



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

April 6, 2009

Robert L. Harris
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405

RE: SRBA Subcase No. 22-13245, 22-13246, 22-13626, 22-13636, 22-13637, 22-13639, and 22-12018 (Idaho Holdings, LLC et al.)

Dear Rob:

I recently met with the Idaho Department of Water Resources (IDWR) to discuss your clients' request that IDWR recognize an accomplished transfer in the point of diversion for the above referenced water right claims. Here are the facts as I understand them: These are beneficial use claims from Teton Creek for irrigation purposes. Teton Creek is a braided stream and the headgate for these rights is located on the west channel of Teton Creek in NWNE of Section 36, Township 5N, Range 45E. The water master historically measured and ensured delivery of these water rights at the headgate described above. Mr. Leon Westin provided an affidavit to IDWR that recognizes that the historical point of diversion is the NWNE of Section 36. However, Mr. Weston explains that sometime in the early 1980s, a developer altered the Teton Creek stream channel. The alteration changed the creek such that less water went into the west channel and more water went into the other channels. As a result, Mr. Westin's father and uncle pushed gravel and other debris into Teton Creek so that more water would move into the west channel. Mr. Westin's father and uncle did this "on a number of occasions" and did this prior to November 19, 1987. This was done in the SW1/4SE1/4 of Section 25, Township 5N, Range 45E. Your clients would like the point of diversion for these rights to now be described as the SW1/4SE1/4 of Section 25, Township 5N, Range 45E.

I have discussed this matter with a number of representatives of IDWR. IDWR is sympathetic to your clients' situation, as your clients are not the ones that originally changed the hydrology of Teton Creek. However, IDWR cannot agree that there has been an accomplish transfer of the point of diversion for these water rights. First, the historical record shows that the point of diversion (where the water is measured and delivered) continues to be located at the NWNE of Section 36. Dee O'Brien was a deputy water master for Water District 01 from 1978 to 2000. Mr. O'Brien provided a letter to IDWR explaining that he delivered water from Teton Creek through the diversion near the "Y" intersection just east of Driggs (this corresponds with the recommended point of diversion). A copy of the letter is attached. IDWR has talked with the current water master and the assistant water master. They said that they measure and deliver these water rights at the headgate at the NWNE of Section 36. Even assuming that Mr. Westin's father and uncle did push gravel and other debris into the Teton Creek on occasion, IDWR does not view these acts as transferring the point of diversion for these water rights. The point of measurement and delivery has always been and continues to be at the NWNE of Section 36.

Moreover, IDWR faced a similar factual situation in Basin 65. In Basin 65, water users along Seven Mile Slough often pushed dirt and other debris into the stream channel to funnel more water towards their headgates. In its SRBA recommendations in Basin 65, IDWR recommended the point of diversion where the headgate is located, not where the water users push dirt and debris into the river to funnel water towards their headgates. The placement of dirt and debris in the river in this manner is analogous to the many splitting structures located in rivers through out the state. These structures do not function as points of diversion for water rights, but instead redirect water in one direction or another within a natural stream. IDWR does not consider river splitting structures as points of diversion for water rights. To do so in this case would be a departure from IDWR policy.

Finally, the request also raises stream channel protection concerns. IDWR is not inclined to support a change to the point of diversion that could lead to arguments that the west channel is not a natural channel of Teton Creek but an unregulated ditch. Moving the point of diversion to the suggested location could undermine the status of the west channel of Teton Creek as a natural stream channel.

If your clients believe they need to put a splitting structure in Teton Creek to ensure they get adequate water, IDWR encourages your clients visit with Mr. Tom Bassista of IDWR's Eastern Regional Office. Mr. Bassista is a stream channel protection specialist for IDWR and would be able to help your clients start the process for getting a permit to install a splitting structure. Mr. Bassista is familiar with the process and can help them navigate their way through it. While IDWR cannot guarantee that the permit would be approved, IDWR sees the permit as the best way to accomplish their goal of moving more water down the west channel.

If you should have any questions or comments, please don't hesitate to contact me at 287-4811.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Baxter', written over the printed name.

Garrick L. Baxter
Deputy Attorney General, IDWR

Attachment

cc: Michael Holliday
Don Shaff
Ernie Carlsen

Dear Sirs:

I am writing this letter to address some issues regarding water rights and delivery of water to Jay Dell Butler, James Price and others from Buffalo Springs, Crandall Springs and unnamed springs. These claimants name Teton Creek as the source for their claims, which seem to be the issue.

I served as deputy watermaster for water district 01 from 1978 to 2000. During that time I delivered water from Teton Creek through the diversion near the "Y" intersection just east of Driggs and from a diversion on Teton Creek just east of the Val Christensen home. This diversion is located approximately 1/3 of a mile downstream from the "Y" diversion. After these two diversions were opened it took approximately 10 days to two weeks for the sub water to come up and for the springs and streams that are used by Price and Butler to begin to flow.

These springs and the sub water continued to flow for the rest of the irrigation season even though Teton Creek was totally diverted above these two diversions on the Creek.

This was the common practice during the entire time that I was the watermaster.

Sincerely yours,

Dee O'Brien

SCANNED

JUN 06 2007