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APR 28 2004

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April 28, 2004

Candice McHugh
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83706

Dear Candice:

Enclosed with this letter is the Stipulation which has now been signed by Michael Creamer and me, together with the original of our letter revoking the withdrawal of the Applications for Transfer and a map prepared by Dr. Charles E. Brockway which constitutes the irrigation plan referenced in the Stipulation. If anything further is needed, please feel free to call upon us at your convenience.

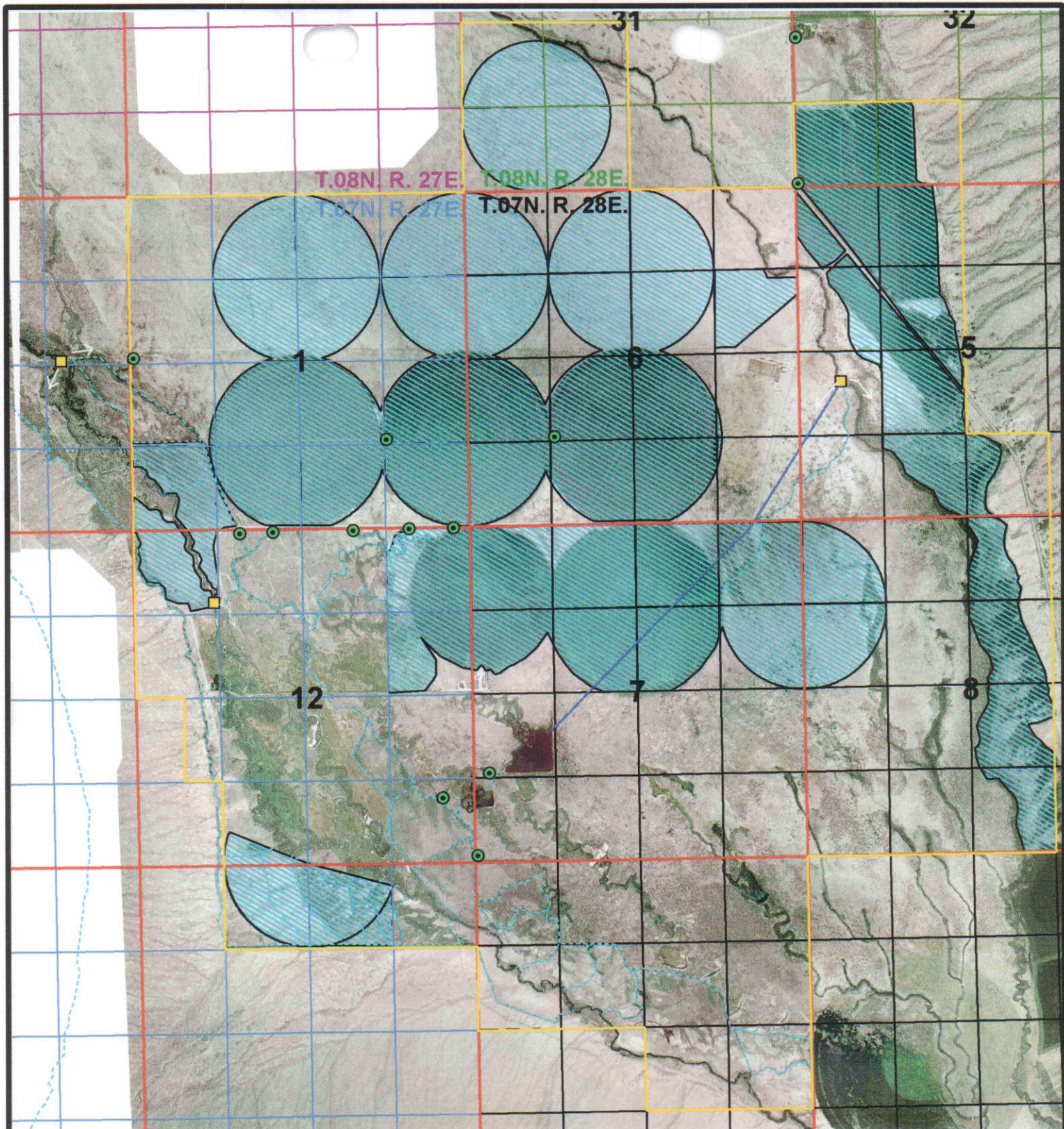
Yours very truly,



Kent W. Foster

Enclosure

c: Michael Creamer
Special Master Bilyeu (w/o enclosures)



