

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

**IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 79876 IN THE NAME OF)
BNH PROPERTIES LLC)**

**PRELIMINARY ORDER
APPROVING TRANSFER**

PROCEDURAL HISTORY

On February 26, 2015, BNH Properties LLC ("BNH") filed Application for Transfer No. 79876 with the Idaho Department of Water Resources ("Department"). BNH filed an amended application in July 2015. The Department published notice of the application on August 6 and 13, 2015. A timely protest was filed by Water District 74J (Withington Creek).

A pre-hearing conference was conducted on November 19, 2015. The parties requested that an administrative hearing be held to decide the contested matter. The Department conducted an administrative hearing on March 8, 2016, in Salmon, Idaho. BNH was represented by Brett Herbst, a member of the company. Water District 74J was represented by Jack Jakovac, chairman of the district. Rick Sager, watermaster for Water District 74 (Lemhi River), and Robert Jensen, watermaster for Water District 74J (Withington Creek), were also present at the hearing. After carefully considering the evidence in the administrative record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application 79876 proposes to change the places of use for water rights 74-2165B (Lemhi River), 74-15708 (Lemhi River) and 74-15672 (Withington Creek). Currently, water right 74-2165B describes an 89-acre place of use. Water right 74-15708 describes a completely separate 231.5-acre place of use. The 76.3-acre place of use for water right 74-15672 is fully overlapped by the place of use for water right 74-15708.

2. Application 79876 proposes to create a 319.6-acre combined place of use for all three water rights. Application 79876 designated a specific 76.3-acre area within the 319.6-acre combined place of use for irrigation under water right 74-15672.

3. The application also proposes to list two points of diversion on the Lemhi River rights. Currently, water right 74-2165B identifies the L-22 Ditch, located in the SENW of Section 25, T20N, R23E, as the only authorized point of diversion. Water right 74-15708 identifies the L-13 Ditch, located in the SENW of Section 3, T20N, R23E, as the only authorized point of diversion.

4. Application 79876 proposes to list the L-13 Ditch and the L-22 Ditch as authorized points of diversion for both Lemhi River water rights.

SUPPORT DATA

5. The places of use under water rights 74-2165B and 74-15708 were irrigated with water from the L-22 Ditch from the early 1900s to the mid-1970s. Ex. A1. In order to bring water to the property from the L-22 Ditch, one of BNH's predecessors in interest obtained a ditch easement from a neighboring property owner. *Id.*

6. In 1974, another of BNH's predecessors in interest conveyed the ditch easement back to the neighboring property, thereby relinquishing the legal access needed to transport water from the L-22 Ditch to the BNH property. Ex. A1; Testimony of Brett Herbst. The places of use under water rights 74-2165B and 74-15708 have been irrigated out of the L-13 Ditch since 1974. *Id.* BNH does not intend to convey its water rights through the L-22 Ditch in the immediate future. *Id.*

7. The neighboring property is currently owned by Jack Jakovac. At the present time, the L-22 Ditch terminates at the Jakovac property. BNH does not have an easement to cross the Jakovac property with a ditch to connect the proposed place of use to the L-22 Ditch. Rick Sager, watermaster for Water District 74 (Lemhi River), prefers to have BNH's Lemhi River water rights moved out of the L-22 Ditch because water cannot currently be delivered to the place of use through the L-22 Ditch. Testimony of Rick Sager.

8. A partial decree for water right 74-2165B was issued in the Snake River Basin Adjudication ("SRBA") on September 19, 2007. Partial decrees for water rights 74-15672 and 74-15708 were issued in the SRBA on November 6, 2007.

9. Lemhi River water rights 74-2165B and 74-15708 have been diverted through the L-13 Ditch and used for irrigation purposes every year since 2007. At least 319.6 acres were irrigated on the BNH property under water rights 74-2165B and 74-15708 in 2009, 2011 and 2013. Testimony of Bob Loucks; Testimony of Steve Herbst; Testimony of Jack Jakovac.

