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DEPT. OF WATER RESOURCES
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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
TRANSFER, NO. 78283 (fka No. 66354), IN THE
NAME OF BUCKEYE FARMS, INC.

EXCEPTIONS BRIEF

COMES NOW, the Applicant, Buckeye Farms, Inc., by and through its counsel of record, and submit this Exceptions Brief to the Director of the Idaho Department of Water Resources (“Department”), pursuant to IDAPA 37.01.01.730.02.b.

INTRODUCTION

This matter involves a transfer that has been pending before the Department since 1994. The transfer was associated with the sale of certain lands then owned by Buckeye Farms, Inc. – the “North Bar S Lands” – to Spring Valley Ranches, Inc. (now known as Western Legends). *See 2nd Burke Aff.* Through the Preliminary Order, the Hearing Officer approved the transfer in part and denied the transfer in part. As a result, Buckeye is left with only 63% of its water rights. *Preliminary Order Att. A.*

This decision is based on the incorrect conclusion that Buckeye’s water rights “historically overlapped” with water right 36-4 (the water right now partially decreed on the North Bar S Lands and that, therefore, granting the transfer in its entirety would result in an

enlargement. The decision, however, refuses to acknowledge that the transfer can still be granted without any enlargement. Accordingly, the Director should enter a final order approving the transfer for the entire water rights.

STATEMENT OF FACTS

Buckeye explained the factual history in its *Opening Brief, Rebuttal Brief* and *Petition for Reconsideration* – all on record in this matter. Rather than recite that history here, Buckeye incorporates that discussion into this brief by this reference.

DISCUSSION

The Hearing Officer's decision is based on the incorrect assumption that this transfer must be denied because certain acres within the place of use for water rights 36-15 and 36-18 overlap with a portion of the place of use for water right 36-4. According to the Hearing Officer, approval of this transfer would result in an enlargement of the water rights. Buckeye explained the problem with this conclusion in its prior briefing before the Hearing Officer.

The Hearing Officer's focus on the place of use element of the water rights – while ignoring the other elements and history of development of the rights – has resulted in an erroneous decision. For example, the SRBA Court and Department have a long established policy and procedure for acknowledging that water rights overlap. This procedure was followed in the decreeing of water rights 36-4, which contains the remark:

Use of this right with right no. 36-15534 is limited to the irrigation of a combined total of 416.0 acres in a single irrigation season.

Arrington Aff. at Ex. F. By using such language, the water master and all water users can know that the identified water rights are combined in their use. Absent such remarks, it is improper to presume that the rights are “stacked” or “overlapping.” Yet, that is exactly what the Hearing Officer has done. Indeed, none of the water rights – i.e. 36-4, 36-15 or 36-18 – have any remark

or other limitation that would suggest the rights were decreed as, or even considered to be, stacked water rights. As such, one must look to the development of the rights to determine whether they are truly overlapping.

This is important, because water rights may have the same place of use identified, but have no overlapping use. This is a common result when the Department creates a Permissible Place of Use (“PPU”) – allowing water rights to be used on any acres within a defined area. For such PPUs, the place of use will be the same for all water rights even though they may never be used on the same ground. The Department’s Transfer Memo No. 24 specifically recognizes this fact. *See* IDWR Transfer Memo No. 24 at 27 (“Water rights for irrigating a permissible place of use are not necessarily stacked when the water rights in total provide for irrigating up to the maximum acreage authorized within a” PPU).

Unfortunately, the Hearing Officer completely overlooked the history and development and relied solely on the place of use for water rights 36-4, 36-15 and 36-18:

Buckeye also argues that its SRBA partial decrees for water rights 36-15 and 36-18 do not contain a combined use limitation with water right 36-4 so there is no overlap. The lack of a combined use condition does not mean the water rights are not overlapping. As explained in the paragraph above, one can simply look to the decreed acres to identify overlaps. No combined use condition is necessary to identify these overlaps.

Order Denying Petition for Reconsideration, at 2. In fact, a review of the *Order Denying Petition for Reconsideration* demonstrates that the Hearing Officer relied solely on the decreed place of use. Yet, as discussed above, “simply” looking “to the decreed acres” does not justify denial of this transfer – particularly here, where there is there no combined use limitation.

The development of these rights plainly demonstrates that water rights 36-15 and 36-18 did not “historically overlap” water right 36-4:

1. As discussed above, there is no combined use limitation on either water right 36-4, 36-15 or 36-18 to demonstrate any finding by the SRBA Court or Department that

these rights were developed together on the same land. *See Arrington Aff.* at Exs. A-1, A-2 & F.

