

Agricultural Law Update

The Official Newsletter of the



A nonprofit, professional organization focusing on the legal issues affecting agriculture throughout the United States for over 28 years.

VOLUME 25, NUMBER 8, WHOLE NUMBER 297

AUGUST 2008

Agricultural Law Update

The official newsletter of the American
Agricultural Law Association

Editor

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2008**

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GENETIC FITNESS: A STOCKMAN'S EXAMINATION OF GENETIC LIABILITY

by A. Blair Dunn

Auctioneer: "Ladies and Gentleman let's have our next consignment to the sale, semen from a fine specimen raised by a champion dam and sired by a show winner, we'll start the bidding at \$50 a straw,¹ do I hear \$75, \$100, \$200, \$300... sold for \$500 a straw."

This does not represent an actual sale, but it is not uncommon for to a single animal to bring in tens of thousands, or even hundreds of thousands, of dollars in genetic materials in a single day. Embryo flushes, semen collections, cloning rights, and the sales of donor animals can result in substantial additional monetary transactions, not to mention the value of the offspring produced.

In today's rapidly changing livestock genetics market, those involved in the industry need to educate themselves and act responsibly with regard to genetic transactions. Because animals are valued for both their outward appearance and their bloodlines, livestock transactions can showcase genetics at its best or at its worst. In the best case scenarios, the sale of good genetics can equate to a substantial profit for producers and great products for consumers around the world; in the worst case scenarios, poor genetics can result in the loss of economic value, loss of reputation, or even in the loss of livestock themselves.

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**Chief Legal Officer at WaterBank*

REMOVAL - FILL PERMITS IN OREGON: DOES YOUR PROJECT REQUIRE ONE?

- by Cortney D. Duke*

An organized water delivery organization in Oregon wants to replace a number of diversion structures in its system. The organization refers to the diversion structures as "rock cribs" and each consists primarily of logs laid across the width of the waterway. Some of the rock cribs that need to be repaired and replaced are located in a river and some of the rock cribs are located in delivery ditches.

The organization requests assistance. Can the repair and replacement project proceed without obtaining a Dredge/Fill Permit from the Department of State Lands?

Dredge/Fill Permits

Generally, removing material from the beds or banks of any waters of the state of Oregon requires a permit from the Department of State Lands ("DSL" or "Department"). However, there are various exceptions to the general rule.

To determine whether a project will fall under DSL jurisdiction and require some form of permit consider the following questions:

First: Is the affected stream a "water of this state"?

Second: If the answer to question one is yes, do any of the various exceptions to the permitting requirements apply?

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These worst case scenarios also generate other undesirable consequences such as bad blood, monetary losses, and litigation.

Genetic materials are expensive: the average cost of semen from a typical breed bull ranges from \$25-\$35 a straw, and \$50 is not an uncommon price per straw. Bull semen has even sold on more than one occasion for over a \$1000 per single straw. Embryos of livestock are also hot commodity items. On average, normal embryos of decent bloodlines can cost between \$400-600. Again this price may rise above several thousands of dollars for a single embryo. The cost increases dependant upon the donor animals that supply the embryos. For example, in the cattle industry, there are instances of a one half interest in a bull bringing \$250,000. This is of course the exception and not the rule. In the cattle industry, donor cows or cows contributing embryos average \$10,000 to \$15,000 on the low end, and normally range from \$20,000 to \$25,000. Again extremely high dollar amounts are not unheard of in the genetic industry and these types of transactions are becoming common for all species.

While semen collections, artificial insemination, and embryonic transfer are cutting edge in most livestock industries, they are becoming more common, and new technologies promise to take things even further. Cloning is emerging as a promising source of safe, advanced reproductive technology. Currently, costs range from \$900 to \$1000 to establish a cell line, and it is possible to enter into a turnkey or completed product contract for a fully functional cloned animal for the cost of \$15,000 to \$20,000.² With high cost per unit and large volume of goods bought and sold in the livestock industry, establishing the rights and responsibilities of both the buyers and sellers is imperative.

