_ TELECOPY (FAX)
Phillip J. Rassier, Esq. Deputy Attorney General Department of Water Resources Statehouse Boise, Idaho 83720	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)
George Woodie Blaine County Canal Company HC 65, Box 1018 Howe, ID 83244	____ HAND DELIVER _X_ U.S. MAIL ____ OVERNIGHT MAIL ____ TELECOPY (FAX)



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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER APPLICATION FOR TRANSFER NOS. 4221, 4222, 4223, 4224, 4225, 4226, AND 4227 IN THE NAME OF SAGE WILLOW, INC.	)	Case No. _____ APPLICANT'S CLOSING ARGUMENT

Applicant submits this memorandum as its closing argument with respect to the relevant facts and applicable law.

STATEMENT OF FACTS

In 1989, Sage Willow, Inc., "Sage Willow" purchased some land in the Little Lost River Valley, known as the "Knollin Ranch" and "Bird Ranch", from Venice Hawley and the Estate of L.R. "Slim" Hawley. The bulk of the Knollin Ranch purchase by Sage Willow contained about 2,960 acres. Although the Bird Ranch was part of the Knollin Ranch, it is physically located about a mile or more to the north and west of the main ranch. It is composed of some 320 acres which comprise the old Bird Ranch proper and another 320 acres adjacent on the east, sometimes referred to during the hearing as the "Homestead".

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In March of 1993, Sage Willow acquired, through a trade, another 920 acres adjacent to the main Knollin Ranch on the north, and also purchased from David and Terry Hawley, some 250 acres adjacent to the same ranch on the northeast, which is sometimes referred to as the "Frew Place".

The water rights appurtenant to this property include the following:

Knollin (and Bird) Ranch

A. Groundwater Rights.

ID No.	CFS	Priority	Point of Diversion	Acres Under Place of Use
33-02057	24.0	02/01/1950	8 wells # 1-8	1,483
33-02083	5.0	08/23/1957	8 wells # 1-8	1,483
33-02090	5.93	12/21/1959	well # 11	320
33-02091	4.36	01/22/1960	well on Bird Ranch	320
	39.29			2,123

B. Surface Water Rights (high water).

ID No.	CFS	Priority	Point of Diversion	Acres Under Place of Use
33-00069	3.2	06/01/1908	Little Lost River	160
33-00070	2.8	10/01/1906	Spring Creek	160
33-00071	3.2	03/15/1909	Spring Creek	160
33-00072	.8	05/01/1908	Little Lost River	40
33-00073	6.4	04/01/1912	Spring Creek	320
33-00074	1.6	08/06/1913	Little Lost River	80
33-00076	6.8	04/01/1913	Little Lost River	680
33-00078	3.2	10/15/1913	Little Lost River	160
33-00079	1.6	04/01/1912	Little Lost River	80
33-00080	.8	05/01/1908	Spring Creek	40
33-00081	.8	05/01/1908	Spring Creek	40

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33-00082	.8	05/01/1908	Spring Creek	40
33-02007	2.9	02/15/1909	Little Lost River	145
33-02008	6.4	06/12/1909	Spring Creek	320
	41.3			2,425

C. Soil Root Zone Storage Right.

ID No.	Acre Feet	Priority	Point of Diversion	Acres Under Place of Use
33-02133	2,960	06/02/1949	Little Lost River Spring Creek	1,480

Terry and David Hawley Ranch (Frew Place)

A. Groundwater Rights.

ID No.	CFS	Priority	Point of Diversion	Acres Under Place of Use
33-02086	4.1	01/12/1959	well # 13	260
33-07018	3.26	09/12/1972	well # 12	163
	7.36			423

The total of all groundwater rights is 46.65 cfs, and the total acres to which the six groundwater rights are appurtenant of record pursuant to the six licenses is 2,383. (See Applicant's Exhibit No. "1a" for a map of the ranch with the water rights shown in each 40 acre quarter-quarter section to which they were appurtenant under the licenses and decree.)