SAGEWILLOW INC. - IRRIGATION PLAN
IRRIGATED AREA 1,816 ACRES
AERO-GRAPHICS PHOTO 8/2003

BROCKWAY ENGINEERING, PLLC.
ALR JAN. 12, 2003

- Diversions.shp
- Wells.shp
- Property bndry.shp
- Sections.shp
- Pipeline.shp
- Ditches.shp
- 8n27e.shp
- 7n28e.shp
- 7n27e.shp
- 40s8n28e.shp
- 1,800 scenario.shp



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**BEFORE THE DIRECTOR OF
THE IDAHO DEPARTMENT OF WATER RESOURCES**

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

**APPLICANT'S AND
PROTESTANTS' STIPULATION
TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
REMAND TO IDWR**

Applicant Sagewillow, Inc., through its attorney Kent W. Foster of the firm of Holden Kidwell Hahn and Crapo, and Protestants James Mays, Mays Land & Livestock, and Blaine County Canal Company, through their attorney Michael C. Creamer of the firm of Givens Pursley LLP hereby stipulate to the following findings of fact and conclusions of law with

1912, priority date to Merchants Trust & Savings Bank to be used on property titled in the decree as “Lillian Myrup Entry.” Id. The land in the decree and the license are the same. These two licenses are the same water right as decreed right nos. 33-71 and 33-73 respectively.

Water Right Nos. 33-2090 and 33-2091

4. With respect to water right no. 33-2090, uncontradicted, clear and convincing evidence was introduced at the hearing, including testimony and historical aerial photographs, demonstrating that water had not been diverted or beneficially used under water right no. 33-2090 on the lands to which it was appurtenant (known as the “North of the Road Place”) for at least twenty consecutive years.

5. With respect to water right no. 33-2091, uncontradicted, clear and convincing evidence was introduced at the hearing, including testimony and historical aerial photographs, demonstrating that water had not been diverted or beneficially used under water right no. 33-2091 on the lands to which it was appurtenant (known as the “Homestead Place”) for at least twenty consecutive years.

6. No evidence was presented to suggest that the non-use of water right no. 33-2090 was due to circumstances beyond the water user’s control or that any other defense to forfeiture could be asserted.

7. No evidence was presented to suggest that the non-use of water right no. 33-2091 was due to circumstances beyond the water user’s control or that any other defense to forfeiture could be asserted, except as set forth below with respect to Sagewillow’s partial resumption of use of this water right on 73 acres pursuant to the Department’s approval of Transfer No. 3785. The parties stipulate and the Department therefore finds that the resumption of use of water on these additional 73 acres does not cause injury to other water rights of the parties.

Water Right Nos. 33-2057 and 33-2083

8. Water right nos. 33-2057 and 33-2083, originally were licensed for irrigation of 1,483 acres from ground water on properties commonly referred to as the “Bird Ranch” and the “Knollin Ranch.” Water right no. 33-2057 has a diversion rate of 24 cfs and water right no. 33-2083 has a diversion rate of 5 cfs; both from ground water. The record contains conflicting evidence concerning the extent of historical irrigation under these rights, and the extent to which water was available for beneficial use on the entire 1,483 acres in the years prior to Sagewillow’s purchase of the Knollin Ranch.

9. The record contains substantial evidence that water was applied to a total of 1,182 acres on the Bird Ranch and the Knollin Ranch prior to Sagewillow’s purchase of the property. This conclusion is supported by the Department’s analysis of Vance Hawley’s testimony at the hearing, IDWR’s shape files, 1987 NAPP photography, 1992 aerial photographs, 1975 orthophotoquad maps and the topography of the land. The Department concludes that 1,182 acres were irrigated under water right nos. 33-2057 and 33-2083 prior to Sagewillow’s purchase of the property in 1989.

