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ATTORNEY GENERAL OPINION NO. 88-2

TO: R. Keith Higginson
Director, Department of Water Resources
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

- 1) Is the embankment surrounding the southern edge of Mud Lake a dam as defined in Idaho Code § 42-1711(b)?
- 2) Are there any liability implications for the State of Idaho if the Idaho Water Resource Board exempts the Mud Lake embankment from the dam safety regulations?
- 3) Would these liability implications be altered by having the landowners surrounding Mud Lake and the holders of water rights from Mud Lake accept responsibility for the embankment as a dike rather than a dam?

CONCLUSION:

1) Yes. The embankment surrounding the southern edge of Mud Lake is a dam as defined in Idaho Code § 42-1711(b) because the embankment is an artificial embankment storing in excess of 50 acre feet of water.

2) Idaho Code § 42-1710 mandates the regulation of all dams. The statute provides no discretion to exempt dams from regulation; there is discretion to determine the degree of regulation. If the Idaho Water Resource Board (Board) adopted regulations which violated the statutory duty, the Board potentially could be liable for any personal or property damage caused as a direct result of the violation of the statutory duty. None of the immunity provisions of Idaho Code § 6-904 or

of Idaho Code § 42-1717 provides the Board a shield from this liability.

3) This alternative would not eliminate the liability of the Board.

ANALYSIS:

Question No. 1

The answer to the first question -- i.e., whether the embankment surrounding the southern edge of Mud Lake is a "dam" as defined in Idaho Code § 42-1711(b) -- largely depends upon the facts regarding the construction of the embankment. The facts as the office understands them are gathered from written materials provided by the Idaho Department of Water Resources (Department) and from discussions with your staff.

Mud Lake, situated in a depressed basin area in northern Jefferson County, is a natural lake with no natural outlet for drainage of water. Camas and Beaver Creeks provide surface water to the basin, and ground water percolating from irrigation of the Egin Bench to the northeast also provides inflow.

Beginning in the 1920's, the early settlers sought to reclaim the land by separating Mud Lake from the surrounding marshes by the construction of dikes around portions of Mud Lake. The individual landowners gradually linked the dikes together to form a thirteen mile long embankment in a crescent shape around the southern end of Mud Lake. The dikes caused Mud Lake to change in shape and in storage capacity. The embankment is about ten feet high, and the average storage capacity is 37,930 acre feet when water reaches a height of eight feet on the embankment.

The first question asks whether this embankment is a dam for purposes of the Idaho Dam Safety Act, Idaho Code § 42-1709 et seq. Idaho Code § 42-1711(b) defines a dam, in part, as follows:

"Dam" means any artificial barrier, together with appurtenant works, constructed for the purpose of storing water or that stores water, which is ten (10) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside

limit of the barrier, if it is not across a stream channel or watercourse, to the maximum storage elevation, or has or will have an impounding capacity at maximum storage elevation of fifty (50) acre feet or more.

This definition is in the disjunctive. An artificial barrier that stores water is a dam if the barrier is ten (10) feet or more in height, or if the impounding capacity at maximum storage elevation is fifty acre feet or more, unless an exception applies. Here, none of the exceptions applies.

The embankment here clearly stores water in excess of 50 acre feet. It would therefore be a "dam" if the embankment is an "artificial barrier." While the initial construction by man of the embankment would normally indicate that the embankment is an artificial barrier, recent litigation concerning Mud Lake casts some doubt on this conclusion.

In Marty v. State, Jefferson County Civil No. 1-3504 (Dist.Ct. December 17, 1987) (order granting partial summary judgment), the district court concluded that "Mud Lake must be considered as a natural as opposed to an artificially created body of water so far as the rules of law and rights of the public or of individuals are concerned." Id. at 5. Thus, this decision makes the statutory definition of dam ambiguous. Did the legislature intend the Department to regulate man-made structures as dams under the Idaho Dam Safety Act if such structures have acquired the attributes of a natural embankment for tort law purposes?

The rules of statutory construction are well known. The primary goal in statutory construction is to ascertain and give effect to the legislative intent. Summers v. Dooley, 94 Idaho 87, 89, 481 P.2d 318, 320 (1971). If a statute is ambiguous, a court will "go outside the language of the statute itself to ascertain and to effectuate the legislative intent. . . . Indicia of legislative intent may be 'collected from the context [of a statute], from the occasion and necessity of the law, from the mischief felt, and the remedy in view.' Noble v. Glenss Ferry Bank, Ltd., 91 Idaho 364, 367, 421 P.2d 444, 447 (1966) (quoting Offield v. Davis, 100 Va. 250, 40 S.E. 910, 912 [1902])." St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 148, 686 P.2d 88, 93 (App. 1984).

The legislative intent in this instance can perhaps best be seen in the recent amendments to the definition of a dam in Idaho Code § 42-1711(b). In 1987, the Idaho legislature added five categories that were to be exempt from dam regulation:

(1) Barriers constructed in low risk areas as determined by the director, which are six (6) feet or less in height, regardless of storage capacity.

