

July 1, 2011

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DEPT. OF WATER RESOURCES
SOUTHERN REGION

Ms. Sara E. Baldwin
Sawtooth National Recreation Area Ranger
United States Forest Service
5 North Fork Canyon Road
Ketchum, ID 83340

Re: Your Letter to Us Dated February 18, 2011

Dear Ms. Baldwin:

By your letter dated February 18, 2011, you offer your views related to ranching and agricultural activities on our Lost Creek property in the Sawtooth National Recreation Area (SNRA). You assert that the letter is prompted by development of two small ponds on our land associated with water right application permit No. 71-10929 which was issued by the Idaho Department of Water Resources (IDWR) on May 17, 2011.

You are of the opinion that "the diversion and water storage is not in compliance with the terms of the [SNRA scenic] easement, and therefore . . . it is not in the public's interest." Based on that opinion, you recommend that "any diversion structures should be plugged or removed as appropriate, and Lost Creek allowed to flow unimpeded," until it sinks on our property, adding that the ponds should be dried up and filled with material from our ranch. You requested that these actions, which you describe as "compliance measures," be completed by June 30, 2011.

We disagree with your opinions about our water rights and the interpretation of the scenic easement by which you arrived at those opinions. With approval of our application for water right No. 71-10929, IDWR has now determined that the application was consistent with the local public interest and that our wildlife storage ponds are authorized and supported by our other water rights.

Although the permit to appropriate water has been issued, we nonetheless want to meet with you to discuss our differences about what the Sawtooth National Recreation Area Act and the easement on our Lost Creek property require. Our desire to work with the Forest Service is the context for the following response to your February 18 letter.

Introduction

We have been private land holders within the SNRA since 1989. During that 22-year period we have been good neighbors to the Forest Service and strongly supportive of its efforts to conserve and develop the scenic, natural, historic, pastoral, wildlife and other values of the SNRA. We have done that through membership in the Sawtooth Society and the Sawtooth Interpretive and Historical Association, both of which use private funds, provided by members, to support the Forest Service in achieving SNRA goals. In addition, we have used our own funds in opposing private development that has threatened historic and

scenic values in the Sawtooth Valley, such as broad scale expansion of overhead center pivot irrigation, an effort that resulted in Forest Service acquisition of much of the Busterback Ranch.

We have followed that same collaborative approach to development of our property. For example, we sought Forest Service guidance and approval in fencing our ranch property in the historic log-worm style found on early ranches in the Sawtooth Valley. We consulted with the Forest Service repeatedly, personally and through our architect, in the siting and design of the residences and outbuildings on Lost Creek Ranch and sought approval for those buildings through the voluntary certification process. In addition to that process we sought guidance from and written approval of the SNRA Forest Service Landscape Architect for landscaping the property.

We successfully collaborated with the Forest Service in the spring of 1997 when high flows in the Salmon River nearly destroyed one of the dwellings on the Lost Creek Ranch. We voluntarily submitted our stream embankment reclamation plan to the Service for approval, and, after initial negative Forest Service views and subsequent reconciliation of perspectives, we completed a project that advanced rustic SNRA scenic values while protecting our Lost Creek Ranch property.

On an annual basis for nearly two decades, the Forest Service has inspected our ranch and approved everything we have done. Not once has the Forest Service suggested we were not in compliance with the easement or Private Land Regulations. On the contrary, they always said we were in compliance. That includes the 13-year period since 1997 during which the Forest Service has been aware of the planned development of ponds as part of our water rights. Our intention to repair and transform the "borrow pits" that provided the stream bank fill material to wildlife storage ponds has been completely transparent to you and your Forest Service predecessors since the 1997 flood. Our Lost Creek Ranch surface and groundwater water rights have been perfected for several years now, and our intended use of groundwater and stream diversion water to fill the ponds for ranching activity is a matter of public record.

In addition to many private conversations between us and Forest Service personnel concerning the ponds, the Forest Service has twice during the development of those water rights been formally asked to comment on and given the opportunity by IDWR to protest our water rights and ponds in public proceedings. The ponds we have created are wildlife storage and stock ponds. The Forest Service has never formally protested the ponds for that use or any other aspect of our water rights development. The silence of the Forest Service since 1997, as they watched us spend time, effort and money on this development, can only be interpreted as implied consent.

Your after-the-fact attempt to impede private land development well within expected stewardship of the SNRA is perplexing to us. We will nonetheless respond to the issues you have raised in an effort to move development of our water rights to a mutually acceptable posture.

Issues Related to Your Correspondence

The SNRA regulations at 36 C.F.R. Section 292.15(l) provide for an appeal by any private landowner “affected by a decision of the Area Ranger.” Title 36 C.F.R. Section 251.82(a)(12) provides for appeals of decisions “related to the standards for the use, subdivision, and development of privately owned property” within the SNRA. A timely filing of the notice of appeal is “within 45 days of the date on the notice of the written decision being appealed.” 36 C.F.R. § 251.88.

If it was your intention that your February 18 letter is a “decision” within the meaning of the SNRA regulations, it is defective and without effect. The regulations require that any “notice of decision” specify the identity of the officer hearing the appeal as well as the deadline for timely filing. *See* 36 C.F.R § 251.84(a). Your letter contains none of this information.

You copied IDWR with your February 18 letter. The opinion expressed there, that the “diversion and water storage is not in compliance with the terms of the easement,” do not constitute a protest to appropriation of water under Idaho law. Even though the Department recently issued the permit for water right No. 71-10929, we address the defects of your position in the context of the State of Idaho’s authority to administer its system of water rights.

