

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 79676 IN THE NAME OF)	PRELIMINARY ORDER
<u>BIRCH CREEK CULINARY WATER CO.</u>)	APPROVING TRANSFER

On December 23, 2014, Birch Creek Culinary Water Company, Inc. ("BC Culinary") filed Application for Transfer No. 79676 with the Idaho Department of Water Resources ("Department"). The application was advertised to the public beginning on January 7, 2015. A protest was filed by Jeff Seamons.

A pre-hearing conference was conducted on March 13, 2015. The parties were unable to resolve the issues of protest during the conference and requested that a hearing be held to decide the contested case.

An administrative hearing was conducted on May 8, 2015 in Preston, Idaho. Greg Belew, president of BC Culinary, represented the company at the hearing. Jeff Seamons represented himself. After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Transfer 79676 proposes to make four changes to a split portion of water right 13-911: (1) change the nature of use from irrigation to municipal use, (2) change the season of use to be January 1 to December 31, (3) rearrange the place of use to match the current service area of BC Culinary, and (4) update the ownership records to list BC Culinary as the current owner.

2. Water right 13-911 was described in a 1920 decree for the Bear River basin. See *Final Decree, Utah Power & Light Co. v. Last Chance Canal Co., July 14, 1920* ("1920 Decree"). Entry No. 477 of the 1920 Decree identified a water right with the following elements:

Priority Date: May 2, 1882

Owner: Birch Creek Irrigation Company ("BC Irrigation")

Point of Diversion: "[N]ear the east quarter corner of Section 8 [T14S, R41E]"

Place of Use: 484 acres in Sections 7 and 8, T14S, R41E and Sections 12 and 13, T14S, R40E.

Diversion Rate:	9.64 cfs	April 20 – July 25
	6.43 cfs	July 25 – September 1
	4.84 cfs	September 1 – September 30

3. Entry No. 477 in the 1920 Decree was originally assigned water right number 11-851. As a result of a change in regional administrative basin designations (from Basin 11 to Basin 13), water right 11-851 was renumbered as water right 13-911.

4. In 1917, BC Irrigation was comprised of about 3,000 shares held by about 22 shareholders. See Articles of Incorporation (dated August 10, 1917), Attachment to Application 79676. The present number of shares and shareholders in BC Irrigation is not part of the record.

5. The 1920 Decree also describes a water right diverted from Mink Creek and held by Mink Creek Irrigation Company ("MCI"). See Entry No. 462 in the 1920 Decree. The MCI water right (currently identified as water right 13-894) bears a priority date of May 1, 1882 and authorizes the diversion of 10.50 cfs from Mink Creek and the irrigation of 525 acres.

6. The Village of Mink Creek is located in Franklin County near the area where Birch Creek flows into Mink Creek. Birch Creek is tributary to Mink Creek which is tributary to the Bear River.

7. As part of its application, BC Culinary provided a copy of a contract executed on March 5, 1920 ("Contract"). Ex. 2 (Instrument No. 12912, recorded with Franklin County on March 29, 1920). The Contract describes a pair of water right conveyances which would allow the Village of Mink Creek to develop a drinking water system from Birch Creek. "Birch Creek" is incorrectly identified as "Bird Creek" throughout the Contract. For purposes of this order, it is assumed that the Contract intended to refer to "Birch Creek."

8. The Contract stated that BC Irrigation was comprised of about 30 shares. Ex. 2, page 2. This differs from the 1917 Articles of Incorporation for BC Irrigation by a factor of 100. For purposes of this order, it is assumed that the 30 shares described in the Contract and the 3,000 shares described in the BC Irrigation Articles of Incorporation represent the same entitlement to water.

9. The Contract states that BC Irrigation agrees to convey "two shares of its water to the said Village of Mink Creek, or sufficient water to fill a three inch pipe, under a [p]ressure equal to a [f]all of 100 feet in a distance of 4,200 feet." Ex. 2, page 2 (emphasis added). The Contract does not provide any other language (such as "whichever is more" or "whichever is less") for determining which of these two options should be employed to calculate the extent of the conveyance.

10. The Contract describes transferring 2 out of 30 shares in BC Irrigation to the Village of Mink Creek. Even though BC Irrigation may have actually been comprised of 3,000 shares at the time of the Contract, it is not reasonable to argue that the Contract is limited to 2 shares out of 3,000. This would only equate to 0.0064 cfs (2.9 gallons per minute or 4,200 gallons per day), which is not a sufficient water supply for a community water system.

