

Memorandum

To: Water Right File – Transfer 78283, Water Right Nos. 36-15 and 36-18

From: Jeff Peppersack

Date: January 27, 2014

Re: Exceptions to Preliminary Order Approving Transfer in Part

Background

Buckeye Farms sold a portion of its ranch to Spring Valley Ranches (now known as Western Legends) in 1989, but withheld the water rights. Buckeye Farms filed Transfer 78283 in 1994 to change the place of use under a portion of rights 36-15 and 36-18. Right 36-15 has a source from Weatherby Springs (tributary to Billingsley Creek) with a 1902 priority date and right 36-18 has a source from Billingsley Creek with a 1917 priority date. The transfer was filed to move the water rights from the land that was sold to other lands owned by Buckeye Farms. The transfer was protested by multiple parties. At the time the transfer was filed, the rights were involved in SRBA proceedings. The rights were decreed in the SRBA in the name of Buckeye Farms in 1997.

A concern about the transfer is the partial overlap of right 36-4 on the place of use where water is proposed to be transferred from. Right 36-4 has a source of Billingsley Creek with an 1884 priority date. Although right 36-4 was originally decreed and claimed in the SRBA on lands that did not overlap rights 36-15 and 36-18, the SRBA claim was amended in 1989 to include the overlapping place of use. Right 36-4 was decreed in the SRBA in the name of Western Legends in 1999 and included the overlapping place of use with the sold portion of rights 36-15 and 36-18.

After all protests of Transfer 78283 were resolved, the Department approved the transfer in part in 2013. The approval split rights 36-15 (split portion 36-16987) and 36-18 (split portion 36-16988) and authorized the change in place of use for portions that did not overlap right 36-4. The split parts determined to be overlapping retained the original water right numbers with reduced diversion rate and acres.

The Department denied a petition for reconsideration filed by Buckeye Farms. Buckeye Farms filed its Exceptions on December 27, 2013.

Exceptions

- Buckeye Farms concludes that it “is left with only 63% of its water rights.” (Exceptions p. 1).

The transfer approval did not reduce Buckeye Farms’ water rights; instead, it approved in part and left the remaining portions intact at the original place of use. Although it was not clear in the preliminary order, the intent of the bifurcation was to approve the part that had no enlargement issue and preserve the remainder for future consideration of a transfer if the enlargement issue could be resolved.

- Buckeye Farms asserts that because rights 36-15 and 36-18 were not decreed with a condition acknowledging overlap with 36-4 (or vice versa), it cannot be presumed that the rights overlap.

Although the rights were not decreed with overlap conditions, the rights do have place of use descriptions that partially overlap. Furthermore, Buckeye Farms acknowledges that water under 36-4 was used on the overlapping place of use when water under 36-15 and 36-18 was unavailable. (See Applicants Opening Brief dated July 17, 2013, pp. 2, 3, 7, 8, and 9). Whether water rights include an overlap condition or not, the Department presumes overlapping use if the place of use (or a portion thereof) is the same, unless the rights specifically provide for some other arrangement.

- Buckeye Farms argues that “water rights may have the same place of use identified, but have no overlapping use.” (Exceptions p. 3). Buckeye Farms offers the concept of a permissible place of use (“PPU”) as an example.

The Department agrees that a PPU may describe an authorized place of use for multiple water rights with no overlapping use. However, rights within a PPU include a condition limiting use of the rights to a specified number of acres within the described PPU. Without a specific condition limiting the acres, it must be assumed that the use overlaps within the described place of use.

- Buckeye Farms states that “the development of these rights plainly demonstrates that water rights 36-15 and 36-18 did not ‘historically overlap’ water right 36-4.” (Exception p. 3). Buckeye Farms then discusses how the rights were developed on separate land or were not used on the same land at the same time and then concludes that there was no overlapping use.

Whether or not right 36-4 was developed on a place of use separate from rights 36-15 and 36-18 or used at times when rights 36-15 and 36-18 were unavailable is irrelevant. Right 36-4 was decreed for use on some of the same lands as decreed rights 36-15 and 36-18. The decrees do not include any limitation or restriction regarding their combined usage on those lands. As long as those rights remain in place, there is no concern regarding enlargement of use under those rights (within the limits of the decrees). However, if rights 36-15 and 36-18 are allowed to be separated from the overlapping place of use with right 36-4, the result would be an enlargement when the rights are considered in combination.