10. The record also contains substantial evidence that water was applied under water right nos. 33-2057 and 33-2083 on an additional 301 acres after Sagewillow purchased the properties. These 301 acres combined with the 1,182 acres irrigated prior to the purchase of the property by Sagewillow totals the 1,483 acres authorized to be irrigated under the two licenses. The parties stipulate and the Department therefore finds that the resumption of use of water on these additional 301 acres does not cause injury to other water rights of the parties.

Water Right No. 33-2133

11. Water right no. 33-2133 authorizes diversions of water from Big Spring Creek and from the Little Lost River during the non-irrigation season for “root zone storage.”

12. Diversion of water under water right no. 33-2133 essentially serves to conserve the surface water in storage as ground water on the Knollin Ranch, to make additional water available in the ensuing irrigation season to the pasture grass on the Knollin Ranch, and to provide some amount of additional supply to surface and ground water sources downstream from the Knollin Ranch.

13. Historically, for reasons beyond the water user’s control, water under water right no. 33-2133 was often difficult to divert through the existing ditch to the place of use because of icing problems. Historically, some portion of this water, therefore, remained in Big Spring Creek during the non-irrigation season, immediately passing downstream as surface water. To the extent this occurred, this water may not have been available to augment ground and surface water supplies during the ensuing irrigation season.

14. After Sagewillow acquired the Knollin Ranch, it installed a pipeline to deliver the surface water under water right no. 33-2133 to several ponds on the Knollin Ranch where the water is allowed to seep into the ground water. The pipeline minimizes the historical icing problems and permits Sagewillow to divert more surface water in winter to storage as ground water. This development and use has beneficial effects on ground and surface water supplies during the ensuing irrigation season.

Water Right Nos. 33-2086 and 33-7018

15. Water Rights Nos. 33-2086 and 33-7018, which Sagewillow purchased from David Hawley, were originally licensed for irrigation of a combined total of 260 acres on what is

known as the “Frew Place.” When Sagewillow purchased 230 of the 260 acres “together with appurtenances” it also purchased the existing wells, the land on which the wells were located and additional land for access to the authorized points of diversion, including the point of diversion located on the thirty acres retained by David Hawley.

16. The thirty acres retained by David Hawley have not been irrigated since Sagewillow’s purchase of the 230 acres and the appurtenant water rights.

17. Sagewillow has provided the Department with an Affidavit of Reed D. Nord, together with documentation from the “Frew Place” transaction demonstrating that the intent of the parties to that transaction was that Sagewillow would buy the 230 acres of land, fee access to the wells, and *all* of water right nos. 33-7018 and 33-2086 appurtenant to the 260 acre Frew Place.

18. The original licenses issued to the water users for use on the Knollin Ranch, Bird Ranch, North of Road Place and Frew Place together with evidence in the record, demonstrate that the Sagewillow lands require no more than 0.02 cfs per irrigated acre.

Prior Transfer No. 3785

19. In 1992, the Department approved Transfer No. 3785 by which Sagewillow proposed to change the place of use of water right no. 33-2091 from the Homestead Place to the North of Road Place. Sagewillow completed a new well, installed mainlines and pivots and commenced irrigating 320 acres of land, which included 185 acres of the North of Road Place.

20. Sagewillow continued irrigating the above-described 320 acres pursuant to Transfer No. 3785 until that transfer was voided by the 1996 Order.

respect to the above-captioned water rights transfers ("Transfers") now pending before the Idaho Department of Water Resources ("Department" or "IDWR") on remand from the Idaho Supreme Court. The parties also stipulate to supplementation of the record by Sagewillow, and waive their right to further hearing on this matter.

