United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Idaho State Office
1387 South Vinnell Way
Boise, Idaho 83709-1657
https://www.blm.gov

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AUG 10 2023
DEPARTMENT OF WATER RESOURCES

In Reply Refer To:
7250 (933b)
Application Transfer No. 84061

August 10, 2023

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AUG 14 2023
Department of Water Resources
Eastern Region

James Cefalo, Regional Manager
Idaho Department of Water Resources
Eastern Regional Office
900 N. Skyline Drive, Suite A
Idaho Falls, Idaho 83704-1718

RE: Withdrawal of BLM Protest:
Application for Transfer No. 84061 f/b P4 Production, L.L.C.

Dear Mr. Cefalo:

By this letter, I state that I have the authority to act on behalf of the United States Department of the Interior, Bureau of Land Management (BLM), with myself as its agent, to the matters discussed herein.

On February 3, 2021, an Amended Application for Transfer No. 84061 ("Transfer") was filed by P4 Production, L.L.C. ("Applicant"). The Transfer involves water rights: 11-00448, 11-00457, 11-00471, 11-00499, and 11-02106. P4 Production, L.L.C. is leasing the above listed water rights to Last Chance Canal Company, Ltd., who is subleasing them to Farmers Land & Irrigation Company ("Farmers"); therefore, the Transfer seeks to change the Places of Use ("POU") to that of Farmers' water rights, and change the Points of Diversion ("POD") to the Soda Canal used by Farmers.

The BLM protested the application for two reasons: (1) the new POU description includes BLM land; and (2) the new means of conveyance (i.e., Soda Canal) crosses BLM land in several locations. The irrigation of BLM land is not authorized; therefore, the protest argues that federal land should be removed from the new Permissible Place of Use ("PPU") description under the irrigation purpose of use. Also, a Right-of-Way ("ROW") is required to access federal land for the purpose of conveying a new water use across federal land through an existing canal (i.e., Soda Canal) located on federal land.

This transfer application seeks to change the existing use and "establish" a new use of water with completely different PODs, POUs, and means of conveyance. Entitlement to a new quantity of water is not the issue in a transfer application, as the underlying water right has been determined. A transfer is about using an existing water right differently. A transfer seeks a change, so as to, use the existing water right differently. One who diverted water and put it to a beneficial use by

aid of trespass, did not, pursuant to such trespass, acquire a water right. *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931). This is a tenant that permeates every aspect of how water works in Idaho. It would conflict with the local public interest to allow a transfer that lacks legal access to the property necessary to operate the project proposed in the Transfer (i.e., to the new thing or change sought). During transfer application processing, IDWR should review evidence demonstrating legal access to the change sought in the Transfer, because the applicant cannot put water to beneficial use by aid of trespass, and because there is no process or follow-up procedures to determine if a transfer was accomplished within a year of approval. Persons may not file an application for a water right and then seek a place of use thereof. *Lemmon v. Hardy*, 95 Idaho 781, 519 P.2d at 1171. The change sought in a transfer application seeks to establish a new use from the existing water right, or use the existing water right in a new way. It seems to me that if a transfer applicant lacks legal access to the change (or new use) described in the transfer application, then the transfer is in vain (*ab initio*).

On April 20, 2021, Farmers agreed by email to recommend removal of POUs on federal land from the transfer. On May 24, 2021, the Applicant amended the Transfer to include additional water rights of theirs (i.e., 11-00449 and 11-00531C), and IDWR prepared a Draft Transfer Approval with a reduced POU description (i.e., removing federal land and other changes) and included Conditions 8-10 to potentially address BLM's ROW concerns.

In further consideration of the ROW issue, the parties wondered if the special nature of the water lease would necessarily trigger BLM's ROW requirements. The effect of the transfer has been described as not diverting additional water or additional rights through the Soda Canal, but rather making the existing rights held by Farmers more reliable. A condition could ensure that any diversion through the Soda Canal would be characterized as a diversion under existing water rights in the canal, rather than by diverting P4's rights through the canal. The non-diversion of P4 water rights to its historical POU (pursuant to the lease) allows Farmers' to divert more of its full entitlement of water under Farmers' own existing water rights (provided the lease arrangement doesn't expose P4's water rights to forfeiture).

On June 2, 2023, IDWR prepared another Draft Transfer Approval to memorialize settlement ideas to-date. The conditions dealing with BLM issues are as follows:

1. Reduce the POU description and shapefile to exclude BLM land;
2. Since one of the POU legal land descriptions included in the reduced POU is still a mixed ownership POU that contains both federal and non-federal lands (i.e., T08S, R40E, S35, NENE), a condition is included that states: "The place of use does not include federal land."
3. To eliminate the triggering of BLM ROW requirements, conditions are included to properly characterize the effect of the transfer as not diverting these water rights across BLM land but to allow Farmers' to fully divert their existing water rights in the Soda Canal:
    a. "This right does not grant any right-of-way or easement across the land of another."
    b. "The place of use for this right represents a subset of the service area for Farmers Land & Irrigation Company. This right will be used to augment the water supply for irrigated acres already covered by shares in the company."
    c. "Rights 11-448, 11-449, 11-457, 11-471, 11-499, 11-531C and 11-2106 ("P4 Rights") and rights 11-432 and 11-531A when combined shall not exceed a total diversion rate of 76.1 cfs and the irrigation of 4,000 acres. The diversion of the P4

Rights at the Farmer's Land & Irrigation Company Canal is pursuant to a lease of water rights and is intended to partially restore water delivery under right 11-531A when the flow in Soda Creek is insufficient to satisfy the full diversion rate of the right and shall be considered a delivery of water right 11-531A. To the extent the P4 Rights are diverted at the Farmer's Land & Irrigation Company Canal to improve the reliability of water right 11-531A, the P4 Rights shall not be subject to forfeiture."

After careful consideration, the June 2, 2023 Draft Transfer Approval satisfies BLM's protest issues pursuant to the reasons stated above; therefore, the draft transfer approval resolves BLM's protest. I hereby withdraw BLM's protest, provided there are no subsequent amendments made without notice to the BLM, and the BLM has the opportunity to protest subsequent amendments. This withdrawal does not create a precedent for settlement of any other future disputes.

The BLM's expectation in withdrawing its protest is that any Approved Transfer issued by IDWR will be based upon the application existing at the time of this protest withdrawal. The BLM requests that it receives notice of any subsequent amendments by the Applicant and of any Approved Transfer issued by IDWR.

If there are questions regarding any statements above, please do not hesitate to contact me at (208) 373-3831, or write to the address in our letterhead.

Sincerely,

Fredric W. Price
Water Rights Specialist

cc:
P4 Production, L.L.C., P.O. Box 816, Soda Springs, ID 83276
T. J. Budge, Racine Olson PLLC, P.O. Box 1391, Pocatello, ID 83204
Jerry Rigby, Rigby Andrus & Rigby Law, P.O. Box 250, Rexburg, ID 83440
Melissa Davis, BLM Pocatello Field Office, 4350 S. Cliffs Dr., Pocatello, ID 83204
Karen Kraus, BLM Pocatello Field Office, 4350 S. Cliffs Dr., Pocatello, ID 83204