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 SAGEWILLOW, INC.	))))	**FINAL ORDER**

This matter is before the Director of the Idaho Department of Water Resources ("Director" or "Department") on remand from the Idaho Supreme Court in the case of *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003).

On April 29, 2004, the parties filed *Applicant's and Protestants' Stipulation to Findings of Fact and Conclusions of Law on Remand to IDWR* ("Stipulation"). On that same date, Sagewillow, Inc. notified the Department and the parties that it was revoking its withdrawal of the above referenced transfers and intended to pursue the transfers as agreed upon by the parties in the Stipulation.

The parties also stipulated to supplementation of the record by Sagewillow, Inc. ("Sagewillow") and waived their right to further hearing in this matter. The Director having considered the Stipulation, other documents and pleadings filed in this matter, the record of the prior proceedings, and the decision of the Idaho Supreme Court, makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Procedural Background

1. On September 20, 1993, Sagewillow filed multiple transfer applications with the Department seeking to change the place of use and points of diversion for 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 proposed transfers were: 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 transfer applications.

3. A hearing on the transfer applications was held in Idaho Falls, Idaho on January 31, and February 1, 1995.

4. The Director issued a final order on March 12, 1996 ("1996 Order"). On review of the 1996 Order, the Idaho Supreme Court remanded the transfer applications to the Department on April 10, 2003, for further proceedings.

5. By letter dated June 20, 2003, Sagewillow requested that the transfer applications be deemed withdrawn.

6. On April 29, 2004, pursuant to the Stipulation, Sagewillow submitted notice that it wished to revoke the withdrawal of the transfer applications. The notice was accompanied with the Stipulation.

Water Rights 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

7. Water rights 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 surface water rights with relatively junior priority dates and are diverted for beneficial use from the Little Lost River and Big Spring Creek when available. These water rights are commonly referred to as the "high water" rights. These water rights historically have been used primarily during times of high water, and have been used in combination with water rights nos. 33-2057, 33-2083 and 33-2133.

Water Rights Nos. 33-2007 and 33-2008

8. License no. 33-2007 was issued in the name of Adolph M. Myrup for 3.2 cfs with a February 1, 1909, priority date from the Little Lost River. Water 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. v. Mays,* ¶ XXI (6th Jud. Dist. Idaho, March 4, 1927). The land description in the decree for right no. 33-71 is the same as for licensed right no. 33-2007. 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, 1912, priority date to Merchants Trust & Savings Bank for use on property titled in the decree as "Lillian Myrup Entry." Id. The land description in the decree for right no. 33-73 is the same as for licensed right no. 33-2008. The Director finds that licensed rights nos. 33-2007 and 33-2008 are the same water rights as decreed rights nos. 33-71 and 33-73, respectively.

Water Rights Nos. 33-2090 and 33-2091

9. 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.

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

11. 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.

12. No evidence was presented to suggest that the non-use of water right no. 33-2091 was due to circumstances beyond the right holder'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.

13. The parties stipulate and the Director finds, based on the continued use of water under right no. 33-2133 discussed below, that the resumption of use of water on these additional 73 acres does not cause injury to other water rights.

Water Rights Nos. 33-2057 and 33-2083

14. Water rights nos. 33-2057 and 33-2083 were originally licensed for irrigation of 1,483 acres 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.

15. 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 Director's analysis of Vance Hawley's testimony at the hearing, the Department's shape files, 1987 NAPP photography, 1992 aerial photographs, 1975 orthophotoquad maps, and the topography of the land. The Director concludes that 1,182 acres were irrigated under water rights nos. 33-2057 and 33-2083 prior to Sagewillow's purchase of the property in 1989.

16. The record also contains substantial evidence that water was applied under water rights nos. 33-2057 and 33-2083 on an additional 301 acres after Sagewillow purchased the properties. Thus, Sagewillow resumed irrigation of 301 acres under the two water rights after it purchased the property in 1989. These 301 acres combined with the 1,182 acres that were irrigated prior to the purchase of the property by Sagewillow totals the 1,483 acres authorized to be irrigated under the two licenses.

17. The parties stipulate and the Director finds, based on the continued use of water under right no. 33-2133 discussed below, that the resumption of use of water on these 301 acres does not cause injury to other water rights.

Water Right No. 33-2133

18. Water right no. 33-2133 authorizes the diversion of water from Big Spring Creek and from the Little Lost River during the non-irrigation season for "root zone storage." This use is more properly characterized as recharge during the non-irrigation season and sub-irrigation for pasture grass on the Knollin Ranch during the irrigation season.

19. Water diverted under water right no. 33-2133 for recharge mitigates the effects of ground water diversions during the ensuing irrigation season. Diversion of water under water right no. 33-2133 during the non-irrigation season provides some amount of additional supply to surface and ground water sources downstream from the Knollin Ranch during the ensuing irrigation season. Water diverted under water right no. 33-2133 may not be rediverted during the irrigation season.

20. 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.