10. Since 2007, the places of use under water rights 74-2165B and 74-15708 have been planted in grain and grass hay. Testimony of Steve Herbst. Water demand for grain and grass hay diminishes significantly by mid-summer. *Id.* Water rights 74-2165B and 74-15708 are deliverable through mid-summer in most years. Testimony of Rick Sager. Water right 74-2165B, which bears a 1913 priority date, is curtailed less than 2% of the time during the irrigation season. *Id.*

11. Water right 74-15672 from Withington Creek was not diverted at all between 2008 and 2014. Ex. P1. Some water was diverted from Withington Creek under water right 74-15672 in October 2015. After it was decreed in November 2007, water right 74-15672 was not diverted for a period of seven years (2008-2014). *Id.*

EVALUATION CRITERIA / ANALYSIS

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 criteria listed in Section 42-222.

Forfeiture of Water Right 74-15672 (Withington Creek)

3. For every water right included in a transfer application, the Department must verify that the portion of the water right being changed has not been forfeited. *See Jenkins v. State, Dep't of Water Res.*, 103 Idaho 384, 387, 647 P.2d 1256, 1259 (1982). Forfeiture must be established by clear and convincing evidence. *Id.* at 389. 647 P.2d at 1261.

4. Idaho Code § 42-223 sets forth a number of statutory defenses to forfeiture. The beginning paragraph for Section 42-223 states:

. . . The legislature does not intend through enactment of this section to diminish or impair any statutory or common law exception or defense to forfeiture existing on the date of enactment or amendment of this section, or to preclude judicial or administrative recognition of other exceptions or defenses to forfeiture recognized in Idaho case law or other provisions of the Idaho Code. No provision of this section shall be construed to imply that the legislature does not recognize the existence or validity of any common law exception or defense to forfeiture existing on the date of enactment or amendment of this section.

5. In the past, the Department has recognized an “alternative source” defense to forfeiture: that a water right is not lost or forfeited for non-use if the right holder is able to accomplish the full beneficial use contemplated under the right through the diversion of other water rights from a different source. *See IDWR Claims Investigation Manual*, Ch. 11, Section VI (1/21/1999) (“Supplemental rights are generally not subject to forfeiture.”). An irrigation water right will not be forfeited, for example, if the water user is able to irrigate the subject property from another source under separate but overlapping water rights.

6. This alternative source defense to forfeiture is closely related to two of the statutory defenses to forfeiture listed in Idaho Code § 42-223. Section 42-223(3) states:

A water right shall not be lost or forfeited by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes

including, but not limited to, discharge from dairy lagoons used in combination with or substituted for water diverted under the water right.

7. Just as a water right holder does not risk forfeiture of a water right on a parcel that continues to be irrigated by land application of waste water, a water user with irrigation water rights from two sources on the same property should not risk forfeiture of the first source by irrigating exclusively from the second source, as long as the second source constitutes a reliable water supply that can satisfy the full irrigation beneficial use on the property.

8. Idaho Code § 42-223(9) states:

No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from a water conservation practice, which maintains the full beneficial use authorized by the water right, as defined in section 42-250, Idaho Code.

9. Just as a water right holder does not risk forfeiture of his unused diversion rate for irrigating with sprinklers or drip lines instead of flood irrigation, a water user with irrigation rights from two sources should not risk forfeiture of the first source if he is able to divert sufficient water from the second source to accomplish the full irrigation beneficial use.

10. Failure to recognize the alternative source defense to forfeiture described above would lead to undesirable results. It would force a water user with irrigation water rights from two different sources on a single parcel to divert continuously from both sources whether the water was actually needed for irrigation or not. This would be in direct opposition to conservation of water resources in the state (Idaho Code § 42-222(1)) and the prohibition against waste (*Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 880, 154 P.3d 433, 451 (2007)).

11. In this case, the protestants argue that water right 74-15672 from Withington Creek has been lost and forfeited for non-use between 2008 and 2014. Idaho Courts have held that, "[o]nce a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of Idaho Code § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to a partial decree." *In Re SRBA*, Case No. 39576, *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase Nos. 36-02708, et al. (Fifth Jud. Dist Ct. 1999). Water right 74-15672 was pending in the SRBA until November 6, 2007, the date that a partial decree was issued for the right. Therefore, the time period for determining forfeiture began with the 2008 irrigation season.