When Sage Willow acquired the main Knollin Ranch (including the Bird Ranch) in the spring of 1989, it arranged with Pancheri, Inc., through Mr. Jerry Pancheri, to operate the ranch. In the acquisition of the ranch, water rights were very important, and after receiving assurances regarding the identity and validity of the water rights, but without obtaining any information regarding how the water rights had previously been used, Mr. Pancheri began

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operating the ranch during the 1989 irrigation season. He has continued to do so since that time.

At the time of the purchase of the ranch, there were nine irrigation wells on the main Knollin Ranch, and one on the Bird Ranch. The well on the Bird Ranch had a diesel motor but has never been used by Mr. Pancheri. The nine wells on the main Knollin Ranch all had electric motors, and have been pumped to provide exchange water into the Little Lost River, to provide for flood irrigation from diversions from both the Little Lost River and Spring Creek and to provide water into the pond system, and more recently to provide sprinkler irrigation.

Besides the nine wells, there are three headgates on Little Lost River and one headgate on Spring Creek, all of which divert water into ditches to provide water for flood irrigation and for the pond system.

When Sage Willow acquired the ranch lands, some of the diversion and irrigation systems were found to be in a somewhat run down condition. All headgates have been replaced with concrete structures; ditches have been cleaned; some of the ponds had to have large amounts of silt removed and berms or dikes and headgates repaired; the pumps and motors have required significant repairs.

At the hearing, Mr. Pancheri was asked on direct examination to identify the acreage to which he has physically applied water since be began to operate the ranch property in 1989. As we understood his testimony, beginning in 1989, Mr. Pancheri estimated he physically applied water to the surface of some 280 acres on the Bird Ranch and 1,120 acres

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on the Knollin Ranch for a total of 1,300 acres. That year, Mr. Pancheri operated wells nos. 1, 2, 3, 4, 5, and 11, some to provide irrigation water directly to the lands, and some to provide water for discharge into the Little Lost River in exchange for upstream diversions through headgates and ditches. Wells nos. 6, 7, and 8 were not operated during the 1989 irrigation season.

During the 1990 irrigation season, Mr. Pancheri continued pretty much in the same manner as he had in 1989 except that he was able to apply water to the surface of an additional 80 acres on the Bird Ranch, and with the use of water from wells nos. 6, 7, and 8, to another 180 acres on the Knollin Ranch as well, bringing the total acreage receiving surface applications in 1990 to about 1,560.

After the 1990 season, Sage Willow determined to make its operation more efficient by converting some of the surface application of water to sprinkler irrigation. In 1991 and 1992 five pivot systems were installed on some of the land. In connection with this conversion, an Application for Transfer of the water right no. 33-02091, to change the point of diversion and place of use of the right from the Bird Ranch to the area of the new pivots, was filed and approved. The application was actually filed October 11, 1990, and approved by Mr. Glen Saxton October 8, 1992. Also, two new wells, nos. 9 and 10, were drilled and interconnected with the old well no. 1 to service the pivots.

The first two pivots were operated during the irrigation season of 1991. They were installed on land which had not previously been irrigated by Mr. Pancheri and increased the total by about 260 acres, the approximate amount of land under the two circles. The rest of

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the irrigation was essentially the same as it had been in 1990, so this increased the total acres to which water was applied on the surface to about 1,820. In addition, some of the ponds on the property were filled with water in 1991, which resulted in substantially more acreage of grass, 250 more acres Mr. Pancheri estimated, bringing the total to 2,000 irrigated acres. Sage Willow began to rehabilitate and repair the ponds and to fill them in 1991. Mr. Pancheri rediscovered that the filling of the ponds provides subirrigation to the surrounding lands and dramatically increases grass production.

The 1992 irrigation season saw three more pivots in operation. Two, and part of third, covered land previously flood irrigated. Mr. Pancheri placed the increase at about 110 acres but also testified the acreage on the Bird Ranch was reduced that year by some 50 acres to a net increase of about 60 acres, bringing for that year, the previous total to 1,880. The filling of the ponds again resulted in the extra acreage of grass, for a total of irrigated acres of approximately 2,130.