11. For purposes of this order, water right 13-911 will be divided according to the plain language of the Contract, conveying 2 shares out of 30 shares (or 6.67%) of water right 13-911 from BC Irrigation to the Village of Mink Creek. 6.67% of water right 13-911 equates to 32.2 acres, 0.64 cfs (from April 20 to July 25), 0.43 cfs (from July 25 to September 1), and 0.32 cfs (from September 1 to September 30).

12. The Contract also states that 12 shareholders in MCI would convey a combined total of 4 MCI shares to BC Irrigation to replace the amount of Birch Creek water being committed to culinary use under the Contract. Ex. 2, page 2. The 4 shares of MCI water would be delivered into the BC Irrigation system. *Id.*

13. The Contract was signed by directors of BC Irrigation and MCI. The Contract was contingent on the Village of Mink Creek acquiring funding to install the water system. Ex. 2, page 2. The community water system appears to have been funded and installed as contemplated in the Contract and is now owned and operated by BC Culinary.

14. There are no documents in the record showing a formal conveyance of shares from BC Irrigation to the Village of Mink Creek or from MCI to BC Irrigation. Glade Larsen, a director for BC Culinary and shareholder in BC Irrigation, testified that BC Irrigation is currently a shareholder in MCI, suggesting that the conveyance of shares from MCI to BC Irrigation, as described in the Contract, was accomplished.

15. BC Culinary has been in existence since at least 1994 and is the successor in interest to the Village of Mink Creek. See Ex. 8, page 1. "The first and foremost purpose for [the BC Culinary] system is for furnishing culinary water to the dwellings." *Id.* at page 4.

16. Currently, there are 31 connections to the BC Culinary System. Belew Testimony. Some of the connections are considered "half" connections and are only used for stockwater. *Id.* Each of the homes connected to the BC Culinary system has a separate septic system. *Id.*

17. Assuming in-house culinary use and ½ acre of irrigation occurs at 31 connections, the peak demand on the BC Culinary system would be approximately 0.60 cfs. See Ex. 3. No evidence was presented about the existing annual volume demand of the BC Culinary system.

18. BC Culinary diverts water from a spring tributary to Birch Creek in the NENW of Section 8, T14S, R41E. See Map attached to Application 79676. The spring is located right next to the Birch Creek channel. *Id.* The uppermost headgate on Birch Creek for BC Irrigation is located about 150 yards downstream of the spring. Belew Testimony.

19. Water at the spring is collected in a concrete spring box and then conveyed through a 4-inch pipe to an 18,000-19,000 gallon storage tank. Belew Testimony. Some users divert water out of the pipeline upstream of the storage tank. *Id.* A pipeline runs from the storage tank to supply water to the other water users on the system. *Id.* Overflow from the storage tank flows into the MCI system, but can be routed back to the BC Irrigation system through a ditch known locally as the "transfer ditch." *Id.*

20. During the summer months, there is very little overflow from the BC Culinary storage tank. Larsen Testimony. In its current configuration, the BC Culinary system has the capacity to convey approximately 120 gallons per minute (0.27 cfs). Seamons Testimony.

21. BC Irrigation is a shareholder in MCI. Larsen Testimony. MCI water (diverted from Mink Creek) is delivered to BC Irrigation through the transfer ditch. *Id.*

22. Water users in BC Irrigation raise alfalfa and generally harvest two cuttings during the year. Belew Testimony. According to data from the University of Idaho, alfalfa with less frequent cuttings consumes 2.175 acre-feet of water per acre over the course of the growing season. See Ex. IDWR1.

ANALYSIS / CONCLUSIONS OF LAW

1. Idaho Code § 42-222 sets forth the criteria used to evaluate transfer applications:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

2. The applicant bears the burden of proof for all of the factors listed in Section 42-222.

Validity of Water Right

3. Water right 13-911 is a valid water right. Arguments raised by Protestant Jeff Seamons suggest that he believes that a portion of the water right proposed to be transferred to BC Culinary may have been forfeited for non-use.

4. The Contract describes the transfer of 2/30ths of the BC Irrigation water right (or 0.64 cfs) from BC Irrigation to the Village of Mink Creek. However, the evidence in the record indicates that the current system and previous configurations of the system have only had the capacity to convey approximately 120 gallons per minute (0.27 cfs).

5. The conversion of irrigation water to municipal water, as contemplated in the Contract, was not formalized until the present application for transfer was filed. Even though the Village of Mink Creek (now BC Culinary) has owned a portion of water right 13-911 since 1920, it has continued to exist as an irrigation right from 1920 to the present day. There is no evidence that water right 13-911 has not been fully utilized for irrigation and culinary use since 1920. Therefore, none of the portion of water right 13-911 involved in the pending transfer application has been lost to forfeiture.

