



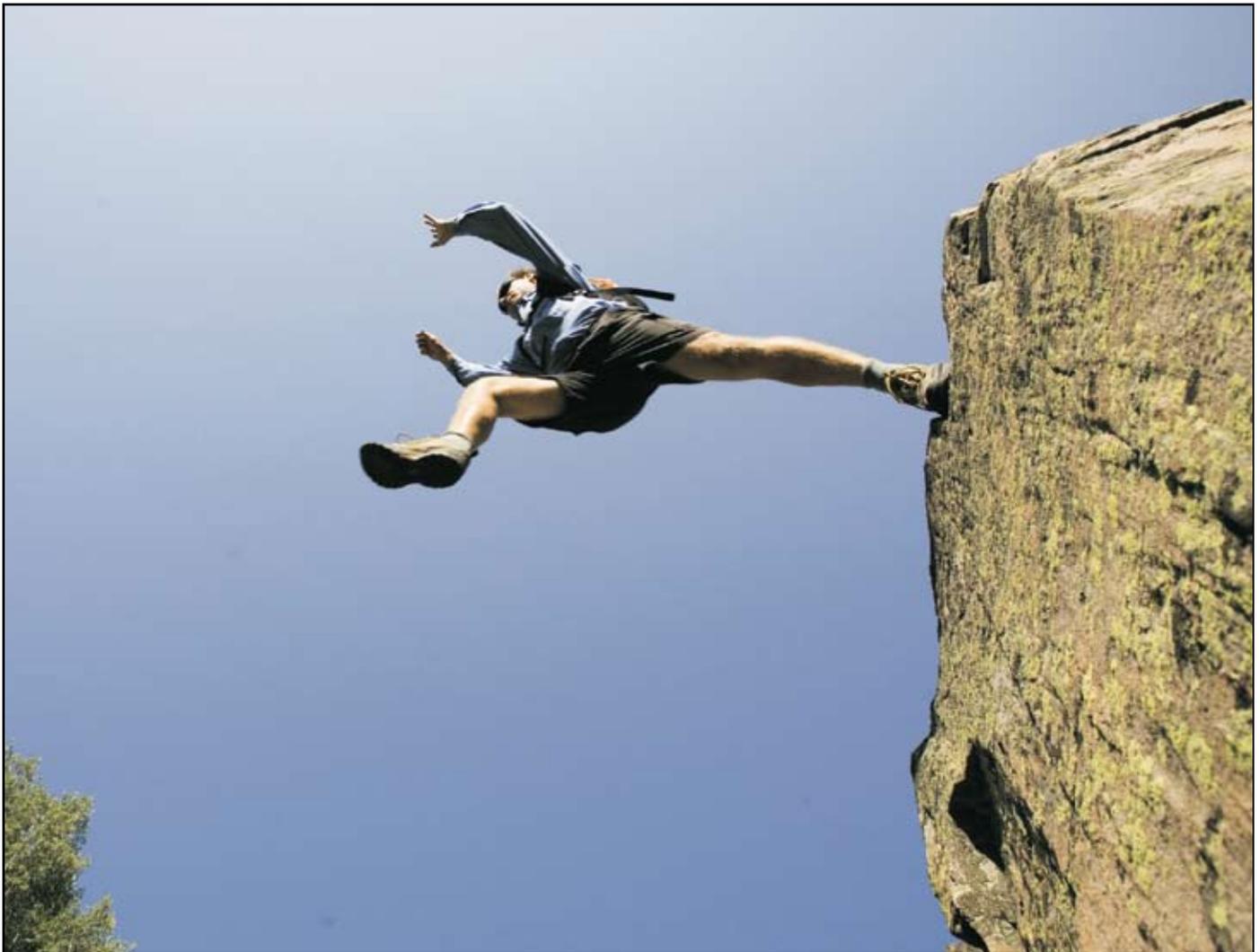
# The Advocate

Official Publication of the Idaho State Bar

Volume 52, No. 5

May 2009

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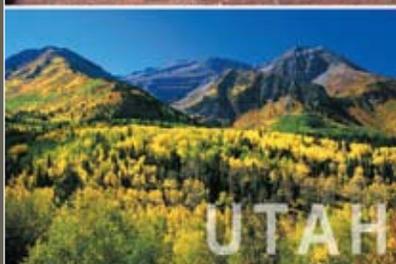
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Cover photo was taken by Liz Donick, an outdoor enthusiast and environmental attorney at Givens Pursley LLP. It was taken from the bridge at Big Springs in the Caribou-Targhee National Forest near Island Park, Idaho. Big Springs is one of the country's largest springs and forms the headwaters of the Henry's Fork of the Snake River.

## SECTION SPONSOR

This issue of *The Advocate* is sponsored by the Environment and Natural Resources Section.

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Special thanks to the May *Advocate* editorial team: John Zarian, Zarian Midgley & Johnson, PLLC; the Hon. Kathryn A. Sticklen, 4th Judicial District; and Sam Laugheed, Canyon County Prosecutor's Office.

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### MOTHER'S DAY STORIES

Dwight E. Baker



We are readers, good readers. We probably always were, back to first grade, and perhaps before. Our ability enabled us to compete, and compete well, in most academic settings.

We were able to perform well in grade school, high school, and undergraduate school, at least well enough to do a reasonably good job on the LSAT, and get into law school. Our love of reading is one of the things that ties us together as lawyers. Books like Robert Ruark's *Uhuru* or Dan Brown's *DaVinci Code* are "can't put them down" stories that capture our imagination to the point loved ones look at us like we're zombies. We should not forget the role that stories have played in our intellectual lives, and how stories can continue to be means of communication, education, validation and persuasion.

Our first communications with our mothers involved the use of stories as an integral part of our nurturing. Lullabies and nursery rhymes were and are important tools in providing babies and young children a sense of comfort, and a sense of understanding of other people. Story-telling, now too often electronic, continues to capture the imagination and contribute to the development of children of all ages, to the point many believe violent television stories contribute to the increasing violence in our society.

Our mothers for most of us were our first and most important teacher. May is the month of Mother's Day. It is appropriate for us to thank our mothers not only for developing our talent as readers, but also for exposing us to the moral lessons which probably provide an unrealized and unappreciated role in the values which drive our practices as lawyers. The lessons of stories such as *The Dog in the Manger*, *Chicken Little*, *The Three Little Pigs*, *The Goose that Laid the Golden Egg*, *The Pied Piper*, and *Brer Rabbit's Briar Patch*

or *Tarbaby* come back to us in different forms in our day to day practice of law. Every story of municipal misfeasance is a reminder of *The Pied Piper of Hamelin*, and every child custody case brings back the hated story of *Hansel and Gretel*.

Nursery rhymes laid the ground work for us to be able to recognize letters, to put sounds to letters and groups of letters, to read words, to understand sequences of words, and to begin to create and exchange thoughts through the printed word. At some point in our lives most of us probably went off the deep end into reading, whether westerns, romance, science fiction, sports or news. As adults many of us continue to read voraciously, though for many our interests are more esoteric. Although our education and experience require us to think on a different plane today than when we were younger, the effective use of the story is one of the most enduring means of communicating a message while holding the interest of others... James A. Michener's great novels such as *The Source*, *Chesapeake* and *Centennial* provided insights about geology, history, anthropology, religion, sociology, government and economics which would have been lost or poorly learned without his stories as the vehicle for his lessons. Stories can enhance our ability to communicate and explain principles of law to our clients. Many times the most basic and fundamental stories are most effective in doing so.

The effective use of stories validates us as lawyers. "Legalese" properly describes much of what we lawyers must read today. To our credit, legalese is often our shorthand communication with other lawyers and judges. But much of the time our audience is comprised of well educated and well informed people who are at best not impressed, and who may be turned off by legalese. We are often accused of being elitist because we are perceived to talk down to people. Our clients, and others with whom we communicate, are usually

much more impressed if we can talk and write in a straightforward, down to earth manner. The well thought out story should be considered as one important way to do so.