In the early spring of 1993, Sage Willow acquired the extra land via the exchange with BLM and the land with the two extra groundwater rights, 33-02086 and 33-07018, from Terry and David Hawley, sometimes called the "Frew Place". After the extended drouth, 1993 was a welcome break with high run off lasting well into the summer. The headgate for the ditch to the Bird Ranch washed out, and so the ditch was full of water longer, resulting in a better job of irrigating the Bird Ranch. Because of the extra river flows, Mr. Pancheri never had to turn on well no. 11 that season. Adding 260 acres for the lands irrigated with the two extra water rights, including the Frew Place, brings the total acreage to which water

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was physically applied on the surface that year to as much as 2,140 acres. We again note Mr. Pancheri's testimony about the substantially increased number of acres of grass as a result of filling some of the ponds. If his estimate of 250 acres is reasonable, then the total of acres which received water from flood, sprinkler and sub irrigation during the 1993 irrigation season would approximate 2,390 acres.

With the acquisition of the additional land in 1993, which included the two groundwater rights on the Frew place, it became apparent that the operation would be even more efficient by adding an additional six circles or pivots. The 11 circles would contain approximately 1,425 irrigated acres. Another 80 would be irrigated with wheel lines. Four other portions of the ranch property, primarily pasture areas, would receive water pretty much as in the past, through flood irrigation, or a combination of flooding and subbing. These areas contain approximately 120 acres, 268 acres, 310 acres and 180 acres respectively, which are irrigable or would be affected positively by the use of the water. Water diverted from Spring Creek or Little Lost River would continue to be replaced by water pumped from the wells except during high water times. The total acreage under the transfers would remain the same as shown in the six licenses; that is, 2,383 acres. The high water rights would be appurtenant to those lands not sprinkled.

In the fall of 1993, Sage Willow filed seven applications for transfer to reconfigure the water rights to effect the above described objectives. The process of preparing the applications actually began in the spring of 1993 and applicant sought and received the able assistance of Mr. Jim Johnson of the Boise office of IDWR.

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Dr. Charles E. Brockway had previously been employed by Sage Willow to investigate the hydrology of the ranch. He mapped and measured the pond and ditch systems and provided engineering advice with respect to the operation of the headgates. He personally walked the ranch and observed what was happening, taking measurements, during the irrigation seasons of 1991 and 1992. He also studied the hydrology of the Little Lost River and its tributaries, as well as the aquifer system in the valley, and in 1993 prepared a report of this study of Water Transfer Losses for Little Lost River. (See applicant's Exhibit "5").

Dr. Brockway prepared a map showing the pond and ditch system on the Knollin Ranch. (Applicant's Exhibit "1c"). Although the Knollin Ranch proper includes lands on both sides of the Little Lost River and Spring Creek, the bulk of the ranch lies between the two streams, just upstream from their confluence. As we understand it, for a short distance downstream of the confluence, there is a geologic condition in the aquifer that slows or retards the movement of underflow water. The result is a raising of the groundwater level upgradient which we understand to explain the existence of the springs and spring ponds shown on the map.

There are four spring ponds identified on the map as well as some other springs in the lower portions of the Knollin Ranch. In addition, applicant discovered and rehabilitated 14 ponds created by placing berms or dikes across an old dry swale or channel that meanders through the lower part of the ranch. These ponds, or some of them, were apparently first constructed and used by Mr. L.R. "Slim" Hawley, starting in the late 1940's in connection

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with his winter diversion program under license number 33-02133. As he found, and as Sage Willow has rediscovered since its rehabilitation efforts in 1991 and 1992, the filling of the ponds with water has a quite remarkable impact on the grass production in the surrounding areas. Of course the areas surrounding the springs, and especially the spring ponds after the cleaning and rehabilitation of those ponds, experience a similar effect; i.e., the grass in those areas is much more lush because of the moisture present in the soil at the root zone level.

As Dr. Brockway prepared his "Consumptive Use Work Sheet" (Applicant's Exhibit "7"), he included consumptive use estimates for all the land, including the nonirrigated ranch lands, the lands which benefit from the presence of sub, or water in the soil at the root zone level, in the areas of the springs, spring ponds and the ponds which must be filled with surface or groundwater, the flood irrigated lands, and the sprinkler irrigated lands. No attempt appears to have been made by either Dr. Brockway or Mr. Scanlan to differentiate between those acres benefited by sub irrigation resulting from total natural conditions, and those areas benefited by sub irrigation which occurs as a result of the activities of the ranch owner and operator in repairing and cleaning ponds and introducing either groundwater through pumping or surface water from the streams into them.