First, even if it was intended as a protest of our application to IDWR, the February 18 letter was not timely. Because the Forest Service failed to formally protest our water rights application before IDWR, the Department was free to approve our application. *See* Idaho Code Section 42-203A(1) (“In the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources.”) As noted, the permit was approved by IDWR May 17.

Second, even though Permit Condition 5 for No. 71-10929 states that the right “does not grant or modify existing scenic easements held by the federal government which may limit use of this right,” Condition No. 3 declares that diversions to fill the ponds on the Lost Creek Ranch are authorized by our previous rights, Nos. 71-7178 and 71-71789. Notwithstanding your views to the contrary, permit No. 71-10929 was issued with a determination by IDWR that the water right is consistent with Idaho Code Section 42-203A(5), which requires the Director to find that our proposed use does not conflict with the local public interest including protection of fish and wildlife resources in the SNRA. *See* IDAPA 37.03.08045.01.e.ii. Nothing in Condition 5 of the water right provides any support for your interpretation of the terms of the scenic easement on the Lee/Brown ranch.

Your February 18 letter is neither a “decision” document (i.e., final agency action), nor was it a valid protest to our water rights application under Idaho law. Despite the lack of legal import to your letter, we provide our views on the substance of your objections.

Your Mischaracterizations of our Ranching Activity at Lost Creek Ranch and Related Private Land Regulation

- Our pond development is consistent with what Congress provided in the Sawtooth National Recreation Area Act. Our activity furthers the “conservation and *development* of the scenic, natural, historic, pastoral, wildlife and other values” of the Recreation Area, see Sec. 2(a), P.L. 92-400 (emphasis added), *see also* 36 C.F.R. § 292.16(c)(2). Congress spoke directly to the opportunity of *furthering* the scenic beauty of the SNRA and did not foreclose the land use opportunity that we propose for our property.
- The original “borrow pits” that have been restored and repaired as ponds were constructed pursuant to and consistent with 36 C.F.R. § 292.16(g)(8). They were “incidental excavation” required to preserve a Lost Creek Ranch dwelling structure due to the 1997 high Salmon River flows. Their appearance and function is consistent with the scenic, natural, historic, pastoral, wildlife and recreational values established by the Sawtooth National Recreation Area Act.
- Contrary to the position taken in your February 18 letter, lawful water diversions under state water law fit well within development activity necessary “to construct, operate, and maintain irrigation, fisheries ... and similar facilities or improvements” pursuant to 36 C.F.R. Section 292.16(c)(5). The ponds will serve many conservation purposes well within the inclusive, not exclusive, voice of the regulation. Your blanket citation to 36 C.F.R. Section 292.16(c)(5) affords no rationale for your conclusion that our development is not compliant with SNRA values.
- The proposed ponds are necessary for legitimate ranching activity on the Lost Creek Ranch within the meaning of 36 C.F.R. Section 292.16(g)(1). The regulation provides far more running room for this type of activity than your cabined interpretation. Your reading of 36 C.F.R. Section 292.16(g)(1) conflicts with and attempts to read out of Public Law 92-400 the entire array of SNRA values that, by your strange construction, fall outside your narrow notion of “ranching.” The SNRA and the values established by Public Law 92-400 are not limited by the notion of “ranching” in the manner you suggest.
- Your statement that we were “prevented” from diverting water for irrigation purposes on the Lost Creek Ranch is incorrect. The original water rights application for the Ranch involved direct discussions with the Idaho Department of Fish and Game (IDFG) as to the beneficial uses of the surface water diversions from Lost Creek. Our surface water right application included irrigation as a beneficial use, and we voluntarily agreed to limit our irrigation to 25 acres from the 50 acres as originally intended. After a series of events which interrupted the final processing of our applications, including an IDWR-imposed moratorium, our

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perfected water rights included wildlife storage as proposed uses under both our surface and groundwater permits.

In the spirit of working through issues with our neighbors in the Sawtooth Valley, we voluntarily agreed to reduce the number of irrigated acres through good-faith discussions with IDFG. To state that we were later "prevented" from irrigating our property through an appropriate exercise of our water rights is incorrect. As part of our continuing development of Lost Creek Ranch, we have this week filed with IDWR an application to include irrigation as part of the uses permitted under our water licenses, consistent with our original applications for permits to appropriate public water of the State of Idaho. We are presently reaching out to IDFG to ensure that any further water development on our property will be as consistent with the conservation values embodied in the Sawtooth National Recreation Area Act as is the original development of our wildlife storage ponds.

Our Proposed Path Forward

Notwithstanding our disagreement with the bases for and opinions expressed in your letter, we renew our commitment to be good neighbors and stewards of the Sawtooth National Recreation Area. We offer to meet and confer with you in order to more fully understand your position on our private land development in the SNRA as well as to attempt to resolve your concerns outside of any formal process.

We make this offer notwithstanding the unusual posture of this matter. Because there is no pending "decision" by the United States Forest Service impacting our private property in the SNRA, there is no administrative remedy available to us in which to formally rebut the errors we have identified in your letter.

We know you will receive this letter in the spirit it is intended. Like you, we are committed to protect the important conservation values that make up the Sawtooth National Recreation Area. We know our interests are aligned in ensuring the future of this special place.

We look forward to visiting with you to discuss this matter as soon as can be conveniently arranged.

Very truly yours,


Patrick Lee
Jack Brown

cc: Allen Merritt, IDWR
Ed Schriever, IDFG