Legal Significance For Stockmen

Many years ago, genetic issues were present but not prevalent. When a stockman shook your hand and told you that a mare, ram, cow, boar, etc. was "sound" and what the animal's parentage was, it followed that animal would serve the normal or ordinary purpose associated with that animal carrying those bloodlines. These transactions were considered explicit and complete; if nothing was said of soundness or suitability, then there was a good chance that no warranties

or other promises were present. That doctrine died out over 100 years ago, (except perhaps in real estate contracts) and was legally referred to as "caveat emptor"³ or "buyer beware" and the risk associated with such a transaction normally rested with the purchaser, unless there was a specific risk assumed by the seller.

Recently, a greater understanding of what might be called hidden or latent defects in the DNA of livestock has been achieved and laws governing commercial transactions in genetic materials of livestock have become statutory or codified to some extent in all fifty states. Both purchasers and a sellers need to understand what legal responsibilities arise out of these transactions. Entering into a commercial transaction inherently exposes every party involved to possible liability or risk, and the best way to manage that liability or risk is to be knowledgeable about the law and the product of the transaction.

Laws Governing Livestock Transactions.

Livestock sales constitute a sale of goods, and the sale of goods is governed by statutes, specifically, the Uniform Commercial Code (UCC). The UCC has been adopted in 49 states as the governing law concerning sales, contracts, warranties, liability, damages, etc.⁴

"Goods" under U.C.C. § 2-105 (1) are "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty."

Livestock, as well as the genetic materials derived from them, are goods subject to the UCC or Louisiana's Civil Code.⁵ The precursor to UCC Article 2 was the Uniform Sales Act promulgated by Uniform Law Commissioners in 1906. UCC Article 2 was itself promulgated in 1951 and began to be widely adopted only in the 1960s. It has the effect of shifting the burden of risk, should something go wrong, from the purchaser to the seller. When examining livestock, either the actual animal in the context of sale on the basis of that animal's genetics, or its genetic products, the UCC plays a determinable role in the formation of warranties and in

damages associated with breach of those warranties. The general principle of the law of warranty is to determine what the seller intended to sell and purchaser intended to buy. When dealing with genetic materials, the relevant law is the UCC express and implied warranties.

Express Warranties

Under the UCC a seller creates an express warranty of genetic materials in the following ways:

(a) Any affirmation of fact or promise by the seller to the buyer concerning some "genetic good" that is the basis of the bargain.

(b) Any description of the "genetic goods" that is the basis of the bargain.

(c) Any sample or model which is made as the basis of the bargain.⁶

Under § 2-313 "it is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty." This means that warranties may be created in unintended ways, and it is important for a seller to be aware of the consequences of his words.

So what does an express warranty mean to a livestock seller or buyer in terms of today's genetics? For example, at a sale, a bull is sold as "(insert bull's name) son." There is a substantial increase in the price attributable to the sire of the bull and the genetic traits that are associated with the sire. It may be assumed that the genealogy of that bull, if it were represented by the seller, would be an express warranty provided that the description of the bull's sire was a part of the basis of the bargain. If it is later found that that the bull's parentage was represented incorrectly, a breach would have occurred. In similar circumstances, the court following Louisiana law analogous to the UCC in *Palmer Ranch Co. v. Campesi*⁷ held that a reduction in price was appropriate when it was proven that about 24.4 percent of the bloodlines associated with the herd were not as they had been represented by seller.⁸

Express warranties can be a powerful tool both for the buyer and the seller of livestock. They can be strong selling or buying points, but care should be given to ensure that the warranties are accurate. A good genetic example of this would be the sale of an animal with the intent to achieve a desired color of the offspring. Color is a genetic trait that

can be either heterozygous or homozygous and may be tied to a either a dominant or a recessive gene. It is an aspect that is not always ascertainable on visual inspection. While it might be reasonable for a seller to state that the animal would produce offspring of a single color, if the seller has only seen that animal, the statement would be a warranty. Color may be associated with a heterozygous or a recessive gene, and the animal could still carry the possibility of throwing offspring of a different color, and if color was a basis for the bargain, the seller may be liable for breach of warranty. This is not a far stretch, and most people involved in the livestock industry know that if you are going to claim something it should be true, you should make sure that it is true. However, the aspects of implied warranties are not quite as straightforward.

