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Department of Water Resources

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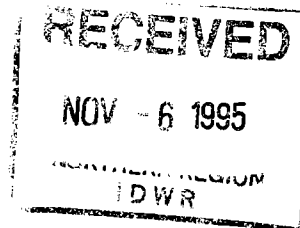
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MEMORANDUM



To: John Chatburn
Special Assistant to the Governor
Governor's Office

From: Rinda Just
Deputy Attorney General
Natural Resources Division

Subject: Broadford Slough

Date: August 10, 1995

Rinda

At the request of Will Whelan, I have reviewed the authority of agents of the state to enter upon private property to remove beaver dams obstructing water delivery to downstream irrigators.

Conclusions

The Idaho Department of Fish and Game and the Idaho Department of Water Resources have no authority to enter onto private property in trespass to remove the beaver dams obstructing the flow of water in the Broadford Slough. To do so would likely subject the state agencies and their employees and agents to liability for trespass.

Background

As I understand the situation, downstream senior right holders who receive their water via the Broadford Slough received little or no water in 1994. Lee Peterson, watermaster, determined that beaver dams on the Slough were obstructing a substantial portion of the flows. According to the attorney for the water users, these dams had consistently been removed from the Slough in previous years by the downstream users. However, in 1994, upstream landowners refused to

allow access across their property for the removal of the dams. The downstream water users anticipate similar difficulties in receiving their water in 1995.

A review of correspondence indicates that the water users, through their attorney, Gary Slette, first contacted the Idaho Department of Water Resources (IDWR) seeking relief pursuant to section 42-3806, Idaho Code. Keith Higginson, then director of the department, responded that nuisance beaver dams were dealt with by IDWR, in cooperation with employees of the Idaho Department of Fish and Game (IDFG), under the provisions of section 36-1107, Idaho Code.. The director recommended that the water users contact IDFG to coordinate removal of the beaver dams.

When requested by the water users to remove the obstructing beaver dams pursuant to section 36-1107, Idaho Code, IDFG declined for the reason that while the code provisions do provide four methods for abating depredations such as beaver dams, none of the methods allow the department or its agents to enter onto private lands in trespass to remove the beaver or their dams.

Analysis

A review of the relevant statutes and case law leads me to the conclusion that neither IDWR nor IDFG personnel have authority to enter onto private property in trespass in order to remove obstructions to the flow of water.

IDWR

Section 42-3806, Idaho Code, provides that no stream channel alteration permit is required for water users to "clean, maintain, construct in, or repair any stream channel, diversion structure, canal, ditch, or lateral." It also authorizes a water user "to remove any obstruction from any stream channel, if such obstruction interferes with, or is likely to interfere with, the delivery of, or use of, water under any existing or vested water right or water right permit." While this provision clearly gives water users substantial authority to conduct activities in the stream channel, it does not authorize them to trespass upon private property to access the stream channel or diversion structure.

This view is supported by General Determination Of Rights To Use Of Surface and Ground Waters Of Payette River Drainage Basin, 107 Idaho 221, 687 P.2d 1348 (1984), hereinafter Branson v. Miracle. Branson involved a dispute between mine owners (Branson) and neighbors (Miracle) over water flowing from the mine. Both parties had filed claims in the 1969 Payette River Basin water rights adjudication. The decree entered in May of 1982 allocated water to each of the claimants. Branson disagreed with the allocation of water to Miracle, who diverted water through a 3/4 inch pipe at the mine portal on the Branson mining claim. Among the issues before the court were whether Miracle had a valid water right, and whether Miracle had a right of ingress and egress onto the Branson mining claim for the purpose of maintaining that right. The Court held that Miracle had a valid water right. In addressing the access issue, however, the Court stated:

The mere fact that one owns a water right does not vest in the owner thereof the right to enter the lands of another for the purposes of maintaining the flow of water.

107 Idaho at 227; Swank v. Sweetwater Irrigation & Power Co., 15 Idaho 353, 98 P. 297 (1908). The Court discussed that a water right holder must have some other, independent, right of access acquired by easement, eminent domain, or prescription.

In light of the statutory language in section 42-3806, Idaho Code, and the decision of the Idaho Supreme Court in Branson v. Miracle, the Department of Water Resources properly declined to enter onto the property of the upstream landowners in order to abate the obstructing beaver dams.

IDFG

Section 36-1107, Idaho Code, provides that when wildlife coming within the purview of the statute "is doing damage to or is destroying any property or is likely to do so, *the owner or lessee thereof* may make complaint and report the facts to the director or his designee who shall investigate the conditions complained of. If it appears that the complaint is well-founded and the *property of such complainant* is being or is likely to be damaged or destroyed by any such wildlife protected under this title, . . ." the director may undertake to resolve the problem by one of four statutorily authorized methods. The director may: (1) send a representative onto the property to control, trap or remove the wildlife; (2) grant safeguarded permission to the complainant to control, trap or remove the wildlife; (3) "authorize or cause the removal or destruction of any dam, house, structure or obstruction erected by furbearing animals . . ."; or (4) issue a trapping permit to the owner or lessee of property being damaged. Each of these remedies presumes that the owner or lessee *on whose property the wildlife is causing damage* has sought the help of IDFG, inviting IDFG personnel onto the owned or leased property to resolve the threat to the property. The statute certainly does not provide authority to IDFG to resolve the situation on the Broadford Slough where the downstream water users have asked IDFG to enter onto the real property of another to remove the beaver dams. Such an entry by IDFG personnel would be in trespass.

In certain circumstances, IDFG personnel have statutory authorization to inspect, search, or seize private property for the purposes of enforcing provisions of the fish and game code. Section 36-1303, Idaho Code, provides for the inspection of storage facilities where there is probable cause to believe that the facilities contain evidence of the violation of provisions of the fish and game codes; the section also authorizes IDFG to search, with or without a warrant, "the tents, wagons, autos, boats, aircraft (private or chartered), campers, camp trailers, or other vehicles, camps, baggage or packs of any person in the state. . ." where there is probable cause to believe that a person has unlawfully taken wildlife or possesses any equipment or substances used to take such wildlife. Section 36-1304, Idaho Code, provides authorization to seize equipment and wildlife. These provisions are clearly inapplicable to the matter at issue here because there is no reason to believe that the owners of the upstream property on or near which the beavers have built their abodes have violated any provisions of the fish and game code. If IDFG personnel were to make

unauthorized entry onto the private property of the upstream owners and remove or destroy the beaver dams, their actions would constitute a trespass.

Conclusion

Both IDWR and IDFG properly declined to enter onto the private property of the upstream land owners in order to remove the obstructions to the water users flows. Neither department has statutory authorization to make such an entry, and to do so without statutory authorization would place each department at risk for civil trespass actions. It appears that there are private remedies available to the water users to resolve this situation or to recover damages should the water users wish to pursue them.

If I can be of further assistance, please feel free to call me at 334-4120.

cc: Dallas Burkhalter
Phillip Rassier

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