



Board of Control

ALLAN CUNNINGHAM
Adjudication Officer

715 East Roosevelt, Riverton, Wyoming 82501
(307)856-0747 FAX (307)856-4837

RANDY TULLIS, SUPERINTENDENT
WATER DIVISION NO. I
MICHAEL WHITAKER, SUPERINTENDENT
WATER DIVISION NO. II
CRAIG COOPER, SUPERINTENDENT
WATER DIVISION NO. III
JADE HENDERSON, SUPERINTENDENT
WATER DIVISION NO. IV

LEGAL ASPECTS RELATING to DITCH RIGHTS and EASEMENTS

The law regarding ditch rights as a private property appurtenance separate from water rights is a confusing and often misunderstood concept in Wyoming water administration. The vast majority of water users in Wyoming have the misunderstanding that disagreements over the use of a ditch in all cases can be settled by decree of the water commissioner. While this may appear true under certain conditions (W.S. 41-6-301 through 41-6-308) the more common problems brought to the water commissioner are not settleable within his jurisdiction, and the most he can do is offer advice based on his knowledge of previous court decisions, always emphasizing that if his advice is not acceptable to all parties, those aggrieved should seek relief in civil court.

The Wyoming Supreme Court in 1912 noted the separation between water rights and ditch rights in the Collett vs Morgan case when it said:

"The Board of Control had no power or authority to determine as between the parties, the ownership or right to the use of the ditch. Its duties are confined to the distribution of the waters of the state between the several appropriators, the granting of permits to use the waters of the state for beneficial uses, to grant certificates therefor, and the general supervision of such waters... The ditch ownership question cannot be settled by the Board but must be settled by agreement between the parties or by proceedings in court."

Keeping this in mind, and observing the fact that ditch easement and ownership questions continue to come before the water commissioners, who are perceived by the public to be the logically empowered public servants from whom free ditch advice can be attained, following are some of the most commonly asked questions, and responses which most properly address the problems.

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1. Question: Where in the water statutes can I find out what law is in regard to ditch easements and rights-of-way?

Answer: There is no water statute referencing ditch easements. These are matters of civil law and common law rather than water law and, as such, require agreement between the affected parties or litigation in court.

2. Question: How do I know if my ditch has an easement across my neighbor's property?

Answer: Many times an easement for a ditch crossing neighboring properties will be recorded as such in the County Clerk's office as an attachment to the deed to the property. If this is the case, the documented easement will normally contain specific lengths, widths and other conditions of the easement.

3. Question: If I check and find that no written easement has ever been recorded, does that mean my ditch has no easement?

Answer: No. In some cases, written easements may have been agreed to and signed by the affected landowners but not recorded. These are sometimes found in the possession of one or all of the affected landowners, and are usually binding although their legality should always be verified by a neutral party (such as a County Attorney) if any of the parties questions the terms. In other cases, no written documentation of any kind exists, but an unwritten easement acquired by prescription may protect the right-of-way of the ditch to cross neighboring property.

4. Question: If I can find no written easement of any kind, how do I know if I have a prescriptive easement?

Answer: The accepted understanding of prescriptive acquisition of ditch easements was enunciated by the Wyoming Supreme Court in the 1956 case of Haines vs Galles, wherein it was said:

"Easement may be created by prescription or, more properly speaking under the modern doctrine, by presumption... . In time, the fiction of a "lost grant" [has been] adopted by the courts—that is, the courts presumed, from the long possession and exercise of right by the defendant with the acquiescence of the owner, that there must have been originally a grant by

the owner to the claimant which has [since] become lost... Today...in most of the states in the United States..., the rule is that the period for acquiring an easement ...corresponds...to the local statute of limitations [which, in Wyoming, is ten (10) years]. It has been emphasized that a prescriptive right is founded upon the presumption of a grant."

In short, the fact that a ditch is found to exist in its present location suggests that, at some time in the past, the landowners agreed that it could be constructed there. If it has existed there for a period of ten years or longer, it has probably established its easement and cannot be removed, except by agreement of all affected parties.

5. Question: What if the ditch has been in place for a period of time less than the period prescribed by the statute of limitations; i.e. less than 10 years?

Answer: Then it may not have established a prescriptive easement, and its existence may be challenged in a civil court by any affected party.