Implied Warranties

Implied warranties are not based upon express undertakings by a seller, Rather they result from the facts of the transaction. Under the UCC, there are two implied warranties; warranties of merchantability⁹ and warranties of fitness for a particular purpose.¹⁰

Implied Warranties of Merchantability

The first implied warranty that may arise out of livestock genetic transactions is that of merchantability. For a warranty of merchantability to arise, there must be a contract for sale and the seller must be a merchant with respect to goods of that kind. UCC § 2-314 (b) defines merchantability. It is applicable to a livestock genetic transaction if the good must pass without objection in the transaction as it is described and be fit for use for the ordinary purpose associated with such goods.

This means that if something is described as being purchased for a normal purpose (such as semen to artificially inseminate, embryos for transplant, or actual males or females of a species for breeding purposes) that good need only perform the basic function associated with it to be merchantable. For example, if a seller were to sell a bull for breeding purposes, it would only need to perform the function of successfully impregnating cows at a proper conception rate. If the bull was infertile and had been sold under the guise of being a breeding bull, the infertility would be a breach of the implied warranty

associated with selling a bull for breeding. However, the bull would not be required to pass perfect genetics. In fact the U.S. District Court for the District of Texas discussed such a situation in *Two Rivers Company v. Curtiss Breeding Service*¹¹ and the court in dictum offered the analysis that “Two Rivers purchased the semen to artificially inseminate its half blood Chianina heifers and to eventually create a purebred Chianina herd. This goal can still be achieved. The Farro semen had an acceptable conception rate.” The court also discussed that, because the semen was not free of all genetic abnormalities, this was not uncommon because genetic defects are present in all livestock and all bulls carry recessive genes.

Since conception is the ordinary purpose of semen, the fact that it achieves that purpose may be enough to meet the implied warranty of merchantability. As with anything, merchantability is something that can be interpreted in many ways and it is possible that passing along harmful genetics, even if they meet ordinary purpose, could still create liability. Whether or not semen or other genetic materials are merchantable would largely depend upon the description of those materials in the contract. If the description of the good said that it was free from genetic defects, the material would have to meet that standard to be merchantable.

However, if the language of the transaction were to change, then type of responsibilities would also change. If a “genetically superior breeding bull” had been described as the good sought after by the buyer, then the implied warranty of merchantability might not have applied, and instead an implied warranty of fitness for particular purpose might have applied instead, as discussed below. *Two Rivers* also discussed the warranty of fitness and found that the buyer was not relying on the skill of the seller in selecting the goods.

Implied Warranty of Fitness for Particular Purpose

U.C.C. § 2-315 defines the implied warranty of fitness: “where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless

excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.” Applying this to livestock genetics, any time a transaction occurs between parties with a known genetic goal in mind, a particular purpose may be present, and, unless disclaimed, a warranty of fitness for that purpose could be present.

For example if a buyer were to approach a seller in the business of selling boar semen with the purpose of breeding up to a purebred level within the buyer’s operation, a particular purpose has been established. If the seller then sells the buyer semen that does not meet that purpose, possibly because of bloodline percentages, then the seller may be liable to the buyer for breach of that implied warranty even though the semen may have produced offspring.

In addition, a strong argument can be made that if the seller knows that the genetic good being purchased for the purpose of building seed stock or breeding business, then there is a particular purpose that the genetic materials in a transaction be free from hidden or latent defects in the form of recessive genes. In that instance, if the seller did not disclaim the implied warranties, the seller might be liable for any genetic defects that surfaced later.

However, the most important requirement for an implied warranty of fitness is the party’s expectations. In order for an implied warranty to exist, the buyer must be relying on the seller’s skill to select the goods and the seller must have reason to believe that the buyer is relying on the seller’s skills.

Damages From Breach of Warranties, Fraud, Misrepresentation, Etc.

It is important for stockmen to be educated as to what risk they are exposed to in both selling and buying. If for some reason something goes wrong, the law will determine which party is liable.

If there is a breach of warranty, either implied or express, the seller may be liable to the buyer of the genetic goods for certain damages. U.C.C. 2-§715 states that a seller, in the event of a breach, will be liable for both:

“(1) Incidental damages resulting from the seller’s breach include expenses reasonably incurred in inspection, receipt, transportation and care and

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custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach, and

“(2) Consequential damages resulting from the seller’s breach including ‘(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.’”

