

POWER COUNTY COMMISSIONER MINUTES

The Board of Power County Commissioners met in special session on Wednesday, November 24, 2014. Present were Commissioners Ron Funk, Chairman, Delane Anderson and Norman Wright. Also present were Prosecuting Attorney Ryan Petersen and Deputy Clerk Jennifer Rupp.

POWER COUNTY JUVENILE PROBATION DETERRENT WALL: John Duffer, with Duffer Construction was present to review the final plans for the construction of the deterrent wall in the Power County Juvenile Probation Office. A motion was made by Commissioner Norman Wright, to accept the bid of \$5,250.00 for the necessary security changes in the Power County Juvenile Probation Office. Motion was seconded by Commissioner Delane Anderson.

Motion carried.

In addition to the motion an advance to Duffer Construction in the amount of \$3,000.00 to begin construction, was made by Commissioner Norman Wright. Second by Commissioner Delane Anderson.

Motion carried.

POWER COUNTY BUILDING & GROUNDS – FARM LEASE (CHRIS FEHRINGER): Discussion of the farm lease included the ground improvements with an irrigation pond, pump, panel and mainline. Further discussions included water shares for the described lease. At this time the Airport Farm Lease will be tabled and scheduled for further discussions on the December 15, 2014 agenda.

DEPARTMENT OF ENVIRONMENTAL QUALITY: On November 18, 2014 a letter was received by Department of Environmental Quality, addressed to Commission Chair, Ron Funk. A motion was made by Commission Chair, Ron Funk to scan the letter dated November 18, 2014 in its entirety and placed as part of the minutes. The letter is regarding the septic systems and the ruling from the Ninth Circuit Court of Appeals for the reservation grounds, concerning fee lands. Motion was seconded by Norman Wright.

Motion carried.



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

1110 North Hillen • Boise, Idaho 83706 • (208) 373-0502

C.L. Butch Otter, Governor
Curt Fransen, Director

November 18, 2014

Ron Funk, Chairman
Power County Commissioners
543 Bannock Avenue
American Falls, ID 83221

Dear Commissioners:

This letter is in response to your letter dated July 22, 2014 regarding the issuance of permits to non-tribal members for septic systems located on non-tribal fee lands within the Fort Hall Reservation. The Department of Environmental Quality (DEQ) has consulted with the Attorney General's office regarding the application of State and Tribal authority to issue such permits in light of the recent opinion of the Ninth Circuit Court of Appeals in *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013). Based upon the advice from the Attorney General's Office, DEQ has determined it is appropriate to rescind its prior directives on the issuance of septic system permits on the Reservation. The attached letter to the Southeastern Idaho Public Health outlines DEQ's new directive.

Southeastern Idaho Public Health will process applications and issue permits for the installation of all septic systems for single family homes owned by non-tribal members on non-tribal fee land within the Reservation boundaries. The letter only addresses septic systems designed for single family dwellings. Larger, more complex, engineered sewage disposal facilities may require greater coordination between the Tribes, DEQ and Southeastern Idaho Public Health. Additionally, this directive does not cover well drilling permits since, as you know, DEQ does not issue these.

Please let me know if you have any further questions or comments.

Curt Fransen

Director
Idaho Department of Environmental Quality

Attachment
CF:BO:dls

cc: Shoshone Bannock Tribe - Candon Tanaka
Idaho Water Resources (Idaho Falls) - Lyle Swank



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

1410 North Hilltop • Boise, Idaho 83706 • (208) 373-0502

C.L. "Bulch" Otter, Governor
Curt Franzen, Director

November 18, 2014

Maggie Mann, Director
Southeastern District Health Department
1901 Alvin Ricken Drive
Pocatello, ID 83201

Dear Ms. Mann:

On September 8, 2011, DEQ Director Hardesty issued a letter to you describing how subsurface sewage disposal facilities on the Fort Hall Indian Reservation should be handled. Specifically, the letter outlined the process to be used for those facilities that are subject to State law and possibly the Shoshone-Bannock Tribes Subsurface Sewage Disposal Ordinance as well. She further indicated that, in order to avoid the potential duplication of fees and regulation, persons seeking permits for, or persons with complaints or other regulatory matters regarding, subsurface sewage disposal facilities should be referred to the Tribes. She also indicated that persons dissatisfied with the referral to the Tribes should be referred to the DEQ Pocatello Regional Office.