6. Question: If I am buying, or selling, a parcel of land with appurtenant water rights, and there is no documented easement for my ditch(es) which cross neighboring properties, what assurance do I have that the easements are secure, assuming I feel sure that they have been successfully acquired by prescription by having been in place ten years or longer?

Answer: This question was addressed by the Wyoming Supreme Court in 1893 and the answer is still in use today. In the Frank vs Hicks case, the courts stated:

"A water right acquired for irrigation of lands and the ditch or other conduit for the water passes by a conveyance of the realty without being specifically mentioned." (emphasis added).

7. Question: Suppose I have acquired a ditch right by prescription across neighboring properties. What do the statutes say about the width of my easement; that is, how many feet am I allowed alongside my ditch to come and go on my neighbor's property?

Answer: There is nothing in the statutes which specifies a required width for ditch easements. By definition, an easement is an interest held by one owner in the property of another which entitles the holder to a

specific limited use. In the case of ditch easements, the ditchowner has the right only to the specific limited access which is attendant to the purpose and function of the ditch. In Wyoming, the accepted view has been that the holder of a ditch easement has only the right to expect his ditch to remain in its historic physical location, and the right to conduct reasonable maintenance on the ditch. Thus, the easement accompanying a small ditch would allow only small equipment for maintenance of the ditch, while a larger ditch would have a correspondingly larger area allowed for maintenance equipment.

There is no provision for the ditchowner to expect to be able to construct a road along his ditch through the other owner's property, or to expect to be able to use any other roads, driveways, etc., which are not immediately in contact with the ditch easement. He must enter the property on the line of the ditch, confine all work to the line of the ditch, and leave the property on the line of the ditch, whenever possible to do so. In discussing entry on the lands of another for the purpose of waterway repair, the Wyoming Attorney General in 1965 quoted Kinney on Irrigation and Water Rights in stating:

"...[an easement] thus acquired is one which must be held to the narrowest limits compatible with the principle right, which is the use of the water. No unnecessary injury must be done to the lands of another...or the [person] making it will be liable in damages."

8. Question: If the ditch which brings water across a neighboring property from the stream source to my irrigated land, or takes my wastewater across another's property, falls into disrepair, whose responsibility is it to have it repaired?

Answer: Wyoming Statute 41-5-101 clearly states that "The owner or owners of any ditch for irrigation, or other purposes, shall carefully maintain the embankments thereof so that the water of such ditch may not flood or damage the premises of others." In addition to this statutory direction, the Wyoming Supreme Court, in the 1905 case of Howell vs Big Horn Basin Colonization Company observed that:

"The well settled rule is that the owner of an irrigating ditch is bound to exercise reasonable care and skill to prevent injury to other

persons from such ditch, and he will be liable for such damages occurring to others as a result of his negligence or unskillfulness in constructing, maintaining or operating the ditch."

It is generally agreed that the "owner" or "owners" of a ditch consist of anyone who uses the ditch or water therefrom for any purpose whatever. The proportionate ownership of the ditch among several owners is determined by the "ratio between the water right of each water user to the total water rights adjudicated under such irrigation works" (Wyoming Statute 41-6-303).

9. Question: If my neighbor fails to properly maintain his ditch across my property, can I ask the Water Commissioner, State Engineer's Office, or Board of Control to institute damage or liability proceedings against him?

Answer: No. Since a ditch is, in essence, an object of private property, anyone who feels his private property rights have been violated must institute his own damage proceedings in a court of civil law. However, the water commissioner, upon inspection of an "undermaintained" ditch which cannot handle its properly adjudicated amount of water, may restrict the headgate of the ditch to where it only diverts what the ditch can safely carry. If one of the landowners' crops suffer because of this restriction, he will probably have no recourse due to his own failure to provide adequate capacity by proper maintenance.

10. Question: What if I clean my ditch through a neighboring property, and then my neighbor runs his livestock in that same field or pasture, and those livestock break down the banks of my ditch and generally put it in a condition of disrepair. Am I obligated to continue spending time and maintenance efforts on the ditch so that my water doesn't damage his property even though the disrepair is caused or accelerated by his livestock?