This means that in the event of a breach of a expressed or implied warranty for genetic materials that the seller would be liable to the buyer for the reasonable costs incurred in the course of dealing with the goods and also any real loss that occurred as result of the use of the “genetic goods.” It is also very important to note that if a genetic good were warranted by the seller, either expressly or impliedly, and there was a breach of the warranty that resulted in injury to a party or their property, the seller would be liable for any of those damages as well.

An example could occur when a buyer purchases bull semen and tells the seller that the purpose for the purchase is to inseminate a heifer for easy calving purposes. The buyer explains that he wants the seller to use his expertise in choosing the semen for buyer, and seller understands the buyer is relying on the seller. If the seller sells the semen to the buyer without any sort of disclaimers, an implied warranty would be created and a duty imposed on the seller to actually furnish good semen. If the buyer uses this semen and it is later found that the semen was poor for calving ease, then the seller could be liable to the buyer for a breach of the implied warranty of fitness. If that breach were proven, the seller would be liable for the incidental costs of using that semen, transportation of the product, the cost of artificial insemination, etc. If the use of the semen resulted in an economics loss, for example, a loss of a calf crop from the heifer, the seller would be liable for that as well. If the buyer can show that the semen caused the death of cows, this would be considered an injury to the buyer’s property and the seller could be liable for

that.

Damages are not strictly limited to these breaches of warranties in genetic transactions. There may be causes of action in tort law for fraud and misrepresentation. There is the potential that genetic materials carrying a genetic defect could potentially cause a seller to incur liability for a defect under *Restatement of the Law, Second, Torts, § 402A*.¹² In fact *Two Rivers* examined this tort liability but found that under Texas product liability law that economic loss does not qualify as damages in a tort cause of action.

However, U.C.C. § 2-719 provides that where consequential damages are for commercial losses, they may be limited or excluded, but damages to a person or their property may not be limited. It is important for stockmen on either side of the transaction to be educated as to the liability in a transaction and to take steps to mitigate that liability from the onset of the transaction by clarifying the purpose for purchase, by disclaiming against any warranties, and limiting damages.

Mitigation of Exposure and Liability for the Buyer and the Seller

The UCC provides that that words or conduct may exclude or limit implied warranties as long as it is done in a reasonable fashion. U.C.C. § 2-316 states that to negate an implied warranty of merchantability, the language must include merchantability, and, if written, must be conspicuous. The UCC states that implied warranties, including the warranty of merchantability, can be limited or negated:

“(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing

or course of performance or usage of trade.”¹³

This is important because a buyer or seller must be sure of what the other party intends to take away from the transaction. It is important that a seller disclaim warranties because the absence of a disclaimer may make a seller liable for hidden or latent defects in the genetic goods. A good practice for buyers is to examine the genetic goods and their background in as complete fashion as is possible.

A good example of this was presented in *Two Rivers*, where the court examined an implied warranty of merchantability and held that Curtiss Breeding Services had successfully disclaimed its warranty in the contract through the language “IT [SELLER] MAKES NO OTHER WARRANTY OF ANY KIND AND HEREBY DISCLAIMS ALL WARRANTIES, BOTH EXPRESS AND IMPLIED OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.”¹⁴

The fact that a seller can limit genetic warranty liability in this fashion does not, however, leave the door wide open. In fact the United State Court of Appeals for the 10th Circuit in *Schweizer v. Dekalb Swine Breeders, Inc.*¹⁵ held that a Kansas statute¹⁶ “permits disclaimer of warranties for livestock unless the seller ‘knowingly sells livestock which is diseased.’ The statute provides that livestock warranties may be disclaimed except where the seller knowingly or with reason to know sells livestock which is or might be diseased.” Diseased may mean a genetic disorder or defect. Many states such Arkansas, Ohio, Tennessee, Texas, and Washington have statutes that specifically exclude the implied warranties that livestock sold are free of sickness and disease. In these states, there is no implied warranty as to whether or not an animal is free of sickness and disease. The major issue in these particular states then becomes “does a defect equal a disease.” This is a question that stands to be decided within the livestock industry in the coming years. If a genetic defect equals a disease, then these state law may preclude a UCC examination of implied warranty liability. However, if a genetic defect is found by the courts to be different from what was intended by excluding disease, then the UCC would control the formation of implied warranties.

