



The  
**Advocate**

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**Remembering  
50 YEARS  
1957 - 2007**

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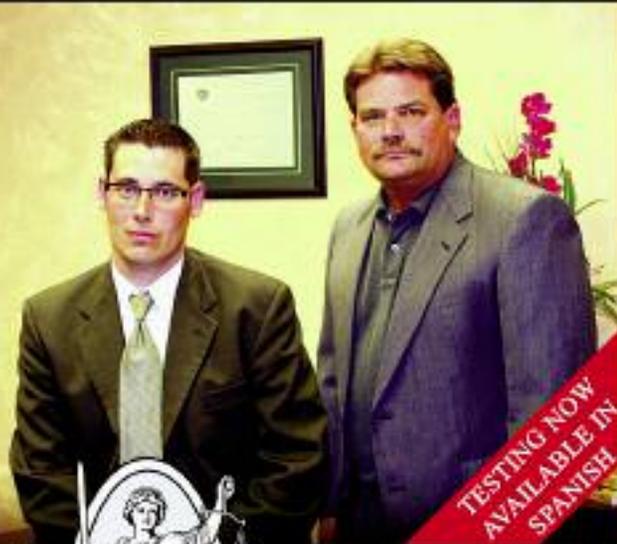
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**DOMESTIC VIOLENCE CASES**  
**PERSONAL INJURY CASES**

## FEATURE ARTICLES

- 11 WELCOME FROM THE WATER LAW SECTION**  
*Andrew J. Waldera*
- 12 WILL 2007 PROVE TO BE THE MOST INTERESTING 'WATER YEAR' EVER?**  
*Chris M. Bromley and Candice M. McHugh*  
Major issues the Idaho Department of Water Resources has faced under the SRBA. The Swan Falls water dispute, which resulted in the commencement of the SRBA in 1987, and how recent events have affected Swan Falls. Reflection on the Clear Lakes Trout Company dispute, the Big Lost River Irrigation District lawsuit, and the Thompson Creek Mining Company case.
- 14 THE FIRST TWENTY YEARS OF THE SNAKE RIVER BASIN ADJUDICATION—IS THERE AN END IN SIGHT?**  
*Clive J. Strong*  
A 20-year history of the Snake River Basin Adjudication ("SRBA"). A discussion of major legal cases that have been decided as a result of the SRBA adjudication. The cases have established significant procedural and substantive rights with regard to claims of water rights, and also affected federal water rights' claims in Idaho.
- 18 FROM THE PANHANDLE INTO THE ADJUDICATION FIRE**  
*Arthur B. Macomber*  
A comparative overview of the North Idaho Adjudication with the Snake River Basin Adjudication process, and potential issues arising under the North Idaho Adjudication.
- 23 WHEN LAND IS WATER: CLEAN WATER JURISDICTION**  
*Norman M. Semanko*  
The 2006 case of *Rapanos v. United States*. In *Rapanos*, the U.S. Supreme Court interpreted the federal government's jurisdiction under the Clean Water Act by construing the definition of "navigable waters."
- 26 ANADROMOUS FISH AND THE LANDSCAPE OF IDAHO WATER USE AND DEVELOPMENT**  
*Andrew J. Waldera*  
Competing claims for water use and the effect on salmon recovery in the Pacific Northwest. An in-depth look at the American Rivers litigation taking place in the U.S. District Court in Oregon, and the case's impact on Hells Canyon hydro-electric dam facilities in Idaho.
- 30 IDAHO'S CONJUNCTIVE MANAGEMENT RULES ARE 'CONSTITUTIONALLY DEFICIENT'**  
*Jon C. Gould*  
The management of surface and ground water through the lens of *American Falls Reservoir Dist. No. 2 et al. v. Idaho Dept. Water Res. et al.* No. 2005-600 (Fifth Judt. Dist. Gooding

County 2006). Administrative rules governing the conjunctive management of surface and ground waters violate the Idaho Constitution .

- 33 THE SNAKE RIVER BASIN ADJUDICATION... FROM THE BEGINNING TO THE PRESENT (REPRINT FEBRUARY 1995)**  
*Robert E. Bakes*  
This article was reprinted as part of the 50-years retrospective The Advocate is celebrating in 2007.

## COLUMNS

- 6 President's Message, *Jay Q. Sturgell*  
10 Executive Director's Report, *Diane K. Minnich*  
53 Federal Court Corner, *Tom Murawski*

## NEWS AND NOTICES

- 7 Discipline  
8 Letters to the Editor  
9 Reciprocals  
9 Newsbriefs  
9 ISB/ILF Staff Changes  
35 Coming Events  
37 February 2007 Idaho State Bar Exam Applicants  
39 Idaho Law Foundation  
39 IVLP Special Thanks  
40 Bankruptcy Section and IVLP Introduce Bankruptcy Helpline  
40 Financial Institutions Approved by the Idaho State Bar to Act as Depositories for Attorney Trust Accounts  
41 Jess B. Hawley, Jr. - In Remembrance  
44 Directory Updates  
50 Of Interest  
54 Idaho Court of Appeals Terms  
54 Idaho Court of Appeals Oral Arguments  
54 Idaho Supreme Court Oral Arguments  
54 Idaho Supreme Court Terms  
55 Cases Pending  
58 Classifieds  
59 Continuing Legal Education

## COVER

**ON THE COVER:** Photo "Icefall" taken along the Payette River. The photograph is a result of a "team" effort by Idaho attorneys Eric Haff and Don Gadda, both from Boise. Simultaneous shutter-times caused "issues" of copyright. According to an "unreliable" source litigation might be pending.

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# The Advocate

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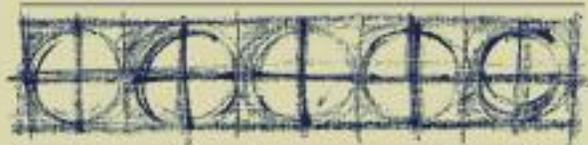
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IT'S HARD TO BELIEVE... .

Jay Q. Sturgell



Wow! It's hard to believe that this is my last column. My tenure as District First and Second's Bar Commissioner has gone amazing quickly. Becoming a Bar Commissioner has been the best thing I have ever done with my law degree. I encourage anyone who has any interest to call Diane Minnich. I urge all of you to become involved in the Bar or the Law Foundation. The rewards received from this service cannot be tallied on any balance sheet and they are truly the most lasting and satisfying.

Many people have expressed an interest in service, either in the Bar or to the Law Foundation, but have said they "don't have time right now in their career." To which I respond, "I am a sole practitioner. You too can make time for something that is really important—you don't have time not to."

I thank you the staff and crew at the Idaho State Bar. I cannot say enough good things about you. I know from having read the columns of every past President of the Idaho State Bar they all say this very thing. Let me assure you that we say "You are the best" because it is true. The staff of the Idaho State Bar makes our Bar the envy of all the other states. I gladly join with all of the past Presidents to publicly and loudly thank you for all the hard work and professionalism you demonstrate constantly. Truly, you are the ones setting the standard for the rest of us.

- **Be prepared**
- **Be Professional**
- **Be Polite**

As I approached these columns, I was concerned that I was preaching to the choir. Those who really need this message wouldn't read *The Advocate*, much less my ramblings, nor would they take my message to heart. However, I decided to go ahead with this series for several reasons.

First, this message may reach someone who really needs it. Either they stumble over it on their own or one of their friends or associates may show it to them. Besides, I may never have another chance at this Bully Pulpit.

Second, we all really need it. Heck, I do! I remind myself of these three simple rules everyday. "It's all about the fundamentals." We need to keep working on these basics our whole career. The basics seem so simple and yet the secret to success is mastering the fundamentals and practicing them every day.

The minute you stop using them they will elude you. As soon as you stop Being Prepared, you will no longer be ready to win that case. If you stop working on Professionalism and holding it up as an uncompromising standard for yourself and your firm, you have stopped being the attorney the court desires to see before it. As soon as you become unconcerned about the appropriateness and civility of your decorum you will have failed your client in Being Polite.

I can think of no discipline case or malpractice suit that came before the Idaho State Bar Commission during my tenure that did not stem from a basic failing of one or more of these fundamentals. Every case, which resulted in some kind of sanction, could have been avoided by observing the basics: Be Prepared, Be Professional, Be Polite.

Finally, I have one more reason for preaching to the choir. I have had the opportunity to talk to many of the lawyers, clerks, and

judges across this state. There is one common concern I have heard voiced everywhere. There is a perception of a decline in professional courtesy, a decline in the civility, and a decline in the fellowship in the Bar. I have wrestled with what can be done to halt and reverse this trend. I have come up with only one answer.

I believe that the people who read the President's Message, and more importantly Diane Minnich's Executive Director's Report are the real Leaders of the Bar. The most important person I need to reach is you. If you want to halt and reverse the trend of declining professionalism and courtesy, here is the answer:

• **Be a Leader**

There is no more powerful for of leadership than to lead by example.

- **Be prepared**
- **Be Professional**
- **Be Polite**

Hold them up as the standard. Demonstrate them to your colleagues. Demonstrate them to the court, both judges and all court staff. Demonstrate them to the public.

Thank you so much for the opportunity to serve as a Bar Commissioner and as your President, it has been an honor and a privilege.



## DISCIPLINE

### **J. JOHN ALEGRIA**

(Suspension)

On November 28, 2006, the Idaho Supreme Court issued a Disciplinary Order suspending J. John Alegria from the practice of law for ninety (90) days. The Idaho Supreme Court found that Mr. Alegria violated Idaho Rules of Professional Conduct 1.3 [Diligence]; 1.4 [Failure to keep client reasonably informed about the status of a matter]; and 3.3(a)(3) [Candor toward the tribunal]. The Disciplinary Order also provided that Mr. Alegria will serve an eighteen (18) month probation, subject to terms and conditions identified in the Order, including that Mr. Alegria make full restitution of all money for fees, court costs or fines that his client paid to Mr. Alegria.

The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation and stipulated resolution of an Idaho State Bar disciplinary proceeding. In October 2002, the Idaho State Bar brought a formal disciplinary Complaint alleging that Mr. Alegria engaged in professional misconduct in connection with his representation of his clients. One case was bifurcated and the separate complaint filed on May 19, 2004, was the subject of the stipulated resolution. The factual allegations and admissions underlying the admitted misconduct related to Mr. Alegria's representation in 2001, of a client with respect to a probation violation stemming from a 1999 DUI conviction. Mr. Alegria admitted that he did not act with reasonable diligence and promptness in representing his client and did not keep her reasonably informed about the status of her matter in violation of I.R.P.C. 1.3 and 1.4. With respect to the admission that his conduct violated I.R.P.C. 3.3, Mr. Alegria admitted that he did not take reasonable remedial measures, including disclo-

sure to the tribunal, after Mr. Alegria learned that he had offered material evidence to the Court and then came to know of its falsity. That situation related to the circumstances that after a staff member made a representation to Mr. Alegria, he submitted a statement to the Court that the defendant had not been able to pay her court costs and fines due to an extended absence from the United States as a result of the death of her father. That representation was made late during Mr. Alegria's representation of his client and his client indicated that the statement was not true, but his client discharged Mr. Alegria before he could disclose the falsity of the statement to the Court. Nevertheless, Mr. Alegria failed to, subsequently, disclose the falsity of the statement to the Court.

Mr. Alegria will serve a ninety (90) day suspension and an eighteen (18) month probation and make a full refund and restitution of all the monies his client paid to him. Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

### **JOHN C. SOUZA**

(Reinstatement)

On November 28, 2006, the Idaho Supreme Court issued an Order reinstating Pocatello attorney John C. Souza to the practice of law subject to the terms and conditions of the reinstatement report of the Professional Conduct Board dated October 31, 2006.

Inquiries about this matter may be referred to Bar Counsel, Idaho State Bar, P. O. Box 895, Boise, ID 83701, (208) 334-4500.

## LETTERS TO THE EDITOR

### HISTORY'S COLLATERAL DAMAGES

As Publications Chairman for the Idaho Legal History Society (ILHS) I have had the privilege of working with the Society and *The Advocate* in preparing the December *Advocate*. I read the issue, and if I do say so myself, it was a very good issue. I am not a historian. At best I am an amateur; but after communicating with people close to the history of the Steunenberg assassination I was stricken by what was missing; perhaps what history always misses.

The issue was nominally about the Haywood Trial, the "Trial of the Century", but as I got into it I realized it was really about the lives of people who, after all these years, were impacted by a horrible crime, the murder of an individual who had a wonderful family who admired and remembered him. John Richards, the great grandson of Frank Steunenberg, made this very clear by his interest in, and support for the project. John also made it clear that "the assassination of his great grandfather and the ensuing events not only changed the history of Idaho and labor relations, but it forever changed the future of our family." Thanks John for bringing us down to reality. Others who lived in Caldwell at the time surely passed memories of the event down through their families. I can only imagine living across the street when the blast went off and how one would feel when their peaceful neighborhood was disrupted. And how about the families of the miners in the bullpens, what memories have they passed on? As Judge Wilper suggests, what about the struggle going on in Judge Fremont Wood's mind when he knew he must give an instruction on corroborative evidence that would surely result in acquittal? Did the prosecution put Edgar Wilson on its team to influence the judge? How much personal courage did it take for Judge Wood to do what was right. What if, as John Greenfield suggests, Haywood was truly innocent.

What I've learned, having gone through this process, is that history need not be cold and unsympathetic if one makes an effort to think beyond the facts

and know that events not only shape history, but they shape lives.

A public thank you is in order to the contributing authors and our ILHS Publications Subcommittee; Rita Ryan, Duff McKee, Judy Austin, Betty Richardson, Larry Boyle, Deb Kristenson, Ron Wilper, Ron Bush, Michael McLaughlin, Susie Boring and others. Great Work!

*Hon. Gaylen L. Box*

*Sixth District Magistrate Judge*

### IDAHO WOMEN LAWYERS SURVEY

This month, many of you will receive a survey that assesses the position of women lawyers in the legal profession; work-life satisfaction within the practice of law in Idaho; what, if any, effects of sexual harassment or discrimination remain; and whether men and women see these issues differently. Idaho Women Lawyers, Inc., a non-profit organization, is sponsoring this endeavor, which will be conducted and analyzed by Boise State University.

In the 111 years since Helen Louise Nichols Young became the first woman to be admitted to the Idaho State Bar:

- Just three women have served on the Idaho Court of Appeals and the Idaho Supreme Court (and no woman has been appointed to or elected to Idaho's appellate courts since 1993);
- No woman has served on the federal bench in Idaho;
- One woman has served as United States Attorney in Idaho; and
- Three women have served as president of the Idaho State Bar.

Aside from these notable facts, we do not really know whether women lawyers are achieving positions of power and influence, including partnerships and management positions, in Idaho's law firms, government and businesses. No one has sought to compile this data before. Women lawyer groups in other states have conducted surveys in recent years to examine the progress of women

lawyers in their states. Many of them have found that, although women lawyers are entering the practice of law in the same numbers as men, they do not progress to senior positions in the same numbers. For example, the Glass Ceiling Task Force in Washington State found in its 2001 study that 50% of women leave private law firms between the time they join the firm as an associate and partnership. One conclusion from the study was that women are underrepresented in the decision-making processes of firms. Some signs of progress arose from the data: private law firms are taking seriously issues of sexual harassment and gender discrimination.

In Idaho, a 2006 survey of gender discrimination in the federal courts found that the situation had improved from a similar survey in the early 1990s but that women, more so than men, were able to discern some difference in treatment in the federal courtroom by attorneys and court personnel. Although important, this federal court-sponsored survey had a limited focus (gender discrimination in federal courtrooms) and a limited outreach (federal court practitioners only).

Anecdotally, Idaho Women Lawyers and other groups have identified some possible explanations for the relatively slow pace at which progress is being achieved. Among these, and perhaps most obviously, the demands of child bearing and child rearing take many women away from the full-time practice of law or influence them to take positions with fewer demands, such as jobs without high billable hour requirements. Of course, the demands of child rearing fall on the shoulders of both men and women, and as the cultural stereotypes of men's and women's roles in professional and home life begin to fall away, our focus might shift from women lawyers' lagging status in the profession to all lawyers' struggle to balance professional and personal lives.

At the *First 50 Women in Idaho Law* dinner held by the Idaho State Bar on March 10, 2005, keynote speaker and Stanford Law School Professor Barbara Babcock stated that she felt the next revolution in the practice of law would be to

make the profession more family friendly, with reduced work hours and more time for other pursuits.

The results of the Idaho Women Lawyers survey will help Idaho's legal community assess, not only whether and why women lawyers are slow to achieve positions of power, but also what we as lawyers can do to make the practice of law more satisfying for everyone. This knowledge has value for all of us as we build or complete our careers and for our daughters and sons who might later enter this profes-

sion. As lawyers entrusted with enforcing the law, protecting civil rights and advising decision makers in government and industry, we must also be leaders in ensuring all lawyers' opportunities to improve their professional status, financial security and sense of personal satisfaction and achievement.

To be a statistically valid and meaningful gauge of workplace opportunities and attitudes, it is critical that we have widespread participation. If you are one of the randomly selected 250 men or 250 women

who receive the Idaho Women Lawyers' survey this month, please contribute a few minutes of your time to help this important project succeed.

**Deborah E. Nelson**  
**President, Idaho Women Lawyers**  
*Partner, Givens Pursley LLP*

## RECIPROCALLS

The following lawyers were admitted to the practice of law in Idaho through reciprocal admission.

### Reciprocal Admission Applicants Admitted

*(from November 1, 2006 to November 30, 2006)*

**Steven Craig Bednar**

Salt Lake City, UT  
*Brigham Young University*  
Admitted: 11/3/06

**John Ray Nelson**

Spokane, WA  
*University of Utah*  
Admitted: 11/7/06

**Jennifer Sandvik Castleton**

Seattle, WA  
*University of Washington*  
Admitted: 11/28/06

**Arnold M. Willig**

Seattle, WA  
*Pepperdine University*  
Admitted: 11/3/06

**Paul Russell Cressman Jr.**

Seattle, WA  
*University of Washington*  
Admitted: 11/3/06

## NEWSBRIEFS

**ICR Rule 25**—Effective January 1, 2007, Rule 25 of the Idaho Criminal Rules will be amended to allow judges who have been disqualified without cause to act in certain matters. The amendment adds a new subsection (a)(11), which provides that a judge who has been disqualified without cause may preside over an initial appearance or arraignment, and may also preside at other hearings and decide other matters when the parties and the disqualified judge have so agreed. The order amending I.C.R. 25 can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/icr251106.htm>

## ISB/ILF STAFF CHANGES

### Idaho Law Foundation

**Carey Shoufler** has accepted a new role with the Idaho Law Foundation. For the last two years, Carey has served as the Fund Development Manager for the Law Foundation. In addition to those duties, Carey will direct the Foundation's Law Related Education efforts. Since Carey spent over 10 years working as a teacher and educational administrator in Boston, this role will put her many years' experience as an educator to work for the Idaho Law Foundation.

Carey obtained her Bachelor's Degrees in English Literature and Spanish from Mills College in Oakland, California and will graduate with a Master's Degree in Instructional and Performance Technology from Boise State University in May 2007.

**Becky Jensen**, Law Related Education Coordinator is leaving the Idaho Law Foundation to accept another position as volunteer coordinator for a hospice in Meridian. Becky has worked for the Foundation for seven years. Her work and efforts have brought national recognition to the Foundation's Law Related Education program. Through her efforts, attorneys and public educators have joined together to engender a positive working relationship to educate today's youth about the legal system and their role in its future.

### MCLE Extension

If you did not complete your MCLE requirements by your December 31, 2006 deadline, you can get an extension until March 1, 2007 to obtain the extra credits you need. Send a written request and \$50 MCLE extension fee to the Membership Department. Remember the licensing deadline is still February 1, 2007 and the rest of your licensing must be physically received in the Idaho State Bar office by that date to avoid the late fee. Courses taken to complete your MCLE requirements will be counted on previous reporting period. The final licensing deadline is March 1, 2007. Your MCLE requirements must be completed by that date. Please contact the Membership Department at (208) 334-4500 or [astrauser@isb.idaho.gov](mailto:astrauser@isb.idaho.gov) if you have any questions.



2006 RESOLUTIONS—THE RESULTS

Diane K. Minnich



The Idaho State Bar membership considered four resolutions during the 2006 resolution process. For the first time that I recall, sections and members of the Bar rather than the Board of Commissioners generated the resolutions. All four resolutions were approved by the membership. The voting results are reported here along with an explanation of the future of successful resolutions.

**06-1—Idaho Legal Aid Services (ILAS) Resolution in Support of State Funding:** This resolution, which was submitted by ILAS Executive Director Ernesto Sanchez, and ILAS Deputy Director James Cook, requested that the Idaho State Bar support ILAS in its request to have the State of Idaho financially support legal services to low-income Idahoans by seeking a direct appropriation and/or enacting a statute

increasing civil filing fees. Idaho Legal Aid Services plans to submit an appropriations request to the 2007 Idaho State Legislature for funding to support legal services for low-income Idaho residents.

**06-2 Authorization to Sponsor ABA Resolutions:** This resolution, which was submitted by Idaho State Bar Delegate to the ABA House of Delegates Larry Hunter proposed that the Idaho State Bar Commission be empowered to authorize the Idaho State Bar Delegate to add the Idaho State Bar's name as a co-sponsor of a resolution. This resolution will allow the Commission; either at the request of the ISB ABA State Bar Delegate or on its own motion, with a unanimous vote, to cosponsor ABA resolutions that it determines the support of the Idaho State Bar is appropriate.

**06-3 Model Standards of Conduct for Mediators:** The Alternative Dispute Resolution Section of the Idaho State Bar proposed that the Idaho State Bar adopt the Model Standards of Conduct for

Mediators as aspirational guidelines for mediators in all fields in the State of Idaho. The ABA House of Delegates adopted the standards; the American Arbitration Association and the Association for Conflict Resolution approved the same set of standards. The standards will be published in the annual ISB Desk Book Directory and on the ISB website.

**06-4 Idaho Entity Transaction Act:** The Business and Corporate Law Section of the Idaho State Bar recommended that the Idaho State Bar support the adoption by the Idaho Legislature of the Idaho Entity Transaction Act (IETA.) IETA is substantially similar to the Model Entity Transactions Act, which was drafted, approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform State Laws. The Section will recommend the adoption of the IETA to the 2007 Idaho State Legislature.

2007 Resolutions Results

District		1st	2nd	3rd	4th	5th	6th	7th	OSA*	Totals	
Members eligible to vote		398	215	212	1711	297	195	322	698	4048	
% of total membership		10%	5%	5%	42%	7%	5%	8%	17%	100%	
Members voting		101	73	46	328	67	75	89	48	827	
% of members voting		25%	34%	22%	19%	23%	38%	28%	7%	20%	
# in attendance		43	51	17	100	24	49	68	0	352	
% in attendance		11%	24%	8%	6%	8%	25%	21%	0%	9%	
1- Legal Services	For	82	54	35	245	50	64	52	33	615	75%
	Against	19	18	11	83	17	11	27	15	201	25%
	Total	101	72	46	328	67	75	79	48	816	
2- ABA	For	75	53	34	247	55	58	66	34	622	78%
	Against	19	16	12	66	11	15	21	11	171	22%
	Total	94	69	46	313	66	73	87	45	793	
3- Mediation	For	94	60	38	302	58	59	77	44	732	90%
	Against	6	10	7	18	9	14	11	2	77	10%
	Total	100	70	45	320	67	73	88	46	809	
3- Entity Transaction Act	For	76	52	36	246	36	54	72	30	602	83%
	Against	11	11	7	38	24	11	12	9	123	17%
	Total	87	63	43	284	60	65	84	39	725	

# WELCOME FROM THE WATER LAW SECTION

Andrew J. Waldera

*Moffatt Thomas Barrett Rock & Fields, Chtd.*

The Water Law Section is pleased to sponsor this month's issue of *The Advocate*. It has been some time since the Section last sponsored an issue, but that does not mean that the world of Idaho water law has laid dormant in our absence. Instead, these are both exciting and challenging times as Idaho struggles to maintain control over, and successfully allocate, an increasingly scarce but absolutely necessary resource. Explosive population growth, coupled with years of drought are soundly testing the resolve of Idaho's first-in-time, first-in-right prior appropriation doctrine, and are leading to new challenges involving the interface and the management of both ground and surface water resources.