Answer: Technically, Wyoming Statute 41-5-101 (cited above in answer #8) is the only guidance which speaks to maintenance obligations. However, it is generally agreed that in an instance of this type, reasonable maintenance is all that is required. It is also generally agreed that one who causes his own problems, is not entitled to relief from another

party. The Wyoming Supreme Court, in the 1976 Bard Ranch vs Weber case, has said:

"The owner of an easement and the owner of the land encumbered by the easement each possess rights, and each must, as far as possible, respect the other's use."

11. Question: It is clear that my neighbor has the right to enter my property to maintain his ditch. What will happen if I try to stop him?

Answer: The Wyoming Attorney General addressed this question in 1965 in quoting from Weil in "Water Rights in the Western States" when he said:

"As in the case of any easement, the ditchowner as the dominant, has the duty of keeping the ditch in repair, and not the landowner. Correspondingly, he has the right of entry upon the servient estate to make repairs and to clean out the ditches, and if the landowner interferes, injunction lies."

However, it is often the case that a landowner who wishes to be in total control of his own property will persuade the ditchowner to allow him to maintain the ditch across his own property for the ditchowner. As long as he maintains it in a condition adequate for the passage of the proper amount of water, and in a condition acceptable to the ditchowner, there may be no reason for the ditchowner to enter the easement, although the right to do so continues to exist. If a conflict arises as to the adequacy of such maintenance, the matter may require litigation in the courts. Again, the Water Commissioner, State Engineer's Office, or Board of Control, are not empowered to pass judgment on such a conflict.

12. Question: Suppose a neighbor's ditch crossing my land is in a location which is cumbersome or a hindrance to the efficiency of my operation. Can I destroy the ditch?

Answer: No. Sutherland on Damages (4th ed. Vol. 4, pg. 3760) says:

"One who destroys a private irrigating ditch is liable for the difference in the value of the land belonging to the owner without the ditch and with it."

13. Question: Suppose a neighbor's ditch crossing my land is in a location which is cumbersome or a hindrance to the efficiency of my operation. Can I require him to move the ditch or to put it in a buried pipeline in a location that allows me the full enjoyment of my property?

Answer: There is no statutory support for such forced requirement. In most cases, since such a change may be a benefit to both parties, both may agree to a shared project which may create advantages for each of them. However, if the ditchowner feels there will be no advantage to him, he may refuse to enter such an agreement, particularly if the ditch has historically been and continues to be adequate for his purposes and is well-maintained. In that case, the landowner whose property is encumbered by the ditch may seek permission from the ditchowner to make the changes himself and at his own expense. If the ditchowner agrees to allow such a change, he is entitled to expect that his historic amount of water and patterns of use are not affected in any way. If the change is carried out and the ditchowner's use is affected, the landowner responsible for making the change is obligated to correct whatever problems he may have created. He may also have to accept responsibility for any additional long-term maintenance above what was originally required before the work was done.

14. Question: Suppose my ditch crossing a neighbor's land has historically caused a seeped or boggy spot in his property. Am I required to repair the ditch to stop the seepage if he so demands?

Answer: Technically, yes (see question #8). However, numerous factors enter into a question of ditch seepage. If the problem has existed for many many years and not gotten any worse, there may be a defense. If the complaining landowner bought the land with knowledge that the boggy area was present and it had existed prior to his acquisition of the land, he may not be granted relief. In any case, this again is a matter to be litigated in civil court if the landowners cannot reach agreement. A competent court would be the only entity able to evaluate the opposing claims in terms of property damage, etc.

15. Question: Suppose I am the owner of a historic ditch crossing another owner's property and he builds a new house or other structure in the vicinity of the ditch

which creates and/or is later damaged by seepage from my ditch. Am I liable for damages?

Answer: Probably not. Wyoming Statute 17-12-103 provides for a "priority of right by location" which essentially says that if the ditch was there first, the owners of any property introduced at a later time are compelled to protect themselves from any damages caused by the ditch. On the other hand, the same statute requires that if structures or other property were there before the ditch was built, the ditchowner is obligated to care for the ditch in such a manner as will prevent damage to any property located prior to ditch construction. If he fails to do so, he may be found liable for damages through civil proceedings.

16. Question: If I own irrigated land within the boundaries of an irrigation district or company, and a neighbor all of a sudden begins using a delivery lateral or waste ditch in which I have always been the only user, can I have the water commissioner, State Engineer's office, or Board of Control throw him out of "my" ditch?