Lastly, the power of the story as an instrument of persuasion should not be overlooked. Professor McElhaney in his monthly articles *McElhaney on Litigation* in the ABA Journal continually emphasizes the importance of common words, common manners of speech, and common stories in order to persuade juries. It's obvious to all the effective use of the story is not limited to persuasion of juries, but can be and is used effectively in our relationships with our spouses, our children, our friends, our associates and our clients. The ability to create a story is an ability we should consciously cultivate and use to our advantage.

And, we should never forget the role our mothers played in teaching us the most basic and perhaps most meaningful of those stories. HAPPY MOTHER'S DAY.

**Dwight E. Baker** has been engaged in private practice since 1971, and is a founding partner in the Blackfoot law firm of Baker and Harris. He is a 1963 graduate of the University of Wisconsin/Madison, and a 1971 graduate of the law school at the University of Idaho. He represents the Sixth and Seventh Districts, and is currently serving a one-year term as President of the Idaho State Bar Board of Commissioners.

## DISCIPLINE

### **WILLIAM J. LITSTER**

(Transfer to Disability Inactive Status)

On April 7, 2009, the Idaho Supreme Court issued a Disciplinary Order transferring Boise attorney William J. Litster to disability inactive status for medical reasons pursuant to I.B.C.R. 516(b).

The Idaho Supreme Court's Order followed a Professional Conduct Board recommendation and stipulated resolution of an Idaho State Bar (ISB) formal disciplinary proceeding. On November 24, 2008, Mr. Litster admitted to violations of the I.R.P.C. and agreed to be disqualified from the practice of law pending a determination by the Professional Conduct Board and the Idaho Supreme Court on whether he qualified for disability inactive status due to mental and/or physical incapacity.

By the terms of the Idaho Supreme Court's Order, in lieu of a formal sanction, Mr. Litster has been transferred to disability inactive status pursuant to I.B.C.R. 516(b)(1)(E) for a minimum period of two years, retroactive to November 24, 2008, the date on which Mr. Litster voluntarily agreed to be disqualified from the practice of law pending the medical disability determination. Mr. Litster may not resume active status until reinstated by order of the Court.

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

### **THOMAS L. La FOLLETT**

(Resignation in Lieu of Discipline)

On February 23, 2009, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Potlatch attorney, Thomas L. La Follett.

The Idaho Supreme Court's Order followed a stipulated resolution of a formal charge disciplinary proceeding requesting entry of a reciprocal sanction under I.B.C.R. 513. Mr. La Follett was previously admitted to practice law in Oregon and in September 2008, he resigned in lieu of disciplinary proceedings in Oregon. Mr. La Follett and the Idaho State Bar agreed that the appropriate sanction in Idaho was his resignation in lieu of disciplinary proceedings.

The Idaho Supreme Court accepted Mr. La Follett's resignation effective May 1, 2009. By the terms of the Order, Mr. La Follett may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. La Follett's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on May 1, 2009.

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

### **ERIC J. BOYINGTON**

(Notice of Disqualification from the Practice of Law)

Notice is hereby given that effective March 20, 2009, Boise attorney, Eric J. Boyington, voluntarily disqualified himself from the practice of law until further notice. A formal disciplinary case is pending before the Professional Conduct Board and the time Mr.

Boyington spends while disqualified will be credited toward any eventual sanction he may receive in that case.

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

### **TAMMY LYNN CROWLEY**

(Revocation of Conditional License)

On March 17, 2009, the Idaho Supreme Court issued an Order permanently revoking the conditional license of Tammy Lynn Crowley.

The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar proceeding for Ms. Crowley to show cause why her conditional license should not be revoked.

Ms. Crowley was admitted to practice law in Idaho subject to terms and conditions contained in a November 2005 Idaho Supreme Court Order Granting Conditional Admission to the Idaho State Bar. Conditional admissions are provided for and governed by I.B.C.R. 209A.

In August 2008, the Idaho State Bar filed a Petition for Order to Show Cause, pursuant to I.B.C.R. 209A(e)(2), based upon the Idaho State Bar's belief that Ms. Crowley had breached a number of the conditions of her conditional license. On August 28, 2008, the Idaho Supreme Court entered an Order, ordering that Ms. Crowley be suspended from the practice of law and issued an order to show cause to her why her revocation from the practice of law should not be permanent. Senior Justice Jesse R. Walters, Jr. was appointed as the Hearing Officer in that show cause proceeding. In January 2009, Ms. Crowley expressed her desire to withdraw her objection to the revocation of her conditional admission license and the parties stipulated that her conditional admission license would be terminated and revoked upon entry of an order by the Idaho Supreme Court. On February 24, 2009, Justice Walters recommended to the Idaho Supreme Court that it revoke Ms. Crowley's conditional admission license.

The Idaho Supreme Court's Order revokes Ms. Crowley's admission to practice law and strikes her name from the records of the Idaho Supreme Court as a member of the Idaho State Bar. The Order further provides that any subsequent application by Ms. Crowley for admission to practice law shall comply with all of the bar admission requirements in Section II of the Idaho Bar Commission Rules, including that her application be subject to a complete evaluation by the Character and Fitness Committee of the Idaho State Bar and that the Character and Fitness Committee may consider all relevant factors, including any of the facts and circumstances relating to her practice of law before her conditional license was permanently revoked and the facts and circumstances underlying the show cause proceeding.

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

### **KATE DONNELLY**

(92-Day Suspension)

On March 17, 2009, the Idaho Supreme Court issued a Disciplinary Order suspending Kate Donnelly from the practice of law for a period of 92 days.

The Idaho Supreme Court found that Ms. Donnelly violated I.R.P.C. 8.1(b) [Failure to Respond to Lawful Demand for

Information from a Disciplinary Authority] and I.B.C.R. 505(e) [Failure to Respond to Disciplinary Authorities] and imposed a 92-day withheld suspension from a prior disciplinary case.

On June 26, 2006, the Idaho Supreme Court issued a Disciplinary Order following a stipulated resolution of an Idaho State Bar (ISB) disciplinary proceeding in which Ms. Donnelly admitted that she had violated I.R.P.C. 1.2(a), 1.3, 1.4 in two instances, 3.3(a)(1), 8.4(c) and 8.4(d) in two instances. The Court imposed a public reprimand pursuant to I.B.C.R. 506(e), a 92-day withheld suspension and an 18-month period of probation. The Idaho Supreme Court's Order further provided that a term and condition of her probation was that she shall not violate any of the Idaho Rules of Professional Conduct, and that if she did so, such conduct shall be grounds for the imposition of the 92-day withheld suspension, even if proven after completion of the probationary period. The 18-month period of probation commenced on June 26, 2006 and continued through and until December 26, 2007.

On June 27, 2007, the ISB received a grievance against Ms. Donnelly regarding a specific incident that had occurred in the Canyon County District Court Clerk's Office when she was employed by the Canyon County Prosecutor's Office. On July 9, 2007, the ISB sent a certified letter to Ms. Donnelly at the prosecutor's office, her last known business address on file with the ISB, requesting that she respond to the allegations in the grievance. That letter was returned and the ISB was later informed that Ms. Donnelly was no longer employed there. On July 24, 2007, the ISB sent a certified letter to Ms. Donnelly at her last known home address on file with the ISB, requesting her response to the grievance. The United States Postal Service (USPS) forwarded that letter on to Ms. Donnelly at another address in a different city. The USPS attempted to deliver the letter to Ms. Donnelly twice, but it was eventually returned to the ISB marked "unclaimed." The ISB attempted to send Ms. Donnelly two more letters at the new address requesting her response to the grievance filed against her in June 2007, and reminding her that she was obligated to provide the ISB with a current address pursuant to I.B.C.R. 306(a). Those letters were also returned to the ISB indicating either that they were "unclaimed" or that the USPS was unable to forward them.

