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ON THE COVER

The winner of the ENR photo contest was taken by attorney **John A. Seiller,** *Ketchum. The picture is of Upper Warbonnet Lake looking back toward Warbonnet Peak. It is considered the crowning jewel of the Verita Ridge, a subrange of the Sawtooth Mountains of Idaho.*

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JUDICIAL PERFORMANCE EVALUATION PROGRAM

Thomas A. Banducci

Over the last year, we have witnessed an unsettling procession of events that would suggest a need to revisit the way we communicate with Idaho citizens about our legal system and Idaho's judiciary, in particular:

- Last November, a contested judicial election in the seventh district underscored the fact the judicial races now involve politicized campaigns where an incumbent's decisions are challenged on the basis of their popular appeal.
- As part of the contested election process, the Idaho State Bar rolled out its survey of judicial candidates. Although a stated objective of the survey is to educate voters on appropriate criteria for judicial candidates (e.g. experience, judicial demeanor etc.), weak response by the statewide Bar likely damaged the credibility of the survey, causing some to question whether the survey hurt or helped the process. In an earlier *Advocate* column, I pointed out that contested judicial elections can threaten judicial independence, particularly when the voting public is not well informed about the appropriate criteria for evaluating judicial performance.
- Earlier this year, Idaho's legislature did less than enough to raise Idaho appellate and district judges' salaries. Before the pay increase, Idaho appellate and district judges were ranked 47th in the nation based on salary; it's unlikely that our judiciary will make any meaningful progress out of the "Salary Cellar". In my article on judicial salaries, I referenced Chief Justice John Stevens's concern over the link between low judicial salaries and eroding judicial independence.
- Very recently, I learned someone has filed to collect petition signatures for something called "Public Employee Accountability Act." This effort appears to be related to my column last month on Jail 4 Judges and may be a future threat to judicial independence. In my column, I noted that referendum proponents are using the platform of "judicial accountability" to rally support for their cause. In their campaigns the message is that judges "legislate from the bench" and "are above the law." Hence, judges should be "reined in" and held accountable for their arbitrary behavior. As a profession, we should be concerned.
  This initiative can be read at: http://www.idsos.state.id.us/elect/inits/08init02.htm

There is a widening credibility gap between those who are part of the legal system (i.e. judges, attorneys, etc.) and those who use it. For many voters the legal system is a "black box" where outcomes are slow, expensive, and unpredictable. The backlash to this perception is what you would expect: frustrated voters and interest groups seek to curb judicial power by imposing term limits, or voting against incumbents for their failure to rule in a predictable (read "popular") way.

Proponents of judicial independence point out that "Judicial Accountability" initiatives, and politicized judicial elections inject political influences into the judicial selection process and threaten the ability of judges to decide cases "on the merits." But are the notions of judicial independence and judicial accountability diametrically opposed? In fact, improving judicial accountability may be the key to maintaining an independent judiciary.

Instead of a black box, our system should be transparent when it comes to our system's expectations for judicial performance. If judicial performance expectations are shared with the public, voters will be afforded the opportunity to understand how a judge performs compared against unbiased, nonpartisan criteria that evaluates a judge on how he or she runs a case, as opposed to the case outcome.

Currently the ISB uses judicial surveys (in the context of contested elections) to publicly communicate its perspective on the appropriate criteria for selecting a judge. The survey also "grades" the judicial candidates on these criteria. Outside this context, Idaho judges have their own performance evaluation process, overseen by the Judicial Council, which is voluntarily, and confidential. I propose that we seriously consider combining these two processes to create a regular, formal judicial performance evaluation process that shares judicial evaluations with the public.

Judicial Performance Evaluation (JPE) programs have been around for roughly 30 years and are currently employed in twenty-one jurisdictions. These evaluation programs vary in specifics from state to state, but, as a general rule, focus on whether judges are managing cases efficiently, explaining their decisions clearly, and exhibiting proper courtroom demeanor. The process is not intended to determine whether the court reached the "right" result; rather it focuses on the process-oriented issues that often frustrate those who participate in our system.

Regularly conducted, nonpolitical, JPEs stand to serve as a powerful tool for changing the debate over what the public should expect from its judges. For example, evaluations would serve as a useful source for voters when judges seek reelections, and would play a role in civic education. The use of neutral, nonpolitical criteria to evaluate judicial performance would tend to educate voters on what to look for in a judicial candidate.

Moreover, every judge benefits from evaluation feedback. Due to a judge's professional relationships with attorneys and litigators, it can be difficult for a judge to obtain constructive feedback on performance without a formal process in place. Appropriately implemented JPEs allow

for anonymous feedback so judges can learn about strengths and weakness in their judicial performance.

Despite the understandable aversion to being reviewed, sitting judges who have participated in the process are supportive of JPEs. A 1998 survey of the states with the most developed programs (Alaska, Arizona, Colorado and Utah) determined that judges found feedback useful and the evaluation criteria appropriate. Surveyed judges also indicated that the review process was fair and constructive.

JPEs may provide a valid method for balancing the judicial accountability/judicial independence debate. The process would serve to define the appropriate criteria for evaluating judicial performance without invading the province of judicial independence. Public dissemination of performance reviews would educate voters and the public at large on the important and substantial role played by judges in our legal process. For more information on JPEs, visit the Institute for Advancement of the American Legal System website at www.du.edu/legalinstitute.

Thomas A. Banducci *is serving a six-month term as president and has been a Bar Commissioner representing the Fourth Judicial District since 2004. He is a partner in the Boise law firm, Greener Banducci Shoemaker. He was admitted to practice in Idaho in 1979, and specializes in litigating complex commercial disputes. He and his wife, Lori live in Boise with their three children, Andrea, Nina and Nick. If you have questions or comments please contact him by email: tbanducci@greenerlaw.com*

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Diane K. Minnich

Idaho State Bar Annual Meeting
July 18-20, 2007
Boise Centre on the Grove

Most Idaho attorneys know that the State Bar has an Annual Meeting, yet most of you have never attended an annual convention. This year's conference in Boise will focus on Law Practice Management. Almost half of the Idaho bar members live within 30 miles of Boise, we hope each of you, along with your colleagues from around the state, will find at least one program or activity that appeals to you and will join us at the Boise Centre on the Grove.

The conference offers a variety of education programs, social events, entertainment, and award presentations. *Sign up by June 15 and for a mere $350 ($300 if you are a first time attendee) you have the opportunity to obtain 10 CLE credits, enjoy two continental breakfasts, two lunches, one dinner with entertainment, and two hosted receptions. The full registration is the best value but you can register for a day pass or individual events (meals). We encourage you to sign up for as many or as few activities as you can fit in to your schedule.*

Plan to attend this year's Annual Meeting and choose from a variety of seminars and events including:

- 16 CLE choices – you can earn up to 10 MCLE credits
- 2 Hosted Receptions
- 5 Meals, including speakers, entertainment, and awards

Thursday morning features a special presentation on *Client Marketing and Development b*y Alan Olson, Alman Weil Law Firm Consulting.

CLE seminar titles from which to choose include:

- Beyond the First 50: The Status of and Impact of Idaho Women Lawyers Today.
- Solo and Small Firm Focus
- Adobe Acrobat – Legal Trends in Law Firm Technology
- Ethics for the Environmental Law Attorney
- The Practical Application of HIPPA: What it means to your Law Firm and Your Clients Who are Employers
- Common Ethical *Pitfalls* in a Real Estate Practice
- Golfing for Ethics (this program actually takes place at Hillcrest Country Club golf course)
- Managing a Family Law Practice
- Handling Client Conflicts and Avoiding Malpractice
- Tips, Tactics and Technology: What Every Lawyer Should Know About E-Discovery and the New Federal Rules
- 60 Law Office Management Tips in 60 Minutes
- The Latest in Legal Research Online
- Cutting Edge Marketing Online
- Managing a Government Law Office • Recruiting, Managing, and Retaining Diversity: How your law firm can embrace ethnic, gender, and generational diversity (and increase profits along the way)
- Lessons From the Masters

The Thursday evening dinner and entertainment is a battle of the lawyer bands. Join us to experience the musical talents of your fellow lawyers.

Several of your colleagues will be honored for their contributions to the Idaho legal profession and the public. The Friday luncheon honors the 2007 Idaho distinguished lawyers, Ken Howard, Coeur d'Alene and Ted Pike, Idaho Falls. Thursday's luncheon includes service awards to those lawyers and non-lawyers that have provided exemplary service to the bar, foundation and their communities.

We offer special thanks to our sponsors for their support of the Annual Meeting.

For more information about the events offered at the Annual Meeting, visit the Idaho State Bar website at www.idaho.gov/isb or refer to the Annual Meeting brochure that was mailed to you in late May.

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NEWSBRIEFS

Board of Commissioners—Newal Squyres, Boise and **Doug Mushlitz**, Lewiston were recently elected as commissioners to the Idaho State Bar's Board of Commissioners. Newal will replace outgoing President Tom Banducci, and Doug will replace Immediate Past President Jay Sturgell. Both Newal and Doug will serve three-year terms. Newal, a partner with Holland and Hart, Boise, will represent the Fourth District Bar Association and Doug, a partner in Clark & Feeney, Lewiston, will represent the First and Second District Bar Associations.

Board of Directors—Susan Eastlake, a Boise CPA, and **Paul Echohawk**, Pocatello have been nominated to serve on the Idaho Law Foundation's Board of Directors. Susan has been involved in many community activities, currently serves on an Idaho Supreme Court Committee and was previously a member of the Ada County Highway District. Paul maintains an active litigation practice and is a founding partner of EchoHawk Law Offices. He was a litigation associate in the Boise office of Holland & Hart and a trial attorney for the United States Department of Justice in Washington, D.C. Prior to working for the Justice Department, he served as a law clerk for the Idaho Supreme Court. He has also worked with the United States Attorney, District of Idaho, and the Native American Rights Fund in their Washington, D.C. office.

2007 Annual Meeting Scholarships Available—The Idaho State Bar is offering a limited number of scholarships to the 2007 Annual Meeting July 18-20, in Boise. The scholarships include the annual meeting registration fee and a per diem (up to $50/day) for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would otherwise be unable to attend. To apply for a scholarship, contact the ISB Commissioner who represents your district.

Reciprocals—New Admittees and Reciprocal Admissions will now be listed as one group. They will be listed in the New Admittee List with all their pertinent address information as well as their admission dates.

DISCIPLINE

JOHN D. ELORRIETA

(Withheld Suspension/Public Censure)

On May 14, 2007, the Idaho Supreme Court issued a Disciplinary Order suspending John D. Elorrieta from the practice of law for 180 days, with all 180 days withheld, pursuant to I.B.C.R. 506(b) and 507, and a public censure pursuant to I.B.C.R. 506(d).

The Idaho Supreme Court found that Mr. Elorrieta violated Idaho Rules of Professional Conduct 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued]; 1.4(a) [A lawyer shall keep a client reasonably informed about the status of the matter]; 1.4(b) [A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation]; and 1.7(b) [A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to a third person or by the lawyer's own interests unless the client consents after consultation].

The Disciplinary Order provided that the 180-day suspension will be withheld and that Mr. Elorrieta will serve a two-year probation, subject to the conditions of probation specified in the Order. Those conditions include that Mr. Elorrieta will serve the entire 180-day suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Elorrieta's period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period.

The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation and stipulated resolution of an Idaho State Bar disciplinary proceeding. In October 2006, the Idaho State Bar brought a formal disciplinary Complaint alleging that Mr. Elorrieta engaged in professional misconduct in connection with his representation of a client. The factual allegations and admissions underlying the admitted misconduct relate to Mr. Elorrieta's representation of his stepfather in a divorce from Mr. Elorrieta's biological mother.

In February 2002, Mr. Eliorreta's stepfather was seriously injured by a gunshot wound to the face in a suicide attempt, which necessitated numerous surgeries and months of constant medical care. In July 2002, Mr. Elorrieta's mother and stepfather requested that he assist them in obtaining a divorce to protect their assets from increasing medical bills. Mr. Elorrieta agreed to represent his stepfather in the divorce action against his mother. Mr. Elorrieta thereafter drafted the divorce complaint, which provided that his mother would receive the majority of the marital assets, including the couple's home and vehicles. Mr. Elorrieta admitted that he did not review or discuss the contents of the complaint in detail with his stepfather or have him verify it prior to filing it in violation of I.R.P.C. 1.2(a) and 1.4(b). Mr. Elorrieta also admitted that he failed to keep his stepfather reasonably informed about the status of the divorce case in violation of I.R.P.C. 1.4(a). Mr. Elorrieta further admitted that he had a conflict of interest in representing his stepfather against his mother in the divorce action in violation of I.R.P.C. 1.7(b).

Mr. Elorrieta's 180-day withheld suspension is subject to the terms and conditions of his two-year probation set forth above and in the Disciplinary Order. The sanction imposed by the Idaho Supreme Court in the Disciplinary Order does not limit Mr. Elorrieta's eligibility to practice law.

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

Welcome from the Environment and Natural Resources Section

Teresa A. Hill
Stoel Rives LLP

The Environment and Natural Resources (ENR) Section is pleased to sponsor this month's special issue of the Advocate. The ENR Section represents over 83 members of the Idaho State Bar. The ENR Section's primary goal is to enhance the skills of its members by providing information, education and networking in this dynamic and wide-ranging area of the law. In the pages that follow you will find articles on a range of environmental and natural resources topics, including an update on Idaho environmental legislation, Clean Water Act jurisdiction, tips on conducting internal investigations regarding environmental crimes, global warming and the story of a creek restoration decades after being damaged from illegal dredge mining. We hope these topics demonstrate the breadth of the environmental and natural resources field and will provide useful insight and information to our members and to the Bar in general.

The Section serves a diverse membership of legal practitioners faced with the complex problems of balancing protection of Idaho's environment and natural resources with growth and the future economy of the State. The greatest benefit the ENR Section can offer its members is a forum to bring together for discussion and debate practitioners from all sides of the issues on the important environmental and natural resources challenges impacting our State and clients. The ENR Section does this through its monthly meetings and sponsorship of CLEs. In January, the section presented its annual environmental law update in conjunction with the Idaho Environmental Forum's 2006 Legislative Forecast. This year's event was titled "Alternative Paths for Environmental Issues Resolution" and featured panels on Environmental Conflict Resolution, the CIEDRA (Boulder-White Clouds) and Owyhee Initiative Experiences, and University of Idaho College of Law's Natural Resources Initiative. The Section also sponsors quarterly lunch CLEs, including a discussion from Mark Ryan regarding the United States Supreme Court's *Rapanos* decision, CAFO rules and stormwater enforcement. The Section will continue to sponsor lunch CLEs and allow members throughout the State to participate via telephone conferencing. In addition, in July the Section will sponsor a CLE at the ISB Annual Meeting in Boise. The Section will circulate more information on upcoming topics in the spring newsletter.

This year, the ENR Section also launched a mentoring program in conjunction with the Environmental Law Society at the University of Idaho College of Law. Ten practitioners throughout the State were matched with law students interested in careers in the environmental and natural resources field. If you are interested in participating in the mentoring program, please contact a member of the Board. We will be pairing up students and practitioners again in the fall.

We are also looking for more opportunities to serve our members and welcome any suggestions or ideas. If you have any topics you would like the ENR Section to cover in the future or activities you would like to see us undertake, please let us know. We hope you enjoy this issue of the Advocate.

About the Author

Teresa A. Hill *is an associate in the Boise office of Stoel Rives, LLP and is a member of the firm's land use, environmental and natural resources practice group. Her practice encompasses a wide range of development, renewable energy and environmental work, including obtaining environmental and land use approvals, environmental compliance counseling, and siting, development and negotiation of power purchase agreements for wind energy facilities. She received her B.A. from Boise State University, an M.S. in Sociology from the University of Utah, and her J.D. from the University of Utah S. J. Quinney School of Law.*

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Key Environmental Actions of the 2007 Idaho Legislature

Senator Kate Kelly
District 18, Idaho State Legislature

Almost twenty new legislators. New leadership in the House. New committee chairs. Transition in the executive branch. All this change, combined with a deadline to vacate the Statehouse so renovation could begin, meant that the 2007 legislative session was not one for major initiatives or other dramatic modification in Idaho's laws.

With regard to environmental legislation, there were still several actions worth noting, including the state's assumption of authority for the Underground Storage Tank program and the adoption of Idaho's first comprehensive, statewide energy plan since 1982. In addition, there were several bills – some successful and some not - having to do with the siting of energy facilities and confined animal feeding operations.

The more notable environmental actions of the 2007 legislature are specifically described below. Unless otherwise indicated, the bills were adopted. Unless they contain language otherwise, the statutory changes will be effective on July 1, 2007. For a complete summary of the major 2007 legislative actions see the "Sine Die Report" at the link on the legislative web page at http://legislature.idaho.gov/. In addition, you can review each bill's text, procedural history, statement of purpose, and fiscal note at http://www3.state.id.us/oasis/minidata.html.

Environmental Regulation

H 33 – **Underground Storage Tank Program**. Underground storage tank systems (USTs) store petroleum products or other hazardous liquids that can harm the environment and human health if the contents are released into the environment. Idaho has about 3,500 regulated USTs; there are estimated to be about 680,000 nationwide.[1] H33 authorizes the state Department of Environmental Quality, instead of the U.S. Environmental Protection Agency, to inspect and monitor Idaho's underground storage tanks and to implement the requirements of the federal "Underground Storage Tank Compliance Act of 2005." Under the provisions of the federal act, to continue receiving federal funds for the clean up of leaking underground tanks Idaho was required to adopt this state-run, comprehensive prevention program.

SCR 121 – **Panhandle Health Septic Tank Rules.** The seven district health departments of Idaho have been designated by the Legislature to protect and preserve public health.[2] The jurisdiction of the Panhandle Health Department (PHD) covers the five northern-most counties in the state. SCR 121 rejected two subsections of a pending administrative rule promulgated by PHD and brought to the Legislature for approval. The rejected rule would have revised the method for determining wastewater flow and capacity for purposes of the design, installation and use of septic tank systems at residential structures. The rule was opposed by developers, realtors and contractors in this fast-growing region of Idaho.

HCR 14 – **Climate Change**. Failed in House Environment, Energy and Technology Committee. This measure would have made a statement that the Legislature supports the development of and education about policies and programs to reduce Idaho's greenhouse gas emissions and encourage the development of clean, economical energy resources and fuel-efficient technologies.

Energy

HCR 13 – **Energy Plan**. HCR 13 adopts the Idaho Energy Plan developed after a comprehensive review of state-level energy issues by the Legislative Council's Interim Committee on Energy, Environment and Technology. This is the first such plan in Idaho in 25 years. To achieve the Committee's energy policy objectives of ensuring a reliable, low cost energy supply, protecting the environment, and promoting economic growth, the plan recommends increasing investments in energy conservation and in-state renewable resources. The Plan has no independent force or effect of law. Rather, there are a number of legislative and executive actions, and actions by the Public Utility Commission, that need to be moved forward to implement the recommendations in the Plan. Several such bills were proposed during the 2007 session, and more are likely to come out of the interim committee's work during the summer of 2008. The 94-page plan can be found at http://www.legislature.idaho.gov/sessioninfo/2007/energy_plan_0126.pdf.

H 137 – **Building Code Revision**. H 137 adopts the 2006 International Residential Energy Conservation Code to require greater energy efficiency in the design and construction of residential structures.

H 169 – **Green Building Standard**. Failed in House Environment, Energy & Technology Committee. H 169 would have required all future state-funded building construction and major renovations to meet recognized high performance, energy efficiency and environmental sustainability standards.

H 154 - **Facility Siting -Technical Advice**. This bill creates an option for a city or county to request and receive information from state agencies when the local government is considering an application for a permit to establish a new electrical generation facility. Under the language of the bill, the local government may, but is not required to, take into account the conclusions of the state agency when making a decision on the application.

S 1041 – **Facility Siting – Statewide Process**. Held in Senate State Affairs Committee without a hearing. S 1041 would have codified a statewide process for the selection of sites for the construction and operation of large electric generation facilities.

H 152 – **Transmission Siting – Statewide Process**. H 152 gives authority to the Idaho Public Utilities Commission to act as the state transmission siting authority if the U.S. Department of Energy designates a "national interest electric transmission corridor" in Idaho. The federal Energy Policy Act of 2005 requires that, for states that do not have a transmission siting agency

(such as Idaho before H 152), an entity seeking to build a national interest corridor transmission line need only file an application with the Federal Energy Regulatory Commission (FERC) for permission to construct the requested line. This legislation allows for in-state – rather than federal - decision making in the siting of transmission corridors in Idaho.

Agricultural Practices & the Environment

H 56aaS – **Rural Partnership Act**. This bill gives legislative approval to the Idaho Rural Development Partnership (previously authorized by Executive Order). The Rural Partnership is made up of a number of state, federal and local representatives and was originally set up under authority of a national act designed to recognize rural development needs. The Partnership will continue to serve as a clearinghouse for rural development resources and information, coordinate agency and private sector activities, and seek solutions to impediments to rural development.

H 178 – **Abatement Districts**. H 178 updates the statute dealing with abatement districts for mosquitoes and "other vermin" by adding new definitions, allowing a single district to include non-contiguous areas, making changes to the procedures for formation of abatement districts, adding to the powers of abatement districts, providing for disasters and emergencies, and providing for operation of the districts. This bill was partially motivated by recent outbreaks of West Nile Virus and issues with black fly infestations. The pest control activities of abatement districts can be a public health concern to citizens and an economic concern to organic farmers.

H 243 – **Confidential Seed Test Results**. This bill creates a public records act exemption for certain test results of the Idaho State Department of Agriculture Seed Laboratory on samples submitted by seed producers and seed companies.

H 244 – **Confidential Animal Test Results**. H 244 creates a public records act exemption for certain records of results of laboratory tests conducted by the Idaho State Department of Agriculture Animal Health Laboratory on samples submitted by veterinarians and animal owners. Under the language of the bill, test results will be released to the public if they indicate the presence of a reportable disease or are used in a regulatory or enforcement action, or if the department determines that it is in the best interest of animal or human health to release the information. The original version of this bill[3] was opposed by environmental groups and Idaho media organizations.

SB 1056 – **CAFO Siting**. Passed the Senate, held in House Local Government Committee. Would have required that all "affected persons" have an opportunity to testify at a public hearing in front of local decision makers considering a permit application for a Confined Animal Feeding Operation. The bill would have eliminated the current requirement that to testify a person must have his primary residence within one mile of the proposed facility.

Conclusion

Although this was not a year for sweeping changes to Idaho law, we did see some activity in the area of environmental policy and regulation during the 2007 legislative session. It can be expected that in upcoming years Idaho's executive and legislative branches will continue to respond to problems created by our evolving economy, our changing energy needs, our emerging air quality issues, and the interface of our growing population with traditionally rural areas and practices. Proposed solutions could be expected to focus on the development of renewable energy, incentives for energy conservation, development of a public transportation infrastructure, control of greenhouse gas emissions, and enhanced land use planning. These ideas may become law, but the process will continue to depend on many factors including the needs of the business community, the will of individual legislators and the Governor, and the strength of the desire for change on the part of the public and other stakeholders.

Endnotes

[1] http://www.deq.idaho.gov/waste/prog_issues/ust_lust/index.cfm.
[2] Idaho Code § 39-414(2).
[3] *See* http://www3.state.id.us/oasis/H0059.html.

About the Author

Senator Kate Kelly *is in her second term in the Idaho Legislature. She has practiced environmental law in Idaho for many years. She holds a B.A. from George Mason University, a M.S. from the University of Idaho College of Mines and a law degree from the University of Utah College of Law.*

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Clean Water Act Jurisdiction: Are the Muddy Waters Clearing?

Margaret B. Hinman
North Wind, Inc.

One of the long-standing questions under the Clean Water Act[1] (CWA) continues to be what constitutes navigable water, or water of the United States, such that any discharges fall within the CWA's jurisdiction. The CWA regulates discharges from point sources such as outfalls or pipes under Section 402. Any discharge from a point source to navigable water requires a Section 402 National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) or a state authorized to carry out the program. Any dredging and filling of navigable water requires a permit from the Army Corps of Engineers under Section 404.

The questions surrounding navigable water continue because the regulatory definition used by both EPA and the Corps extends to more than navigable-in-fact waters in order to protect use, degradation or destruction of such waters. The definition of water of the United States includes wetlands as well as wetlands adjacent to water of the United States.[2]

Under this definition, questions often arise regarding the proper test to determine whether wetlands are adjacent to waters of the United States. Since 2001, the U.S. Supreme Court has taken steps to limit EPA and the Corps' interpretation of their regulatory reach over wetlands. However, the regulations have remained unchanged and the scope of jurisdiction has remained uncertain. The much-anticipated Supreme Court decision in *Rapanos v. United States; Carabell v. United States*[3] *(Rapanos)* found that the Corps had failed to interpret its jurisdiction under the CWA in determining what wetlands were adjacent to navigable waters. However, the Supreme Court did not reach agreement on the proper test to be applied to determine whether jurisdiction exists.[4] Hence the continued questions.

Two recent Ninth Circuit decisions have provided some clarity for practitioners on which test applies to determine jurisdiction and on the extent of jurisdiction over water bodies adjacent to waters of the United States.

In the first Ninth Circuit case to apply the *Rapanos* decision, *Northern California River Watch v. City of Healdsburg,*[5] the Ninth Circuit Court of Appeals found that the City of Healdsburg was required to have a NPDES permit to discharge sewage from its waste treatment plant into 'Basalt Pond', a rock quarry pit that had filled with water up to the line of the water table of the surrounding aquifer. Basalt Pond is separated from the Russian River by a levee. In 1978, Healdsburg began discharging from a secondary waste-treatment plant into Basalt Pond. The pond drains into the surrounding aquifer and to the Russian River. [6]

The Ninth Circuit reviewed the *Rapanos* opinions. The Court noted that the plurality opinion written by Justice Scalia for four Justices would have ruled for Rapanos on the grounds that only wetlands with a continuous surface connection to waters of the United States qualify as navigable waters. However, Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and therefore, provides the controlling rule of law. The Ninth Circuit Court adopts Justice Kennedy's view that wetlands come within 'navigable waters' when there is a significant nexus to navigable-in-fact waterways. The Ninth Circuit then applied the test and found that there were several physical connections between Basalt Pond and the Russian River as well as a significant ecological connection.

The Court concluded that the "[p]ond significantly affects the physical, biological and chemical integrity of the Russian River, and ultimately warrants protection as a "navigable water" under the CWA. Appellant's discharge of wastewater into Basalt Pond without a permit, therefore, violates the CWA."[7]

Another recent Ninth Circuit decision, *San Francisco Baykeeper v. Cargill Salt Division,*[8] examined CWA jurisdiction specifically as it applies to adjacent water bodies.

Since the 1860s, the Cargill Company and its predecessors have produced salt at the edge of San Francisco Bay by evaporating water in a series of ponds. A heavily saline waste residue containing other pollutants is generated from harvesting and refinement of the salt. Cargill maintains a waste containment facility for disposal of the residue. During storms, run-off from a pile of uncovered waste drains to a lower portion of the site into a non-navigable pond. An earthen levee separates the southern edge of the pond from Mowry Slough, a navigable tributary of San Francisco Bay.

Baykeeper filed its CWA citizen suit in 1996, alleging unpermitted discharges into waters of the United States. Cargill's first appeal to the Ninth Circuit was remanded to the district court for consideration of the effect of the Supreme Court's opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[9] (*SWANCC*), in which jurisdiction based upon use of intrastate waters by migratory birds was found to exceed the Corps' authority. Baykeeper's motion for summary judgment after remand was based upon the theory that the Pond is water of the United States because it is adjacent to Mowry Slough. The district court granted summary judgment, determining that bodies of water that are adjacent to navigable waters are 'waters of the United States' and therefore protected under the CWA. The district court reasoned that the same characteristics that justify protecting adjacent wetlands apply to adjacent ponds. The parties entered into a settlement including a provision that Baykeeper would limit its claims on appeal to the question of jurisdiction based upon existence of an adjacent water body that is not a wetland.

The Ninth Circuit analyzed whether Cargill had discharged pollutants into a water of the United States without a permit. The Court reviewed recent Supreme Court decisions including *Rapanos* and *SWANCC*. The Court concluded that the Supreme Court has never adopted or supported the view that any type of water body could be within the CWA's jurisdiction simply because it is adjacent to navigable water. The adjacent water body that is covered under the CWA is a wetland, not a pond, stream, or other water body. The Court also rejected Baykeeper's arguments that the pond could be tributary to the Slough and

noted that, in any event, this basis for jurisdiction had been waived in the settlement with Cargill.[10]

The opinion in Cargill can be viewed as beneficial to developers and property owners as it draws limits on CWA coverage and provides certainty regarding jurisdiction over adjacent water bodies. However, this case could have implications for property owners who face decisions to apply for CWA Section 404 permits to dredge and fill wetlands. First, the property owner with what appears to be an isolated water body must determine if it could involve a wetland system for which a permit is needed. A wetlands delineation may still be needed to rule out the concern. Without a delineation, the property owner bears some risk of moving forward with development without a permit. Second, when mitigation is required because wetlands will be disturbed, a pond will most likely no longer be acceptable except as part of a wetlands system.

Endnotes

[1] 33 U.S.C. §§ 1251 – 1387.
[2] 40 CFR § 122.2.
[3] 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006).
[4] Norman M. Semanko, *When Land is Water: Clean Water Act Jurisdiction*. The Advocate: The Official Publication of the Idaho State Bar (Jan. 2007).
[5] 457 F. 3d 1023 (9th Cir. 2006).
[6] *Id*. at 1026-1027.
[7] *Id*. at 1031.
[8] 481 F.3d 700 (9th Cir. 2007).
[9] 531 U.S. 159 (2001).
[10] *Cargill*, 481 F.3d at 706-07.