It is important that both buyers and sellers be

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educated on the potential genetic problems that may be present in genetic goods they are buying and selling. Knowingly selling genetic materials that could cause harm to others or their properties could result in liability for the seller.

Conclusion

As genetics continue to rapidly change and improve the way stockmen transact business in the livestock industry, the need will only grow for responsible producers to be educated on limiting their risks and liability both as purchasers and as sellers. With all parties on the same page, stockmen for all breeds and all species can move forward with less chance of undesirable consequences, such as litigation.

Endnotes

- ¹ The small plastic tube holding the frozen semen is referred to as a "straw."
- ² Facts and figures concerning the costs associated with genetic materials were provided by Dr. Don Coover, DVM. Dr. Coover is the owner of SEK Genetics and strong industry leader advocating for ethics and improving livestock genetics. <http://pewagbiotech.org/events/0924/bios/coover.php>; <http://www.sekgenetics.com/>
- ³ In 1906 the Uniform Sales Act was promulgated as codification of the common

law and was taken primarily from the English Sale of Goods Act of 1894 which served to codify the same principle of English common law. It was stated by Lord Ellenborough in discussing the reason for this codification that: "under such circumstances the purchaser has a right to a saleable article answering the description in the contract....Where there is no opportunity to examine the commodity, the maxim of *caveat emptor* does not apply. See William Prosser, "The Implied Warranty of Merchantable Quality," 27 *Minn. L. Rev.* 11 (1943).

⁴ The only state that has not adopted the UCC Article 2 is Louisiana which is a Civil Law jurisdiction and the sale of goods is covered under Louisiana Civil Code.

⁵ See J.W. Looney, "Warranties in Livestock, Feed, Seed, and Pesticide Transactions," 25 *U. Mem. L. Rev.* 1123 (1995).

- ⁶ U.C.C. § 2-313.
- ⁷ *Palmer Ranch Co. v. Campesi*, 647 F.2d 608 (5th Cir. 1980).
- ⁸ *Id.* at 617.
- ⁹ U.C.C. § 2-314.
- ¹⁰ U.C.C. § 2-315.
- ¹¹ *Two Rivers Company v. Curtiss*

Breeding Service, 624 F.2d 1242, 1251 (C.A.Tex. 1980).

¹² "This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." Restatement 2d of Torts, § 402A, Comments & illustrations: (a) (1965).

¹³ U.C.C. § 2-316.

¹⁴ *Two Rivers Company v. Curtiss Breeding Service*, 624 F.2d 1242, 1252(5th Cir. 1980).

¹⁵ *Schweizer v. Dekalb Swine Breeders, Inc.*, 954 F. Supp. 1495, 1505 (10th Cir. 1997).

¹⁶ K.S.A. 50-639(h): "Disclaimer or limitation of warranties; liabilities; attorney fees, when section inapplicable to seed for planting, livestock for agricultural purposes or disposal of surplus property by a governmental entity. . .

(h) This section shall not apply to sales of livestock for agricultural purposes, other than sales of livestock for immediate slaughter, except in cases where the supplier knowingly sells livestock which is diseased."

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FEDERAL REGISTER - by Robert P. Achenbach, Jr.

FOOD SAFETY. The FDA has adopted as final regulations amending the food additive regulations to provide for the safe use of ionizing radiation for control of food-borne pathogens, and extension of shelf-life, in fresh iceberg lettuce and fresh spinach at a dose up to 4.0 kiloGray. This action is a partial response to a petition filed by the National Food Processors Association on behalf of the Food Irradiation Coalition. **73 Fed. Reg. 49593 (Aug. 22, 2008).**

FRUIT MARKETING ORDERS. The AMS has adopted as final regulations amending the general regulations for federal fruit, vegetable and nut marketing agreements and marketing orders by establishing supplemental rules of practice for amendatory formal rulemaking proceedings

in accordance with section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). The supplemental rules of practice add procedures to the rulemaking process relating to amendments to fruit, vegetable and nut marketing agreements and marketing orders; authorize the USDA to impose assessments on affected industries to supplement funds necessary to improve or expedite an amendatory hearing process; and authorize the use of informal rulemaking to amend such agreements and orders. Section 1504 of the 2008 Farm Bill also applies to amendments of federal milk marketing agreements and orders. The supplemental rules of practice for federal milk marketing agreements and orders are addressed in a separate rulemaking document. **73 Fed. Reg. 49307 (Aug. 21, 2008).**

