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# Local Flood Control: Using Idaho's Flood Control District Statute to Enable Place-Based Stream Restoration

Jerold A. Long  
Samuel Finch



During the 1980s and 1990s, a Teton County developer slowly converted a one mile stretch of Teton Creek's wide floodplain and riparian area, which was historically comprised of three distinct stream channels, into a single, straight, deep, un-vegetated sluice. This alteration of the natural stream channels caused floodwater to pick up both speed and sediment, leading to recurring damage to the surrounding property. If this sounds inappropriate, it is. The developer's activities violated Section 404 of the Clean Water Act, which requires a federal permit before discharging any dredged or fill material into "waters of the United States." While he did not go willingly, the developer ultimately served time in federal prison for criminal violations of the Clean Water Act.<sup>1</sup>

But what of the stream? Prior to the stream's channelization, and dewatering by the Grand Teton Canal Company, Teton Creek provided important habitat for Idaho's native Yellowstone Cutthroat Trout. Now, with an eroding headcut migrating upstream, and increased sediment loads depositing downstream, parts of the stream serve more as an erosive force and sediment transport system than a stream. With its damaged aesthetics and compromised ecological health and function, Teton Creek begs for attention. Although local government and community organizations have begun to restore part of the degraded stream corridor, much of the damage still remains, and local land and homeowners and the city of Driggs face an increased risk of harm from flooding.

While the developer's brazen disregard for legal requirements might make Teton Creek somewhat unique, the resulting stream-channel alterations unfortunately are not. In Idaho alone over 7,000 miles of stream channels are impaired by the physical conditions of the stream, either through

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flow or physical-habitat alterations.<sup>2</sup> In other words, due to dewatering, stream channelization, erosion, or other degradation of the stream channel and floodplain, these 7,000 miles of streams cannot serve the beneficial uses designated by the people of Idaho. An additional 7,364 miles of streams are impaired due to increased temperatures, and 4,780 miles are impaired by sediment or siltation. Idaho is not alone in this. Across the Intermountain West, silt, sediment, temperature, low flows, and other morphological alterations impair thousands of stream miles.<sup>3</sup> These streams are compromised not only ecologically and aesthetically, they also lack natural flood control properties. This leads to increased frequency and severity of flood events.

Idaho communities do have the capacity to remedy these failings and restore their degraded streams. Idaho's Flood Control District Statute<sup>4</sup> allows for grassroots, place-based, locally-managed efforts to restore degraded stream systems and allow for the natural control and mitigation of floodwaters, while simultaneously providing for the conservation of Idaho's water resources. Historically, flood control districts have mitigated floods by implementing stream-channel-altering flood control methods such as dikes, levees, dams, and canals. But more recently, local communities are exploring creating flood control districts that take advantage of a stream's natural flood control properties through stream res-

toration. Place-based stream restoration has the benefit of improving locally-desired aesthetic, health, ecological, and economic resources, in addition to flood control. The Idaho Department of Water Resources ("IDWR") should encourage the use of flood control districts to achieve locally-identified stream restoration — and flood control — goals.

## Place-based stream restoration

In Idaho local communities can petition the Director of the IDWR to create flood control districts.<sup>5</sup> Flood control districts are local taxing districts authorized to levy a small property tax to fund and implement flood control operations.<sup>6</sup> The powers granted to flood control districts are broad, allowing for a wide range of actions, but arguably limited by the general policy statement of the enabling statute: "to provide for the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources."<sup>7</sup>

While it appears that all Idaho flood control districts have historically limited their efforts to traditional physical stream-channel-altering flood control methods, the statute does not require that approach. The statute does not specify any required methods of flood control. Rather it only requires that the petition explain the "method or system of flood control" to be used by the proposed district, and demonstrate that such flood control methods are "a

proper and advantageous method of accomplishing the relief sought or the benefits to be secured.”<sup>8</sup> The statute’s general purpose is clear, but it leaves the specific means of achieving that purpose in the hands of the local community.

In articulating the numerous powers granted to flood control district commissioners, the statute specifically recognizes that natural stream systems can serve a flood control purpose. The statute grants commissioners the power “to use natural streams and to improve the same for use as a flood control structure.”<sup>9</sup> The statute further provides that “in the event that use of the natural stream involves alteration of the stream channel,” such alteration requires approval by the IDWR Director.<sup>10</sup> This provision indicates that the use of natural streams as contemplated by the statute does not necessarily include stream channel alteration — it may include it, but may instead involve preservation or restoration of the natural system.

These elements of the flood control district statute — broad authority to act in the public interest, a preference for local control, and the specific authorization of the use of natural streams for flood control purposes — suggest several flood control alternatives. A community may use a flood control district to fund stream restoration activities that both reduce the potential for flood damage and achieve locally-desired ecological, aesthetic, and economic development goals. In other words, the historical use of flood control districts in Idaho for constructing physical flood control methods is not mandated by the statute. In many cases, preservation or restoration of the natural stream may be a better flood control approach.