On July 1, 2008, the ISB filed a formal charge Complaint against Ms. Donnelly alleging that she had violated I.R.P.C. 8.1(b) and I.B.C.R. 505(e) for failing to respond to the ISB with respect to the June 2007 grievance, and that at all relevant times, she was on probation pursuant to the Idaho Supreme Court's June 26, 2006 Disciplinary Order. Because the ISB was unable to serve the Complaint on Ms. Donnelly by certified mail, notice of the Complaint was published in the September 2008 issue of *The Advocate*. Ms. Donnelly failed to appear or file an answer to the Complaint, and on November 26, 2008, the Professional Conduct Board Hearing Committee issued an order deeming the allegations in the Complaint admitted. Following a hearing on the sanction to be imposed, the Hearing Committee issued its Findings of Fact, Conclusions of Law and Recommendation on December 12, 2008, recommending that the Idaho Supreme Court impose the 92-day withheld suspension from the prior disciplinary case.

The Idaho Supreme Court's March 17, 2009 Disciplinary Order provides that any further reinstatement of Ms. Donnelly's privilege to practice law in the State of Idaho must be in accordance with I.B.C.R. 518(b).

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

## JOHN R. HATHAWAY

(Withheld Suspension/Public Censure)

On March 17, 2009, the Idaho Supreme Court issued a Disciplinary Order suspending John R. Hathaway from the practice of law for a period of six (6) months, with the entire (6) six months suspension withheld, placing him on Bar Counsel probation and imposing a public censure.

The Idaho Supreme Court found that Mr. Hathaway violated I.R.P.C. 1.4 [Communication], 8.1(b) [Failure to Respond to Lawful Demand for Information from a Disciplinary Authority] and I.B.C.R. 505(e) [Failure to Respond to Disciplinary Authorities].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Hathaway admitted that he had violated I.R.P.C. 1.4 and in two instances, violated I.R.P.C. 8.1(b) and I.B.C.R. 505(e). The Stipulation also dismissed two alleged violations of I.R.P.C. 1.2, one alleged violation of I.R.P.C. 1.3 and one alleged violation of I.R.P.C. 1.4. Those alleged violations were dismissed for lack of clear and convincing evidence.

The admitted violation of I.R.P.C. 1.4 related to Mr. Hathaway's failure to reasonably consult with a client about the status of an appeal and his failure to reasonably consult with his client about the means by which the appellate objectives were to be accomplished. Mr. Hathaway's admission that he violated two counts of I.R.P.C. 8.1(b) and I.B.C.R. 505(e), related to his failure to respond to multiple requests for information from Bar Counsel with respect to two client complaints about Mr. Hathaway's professional conduct.

The Disciplinary Order provides that the six (6) month suspension will be withheld and that Mr. Hathaway will serve a one (1) year probation, subject to the conditions of probation specified in the Order. Those conditions include that Mr. Hathaway will serve the entire six (6) month 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. Hathaway's period of probation. In addition, if Mr. Hathaway admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a private sanction is imposed for any conduct during his period of probation, then ninety (90) days suspension for each private sanction, not to exceed 180 days, shall be immediately imposed and served by Mr. Hathaway. During his probation, Mr. Hathaway must also provide monthly reports attesting that his representation of his clients is consistent with his responsibilities under the Idaho Rules of Professional Conduct.

This public censure shall be published in *The Advocate*, a newspaper of general circulation in the judicial district in which Mr. Hathaway maintains his office and the Idaho Reports.

The withheld suspension and this public censure do not limit Mr. Hathaway'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.

## NOTICE TO MICHAEL L. SCHINDELE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule* 614(a), the Idaho State Bar hereby gives notice to Michael L. Schindele that a Client Assistance Fund claim has been filed against him by former client Wells Fargo Bank, N.A., in the amount of \$124,336. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

**Judicial Council Vacancy**—The Idaho State Bar (ISB) Board of Commissioners is currently accepting applications for a lawyer vacancy on the Idaho Judicial Council, for a six-year term commencing July 1, 2009. Applications should be received in the ISB office by June 1, 2009. Submissions should include information about the applicant, why he or she is interested in the position, and the political party affiliation of the applicant, if any. No member of the Judicial Council may hold “any other office or position of profit under the United States or the State.” In making its choice, the commission will be guided by the following statutory considerations, found in Section 1-2101, Idaho Code: Appointments shall be made with due consideration for area representation and not more than three of the permanent appointed members shall be from one political party.

Applications and any questions may be directed to: Diane K. Minnich, Executive Director, Idaho State Bar, P.O. Box 895, Boise, ID 83701, (208) 334-4500, [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

The **Hon. Darrel R. Perry**, Idaho Court of Appeals is retiring September 30, 2009. Judge Perry has served on the Idaho judiciary for more than 27 years. After his retirement he will continue to serve as senior judge, sitting in on the Court of Appeals when another judge isn't available to hear a case. Judge Perry graduated from the University of Idaho College of Law in 1979, and at the age of 27 became one of the youngest judges appointed by a magistrate commission, taking the bench in Nez Perce County in 1982. In 1993, he was appointed to the Idaho Court of Appeals by former Gov. Cecil Andrus. Judge Perry's replacement will be appointed later this year by Governor C. L. “Butch” Otter.

The **Hon. Ronald M. Hart**, Caribou County Magistrate announced his retirement, effective June 30, 2009. Following retirement, Judge Hart will become a senior judge, maintaining a calendar in Bannock County relating to guardianships and conservatorships, as well as continuing his work with the Guardianship and Conservatorship Committee.

The **Hon. Bradley S. Ford**, Nampa was appointed by Governor C.L. “Butch” Otter as Canyon County District Judge. He has been a Canyon County magistrate since May 1997 and will replace Third District Judge Gordon Petrie who resigned. Judge Ford is a Bakersfield, California native who grew up in Nampa and graduated from Nampa High School. He has a bachelor's degree from the College of Idaho in Caldwell and a law degree from the University of Idaho. He previously was in private law practice in Nampa. He and his wife, Margene, have three children.

**Gregory W. Moeller**, a Rexburg attorney was appointed by Governor C. L. “Butch” Otter to a vacant 7th District Court judgeship. He will replace 7th District Judge Brent Moss, who retired. He is a Norwalk, California native who grew up in Fremont County, graduating from St. Anthony's South Fremont High School. He has a bachelor's degree from Brigham Young University and a law degree from the J. Reuben Clark Law School at BYU. Since 1990, he has been a partner in the Rexburg law firm of Rigby, Andrus & Moeller, Chartered. He and his wife, Kathy Ann, have five children.

**Allyn Dingel** was honored by the Idaho State Senate on April 2, 2009. The Senate adopted SCR 111, honoring Allyn Dingel for his years of service to the Idaho Legislature and to the courts and for his

charitable and philanthropic endeavors. Allyn has been passionate in his devotion to maintaining the high quality of our judiciary, and the resolution noted that Allyn “has been recognized by the Idaho judiciary for the outstanding contributions in advancing, promoting and improving the administration of justice in the state of Idaho, including his unwavering support of the judiciary's legislative priorities and innovations to ensure Idaho courts continue as one of the top court systems in the nation.” Members of Allyn's family and some of his many friends were present on the Senate floor for the “debate” on the amendment. Warm tributes to Allyn were delivered by Senators Bart Davis, Denton Darrington, Les Bock, Dianne Bilyeu, Dean Cameron, Joe Stegner, Patti Anne Lodge, Elliot Werk, Charles Coiner, John Goedde, John Andreason, Robert Geddes, and Mike Jorgenson, as well as Lieutenant Governor Brad Little and Bill Roden.

The **Idaho Industrial Commission** has amended its Rules of Appellate Practice and Procedure under the Idaho Employment Security Law. The amended rules are effective March 1, 2009. You can review and download a copy from the Commission's web site, <http://www.iic.idaho.gov/>. Contact the unemployment appeals section of the Commission's adjudication division with any questions at 334-6000.

