



Alison K. Toivola
Partner
(541) 318-9836
alison.toivola@bbklaw.com

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VIA E-MAIL ONLY:

JEREMY.T.GIFFIN@WATER.OREGON.GOV
ANN.L.REECE@WATER.OREGON.GOV
SARAH.A.HENDERSON@WATER.OREGON.GOV

Jeremy Giffin
Watermaster - District 11
Oregon Water Resources Department
231 SW Scalehouse Loop, Suite 103
Bend, OR 97702

Ann Reece
Sarah A. Henderson
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: City of Bend Water Rights Transfer Applications

Dear Mr. Giffin, Ms. Reece, and Ms. Henderson:

We represent the Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”). We write to provide the Department of Water Resources (“Department”) with an update on the City of Bend’s (“City”) pending water rights transfer applications, T-13811 and T-14541, which are attached hereto as **Appendix A** (“Applications”).

As you know, the Tribe, the State of Oregon, and the United States are all parties to the Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement, dated November 17, 1997, as amended (“Settlement Agreement”). The Settlement Agreement requires the three sovereign parties “to meet and describe in the memorandum of understanding the process for determining injury to the Tribal Reserved Water Right.” Agmt. at Art. IX, § A. The ability to determine such an injury is a prerequisite to administering water rights transfers¹ in the Deschutes Basin, as “[n]o transfer of a State water right in the Deschutes Basin shall be made *unless the State finds that no injury to the Tribal Reserved Water Right shall result.*” Agmt. at Art. V, § (B) (emphasis added). The Tribe emphasizes that the contractual obligation to make a finding of no injury resides with the State, not the Tribe.

The parties to the Settlement Agreement have not yet developed the process for determining injury to the Tribal Reserved Water Right. In the absence of the injury determination process required by the Settlement Agreement, the Tribe reviewed numerous water rights transfer applications in 2024. During this process, the Tribe expended substantial resources to review certain information concerning water rights

¹ A “Transfer” means any change in the nature of use, place of use, or point of diversion of a water right.” Agmt. at Art. III, § 25.

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transfer applications in the Deschutes Basin. The Tribe's review of the 2024 applications was both time- and resource-intensive. It was also informative.

The Tribe has preliminarily identified that the City's Applications may present two different potential risks of injury to the Tribe's water rights. First, the Tribe has identified the Applications' potential for localized impacts to Tumalo Creek. Second, the Tribe has identified the Applications' potential impact to regional groundwater that is ultimately connected to surface flows on the Crooked River, which could thereby decrease flows in the Crooked. To be clear, the Tribe holds undetermined vested water rights to these two surface water bodies pursuant to the Treaty of June 25, 1855, with the Tribes of Middle Oregon, 12 Stat. 963 ("1855 Treaty") and the Settlement Agreement.

The Tribe is continuing to work closely with the City to better understand, and resolve, these two potential risks of injury. The Tribe remains hopeful that it can achieve a satisfactory resolution directly with the City to protect the Tribe's water rights. Accordingly, at this time, and while the Tribe and the City continue their ongoing collaboration efforts, the Tribe does not object to the Department processing the Applications in accordance with applicable law, and the Department's customary practice.

The Tribe expressly reserves, and does not waive, all rights, claims, and defenses that it may possess in connection with the Applications, including, but not limited to, whether the Applications violate the 1855 Treaty or the Settlement Agreement. To be clear, this letter, does not remove or absolve the State of Oregon from fulfilling its obligations under the 1855 Treaty and the Settlement Agreement. It is the Tribe's position that the Settlement Agreement requires that the Department affirmatively confirm that each and every water rights transfer application will not injure the Tribal Reserved Water Right or any undetermined vested water right claimed by the Tribe or the United States acting as trustee for the Tribe, including, but not limited to, instream flows necessary to maintain harvestable populations of treaty-protected fish in the Deschutes Basin. This letter is not a replacement for that affirmative obligation and finding.

We would be happy to meet with the Department to discuss any questions.

Sincerely,



Alison K. Toivola
of BEST BEST & KRIEGER LLP

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cc: Robert A. Brunoe
Austin Smith, Jr.
Brad Houslet
Josh Newton, Esq.
Mike Buettner
Lori Faha