BACKGROUND INFORMATION

1. On September 20, 1993, Sagewillow filed the Transfers with the Department seeking to change the place of use and points of diversion of various ground and surface water rights originally authorized for irrigation purposes on a combined total of 2,383 acres. The water rights involved in the Transfers are: 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, 33-82, 33-2007, 33-2008, 33-2090, 33-2091, 33-2057, 33-2083, 33-2086, 33-2133 and 33-7018.
2. James Mays, Mays Land & Livestock, and Blaine County Canal Company filed protests to the Transfers.
3. The Protestants alleged that all or portions of the water rights proposed to be transferred had been abandoned by Sagewillow's predecessor in interest, Slim Hawley, or in any event had been forfeited due to non-use for more than the statutory five-year period.
4. A hearing on the Transfers was held in Idaho Falls, Idaho on January 31 and February 1, 1995.
5. The Department issued a final order on March 12, 1996 ("1996 Order"). On review of the 1996 Order the Idaho Supreme Court, on April 10, 2003, remanded the Transfers to the Department for further proceedings.
6. By letter dated June 20, 2003, Sagewillow requested that the Transfers be deemed withdrawn. On _____, pursuant to a stipulation of the parties, Sagewillow submitted notice

that it wished to revoke the withdrawal of the Transfers. The Notice was accompanied with a Stipulation to Findings of Fact and Conclusions of Law, and a proposed irrigation plan.

7. The Department has considered the above documents and pleadings, the record of the prior proceedings, the decision of the Idaho Supreme Court, and being otherwise advised, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

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

1. Water right nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82 are water rights with relatively junior priorities that are diverted from the Little Lost River and Big Spring Creek to beneficial use when available. These water rights are referred to as the "high water" rights. These water rights historically have been used primarily during times of high water, and have been used as a water supply that is supplemental to water right nos. 33-2057 and 33-2083.

2. The "high water" rights, can be used only as supplemental water rights to water right nos. 33-2057 and 33-2083.

Water Right Nos. 33-2007 and 33-2008

3. License no. 33-2007 was in the name of Adolph M. Myrup for 3.2 cfs with a February 1, 1909, priority date from the Little Lost River. Decreed right no. 33-71 was decreed from Spring Creek with a March 15, 1909, priority date to Merchants Trust & Savings Bank to be used on property titled in the decree as "A.M. Myrup Desert Entry." *Blaine County Investment Co.* ¶ XXI. The land in the decree and the license are the same. License no. 33-2008 was developed in the name of Lillian Myrup for 6.4 cfs from Spring Creek with a June 12, 1909, priority date. Water right no. 33-73 was decreed from Spring Creek with an April 1,

CONCLUSIONS OF LAW

1. The originally authorized place of use under all of the above-described water rights totals 2,383 irrigated acres.

2. Water right nos. 33-2057 and 33-2083 are recognized as valid to the extent of 0.02 cfs per irrigated acre on the 1,483 acre place of use, 301 acres of which was resumed after Sagewillow purchased the Knollin Ranch.

3. Water right nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82 are recognized as valid for use as a supplemental water supply on 268 acres within the 1,483 acre place of use as described for water right nos. 33-2057 and 33-2083.

4. Water right nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82 are recognized as valid for use on 414 acres within the 1,436 acre place of use described for water right no. 33-2133.

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

6. Water right nos. 33-2090 and 33-2091 totaling 640 irrigated acres were forfeited in their entirety by Slim Hawley before Sagewillow purchased the Homestead Place and the North of Road Place. A portion of 33-2091 was resumed on 73 acres after Sagewillow purchased the North of Road Place and Knollin Ranch. Although Transfer No. 3785 has since been voided by the Department, Sagewillow resumed the diversion of ground water under Water

Right 33-2091 pursuant to Transfer No. 3785. Because Sagewillow actually resumed such use pursuant to the seemingly valid Transfer No. 3785, and because the adverse effects on junior rights of such a resumption were, and can continue to be, prevented by historical and continued winter water diversions under water right no. 33-2133, the Department recognizes a valid resumption of use of water right no. 33-2091 for irrigation to the extent of 0.02 cfs per acre on 73 acres. The balance of water right no. 33-2091 is deemed forfeited.

7. The Department also recognizes a valid resumption of use of water right nos. 33-2057 and 33-2083 for irrigation to the extent of 0.02 cfs per acre on 301 additional acres, making these water rights valid on a total of 1,483 acres. These water rights are determined to be resumed only up to the extent of their originally licensed quantities and acres.