About the Author

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The Storm Water Pollution Permit Program

The goal of the Clean Water Act (CWA) is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." To achieve this goal, Congress set the mandate to eliminate the discharge of pollutants into the navigable waters.[1] To help eliminate discharges, Congress set up the National Pollutant Discharge Elimination System (NPDES) which requires a permit and compliance with permit conditions to discharge pollutants into the navigable waters. The NPDES authorizes the Environmental Protection Agency (EPA) and authorized states to issue permits and administer the permit conditions.[2]

Most states have been authorized and do administer the permit program in their states. In Utah for example, permits are administered by the Utah Pollutant Discharge Elimination System (UPDES). Idaho, however, is one of the few states that still follows a permit program administered by the EPA; in Idaho, permits are administered by Region 10 of the EPA. In addition to federal and state administration of the permit program, local cities and municipalities may enact their own storm water pollution prevention ordinances. For example, the City of Boise has enacted the Construction Site Erosion Control Ordinance.[3]

Pollution Prevention Requirements for the Construction Industry

The construction industry has been significantly impacted by the NPDES permit program. Clearing, grading, and excavation activity removes natural vegetative erosion controls which allows for the transport beyond construction site perimeters of sediment and other pollutants with storm water runoff. Common sources of pollutants on construction sites are dirt in the street, blowing trash, petroleum leaks and spills, paint and concrete washout waters, and improperly maintained erosion controls. In 2003, all regions of the EPA reissued the NPDES General Permit for Storm Water Discharges From Construction Activities (General Permit). This General Permit is intended to prevent the point source discharge of construction activity pollutants from storm water runoff into the national waters. In order to obtain coverage under the General Permit and avoid liability, the following phase 2 requirements must be met for all construction activity that disturbs one acre of land or more or less than one acre if it is part of a larger common plan of development that disturbs one acre or more.

A signed and certified Notice of Intent (NOI) to discharge under the General Permit must be submitted. The NOI is the application to operate under the General Permit. Fines for pollutant discharges may be assessed for sites that do not have permit (NOI) coverage and/or do not comply with the permit conditions.

A Storm Water Pollution Prevention Plan (SWPPP) must be prepared for and followed on the construction site. Among other items, the SWPPP includes the following: (1) an identification of potential erosion and pollutant discharges from the construction activity, (2) a description of the Best Management Practices (BMPs) to be used on the site to control erosion and prevent pollutant discharges, (3) a program for conducting the required inspections to ensure proper maintenance of the installed BMPs, (4) a storm water pollution prevention training program for workers on the site, and (5) a method for stabilizing the construction site upon completion with permanent erosion controls.

Finally, a signed and certified Notice of Termination (NOT) must be submitted upon completion of the construction project. The NOT terminates coverage for discharges under the General Permit and is a mechanism to avoid liability for future discharges caused by others on the site. In order to submit the NOT for commercial sites, one of the following requirements must be met: (1) final stabilization has been achieved on all portions of the site for which the applicant is responsible, (2) another operator has assumed control over the areas of the site that have not been finally stabilized, or (3) coverage under another NPDES permit has been obtained. The NOT can be very important to relieve liability for a contractor that had initial control of the construction site but later transferred responsibility to another contractor (*e.g.* infrastructure contractor to vertical construction contractor).

Recent Enforcement Activity

The current maximum civil penalty for violating the conditions of the General Permit is $32,500 per day for each violation.[4] With such maximum penalties, a single violation lasting one month could cost one million dollars. Public owners, private owners, and contractors are all at risk for fines due to violations on their construction sites.

On May 12, 2004, the EPA announced that Wal-Mart settled with the United States and the states of Utah and Tennessee for $3.1 million dollars due to violations. The complaint alleges that Wal-Mart failed to obtain coverage under the appropriate General Permits and/or failed to comply with the permit conditions during the construction of seventeen Wal-Mart stores around the nation. On May 3, 2006, Region 10 of the EPA announced that the Idaho Transportation Department (ITD) and Scarsella Brothers, Inc. agreed to pay $895,000 for violations relating to the Bellgrove-Mica realignment of Highway 95 near lake Coeur d'Alene. Of the settlement amount, ITD will pay $495,000 and Scarsella Brothers will pay $400,000. The complaint alleges that the failure to apply BMPs caused a significant impact on the receiving waters of lake Coeur d'Alene. Just this year on January 10, 2007, Region 10 announced that Pinewood Lakes, LLC and Superior Construction & Excavating, Inc. agreed to pay $20,000 for the alleged failure to obtain permit coverage under the General Permit and install adequate BMPs. The activity in question occurred at the Pinewood Lakes Subdivision construction site near state Highway 44 in Star, Idaho.

Risk Management

Such enforcement measures create a significant business risk for construction owners and contractors. In order to help clients manage this risk, construction contracts might require compliance with the General Permit, assign responsibility for compliance to the contractor and among the subcontractors, and include specific indemnity provisions protecting upstream parties from any fines assessed for downstream violations. Further, similar to the practice of requiring certificates of insurance on construction projects, the NOI and SWPPP might be required as a condition precedent to commencement of construction work. Finally, both owners and contractors should insure that the NOT is filed on the site and that all records evidencing compliance with the General Permit are maintained for at least three years.

As the EPA and authorized states continue their aggressive enforcement, owners and contractors will see the benefits of investing in storm water pollution prevention controls and managing their NPDES risk.

Endnotes

[1] 33 U.S.C. § 1251(a).
[2] 33 U.S.C. § 1342.
[3] Boise Municipal Code § 8-17-01 *et. seq*.
[4] 33 U.S.C § 1319(d) and 40 C.F.R. § 19.4.

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The New "Hot" Topic in Environmental Law: Global Warming

Judi Brawer
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Global warming is a "hot" topic these days. No longer ignored as merely the alarmist cry of environmentalists, from the Red Carpet to the Supreme Court, global warming has hit the mainstream. This increased public awareness, along with the mounting scientific evidence that global warming is a serious environmental, economic and social issue and the litigious tendencies of public interest groups, have resulted in a significant increase in global warming-related litigation in the 21st century.[1]

In addition, as one analyst explained, "the current spate of global warming litigation is also the product of a failure by national political institutions to come to grips with global warming. In general, U.S. political institutions are remarkably bad at dealing with long term problems, and this appears to have been the case with global warming. Frustrated by the inaction of the political branches, environmentalists have turned to the judicial branch, hoping the courts will provide timely resolution of the issues presented to them."[2] As discussed below, the Supreme Court recently did.

But environmentalists are not the sole plaintiffs in global warming litigation. States and local governments have joined in a number of lawsuits, and in some instances initiated their own; and industry groups have launched challenges to state efforts to regulate vehicle emissions of greenhouse gasses.

Given the wide variety of issues and plaintiffs, global warming-related litigation can be categorized in a number of ways. The easiest and most descriptive categorization I found divides the cases into six general categories: (1) Clean Air Act[3] (CAA) litigation questions whether the CAA applies to, and thus the Environmental Protection Agency (EPA) has the authority to regulate, greenhouse gas emissions; (2) National Environmental Policy Act[4] (NEPA) litigation addresses the procedural issue of whether federal government agencies adequately analyze and/or disclose the potential consequences of their actions on global warming, and the potential consequences of global warming on the environment; (3) Nuisance litigation involves claims that actions by public (government agency) or private (e.g., power plants, oil refineries, motor vehicle manufacturers) entities contributing to global warming represent a "nuisance" under common law tort doctrine; (4) Preemption litigation claims that federal authority bars states from regulating greenhouse gas emissions (e.g., industry challenges to state efforts to curb motor vehicle emissions); (5) Information-forcing litigation involves challenges to the federal government's failure to generate, compile and/or disclose information pursuant to statutes such as the Freedom of Information Act[5] and the Global Change Research Act of 1990,[6] which requires the federal government to generate information about global warming; and (6) Miscellaneous litigation, which is essentially all remaining cases that do not fall into any of the above categories. [7] I will take the liberty of adding a 7th category: Endangered Species Act[8] (ESA) litigation, which addresses whether the accelerated rate of species' declines and extinctions is a result of habitat destruction due to global warming.

Who Can Sue?

Yet, even before reaching the merits, the one overarching issue—particularly in cases brought by conservation and other public interest groups—is whether the plaintiffs have "standing" to sue.[9] While some courts have dismissed cases for lack of standing, others have found the requisite injury, causation and redressability.

For example, in *Northwest Environmental Defense Center,* et al. *v. Owens Corning*[10] the District Court, in a detailed analysis, upheld plaintiffs' standing to challenge the defendants' construction of a polystyrene foam insulation plant without having obtained the necessary preconstruction CAA permit. The court stated that "issues such as global warming and ozone depletion may be of 'wide public significance' but they are neither 'abstract questions' nor mere 'generalized grievances.' An injury is not beyond the reach of the courts simply because it is widespread."

In *Friends of the Earth v. Mosbacher,* formerly *Friends of the Earth v. Watson,*[11] environmental groups sued the Overseas Private Investment Corporation and the Export-Import Bank for violating NEPA by failing to analyze the global warming impacts when deciding to fund or insure overseas oil and gas development projects. The district court upheld plaintiffs' standing, finding that continued increases in greenhouse gas emissions will continue to increase global warming with consequent widespread environmental impact, and these impacts have and will affect areas used and owned by plaintiffs. Further, the Court stated that plaintiffs demonstrated a reasonable probability that emissions from projects supported by the defendants will threaten plaintiffs' concrete interests.

On the other hand, in *Center for Biological Diversity v. Abraham*[12] environmental groups sued 16 federal agencies with violating the Energy Policy Act of 1992[13] by failing to report on and purchase alternative fuels vehicles. While the district court granted standing based on air quality concerns, it held that plaintiffs' "concerns presented regarding global warming were too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing."

In *Connecticut v. American Electric Power Company,*[14] a common law nuisance suit against the nation's five largest emitters of greenhouse gasses, the district court declined to address standing in the context of global warming because "determining causation and redressability in the context of alleged global warming would require me to make judgments that could have an impact on the other branches' responses to what is plainly a political question."

Massachusetts *v. EPA*

While those cases that have reached the merits have had similarly mixed results, environmentalists got good news on April 7, 2007 when the Supreme Court issued its highly anticipated deci-

sion in *Massachusetts v. U.S. Environmental Protection Agency.*[15] Ruling 5-4,[16] the Supreme Court held that the CAA gives EPA the authority to regulate greenhouse gas emissions from motor vehicles and, on remand, EPA must review the scientific evidence to determine whether such emissions contribute to climate change and endanger public health or welfare.

The case began in 1999 when a group of 19 private organizations petitioned the Environmental Protection Agency (EPA) to regulate the emissions of four "greenhouse gasses," including carbon dioxide, from new motor vehicles under § 202(a)(1) of the CAA.[17] In 2003 EPA denied the petition, reasoning that it either lacked the authority to regulate new vehicle emissions because carbon dioxide is not an "air pollutant" as defined in the CAA §7602, or, in the alternative, even if the agency possessed such authority, it would decline to do so because such regulation would conflict with other administration priorities.[18]

Joined by a number of states and local governments, the petitioners sought review of EPA's decision. The lower court denied the petition for review, holding that the EPA Administrator properly exercised his discretion under §202(a)(1) in denying the petition for rulemaking.[19]

In their petition for certiorari, the petitioners asked the Supreme Court to answer two questions: whether EPA has the statutory authority to regulate greenhouse gas emissions from new motor vehicles; and if so, whether its stated reasons for refusing to do so are consistent with the CAA.[20] As the Court stated, "the unusual importance of the underlying issue persuaded us to grant the writ."[21]

Before reaching the merits, however, the Court first analyzed whether the petitioners even had standing to bring the case. Skirting the issue of standing relative to the private organizations, the Court recognized that only one of the petitioners need have standing to permit the Court to consider the petition for review, and stressed the "special position and interest of Massachusetts" as a sovereign state, as opposed to a private individual or organization.[22] Finding the requisite injury, the Court stated that "the harms associated with climate change are serious and well recognized…That these climate-change risks are 'widely shared' does not minimize Massachusetts' interest in the outcome of this litigation."[23] It further identified the impacts of global warming on Massachusetts, such as the loss of coastal lands due to rising sea levels.

As to causation the Court stated that "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions "contributes" to Massachusetts' injuries.[24] It then dismissed EPA's assertion that "its decision not to regulate greenhouse gas emissions from new motor vehicles contributes so insignificantly to petitioners' injuries that the agency cannot be haled into federal court to answer for them."[25] In sum, the Court found that the petitioners had standing because "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent'" and that "[t]here is…'a substantial likelihood that the judicial relief requested will prompt EPA to take steps to reduce that risk.'"[26]

Importantly, the Court did not address the issue of standing relative to any of the environmental or other public interest organizations. Thus, this issue will continue to be heavily litigated - with continued mixed results - in the lower courts.

As to the merits, the Court held that the unambiguous text of the CAA forecloses EPA's reading that carbon dioxide is not an "air pollutant" within the meaning of that provision.[27] The Court determined that the four greenhouse gases at issue, including carbon dioxide, fall within the CAA's broad definition of "air pollution" as "*any* air pollution agent or combination of such agents, including *any* physical, chemical…substance or matter which is emitted into or otherwise enters the ambient air"[28] and thus EPA has the statutory authority to regulate the emission of such gasses from new motor vehicles.[29]

The Court further rejected EPA's alternative argument that even if it does have the statutory authority to regulate greenhouse gases, it would be unwise to do so at this time. The second part of the statutory provision at issue in this case conditions the exercise of EPA's authority to regulate greenhouse gasses on whether such pollutants, "in [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger pubic health or welfare."[30] The Court found that EPA's "laundry list of reasons not to regulate…have nothing to do with whether greenhouse gas emissions contribute to climate change. Still less do they amount to a reasoned justification for declining to form a scientific judgment."[31]

Thus, the Court held that EPA's action denying the petition for rulemaking was "arbitrary, capricious, …or otherwise not in accordance with the law."[32] The Court did not determine whether, on remand, EPA must make an endangerment finding, but held "only that EPA must ground its reasons for action or inaction in the statute."[33]

What Next?

What are the ramifications of this decision? EPA must make a decision on the endangerment issue. Of course, that could take a very long time, and what that decision will be is anyone's guess. It might depend on the next presidential elections. Will the Administration be willing to establish a greenhouse gas vehicle emissions program? Or will EPA attempt to claim that such emissions do not cause global warming and do not endanger human health and safety? Undoubtedly, we have not seen the last of the litigation related to this case.

There are several cases that have been put on hold pending the outcome of *Massachusetts*. One is *Coke Oven Environmental Task Force v. EPA,*[34] which is a petition for review by a number of states, local governments and environmental groups of EPA's refusal to set standards for emissions of greenhouse gases from new stationary sources (as opposed to the mobile sources in *Massachusetts)*, such as electric generating power plants and industrial-commercial steam generating units. The petitioners had asked EPA to promulgate the greenhouse gas emission standards during the comment period on the agencies' 2006 New Source Performance Standards, which establish the maximum amount of pollution a new stationary source can emit. The *Massachusetts'* decision that greenhouse gasses are "air pollutants" bodes well for plaintiffs here.

Another case is *Comer v. Murphy Oil, U.S.A.,*[35] which is a class action suit brought by Louisiana landowners against oil companies, oil refineries, and coal companies. Plaintiffs allege that the defendants' massive carbon dioxide emissions were a direct cause of Hurricane Katrina's destructive force, and allege common law tort claims of nuisance, trespass, negligence and fraudulent misrepresentation and seek damages for loss of property, income, cleanup expenses, and emotional distress.

Also waiting are several industry challenges to state emissions standards for greenhouse gasses. *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*[36] is a challenge by the automobile industry to California's rule requiring all motor vehicles sold in the state to meet certain emission standards for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. Plaintiffs assert, in part, that the rule is preempted by the Energy Policy and Conservation Act (EPCA),[37] which authorizes the Corporate Average Fuel Economy (CAFE) Standards. They argue that because greenhouse gas emissions from cars are largely a byproduct of their fuel economy, regulating greenhouse gas emissions would require automakers to improve fuel efficiency. Thus, since EPCA prohibits states from enacting laws or regulations related to fuel economy standards for those automobiles covered by CAFE, this preempts California's regulation. This case was stayed pending the Supreme Court's decision in *Massachusetts,* which the *Witherspoon* court found may impact the issue of preemption because if the Court determines that EPA does not have the authority to regulate automobile greenhouse gas emissions, it does not have the authority to waive CAA preemption for California's regulations.

Rhode Island and Vermont adopted California's regulations. Thus, similar cases were launched in those states. *Association of International Automobile Manufacturers v. Sullivan*[38] and *Green Mountain Chrysler Plymouth Dodge Jeep v. Dalmasse.*[39] In the Vermont case, the state moved to dismiss, arguing that the case was not ripe because EPA had not granted California's request for a CAA waiver. The district court recently denied Vermont's motion, ruling that the case is ripe because the automobile manufacturers would immediately have to start redesigning their vehicles..

On the same day the Supreme Court issued its *Massachusetts* decision, it also decided *Environmental Defense v. Duke Energy Corp.*[40] This case concerned EPA's permitting authority under its' Prevention of Significant Deterioration (PSD) program of the CAA. In a unanimous decision, the Court upheld EPA's claim that a power company is required to obtain a permit prior to making modifications to power plants that, while they do not result in an increase in the hourly output of emissions, allow the plant to run for more hours per day, resulting in more output per year. Coal fired power plants emit nitrogen oxide, which is one of the main ingredients in the formation of ground level ozone and contributes to global warming and the formation of acid rain.[41]

Other Cases

When I decided to write this article, I had planned on providing a broad overview of global warming related cases. When the Supreme Court issued the *Massachusetts* decision, however, I thought it necessary to focus more attention on that important decision. Nonetheless, here are few other global warming cases.

NEPA Cases

In *Border Power Plant Working Group v. U.S. Department of Energy*[42] plaintiff challenged the failure of the Department of Energy to conduct an Environmental Impact Statement (the agency had conducted an Environmental Assessment) pursuant to NEPA when it granted rights-of-way for transmission lines to connect new power plants in Mexico to the U.S. power grid. The district court agreed with plaintiff's assertion that DOE was required to analyze the environmental impacts of the new plants' carbon dioxide emissions in an EIS.

In *Center for Biological Diversity v. National Highway Traffic Safety Administration,*[43] five environmental groups petitioned the Ninth Circuit for review of EPA's 2006 rulemaking for updated fuel economy standards for model year 2008-2011 SUV's and pickup trucks. Plaintiffs assert that the agency's rulemaking violated the EPCA by not conducting an analysis of global warming in weighing "the nation's need to conserve energy;" and violated NEPA because the Environmental Assessment did not adequately analyze global warming and the impacts of the new standards are significant, and thus warrant preparation of an Environmental Impact Statement (EIS). The agency, which issued an EIS in 1987 on the CAFE program, concluded that because the new standards are lower than the previous ones, they would have no significant environmental impact, thus preparation of a new EIS was not necessary. Plaintiffs argue that a new comprehensive EIS is necessary because of the significant amount of scientific information on global warming compiled since the preparation of the initial EIS necessitates the consideration of stricter standards.

ESA Litigation

Center for Biological Diversity v. Norton[44] challenged the U.S. Fish and Wildlife Service's failure to respond to the plaintiff conservation groups' petition to list the polar bear as a threatened species under the ESA. The petition asserted that polar bear populations have declined significantly in large part because global warming has caused the bears' habitat, the Arctic ice, to melt. The case settled in June, 2006, when FWS agreed to respond to the petition. On January 7, 2007 FWS – headed by our own Dirk Kempthorne - issued a proposed listing decision, stating that the polar bear deserves protection as a threatened species based, in large part, on the impacts to the bears' habitat and availability of food due to the melting of the Arctic ice from global warming. A final listing decision is due in January, 2008. If polar bears are listed, it will be the first time that a species is provided ESA protection based on the impacts of global warming. The impacts of this could be far reaching, but then so are the impacts of global warming.

Conclusion

This article provides a mere peek into recent and ongoing global warming litigation, which reaches into every facet of environmental law: air and water quality, water quantity, endangered species, public health, public lands management, urban/suburban sprawl and development, transportation, and international law, to name a few. While the results of these cases have been mixed, it does appear that the judicial branch may have a slightly better grip on the issue of global warming than the political branch. It will be interesting to watch the fallout from

the *Massachusetts* decision. Now, if only it could generate as much hype as a radio talk show host or a deceased former playboy bunny…

Endnotes

[1] *See* Justin R. Pidot, *Global Warming in the Courts, An Overview of Current Litigation and Common Legal Issues,* Georgetown Environmental Law & Policy Institute, Georgetown University Law Center at 1 (Jan. 26, 2007). This report can be found at http://www.law.georgetown.edu/gelpi/current_research/global_warming_litigation/global_pub.cfm.

[2] *Id.*

[3] 42 U.S.C. § 7401 *et seq.*

[4] 42 U.S.C. § 4321 *et seq.*

[5] 5 U.S.C. § 552 *et seq..*

[6] Public Law 101-606 (1990).

[7] *See Pidot,* at 1-2. *This report was updated in March, 2007. See* Justin R. Pidot, *Global Warming in the Courts: A Litigation Update – March 5, 2007,* Georgetown Environmental Law & Policy Institute, Georgetown University Law Center (Mar. 5, 2007). This update can be found at *http://www.law.georgetown.edu/gelpi/current_research/documents/GWL_Update_3.13.07.pdf*

[8] 16 U.S.C. § 1531 *et seq.*

[9] The issue of "standing" arises from the U.S. Constitution, Article III, requirement that the federal courts can only hear "cases and controversies." Pursuant to the Supreme Court's developed standing doctrine, to bring a case in federal court, a plaintiff must demonstrate that (1) he/she has suffered a particularized injury that is either actual or imminent, (2) the injury is fairly traceable to the defendant's action(s), and (3) a favorable decision by the court will redress the injury. *See Mass. v. EPA,* 549 U.S. ___ (2007), at 14, *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992).

[10] 434 F.Supp.2d 957 (D.Or. 2006).

[11] 2005 WL 2035596 (N.D.Cal. Aug. 23, 2005). Summary judgment on the merits was argued in April, 2006, and a decision is still pending.

[12] 218 F.Supp.2d 1143 (N.D. Cal. 2002).

[13] Public Law 102-486 (1992).

[14] 406 F.Supp.2d 265, 271 (S.D.N.Y. 2005). This case is currently on appeal to the U.S. Court of Appeals for the Second Circuit.

[15] 549 U.S. ___ (2007) (No. 05-1120).

[16] Justice Stevens delivered the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg and Breyer joined. Justice Roberts filed a dissenting opinion in which Justices Scalia, Thomas and Alito joined. Justice Scalia also filed a dissenting opinion in which Justices Roberts, Thomas and Alito joined.

[17] *See Mass. v. EPA*, at 6. The CAA § 202(a)(1) requires that the EPA "shall by regulation prescribe…standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles…which in [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The CAA defines "air pollutant" to include "any air pollution agent…, including any physical, chemical…substance… emitted into…the ambient air." *Id.* at § 7602(g). "Welfare" is defined to include, among other things, "effects on …weather… and climate." *Id.* at § 7602(h).

[18] *Id,* at 25.

[19] *See Mass. v. EPA,* 549 U.S. ___ (2007), at 11.

[20] *Id.*

[21] *Id. at*. 2.

[22] *Id*. at. 15.

[23] *Id.* at 18- 19.

[24] *Id.* at 20.

[25] *Id.*

[26] *Id.,* at 18.

[27] *Id.* at 26.

[28] *Id.* (emphasis in original).

[29] *Id. at 30.*

[30] 42 U.S.C. § 7521(a)(1).

[31] *Mass. v. EPA*, at 31. EPA's "laundry list" included, for example "that a number of voluntary executive branch programs already provide an effective response to the that of global warming,…that regulating greenhouse gases might impair the President's ability to negotiate with 'key developing nations' to reduce emissions, and that curtailing motor-vehicle emissions would reflect 'an inefficient, piecemeal approach to address the climate change issue.'" *Id.*

[32] *Id., at 32.*

[33] *Id*.

[34] No. 06-1131 (and consolidated cases) (D.C. Cir., filed April 7, 2006).

[35] No. 01-436 (S.D. Miss., fourth amended complaint filed Dec. 19, 2006).

[36] 2006 WL 2734359 (E.D. Cal. 2005).

[37] 42 U.S.C. § 6201 *et seq.*

[38] No. 06-cv-69 (D. R.I., filed Feb. 13, 2006).

[39] No. l2:05-cv-302 (D. Vt. Nov. 20, 2006).

[40] 549 U.S. ___ (2007) (No. 05-848).

[41] *See* http://www.epa.gov/air/urbanair/nox/index.html.

[42] 260 F.Supp.2d 997 (S.D. Cal. 2003).

[43] No. 06-71891 (9th Cir 2006). Oral argument was held before the Ninth Circuit on May 14, 2007. This case is consolidated with similar challenges by California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, the District of Columbia and the City of New York.

[44] No. 3-05-05191 (N.D. Cal. filed Dec. 15, 2005).

About the Author

Judi Brawer *recently entered into solo practice in Boise focusing on environmental law, including public lands, land use planning, water quality, and endangered species. Previously, she worked for five years with the Boise-based non-profit environmental law firm Advocates for the West. Judi received her J.D. from Vermont Law School in 1997 and her B.A. in International Relations from the University of Colorado in 1991. She serves on the Board of the Idaho State Bar's Environment and Natural Resources Section.*

The Long and Winding Road: Restoration of Sherlock Creek

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After decades of on and off again illegal dredge mining, Sherlock Creek, a tributary of the St. Joe River is finally getting a rest. Sherlock Creek rushes through a pristine and remote corner of the Idaho Panhandle National Forests in the Bitterroot Mountains, close to the Montana border in a valley so out of the way it is a four-hour drive from Coeur d'Alene. Illegal dredge mining began on Sherlock Creek in 1969. The mining has resulted in extensive environmental damage, and the destroyed critical bull trout habitat. After many lawsuits spanning four decades, including cases before the Idaho Supreme Court, the Ninth Circuit Court of Appeals and the United States Supreme Court, this matter is finally being resolved and the restoration of the Sherlock Creek area will begin this summer.

Dredge Mining in Sherlock Creek

Sherlock Creek meanders though a narrow valley and joins Heller Creek approximately one-fourth of a mile above its confluence with the St. Joe River. The St. Joe River and its tributaries are protected under the Wild and Scenic Rivers Act as one of our national treasure.[1] The fishing in this area is renown, as evidenced by Justice Sandra Day O'Conner's recent fishing excursion to the St. Joe River in connection with a Ninth Circuit Judicial Conference. Access to this remote area is limited to two very narrow and steep primitive roads, after spring snow melt.

The illegal dredge mining covered the bottom lands of Sherlock Creek from its mouth to approximately three miles upstream. Dredge mining is the processing of alluvial gravel, usually through the use of water and gravity to separate and collect gold and other valuable metals from it. Large amounts of the steam bed of Sherlock Creek were removed, washed and screened to find gold, and then discarded along stream banks. To accomplish this, an enormous dredge was moved in place piece by piece in 1969 and assembled on site, along with other various earth moving equipment.[2] In the early 1970s over ten acres of meadows adjacent to the steam were cleared and dredged. In 1976, there were approximately 920,000 cubic yards of placer gravel extracted from the drainage according to Forest Service records. In 1978 major unauthorized activity continued and a new dredge pond was created. Activity on the claim ceased in the mid-1980s as a result of litigation, and the Bureau of Land Management declared these claims to be abandoned and void on July 22, 1985. Despite these facts, intermittent mining began to occur again in the 1990s.

More Law Was Mined Than Gold

Battles in the 1970s and the 1980s arising from this mining activity were addressed by the Idaho Supreme Court and the Ninth Circuit Court of Appeals on two occasions and on another by the United States Supreme Court.[3] During the flurry of litigation, nine reported decisions were filed in three separate cases on issues stemming from these claims. Included among them in the seminal case upholding the Forest Service's ability to regulate the use of Forest Service lands in connection with mining,[4] and the Idaho Supreme Court's determination that the Idaho Dredge and Placer Mining Protection Act[5] applies to mining within Idaho on federal land, establishing that state regulation supplementing federal mining laws is permissible.[6]

In 2001, news that the claimants were working on the site reached the Forest Service, after fire patrol planes observed turgid water in the ponds. This confirmed that dredge mining activities were within the bed and banks of this tributary of the St. Joe River, in violation of the Wild and Scenic Rivers Act. This area had also been withdrawn from mining entry as a protected "streamside zone" by the Assistant Secretary of the Department of the Interior.

The matter was referred to the United States Attorneys' Office for the District of Idaho upon confirmation that the illegal mining had resumed and was seriously degrading an area that had been proposed as critical habitat for the threatened bull trout by the United States Fish and Wildlife Service. An unauthorized locked gate had been installed preventing public and Forest Service access to the site and a tributary of Sherlock Creek had been bulldozed into a straight channel.

The Final Round of Litigation

A complaint in federal district court was filed[7] seeking permanent injunctive relief and damages against the individuals in the mining partnership for trespass on the national forest, violation of the Wild and Scenic Rivers Act,[8] violation of Public Lands Order No. 4716 which removed the land from mineral entry as well as regulations of the Secretary of Agriculture.[9] The United States moved for a temporary restraining order and a preliminary injunction which were quickly imposed by the district court barring all mining operations on the site during the pendency of the litigation.

Litigation ensued and the validity of the Bureau of Land Management's 1985 determination that the claims were abandoned and void was challenged, on the basis that the claims predated the federal statutes which would invalidate them under current law. Archived records were retrieved from state and federal agencies in support of the determination that invalidated the claims. The Bureau of Land Management's determination was upheld, resulting in summary judgment granted on behalf of the United States.

The plaintiff miner is an elderly disabled World War II veteran and both he and his adult son were judgment proof. No money was recovered from them to apply toward the recovery of the area. A restoration plan estimated to cost in excess of $1.9 million dollars has been proposed for the site, and accepted by the district court. The site currently contains waste dumps, large machinery, unauthorized roads, channelized streams, artificial ponds, altered topography and barren ground. The Sherlock Creek Placer Mine Reclamation Plan will involve removal of the

equipment and debris, revegetation, regrading the flood plain and the reconstruction of Sherlock Creek. In addition to Forest Service funds, the Coeur d'Alene Basin Trustee Group has contributed $70,000 dollars towards the design of this restoration plan. This group also has committed an additional $200,000 of its settlement funds for the actual project. The Forest Service has applied to another mining settlement trust fund for $750,000 dollars as replacement in kind mitigation for bull tout habitat damage in other areas of the Coeur d'Alene Lake Basin. Additional funds have been sought to allow completion of this restoration plan which is expected to begin this summer under the supervision of the Forest Service.

Conclusion

The story behind this restoration effort provides a unique glimpse into a tenacious mining dispute on federal lands in Idaho. It is a fitting end to a saga that stretched decades of litigation since the 1960s between renegade miners and the state and federal government, over the unlawful gold mining on the site and the damage done to this beautiful tributary of the St. Joe River. With restoration plans in place, this area will be returned to its natural grandeur.

Endnotes

[1] Wild and Scenic Rivers Act, 16 U.S.C. § 1271-1287. "[C]ertain rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations."