The **United States Court of Appeals for the Ninth Circuit** is making a successful transition to the use of electronic documents. The nation's largest federal appellate court switched to an improved electronic case management system just over a year ago, then introduced electronic case filing, or ECF, to the federal bar last September. Since then, nearly 15,000 attorneys have signed up to use ECF, which became mandatory in the Ninth Circuit on January 2, 2009. The court is averaging about 325 new ECF users each week and expects to eventually register more than 30,000 attorneys for the service. Registration is mandatory for all attorneys and enables the court to associate attorneys with new or ongoing cases. ECF allows attorneys to file documents directly with the court via the Internet using standard computer hardware and software. The system offers numerous benefits for the bar, most notably 24-hour access, automatic email notice of case activity, and expanded search and reporting capabilities. There is no extra charge for filing electronically. More than 2,800 attorneys, paralegals and legal secretaries have participated in the training for ECF. Training videos and other materials also are available from the court's ECF web site: <http://www.ca9.uscourts.gov/cmecf>. Most court documents filed electronically are available to the public through the PACER system. For more information, visit the PACER web site: <http://pacer.psc.uscourts.gov>.

**2009 Annual Conference Scholarships Available:** The Idaho State Bar is offering a limited number of scholarships to the 2009 Annual Conference July 8-10 in Boise. The scholarships include the annual conference registration fee and a per diem (up to \$50 per 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 judicial district or Terri Muse, Deputy Executive Director, at [tmuse@isb.idaho.gov](mailto:tmuse@isb.idaho.gov).



# EXECUTIVE DIRECTOR'S REPORT

## VOLUNTEER OPPORTUNITIES

Diane K. Minnich



Bar and Foundation activities depend on the volunteer efforts of Bar members. The Bar Commissioners and the Foundation Directors are recruiting attorneys interested in volunteering their time to assist with ISB and ILF programs and activities.

The general responsibilities of each committee are outlined in this column. If you are interested in one of the volunteer opportunities listed, please complete the form on Page 12; and, return it to the ISB/ILF offices or email me your preferences. If you have any questions about the committees, please contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov) or call 208-334-4500.

Committee appointments are made at the July ILF and ISB Board meetings. In selecting committee replacements, the board members consider geographic diversity, areas of practice, and other previous or current committee assignments.

### IDAHO LAW FOUNDATION (ILF) COMMITTEES

*Note: Committee appointments are for three-year terms. Chairpersons are appointed for one-year terms.*

#### Idaho Volunteer Lawyers Program (IVLP) Policy Council

Plans and reviews programs, activities, policies and procedures for IVLP's pro bono efforts. As needed, makes recommendations to ILF Board of Directors. *Meets quarterly; 13-14 members (3-4 non-lawyers).*

#### Law Related Education (LRE) Committee

Promotes and oversees law related education programs, such as the High School Mock Trial competition, Lawyers in the Classroom and the Citizens Law Academy. *Meets 3-4 times a year; 14-15 members (5-6 non lawyers).*

#### Continuing Legal Education (CLE) Committee

Plans and oversees Idaho Law Foundation CLE programming of subjects, speakers, course materials and policies. *Meets three times a year; 15-16 members.*

#### IOLTA Fund Committee

Reviews and considers IOLTA grant applications. Recommends grant recipients to the Board of Directors. *Meets once a year; 10 members.*

#### Idaho State Bar (ISB) Committees

##### Professional Conduct Board

Exercises general control over attorney discipline. Acts as an "intermediate appellate court" in attorney discipline matters. Receives and considers formal charge complaints, and makes recommendations for disposition to the Idaho Supreme Court. The newly adopted rules for review of professional conduct (Section V of the Idaho Bar Commission Rules), allow for additional members to be appointed to the Professional Conduct Board (PCB). The Board is specifically in need of volunteers from the Northern and Eastern parts of the state to serve on the PCB. *Meets in three-member panels as needed; includes both lawyers and non lawyers.*

##### The Advocate

##### Editorial Advisory Board

Determines the theme, selects/recruits authors for lead articles, and reviews the contents of each issue of *The Advocate*. *Meets the third Wednesday of each month; 10-12 members.*

##### Lawyer Assistance Program

Oversees the LAP program, which helps and support lawyers who are experiencing problems associated with alcohol and/or drug use or mental health issues. *Meets quarterly; 15-17 members*

##### Character and Fitness Committee

Reviews bar exam applicants for character and/or fitness issues. Makes recommendations to the Board of

Commissioners on whether applicants should be allowed admission to the practice of law in Idaho. *Meets 4 to 6 times a year; 9 members (2 non-lawyers).*

##### Client Assistance Fund Committee

Reviews claims against Client Assistance Fund for attorney misappropriation of funds due to dishonesty. *Meets as needed; 5 members (2 non-lawyers).*

#### OTHER VOLUNTEER OPPORTUNITIES

##### ILF Law Related Education

Attorneys are needed to assist with the high school mock trial competition, the Lawyers in the Classroom program, Law Day activities, and help with Youth Court.

##### Sections of the Bar

ISB Sections welcome assistance with program planning, newsletters, publications and public service projects. There are currently 20 Idaho State Bar sections.

##### ILF Idaho Volunteer

##### Lawyers Program

Attorneys are needed to provide pro bono assistance to low-income individuals through direct case representation, brief legal services, workshops or mentoring.

##### District Bar Associations

As a member of your local district bar association, you can assist with educational programs, social events, and public service activities.

*We offer our thanks to those of you who have committed your time, expertise and energy to the work of the Bar and Foundation. The organizations are able to provide needed service to the profession and the public because of your volunteer efforts.*

# ISB/ILF Committees

## Volunteer Opportunities

Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyers can and do make a difference by participating on one of the many committees listed below. Committee assignments are three-year terms, and each year there are generally one to three openings available on each committee. Time commitments vary with each committee depending upon its function and meeting schedule. In the appointment process, consideration is given to geographic distribution, areas of practice, and other committee assignments or ISB/ILF involvement.

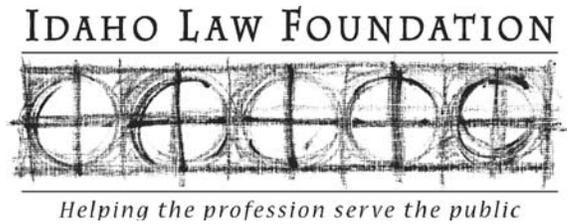
Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below. Please indicate your 1st, 2nd, or 3rd choice.



**IDAHO STATE BAR  
VOLUNTEER COMMITTEES**

- The Advocate Editorial Advisory Board  
meets monthly
- Bar Exam Grading  
takes place twice a year
- Character and Fitness  
meets as needed
- Professional Conduct Board  
meets as needed
- Lawyer Assistance Program  
meets quarterly

- I would like more information about the Bar Sections.
- I would like more information about the District Bar Associations.



**IDAHO LAW FOUNDATION  
VOLUNTEER COMMITTEES**

- Continuing Legal Education  
meets quarterly
- IOLTA Fund  
meets once a year
- Law Related Education  
meets 3 times a year
- Idaho Volunteer Lawyers Program Policy Council  
meets quarterly

- I would like more information about participating in the Foundation's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.
- I am interested in participating in the Foundation's Idaho Volunteer Lawyers Program.

Name: \_\_\_\_\_ Firm: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Have you previously participated as a member of an ISB and/or ILF Committee?

- No
- Yes – Most recent committee assignment(s) \_\_\_\_\_

**Please return this form no later than May 23, 2009**

**ISB/ILF Committees  
P.O. Box 895  
Boise, ID 83701**

**Or email your committee interests to [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov)**



## ABA MID-YEAR MESSAGE HOUSE OF DELEGATES AMENDS RULE 1.10 AT MID-YEAR MEETING

Larry Hunter

*Idaho Delegate to ABA House of Delegates*

The House of Delegates of the American Bar Association has amended Rule 1.10 of the Model Rules of Professional Conduct at its mid-year meeting in Boston in February. The new rule allows for an expansion of the application of screening to avoid the imputation of conflicts to a new firm if a lawyer with a conflict joins the firm. The lawyer with the conflict would still be prohibited from working on the matter of course, and the rule allowing his new firm to screen him also restricts the transferring lawyer from receiving any fee from the matter for which he/she has a conflict. The new rule reads as follows:

### **Rule 1.10 Imputation of Conflicts of Interest: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the

former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

A change in the rule had been proposed in August, but was tabled by a narrow vote. During the ensuing months changes were made to the amendment. The matter was extensively debated before and at the meeting and a competing provision allowing for screening in much more narrow circumstances was proposed, but defeated. The changes to the amendment increased the burden on the new firm with regard to its responsibility to apprise the former client of the transferring lawyer of its rights in the situation and the firm's obligation to report on the mechanism being used to screen. The final vote was 226 in favor and 191 opposed.