12. In this case, both parties acknowledged that at least 319.6 acre had been irrigated with water from the Lemhi River regularly between 2008 and 2014. Steve Herbst testified that grain and grass hay was grown on the property throughout that time period. He also testified that grain and grass hay only require water through mid-summer. Rick Sager, watermaster for Water District 74 (Lemhi River), testified that the Lemhi River water rights associated with the property (74-2165B, 74-15708) are available through mid-summer in most years.

13. Evidence establishes that the Lemhi River water rights (74-2165B and 74-15708) constitute a reliable supply of water for irrigation of grain and grass hay and that the acres under

water right 74-15672 were irrigated regularly between 2008 and 2014 with overlapping Lemhi River water rights.

14. Water right 74-15672 has not been lost or forfeited for non-use. The alternative source defense to forfeiture described above prevents a finding of forfeiture in this case. Water right 74-15672 may be included in Application 79876.

Injury to Other Water Rights

15. Application 79876 proposes to rearrange the place of use for water right 74-15762, but does not propose any changes to the location of the point of diversion on Withington Creek. There is no evidence in the record that the changes proposed in Application 79876 will injure any water rights on Withington Creek or on the Lemhi River.

Enlargement of Water Rights

16. There is no evidence in the record suggesting that the proposed changes will result in an enlargement of any of the water rights included in the application. In order to prevent enlargement of its most senior water right, BNH has designated a specific 76.3-acre place of use for water right 74-15672. If the Lemhi River rights are ever curtailed, the water right holder will be limited to the 76.3 acres of irrigation described under Withington Creek water right 74-15672.

Conservation of Water Resources

17. 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.

Effect on the Local Economy

18. BNH is not proposing to move its proposed place of use outside of the local watershed. Therefore, this element of review under Idaho Code § 42-222 is not applicable to the pending contested case.

Local Public Interest

19. 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)).

20. In this case, BNH proposes to list the L-22 Ditch headgate as an authorized point of diversion on its Lemhi River water rights (74-2165B and 74-15708) even though it has no present intent to use the L-22 ditch to convey water and does not have the legal access necessary to convey water through the L-22 Ditch to its proposed place of use.

21. BNH did not provide any persuasive arguments for listing the L-22 Ditch as a point of diversion on its Lemhi River water rights. It is not in the local public interest to add points of

diversion to water rights when the water user has no present intent to use or develop the added points of diversion and lacks the legal access necessary to convey water through the points of diversion. *See Amended Preliminary Order Approving Transfer 79037*, pages 11-12 (Water Right 11-2102). The L-22 Ditch should not be included as an authorized point of diversion on Transfer Approval 79876.

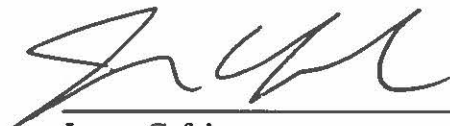
CONCLUSIONS OF LAW

BNH has satisfied its burden of proof for the review criteria set forth in Idaho Code § 42-222 and Transfer 79876 should be approved. However, as a result of local public interest concerns, the L-22 Ditch should not be listed as an authorized point of diversion on water right 74-2165B or 74-15708.

ORDER

IT IS HEREBY ORDERED that Application for Transfer No. 79876 in the name of BNH Properties LLC is APPROVED as described in Transfer Approval 79876 issued in conjunction with this order.

Dated this 4th day of April 2016.



James Cefalo
Water Resources Program Manager

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

I HEREBY CERTIFY that on this 4th day of April 2016, 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 (79876)
Transfer Approval 79876**

BNH Properties LLC
PO Box 367
Spanish Fork, UT 84660

Water District 74J
c/o Jack Jakovac
71 Red Rock Stage Road
Salmon, ID 83467

Courtesy copies sent via regular mail to:

Steve Herbst
74 Lemhi Road
Salmon, ID 83467

Rick Sager
985 Hwy 28
Salmon, ID 83467

Robert Jensen
184 Withington Creek Road
Salmon, ID 83467

Bob Loucks
260 Withington Creek Road
Salmon, ID 83467



Judea Jones

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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.