Dr. Brockway's efforts to quantify consumptive use were divided into three primary time frames; before 1989, between 1989 and 1994, and after the proposed transfer. Consistent with all the testimony, the consumptive use quantities estimated by Dr. Brockway appear to be lowest in the time period prior to 1989. The consumptive use estimates for the period of Sage Willow ownership after 1989, and then, after the proposed transfer, are not

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significantly different. Before 1989, both Dr. Brockway's and Mr. Scanlan's estimates are based primarily on a review of various aerial photos, none of which lend themselves to much accuracy. Perhaps the best evidence of irrigation practices between 1970 and 1981, is the testimony of Mr. Vance Hawley, who placed the acreage to which water was physically applied on the surface during that period at about 1,200 acres. Mr. Scanlan's estimates do not really attempt to account for the period between 1981 and 1989 when Sage Willow acquired the property, or more importantly for the period since Sage Willow began operating it, at least since the improvements to the pond system and the installation of the sprinkler systems, beginning in about 1991. Mr. Scanlan has never personally been present on the land; he has only physically seen the property once, from outside the boundaries of the property, in January of 1995, just before the hearing, while the property was covered with snow.

So far as we know, the only person familiar with the irrigation of the ranch, with whom Mr. Scanlan has ever spoken, (excluding Dr. Brockway) is Vance Hawley, whose period of familiarity was 1970 to 1981, many years prior to the improvements and substantially increased efforts of Mr. Pancheri, on behalf of Sage Willow. Based upon this extremely limited review and the quite speculative estimates, Mr. Scanlan has projected an increase in consumptive use (or ET) between the time before the rehabilitation of the ranch by Sage Willow and the conditions which might exist after the transfer, of either 1,599 acre feet (Mays' Exhibit "14") or 858 acre feet (Mays' Exhibit "15") or 1,504 acre feet (Mays' Exhibit "19") or 1,809 acre feet (Mays' Exhibit "20"). Admittedly, the difference in the

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consumptive use estimates by Dr. Brockway for the period prior to Sage Willow's rehabilitation of the irrigation of the ranch (10,192 acre feet) and after the proposals set out in the transfers take effect, (1,1029 acre feet) is much greater than those differences would be between what has actually been occurring with Sage Willow's increased irrigation use during recent years and what might occur following the transfer. Dr. Brockway's estimate of this difference is very small indeed. From his estimates, it appears that anticipated consumptive use after the transfer will be essentially the same as estimated consumptive use in the immediately preceding years.

Everyone seemed to agree that the only well not pumped for a significant number of years (perhaps since prior to 1970) is the well on the Bird Ranch (or on the Northwest corner of the "Homestead"). All the other wells have been pumped. We suppose it is not too surprising that (1) the total volume pumped varies from year to year, (2) the volumes were less in 1993 (a year of sufficient surface flows such that well no. 11 was not even turned on), or (3) the volumes have increased since Sage Willow acquired the ranch properties. The power records have apparently been converted into total volumes pumped by each well, or a cluster of wells on a particular meter, for each monthly billing period. However, as we understand it, one cannot compute from the power use records the rate of flow being pumped by any well at any given time. It appears that the volumes are all of great enough magnitude that we can presume there were times during recent irrigation seasons when the entire cubic foot per second amount of the six groundwater rights (46.65 cfs) was being diverted and applied to beneficial use. We also believe the evidence supports that during recent years,

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prior to the filing of the Applications for Transfer, the water was being applied to use in such a manner that there were as many as 2,383 acres of lands which benefited or had production of beneficial crops growing thereon and which had been improved and increased as a direct result of such diversions and applications.

With respect to impacts on others water rights, there was testimony that groundwater levels in the location of the Blaine County Canal service area may have diminished somewhat in recent years. However, both Dr. Brockway and Mr. Scanlan testified that such lowering is a result of the many years of drouth conditions recently experienced in the valley, and that the increases in consumptive use of groundwater pumped on the Knollin Ranch would not have a measurable influence on groundwater levels either at the location of the Mays' exchange well or in the service area of the Blaine County Canal Company.