A number of states already have adopted modifications of Rule 1.10 and allow for screening, including all of Idaho's neighbors, except for Wyoming. When Idaho adopted the latest iteration of the Model rules (with some modifications) in 2004, an attempt to modify 1.10 to allow for screening was narrowly defeated. Since 2004, the states which allow screening similar to the new model rule have reported few reports of violations of the screening provisions. For example, representatives of

the bar of the State of Washington report no ethics complaints involving screening. Washington's rule is very similar to the new ABA rule.

In addition to the consideration of this Resolution, the House considered 44 other resolutions which dealt with a number of issues. Those resolutions primarily are statements either in support of or opposition to legislation, policies or principles being considered by executive, judicial or legislative bodies that deal with specific areas of the law. Others dealt with internal policies of the ABA, such as the approval of various Paralegal programs meeting ABA guidelines. If you are interested in further information about the other resolutions, you can visit the ABA website and look for the link to the mid-year meeting.

In matters of interest to Idaho practitioners relating to officers of the ABA, Tim Hopkins of Idaho Falls was elected to serve on the Board of Governors of the ABA for three years, starting with the August annual meeting this summer



*Larry Hunter was appointed as the Idaho State Bar Delegate to the American Bar Association House of Delegates effective August 2004. Mr. Hunter is a partner with Moffatt, Thomas, Barrett, Rock and*

*Fields in Boise. His practice includes general and commercial litigation, administrative law, and alternative dispute resolution. Larry is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law. He has an A.B. from Harvard University (cum laude). Contact information for Larry is: (208) 345-200, or lch@moffatt.com*

## WELCOME FROM THE ENVIRONMENT AND NATURAL RESOURCES SECTION

Erika E. Malmen  
Perkins Coie, LLP

Greetings! Thanks for picking up the May 2009 issue of *The Advocate*, sponsored by the Environment and Natural Resources (ENR) Section of the Idaho State Bar. We are pleased to offer a variety of articles for your reading pleasure. Even if you are not in the least bit interested in environmental law, I encourage you to read on anyway. You'll either decide you are interested and be pleasantly surprised by the extent to which environmental law does have cross-application to many other legal disciplines, or you'll save yourself some cash from the resulting ability to forego purchasing prescription sleep aids. It's a win/win.

In the first article, Stoel Rives partner Kevin Beaton discusses the application of pesticides and whether Idaho farmers may be required to obtain authorization from the Environmental Protection Agency under the Clean Water Act to continue to apply pesticides near or onto surface waters. Yikes!

Also on the topic of the Clean Water Act, Laura Schroeder, reciprocal Oregon practitioner and ENR section member-at-large, reviews the latest guidance issued by the Environmental Protection Agency and U.S. Army Corps of Engineers (Corps) regarding which waters are in fact subject to, or properly regulated by, the Clean Water Act. As many of you know, there has been substantial debate about what constitutes a "water of the United States," which is the threshold for federal jurisdiction under the Act. You'll want to find out what the implications are of the latest guidance issued by the Corps and EPA.

Of further interest is Coeur d'Alene-based attorney Art Macomber's article concerning the Coeur d'Alene Spokane River Basin Adjudication (CSRBA). Although the CSRBA is not the State's first rodeo, so to speak, there appear to be some notable differences between the CSRBA and the Snake River Basin Adjudication (SRBA) that may be of interest to readers.

Deputy Attorney General Clay Smith contributes an article on the evolution of Endangered Species Act case law surrounding the controversial operations of the Federal Columbia River Power System and its potential impact on the economic infrastructure of the Pacific Northwest.

Deputy Attorney General Courtney Beebe and Certified Public Accountant Timothy Wendland with the Idaho Department of Environmental Quality have contributed an article about potentially available federal stimulus monies that may be used to fund improvements to Idaho's drinking and wastewater systems. As is generally the case with federal monies, there are strings attached, and Courtney and Tim identify them for us. As an aside, I should note that Courtney has been working on the ENR section's website and we all owe her BIG for providing our section with a website that includes practically useful tools and links. Please check out our new and much improved website at <http://www2.state.id.us/isb/sec/enr/enr.htm>. Thanks, Courtney!

Crop burning has been a contentious topic in Idaho for some time. In her piece, Deputy Attorney General Lisa Kronberg outlines the

general history and environmental issues associated with crop burning. Lisa can tell you everything and anything you've ever wanted to know and more about crop burning, and the ENR section appreciates Lisa's willingness to keep us updated and for the half-hour CLE she did for section members last fall on this topic.

One can't turn on the television these days without being inundated with news about the "energy crisis," alternative sources of energy, "green collar jobs," stimulus monies for renewables, and the like. Givens Pursley associate Kelsey Nunez contributes a timely article about energy transmission and its importance to Idaho's energy future. In her article, Ms. Nunez discusses proposed state legislation concerning the siting of transmission facilities. Hopefully by the time this article appears in print, the legislature will have gone home ... having decided the issue.

Jerrold Long, Associate Professor of Law at the University of Idaho College of Law, has contributed a thought-provoking essay focused on "sustainability", a topic which some of you may think has achieved cliché status. Fortunately for us, Professor Long provides a fresh view on sustainability, advocating for more local control of natural resources in a time when more federal control seems inevitable.

I can't imagine that there has been a more exciting time than ours to be practicing environmental law. Environmental issues and concerns continue to take center stage (or at least center stage left, no pun intended) in the scientific, political and cultural discourse of our nation. The ongoing demand for natural resources and quest for economic prosperity will ensure that current and future environmental practitioners will have plenty of subject matter to keep this practice interesting and challenging. A heart-felt "thank you" to all the contributors to this issue for taking precious time away from other pursuits to enlighten ENR section members and other members of the Idaho State Bar. We hope to see you at one of our luncheon CLE's soon.

### ABOUT THE AUTHOR

**Erika E. Malmen** is a member of the Perkins Coie Environment & Natural Resources group. She practices in the firm's Boise office focusing on environmental, energy and natural resources law, local, state and federal government permitting, real estate and land use, and water law. Prior to joining Perkins Coie, Ms. Malmen worked for the U.S. Department of the Interior in Washington, D.C., where she was first an attorney for the Division of Land and Water and later the Acting Special Assistant to the Solicitor. She also served as legal counsel to the Governor of Idaho's Office of Species Conservation. She received her law degree from the University of Denver Sturm College of Law and her undergraduate degree in speech communication from the University of Utah.

**DISCLAIMER:** The material and/or any opinions expressed in this article are solely Erika Malmen's and should not be attributed to the ENR section of the Idaho State Bar or Perkins Coie, LLP.

### ENVIRONMENTAL AND NATURAL RESOURCES SECTION

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# CLEAN WATER ACT PERMITTING REQUIREMENTS FOR PESTICIDE APPLICATIONS IN IDAHO

Kevin J. Beaton  
Stoel Rives LLP

In *National Cotton Council v. EPA*,<sup>1</sup> the Sixth Circuit Court of Appeals struck down a federal rule that exempted the application of pesticides to surface waters from permitting requirements under the Federal Water Pollution Control Act (hereinafter “Clean Water Act”).<sup>2</sup> The effect of this ruling will likely require any person or governmental entity in Idaho that applies pesticides and insecticides near or onto waters to first obtain a Clean Water Act permit.

This article examines how pesticide<sup>3</sup> application has been regulated under the Clean Water Act and examines the recent *Cotton Council* decision and the likelihood of additional requirements and restrictions on a variety of pesticide applications in Idaho.

