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EISH AND WILDLIFE

BEAVER ON TRIAL

by Paul W. Schaffer ^{1/}

The judge took his place at the bench. He spoke, "I find the defendant -- not guilty!".

The true defendants of the case were not in court to hear their acquittal, but when word of the court's decision reached the wilds of the State of Oregon in the late evening, it might be presumed that the nocturnal silence of the wilderness exploded with the thunderous report of thousands of beaver tails slapping the dark waters of their ponds in celebration. It was the beavers who had been on trial! It was the beavers who had been set free!

This figuratively-interpreted but actual court case was tried in Oregon, in October 1939. That was a couple of years ago. Since then, inquiries have come in from various parts of the country for full information on the probably unparalleled litigation involving the right of the flat-tails to live and work and enjoy their watery homes. Meanwhile, the beavers whose fate hung in the balance before the Oregon Court have thrived and multiplied -- but that is a bit ahead of the story.

Actually, the right of a landowner to protect his land from the ravages of soil erosion with the allied assistance of a colony of beaver was subjected to court decision.

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The history of this unique case takes us back to the year 1884, when Paul Stewart bought a tract of rangeland in eastern Oregon. Part of this land was in meadow and was sub-irrigated by Crane Creek, a stream that coursed through Stewart's meadows of stirrup-high, native grasses. Sub-irrigation was aided further by several families of industrious beavers who had built numerous dams across the stream to form ponds for their homes. It was a productive ranch.

Forty years later, this picture was suddenly changed. In 1924, Stewart left his farm for a year and, upon returning, found that poachers had trapped the beavers from his stream. The dams, no longer attended, had washed out. The unchecked stream ran wild.

Although the washing out of the unattended beaver dams was not particularly a remarkable phenomenon in itself, more startling events did follow in rapid chronological order:

- 1925 - Flood waters raged through the meadowlands cutting into the non-stabilized stream channel. Erosion began!
- 1930 - The stream channel cut to a depth of ten feet. Sloughing banks ate farther and farther into valuable crop land.
- 1935 - The stream was flowing fifteen feet below its original level. The water table in the adjoining hay lands was dropping correspondingly.
- 1936 - The valuable meadow lands had nearly been destroyed.

Paul Stewart stood at the edge of the stream one morning gazing into a yawning canyon. It was a discouraging sight! Twenty feet below the meadow, a small stream found its way around huge blockades of dirt that had fallen from the banks. Only eleven years before, he

had been able to drive his team across this very waterway -- protected then by beaver dams.

Stewart turned toward his meadowlands. More desolation! Dust stirred by the hoofs of a few range cows rose and settled again across a near barren waste broken only by clumps of new sage and sparse remnants of the original grasses. Other cattle stood at a tank, drinking the last water that a pump had been able to raise from the once abundant supply of the nearby well.

Something had to be done! And something was done! Engineering assistance was needed. Paul Stewart reasoned that if beavers had protected his land once, they could do it again. He sent an emergency call to the Oregon State Game Commission. Later that year, 1936, sixteen of Nature's hydraulic engineers -- native beavers -- were transported to the scene at Stewart's request.

The beavers began their reclamation work at once. They erected strong dams almost overnight; they sent huge cottonwoods and aspen crashing into the gully; they built more and more dams.

When the heavy spring run-off came, water that for the past twelve years had rushed through the stream channel to be lost in the river below was caught behind the beaver dams and stored in large ponds. The ponds acted as settling basins for the silt-laden waters. At each flood stage of the stream, inches of soil were added to the bottom of the deepened channel. As the ponds were filled, excess water flowed over well-designed spillways and continued down the stream.

The average summer streamflow of the preceding twelve years

was increased considerably by the water escaping from storage. Water from the ponds percolated into the banks to the adjacent fields. In two short years, the picture of desolation began to change perceptibly. Hay production in the meadows improved. The well again supplied ample stock water. The ugly erosion scar through the meadow was healing.

Spring and summer rains in 1939 were not plentiful in Harney County, Oregon. The high range lands were not as green as they had been in previous years. Stockmen knew that their livestock would have to be brought in early in the fall to be fed from supplemental stores. Watersheds were unable to feed normal supplies of water to the lower lands. Irrigation water was at a premium.

Paul Stewart was fortunate! His beavers had been working night after night to impound a scanty water supply that would keep his hay meadows green and productive. The beaver ponds had raised the water table of the meadows to the roots of the alfalfa and native grasses. Stewart's livestock would have plenty of feed for the winter.

Another rancher, Lloyd Johnson, living below the "reclaimed" Stewart ranch was not so fortunate. His meadows had drained into deeply gullied stream channels that were not protected by beaver dams. He would have to set his sickle bar pretty low to get even one cutting of hay this year. Sagebrush was beginning to invade his fields, too. What he needed was more water!

One day, while watching the small trickle of water running through the gullied stream channel of his meadow lands, Johnson decided to investigate. He knew of the beaver ponds on the Stewart ranch, and decided to see what the water situation was on his neighbor's place.

After a short walk along the creek channel, Johnson arrived at the lower outpost of the beaver stronghold. The sight that greeted him was one of an abundant water supply held behind strong dams, and bordering fields of knee-deep alfalfa and green native hay.

