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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.

**PETITION FOR
RECONSIDERATION**

COMES NOW, the Applicant, Buckeye Farms, Inc., by and through its counsel of record, and petition the Hearing Office for reconsideration of the November 21, 2013 *Preliminary Order Approving Application for Transfer*. This petition is filed pursuant to IDAPA 37.01.01.730.02.a.

INTRODUCTION

On November 21, 2013, the Idaho Department of Water Resources (“Department”) issued a preliminary order granting Buckeye’s application for transfer. However, in doing so, the Department decided to split Buckeye’s water rights 36-15 and 36-18 – concluding that failure to do so would result in an “enlargement” of the water rights. Accordingly, although the transfer was “approved,” Buckeye is left without only 63% of its water rights. *Preliminary Order Att. A.*

The Preliminary Order appears to be based on the assumption that Buckeye’s water rights “historically overlapped” with water right 36-4. This assumption is a misunderstanding of the historical development of these water rights and has resulted in errors. Accordingly, the Hearing Officer should reconsider the transfer order and approve the transfer for the entire water rights.

DISCUSSION

The Preliminary Order made the following finding:

11. The documents submitted by Buckeye in this proceeding establish that the place of use for water rights 36-4, 36-15 and 36-18 and [sic] historically overlapped:

“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.

“[Spring Valley] owns Right No. 36-0004 for 15 cfs of water with a priority of September 10, 1884, for use on other lands owned by [Spring Valley] although water from said right has been used by [Buckeye] and [Buckeye’s] predecessors on the parcel which is the subject of this Agreement when not otherwise being used by [Spring Valley].” *Aff. of John A. Burke*, Ex. A at 3.

12. Buckeye participated in the SRBA objection resolution of water right 36-4 and signed the SRBA Standard Form 5 settlement document whereby it was agreed that water right 36-4 was historically used on the lands sold to Spring Valley listed above. The same lands where a portion of rights 36-15 and 36-18 are decreed.

13. Buckeye water rights 36-15 and 36-18 and Western Legends LC water rights 36-4 and 36-154534 were decreed in the SRBA as partial overlapping water rights.

Preliminary Order at 2-3. As discussed below, the record does not support these conclusions.

The conclusions in the Preliminary Order appear to be based on the mistaken conclusion that Buckeye’s water rights and water right 36-4 were developed as “overlapping water rights.” In Idaho water law, the designation of water rights as “overlapping” has legal significance. Indeed, water rights that “overlap” are rights that were developed on the same land. Generally, such rights are decreed with combined use limitations, such as the one partially decreed on water right 36-4:

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 SRBA Court and Department have established a method to clearly indicate that the identified water rights were developed together, such that the use of one is limited by the use of the other.

The record before the Hearing Officer clearly demonstrates that the Buckeye water rights and water right 36-4 did not “historically overlap.”

1. 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 lack of a combined use limitation is important. As discussed above, a combined use imitation is how the SRBA Court and Department designate overlapping water rights. Such was the case with water right 36-4. *Arrington Aff.* at Ex. F. Importantly, water right 36-4 was partially decreed over 2-years after water rights 36-15 and 36-18. During that time, there was dispute about the development and history of water right 36-4. 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. Contrary to the assumptions in the Preliminary Order, however, Buckeye’s participation in these proceedings was not evidence of any recognition that the rights overlapped. 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. Likewise, 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.
3. John Burke’s affidavits confirm 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.” *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”). In other words, water right 36-4 was not developed on the North Bar S Lands.

4. The duty of water associated with these water rights makes is clear that no one anticipated that these rights would be considered to have “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. In truth, the parties and Department fully addressed these concerns and worked a solution that would allow all water rights to remain whole. Even Nick Spencer 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).

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 rights could not “overlap” because they were developed on separate lands. Water right 36-4 was not appurtenant to the North Bar S lands – and the sales Agreement recognized this by requiring the parties to transfer their water rights. This is borne out by the “gentlemen’s agreement” to allow Buckeye to use the 36-4 water when its supplies were not sufficient. *Supra*. Importantly, 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

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.

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.

remained in the source for use by the junior water rights (i.e. 36-15 and 36-18). The Department's failure to recognize this supplemental use leads to the erroneous conclusion that lands in the Hagerman can beneficially use 4.5 inches/acre. Buckeye's acknowledgement that 36-4 water was used on North Bar S lands – to supplement its water supplies in times of shortage – does not justify this result. The Department's Transfer Memorandum specifically allows the transfer of supplemental water rights following a consideration of the use of the water.

Since the record is clear that water rights 36-4, 36-15 and 36-18 were not developed as overlapping water rights, the Hearing Office should reconsider the Preliminary Order and approve Buckeye's transfer of the entire water rights 36-15 and 36-18.

CONCLUSION

The Preliminary Order is mistaken in concluding that water rights 36-4, 36-15 and 36-18 were "historically overlapping" water rights. Because of this conclusion, however, Buckeye is left with only 63% of its water rights. The record is clear, however, and does not support such a conclusion. Accordingly, the Hearing Office should reconsider the Preliminary Order and approve Buckeye's transfer of the entire water rights 36-15 and 36-18.

Dated this 4th day of December, 2013.

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