## THE CLEAN WATER ACT PERMIT PROGRAM

The Clean Water Act makes it unlawful to “discharge”<sup>4</sup> “pollutants”<sup>5</sup> from a “point source”<sup>6</sup> to a variety of surface waters<sup>7</sup> without first obtaining a National Pollutant Discharge Elimination System Permit (hereinafter “NPDES Permit”) from the United States Environmental Protection Agency (EPA) or an authorized state environmental agency.<sup>8</sup> There are potentially severe civil and criminal sanctions under the Clean Water Act for persons that discharge pollutants to surface waters without a NPDES Permit.<sup>9</sup> The Clean Water Act also authorizes citizen suits in federal court to assess civil penalties for violations of NPDES Permit requirements and allows citizen and permittees to challenge permits and rules issued by the EPA.<sup>10</sup> Typical activities and facilities subject to NPDES Permits in Idaho include industrial discharges, municipal wastewater treatment plants discharges, aquaculture facilities, dairies, feedlots, stormwater runoff from cities and counties, storm water runoff from construction sites, and storm water runoff from a variety of industrial facilities.

Almost every state in the country has been authorized by the EPA to administer the NPDES Permit program. but the state of Idaho does not have an authorized NPDES Permit program.<sup>11</sup> Therefore, in Idaho, the EPA issues NPDES Permits. Because the EPA is the permitting agency, the effect of regional or national federal Clean Water Act judicial cases like the ones discussed in this article are often magnified in Idaho. This is so for a number of reasons, but principally because the EPA is directly bound by federal judicial cases and because the EPA has varied obligations and limited resources to respond to local conditions and priorities in Idaho caused by such judicial cases.

By way of background, for those who are not familiar with the process of obtaining a NPDES Permit from the EPA, it is no simple task.<sup>12</sup> For example, it is not unusual for the EPA to take years to issue a NPDES Permit for a new facility or years to reissue a NPDES Permit for an existing facility whose permit has expired.<sup>13</sup> General permits are authorized for certain categories of discharges.<sup>14</sup> Typical general permits issued by the EPA in Idaho include stormwater discharges from construction sites, stormwater discharges from industrial facilities, discharges from aquaculture facilities and discharges from confined animal feeding operations. Often, coverage under a general permit can be obtained relatively quickly by submitting a notice to EPA. However, it often takes the EPA years to develop such a general permit.

## THE HISTORY OF PESTICIDE REGULATION UNDER THE CLEAN WATER ACT

In *National Cotton Council of America v. EPA*, the court evaluated the legality of a 2006 EPA rule<sup>15</sup> which provided that the application of pesticides and herbicides to and over surface water to control pests, weeds and insects consistent with the Federal Insecticide, Fungicide,

and Rodenticide Act (FIFRA)<sup>16</sup> does not require a NPDES Permit. In *Cotton Council*, the Court determined the NPDES exemption in the rule violated the Clean Water Act.

Some background on how the EPA came to promulgate the 2006 rule is instructive. In general, Congress passes sweeping environmental laws that end up regulating activities nobody ever envisioned or intended. True to form, the operative provisions in the Clean Water Act relied upon by the court in the *Cotton Council* decision to vacate the EPA’s 2006 rule have been in place since 1972. For some thirty years, farmers, irrigation districts, foresters, local health agencies, fishery agencies and others have applied pesticides and herbicides to and above waters to control pests, weeds, insects and other undesirable species believing that all that was required under federal law was to follow the FIFRA labeling requirements. During this time, the EPA never definitively took a position as to whether NPDES Permits were or were not required for such applications.

In 2001, however, the assumption that compliance with FIFRA exempted pesticide applicators from the Clean Water Act permitting was dashed in the case of *Headwaters, Inc. v. Talent Irrigation District*.<sup>17</sup> In *Headwaters*, the Ninth Circuit Court of Appeals found that the application of an herbicide to a canal to control weeds required a NPDES Permit. Critical to the Court’s decision in *Headwaters* was the fact that a chemical residue toxic to fish remained in the water days after application.<sup>18</sup> Therefore, the Court found that the residue was a “chemical waste” and therefore a “pollutant” under the Clean Water Act. The Court also rejected the idea that compliance with FIFRA labeling requirements obviated the need for a NPDES Permit, finding that the two federal statutes served different purposes.<sup>19</sup> The Ninth Circuit’s finding on this point was based, in part, on an amicus brief filed by the EPA in the case which took the position, at that time, that compliance with FIFRA did not exempt an applicator of pesticides from obtaining a NPDES Permit.<sup>20</sup>

Shortly after *Headwaters*, the Ninth Circuit issued another decision on whether the application of pesticides from an airplane above surface waters required a NPDES Permit in *League of Wilderness Defenders v. Forsgren*.<sup>21</sup> *Forsgren* was another citizen suit, this time brought against the United States Forest Service (USFS) for discharging insecticides from airplanes to control moths which infect and kill trees on national forest lands in Oregon, Washington and Idaho without an NPDES Permit. In *Forsgren*, the Court found that the aerial application of insecticides over national forest lands (including surface waters) required a NPDES Permit. The USFS argued such spraying was covered by an EPA rule exempting certain silvicultural activities from NPDES Permit requirements.<sup>22</sup> However, the Court found that the USFS’ application of pesticides clearly involved the discharge of a pollutant (insecticide) from a point source (airplane) to jurisdictional waters. The Court also found that EPA’s silvicultural rules did not (and could not) exempt activities Congress clearly required to be subject to NPDES Permit requirements under the Clean Water Act.<sup>23</sup>

The *Headwaters* and *Forsgren* decisions created a major stir not only in the West but around the United States. Now, activities

### Acronyms

EPA - Environmental Protection Agency  
FIFRA - Federal Insecticide, Fungicide and Rodenticide Act  
NPDES - National Pollutant Discharge Elimination System Permit  
USFS - United States Forest Service

that nobody ever believed required a NPDES Permit were subject to Clean Water Act permitting. For example, during this time, the spread of West Nile Virus associated with water borne vectors was causing illness and deaths around the United States. Local agencies around the United States were being forced either to go through a lengthy permit process to undertake an activity that required immediate action or to face civil and criminal liability for unlawfully spraying insecticides on waters without a NPDES Permit. One might legitimately ask at this point: “Is this not an elevation of form over substance?” or “How can it be that environmental laws designed to protect public health are being used as a barrier to protect public health?” or “Can’t we just get along?” (All legitimate questions but, alas, rhetorical ones in the world of environmental law and policy in the United States.)

To address this untenable situation, some states with NPDES Permit programs, such as Washington and California, acted quickly and issued general NPDES Permits to authorize application of pesticides and herbicides into waters. The EPA chose not to issue any type of general permits in Idaho or elsewhere, but rather adopted an “interim guidance document” in 2003. In that document, the EPA opined that pesticides and herbicides applied to surface waters consistent with FIFRA requirements were not “pollutants” under the Clean Water Act, since such application did not involve the discharge of a chemical “waste” but rather a chemical “product,” and therefore no NPDES Permit was required.<sup>24</sup> The EPA then went forward with a proposed rule that resulted in publication of a final rule at 40 CFR § 122.3(h) in 2006 that closely followed the EPA’s interim guidance document.<sup>25</sup>

### THE COTTON COUNCIL DECISION

After the EPA published its final rule in late 2006, a host of environmental advocacy groups, groups opposed to the use of pesticides, and industries filed challenges to the rule in numerous federal courts throughout the United States. Each group sought to have its challenge heard in a favorable forum. All of the challenges were consolidated before the Sixth Circuit Court of Appeals for decision.

In *Cotton Council*, the Sixth Circuit rejected much of the rationale offered by the EPA in support of the rule. The EPA’s principal position in supporting the exemption was that the application of pesticides to and above waters in accordance with FIFRA is the application of a product and not a “chemical waste” or a “biological material” and therefore not a “pollutant” under the NPDES Permit program.