(2) Barriers constructed in low risk areas as determined by the director, which impound ten (10) acre-feet or less at maximum water storage elevation, regardless of height.

(3) Barriers in a canal used to raise or lower water therein or divert water therefrom.

(4) Fills or structures determined by the director to be designed primarily for highway or railroad traffic.

(5) Fills, retaining dikes or structures, which are under jurisdiction of the division of environment, department of health and welfare, designed primarily for retention and treatment of municipal, livestock, or domestic wastes, or sediment and wastes from produce washing or food processing plants.

See Act of March 25, 1987, ch.98, 1987 Idaho Sess. Laws 192. The statement of purpose for ch.98 stated, in relevant part, as follows:

The Dam Safety Program will continue to concentrate on regulation of dams and tailing structures in accordance with the Safety of Dams Statutes, Idaho Code (§§ 42-1709-1721) particularly the dams that pose a threat to the public or could cause extensive property damage. The amendment would improve the efficiency of the program without any change in costs by excluding 40 small, insignificant dams in remote areas. By raising the size limits of dams regulated, fewer small dams would require

review and approval, except for those in high risk (developed) areas in the state.

The Department's letter dated December 18, 1987, makes it clear that the Mud Lake embankment was not one of the "insignificant dams" that were intended to be exempt from regulation:

The department has included the [Mud Lake] structure on the inventory of dams since at least 1971. It was evaluated in the Corps of Engineers Phase I inspection program and designated a large dam located in a significant risk area. Because the structure confines a terminal lake, only a part of the water stored would be released during failure. The area potentially subject to flooding during failure is divided into cells by the roads and canals radiating outward from the structure. A single break would flood several hundred to a few thousand acres of farm land. Some homes could be affected but water levels would not exceed 2-3 feet on the first floor elevation. (Emphasis added.)

Given the risk of failure of the Mud Lake embankment and the history of its construction, this type of structure certainly seems to be of the type the legislature intended the Department to regulate under the Idaho Dam Safety statute. This conclusion is further supported by the fact that the area was recently subject to substantial flooding that resulted in the filing of the Marty case.

This conclusion is not contrary to the district court's order in the Marty case. First, that order did not purport to decide the jurisdiction of the Department under the Idaho Dam Safety statute. Rather, the district court's conclusion that the Mud Lake embankment had become a natural barrier was used to support the district court's ultimate conclusion that the doctrine of strict liability did not apply to the action for damages before the district court. Second, the district court relied on three cases and one treatise on water rights for reaching the conclusion that the Mud Lake embankment had become a natural barrier. See Wilber v. Western Properties, 540 P.2d 470 (Wash.App. 1975); Ramada Inns v. Salt River Valley Water Users' Ass'n; 523 P.2d 496 (Ariz. 1974); Los Angeles County Flood

Control District v. Mindlin, 106 Cal.App.3d 698, 165 Cal.Rptr.233 (1980); 1 S. Wiel, Water Rights in the Western States, § 60 (3rd Ed. 1911). None of these cases or treatise supports a conclusion that the artificial channel or water body that has some characteristics of a natural water body is no longer subject to regulation under a statute such as the Idaho Dam Safety statute. The Los Angeles County Flood Control District case concerned the valuation of real property in an eminent domain case 106 Cal.App.3d at 703, 165 Cal.Rptr. at 235-236. The Wilber and Ramada Inns cases were both damage actions involving claims based on strict liability. 540 P.2d at 474; 523 P.2d at 499.

Significantly, the court in the Ramada Inns case made clear that its holding should not be applied too broadly. The court expressly cautioned the defendant water users as follows: "[B]ut this does not mean that the water belongs to the public as do wholly natural waters . . . , nor do we imply that the water users are relieved from the duty to maintain and repair the canal." 523 P.2d at 498 (citations omitted).

Therefore, we conclude that the Mud Lake embankment is a dam within the meaning of Idaho Code § 42-1711(b). The Board and the Department have the authority and duty to regulate it under the Idaho Dam Safety statute.

Question No. 2

The answer to this question depends on the nature of the duties imposed on the Board and on the Department in the administration of the Idaho Safety of Dams Statutes and on the immunity provisions of Idaho Code § 42-1717 and the Idaho Tort Claims Act, Idaho Code §§ 6-901 et seq. The determination of the duties of the Board and of the Department requires a review of Idaho Code §§ 42-1710, 42-1714, and 42-1717.

Idaho Code § 42-1710 mandates that the Department "shall supervise" all dams in the state of Idaho. The plain meaning of the language expresses a legislative intent to create a mandatory program for the supervision of all dams. The text of Idaho Code § 42-1717 supports this conclusion by outlining in detail the director's duties in carrying out the dam safety program; at least six of these duties are prescribed with the mandatory "shall."

