

RECEIVED

APR 18 2012

DEPARTMENT OF
WATER RESOURCES

Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
22377.0000

Attorneys for Petitioner Snake River Dairies, LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF A PETITION TO
RESCIND TRANSFER NO. 73927
INVOLVING WATER RIGHT NO. 63-7270B

PETITION

Petitioner Snake River Dairies, LLC ("SRD") hereby files this Petition with the Director of the Idaho Department of Water Resources ("IDWR") pursuant to IDWR Procedure Rules 152 and 230. By filing this Petition, SRD hereby requests that IDWR rescind its approval of Transfer No. 73927 involving Water Right No. 63-7270B and, therefore, that IDWR restore the non-ownership elements of that water right as they existed prior to transfer approval. There is no respondent or other person petitioned against, as SRD is now the owner of Water Right 63-7270B. Pursuant to IDWR Procedure Rule 210, this Petition is supported by affidavits of Scott King, P.E., Dylan Lawrence, and Jerry Tlucek. The factual and legal bases for granting this request are set forth below.

**I.
THE PETITIONER**

1. SRD is an Idaho limited liability company. (Lawrence aff., Ex. A (Idaho Secretary of State materials).) Mr. Jerry Tlucek is a member of, and is the registered agent for, SRD. (*Id.*) Mrs. Mary Louise Tlucek is also a member of SRD. (*Id.*)

**II.
THE SRBA *PARTIAL DECREE***

2. On April 11, 2007, the Snake River Basin Adjudication (“SRBA”) district court issued a *Partial Decree* to Glenn and Rhea Vander Woude for Water Right No. 63-7270B (the “Water Right”). (Lawrence aff., Ex. B.) That *Partial Decree* authorized the diversion of up to 1.39 cfs and 629.9 AFY to irrigate 140.0 acres of land in Township 1 South, Range 1 West. (*Id.*) More specifically, the *Partial Decree* authorized the irrigation of 110 acres in the Southeast quarter of Section 20, and 30 acres in the NENE of Section 29. (*Id.*) The *Partial Decree* did not authorize any irrigation within the NWNE of Section 29. (*Id.*)

**III.
TRANSFER NO. 73927**

3. On February 29, 2008, the Vander Woudes submitted an amended *Application for Transfer of Water Right* (Transfer No. 73927) to IDWR. (Lawrence aff., Ex. C.) In order to accommodate a proposed dairy, that application requested permission to, among other things, convert a portion of the Water Right from irrigation to commercial and stockwater purposes of use. (*Id.*) It proposed the commercial use to occur throughout the Southeast quarter of Section 20 and within both the NENE and the NWNE of Section 29. (*Id.*) It also proposed to add a new point of diversion in the NESE of Section 20. (*Id.*)¹

¹ The *Partial Decree* identifies one point of diversion within the NESE of Section 20. (Lawrence aff., Ex. B.) However, that was plainly in error. In reality, the record demonstrates that the point of diversion had always been in the SESE of Section 20, and that the new point of

A. Transfer No. 73927 Should Be Rescinded Because IDWR Approved the Transfer of Water to the Tluceks' Land Without Permission from the Tluceks.

4. On April 23, 2008, IDWR approved Transfer No. 73927, including the commercial use of water within the NWNE of Section 29. (Lawrence aff., Ex. D.)

5. However, approximately one month earlier, on March 29, 2008, the Tluceks acquired real property from Duane and Laura Ellen Pancheri, including the entire NWNE of Section 29, Township 1 South, Range 1 West. (Lawrence aff., Ex. E (*Notice of Change in Water Right Ownership* of 8/29/08 and attached deed).)

6. Prior to transfer approval, the Tluceks had not authorized the commercial use of water within their property. (Tlucek aff., ¶ 4; Lawrence aff., ¶ 7.)

B. Transfer No. 73927 Should Be Rescinded Because the Vander Woudes Never “Accomplished the Change” Authorized By the Transfer Approval.

7. Condition of Approval No. 1 of Transfer No. 73927 states that, “[t]he right holder *shall* accomplish the change authorized by this transfer within one year of the date of this approval.” (Lawrence aff., Ex. D (emphasis added).) In addition, Condition of Approval No. 2

diversion proposed by Transfer No. 73927 was to be in the NESE of Section 20. For example, the transfer application itself described the point of diversion in the SESE as the “existing” point of diversion, and the point of diversion in the NESE as the “New Irrigation Well.” (Lawrence aff., Ex. C.) Other documents that pre-date the *Partial Decree*, including the approved permit, the beneficial use field exam report, the license, and the SRBA claims for the “parent” water right 63-7270 (prior to its split into 63-7270A and 63-7270B) all reflect that the only point of diversion was in the SESE. (Lawrence aff., Ex. I.) Importantly, when IDWR issued the NCAP and recommendations for the split of 63-7270 into 63-7270A and 63-7270B, it specifically noted that there was an accomplished transfer involving the place of use, but *not* involving the point of diversion. (*Id.*) In addition, there are no well driller’s logs which reflect construction of any wells in the NESE, and there is no physical or visual evidence that a well has ever been located in the NESE. (King aff., ¶ 3; Tlucek aff. ¶ 6.) Therefore, the only logical conclusion is that the *Partial Decree* simply identified the wrong point of diversion, and neither the prior owner of the Water Right, nor IDWR, nor the SRBA district court caught the error.

states that, “[f]ailure of the right holder to comply with the conditions of this transfer *is cause* for the Director to rescind approval of the transfer.” (*Id.* (emphasis added).)

