



201 E. Center St.
P.O. Box 1391
Pocatello, ID 83204
O 208.232.6101
F 208.232.6109
racinelaw.net

Thomas J. Budge
tjb@racinelaw.net

February 25, 2015

Greg Belew
Bryce Stromberg
Glade Larsen
Birch Creek Culinary Water Company
6647 East Birch Creek Road
Preston, Idaho 83263

Re: Application for Transfer No. 79676

Gentlemen,

This letter follows up on our meeting at my office on February 20th concerning the protest filed by Jeff Seamons against Birch Creek Culinary Water Company's water right transfer no. 79676. The protest asserts that 0.64 cfs is an excessive amount to transfer based on Mr. Seamons' understanding that less water has historically been diverted by the Company. As explained below, the Company is not required to limit the amount it transfers based on the amount it has diverted in the past.

Initially I should note that the difference between the amount of water proposed by the transfer (0.64 cfs) and the amount proposed by Mr. Seamons (120 gpm or 0.27 cfs) is only 0.37 cfs—a relatively small amount of water in most estimations. I recognize, however, this is a significant in terms of the Company's ability to provide its members with an adequate and reliable supply of water.

Enclosed with this letter is a chart used by the Idaho Department of Water Resources to calculate the amount of water that may be used in multi-connection residential water systems. The calculation is made by adding the amount of water for in-house use shown on the chart, plus 0.01 cfs per connection for irrigation.

I understand the Company has 31 connections. Under the chart, approximately 0.26 cfs is allowed for in-house use. An additional 0.31 cfs can be added for irrigation, bringing the total to 0.57 cfs.

While the Company may not have diverted this much water in the past, I understand some members of the Company run out of water at times, and that you anticipate making improvements to the water system to improve water service to your members. The 0.64 cfs you seek to transfer will allow you to make such improvements and may enable the Company to add hookups in the future.



We also discussed whether Mr. Seamons' protest creates a risk of forfeiture of the Company's water right to the extent the Company has not diverted 0.64 cfs in the past. While there is arguably some risk, there is a strong argument against it.

First, courts are very reluctant to find forfeiture of water rights. Forfeiture is disfavored under Idaho law, and the person claiming forfeiture must prove it by a high standard of clear and convincing evidence.

Second, there are a number of defenses to forfeiture, one of which is particularly relevant to your Company. Idaho Code section 42-223(7) states:

No portion of a water right held by . . . any [] company, corporation, association, or entity which holds water rights for distribution to its landowners, shareholders or members shall be lost or forfeited due to nonuse by such landowners, shareholders or members, unless the nonuse is subject to the control of such entity.

Your Company does not presently own an independent water right; rather, the documents you provided show it acquired shares in Birch Creek Irrigation Company which owns water right number 13-911. I understand any water not diverted into the Company's culinary pipe simply flows downstream to the irrigation ditch where it can be used by other Birch Creek Irrigation stockholders. Accordingly, under Idaho Code section 42-223(7), no part of water right number 13-911 has been forfeited as a result of non-use of water by your Company or any other stockholder of Birch Creek Irrigation Company.

Third, should Mr. Seamons press forward with a forfeiture argument it would hurt Birch Creek Irrigation Company as well as your Company because it would cause a portion of Birch Creek Irrigation Company's water right number 13-911 to be lost. In other words, forfeiture of a portion of the Company's water would come out of the Birch Creek Irrigation Company water right.

For these reasons, it is in the interest of both companies to allow your transfer to go forward without making forfeiture arguments.

Be aware that once your transfer is approved your Company will independently own a water right for municipal purposes and may no longer be protected from forfeiture by Idaho Code section 42-223(7). You will have five years from the date of the transfer to utilize the full amount of the transferred water or take action to ensure any unused portion of the Company's water right is not forfeited. If this becomes a concern please contact me well in advance of the five year anniversary of the transfer to discuss the options available to the Company to avoid forfeiture.

I trust this information will be helpful to you in resolving Mr. Seamons' protest. Should you have any questions, please feel free to give me a call. Otherwise, I

February 25, 2015
Page 3 of 3

understand you will work with Mr. Seamons directly to resolve his protest and complete your transfer.

Sincerely,

A handwritten signature in black ink, appearing to be "T.J. Budge", with a stylized flourish at the end.

T. J. BUDGE