[2] A dredge digs gravel at one end, separates the gravel from the gold in the middle, and passes the gravel out the back. The one used at this site was quite large with a 20 x 20 foot base, approximately 25 feet high, not including the dragline bullwheel and the conveyor, and is alleged to be one of the largest in the lower forty-eight states.

[3] *See United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981); *State of Idaho v. Click*, 97 Idaho 791, 554 P.2d 969 (1976); *State of Idaho v. Click*, 102 Idaho 443, 631 P.2d 614 (1981) *cert. denied*, *Click v. Idaho*, 457 U.S. 1116 (1982) *rehearing denied Click v. Idaho*, 458 U.S. 1131 (1982); *Weiss v. Lehman*, 642 F.2d 265 (9th Cir. 1981) *cert. granted, judgment vacated* by *Lehman v. Weiss*, 484 U.S. 807 (1981) *remanded to Weiss v. Lehman*, 676 F.2d 1320 (9th Cir. 1982) *cert. denied Weiss v. Lehman*, 459 U.S. 1103 (1983).

[4] *Weiss v. United States*, 642 F.2d 296 (9th Cir. 1981).

[5] Idaho Code §47-1322 (1955).

[6] *State of Idaho v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

[7] *United States v. Weiss*, Civil No. 03-017-N-EJL in the District of Idaho. The complaint was filed on January 13, 2003.

[8] 16 U.S.C. § 1271, 1274 (1968).

[9] 16 U.S.C. § 478 (1905), 16 U.S.C. § 482 (1897) and 16 U.S.C. § 551(1990); 30 U.S.C. § 21 (1866), 30 U.S.C. § 54 (1949) and 30 U.S.C. § 612 (1955), and 36 C.F.R. § 261 (2001).

About the Author

Deborah A. Ferguson *has been an Assistant United States Attorney with the United States Attorney's Office for the District of Idaho in Boise, Idaho since 1995 and has handled numerous environmental cases. She is a graduate of Loyola University School of Law (1986) and was in private practice in Chicago before joining the United States Attorney's Office in Chicago in 1991. She represented the United States in United States v. Weiss, CV 03-017-N-EJL in the District of Idaho. She wishes to thank Alan Campbell, Office of the General Counsel for the Department of Agriculture in Missoula, Montana for his assistance in this litigation, and the good folks at the St. Joe Ranger District on the Idaho Panhandle National Forest for all their hard work.*

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The Endangered Species Act: A Year in Review in the Ninth Circuit

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The past year saw a significant increase in the number of Endangered Species Act[1] (ESA) cases in the Ninth Circuit Court of Appeals and associated federal district courts. One reason for this increase is that ESA litigation is no longer solely the domain of environmental groups challenging the failures of the federal government to protect threatened and endangered species. Industry groups and state and local governments have joined the fray, challenging, for example, species' listings and critical habitat designations.

The Ninth Circuit issued a number of important decisions that impact Idaho, including decisions regarding the listing of sage grouse, the operation of the Federal Columbia River Power System dams and related facilities and its impacts on listed fish species in the lower Columbia and Snake Rivers, consultation over water diversions, the validity of certain listing policies, and what a plaintiff must demonstrate when challenging agency decisions under the ESA. The purpose of this article is not to analyze each case—indeed, that would be an impossible task in this limited space. Nor does time and space allow inclusion of the dozens of district court cases. Instead, my goal is to provide a general overview of the ESA and a brief summary of the Ninth Circuit's decisions since January, 2006.

Listing Species

The purpose of the ESA is, in part, "to provide a means whereby the ecosystems upon which endangered…and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered…and threatened species.[2] The ESA defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature."[3] Because species receive none of the ESA's substantive or procedural protections until they are placed on the list as "threatened" or "endangered", the "listing process" is the essential first step in the ESA's system of protection and recovery.[4]

The U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA, formerly the National Marine Fisheries Service) are the two federal agencies charged with administering the ESA. Their mandate is to determine, based "solely on the basis of the best scientific and commercial data available,"[5] whether a species is endangered or threatened because of any of the following listing factors: (1) the present or threatened destruction, modification, curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence.[6]

While there are internal agency listing procedures, today most species are listed through the ESA's "petition process," which enables the public to petition the agency to add (or remove) a species to the list of threatened and endangered species. Upon receipt of a listing petition, the agency must decide within 90 days whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted."[7] This is commonly referred to as the "90-day finding."

To date, most 90-day finding litigation has been non-substantive challenges to the agencies' failure to comply with the deadline. This was the issue in *Institute for Wildlife Protection v. Norton,*[8] which challenged FWS' failure to respond to a petition to list the eastern sage grouse, and accused the agency of a pattern and practice of promoting discretionary tasks ahead of its mandatory duty to make timely findings on listing petitions. In compliance with a previous court order, FWS issued a 90-day finding on plaintiffs' petition, thus the Ninth Circuit affirmed the district court's holding that the claim was moot. The Court further affirmed the district court's decision dismissing the pattern and practice claims for lack of subject matter jurisdiction because the plaintiffs did not allege either a violation of an ESA provision or the failure to perform a nondiscretionary act or duty; and did not challenge a "final agency action."

Recently, there has been an increase in substantive challenges, which is likely due to the increase in the number of negative 90-day findings. In *Center for Biological Diversity v. Kempthorne*[9] conservation groups challenged FWS' negative 90-day findings for the Siskiyou Mountains and Scott Bar salamanders in California. The Ninth Circuit remanded the finding back to FWS because, in part, the agency's "conclusive evidence" standard is more stringent than that required by the ESA, which is whether a "reasonable person" would find that the proposed action "may be warranted."

In *Institute for Wildlife Protection v. Norton,*[10] plaintiffs challenged FWS' 90-day finding on a petition to list the western sage grouse. The Ninth Circuit held that FWS' decision to no longer recognize western sage grouse as a subspecies after decades of recognition was arbitrary and capricious given the absence of new studies to support the change, the agency's disregard of the opinion of the only taxonomist consulted, and its failure to discuss behavioral data supporting its designation as a subspecies. However, the Court upheld FWS' determination that western sage grouse is not a distinct population segment (DPS).[11]

If the agency makes a positive 90-day finding, it then commences a status review of the species and must make one of three determinations within 12 months of receipt of the listing petition ("12-month finding"): whether listing is warranted, not warranted, or warranted but precluded.[12] If the agency concludes that listing is "warranted," it publishes a proposed listing rule in the Federal Register. Then, within 12 months of publishing the proposed rule, and after considering public comment and all relevant evidence, the agency decides whether to adopt a final rule listing the species.[13]

The Ninth Circuit issued three decisions on substantive challenges to listing decisions. In *Kern County Farm Bureau v.*

Allen[14] plaintiffs challenged FWS' listing of Buena Vista lake shrew. Upholding the listing, the Court found that FWS used best available scienceplaintiffs pointed to no data that was omitted from consideration - and that the agency's analysis of the data and discussion of extinction factors satisfied the ESA's requirements.

In *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*[15] the Ninth Circuit upheld FWS' determination that the western gray squirrel in Washington is not a DPS, and therefore listing is "not warranted." Ruling on the validity of the agency's DPS policy, the Court afforded FWS *Chevron*[16] deference, holding that its interpretation of the term "DPS" is reasonable under ESA. This was the first appellate court to consider the validity of the agency's "DPS" interpretation.

In *Center for Biological Diversity v. Kempthorne,*[17] conservation groups challenged FWS' "warranted but precluded" decision for the Sierra Nevada Mountain Yellow-Legged Frog. The Ninth Circuit remanded the decision back to the agency because the Federal Register notice did not include the required findings—that work on other listings actually precluded listing the frog and that the agency was making expeditious progress on other listing and de-listing decisions. The Court held that these findings must be included in the published decision, and the agency cannot rely on earlier decisions not referenced in the challenged one, later decisions, or reference to the administrative record.

Critical Habitat

The ESA requires that, "to the maximum extent prudent and determinable," concurrently with listing a species as threatened or endangered, the agency must designate "critical habitat."[18] This particular critical habitat provision was added to the ESA in the 1982 Amendments to the Act. In *Center for Biological Diversity v. U.S. Fish & Wildlife Service,*[19] plaintiffs asserted that FWS was required to designate critical habitat for the unarmored threespine stickleback, which was listed over 35 yrs ago. While the agency had proposed critical habitat in 1980, it still had not made a final decision at the time of the 1982 Amendments. The Ninth Circuit held that the FWS was not required to designate critical habitat because proposed critical habitat designations pending at the time of the 1982 Amendments are governed by the provision for critical habitat revisions, which makes designation discretionary. The Ninth Circuit also upheld the FWS' 2002 decision not to designate critical habitat for the species.

Consultation

Once a species is listed as threatened or endangered, the ESA provides several procedural and substantive protections designed to recover the species and prevent extinction.[20] Section 7 requires all federal agencies to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of [critical habitat]."[21] To accomplish this, federal agencies (such as the Forest Service, Bureau of Land Management, Army Corps of Engineers, etc…) must consult with the FWS/NOAA whenever their actions "may affect" a listed species.[22] What constitutes an "action" requiring consultation is the subject of much litigation.

This procedural requirement can be satisfied through either informal or formal consultation. Informal consultation is authorized when the action "is not likely to adversely affect" listed species.[23] If the agency action "may affect" and is likely to adversely affect a listed species, formal consultation is required.

To initiate formal consultation the action agency submits a Biological Assessment (BA) to FWS/NOAA, who reviews it and then issues a Biological Opinion (BiOp).[24] FWS/NOAA's responsibilities during formal consultation include: (1) Review all relevant information provided by the federal agency or otherwise available; (2) Evaluate the current status of the listed species or critical habitat; (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat; (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species; (7) Formulate a statement concerning incidental take, if such take may occur; and (8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, considering the best scientific and commercial data available.[25]

Consultation has generated a significant amount of litigation in recent years, much of it related to the impacts of dams on listed salmon. Issues include whether consultation must be conducted, as well as substantive challenges to the adequacy of BiOps and their "incidental take statements."[26]

The Duty to Consult

In *California Sportfishing Protection Alliance v. FERC*[27] plaintiffs challenged the Federal Energy Regulatory Commission's (FERC) failure to consult on the impacts of a 30-year hydropower permit on newly listed salmon. The Ninth Circuit upheld FERC's determination that there was no affirmative agency action triggering the need to consult. The Court rejected the argument that because FERC retained discretion under the 1980 permit to modify it if necessary, this represents sufficient discretionary control or involvement under 50 C.F.R. § 402.03 to require initiation of consultation over the impacts of the dam on the newly listed species. Simply having the discretion to act under the permit without affirmatively acting on that discretion does not trigger consultation.

Similarly, in *Western Watersheds Project v. Matejko*[28] plaintiffs challenged the Bureau of Land Management's (BLM) failure to consult on existing water diversions on BLM lands in Idaho. The district court held that BLM had a duty to consult because the agency has discretion to impose conditions on these diversions and its failure to exercise that discretion is "agency action." The Ninth Circuit reversed, holding that the duty to consult is triggered only by affirmative agency actions and thus unexercised discretion to act is not "action."

Adequacy of Biological Opinions

A number of cases upheld the merits of BiOps for FERC's relicensing of hydro-electric projects. *See Cowlitz Indian Tribe v. FERC*[29] and *California Sportfishing protection Alliance v FERC.*[30] In *Idaho Rivers United v. FERC*[31] the Ninth Circuit upheld the merits of FWS' BiOp for FERC's re-licensing of five Idaho Power Company hydroelectric projects on the Snake River.

On the other hand, in the ongoing challenge to the operation of the Federal Columbia River Power System dams and related facilities and its impacts on listed fish species in the lower Columbia and Snake Rivers, the Ninth Circuit struck down the BiOp. This case is far too long and convoluted to explain in detail and this *very* brief summary does not do it justice. In sum, in *National Wildlife Federation v. NMFS*[32] the district court initially granted plaintiffs a preliminary injunction, finding a "substantial procedural violation" in that because the BiOp considered the effects of the existence of the dams as part of the "baseline" instead of the "proposed action," the agencies had consulted on only part of their "action."

On July 26, 2005 the Ninth Circuit affirmed the district court's preliminary injunction order, although it remanded back to the court to determine if any modifications to the order were necessary. On October 7, 2005, the district court, on remand, issued a decision ordering the various federal agencies involved to collaborate with the State and Tribal sovereigns in formulating a new proposed action for the power system operations and for NOAA to complete a remand of the biological opinion within one year (since extended). On April 9, 2007, the Ninth Circuit affirmed the district court, finding that its rejection of the BiOp was appropriate and it did not abuse its discretion by its remand order.

Moving inland, in *Defenders of Wildlife v. U.S. Environmental Protection Agency*[33] the Ninth Circuit upheld its previous 2005 opinion that the Environmental Protection Agency's (EPA) decision to transfer water pollution permitting authority (under the National Pollution Discharge Elimination System (NPDES) program of the Clean Water Act) to the state of Arizona was arbitrary and capricious; and that EPA erred in concluding in its BiOp to disregard the impacts of the transfer on listed species. This case is far too long and convoluted to explain in detail, and this *very* brief summary does not to it justice. The Supreme Court granted petitions for certiorari filed by the National Association of Home Builders and EPA and consolidated the appeals in *EPA v. Defenders of Wildlife* (No. 06-549) and *National Association of Homebuilders v. Defenders of Wildlife* (No. 06-340). Oral argument was held on April 17, 2007.

Incidental Take Statements

In *Center for Biological Diversity v. U. S. Fish and Wildlife Service*[34] plaintiffs challenged the Incidental Take Statement contained in FWS' BiOp for a mine on BLM land on the basis that the proposed action did not meet the consultation regulation's definition of "otherwise lawful activity" which is defined as "those actions that meet all State and Federal legal requirements except for the prohibition against taking." The Ninth Circuit held that FWS' interpretation of the regulation to mean only that an Incidental Take Statement does not relieve the action agency or applicant of its responsibility to comply with all other legal requirements was reasonable.

In *Oregon Natural Resources Council v. Allen*[35] the Ninth Circuit found an Incidental Take Statement, issued for two timber sales that would impact the endangered northern spotted owl, arbitrary and capricious on several counts. First, because the underlying BiOp was withdrawn, the Incidental Take Statement lacks any underlying factual predicate; second, the Incidental Take Statement fails to provide a numerical limit on take without explaining why such a limit is impracticable; and third, the Incidental Take Statement could never trigger the re-initiation of consultation because the permissible take level is coextensive with the scope of the project.

Re-initiation of Consultation

The ESA's implementing regulations require an agency to re-initiate formal consultation if (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the initial biological opinion; or (c) if a new species is listed that may be affected by the action.[36]

In *Forest Guardians v. Johanns*[37] conservation groups claimed, and the Ninth Circuit agreed, that the Forest Service was required to re-initiate consultation over the environmental impacts of cattle grazing on National Forest land in Arizona because the agency failed to comply with requirements to monitor the impacts of grazing on endangered and threatened species.

Conclusion

The future implications of these decisions in Idaho remains to be seen. The Supreme Court's decision on whether the EPA must consider the impacts to listed species when deciding whether to transfer water pollution permitting authority will likely affect whether Idaho attempts such a transfer. The determination that the western sage grouse is still a subspecies enables the challenges to FWS' refusal to list that species to move forward. NOAA must now issue a new BiOp for operations of the Federal Columbia River Power System dams in the lower Columbia and Snake Rivers, which may affect dam operations upstream here in Idaho. If the Forest Service and BLM do not comply with monitoring requirements for listed species here in Idaho, will they be forced to re-initiate consultation and perhaps, as a result, change grazing management practices?

Ultimately, the increase in ESA-related litigation has focused a spotlight on all federal agencies charged with protecting listed species and their habitats. Hopefully, instead of leading to a weakened ESA and decreased funding, it will result in species recovery - which is the ultimate goal of the ESA.

Endnotes

[1] 16 U.S.C. § 1531 *et seq.*

[2] *Id.* at § 1531(b).

[3] *Id*. at § 1532(16).

[4] An "endangered species" is one that is "in danger of extinction throughout all or a significant portion of its range. *Id.* at § 1532(6). A "threatened species" is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *Id.* at § 1532(20).

[5] *Id.* at §1533(b)(3)(A).

[6] *Id*. at § 1533(a)(1).

[7] *Id.* at § 1533(b)(3)(A); 50 C.F.R. § 424.14(b)(1). "Substantial information" is the "amount of information that would lead a rea-

sonable person to believe that the measure proposed in the petition may be warranted." 50 C.F.R. § 424.14(b).

[8] 2006 WL 2844536 (9th Cir. 2006).

[9] 466 F.3d 1098 (9th Cir. 2006).

[10] 2006 WL 536088 (9th Cir. 2006).

[11] The definition of "species" includes "distinct population segments." 16 U.S.C. § 1532(16). However, the ESA does not include a definition of that term. Thus, to determine whether a species is a DPS, in 1996 FWS and NMFS jointly adopted a policy which sets forth the requirements for a population to be considered a DPS and therefore eligible for ESA listing. 61 Fed. Reg. 4722 (Feb. 7, 1996).

[12] 16 U.S.C. § 1533(b)(3)(B). A "warranted but precluded" finding means that although the species deserves to be listed as threatened or endangered, immediate ESA protection is precluded by higher listing priorities. To make a "warranted but precluded" finding, the agency must demonstrate how listing the species is precluded by pending listing proposals; that "expeditious progress" is being made to list or de-list other species; and a description and evaluation of the reasons and data on which the finding is based. *Id.* at § 1533(b)(3)(B)(iii). "Warranted but precluded" species receive none of the ESA protections afforded to listed species.

For any petition regarding which FWS has made a "warranted but precluded" finding, the ESA requires FWS to make a new 12-month finding on the petition on the anniversary of the "warranted but precluded" determination. *Id.* at §1533(b)(3)(C)(I). Therefore, FWS must make a new 12-month finding on the petition each year until it publishes a proposed rule listing the species as threatened or endangered or makes a determination that listing is not warranted.

[13] 16 U.S.C. § 1533(b)(3)(B) and (b)(5).

[14] 450 F.3d 1072 (9th Cir. 2006).

[15] __ F.3d __, 2007 WL 286581 (9th Cir. Feb. 2, 2007).

[16] *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837 (1984).

[17] 466 F.3d 1098 (9th Cir. 2006).

[18] 16 U.S.C. § 1533(a)(3). Designation of critical habitat must be made "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular areas critical habitat." *Id.* at § 1533(b)(2). The ESA defines Critical Habitat as: (i) the specific areas within the geographic area occupied by a species, at the time it is listed…on which are found those physical or biological features (I) essential to the conservation of the species and (ii) which may require special management considerations or protection; and (ii) specific areas outside the geographical areas occupied by the species at the time it is listed…upon a determination…that such areas are essential for the conservation of the species. *Id.* at § 1532(5)(A).

[19] 450 F.3d 930 (9th Cir. 2006).

[20] *See, e.g.*, 16 U.S.C. §§ 1533(f) (recovery plans), 1536(a)(2) (consultations), and 1538(a)(1)(B) and (G) (prohibition against takings). The ESA makes it unlawful to "take" any species that has been listed as endangered. 16 U.S.C. § 1538(a)(1). "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct." *Id.* at § 1532(19).

[21] 16 U.S.C. § 1536(a)(2).

[22] *Id.* at § 1536(a)(2); 50 C.F.R. § 402.14(a).

[23] 50 C.F.R. §§ 402.13 and 402.14(b).

[24] 16 U.S.C. § 1536(b)(3)(A) and (c).

[25] 50 C.F.R. § 402.14(g).

[26] Section 7(b)(4) of the ESA provides that if, after formal consultation, the FWS concludes that the agency action and any takings incidental to the agency action are not likely to jeopardize the continued existence of any listed species, or offers reasonable and prudent alternatives which the agency believes would prevent such jeopardy, FWS shall provide the Federal agency with an Incidental Take Statement that:

> (i) specifies the impact of such incidental taking on the species,
>
> (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, and…
>
> (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

[27] __ F.3d __, No. 05-73064 (9th Cir. 2006).

[28] 456 F.3d 922 (9th Cir. 2006).

[29] 2006 WL 2088200 (9th Cir. 2006).

[30] 2006 WL 2022503 (9th Cir. 2006).

[31] 2006 WL 1932330 (9th Cir. 2006).

[32] 2005 WL 1398223, CV 01-640-RE and CV 05-23-RE (D. Or. June 10, 2005) *aff'd* 418 F.3d 971 (9th Cir. 2005), as amended 422 F.3d 782 (9th Cir. Sept. 2, 2005), remanded, 2005 WL 2488447 (D. Or. Oct. 7, 2005), *aff'd* 2007 WL 1040032 (9th Cir. April 9, 2007).

[33] 450 F.3d 394 (9th Cir. 2006) (denial of petition for review en banc).

[34] 450 F.3d 930 (9th Cir. 2006).

[35] No. 05-35830, 2007 U.S. App. Lexis 3472 (9th Cir. February 16, 2007).

[36] 50 C.F.R. § 402.16.

[37] 450 F.3d 455 (9th Cir. 2006).

About the Author

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Tips on Conducting Internal Investigations of Environmental Crimes

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Given the recent trends in and renewed focus on criminal enforcement at the Environmental Protection Agency (EPA), a company could unwittingly find itself subject to prosecutorial review for environmental crimes. The way in which a company responds internally upon first learning that it is a target of a government investigation can set the tone of the investigation and impact its ability to manage and control the process. From the beginning, the company should be prepared to conduct an internal investigation to assemble the necessary facts to respond promptly to the government and develop a strategy to resolve the investigation in a manner that best minimizes potential liability.

Not surprisingly, internal investigations of criminal liability require a different approach than review of alleged noncompliance in the civil context. Implementing procedures to maintain control over evidence and communication with governmental officials can be crucial. This article provides an overview of the particular steps that a corporation or individual should take when conducting an internal investigation to respond to a federal investigation of environmental crimes.

The methods used in internal investigations are driven primarily by the way the government itself approaches criminal investigations. The government's investigation is likely to begin with federal agents interviewing selected employees at their homes or other locations away from the workplace and outside of working hours. The agents typically intimate that they know the company or other employees have engaged in misconduct, based either on a tip they have received or their own interpretation of reports or other documents the company has submitted to a regulatory agency. Such late-night interviews are frequently intimidating to employees who may feel they need to "cooperate" with the government to avoid going to jail. This can lead some employees to make incriminating statements that they otherwise would not have made. The agents may also suggest that the employee should keep the interview confidential to avoid impeding the investigation. As a result, the company may not even know that the investigation has begun until after a number of employees have already been interviewed. The government may also use a search warrant to seize documents early in the investigation. As part of executing the search warrant, the government frequently sends a host of agents to the company's facility to question as many employees as possible. Again, the intimidating nature of the process can cause some employees to say things they would not otherwise say. In addition, without any controls on the process, it is nearly impossible after the fact for the company to know what the employees may have said, much less what materials have been seized. In response to such a situation, management personnel may be tempted to rush out and tell employees not to talk to the government agents, or if they do talk, to tell them what to say so as to put the company in the best light. Worse yet, employees themselves may decide to destroy incriminating documents because they are afraid of going to jail.

All of these events can have dire consequences for the company. Before senior executive has even got their arms around the situation, the company's lawyer may get a call from the prosecutor saying that he or she not only believes the company and selected management personnel have engaged in criminal environmental violations, but they have also made false statements and engaged in obstruction of justice in a manner that confirms their guilt. The prosecutor may then suggest that the company and management may get out of the case on better terms if they plead guilty before indictment, but the plea will involve substantial jail time, massive fines, and an admission of making false statement. At this point, senior executives may still be asking, "Did the company commit a crime? Did our 20-year veteran manage actually tell employees to lie to the government? Did our employees actually destroy documents?"

Obviously, not every case proceeds in such a dramatic and negative manner, but minimizing the risk of such an outcome and conducting an investigation that will help the company avoid prosecution entirely is absolutely vital. Several steps are necessary to accomplish this:

Respond Quickly

It is critical to begin the internal investigation as soon as possible after learning that there is any government investigation. This process should be managed by lawyers—preferably outside lawyers with experience in the area—to ensure that he attorney-client privilege is preserved, conflicts are appropriately managed, and an effective strategy is developed.

The first step in such an investigation is to interview any employees who have talked with government agents. Again, such interviews should be conducted by counsel, who should inform the employee that they represent the company. The focus of the interview should be on identifying the government agents and finding out what they asked about, what the employee said, who else besides the agents they have talked with, and any potential information regarding the status of the investigation (has the employee testified before a grand jury or been told that he or she may be called to do so?). After these preliminaries, the interview should go into more depth on the focal points of the government investigation and identify other employees who may have relevant knowledge. Similar interviews with all such other employees should be conducted as soon as possible. In conducting these interviews, care should be taken in deciding whether and how the interviews should be memorialized. Memoranda or notes that directly quote a witness may later become subject to disclosure in the event of a prosecution.[1] If they contain incriminating information, such disclosure could potentially affect the ability of the company to call the witness to testify even if he or she otherwise has very positive things to say.

The second step in the investigation, if possible, should be to contact the government agents. This contact should be made by

an attorney experienced in the area who can probe for additional information regarding the investigation and its status. It may also be possible to identify the prosecutor involved in the case, who may be willing to provide additional information on the scope and likely course of the investigation.

Finally, the third step should be to locate and copy documents that may be relevant to the investigation, including any government files that include relevant reports submitted by the company or agency personnel.

Ensure That Employees Do Not Overreact or Destroy Evidence

While this process is going on, the company should communicate with all employees who potentially have knowledge of the subject of the investigation to ensure that they understand their rights in communicating with the government and they do not destroy any documents. As part of this process, the company should consider whether it wants to offer to provide counsel to employees to advise them on whether they should acquiesce to being interviewed and what they should do if they are in fact interviewed.

Again, the communication needs to be managed very carefully to avoid creating any misimpression that the company is either trying to obstruct the government or indirectly hint that documents should be destroyed, *e.g.*, by failing to make clear that all normal document destruction pursuant to the company's document retention program should be suspended. If possible, the communication should be in writing, although it is often best to distribute the writing at an employee meeting or in another setting that will minimize anxiety and allow employees to ask questions. The following is an example of the type of information that that should be conveyed:

> The **[describe government agency]** is conducting an investigation relating to **[describe investigation]**. The mere fact that there is an investigation does not mean that the company has engaged in any wrongdoing, and the company is currently cooperating with the government in responding to the investigation.
>
> The government may seek to interview company employees as part of its investigation. Government agents may even attempt to contact employees at their homes after normal working hours.
>
> If you are contacted, you have the right to refuse to talk to the government agents if you do not wish to do so. You also have the right to talk to a lawyer before deciding whether you want to talk to the government. The company has a list of lawyers who have experience with situations of this kind and will pay for a lawyer to represent you, if appropriate. This lawyer would be acting for you and not the company and could advise you on whether to talk to the government and could also be present with you should you decide to talk to the government. Any discussions you have with the lawyer would remain between you and the lawyer and would not be disclosed to the company or anyone else unless you choose to disclose such information.
>
> If you decide to talk to the government agents without a lawyer, you are free to do so. However, it is imperative that you be accurate and tell the truth. Lying to government agents is a crime and can be harmful to the company as well as the employee who lies. Providing information that is inaccurate because it is based on speculation or rumors may also be harmful.
>
> Along these lines, the company is trying to keep track of which employees are contacted. As a result, we would appreciate it if you would let **[insert the name of in-house counsel]** know if you have been contacted, regardless of whether you decide to be interviewed.
>
> Finally, until you are advised otherwise, we ask that you not destroy any documents, notes, email, or other written information relating to your work, wherever it is maintained. This is true even if you don't believe such documents have anything to do with the investigation or would otherwise normally be destroyed or shredded as part of the company's policy. If you have any questions about this, please call **[insert the name of in-house counsel]**.

Know What do Do if a Search Warrant Is Issued

Depending on what is learned during the initial states of the internal investigation, the company should also be prepared to respond to a search warrant. As a threshold matter, it is important to recall that it is a felony to "forcibly … resist[ ], oppose[ ], prevent[ ], impede[ ], … or interfere[ ] with any person … execut[ing] search warrants."[2] Moreover, any actions that improperly seek to restrict or interfere with the government's access to information may be viewed as obstruction of justice. For these and other reasons, it is normally appropriate to cooperate with government agents executing a search warrant. At the same time, however, it is essential to take all possible steps to protect the company. Some specific measures that should be considered:

1. Notify outside defense counsel and appropriate members of senior management. If the corporation has outside counsel in the area with expertise in white-collar criminal defense matters, such counsel should be notified immediately and asked to be present at the search location. In-house counsel should also notify appropriate members of senior management, if they are not already aware of the search.

2. Review the warrant. In-house counsel, outside counsel, or both should go to the location of the search, identify the agent in charge of the search, and request a copy of the warrant, including the description of the items to be seized. Among other things, counsel should make sure that the warrant includes the correct name and address of the company location being searched. Any defects should be noted and pointed out to the agent in charge. If there are significant inaccuracies, counsel should consider asking the agent to suspend the search. This is important to avoid later claims of good faith by the agents if the warrant is defective.

3. Cooperative—within appropriate boundaries. Counsel should also cooperate with the agents in locating items identified in the warrant but should make sure the search does not exceed the scope of the warrant. In this

regard, counsel should *not* consent to a search for items or of locations not specifically identified in the warrant. If agents begin to seize items or search areas not covered by the warrant, counsel should consider calling the prosecutor assigned to the matter, the magistrate who authorized the warrant, or both.

4. Seek to avoid or control the seizure of privileged materials. Counsel should be alert to the potential that agents may review and seize materials protected by the attorney-client privilege or work-product doctrine. Counsel should immediately identify any privileged files or documents and request that the agents refrain from reviewing such materials. If the agents insist on taking such materials despite such warnings, counsel should ask that they be segregated and marked as privileged so that the issue can be addressed with the prosecutor or court as necessary.

5. Prepare an inventory of what has been seized. The government ordinarily seizes original documents without providing any duplicates. Not only can this leave companies without key documents necessary to operate their business, it may leave them unable to even to identify what specific materials were seized. One way to minimize this problem is to prepare a detailed inventory of precisely what is taken. This inventory can then be used in subsequent negotiations with the prosecutor to obtain copies of essential documents or for a motion for return of property under Federal Rule of Criminal Procedure 41(e).

If the search encompasses computer files, counsel should work with the agents on site and in-house IT personnel to copy the requested files in electronic form on site (while retaining a similar copy for the company). This may avoid having the government seize the company's computer equipment, which can prove extremely disruptive. It also ensures that the company has a copy of what the government has taken.