None of the priorities of the water rights, the subject of the proposed transfers, are early enough to have any impact on surface flows downstream. If water continues to be pumped from the ground under the six groundwater rights with priorities ranging between 1950 and 1972 and beneficially used on up to 2,383 acres, as authorized by the six licenses, there can be no different or greater impact on surface flows than when the licenses were granted. On the other hand, increases in consumptive use on the Knollin Ranch since 1989 would also result in some amount of decreased stream flow below the Knollin Ranch. There was testimony that the transfers could result in greater consumptive uses on the Knollin Ranch than what had been experienced during a time period of from 1970 to 1981, and possibly even in 1989 or 1990. But there was no evidence, oral or otherwise, that the six

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groundwater rights licenses contained any consumptive use limitations or restrictions, or that consumptive uses after the proposed transfer will be greater than at the time such licenses were granted.

STATEMENT OF THE LAW AND ARGUMENT

Of course we begin this statement with a reference to the applicable statute under which the transfer applications are filed, Idaho Code § 42-222. It appears that this statute has been amended even since the filing of these applications but that the director is still required in each case to:

> . . . Approve the change, in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest . . .

As we understand it, none of the protestants has raised an issue regarding the conservation of water resources or the local public interest, but are focusing instead on questions of injury to other water rights and enlargement. Further, if we understand their positions correctly, they argue that all of some water rights and portions of others, have been lost and forfeited by applicant or applicant's predecessors in interest, and that the grant of the proposed transfer would therefore constitute an injury to other water rights or an illegal enlargement, or both.

We will therefore attempt to address three basic issues in this statement and argument; forfeiture, injury, and enlargement. Before doing so however, we think it would be appropriate to consider briefly what we understand a water right to be under Idaho law. The

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most important water rights which are the subject of these proposed transfers, are six groundwater rights for which some of the pertinent information is set forth below:

ID No.	Priority	Amount in CFS	Point of Diversion (wells)	Acreage
33-02057	02/01/1950	24.00	1-8	1,443
33-02083	08/23/1957	5.00	1-8	1,483
33-02086	01/12/1959	4.1	13	260
33-02090	12/21/1959	5.93	11	320
33-02091	01/22/1960	4.36	Bird Ranch	320
33-07018	09/12/1972	3.26	12	163
		46.65		2,383

For each of these water rights, a predecessor state agency of Idaho Department of Water Resources issued a license. Idaho Code § 42-220 provides that:

> **42-220. Effect of License**. - Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the

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> local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

The license is prima facie evidence of the water right. (*Basinger v. Taylor*, 36 Idaho 591, 211 P. 1085 (1922)). Indeed, the licenses are conclusive proof of the diversion of water and its application to beneficial use in the amounts and in the acreages set forth therein. The licenses are presumed to be accurate. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984).[1]

Water rights have great importance in our state. Once a water right license is issued, the water right so evidenced and confirmed is an appurtenance of the land, a real property right, constituting a permanent improvement and part of the value of the real estate benefited. Idaho Code § 55-101; *Anderson v. Cummings*, 81 Idaho 327, 340 P.2d 1111 (1959).

Altogether too much attention was focused at the hearing on the amount of water estimated to have been consumptively used or to be consumptively used under these groundwater rights. As was pointed out, none of the licenses contains a consumptive use limitation or condition; consumptive use, or the amount of water utilized by the plants in the evapo-transpiration process is not an element of the water right. These groundwater rights licenses were all issued with a place of use acreage figure and a rate of flow number.

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[1] Although *Crow v. Carlson* involved a decreed right, the court relied for its authority on Idaho Code § 42-220, cited above, which relates to both licenses and decrees. We assume the same presumptions attach to a licensed right as attach to a decreed right.

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Presumably, the holder then has the right to apply that rate of flow to that many acres of land at anytime during the irrigation season so long as the same is "beneficially used".