Endangered Species Act litigation in federal district court in Oregon involving listed salmon and steelhead is exerting pressure on Idaho stored-water supplies in the name of downriver flow augmentation. Relicensing proceedings currently pending before the Federal Energy Regulatory Commission will soon dictate the future manner in which hydroelectricity is produced by Idaho Power's Hells Canyon Dam Complex. Here at home, battles continue to rage over the development and use of ground water from the Eastern Snake Plain Aquifer—a massive under-water lake roughly the size of Lake Erie—and whether, and to what extent, that ground water development is harming water flows and uses in the Thousand Springs reach of the Snake River.

Even north Idaho, which benefits from a significantly wetter climate, is not immune from water borne pressures that most associate with the comparatively arid south. Endangered Species Act salmon and steelhead litigation implicates water storage and use in the Clearwater River drainage. Continuing population growth and urbanization threaten depletion and pollution of the Spokane-Rathdrum Prairie Aquifer. And lest it feel left out, after all these years of the Snake River Basin Adjudication, north Idaho is now on the cusp of its own comprehensive water rights adjudication, slated to begin at or near the completion of the now twenty-year-old Snake River Basin Adjudication.

As for the state of the Water Law Section itself, our membership continues to be strong, and the Section is well funded. The Section is always looking for ways to lend its support to others, but never forgetting its mission of service to its membership and to the practice of water law first and foremost. Recently, the Section enjoyed a very successful CLE presentation at the Idaho State Bar's annual convention in Sun Valley in July. The program focused on the continuing challenges that population growth and urbanization present for Idaho's many irrigation water delivery entities, such as irrigation districts, canal companies, and lateral-ditch-users associations.

Unfortunately, it would take much more space than this issue of *The Advocate* affords to cover the myriad of issues and challenges facing those who work to develop, secure, allocate, and protect Idaho's liquid gold, and Idahoans' property interests in it. It is our hope that you find the articles contained within this issue of *The Advocate* to be both informative and entertaining. As Chair of the Water Law Section, I would like to extend a special thanks to those who volunteered their time and expertise to make this issue a reality. No good deed goes unpunished.

#### ABOUT THE CHAIR

**Andrew J. Waldera** is an attorney in the Boise office of *Moffatt Thomas Barrett Rock & Fields, Chtd.*, and is currently serving as Chair of the Water Law Section. His practices focuses on water and environmental/natural resources law, and includes some general litigation. Andy also serves as a member of the editorial board of the *Western Water Law & Policy Reporter*, a monthly water law publication distributed to water resource professionals throughout the western United States. Andy has a B.S. (magna cum laude) in Biology and Environmental Science from Tufts University, and obtained his J.D. from the University of Oregon School of Law with a certificate in environmental and natural resources law. Andy can be reached at 208-385-5418 or [ajw@moffatt.com](mailto:ajw@moffatt.com).

## 2007 Environment and Natural Resources Section Annual CLE

**Tuesday, January 23, 2007 from 8:30 a.m. to 1:30 p.m. at the Crystal Ballroom, Hoff Building located at 802 West Bannock in Downtown Boise. Lunch is included. 4 CLE Credits pending.**

The ISB Environment and Natural Resources section will hold their annual seminar at the Crystal Ballroom, at the Hoff Building in Downtown Boise. This seminar will be held in conjunction with the Idaho Environmental Forum and will feature nationally known speakers in environment and natural resources law.

#### Topics of discussion include:

- Environmental Conflict Resolution
- Boulder White Clouds and Owyhee Wilderness Bills—What happened and what's next?
- University of Idaho College of Law-Environmental Law Program

*Watch for Registration Information available soon on the Idaho State Bar website*

# WILL 2007 PROVE TO BE THE MOST INTERESTING “WATER YEAR” EVER?

Chris M. Bromley and Candice M. McHugh  
*Office of the Attorney General*  
*Natural Resources Division*

*Since the Water Law Section last sponsored an edition of The Advocate (February 2004), numerous matters have come and gone before the Idaho Department of Water Resources (“IDWR”). This article will provide an overview of many of those issues, as well as give a brief summary of where the Department currently stands in its quest to complete its recommendations for water rights to the Snake River Basin Adjudication (“SRBA”) District Court.*

## THE SURFACE WATER COALITION DELIVERY CALL

Prior to 2005, conventional wisdom would have said that the most far-reaching water matter to have occurred in Idaho was the Swan Falls dispute, which resulted in, among other things, the 1987 commencement of the SRBA. Swan Falls’ status could be in jeopardy as the result of a call for delivery of water<sup>1</sup> by a group of seven canal companies and irrigation districts on Idaho’s Eastern Snake River Plain, collectively known as the Surface Water Coalition (“Coalition”).<sup>2</sup> On January 14, 2005, the Coalition petitioned the Department, pursuant to the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11.000-999 (“Conjunctive Management Rules”),<sup>3</sup> for administration and curtailment of junior priority ground water rights that pump water from the Eastern Snake Plain Aquifer (“ESPA”),<sup>4</sup> thereby potentially reducing the amount of water available to satisfy senior surface water rights.

Since the delivery call, the IDWR Director has issued orders finding that the Coalition was being materially injured by junior ground water pumping from the ESPA.<sup>5</sup> Those orders have required junior ground water users to either mitigate the material injury suffered by the Coalition or curtail junior diversions. Mitigation can occur by providing replacement water, or by providing substitute curtailment of acres that are irrigated by ground water, such as converting those lands to surface water irrigation or placing those lands in the Conservation Reserve Enhancement Program.<sup>6</sup>

Before an administrative hearing on the matter was commenced, the Coalition filed a lawsuit on August 15, 2005 in the Fifth Judicial District Court in Gooding County.<sup>7</sup>

The Coalition petitioned the district court for a declaratory judgment regarding the validity and constitutionality of the Conjunctive Management Rules. After hearing the case, the Honorable Barry R. Wood found that the Department’s Conjunctive Management Rules were unconstitutional. Judge Wood’s ruling has since been appealed to the Idaho Supreme Court under case numbers 33249, 33311, and 33399. Oral argument occurred at the Idaho Supreme Court on December 8, 2006.

## OTHER JUDICIAL PROCEEDINGS

Currently pending before the Honorable Barry R. Wood is a writ of mandamus action filed by Clear Lakes Trout Company, Inc. against the Department.<sup>8</sup> Clear Lakes asked the court to require the Department to deliver water pursuant to a surface water delivery call against junior ground water users diverting water from the ESPA. The court granted in part the Department’s Motion

to Dismiss and reserved action on a motion by Clear Lakes to amend its complaint to include a declaratory judgment action. The case is on hold until the appeal of Judge Wood’s decision to the Idaho Supreme Court is resolved.

In addition to the Clear Lakes matter, there are two other judicial cases pending in district court to which the Department is a party. The question in *Nelson et al. v. Big Lost River Irrigation Dist. et al.*, No. 06-91 (Seventh Jud. Dist. Custer County 2005), is whether or not IDAPA 37.03.12.040.03.b applies to the Big Lost River Irrigation District’s assessment of conveyance loss to its patrons. On November 17, 2006, the court granted the Defendants’ Motion for Summary Judgment, denied the Plaintiffs’ Motion for Summary Judgment and declared that IDAPA 37.03.12.040.03.b does not require the irrigation district to distribute water according to the watermaster’s calculation in Rule 40.03.b. The court also vacated the preliminary injunction.

Finally, in *Thompson Cr. Mining Co. v. Idaho Dept. Water Res.*, No. 06-66 (Seventh Jud. Dist. Custer County 2006), an appeal was filed to the Department’s Amended Final Order Creating Water District No. 170. Water District No. 170 is located in the upper Salmon River basin in IDWR administrative basins 71 and 72. This case is in an early stage involving service of the petition for judicial review upon all water users within the newly created water district.

## SNAKE RIVER BASIN ADJUDICATION UPDATE

While it may be hard to believe, it has been nearly twenty years since the commencement of the SRBA. On December 15, 2006, the Department will have filed its final recommendations with the SRBA District Court. The upcoming year will be a monumental period in the SRBA, as the SRBA District Court, claimants, attorneys, the Department and its legal staff, start the judicial process for nearly 14,000 recommendations. The table summarizes the approximate schedule for the remaining director’s reports,<sup>9</sup> as of November 1, 2006 (see Table 1).

If the past is any indicator of the future, the vast majority of the remaining recommendations will proceed to partial decree without objection. The recommendations that do receive objections will be set for initial hearings in the various basins after the expiration of objection and response deadlines. By the end of next summer, courtrooms across the entire Snake River Basin will likely be buzzing with activity as water users, the Department, and other parties begin to talk about the issues and pursue settlement options or set trials.

**PRACTICE TIP**

On April 24, 2006, the state of Idaho’s Office of Administrative Rules requested that, pursuant to Idaho Code § 67-5206(1)(d), the Department compile an indexing system of its orders that arose from contested cases, as defined by Idaho Code § 67-5201(6), which the Department intends to rely upon as precedent. Orders dating as far back as 1993 were requested for the indexing system. For purposes of the indexing system, the Department was requested to identify the date the order was issued, the portion of the Idaho Administrative Code that was implicated, and the location(s) where the orders may be viewed.

Since the date of the request, the Department has been in the process of gathering those decisions and creating a database that indexes the orders by name and subject. The database of decisions can be viewed on the Department’s website at: <http://www.idwr.idaho.gov/CONTESTED%20CASE%20INDEX.pdf>. The database will be updated as new contested case orders are issued.

Basin	Approximate Number of Claims	Approximate Director’s Report Filing Date	
37	Part 2	600	12/8/2006
47		1,800	12/8/2006
73		500	12/8/2006
63	Part 3	1,800	12/10/2006
1	Part 2	500	12/15/2006
78		600	12/15/2006
2		900	12/19/2006
22	Part 2	1,700	12/19/2006
37	Part 3	1,900	12/19/2006
67		2,100	12/19/2006
75		1,300	12/19/2006
<b>Total</b>		<b>13,700</b>	

(Table 1: Summarizes the approximate schedule for the remaining director’s reports as of November 1, 2006.)

**ABOUT THE AUTHORS**

**Chris M. Bromley** and **Candice M. McHugh** are Deputy Attorneys General with the Office of the Attorney General’s Natural Resources Division. The opinions in this article are the authors’ and do not necessarily represent the opinion of the Attorney General or the Department of Water Resources. Chris received his Bachelor of Arts degree in 1997 from Whitman College in Politics and his law degree from the Gonzaga University School of Law in 2001. Candice received her Bachelor of Arts degree from Gonzaga University in 1994 and her law degree from the University of Denver College of Law in 1998. Chris and Candice currently serve as the secretary/treasurer and vice chairperson, respectively, for the Water Law Section

**ENDNOTES**

<sup>1</sup> “Delivery call” is defined by the Idaho Department of Water Resources’ Rules for Conjunctive Management of Surface and Ground Water Resources as follows: “A request from the holder of a water right for administration of water rights under the prior

appropriation doctrine.” IDAPA 37.03.11.04. The Surface Water Coalition initiated a “delivery call” when it petitioned the director to administer hydraulically connected junior ground water rights that it contended were injuring its senior surface water rights.

<sup>2</sup> The Surface Water Coalition is composed of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

<sup>3</sup> Recognizing that surface water and ground water are interconnected sources, the Conjunctive Management Rules provide the director with a framework for responding to calls for delivery of water by senior surface water users against junior ground water users.

<sup>4</sup> The Eastern Snake Plain Aquifer (“ESPA”) is a Lake Erie-sized aquifer underlying an area of the Eastern Snake River Plain, from King Hill northeast to Ashton. The ESPA is about 170 miles long and 60 miles wide. The ESPA is defined as an area having a common ground water supply. See IDAPA 37.03.11.050. A map depicting the boundaries of the ESPA can be found at: [http://www.esaplan.idaho.gov/presentations/up\\_snake\\_page\\_b\\_w.pdf](http://www.esaplan.idaho.gov/presentations/up_snake_page_b_w.pdf).

<sup>5</sup> All orders issued and documents filed in the Surface Water Coalition delivery call matter can be found on the Department’s website:

<http://www.idwr.idaho.gov/Calls/Surface%20Coalition%20Call/default.htm>.

<sup>6</sup> The Conservation Reserve Enhancement Program, between the United States Department of Agriculture and the state of Idaho, seeks to enroll 100,000 acres of land supplied by ground water pumping from the ESPA to voluntarily cease agricultural production on those lands, in exchange for payments from the United States and the state of Idaho, for a term of 15 years, thereby reducing ground water withdrawals from the ESPA by approximately 200,000 acre-feet annually, for the 15-year term.

<sup>7</sup> *American Falls Reservoir Dist. No. 2 et al. v. Idaho Dept. Water Res. et al.*, No. 2005-600 (Fifth Jud. Dist. Gooding County 2006).

<sup>8</sup> *Clear Lakes Trout Co., Inc. v. Dreher et al.*, No. 2005-426 (Fifth Jud. Dist. Gooding County 2005).

<sup>9</sup> Idaho Code § 42-1411 states that the Director of the Idaho Department of Water Resources “shall prepare a director’s report on the water system.” The director’s report is a document that includes the director’s recommendation for each water right claimed in the Snake River Basin Adjudication. The director’s report can report all claims in a particular watershed or can be issued in parts. As set forth in Idaho Code § 42-1422, the director’s recommendation for each water right claim must include the following elements, to define and administer water rights acquired under state law: the name and address of the claimant, source of water, the quantity of water, the date of priority, the legal description for the point of diversion, the purpose for which the water is used, the period of year when the water can be used, a description of the place of use, and any other conditions or remarks that the director deems necessary for the definition or administration of the water right.

# THE FIRST TWENTY YEARS OF THE SNAKE RIVER BAS ADJUDICATION: IS THERE AN END IN SIGHT?

Clive J. Strong  
*Office of the Attorney General*

The Snake River Basin Adjudication (“SRBA”), the largest legal proceeding in the history of the state of Idaho, was initiated on June 17, 1987.<sup>1</sup> As I drove to Twin Falls on that sunny summer afternoon in June to file the complaint, I recall wondering whether the SRBA would falter like the general stream adjudications of other western states. As the twentieth anniversary of the SRBA approaches, it seems appropriate to reflect back on the SRBA and answer the often asked questions: Will the SRBA ever end and what do we have to show for the time and effort invested in the adjudication?

## WILL ADJUDICATION EVER END?

The SRBA was originally projected to take ten years and cost approximately \$28 million to complete. As the twentieth anniversary of the SRBA nears and the cost approaches \$75 million, some have questioned how the original projection was so wrong. The answer to this question lies in the assumptions upon which the projection was based.<sup>2</sup>

The projection assumed 114,026 claims would be filed in the adjudication,<sup>3</sup> and the United States would pay its proportionate share of the cost of the adjudication.<sup>4</sup> Both of these assumptions turned out to be wrong. As the claims taking process comes to a close, we now know approximately 170,000 claims will be filed in the SRBA, a nearly 50 percent increase over the original projection. Likewise, while local federal agency officials initially indicated a willingness to pay adjudication filing fees, the United States Department of Justice successfully argued the United States was immune to payment of filing fees.<sup>5</sup> These two facts in large measure explain why the original projection was wrong.

Although the SRBA is taking longer to complete than originally projected, there is reason to believe the end of the SRBA is in sight. Idaho Department of Water Resources (“IDWR”) filed the final Director’s Reports<sup>6</sup> with the SRBA District Court in January 2007.<sup>7</sup> IDWR issued more than 149,000 recommendations. As of December 15, 2006, the SRBA District Court had decreed 120,401 water rights and, based on past experience, it is expected that more than eighty-five percent of the remaining approximately 29,000 recommended water rights will be decreed without objection. In addition, it is expected that approximately ninety percent of the objections to the director’s recommendations will be resolved through the dispute resolution process. Thus, if past experience is a prologue for the future, by 2009 significantly less than 1,000 SRBA subcases will remain for resolution.<sup>8</sup> Stated another way, more than ninety-nine percent of the water rights recommended by IDWR to the SRBA District Court are expected to be decreed by the end of 2009.

While some may think 22 years is a long time for the completion of an adjudication, the SRBA is moving at light speed compared to general stream adjudications in other western states. For example, the state of Montana commenced a state wide general stream adjudication in 1973.<sup>9</sup> Of the approximately 219,000 claims

filed, final decrees have been issued in 16,354 cases and another 113,070 claims have received preliminary or temporary preliminary decrees.<sup>10</sup> Montana’s General Stream Adjudication is currently projected to take 47 years.<sup>11</sup> The Gila River Adjudication in Arizona was commenced in 1974.<sup>12</sup> Of the approximately 70,000 claims filed in the Gila River Adjudication,<sup>13</sup> the vast majority remain to be decreed, and the adjudication is expected to last indefinitely.<sup>14</sup> Likewise, the Klamath Adjudication in the state of Oregon is in its 88th year,<sup>15</sup> and the Yakima General Stream Adjudication in the state of Washington is in its 90th year.<sup>16</sup>

Three factors explain why the SRBA has been more successful than adjudications in other western states. First, the Idaho Legislature provided an adequate funding source for the adjudication. All of the other state adjudications are severely under funded. Second, Idaho took the time to plan for the SRBA. Prior to commencing the adjudication, state legislative, executive and judicial officials studied the experience in other western states and identified potential pitfalls to avoid. Finally, there was considerable coordination with the federal government and the water users from the outset of the SRBA.

## WHAT DO WE HAVE TO SHOW FOR OUR TIME AND EFFORT?

If time and cost were the sole yardsticks for evaluating the merits of the SRBA, it would be hard to justify the investment. A closer examination of the underlying achievements of the SRBA, however, demonstrates not only the value of the adjudication but its necessity as a building block for the long-term management of Idaho’s water resources. The SRBA has answered many complex procedural and legal issues of first impression. To date, the SRBA proceeding has led to one United States Supreme Court decision,<sup>17</sup> 29 Idaho Supreme Court decisions,<sup>18</sup> 3 tribal water right settlements,<sup>19</sup> and 5 federal reserved water right settlements.<sup>20</sup> These milestones demonstrate that much has been accomplished in a relatively short period of time.

## SIGNIFICANT PROCEDURAL DECISIONS

The SRBA will be long remembered for the United States Supreme Court’s decision in *United States v. Idaho, Ex Rel. Director, Idaho Department of Water Resources*,<sup>21</sup> which is also known as the filing fee case. In that case, Idaho sought to require the United States to pay the same adjudication filing fees required of other claimants in the SRBA. Although the McCarran Amendment<sup>22</sup> provides that the United States, when joined in a state court general stream adjudication is subject to “State laws,” the Supreme Court held that Idaho’s filing fees were akin to a judgment for costs, which is precluded by the McCarran Amendment.<sup>23</sup> While the state lost on the issue of imposition of filing fees on the United States, it otherwise prevailed on the argument that the United States is subject “generally to state adjective law, as well as to state substantive law of water rights.”<sup>24</sup> This latter ruling has

proven to be significant as the SRBA has progressed to address the United States' water right claims.

*State of Idaho and the Idaho Legislature v. United States*<sup>25</sup> addressed the relative powers of the judicial and executive branches to establish the procedures governing the SRBA. In 1994, the Idaho Legislature passed extensive amendments to the general adjudication statute.<sup>26</sup> Among other things, these amendments removed the IDWR Director as a party to the adjudication and established additional procedures for the SRBA. The Idaho Supreme Court, in upholding most of the amendments, recognized that "Article V, Section 13 of the Idaho Constitution provides a shared power [between the legislature and the judiciary] to enact 'methods of proceeding' in the district courts."<sup>27</sup>

The Idaho Supreme Court's ruling in *State of Idaho and the Idaho Legislature v. United States* paved the way for establishing a cooperative working relationship between the SRBA District Court and IDWR, which contributed greatly to the speed with which the adjudication has progressed. A hallmark of the SRBA is its dispute resolution process. As noted above, the dispute resolution process has resulted in the resolution of all but a few of the objections filed against the Director's recommendations.

#### *SIGNIFICANT SUBSTANTIVE STATE LAW DECISIONS*

*Musser v. Higginson*<sup>28</sup> has proven to be a significant substantive state law decision. There, the Idaho Supreme Court issued a writ of mandate to the IDWR Director, requiring him to administer junior ground water rights for the protection of Musser's senior water rights. As a result of this decision, the IDWR promulgated the conjunctive management rules; the same rules that were recently held unconstitutional by Judge Barry Wood in Gooding County, and whose decision is currently on appeal to the Idaho Supreme Court.<sup>29</sup> The import of the Musser Decision continues to be a source of much debate within the water law community. Nonetheless, it provided the impetus for addressing the conjunctive management of surface and ground water rights diverting from the Eastern Snake Plain Aquifer.

In addition to *Musser*, the Idaho Supreme Court has also issued rulings addressing the public trust doctrine,<sup>30</sup> partial forfeiture of water rights,<sup>31</sup> and inclusion of general provisions in decrees.<sup>32</sup> Also pending in the Idaho Supreme Court is the issue of ownership of the United States Bureau of Reclamation's water rights.<sup>33</sup>

#### *FEDERAL RESERVED WATER RIGHT DECISIONS*

One of the most significant achievements in the SRBA is the near completion of the adjudication of the 25,000 plus federal reserved water right claims. Presently, less than 30 federal reserved water right claims remain to be resolved.

The Idaho Supreme Court has issued six (6) federal reserved water right decisions. *Potlatch v. United States*<sup>34</sup> is the most controversial of the Court's decision. There, the Court decided "Congress could not and would not have passed a [wilderness] bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas."<sup>35</sup> While the decision has been condemned by some public interest advocates, the case stands for the unremarkable proposition that "where water is not necessary to fulfill the specific purposes of a reservation, there arises a contrary inference that the 'United States would acquire water in the same manner as any other public or pri-

vate appropriator."<sup>36</sup> This decision represents an important recognition that the implied federal reserved water rights doctrine is inapplicable in those instances where Congress expressly considers the issue of whether to reserve water and then fails to affirmatively act to reserve water.

In a companion case to the *Potlatch* decision, the Idaho Supreme Court held that Congress created an express federal reserved water right for rivers designated under the Wild and Scenic Rivers Act.<sup>37</sup> Section 13(c) of the Act states: "Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes." Although stated in the negative, a floor colloquy by Senator Frank F. Church (D-Idaho), the bill's sponsor, left no doubt Congress intended to create a federal reserved water right for rivers designated under the Wild and Scenic Rivers Act.<sup>38</sup>

In addition to the Wilderness and Wild and Scenic River decisions, the Idaho Supreme Court has held that the United States is not entitled to federal reserved water rights for the Deer Flat National Wildlife Refuge,<sup>39</sup> the Sawtooth National Recreation Area,<sup>40</sup> and the national forests under the Multiple-Use, Sustained-Yield Act.<sup>41</sup> The Idaho Supreme Court has held, however, that the United States is entitled to a federal reserved water right for public water reserves<sup>42</sup> and the Hells Canyon National Recreation Area.<sup>43</sup>

#### *FEDERAL RESERVED WATER RIGHT SETTLEMENTS*

When the final chapter on the SRBA is written, one of the highlights will be how parties turned what could have been a clash between sovereigns into a win-win solution for all three sovereigns involved: state, federal, and tribal. Even before the SRBA began, the Shoshone-Bannock Tribe approached state officials and suggested that rather than litigate the tribes' reserved water right claims, the parties attempt to resolve the claims through good faith government-to-government negotiations. Idaho, motivated in part by the state of Wyoming's experience in litigating the United States' federal reserved water rights claims for the Wind River Indian Reservation, which was created under the same treaty as the Fort Hall Indian Reservation, agreed to negotiate.<sup>44</sup>

After five years of often difficult negotiations, the parties agreed to recognize federal reserved water rights for the Fort Hall Indian Reservation totaling 581,031 acre feet per year.<sup>45</sup> This agreement is remarkable because in addition to providing for the present and future needs of the Shoshone-Bannock Tribe, it also protected all existing water rights under state law by requiring the United States to provide mitigation water to state water right holders.