Idaho Code § 42-1714 requires the Board to "adopt and revise . . . such rules and regulations . . . as may be necessary for the carrying out of the provisions of sections 42-1710 through

42-1721, Idaho Code." The Board does not have authority to adopt regulations that are inconsistent with the statutory definition of a dam contained in Idaho Code § 42-1711(b). See Holly Care Center v. State, Department of Employment, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986). Thus, if the Board adopted regulations that exempted the embankment surrounding Mud Lake from the definition of a dam, the Board's action would be in violation of its strict statutory duty.

Your second question asks whether such conduct would expose the Board to liability if a person suffers personal injury or property damage as the direct result of this violation of statutory duty. The answer to this question is governed by Idaho Code § 42-1717, which states in relevant part:

No action shall be brought against the state, the water resource board, the director, or the department of water resources or their respective agents or employees for the recovery of damages caused by the partial or total failure of any dam, reservoir or mine tailings impoundment structure or through the operation of any dam, reservoir or mine tailings impoundment structure upon the ground that such defendant is liable by virtue of any of the following:

(a) The approval of the dam, reservoir or mine tailings impoundment structure.

(b) The issuance or enforcement of orders relative to maintenance or operation of the dam, reservoir or mine tailings impoundment structure.

(c) Control and regulation of the dam, reservoir or mine tailings impoundment structure.

(d) Measures taken to protect against failure during an emergency.

(e) The use of design and construction criteria prepared by the department.

(f) The failure to issue or enforce orders, to control or regulate dams, or to make measures to protect against dam failure.

The six exceptions listed above are sweeping in scope. Nonetheless, it is our opinion that none of them is intended to absolve the Board from liability in the event that the Board

affirmatively announced its intention to exempt particular dams from regulation.

Much the same result is reached if the situation is analyzed under the Idaho Tort Claims Act, Idaho Code § 6-901 et seq. That act makes liability the rule for negligent acts of governmental entities, with certain specific exceptions. Sterling v. Bloom, 111 Idaho 211, 214-215, 723 P.2d 755, 758-759 (1986). The first exception in Idaho Code § 6-904, commonly called the "discretionary function" exception, is the only one that arguably would apply to the Board's adoption of a regulation exempting the Mud Lake embankment from dam safety regulation. However, case law makes it clear that acts of an administrative agency in violation of a statute or valid regulation generally are not within this exception. Oppenheimer Industries v. Johnson Cattle Co., 112 Idaho 423, 425, 732 P.2d 661, 663 (1987).

We conclude that the Board is not shielded by the immunity provisions of the Dam Safety Act or the "discretionary function" exception of the Tort Claims Act if it exempts the Mud Lake embankment from the dam safety program.

Question No. 3

The discussion in Question No. 2 makes clear that the Board would be liable if a person suffered personal or property damage as the direct result of a Board refusal to carry out its statutory duty. If the state attempts to transfer this responsibility by contract, as this question suggests, the issue would be whether the contract is void as against the public policy expressed in the Idaho Safety of Dams statute. Our answer to Question No. 2 again makes clear that the Board has no authority to contract away its statutory duty.

AUTHORITIES CONSIDERED:

Idaho Statutes

Act of March 25, 1987, ch.98,
1987 Idaho Sess. Laws 192
Idaho Code § 6-901 et seq.
Idaho Code § 6-904
Idaho Code § 42-1709 et seq.
Idaho Code § 42-1710
Idaho Code § 42-1711
Idaho Code § 42-1714

Idaho Code § 42-1717

Idaho Cases:

Holly Care Center v. State, Department of Employment, 110 Idaho 76, 714 P.2d 45 (1986).

Marty v. State, Jefferson County Civil No. 1-3504 (Dist.Ct. December 17, 1987).

Oppenheimer Industries v. Johnson Cattle Co., 112 Idaho 423, 732 P.2d 661 (1987).

St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 686 P.2d 88 (App. 1984).

Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

Summers v. Dooley, 94 Idaho 87, 481 P.2d 318 (1971).

Other Cases:

Los Angeles County Flood Control District v. Mindlin, 106 Cal.App.3d 698, 165 Cal.Rptr. 233 (1980).

Ramada Inns v. Salt River Valley Water Users' Ass'n, 523 P.2d 496 (Ariz. 1974).

Wilber v. Western Properties, 540 P.2d 470 (Wash.App. 1975).

Other:

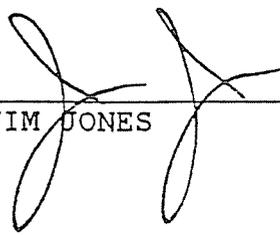
1 S. Wiel, Water Rights in the Western States, § 60 (3d ed. 1911).

Statement of Purpose for Act of March 25, 1987 Idaho Sess. Laws 192.

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DATED this 4th day of March, 1988.

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