The *Cotton Council* court focused on the definition of “pollutant” in the Clean Water Act which included the terms “chemical waste” and “biological materials.”<sup>26</sup> The court accepted the EPA’s position that some chemical pesticides that are intentionally applied to waters for a beneficial purpose are chemical products and not a “chemical waste” as long as there does not remain any chemical residue after application.<sup>27</sup> This finding was consistent with an earlier Ninth Circuit case that found the discharge of a pesticide to waters with the intent of eradicating a certain species of fish and which did not leave any remaining chemical residue in the water was not a discharge of a pollutant requiring a NPDES Permit.<sup>28</sup> However, the court in *Cotton Council* disagreed with the EPA’s position as it relates to pesticides that leave a “residue” in the water.<sup>29</sup> Instead, the *Cotton Council* court agreed with the Ninth Circuit’s analysis in *Headwaters* that such residues were clearly a “chemical waste” and therefore a pollutant.<sup>30</sup>

In *Cotton Council*, the Sixth Circuit rejected the EPA’s attempt to subtly overturn *Headwaters* by suggesting that even if chemical residues (toxic or otherwise) remained in the water after application of chemical pesticides a NPDES Permit was still not required because at the time of discharge the pesticide was still a “product” and only turned into a waste after it was in the water.<sup>31</sup> According to the EPA, this meant that the chemical waste was not discharged from a point source but rather was now a “nonpoint” pollution source and not subject to NPDES Permit requirement.<sup>32</sup> The Court rejected this logic,

finding that the Clean Water Act did not support the EPA’s “temporal” interpretation that material could be lawfully discharged without a permit but later turn into a pollutant.<sup>33</sup>

The Sixth Circuit also found that a variety of other pesticides which utilize “biological materials” such as viruses, bacteria, fungi and plant material were pollutants and therefore could not be exempted from NPDES Permit requirements if they were discharged to or above surface waters.<sup>34</sup> The Court found that the plain meaning of the term “biological materials” in the definition of “pollutant” did not require such material to be a “waste.”<sup>35</sup> Accordingly, the Court concluded that the application of any biological pesticide to jurisdictional waters from a point source, whether it left a residue or not, required a NPDES Permit.<sup>36</sup>

### CONCLUSION

It is not yet known whether the EPA or other parties will seek rehearing, a stay of the ruling or request review before the United States Supreme Court. Absent a successful appeal or a stay of the ruling, it is clear that any chemical pesticide that is applied to or above surface waters which leaves any type of residue in the water as well as the application of any biological pesticide to or above surface waters will require a NPDES Permit. It is also possible that the EPA may attempt to substantially modify the rule to be consistent with the Court’s ruling in *Cotton Council*. The more likely outcome will be that the EPA and authorized states will need to issue NPDES Permits which authorize the application of pesticides to or above surface waters.

Unless the EPA issues a general NPDES Permit in Idaho authorizing such pesticide applications, then any person, entity or governmental entity that intends to lawfully apply such pesticides to or above water must first obtain an individual NPDES Permit. As noted above, the individual permits process is often lengthy. Until the EPA issues an individual or general permit to applicators of pesticides to surface water in Idaho, such applicators face potential liability from third party citizen suits and possibly even from EPA.

### ABOUT THE AUTHOR

**Kevin Beaton** has been practicing environmental and natural resources law for the past twenty (20) years. He is a partner with *Stoel Rives LLP*. Kevin represents a variety of industrial, commercial and energy facilities as well as real estate developers on Clean Water Act NPDES and § 404 permitting actions, 401 water quality certifications, endangered species act consultations, clean up actions, water rights, and related federal and state environmental enforcement actions. He received his undergraduate B.A. from Boston College in 1979 and his J. D. from the National Law Center, George Washington University in 1983.

### ENDNOTES

<sup>1</sup> 553 F.3d 927 (6th Cir. 2009).

<sup>2</sup> See 33 USC §§ 1251 through 1387.

<sup>3</sup> Reference to “pesticides” in this article also includes herbicides, insecticides and similar products.

<sup>4</sup> The term “discharge” means the addition of a pollutant from a point source. See 33 USC § 1362(12).

<sup>5</sup> The term “pollutant” under the Clean Water Act includes “dredge spoil, solid wastes ... sewage, chemical wastes, biological materials ... dirt, industrial municipal and agricultural waste discharged into water.” See 33 USC § 1362(6).

<sup>6</sup> “Point source” means any “discrete conveyance” such as a “pipe, ditch, channel, tunnel, vessel . . .” See 33 USC § 1362(14).

<sup>7</sup> The actual term used under the Clean Water Act is “navigable water” or “waters of the United States.” See 33 USC § 1362(7). The scope of waters covered by the Clean Water Act is broad and controversial and is beyond the scope of this article. See e.g. *Rapanos v. United States*, 126 S.Ct 2208 (2006) for the United States Supreme Court’s most recent analysis of the scope of navigable waters under the Clean Water Act.

<sup>8</sup> See 33 USC §§ 1311 and 1342.

<sup>9</sup> See 33 USC § 1319. For example, civil penalties can be up to \$37,000 per

day per violation. Criminal penalties include imprisonment and more severe monetary penalties.

<sup>10</sup> See 33 USC §§ 1365 and 1369.

<sup>11</sup> Forty six states have been authorized to administer the NPDES Permit program. In 2005 the Idaho Legislature directed the Idaho Department of Environmental Quality (IDEQ) to explore whether the state should operate a NPDES program. See Idaho Code §§ 39-175A – 39-175C. Due to the potential costs of the program and other priorities, further steps to obtain authorization for the NPDES Permit program from EPA have not been undertaken by the state of Idaho.

<sup>12</sup> The application process for NPDES permits and the process EPA follows in issuing NPDES permits is set forth in federal rules at 40 CFR Part 122.

<sup>13</sup> The Clean Water Act stipulates that NPDES Permits must be issued for a fixed term not to exceed five (5) years. See 33 USC §§ 1342(b)(1)(B).

<sup>14</sup> See 40 CFR § 122.28.

<sup>15</sup> See 40 CFR § 122.3(h).

<sup>16</sup> 243 F.3d 526 (9th Cir. 2001)

<sup>17</sup> 243 F.3d, at 532-533.

<sup>18</sup> 243 F.3d at 530-532.

<sup>19</sup> 243 F.3d at 531-532.

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

<sup>21</sup> 309 F.3d 1181 (9th Cir. 2002)

<sup>22</sup> 309 F.3d at 1185. See also 40 CFR § 122.27.

<sup>23</sup> 309 F.3d at 1186-1190.

<sup>24</sup> EPA Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA. 65 Fed. Reg 48385.

<sup>25</sup> See 71 Fed. Reg. 68492 (November 27, 2006).

<sup>26</sup> 553 F.3d at 935.

<sup>27</sup> 553 F.3d at 936.

<sup>28</sup> See *Fairhurst v. Hager*, 422 F.3d 1146 (9th Cir. 2005).

<sup>29</sup> 553 F.3d at 936.

<sup>30</sup> *Id.* at 937.

<sup>31</sup> 553 F.3d at 938-939.

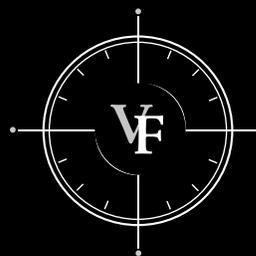
<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 939.

<sup>34</sup> 553 at 937-938.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



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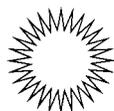
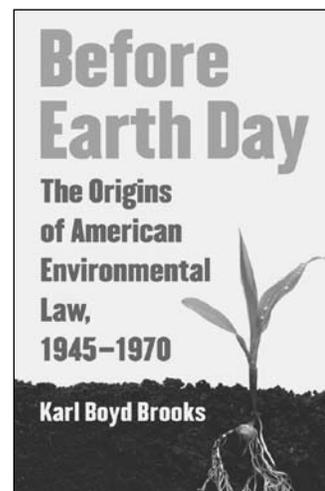
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# AFTER THE FLOOD: THE JURISDICTIONAL REACH OF NAVIGABLE WATERS IN THE POST-*RAPANOS* WEST

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## BACKGROUND

In the arid West, the desert blooms... at least when irrigation project waters flow! Without a doubt, federal regulations regarding water flow and quality changed the American desert landscape and encouraged settlement in previously inhospitable areas. Now, some would say, there are too many settlers in the West, and water-based regulation should again be used to control settlement – this time by reducing population scatter and its corresponding effect on the environment.