6. Gather information relating to the investigation and search. In talking with the agent in charge of the investigation or other agents, counsel should gather as much information as possible about the purpose of the search, the nature of the investigation, the targets of the investigation, and the government's overall theory of the case. Although the agents may not be willing to answer questions on these subjects directly, they may provide clues during the execution of the warrant. In this regard, counsel should keep (or have someone keep) detailed notes on how the warrant is executed, including (a) what time the search began and concluded; (b) the identity of the agent in charge and other agents participating in the search, as well as the prosecutor who authorized the search; (c) the order in which the search was conducted (what files were searched and in what order, and how much time was spent in each area); (d) the identity of any employees the agents spoke with, tried to speak with, or asked to speak with; (e) any comments the agents made or questions they asked that may relate to the scope of the investigation; and (f) any actions by the agents that could be construed as misconduct.

7. Appropriately limit and monitor government interviews of company employees. While the search warrant is being executed, agents will inevitably attempt to interview company employees. Any attempt to prohibit such interviews directly, or take any action that could be construed as discouraging such interviews, is likely to be viewed by the government as obstruction of justice. Nonetheless, there are several steps that counsel can take to limit and monitor the flow of information during such interviews: Counsel should send all nonessential employees home for the day. Most search warrants will take a full day to execute, and employees are unlikely to perform any work while the search warrant is being executed. They are, however, likely to talk to the agents on site. Counsel should also brief the employees who remain on site that they are under no legal obligation to submit to an interview and should seek to be present for any interviews that take place. This may be difficult because multiple agents are likely to be talking to multiple employees on site. To be prepared for this situation, it is normally appropriate to bring more than one attorney to the search location. Finally, counsel should debrief any employees who have been interviewed outside their presence as soon as possible after the interview is concluded.

Preserve the Attorney-Client Privilege and Confidentiality

Throughout this process, it is important to do everything necessary to preserve the attorney-client privilege. As already noted, witness interviews should be conducted by counsel, and any notes or interview memoranda should be kept confidential. Company management should also be told not to discuss the investigation internally outside the presence of counsel in a manner that could waive the privilege. Finally, consideration should be given to whether the company wants to prepare a full written report of the investigation. In making this decision and in drafting any report, it is important to bear in mind that the final version could eventually be disclosed to the government.

Manage Conflicts of Interest

As the investigation progresses, it is important to avoid conflicts of interest that can be created by joint representation of the company and any management personnel who may be government targets. The default position should be to hire separate counsel for any individuals who may become defendants rather than trying to have one lawyer represent all of the potential parties.

This is true in part because the rules of professional conduct make it more difficult to represent two defendants in criminal proceedings than in civil proceedings.[3] There are also practical reasons why counsel should exercise caution in even considering the possibility of representing both the company and one or more managerial employees. For example, it is often difficult to know early on in an investigation whether facts will develop that could create a conflict. Managerial employees who may have violated the law frequently conceal their misconduct and may not dis-

close facts that suggest they may be liable. In addition, other management personnel may be blind to the potential that one of their peers or immediate subordinates could have committed any form of misconduct, adopting an attitude of "nothing like that could ever happen at our company." As a result, the company may be willing to consent to joint representation on the assumption that no wrongdoing took place, only to be proven wrong after the investigation is complete. Both the company *and* the executive may then be forced to hire *new* counsel to represent them in the event of an actual prosecution.

If a decision is made to have one outside attorney represent both the company and one or more key individuals, it is important to execute conflict waiver letters that allow outside counsel to continue to represent the company if a conflict eventually develops.

Finally, to the extent separate counsel are engaged for individuals, it is important to select lawyers who can and will work well with the company's own outside lawyers. Normally, it is best to have the company's outside counsel suggest a list of lawyers who have experience in the area and who are familiar with the benefits of cooperation in such a setting. It is also important in such contexts to evaluate the benefits of joint defense arrangements that will allow for a reasonable sharing of information but avoid future conflicts should one party decide to cooperate.

Keep Focused on the Goals

Last but not least, it is essential to continually work on developing and refining the company's strategy for resolving the investigation. The direction that management decides to take will obviously depend on the results of the investigation. In some instances, there will be no evidence of wrongdoing, and the strategy will be to persuade the government not to pursue the investigation at all. More often, there may be evidence of misconduct but solid grounds to argue that the matter should be dealt with on a civil rather than criminal basis. In such instances, the focus should be on developing the evidence necessary to persuade the government of this, relying on the factors identified in the McNulty Memorandum.[4] Finally, there are some instances in which there is evidence of criminal misconduct and the company will have to make a decision on how to minimize its potential exposure, whether it be by cooperation and a plea (coupled with firings of the key individual perpetrators) or by fighting the charges and hoping the government will not be able to prove them at trial. It is rarely possible to know what strategy the company will ultimately adopt when the investigation begins. So it is vital to reevaluate the company's position throughout the process. Staying in touch with the government and actively monitoring the government's investigation will assist in this, but the outcome will be determined in large measure by the results and quality of the internal investigation itself.

Being the subject of a government investigation for environmental crimes is not a position in which a company wants to find itself. Planning in advance and developing a sound approach for conducting an internal investigation could minimize potential liability and help avoid prosecution altogether.

Endnotes

[1] Federal Rule of Criminal Procedure 26.2 and the Jenks Act, 18 U.S.C. § 3500, require that parties produce statements of witnesses who have testified at trial as soon as their direct examination is complete. A "statement" for this purpose may include notes or memoranda of a witness interview that are a substantially verbatim recital of any oral statements by the witness or any notes or statements shown to or adopted by the witness.

[2] 18 U.S.C. § 2231

[3] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R.1.7 cmt ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant")

[4] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, DOJ, to Heads of Department Components, United States Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty-memo.pdf. For a complete discussion of the criteria that the DOJ uses to determine whether to prosecute specific cases see *Current Trends on Enforcement of Environmental Crimes* by Krista McIntyre also published in this issue.

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Current Trends in Enforcement of Environmental Crimes

Krista McIntyre
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Federal enforcement of environmental crimes is active and expanding. The federal Environmental Protection Agency (EPA) employs 180 federal agents across the county, who, like Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) agents, are armed with guns and badges. These agents are actively investigating cases under the full range of federal environmental statutes. The stakes are high for targeted corporations and individuals. Incarceration, fines, and restitution are among the sanctions levied by criminal prosecutors. In FY2006, EPA's criminal enforcement results included a total of 154 years of incarceration and $43 million in fines for environmental crimes.[1]

This article summarizes the renewed focus on criminal enforcement at EPA, the improved integration of case selection between civil and criminal prosecutors, and the current case selection criteria applied by the Department of Justice (DOJ) in determining whether to prosecute a corporation for criminal liability.

EPA and DOJ are paying increased attention to environmental criminal enforcement. This is evidenced by the increased coordination between EPA and other federal agencies, including the U.S. Coast Guard, Occupational Safety and Health Administration, and U.S. Fish & Wildlife Service, to investigate and refer criminal activities for enforcement. EPA is actively engaged with state and local agencies to ferret out criminal conduct, and EPA has installed a tips and compliance link on the agency's home page to encourage public reports of environmental violations. Increased coordination of these sources of tips and leads has caused agents within EPA's Criminal Investigation Division (CID) to open an ever-larger number of investigations. In FY2006, over 300 environmental crimes cases were initiated by EPA, and 278 defendants were charged.[2]

These cases have been initiated under a wide variety of statutes, including the Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Migratory Bird Act, Oil Pollution Act, and others. EPA reports that its attorneys are also strengthening coordination between the civil and criminal divisions at EPA and DOJ.[3] Consequently, most cases referred for civil enforcement are now evaluated for criminal liability. The focus is on cases that involve significant environmental harm and/or other culpable conduct, such as lying to federal agents or failing to report unauthorized releases of substances into the environment. This policy is reflected in EPA's "Devaney memorandum,"[4] which states that the agency will focus on cases that involve cumulative bad effects, such as actual or threatened environmental harm through illegal discharge or emissions, failure to report releases, or offenses that represent a trend or common practice within an industry. Criminal investigations are more likely to be initiated when the questionable conduct involves repeat violations, deliberate misconduct, falsification of information or records, monitoring or pollution control equipment tampering, operating without proper permits, or attempts to ignore the regulatory system altogether.

The Devaney memorandum addresses investigation of both individual employees and companies. Corporate culpability may be indicated when, for example, a company performs an environmental compliance audit and then knowingly fails to correct detected noncompliance in a timely manner. Notably, EPA's guidance also addresses the credit companies should receive when self-auditing is conducted, followed by full and complete disclosure, as well as correction of the noncompliance. When these circumstances exist, according to the Devaney memorandum, a case will not warrant expenditure of EPA's scarce criminal investigative resources.

The increased coordination and collaboration between civil and criminal prosecutors is leading to more complex cases. Historically, for example, criminal enforcement under the Clean Air Act was limited to violations of asbestos management requirements. Cases brought under the Clean Water Act were similarly limited to illegal discharges. Recently, however, Clean Air Act cases have been brought involving complex issues relating to permit compliance, emissions testing, and equipment tampering.[5] Cases under the Clean Water Act have expanded to include matters such as technical violations involving wetland fills.[6]

The penalties for environmental crimes have also grown more severe. In 1999, a jury convicted Allan Elias in Idaho federal court for criminal violations of the Resource Conservation Recovery Act and the Occupational Safety and Health Act. Mr. Elias was sentenced to 17 years in prison.[7]

The decision to prosecute specific cases is coordinated between EPA and DOJ criminal staff. DOJ ultimately determines whether to go forward by applying the criteria outlined in the "McNulty memorandum."[8] This guidance provides a framework for prosecutors to evaluate criminal charges against a corporation and its officers. The McNulty memo emphasizes a set of underlying assumptions that (a) prosecution of corporate crime is a high priority for not only the government, but for corporate leaders; (b) criminal prosecution can force change in culture and behavior; (c) increased self-policing, detection, reporting, and crime prevention is promoted by criminal prosecution; and (d) charges brought against individuals are the single most effective deterrent. On this platform, the McNulty memo reestablishes nine criteria for case selection and establishes a process for prosecutors to follow.[9] The factors were first presented in a memorandum drafted in 2003 by then DOJ Deputy Attorney General Larry Thompson.

With respect to environmental crimes, each of the factors may be relevant to a determination to charge. In summary, the criteria include:

- Nature and seriousness of the offense, including risk of harm;
- Pervasiveness of the wrongdoing within the corporation;

- History of similar conduct, or civil, criminal, or other regulatory action;
- Timely and voluntary disclosure and willingness to cooperate;
- Existence and adequacy of preexisting compliance program;
- Remedial actions, including discipline of wrongdoers, restitution, and cooperation with government agencies;
- Collateral consequences;
- Adequacy of prosecution of individuals for corporation's malfeasance; and
- Adequacy of civil or other regulatory enforcement remedies.

The specific references to compliance programs, disclosure, and cooperation warrant additional discussion in the context of environmental cases. The McNulty memo makes clear that preexisting compliance programs will not bar prosecution if there is evidence that they have not been adequately implemented or enforced. Similarly, general corporate policy statements alone will not be viewed as an adequate substitute for actual compliance programs. Finally, the McNulty memo acknowledges that no program can ever prevent all criminal activity, but stresses that it is critical to have a program that is designed for maximum effectiveness to detect criminal misconduct and to enforce the established elements of the corporate program. Appropriate staffing sufficient to perform the compliance function is emphasized as well.

Regarding timely and voluntary disclosure, DOJ strongly promotes incentives for cooperation and disclosure. The government is understaffed for the scope of prosecutions it considers and therefore offers credit and mitigation to those corporations that facilitate the enforcement effort by turning themselves in and cooperating with the government's investigation. DOJ has been criticized for its implementation of this element of the case selection criteria because of alleged unreasonable requests that potential defendants waive the attorney-client privilege to meet the element of cooperation. The McNulty memo explicitly confirms that waiving the privilege is not a prerequisite to a finding that a company has cooperated in the government's investigation; however, many veteran defense lawyers believe this promise is illusory. At a minimum, the potential of disclosure should be considered as part of every investigation.

DOJ policy requires that the McNulty factors be considered in every prosecution determination. No single factor is dispositive, and not every factor will apply in every case. DOJ prosecutors make these determinations based upon the case-specific information developed by an agent from EPA's CID in the course of a case investigation.

The EPA and DOJ's increased attention to environmental criminal enforcement and the potential penalties for conviction should not be taken lightly. As preventative measures, it behooves a corporation to actively monitor environmental compliance to ensure that its activities do not result in significant environmental harm, to train its environmental professionals not to engage in culpable conduct such as lying to federal agents or failing to report unauthorized discharges or releases, and to implement and maintain compliance programs that are designed to enforce the established requirements and detect criminal misconduct If a corporation finds itself the target of a criminal investigation, it must work with its defense counsel to gather information that responds to the McNulty memo criteria and develops an accurate and thorough account of the underlying facts- the assembly of which hopefully leads EPA and the DOJ to conclude that a charge is unwarranted.

Endnotes

[1] Kris Dighe, Assistant Chief, Environmental Crimes Section, U.S. Department of Justice (DOJ), FY2006 Data Source: Criminal Case Reporting System (Oct. 28, 2006), presented to American Bar Association (ABA) panel (Mar. 1, 2007).

[2] *Id.*

[3] Kris Dighe, Assistant Chief, Environmental Crimes Section, DOJ, and Randolph Hill, Deputy Director, EPA Office of Civil Enforcement, statements at ABA panel (Mar. 1, 2007).

[4] Memorandum from Earl E. Devaney, Director, EPA Office of Criminal Enforcement, to All EPA Employees Working in or Support of the Criminal Enforcement Program (Jan. 12, 1994), *available at* http://epa.gov/compliance/resources/policies/ criminal/exercise.pdf.

[5] *United States v. Tyler Pipe*, No.05-CR-00029 (E.D. Tex. 2005); *United States v. McWane*, No. 05-CR-00811(D. Utah 2005).

[6] *United States v. Lucas*, No. 04-CR-00060 (S.D. Miss. Dec. 6, 2005).

[7] *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001); see also Joseph Hilldorfer and Robert Dugoni, The Cyanide Canary (Free Press 2004) for a discussion of the case as told by the CID investigators.

[8] Memorandum from Paul J. McNulty, Deputy Attorney General, DOJ, to Heads of Department Components, United States Attorneys (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speech/2006/ mcnulty_memo.pdf.

[9] Id. at 4.

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More Dam Process: Relicensing of Dams and the 2005 Energy Policy Act

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Every hydropower facility in the nation not operated by the federal government must obtain an operating license from the Federal Energy Regulatory Commission (FERC) if that facility affects interstate commerce, navigable waterways, or meet other criteria.[1] In Idaho, dams such as Idaho Power Company's Hells Canyon Complex on the Snake River and Avista Corporation's Post Falls dam on the Spokane River are subject to FERC's jurisdiction.

License renewal, called "relicensing," occurs only once every 30 to 50 years. Each time a license is issued or renewed the process provides an opportunity for any interested stakeholder to earn legal standing and influence the terms of the next license. Because a license term lasts for decades, dams seeking license renewal today were effectively grandfathered from complying with existing environmental laws and standards. Thus, relicensing is a significant opportunity to address a hydropower dam's environmental footprint and to weigh the commitment of watershed resources for another 30 to 50 years.[2]

Many Authorities in the Hydropower Licensing Kitchen

While FERC administers hydropower licenses, many federal and state agencies share the authority to craft license conditions. Under Section 18 of the Federal Power Act, federal fisheries agencies, such as the United States Fish and Wildlife Service or National Oceanic and Atmospheric Administration (NOAA, formerly the National Marine Fisheries Service), may require a licensee to construct a fish passage device around a dam.[3] FERC has no authority to deny or alter the prescription,[4] even if it is a reservation of authority.[5] Section 4(e) of the Federal Power Act empowers any manager of a federal reservation upon which the hydropower project lies to place license conditions for the "adequate protection and utilization of the reservation."[6] Again, FERC has no authority to alter these conditions.[7] Nor can FERC deem submitted § 4(e) conditions untimely or inappropriate and ignore them; only a court may review these conditions.[8] The United States Forest Service (Forest Service), the Bureau of Indian Affairs, and the Bureau of Land Management (BLM), among others, frequently utilize this § 4(e) conditioning authority.

A state agency may also place conditions in its certification that will ensure that water quality is protected. These conditions are mandatory,[9] and certification may include minimum instream flow requirements.[10] In May 2006, the United States Supreme Court in *S.D. Warren Co. v. Maine Bd. of Environmental Protection* issued a unanimous decision confirming that water quality certifications are required for federal licensure of hydropower dams.[11] The combination of Supreme Court reinforcement and the Energy Policy Act amendments discussed below have emphasized the importance of the Clean Water Act certification authority.

The Federal Power Act grants certain agencies the authority to provide recommendations that FERC must consider. Section 10(j) of the Federal Power Act allows state and federal fisheries agencies to provide recommendations for the protection, mitigation, and enhancement of fish and wildlife.[12] These recommendations must receive expert agency deference at FERC.[13] The licensing process may also trigger requirements for formal review and consultation under the Endangered Species Act if the dam impacts threatened or endangered species.[14]

The Energy Policy Act of 2005: Federal Power Act Amendments

Signed into law in August 2005, the Energy Policy Act of 2005 (EPAct) established an interim process to challenge Sections 18 and 4(e) prescriptions and conditions of relicensing.[15]

Under the new amendments, once an agency files its proposed § 4(e) conditions or § 18 fishway prescription, a challenger has thirty days to respond with a request for hearing and/or an alternative. The hearing provision entitles any party to a license proceeding to a determination on the record, after an expedited trial-type evidentiary hearing, of any disputed issue of material fact with respect to conditions or prescriptions. The implementing rules define "material facts" as facts that, "if proved, may affect a department's decision whether to affirm, modify, or withdraw any condition or prescription."[16] The hearing is administered by an agency Administrative Law Judge (ALJ) and results in an opinion documenting findings of fact within ninety days of the Department's referral to the ALJ.[17]

The EPAct also established a strict requirement for consideration of submitted alternative conditions. By the terms of the EPAct, the secretary of the department in which the agency is housed must accept an alternative to a § 18 fishway prescription if the alternative provides equal or greater protection than the original condition and either costs less to implement or generates more power.[18] For § 4(e) conditions, the standard is looser: the secretary must accept the alternative if the condition is adequate for the protection and utilization (but does not necessarily provide equal or greater protection) of the federal reservation, and costs less to implement or generates more power. In either instance, if an alternative does not meet these criteria, the depart-

ment must still consider the alternative against several criteria, including energy supply, air quality, and navigation.[19] The implementing rules direct the appropriate secretary to make a final decision on submitted alternatives within sixty days of the close of the comment period on the Environmental Impact Statement or Environmental Assessment for the license.[20]

On November 17, 2005, the Departments of Agriculture, Commerce, and Interior published regulations implementing the hydropower provisions of the EPAct.[21] The "interim final" rules were published for comment at the same time that they went into effect. The rules function identically for each department, varying only by the agencies' specific statutory authorities. The interim final regulations apply to all license proceedings for which no license had been issued as of November 17, 2005, including pending applications with previously filed conditions and prescriptions.

In December 2005, several conservation and recreation organizations filed suit challenging the rules in the Western District of Washington, charging that the inclusion of pending license applications under the new regulatory framework was an impermissible retroactive application of the law under section 706 of the Administrative Procedures Act (APA).[22] The suit also charged that the APA required the rules to undergo a public comment period before they could take effect, citing substantive decisions by the authoring departments and omission of key functional pieces of the rules, such as burden of proof in the hearing.

The Western District of Washington Court rejected these claims in its October 3, 2006 opinion.[23] The Court found that the rules were exempt from the APA's notice and comment requirements because they were procedural and interpretive rules, not substantive provisions. Further, the Court held that the rules did not provide an impermissible retroactive application of law because the conditions and prescriptions that had been previously submitted did not meet the test of the kind of settled expectations protected from retroactive application.

Use of the EPAct Amendments in Individual Proceedings

The regulations established a December 19, 2005 deadline for any retroactive EPAct challenges in pending licensing proceedings, or proceedings in which no license had issued but preliminary terms and conditions had been filed. Licensees for fifteen hydropower projects filed challenges by that deadline.[24]The departments did not consider the congressionally-established timeframe to apply to these retroactive projects, and began docketing the hearings at extended timeframes; in some cases deferring response until over a year after the request was filed.[25]

The federal departments began consideration of retroactive hearing requests and alternatives at the same time new requests and alternatives were filed. As more hearings were requested, ALJ actions resolved outstanding questions about the hearing process. First, the ALJs provided varying responses to determining whether an issue subject to an EPAct challenge is factual or material. Some ALJs suggested that the party requesting the hearing should have the opportunity to develop the facts to demonstrate materiality, while others have dismissed issues that raise legal, non-material, and policy questions.[26] However, ALJ opinions have consistently held that the party requesting the hearing bears the burden of proof.[27]

One striking feature of the hearing requests is that they have almost exclusively led to settlements between the conditioning agency and the hearing requestor, who in all instances outside of the Klamath proceeding have been the licensee. These settlements typically do not resolve the stated factual issues, rather they result in the agency either revising its underlying conditions and issuing wholly new license conditions or abandoning its license conditions altogether.[28] Intervenors in the hearing typically do not have access to these settlement discussions, and once a settlement is complete, the hearing request is usually withdrawn. In some instances, hearing requestors have asserted their rights to reinitiate a hearing if license conditions change or have amended the original hearing request or alternative.[29] Conservation and recreation interests note that these settlements result in reduced resource protection.[30]

The Hells Canyon Settlement

The architect of the hydropower provision of the EPAct was Senator Larry Craig. As Senator Craig stated at a Congressional oversight hearing he organized in May 2006:

It just so happens, as it turns out that the first trial-type hearing will take place this June in my state of Idaho to examine issues relating to the Hells Canyon complex. I hope to attend those hearings personally. I'm fascinated to see how this process will work out.[31]

Indeed, Hells Canyon was the first non-retroactive application of the EPAct challenge process. On February 27, 2006, Idaho Power filed challenges against preliminary conditions filed by the Forest Service and the BLM. Idaho Power's filing against the Forest Service alone consisted of more than 200 pages challenging twenty-six issues of material fact and included more than twenty alternative conditions for agency review.[32]

Two conservation groups, the states of Oregon and Idaho, and NOAA all intervened in the Forest Service's EPAct proceeding. At the same time, the state of Oregon, two conservation groups, and the Shoshone-Bannock Tribes filed alternatives to the NOAA's § 18 fishway prescription, a reservation of authority in lieu of an actual fish passage measure.[33]

The BLM reached a settlement with Idaho Power and filed revised § 4(e) conditions within three months of the hearing request. Despite repeated requests by the interveners to participate in the Forest Service's settlement discussions, the Forest Service and Idaho Power reached settlement covering all issues except those relating to one sediment management condition. The sediment management condition required Idaho Power to replenish depleted lower Hells Canyon beaches with sand. The Hells Canyon Complex dams hold back hundreds of thousands of tons of sand and gravel from reaching the lower river.[34] Ultimately, the Forest Service reached agreement covering sediment management, replacing the existing replenishment requirement with a new condition requiring Idaho Power to pay into a Forest Service fund.[35] There has been significant argument over whether any of Idaho Power's original factual challenges ever met the standard of a "material fact in dispute."[36]

The Forest Service settlement did not result in a factual stipulation; instead it created precise terms under which the Forest Service would resubmit its preliminary § 4(e) conditions. The settlement resulted in significantly weaker mitigation measures and land management. For example, instead of requiring Idaho Power to acquire 1,522 acres to address the depletion of riparian habitat, the Forest Service required the company to acquire only 56.3 acres. Finally, Idaho Power successfully excluded a suite of intervenors and submitted revised alternatives that mirrored the settlement after the statutory deadline had expired.

The First Hearing: Klamath River

In fall 2006, the Klamath Hydroelectric Project became the first project subject to a completed trial-type hearing. The Klamath Project includes four dams in Oregon and California that many licensing parties are actively working to remove. PacifiCorp, the owner and operator of the Klamath Project, requested an EPAct hearing on April 28, 2006, challenging prescriptions and conditions of NOAA and agencies within the Department of the Interior.[37]

The Departments of Commerce and Interior consolidated the hearing requests and conducted one hearing adjudicated by a Coast Guard ALJ, Judge Parlen McKenna.[38] The California Department of Fish and Game, Klamath Tribes, Hoopa Valley Tribes, and several conservation groups all filed notices of intervention.[39] A five-day hearing with 57 available witnesses was held in Sacramento, California in late August 2006.

On September 27, 2006, Judge McKenna issued a decision. Of the fourteen disputed material facts, PacifiCorp prevailed on issues related to the recreational use of the river and on lamprey habitat and survival. On the central factual disputes, including whether anadromous fish occurred above the project facilities and whether current habitat and water quality conditions above and through the facilities would support repopulation of these fish, Judge McKenna confirmed the original positions taken by the resource agencies, the Tribes, and the conservation groups: that "PacifiCorp failed to prove its version of the facts."[40]

Although the result of the hearing was an incremental loss from the factual position underlying the preliminary conditions, the federal resource agencies, the conservation groups, and the Tribes achieved positive precedent for all future EPAct cases. The order's factual conclusions form a strong record that will substantiate agency conditions and prescriptions under any future legal review. The Klamath proceeding also demonstrated the scale of time, expense, and human resources required to challenge and defend mandatory conditions under the EPAct hearing.

The Avista Hearing

In 1906, Post Falls dam was built on the Spokane River.[41] While Lake Coeur d'Alene is a natural lake, the operation of the dam raises the surface elevation of Coeur d'Alene Lake and allows the control of the summer lake levels at a level approximately eight feet above the historical levels at that time of year.[42] According to the Department of Interior, the Coeur d'Alene Tribe, and others, the artificially high lake level results in degraded water quality, significant shoreline erosion, flooded wetlands, increased habitat for non-native aquatic weeds, and eroded cultural resource sites.[43]

As a result, the Department of the Interior acting on behalf of the Coeur d'Alene Tribe imposed § 4(e) conditions on the new license for Avista's dams that will require Avista to finally mitigate the impacts associated with the operation of its dam.[44] These conditions included an aquatic weed management program, fisheries mitigation projects, cultural resource surveys, and water quality monitoring.

On August 17, 2006, Avista filed an EPAct hearing request, challenging many of the facts that support the imposition of the Interior Department's conditions and proposed alternative conditions.[45] Avista claimed that the Interior Department's conditions would cost the company more than $400 million.[46]

The evidentiary hearing occurred during the first week of December 2006 in Spokane before a Department of Interior ALJ, Andrew Pearlstein. The Coeur d'Alene Tribe and Sierra Club joined the Department of Interior to support the imposition of the conditions. Avista's challenge focused on virtually every aspect of the department's conditions, including challenges over whether Post Falls dam affects erosion, wetlands, and water quality. The crux of Avista's argument was that impacts to the southern portion of the lake were caused by sources other than Post Falls dam. The week-long hearing included testimony from 24 expert witnesses and involved nearly that many attorneys.

On January 8, 2007, Judge Pearlstein issued a decision affirming the facts supporting most of Interior's conditions, finding that Post Falls dam does indeed impact water temperatures and dissolved oxygen levels of the lake, contributes to shoreline erosion and loss of wetlands, as well as impacts tribal cultural resources.[47]

Judge Pearlstein disagreed with the Interior Department's description of the dam's impact on native trout, ruling instead that the dam "has had only minor impacts on the decline of native salmonid fish in the lake, that are dwarfed by the devastating impacts of non-Project factors, primarily the introduction of non-native species, and the degradation of tributary spawning habitat."[48] He also disagreed that the dam increased the solubility of heavy metals on the bottom of the finding that the dam "has no effect, or only a negligible effect, on the amount of metals that dissolve in the lake."[49]

Avista is only the second hydroelectric licensee to complete the new trial-type hearing process. The Interior Department is now reviewing the ALJ decision and Avista's proposed alternative conditions. Avista's new license is due in August 2007, but is not expected to be issued on time.[50] Like the Klamath proceeding, the Avista hearing illustrates the expense and resources necessary to challenge an agency's mandatory conditions and the difficulty of a licensee in successfully challenging the material facts supporting the mandatory conditions.

Conclusion

At a May 2006 hearing, Senator Larry Craig described FERC hydropower licensing as "12 and 14 year processes that cost millions and millions of dollars."[51] The hydropower provisions of the EPAct were billed as a mechanism to streamline the process and increase its affordability. However, in practice it is clear that the provisions have not streamlined the process or reduced the cost for licensing participants. Instead, the EPAct, if carried out,

makes the process more complex, litigious, and expensive. A more common outcome of hearing requests is not a confirmed set of facts but an exclusive supra-licensing settlement proceeding that revises the underlying agency mandatory conditions. This threatens only to further complicate the relicensing process and undermine the intent of the Federal Power Act.

