

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 78283 IN THE)	ORDER DENYING PETITION
<u>NAME OF BUCKEYE FARMS</u>)	FOR RECONSIDERATION

This matter having come before the Idaho Department of Water Resources ("Department") as a petition to reconsider the approval of a transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On November 21, 2013, the Department approved Transfer No. 78283, authorizing Buckeye Farms Inc. ("Buckeye") to change the place of use of portions of water rights 36-15 and 36-18.
2. On December 4, 2013, the Department received Buckeye's petition for reconsideration of its approval of Transfer No. 78283.
3. Water rights 36-15 and 36-18 authorize the irrigation of 483 acres in Sections 23, 26 and 35, T07S, R13E. The applicant sought to move a total of 483 acres.
4. In approving Transfer No. 78283, the Department determined from SRBA decrees that a portion of the 483 acres sought to be moved also have other water rights decreed to the same lands. In approving the transfer, only those acres without an overlap (totaling 306.4 acres) were approved to be moved. The remaining 176.6 acres that overlap other decreed rights were not allowed to be moved to avoid an enlargement of acres irrigated in the area.

EVALUATION CRITERIA

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall 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, 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 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a

municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

DISCUSSION

Buckeye argues that the Department is mistaken in concluding that water rights 36-15 and 36-18 (the two water rights Buckeye seeks to transfer) overlap with water right 36-4. However, this argument is not supportable in light of the SRBA partial decrees for these water rights. The SRBA partial decrees of the subject rights clearly demonstrate that portions of water rights 36-15 and 36-18 overlap with water rights 36-4 and 36-15534. For example, within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 23, T7S, R13E, rights 36-15 and 36-18 were decreed 40 acres. In the same tract right 36-4 and 36-15534 were decreed 34 acres. Since there is only 40 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 23, T7S, R13E, there can be no other conclusion but that these water rights overlap.

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.

Lastly, Buckeye argues that at most Buckeye's water rights were supplemented by water right 36-4. The applicant suggests that there is a relevant distinction between "supplemental" and "overlapping" water rights that is applicable here. The Department disagrees. Whether water right 36-4 is called supplemental to or overlapping with water rights 36-15 and 36-18, the fact is that the decreed place of use for most of the acres is the same and that unstacking the water rights in this circumstance would lead to an enlargement.

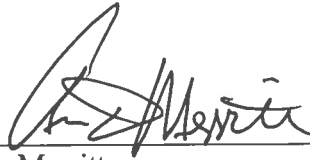
CONCLUSIONS OF LAW

1. The information provided by Buckeye does not demonstrate that the proposed place of use would not enlarge the number of acres historically irrigated and decreed in the SRBA in the area.
2. Buckeye has not provided sufficient reason for the Department to grant the petition.
3. The Department should deny the petition pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02a).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order approving Transfer No. 78283 is **DENIED**.

Dated this 13th day of December, 2013.

A handwritten signature in black ink, appearing to read "Allen Merritt", written over a horizontal line.

Allen Merritt
Southern Region Manager

CERTIFICATE OF SERVICE

I hereby certify that on this ^{18th}~~17th~~ day of December, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER DENYING PETITION FOR RECONSIDERATION** to the person(s) listed below:

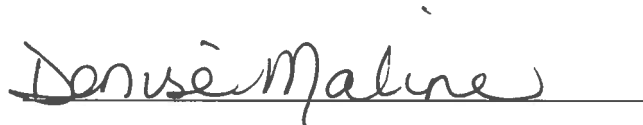
BUCKEYE FARMS INC
PO BOX 269
HAGERMAN, ID 83332

BARKER ROSHOLT & SIMPSON
ATTN: JOHN K SIMPSON
1010 W JEFFERSON, STE 102
PO BOX 2139
BOISE, ID 83701-2139

BARKER ROSHOLT & SIMPSON
ATTN: PAUL ARRINGTON
195 RIVER VISTA PL, STE 204
TWIN FALLS, ID 83301

OLD CURRAN RANCH
PO BOX 3398
HAILEY, ID 83333

WESTERN LEGENDS LC
C/O WILLIAM LEHMAN
PO BOX 764
KETCHUM, ID 83340

A handwritten signature in cursive script, reading "Denise Maline", is written over a horizontal line.

Denise Maline
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period 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 preliminary order shall be served on all other parties to the 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 Director 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.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date 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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.