Director Hardesty later clarified in a November 2, 2011 letter that if a person submits an application for a permit to Southeastern Idaho Public Health, they should be referred to DEQ who would advise them of the risk of duplicative fees and regulations.

Since the issuance of the September 8th and November 2nd letters, the United States Ninth Circuit Court of Appeals issued an opinion that is relevant to the jurisdictional question addressed in those letters. In *Evans v. Shoshone-Bannock Land Use Policy Commission*, 736 F.3d 1298 (9th Cir. 2013), the Ninth Circuit ruled that the Shoshone-Bannock Tribes lacked authority to regulate the construction of a single family home by Evans (who is not a member of the Tribes) on non-Tribal fee land under the Tribes' Land Use Policy Ordinance and Business License Act.

In *Evans*, the Tribes argued that their building code applied to the construction of a home on non-Indian land within the Fort Hall Indian Reservation. Although an Indian tribe generally does not have jurisdiction over non-Indian lands, the U.S. Supreme Court in *Montana v. U.S.*, 450 U.S. 544 (1981) recognized an exception to this rule when the activity of the non-member directly affects the tribe's political integrity, economic security, health or welfare. This is referred to as the 2nd Montana exception. Relying upon this exception, the Tribes argued that Evans' construction posed environmental threats, including ground water contamination, improper disposal of construction debris and increased risk of fire that directly affected the Tribes health and welfare. The court held that the Tribes had failed to produce evidence that the construction of a single family house posed the type of catastrophic risks to the Tribes necessary to apply the Montana exception. Therefore, the Court concluded the Tribes lacked the authority to apply their land use planning laws to Evan's property.

The *Evans* decision emphasizes the narrow scope of the 2nd Montana exception. The exception does not apply when the challenged conduct may have some adverse effect on the tribe; instead, the effect must be so severe as to "fairly be called catastrophic for tribal self-government."

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Maggie Mann, Director
Southeastern District Health Department
November 18, 2014
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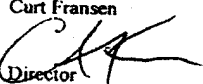
Applying this standard, the Ninth Circuit required the production of specific evidence, more than just generalized concerns, showing that the Evans' construction posed catastrophic environmental risks for the Tribes. It is also important to note that the application of the 2nd Montana exception in the Evans case was reviewed in order to determine whether Evans was required to exhaust tribal remedies. In this context, the burden for the Tribes was relatively low as the Tribes only had to show that there was a plausible or colorable claim to jurisdiction. Even using this relatively relaxed standard, the Court held that there was no Tribal authority—no plausible or colorable claim to jurisdiction based upon environmental threats.

While the Evans case did not address the Tribes assertion of jurisdiction to regulate subsurface sewage disposal, the case shows that it will be very difficult for the Tribes to carry their burden of establishing authority to apply their Subsurface Sewage Ordinance to non-members on non-member fee land based upon the 2nd Montana exception.

In light of the Evans decision, DEQ is rescinding the directives in its September 8th and November 2nd letters and directing Public Health to process applications and issue permits for the installation of all septic systems for single family homes owned by non-tribal members on non-tribal fee land within the Reservation boundaries. While DEQ is no longer advising the referral of such non-tribal members to the Tribes, as a matter of comity, notice should be provided to the appropriate authority at the Shoshone-Bannock Tribes of permit actions on non-Tribal fee land.

This letter only addresses septic systems designed for single family dwellings. Larger, more complex, engineered sewage disposal facilities may require greater coordination between the Tribes, DEQ, and Public Health.

If you have further questions or comments, please let me know.

Curt Fransen

Director
Idaho Department of Environmental Quality

cc: Shoshone Bannock Tribe – Candon Tanaka
Power County Commissioners – Ron Funk, Chairman

AIRPORT HOUSE AND HANGER PROPERTY: Discussion of the repairs needed to clean up the airport house to return it to livable. Also the possible repairs needed on the hanger. A motion was made by Commissioner Delane Anderson for a 30 day Notice to Vacate the Premises of the Airport Hanger. A second was made by Commissioner Norman Wright.

Motion carried.

Notice will be prepared by Prosecuting Attorney Ryan Petersen.

POWER COUNTY EMPLOYEE CHRISTMAS BONUS: Discussion for the full and part-time employees Christmas bonus. A motion was made by Commissioner Norman Wright for a \$50.00 bonus to full time Power County employees, and a \$25.00 bonus to part time Power County employees. Motion was seconded by Commission Chair, Ron Funk.

Motion carried.

Adjournment



Clerk, Christine Steinlicht



Commission Chair, Ron Funk