It is worth noting that Wyoming is still involved in the litigation over the Wind River Reservation reserved water right claims. Although the United States was awarded federal reserved water rights for the reservation totaling 500,717 acres, conflicts continue to arise over administration of the water rights and the claims of private landowners adjacent to the reservation. Total costs for the litigation are well in excess of \$50 million.<sup>46</sup>

The Nez Perce Tribe's federal reserved water right claims provided a unique opportunity for addressing broader environmental concerns in the context of a tribal water right settlement. Initially, it

appeared that the Nez Perce federal reserved water rights would have to be resolved through litigation. Indeed, it was not until the SRBA District Court issued its decision finding the Nez Perce Treaty did not create off-reservation instream flow water rights that meaningful negotiations began. The final settlement agreement reflects the tribe's and state's shared interest in preserving and protecting Idaho's anadromous fish runs. The agreement provides for a voluntary state based flow augmentation program in the Snake River Basin above Hells Canyon Dam, a state led riparian habitat program in the Salmon and Clearwater Basins, and the creation of 205 state law based instream flows. Federal funding, once again, was a key component to the settlement and represented a federal commitment to resolving the conflict the United States created when granting lands to both private individuals and the Nez Perce Tribe. Admittedly, the final chapter is yet to be written on this agreement as it is under challenge by public advocacy groups; however, it represents the only comprehensive effort by a State to address the conflicting demands for water for consumptive and nonconsumptive uses.

The Shoshone-Paiute Tribes' claims for the Duck Valley Indian Reservation were also quantified through a settlement agreement. In addition, the federal reserved water right claims for the United States Department of Energy, the Yellowstone National Park, the Craters of the Moon National Monument, the Hells Canyon National Recreation Area, and wild and scenic rivers in the Snake River Basin were resolved by settlement agreements.

## EPILOGUE

While the SRBA is achieving its stated goals,<sup>47</sup> the notion that the completion of the SRBA will resolve once and for all time Idaho's water conflicts is wrong. The SRBA is but a first step, albeit an important step, in ensuring that Idaho can effectively administer its water resources in the Twenty First Century.

As it is impossible to administer what has not been defined, the value of the SRBA is in the definition of all water rights diverting from the Snake River Basin within Idaho. Defining the elements of a water right alone, however, does not protect the water right. The administration of water rights diverting from interconnected sources in accordance with the prior appropriation doctrine as defined by Idaho law provides the real protection for a water right.<sup>48</sup> This chapter of Idaho water is still being written.<sup>49</sup>

## ABOUT THE AUTHOR

**Clive J. Strong**, is the Natural Resources Division Chief of the Office of the Attorney General. The opinions in this article are that of the author and do not necessarily represent the opinion of the Attorney General.

## ENDNOTES

<sup>1</sup> The Snake River Basin Adjudication complaint was filed with the Fifth Judicial District Court on June 17, 1987 and then was transmitted by the District Court to the Idaho Supreme Court on June 19, 1987. The Commencement Order was issued by the Fifth Judicial District Court on November 19, 1987.

<sup>2</sup> Many, including the author, believed the original projection was overly optimistic. Even a cursory examination of ongoing general stream adjudications in other states in 1985 disclosed that most of these proceedings were bogged down because of lack of funding and political will to address the difficult issues raised in such proceedings.

<sup>3</sup> IDWR believed the estimation of the number of claims to be high

because of possible double counting of some rights and the overestimation of some types of uses. *Recommended Adjudication Cost Sharing for Snake River Above Lewiston*, Attachment 3, Minutes, Idaho House Resources and Conservation Committee (Jan. 17, 1985).

<sup>4</sup> *Recommended Adjudication Cost Sharing for Snake River Above Lewiston*, Attachment 3, Minutes, Idaho House Resources and Conservation Committee (Jan. 17, 1985).

<sup>5</sup> *United States v. Idaho*, 508 U.S. 1 (1993).

<sup>6</sup> Idaho Code § 42-1411 requires the IDWR Director to file a "Director's Report," which consists of his recommendation for how each claimed water right should be decreed and general provisions necessary for the administration of the water rights to be decreed. In the SRBA, the IDWR Director divided the Director's Report in to 40 separate reports.

<sup>7</sup> Once a Director's Report is filed with the SRBA District Court the parties to the adjudication have an opportunity to object to the recommendation. If an objection is filed, then the court resolves the objection through a trial if necessary.

<sup>8</sup> On average, the dispute resolution process takes approximately two years to complete.

<sup>9</sup> [http://dnrc.mt.gov/wrd/water\\_rts/wr\\_general\\_info/waterrights\\_in\\_montana.pdf](http://dnrc.mt.gov/wrd/water_rts/wr_general_info/waterrights_in_montana.pdf) (visited Nov. 7, 2006).

<sup>10</sup> *Id.*

<sup>11</sup> The projected completion date for the Montana adjudication is 2020. [http://dnrc.mt.gov/house\\_bill22/default.asp](http://dnrc.mt.gov/house_bill22/default.asp) (visited Nov. 7, 2006).

<sup>12</sup> [http://www.dividingthewaters.org/adjudications/single\\_detail.php?id=az](http://www.dividingthewaters.org/adjudications/single_detail.php?id=az) (visited Nov. 7, 2006).

<sup>13</sup> *Id.*

<sup>14</sup> Personal conversation with George A Schade, Jr., Special Master Arizona General Stream Adjudication (Nov. 7, 2006).

<sup>15</sup> [http://www.dividingthewaters.org/adjudications/single\\_detail.php?id=or](http://www.dividingthewaters.org/adjudications/single_detail.php?id=or) (visited Nov. 7, 2006).

<sup>16</sup> [http://www.dividingthewaters.org/adjudications/single\\_detail.php?id=wa](http://www.dividingthewaters.org/adjudications/single_detail.php?id=wa) (visited Nov. 7, 2006).

<sup>17</sup> *United States v. Idaho*, 508 U.S. 1 (1993).

<sup>18</sup> *LU Ranching v. United States and Joyce Livestock Company v. United States*, S. Ct. Docket No. 31994, 32278, 32279, 32846 (argued November 8, 2006) (consolidated appeals regarding private/federal claims to livestock watering rights); *United States v. Pioneer Irrig. Dist.*, S. Ct. Docket No. 31790 (argued May 3, 2006) (ownership of Bureau of Reclamation water rights); *A & B Irrig. Dist. v. Aberdeen American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005) (water district could not enlarge its ground water permit); *Lu Ranching Co. v. United States*, 138 Idaho 606, 67 P.3d 85 (2003) (constitutionality of SRBA notice provisions); *United States v. Idaho*, 137 Idaho 654, 51 P.3d 1110 (2002) (denial of disqualification of judge); *North Snake Ground Water Dist. v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002) (special master's findings of fact become district court's findings when adopted); *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001) (evidence supported finding of forfeiture); *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001) (Deer Flat National Wildlife Refuge federal reserved water right claims); *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1284 (2000) (the Sawtooth National Recreation Area federal reserved water right claims); *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000) (Wilderness and Hells Canyon National Recreation Area federal reserved water right claims); *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (2000) (Wild and Scenic Rivers federal reserved water right claims); *Idaho v. United States*, 134 Idaho 106, 112, 996 P.2d 806, 812 (2000) ("United States may not utilize Idaho's constitutional method of appropriation to claim a non-diversionary water right for purposes other than stock watering"); *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999) (Multiple-Use Sustained-Yield Act of 1960 federal reserved water right claims); *Riley v. Rowan*,

131 Idaho 831, 965 P.2d 191 (1998) (determination of ownership of water right); *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449 (1998) (Public Water Reserve No. 107 federal reserved water right claims); *Idaho v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998) (general provisions in a decree are binding once they become part of the decree); *Idaho v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) (general provisions may be included in decree); *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997) (“excess water” or “high flow” use is not a water right); *Idaho v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 743, 947 P.2d 409, 416 (1997) (“the Idaho Constitution does not mandate that non-application to a beneficial use, for any period of time no matter how small, results in the loss or reduction of water rights”); *Idaho v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 947 P.2d 391 (1997) (reversing the district court’s award of attorney fees against the state of Idaho pursuant to the private attorney general doctrine); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997) (recognizing the concept of partial forfeiture under Idaho law); *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) (upholding a facial constitutional challenge to the enlargement provisions of Idaho’s accomplished transfer statutes, Idaho Code §§ 42-1425–1427); *Fort Hall Water Users Ass’n v. United States*, 129 Idaho 39, 921 P.2d 739 (1996) (holding that non-Indian water users’ association was not a “claimant” under the SRBA); *In re SRBA Case No. 39576, State ex rel. Higginson v. United States*, 128 Idaho 246, 912 P.2d 614 (1995) (upholding the legislature’s power to remove the Director of IDWR as a party to the SRBA); *Idaho Conservation League, Inc. v. Idaho*, 128 Idaho 155, 911 P.2d 748 (1995) (holding that the SRBA Court is not required to consider the public trust as an element of a water right subject to adjudication); *In re SRBA Case No. 39576*, 127 Idaho 688, 905 P.2d 89 (1995) (dismissing claim for declaratory relief regarding validity of IDWR conjunctive management rules in the SRBA Court); *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) (holding that a writ of mandamus could be issued to compel the Director of IDWR to deliver decreed water rights to landowners); *Idaho Dept. of Water Res. v. United States*, 122 Idaho 116, 832 P.2d 289 (1992), *reversed by, United States v. Idaho Dept. of Water Res.*, 508 U.S. 1 (1993) (holding that the McCarran Amendment did not waive the United States’ sovereign immunity with respect to payment of filing fee in the SRBA); *In re Snake River Basin Water Sys.*, 115 Idaho 1, 764 P.2d 78 (1988), *cert. denied, Boise-Kuna Irrig. Dist. v. United States*, 490 U.S. 1005 (1989) (discussing SRBA boundaries).

<sup>19</sup> 1990 Fort Hall Indian Water Rights Act, Pub. L. No. 101-602, 104 Stat. 3059; 2004 Snake River Water Rights Act, Pub. L. No. 108-447, 118 Stat. 3431-3441. Revised Consent Decree Approving Entry of Partial Decrees Determining the Rights of the United States as Trustee for the Benefit of the Shoshone-Paiute Tribes to the Use of Water in the Snake River Basin in Idaho, dated December 12, 2006.

<sup>20</sup> Water right agreements were entered between the state of Idaho and the United States for: the United States Department of Energy (July 11, 1990); Craters of the Moon National Monument (May 14, 1992); Yellowstone National Park (May 14, 1992); Wild and Scenic Rivers (Sept. 1, 2003); and Hells Canyon National Recreation Area (Sept. 1, 2003).

<sup>21</sup> 508 U.S. 1 (1993).

<sup>22</sup> 43 U.S.C. § 666(a).

<sup>23</sup> 43 U.S.C. § 666.

<sup>24</sup> 508 U.S. at 8.

<sup>25</sup> 128 Idaho 246, 912 P.2d 614 (1995).

<sup>26</sup> Idaho Code § 42-1401 *et seq.*

<sup>27</sup> 128 Idaho at 253, 912 P.2d at 621.

<sup>28</sup> 125 Idaho 392, 871 P.2d 809 (1994).

<sup>29</sup> *American Falls Reservoir Dist. No. 2 et al. v. Idaho Dept. Water Res. et al.*, No. 2005-600 (Fifth Jud. Dist. Gooding County 2006), *appeal docketed*, Nos. 33249, 33311, and 33399 (Idaho July 11, 2006) (Argued December 8, 2006) (This appeal concerns the district court’s decision finding the Rule for Conjunctive Management of Surface and Ground Water Resources facially unconstitutional based on the perceived absence of procedural components of the prior appropriation doctrine).

<sup>30</sup> *Idaho Conservation League, Inc. v. Idaho*, 128 Idaho 155, 911 P.2d 748 (1995).

<sup>31</sup> *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

<sup>32</sup> *Idaho v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998).

<sup>33</sup> *United States v. Pioneer Irrig. Dist.*, S. Ct. Docket No. 31790 (argued May 3, 2006).

<sup>34</sup> 134 Idaho 916, 12 P.3d 1260 (2000).

<sup>35</sup> *Id.* at 924, 12 P.3d at 1268.

<sup>36</sup> *Id.* at 932, 12 P.3d at 1276 (quoting *United States v. New Mexico*, 348 U.S. 696, 702 (1978)).

<sup>37</sup> 134 Idaho 912, 12 P.3d 1256 (2000).

<sup>38</sup> “The enactment of the bill is itself a reservation of water needed to carry out its purposes.” 112 Cong. Rec. 403, 433 (Jan. 17, 1966) (statement of Sen. Frank F. Church).

<sup>39</sup> *United States v. State*, 135 Idaho 655, 23 P.3d 117 (2001).

<sup>40</sup> *State v. United States*, 134 Idaho 940, 12 P.3d (2000).

<sup>41</sup> *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199 (1999).

<sup>42</sup> *United States v. State*, 131 Idaho 468, 959 P.2d 449 (1998).

<sup>43</sup> *Pottlatch Corp.*, 134 Idaho at 925, 12 P.3d at 1269.

<sup>44</sup> BONNIE G. COLBY ET AL., *NEGOTIATING TRIBAL WATER RIGHTS: FULFILLING PROMISES IN THE ARID WEST* 61 (2005).

<sup>45</sup> The 1990 Fort Hall Indian Water Rights Agreement was ratified by the Fort Hall Indian Water Rights Act, Pub. L. No. 101-602, 104 Stat. 3059.

<sup>46</sup> Personal conversations with Department of Justice Attorneys and private counsel.

<sup>47</sup> Four reasons were advanced for a general adjudication of the water rights of the Snake River Basin:

1. Identification and quantification of waters in the Snake River Basin will provide the Department of Water Resources the information to manage the river and enforce minimum flows.
2. Clear definitions of water rights will protect valid claims against future challenges and facilitate transfers and trading of such rights.
3. A general adjudication will result in quantification of federal and Indian water rights which until now have been unresolved.
4. The adjudication will define the amount of water available for development over and above the proposed new minimum flows.

*Benefits of Adjudication*, Attachment, Minutes of Hearing on RS 10961C2, Idaho House Resources and Conservation Committee (Jan. 17, 1985).

<sup>48</sup> As our water supplies become more limited, the only source for new water will be the acquisition of existing water rights. The SRBA will ensure the marketability of existing water rights.

<sup>49</sup> What constitutes proper administration of water rights is currently on appeal to the Idaho Supreme Court in *American Falls Reservoir Dist. No. 2 et al. v. Idaho Dept. Water Res. et al.*, No. 2005-600 (Fifth Jud. Dist. Gooding County 2006), *appeal docketed*, Nos. 33249, 33311, and 33399 (Idaho July 11, 2006).

# FROM THE PANHANDLE INTO THE ADJUDICATION FIRE

Arthur B. Macomber

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*In 2006, the Idaho Legislature passed a bill authorizing adjudication of the water rights in three northern Idaho watersheds.<sup>1</sup> The three watersheds, in order of their proposed adjudication, are the Coeur d'Alene-Spokane River Basin, the Palouse River Basin, and the Kootenai and Clark Fork-Pend Oreille River Basins.<sup>2</sup> The decree of water rights for these basins will complete the adjudication of all Idaho water rights. All Idaho attorneys should be aware of the North Idaho Adjudication (NIA) so that their clients may receive counsel related to it and safeguard their water rights.*

## COMPARING NIA TO SRBA

The primary differences between the Snake River Basin Adjudication (SRBA) that is currently headed toward a final decree and the coming NIA are the total number of claims and the ratio of surface water diverters to groundwater well users. The SRBA decreed over 150,000 separate water rights,<sup>3</sup> whereas the total number of water rights within the three NIA watersheds is about 24,500.<sup>4</sup> This difference in the number of water rights means that the SRBA Court's expertise at processing and handling claims and objections could potentially benefit the NIA by assuring efficiency in the use of both court and water rights holders' resources. Also, the SRBA Court's expertise is one reason not to allow venue in Idaho's First Judicial District (see below), but to use instead the Twin Falls SRBA Court to assure good water law as an outcome. Secondly, due to the numbers of NIA water rights holders and the SRBA Court's expertise, adjudication should only take a relatively few short years, instead of the decades that the SRBA consumed.

## SURFACE WATER V. GROUNDWATER USERS

The ratio of surface water users to groundwater well users differs dramatically between the SRBA and NIA. The historic method of procuring water in the relatively dry geographic area<sup>5</sup> subject to the SRBA was through diversion of the Snake River into ditches serving flat agricultural areas. Over decades, significant numbers of senior water rights were developed in surface water irrigation, prior to many groundwater well users competing for the water resource. In northern Idaho, the mountainous terrain and lack of navigable rivers with steady flows for good diversion works has meant that development of water rights occurred differently. Flat topography and ditch works for irrigation serve relatively few water users up north, in comparison to the more numerous groundwater well users.<sup>6</sup>

## MORE RAIN, FEWER PEOPLE

Another significant difference between the SRBA and the NIA regions is that the NIA region has higher annual rainfall<sup>7</sup> and only fifteen percent of Idaho's population.<sup>8</sup> This difference probably accounts for some NIA regional attitudes reflecting disbelief that they should be concerned about the amount of available water. If a landowner up north wanted water, he would simply dig or drill a well, or drop a pipe into the nearest lake or river, with little concern except as to proximity to source point or other potentially polluting circumstances. Further, with fewer people in that higher rainfall environment, neighbors could ignore how others conserved or wasted water, unless there was a polluting occurrence that could not be ignored. Thus, northern Idaho's

compliance with the Idaho Department of Water Resources' (IDWR) permit processes will probably be lower than SRBA region compliance. When the cupboard is bare, every crumb is counted, but with a full larder, waste may be ignored.

## DOMESTIC WATER RIGHTS INCLUDED

All that is about to end. In addition to a decree of municipal, agricultural and industrial uses, and unlike the SRBA adjudication, the IDWR has stated that the NIA adjudication will include a decree of domestic water rights.<sup>9</sup> Domestic water rights are:

- (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or
- (b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.<sup>10</sup>

The danger for Idaho attorneys' clientele is that small, domestic groundwater well users in the NIA region may not pay sufficient attention to the NIA process. This does not necessarily mean that domestic-water-rights holders in NIA region could lose their right to take water for a beneficial use.<sup>11</sup> But it does mean that unless such users verify their right as reported in the IDWR Director's Report, or make a claim to prove their right following commencement of the NIA, the priority date of their right could be advanced to the date of the final decree.<sup>12</sup> Since the SRBA process has taken over nineteen years<sup>13</sup> and the NIA is targeted for completion in 2015 or thereabouts,<sup>14</sup> NIA-region-domestic-water-rights holders will want to be proactive with the IDWR to make sure their historic priority date(s) are preserved.

## OTHER SIGNIFICANT ISSUES

As in the SRBA, the NIA process will include federal-reserved-rights claims. Federal reserved rights are important for three reasons. The first reason is that federal immunity to state laws is waived when water rights within an entire stream system are adjudicated.<sup>15</sup> The second reason is that federal lands constitute a large percentage of land in the NIA region. Finally, as a trustee for Indian lands, the federal government reserves rights to water for the tribes, subject to certain legal restrictions discussed in more detail below.<sup>16</sup> During the NIA, Indian water rights will be adjudicated for the Coeur d'Alene and Kootenai tribes.

## FEDERAL RESERVED RIGHTS

The McCarren Amendment<sup>17</sup> waives federal immunity to suit in state courts for the purpose of adjudicating water rights for entire stream systems. That statute mandates consent to joinder should a state request it. Due to the presence of federal lands within the NIA, that adjudication will require joinder of the federal government under the McCarren Amendment.

Further, beyond claims the federal government may have in its own water rights, the McCarren Amendment waiver has been held to create state court jurisdiction over claims of the federal government in its capacity as trustee for Indians<sup>18</sup> and claims of Indian tribes in their capacities as trust beneficiaries.<sup>19</sup> Thus, the NIA will adjudicate federal water rights on federal lands, federal reserved water rights in its capacity as trustee for the Indian tribes, and federal reserved water rights based on Indian tribal claims in their capacities as beneficiaries.

## INDIAN WATER RIGHTS

The Coeur d'Alene-Spokane River Basin is the home of the Coeur d'Alene Tribe. The Kootenai Tribe's reservation is within the boundaries of the Kootenai and Clark Fork-Pend Oreille River Basin. The Coeur d'Alene Indian reservation was created by Executive Order of President Ulysses S. Grant on November 8, 1873.<sup>20</sup>

The Kootenai Tribe's reservation was created October 18, 1974, by allotment.<sup>21</sup>

The U.S. Supreme Court decided the *Winters*<sup>22</sup> case in 1908, which held that the Gros Ventre and Assiniboing Indian tribes impliedly reserved their water rights in Montana by the 1888 agreement that created that reservation, and that the later admission into the United States of the Montana Territory as the state of Montana did not sever those rights from the Indians. Thus, the *Winters* case created the rule that lacking express agreement or a treaty reserving water rights, Indian tribes are federal trust beneficiaries of impliedly reserved water rights sufficient to support activities occurring on reservations as of the date when agreements or treaties with the United States created such reservations. Therefore, in the NIA the Coeur d'Alene Tribe and the Kootenai Tribe will probably obtain implied reserved water rights as of the dates of creation of their respective reservations.

Facts related to such a finding on behalf of the Coeur d'Alene Tribe may be subject to the doctrine of collateral estoppel, due to a U.S. Supreme Court case ruling that submerged lands under Lake Coeur d'Alene and the St. Joe River inside the exterior boundaries of the Coeur d'Alene Reservation are held in trust by the federal government for tribal use.<sup>23</sup> The question will then arise as to what quantities of water are necessary to support the Indians' reserved rights. The U.S. Supreme Court developed the Practicably Irrigable Acreage (PIA) standard based on the number of acres of trust land in a reservation,<sup>24</sup> but this measurement technique may not adequately address fishing rights, timber growth or other non-agricultural uses, which NIA-region tribes will probably require.

## TYPES OF INDIAN WATER CLAIMS

To narrow the scope of such concerns, potential types of NIA tribal claims should be identified. Some claims will be for reservation uses, such as domestic, commercial, municipal, and industrial uses; springs and ponds for livestock and wildlife; irri-

gation from surface and groundwater sources; water to develop or maintain wildlife habitat; and recreation. Other claims may be related to water from outside reservations flowing across reservation boundaries and into reservations (so-called "off-reservation claims"), flowing either by surface or groundwater action. Off-reservation claims may be related to instream flows to support fishing and other traditional activities of a tribe on its reservation, even if no diversion for a beneficial use occurs. But such claims likely require that the documents creating the Indian reservation expressly recognize such purposes.<sup>25</sup> In the NIA, it is conceivable that groundwater usage by non-Indians over the Rathdrum Aquifer may impact adjudication of on-reservation claims of the Coeur d'Alene Tribe. More easily envisioned are on-reservation impacts related to instream off-reservation flows from the Coeur d'Alene, St. Joe, and St. Maries Rivers.<sup>26</sup> In any case, adjudicators would be wise to avoid creation of future problems as were created by Indian and federal negotiators in the 1800s, when even express water allocations did not include an expectation of future water scarcity due to competing uses.<sup>27</sup>

Further, the Nez Perce Tribe and the state of Idaho negotiated fruitlessly from 1987 until 1998 when the SRBA Court appointed Frances McGovern as a mediator<sup>28</sup> In all fairness, efforts during that time productively isolated issues and educated various parties regarding numerous, extremely complex issues, including impacts of the potential settlement on Endangered Species Act (ESA)<sup>29</sup> habitat, hydroelectric power generation, and off-reservation agricultural users. However, as of October 2006, there were few water-rights-related discussions between the two NIA-region tribes and the state of Idaho. Thus the probability of an appointed mediator for tribal claims is high.