One would undoubtedly be entitled to properly irrigate all crops customarily or reasonably grown in the area with the use of these water rights. Such crops would clearly include grass, alfalfa hay and small grains. Dr. Brockway and Mr. Scanlan even agreed to a percentage of such crops for the consumptive use figures. But alfalfa may be significantly more consumptive in terms of amounts of water evapo-transpired than a small grain crop, and the irrigation of grass may be more or less consumptive, depending upon how intensely water is applied. If water is applied only in the early part of the season for early pasture, rather than all season long or to maximize the amount of grass hay, are not such applications both reasonable and common, as well as authorized under these groundwater licenses, even though the total amount evapo-transpired may vary significantly, depending upon the crop or the purpose of the crop? We suggest that consumptive use is not a very good yard stick, or even necessarily a relevant one, by which to measure use under these water rights licenses.

A. FORFEITURE.

As we understand the protestants' position, the issue of forfeiture appears to be the matter of greatest concern to them in this proceeding. Indeed, what they seem to be most concerned about is that if the transfers are granted, the estimated consumptive use of water will be greater than the estimated consumptive use which may have occurred for a significant number of irrigation seasons, longer than five (5) years, at some period of time prior to about 1991. Such increases, they apparently argue, will constitute an enlargement or expansion and

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consequently result in injury to other water rights. We do not understand the protestants to have raised the issue of common law abandonment, or to have introduced any evidence of the intent element which would be required to show common law abandonment, and so have not made any attempt to address that issue separately.

The relevant statutory language to the issue of statutory forfeiture comes from the transfer statute, Idaho Code § 42-222(2) which provides, in pertinent part:

> (2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; . . .

However, forfeiture of water rights is not favored in the law and is not to be presumed. Some courts have said that forfeitures are abhorrant and that every intendment must be indulged in against a forfeiture. The burden of proof to establish forfeiture is on the party asserting it, and it must be established by clear and convincing evidence. *Hurst v. Idaho - Iowa L.Nr.Co.*, 34 Idaho 342, 202 P. 1065 (1921); *Zezi v. Lightfoot*, 57 Idaho 707, 68 P.2d 50 (1937); *Idaho Farms Co. v. Northside Canal Co.*, 24 F.Supp. 189 (Idaho, 1938); *Perry v. Reynolds*, 63 Idaho 457, 122 P.2d 508 (1942); *Carrington v. Crandall*, 65 Idaho 525, 147 P.2d 1009 (1944); *Wagoner v. Jeffery*, 66 Idaho 455, 162 P.2d 400 (1945); In re application of *Boyer*, 73 Idaho 152, 248 P.2d 540 (1952); *Hodges v. Trail Creek Irr. Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976); *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

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We are not persuaded that, with respect to any or all of the six groundwater rights which are the subject of these transfers, there has been a showing of a failure to apply the water to the beneficial use for which it was appropriated. The beneficial uses for which these six water rights were appropriated are stated in the licenses. License No. 33-02057 states that the purpose of the use is irrigation and domestic use. All of the other five licenses state that the purpose of the use is irrigation. We heard no testimony, and saw no evidence, that water diverted pursuant to any of these licenses has been used for any purpose other than irrigation, except that to some extent water has been pumped under right no. 33-02057, for stock watering, which we understand to have been considered a domestic type use in 1950 when it was appropriated.

What the evidence did show, is that for several years, longer than five, prior to 1991, less water may have been diverted than was licensed under these water rights, and that water so diverted was applied to fewer acres, and in some instances, different acres, than set forth in the licenses. Whether these facts sufficiently establish a showing of a "failure to apply the water to the beneficial use for which it was appropriated" we suppose is the first important question in considering forfeiture. And if so, whether the showing was made by "clear and convincing evidence" could be a second issue. As to the second issue, we suppose the evidence must be clear and convincing to the trier of fact. This appears to be a more stringent standard than a preponderance of the evidence, and not as great a burden as the "beyond a reasonable doubt" standard used in criminal cases.

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The facts do appear to show that water was not applied to all the acreage authorized under the licenses for a period of time exceeding five (5) years. It is not as clear which rights were not used, or with respect to each, what specific portion may not have been used. Protestants focused particular attention on rights 33-02090 and 33-02091, all of which they claim have been forfeited. They appear to claim that some portion of every other groundwater right has been forfeited.