### Using Nature to Control Floods

Of course, using stream restoration or preservation as a flood control tool requires that natural stream conditions actually serve flood control purposes. The evidence for this is overwhelming. As demonstrated tragically by Hurricanes Katrina in 2005 and Sandy in

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2012,<sup>11</sup> and through hundreds of on-the-ground research projects over several decades,<sup>12</sup> natural riparian systems play a vital role in absorbing flood waters and reducing the harm to land and structures built near flood plains. This role cannot be replicated fully by artificial flood control approaches. Natural stream systems contain many mechanisms to control floodwaters, and restoring an altered stream to its natural state can improve the flood control capacity of that stream.

Because stream restoration achieves both flood control and local ecological or aesthetic goals, several western states already use restoration as part of the tools available to flood control districts. In Washington, the Donald Wapato Levee Removal Project in Yakima County — funded and implemented by the Yakima County Flood Control Zone District<sup>13</sup> — restored 100 acres of floodplain. This has reduced flood overflows, and improved riparian habitat, native plant communities, and fish populations. Similarly, Arizona’s flood control district statute specifically advocates for flood control solutions that use stream restoration practices.<sup>14</sup> In the Arlington Valley Flood Plain Acquisition Project,<sup>15</sup> the Maricopa County Flood Control District purchased an elementary school in a flood prone area, demolished the building and restored the floodplain’s natural conditions. While this might seem a drastic measure, relocating the school was more cost effective than leaving it in place and attempting to protect it from the flooding Gila River. In both cases, local communities implemented stream restoration under flood control

authority enabled by legislation very similar to Idaho’s flood control district statute.

### Resolving Uncertainty and Enabling Local Control

While Idaho’s flood control district statute should allow for the use of place-based stream restoration efforts, two uncertainties exist in the statute. First, although natural streams can be used for flood control purposes under the statute’s broad purpose and delegated powers, apparently no Idaho flood control district has implemented stream restoration as a flood control tool. Further, neither the statute nor the IDWR explicitly support that particular tool. Second, and perhaps more troubling, the statute’s broad grant of authority to district commissioners — with few explicit restrictions on how that authority is used — leaves flood control districts prone to capture by interests that might favor traditional, stream-channel-altering flood control approaches, even where the local community may prefer otherwise. Legislative attention to these two issues is unnecessary. When a petition contemplates the use of stream restoration as the method of flood control, the IDWR Director should clarify when granting the petition that the authority of the flood control district is limited by “proposed method or system of flood control” described in the petition. The proposed method or system may specifically include and be limited to stream restoration.

The statute requires that the petition to establish a district contain two elements that suggest that the legisla-

ture intended a district's power be determined and limited by the petition that created it. First, all petitions must specify the "object of the organization of the district."<sup>16</sup> As demonstrated by the petition requirements that follow, the word "object" in this sentence means "purpose" or "goal." Because the entire statute requires that all districts achieve flood control in some form, this requirement that the petition describe the purpose of a particular flood control district indicates that an individual flood control district may have a purpose that is more specific than that statute's general goal. For example, the petition might describe as its purpose the mitigation or controlling of floods by restoring the stream's natural condition. Similarly, a specific flood control district might provide that its purpose is to restore a floodplain by purchasing private lands that might otherwise be developed and exacerbate stormwater runoff. Both purposes achieve the statute's general goal, but in a specific, locally-appropriate way.

The petition must also describe how establishment of the district, and use of the proposed method or system of flood control, "is a proper and advantageous method of accomplishing the relief sought or benefits to be secured."<sup>17</sup> As noted above, the reference to "relief sought or benefits to be secured" only makes sense if a district can have a purpose that is more specific than simply "flood control." More important, the requirement that a petition describe both the proposed method and system of flood control and how it will achieve the proposed district's specific goals demonstrates that the method or system described is an integral part of the district itself. This requirement would be meaningless if the district could ignore both the purpose and method or system described in the petition. The only reasonable interpretation of this requirement is that the petition itself — as approved by the registered voters in the proposed district — describes and limits the range of actions that might be undertaken by the district. Any other interpretation renders the petition requirements a mere formality, to be ignored once the district is approved.

In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.



The procedure by which a petition is approved also indicates that the authority granted a specific district can and should be constrained as described in the petition itself. After considering a petition, the Director has three options. The Director may approve the petition as submitted, may deny the petition, or may recommend a district different from that described in the petition.<sup>18</sup> When the alternative district recommended is "materially different" from that described in the petition, the registered voters in the proposed district must approve the revised district in the same manner required for the original petition.<sup>19</sup> Because the original petition need only describe the "temporary boundaries of the proposed district," and because the materially different provision refers to the petition in its entirety, the materially different language must refer to more than simply the proposed district's geographic boundaries. A materially different flood control district would be a district with a different purpose, or with a different proposed system or method of flood control. If the statute did not limit the authority of flood control districts to the purpose, and system or methods, described in the petition, this "materially different" language would be irrelevant.

