



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

March 31, 2008

Jeanette Wolfley  
202 N Arthur  
Pocatello, ID 83204

Re: Addition of Point Diversion for Tribal Water Right No. 29-231

Dear Jeanette:

The Idaho Department of Water Resources ("IDWR") received a letter from Else Teton with the Shoshone-Bannock Tribes ("Tribes") on September 4, 2007 regarding the addition of a point of diversion for Tribal Water Right 29-231. Through the letter, the Tribes sought to notify Mr. Steve Hebdon, Watermaster for Water District 29, that the Tribes were exercising their rights to add a point of diversion under the Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin ("Consent Decree"). Mr. Hebdon forwarded the letter to IDWR and IDWR forwarded the letter to me and asked that I provide a response.

I have had the opportunity to review the Consent Decree along with the letter. It is my understanding from our previous discussion that the new point of diversion is off the reservation. The question raised by the letter is whether the Tribes may add an off reservation point of diversion on Toponce Creek through the notice procedure set out in Section II.C.13 of the Consent Decree. Section II.C.13 of the Consent Decree provides, in relevant part:

The Tribes or the United States shall prepare a written Notice of Use of a Tribal water right whenever the Tribes or the United States intend to (1) transfer or lease within the Reservation the right to an existing use, (2) put to use within the Reservation any portion of the Tribal water right which is not in present use, or (3) undertake a combination of (1) and (2).

First, it is unclear that this section applies to an addition of a point of diversion. Section II.C.13 only applies when the Tribes intend to "transfer...the right to an existing use." However, assuming for the purposes of this letter that the addition of a point of diversion qualifies as a transfer of a right to an existing use, Section II.C.13's notice procedures would not be available to add a point of diversion off the reservation. The

Consent Decree says that the Tribes can use Section II.C.13's notice procedure to "[t]ransfer or lease within the Reservation the right to an existing use, ... ." (emphasis added). If the transfer is not within the reservation, Section II.C.13 cannot apply. I have reviewed the Consent Decree and have found no other provisions related to the addition of a point of diversion. Please let me know if you know of another section that might be applicable.

In the absence of a negotiated process for the addition of a point of diversion, Idaho's statutory transfer procedures apply to changes in water rights. Tribal Water Right 29-231 is a federal reserve water right decreed by the Snake River Basin Adjudication district court. Once a federal reserved water right is quantified, any change in use or point of diversion is subject to administration by the state. *See United States v. Denver*, 656 P.2d 1, 35 (Colo. 1982). Idaho Code § 42-222 provides:

Any person, entitled to the use of water whether represented by license issued by the department of water resources, ... or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

Thus, if the Tribes seek to add a point of diversion off the reservation, the Tribes must file a transfer application with IDWR pursuant to Idaho Code § 42-222.

Please let me know if you have any questions regarding this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Baxter'.

Garrick Baxter  
Deputy Attorney General  
Idaho Department of Water Resources

cc: ~~Tim Luke, IDWR~~