## THE NIA CALENDAR

Pursuant to Idaho Code § 14-1401 *et seq.*, the Coeur d'Alene-Spokane Watershed Basin adjudication is scheduled to commence in fiscal year 2008, which begins July 1, 2007. The IDWR's petition will be filed and venue will probably lie with the SRBA Court in the Fifth Judicial District, pursuant to its special jurisdiction granted by the Idaho Supreme Court's Provisional Order of September 29, 2006.<sup>30</sup> While the Court is not bound by its own provisional order, changing venue to northern Idaho is unlikely.<sup>31</sup> The broad outlines of the NIA call for each watershed's adjudication to undergo a five-stage, five-year process.

Using the Coeur d'Alene-Spokane Watershed Basin adjudication as an example, the first stage will include commencement of suit by an IDWR petition to the SRBA Court, the initial taking of claims, and the conduct of meetings to prepare and work with various entities.<sup>32</sup> The second year's work includes field examinations by the IDWR.<sup>33</sup> In the third year, the IDWR will prepare for the Court recommendations from its findings, which will include all records and claims collated and sorted into a compilation of its Director's Report<sup>34</sup> that should be ready for issuance in 2010.<sup>35</sup> Publication of the IDWR's Director's Report constitutes an expert opinion<sup>36</sup> for the Court to use in addressing objections to that Report. Finally, in 2011, the IDWR envisions the Coeur d'Alene-Spokane Watershed Basin to reach the dispute resolution phase.<sup>37</sup>

## LONG-ARM VENUE

The Idaho State Supreme Court believes that the Twin Falls-based SRBA Court is sufficiently practiced at addressing concerns of distant water rights holders to mollify objections while maintaining cost efficiencies. Thus the venue for the NIA is not likely to be northern Idaho.<sup>38</sup> The strong likelihood is that the Idaho Supreme Court will make permanent its provisional order granting special jurisdiction to the SRBA Court. NIA assignment to the SRBA Court will require some combination of video/telephone conferencing and Internet-based claims filing. Efforts in this direction are being planned.<sup>39</sup> Major objections in the NIA will be handled with physical visits to northern Idaho.<sup>40</sup> Thus, venue and jurisdiction for the NIA will probably remain as provisionally granted.

## NIA PROCESS FOR MOST USERS

Once the NIA petition is filed by the IDWR, standard Idaho Rules of Civil Procedure and the SRBA Administrative Rules will apply. Pursuant to I.R.C.P. 11(c), verified pleadings are currently required to be attested to before a person authorized to take oaths, such as a notary public, or other person pursuant to Rule I.R.C.P. 28(a). A claim is a pleading before the adjudication courts and pursuant to Idaho Code the SRBA Court required claimants' affidavits<sup>41</sup> to be entered into evidence to support a claim. In order to allow Internet filing to occur, statutory changes are being introduced in the Idaho Legislature to remove this requirement.<sup>42</sup> Thus, most NIA-water-rights claimants will be able to file their own documents over the Internet directly to the court. Then, they will be able to provide evidence to support their claims or counterclaims directly to the SRBA Court through video/telephone conferencing equipment located in Coeur d'Alene, unless hearings physically located in northern Idaho are required. In that case, SRBA-Court personnel may get to travel to what U.S. Supreme Court Justice Kennedy apparently believes is the most beautiful part of Idaho.<sup>43</sup>

Evidence of a non-permitted beneficial use or constitutional water right<sup>44</sup> may be offered through an owner's or neighbor's affidavit, well drillers' records, deeds, estate transfer records, photographs or other physical evidence. Changes in any point or place of diversion of water, place of use, yearly time period of use, or nature of use of water must currently be and should have been reported in the past to the IDWR.<sup>45</sup> Also, changes in ownership, including division of a right into fractional ownership, or changes of the address of a water right's owner must be reported to the IDWR.<sup>46</sup> Idaho attorneys should counsel their clients that these records should be gathered now in preparation for the NIA.

## UNRESOLVED ISSUES

Challenges before the SRBA Court resulted in Judge Wood's finding in a recent case that the IDWR's management of surface and groundwater rights through the Conjunctive Management Rules (CMRs) resulted in a "diminishment in vested rights," because the CMRs did not "contain reasonable and objective standards, omit[ted] significant [legal] concepts, and failed to establish a timeframe for administration commensurate with the needs for irrigation."<sup>47</sup> Specifically, that ruling barred the IDWR from using CMRs that shuffle junior and senior-water-rights priorities for the purpose of managing water rights for a given

watershed. Judge Wood's decision requires the IDWR to adhere to Idaho's Constitution, which requires "first-in-time, first-in-right" priority.<sup>48</sup> Thus, the IDWR must recreate management rules for use in the NIA that account for that court's decision. This is important because unlike the SRBA the NIA does not primarily involve a battle between off-reservation-senior-surface-water diverters and off-reservation-junior-groundwater pumpers. In the NIA, albeit primarily in the Coeur d'Alene-Spokane Watershed, the senior water rights will be the on-reservation, federally-reserved Indian water rights located upstream from the numerous off-reservation, non-federally-reserved downstream groundwater pumpers on the northern shores of Lake Coeur d'Alene and the Rathdrum Prairie Aquifer. The location of the Kootenai Tribe's reservation on the Kootenai River may trigger a similar set of issues.

Further, the NIA process will probably involve the ESA concerning problems associated with Lake Coeur d'Alene's heavy metal sediments located in the superfund<sup>49</sup> site that extends from the Bunker Mine Complex down the Coeur d'Alene river, through the lake, and into the Spokane River. Provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>50</sup> will thus also contribute to the complexity of the NIA. The NIA will involve significant federal and state issues of great magnitude and intertwining complexity.

## WASHINGTON'S INTERESTS

One final NIA issue warrants mention. In 2003, the City of Spokane had an estimated population of 196,624.<sup>51</sup> Spokane procures its water from the western end of the Rathdrum Prairie Aquifer. Overshadowing the NIA process may be the insistence of our sister state to impose a temporary moratorium on Idaho's constitutionally-authorized<sup>52</sup> grants of water rights during the pendency of the NIA. Washington State could bring suit to argue that adverse impacts from Idaho's NIA or its continued constitutional issuance of water rights permits during the NIA implicate interstate commerce violations. Also, Washington could bring suit demanding the creation of an interstate compact between Idaho and Washington as a remedy for interstate disputes over water. Whatever Washington State's approach, there should be no doubt of its concerns over the NIA.

## CONCLUSION

While appearing to present a simpler puzzle than the SRBA, the NIA will probably involve as many or more complex federal issues, but there will be fewer parties encumbered by those issues. Ordinary water-rights-holding clients of Idaho attorneys will enjoy electronic filing and local access to a public hearing process run by experienced SRBA-Court personnel. After the NIA, every Idaho citizen can bask in the satisfaction that Idaho is the only state to have successfully adjudicated all of its water rights.

## ENDNOTES

<sup>1</sup> H.B. 545, 58th Leg., 2nd Reg. Sess. (Idaho 2006).

<sup>2</sup> *Id.*

<sup>3</sup> Frances McGovern, *Mediation of the Snake River Basin Adjudication*, 42 Idaho Law Review 547, 553 (2006).

<sup>4</sup> Don Schaff, IDWR Adjudication Bureau Chief, *Projected Counts* (Microsoft Powerpoint slide presentation dated Apr. 17, 2006).

<sup>5</sup> U.S. Army Corps of Engineers, Luck Peak Master Plan, Vol 2 at § 2.02,

[http://www.nww.usace.army.mil/planning/er/lpeak/vol\\_2/22\\_02.htm](http://www.nww.usace.army.mil/planning/er/lpeak/vol_2/22_02.htm) (last visited Oct. 21, 2006).

<sup>6</sup> The total of previously adjudicated water rights between private parties, licenses and permits, and statutory claims for NIA's Coeur d'Alene-Spokane Watershed is 4,097, whereas the number of recorded wells is 10,858. Schaff, *supra* note 4. In an email, Mr. Schaff stated that for the SRBA region, "IDWR does have records for 42,791 recorded wells prior to Nov 19, 1987, but that number was the tip of the iceberg for the number of claims from wells in the SRBA." Email from Don Schaff, IDWR Adjudication Bureau Chief, to Arthur B. Macomber, Attorney (Oct. 18, 2006).

<sup>7</sup> See

[http://newweb.wrh.noaa.gov/images/otx/climate/precip\\_climo/id\\_precip.gif](http://newweb.wrh.noaa.gov/images/otx/climate/precip_climo/id_precip.gif) (last visited Oct. 22, 2006).

<sup>8</sup> Idaho's population is about 1,429,096, see U.S. Census Bureau, 2005 Estimate, <http://quickfacts.census.gov/qfd/states/16000.html>, (last visited Oct. 22, 2006), but the NIA's population is estimated to be 213,268, see U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/16000lk.html>, (statistics for Idaho counties of Boundary, Bonner, Kootenai, Shoshone, Benewah, and Latah, last visited Oct. 22, 2006), thus the NIA has 15% of the SRBA's population.

<sup>9</sup> Karl Dreher, Director of IDWR, Address at the Idaho Water Adjudication Conference in Post Falls, Idaho (Oct. 11, 2006).

<sup>10</sup> Idaho Code § 42-111(2006).

<sup>11</sup> Idaho Code § 42-1408(1)(c)(2006) ("failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed . . .").

<sup>12</sup> Dreher Address, *supra* note 9.

<sup>13</sup> The initial adjudication date of SRBA was November 19, 1987. See IDWR Website, <http://www.idwr.idaho.gov/water/srba/SRBA%20Court/main%20page.htm> (last visited Oct. 22, 2006).

<sup>14</sup> Schaff, *supra* note 4, *Target IDWR calendar for NIA* (Microsoft Powerpoint slide presentation dated Apr. 17, 2006).

<sup>15</sup> 43 U.S.C. 666(a)(2004).

<sup>16</sup> See *United States v. New Mexico*, 38 U.S. 696, 702 (1978).

<sup>17</sup> 43 U.S.C. 666(a)(2004).

<sup>18</sup> *Colo. River Water Conversation Dist. v. United States*, 424 U.S. 800, 813 (1976).

<sup>19</sup> *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 570 (1983).

<sup>20</sup> *Indian Affairs: Laws and Treaties, Vol. I, Laws, Part III – Executive Orders Relating to Indian Reserves* at 835-837 (Charles J. Kappler, ed., 1904) (compiled to December 1, 1902), available at [http://digital.library.okstate.edu/Kappler/Vol1/HTML\\_files/IDA0835.html](http://digital.library.okstate.edu/Kappler/Vol1/HTML_files/IDA0835.html), (last visited Oct. 23, 2006).

<sup>21</sup> Pursuant to the General Allotment Act of February 8, 1887 (ch. 119, 24 Stat. 388, codified at 25 U.S.C.A. 331), Congress passed Senate Bill 634 (titled: *A bill to declare that certain federally owned lands shall be held by the United States in trust for the Kootenai Tribe of Idaho*; sponsored by Senator Frank Church (ID); co-sponsored by Senator James A. McClure (ID); and introduced on January 31, 1973), as the Act of Oct. 18, 1974, Pub. L. No. 93-458, 88 Stat. 1383.

<sup>22</sup> *Winters v. United States*, 207 U.S. 564, 576 (1908).

<sup>23</sup> *Idaho v. United States*, 533 U.S. 262, 280-81 (2001).

<sup>24</sup> *Arizona v. California*, 373 U.S. 546, 600-01 (1963).

<sup>25</sup> *United States v. New Mexico*, 438 U.S. 696, 707 (1978) (In dis-

cussing the Organic Administration Act of 1897, the Court stated Congress "intended national forests to be reserved [to] . . . conserve the water flows, and to furnish a continuous supply of timber for the people . . . [but that n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes."). Arguably, unless congressional intent recognized uses requiring off-reservation water, such claims would not be recognized.

<sup>26</sup> As to off-reservation, instream-flow-reserved-water-rights claims, the Nez Perce filed such claims in the SRBA and Judge Wood refused to recognize such claims. See *In re SRBA Case No. 39576*, Consolidated Subcase 03-10022 at 47, (Idaho 5th Judicial Dist. Ct., Twin Falls County, Nov. 10, 1999) (currently on appeal); *In re SRBA Case No. 39576*, Subcase 03-10022 (Idaho 5th Judicial Dist. Ct., Twin Falls County, June 27, 2005). Certainly the Nez Perce appeal has interesting implications for Coeur d'Alene Tribal water rights claims impacted by cleanup of the superfund site that begins at the Bunker Mine Complex and continues down the Coeur d'Alene River, through Lake Coeur d'Alene, and into the Spokane River.

<sup>27</sup> *In re SRBA Case No. 39576* at 47 ("[T]he Nez Perce do not have Indian reserved instream flow water rights extending beyond the boundaries of the present Reservation, where ever [sic] those boundaries may be.").

<sup>28</sup> *In re SRBA*, No. 39576, Consolidated Subcase No. 03-10022, *Order of Mediation and Appointment* at 1 (Idaho 5th Judicial Dist. Ct., Twin Falls County, Dec. 21, 1998).

<sup>29</sup> 16 U.S.C.A. §§ 1531-1544 (2005).

<sup>30</sup> See *In the Matter of the General Adjudications of Rights to Use of Water From the Water Systems of the Coeur d'Alene-Spokane River Basin, the Palouse River Basin, and the Clark Fork-Pend Orielle River Basins*, Provisional Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudications of the Coeur d'Alene-Spokane River Basin, the Palouse River Basin at 2, and the Clark Fork-Pend Orielle River Basins, (Idaho, Sep. 29, 2006) (hereinafter "*In re Matter of the General Adjudication of Rights*").

<sup>31</sup> Idaho Code § 42-1407(1) (2006).

<sup>32</sup> Schaff, *supra* note 4, *Projected Milestones, By Fiscal Year – Northern Basins* (Microsoft Powerpoint slide presentation, dated April 17, 2006).

<sup>33</sup> Idaho Code § 42-1410 (2006).

<sup>34</sup> Idaho Code § 42-1411 (2006).

<sup>35</sup> Schaff, *supra* note 4, *Projected Milestones, By Fiscal Year – Northern Basins* (Microsoft Powerpoint slide presentation, dated April 17, 2006).

<sup>36</sup> Idaho Code § 42-1401B(1) (2006).

<sup>37</sup> See note 33.

<sup>38</sup> See *In re Matter of the General Adjudication of Rights*, note 30, *supra*.

<sup>39</sup> Telephone interview with Diana Delaney, SRBA court employee, on behalf of Eric Wildman (Oct. 20, 2006).

<sup>40</sup> See *In re Matter of the General Adjudication of Rights*, note 30, *supra*.

<sup>41</sup> Idaho Code § 42-1409(3) (2006).

<sup>42</sup> Executive Agency Legislative System (EALS) No. 360-01, Fiscal Year 2008 Statutory Change Request by Dave Tuthill, IDWR, submitted Aug. 7, 2006 ("[The] notarization requirement hinders the ability of a water user to file a claim using the internet... [and] implementation... will decrease the cost of an adjudication... by removing the need to travel to a notary[, thus enabling] internet filing.").

<sup>43</sup> *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 261 (1997) (Justice Kennedy's opinion begins stating, "In the northern region of

Idaho, close by the Coeur d'Alene Mountains which are part of [the] Bitterroot Range, lies tranquil Lake Coeur d'Alene. One of the Nation's most beautiful lakes, it is some 24 miles long and 1 to 3 miles wide. The Spokane River originates here and thence flows west, while the lake in turn is fed by other rivers and streams, including Coeur d'Alene River which flows to it from the east, as does the forested Saint Joe River which begins high in the Bitterroots and gathers their waters along its 130-mile journey.”).

<sup>44</sup> See IDAPA 37.03.02, Beneficial Use Examination Rules.

<sup>45</sup> Idaho Code § 42-108 (2006).

<sup>46</sup> Idaho Code § 42-248 (2006).

<sup>47</sup> *Am. Falls Reservoir Dist. #2 v. Idaho Dep't of Water Res.*, Case # CV-2005-0000600, *Order on Plaintiff's Motion for Summary Judgment* at 125, (5th Judicial Dist. Ct., County of Gooding, June 2, 2006).

<sup>48</sup> Idaho Const. Art. XV, § 3.

<sup>49</sup> 42 U.S.C.A. § 9601(11) (2004) (defining “Fund” or “Trust Fund” in CERCLA to “mean[] Hazardous Substance Superfund established by section 9607 of Title 26.”).

<sup>50</sup> 42 U.S.C.A. §§ 9601-9675 (2004).

<sup>51</sup> U.S. Census Bureau, 2003 Estimate, <http://quickfacts.census.gov/qfd/states/53/5367000.html> (last visited 10/26/06).

<sup>52</sup> Idaho Const. Art. XV, § 3. (“The right to divert and appropriate... for beneficial uses... shall never be denied...”).

#### ABOUT THE AUTHOR

**Arthur B. Macomber** has a solo practice in Coeur d'Alene focusing on real property, land use, water and construction law. He earned his undergraduate degree at George Fox University. Prior to attending the University of California Hastings College of Law he practiced for 25 years in business, real estate and construction.

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# WHEN LAND IS WATER: CLEAN WATER ACT JURISDICTION

Norman M. Semanko

*Idaho Water Users Association, Inc.*

*“It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act.... What is unusual in this instance, perhaps, is how readily the situation could have been avoided.”*

*Chief Justice Roberts*

When the U.S. Supreme Court speaks, attorneys listen. When the Court issues an opinion regarding jurisdiction under the Clean Water Act (“CWA” or “Act”), water lawyers and their clients sit up and take notice. And when it comes to the Court’s most recent pronouncement in this area of the law, *Rapanos v. United States*; *Carabell v. United States*<sup>1</sup> (“*Rapanos*”), the problem is figuring out what the Court actually said. Five of the nine justices agreed that the federal government had failed to properly interpret its jurisdiction under the Act. However, they could not agree on the test to be applied.

Settling on a bright-line rule, four justices<sup>2</sup> opined that the reach of the Act extends only to traditional navigable waters, such as “lakes, rivers, and streams” and adjacent wetlands. The other justice<sup>3</sup> concluded that the federal government could regulate a water body if it had a “significant nexus” with a traditional navigable water, thereby requiring a case-by-case determination of jurisdiction. This article examines the recent Court opinion and offers some thoughts on what it may mean for the future of regulation under the Clean Water Act.

## BACKGROUND: BOUNDLESS JURISDICTION

The Clean Water Act provides that “the discharge of any pollutant by any person shall be unlawful.”<sup>4</sup> In turn, “the discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source”<sup>5</sup>, and “navigable waters” are “the waters of the United States, including the territorial seas.”<sup>6</sup>

The question in *Rapanos* was “whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute ‘waters of the United States’ within the meaning of the Act.”<sup>7</sup>

As the Court noted, “[f]or a century prior to the CWA,<sup>8</sup> we had interpreted the phrase ‘navigable waters of the United States’ in the Act’s predecessor statutes to refer to interstate waters that are ‘navigable in fact’ or readily susceptible of being rendered so.”<sup>9</sup> Following passage of the Act, however, the U.S. Army Corps of Engineers eventually adopted regulations that “deliberately sought to extend the definition of ‘the waters of the United States’ to the outer limits of Congress’s commerce power.”<sup>10</sup> The Corps has “adopted increasingly broad interpretations of its own regulations under the Act”<sup>11</sup> to extend its jurisdiction to intrastate waters “which are or would be used as habitat” by migratory birds,<sup>12</sup> ephemeral streams and drainage ditches,<sup>13</sup> and “virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only ‘the presence of litter and debris.’”<sup>14</sup> The Court further observed that the expansive regulatory definition had been upheld by lower courts to apply to “storm sewers that contained flow to covered waters during

heavy rainfall”<sup>15</sup> and “dry arroyos connected to remote waters through the flow of groundwater over ‘centuries.’”<sup>16</sup> In short, the definition of “waters of the United States” became very expansive.

In 2001, the Court finally began to limit the Corps’ regulatory overreaching in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*<sup>17</sup> (“*SWANCC*”). In that case, the Corps asserted jurisdiction over “an abandoned sand and gravel pit in northern Illinois”<sup>18</sup> under the “Migratory Bird Rule.”<sup>19</sup> Observing that “[i]t was the significant nexus between the wetland and ‘navigable waters’ that informed [the Court’s] reading in *Riverside Bayview*,”<sup>20</sup> the Court “held that ‘nonnavigable, isolated, intrastate waters’... which did not ‘actually abut on a navigable waterway’... were not included as ‘waters of the United States.’”<sup>21</sup> Following the ruling, the Corps did not assert jurisdiction over what it determined to be the isolated wetlands at issue in *SWANCC*, but otherwise continued to maintain an expansive interpretation of “waters of the United States.”<sup>22</sup> As the Court noted, “district offices of the Corps have treated, as ‘waters of the United States,’ such typically dry land features as ‘arroyos, coulees, and washes,’ as well as other ‘channels that might have little water flow in a given year.’”<sup>23</sup> Likewise, “the lower courts have continued to uphold the Corps’ sweeping assertions of jurisdiction over ephemeral channels and drains.”<sup>24</sup> For example, the Ninth Circuit has held that “waters of the United States” include irrigation ditches and drains that intermittently connect to covered water,<sup>25</sup> as well as the “washes and arroyos” of an “arid development site,” located in the middle of the desert, through which “water courses... during periods of heavy rain,”<sup>26</sup> and “wetlands” separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads.<sup>27</sup>

## THE COURT STEPS IN: TWO OPINIONS

Shortly after Chief Justice Roberts was sworn in, the Court granted petitions for writs of certiorari in *Rapanos* and *Carabell* and the two cases were consolidated.<sup>28</sup> The cases involved wetlands that lie near or are connected to ditches or man-made drains that eventually empty into traditional navigable waters, without any indication of whether the connections are continuous or intermittent.<sup>29</sup> Without a majority opinion to draw from, water practitioners and the lower courts will all look to the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy.<sup>30</sup>

Justice Scalia’s plurality opinion concluded that “waters of the United States,” as defined in Webster’s Dictionary, includes “those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams... oceans, rivers and lakes.’”