Endnotes

[1] 16 U.S.C. § 797(e)
[2] 16 U.S.C. § 808(e).
[3] 16 U.S.C. § 811.
[4] *Am. Rivers v. FERC*, 201 F.3d 1186, 1210 (9th Cir. 2000).
[5] *Wis. Pub. Serv. Corp. v. FERC*, 32 F.3d 1165, 1168-71 (7th Cir. 1994).
[6] 16 U.S.C. § 797(e).
[7] *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 780-784 (1984).
[8] *City of Tacoma v. FERC*, 460 F.3d 53, 65 (D.C. Cir. 2006). This decision also clarified that FERC is not obligated to issue an economic license.
[9] *Am. Rivers v. FERC*, 129 F.3d 99, 110-11 (2nd Cir.1997).
[10] *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 723 (1994).
[11] 126 S.Ct. 1843 (2006).
[12] 16 U.S.C. § 803(j).
[13] *Am. Rivers,* 201 F.3d at 1205(quoting *Kelley v. FERC*, 96 F.3d 1482, 1487 (D.C.Cir. 1996)).
[14] 16 U.S.C. § 1536.
[15] Pub. L. No. 109-58, § 241, 119 Stat. 594, 675-76 (2005).
[16] 43 C.F.R. § 45.2.
[17] 43 C.F.R. § 45.60.
[18] 43 C.F.R. § 45.73(b)(1).
[19] 43 C.F.R. § 45.73(d).
[20] 43 C.F.R. § 45.72.
[21] 70 Fed. Reg. 69,804 (Nov. 17, 2005).
[22] *Am. Rivers v. Dep't of Interior*, 2006 WL 2841929 (W.D. Wash. 2006).
[23] *Id*.
[24] These projects were Borel (CA), FERC Project No. 382; Boulder Creek (UT), FERC Project No. 2219; Donnells-Curtis Transmission Line (CA), FERC Project No. 2118; Elsinore (CA), FERC Project No. 11858; Kern Canyon (CA), FERC Project No. 178; Pit 3,4,5 (CA), FERC Project No. 233; Poe (CA), FERC Project No. 2107; Portal (CA), FERC Project No. 2174; Stanislaus-Spring Gap (CA), FERC Project No. 2130; Upper North Fork Feather (CA), FERC Project No. 2105; Vermillion Valley (CA), FERC Project No. 2086; Box Canyon (ID/WA), FERC Project No. 2042; Priest Rapids (WA), FERC Project No. 2114; Rocky Reach (WA), FERC Project No. 2145; and Condit (WA), FERC Project No. 2342. After the deadline passed, another project was permitted to use the retroactive procedures: Bar Mills (ME), FERC Project No. 2194.
[25] *See, e.g*. Notice of Schedule for Hearing, *Priest Rapids Hydroelectric Project* (FERC Project No. 2114) (Mar.15, 2006) (established a Jan. 12, 2007 deadline for referral to the Hearings Division in order to assign matter to an ALJ).
[26] *See* Initial Prehearing Conference Order *Idaho Power Co. v. Bureau of Land Mgmt.*, Docket No. DCHD-2006-01 (FERC Project No. P-1971) (May 4, 2006); Ruling Denying Motions to Dismiss, *In re Idaho Power Company, Hells Canyon Complex*, Docket No. 06-0001 (FERC Project No. 1971) (May 24, 2006); Order Granting In Part Motion to Dismiss Certain PacifiCorp Issues, *In the Matter of the Klamath Hydroelectric Project*, Docket Number 2006-NMFS-0001 (FERC Project No. 2082) (July 13, 2006); Prehearing Conference Order, *Avista Corp. v. U.S. Bureau of Indian Affairs*, Docket No. DCHD 2007-01 (FERC Project Nos. 2545, 12606) (Nov. 1, 2006).
[27] *See e.g.,* Order Granting Motion to Confirm the Burden of Proof*, In the Matter of the Klamath Hydroelectric Project*, Docket Number 2006-NMFS-0001 (FERC Project No. 2082) (July 6, 2006).
[28] *See* Letter from the U.S. Dep't of the Interior to FERC (Mar. 24, 2006) (titled "Comments, Recommendations, Terms and Conditions, and Prescriptions"). The Department withdrew § 4(e) conditions and resubmitted them as non-mandatory § 10(a) recommendations.
[29] *See, e.g.,* Amendment to Proposed Alternative Conditions Filed Pursuant to 7 C.F.R. Part 1, *Hells Canyon Complex Hydroelectric Project* (FERC Project No. P-1971) (May 19, 2006).
[30] *See* Gene Johnson, *Environmental Groups Challenge New Dam Relicensing Rules*, Assoc. Press (Aug. 29, 2006) *available at* http://www.kxly.com/index.php?sect_rank=4&section_id=562&story_id=4511 (last visited Apr..10, 2007).
[31] *Senate Energy and Natural Resources Committee Hearing*, transcript at 2 (May 8, 2006) (on file with the authors).
[32] Idaho Power's Request for Expedited Trial-Type Hearing Pursuant to 7 C.F.R. Part 1, *In re Idaho Power Company, Hells Canyon Complex*, Docket No. 06-0001 (FERC Project No. 1971) (Feb. 27, 2006).
[33] The Department of Commerce responded to these submissions on December 27, 2006 noting that the rules prohibit application of alternatives or hearings to reservations of authority.
[34] "The total load of coarse sediment trapped above Hells Canyon dam is estimated to be 274,000 to 652,500 tons per year." FERC, *Draft Environmental Impact Statement for the Hells Canyon Hydroelectric Project* at 99 (Section 3.4.4 Unavoidable Adverse Impacts) (July 2006).
[35] USDA Forest Service Revised § 4(e) Terms and Conditions*, Hells Canyon Complex Hydroelectric Project* (FERC Project No. 1971-079) (June 7, 2006).
[36] "IPC asserts 26 alleged disputed issues of material fact underlying 10 of the FS Conditions. Of these, none are factual, disputed, and material." USDA Forest Service Answer, *In re Idaho Power Company, Hells Canyon Complex*, Docket No. 06-0001 at 2 (FERC Project No. 1971) (Apr.,13, 2006).
[37] PacifiCorp's Combined Request for Hearing on Disputed Issues of Material Fact Regarding U.S. Fish and Wildlife Serv.§ 18 Prescriptions and BLM and Bureau of Reclamation § 4(e) Conditions and Request to Consolidate All Hearings Regarding the Klamath Hydroelectric Project and PacifiCorp's Request for

Hearing on Disputed Issues of Material Fact Regarding NMFS § 18 Prescriptions and Request to Consolidate All Hearings Regarding the Klamath Hydroelectric Project, *In the Matter of Klamath Hydroelectric Project*, Docket No. 2006-NMFS-0001 (FERC Project No. 2082) (Apr. 28, 2006).

[38] Decision*, In the Matter of Klamath Hydroelectric Project*, Docket No. 2006-NMFS-0001 at 5 (FERC Project No. 2082) (Sept. 27, 2006).

[39] The conservation groups were American Rivers, Trout Unlimited, Northcoast Environmental Center, Pacific Coast Federation of Fishermen's Associations and the Institute of Fisheries Resources, WaterWatch of Oregon, California Trout, Friends of the River, and Oregon Natural Resources Council.

[40] *In the Matter of Klamath Hydroelectric Project*, at 2, n.41.

[41] Coeur d'Alene Tribe, *Coeur d'Alene Subbasin Summary* (Mar. 16, 2001) *available at* http://www.cbfwa.org/FWProgram/ReviewCycle/fy2002mc/workplan/CoeurdAlene/CoeurdAlene.htm (last visited Apr. 10, 2007).

[42] *Id.*

[43] *See, e.g.,* Letter from the U.S. Dep't of the Interior to FERC (July 18, 2006) (titled "Comments, Recommendations, Terms and Conditions, and Prescriptions").

[44] *Id.*

[45] Avista's Request for a Hearing on Disputed Issues of Material Fact with Respect to Certain Preliminary § 4(e) Mandatory Terms and Conditions filed by the BIA and Proposed Alternative Conditions, *Avista Corp. v. U.S. Bureau of Indian Affairs,* Docket No. DCHD 2007-01 (FERC Project Nos. 2545, 12606) (Aug. 17, 2006).

[46] John Stucke, *Dam Fight Heats Up*, SPOKESMAN REVIEW (Aug. 18, 2006).

[47] Decision, *Avista Corp. v. U.S. Bureau of Indian Affairs,* Docket No. DCHD 2007-01 at 4-5 (FERC Project Nos. 2545, 12606) (Jan. 8, 2007).

[48] *Id.* at 5.

[49] *Id.*

[50] *See* Letter from Wash. Dep't of Ecology to Avista (April 5, 2007). In this letter, Ecology indicated that additional information is needed for its § 401 certification process and that Avista may need to withdraw its § 401 certification application and reapply or be denied state certification. This would undoubtedly delay the issuance of the license, as Ecology has one-year from the date of the application to review and issue a § 401 certification.

[51] Senate Energy and Natural Resources Committee Hearing, at 39, n.34.

About the Authors

Rick Eichstaedt *is an attorney with the Center for Justice in Spokane, Washington. In that capacity, Eichstaedt represents conservation and citizen groups in environmental and land use matters, including the relicensing of Avista's Spokane River Project. Previously, Eichstaedt represented the Nez Perce Tribe in a variety of natural resource and treaty-right protection matters, including the relicensing of Idaho Power's Hells Canyon Complex. Eichstaedt is a member of the Idaho Bar and serves on the Board of the Environment and Natural Resource Section of the Bar.*

Rebecca Sherman *is the Northwest Coordinator of the Hydropower Reform Coalition, a national consortium of 130 conservation and recreation organizations that improve rivers through the hydropower licensing process. Currently based in Portland, Oregon, she advocates exclusively on licensing policy and process in the Pacific Northwest and in Washington DC. In her previous appointment, she worked for American Rivers on several campaigns, including coal mining and national outreach.*

Adell Amos *is an Assistant Professor of Law and the Director of the Environmental and Natural Resources Law Program at the University of Oregon School of Law. Amos joined the law school faculty after practicing environmental and natural resources law for six years with the Solicitor's Office at the United States Department of the Interior representing and advising the U.S. Fish and Wildlife Service and the National Park Service on state and federal water rights issues including work involving the Klamath, Snake, Columbia, Middle Rio Grande, and Gunnison River Basins.*

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Exciting Initiatives in Environment and Natural Resources Law at the University of Idaho College of Law

Dean Donald Burnett and Professor Barbara Cosens[1]
University of Idaho College of Law

The Environment and Natural Resources (ENR) Section of the Idaho State Bar holds its annual CLE in Boise each January in conjunction with the Idaho Environmental Forum Legislative Preview. Dean Donald Burnett and Professor Barbara Cosens spoke at the luncheon meeting regarding the new environment and natural resource initiatives at the University of Idaho College of Law.[2]

Environmental, water and natural resource issues are in the forefront of concerns for Idaho and its citizens. The faculty and students of the University of Idaho College of Law are responding to this need by undertaking exciting new initiatives to become leaders in this field of law, a "natural fit" for Idaho. One of the new initiatives being proposed is a Water Resources Program under the College of Graduate Studies and the College of Law. This Program will need approval from the State Board of Education and the University of Idaho Regents. As envisioned, new M.S./Ph.D. degrees in water resources would be offered, with three option areas: Engineering & Science; Science & Management; and Law, Management & Policy; as well as concurrent J.D./M.S. and J.D./Ph.D. degrees in any of the option areas. The proposed degrees form a coordinated effort to create interdisciplinary study options in water resources. The proposed Program has the support of, and will draw participants from the Colleges of Agriculture and Life Sciences; Engineering; Law; Science; Letters, Arts and Social Sciences; and Natural Resources. The Program will include faculty in Moscow, Boise, Idaho Falls, and Twin Falls, and strong collaboration with the Idaho Water Resources Research Institute. Both M.S. and Ph.D. are proposed to be offered in Moscow, Boise, Idaho Falls, Coeur d'Alene and Twin falls, but the offering at off-campus locations will be phased in during the first three years of operation.

The proposed interdisciplinary Program will encompass engineering, natural, and social sciences to advance water resources education, research, and outreach throughout Idaho. The term "water resources" is used here in the broadest sense and those participating in the Program will study how water moves through and interacts with natural systems, and the physical, social, and economic aspects of human interaction with the water cycle. The proposed option areas within the water resources degrees will be integrated by requiring a set of common courses for all students in the Program. The proposed Program will facilitate education and research that influences both the scientific understanding of the resources and how it is managed, and the decision-making processes that are the means to address competing societal values. The option areas will have rigorous entrance requirements, appropriate for each degree, a set of core courses, and a broad range of elective courses.

Nowhere is the need for sustainable use of water and the potential failure to achieve sustainability more evident than in Idaho and other states in the western United States. Growing demand for water stems from multiple factors including urban population growth, agricultural needs, tribal water development, energy demand, habitat requirements, recreational use, and aesthetic values. Seven of the ten fastest growing cities in the United States are located in the water-limited West. Idaho has the sixth highest projected population growth rate in the nation –50% in the next 25 years. Most of that growth is in urban areas that compete for the same water resources currently used for irrigated agriculture. Development of tribal water resources in the region has lagged behind that of their neighbors, and only in the past few decades have the proper institutions and funding been made available to being to reverse this disparity. Habitat needs are highlighted by the reality that freshwater fish are the single most endangered vertebrate group in the United States. Furthermore, the Columbia River basin is the primary source of hydroelectric power in the northwest and its waters serve five states, numerous Native American tribes, and two countries. It is also home to twelve endangered salmonid populations, decimated by blockage to migratory routes, dewatering, poor water quality, loss of habitat, competition from hatchery and exotic fish, and commercial fishing.

These competing water resources issues cannot be resolved through a conventional approach in which science, engineering, law, and policy are compartmentalized in university education, research, and outreach programs. Recent studies indicate that graduate education must expand interaction with stakeholders and more proactively engage social and technical challenges. The University of Idaho proposes to take the next critical step in providing engineers, scientists, lawyers, mangers, leaders, and citizens with integrated knowledge and problem-solving skills to address water resources problems. In short, we must educate scientists and engineers to be more politically aware and policy makers to be more scientifically knowledgeable.

The opportunity exists for the University of Idaho to become a leader in education and research on water resources at the interface of law, policy, management, science and engineering. Due to the demand for this capability among water management policy institutions, other universities may begin to fill the gap within the next decade. By transforming water resources education at the University of Idaho, the community, state, and region can be provided with the tools to bring our obligations as citizens of the earth in alignment with our ability to extract its benefits. Given the importance of water resources, there can be no greater goal of a land grant university than to lead the region in defining a sustainable future for water resources management and use.

Although the Water Resources Program is a new initiative, the University of Idaho Law School has long excelled in providing a context for student to study environmental and natural resource law. The following abstracts of papers written by

University of Idaho law students in the spring of 2007 illustrate the range of issues, and depth of discussion that the University of Idaho is already providing in the environmental and natural resource arena. Information on how to obtain copies of the papers may be found on the ENR Section's website at http://www2.state.id.us/isb/sec/enr/enr.htm.

Major Energy Facility Siting in Idaho

Trent Belnap[3]

In 2006, representatives from Sempra Energy presented their plan to build a coal-fire power plant in Jerome County. Currently, the final decision makers in Idaho's siting procedure are local government leaders; however, neighboring states employ a state level siting board. Proponents of local siting authority are reluctant to create another layer of bureaucracy and feel the fate of local lands and residents should remain in the hands of local jurisdictions. Supporters of state level authority assert a state agency is better able to consider the effects major energy facilities would have on the entire state. Idaho's energy goals—"to provide for the state's power generation needs and protect the health and safety of the citizens of Idaho" are better served by a state level siting agency; an agency which is better able to consider the impacts energy facilities would have on the entire state.

Artificial Recharge of the Eastern Snake Plain Aquifer and the Clean Water Act

Matt Darrington[4]

Recent years of prolonged drought, decreased artificial recharge, and sustained groundwater withdrawals have combined to have a deleterious impact on the Eastern Snake Plain Aquifer (ESPA). Among the foremost water issues regarding the ESPA is the possibility of large scale managed recharge, with the goal of maintaining or increasing aquifer productivity. If the ESPA is found to be a tributary of navigable waters, requiring conformity with National Pollutant Discharge Elimination System (NPDES) permitting of the Clean Water Act (CWA), such a permitting requirement would drastically impede the ability of the state to operate managed recharge sites. It is not likely that managed recharge sites fall within CWA jurisdiction; however, if the holding in *Idaho Rural Council v. Bosma* makes it possible for the ESPA to be regulated under the CWA as a tributary to the Snake River, it would prove troublesome to bring recharge sites under the jurisdictional umbrella of the CWA NPDES permitting requirements.

Treasure Valley Air Quality Act

Amber Ellis[5]

The Treasure Valley's population, rapid growth, and geographic and meteorological situation, predispose the area to air pollution events and potential non-attainment under the Clean Air Act (CAA). Once in non-attainment, it is expensive for a state to comply with the CAA, and the CAA holds new industry proposals to higher standards to prevent further air pollution—making it undesirable for business to relocate in a non-attainment area. The Treasure Valley Air Quality Plan emphasizes voluntary and unenforceable control measures, which fail to adequately address the biggest polluter in the Treasure Valley: automobiles. To be effective, this plan must mandate the support and funding of reliable transit system to enable citizens to reduce their total vehicle miles driven.

Free Trade and International Environmental Law: the WTO as a Framework for Dealing with Internal Environmental Problems

Seth L. Gordon[6]

It took until the later half of the twentieth century, but the international community has finally recognized that globalization has taken a devastating toll on the world's environment. Free and unrestricted access to the world's shared resources, such as the atmosphere, wildlife, and oceans has resulted in over-exploitation and environmental degradation. Multilateral international treaties concerning the environment have proven to be ineffective because the agreements depend on the consent of the parties, and parties are reluctant to consent to effective enforcement mechanisms. The General Agreement on Tariffs and Trade provides exceptions to its general trade rules where environmental concerns are implicated and has provided the impetus for a handful of cases in which the World Trade Organization (WTO) has had to address environmental issues. Because the WTO provides powerful incentives to comply with its rulings (trade sanctions), and it already provides for a mechanism for addressing environmental issues (although in a limited capacity), with minor changes, such as the creation of an advisory panel for scientific matters, it is probably the most viable avenue through which environmental issues can be addressed at the international level.

A Comparative Analysis of UK and U.S. Styles of Environmental Regulation, With Specific Emphasis on Water Pollution Enforcement

Helen Jackson[7]

Both the United States and United Kingdom's legal systems stem from the common law tradition; however, there are many instances in which the law and policy differ. The United States' system has generally taken a more 'adversarial and legislative approach' whereas the United Kingdom's approach has placed greater trust in the Environment Agency for England and Wales to enforce compliance. The United Kingdom is more concerned with bringing industries into compliance as opposed to using punitive measures for violations, but a range of sanctions are employed to bring industries into compliance: compliance is not a voluntary option. Nonetheless, the approaches of the two countries do differ in that the United States' system appears to take a more formalistic, legal approach, whereas the United Kingdom follows a more policy-oriented approach.

Application of Pesticides to Waters of the United States in Compliance with FIFRA but Inconsistently with CWA

Lisa Johnstone[8]

Today, most environmental laws seek to eliminate or minimize hazardous releases though command and control regulation. Statues such as the Clean Water Act (CWA) and the Clean Air Act require permits for the discharge of pollutants into the environment and set maximum levels these pollutants can reach in the environment. Historically, pesticides have been excluded from the reach of these two statues and have primarily been regulated by the Federal Insecticide, Fungicide, and Rodenticide

Act; however, a series of recent Ninth Circuit cases found pesticides to be a "pollutant" within the meaning of the CWA. Under this reasoning a National Pollutant Discharge Elimination System (NPDES) permit will be required anytime a pesticide is applied to water. The EPA responded to the Ninth Circuit decisions by promulgating a new rule, which excludes pesticides applied directly to water from the definition of "pollutant" and consequently the NPDES permitting system. This new rule creates ambiguity in an unambiguous statue by narrowly defining terms that were intended to be so broad that they would include "any material."

NEPA Reform in Relation to Livestock Grazing on Federal Lands in the West

Luke Marchant[9]

Congress enacted the National Environmental Policy Act of 1969 (NEPA) as the first major piece of environmental legislation in what was to become the environmental decade. NEPA was visionary for its time, but what started out as visionary has now grown to 25 pages of regulations, over 1,500 court cases, and several hundred pending lawsuits. NEPA, as interpreted by the Ninth Circuit, prevents grazing permittees from substantively intervening in litigation involving their grazing permits. NEPA was intended to foster participation, encourage the airing of different perspectives, and to draw out information from all sides. Similarly, the judicial process rests on the assumption that an adversarial process involving parties with direct, concrete interests on both side of an issue is likely to produce the best result. Denying this right to participate to ranchers, who in many case have the strongest tangible economic interests in the outcome of that litigation diminishes NEPA as well as the judicial process. NEPA should be amended to allow permittees to participate.

Deficiencies in Regulatory Application of the Clean Air Act: A Case Study

Mark Solomon[10]

The Potlatch Corporation's Lewiston, Idaho facility has consistently been one of Idaho's largest air polluters. Cancer rates in the surrounding population are over 12% higher than the Idaho norm. The estimated cancer risk from chloroform exposure alone, prior to process changes at the mill in 1993, is about 40 times higher than exposure to national background chloroform levels. Potlatch's permits are based on the outputs of the Environmental Protection Agency (EPA)-approved Industrial Source Complex Model (ISCST3) for assessing ambient air quality impacts but ISCST3 is a modified second-generation air model designed to measure building downwash effects in non-complex terrain. It is unable to account for meteorological effects consistent with a canyon environment such as daily inversions created by cooler nighttime "capping" of the canyon atmosphere. EPA-approved third generation models that more accurately predict ambient air quality in complex terrain are now available for permitting us; however, neither the Clean Air Act, EPA guidance nor state regulations require application of new models to existing permits. Until and unless a discharger applies for a Permit to Construct that triggers either New Source Review requirements for non-attainment areas or Prevention of Significant Deterioration analysis for attainment areas, no further modeling is required.

The Addition of Pollutants to the Waters of the United States: Interbasin Water Transfers and the Uncertain Scope of the NPDES

John R. Withers[11]

After a string of trial court and appeals court cases, the Second Circuit held that the interbasin transfer of turbid water from the Shandaken Tunnel into Esopus Creek constituted a discharge of pollutants subject to the National Pollutant Discharge Elimination System (NPDES) permitting program. Requiring the treatment of transferred water to comply with the effluent limitations of a permit may be prohibitively expensive. If so, the alternative is to stop using the tunnel to provide water to New York City's nine million inhabitants, an alternative that seems untenable. A similar dilemma faces the arid western states, whose 60 million inhabitants and hundreds of thousands of farmers rely every day on thousands of water transfers for their drinking and irrigation water. As the United Stated Supreme Court wrote in 2004, "it may be that construing the NPDES program to cover such transfers would … raise the costs of water distribution prohibitively, and violate Congress' specific instruction that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired."

The Emerging Role of the Endangered Species Act in the Settlement of Native American Water Rights

Brian Wonderlich[12]

The Nez Perce Water Rights Settlement of 2004 (NPWRS) "clears the way for a long-term public water policy for Idaho and . . . the Tribe" and resolves one of the largest water rights disputes in the Pacific Northwest. It is especially significant because it was reached in a basin that contains twelve stocks of endangered salmon and steelhead and where, some believe, "there is not a more complex Endangered Species Act [(ESA)] issue right now in the United States." Amongst that complexity, and arguably as a result of it, the NPWRS has become the most recent Native American water rights settlement to run up against significant ESA challenges that the parties to the settlement left unresolved. Specifically, the NPWRS seems to be testing the capacity of the federal government to live up to its duty under section 7 of the ESA to "conserve endangered species and threatened species" while still fulfilling the promise and obligation it makes in this settlement.

About the Authors (Endnotes)

[1] **Professor Barbara Cosens** *earned a B.S. in Geology from the University of California at Davis, an M.S. in Geology from the University of Washington, a J.D. from University of California Hastings College of Law in San Francisco, and an LL.M. from Northwestern College of Law at Lewis and Clark College. She is admitted to the Colorado, California and Montana State Bars. Her work in hydrothermal geology has taken her to Japan and the Philippines, and she has worked in environmental and water rights dispute resolution negotiations throughout the West.*

[2] *At the 2007 session of the Environmental and Natural Resource*

Section**, Dean Donald Burnett and Professor Barbara Cosens** *of the law faculty, made presentations at the CLE workshop, and brought along several of their students who have attended Professor Cosens environmental law course and are interested in pursuing practice in the environmental and natural resource field. Professor Cosens made a presentation in a panel discussion on environmental dispute resolution, presenting details of the multi-party negotiation over the Walker River, which crosses from California into Nevada and terminates at Walker Lake. Competing interests include three Indian tribes, preservation of nearby wilderness and national forests, a Marine Corps training center and an Army munitions storage depot. River water is withdrawn for commercial irrigation, while the water is habitat for the threatened Lahonto cutthroat trout.*

[3] **Trent Belnap** *graduated from Idaho State University with a B.A. in Psychology. He is currently a 2L at the University of Idaho, College of Law. His legal interests include family law, healthcare law, and state government.*

[4] **Matt Darrington** *received a B.A. in Political Science from the University of Utah and is currently a second year student at the University of Idaho College of Law. He intends to practice water and natural resource law upon graduation.*

[5] **Amber Ellis** *is a third year law student and James E. Rogers Scholar at the University of Idaho. She received her B.A. in English Literature from Portland State University.*

[6] **Seth L. Gordon** *is a third year law student at the University of Idaho College of Law. Mr. Gordon graduated from Boise State University magna cum laude and majored in History with an emphasis on American and European Studies.*

[7] **Helen Jackson** *graduated from the University of Leeds in England with a first class honors, LLB law degree. She was awarded the Ella Olesen Scholarship, which is a one-year scholarship open to females who have recently graduated and are from the Isle of Man to study at the University of Idaho.*

[8] **Lisa Johnstone** *is a third year law student at the University of Idaho. She graduated in 2002 from Albertson College of Idaho with a B.S. in Biology.*

[9] **Luke Marchant** *received a B.S. in Range Science from Brigham Young University. He is currently in his second year of school at the University of Idaho College of Law. After graduation, he plans to practice law in the natural resources arena.*

[10] **Mark Solomon** *is currently completing his B.S. in Environmental Science with the intention of taking his masters in the University of Idaho's new Water Resources Program.*

[11] **John Withers** *holds a master's degree in Chemical Engineering from the University of Idaho.*

[12] **Brian Wonderlich** *is a third year law student at the University of Idaho College of Law. He received his undergraduate education from the University of Idaho.*

Professor Barbara Cosens, William Fletcher, Susanne Kaye, Tyler Bair, Charissa Eichman, Sean Beck, Erica Mortensen, Jennifer Stephens, Kirstin Eidenbach, and Dean Donald Burnett.

Photography and the Environment
Advocate Cover and ENR Section Photography Contest

Murray D. Feldman
Holland & Hart, LLP

As part of the Environment and Natural Resources Section sponsorship of this issue, the Section organized a photography contest to select the cover photograph. The winning entry is a photograph of Upper Warbonnet Lake looking back toward Warbonnet Peak, taken by John Seiller. A sampling of some of the other photographs submitted is presented on these pages.

As directed by the contest announcement, the entries reflected a wide variety of subjects of interest to the Environment and Natural Resources Section in the various practice areas of the Section's members. We received entries from all over the state, depicting scenes from the Palouse prairie to the central Idaho mountains, Salmon and Snake River Canyons, aspen groves, and the Targhee backcountry near the Wyoming border. For the ENR Board, it was rewarding to communicate with so many of our Section's members in this way. We saw the diversity of landscapes and natural scenes that touched our colleagues' interests and that they were moved to photograph and share with us. It was also nice to see that our fellow practitioners are not just sequestered in their offices, libraries, or in the courtroom. Instead, they are out and about in the Idaho outdoors experiencing the environment and our state's natural resources firsthand. This deep-seated interest in the subject matter of the practice, and our ready access to so many natural areas in Idaho, is all part of what makes practicing in Idaho, and in the environment and natural resources field in particular, so special.

The photographs that we received also illustrate for us of the importance of the land and a sense of place in our practice. At times, photographs of Idaho's natural areas have played a key role in the conservation of certain places, such as Ernie Day's photographs of Castle Peak in the White Cloud Mountains and the efforts to support designation of the Sawtooth National Recreation Area, which Congress did in 1972.[1] Similarly, photographs of some of Idaho's remote backcountry areas helped persuade Congress to designate what is now the Frank Church-River of No Return Wilderness in the 1980 Central Idaho Wilderness Act.[2]

In our own practices, photographs may also document the condition of a landscape, whether it is the unique aspects of a place, or showing how an area may have been affected by environmental disruptions, ecosystem manipulation, or improper management. Photographs may also document mitigation or environmental restoration efforts. And in the litigation context, some jurists have recognized in appropriate instances the importance of the landscape or the area to the context of a case and have accepted proposals of, or initiated, a view of the specific environment that is the subject of the litigation.[3]

But more than anything, the photographs we received show us that, as Mary Austin wrote, there are places where "[n]to the law, but the land sets the limit."[4] And where in such a landscape "it is impossible to believe that one will ever be tired or old. Every sense applauds it."[5] Indeed, as Aldo Leopold wrote in A Sand County Almanac, "I am glad that I shall never be young without wild country to be young in. Of what avail are forty freedoms without a blank spot on the map?"[6] These photographs also record and share with us the sublime appeal that can be found in the natural world. Ansel Adams, the noted American landscape photographer and conservationist, observed in his autobiography: "My world has been a world too few people are lucky enough to live in—one of peace and beauty. I believe in beauty. I believe in stones and water, air and soil, people and their future and their fate."[7] As these photographs remind us, so do we.

Endnotes

[1] Sawtooth National Recreation Area Act, Pub. L. No. 92-400, 86 Stat. 612 (1972).

[2] Pub. L. No. 96-312, 94 Stat. 948 (1980).

[3] *E.g., Access Fund v. Dep't of Interior*, No. CV 98-0445-E-BLW (D. Idaho Aug. 9, 2000) (City of Rocks National Reserve).

[4] Mary Austin, The Land of Little Rain 1 (1988 ed.)

[5] Wallace Stegner, The Sound of Mountain Water 42 (1980) (describing Upper Mesa Falls on Idaho's Henrys Fork of the Snake River).

[6] Aldo Leopold, A Sand County Almanac 158 (1966 Oxford Univ. Press ed.).

