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PRIVILEGED AND CONFIDENTIAL

June 21, 2006

John Etchepare
Director, Wyoming Department of Agriculture
2219 Carey Ave.
Cheyenne, WY 82002

Re: Request for opinion regarding ownership and liability of co-produced water

Dear Director Etchepare,

You have asked the following question on behalf of the Little Snake River Conservation District (the Conservation District):

The Conservation District is seeking clarification on permits or rights of ownership to use water for beneficial use. If an Oil and Gas company filed on water for the production of natural gas/coal bed methane and once the gas is produced and the water is discharged to the surface for the purpose of their permit of ownership of the water for the expressed purpose of gas production the beneficial use has been met.

*QUESTION: If upon discharge to the surface, **another entity** then filed on that water for permit of ownership for other beneficial uses unrelated to gas production:*

- 1. Which entity would be liable for any damage associated with the use of the water once the third party files on it?*
- 2. Is there **any liability** for the company that initially produced the water if the State issues permits for other uses to a different entity?*

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I have revised these questions slightly because these questions have been asked by the Conservation District:

QUESTION: If upon discharge to the surface, **Little Snake River Conservation District** then filed on that water for permit of ownership for other beneficial uses unrelated to gas production:

1. Would the Conservation District be liable for any damage associated with the use of the water once the Conservation District files on it?
2. Is there **any liability** for the company that initially produced the water if the State issues permits for other uses to the Conservation District?

ANSWER 1: Probably not. See discussion below.

ANSWER 2: See Discussion below.

DISCUSSION

This office wrote an opinion for you in 2004 describing some of the authority and purposes of conservation districts. (*See* Letter from Crank to Etchepare of 9/23/2004.) Using that same analysis, it is not clear if the Conservation District could own a water right.¹ *Id.*; WYO. STAT. ANN. §§ 11-16-122 & 11-16-123 (LexisNexis 2005). Whether the Conservation District could own a water right would depend upon how the Conservation District would use the water right and whether that use is within the purpose and authority of a conservation district. (*See* Letter from Crank at 2-5); §§ 11-16-103 & 11-16-122. Therefore without specific facts, we could not say whether the Conservation District could own a water right.

The Wyoming Governmental Claims Act (WGCA) grants governmental entities immunity from tort liability (and therefore damages) except as provided by statute. (*Natrona County v. Blake*, 2003 WY 170 ¶ 10, 81 P.3d 948, 953 (Wyo. 2003)). When a governmental entity and its employees act within their statutory duties they are immune from tort liability unless their actions fall within a statutory waiver of immunity. § 1-39-104. In a lawsuit against a governmental entity based on a contract with the entity, immunity is waived except to the extent provided by the contract if the contract was

¹ In Wyoming, water rights are considered real property. *DeWitt v. Balben*, 718 P.2d 854, 860 (Wyo.1986).

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within the entity's authority. *Id.* A governmental entity includes the State and any local government. § 1-39-103(a)(i). The State includes "the State of Wyoming or any of its branches, agencies, departments, boards, instrumentalities or institutions." § 1-39-103(a)(vi). Local government is defined as ". . . public corporations, . . . special districts, . . . all political subdivisions of the state, and their agencies, instrumentalities and institutions." § 1-39-103(a)(ii).

The Conservation District is a governmental subdivision of the state and a public body corporate and politic. § 11-16-113(a). Therefore, it is a governmental entity as defined under the WGCA. § 1-39-103(a). A conservation district acting within the scope of its statutory duties would be immune from tort liability and resulting damages unless its conduct falls within the exceptions enumerated by the WGCA. §§ 11-16-113(a), 1-39-103(a), 1-39-104(a) & 1-39-105 through 112. Since we do not know exactly what the Conservation District plans to do with the water, we cannot say for sure whether the Conservation District would be liable for any damage associated with the use of the water once the Conservation District files on it. §§ 1-39-104 through 112.

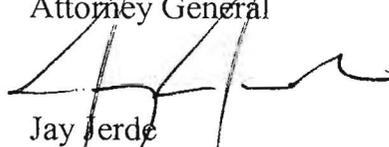
As to the second question of whether there is liability to the Oil and Gas company (or any other private parties), without specific facts, this appears to be a hypothetical situation. It is perhaps a future question better answered by the Oil and Gas company's private legal counsel.

Please contact us if the Conservation District has further questions.

Regards,



Patrick J. Crank
Attorney General



Jay Berde
Deputy Attorney General



Erika Olson
Assistant Attorney General