“All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows.”<sup>31</sup> The Scalia opinion specifically criticized the Corps for asserting jurisdiction over “ephemeral streams, wet meadows, storm sewers or culverts, sheet flow during storm events, drain tiles, mad-made drainage ditches, and dry arroyos in the middle of the desert.” “The plain language of the statute simply does not authorize this ‘Land is Waters’ approach to federal jurisdiction.”<sup>32</sup> Moreover, such an “expansive interpretation would ‘result in a significant impingement of the States’ traditional and primary power over land and water use.”<sup>33</sup> The plurality opinion concluded that the incorrect standard had been applied and that the cases should be remanded to the lower courts.<sup>34</sup>

Justice Kennedy’s concurring opinion, while providing the fifth vote necessary to remand the cases, was markedly different than the plurality opinion. In addition to navigable waters, Justice Kennedy concluded that non-navigable waters, including wetlands that have a “significant nexus” to navigable waters are also “waters of the United States.” To establish a “significant nexus,” the Corps must “establish... on a case-by-case basis” that the wetlands “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” When the “effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”<sup>35</sup> Justice Kennedy concluded that the cases should be remanded “for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.”<sup>36</sup>

#### WHAT LIES AHEAD: MORE LITIGATION OR RULEMAKING?

The Supreme Court’s opinion in *Rapanos*, while coming painfully close, did not definitively resolve the question of what constitutes “waters of the United States” under the Clean Water Act. The most likely scenario, given the controlling, concurring opinion by Justice Kennedy, is that future litigation will involve case-by-case determinations of whether a “significant nexus” exists between non-navigable waters, including wetlands, and traditional navigable waters.<sup>37</sup> With no bright-line test in site, it now falls to the Corps to conduct a long overdue rulemaking effort to clarify the meaning of “waters of the United States.”<sup>38</sup> If and when that happens, we will definitely be listening.

#### ABOUT THE AUTHOR

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#### ENDNOTES

- <sup>1</sup> 547 U.S. \_\_\_, 126 S.Ct. 2208 (2006).
- <sup>2</sup> Justice Scalia, joined by Chief Justice Roberts, Justice Thomas and Justice Alito.
- <sup>3</sup> Justice Kennedy.
- <sup>4</sup> 33 U.S.C. § 1311(a). However, permits may be granted for discharges under 33 U.S.C. §§ 1342(a)(for direct discharges of pollutants) and 1344(a), (d) (for dredge and fill permits).
- <sup>5</sup> 33 U.S.C. § 1362(12).
- <sup>6</sup> 33 U.S.C. § 1362(7).
- <sup>7</sup> *Rapanos*, 126 S.Ct. at 2219.
- <sup>8</sup> The Clean Water Act, formally known as the Federal Water Pollution Control Act, was enacted by Congress in 1972.
- <sup>9</sup> *Rapanos*, 126 S.Ct. at 2216 (quoting *The Daniel Ball*, 10 Wall. 557, 563 (1871)).
- <sup>10</sup> *Id.* (citing 42 Fed.Reg. 37144, n. 2).
- <sup>11</sup> *Id.*
- <sup>12</sup> 51 Fed. Reg. 41217 (the so-called “Migratory Bird Rule”).
- <sup>13</sup> 33 CFR § 328.3(a)(5); 65 Fed. Reg. 12823.
- <sup>14</sup> *Rapanos*, 126 S.Ct. at 2217 (quoting 33 CFR § 328.3(e)).
- <sup>15</sup> *Id.* (citing *United States v. Eidson*, 108 F.3d 1336, 1340-1342 (11<sup>th</sup> Cir. 1997)).
- <sup>16</sup> *Id.* (quoting *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10<sup>th</sup> Cir. 1985)).
- <sup>17</sup> 531 U.S. 159 (2001).
- <sup>18</sup> *SWANCC*, 531 U.S. at 162.
- <sup>19</sup> See note 12 accompanying text.
- <sup>20</sup> *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). *Riverside Bayview* was the first Court case to interpret the statutory term “waters of the United States”, holding that a wetland that was adjacent to and actually abutted a body of navigable water was a “waters of the United States”.
- <sup>21</sup> *Rapanos*, 126 S.Ct. at 2217 (quoting *SWANCC*, 531 U.S. at 167, 171).
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.* at 2218.
- <sup>24</sup> *Id.* at 2217.
- <sup>25</sup> *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (9<sup>th</sup> Cir. 2002); *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9<sup>th</sup> Cir. 2001).
- <sup>26</sup> *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9<sup>th</sup> Cir. 2005). The Court referred to this decision as the “most implausibl[e] of all”, 126 S.Ct. at 2218, and specifically noted “the absurdity of finding the desert filled with waters”. 126 S.Ct. at 2218, n. 2.
- <sup>27</sup> *Baccarat Fremont Developers, LLC v. Army Corps of Engineers*, 425 F.3d 1150, 1157 (9<sup>th</sup> Cir. 2005).
- <sup>28</sup> 546 U.S. \_\_\_ (2005).
- <sup>29</sup> *Rapanos*, 126 S.Ct. at 2219.
- <sup>30</sup> The dissenting opinion, authored by Justice Stevens and joined by Justices Souter, Ginsburg and Breyer, 126 S.Ct. at 2252-2265, would have upheld the Corps’ assertions of jurisdiction and affirmed the lower court opinions.
- <sup>31</sup> *Rapanos*, 126 S.Ct. at 2220-2221, 2225.
- <sup>32</sup> *Id.* at 2222.
- <sup>33</sup> *Id.* at 2224 (quoting *SWANCC*, 531 U.S. at 174).
- <sup>34</sup> *Id.* at 2235.
- <sup>35</sup> *Id.* at 2248.
- <sup>35</sup> *Id.* at 2252.

<sup>37</sup> Indeed, the Pacific Legal Foundation (“PLF”), which argued the *Rapanos* case before the Supreme Court, “is involved in more than ten *Rapanos*-style cases from California to Massachusetts and is pursuing many more”, as part of a project it calls “Beyond *Rapanos*: Charting a Course to Liberty”. *Guide Post* (PLF publication) at 10 (Oct. 2006).

<sup>38</sup> The singular focus of a short and terse concurring opinion by Chief Justice Roberts in *Rapanos* was the Corps’ failure to adopt a final rule following the *SWANCC* decision in 2001. As the Chief Justice noted, the Corps initiated rulemaking regarding the definition of “waters of the United States” and the scope of jurisdiction under the Clean Water Act, 68 Fed. Reg. 1991 (2003), but subsequently abandoned the effort.

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# ANADROMOUS FISH AND THE LANDSCAPE OF IDAHO WATER USE AND DEVELOPMENT

Andrew J. Waldera

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For decades, debate and litigation have raged in the Pacific Northwest regarding salmon recovery. Few issues have received so much scrutiny, or have received so much funding, and yet remain as unresolved as ever. Over this time, the federal government has spent billions of dollars on various salmon recovery efforts. For example, Columbia River federal basin-wide salmon funding has ranged from \$453.1 million up to \$640.5 million since fiscal year 2001 to date. More so now than ever, Endangered Species Act (“ESA”) and Federal Power Act (“FPA”)-spurred considerations over listed salmon and steelhead are implicating Idaho water supplies as well as their use and development. Two of the more recognizable and ongoing examples of this intersection are the *American Rivers* litigation taking place in the U.S. District Court, District of Oregon, and the Federal Energy Regulatory Commission (“FERC”) relicensing proceeding regarding Idaho Power Company’s Hells Canyon hydroelectric facilities.<sup>1</sup>

## AMERICAN RIVERS, INC. V. NOAA FISHERIES

On January 16, 2004, a coalition of conservation and fishing groups filed suit in federal district court in the District of Oregon challenging the validity of the 2001 Upper Snake biological opinion governing the operations of Bureau of Reclamation facilities located in the Snake River Basin. The biological opinion concluded that the Reclamation’s operation of its Upper Snake Projects did not jeopardize the continued existence of ESA-listed salmon and steelhead found in the lower Snake and Columbia Rivers downstream of Idaho Power Company’s Hells Canyon hydroelectric dam complex.<sup>2</sup>

On May 23, 2006, District Judge James A. Redden struck down the applicable biological opinion as being arbitrary and capricious under the federal Administrative Procedure Act and the Endangered Species Act (“ESA”).<sup>3</sup> Judge Redden opined that the National Oceanic and Atmospheric Administration (“NOAA”) Fisheries’ jeopardy analysis failed to consider the combined effects of the proposed action (Reclamation’s operation of its Upper Snake Projects) and the existing environmental baseline (which, according to Judge Redden, includes the Army Corps of Engineers’ operations of the downstream Federal Columbia River Power System series of hydroelectric dams).<sup>4</sup> Judge Redden held that NOAA Fisheries’ failure to perform the desired combined-effects analysis resulted in the agency’s failure to provide the comprehensive review that is required by the ESA in authoring the 2005 Upper Snake Biological Opinion. As a result, Judge Redden ordered the remand of the 2005 Upper Snake Biological Opinion<sup>5</sup> back to NOAA Fisheries and the Bureau of Reclamation requiring the agencies to go back to the consultation drawing board and to undertake a more comprehensive jeopardy analysis.<sup>6</sup>

## STERN LANGUAGE FROM THE BENCH ON REMAND

Judge Redden’s Opinion and Order of Remand chastised NOAA Fisheries and the Bureau of Reclamation for allegedly being more concerned with ensuring that their chosen jeopardy analysis framework not interfere with preexisting water uses in the Upper Snake River Basin than with ensuring that the Reclamation’s project operations not jeopardize the continued existence and recovery of listed salmon and steelhead. Put another way, Judge Redden stated that instead of looking for what could be done to protect listed salmon and steelhead, the agencies chose instead to narrowly focus their efforts and analysis on what the “establishment” could handle “with minimal disruption.”<sup>7</sup>

In warning the agencies to perform the comprehensive analysis he desires during the remand process, Judge Redden noted the agencies’ purported past “history of noncompliance with the ESA” in the Columbia and Snake River Basins. Specifically, Judge Redden stated that NOAA Fisheries, the Bureau of Reclamation, the Army Corps of Engineers, and the Bonneville Power Administration “have repeatedly and collectively failed to demonstrate a willingness to do what is necessary to halt and reverse the trend toward species extinction in both the Columbia and Snake River Basins whatever the cost.” Judge Redden continued, stating that “none of us—especially the threatened and endangered Snake River salmon and steelhead—can afford the dire consequences that will follow” another action agency failure to perform a thorough and comprehensive jeopardy analysis.<sup>8</sup> As such, Judge Redden admonished that, if necessary, he, himself, “may well direct” the federal agencies to consider certain steps during the remand process in order to ensure compliance with the substantive requirements of the ESA.<sup>9</sup>

## IMPLICATIONS FOR IDAHO WATER

Despite the fact ESA-listed salmon and steelhead are only found downstream of Idaho Power Company’s Hells Canyon hydroelectric dam facilities, Judge Redden’s decision voiding the 2005 Upper Snake Biological Opinion reaches far into southern Idaho by implicating stored water supplies through the concept of downstream flow augmentation. For years, flow augmentation (the timed release of stored water), and increased spill from federal storage facilities, have been championed by salmon recovery advocates. Popular theories regarding the potential benefits of flow augmentation include that flow augmentation speeds smolt migration time to the ocean, that flow augmentation lowers water temperature at key times of the year, and/or that flow augmentation improves total dissolved gas and other chemical/biological component aspects of water during salmon smolt migration. In very basic terms, flow augmentation boils down to the theory that fish like water, thus fish must like, and will do better, in more water. Thus, flow augmentation involves

the timed release of Idaho water stores in hopes of benefiting downstream populations of salmon and steelhead, whatever the mechanism.

Though not quite directing an explicit inquiry into whether more Idaho water is needed for lower Snake and Columbia River flow augmentation, beyond the 487,000 acre-feet provided for and capped by the invalidated 2005 Upper Snake Biological Opinion and the 2004 Snake River Water Rights Act (Pub. Law 108-447), Judge Redden's Opinion and Order of Remand did suggest that additional flow augmentation should be thoroughly considered by NOAA Fisheries and the Bureau of Reclamation during the remand process. Judge Redden's Opinion and Order on Remand cited statistics that Bureau of Reclamation projects in the Upper Snake River Basin deplete annual flows in the Snake River by up to two million acre-feet.<sup>10</sup> Moreover, Judge Redden cited to NOAA Fisheries documentation in the administrative record that purportedly states that the minimum amount of flow augmentation needed to mitigate Bureau of Reclamation-based Snake River flow depletions is 1.05 million acre-feet—approximately 2.2 times the 487,000 acre-feet of Idaho water currently contemplated and earmarked for flow augmentation.<sup>11</sup> Judge Redden further insinuated that the ESA-based salmon and steelhead considerations trumped any and all water uses allocated by the Snake River Water Act—an agreement between the state of Idaho, the Nez Perce Tribe, and Idaho water users settling tribal claims to flows of the Snake River, subsequently approved by Congress.

Needless to say, Idaho water users, particularly those in the Snake River Basin, are monitoring this case very closely. At this point, all eyes are on NOAA Fisheries and the Bureau of Reclamation to see what the new Upper Snake biological opinion will say. In the meantime, the Parties involved are resigned to participating in an uneasy waiting game.

#### FERC PROJECT NO. 1971-079

On July 21, 2003, Idaho Power Company filed its application for license with the Federal Energy Regulatory Commission ("FERC") seeking a new license for its continued operations of its Hells Canyon hydroelectric dam complex. The existing license for the Complex expired on July 31, 2005, and the Complex has been operating on interim annual license renewals granted by FERC ever since.

The Hells Canyon Complex consists of three hydroelectric projects (dams, reservoirs, and corresponding powerhouses) on the portion of the Snake River forming a part of the border between Idaho and Oregon. The Complex (Brownlee Dam, Oxbow Dam, and Hells Canyon Dam) is owned and operated by Idaho Power Company. Together, the dams impound approximately 95 miles of the Snake River, and produce roughly 1,200 megawatts of electricity.<sup>12</sup>

Brownlee Dam is the largest of the three, and was the first dam completed in 1958. Brownlee Dam (277 feet of hydraulic head) impounds Brownlee Reservoir, a reservoir about 58 miles long, with an approximate surface area of 14,261 acres, and a total storage capacity of approximately 1.42 million acre-feet. The Brownlee powerhouse contains five turbines with a com-

bined hydraulic capacity of 34,500 cubic feet per second and a combined generation of nearly 600,000 kilowatts of electricity.<sup>13</sup>

The next dam downstream of Brownlee is Oxbow Dam, completed in 1961. Oxbow is the smallest dam in the complex, measuring only 115 feet of hydraulic head, and impounding a reservoir roughly 12 miles long, with a surface area of 1,150 acres, and a total storage capacity of 58,400 acre-feet. The Oxbow powerhouse contains four turbines with a combined hydraulic capacity of 24,400 cubic feet per second and a combined generation of 190,000 kilowatts of electricity.<sup>14</sup>

The last dam in the series is Hells Canyon Dam, completed in 1967. Hells Canyon Dam (210 feet of hydraulic head) impounds a reservoir about 25 miles long, with a surface area of approximately 2,400 acres, and a total storage capacity of 167,720 acre-feet. The Hells Canyon powerhouse contains three turbines with a combined hydraulic capacity of 27,000 cubic feet per second and a combined generation of 391,500 kilowatts of electricity.<sup>15</sup>

Idaho Power Company's final license application, exclusive of supporting technical appendices, numbered nearly 2,300 pages of materials. The Company's application proposes nearly \$324 million in protection, mitigation, and enhancement measures to mitigate for the hydroelectric system's purported effects upon the environment.

#### FEDERAL POWER ACT MANDATES REGARDING ENVIRONMENTAL QUALITY

In deciding whether to issue any license for hydroelectric projects, FERC must consider power and development, energy conservation, protection, mitigation of damage to, and enhancement of fish and wildlife, protection of recreational opportunities, and preservation of other aspects of environmental quality.<sup>16</sup> The Federal Power Act ("FPA") also requires FERC to include license conditions for the "protection, mitigation, and enhancement" of fish and wildlife affected by the project.<sup>17</sup> These conditions are to be based upon recommendations it receives, pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*) from NOAA, the United States Fish and Wildlife Service ("USFWS"), and the State fish and wildlife agencies with jurisdiction in the project area.<sup>18</sup> While FERC must solicit these comments, terms, conditions, and recommendations from those with FPA Section 10(j) powers, FERC retains the ultimate authority to include the recommended conditions in the license. FERC determines whether the recommended conditions are "inconsistent with the purposes" of the FPA or other laws. If they are, the FPA directs FERC to reject them.<sup>19</sup> Even if the recommendations received from the Section 10(j) authorized agencies are in concert, those agencies do not have veto power over FERC licensing decisions.<sup>20</sup> However, while FERC retains ultimate authority over most aspects of the relicensing process, it must require the construction, maintenance, and operation of fishways as determined by either the Secretary of the Department of Interior (per the USFWS) or the Secretary of Commerce (per NOAA) if fishways are prescribed.<sup>21</sup>

In contrast to Judge Redden's view, that ESA-based salmon and steelhead considerations trump any and all water uses and allocations as noted above, the FPA and case law interpreting it

prescribe a “balancing” of development and environmental needs. For example, the FPA does not mandate that all past damage to fish and wildlife caused by a project be mitigated in a relicensing proceeding.<sup>22</sup> While FERC must give “equal consideration” to the environmental factors associated with a project, those factors do not have “preemptive force.”<sup>23</sup> Requiring FERC to establish a baseline containing every fish and wildlife recommendation it receives would undermine the Commission’s mandate to consider numerous conflicting interests, thereby rendering Sections 4(e), 10(a), 10(j), and 18 of the FPA superfluous.<sup>24</sup> In other words, FPA-mandated “equal consideration” of the environmental factors associated with a project is not the same as “equal treatment.”<sup>25</sup> At the end of the day, the FPA and case law interpreting it demonstrate that regardless of the comments, terms, conditions, and recommendations it receives, FERC is charged with determining the “public interest” by balancing power and non power values.<sup>26</sup> This theme of balancing development versus environmental interests has led to, and will continue to cause, friction between the different stakeholders involved in this relicensing process.

#### *FISH PASSAGE WITHIN AND ABOVE THE COMPLEX AND NOAA’S SECTION 18 DECISION*

In short, Idaho Power does not believe that the reintroduction of anadromous fish or native salmonids above Brownlee is feasible now or in the near future, despite the urgings otherwise by various environmental advocacy groups, Indian tribes, and certain fish and wildlife agency personnel.<sup>27</sup> As for limited fish passage within the Hells Canyon Complex itself, Idaho Power is also skeptical, though it is willing to implement a two-phase passage plan coupled with tributary enhancement program funding. Idaho Power is amenable to attempting intra-complex passage as some of the existing tributary habitats appear promising, particularly the Pine Creek, Indian Creek, and Wildhorse River basins.<sup>28</sup>

Regarding passage of anadromous fish above Brownlee, and into the mainstem of the Snake River, Idaho Power points to available habitat quality as militating against prescribing such a license condition at this time. Current Idaho Power studies illustrate that the waters above Brownlee have high nutrient loads and that spawning gravels contain fine sediments, and low dissolved oxygen concentrations, all of which negatively affect incubating fry.<sup>29</sup> Sustainability and recovery of anadromous fish below the Complex is likely indicative of the feasibility of fish reintroduction within and above the Complex. Because current anadromous fish populations are not being readily sustained downstream of the Complex (in habitat considered by most experts as being of good to excellent quality), fish passage above the Complex will fare even worse due to the need to additionally navigate the Complex, and because habitat upstream of Brownlee is currently of exceedingly poor quality. Idaho Power was not alone in reaching these conclusions.<sup>30</sup>

For its part, NOAA Fisheries largely agreed with Idaho Power’s conclusions. On January 26, 2006, NOAA Fisheries filed its comments and preliminary recommended terms and conditions with FERC regarding Idaho Power Company’s final license application for the Hells Canyon Complex. In it, NOAA Fisheries noted that the Hells Canyon Complex dams not only

block fish passage within the Snake River and its tributaries, but have also inundated approximately 95 miles of historical spawning habitat, particularly for Snake River fall Chinook, and for Snake River spring/summer Chinook.<sup>31</sup> According to NOAA Fisheries, the reservoirs of the Hells Canyon Complex inundated historically highly productive Snake River fall Chinook habitat, and blocked access to historically highly productive Snake River spring/summer Chinook habitat located upstream of the Complex in both the mainstem Snake River and its major tributaries.<sup>32</sup> Regarding Snake River spring/summer Chinook, however, other forces in addition to the construction of the dams, including mining, grazing, irrigated agriculture, municipal and industrial development, have limited habitat productivity upstream of the Hells Canyon Complex. In addition to the inundation and blocked passage created by the Complex, operation of the Complex, in conjunction with upstream development, have resulted in alteration of water quality regimes, particularly temperature, nutrient loads, dissolved oxygen levels, total dissolved gas levels, and turbidity. The combination of these various effects led NOAA Fisheries to conclude that reintroduction of anadromous species both within and above the Hells Canyon Complex, particularly in the mainstem Snake River, would not be suitable at this time as the mainstem habitat would not support reintroduced fish.

In sum, NOAA Fisheries identified the following goals during this relicensing period regarding anadromous fish: 1) protect and enhance existing habitat productivity below the Hells Canyon Complex; 2) improve migration conditions in the lower Snake River (below the Complex) for juvenile migrants; 3) continue fish hatchery mitigation efforts; and 4) improve water quality to restore spawning and rearing habitat in historically accessible and productive habitat upstream of the Complex.<sup>33</sup> In order to achieve these goals, NOAA Fisheries chose to reserve its FPA Section 18 powers (fishway prescription) due to current water quality concerns, and opted instead to focus its license term and condition recommendations upon terms and conditions geared toward improving habitat quality both within and above the Hells Canyon Complex in hopes that anadromous fish reintroduction requiring fish passage measures could be successfully accomplished in the future.

#### *REACTION TO NOAA FISHERIES’ DECISION*

Not surprisingly, NOAA Fisheries’ decision not to prescribe fishways at the Hells Canyon Complex at this time drew the ire of fish passage/reintroduction proponents such as the environmental conservation groups American Rivers and Idaho Rivers United, as well as Indian tribes, and the State of Oregon. As a result, many of these parties filed requests with NOAA Fisheries seeking its consideration of alternative conditions/prescriptions for fish passage crafted by the parties themselves pursuant to Section 241 of the Energy Policy Act of 2005, and 50 CFR Section 221.

Both Section 241 of the Energy Policy Act of 2005 and 50 CFR Section 221(b) entitle any party to the relicensing proceeding to a determination on the record, after an agency hearing, on any disputed issues of material fact with respect to fishway prescriptions. The statute and regulation also provide that any party to the proceeding may propose an alternative prescription to that

made by NOAA Fisheries. Essentially, the aforementioned parties have submitted alternative prescriptions requiring fish passage as a license condition, arguing that NOAA Fisheries' decision to reserve such a prescription at this time amounts to an affirmative decision not to act pursuant to Section 18 of the FPA in derogation of its duties under the various statutes noted earlier in the article.

#### IMPLICATIONS

NOAA Fisheries' decision to reserve its FPA Section 18 prescriptive power to require fish passage until such time as it is satisfied that habitat and water quality can support anadromous fish reintroduction, and other parties' submission of alternative fishway prescriptions, is just the latest in a series of contentious differences of opinion regarding what is and what is not proper mitigation for the effects of the Hells Canyon Complex during the FERC relicensing process. FERC anticipates release of its final Environmental Impact Statement at the end of February 2007. Its ultimate relicensing decision should issue soon thereafter. For now, it remains to be seen what mandatory terms and conditions FERC will impose upon Idaho Power in the new license it issues.

#### ABOUT THE AUTHOR

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#### ENDNOTES

<sup>1</sup> See *Am. Rivers, Inc. v. NOAA Fisheries*, CV-04-00061-RE (D. Or. May 23, 2006) and FERC Project No. 1971-079, respectively.

<sup>2</sup> The lawsuit as originally filed challenged the validity of NOAA Fisheries' 2001 biological opinion for the "U.S. Bureau of Reclamation Operations and Maintenance of its Projects in the Snake River Basin Above Brownlee Dam," and the subsequent January 24, 2002 supplemental biological opinion addressing the same. The lawsuit then subsumed and incorporated a challenge of NOAA Fisheries' March 31, 2005 biological opinion regarding Reclamation's Upper Snake Project operations.

<sup>3</sup> Opinion and Order at 15, *Am. Rivers, Inc.* (CV-04-00061-RE).

