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**JUL 17 2013**

DEPT. OF WATER RESOURCES  
SOUTHERN REGION

*Attorneys for Buckeye Farms, Inc.*

**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 OPENING  
BRIEF**

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

**INTRODUCTION**

The *Scheduling Order* provides the following issues that should be addressed in this opening brief:

1. Whether the transfer will injure other water rights – specifically right 36-33E and others delivered from Weatherby Springs through the Bar S Ditch, Curren Ditch and North Pipeline?
2. Whether the transfer would constitute an enlargement of use of rights 36-15 and 36-18 – specifically how unstacking of these rights from right 36-4 or its children rights is not an enlargement?

3. Whether the transfer is within the public interest as defined by 42-202B, Idaho Code.

In addition, the *Scheduling Order* requires that Buckeye amend the application to properly describe the proposed place of use. The amended application is filed concurrently herewith.

Each of these issues will be discussed in turn. As discussed below, this transfer should be approved.

### STATEMENT OF FACTS

Until 1989, Buckeye Farms held property interest in certain lands in the Hagerman Valley known as the North Bar-S Ranch and the South Bar-S Ranch. *Affidavit of John A. Burke* at ¶ 4 (*Burke Aff.*). On February 2, 1989, Buckeye sold the North Bar-S Ranch to Spring Valley Ranches, Inc. *Id.* at Ex. A (draft of sales agreement). The agreement provided the following about the water rights owned by the Buckeye and Spring Valley:

It is acknowledged that both Seller and Buyer are holders of water rights decreed in the case of *New International Mortgage Bank v. Idaho Power Company*, Federal District Court of Idaho, No. 1602, March 22, 1932, to divert from Billingsley Creek through the Curran Ditch. There are some other users with decreed water rights which are also conveyed in the Curran Ditch to the point of intersection with the North Bar S pipeline. Buyer owns Right No. 36-0004 for 15 cfs of water with a priority date of September 10, 1884, ***for use on other lands owned by Buyer although water from said right has been used by Seller and Seller's predecessors on the parcel which is the subject of this Agreement when not otherwise being used by Buyer.*** Seller owns decreed Water Right No. 36-0003 for 20 cfs with a priority date of September 10, 1884, for diversion from Billingsley Creek through the Curran Ditch, and decreed water Right Nos. 36-0015, 36-0016 and 36-0017 for diversion of water from Weatherby Springs through Curran Ditch. Seller holds Permit No. 36-7742 and Permit No. 36-7740 for the diversion of the same waters on a year around basis for nonconsumptive purposes. Portions of these rights are now appurtenant to the property which is the subject of this Agreement.

It is understood and agreed by the parties that prior to the recording of the executed warranty deed (Exhibit "A" hereto), Buckeye Farms, Inc. shall execute and record a water transfer deed (in the form of Exhibit "E" hereto),

prior to the recordation of the warranty deed (Exhibit "A") and the mortgage (Exhibit "C"). Buyer acknowledges that all water rights of the Seller appurtenant to the property which is the subject of this transaction (including those described above) shall be transferred from said property to other properties of the Seller. Provided, however, that the transfer of water rights pursuant to Exhibit "E" shall not include the transfer of any water represented by Buyer's Right No. 36-0004. Buyer acknowledge he has no claim to water right Nos. 36-0003, 36-0015, 36-0016, 36-0017; Permit Nos. 36-7742 and 36-7740; or 65 shares of Big Bend Irrigation and Mining Co. Stock.

*Id.* at 3-4, §5 (emphasis added). In other words, the agreement recognized the historical use of water right 36-0004 on separate properties – other than the North Bar-S Ranch – but provided that it was occasionally used on the North Bar-S properties when not needed on its base property and as agreed by the owner of water right 36-4. *Id.*

The agreement also required that Buckeye transfer its water rights off of the North Bar-S Ranch property. *Id.* Specifically, "the parties hereto shall each be responsible for the appropriate necessary transfers as might be required to facilitate the removal and transfer of the water by the Seller, as well as the transfer of water by the Buyer." *Id.* at § 10.

