State of Idaho
DEPARTMENT OF WATER RESOURCES
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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

September 24, 2002

Bob Thomas, Watermaster
Andrews and Slough Ditch WD 74-U
Rt 1 Box 112
Salmon ID 83467-

Re: Watermaster responsibilities for stream channel construction work and control of beavers/beaver dam removal.

Dear Watermaster:

The department has fielded a number of questions this year regarding the responsibility and authority of the watermaster to remove obstructions in streams and to take other actions to make water available for diversion because of the short water supplies available across the state. Even though it is late in the irrigation season, the following guidance is being sent to all watermasters because situations similar to those that prompted the questions occur from time-to-time in most water districts and it is important to understand the role that watermasters have in resolving such matters.

CHANNEL MAINTENANCE AND IMPROVEMENTS

State watermasters must refrain from authorizing, organizing or performing construction work involving the channels of natural watercourses. State watermasters, as employees of the Idaho Department of Water Resources, must exercise care to operate within the statutorily prescribed limits for watermasters set out in chapter 6, title 42 of the Idaho Code. The watermasters' central duty is to distribute water in accordance with water right priorities. In completing this duty, the watermaster routinely takes actions such as:

a. Opening and closing of headgates
b. Raising and lowering of check dams
c. Moving rock or other materials at the diversion to change the water flow if the diversion is not a permanent facility.
d. Cleaning trash and other obstructions from diversions.

Other than the occasional maintenance or minimal construction activity involving incidental shovel work, state watermasters duties are limited to measuring water and controlling diversion works as described above.

State watermasters should avoid participating in construction activities designed to "clean" the stream or projects purporting to recapture water that might not otherwise be available for distribution. Flood control districts, irrigation districts, canal companies or the water users are the appropriate entities to organize projects to remove obstructions (including beaver dams) and clean the channel, not the state watermaster.

In many cases these types of projects will require permits or approvals from different governmental agencies before the construction activity can go forward in the channel or adjacent wetlands and riparian areas. The United States Army Corps of Engineers issues permits under the Clean Water Act, regulating the discharge of materials into the waters of the United States and wetlands. In addition to its water distribution responsibilities, the Idaho Department of Water Resources issues permits under the Stream Protection Act. The Idaho Department of Lands owns the title to the beds of navigable rivers and requires a permit or easement for activities involving state-owned land. The Idaho Department of Environmental Quality regulates water quality and may require a permit or certification prior to work being done. Counties administer under local ordinances elements of the National Flood Insurance Program through the Federal Emergency Management Agency, which often require engineering studies be completed before construction can go forward.

To avoid confusion and potential liability accruing to the state, water users and/or the watermaster, state watermasters, who serve in an additional capacity as a ditchrider for a private company or irrigation district, must decline to participate in construction activities that fall outside the statutorily prescribed watermaster duties. The concern is that watermasters will be viewed by others as having authorized the work and are not simply acting as an employee of a private company or irrigation district.

Removal of Beavers and Beaver Dams

State watermasters are not authorized or empowered to kill beavers or to physically remove or destroy beaver dams. Removal of beavers and beaver dams is governed by a process specifically set out by statute. Authorization to remove or destroy beaver dams rests exclusively with the Idaho Department of Fish and Game under I.C. § 36-1107. Although the removal of a beaver dam, which obstructs the delivery of water, may in many cases be exempt from the requirements of the Stream Protection Act under I.C. § 42-3806, persons seeking to remove dams must still comply with the provisions of I.C. § 36-1107.

I.C. § 36-1107(a) provides in part:

> ...[W]hen...wildlife...is doing damage to or is destroying any property, including water rights, or is likely to do so, the owner or lessee thereof may make a complaint and report the facts to the director [the Department of Fish and Game] or his designee who shall investigate the conditions complained of. In the case of water rights, the director [the Department of Fish and Game] shall request an investigation by the director of the Department of Water Resources of the conditions complained of. The director of the Department of Water Resources

shall request a recommendation from the local water master, if any, and upon such examination shall certify to the director of the Department of Fish and Game whether said wildlife, or house, dams or other structures erected by said wildlife is injuring or otherwise adversely impacting water rights.

The statute then provides Fish and Game with several alternatives for controlling, capturing or destroying the wildlife causing damage. None of these alternatives provide for the watermaster to take direct action to resolve beaver problems.

Most complaints received by the watermaster or the Department of Water Resources (IDWR) regarding damage to water rights relate to beaver dams. Other water loving animals, such as muskrats, may also injure water rights. The following process should be followed in implementing watermaster's responsibilities under Idaho Code § 36-1107.

1. In following up on a beaver complaint from a water user, the Department of Fish and Game is required to get a determination from IDWR concerning whether the beaver activity is injuring existing water rights. Before making this determination, IDWR is required to get the recommendation of the watermaster. Thus, the statutes require the involvement of both IDWR and the watermaster in the resolution of complaints involving beaver activity depleting flows needed for water rights. If the water user contacts Fish and Game first and IDWR or the watermaster is then requested by Fish and Game to review the complaint, IDWR and the watermaster should coordinate on the review. If a water user complains directly to the watermaster or IDWR without first complaining to Fish and Game, IDWR and the watermaster should jointly respond to the complaint, and, if possible, preliminarily investigate prior to sending the water user to Fish and Game. By doing so, IDWR and the watermaster serve the water user initially, and also may deflect some unnecessary complaints to Fish and Game.

2. The analysis by IDWR will require a determination that the water loss in the stream reach with the beaver dams significantly exceeds that occurring prior to the construction of the dams. A determination that water rights are being or will be damaged should be supported by actual water loss measurements or by direct observation if loss is through surface flows. A theoretical computation of evaporation and seepage can be included in the analysis but should not be relied upon as the only information because other factors increase or reduce the total loss of water in the stream reach. If the damage cannot be measured and quantified, or is not readily observable, IDWR and the watermaster should not recommend removal of the wildlife or its structures.

3. If the analysis shows that water is being lost due to the beaver activity and that valid existing rights are thereby deprived of water to which they are entitled and could beneficially use in accordance with the water right, the statutes provide for Fish and Game to take an appropriate action to protect the water rights whether or not the beaver activity is on land owned by the complaining water user or on land owned by another.

In the event that a private property owner wishes to remove a beaver dam from his or her own property as a result of some injury to the property, including water rights appurtenant to the property, then the owner should seek to obtain a permit directly from Fish and Game. IDWR involvement should not be necessary in this case unless Fish and Game specifically requests an investigation and written report.

Beaver dams that have been in place prior to the irrigation season may require additional review by IDWR in relation to the Stream Channel Protection Act. IDWR may coordinate with the US Army Corps of Engineers if necessary.

Please contact one of the Department's regional offices or Tim Luke at the above office if you have questions or require assistance concerning this matter.

Sincerely

Tim Luke

Tim Luke
Water Distribution Section Manager

Cc: IDWR Regional Offices
Norman Young, IDWR Administrator
John Homan, Idaho Deputy Attorney General
Ervin Ballou, IDWR

Enclosure

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