Johnson decided that the salvation for his own crops that were suffering from lack of water was to drain the beaver ponds in order that the water might flow on down through his own property. As indicated in later briefs and argument at the trial, Johnson did not foresee that little would be accomplished by draining the beaver ponds, or that the unchecked water truly would flow through his own land to the river beyond. He discussed the matter with Stewart, who refused to heed Johnson's request that he dynamite the dams.

"Why," Stewart pointed out, "if those beaver dams were blown out, as soon as the water had drained, you wouldn't have any more water down there than you've got now, and my ranch would go back to sagebrush."

The question remained under the law whether Stewart had the legal right to impound more water than he had filed rights on, even though he was protecting his land. That, in effect, is what Johnson told officials when he obtained an order for Stewart to show cause why he should not release the beaver-impounded water. Johnson was in desperate need of water, and it was now a matter for court decision. The beavers were on the spot!

The case was brought to the circuit court in Harney County, and Stewart now becomes the actual defendant in this story. Johnson's contention was that Stewart was violating his decreed water rights. Stewart's counsel replied that the defendant was within his legal

rights in protecting his property from the ravages of erosion by the use of beaver and beaver dams.

"Futhermore," Stewart's attorney argued, "as a result of the beaver operations, more water is now available to the plaintiff (Johnson) than the plaintiff has filed rights on.

The circuit court, in June 1939, ruled that Stewart had violated the court's earlier water rights decree, granted Johnson a judgment for \$500 damages, and ordered Stewart to have the State Game Commission remove the beavers from his property and to take their dams out of Crane Creek. Stewart also was ordered to pay a \$300 contempt fine and was given five days to comply with the court's order, subject to three months' imprisonment in the Harney County jail if he failed to do so.

The beavers had been given what amounted to their death sentence! Was the thousand years' work of their ancestors in helping to shape fertile valleys to go unrecognized? Was their importance as flood-control and reclamation "engineers" to be overlooked?

But Paul Stewart, reluctant to accept as final the decision of his fellow man, appealed to the state supreme court. The appeal was granted and new hope was held for the beavers. They would have a second chance!

The Oregon Supreme Court convened in October 1939 and the case of "State of Oregon Ex Rel Lloyd L. Johnson vs. Paul Stewart" was presented for argument. Although the beavers, the true defendants in the case, were not present at their trial, they were ably represented by competent lawyers. Stewart's counsel began his argument:

"The question of soil erosion in this case," he stated, "is of national importance and the decision of this court will affect every erosion-control program in the Nation. This court must decide whether or not the landowner has the right to protect his chattel from destruction by erosion."

For more than an hour the court listened to his argument.

"All my client wants," Stewart's counsel finally concluded, "is the right to protect his land!"

Johnson's attorney, opposed the defending counsel with, "It is peculiar that the court should be listening to a soil erosion case when it is not the true issue. Soil erosion is being used here as a subterfuge."

"Mr. Stewart has retained water on his property," he continued, "that belongs to Mr. Johnson. Soil erosion wasn't even heard of when the water rights decree was written. We are just now beginning to get erosion conscious."

Came time for the opinion of the higher court, that significant ruling reversing the eviction order against the beaver back along Crane Creek.

"After giving the matter our best consideration, we think that defendant would have the right to construct dams or permit them to be constructed by beavers to control the erosion, without diverting the water over the land or from the diversion works of another appropriator, and restore the bed of the stream to its original condition as near as may be, if he can do so without materially interfering with the right of the lower appropriator, Johnson."

Then it added: "To deny our water users the right to control

such streams and prevent the erosion that would soon take place would mean the utter destruction of much of our most valuable lands throughout the state. It is the duty of the landowner to prevent the construction of dams to a point where diversion from the channel will occur, but the landowner has the right to use or permit such dams for the purpose of erosion control, where they will not divert water from the channel or from the diversion works of another appropriator. It is shown that if the erosion is permitted to continue the water would be drained from the lands bordering on the creek and they would become dry and worthless."

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EPILOGUE

Paul Stewart since has sold his ranch, but the beavers still are on the property, and a noticeable increase in the size of the colony has been observed.

"There are more than 150 beavers on the place now," Stewart reported in an interview, "and a number of large dams have been built in the creek channel running through the meadow and hay land. Most of the beaver dams are located above the cultivated land. You can see scores of them up there."

"The thing that pleased me most," Stewart said, "was the effect the beaver dams had on the water table of my cultivated lands. The level of the ground water was raised, and I got at least a fifty percent increase in my hay, grain and alfalfa crops during the last three years I operated the place. Those beavers were worth plenty of money to me."

What about the Johnson place?

"I know that Johnson is getting more water now and for a longer season than he has for many years," Stewart observed in answer to a question. "I am sure the beavers had something to do with it. They should be down on his place too by now, in fact, if they were not molested."

"You should see the creek channel on my old ranch now," Stewart added, "places that used to be twenty feet deep have silted up to within three or four feet of the top. Oh, there are still some spots where the channel is plenty deep, but the beavers are on the job and have it under control."

-- Paul M. Schaffer

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*I was glad
to see by the
very evidence
that water
was under
control*