2. The timing of the decrees also supports separate, independent development of the water rights. For example, water rights 36-4 was partially decreed over 2-years after water rights 36-15 and 36-18. *Id.* As such, both the Department and SRBA Court would have been well aware of the decree place of use and whether or not there was any historical overlap. At that time, had the Department or Court determined that there was any overlap, the proper method for addressing that overlap would be through a combined use limitation. The absence of any such remark evidences an understanding that the rights did not overlap.
3. Importantly, during the SRBA process for water right 36-4, there was dispute about the development and history of the water right. There were several meetings with all involved, including the Department and Buckeye to determine the best resolution for the dispute. In the end, an agreement was reached and water right 36-4 was partially decreed. *See Id.* Buckeye participated in those proceedings and signed the Standard Form 5. *See Preliminary Order* at ¶ 12. Buckeye's participation further supports the separate nature of these rights. Indeed, there is nothing on the face of the Standard Form 5 indicating that the rights "historically overlapped." The Standard Form 5 did not include any combined use limitation – and that document was signed by the Department and parties and then approved by the SRBA Court. Indeed, there is nothing in the record to support the conclusion that the "use" of water right 36-4 on the North Bar S Lands amounted to anything more than a "gentlemen's agreement" to supplement water supplies in times of shortage. *2nd Arrington Aff.* at Ex. M. Had the SRBA believed that these water rights "historically overlapped," then a combined use limitation would have been appropriate. Now, 15 years later, the Hearing Officer has determined that Buckeye's involvement in the settlement process somehow equates to an understanding that the rights "historically overlapped" and that any transfer of the rights should be limited accordingly. Yet, that is directly contrary to the understanding of the parties at the time. In truth, the parties and Department worked a solution that would allow all water rights to remain whole. Even Nick Spencer, attorney for the Department, recognized this during the discussions in the late 1990's:

Let's see if there is a way to establish the full quantity on the full place of use to avoid the stacking problem on the 400 acres. If you can show full 15 cfs on the Home Place then transfer it to the 400 acres to establish the legal right and then do an agreement to continue sharing. The establishment on the home place can be done on Tuesday, and on Wednesday transferred to the 400 acres. ***The purpose is to have all the water anyway.***

2nd Arrington Aff. at Ex. M at 4 (emphasis added). The Hearing Officer's conclusions on this matter are wrong.

4. Buckeye submitted an affidavit from John Burke further confirming that the rights were not developed on the same land and did not “overlap.” In fact:

Buckeye Farms did use water from the Spring Valley Ranches – including water right no. 36-04 at times when Spring Valley land had excess water. This water was rented or diverted from Spring Valley with their permission.

Aff. of John A. Burke at ¶ 14. This statement recognizes the “gentlemen’s agreement” to allow water right 36-4 to be used on the Buckeye Lands in times of shortage. ^{2nd} *Arrington Aff.* at Ex. M. It shows, along with the rest of the record, that water right 36-4 was used on the Buckeye lands as a stop gap measure for depleted water supplies. *Burke Aff.* at ¶ 14 (“The water was rented or diverted from Spring Valley with their permission”).

5. Finally, the duty of water associated with these water rights makes it clear that no one anticipated that these rights had “historically overlapped.” For example, water rights 36-4 and 36-15534 authorize a diversion rate of 15.00 cfs for up to 416 acres. *Arrington Aff.* Ex. F. This amounts to 0.04 cfs – or 2 inches – per acre. Water rights 36-15 and 36-18 authorize a total diversion rate of 26.5 cfs for up to 483 acres. *Id.* at Exs. A-1 & A-2. This amount to 0.05 cfs – or 2.5 inches – per acre.¹ In other words, if the Preliminary Order is true, then the “overlapping” acres have irrigation authorizations of a total of 4.5 inches per acre. This is significantly higher than other water rights in the area. Concluding that these water rights “historically overlapped,” would lead to waste of the water resource – a result that is not desired under any condition. Such a result is inconsistent with the legal requirement that the duty of water be reasonable. *C.f. Union Grain & Elevator Co. v. McCammon Ditch Co.*, 41 Idaho 216, 217 (1925) (“A prior appropriator is only entitled to the water to the extent that he has use for it when economically and reasonably used”).
6. There is no evidence in the record that these rights were ever diverted and used on the North Bar-S lands at the same time. As such, there is no evidence of any stacking of the rights. In fact, the evidence in the record shows that water right 36-4 was only diverted to the North Bar-S Lands at times when water rights 36-15 and 36-18 were not sufficient to irrigate the lands. *Supra*. As such, no actual stacking of the right ever occurred.