Applicants introduced substantial and uncontradicted evidence to show resumption in use of each and every portion of all six groundwater rights. We have reviewed six Idaho cases dealing with the doctrine of resumption of use as a defense to statutory abandonment or forfeiture; *Zezi v. Lightfoot*, Supra; *Carrington v. Crandall*, Supra; *Wagoner v. Jeffery*, Supra; In re application of *Boyer*, Supra; *Jenkins v. State, Dept. of Water Resources*, Supra; and *Dovel v. Dobson,* 122 Idaho 59, 831 P.2d 527 (1992). These cases certainly establish that the doctrine of resumption of use is available under Idaho law to defeat a statutory forfeiture under Idaho Code § 42-222(2). The doctrine, as stated in *Jenkins*, Surpa, is that "if use of the water right is resumed after the five (5) year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture". In the *Dovel* case, the court makes it clear that the resumption must have occurred within the five (5) year period prior to the hearing.

There was no showing through testimony or exhibits that any third parties have made a claim to the groundwater authorized to be diverted and applied to beneficial use under any of the six groundwater rights, the subject of these proposed transfers. From the evidence

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placed in the record, it was uncontroverted that from the time the ranch property was first acquired by Sage Willow, an effort commenced by the ranch operator, Mr. Jerry Pancheri, to irrigate as much acreage as the groundwater rights listed. Through the use of sprinkler, flood and sub irrigation practices, the record also seems clear that by the irrigation season of 1991, with new pivot sprinkler systems, Mr. Pancheri had brought the total acreage irrigated with four of the groundwater rights, 33-02057, 33-02083, 33-02090, and 33-02091, to about 2,070 acres (260 sprinkled, 1,560 flooded, and 250 subbed from the ponds). The total acreage authorized under these four licenses totals 2,123. Mr. Pancheri's estimates place the total very close to this figure.

By 1992, with the addition of the extra three pivots, the total of Mr. Pancheri's estimates actually slightly exceeded the total acreage authorized; 2,130 acres (650 sprinkled, 1,230 flooded, 250 subbed).

Much was made of the fact that the specific acreage described in right nos. 33-02090 and 33-02091 was not irrigated. Mr. Pancheri testified that some of the land under right 33-02091 was irrigated by him beginning in 1989. More importantly however, an Application for Transfer of Right No. 33-02091 was filed by Sage Willow in 1990 and formally approved in 1992. In 1991 and 1992, with the installation of the pivots, the lands under right 33-02090 and the transferred lands under right 33-02091 were also irrigated.

Then, in 1993, an additional farm, including groundwater rights 33-02086 and 33-07018, was acquired by Sage Willow. That year, the total number of acres authorized under all six groundwater rights, 2,383, where irrigated according to Mr. Pancheri, the only witness

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who testified with respect to the irrigation of the lands from 1989 through 1994. Mr. Pancheri's estimate for 1993 places the total at 2,390 acres (650 by sprinkler irrigation, 1,490 by flood irrigation, and 250 acres that were sub irrigated from the ponds).

B. INJURY.

The issue of injury in a transfer proceeding, we are told by the statutory language and the case law, is a question of injury to other water rights. Idaho Code § 42-222. In order to preclude the holder of the water right from making a change in the point of diversion or place of use, the injury to other water rights must be of substance, that is, "not merely a fanciful injury but a real and actual injury." *Beecher v. Cassia Creek, Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944); *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

From the testimony of Dr. Brockway, and the rest of the record, it is clear that there will not be an injury to other water rights. Actually, the changes proposed by these applications for transfer do not move the places of use or points of diversion significantly. In fact, the points of diversion for both ground and surface rights will not change, and most of the land is almost identical except that there will be additional acreage at the north of the Knollin Ranch irrigated by sprinklers, and no further irrigation of the Bird Ranch and certain portions of the Knollin Ranch where the land is too alkaline.