The agreement further provided the following, as it relates to the rights of other water users that may be impacted by the above agreements:

It is understood by the parties that a certain pipeline commonly known as the North Bar S pipeline traverses a portion of the property which is the subject of this Agreement, which said pipeline facilitates the delivery of certain decreed and permitted water rights of the Seller from Weatherby Springs and Billingsley Creek through the Curran Ditch, as well as the rights of other users who own adjacent properties. The Seller contemplates the transfer of the point of diversion of Seller's said water rights from the North Bar S Pipeline to alternate facilities to satisfy Seller's water needs. ***Buyer acknowledges that there are obligations in favor of the other users for the delivery of water through the North Bar S Pipeline. The parties acknowledge that as a part of the consideration for this Agreement, Buyer shall hereafter be responsible for the delivery of the water of the users of the North Bar S pipeline (except Seller). Said other users are identified on Exhibit "F" hereto. Buyer agrees to assume any and all obligations***

***existing for the delivery of water through the North Bar S Pipeline to said users identified on Exhibit “F” and will indemnify and hold Seller harmless from any claim or claims for the delivery of water to said users including repair or replacement of said North Bar S Pipeline.***

*Id.* at 4-5, § 6 (emphasis added). Exhibit F identifies the following other users on the North Bar “S” Pipeline: Stan Hoskovec, 125 Club Loranger, Carlton, **Bell**, Betty Hoskovec, King, Sauer, Ellis. *Id.* at Ex. F. Importantly, after the sale, Buckeye no longer had access to the Curren ditch or North pipeline past Buckeye’s last ditch diversion point at the South Bar S pipeline. *Id.* at ¶ 17 & Ex. C.

On January 25, 1994, as required by the sales agreement, Buckeye filed this Transfer Application, seeking to move water rights 36-15 and 36-18 off of the North Bar-S Ranch. Four protests against the Transfer were filed by Aqua Life, Inc., Michael Branchflower, Western Legends, LC and Verl C. Bell. To date, all protests, except the one filed by Mr. Bell, have been resolved.

On March 6, 1997, water rights 36-15 and 3-18 were partially decreed in the SRBA. *Arrington Aff.* at Ex. A1 & A2. The decreed place of use includes the North Bar-S Ranch property but did not include the property identified in the transfer application.

On December 23, 1989, the SRBA claim for water right 36-4 was amended to include the North Bar-S properties in the place of use. This created confusion within the Department as to the appropriate action that should be taken on the transfer applications. *Arrington Aff.* at Ex. B (internal memo); *id.* at Ex. C (internal memo); *Id.* at Ex. D (internal memo); *Id.* at Ex. E (internal memo). In the end, it was determined that the “best resolution appears to be building in conjunction with the transfer protest settlement.” *Id.* at Ex. E. On May 28, 1999, Buckeye and Western Legends, LC, successor in interest to Spring Valley Ranches, entered into a settlement agreement to resolve a number of water right issues relating to the North Bar-S Ranch. *Burke*

*Aff.* at Ex. B. That settlement agreement confirmed that, through the transfer, the disputes regarding the water would be resolved.

Legends will withdraw all previous objections and protests to the transfer of Buckeye Water Right 36-00018 (Curran Ditch) and 36-00015 (Weatherby Springs), and to existing applications and permits filed by Buckeye for water out of Billingsley Creek. ***Buckeye agrees to 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.***

*Id.* at 3, § I.C (emphasis added).

On July 22, 1999, water right 36-4 was partially decreed in the SRBA. *Arrington Aff.* at Ex. F. The decree included the North Bar-S Ranch lands in the place of use.

## DISCUSSION

### I. The Transfer of Water Rights 36-15 and 36-18 Will Not Injure Other Water Rights.

The only remaining protest to this transfer is that of Mr. Bell. That protest states that it would be resolved, however, so long as the transfer would “leave water right A36-00033E intact.”

The sales agreement between Buckeye and Spring Valley addresses the delivery of water following the sale of the North Bar-S Ranch and the transfer of water rights 36-15 and 36-18 and requires that water rights in the pipeline be left “intact.” Specifically, the agreement provides:

***The Seller contemplates the transfer of the point of diversion of Seller's said water rights from the North Bar S Pipeline to alternate facilities to satisfy Seller's water needs. Buyer acknowledges that there are obligations in favor of the other users for the delivery of water through the North Bar S Pipeline. The parties acknowledge that as a part of the consideration for this Agreement, Buyer shall hereafter be responsible for the delivery of the water of the users of the North Bar S pipeline (except Seller). Said other users are identified on Exhibit "F" hereto.*** Buyer agrees to assume any and all obligations existing for the delivery of water through the North Bar S Pipeline to said users identified on Exhibit “F” and will indemnify and hold Seller harmless from any claim or claims for the delivery of water to said users including repair or replacement of said North Bar S Pipeline.