[7] Ansel Adams, An Autobiography

About the Author

Murray D. Feldman *is a partner with Holland & Hart, LLP. His practice covers several environmental and natural resources law areas, including environmental impact assessment, endangered species, environmental permitting, public lands, and environmental insurance. Mr. Feldman has been admitted to practice in California, Colorado, and Idaho, and before the U.S. Courts of Appeals for the Fifth, Ninth and Tenth Circuits and the federal district courts for the District of Idaho and the Western District of Texas. Prior to joining Holland & Hart, he served as a law clerk to Justice George Lohr of the Colorado Supreme Court. He is a member of the Water Law Section and Environment and Natural Resources Law Section.*

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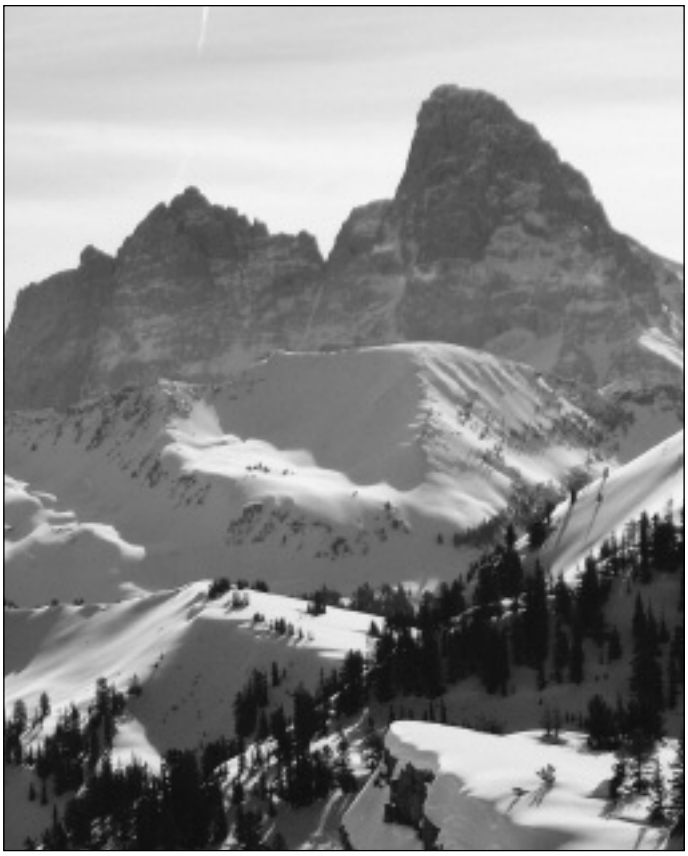

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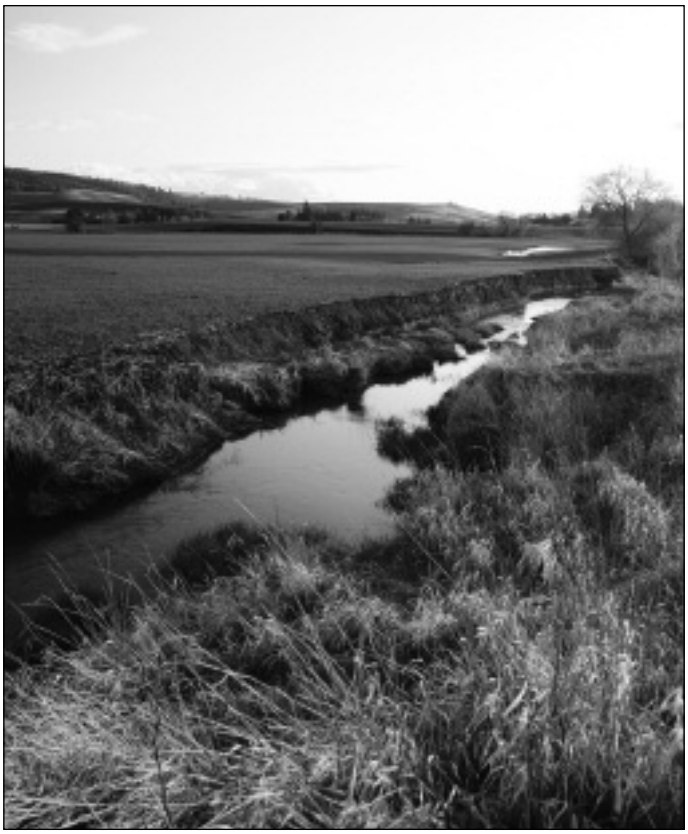
Chris Booker



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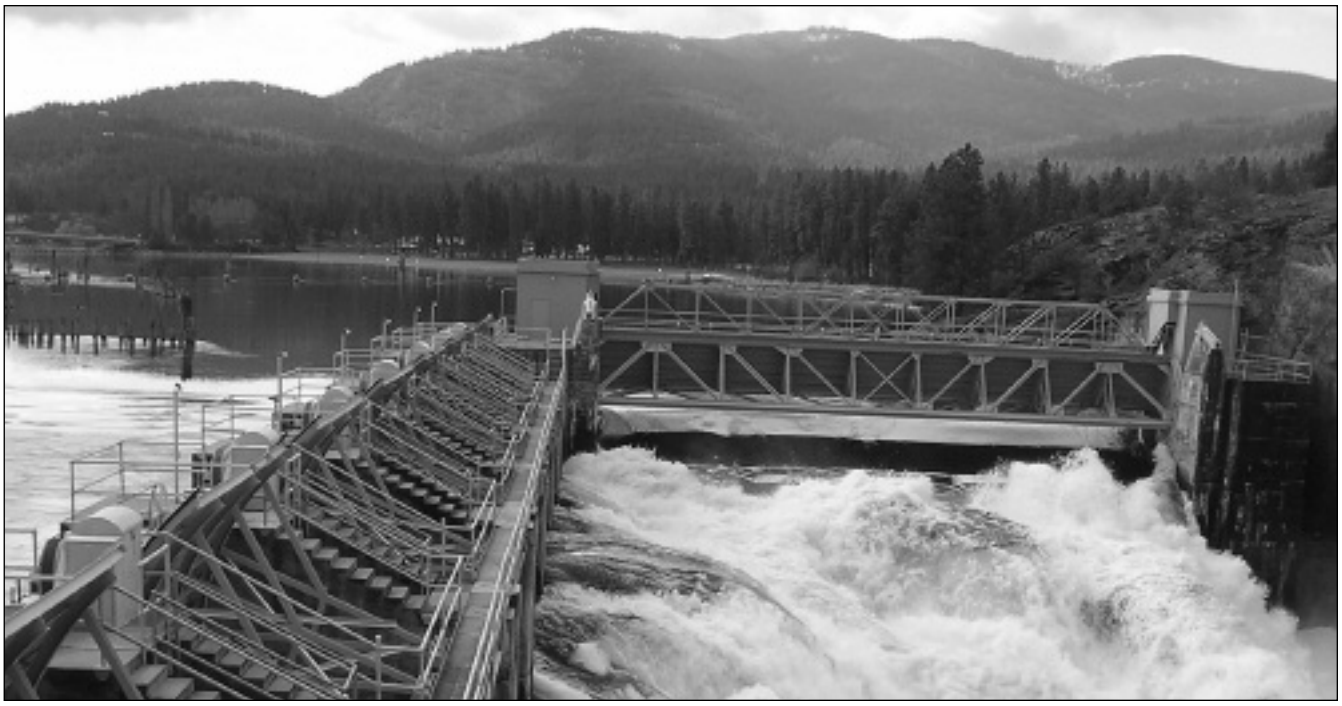

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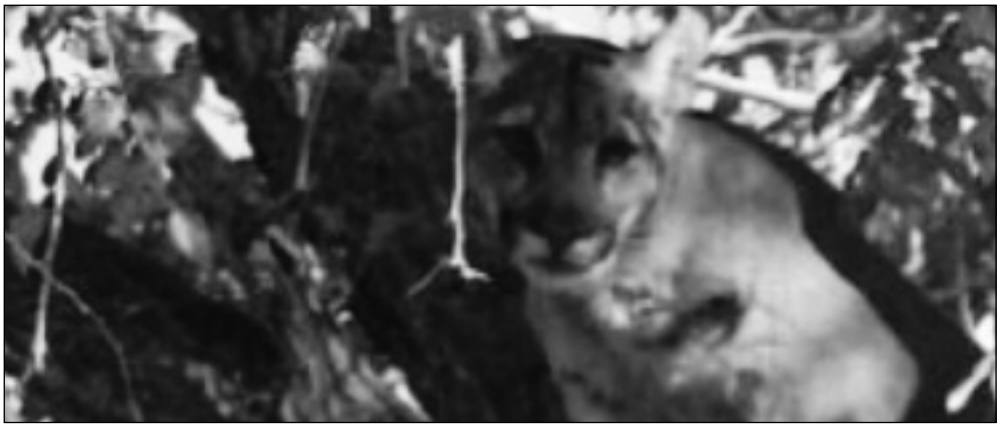


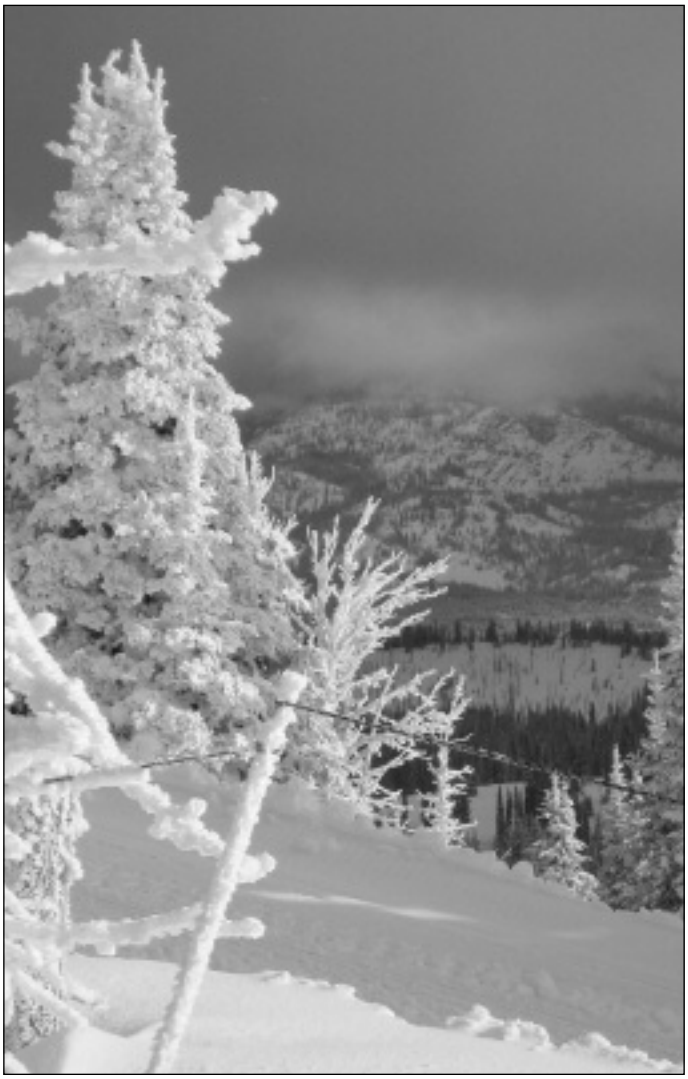
Bill Myers

Tyler Rounds

Lewis Stoddard

Christopher Nye

Suzanne Fegelein



Frank Hruban

2007 Annual Meeting
July 18-20
Continuing Legal Education Program Schedule

Wednesday Programs

1:00 p.m. to 4:15 p.m.

- **Beyond the First 50: The Status and Impact of Idaho Women Lawyers Today**—*2.5 Credits (RAC)*
- **Solo and Small Firm Forum: Hiring Staff, Succession Planning and Tips, Techniques and Tools for Dealing With E-Mail Overload**—*3.0 Credits of which .5 is ethics (RAC—2.0 Credits)*

2:15 p.m. to 4:15 p.m.

- **Adobe Acrobat and Legal Trends in Law Firm Technology**—*2.0 Credits*

Thursday Programs

8:45 a.m. to 10:15 a.m.—Plenary Session

- **Welcome from ISB President Thomas Banducci**
- **Comments from Idaho Supreme Court Chief Justice Gerald Schroeder**
- **"Results Oriented Law Firm Marketing" presentation by Alan Olson, Altman Weil, Inc. Law Firm Consulting**

10:30 a.m. to 11:30 a.m.

- **Ethics and the Environment and Natural Resources Lawyer**—*1.0 Credit of which 1.0 is Ethics Credit*
- **The Practical Implications of HIPAA: What it Means to Your Law Firm and to Your Clients Who are Employers**—*1.0 Credit (RAC)*
- **Common Ethical Pitfalls in a Real Estate Practice: Dealing with Client Expectations and Conflicts of Interest**—*1.0 Credit (RAC)*

1:45 p.m. to 3:15 p.m.

- **Tips, Tactics and Technology: What Every Lawyer Should Know about E-Discovery and the New Federal Rules**—*1.5 Credits*

1:45 p.m. to 5:00 p.m.

- **Managing a Family Law Practice**—*3.0 Credits (RAC—2.0 Credits)*
- **Golfing for Ethics**—*2.0 Credits of which 2.0 are Ethics Credit—(additional fee and pre-registration required; Hillcrest Country Club)*

4:00 p.m. to 5:00 p.m.

- **The Latest in Legal Research Online**—*1.0 Credit*
- **Managing a Government Law Office: Delivering Objective Legal Advice to a Divided Client**—*1.0 Credit of which 1.0 is Ethics Credit*

Friday Programs

8:45 a.m. to Noon

- **Lessons from the Masters: Justice Byron Johnson on the Haywood Trial, Raymond Givens on *Idaho v. U.S. and Coeur d'Alene Tribe*, and Paul (Larry) Westberg on *Anchor Life Insurance* and *Life Insurance of New York;* Two Cases Involving the "Slayer Statute"**—*3.0 Credits (RAC)*

8:45 a.m. to 10:15 a.m.

- **Recruiting, Managing, and Retaining Diversity: How Your Law Practice Can Embrace Ethnic, Gender, and Generational Diversity (and Increase Profits Along the Way)**—*1.5 Credits*
- **Cutting Edge Marketing On-line**—*1.5 Credits*

10:45 a.m. to 11:45 a.m.

- **60 Law Practice Management Tips in 60 Minutes**—*1.0 Credits*
- **Handling Client Conflicts and Avoiding Malpractice**—*1.0 Credit of which 1.0 is Ethics Credit*

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LAW DAY
MAY 1, 2007

What Is Law Day? *Established in 1957 by the American Bar Association, Law Day is a national day set aside to celebrate our legal system. Law Day programs are conducted across the country for both youth and adults and are designed to help people understand how law keeps us free and how our legal system strives to achieve justice.*

The Law Day 2007 Theme is Liberty Under Law: Empowering Youth, Assuring Democracy. This year's theme encourages us to listen to the voices of young people and consider how the law can better serve their needs and interests, enabling them to use their knowledge and skills to effectively make their voices heard within our democracy.

Fourth District Bar Association

Court of Appeal's—Oral Argument 101: On May 1, the Idaho Court of Appeals held the oral argument for a northern Idaho murder case at the Borah High School Auditorium. Borah High School's entire senior class observed this oral argument and studied summaries of the parties' briefs in their government classes. Additionally, several local attorneys attended these government classes to field questions about the procedural and substantive aspects of the case. Following oral argument, the students had the unique opportunity to ask the Idaho Court of Appeals and counsel for the litigants questions about the judicial process and appellate advocacy.

The 6.1 Challenge: Modeled after *Idaho Rule of Professional Conduct 6.1* concerning the number of pro bono hours an attorney should handle during a year, this year's *6.1 Challenge* represents a friendly competition to recognize and encourage pro bono and public service from law offices within the Fourth District. The panel, comprised of Idaho Federal District Chief Judge B. Lynn Winmill, 4th District Judge Ronald J. Wilper, Idaho Supreme Court Justice Linda Copple Trout, Boise Mayor David H. Bieter, and Idaho Statesman Executive Editor Vicki Gowler, determined the winning team/firms by evaluating the quality and type of contributions and the number of hours the office contributed to low-income people through pro bono work and to the community through public service during the last year. The winner of the Pro Bono Awards were **Robert Aldridge**, a sole practitioner and **Perkins Coie LLP**, a regional law firm.

Liberty Bell Award: Every year, the Liberty Bell Award acknowledges outstanding community service by an individual in the local community. The Liberty Bell Award recognizes a person or persons who have:(1) promoted a better understanding of the rule of law, (2) encouraged a greater respect for law and the courts, (3) stimulated a sense of civic responsibility, and (4) contributed to good government in the community. The 2007 Liberty Bell Award recipient was the Hon. Charles Hay. Judge Hay started the Ada County Youth Court in 1991. It was the first of its kind in Idaho. The purpose of the court is to educate young people about the justice system and provide humane and creative consequences for first-time offenders, involving their families and the community in a network of corrective support. Judge Hay and his wife Bobbi, the 1996 Liberty Bell Award recipient, have devoted countless hours to the success of the Court.

Law Day School Outreach Program: Conducted in the classrooms from April 2 – May 4, attorneys were matched with teachers in elementary through high school in Fourth District schools. The attorneys spoke in classes about legal careers and law-related topics. They used lesson plans created for grades K-12 to expand the students' knowledge of the legal system and to increase their understanding of the law.

Ask-a-Lawyer Call-in Program: **May 1, 2007,** this program is very popular in the community with over 350 callers during last year's program. The general public can call in on three phone lines to speak to an attorney about a variety of legal matters. Attorneys and callers use only first names to remain anonymous. Calls are limited to 15 minutes. The phone numbers were provided by Cricket. Calls were taken from 5:00 a.m. – 4:00 p.m. If an attorney can't answer the question immediately, a message will be taken and the call will be returned within 24 hours.

Fifth District Bar Association

Ask-a-Lawyer—For "Law Day," the Fifth District Bar sponsored an Ask-a-Lawyer program on May 10, 2007. Attorneys volunteered to meet with members of the public for a free, brief consultation. They were able to help 33 people. The attorneys who participated were: Dick Greenwood, Tom Kershaw, Dan Taylor, Karen McCarthy, Laura O'Connell, Stacey Gosnell, and Mike McCarthy. Tina Young and Shelli Tubbs also helped with taking information. The program was so successful they plan to make it an annual "Law Day" event, perhaps expanding it to adjoining counties.

Sixth District Bar Association

Liberty Under Law: For 2007 Law Day, Judges Randy Smith and Bryan Murray, probation officers Jessie Thompson-Kelly and Matt Olsen and moderator, Kay Merriam, Ph.D, participated in a one hour panel discussion on juvenile justice and related youth behaviors. The program aired on the Pocatello Public Access Channel 12 throughout May. The goal of this program was to engage the youth in activities and encourage them to think about the law, their behaviors, and their peers. For more questions or for a copy of the panel discussion on DVD, please contact Kay Merriam at kcmerriam@yahoo.com or at 232-4033.

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JULY 2007 IDAHO STATE BAR EXAMINATION APPLICANTS
(as of May 17, 2007)

Listed below are the applicants who have applied to sit for the July 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 July 14, 2007. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

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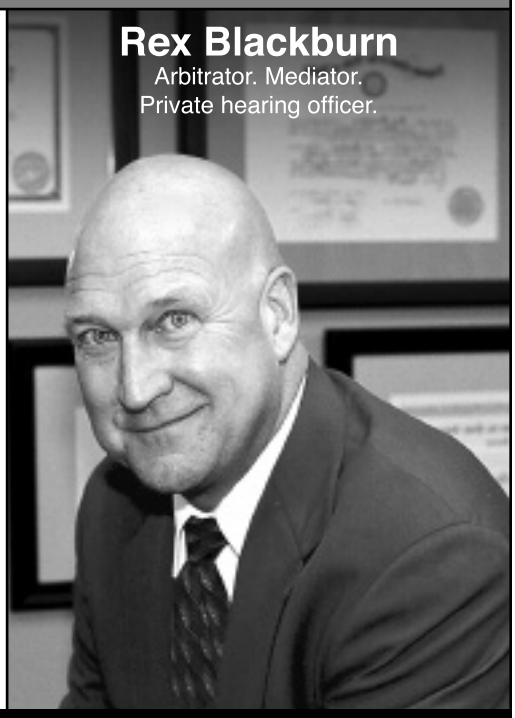

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6.1 Challenge

The Law Day 2007 reception at Boise's Rose Room was the scene for the presentation of the Fourth District Bar's first ever 6.1 Challenge awards. The 6.1 Challenge is based on Idaho Rule of Professional Conduct 6.1 concerning lawyers' responsibility to provide *pro bono* service. The Challenge represents a friendly competition between law offices to recognize and encourage *pro bono* and public service.

Fourteen law firms in the Fourth District submitted entries to the 6.1 Challenge detailing the activities and hours each firm committed to *pro bono* and public service between May 1, 2006 and April 15, 2007. A blue-ribbon panel served as judges for the friendly competition. **Vicky Gowler**, Idaho Statesman Executive Editor, Boise Mayor **Dave Bieter**, Chief U.S. District **Judge Lynn Winmill**, Fourth District **Judge Ronald Wilper** and Idaho Supreme Court **Justice Linda Copple Trout** reviewed the applications and selected the winners.

Vicki Gowler, speaking for the judges, praised the contributions of the competing offices, "the forms were filled with descriptions of wonderful service." Gowler noted the wide variety of legal services contributed to individuals and non-profit organizations and the community service represented by attorney service on boards for the arts, community service groups, universities, and schools, as well as attorney volunteerism in projects such Rake Up Boise and the Boy Scouts, and at schools and food banks.

The judges admit theirs was a difficult task. Ultimately they chose two winners: **Robert Aldridge**, a sole practitioner and **Perkins Coie LLP**, a regional law firm.

Presenting the award to **Robert Aldridge**, Gowler stated, "his *pro bono* and public service in the past year was simply outstanding." If anything, that is an under statement. Aldridge's submission recorded his donation of several hundred *pro bono* hours assisting nonprofits and individuals with tax, estate planning, and business law services. Aldridge counseled people on Medicaid issues, prenuptials agreements, wills, insurance claims and on property tax issues. In addition Aldridge provided hours of work supporting the legal profession, including reviewing conservator and guardianship laws and setting up a pilot project to monitor guardians and conservators, teaching classes on ethics and coming up with legislative solutions to property tax issues. Aldridge's 6.1 Challenge award is the latest in a long series of recognition for his service including the 2004 AARP Idaho Andrus Award for community service, and the Spirit of Philanthropy Award for his work to obtain rights for the elderly and disabled.

Turning to the large firm winner, **Perkins Coie LLP**, Gowler announced, "the application was impressive in several ways: the high percentage of attorneys involved in *pro bono* and public service, the hours committed to such service and the range of service provided." Perkins Coie is an international firm with more than 600 lawyers in 15 offices across the United States and China. The Boise office opened in 1997 and currently has 13 attorneys who provide legal services in general commercial litigation, environment and natural resources, labor and employment, business transactions, real estate and government contracts. Describing their *pro bono* service, Gowler stated the attorneys "did everything from providing free legal advice to senior citizens, to representing children in court, to helping employers with work issues, to defending the civil rights of prisoners. They also served on numerous non-profit boards." When asked how Perkins Coie creates a culture that inspires this kind of commitment to *pro bono* and public service, Christine Salmi, the firm's liaison with the Idaho Volunteer Lawyers Program stated, "Our firm encourages and strongly supports *pro bono* work and public services activities. A major theme of our *pro bono* program is independence—attorneys are urged to choose and develop projects that match their personal beliefs, philosophies and interests." Salmi also noted that while the firm is proud to be one of the first recipients of the 6.1 Challenge award, they "recognize that there are many Idaho attorneys who consistently dedicate their time and skills to performing *pro bono* work and public service activities. We applaud those attorneys for their honorable commitment to our community."

6.1 Challenge Judges - Fourth District Judge Ronald Wilper, Idaho Supreme Court Justice Linda Copple Trout, Vicky Gowler, Idaho Statesman Executive Editor, and Boise Mayor Dave Bieter.

Salmi's sentiment is shared by everyone who worked on the 6.1 Challenge. In fact, in addition to the winners, the judges specifically recognized the *pro bono* service the **Ada County Prosecutor's Office**, the only government office entry, because of the extra care government attorneys must take to avoid conflicts of interest when providing *pro bono* service.

The 6.1 Challenge has already begun for 2008. Anyone needing additional information may contact Mary Hobson, Idaho Volunteer Lawyers Program Legal Director at 334-4510 or mhobson@isb.idaho.gov.

Soundstart Project
IVLP's newest Grant

Soundstart will work to expand legal services provided to low-income women and families by providing education, advice and consultation, and direct legal services before patterns of disruption, insecurity, and violence develop to the point of crisis. Using volunteer attorneys, IVLP will reach out to provide a cluster of legal services geared to the needs this population. IVLP will provide these services in collaboration with community groups who already work with this population, as well as with individual lawyers and lawyer groups well suited to provide these services.

The Idaho Law Foundation's Idaho Volunteer Lawyers Program (IVLP) received $25,000 from the Idaho Women's Charitable Foundation (IWCF) to put the Soundstart Project in motion. According to their website, IWCF, "was formed in 2001 to expand the number of Idaho women involved in charitable giving and to increase the impact of their giving." The grant received from IWCF will fund IVLP's new Soundstart project.

For more information about IVLP or the Soundstart project, contact Carol Craighill or Mary Hobson at 334-4500.

Carol Craighill, IVLP Director and Mary Hobson, IVLP Legal Director receive Soundstart grant check from the Idaho Women Charities Foundation Project.

IDAHO LAW FOUNDATION

Helping the profession serve the public

The Idaho Law Foundation has received generous donations

In Memorian
Jess Hawley

from
Mark and Pamela Salon
Brent Lloyd

IDAHO LAW FOUNDATION

Helping the profession serve the public

The Idaho Law Foundation has received generous donations

In Memorian
Hon. John Hohnhorst

from
Hon. John and Mrs. Linda Butler

Idaho Mock Trial Champions
Compete in National Tournament

Moscow's Logos Secondary School, the 2007 Idaho High School Mock Trial champions, competed in the National High School Mock Trial Championship in Dallas on May 11 and 12. The team won three of the four rounds in which they competed, placing 12th overall among 40 teams.

The one round Logos lost was to Georgia, who went on to win the national mock trial title. According to Chris Schlect, Logos teacher coach, the Georgia coach shared that the Logos team was their most difficult adversary in the tournament.

In addition to an impressive team showing, Emily Gray, one of the Logos team members, received individual recognition for her outstanding performance as a witness. Emily was one of 15 to be recognized out of the 500 participants who competed in witness roles.

For information about the mock trial program, please contact Carey Shoufler, LRE Director, at 334-4500 or cshoufler@isb.idaho.gov.

Logos Secondary School, Moscow. 2007 Idaho High School Mock Trial Champions.

2nd Annual CLE
Presented at the 2007 Annual Meeting

Lessons from the Masters

The Continuing Legal Education Committee of the Idaho State Bar is responsible for providing relevant programs that will enable practitioners at all stages of practice to hone their professional skills. Recognizing that every profession has "masters," senior members who have experiences well worth sharing and preserving, the Committee inaugurated a series of presentations entitled: "Lessons from the Masters," at the Idaho State Bar's Annual Meeting in 2006.

The inaugural program featured *Scott W. Reed*, Coeur d'Alene, *Allen R. Derr,* Boise, and *Fred W. Hoopes*, Idaho Falls. The initial set of presentations was very well-received and, because the annual meeting proved an ideal forum for attorneys from throughout Idaho, the Committee decided to offer this series each year at the annual meeting.

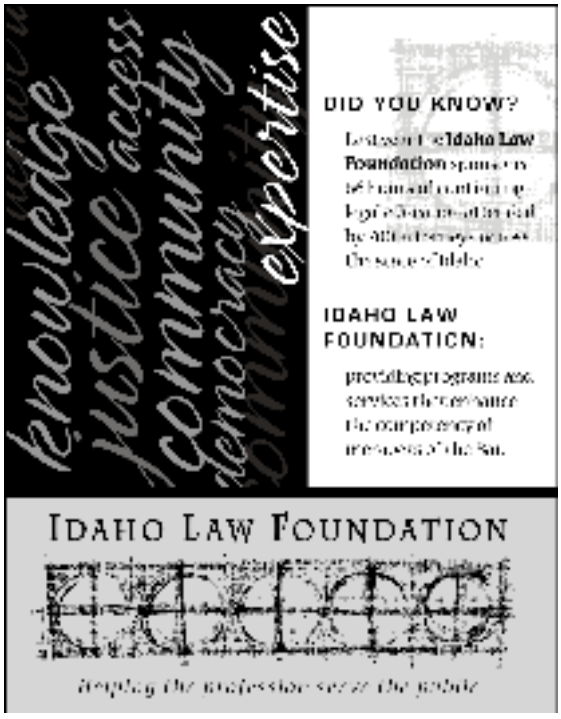
This year, the Committee has assembled another stellar line-up for a program to be presented on Friday morning, July 20, 2007, at the Idaho State Bar's Annual Meeting in Boise.Below is a brief description of the presentations.

First, we will hear from **Justice Byron Johnson**, as he explains how one of the most riveting chapters in Idaho's rich legal heritage – the 1907 trial of "Big Bill" Haywood for the murder of Idaho Governor Frank Steunenberg – remains relevant to today's practitioners. In this, the centennial year of the trial, Justice Johnson will present "Lessons the Trial Lawyer Can Learn from the Haywood Trial."

Next, **Raymond C. Givens**, Coeur d'Alene, will discuss *Idaho v. U.S. and Coeur d'Alene Tribe*, 533 U.S. 262 (2001), 210 F.3d 1067 (9th Cir. 2000), 95 F. Supp.2d 1094 (D. Idaho 1998).This is the landmark case in which the United States Supreme Court held that the Coeur d'Alene Tribe/United States owned Lake Coeur d'Alene and the St. Joe River within the Coeur d'Alene Reservation.

Our third master will be **Paul L. (Larry) Westberg**, Boise, who will discuss two rare "civil murder" cases, involving the Slayer Statute.Both interpleader actions were filed in federal court.One case settled, and Mr. Westberg won the other case on a jury verdict.

Please plan on joining your colleagues at the annual meeting for what promises to be another memorable and inspiring "Lessons from the Masters" series.