Injury to Other Water Rights

6. There is no evidence in the record that the proposed transfer will result in injury to any existing water rights. The spring used by BC Culinary to supply water to its patrons is directly tributary to Birch Creek immediately upstream of the BC Irrigation headgate. BC Culinary's portion of water right 13-911 will continue to be diverted in the same general location as the original irrigation right. There are no other existing water right points of diversion between the BC Culinary Spring and the uppermost diversion for BC Irrigation.

7. The BC Culinary portion of water right 13-911 and the BC Irrigation portion of water right 13-911 share the same priority date. In times of scarcity, the water rights must be reduced proportionately. In other words, approval of the proposed transfer does not insulate BC Culinary from reduction or curtailment if flows in Birch Creek drop below levels needed to supply water to May 2, 1882 water rights. The local watermaster has the authority to deliver or curtail BC Culinary's water right according to the prior appropriation doctrine.

Enlargement of Water Rights

8. Water right 13-911 is currently limited to a season of use of April 20 – September 30. Extending the season of use to include the non-irrigation season (October 1 – April 19) creates water demand on Birch Creek, Mink Creek and the Bear River that never existed prior to the Contract. BC Culinary is not proposing to reduce its summertime use to offset or mitigate for the expanded season of use. Reducing use during the irrigation season would not lead to any additional water in Birch Creek during the non-irrigation season. Expanding the season of use as proposed in the transfer application constitutes an enlargement of the water right and cannot be approved.

9. BC Culinary likely has a separate, unrecorded beneficial-use water right for the diversion occurring during the non-irrigation season. This water right could be claimed and defined in a future general adjudication of water rights.

10. Water right 13-911 includes a stepped-down (or graduated) diversion rate. A higher diversion rate is authorized at the beginning of the irrigation season than is authorized at the end of the irrigation season. In order to prevent enlargement, the same stepped-down diversion rate must be applied to BC Culinary's portion of water right 13-911.

11. Pursuant to Idaho Code § 42-222(1), the director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

12. "Consumptive Use" is defined as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state." Idaho Code §42-202B(1).

13. To prevent enlargement, when a transfer application proposes to change the nature of use of a water right, the Department may limit the proposed water right to the historic consumptive use of the original right. In this case, BC Culinary proposes to change the nature of use of a portion of water right 13-911 from "irrigation" to "municipal" use. In order to prevent enlargement of the water right, the municipal use must be limited to the historic consumptive use occurring under water right 13-911.

14. Assuming water users in BC Irrigation grow alfalfa with less frequent cuttings, the annual precipitation deficit (or, the amount of water applied through irrigation and consumed by plants) would be 70.3 acre-feet (32.3 acres x 2.175 acre-feet per acre). Ex. IDWR 1 (ET Idaho data for Preston, Idaho).

15. If the season of use and stepped-down diversion rate as listed on existing water right 13-911 is preserved in the split portion of the right transferred to BC Culinary and the annual diversion volume of the split portion is limited to 70.3 acre-feet, then the proposed transfer can be approved without enlargement of the original water right.

Conservation of Water Resources

16. There is no evidence in the record that the proposed water use would be inconsistent with the conservation of water resources in the state of Idaho.

Local Public Interest

17. The local public interest analysis under Section 42-222 is meant to be separate and distinct from the injury analysis. Local public interest is defined as "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." (Idaho Code § 42-202B(3))

18. Approving the proposed transfer updates water right 13-911 to reflect a water right agreement executed nearly 100 years ago. Approving the proposed transfer should reduce the likelihood of future disputes between BC Culinary and BC Irrigation over use of water from the spring tributary to Birch Creek. There is no evidence in the record that the changes proposed in Application 79676 are not in the local public interest.

Summary

19. If the transferred portion of water right 13-911 is limited as described above, BC Culinary has met its burden of proof under Idaho Code § 42-222 and Transfer 79676 should be approved.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79676 in the name of Birch Creek Culinary Water Company, Inc. is APPROVED as described in Transfer Approval 79676 issued in conjunction with this order.

Dated this 19th day of June, 2015.



James Cefalo
Water Resources Program Manager

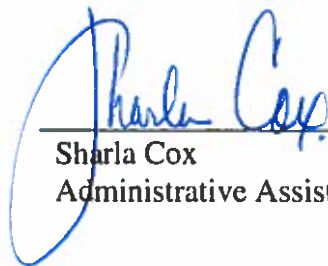
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June 2015, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, certified with return receipt requested, to the following:

Document Served: Preliminary Order Approving Transfer (79676)

Birch Creek Culinary Water Co.
6647 East Birch Creek Road
Preston, ID 83263

Jeff Seamons
7124 East Birch Creek Road
Preston, ID 83263



Sharla Cox
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.