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AUG 29 2013

DEPT. OF WATER RESOURCES
SOUTHERN REGION

**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.

**APPLICANT'S REBUTTAL
BRIEF**

COMES NOW, the Applicant, Buckeye Farms, Inc., by and through its counsel of record,
and submits this rebuttal brief in the above caption transfer proceedings, pursuant to the
Scheduling Order, dated May 23, 2013.

INTRODUCTION

On August 15, 2013, Verl Bell, the lone remaining protestant in the above matter,
withdrew his protest. As it currently stands, therefore, there is no protest to the approval of the
transfer of water rights 36-15 and 36-18, as requested in the above transfer application.

This rebuttal brief is submitted to address the withdrawn protest as well as to provide
additional information supporting approval of the transfer application.

DISCUSSION

**I. The Lack of Any Protest Supports Buckeye's Assertion that the Transfer will Not
Injure Other Water Rights.**

As of August 15, 2013, there are no protests against the above transfer. Notice of this
transfer was provided as required by Idaho law. Although some protests were originally filed,

they have all been resolved and/or withdrawn – including protests filed by the owners of water right 36-4. The last remaining protest, filed by Verl Bell, was withdrawn on August 15, 2013. The withdrawn protest was in response to Buckeye’s opening brief, which explained that there would be no injury to other water rights resulting from this transfer. This point remains unchallenged in these proceedings.

II. The History of the Buckeye Land and Water Rights 36-4, 36-15 and 36-18 Demonstrates that the Transfer Will Not Result in an Enlargement and Should be Approved.

This transfer was filed in the mid-1990’s. At that time, there was dispute over the approval of the transfer. The dispute revolved around this transfer and the adjudication process relating to water right 36-4. The parties had several meetings with IDWR and, in the end, resolved the disputes. Although water right 36-4 was partially decreed consistent with that resolution, this transfer sat dormant for the next 15 years. Buckeye simply seeks to have this transfer approved as agreed to by all the parties – including IDWR.

Buckeye’s opening brief explained why any concerns over the approval of this transfer – including concerns over enlargement – should not prevent approval of this transfer. That discussion explained the various agreements, *see Burke Aff.*, and documents from the backfiles for the applicable water rights, *see Arrington Aff.* And showed by the transfer should be approved.

Since submitting its opening brief, Buckeye has located the signed copy of the 1989 Agreement conveying land to Spring Valley. *See 2nd Burke Aff.* Although there are a few minor differences from the draft submitted with the *Burke Affidavit*, the signed copy of the 1989 agreement is substantively identical and demonstrates an understanding between the parties that (1) the water rights were developed on separate lands, (2) water right 36-4 was used by

permission on the Buckeye lands, and (3) Buckeye's water rights would be transferred off of the Buckeye land following the sale. *2nd Burke Aff.* Ex. D at §§ 5 & 10. This agreement was confirmed in a subsequent 1999 agreement, which called for Buckeye to remove water rights 36-15 and 36-18 from the North Bar-S lands. *Burke Aff.* at Ex. B.

The Water Master at the time recognized that water right 36-4 had been used on the North Bar-S land prior to 1987 as an arrangement to accommodate for a dwindling water supply. According to George Lemmon, "water right 36-18 is so junior that actual waterflow to deliver this right has not existed for years in sufficient quantity to deliver the water during the entire irrigation season." *2nd Arrington Aff.* at Ex. G. Mr. Burke, who has been involved with the Buckeye operations for several decades, explains that, in the 1980's when water supplies began to be strained, Buckeye would find alternate water supplies – including use of water right 36-4, when available. *Burke* at ¶¶ 8 & 14.

The fact that water rights 36-4 and 36-18 were partially decreed on North Bar-S Ranch lands does not result in an enlargement. Rather, it is evidence of a settlement reached between the parties at the time. The Department was aware of the enlargement "concern" and determined that the matter should be resolved through the transfer process. *Arrington Aff.* at Ex. E. The SRBA settlement agreement recognized that Buckeye would "take those actions required in the SRBA or otherwise, to remove those lands presently owned by Legends from the place of use for water rights 36-00018 and 36-00015." *Burke Aff.* at Ex. B.

The SRBA partial decrees for water rights 36-4 and 36-18 do not include any limitation on the use of the water rights – further indication that they were separately developed. *See Arrington Aff.* at Exs. A-2 & 8. It is clear, however, that the Department and SRBA Court did

consider whether these rights were developed in association with other water rights. For example, water right 36-4 includes the following combined use limitation:

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. 8. There is no mention of water right no. 36-18 on the partial decree for water right no. 36-4. Given the Department's clear pattern for addressing water rights developed on the same ground through combined use limitations, there is no basis to limit the use of 36-18 in relation to water right no. 36-4.