MILK. The AMS has adopted as final regulations amending the general regulations for federal milk marketing agreements and marketing orders by establishing supplemental rules of practice for amendatory formal rulemaking proceedings in accordance with section 1504 of the 2008 Farm Bill. This rule provides for supplemental guidelines, time periods and procedures for amending federal milk marketing agreements and orders; authorizes the use of informal rulemaking to amend such agreements and orders; and establishes provisions that permit the USDA to impose assessments on pooled milk under a federal milk marketing agreement or order to fund expedited amendatory formal rulemaking. **73 Fed. Reg. 49085 (Aug. 20, 2008).**

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Third: If yes, the project is within “waters of this state” and no exceptions to permitting requirements are applicable; then, what type of permit is appropriate?

DSL Jurisdiction Over “Waters of this State”

DSL adopted a comprehensive set of regulations defining the reach of the Department’s jurisdiction over “waters of this state” under ORS 196.810. The Removal Fill law itself provides waters of this state include “all natural waterways” and “all other navigable and nonnavigable bodies of water in this state.” ORS 196.800 (14).

The scope of “natural waterways” is very broad and includes all waterways “created naturally by geological and hydrological processes.” OAR 141-085-0010 (136). With regard to “other” waters, the regulations include some artificially created waters, including: “channels or ditches that are artificially created from upland that: (a) contain food and game fish; and (b) have free and open connection to waters of this state.” OAR 141-085-0015 (8).

Absent these characteristics, seasonal irrigation ditches and other channels created entirely from uplands for agricultural or ranching purposes are generally exempt from the permitting requirements. Irrigation ditches, canals and upland ponds created and used for conveying irrigation water and dewatered during the off season are not included under DSL jurisdiction. OAR 141-085-0015.

The rock cribs within the bed and banks of the river would qualify as located in a “natural waterway” and fall under DSL jurisdiction in our scenario. Therefore, any removal-fill activities within the bed and banks of the river would require a DSL permit unless a regulatory exemption applies to these specific structures and activities. Conversely, if the rock cribs in the delivery ditches are seasonal ditches created entirely from uplands for agricultural and ranching purposes they may be exempt from permitting requirements under DSL jurisdiction.

Exempt Activities and Structures

DSL established specific rules exempting certain activities in waters within the Department’s jurisdiction. Thus, the work in our scenario could qualify for a regulatory

exemption even though DSL likely has jurisdiction over any removal-fill work done on the diversion structures in the river. The most basic permitting exemption is the “50 cubic yard rule.” This rule exempts the removal or fill of less than 50 cubic yards of material from a waterway subject to DSL jurisdiction. OAR 141-085-0015. In addition, two other exemptions may apply:

Exempt Maintenance or Reconstruction of Certain Structures

OAR 141-085-0020 (8) provides a broad permit exemption for the maintenance or reconstruction of “certain structures” within jurisdictional waters, including: dikes, dams, levees, drainage ditches, irrigation ditches, and irrigation structures. In order to qualify, two requirements must be met:

(a) The structure was serviceable within the past five years; and

(b) Such maintenance or reconstruction would not significantly adversely affect wetlands or other waters of this state to a greater extent than the [waters] were affected as a result of the original construction of those structures. *Id.*

If the irrigation diversion “rock cribs” in our example were operational within the past five years, the proposed maintenance and reconstruction would qualify under the first prong of part (a).

It is more difficult to determine how the second prong (b) will apply. DSL characterizes this exemption as applying to maintenance and reconstruction on an “in kind, in-place basis.” The proposed activities would likely fall within the exemption and not require a permit if the maintenance and reconstruction proposed would not significantly alter the size, scope or effect of the rock cribs as originally constructed.