Answer: No. Since there is no requirement that a permit map accompanying a filing to the State Engineer for a multi-owner ditch or canal has to show individual laterals for delivery of water to each individual farm or tract, there is seldom any record for water administrator use delineating who all is entitled to use a specific delivery lateral or waste ditch. In the absence of any documentation to the effect of who has a right to take water out of any given ditch, the only way to establish ownership is, again, by agreement of the parties or through litigation. It sometimes happens that the district or company will have its own map and/or listing of users entitle to take water from a certain headgate or lateral and in those cases, the findings of the directors would rule. Since state water administrators normally have no records to determine such matters, they have no authority deciding who can and can't use a certain internal lateral or waste ditch.

17. Question: Has there been any pronouncement as to legalities of someone placing unauthorized obstructions, or undersized culverts, in an irrigation or wastewater ditch?

Answer: Aside from the knowledge that basic common sense dictates that one just can't obstruct a ditch or

channel where water is accustomed to flowing, Wyoming Statutes regarding miscellaneous offenses to public health and safety provide the following penalty:

"If any person, company, or corporation shall obstruct or injure...or shall in anywise pollute or obstruct any watercourse, lake, pond, marsh... or continue such obstruction...so as to render the same unwholesome or offensive...[he/they] so offending...shall be fined not exceeding \$100, and such nuisance...may be removed...by the sheriff of the proper county." (W.S. 35-10-401).

Similarly, under the general regulatory provisions of the game and fish statutes, section 23-3-204(b) (ii) reads:

"No person shall allow any refuse or substance to pass into any public water...which obstructs the natural flow, channels, or condition of any stream or body of water."

"Violation of this section constitutes a first degree misdemeanor." (W.S. 23-3-204 (c)).

Another direct reference in the statutes to ditch obstruction is found in the general provisions regarding highways, and outlines the procedures to be followed when such an obstruction causes flooding of public roads.

"No person or persons...shall be permitted or allowed to dam the water or waters of any stream or...ditch...so that the water thus dammed...shall overflow any public road or highway...nor shall any person...owning or controlling any ditch or irrigated lands, allow any wastewater from the same to flow across or upon any public road or highway or bridge flooded or damaged by such wastewater may report the same to the road supervisor of the county in which the road, highway, or bridge may be located, who shall make an inspection and report to the prosecuting attorney of the said county. If the report to the...supervisor shows that such damage has occurred, it shall then be the duty of the said prosecuting attorney to institute proceedings against the party or parties whose negligence has caused such damage." (W.S. 24-1-116).

While these references are somewhat specific as to their intent, it is again clear that water

administrators are not intended to be involved in their resolution. These statutes are not found under Title 41, the water statutes, but rather are constructed under Title 23 (Game and Fish), Title 24 (Highway) and Title 35 (Public Health and Safety), and require the complaining party to file a civil complaint with the proper civil authorities.

The only possible reference to ditch obstruction in the Title 41 statutes would have to be inferred from the "Prohibited acts" found under W.S. 41-5-110, which water administrators often refer to as the penalty reference for water stealing. That statute reads as follows:

"Any person or persons who shall knowingly and willfully cut, dig or break down, or open any gate, bank, embankment or side of any ditch, canal or reservoir, flume, tunnel or feeder in which such person or persons may be joint owners, or on the property of another, or in the lawful possession of another or others, and used for the purpose of irrigation, milling, manufacturing, mining or domestic purposes, with intent maliciously to injure any person, association or corporation, or for his or her own gain, unlawfully, with the intention of stealing, taking or causing to run or pour out of such canal or reservoir, feeder or flume, any water for his or her own profit, benefit or advantage, to the injury of any other person, persons, association or corporation lawfully in the use of such water, or of such ditch, canal, tunnel, feeder or flume, he, she, it or they, so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding one hundred dollars (\$100.00), and may be imprisoned in the county jail not exceeding six (6) months, or both, in the discretion of the court.