*Burke Aff.* at Ex. A, § 6 (emphasis added). Mr. Bell and other water users in the North Bar S Pipeline are specifically identified on Exhibit F. *Id.* In short, the “Buyer” – Spring Valley and, now, Western Legends – is responsible for the delivery of water to the users of the North Bar S Pipeline, including Mr. Bell. These water rights must be left “intact.”

To the extent that water supply is a concern, then the priority doctrine will ensure that Mr. Bell and other water users on the North Bar S Pipeline receive the water to which they are entitled. I.C. § 42-106 (“First in time is first in right”). To the extent that there is a water shortage, Mr. Bell and the other water users on the North Bar S Pipeline will be entitled to receive their decreed and/or licensed water supplies so long as they are in priority. As stated above, Western Legends has taken upon itself the obligation to ensure delivery of that water.

This transfer does not impact the priority or deliverability of the water rights that will remain in the North Bar S Pipeline. As such, there is no injury to other water rights.

## **II. The Transfer of Water Rights 36-15 and 36-18 Will Not Result in an Enlargement.**

This transfer will not result in an enlargement. First, the transfer will not result in the irrigation of more acreage than authorized under the decreed water rights. *See Arrington Aff.* at Ex. C (recognizing that the Partial Decree authorized 483 acres and the transfer should not allow more irrigation).

Furthermore, as the parties specifically recognized, the water rights were historically developed on separate grounds. *See Burke Aff.* at Ex. A, *supra*. Water rights 36-15 and 36-18 were developed on the North Bar-S Ranch – water right 36-4 was not. The agreement between Buckeye and Spring Valley makes this clear. *Id.* These rights were decreed in the *New International Mortgage Decree* on separate lands and were historically used on those separate lands. *Id.*

In times of shortage, water right 36-4, which is senior in priority, has occasionally been used on the North Bar-S Ranch to supplement Buckeye's water supplies through agreements with the owners of water right 36-4 (written and/or verbal). As the agreement recognized, "Buyer owns Right No. 36-0004 for 15 cfs of water with a priority date of September 10, 1884, *for use on other lands owned by Buyer although water from said right has been used by Seller and Seller's predecessors on the parcel which is the subject of this Agreement when not otherwise being used by Buyer.*" *Burke Aff.* at Ex. A (emphasis added). 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. *Id.* at ¶¶ 8 & 14. In short, the water was developed and decreed in separate ground. Accordingly, approving this transfer will not result in any enlargement.

Concerns over enlargement appear to stem from the fact that both rights 36-18 and 36-04 were partially decreed with the North Bar-S Ranch identified as a portion of the place of use. *See Arrington Aff.* at Exs. A1, A2 & F. These concerns were raised during the adjudication process, *id.* at Exs. B-E, wherein it was decided that the "best resolution appears to be building in conjunction with the transfer protest settlement," *id.* at Ex. E. To that extent, the parties entered into a settlement agreement, again, recognizing 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 § I.C. The settlement also resulted in SF5's for water right 36-4, which was subsequently decreed in the SRBA. *Arrington Aff.* at Ex. F. Importantly, there is no reference to 36-15 or 36-18 on the partial decree for water right 36-4. *Id.* There are no conditions or limitations on the decrees of any of the water rights

that would suggest the water rights were developed in conjunction on North Bar-S Ranch. Indeed, there is nothing to indicate that water right 36-4 was ever used on the North Bar-S Ranch except in those times when spring levels were low and Buckeye sought to augment its water supplies. *See Burke Aff.* at Ex. A (“Buyer owns Right No. 36-0004 for 15 cfs of water with a priority date of September 10, 1884, ***for use on other lands owned by Buyer although water from said right has been used by Seller and Seller's predecessors on the parcel which is the subject of this Agreement when not otherwise being used by Buyer***”) (emphasis added); *Id.* at ¶¶ 8 & 14 (explaining that, in the 1980’s when water supplied began to be strained, Buckeye would find alternate water supplies – including use of water right 36-4, when available). As stated above, the parties expressly agreed, on multiple occasions, that the rights were developed on separate grounds and that water rights 36-15 and 36-18 would be transferred to new grounds by Buckeye.