<sup>4</sup> *Id.* at 5-6; see also Opinion and Order of Remand at 1, *Am. Rivers, Inc. v. NOAA Fisheries*, CV-04-00061-RE (D. Or. Sept. 26, 2006).

<sup>5</sup> Opinion and Order at 5-6; see also Opinion and Order of Remand at 1.

<sup>6</sup> Opinion and Order at 6; see also the Endangered Species Act, 16 U.S.C. § 1536(a)(2). Section 1536(a)(2) requires federal agencies to consult with NOAA Fisheries and/or the United States Fish and Wildlife Service to insure that any action author-

ized, funded, or carried out by the agency does not jeopardize the continued existence of listed species or result in the destruction or the adverse modification of listed species' critical habitat. In essence, a biological opinion memorializes the results of the consultation process and prescribes those actions an agency must take to protect against harming listed species.

<sup>7</sup> Opinion and Order of Remand at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 3 n.3.

<sup>12</sup> Draft Environmental Impact Statement for the Hells Canyon Project, Docket No. P-1971-079 at Section 2.1.1 (Fed. Energy Regulatory Comm'n July 2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Federal Power Act, 16 U.S.C. § 797(e).

<sup>17</sup> 16 U.S.C. § 803(j)(1).

<sup>18</sup> *Id.*

<sup>19</sup> 16 U.S.C. § 803(j)(2); see also *U.S. Dep't of Interior v. FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992)

<sup>20</sup> *Conservation Law Found. v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000); see also *American Rivers v. FERC*, 201 F.3d 1186, 1198 (9th Cir. 2000).

<sup>21</sup> 16 U.S.C. § 811.

<sup>22</sup> *American Rivers v. FERC*, 201 F.3d at 1198.

<sup>23</sup> *U.S. Dep't of Interior v. FERC*, 952 F.2d at 545.

<sup>24</sup> *American Rivers v. FERC*, 201 F.3d at 1198.

<sup>25</sup> *Conservation Law Found. v. FERC*, 216 F.3d 41, 47 (D.C. Cir. 2000), citing *State of California v. FERC*, 966 F.2d 1541, 1550 (9th Cir. 1992).

<sup>26</sup> *U.S. Dep't of Interior v. FERC*, 952 F.2d at 545.

<sup>27</sup> IDAHO POWER CO., FEASIBILITY OF REINTRODUCTION OF ANADROMOUS FISH ABOVE OR WITHIN THE HELLS CANYON COMPLEX: TECHNICAL REPORT APPENDIX E.3.1-2 (2001).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Idaho Fish & Game, Comments And 10(j) Recommended Terms and Conditions; Oregon Department of Fish & Wildlife, Comments And 10(j) Recommended Terms and Conditions; and Comments And Recommendations of American Rivers and Idaho Rivers United.

<sup>31</sup> National Marine Fisheries Service's Comments and Preliminary Recommended Terms And Conditions.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 40.

# IDAHO'S CONJUNCTIVE MANAGEMENT RULES ARE "CONSTITUTIONALLY DEFICIENT"

Jon C. Gould

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On June 2, 2006, Idaho District Judge Barry Wood ruled that the Idaho Department of Water Resource's ("IDWR") administrative rules governing the conjunctive management of surface and ground water violate the Idaho Constitution and that the Director of the Department of Water Resources acted outside his legal authority in adopting conjunctive management rules which are inconsistent with Idaho's version of the prior appropriation doctrine.<sup>1</sup> Judge Wood also held that the conjunctive management rules do not contain reasonable and objective standards, omit significant concepts of the law, try to re-write other concepts of law, and fail to establish a time frame for administration commensurate with the needs for irrigation.<sup>2</sup> He also concluded that administration of water rights under the conjunctive management rules ("CMRs"), IDAPA 37.03.11, results in a diminishment of vested rights and that such a diminishment is an unconstitutional taking of property without just compensation.<sup>3</sup>

Judge Wood summarized his decision on the CMRs as follows:

"In the final analysis, one only need to step back from the trees and look generally at the process currently in place. In the Director's effort to satisfy all water uses on a given source, seniors are put in the position of re-defending the elements of their adjudicated water right every time a call is made for water. The call is the process and means by which effect is given to a water user's priority, which is the essence of the right under a prior appropriation doctrine. The mechanism now in place also creates a process that cannot be completed within the attendant time frame exigencies associated with water usage for a crop in progress. In practice, an untimely decision effectively becomes the decision, i.e., 'no decision is the decision.' Finally, the Director is put in the expanded role of re-defining the elements of water rights in order to strategize how to satisfy all water users as opposed to objectively administering water rights in accordance with the decrees. While full economic development of the state's water resources may be consistent with prior appropriation, even to satisfy prior appropriation, it must be a policy that cuts both ways."<sup>4</sup>

## FORMATION OF THE CONJUNCTIVE MANAGEMENT RULES

The need to implement conjunctive management of surface and ground water resources was recognized in the early 1970s. In the late 1970s, Idaho enacted Idaho Code Title 42, Chapter 42, in part to sustain and increase spring flows and the flow of the Snake River through ground water recharge. In early 1994, IDWR held a series of public meetings regarding the conjunctive management of ground and surface water. A set of rules was developed through a negotiated rulemaking process. In October, 1994, IDWR adopted the CMRs.

## CONJUNCTIVE MANAGEMENT RULES

The CMRs define conjunctive management as the legal and hydrologic integration of administration of the diversion and use of water under water rights from surface or ground water sources, including areas having a common ground water supply.<sup>5</sup> The CMRs prescribe procedures for responding to a delivery call made by a holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right in an area having a common ground water supply. Under the CMRs, a delivery call is a request by a holder of a water right for administration of water rights under the prior appropriate doctrine and a common ground water supply is "a ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights."<sup>6</sup>

## BACKGROUND ON LAWSUIT

Ground water of the Eastern Snake River Plain Aquifer is hydraulically interconnected with the Snake River and some of the Snake River's tributary surface water sources (such as springs). The American Falls Reservoir District No. 2, the A&B Irrigation District, the Burley Irrigation District, the Minidoka Irrigation District, and the Twin Falls Canal Company ("irrigation entity plaintiffs") hold natural flow storage and surface water rights with priorities dating from the early 1900s. The respective water rights permit the irrigation entities to divert and/or store water from the Snake River in southern Idaho.

The irrigation entity plaintiffs initiated an administrative delivery call on January 14, 2005, under Idaho's CMRs. Through the delivery call process, the irrigation entity plaintiffs sought the curtailment of junior groundwater rights in Water District 120 in order to allow additional water to be delivered to them in accordance with their senior surface water rights. Some 20 months after making the initial delivery call upon the IDWR, the Director had yet to enter a final order administering the call.

In August 2005, the irrigation entity plaintiffs filed suit against IDWR seeking a declaratory ruling regarding the validity and constitutionality of the CMRs. Essentially, the irrigation entity plaintiffs assert that the process provided by the CMRs has not allowed for either the correct or timely administration of their senior surface water rights.

Not surprisingly, many parties intervened in the suit representing both surface and ground water interests. The surface water user intervenors include the Thousand Springs Water Users Association; Rangen, Incorporated; Idaho Power Company; and Clear Springs Food, Incorporated. The primary ground water intervenor is the Idaho Ground Water Appropriators, Incorporated, a non-profit corporation comprised

of ground water districts, an irrigation district, cities, industries, and various municipalities, all of whom rely upon ground water resources.

#### CONJUNCTIVE MANAGEMENT UNDER THE PRIOR APPROPRIATION DOCTRINE

In the challenge to the CMRs, Judge Wood was mindful that most of the issues pertaining to the principles of the prior appropriation doctrine have developed largely in the context of surface water rights administration. Application of the prior appropriation doctrine to conjunctively managed surface and ground water systems is much more difficult compared to the combined administration of both surface and ground water. However, in the end, Judge Wood admonished that “these surface/ground water complexities cannot override the procedural mechanisms that have historically and constitutionally been in place to ensure that the administration of a water right does not undermine the decreed elements of such a water right.”<sup>7</sup>

#### “CONSTITUTIONAL DEFICIENCIES” OF THE CMRS FOUND BY THE COURT

Judge Wood concluded that the factors and policies contained in the CMRs can be construed consistent with the prior appropriation doctrine.<sup>8</sup> However, he held that the CMRs are constitutionally deficient for failure to integrate the required legal tenets and procedures regarding presumption of injury and burden of proof, failure to give proper legal effect to a partial decree, failure to establish objective criteria necessary to evaluate the aforementioned factors, and failure to establish a procedural framework to process a call in a timely manner.<sup>9</sup> Therefore, according to Judge Wood, the CMRs impermissibly allow the administration of certain water rights to “circumvent certain constitutional protections that have been historically accorded water rights.”<sup>10</sup> Judge Wood pointed out that this form of administration can result in a diminishment of the senior water rights, amounting to an unlawful taking of those rights.<sup>11</sup>

In addition, Judge Wood also held that the CMRs impermissibly allow for the reevaluation or the “*de facto* re-adjudication” of already decreed rights.<sup>12</sup> Essentially, the delivery call process provided by the rules puts the senior water right holder in the position of having to re-defend the elements of his adjudicated right every time he makes a delivery call for water. The judge held that this process is problematic for numerous reasons.

Judge Wood explained that this re-evaluation of the senior’s adjudicated rights fails to give conclusive effect to the adjudicated process, when the very point of the adjudication process is finality.<sup>13</sup> A right holder has already proven up the elements of his water right through the adjudication process and need not do it again. Such reevaluation of water rights is barred by the doctrine of *res judicata*.

Additionally, Judge Wood stated that in order to afford a senior water right any meaningful constitutional protection, the delivery call procedure must be timely, and completed with the exigencies of a growing crop during irrigation season.<sup>14</sup> Putting the senior right holder in the position of having to re-defend the elements of his water rights every time he makes a delivery call creates an unwieldy process that fails to provide a timely remedy. In other words, what good is a delivery call during irrigation

season 2006, if the remedy (more water) is not realized until irrigation season 2007? The crops need the water in 2006, not in 2007. Further, any delay caused by the delivery call process puts further burden upon the senior water right holder, thereby further diminishing his right without just compensation. Judge Wood held that the CMRs fail to define the appropriate standard the Director is to apply when responding to a call, do not state the presumption of injury, or allocate the burdens of proof according to established principles of the prior appropriation doctrine.<sup>15</sup> Judge Wood concluded that this absence results in the CMRs being unconstitutional on their face.<sup>16</sup> Likewise, Judge Wood concluded that the CMRs are devoid of any objective standard from which to evaluate the criteria the Director is to consider when responding to a delivery call.<sup>17</sup> Judge Wood noted that “a discretionary standard of ‘reasonableness’ in the eye of the Director does not comport with the Constitution.”<sup>18</sup>

Additional shortcomings with the CMRs include the exclusion of domestic water rights from ground water sources from administration of delivery calls. Judge Wood found this exemption to be both facially unconstitutional and also violates Idaho Statute.<sup>19</sup>

Judge Wood also recognized that a water right is a vested property right allowing the holder to use the water.<sup>20</sup> Any diminishment in the right defeats the very purpose of the right and any action which undermines the priority of the water right undermines the core value of the right. Judge Wood determined that through the administration pursuant to the CMRs, water rights are diminished and such a diminishment constitutes an unconstitutional taking without just compensation.<sup>21</sup>

#### FUTURE IMPLICATIONS

Not surprisingly, Judge Wood’s Order was not the last word on the constitutionality of the CMRs. Defendants promptly filed an appeal. The Supreme Court is scheduled to hear the appeal on December 8, 2006. IDWR and the Director filed a motion to stay the execution of the judgment, which was denied. Therefore the constitutionality and legality of the Director’s prior orders that are based upon the CMRs remain at issue.

Regardless of the Supreme Court’s ruling on appeal, the harshness of the prior appropriation doctrine will be felt by some water users. Judge Wood astutely noted that “[i]n times of scarcity, administration of water under Idaho’s version of the prior appropriation doctrine is not a user friendly business. To the contrary, it is harsh—there are winners and there are losers.”<sup>22</sup> The CMRs include a complete incorporation of Idaho’s prior appropriation doctrine—even those portions which are harsh and abrupt, those which benefit some at the expense of other.

#### ENDNOTES

<sup>1</sup> Judgment Granting Partial Summary Judgment at 2, *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, CV-2005-000060 (5th District Idaho June 30, 2006).

<sup>2</sup> Order On Plaintiffs’ Motion for Summary Judgment at 125, *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Res.*, CV-2005-000060 (5th Dist. Idaho June 2, 2006).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at p.97.

<sup>5</sup> IDAPA 37.03.11.010.03.

<sup>6</sup> IDAPA 37.03.11.010.04 and 01.

<sup>7</sup> Order on Plaintiffs' Motion for Summary Judgment at 91.

<sup>8</sup> *Id.* at 84.

<sup>9</sup> *Id.* at 90.

<sup>10</sup> *Id.* at 91.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 92.

<sup>14</sup> *Id.* at 93.

<sup>15</sup> *Id.* at 94-95.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 95.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 105.

<sup>20</sup> *Id.* at 121.

<sup>21</sup> *Id.* at 124.

<sup>22</sup> *Id.*

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Celebrating 50 years  
1957-2007

This year marks 50 years of *The Advocate*. When the Editorial Board reviewed past issues of *The Advocate* to select some items to reprint, we found ourselves laughing at the humorous items, especially the April Fool's issues, impressed by past ISB speakers, including the likes of Robert Kennedy and George Bush Senior, and intrigued by the spirited debates. It was interesting to many of us that even with the passage of time, the issues of importance to attorneys in the state remain much the same. To mark this 50-year milestone, each issue of *The Advocate* for the next year will take a walk down memory lane by reprinting articles and other items from past *Advocates*. We hope you will enjoy the selections. Special thanks go to Justice Jesse Walters for helping us go through back issues of *The Advocate*.

Lorna Jorgensen  
Chair, Advocate Editorial Advisory Board

**ADVOCATE RETROSPECTIVE**  
(REPRINT FROM FEBRUARY 1995)

**THE SNAKE RIVER BASIN ADJUDICATION... FROM THE BEGINNING TO THE PRESENT<sup>1</sup>**

Robert E. Bakes

*Moffatt, Thomas, Barrett, Rock & Fields, Chartered*

*This article is a reprint of an article that ran in the February 1995 issue of The Advocate. It is reprinted here as an article of historical perspective on the SRBA.*

**INTRODUCTION**

The Snake River Basin Adjudication (SRBA) is an attempt to quantify the claims to the water which the vagaries of nature and weather deposit in the Snake River Basin each year. The problem is unique in that the precipitation which recharges the Snake River basin divides itself into surface waters—lakes, reservoirs and streams—and ground water which migrates into one of the most unique subterranean aquifers on the North American continent. While the surface waters and the ground water in the aquifer are hydrologically connected, the development of the water from the surface and from the aquifer have occurred in the past as though they were separate sources unrelated to each other both hydrologically and legally.

Appropriation of the surface flow by gravity diversions occurred first, which early on consumed the natural flow of the river, at least above the American Falls reach of the river. Later, storage facilities appropriated the flood waters. These-surface appropriations proceeded on the basis of the first in time/first in right doctrine, at least within individual tributary basins of the Snake River. These early individual basin adjudications generally did not consider the impact which those decreed water rights had upon either the subterranean aquifer, or upon other parts of the Snake River basin.

With the advent of more efficient electric pumps and cheap hydroelectric rates following World War II, ground water pumping developed rapidly. With few exceptions<sup>2</sup> the impact which the withdrawal of water from the aquifer had upon down gradient surface water users, spring water users, and underground pumpers was not considered.

Complicating this problem of conflicting surface and groundwater consumptive uses was the Idaho Power's claim to 8,400cfs at its Swan Falls power generation plant. Most water users assumed that the power company's early 1900's power generation water right at Swan Falls was subordinated to up river consumptive appropriations. When the Idaho Supreme Court, in 1983, held that the power company's Hells Canyon licenses did not subordinate Idaho Power's Swan Falls water power rights,<sup>3</sup> a major confrontation between these conflicting claims was in the making.

Adding to that matrix was the emerging and expanding federal reserved water rights claims and indian tribal claims, which cut across the already complicated structure and priority of the competing claims to the Snake River water. The result was a major controversy about to explode.

**THE BEGINNING**

The fuse was lit in 1977 by Matthew Mullaney, a Boise lawyer, who filed a petition with the Public Utilities Commission asserting that Idaho Power had failed to protect and preserve its Swan Falls water rights, and that by doing so Idaho Power had wasted its assets and overstated its capital investment, resulting in overcharges to its rate payers. After the Supreme Court's decision in 1983 holding that the water rights at Swan Falls had not been subordinated, the Idaho Power Company immediately filed protests in all pending water applications in the Snake River drainage. Additionally, Idaho Power filed a complaint in the district court asserting its 8,400 cfs flow rights at Swan Falls against all upstream appropriators whose rights were junior to Idaho Power's Swan Falls priority dates.

Faced with the prospect of extensive long-term litigation causing a tremendous uncertainty regarding both the irrigators' water rights and the power company's water rights for power generation, the governor, the legislature and the Idaho Power Company entered into a comprehensive agreement in 1985 in order to resolve the dispute. Known as the "Swan Falls Agreement", it provided that:

(1) Idaho Power agreed to reduce its 8,400 cfs water right at Swan Falls to 3,900 cfs during the summer and 5,600 cfs during the winter, and that Idaho Power would drop its suit against upstream irrigators.

(2) The state agreed that any new requests for irrigation would be evaluated for their impact on hydroelectric generation downstream based on certain criteria.

(3) That the United States Congress would enact legislation requiring the Federal Energy Regulatory Commission to accept the Swan Falls agreement in its licensing activities

on the Snake River. A congressional bill was signed into law in 1987.

(4) The state would initiate an adjudication of all claims for water in the entire Snake River Basin, including those of the federal government and the Indian tribes.

To carry out the Swan Falls agreement, the Idaho Legislature, in 1985 enacted legislation authorizing the commencement of the Snake River Adjudication. Idaho Code Section 42-1406(A), *et. seq.* That legislation also included Section 42-1416 creating certain presumptions that "adjudicated water rights shall be presumed to have been validly applied"; "expansion of the use... in violation of the mandatory permit requirements shall be presumed to be valid"; and "a prior decree adjudicating a tributary stream or subbasin within the basin shall be presumed correct... ." Additionally, Idaho Code Section 42-1416(A) authorized the approval of certain changes in points of diversion, places of use, periods of use, or nature of use of water rights which had not complied with the statutory procedures for those changes.

In early 1994, the SRBA District Court, in an opinion issued in Basin-Wide Issue No.1, held that Idaho Code Section 42-1416 (the presumption statute) and Idaho Code Section 42-1416(A) (accomplished transfer statute), were unconstitutional due to vagueness. A month later, the Idaho Supreme Court affirmed another SRBA Court decision in the *Musser* case<sup>4</sup> which had ordered the director to do what was necessary to restore the Musser's Hagerman spring flows which had diminished during the preceding years, allegedly because of junior underground pumpers depleting the Snake River aquifer. In the *Musser* case, the Supreme Court also affirmed the assessing of attorneys fees against the director and the State of Idaho under Idaho Code Section 12-117.<sup>5</sup>

The 1994 Idaho State Legislature immediately responded to those decisions by enacting House Bills 969 and 990, which made numerous changes both in the procedural and substantive law relating to the SRBA and the adjudication statutes. First, the new legislation removed the director as a party to the adjudication, and made him a technical advisor who would only recommend water rights in his director's reports, and who would not be defending them in the SRBA. Second, the legislation prohibited the assessment of costs and attorneys fees against the state of Idaho by the SRBA court, and further reasserted the claim of sovereign immunity on behalf of the state of Idaho from paying attorneys fees and costs in any water rights adjudication. Idaho Code Section 42-1423. Next, the legislation reasserted that the SRBA was a McCarran amendment adjudication in order to ensure that the federal government would remain a party to the SRBA. Further, the legislation repealed Idaho Code Section 42-1416 and 42-1416(A) (which had been held to be unconstitutional by the SRBA Court) and replaced those sections with new expansion and accomplished transfer statutes, Idaho Code Sections 42-1425, 42-1426 and 42-1427, generally referred to as the "amnesty statutes." These new statutes declared that expansions and transfers that had occurred before the start of the Snake River Adjudication were in the local public interest. The legislation waived certain statutory requirements to accomplish those expansions and transfers.

In response to the legislation, the SRBA Court, on April 27, 1994, issued an order staying all proceedings in the SRBA, and prohibiting the director from contacting litigants or water rights claimants until his role under the new statutes had been determined. The court then appointed a steering committee composed of litigants, water users, and other interested professionals. The charge to the steering committee was to identify and respond to significant legal issues raised by the legislation adopted during the 1994 Idaho Legislative Session which govern the Snake River Basin Adjudication. The committee in its report to the Court dated July 12, 1994, identified numerous issues raised by the 1994 legislation, concluding that the following three issues had the highest priority and need for immediate determination:

1. The status of the director of the Idaho Department of Water Resources (Director) as a "party" in the adjudication under the 1994 statutes.

2. The validity and applicability of Idaho Code Sections 42-1425, 42-1426 and 42-1427 (amnesty statutes).

3. The constitutionality and applicability of Idaho Code Section 42-1423, prohibiting the award of attorneys fees against the state and reasserting sovereign immunity to the State of Idaho and its officers and employees.

After reviewing and considering the steering committee's report and recommendations, the SRBA Court on July 15, 1994, issued its "Order Designating Basin-Wide Issue No.3" identifying the following questions to be litigated by any party to the adjudication who intended to respond to Basin-Wide Issue No. 3. Those questions were:

1. Can the legislature expand or reduce the court's jurisdiction in the SRBA after jurisdiction attaches to the parties and subject matter of the action following the issuance of the *Commencement Order* and the filing of notices of claims.

Specifically, can the following legislative changes to the court's jurisdiction be made during the pendency of the SRBA:

- a. Changes in party status, pleadings and relief to be decreed;
- b. Modification of the Idaho Rules of Civil Procedure with respect to the award of costs and attorneys fees and the use of mandatory settlement conferences;
- c. Modification of the Idaho Rules of Evidence with respect to the designation of expert witnesses, the rules governing expert witness testimony, the admissibility of evidence and the legal weight to be attributed to evidence; and
- d. Expansion of the court's jurisdiction to decree provisions controlling the administration of water rights by the Director of the Idaho Department of Water Resources.

2. Resolution of number 1 (above) requires determining whether the SRBA is a court or an administrative proceeding.

Numerous parties filed briefs in support of or in opposition to the questions raised in the order designating Basin-Wide Issue No.3. Oral argument was held on October 11, 1994, and the court took the matter under advisement.

#### THE CURRENT STATUS

On December 7, 1994, the SRBA court issued its Memorandum Decision and Order on Basin-Wide Issue No.3. The court answered Question No.1, together with its subparts (a), (b), (c) and (d), in the negative, ruling that the 1994 statutory changes relating to the status of the director, the award of costs and attorney fees, designating the director as an expert witness, and the provisions relating to administrative provisions in water rights decrees were void either as being unconstitutional or preempted by the rulemaking authority of the Idaho Supreme Court. The court specifically held that the State of Idaho may not withdraw its sovereign immunity to a judgment for costs or attorney fees after the court's jurisdiction has attached to the parties and subject matter of the SRBA. The court further ruled that the various agencies of the State of Idaho could not assert claims in conflict with one another, nor could they appear by separate counsel. The court ordered that due process prohibited the State of Idaho from appearing as a party more than once in the SRBA. Except for the amnesty statutes, I.C. §§ 42-1425, -1426 and -1427, the court ruled that all sections of the 1994 Act are unconstitutional, and that as a result the SRBA was to proceed under the 1985 Act, even though significant portions of that Act had been repealed by the 1994 legislation.