While ditch obstruction is not specifically mentioned in this statute as an action a person may carry out "with intent maliciously to injure any person...or for his or her own gain," there exists a possibility that an offender attempting to steal someone else's water by diverting it out of its proper ditch may place a dam or other obstruction in the ditch to facilitate such diversion. It appears that this is the only circumstance in which a water administrator would have jurisdiction to become involved, and even then, the duties would only extend to denying the stolen water or, under extreme

circumstances, arrest for the act of stealing water. The obliteration of a ditch, or obstruction of a dry ditch in anticipation of stealing water later would still be considered civil differences between parties, and be countered by the filing of a complaint with civil authorities.

It sometime happens that someone will install a culvert crossing or other pipe, which is deemed too small by the owner or owners of the ditch in a ditch used to supply appropriated water, or carry wastewater. The water administrator is often contacted and asked to require the offender(s) to either remove or install a larger pipe to restore the original capacity of the ditch at that point. Because there is no statutory or case law guidance for the water administrator to take such action, it is again proper to identify such a disagreement as a civil matter between the parties. While most water administrators have some degree of engineering expertise, they are not, for the most part, qualified to determine whether or not a pipe or culvert is of adequate or proper size to deliver or carry a specified amount of water. If the ditch overflows because the newly installed culvert can't handle the water, it will be necessary to determine whether it was because the culvert was too small, or whether the ditchowner was attempting to carry more water than he should have been. Such a determination would have to be made by a competent engineer retained by the parties, unless the water administrator has extreme confidence in his engineering abilities, and is willing to stand behind them in court.

18. Question: What if a landowner builds a fence right up next to the ditch or across any ditchbank which has been clearly established as being within the historic maintenance easement of that ditch?

Answer: The answer to this question is the same as the answer to Question Number 11. If a landowner interferes with a ditchowner's ability to maintain his ditch, the ditchowner may seek an injunction from the court ordering the landowner to refrain from interfering.

19. Question: Suppose a ditchowner or company, after cleaning its ditch through my property, leaves the silt or other dredged material in unsightly piles, or deposits it on my fence, road or other property. Am I obligated to accept such treatment?

Answer: Not necessarily. As discussed in the answer to Question Number 7, the ditch easement cannot be continuously expanded or exercised without consideration for the servient landowner. The ideal method of disposing of dredged material would often be to load it into dump trucks and haul it away. However, economics often dictate that this approach may not be feasible or desirable, or that the material is needed to rebuild the banks of the ditch in the same area. In these cases, the ditchowner should take care in depositing the dredged material so as not to cover any more property than has historically been covered and, upon completion of the cleaning, smooth the piles out into a level and slightly berm if requested by the landowner. As described in the answer to Question Number 7, any injury done to the landowner raises the possibility of liability against the ditchowner.

20. Question: Who determines the necessity and extent of ditch maintenance? Suppose my neighbor, with whom I share ownership of a ditch, decides that our ditch needs extensive work and, without talking to me, hires a contractor, or himself carries out work which I feel is far in excess of what was necessary to maintain the ditch in operating condition and then sends me a bill for my share. Am I obligated under W.S. 41-5-102 to pay my proportionate share of the cost of the job, if I feel sure the work could have been done for much less cost?

Answer: A co-owner in a ditch should never undertake to work on the co-owned ditch without discussing the necessity and extent of the proposed work with his co-owners and securing their agreement as to what work needs to be done and how it will be paid for. The statute that obligates a co-owner to pay "...his, her or their proportionate share of the work..." uses the phrase "...necessary for the proper maintenance and operation of such ditch..." as the guide. Work done over and above what is "necessary," is done at the expense of the one who does, or contracts, the excess work and costs. Clearly, the only ones who can determine the necessity of maintenance work are the co-owners of the facility. In some cases, depending on his knowledge of the system, the local water commissioner may be asked to give his opinion as to the necessity and extent of work needed, based on the ditch capacity necessary to carry water to water rights on down the ditch, etc. If the work has already been done at the time the water administrator is contacted, unless he has personal knowledge of the condition of the ditch before the

work, he should once again inform the complainants that their lawyers should be contacted to settle the matter. In the case of a company ditch, it sometimes happens that the company as a whole will vote to conduct maintenance or improvements on the ditch over the objection of one or more of its members, who, once the work is done, will refuse to pay for their proportionate share. Provided the benefits are deemed to be a value to the purpose of the whole company, it will generally be found that the enforcement provisions of W.S. 41-5-102, 103 and 105 are applicable.

21. Question: Does my ditch maintenance easement through neighboring properties include the right to cut down trees that have grown up along the ditchbanks?