Using the numbers from the transfer approval, rights 36-15 and 36-18 were decreed to allow a total of 483 irrigated acres. Right 36-4 was decreed to allow a total of 416 irrigated acres; 176.6 acres of those acres are also described under rights 36-15 and 36-18. At their decreed place of use, the total number of acres irrigated under all three rights in combination would be 722.4 acres. If Transfer 78283 were approved as requested, the total number of acres that could be irrigated under all three rights in combination would increase to 899 acres. Furthermore, once separated, the volume of water use under 36-4 would likely be increased to provide a full supply for all of the acreage.

- Buckeye Farms argues that because the place of use for right 36-4 was based on an accomplished transfer, and because an accomplished transfer may only be recognized if it does not cause injury to other rights, then the transfer approval’s reduction of rights 36-

15 and 36-18 should be rejected because such reduction constitutes injury. (See Exceptions p. 5).

As discussed above, the transfer approval did not reduce Buckeye Farms' water rights; instead, it approved in part and left the remaining portions intact at the original place of use. When used as decreed, rights 36-4, 36-15 and 36-18 have no limitations or restrictions regarding their combined usage on the described lands. The enlargement issue arises as a result of the request to alter the way the rights would be exercised by separating the overlapping portion of the rights through a change in the place of use.

- Buckeye Farms states that "at most, the record shows that water right 36-4 was supplemental to 36-15 and 36-18." (Exceptions p. 6). "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." (Exceptions p. 7). "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." (Id).

The Department does not dispute that right 36-4 was historically used to "supplement" some of the place of use described under rights 36-15 and 36-18 when water under those rights was unavailable. The decrees impose no limitation or restriction, however, regarding the timing or quantity of use under right 36-4 in conjunction with rights 36-15 and 36-18. Consequently, right 36-4 could be used more intensely on the overlapping acres to the extent that such use would constitute beneficial use of the water. The Department has not made a determination that the lands can beneficially use 4.5 inches/acre. More intense use of right 36-4 on the overlapping acres would likely result in a reduced need for rights 36-15 and 36-18 on those acres. In fact, that is likely occurring now on the overlapping lands under Western Legends' ownership.

In practice, the Department considers a supplemental right to have a different source than the associated primary right and is restricted to use when the primary right is unavailable or insufficient. A typical example would be a ground water right used to supplement an earlier-priority surface water right. A supplemental right is always considered to be an overlapping or stacked right, whether it is used while the associated primary right is still partially available or after the primary right is fully curtailed. Non-supplemental overlapping rights don't include a restriction on timing of use because the source is generally the same or there is no need for the restriction to protect a particular source. Although right 36-4 was historically used to provide additional water at times when rights 36-15 and 36-18 were unavailable, right 36-4, as decreed, would not be considered a supplemental right under the Department's use of the term.

The Department does allow the transfer of supplemental water rights in some circumstances. The place of use for a supplemental right may be changed for continued use as a supplemental right at a different place of use as long as the primary rights at the original and proposed places of use provide comparable water supplies. Buckeye Farms' application is not seeking to transfer its rights for continued supplemental use, so the circumstance is not applicable.

The Department also allows a change from a supplemental right to use as a primary right if the applicant can clearly demonstrate, using historic diversion records for the supplemental right, that there would be no enlargement of the water rights being changed or other related water rights. Since the Department requires that use of a supplemental right is limited to times when the primary right is unavailable or insufficient, enlargement of the primary right is usually not a concern. To prevent enlargement, an approval of a change from a supplemental right to

primary use requires that the use of water under the supplemental right is limited to its historic use.

Even if right 36-4 is considered to be a supplemental right for this transfer, separation from the primary rights could only be approved under very limited circumstances. Rights 36-15 and 36-18 would need to be moved to a place of use where a similar primary-supplemental relationship could be established with another right. In this unusual circumstance, right 36-4 is senior to rights 36-15 and 36-18, but had been used only when rights 36-15 and 36-18 were unavailable. The supplemental right at the new place of use would need to be similar in priority date and source. Or, if a similar primary-supplemental relationship could not be established with another right, then the transfer of rights 36-15 and 36-18 to a new place of use would require the use of 36-4 to be limited to its historic volume to prevent its enlargement. Buckeye Farms could not impose such a limitation on right 36-4 without consent of the water right owner.