The place of use for water right 36-4 was determined based on an accomplished transfer.

Under Idaho law, an accomplished transfer may only be recognized if it does not cause injury to other water rights. I.C. § 42-1425(2) (accomplished transfer may be recognized “provided no other water rights existing on the date of the change were injured”). As such, the accomplished

¹ Water rights 36-15 and 36-18 also have a combined volume limitation of 1690.5 a/f. *Arrington Aff.* at Exs. A-1 & A-2. This amounts to 3.5 a/f per acre.

transfer for water right 36-4 could only have been recognized with the understanding that it did not injure other water rights – including 36-15 and 36-18. Notwithstanding this law, the Hearing Office determined that water rights 36-15 and 36-18 must be reduced by 37% as a result of the accomplished transfer of water right 36-4. *See supra* (Hearing Office determined that, since the places of use “overlap,” the water rights must be reduced to 63% of their decreed diversion rate). Such a holding is contrary to the plain law regarding accomplished transfers and should be rejected. The only way to reconcile the recognition of an accomplished transfer, with the lack of any injury as mandated by the statute, would be to allow for the transfer of the entire water rights 36-15 and 36-18.

At most, the record shows that water right 36-4 was supplemental to 36-15 and 36-18 on the North Bar S Lands.² The Hearing Officer concluded, however, that there is no “relevant distinction” between “supplemental” and “overlapping” water rights. *Order Denying Petition for Reconsideration*, at 2. Again, however, the Hearing Officer’s unrelenting focus on the decreed place of use, alone, has resulted in an erroneous conclusion. First, as discussed above, one cannot simply focus on the decreed place of use. Indeed, absent a combined use limitation, there is no presumption that the rights historically overlapped.

Second, in this case, the rights could not “overlap” because they were developed on separate lands. Water right 36-4 was not appurtenant to the North Bar S lands. The sales agreement specifically recognized this by requiring the parties to transfer their water rights following the sale. *2nd Burke Aff.* This is further borne out by the undisputed evidence that there was a “gentlemen’s agreement” to allow Buckeye to use the 36-4 water when the supplies of its

² It remains Buckeye’s position that it did everything required as the seller of land with water rights appurtenant. If one desires to retain ownership, the right holder should explicitly state such intent. Buckeye did and filed a transfer application. The Buyer, Spring Valley Ranch, acknowledged this intent and the fact that no other rights were appurtenant to the subject lands at the time of the sale. IDWR’s failure to timely process the transfer application resulted in this issue which is now in dispute.

own water rights (i.e. 36-15 and 36-18) were not sufficient. *Supra*. To conclude that the rights are not supplemental, would be to conclude that the Department recommended, and the SRBA Court decreed, 4.5 inches per acre of water on the North Bar S Lands – which is far in excess of the quantity of water actually needed to irrigate the lands. Furthermore, had water right 36-4 not been used by Buckeye pursuant to this arrangement, the right would not have been used, and the water would have remained in the source for use to fill junior water rights (i.e. 36-15 and 36-18).

As a result of the Hearing Officer's failure to recognize the supplemental use of water right 36-4, the decision concludes that lands in Hagerman can beneficially use 4.5 inches/acre. Nothing in the record justifies this result.

Third, the Department's Transfer Memorandum No. 24 specifically allows the transfer of supplemental water rights following a consideration of the use of the water. Rather than consider this use, however, the Hearing Officer refused to conduct this analysis.

Since the record is clear that water rights 36-4, 36-15 and 36-18 were not developed as overlapping water rights, the Director should order that the Buckeye transfer be approved in its entirety.

CONCLUSION

The Hearing Officer's persistent refusal to consider the history and development of water rights 36-4, 36-15 and 36-18 has resulted in an erroneous decision to grant Buckeye's transfer in part – leaving Buckeye with only 63% of its water rights. The record is clear, however, and does not support such a conclusion. Accordingly, the Director should enter an order approving Buckeye's transfer of the entire water rights 36-15 and 36-18.

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Dated this 27th day of December, 2013.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in dark ink, appearing to read "John K. Simpson", is written over a horizontal line. The signature is stylized with large, sweeping loops.

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