8. On February 1, 2012, SRD acquired real property from the Vander Woudes in the NENE of Section 29 and in the Southeast quarter of Section 20, Township 1 South, Range 1 West (the “Property”), including the Water Right, which is appurtenant to the Property. (Lawrence aff., Ex. F (*Notice of Change in Water Right Ownership* of 2/10/12 and attached deed).)

9. In addition to his role as a principal of SRD, the current owner of the Property and the Water Right, Mr. Tlucek has also owned land adjacent to the Property since 2008, which has allowed him to observe the operations and water use practices of the Vander Woudes on the Property prior to the sale of the Property and Water Right to SRD. (Tlucek aff., ¶ 5.)

10. According to Mr. Tlucek, after IDWR’s approval of Transfer No. 73927, the Vander Woudes did not take physical measures to implement the approved transfer, in that they have not constructed any buildings or facilities on the Property that would accommodate a dairy operation, and they never constructed a new well. (*Id.*, ¶¶ 5, 6.) The only significant change to the Property that Mr. Tlucek has observed since 2008 is an excavation that could be used to store water. (Tlucek aff., ¶ 5.) This excavation is visible in 2011 aerial photography of the Property. (King aff., ¶ 2, Ex. B.) In addition, the only water use that Mr. Tlucek has observed on the Property since 2008 has been irrigation. (Tlucek aff., ¶ 5.)

11. This is consistent with the findings of Scott King, P.E. According to Mr. King, the aerial photography from 2011 does not reflect any dairy operations or any commercial or stockwater uses of water on the Property. (King aff., ¶ 2.) In addition, the aerial

photograph does not reflect any groundwater well in the NESE of Section 20, and Mr. King has been unable to locate any well driller's logs reflecting groundwater wells constructed within the NESE of Section 20. (King aff., ¶ 3.)

IV. THE WATER RIGHT HAS NOT BEEN FORFEITED

12. There is no basis to conclude that any portion of the Water Right has been forfeited due to the water use practices of the Vander Woudes prior to their sale of the Property to SRD.

13. In Idaho, a water right is forfeited by undergoing five consecutive years of non-use. IDAHO CODE § 42-222(2). The SRBA district court has held that this five-year forfeiture period starts over with the issuance of a partial decree. (Lawrence aff., Ex. G (relevant excerpts of SRBA district court *Wood v. Troutt* opinion).)

14. In addition, it is well-established under Idaho law that water right forfeitures “are not favored, and clear and convincing proof is required to support a forfeiture.” *Jenkins v. State, Dep’t of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982).

15. Here, the SRBA district court issued the *Partial Decree* for the Water Right on April 11, 2007. (Lawrence aff., Ex. B.) Therefore, the five year forfeiture period started anew at that time. Any five-year period of non-use cannot be completed prior to April 11, 2012.

16. On March 22, 2012, IDWR accepted a lease of water right 63-7270B into the Water Supply Bank. (Lawrence aff., Ex. H.) Pursuant to Idaho Code Section 42-1764(2), water rights are not subject to forfeiture while they are leased to the Water Supply Bank.

**V.
REQUEST FOR RELIEF**

17. Based on the foregoing, SRD respectfully requests that IDWR rescind Transfer No. 73927, involving Water Right No. 63-7270B. There are two independent justifications for such rescission. First, the transfer approved the use of water on land owned by the Tluceks, without their permission. Second, the Vander Woudes never “accomplished the change” authorized by the transfer approval pursuant to Condition of Approval Nos. 1 and 2.

18. Therefore, SRD respectfully requests that IDWR restore the non-ownership elements of Water Right No. 63-7270B as they existed prior to approval of Transfer No. 73927.

DATED this 18th day of April, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

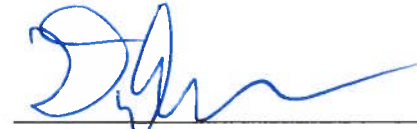
By 
Dylan B. Lawrence – Of the Firm
Attorneys for Petitioner Snake River
Dairies, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2012, I caused a true and correct copy of the foregoing **PETITION** to be served by the method indicated below, and addressed to the following:

There are no other parties of record to this matter at this time

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile



Dylan B. Lawrence