8. Water right nos. 33-2086 and 33-7018 are recognized as valid to the extent of 0.02 cfs per acre on 260 acres. Idaho law provides that absent contrary evidence of intent of the parties, it is presumed that a water right will pass as an appurtenance in parts on the sale of the land in parts. Although the deed of the 230 acres from David Hawley to Sagewillow purports to convey only the appurtenant water rights, i.e., that portion of the rights appurtenant to the 230 acres conveyed in the deed, Sagewillow has presented sufficient evidence of the parties' intent that the entire water right was to pass with the 230 acres to rebut the presumption that only a portion was conveyed. Thus, no portion of the water rights remains appurtenant to the 30 acres retained by Hawley that was part of the original place of use.

9. Clear and convincing evidence of forfeiture of water right no. 33-2133 has not been established. Water right no. 33-2133 is recognized as valid to the extent of 1,436 acres of beneficial use for root zone storage, provided however, that water may not be reddiverted from storage for direct irrigation under this water right.

10. The diversion of water right no. 33-2133 during the non-irrigation season has an acknowledged positive effect on ground water levels on the Knollin Ranch, and delayed benefits to stream flows and ground water levels downstream from the Knollin Ranch.

11. The resumption of use of water under water right nos. 33-2057, 33-2083 and 33-2091 will reduce the amount of water available in the Little Lost River downstream from the Knollin Ranch, and accruals to the interconnected ground water source below the Knollin Ranch. The parties have stipulated, and the Department concludes, that the positive hydrologic effects of the winter water diversions under water right no. 33-2133 described above will offset or mitigate the adverse effects that may be attributable to irrigation of the 73 acres under water right no. 33-2091 and the 301 additional acres under water right nos. 33-2057 and 33-2083. Therefore, resumption of these portions of these water rights is recognized.

12. Continued diversion of water under the resumed portions of water right nos. 33-2057, 33-2083 and 33-2091 are deemed mitigated by, and therefore are expressly contingent upon, continued diversions of winter water under water right no. 33-2133 to the extent water is available for diversion under that water right.

13. The number of acres authorized to be irrigated is 2,230 more specifically described as follows:

- a. 1816 acres consisting of
 - i. 1,483 acres under water right nos. 33-2057 and 33-2083, as supplemented by water right nos. 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82;
 - ii. 260 acres under water right nos. 33-2086 and 33-7018; and
 - iii. 73 acres under water right no. 33-2091.

- b. 414 acres under water right numbers 33-69, 33-70, 33-71, 33-72, 33-73, 33-74, 33-76, 33-78, 33-79, 33-80, 33-81, and 33-82 within the same place of use as water right no. 33-2133.

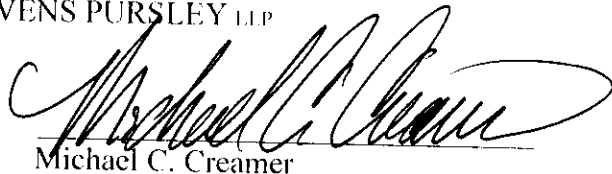
14. The Transfers are APPROVED with conditions as set forth herein and any necessary standard conditions. Sagewillow shall be entitled to irrigate 2,230 acres under the subject water rights consistent with the irrigation plan submitted by Sagewillow with its Notice of Intent to Proceed with Transfers.

15. The resumption of use determinations made in this Order are based upon the stipulations of the parties and shall not be cited or relied upon for purposes of precedence.

DATED this 28th day of April 2004.

GIVENS PURSLEY LLP

By

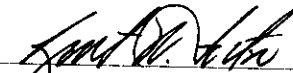


Michael C. Creamer

Attorneys for James Mays, Mays Land and Livestock Inc. and Blaine County Canal Company

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

By:



Kent W. Foster

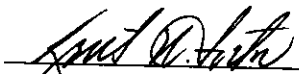
Attorneys for Sagewillow, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of April 2004, I served a true and correct copy of the foregoing by delivering the same to the following by the method indicated below, addressed as follows:

Michael C. Creamer
Givens Pursley LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

☐ U. S. Mail
☐ Hand Delivered
☒ Overnight Mail
☐ Facsimile



Kent W. Foster