In a separate order, the SRBA court designated the constitutionality of the amnesty statutes, I.C. §§ 42-1425, -1426 and -1427, as Basin-Wide Issue No.4, and the court set a briefing schedule for early January, 1995,

with a hearing date of January 24, 1995. A decision on those issues is expected early, probably in February 1995.

On December 22, 1994, the SRBA court granted a motion by the Idaho Ground Water Appropriators, Inc., to appeal from the interlocutory orders in Basin-Wide Issues Nos. 2 and 3. The Supreme Court is expected to certify the two orders for appeal under Idaho Appellate Rule 12.

As *The Advocate* goes to press, it is too early to determine what legislation might be proposed to address the Snake River Adjudication problems.

#### ENDNOTES

<sup>1</sup> This article is a revision and updating of a presentation made at the Eleventh Annual Water Law & Resource Issues Seminar sponsored by the Idaho Water Users Association on November 18, 1994.

<sup>2</sup> See *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973) and *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

<sup>3</sup> *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983).

<sup>4</sup> *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

<sup>5</sup> The trial court had also supported its award of attorney fees under the private attorney general doctrine. The Supreme Court, in *Musser*, did not address the private attorney general doctrine.

#### About the Author

**Former Chief Justice Robert E. Bakes** is a partner at *Moffatt, Thomas, Barrett, Rock & Fields*. He concentrates his practice in the areas of alternative dispute resolution, including arbitration, mediation, and summary trials, as well as consultation in trial and appellate practice and procedure.

## COMING EVENTS

1/1/07 - 2/28/07

These dates include Bar and Foundation meetings, seminars, and other important dates. All meetings will be at the Law Center in Boise unless otherwise indicated. Dates might change or programs may be cancelled. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

#### JANUARY 2007

- (Dates May Change or Programs May Be Cancelled)
- 1 **New Years Day, Law Center Closed**
  - 2 *The Advocate* Deadline
  - 3 Public Information Committee Meeting
  - 4 **CLE: ISB Intellectual Property section present: Intellectual Property Issues in the Courtroom**
  - 12 Idaho State Bar Board of Commissioners Meeting
  - 12 Bar Exam Reexamination Deadline
  - 15 **Martin Luther King Day, Law Center Closed**
  - 17 **CLE: ISB Young Lawyers section present: Choice and Creation of Business Entity**
  - 17 *The Advocate* Editorial Advisory Board
  - 19 Idaho Law Foundation Board of Directors Meeting
  - 23 **CLE: ISB Environmental and Natural Resources section present: 2007 Annual Environmental and Natural Resources Seminar, Rose Room, Boise**
  - 26 **CLE: Idaho law Foundation present: Handling Your First or Next Probate Case**

#### FEBRUARY 2007

- (Dates May Change or Programs May Be Cancelled)
- 1 **Licensing Deadline**
  - 1 *The Advocate* Deadline
  - 6 – 13 ABA/NABE/NCBP/NCBF Midyear Meeting, Miami
  - 15 – 17 **CLE: Commercial Law and Bankruptcy section present: Annual Bankruptcy Seminar, Red Lion Templin's Hotel, Post Falls**
  - 19 **President's Day, Law Center Closed**
  - 21 **CLE: ISB Young Lawyers section present: Obtaining Venture Capital for a Startup Business**
  - 21 *The Advocate* Editorial Advisory Board
  - 23 Idaho State Bar Board of Commissioners Meeting
  - 23 **CLE: ISB Real Property section present: Real Property Section 2007 Annual Seminar Doubletree Riverside Hotel, Boise**
  - 26 – 28 Idaho State Bar: Bar Exam, Boise Centre on the Grove, Boise



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**FEBRUARY 2007 IDAHO STATE BAR EXAMINATION APPLICANTS**  
**(as of December 12, 2006)**

*Listed below are the applicants who have applied to sit for the February 2007 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the board of Commissioners in a signed letter by February 16, 2007. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.*

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Jensen, Graydon Earl	Weiss, Marcus Samuel	Frederick
Udell, Richard Sidney	Mellon, Richard Curtis, Jr.	Bray, Christopher Cavis
Greenfield, John Frederic	Souza, John Carroll	
Elliott, Robert A.	Duplessie, Richard David	
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The 2007 licensing deadline is February 1, 2007. Your payment and forms must be physically received in the Idaho State Bar office by deadline to avoid the late fee. Postmark dates do not qualify. If your licensing is going to be late, be sure to include the appropriate late fee: Active, Out of State Active and House Counsel - \$50; Affiliate and Emeritus - \$25. The final licensing deadline is March 1, 2007.

Contact the Membership Department at (208) 334-4500 or [astrauser@isb.idaho.gov](mailto:astrauser@isb.idaho.gov) if you have any questions.

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#### **Snake River Valley:**

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*Interested judges and lawyers can contact Becky Jensen at [bjensen@isb.idaho.gov](mailto:bjensen@isb.idaho.gov) or Kendra Hooper at [khooper@isb.idaho.gov](mailto:khooper@isb.idaho.gov).*



# IDAHO LAW FOUNDATION



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**Please Volunteer!** To continue to provide these important services we need volunteers for 2007. If you would like to participate at one of the following locations, or if you would like to see an advice and consultation clinic started in your community please contact Mary Hobson at 1-800-221-3295 or [mhobson@isb.idaho.gov](mailto:mhobson@isb.idaho.gov).

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## BANKRUPTCY SECTION AND IVLP INTRODUCE BANKRUPTCY HELPLINE

Starting with a grant from the United States Bankruptcy Court, the Commercial Law and Bankruptcy Section of the Idaho State Bar and the Idaho Volunteer Lawyers Program have created a new service for *pro se* bankruptcy participants known as the **Bankruptcy Helpline**. Each month the United States Bankruptcy Court Clerk's office receives between 35 and 50 calls from *pro se* debtors and creditors seeking legal advice. Since the clerks are not permitted to render advice, these callers are forced to proceed without assistance, often to their detriment. At the same time *pro se* parties who lack the knowledge they need to proceed, cause delay and frustration for the court and its personnel as well as for bankruptcy attorneys and their clients.

The Bankruptcy Helpline is designed to address this problem by pairing *pro se* callers with volunteer attorneys with bankruptcy expertise to answer their questions. Callers will leave messages containing their question and contact information (an online version will also be provided). Messages will be retrieved by the Idaho Volunteer Lawyers Program and forwarded to volunteers that have agreed to provide bankruptcy advice. The vol-

unteer lawyer will then make contact with the *pro se* caller. Provisions are available to allow attorneys to remain anonymous.

The Bankruptcy Helpline concept has enjoyed terrific support from the U S Bankruptcy Court and from the Bankruptcy Section. However its success rests with volunteer attorneys. It is estimated that answering these calls, in most instances, will take 30 minutes or less. The number of calls received by volunteers will depend entirely on the number of volunteers but should not exceed two calls per month. Furthermore, IVLP will work with attorneys' schedules to block out times when a volunteer simply cannot take calls. Thus attorneys with bankruptcy expertise can provide significant *pro bono* assistance and aid in efficient operation of the bankruptcy courts for a very small time investment.

To volunteer for the Bankruptcy Helpline, please contact Mary Hobson, Legal Director, Idaho Volunteer Lawyers Program at (208) 334-4510, 1-800-221-3295 or [mhobson@isb.idaho.gov](mailto:mhobson@isb.idaho.gov).

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In accordance with Idaho Bar Commission Rule 302(a)(2)(C) the Idaho State Bar annually publishes a list of financial institutions acting as depositories for trust accounts that have consented to provide notification to Bar Counsel in the event any properly payable instrument is presented against an attorney trust account containing funds insufficient to honor the instrument in full, irrespective of whether the instrument is honored. The following financial institutions have agreed to report this information to the Bar Counsel as of December 1, 2006. Contact Barbara Anderson (208) 334-4500 for information on being an approved financial institution.

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—IN MEMORIAM—

**Jess B. Hawley, Jr.**  
**1914 - 2006**



**Jess B. Hawley, Jr.** passed away on Nov. 22, 2006 at home, getting ready to go to the office. He was 92. Jess was born July 12, 1914 in Boise, Idaho, the eldest son of pioneer Idahoans Jess B. and Jennie Hawley. He counted two brothers and four sisters among his siblings. The family home still stands at 203 Main Street in Boise. Jess attended local parochial schools and then enrolled in the College of Idaho. As a freshman, he was a member of the football, basketball, swimming and tennis teams. Always a top scholar, Jess transferred to the University of Notre Dame, graduating cum laude in 1936. Jess then moved to Washington D.C. where he worked full time at the United States Department of Commerce and attended the Georgetown Law Center at night. He loved his experience in Washington and was a frequent dinner guest at the home of then Idaho Senator William E. Borah. After graduating from law school with honors in 1940, Jess turned down offers to stay on the East coast and returned to Boise and joined his father's law practice. World War II led to his enlistment in the United States Army. He served his country with honor and was discharged as a captain from the Judge Advocate General Corps. Fatefully, while at Fort Bragg, North Carolina, Jess was injured during infantry drills. While in the base hospital he met the love of his life, Nell Victoria Holt. Nell, who had joined the Red Cross to support the war effort, was from Spartenberg, South Carolina. Jess convinced this beautiful young lady from the South to go West and they were married on June 28, 1945. Jess took Nell on a 'memorable' honeymoon trip in the White Cloud Mountains by horse pack string. Their marriage and friendship lasted for 61 marvelous years. After returning to Boise and resuming his law practice, Jess was elected to the first of two separate terms in the Idaho House of Representatives. He was the only attorney in the House following his election in 1947, which came some 35 years after his grandfather, James, served as Idaho's ninth governor. Jess's friend and brother, Jack Hawley, joined him in private practice in 1956. In 1964, the two brothers joined with Robert Troxell and Paul Ennis to form Hawley, Troxell, Ennis and Hawley. Under their leadership, Hawley Troxell evolved not only into Idaho's largest law firm but one of the premier firms within its geographical reach. Its evolution provided Jess with a source of great pride and no small degree of wonder. Mr. Hawley was a lawyer's lawyer, widely recognized for his unwavering integrity and consummate respect for the law. He represented clients and appeared in courts throughout the country, moving easily in all circles. He was a formidable opponent, serving his clients and his firm with great vigor and loyalty. He had a remarkable commitment and long history of activism in public and community affairs. He founded and served as the first President of the Idaho Law Foundation. He

received numerous gubernatorial appointments and served on several state commissions, including the Idaho Code Commission and the Uniform Laws Commission. He served on countless committees of the Idaho State Bar and Idaho Supreme Court, and was chair of the ethics committee and a member of the Supreme Court's blue ribbon select committee on Civil Rules and Bar examinations. He served as Idaho's liaison and was a senior advisor to the Ninth Circuit Court of Appeals. Jess was asked to address the Idaho Supreme Court on several historical occasions and he presided over numerous public events, including Idaho's kickoff of Dwight Eisenhower's presidential campaign, attended by some 20,000 people. Jess's unyielding character and principle was marked by his admission to the American College of Trial Lawyers whose peer review membership consists of the top one percent of all trial lawyers nationally. He served as a Regent of the College until 1986. Jess was honored by the Idaho State Bar as its most Distinguished Lawyer in 1990. Jess served on the boards of the Boise YMCA, United Fund, Red Cross, Chamber of Commerce, and Fundsy, among others, and he was Chairman of the Board of the Intermountain Gas Company and was a director of the Continental Life Company, Hoff Companies, Inc., the Dufresne Foundation and was a Trustee of Boise State University. He was a long time and active member of the Arid Club and Hillcrest Country Club. Jess's notable career was supported and shaped by his family whom he held dear. He had a life long love of outdoor Idaho. As a teenager, he and his brothers worked in Warren, Idaho assisting miners. He was an avid bird hunter and the proud owner of several bird dogs who would, on occasion, remove the family dinner steak from the grill, much to his chagrin. He followed his pioneer roots by regularly floating the Middle Fork of the Salmon River in the early 1950s, catching salmon from then plentiful runs. He was an accomplished fly fisherman and loved to play golf.

His regular Saturday morning partners were colorful and fun loving friends and many were also his clients. He possessed a 'unique' golf swing that will never be replicated. He was proud of the fact that his favorite labrador and regular golfing companion, Sam, was the only dog allowed on the golf course. Jess was an avid skier and he passed his love of skiing, and for all outdoors, on to his children. The family spent countless weekends in Sun Valley and Jess took great pleasure in exposing his children to the various celebrities and politicians in the cafeteria line at the Round House restaurant on Sun Valley's Bald Mountain. Jess had a broad range of knowledge and real life experience which never ceased to amaze despite his understated nature. He enjoyed sharing his advice with the many who consulted him. Many friends and young lawyers routinely sought his counsel and he willingly gave of his time. His children always sought his guidance and advice, not only as their father but also as their dear friend. He was a favorite 'Papa' to each of his





eight grandchildren with whom he shared many moments of great laughter and joy. He was the tie that truly bound the several generations of the Hawley family. Jess is survived by his wife, Nell Hawley; two sons, Jess B. Hawley III and his wife Iris Johnson Hawley of Grangeville, Idaho, and Stephen H. Hawley of Boise; two daughters, Victoria Hawley and her husband Jody B. Olson, and Kathryn Hawley Bush and her husband John A. Bush, all of Boise; eight grandchildren, Margot Hawley and her husband Vivek Krishnappa, Jess B. Hawley IV, Toby Hawley, Andrew Olson, Maxwell Olson, Kathryn Olson Madarieta and her husband Ethan Madarieta, Nathan Bush, Annie Victoria Bush, and one great-grandchild Kush Krishnappa. In addition, he is survived by two sis-

ters, Pauline Hinman of Eagle, Idaho and Eileen Hinman of Exeter, New Hampshire. He was preceded in death by his brothers John T. 'Jack' Hawley, James H. Hawley M.D., and two sisters, Mary Hawley Moller and Genevieve Wright. Jess had a keen insight into people and life. His sense of humor was grand. He was wise, kind, and enjoyed the company of people from all walks of life. He was a unique and special man who will be deeply missed by all those who survive him. In accordance with his clearly stated wishes, there will be no public service. In lieu of flowers, the family suggests that donations may be made to the Idaho Law Foundation, P.O. Box 895, Boise, Idaho 83701.

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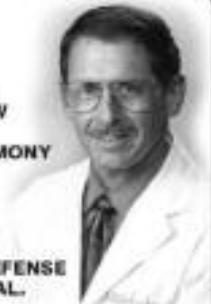
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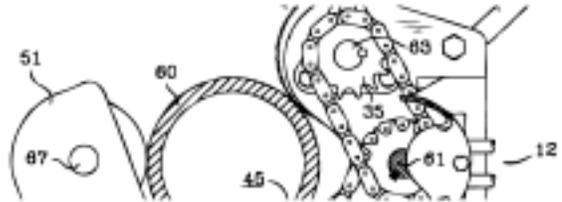
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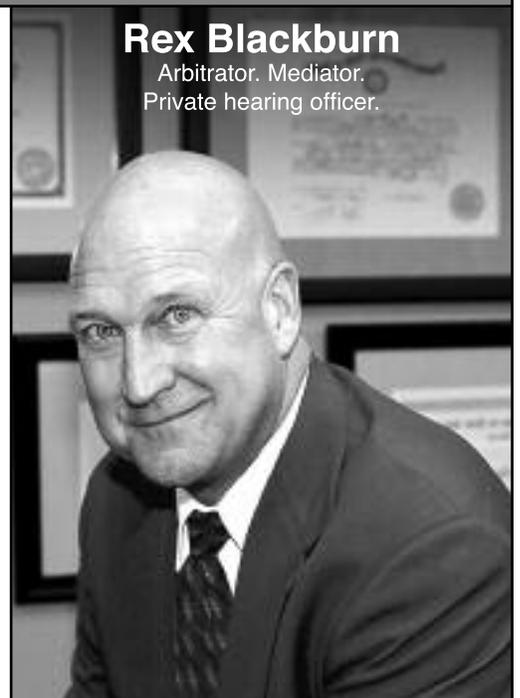
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## OF INTEREST

—IN MEMORIAM—

### Hon. Henry F. McQuade 1915 - 2006

**Henry Ford McQuade**, 91, died Dec. 13, 2006 at St. Alphonsus Hospital, surrounded by his family. He was born Oct. 11, 1915 in Pocatello, Idaho, the son of Irish parents, Mary Ellen Farnan McQuade and Joseph Michael McQuade. He attended grade school and high school in Pocatello, graduating in 1935. In 1940, he graduated from the University of Idaho with a degree in history, followed by a law degree in 1943. While working his way through college, from 1937 to 1943 he served as Justice of the Peace for Latah County, Idaho. At the age of 22, Justice McQueen received recognition from a National Publication, "Photogravure" as the youngest Justice of the Peace in the United States. From 1938-1943 he served conjunctively as the Police Judge for the City of Moscow, Idaho. Also from 1939-1943 he served as a United States Commissioner for the Idaho Federal District Court. On the day Pearl Harbor was bombed, Dec. 7, 1941, Henry had his first date with the love of his life, Mary Elizabeth (Betty) Downing. They were married the following year, April 11, 1942. After law school graduation, he served from 1943 to 1946 as a member of the United States Army, last serving in the rank of Captain in the Intelligence Division with the Ninth Service Command in Salt Lake City, Utah. Between 1946 and 1950 he served as Prosecuting Attorney for Bannock County. From 1951-1956 he served as District Judge for the then 5th Judicial District (now known as the 6th Judicial District). Interestingly enough, at the same time, his brother Jack was also elected as District Judge in Moscow, Idaho, the first time in Idaho history two brothers served as District Judges. In 1956 Governor Robert E. Smylie appointed Henry to the Idaho Supreme Court. During the time he served on the Court he was Chief Justice three terms. While on the Idaho Supreme Court he authored over five hundred opinions among which are several that are studied by law students throughout the United States. Throughout his career, Justice McQuade was active in the reformation of the Judicial

System of Idaho. He initiated the first program in the State of Idaho for continuing education and training for the lower court judges. He served on the Idaho Supreme Court until 1976 at which time he retired to accept an appointment by President Gerald Ford as Deputy Administrator of the Law Enforcement Assistance Administration (LEAA) in Washington, D.C. In 1977 he served as an Administrative Law Judge with the Occupational Health and Safety Review Commission. He also helped author the Code of Criminal Justice. In 1981, Henry and his beloved Betty retired in Boise. Justice McQuade was an avid golfer and during the course of his life he scored two holes in one and made many friends while golfing at Crane Creek, Plantation and courses throughout the valley. Justice McQuade maintained an active role in community activities. Among those activities were: Centennial Committee, Boise Red Cross, Idaho Highway User's Association, Boy Scouts, and the Idaho Youth Legislature. In 1964, Justice McQuade was honored in the Idaho Statesman as a Distinguished Citizen. In 1989 he was inducted into the University of Idaho Hall of Fame. Throughout his career, he received many awards and citations recognizing his achievements. He was a member of St. Mary's Catholic Church in Boise, Idaho.

Henry was a giant among men in the field of the law. He was a champion of fairness and integrity. His sense of fairness and duty to all permeates every opinion he wrote. His wonderful wit and exceptional intellect remain unsurpassed. He was a man who had a philosophy of integrity and he lived by that philosophy. His honor, integrity, sense of duty and commitment to family, country and the Constitution are an example to be followed. He was the human embodiment of nobility of spirit. Justice McQuade is survived by his wife of 64 years, Mary Elizabeth, their seven children and their families: Sharon Grisham; Mary Frances Munning; and Robert (Jody) all of Boise; Michael (Joanne) and Joseph (Chris) of Plano, Texas, Peter (Marilyn) of Colorado Springs, Colo., and William (Caroline) of Titusville, Fla.; 13 Grandchildren: Heather Ormsby; LeeAnn, Karen. and Jennifer McQuade; Laurie Roybal, D.J. McQuade,

Nicole Munoz, Rob McQuade, Rebecca, David, and Linda McQuade; and Virginia Symonds and Emily McQuade; five Great Grandchildren: Christina, Ashley, and Katherine Ormsby; Rebecca Briggs, and six week old Abigail Elise Symonds. He was preceded in death by his parents, his four brothers, daughter Margaret Catherine, and two grandchildren. Donna Lynn Horan and Carrie McQuade.

### Alfred C. Kiser 1922 - 2006

**Alfred C. Kiser**, 84, died June 18, 2006 of natural causes. He was born on May 2, 1922, to George and Mallie Kiser at their homestead in Fairfield, Idaho. He graduated from high school in Damas County and from college at the University of Idaho. He served as a field secretary for his college fraternity, Delta Tau Delta, which required him to travel to many different universities and colleges. In 1948 he married Eleanore (Ellie) Andrew from Parma, Idaho, a fellow student. He began working for Standard Oil Company in Spokane, Washington. In 1950, he received his law degree from the University of Idaho College of Law. He began practicing law in Weiser, Idaho and then moved to Boise where he worked with the firm of Anderson-Kaufman. He later opened his own office and was in private practice until he retired in 1983. He was active in Capital city Kiwanis and was a member of the First Presbyterian Church.

Following his retirement he began building his beloved log cabin on the shores of Cascade Lake in Donnelly. He did the majority of the work himself including the sawing down and milling of trees for the outside walls of the cabin. It was his favorite place to spend his retirement and was a wonderful gathering spot for the entire family every summer.

Al is survived by his wife Ellie of 58 years and his five children: James (Judy Joyce) of Boise; Carolyn (Bill Harrington) of Gresham, OR; Kay (Jim Stahlke) of Mound, MN; Jerry (Lisa Meredith) of Boise; Jeff (Steve Pollock) of Phoenix, AZ and eight grandchildren: Janie and Jason Kiser, Boise; Ryan and Cody Harrington, Gresham; Ben and Matt Stahlke, Mound; Andrew and John Kiser, Boise; and special caregiver Nellie Poen, Nampa, Idaho.

He was preceded in death by his parents, his siblings Clarence, Walter, and Eva, and his granddaughter Kelsey Harrington.

He will be remembered for his great sense of humor, hard work ethic, tenacity, and integrity.

### **Hon. Roy Mosman 1932 - 2006**

Roy Mosman, a Moscow attorney, former district judge and former member of the Idaho State Board of Education, passed away peacefully December 7, in the company of his family. He was 74. A native of Boise, Mosman attended what is now North Junior High and graduated from Boise High School. He went on to attend Boise Junior College and the University of Idaho on football scholarships. He was a junior college All-American at BJC, and was the University of Idaho's first nominee to represent the school at the prestigious East-West All-Star Shrine football game of 1953. That award was particularly special to him as he had spent nearly 18 months in the Shriners Children's Hospital in Portland when he was five years old.

He attended the University of Idaho where he met the young woman who was to become his partner and wife. He married Barbara Greene on Sept. 6, 1952 in Frederick, Maryland. He graduated from the Medical College of Virginia, where their daughter Jill was born, before attending law school at the University of Oregon, where he graduated with a Juris Doctor in 1959. Sons Michael and Craig were born in Eugene during law school.

Roy, Barbara and their family moved to Lewiston, where he was elected Nez Perce County Prosecutor just three years after his graduation from law school, the first Republican elected in the county in decades. He served as prosecutor in Nez Perce County for 11 years, once garnering the nomination from both political parties. While in Lewiston, sons Matthew and Wynn were additions to the family.

In 1973 Mosman was appointed a judge in the Second Judicial District by Governor Cecil Andrus, and the family moved to Moscow. He served as district judge for five years before opening a law practice in Moscow, where he worked until his retirement.

Governor Andrus later appointed Mosman to another post, on the Idaho State

Board of Education, where he served three terms, including a term as President. As a board member he stood firmly against increased tuition and fees at Idaho universities, arguing that such increases are not allowed in the Idaho constitution.