Early conversations between Department staff and Spring Valley Ranches confirmed that the rights would be transferred, as required by 1989 agreement and reiterated in the 1999 agreement. *2nd Arrington Aff.* at Exs. H & I. Early in this process, Buckeye met with the Department to address the sale of the North Bar-S Ranch lands and the impending transfer of water rights. In a memorandum to file, prepare by counsel for Buckeye following an October 21, 1992 meeting with Steve Clelland of IDWR, it was recognized that Buckeye must transfer right 36-18 or risk forfeiture. *Id.* at Exs. J & K.

Concerns over an enlargement are based on a partial decree apparently recognizing an accomplished transfer of water right 36-4 onto the North Bar-S Ranch.¹ Yet, the record clearly demonstrates the following: (1) Spring Valley Ranches did not own any portion of the North Bar-S Ranch until 1989, (2) water right 36-4 was originally decreed and developed on separate ground, and (3) water right 36-4 was only used on the North Bar-S ranch to supplement water rights 36-15 and 36-18 as a result of declining water supplies. This permissive use arrangement did not create any legal rights in Spring Valley to claim development of water right 36-4 on the North Bar-S Lands. Indeed, it is unclear how the Department could recommend and the SRBA

¹ The original recommendation for water right 36-4 included recognition of an accomplished transfer even though the place of use did not include the North Bar-S Lands.

Court could partially decree a water right pursuant to an accomplished transfer under these circumstances. *See* I.C. § 42-1425 (accomplished transfers must be concluded prior to November, 1987).

The accomplished transfer statute provides a safe harbor for those who “have a right to use water” or “own land to which water has been made appurtenant” and who use water on land outside of the original authorization. *Id.* at § 42-1425(1)(a) & (2). Further, any change must have occurred prior to 1987. *Id.* Spring Valley did not have any right, in and of itself, to the use of water right 36-4 on the North Bar-S Ranch and did not own the North Bar-S Ranch in 1987. Indeed, Buckeye did not deed the land to Spring Valley until 1989. There is no evidence of any right by Spring Valley to “transfer” its water onto the North Bar-S lands prior to the 1989 agreement. As discussed above, the water was only used on the North Bar-S Ranch through an arrangement with the owners of the North Bar-S lands to supplement water rights 36-15 and 36-18 as a result of declining water supplies. It was not used every year. *2nd Arrington Aff.* at Ex. L (Letter from Donald McFadden, who owned the North Bar-S Ranch from 1976 through 1988, stating that water right 36-4 was not used on the lands during the years he owned the property). Furthermore, there is no evidence to suggest that Spring Valley had any other legal right to use its water on the North Bar-S Ranch – such that there was a legal right to “transfer” water right 36-4 onto the North Bar-S Ranch.

This issue was addressed in detail by Buckeye, Spring Valley/Western Legends and IDWR in February 17, 1997 meeting. *2nd Arrington Aff.* at Ex. M. At that meeting, it was further confirmed that 36-4 was used on the North Bar-S Ranch lands as part of a “Gentlemen’s agreement” at times when water rights 36-15 and 36-18 did not provide sufficient water. The

participants recognized that this did not mean that the rights were stacked. In fact, Nick Spencer, attorney for IDWR, believed there was a solution to the stacking question:

Lets 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.

Id. at 4 (emphasis added).

It is clear that the Buckeye, Spring Valley/Western Legends and IDWR were all aware of the concerns and had the same goal in mind – “to have all the water anyway.” To that extent, settlements were negotiated and SRBA decrees were allowed to move forward. For unknown reasons, however, this transfer was allowed to languish for 15 years. In that time, nothing has occurred that would change the understanding of the parties. After a nearly 20-year delay, the transfer process is finally moving forward as contemplated by Buckeye, Spring Valley and the Department. To now determine that the transfer results in an enlargement and should be denied would unfairly prejudice Buckeye and would contradict the agreements and understandings of the parties at the time.

CONCLUSION

This transfer will not result in injury to other water rights. All enlargement and stacking concerns were addressed through negotiations and settlement agreements during the SRBA process. Accordingly, the transfer of water rights 36-15 and 36-18 should be approved.

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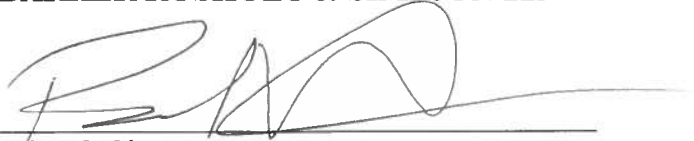
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Dated this 29th day of August, 2013.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'John K. Simpson', written over a horizontal line.

John K. Simpson
Paul L. Arrington

Attorneys for Buckeye Farms, Inc.