The experts seemed to us to agree that both groundwater levels and surface water flows downstream from the Knollin Ranch will remain essentially unchanged. We cannot imagine how, as the exclusive result of the proposed transfers, either the surface flows or aquifer conditions could change from what they were when each of the six groundwater

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rights were appropriated. Of course if the rights are fully utilized there will be a consumptive use by crops on up to 2,383 acres of land. And of course whatever water is consumptively used will not be in the ground and/or surface water supplies downstream from the Knollin Ranch, the same as it was not when the rights were licensed. Either the use of the six rights has been fully or partially resumed or it hasn't. If it has, as we claim, then the transfer changes nothing so far as the downstream rights and circumstances are concerned. Even if the use of the six rights, or some of them, have not been fully or partially resumed, the testimony of the experts as to impacts on groundwater was consistent; there won't be any measurable impact. All agreed that the problems complained of by the Blaine County Canal Company witnesses regarding lowering of the groundwater level at their wells has been a direct result of the several years of recent drouth, and not related to the resumptions of use under the six groundwater rights by Sage Willow since 1989.

There was a disagreement between the experts as to whether consumptive uses would increase after the transfer from what they were prior. However, we suggest that this issue will be resolved with resolution of the forfeiture and resumption of use issues because protestant's experts' pretransfer estimates were all based on a premise that all of some, and much of nearly all, groundwater rights had been forfeited. He did not make any consumptive use estimate based on all or some portion of the use of the six rights having been resumed as did Dr. Brockway.

If we are correct that the use of the six groundwater rights was legally resumed prior to the hearing, then the laws of prior appropriation and the conjunctive management rules

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take care of impacts to other water rights by reason of the use of the six groundwater rights, and there is no legitimate injury issue. The priorities, amounts diverted, and acres irrigated will not change in any manner that changes stream flows or aquifer conditions downstream and down gradient from what was authorized by the issuance of the six licenses in question.

C. ENLARGEMENT.

The protestant, Mays, apparently argues that because of the forfeiture of some or all of the groundwater rights, the proposals of the applications for transfer will result in an enlargement or expansion beyond historical conditions. The words of the statute, Idaho Code § 42-222, relating to enlargement specify "an enlargement in use of the original right". The "original rights" are set forth in each of the six licenses, and we assert that the proposed transfers do not contemplate any enlargements in use from what is authorized by the "original rights".

What the protestant is obviously arguing is that the rights have been lost or reduced by forfeiture and because the transfers contemplate a fuller use of the rights than was the case for some period of years in the past, the transfer would result in an enlargement in use over uses which may have occurred during the period from 1970 to 1981 and perhaps even up to 1991. We suggest that the real issues are still forfeiture and resumption of the use, and that enlargement is not a true issue here.

As we have pointed out, there is no consumptive use limitation or condition in any of the six licenses, and the licenses must be presumed to have authorized full use of the water appropriated on the number of acres to which the rights were made appurtenant, which would

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include a reasonable consumptive use by the crops customarily grown in the area. We must also presume that the number of acres listed in the licenses were in fact being irrigated with water in the amounts authorized at the time licensing occurred. There was certainly no evidence to the contrary. The applications do not propose any type of use different from or greater than what the licenses sanction, and the issues of enlargement and expansion are really subsumed by the resumption of use issue.

CONCLUSION

In conclusion, the record and the evidence generated at the hearing quite clearly demonstrate that there will be no injury to other water rights or any enlargement in use of the original rights as a result of the proposed transfers.

We leave to the trier of fact whether protestants carried their burden of showing a forfeiture by clear and convincing evidence. In our view, Protestants introduced no evidence with respect to forfeiture of all or any portion of water rights nos. 33-02086 and 33-07018.

We do agree that from the record it appears to be a fact that the acres irrigated through physical applications of water to the surface of the ground under groundwater rights nos. 33-02057, 33-02083, 33-02090 and 33-02091, between the years 1970 to 1981, and to a lesser extent in 1989 and 1990, were fewer than 2,123, the total to which said four rights were by license made appurtenant. However, we adamantly assert that in 1991, 1992, 1993, and 1994, four of the five years prior to the hearing held herein, water was diverted in amounts authorized by all six licenses and beneficially applied to the total number of acres authorized thereby, 2,383. The forfeitures, if any, which may have resulted from nonuse in prior years,

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are fully defeated and nullified by such resumptions of use and the applications for transfer should be granted.

Respectfully submitted this 15th day of February, 1995.

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on this 15th day of February, 1995.

DOCUMENT SERVED: APPLICANT'S CLOSING ARGUMENT

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