A devout member of the Church of Jesus Christ of Latter-day Saints, Mosman served throughout his adult life in various church leadership capacities. He was bishop of the married students ward at the University of Idaho, he and his wife were missionaries at the church's historical sites in Palmyra, N.Y., and he served as President of the Pullman Washington Stake. He was instrumental in the construction of the church's Moscow Idaho Stake Center. Mosman loved his family, his church, and athletics, particularly at the University of Idaho. He relished every opportunity to see one of his children or grandchildren participate in a sporting event, and he was proud to see four of his children and three of his grandchildren serve as missionaries for the LDS church.

Of his relationship with his wife, his friend Bob Hall wrote: "To his constant wife and best friend Barbara, who took over Roy's professional career achievement project from (his mother) Bessie, in college, his return of respect and affection leaves the result that neither is ever referred to by friends as just 'Roy' or 'Barbara'. We talk about 'Roy & Barb', as if they are one and the same. They are. That's high praise for a marriage in a time when wives and husbands carefully post full, separate names in phone books and on letterheads."

Mosman was named Distinguished Lawyer by the Idaho State Bar, and was honored by the Idaho Chapter of the American Federation of Teachers. He was also given the University of Idaho Alumni Association's Jim Lyle award for service to his alma mater.

He is survived by his wife of 54 years, Barbara Mosman of Moscow, and by his five children: Jill Reardon of Boise, Michael Mosman of West Linn, Ore., Craig Mosman of Washington, Utah, Matthew Mosman of San Mateo, Calif., and Wynn Mosman of Moscow. He is also survived by his brother, Bill Mosman of Garden Valley, by his sister, Karin Morley of Salt Lake City, and by 21 grandchildren and two great-grandchildren.

#### **—ON THE MOVE—**

The members of the law firm Service, Spinner and Gray are pleased to announce

the relocation of their offices to 1335 East Center Street in Pocatello. **Archie Service, Jim Spinner, and Monte Gray** have over 80 years combined experience practicing law in the areas of commercial law, business organizations, probate and estate planning, bankruptcy, real estate, and domestic relations. They can be contacted at Service, Spinner & Gray, 1335 E. Center, Ste. 202, P.O. Box 6009, Pocatello, ID 83205-6009, (208) 232-4471.

**John R. Kormanik, T. Guy Hallam, Jr. and Bradley V. Sneed** are pleased to announce the opening of the law offices of Kormanik Hallam & Sneed LLP in Meridian off I-84 at the Eagle Road exit. John is licensed in Idaho and California, while Guy and Brad are licensed in Idaho and Oregon. The three partners formerly served together as judicial clerks for the Idaho Court of Appeals from 1998-2001. Most recently, John and Guy were shareholders in the Nampa firm of White Peterson, P.A., while Brad was a senior associate at the Boise firm of Givens Pursley LLP. All three partners are members of the Idaho Trial Lawyers Association. Kormanik Hallam & Sneed LLP is located in the new Wyndstone business park at 1099 S. Wells St., Suite 120, Meridian, Idaho 83642. Telephone: (208) 288-1888 /Fax: (866) 821-9543 (toll free).

**Laura Thompson**, Boise, U.S. Courts, District of Idaho won the female division of the Marine Corps Marathon on October 29, 2006. She was timed in at just over three hours. The race featured more than 32-thousand runners over the 26.2 mile course.

#### **THE ADVOCATE REMEMBERING 50 YEARS JANUARY 1974**

**Charles D. Coulter & James G. Reid** have opened offices under the name of Coulter & Reid at 621 North 8th St., Boise. **Stanley E. Gardner** has opened an office at the Oka Street Law Center, 600 E. Oak, Pocatello. **William F. Gigray, III**, of Caldwell has been appointed Owyhee County Prosecutor, replacing Robert Tunnicliff. **Darrel W. Aherin** has opened an office in the Lewiston Mall. **Merlyn W. Clark** of Lewiston has been appointed Nez Perce County Prosecutor, replacing Roy E. Mosman, who was appointed district judge last month.

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### CHIEF MAGISTRATE JUDGE BOYLE APPOINTED TO NINTH CIRCUIT PICO COMMITTEE

Chief Magistrate Judge Larry M. Boyle was recently appointed to serve on the Ninth Circuit Public Information and Community Outreach (PICO) Committee. The mission of this Committee is to facilitate better relations between the courts and the news media, and to promote existing community outreach programs, which help educate the public about the work of the court.

### NEW LAWYER REPRESENTATIVE APPOINTED

Barry McHugh, a partner in the Coeur d'Alene law firm of Elsaesser, Jarzabek, Anderson, Marks, Elliott & Mc Hugh, was appointed to a three-year term as the new lawyer representative, replacing outgoing lawyer rep Ron Kerl. Barry will join current lawyer representatives Keith Roark and Deb Kristensen.

After receiving his J.D. from the University of Idaho School of Law, Mr McHugh served for 15 years as a prosecuting attorney with the city of Coeur d'Alene, Kootenai County, the Idaho Attorney General's Office and the U. S. Attorney's Office. He has been in private practice since 2002, which has included all areas of civil, criminal, bankruptcy, business and family law. Barry is licensed to practice in all state and federal courts in Idaho as well as the Federal Court of Appeals.

Typical duties a lawyer representative include: serving as the representative of the bar to advance opinions and suggestions for improvement; assisting the Court in the implementation of new programs or procedures; serving on court committees; and developing curriculum for training programs. There is now a summary on our website under "Attorney Resources/Lawyer Representative" which explains in detail the various duties & responsibilities of a lawyer representative, as well as a list of the distinguished attorneys who have

previously served in this capacity dating back to 1963.

### NEW BANKRUPTCY LOCAL RULES

The Bankruptcy Local Rules Committee has revised a considerable number of the Local Bankruptcy Rules which, after a 30-day comment period for the Bar, became effective on January 1, 2007. The following **Bankruptcy Local Rules** were amended: **1002.1** (Petitions); **1006.1** (Filing Fees); **1007.1** (Master Mailing List); **1007.2** (Extension of Time); **1007.3** (Tax Returns); **1007.4** (Payment Advices - new); **1009.1** (Amendments to Petitions, etc.); **2002.2** (Notice and Hearing); **2002.3** (Filing and Service of Plans); **2002.5** (Filing and Confirmation of Chapter 13 Plan); **2003.1** (Section 341(a) Meeting of Creditors); **3003.1** (Filing Proof of Claim in Chapter 11 Case); **3017.1** (Small Business Chapter 11 Reorganization Cases - deleted); **3018.1** (Chapter 11 Ballots Voting on Plans - new); **3020.1** (Chapter 11 Preconfirmation Reports - new); **4008.1** (Reaffirmations - deleted); **5003.1** (Electronic Case Filing); **5005.1** (Venue); **5005.2** (Documents for Filing); **5005.3** (Protection of Personal Privacy - new); **5010.1** (Reopening Fees and Procedures); **7026.1** (Discovery Rules - new); **8001.1** (Bankruptcy Appeals); **9004.1** (Form or Orders); **9010.1** (Attorneys); and **9024.1** (Changes to Judgments or Orders). In addition, a new Chapter 13 Plan was adopted. Please access our website at [www.id.uscourts.gov](http://www.id.uscourts.gov) to review these new revisions in detail.

### NEW DISTRICT LOCAL RULES

After a 30-day comment period for the Bar, the following revisions to the District Court Civil and Criminal Local Rules were adopted by the Court and took effect on January 1, 2007: **Civil Rules: 54.2** (Attorneys Fees); **72.1** (Magistrate Judge Rules); **83.4** (Bar Admission); and **83.5** (Attorney Discipline); **Criminal Rules 1.1** (Scope); **32.1** (Investigative Reports by the U.S. Probation Office); **58.1** (Assignment of Criminal Matters to

Magistrate Judge); **59.1** (Magistrate Judge Rules).

### NEW FEDERAL RULES AMENDMENTS

A number of new amendments to federal rules became effective on December 1, 2006. These include: the **Federal Rule of Bankruptcy Procedure 1009, 5005 and 7004**; **Federal Rule of Civil Procedure 5, 5.1, 9, 14, 16, 24, 26, 33, 34, 37, 45, 50, and 65.1**; **Federal Rule of Criminal Procedure 5, 6, 32.1, 40, 41, 58; and Federal Rule of Evidence 404, 408, 606, and 609**. Please check our website at [www.id.uscourts.gov](http://www.id.uscourts.gov) for a comprehensive summary as well as links to the actual rules.

### WI-FI SYSTEM IN COURTROOMS— ACCESS CARD & CODE NO LONGER REQUIRED

You might recall that the Court previously installed a Wi-Fi System in all of the courtrooms and witness rooms in Boise to allow attorneys to access the Internet for business purposes. Please note that, for your convenience, an access card and codes are no longer required. We hope that the Bar will take full advantage of this policy change. The Court plans to install similar Wi-Fi systems at the courthouses in both Pocatello and Coeur d'Alene in the near future.

### INCREASE IN BANKRUPTCY FEES

There are some increases in Bankruptcy fees which became effective January 1, 2007. Chapter 7 reopenings and bifurcations will increase to \$260 while Chapter 13 reopenings and bifurcations will now be \$235. Converting a Chapter 13 to a Chapter 7 will now cost \$25. Converting a Chapter 12 to a Chapter 7 will increase to \$60. Converting a Chapter 12 to a Chapter 13 will now be \$35. The adversary proceeding filing fee remains at \$250, but is no longer linked to the civil action filing fee. The fee for bifurcation of a Chapter 11 case will remain at \$ 1,000. See our website under "Court Information/Filing Fees" for the complete Fee Schedule.

# COURT INFORMATION

## OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice  
Gerald F. Schroeder

Justices  
Linda Copple Trout  
Daniel T. Eismann  
Roger S. Burdick  
Jim Jones

### 2nd Amended - Regular Fall Terms for 2006

**Boise**..... December 1, 4, 6, and 8

### Regular Spring Terms for 2007

**Boise**..... January 3, 5, 8, 10, and 12

**Boise**..... January 29, 31, and  
February 2, 7, and 9

**Boise (Twin Falls appeals)**..... February 28, and  
March 2, 7, and 9

**Coeur d'Alene and Lewiston**..... April 2, 3, 4, 5, and 6

**Boise (Eastern Idaho appeals)**..... May 2, 4, 7, 9, and 11

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2007 Spring Terms of the Idaho Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

## OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge  
Darrel R. Perry

Judges  
Karen L. Lansing  
Sergio A. Gutierrez

### 4th Amended - Regular Fall Terms for 2006

**Boise**.....December 5 and 7

### Regular Spring Terms for 2007

**Boise** .....January 9, 11, 16, and 18

**Boise**.....February 6, 8, 13, and 15

**Eastern Idaho**.....March 12, 13, 14, 15, and 16

**Northern Idaho**.....April 9, 10, 11, 12, and 13

**Boise** .....May 8, 10, 15, and 17

**Boise**.....June 5, 7, 12, and 14

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2006 fall terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

## IDAHO SUPREME COURT ORAL ARGUMENT DATES

As of December 8, 2006

### Wednesday, January 3, 2007 – BOISE

8:50 a.m.	OPEN	OPEN
10:00 a.m.	Fritts v. Liddle & Moeller Construction	#32089
11:10 a.m.	Utah Cleaning v. Ness	#32456

### Friday, January 5, 2007 – BOISE

8:50 a.m.	Parsons v. Mutual of Enumclaw	#32603
10:00 a.m.	Hairston v. State	#28528/29653/29680
11:10 a.m.	OPEN	OPEN

### Monday, January 8, 2007 – BOISE

8:50 a.m.	Trammel v. City of Nampa	#32150
10:00 a.m.	Wilson v. Simplot	#31774
11:10 a.m.	State v. Dalrymple (Petition for Review)	#33447

### Wednesday, January 10, 2007 – BOISE

8:50 a.m.	Stolle v. Bennett	#32429
10:00 a.m.	Mannos v. Moss	#31958
11:10 a.m.	Mercy Medical Center v. Ada County	#32729

### Friday, January 12, 2007 – BOISE

8:50 a.m.	OPEN	OPEN
10:00 a.m.	State v. Lewis (Petition for Review)	#33069
11:10 a.m.	Swader v. State	#32114

## IDAHO COURT OF APPEALS ORAL ARGUMENT DATES

As of December 8, 2006

### Tuesday, January 9, 2007 – BOISE

9:00 a.m.	State v. Sheldon	#31782
10:30 a.m.	State v. John Doe	#32575
1:30 p.m.	State v. Davenport	#31883

### Thursday, January 11, 2007 – BOISE

9:00 a.m.	State v. Robinson	#32673
10:30 a.m.	State v. Cutler	#31789
1:30 p.m.	State v. McBaine	#32368

### Tuesday, January 16, 2007 – BOISE

9:00 a.m.	State v. Watson	#31483
10:30 a.m.	State v. Anderson	#32038
1:30 p.m.	State v. Shafer	#32774

### Thursday, January 18, 2007 – BOISE

9:00 a.m.	Martinez v. State	#32349
10:30 a.m.	State v. Phillips	#31872
1:30 p.m.	State v. Loftis	#31003

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
*(UPDATE 12/01/06)*

**CIVIL APPEALS  
PROCEDURE**

1. Whether the court erred when it determined I.C. § 6-417 requires actual notice, rather than constructive notice, to defeat a restitution claimant's "good faith" showing.

*John Bach v.  
Katherine Miller*  
S.Ct. No. 31658  
Supreme Court

**INSURANCE**

1. Whether the district court erred by finding Household Finance Corporation and its employees owed no duty to the Rouses as a matter of law.

*Jim Rouse v.  
Household Finance Corp.*  
S.Ct. No. 32886  
Supreme Court

**SUMMARY JUDGMENT**

1. Whether the district court erred in granting Dr. Dixon's summary judgment and Dr. Walter's motion in limine to exclude testimony of Dr. Richter.

*Jennie Ramos v.  
Gordon Dixon, D.O.*  
S.Ct. No. 33095  
Supreme Court

2. Did the court err in concluding that I.C. §6-1103(10) precludes liability under the facts of this case for any action taken by Bogus Basin to alter or lessen risks inherent in the sport of skiing?

*Helga Withers v.  
Bogus Basin Rec. Assoc.*  
S.Ct. No. 33098  
Supreme Court

**POST-CONVICTION RELIEF**

1. Did the court err in failing to rule on Converse's request for appointment of counsel prior to dismissing his petition and in failing to appoint him counsel?

*Robert Converse v.  
State of Idaho*  
S.Ct. No. 32871  
Court of Appeals

2. Did the court err by dismissing Cunningham's petition for post-conviction relief as untimely because the doctrine of equitable tolling should have been applied?

*Louis Cunningham v.  
State of Idaho*  
S.Ct. No. 32675  
Court of Appeals

3. Did the court err by summarily dismissing Harvey's petition for post-conviction relief because he presented an issue of material fact as to whether the time to file should have been equitably tolled?

*Ben Harvey v.  
State of Idaho*  
S.Ct. No. 32802  
Court of Appeals

**QUIET TITLE**

1. Whether the court erred in quashing the lien of the Greif Trust Deeds, and quieting title to The Properties in the Greifs.

*The Vanderford Company v.  
Richard Greif*  
S.Ct. No. 31047  
Supreme Court

**INSTRUCTIONS**

1. Did the court err by giving a "but for" causation instruction to the jury?

*Maria Garcia v.  
Jay Windley*  
S.Ct. No. 32274  
Supreme Court

**HABEAS CORPUS**

1. Did the court err in dismissing Muraco's petition for writ of habeas corpus?

*William Muraco v.  
Idaho Commission of Pardons and Parole*  
S.Ct. No. 32260  
Court of Appeals

**CRIMINAL APPEALS  
JURISDICTION**

1. Was the information jurisdictionally deficient in leaving out a material element as to the *mens rea* of possession of a controlled substance?

*State of Idaho v.  
Michael Davis*  
S.Ct. No. 32637  
Court of Appeals

2. Did the court lack jurisdiction over the charge of aiding and abetting because the information was amended to add this charge after the preliminary hearing?

*State of Idaho v.  
Alese Stewart-Meyers*  
S.Ct. No. 32037  
Court of Appeals

**PLEAS**

1. Did the court err by denying Sanchez's motion to withdraw his *Alford* plea?

*State of Idaho v.  
Nestor Sanchez*  
S.Ct. No. 32181  
Court of Appeals

**SEARCH AND SEIZURE—  
SUPPRESSION OF EVIDENCE**

1. Did the court err by denying Baxter's motion to suppress evidence of methamphetamine that police found in his wallet when they attempted to verify his identity during a traffic stop initiated to execute a felony arrest warrant on a fugitive mistakenly identified as Baxter?

*State of Idaho v.  
Joseph Baxter*  
S.Ct. No. 32597  
Court of Appeals

2. Should the Idaho Supreme Court overrule *State v. Worthington*, 138 Idaho 470 (Ct. App. 2003), and hold that involuntary blood alcohol testing for the crime of DUI, where there is no death or serious bodily injury, is not permitted by I.C. §18-8002 and violates the Fourth Amendment?

*State of Idaho v.  
Benito Diaz*  
S.Ct. No. 32422  
Supreme Court

3. Did the court err when it denied Reynolds's motion to suppress because the evidence seized was the result of an illegal stop and frisk?

*State of Idaho v.  
Jeremy Reynolds*  
S.Ct. No. 32374  
Court of Appeals

4. Did the court err in finding that the officer did not have reasonable suspicion that Salois was operating a car without license plates and in suppressing evidence found as a result of the stop?

*State of Idaho v.  
Juliana Salois*  
S.Ct. No. 32822  
Court of Appeals

5. Did the officer have a reasonable, articulable suspicion to stop Watson's vehicle on a private road marked "no trespassing"?

*State of Idaho v.  
Tyler Watson*  
S.Ct. No. 32693  
Court of Appeals

## NEW TRIAL

1. When one co-defendant is not aware that his co-defendant could have testified to exculpatory facts until after both were convicted in separate trials is that evidence “newly discovered” or “merely newly available” for purposes of a new trial motion?

*State of Idaho v. Blaine Svetich*  
S.Ct. No. 32760  
Court of Appeals

## EVIDENCE

1. Did the court abuse its discretion by ruling that a statement made by a suspect during police interrogation lacked a satisfactory guarantee of trustworthiness to make it admissible under the residual hearsay exception?

*State of Idaho v. David Baker*  
S.Ct. No. 31054  
Court of Appeals

2. Did the court deny Landeros his right to present a defense by excluding a photograph on the basis of lack of foundation?

*State of Idaho v. Juan Landeros*  
S.Ct. No. 32758  
Court of Appeals

3. Was there substantial competent evidence to support the court’s finding that Williamson was guilty of speeding?

*State of Idaho v. Isaac Williamson*  
S.Ct. No. 33068  
Court of Appeals

## INSTRUCTIONS

1. Did the court err in instructing the jury it had to find Amelia knew the substance he possessed was amphetamine or another controlled substance?

*State of Idaho v. Michael Amelia*  
S.Ct. No. 31885  
Court of Appeals

## DUE PROCESS

1. Do the jury’s inconsistent verdicts require dismissal of Purdie’s aggravated battery conviction?

*State of Idaho v. Jackson Purdie*  
S.Ct. No. 32647  
Court of Appeals

**Summarized By:**  
**Cathy Derden**  
**Supreme Court Staff Attorney**  
**(208) 334-3867**

## AMENDED

### IDAHO CRIMINAL RULES—RULE 25

Effective January 1, 2007, Rule 25 of the Idaho Criminal Rules will be amended to allow judges who have been disqualified without cause to act in certain matters. The amendment adds a new subsection (a)(11), which provides that a judge who has been disqualified without cause may preside over an initial appearance or arraignment, and may also preside at other hearings and decide other matters when the parties and the disqualified judge have so agreed. The order amending I.C.R. 25 can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/icr251106.htm>.

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# JANUARY/FEBRUARY CLE COURSES

## **THURSDAY, JANUARY 4, 2007 FROM 8:30 - 10:45 A.M. (MT) AT THE LAW CENTER, BOISE**

*Intellectual Property Issues in the Courtroom* (1 to 2 CLE credits)

Sponsored by the Intellectual Property Section

*Closing Arguments in Complex Business Jury Trials* (first hour) (1 CLE credit)

This CLE will include a discussion of techniques and strategies to make closing arguments to juries in complex cases effective.

*Phillips v. AWH: Appeal and Aftermath* (second hour) (1 CLE credit)

This CLE will include a review of the holding and import of the Phillips v. AWH case involving patent claim construction, and subsequent jury verdict and post-trial deliberations of interest.

## **WEDNESDAY, JANUARY 17, 2007 FROM 8:30 - 9:30 A.M. (MT) AT THE LAW CENTER, BOISE**

*Choice and Creation of Business Entity* (1 CLE credit)

*Sponsored by the Young Lawyers Section*

This seminar will discuss the relative advantages of LLCs, LLPs, and corporations, and some of the basic issues involved in creating each of them. Chad Hansen of Hawley Troxell Ennis & Hawley will be the featured speaker.

## **TUESDAY, JANUARY 23, 2007 FROM 8:30 A.M. - 1:30 P.M. (MT) AT THE CRYSTAL BALLROOM, HOFF BUILDING, BOISE**

*2007 Annual Environmental and Natural Resources Seminar* (4 CLE credits)

Sponsored by the Environment and Natural Resources Section

The Environment and Natural Resources section will hold their annual seminar at the Crystal Ballroom, Hoff Building in Downtown Boise. This seminar will be held in conjunction with the Idaho Environmental Forum and will feature nationally known speakers in environment and natural resources law.

## **FRIDAY, JANUARY 26, 2007 FROM 8:30 - 10:00 A.M. (MT) AT THE LAW CENTER, BOISE**

*Handling Your First or Next Probate Case* (1.5 CLE credits)

Sponsored by the Idaho Law Foundation

Join Boise attorney Louis Uranga and Ada County Probate Judge Christopher Bieter as they discuss the basics of handling your first or next probate case.

## **THURSDAY - SATURDAY, FEBRUARY 15 - 17, 2007 AT THE RED LION TEMPLIN'S HOTEL, POST FALLS, IDAHO**

*Annual Bankruptcy Seminar* (12.5 CLE credits of which 1.25 is ethics credits)

Sponsored by the Commercial Law and Bankruptcy Section

This is the 25<sup>th</sup> Annual Bankruptcy Section Seminar. This year's topics include update on the rule changes since the BAPCPA; perfection and treatment of security interests; U.S. Trustee's report; Small Business and Chapter 11 bankruptcies and a panel of bankruptcy judges. For room reservations at the Red Lion Templin's call (800) 733-5466.

## **WEDNESDAY, FEBRUARY 21, 2007 FROM 8:30 - 9:30 A.M. (MT) AT THE LAW CENTER, BOISE**

*Obtaining Venture Capital for a Startup Business* (1 CLE credit)

Sponsored by the Young Lawyers Section

This CLE will discuss how to search for venture capital for a client starting a business, and some of the issues involved in negotiating the venture capital agreement.

## **FRIDAY, FEBRUARY 23, 2007 FROM 8:30 A.M. - 4:30 P.M. (MT) AT THE DOUBLETREE RIVERSIDE HOTEL, BOISE**

*Real Property Section 2007 Annual Seminar* (CLE credits TBA)

Sponsored by the Real Property Section

The Real Property Section of the Idaho State Bar will host their 2007 Annual CLE at the Doubletree Riverside Hotel in Boise. Watch your email for further details regarding topics and speakers.

### **Coming in March**

**Friday, March 9, 2007**

*Annual Workers Compensation Seminar*, Sun Valley Resort, Sun Valley

**Friday - Saturday, March 9 & 10, 2007**

*Trial Skills Academy*, Federal Court, Boise

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