A plain reading of the statute indicates that it both authorizes the use of stream restoration and limits the acceptable tools and powers of a specific district to those that carry out the specific purpose, and use the specific system or methods, described in the petition. Any other interpretation renders significant aspects of the statute largely meaningless and would invali-

date the goals and desires of the taxpayers who approved and fund the district. In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.

#### Conclusion

Idaho is home to more miles of streams and rivers than any other western state. And those streams, and the communities that surround and love them — from the Bruneau Canyon to the deep forests of North Idaho or the high alpine streams flowing out of the Tetons — are incredibly diverse. What might work to control floods and achieve locally-desired aesthetic, ecological, or economic development goals in Weiser might not work in Driggs. Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture. This includes stream restoration and preservation. Idaho law authorizes and supports local control and funding of flood control efforts. The Idaho Department of Water Resources should promote the use of locally-designed programs to achieve local goals that are consistent with the state-wide interest in conserving our water resources. Stream restoration and related flood management approaches provide local communities more options to manage floodwaters and water resources, while strengthening those local communities and cultures, preserving and conserving the state's water resources, and improving degraded streams in our great state.

## End notes

1 See *United States v. Moses*, 2006 WL 1459836 (D. Idaho 2006), affirmed by *United States v. Moses*, 496 F.3d 984 (9<sup>th</sup> Cir. 2007), certiorari denied by *Moses v. United States*, 554 U.S. 918 (2008), and post-conviction relief dismissed by *United States v. Moses*, 642 F.Supp.2d 1216 (D. Idaho 2009).

2 See Idaho's 2010 Integrated Report (August 2011), available at <http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>.

3 See, e.g., United States Environmental Protection Agency, National Rivers and Stream Assessment, 2008-2009 (Draft), (Feb. 28, 2013).

4 Idaho Code Ann. §42-3101 to 3128.

5 See Idaho Code Ann. §42-3105.

6 The property tax assessed by a flood control district may be no more than 0.06% of a property's assessed value, unless a higher amount is approved by voters. See Idaho Code Ann. §42-42-3115(1).

7 Idaho Code Ann. §42-3102.

8 Idaho Code Ann. §42-3105(3).

9 Idaho Code Ann. §42-3115(14).

10 *Id.*

11 In Louisiana, the use of dikes and channelization to control the Mississippi River has caused the loss of more than 5,000 square kilometers of wetlands in the Mississippi River Delta since 1900. These wetlands formerly served as a buffer that reduced the storm surges and flooding associated with hurricanes or other significant storms. See John W. Day, Jr., et al., Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita, 315 *SCIENCE* 1679 (2007); Some of Hurricane Sandy's effects were exacerbated by coastal development, which eliminates the buffering capacity of coastal wetlands and dunes and can increase severity of storm surges. See, e.g., John Rudof, et al., "Hurricane Sandy Damage Amplified by Breakneck Development of Coast," Nov. 11, 2012, available at [http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html)

[damage\\_n\\_2114525.html](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html) (last accessed Apr. 1, 2013); see also Robert A. Monton, Factors Controlling Storm Impacts on Coastal Barriers and Beaches: A preliminary basis for near real-time forecasting, 2002 *J. COASTAL RES.* 486.

12 See, e.g., Cynthia Berlin & James Handley, Wetlands as Flood Control: The case of the La Crosse River marsh, 50(2) *FOCUS ON GEOG.* 7 (2007); Ted Sommer, et al, California's Yolo Bypass: Evidence that flood control can be compatible with fisheries, wetlands, wildlife, and agriculture, 26(8) *FISHERIES* 6 (2001); Donald L. Hey & Nancy S. Philippi, Flood Reduction through Wetland Restoration: The Upper Mississippi River basin as a case history, 3(1) *RESTORATION ECOLOGY* 4 (1995); Taylor A. Delaney, Benefits to Downstream Flood Attenuation and Water Quality as a Result of Constructed Wetlands in Agricultural Landscapes, 50(6) *J. SOIL & WATER CONSERVATION* 620 (1995).

13 See <http://www.yakimacounty.us/surface-water/FCZD.htm>.

14 See Ariz. Rev. Stat. §48-3603(C)(20)(b).

15 See <http://www.fcd.maricopa.gov/Projects/PPM/projStructDetails.aspx?ProjectID=5>.

16 Idaho Code Ann. §42-3105(1).

17 Idaho Code Ann. §42-3105(3).

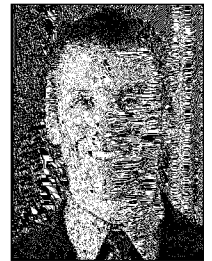
18 See Idaho Code Ann. §42-3108.

19 *Id.*

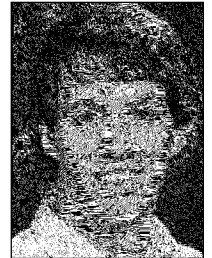
Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture.

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