21. After Sagewillow acquired the Knollin Ranch, it installed a pipeline with the capacity to convey 3.71 cfs of surface water from Big Spring Creek under water right no. 33-2133 to several ponds on the Knollin Ranch where the water is allowed to seep into the ground. The pipeline minimizes the historical icing problems and permits Sagewillow to divert 3.71 cfs of the licensed amount of water right no. 33-2133 from Big Spring Creek during the non-irrigation season for recharging ground water and for sub-irrigation uses without the water being rediverted during the irrigation season. In addition, up to 6.71 cfs is diverted from the Little Lost River through a ditch into the same ponds on the Knollin Ranch under water right no. 33-2133, and this water also seeps into the ground. A total of 9.88 cfs, or 2,960 acre-feet annually, can be diverted under water right no. 33-2133 during the non-irrigation season. This development and use has beneficial effects on ground and surface water supplies during the ensuing irrigation season.

Water Rights Nos. 33-2086 and 33-7018

22. 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.

23. Evidence shows that the thirty acres retained by David Hawley have not been irrigated since Sagewillow's purchase of the 230 acres and the appurtenant water rights.

24. Sagewillow provided the Director 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.

25. 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, provided that this limitation should not apply to the diversion of the "high water" rights, identified in Finding No. 7.

Prior Transfer No. 3785

26. In 1992, the Department approved transfer no. 3785 by which Sagewillow proposed to change the place of use under 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.

27. Sagewillow continued irrigating the 320 acres pursuant to transfer no. 3785 until that transfer was voided by the 1996 Order.

CONCLUSIONS OF LAW

1. The originally authorized place of use under all of the above-described water rights, except for water right no. 33-2133, totals 2,383 irrigated acres. Water right no. 33-2133 originally authorized sub-irrigation of 1,436 acres.

2. Water rights 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 rights 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 268 acres within the 1,483-acre place of use described for water rights nos. 33-2057 and 33-2083.

4. Water rights 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 382 acres within the 1,436-acre place of use described for water right no. 33-2133.

5. The Director concludes that licenses for water rights nos. 33-2007 and 33-2008 were superseded by the decree in *Blaine County Investment Co. v. Mays,* (6th Jud. Dist. Idaho, March 4, 1927). These water rights were decreed in that case as water rights nos. 33-71 and 33-73, respectively.

6. Water rights nos. 33-2090 and 33-2091, for irrigation of 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 water right no. 33-2091 was resumed on 73 acres after Sagewillow purchased the North of Road Place and Knollin Ranch. Water right no. 33-2090 is forfeited entirely.

7. Sagewillow resumed the diversion of ground water under water right no. 33-2091 pursuant to transfer no. 3785. The Department subsequently voided transfer no. 3785. Because Sagewillow resumed its use of water under water right 33-2091 prior to transfer no. 3785 being voided, and because the adverse effects on junior water rights of the resumption were and will continue to be mitigated by historical and continued water diversions under water right no. 33-2133 during the non-irrigation season, the Director recognizes a valid resumption of use under 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 forfeited.

8. Facts and applicable law warrant that transfer no. 3785 should remain void.

9. The Director also recognizes a valid resumption of use under water rights 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.

10. Water rights nos. 33-2086 and 33-7018 are recognized as valid to the extent of 0.02 cfs per acre on a total of 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 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 David Hawley that were part of the original place of use.

11. 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 for recharge and sub-irrigation of 1,436 acres, provided that water may not be rediverted for direct irrigation under this water right.

12. The diversion of water under water right no. 33-2133 during the non-irrigation season has a 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.

13. The resumption of use of water under water rights 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 will reduce accruals to the interconnected ground water source below the Knollin Ranch. The parties have stipulated, and the Director concludes, that the positive hydrologic effects of the diversions under water right no. 33-2133 during the non-irrigation

the non-irrigation season 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 rights nos. 33-2057 and 33-2083. Therefore, the resumption of water use under these portions of these water rights is recognized.

14. Continued diversion of water under the resumed portions of water rights nos. 33-2057, 33-2083, and 33-2091 are deemed mitigated by, and expressly contingent upon, the continued diversion of water under water right no. 33-2133 during the non-irrigation season to the extent water is available for diversion under that water right.

15. Sagewillow is authorized to irrigate a total of 3,026 acres pursuant to this transfer proceeding through a combination of ground water rights, surface water rights, and sub-irrigation. The 3,026 acres consist of 1,816 acres irrigated from ground water, 1,436 acres by sub-irrigation under water right no. 33-2133 (less 251 acres overlapped by ground water), and 25 acres irrigated solely by surface water, all more specifically described as follows:

a. 1,816 acres from ground water right nos. 33-2091, 33-2057, 33-2083, 33-2086 and 33-7018. A portion of these acres are also irrigated under surface water rights and 251 acres are sub-irrigated under water right no. 33-2133.

b. 655 acres under surface water rights 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. All but 25 of these acres are also irrigated under ground water rights and sub-irrigated under water right no. 33-2133.

c. 1,436 acres under water right no. 33-2133, of which 930 acres are irrigated exclusively by sub-irrigation from water diverted during the non-irrigation season under this water right.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Director hereby orders as follows:

1. Transfer applications nos. 4221, 4222, 4223, 4224, 4225, 4226, and 4227 are **APPROVED** with conditions as set forth herein and as more specifically described and detailed in Attachment 1, consisting of 43 pages, which is appended hereto and incorporated herein by this reference.

2. Sagewillow shall be entitled to irrigate a total of 3,026 acres under the water rights that are the subject of this transfer proceeding.

3. Water right no. 33-2090 is forfeited.

5. Transfer no. 3785 shall remain VOID.

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

7. This Order becomes effective upon entry.

DATED this 28th day of June 2004.

Karl J. Dreher
Director