2007
ISB Annual Meeting Sponsors

·*Attorney Liability Protection Society*

·*LexisNexis*

·*Moreton & Company*

·*University of Idaho College of Law*

·*Wells Fargo Private Client Services*

2007 Annual Meeting Schedule
Boise, Boise Centre on the Grove

Wednesday, July 18

8:30 a.m. - 3:00 p.m.	Board of Commissioners Meeting
11:30 p.m. - 5:30 p.m.	**Registration & Vendor/Exhibit Hall Open**
1:00 p.m. - 4:15 p.m.	Concurrent CLE Programs • ***Beyond the First 50: The Status of and Impact of Idaho Women Lawyers Today*** • ***Solo and Small Firm Forum*** • ***Adobe Acrobat and Legal Trends in Law Firm Technology***
4:30 p.m. - 5:30 p.m.	Idaho Legal Education in the 21st Century: A Conclave Summary
5:30 p.m. - 7:00 p.m.	**President's Hosted Reception**

Thursday, July 19

7:30 a.m. - 5:30 p.m.	**Registration & Vendor/Exhibitor Hall**
7:30 a.m. - 8:30 a.m.	Litigation Section Annual Meeting/Breakfast
7:30 a.m. - 8:30 a.m.	District Bar Presidents Breakfast (by invitation)
7:45 a.m. - 8:30 a.m.	LexisNexis Code Index Enhancement Meeting
8:45 a.m. -10:15 a.m.	**Plenary Session—"Results Oriented Law Firm Marketing"** **Alan Olson, Altman Weil Law Firm Consulting**
10:30 a.m. -11:30 a.m.	Concurrent CLE Programs • **Ethics for the Environmental Law Attorney** • **The Practical Implications of HIPAA:** **What it Means to your Law Firm and Your Clients Who are Employers** • **Common Ethical Pitfalls in a Real Estate Practice**
10:30 a.m. -3:00 p.m.	Idaho Law Foundation Board of Directors Meeting
12:00 p.m. -1:15 p.m.	**Idaho Law Foundation and Service Awards Luncheon**
1:45 p.m. -5:00 p.m.	Concurrent CLE Programs • **Golfing for Ethics (Hillcrest Country Club)** • **Managing a Family Law Practice** • **Tips, Tactics and Technology: What Every Lawyer** **Should Know About E-Discovery and the New Federal Rules** • **The Latest in Legal Research Online** • **Managing a Government Law Office**
5:30 p.m. -7:00 p.m.	**Hosted Reception acknowledging Idaho Law Foundation donors**
7:00 p.m. -9:30 p.m.	Dinner and Entertainment

Friday, July 20

7:30 a.m. -12.00 p.m..	Registration & Vendor/Exhibit Hall
7:30 a.m. -8:30 a.m.	**50-65 yr. Attorney Recognition Breakfast**
8:45 a.m. -12:00 p.m.	Concurrent CLE Programs • **Lessons From the Masters** • **Cutting Edge Marketing Online** • **60 Law Office Management Tips in 60 Minutes** • **Handling Client Conflicts and Avoiding Malpractice** • **Recruiting, Managing and Retaining Diversity:** **How Your Law Firm Can Embrace Ethic, Gender and Generational Diversity** **(and Increase Profits Along the Way)**
12:15 a.m. -1:15 p.m.	**Distinguished Lawyer Luncheon**
1:45 p.m.	Conference adjourns

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

Regular Fall Terms for 2007

Coeur d'Alene ..... September 4 and 5
Lewiston ..... September 6 and 7
Idaho Falls ..... October 3 and 4
Pocatello ..... October 5
Boise ..... October 10 and 12
Boise ..... November 2 and 5
Twin Falls ..... November 7, 8, and 9
Boise ..... December 3, 5, 7, 10, and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 Fall 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

Regular Fall Terms for 2007

Boise . . . . . August 14, 16, 21, and 23
Coeur d'Alene (Northern Idaho term)
. . . . . September 10, 11, 12, 13, and 14
Hailey (Eastern Idaho term)
. . . . . October 3, 4, and 5
Boise . . . . . October 11
Boise . . . . . November 6, 8, 13, and 15
Boise . . . . . December 11 and 13

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 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 and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(*UPDATE 05/01/07*)

CIVIL APPEALS
INSURANCE

1. Whether the district court committed error in determining the restrictive endorsement pertaining to outbuildings is unambiguous.

Miguel Arreguin v. Farmers Insurance Company
S.Ct. No. 33305
Supreme Court

2. Should there be prejudgment interest on an award of benefits for damages recoverable under an underinsured motorist policy, when the amount is not liquidated and not certain until the Arbitration Award is announced?

Arden Cranney v. Mutual of Enumclaw Insurance
S.Ct. No. 33501
Supreme Court

SUMMARY JUDGMENT

1. Whether appellant's acceptance of the settlement agreement in court and under oath judicially stops him from claiming his attorney was negligent in recommending such acceptance.

Timothy S. Heinze v. Charles B. Bauer
S.Ct. No. 33579
Supreme Court

POST-CONVICTION RELIEF

1. Did the court give Crider adequate specific notice of its reasons for summarily dismissing certain of Crider's claims for post-conviction relief?

Gerhard Crider v. State of Idaho
S.Ct. No. 31983
Court of Appeals

2. Whether the court erred by summarily dismissing the petition for post-conviction relief as untimely.

Timothy Fox v. State of Idaho
S.Ct. No. 33262
Court of Appeals

3. Did the district court err in summarily dismissing Kuehl's claim that he received ineffective assistance of counsel when counsel advised him not to testify?

Darryl Robin Kuehl v. State of Idaho
S.Ct. No. 30786
Court of Appeals

4. Did the court err when it summarily dismissed Nunez's petition for post-conviction relief because there existed genuine issues of fact involving trial counsel's failure to pursue a motion to suppress?

Adriel Nunez v. State of Idaho
S.Ct. No. 33224
Court of Appeals

5. Did the court err in summarily dismissing Priest's untimely successive petition for post-conviction relief?

Steven Priest v. State of Idaho
S.Ct. No. 31267
Court of Appeals

6. Was the court's factual finding that Walker did not request his attorney to file an appeal supported by substantial evidence in the record?

Jesse Walker v. State of Idaho
S.Ct. No. 33221
Court of Appeals

7. Was the district court's opinion and order providing notice of dismissal insufficient to summarily dismiss Warden's claim that his counsel was ineffective for erroneously advising him there was enough evidence to convict him of driving under the influence?

Robert Warden v. State of Idaho
S.Ct. No. 33032
Court of Appeals

PROPERTY

1. Whether the 1981 Covenants, Conditions and Restrictions of Birdwood Subdivision are valid such that Bulotti Construction cannot subdivide Lot 15.

Birdwood Subdivision Homeowner's Assoc. v. Bulotti Construction
S.Ct. No. 33391
Supreme Court

2. Whether the district court erred in not allowing the statutory right of a junior mortgage redemption to redeem the senior mortgages and be "subrogated to all the benefits of the superior lien" as provided by I.C. § 45-114.

Lynn Allan Jenkins v. Brett S. Barsalou
S.Ct. No. 32522
Supreme Court

3. Did the Valley County Board of Commissioners have authority to consider the altered application for the planned development without first obtaining a recommendation from the Planning and Zoning Commission?

Neighbors for a Healthy Gold Fork v. Valley County
S.Ct. No. 33552
Supreme Court

CONTRACT

1. Was the covenant not to compete overbroad and unenforceable under Idaho law?

Stanley Bybee v. Denise Isaac
S.Ct. No. 33251
Supreme Court

HABEAS CORPUS

1. Did the court abuse its discretion in dismissing Baldwin's petition for writ of habeas corpus?

Darrell Baldwin v. Olivia Craven
S.Ct. No. 33751
Court of Appeals

2. Did the court err by misinterpreting Madison's complaint?

Carl Madison v. Olivia Craven
S.Ct. No. 33710
Court of Appeals

LICENSE SUSPENSION

1. Does the presence of Carboxy-THC indicate a failed evidentiary test pursuant to I.C. § 18-8002A?

Kyle Reisenauer v. Dept. of Transportation
S.Ct. No. 33678
Supreme Court

CRIMINAL APPEALS
APPOINTMENT OF COUNSEL

1. Did the court abuse its discretion by denying Weliever's statutory right to appointment of counsel for his Rule 35 motion because it erroneously found that Weliever had appointed counsel at the time he filed the motion?

State of Idaho v. Robert Henry Weliever
S.Ct. No. 32270
Court of Appeals

PLEAS

1. Did the prosecutor violate the terms of the plea agreement by arguing against her own agreed-upon sentencing recommendation?

State of Idaho v. Tiara Jones
S.Ct. No. 33051
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in granting the motion to suppress where the evidence at the suppression hearing established the stop of Ash's truck was supported by probable cause to believe he had violated the law by entering the highway without signaling?

State of Idaho v. George Ash
S.Ct. No. 33226
Court of Appeals

2. Did the district court err in denying Gomez's motion to suppress evidence found in a warrantless search of his vehicle?

State of Idaho v. Lawrence Gomez
S.Ct. No. 33146
Court of Appeals

3. Did the court err in denying Schmitt's motion to suppress and in finding his detention by police was not unlawful?

State of Idaho v. Dylan Werner Schmitt
S.Ct. No. 32641
Court of Appeals

SUBSTANTIVE LAW

1. Whether I.C. § 19-2604 grants Idaho courts the authority to expunge an adult offender's criminal record.

State of Idaho v. Kraig D. Parkinson
S.Ct. No. 33333
Supreme Court

2. Did the court err in ruling that Schmoll's Montana felony DUI conviction substantially conforms to the provisions of I.C. § 18-8004 and qualifies as a substantially conforming foreign criminal felony violation for purposes of enhancement pursuant to I.C. § 18-8005(7)?

State of Idaho v. Christian F. Schmoll
S.Ct. No. 33349
Court of Appeals

DUE PROCESS

1. Was Heineman's right to due process violated when the state elicited testimony of Heineman's post-*Miranda* silence?

State of Idaho v. David Heineman
S.Ct. No. 33016
Court of Appeals

2. Was Wolfrum denied his right to due process by the creation of a fatal variance between the acts charged in the information and the acts delineated in the jury instructions?

State of Idaho v. Edward John Wolfrum
S.Ct. No. 31557
Court of Appeals

EVIDENCE

1. Was there any evidence that Beebe intentionally used fear or force to overcome the will of the store clerk such that a conviction for attempted robbery can be sustained?

State of Idaho v. Sky J. Beebe
S.Ct. No. 33007
Court of Appeals

2. Did the court abuse its discretion in determining that evidence alleging one of the victims had made a prior false allegation of a sex crime was not admissible under I.R.E. 412?

State of Idaho v. Joseph Perry
S.Ct. No. 33062
Court of Appeals

RESTITUTION

1. Did the court abuse its discretion in ordering Gonzales to pay $369 in restitution for non refundable tuition expenses the victim lost after she dropped out of an educational program due to anxiety caused by Gonzales' crime?

State of Idaho v. Jose Alfred Gonzales
S.Ct. No. 31976
Court of Appeals

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

Highlights of the 2007 Rule Changes

Catherine Derden
Staff Attorney and Reporter
Idaho Supreme Court Rules Advisory Committees

Supreme Court Rules Advisory Committees

The reports of the various Supreme Court Advisory Committees, recommending proposed changes to the rules, are submitted to the Idaho Supreme Court, which reviews each proposal. The 2006-2007 proposals have resulted in the ordering of the following rule changes, which will go into effect on July 1, 2007, unless otherwise noted. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at www.isc.idaho.gov.

Appellate Rules

The Appellate Rules Advisory Committee, chaired by Chief Justice Gerald Schroeder, met on January 19, 2007, and the recommendations of this Committee resulted in the following rule changes.

Rule 11. Appealable judgments and orders. While I.C. § 7-919 provides that an appeal may be taken from certain arbitration orders, some of the orders listed in this statute are not final orders that are appealable as a matter of right under I.A.R. 11. As a practical matter, these orders are final with respect to arbitration; thus, Rule 11 has been amended to include orders made appealable under the Uniform Arbitration Act.

Rule 12.1. Permissive appeal in custody cases. The purpose of this rule is to expedite appeals involving the custody of a child, termination of parental rights or adoption, by allowing them to go straight to the Supreme Court from the magistrate court; however, the appeal time is still taking too long in some instances. Thus, this rule has been amended to provide that these appeals shall proceed in an expedited manner. This means the appeal is set for oral argument and then the briefing schedule is set by working backwards from that date.

Rule 14. Time for filing an appeal. The amendment to this rule is simply a correction to the reference to the period of retained jurisdiction, as it is no longer 120 days.

Rule 19. Request for additional transcript or clerk's or agency's record. The rule has been repealed and a new one substituted that simply reorganizes and clarifies the information in the rule. The rule has been divided into subsections addressing the situations where the appellant has requested less than a standard transcript and record, no transcript at all, or where the respondent simply wants to add to the standard transcript and record. It also addresses who bears the costs in each situation. This is information that was formerly in the rule, but hopefully the new format will make it easier to follow.

Rule 23. Filing fees and clerk's certificate of appeal- waiver of appellate filing fee. A statement has been added that there is no filing fee for state and county agencies. The reference to the automatic waiver for those represented by Idaho Legal Aid Services has been set out in a new subsection.

Rule 25. Reporter's transcript – contents. Currently there are a large number of requests to augment the record in criminal appeals with the transcript of the change of plea hearing. Since these requests are being granted and it is difficult and often time consuming for the reporter to go back months later and prepare these transcripts, the transcript of the change of plea hearing, as well as the sentencing transcript, have been added to the standard transcript in criminal appeals. The appellant is asked to designate less than the standard transcript if these transcripts are not needed.

Rule 28. Preparation of clerk's or agency's record –content and arrangement. The ROA, Register of Actions, has been added as part of the standard record in civil cases just as it is part of the standard record in criminal cases. This will be especially helpful in post-conviction cases.

Rule 32. Motions –time for filing-briefs. Currently motions are held in the clerk's office for fourteen days in case an objection is filed. Since the body of the motion is not reviewed in the clerk's office, this is true even though the movant might state the other party has been contacted and has no objection. The rule has been amended to provide for a certificate of uncontested motion that will alert the clerk's office to the fact there is no objection and avoid delay in obtaining a ruling on the motion. The wording of the certificate is provided in the rule.

Rule 34. Briefs on appeal- number- length- time for filing-service of briefs. Currently the clerk's office is scanning all briefs for an electronic repository and for archive purposes. While it takes little time to scan a brief, the time consuming part of this endeavor is taking off and reattaching the comb binding. Having an unbound copy of the brief would speed up the scanning process and be of little cost to the parties. Thus, a requirement has been added that in addition to the original and bound copies, the parties submit one unbound, unstapled copy of the brief. The number of bound copies has been reduced from nine to six.

Rule 34.1. Electronic brief, optional. This is a new rule allowing for the optional filing of an electronic copy of the brief in addition to the hard copies. Several years ago the federal courts went to electronic filing and it is likely the Idaho courts will go to electronic filing at some point in the future. Currently the clerk's office is attempting to scan briefs so that the court has an electronic copy. The electronic brief would make it easier for the court to do a word search and make the briefs more accessible to the public. The electronic brief may be sent to a special email address that has been set up for this purpose or may be submitted on a CD and either way the transmittal letter accompanying the hard copies of the brief must advise the clerk's office of the electronic filing. An electronic copy must also be served on each party to the appeal. The electronic copy must be in searchable PDF format so that it cannot be altered and it may not contain

any material that is not included in the original hard copy. The email attachment or CD must be free of viruses. The new rule contains a certificate of compliance that must be attached, stating that the brief has been submitted in compliance with the requirements of the rule.

Rule 44.1. Expedited Review for appeals brought pursuant to I.C. § 18-609A. A new rule 44.1 was adopted to conform to the procedural requirements set out in I.C. § 18-609A as amended in 2007. This statute addresses the need for parental consent for a minor's abortion and sets out a judicial bypass to the consent requirement. An appeal from a denial of a petition must be heard by the Supreme Court within 48 hours of the notice of appeal being filed, excluding weekends and holidays.

Child Support Guidelines

The Child Support Guidelines Advisory Committee, chaired by Judge Michael Redman, met on September 22, 2006, with the recommendations of this Committee resulting in the rule changes set out below. The Child Support Guidelines are found in Rule 6(c)(6) of the Idaho Rules of Civil Procedure.

Section 7. Adjustments to gross income. In 2000 the guidelines were amended to provide that in a proceeding to modify an existing award, children of the party requesting the modification, who are born or adopted after the entry of the existing order, shall not be considered. The rationale was that the decision to have additional children after an order of support is entered should not be a basis for asking that you receive more support or pay less support. However, the additional children of the nonmoving party were still considered. The 2007 amendment provides language that children who are born or adopted by either party after the existing order will not be considered in a proceeding to modify support so that the restriction applies to both the moving and nonmoving party.

Section 8 (c). Adjustments to the award of child support. Tax benefits. The tax benefit exemption tables have been updated as well as the examples following the table to reflect current tax laws.

Section 10 (d). Computations. Income over $300,000. This subsection was updated to refer to income over $300,000 since the guidelines now calculate support up to a combined income of $300,000.

Civil Rules

Rule 16(o). Supervised access to children. Part (ii) under Subsection (f) on qualifications of providers was amended to clarify that in regard to criminal history checks a denial based on a criminal offense, whether conditional or unconditional as defined by I.C.A.R. 47, precludes employment as a supervised access provider.

Rule 85. Small Lawsuit Resolution Act Procedures. To improve the gathering of statistical information on cases initiated under the Small Lawsuit Resolution Act, this rule has been amended to provide for a case information cover sheet that must be filed when the case is initiated, when a request for trial de novo is made and again when an order is entered. The effect of the rule is to now place the burden on the parties using the provisions of this Act to file this information sheet so that statistical information can be gathered. The case information sheet, which can be obtained from the clerk, is very short and simply requires the parties to check a few boxes.

Court Administrative Rules

Rule 32. Records of the Judicial Department-examination and copying- exemption from and limitations on disclosure. The previous Rule 32 was repealed and a new Rule 32 adopted, in accordance with recommendations by the E-Records Committee. The main objective of the Committee was to address access to records that are in electronic form, access to compiled information, and other issues arising from swiftly-changing court and record keeping technology.

The new subsection (e) deals with access to records maintained in electronic form. It lists the records that will be available in electronic form from terminals at court facilities or through the Internet. It also restricts access to certain personal identifying information contained in court records.

The new subsection (f) allows members of the public to request compiled information consisting solely of information that is not exempt from disclosure. It also allows requests for compiled information including information to which public access has been restricted; decisions on such requests shall be made by the Supreme Court.

The statement of policy in subsection (a) has been revised. In addition, the list of records exempt from disclosure, which will now be in subsection (g), has been amended. The rule now makes clear that unreturned arrest warrants or summonses may be disclosed by law enforcement agencies at their discretion. Applications, orders, recordings and reports pertaining to wiretaps and other interceptions of communications are made exempt from disclosure, in keeping with existing statutory provisions. In addition, bulk distribution of electronic data is not allowed, but the Supreme Court, in its discretion, may grant requests for such distribution for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes.

The provision allowing parties to an action and their attorneys to have access to information in the court file that is otherwise exempt from disclosure has been clarified to reflect that such access is limited by the provisions of subsection (g) relating to adoption records, parental termination records, documents filed or lodged with the court in camera and the family law case information sheet.

Rule 47. Criminal History Checks. The proposed changes to this rule are the result of recent legislative action, requiring a criminal history check on persons applying to be a family court services coordinator, supervised access providers, coordinators and staff members of any guardian ad litem program, as well as persons volunteering to serve as guardian ad litems in such programs. Except for those who are volunteers, the rule provides for the conditional denial of an application and exemption review process with regard to certain offenses.

Criminal Rules

The Criminal Rules Advisory Committee, chaired by Justice Roger Burdick, met on January 20, 2006, and appointed a subcommittee to work on proposed amendments to Rule 11 on plea

advisories, and a second subcommittee to work on proposed amendments to Rule 16 on discovery. The Committee met again on November 13, 2006, to consider the proposals and as a result made several recommendations for amendments that were adopted by the Supreme Court.

Rule 5(h). First appearance on indictment by grand jury. This rule has been amended to provide that a district judge may also arraign a defendant on a grand jury indictment. This allows any judge to act based on availability.

Rule 11. Plea advisories. The rule has been amended to require the court, prior to taking a plea of guilty, to further instruct the defendant as to other consequences of the plea. The court will be required to advise every defendant that if he or she is not a citizen then the entry of the plea could have immigration consequences of deportation, inability to obtain legal status or denial of an application for United States citizenship. In the last ten years, Congress has expanded the immigration consequences of a criminal conviction and expanded the definition of a conviction to include convictions that were expunged, as well as factual admissions made in connection with a charge even if there was no conviction on that charge. The list of what is considered an aggravated felony for deportation purposes is vast so that even crimes that are considered misdemeanors under state law and carry only a minor penalty may still be included and expose a defendant to deportation. Since immigration consequences may be life altering, a defendant should be given notice that this is a possibility if his counsel has not discussed the issue with him so that it can be discussed before the plea is entered.

The court will also be required to advise a defendant whether the offense to which the defendant is pleading guilty is one which will require sex offender registration. The list of offenses requiring registration has grown and this may also be a life altering consequence.

In addition, if the plea involves waiver of the right to appeal, the court shall confirm with the defendant his or her awareness of this waiver.

A plea advisory form has been added as an appendix to the Criminal Rules along with a provision that the court may require the defendant to fill out and submit this form as an aid to taking the guilty plea. The idea is for counsel to review the form with the defendant. The court must still make a record demonstrating the plea is voluntary, the defendant understands the maximum and minimum punishments, as well as the nature of the charge and the direct consequences of the plea.

Rule 16(b). Disclosure of evidence and materials by the prosecution upon written request. The amendment to this rule adds a new subsection on discovery that requires the prosecutor to disclose information about expert witnesses upon request by the defendant. Upon request, the prosecution is to provide a written summary or report of any expert testimony the state intends to introduce at trial that includes the witness's opinions as well as the basis for the opinion and the witness's qualifications, similar to discovery allowed under the civil rules. Better disclosure will be helpful to both the prosecution and defense and a similar requirement has been added to subsection 16(c) of the rule. There is no duty to disclose experts that will be used only for rebuttal purposes.

Rule 16(c). Disclosure of evidence by the defendant upon written request. Similar to subsection (b) of this rule, a new subsection has been added on discovery that requires the defendant to disclose information about expert witnesses upon request by the prosecutor.

Criminal Rule 33.3. Evaluation of persons guilty of domestic assault or domestic battery. The Domestic Assault and Battery Evaluator Advisory Board, chaired by Judge Gary DeMeyer, met on January 3, 2007, and recommended several amendments to this rule. Subsection (c) of the rule that sets out the scope and content of the report was amended to reflect that the danger of reoffending should be addressed as part of the risk assessment, and a new section was added requiring the evaluator to summarize and identify the specific basis for the treatment recommendation.

In addition, a new subsection (d) was added addressing removal of an evaluator from the roster for failure to submit evaluations that conform to the specifications for scope and content set out in subsection (c) of the rule. The amendment provides that in the event the evaluator submits an evaluation that is not in compliance with subsection (c) of this rule, the court may return the evaluation with instructions to prepare an evaluation in compliance with the rule at no additional cost to the defendant. In the event an evaluator fails to submit an evaluation in compliance with this rule after such an instruction, the court may forward the evaluation to the Board as a sealed confidential document along with a written request that the evaluator be removed from the roster for failure to comply with the rule. If the Board determines the evaluation fails to meet the requirements of the rule, the evaluator may be removed from the roster.

Rule 46. Bail or release on own recognizance. The amendments to this rule come about as the result of recent legislation as well as recommendations from the Bail Bonds Guidelines Committee, chaired by Judge Barry Wood. The rule now requires the court to give notification of what constitutes the crime of escape where electronic or GPS tracking is a condition of release. When a defendant fails to appear, the person posting bail now has 180 days from the entry of the forfeiture to return the defendant in order to have the forfeiture set aside. When bail consists of a surety bond, notice of the forfeiture is to be sent to the surety or the surety's designated agent and the rule requires the surety to clearly identify on the bond the name and mailing address of the person designated to receive all notices.

To resolve a conflict between the rule and I.C. § 19-2927, the rule has been amended to provide that, when a defendant fails to appear, the court shall immediately order forfeiture and a bench warrant. However, to make it easier to set aside forfeiture and reinstate the bail in those cases where a defendant appears shortly after the forfeiture, subsection (e)(4) has been amended to provide that within seven days after the forfeiture, and for good cause, the court may quash the bench warrant, set aside the forfeiture and reinstate the bail without obtaining the consent of the person posting the bail.

Evidence Rules

The Evidence Rules Advisory Committee, chaired by Judge Karen Lansing, met on November 16, 2006, and the recommendations of this Committee resulted in the following rule changes.

Rule 101. Title and scope. The amendments to this rule are "housekeeping" amendments that reflect changes in statutory references.

Rule 201. Judicial notice of adjudicative facts. Often a court is asked or on its own takes judicial notice of a file without specifying which documents in the file are really being noticed. This presents a problem on appeal, especially in post-conviction cases where the file from the underlying criminal case is noticed. The rule has been amended to provide that when a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. It also has been amended to provide that when a court takes judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case, the court shall identify the specific documents or items that were so noticed.

Rule 414. Inadmissibility of expressions of condolence or sympathy. This is a new rule on the inadmissibility of expressions of sympathy as admissions of liability that was prompted by the enactment of I.C. § 9-207 in July 2006. I.C. § 9-207 declares expressions of apology, condolence and sympathy by health care workers inadmissible for any purpose in a civil action. The purpose for the statute is to make certain expressions of sympathy following an unintended outcome of medical care inadmissible in a malpractice action. Because those statements currently are admissible in malpractice actions, health care professionals are cautioned not to make them and this can anger patients who conclude that the health care professional is uncaring or indifferent to a patient's suffering. However, the rule is not as broad as the statute. It eliminates the word "apology" and it states these expressions are not admissible on the issues of liability or damages.

Juvenile Rules

The amendments to the Juvenile Rules come from the recommendations of two committees, the Juvenile Rules Committee, chaired by Judge John Varin, and the Child Protection Committee, chaired by Judge Bryan Murray.

Rule 19. Standards for commitment to the Department of Juvenile Corrections. The rule now states that the court must find "extraordinary circumstances" before committing a child under the age of 12 to the custody of the Department of Juvenile Corrections. The amendment would add a requirement that the court convene a screening team to evaluate alternatives to commitment of the juvenile.

Rule 27. Transfer to juvenile court. This is a new rule and it provides that, in the court's discretion, a misdemeanor citation, naming a defendant who was under the age of 18 at the time of the alleged violation, may be transferred to juvenile court and treated under the provisions of the Juvenile Corrections Act. The request may be made by the juvenile, the juvenile's attorney, the prosecutor or the transfer may be upon the court's own motion.

Rule 28. Expungement. This is a new rule outlining the procedure for a petition for expungement pursuant to I.C. § 20-525A and applies only to actions pursuant to the Juvenile Corrections Act. The petition requires a hearing and if granted the case will be sealed and filed in a separate expunged record file. One of the provisions requires the person seeking expungement to name all agencies with records that the person is seeking to have expunged. The order will be served on all agencies noticed in the petition.

Rule 31. Emergency (pretrial) removal of a child and/or offender (C.P.A.). Previously, I.C. § 16-1611(4) provided that in CPA actions, where the court determined that a child should be removed from the home, it would so order by endorsement on the summons. HB 171 removed the word "endorsement," and the statute now provides that in such cases the court "shall include on the summons an order to remove the child." This rule has been amended to reflect this change.

Rule 35. Guardian Ad Litem Programs (C.P.A.). The new rule provides that criminal history checks of persons in the GAL program include a check of the Idaho Sex Offender Registry and the Child Abuse Registry, as required by HB 21.

Rule 39. Shelter care hearing. Rule 41. Adjudicatory hearing (C.P.A.). These two rules now include new language, contained in HB 171, concerning "reasonable efforts" to avoid removal of a child from the home.

Rule 54. Proceedings under I.C. § 20-511A. Rule 54 addresses the procedures to be followed when a juvenile court orders a mental health assessment and adopts a plan of treatment. It is amended in three respects: (1) the title is changed to more clearly reflect the subject of the rule; (2) teen early intervention specialists are added to the screening team, as required by SB 1147; and (3) forms for orders are added in a new subsection (j).

Misdemeanor/Infraction Rules

The Misdemeanor/Infraction Rules Advisory Committee, chaired by Judge Barry Watson, met on May 13, 2005, and proposed some amendments to the infraction penalty schedule but decided to wait and recommend the changes for July 1, 2007. The Committee met again on June 30, 2006, and as a result the following amendments have been enacted.

Misdemeanor Rules

Rule 5. Uniform citations- issuance- service- form –number of copies. In 2006, the court entered an order approving the use of a uniform citation that is computer generated from the officer's patrol car and thought to be a time saving process. It began as a pilot project but soon other agencies wanted to be able to issue these electronic citations. Since these citations differ in terms of the formatting requirements set out in Rule 5, a new subsection has been added that allows for these electronically issued citations.

Rule 13. Bail Schedule. Senate Bill 1123a, was signed into law enacting a new statute, I.C. § 72-1105 and the Peace Officer and Detention Officer Temporary Disability Fund, effective July 1,

2007. This law adds an additional fee of $3.00 for each charge for which the defendant is convicted. An additional $3.00 was added to the bail bond schedule for the offenses that are payable through the clerk in accordance with Rule 14.

Rule 14. Disposition of citations by written plea of guilty – limitations. This rule allows persons charged with certain citations to enter a written plea of guilty on the citation form and the bail bond amount will serve as the fine and court costs to be assessed. The plea of guilty only applies to offenses where the bail bond does not exceed a certain amount. In accord with the $3.00 raise for the Peace Officer Temporary Disability Fund in Rule 13, the limitations have been raised by $3.00.

Infraction Rules

Rule 2. Definitions. The meaning of "penalty" now refers to the fixed penalty "exclusive" of costs, as that is how it actually appears in the infraction schedule.

Rule 5. Uniform citations- issuance- service- form –number –distribution. A new subsection has been added to allow for citations that are electronically issued in accord with Misdemeanor Criminal Rule 5.

Rule 6. Appearance of defendant- admission of citation by mail. In accord with the change to the definition of penalty, references to "fixed penalty" have been changed to the "total amount due", which includes the fixed penalty plus court costs.

Rule 9. Judgment- Fixed penalty for infractions. In accord with the change to the definition of penalty, references to "fixed penalty" have been changed to the "total amount due", which includes the fixed penalty plus court costs. In addition, the total amount due on a speeding infraction, other moving traffic violations, fictitious display of license, and lending or permitting another to use registration or license has been raised. A speeding ticket is now a total of $75 if the speed is one to fifteen miles over the limit and $140 if the speed is sixteen or more miles over the limit. The over fifteen mile mark is the difference between three or four points being assessed by the Department of Transportation.

Rule 9.1. Entry of judgment by clerk of the court. In accord with the change to the definition of penalty, references to "fixed penalty" have been changed to the "total amount due", which includes the fixed penalty plus court costs.

Rule 10. Failure to pay infraction – Suspension of driver's license. In accord with the change to the definition of penalty, references to "fixed penalty" have been changed to the "total amount due", which includes the fixed penalty plus court costs. References to notice of nonpayment of a penalty have been changed to nonpayment of an infraction judgment.

Rule 14. Reporting of proceedings. In accord with the change to the definition of penalty, references to "fixed penalty" have been changed to the "total amount due", which includes the fixed penalty plus court costs.

The various rules advisory committees meet annually as the need dictates. The agenda for a meeting is posted on the court's website a few weeks prior to the meeting and the minutes are posted after the meeting. Agenda items may be submitted to the chair of the particular committee or to me, as reporter for the committees. A listing of Supreme Court Committees and their membership can be found at www.isc.idaho.gov under judicial rosters- judicial committees.

