

MEMO

FROM: Allen Merritt

DATE: November 26, 2010

TO: Jeff Peppersack, Garrick Baxter

CC: Nick Spencer, Steve Clelland, Tim Luke

SUBJECT: Transfer ~~66354~~ *Re-numbered to 78283 12/2012.* (Buckeye Farms) request for legal review

This transfer was filed 1/24/1994 and was protested by several parties. Recent efforts have been made to resolve the protests. (Two parties have dropped out with Verl Bell remaining as the sole protestant.) Recently I have conducted two pre-hearing conferences which have helped identify the issues between Mr. Bell and the applicant (Represented by John Simpson). Based on the recent conference the parties will continue to share information and will study conveyance loss issues and may work toward satisfying Mr. Bell's concerns.

The conferences have also identified a serious issue of enlargement if the transfer is approved. The enlargement issue comes about because of the way some SRBA decrees have been issued. In discussing this with Mr. Simpson he requests that IDWR review the way the rights were decreed and seeks an opinion as to whether the overlapping rights need to be set aside.

Review of the facts as I understand them:

Transfer 66354 seeks to modify the POU of rights 36-15 from Weatherby Springs and 36-18 from Billingsley Creek diverted via the Curren Ditch. Both were initially partially decreed to Buckeye Farms in the SRBA on 3/6/1997. The decreed POU is 466 acres that is comprised of 318 acres on lands still owned by Buckeye Farms and 148 acres on the land that was purported to have been sold dry to Spring Valley Ranches on 2/7/1989. Numerous water rights were reserved in the deed including 36-15 but no mention of 36-18. The deed indicates the land was sold dry. The purpose of the transfer is to relocate the entire 466 acres on Buckeye Farms land.

These same 148 acres that were sold to Spring Valley Ranches were partially decreed water under right 36-4 on 7/22/1999 to Western Legends. This partial decree is for water from Billingsley Creek via the Curren Ditch and includes irrigation of 416 acres with the above referenced 148 acres being a portion. This SRBA matter was a contested case involving numerous parties including Buckeye Farms.

Other issues:

Buckeye Farms water right 36-15 from Weatherby Springs is part of the Bar S Pipeline mess as described in Tim Luke's 3/9/2001 letter to Frank Erwin regarding the Kramer Stipulation. Tim references Nick Spencer's letter to Bill Jones about this issue.

As I understand from the conference, Buckeye Farms pretty much has deferred irrigation under 36-15 and 36-18 (they do some limited irrigation so it is not totally deferred) to keep the water

going to satisfy other Bar S Ditch and Weatherby Springs users during much of the irrigation season. I got the impression that they have irrigated most recently when water was supplied to Billingsley Creek and then to the Curren Ditch when NSGD was supplying water via the Sandy Pipeline. This practice of voluntary limiting use during much of the irrigation season was by agreement between users so that Buckeye can pretty much take delivery of the water from the Bar S Pipeline and thru the Curren Ditch during the non-irrigation season to fill permits 36-7740 and 36-8728 from Weatherby Springs and permits 36-7742 and 36-8730 from Billingsley Creek diverted in the Curren Ditch.

To complicate matters right 36-4 has been split numerous times and the 148 acres is not currently in single ownership. Additionally, I understand from the conference and from the Watermaster that much of the 148 acres and other portions of the total of 416 acres decreed under 36-4 is not actually delivered water thru the Curren Ditch but it is served by pumps in the Buckeye Ditch that diverts from Billingsley Creek at another location. This practice is predicated by some sort of exchange agreement. (I do not know if this is written or not but I do not believe it is of record with IDWR).

We have deferred further discussion about the transfer until March 2011 since Mr. Bell is going to be gone. The legal issues described above need to be explored beforehand. Specifically I need to know....

- Was there any sort of implied expectation in resolution of 36-4 that the state agreed to that would allow the transfer to move forward and it not be considered enlargement?
- Since Buckeye was party to the 36-4 matter are they barred from trying to get it set aside?
- Does deferral of delivery in exchange for winter water for the permits constitute partial forfeiture?
- Should IDWR instruct the watermaster not to deliver the children rights of 36-4 thru the pumps in the Buckeye ditch until a formal transfer is approved?