It is unclear why the processing of Buckeye’s transfer has been delayed for nearly 20 years. Had the transfer been processed in a timely manner, the issues relating to enlargement would not be present. As stated above, these water rights were developed on separate grounds. Prior to the 1989 sale, 36-4 was only used on the North Bar-S grounds as a mean of augmenting Buckeye’s water supply through agreements and rentals with Spring Valley. These temporary uses on the North Bar-S land did not constitute a “transfer” onto the North Bar-S property. Indeed, absent express authority from Buckeye – who owned the North Bar-S Ranch prior to 1989 – it is unclear how Spring Valley could seek an accomplished transfer of water right 36-4 onto the property. *See* I.C. § 42-1426 (accomplished transfers must be concluded prior to November, 1987). Prior to that time, the water was used through a rental-type agreement between Buckeye and the owner of water right 36-4.

Buckeye complied with its obligations in the sales agreement by passing water delivery responsibilities to Spring Valley and then filing a transfer application in 1994. *Supra*. Had IDWR processed the transfer and filed a N.C.A.P. with the SRBA Court, the issue would have been resolved prior to the decreeing of water rights. The failure to process the transfer for nearly 20 years should not prejudice Buckeye. Yet, that is exactly what would happen if the Department denies this transfer. Furthermore, Buckeye has not had sufficient water to fulfill water rights 36-15 & 36-18. That associated with the lack of any administration for those rights in the last 20 years threatens to leave Buckeye without its decreed water right.

Consistent with the history of development and use of water rights 36-15, 36-18 and 36-04, this transfer will not result in an enlargement.

### **III. The Transfer of Water Rights 36-15 and 36-18 Is In the Public Interest.**

Idaho Code defines the “Local Public Interest” as follows: “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” I.C. § 42-202B(3). The Department has generally held that a transfer is within the public interest where the proposed change does not alter the historic purpose of use. *See, e.g., Preliminary Order*, Transfer No. 78362<sup>1</sup> (Apr. 24, 2013) (granting transfer where “the water rights will continue to be used for agricultural purposes, the primary use of water in the local community”); *Preliminary Order*, Transfer No. 77610<sup>2</sup> (Aug. 22, 2012) (“The Applicant presented evidence that the ground water rights would continue to be used for agricultural purposes, the primary use of ground water in the local community. The Applicant met its burden of proof for this element.”). Consistent with these prior transfers, Buckeye will continue to use the water rights subject to this transfer for the same agricultural purpose of use.

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<sup>1</sup> [http://www.idwr.idaho.gov/WaterManagement/Orders/PDFs/2013/20130424\\_Prelim\\_order\\_appr\\_tran78362.pdf](http://www.idwr.idaho.gov/WaterManagement/Orders/PDFs/2013/20130424_Prelim_order_appr_tran78362.pdf)

<sup>2</sup> [http://www.idwr.idaho.gov/WaterManagement/Orders/PDFs/2012/Transfer\\_77610.pdf](http://www.idwr.idaho.gov/WaterManagement/Orders/PDFs/2012/Transfer_77610.pdf)

Furthermore, as stated above, these rights have been partially decreed in the SRBA without any combined use limitations or any other indication that their uses are connected. *Arrington Aff.* at Exs. A1, A2 & F. The only historical connection arises from the use agreement between Buckeye and the owners of water right 36-4, which allowed Buckeye to temporarily use the water right in times of shortage. It is in the public interest to allow these water rights to be use as they were developed and decreed – without any combined use limitations. Finally, as discussed above, any concerns over water availability will be resolved through the terms of the sales agreement and through the prior appropriation doctrine.

### CONCLUSION

This transfer has been gathering dust for too long. After nearly 20 years, it is long past time to process the transfer. This transfer will not result in injury to other water rights. The only claim of injury comes from Mr. Bell – whose right is protected by the sales agreement and the priority doctrine. There is no enlargement because the rights in question were all developed and used on separate properties and ultimately partially decreed without any combined use limitations on their use. Finally, the public interest calls for approval of this transfer where the water rights have been decreed and will continue to be used for their agricultural purposes.

Dated this 17<sup>th</sup> day of July, 2013.

**BARKER ROSHOLT & SIMPSON LLP**

  
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John K. Simpson  
Paul L. Arrington

*Attorneys for Buckeye Farms, Inc.*

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of July, 2013, I caused to be served a true and correct copy of the foregoing to be served on the following via first class mail, postage prepaid:

Verl C. Bell  
853 East 2830 South  
Hagerman, ID 83332

  
\_\_\_\_\_  
John K. Simpson  
Paul L. Arrington