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Mr. Clark serves as a private hearing officer, federal court discovery master, neutral arbitrator and mediator. He has successfully conducted more than 500 mediations. He received the designation of Certified Professional Mediator from the Idaho Mediation Association in 1995. Mr. Clark is a fellow of the American College of Civil Trial mediators. He is a member of the National Roster of Commercial Arbitrators and Mediators of the American Arbitration Association and the National Panel of Arbitrators and Mediators for the National Arbitration Forum. Mr. Clark is also on the roster of mediators for the United States District Court of Idaho and all the Idaho State Courts.

Mr. Clark served as an Adjunct Instructor of Negotiation and Settlement Advocacy at the Straus Institute For Dispute Resolution, Pepperdine University School of Law in 2000. He served as an Adjunct Instructor at the University of Idaho College of Law on Trial Advocacy Skills, negotiation Skills, and Mediation Advocacy Skills. He has lectured on evidence law at the Magistrate Judges Institute, and the District Judges Institute annually since 1992.

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IN MEMORIAM

ELI RAPAICH
1925-2006

Eli Rapaich, a prominent Lewiston attorney, passed away Saturday, Oct. 7, 2006, at St. Joseph Regional Medical Center in Lewiston at the age of 80. He was born Elija Rapaich on Nov. 13, 1925, to Dan and Milia Rapaich, in La Grande, Ore. His life began humbly, living in a train car located near Flora, Ore. His family lived a short time in Pueblo, Colo., before moving to Lewiston. Eli entered the Lewiston public school system as a young boy and graduated from Lewiston High School in 1944. After graduation, Eli, along with many of his classmates, went off to serve their county in World War II. Eli enlisted in the United States Marine Corps. He served with the 2nd Marine Division as past of the Pacific Theater effort in Guam, Okinawa, and Saipan. Following his discharge, Eli pursued his education at Eastern Oregon State College in La Grande. There he met and married Joan Morris, his English teacher. Eli returned to Lewiston to earn extra money for college and worked for a short time in the editorial department at the Lewiston Tribune.

Eli attended the University of Idaho, receiving both his B.A. and L.L.B. degrees. He was elected to the Honor Court of Bench and Bar. Eli was awarded a Sterling Fellowship to Yale University in 1954. While there, he was one of 29 legal scholars from all over the world to be named graduate fellows of the Yale University Law School. He was one of 10 fellowships announced by the American Political Science Association and served in Washington, D.C., as an intern to Sen. Wayne Morse of Oregon. Sen. Morse encouraged Eli to open his own law practice. He returned to Lewiston and opened his law practice using a door and boxes for his desk. Shortly thereafter, he formed Rapaich and Knutson law firm, a partnership with his lifelong friend, Loren Knutson.

He was a founding member of the Idaho Trial Lawyers Association, the American Trial Lawyers Association, the California Defense Lawyer Association, and the American Judiciary Society. He was one of five Idaho lawyers named as associate members of the America Bar Association's Special Committee on Defense of Indigent Persons. He served as reporter and staff assistant for the committee. He also served as deputy prosecuting attorney for Nez Perce County under Wynn Blake. In 2004, he was recognized by the Idaho State Bar as a 50-year attorney.

Eli's interests were many and varied. He served as president of District 2 Lewis-Clark Wildlife Club, president of the Salvation Army Advisory Board, member of the Lewiston Chamber of Commerce, attorney for the Lewiston Orchards Landowners Organization and served as a board member of the Lewiston Orchards Irrigation District. Eli enjoyed raising, training, shoeing, and riding horses. He enjoyed fence-building, backpacking, snowshoeing and skiing, white-water rafting, fly fishing and hunting. He loved his dogs, especially Ranger. After retirement, he enjoyed traveling with his wife, Elaine, to Europe, Puerto Rico, Hawaii, Alaska, Canada, Utah and Colorado. Eli had many close friends and managed to maintain those friendships regardless of miles or years.

He was preceded in death by his first wife, Joan; his parents, Dan and Milia Rapaich; his sister-in-law, Julie West; and many of his close friends. He is survived by his wife, Elaine; stepchildren, Donald and Golitta Cate of Pocahontas, Ark., Dale and Janie Cate of Okanogan, Wash,; and two stepgrandchildren, Ryan and Myranda; his sister and brother-in-law, Stella and Dan Radakovich of Pueblo, Colo.; his niece, Dorothy Valentish; and nephew Dan Radakovich. He is also survived by many sisters and brothers-in-law: Joan Lewis of Coulee City, Wash., Archie and Evelyn Cooper of Spokane, Ron and Colleen Neilson of Lewiston, Ray West of Kamiah, Spike and Pat Maltock of Spokane, Bill Neilson of Lewiston, Richard Neilson of Spokane, and Tom and Jackie Neilson of Spokane. Many of Eli's friends were as close to him as any family member, and he would want you who remain to know how much he loved and cherished your friendship.

DWAINE L. WELCH
1926-2007

Dwaine L. Welch, 80, died May 7, 2007 at The Cottages in Payette. He was born Oct.19, 1926 in Hartley, Iowa to Roy W. and Luella (Bader) Welch. His parents moved to Emmett, Idaho when Dwaine was 18 months old. He attended schools in Emmett through High School, graduating in 1944. Following graduation he joined the Navy in the fall of 1944 and was appointed to attend radio school at Pearl Harbor. He then was assigned to Einewetch in the Marshall Islands, and was in Saipan when the war ended. After his discharge from the Navy, Dwaine entered the University of Idaho, where he was a member of the Phi Gamma Delta fraternity. He graduated in 1950. He then went on to law school at the University of Idaho and following graduation in 1953, moved to Payette to enter private practice with John H. Norris.

Mr. Welch practiced law in Payette until his retirement in November 1991. Mr. Welch was a member of the Air Force Reserves, St James Episcopal Church, and was an avid golfer. He married Mary Louise Cress on August 26, 1951 in Spokane Wash. They have three children: Jim (Celeste), children Matt and Kellie Welch, of Los Altos, Calif., Patty and daughters Kathleen and Clara Balestrieri, of Arlington, Va. and Nancy (Rich), children Lauren and Ari Levine, of San Francisco.

He is survived by one brother, L. Dean Welch, of Brookfield, Wis. He was preceded in death by his wife Mary Lou, his parents, Roy and Luella Welch, and two brothers, Billy D. Welch and Kenneth Roy Welch.

—RECOGNITION—

Syrena Case Hargrove was recognized as a 2007 Idaho Woman of the Year by the Idaho Business Review. Syrena, a Harvard Law School graduate, works for Judge Tom Nelson, who sits on the Ninth Circuit Court of Appeals and who also hears cases as a judge in Idaho's U.S. District Court. She is also involved with the Boise Peace Quilt Project.

Laurie Maiers Reynoldson was recognized as a 2007 Idaho Woman of the Year by the Idaho Business Review. Laurie is a partner at Spink Butler where she counsels real estate and development clients. She also volunteers as a mentor with the Ada Youth Court and donates time to the Ronald McDonald House and the Boise Metro Chamber of Commerce Leadership Program.

Stephanie Westermeier was recognized as a 2007 Idaho Woman of the Year by the Idaho Business Review. Stephanie was admitted to the Idaho State Bar in 2001. Formerly a partner at Givens Pursley, she left the firm in 2001 to establish St. Alphonsus Regional Medical Center's in-house legal department. Today, she serves as vice president, general counsel and local integrity office for St. Alphonsus. She serves on the board of directors for the Bishop Kelly High School Foundation and is president of the health law section of the Idaho State Bar.

Suzanne E. Craig, Chief Criminal Deputy for the Twin Falls County Prosecutor's Office was presented with the "2006 Prosecutor of the Year" award at the Idaho Prosecuting Attorney Association's annual Winter Training Conference in Boise. Prosecutors, statewide, were nominated for the prestigious award. The Idaho Prosecuting Attorneys Association's Board of Directors selects one recipient. Governor C.L. "Butch" Otter made a special appearance to present the award to Ms. Craig. Ms. Craig became a Prosecuting Attorney in Twin Falls County, in 1997. She was promoted to Senior Deputy Prosecuting Attorney in 2000, and to Chief Criminal Deputy in 2002.

—On The Move—

James M. (Jim) Runsvold is pleased to announce his relocation across the railroad tracks to 623 S. Kimball, Suite C, Caldwell, He is a 1982 graduate of the University of Idaho College of Law, a Vietnam veteran (Navy Civil Engineer Corps), and Professional Engineer (inactive). Jim will continue his litigation and counseling practice with emphasis on family law, guardianship/conservatorships, general civil, personal injury, workers comp., and contracts. He can still be reached at (208) 459-2610, fax (208) 459-0288, and P.O. Box 917, Caldwell ID 83606-0917.

Lance J. Schuster has joined the firm Beard St. Clair Gaffney PA as a shareholder. Lance has been practicing law in Idaho Falls since he received his J.D. from the University of Idaho in 1996. His practice will continue to focus on the agriculture and health care industries, as well as criminal defense work and family law. Lance has successfully counseled clients on issues involving farm leases & sales, conservation easements, water disputes, health care compliance plans, Medicaid & Medicare fraud & abuse, HIPPA issues, and stark & antikickback issues. Lance is actively involved in the Idaho Falls community serving as Chairman of the Sandy Downs Advisory Committee, and has served as the Director of the Medical and Professional Credit Union and Director of the Idaho Falls Public Library. Lance is licensed in both Idaho and Wyoming.

Jason Dykstra was joined the law firm Meuleman Mollerup LLP as an associate. Mr. Dykstra is licensed in Idaho and Montana, and brings to the firm ten years of legal experience with a focused practice in Business Law, Commercial Litigation, Insurance Defense, and Estate Planning. Mr. Dykstra will serve clients in complex commercial litigation, litigating on behalf of businesses and business owners in defense of intellectual property rights and insurance defense, and against a wide variety of tort claims. Estate planning services will include simple and complex wills, trusts, powers of attorney and living wills. Mr. Dykstra is a Permanent Elite Roster Member of the Boise Development Cycling Team (Bode), serving as a mentor for the Treasure Valley's next generation of elite cyclists. He has served on the Board of Trustees for the Paris Gibson Museum of Art and on the Board of Commissioners for the Great Falls Housing Authority. Mr. Dykstra received his *Juris Doctorate* from the University of Montana School of Law, and he completed his undergraduate studies in Finance at the University of Montana as a Defense Foundation Scholar.

Sarah Cunningham Duranske has joined the firm of Perkins Coie, LLP in their Boise office, as an associate in its national business practice. She joins the firm from Covington & Burling LLP in San Francisco, where she represented clients in stock purchase and asset purchase agreements; negotiated a wide array of contracts, including service agreements, consulting agreements and confidentiality agreements; advised clients on corporate formation; prepared stock option plans and related consents and filings; and prepared filings for the SEC. Sarah will work with a Perkins Coie team of nearly 200 lawyers from offices across the country. The group has a broad charter, covering the full range of finance, transactional and counseling work for large public and private companies, leading emerging technology companies, private equity and venture capital firms, and some public entities.

Sarah earned her law degree from the University of California, Berkeley School of Law (Boalt Hall), where she was a publishing editor of the California Law Review, and received the Moot Court Advocacy Award. She earned her undergraduate degree in International Relations from Pomona College, where she was a Pomona Scholar. Sarah can be reached at Perkins Coie, LLP, PO Box 737, Boise ID 83701-0737, (208) 343-3434.

—The Last Case—

The last case to be argued before the Idaho Supreme Court in its 2007 spring term on Friday, May 11, was the occasion for a surprise tribute by the present and former law clerks of **Chief Justice Gerald Schroeder** in respect of his impending retirement (officially August 1). They gathered to honor him for his years of judicial service and his mentoring them as his law clerks. Unbeknown to Justice Schroeder, this last argument was on a faux case stealthily rigged up by the Court's clerk, Steve

Kenyon and former law clerk Michelle Points, in which scheme the other Justices were complicit.

Former law clerk Karl Runft led off in the faux argument as "substitute counsel" for the Appellant, with former law clerk Geoff Goss appearing as "substitute counsel" for the Respondent. According to the plan, shortly after the start of the argument, Mr Runft would claim that he left a vital part of his transcript out in the hall, exit the court room, and return with the other law clerks for the surprise tribute. All went well, although the cat was gradually creeping out of the bag even before Karl Runft led the other clerks back into the court room. This was later confirmed by Justice Schroeder. Not surprisingly, it was Justice Roger Burdick who had difficulty in keeping the surprise a secret. The faux case involved a claim for attorney fees in matter involving staple stamping machines. Early in the argument, Justice Burdick asked Mr. Runft how many staple studs can a stud stapler stamp in one hour using this type of studding staple stamping machine (or something to that effect). Mr. Runft took this as a cue to seek the missing transcript.

In the tribute to Justice Schroeder, Geoff Goss read a poem written by the Supreme Court's new poet laureate, Justice Jim Jones, and Michelle Points presented and recited a proclamation in honor of Justice Schroeder's many years of exemplary service on the bench and in gratitude for his many hours of mentoring newly minted lawyers signed by all of the clerks present. After the tribute, honors, and a thank you by Justice Schroeder, all present repaired to the Court's enclosed balcony for a luncheon.

—Errors & Omissions—

DeskBook correction: Following is the correct information for the **Hon. Lansing Haynes,** Coeur d'Alene. It was listed incorrectly in the April DeskBook. Hon. Lansing L. Haynes, P.O. Box 9000, Coeur d'Alene, ID 83816-9000. Phone: (208) 446-1106, Fax: (208) 446-1138, Email:haynes@kcgov.us and for his Court Reporter: Laurie Johnson, P.O. Box 9000, Coeur D'Alene, ID 83816-9000, Phone: (208) 446-1136, and Email: skipper-do@adelphia.net

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Dan Taylor's information was listed incorrectly in the May Advocate. He has joined the firm Jeffrey J. Hepworth, P.A. & Associates, 151 N. 5th, PO Box 1806, Twin Falls, ID 83301, (208) 734-0702. He was previously employed with the Twin Falls Public Defender's office. His office practice will concentrate on criminal law, personal injury, and workers compensation.

COMING EVENTS

6/1/07 - 8/15/07

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 (www.idaho.gov/isb) contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

JUNE

1 **CLE: Idaho Law Foundation present: High Tech Ethics: Law Firm Risk Management on the Digital Frontier**

1 Jackrabbit Bar Meeting, Lake Tahoe

6 **CLE: Professionalism and Ethics Section and the Intellectual Property Law Section present: Rule 11 in Intellectual Property Cases**

8 **CLE: Law Practice Management Section present Think REAL Big: Ten Innovative Strategies for Building a Better Firm**

8 4th District Bar Association Spring Fling Golf Tournament, Warm Springs Golf Course

15 **CLE: Idaho Law Foundation present: Handling Your First or Next Post Judgment Collections Case, *Shilo Inn in Idaho Falls***

20 **CLE: Young Lawyers Section present: The Art of the Deal**

22 **CLE: High Tech Ethics: Law Firm Risk Management on the Digital Frontier, Coeur d'Alene Inn and Conference Center, Coeur d'Alene**

JULY

4 **Independence Day, Law Center Closed**

11 *The Advocate* Editorial Advisory Board Meeting

18 – 20 **Idaho State Bar Annual Meeting, Boise Centre on the Grove**

18 Idaho State Bar Board of Commissioners Meeting

19 Idaho Law Foundation Board of Directors Meeting

23 - 25 Idaho State Bar Exam, Boise and Moscow

AUGUST

15 *The Advocate* Editorial Advisory Board Meeting

DIRECTORY UPDATES

NEW ADMITTEES*

4/2/07 – 5/3/07

(*all admitted on 5/3/07 unless otherwise noted)

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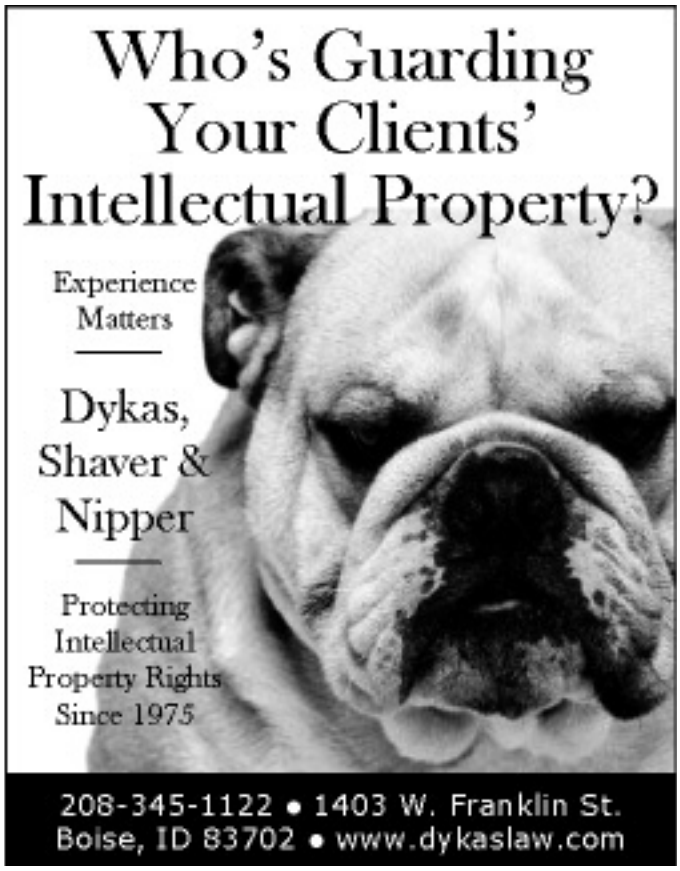

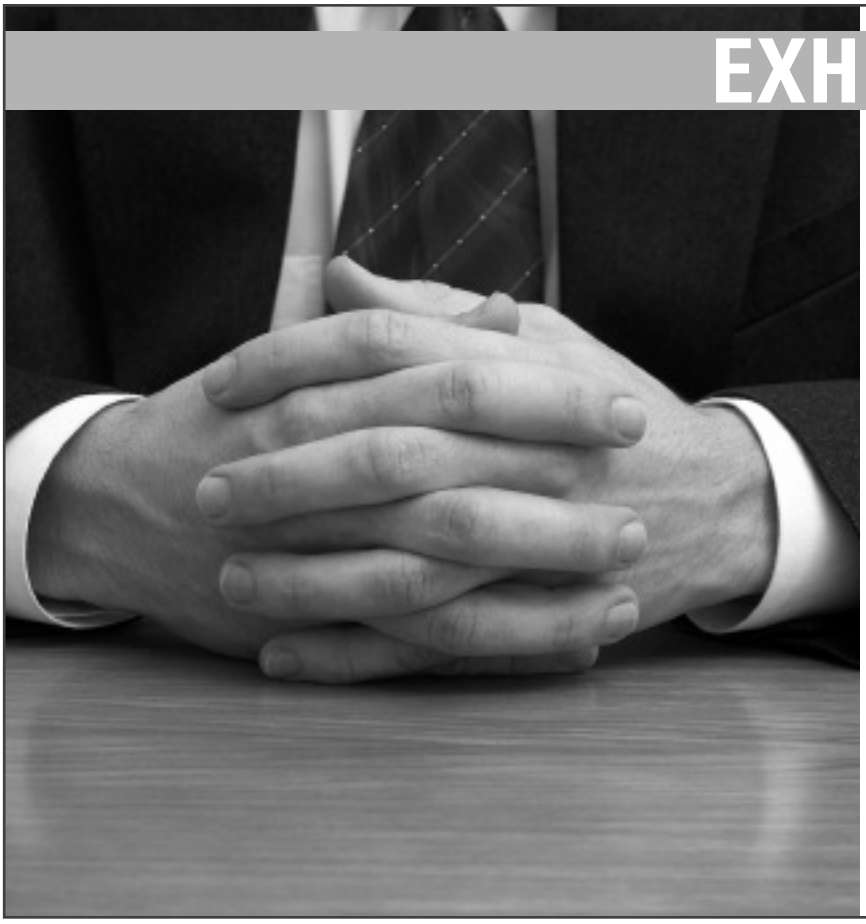

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~ LEGAL ETHICS ~

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IDAHO LEGAL Diversity SECTION

***** Announcement *****

On Friday, June 22, 2007, an organizational meeting will be held at noon in the Idaho State Bar office and by teleconference to adopt by-laws and elect officers of the newly approved Idaho Legal Diversity Section, pursuant to Idaho Bar Commission Rule 1102(d).

The Idaho Legal Diversity Section will advance the ability of the legal profession to better serve the needs of an increasingly diverse client base in Idaho.

All are welcome and encouraged to attend the June 22 organizational meeting. Please RSVP to Dayna Ferrero (dferrero@isb.state.id.us) and let her know whether you will be attending in-person or via teleconference.

For further information, or if you have questions contact Wes Meyring at wmeyring@gmail.com.

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June/July CLE Courses

June 2007

High Tech Ethics:
Law Firm Risk Management on the Digital Frontier
Friday, June 1, 2007
Sponsored by the Idaho Law Foundation
Law Center in Boise from 8:30 a.m. to 10:30 a.m.
1.0 CLE credits of which 2.0 are Ethics (RAC Approved)

Rule 11 in Intellectual Property Cases
Wednesday,June 6, 2007
Sponsored by the Professionalism and Ethics Section and the Intellectual Property Law Section
Law Center in Boise from 8:00 a.m. to 9:00 a.m.
1.0 CLE credits of which 1.0 is Ethics

Think REAL Big: Ten Innovative Strategies for Building a Better Firm
Friday, June 8, 2007
Sponsored by the Law Practice Management Section
Law Center in Boise from 8:30 a.m. to 10:00 a.m.
2.0 CLE credits

Handling Your First or Next Post Judgment Collections Case
Friday, June 15, 2007
Sponsored by the Idaho Law Foundation
Shilo Inn in Idaho Fallsfrom 8:30 - 10:00 a.m.
1.5 CLE credits

The Art of the Deal
Wednesday, June 20, 2007
Sponsored by the Young Lawyers Section
Law Center in Boise from 8:30 a.m. to 9:30 a.m.
1.0 CLE credits

High Tech Ethics:
Law Firm Risk Management on the Digital Frontier
Friday, June 22, 2007
Sponsored by the Idaho Law Foundation
Coeur d'Alene Inn and Conference Center in Coeur d'Alene from 8:30 -10:30 a.m.
2.0 CLE credits of which 2.0 are Ethics (RAC Approved)

July 2007

Idaho State Bar 2007 Annual Meeting

Law Practice Management:
Tips, Technology and Training
July 18 to 20, 2007
Boise Center on the Grove

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- Adobe Acrobat and Legal Trends
- Cutting Edge Marketing Online
- The Latest in Legal Research Online
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- Common Ethical Pitfalls in a Real Property Practice
- Managing a Government Law Office
- Lessons From the Masters
- Managing a Family Law Practice
- Client Development and Marketing
- Ethics for the Environmental and Natural Resources Lawyer
- Status of Women Lawyers in Idaho
- 60 Law Office Management Tips in 60 Minutes
- Electronic Discovery-Federal Rules Update
- Forensic Electronic Discovery
- Recruiting, Managing and Retaining Diversity

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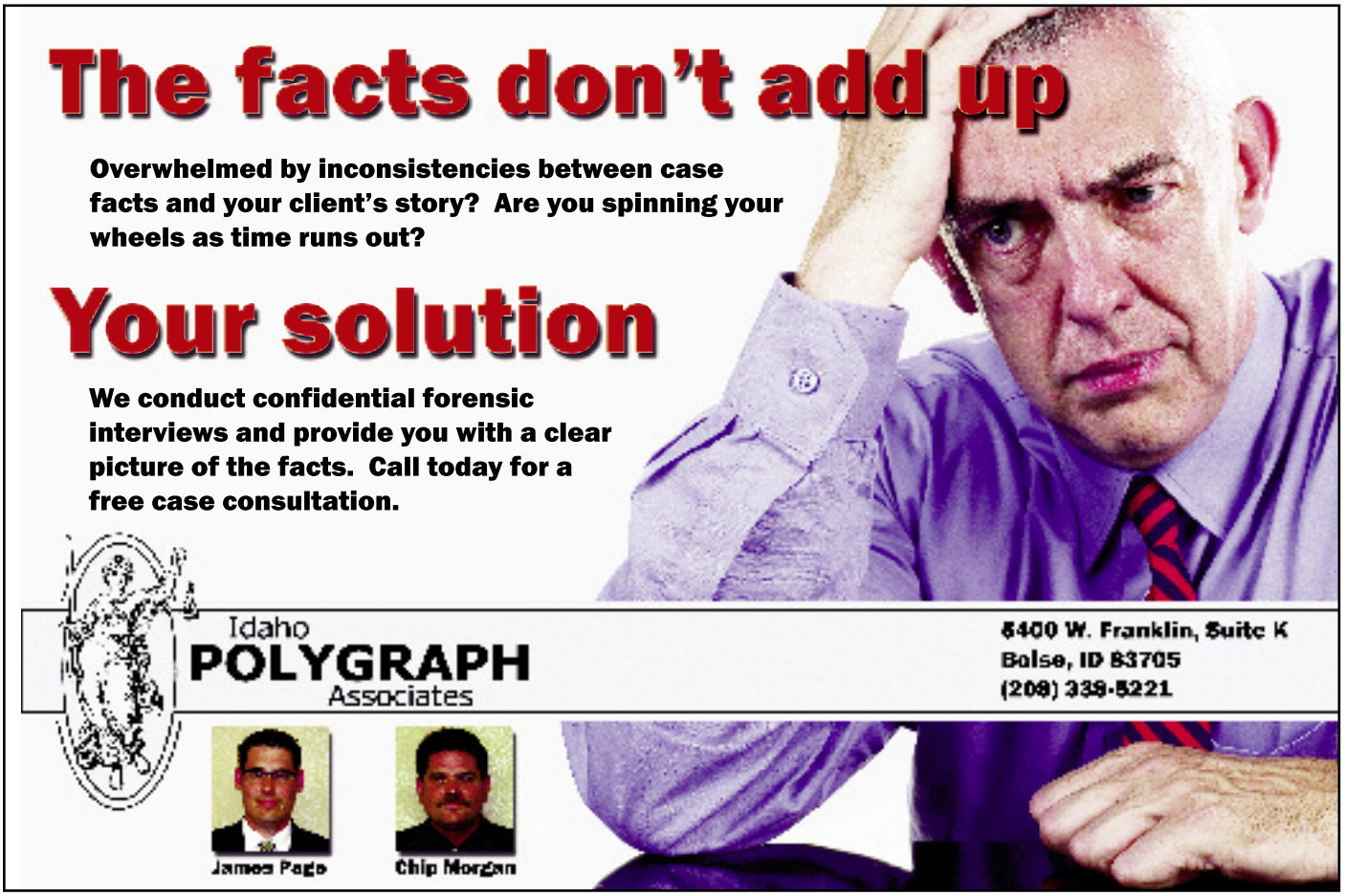

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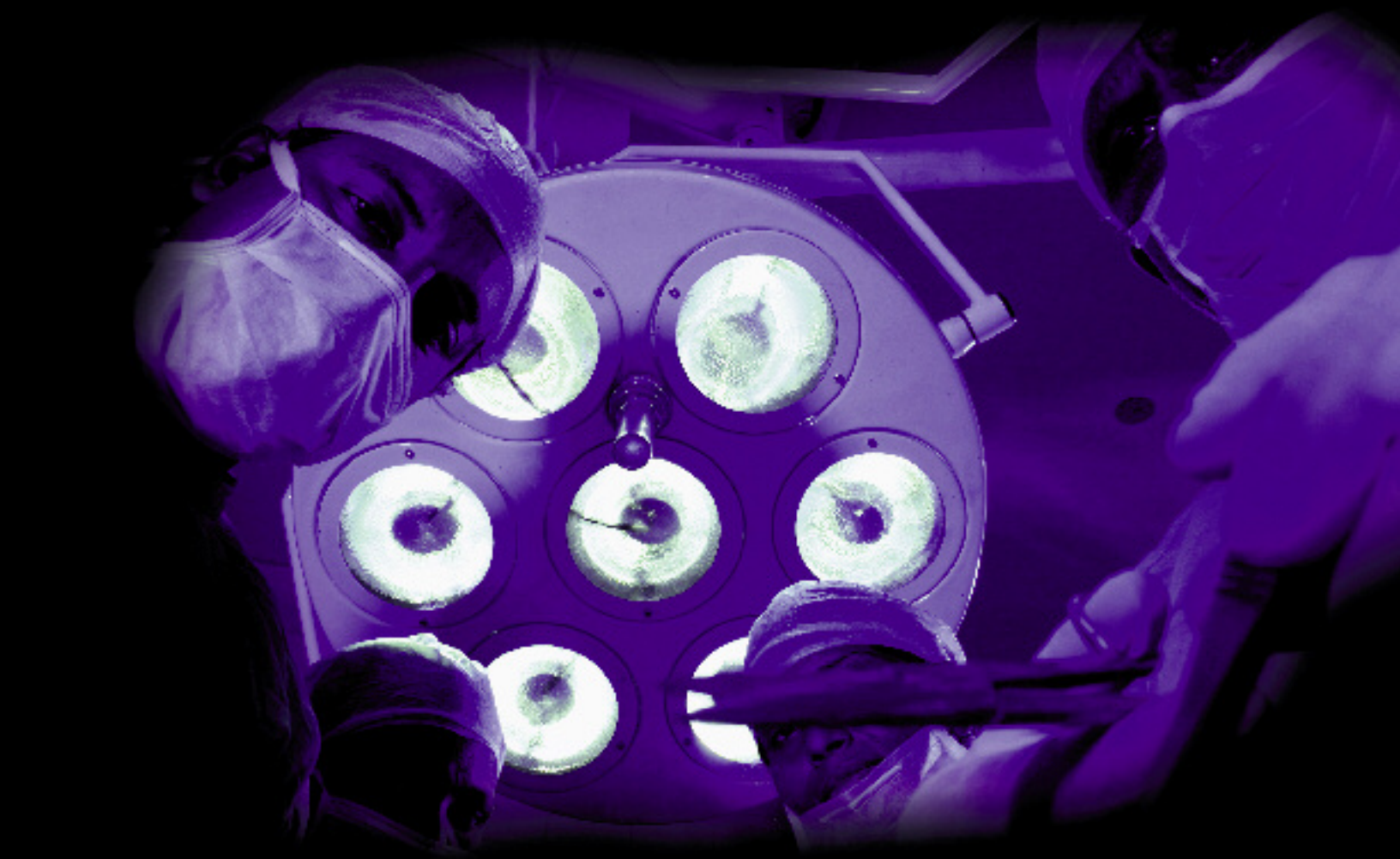

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