Answer: Historically in Wyoming the understanding has been that the ditchowner has the right to cut all trees and brush along the ditch as part of his obligation to "maintain the embankments thereof so that the water of such ditch may not flood or damage the premises of other" (W.S. 41-5-101). Mature tree roots seeking water which grow out into the line of a ditch have the effect of catching trash and debris which can plug the ditch and cause it to overflow, creating a damage liability for the ditchowner. Stands of trees along any watercourse often attract beaver which create obstruction problems by cutting trees so that they fall into the water with the same result. Tree root pathways in ditchbanks, the same as in reservoir dams, create conduits for seepage which can result in washouts and other injurious situations. Additionally, USDA SCS information shows that one mature cottonwood or willow tree will consume up to 250 gallons of water per day, revealing that the cumulative consumption effects of ditchbank phreatophytes can be negatively significant on appropriated water which is being conveyed through a ditch on its way to its designated land.

With the proliferation of subdivisions in irrigated land, the problem has taken on an additional dimension. Subdivision lot buyers who find an irrigation ditch traversing their property often see a landscaping opportunity in that the ditch provides sort of an automatic watering system. They will then plant expensive trees or shrubs in the ditch easement with the intent that the roots from their plants will grow directly to the ditch for water. When the ditchowner comes through to clean the ditch in the spring, his dual-tired tractor mashes, breaks

or destroys the landscape trees and the fight is on. To date in Wyoming there has not been found a successful civil case wherein the tree owners have overcome the right and obligation of the ditchowner to maintain his ditch embankments under W.S. 41-5-101. While under certain circumstances the landowner and ditchowner might some sort of written agreement that the trees can stay as long as the landowner will accept a transfer of liability to himself in case an injurious situation occurs, any vegetation encroachment on the easement which negates the ability of the ditchowner to get his ditch cleaning equipment through as he historically has should be rejected.

22. Question: Suppose a spring flood or beaver work has changed the stream channel on my neighbor's land so that water to satisfy my appropriation no longer comes to my headgate. Can I enter my neighbor's land to restore the channel to protect my ability to divert?

Answer: The Wyoming Supreme Court and Wyoming Attorney General have answered this question in the affirmative (see Attorneys General Opinions, July 27, 1965, Opinion 34). In the 1903 case of Willey v. Decker, the Wyoming Supreme Court noted:

"That a valid appropriation of water from a natural stream constitutes an easement in the stream, and that such easement is an incorporeal hereditament, the appropriation being in perpetuity, cannot be disputed. He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream and through the ditch for his use."

The Wyoming Attorney General elaborated on this language by quoting Kinney on Irrigation and Water Rights:

"Where a person has acquired the right to a certain amount of water in a stream by the appropriation of the same, he also acquires the right to have that water flow in the natural stream and over the lands of others down to the head of his ditch. The appropriation of the water also carries with it an implied authority to do all that may become necessary to secure the benefit of the appropriation. He therefore has the right to enter the bed of the stream above the head of his ditch, even on the lands

of others, and to remove sediment or obstructions which may have changed or obstructed the course of the current so as to prevent it from flowing down to and entering his ditch. Thus to this extent the appropriator acquires an easement in the lands through which the stream flows; but the right thus acquired is one which must be held to the narrowest limits compatible with the principal right, which is the use of the water. No unnecessary injury must be done to the lands of another in making the change, or the person making it will be liable in damages.

In summary, it is emphasized that this memorandum is not intended to provide conclusive legal answers to the questions posed. It is also emphasized that water administrators are not empowered to adjudge as between parties involved in ditch disputes. This memorandum is intended to provide the water administrator with a general background of historic practice the courts have used to resolve conflicts over the use of ditches, in order that the administrator may have documented references to support any advice he may be called upon to offer to persons involved in conflicts over ditch matters. It is also intended to provide water administrators with the ability to be consistent with their counterparts across the state, in the positions they may take when confronted with the situations noted. It is possible in some cases that litigation may be avoided by the water administrator's ability to offer advice as a disinterested or neutral arbitrator, but he should not represent his advice as being a final decree. Upon receipt of the administrator's advice, the parties must be allowed to make their own decision as to whether or not they wish to seek additional legal advice or pursue litigation.