Push-up Dams

Certain push-up dams within waters subject to DSL jurisdiction are exempt from the permit requirement under DSL regulations. In order to qualify as a push-up dam, the structure must first meet the explicit definition provided in OAR 141-085-0010 (172):

“Push-up Dam” is a berm of *streambed material* that is excavated or bulldozed (i.e., pushed-up) from within the streambed itself and positioned in the stream in such a way as to hold or divert water in an active flowing

stream (i.e., a ‘removal’).... Push-up dams are re-constructed each water use season; high water usually flattens or breaches them or equipment is used to breach or flatten them at the close of the water use season.”

Push-up dams established before September 13, 1967, are exempt from any permitting requirements. However, these push-up dams must be maintained in substantially the same condition as existed prior to the establishment date (before September 13, 1967) and used in accordance with any associated water rights. Any structure constructed with materials other than streambed material would likely be considered a more permanent structure such as a dam or “irrigation structure” under the general maintenance and reconstruction exemption, as described above.

This exemption would not apply in our scenario as the logs used in the rock cribs would not qualify as streambed material. Having determined the project will be carried out in “waters of this state” and that no exemption applies to the requirement of obtaining a DSL permit, obtaining a Removal-Fill permit from DSL to complete the project must be considered.

Obtaining a Removal-Fill Permit: The Application Process

There are two options for seeking removal-fill authorization: (1) individual permits; and (2) general authorizations. Individual permits apply to projects with potentially significant impacts to waters, while general authorizations provide an expedited review process for certain categories of small projects.

Application for either requires using the “Joint Permit Application Form”. The application form must be submitted to both DSL and the U.S. Army Corps of Engineers. Additionally, the Corps can require an applicant to obtain a federal permit in addition to a state permit.

An individual permit is likely required in our scenario. DSL’s report for Fiscal Years 2004-2005 and 2005-2006 suggests that DSL reserves general authorizations for minimal disturbances. Of the more than 1500 general authorizations issued during the two-year period: nearly 900 were for “recreational placer mining;” and roughly 300 were for fish and wildlife enhancement projects. None appear to relate to farming,

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agriculture, or irrigation related activities. The type of activities proposed in our scenario would likely not qualify for a general authorization.

The application itself is lengthy and involved regardless of what selected authorization mechanism is chosen. The form is ten pages long and requires a description of the project and purpose, a location map, site plan, cross-section drawings and recent aerial photo, an alternatives analysis, a description of measures to minimize impacts, a description of the physical and biological resources in

the area, a description of site restoration measures, a review by the local city and/or county planning department, and Coastal Zone certification, if applicable. No “short form” or other authorization avenues exist for either an individual permit or a general authorization.

If the project starts without obtaining the proper permit, the assessment of civil penalties is possible. Unlawful removal-fill activities are punishable by fines of up to \$10,000 per each day of the violation. ORS 196.990. The calculated fines are based on prior knowledge of the removal/fill laws,

cooperation with the DSL, and damage to the resource. OAR 141-085-0090.

More information on DSL and Removal-Fill Permits can be found at <http://statelands.dsl.state.or.us/DSL/PERMITS/index.shtml> or by contacting Schroeder Law Offices at www.water-law.com.

**IF YOUR HORSE SAYS
NO, YOU EITHER ASKED
THE WRONG QUESTION
OR ASKED THE
QUESTION WRONG.**

From the Executive Director:

Set your calendars now for October 24-25, 2008 – AALA 29th Annual Agricultural Law Symposium at the City Center Marriott in downtown Minneapolis, MN. If you have not received a brochure, please let me know. RobertA@aglaw-assn.org The current program and an online registration form is available at www.aglaw-assn.org.

Conference Sponsorships. Each year the AALA receives sponsorships for assistance with the various costs of the annual conference. Several member firms have already come forward with generous sponsorships of the Friday evening reception, breakfasts, student travel sponsorships and others. Sponsorships start at \$500 and all sponsors are acknowledged at the conference in the handbook and at the sponsored event. If your firm is interested in showing its support for the AALA through a conference sponsorship, please contact me (RobertA@aglaw-assn.org or 541-466-5444) as soon as possible so I can mention your sponsorship in the conference handbook.

A reminder that the *Agricultural Law Update* is available by e-mail, often sent up to a week before the printed version is mailed. The e-mail version saves the association substantial costs in printing and mailing. Please send an e-mail to RobertA@aglaw-assn.org to receive a sample copy and to change your subscription to e-mail.

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