Whether one agrees with such sentiments or not, the United States Supreme Court, the Environmental Protection Agency (EPA), and the Army Corps of Engineers (Corps) appear to be paving the way for such control through recent interpretation and application of the Clean Water Act (CWA).<sup>1</sup>

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>2</sup> To achieve this purpose, the CWA prohibits the discharge of any pollutants, including dredged or fill material, into “navigable waters.” As discussed below, through the enforcement of these prohibitions over “navigable waters” (including administration of a permitting process for exceptions), the EPA and Corps arguably control more than just water quality and flow.

## THE 2008 GUIDANCE

What are “navigable waters” as that term is used in the CWA? The United States Supreme Court recently addressed interpretation of this phrase in the consolidated cases *Rapanos v United States* and *Carabell v United States (Rapanos)*.<sup>3</sup> Because *Rapanos* took interpretation of “navigable waters” in a different direction than earlier decisions, the EPA and the Corps issued an explanatory memorandum (the 2008 Guidance) to help their field offices “identify] those waters over which the agencies will assert jurisdiction categorically and on a case-by-case basis, based on the reasoning of the *Rapanos* decision.”<sup>4</sup>

The 2008 Guidance seeks to reconcile the *Rapanos* decision with earlier agency interpretation of the CWA’s jurisdictional reach. To that end, the 2008 Guidance creates three primary groups of waterways that are to be considered federal waters under CWA jurisdiction: (1) Traditional Navigable Waters (i.e., “(a)(a) Waters”) and Their Adjacent Wetlands; (2) Relatively Permanent Non-navigable Tributaries of Traditional Navigable Waters and Wetlands with a Continuous Surface Connection with Such Tributaries; and (3) Certain Adjacent Wetlands and Non-navigable Tributaries That Are Not Relatively Permanent.

## TRADITIONAL NAVIGABLE WATERS AND THEIR ADJACENT WETLANDS

Under the 2008 Guidance, Traditional Navigable Waters (TNW) are considered categorical federal waters. TNW include waters that are navigable-in-fact, such as waters currently used or susceptible of being used for commercial navigation. For purposes of the CWA, commercial navigation also includes commercial water-borne recreation like boat rentals, guided fishing trips, and water ski tournaments within its definition of TNW.

When discussing adjacent wetlands, the applicable regulations require that the wetlands borders are contiguous to or neighbor the

TNW; however, wetlands separated from the TNW by a man-made dike or barrier, natural river berm, or beach dune are considered “adjacent.”<sup>5</sup> The EPA and Corps consider wetlands “adjacent” if one of the following criteria is satisfied: (a) There is an unbroken surface or shallow sub-surface connection to the TNW that may be intermittent; (b) the wetland is physically separated from the TNW by man-made dikes or barriers, natural river berms, beach dunes, and the like; or, (c) the wetlands are reasonably close to the TNW, supporting the science-based inference that such wetlands have an ecological interconnection with the TNW.<sup>6</sup>

## RELATIVELY PERMANENT NON-NAVIGABLE TRIBUTARIES OF TRADITIONAL NAVIGABLE WATERS AND WETLANDS WITH A CONTINUOUS SURFACE CONNECTION WITH SUCH TRIBUTARIES

Under the 2008 Guidance, a non-navigable tributary of a TNW is also considered a categorical federal water. Such waters include natural, man-altered, or man-made water bodies that carry flow directly or indirectly by means of other tributaries into a TNW. The inclusion of the “relatively permanent” modification to the definition attempts to limit CWA jurisdiction to those non-navigable tributaries that flow year round or have continuous flow on a seasonal basis – which the guidance suggests would typically be three months.<sup>7</sup>

Also included within CWA jurisdiction are wetlands with a physical connection to a relatively permanent, non-navigable tributary.<sup>8</sup> The applicable agency regulations further explain that a continuous surface connection does not require surface water to be continuously present between the wetland and the tributary, as wetlands include “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support ... a prevalence of vegetation typically adapted for life in saturated soil conditions.”<sup>9</sup>

## CERTAIN ADJACENT WETLANDS AND NON-NAVIGABLE TRIBUTARIES THAT ARE NOT RELATIVELY PERMANENT

One might conclude that most tributaries of the arid West would not fall within the CWA jurisdiction for want of “relative permanency;” however, the 2008 Guidance specifically provides that if a tributary fails this test, or to qualify for another basis for categorical jurisdiction, it can still be evaluated under the “significant nexus” test.

Thus, the EPA and Corps may apply the significant nexus test to assert CWA jurisdiction over adjacent wetlands and non-navigable tributaries that are not relatively permanent. The application of this significant nexus test also extends to adjacent wetlands that do not directly abut a relatively permanent tributary (e.g., separated from it by uplands, a berm, dike or similar feature).

In general, the significant nexus test assesses whether the flow characteristics and functions of the non-navigable tributary, together with the function, if any, of wetlands adjacent to the

### Acronyms

CWA - Clean Water Act  
EPA - Environmental Protection Agency  
TNW - Traditional Navigable Waters

tributary, significantly affect the chemical, physical and biological integrity of the downstream TNW.

While the 2008 Guidance purports to exempt “ditches” as not holding a “significant nexus” to downstream TNW, the term “ditch” is narrowly construed and refers to those that are “excavated wholly in and draining only uplands that do not carry a relatively permanent flow of water.”<sup>10</sup> Of further significance to the arid West is the fact that the 2008 Guidance specifically provides that certain ephemeral waters may be subject to CWA jurisdiction where the waters are tributaries that serve as a “transitional area between the upland environment and the TNW.” Arguably, the 2008 Guidance predisposes such ephemeral waters to CWA jurisdiction.<sup>11</sup>

#### CONCLUSION

Under *Rapanos* and the 2008 Guidance, (see figure 1, Summary of Key Points) it is likely a rare case in which an ephemeral stream tributary to a TNW will fail the CWA jurisdictional significant nexus test. Accordingly, water law practitioners – and those whose

#### Figure 1 - Summary of Key Points 2008 Guidance

##### Summary of Key Points

The agencies will assert jurisdiction over the following waters:

- Traditional navigable waters
- Wetlands adjacent to traditional navigable waters
- Non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months)
- Wetlands that directly abut such tributaries

The agencies will decide jurisdiction over the following water based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water:

- Non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to non-navigable tributaries that are not relatively permanent
- Wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary

The agencies generally will not assert jurisdiction over the following features:

- Swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow)
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water

The agencies will apply the significant nexus standard as follows:

- A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream traditional navigable waters
- Significant nexus includes consideration of hydrologic and ecologic factors

interest is in the settlement of the arid West – must be increasingly concerned with the use, maintenance and operation of ditches and ponds or reservoirs established in or near wetlands and tributaries including ephemeral streams of traditional navigable waters without benefit of a CWA permit.

#### ABOUT THE AUTHOR

**Laura Schroeder** and *Schroeder Law Offices, PC*, practice water law, exclusively, in Idaho, Oregon, Washington and Nevada. A Treasure Valley native, her water law practice includes representing clients in water rights acquisitions, sales, permitting, transfers and consultations and litigating water rights disputes before state administrative bodies, as well as state and federal courts. For more information, see [www.water-law.com](http://www.water-law.com).

#### ENDNOTES

<sup>1</sup> 33 U.S.C. 1251(a).

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

<sup>3</sup> 126 S. Ct. 2208 (2006).

<sup>4</sup> EPA/Army Corps., Clean Water Act Jurisdiction Memorandum, 1, issued Dec. 2, 2008, see [http://www.epa.gov/owow/wetlands/pdf/CWA\\_Jurisdiction\\_Following\\_Rapanos120208.pdf](http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf).

<sup>5</sup> 33 C.F.R. 328.3 (c).

<sup>6</sup> See e.g. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

<sup>7</sup> See 126 S.Ct. at 2221 n.5.

<sup>8</sup> *Id.* At 2232 n.13, 2230.

<sup>9</sup> 33 C.F.R. 328.3(b); 40 C. F.R. 232.2.

<sup>10</sup> See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).

<sup>11</sup> During and following precipitation events, ephemeral tributaries collect and transport water and sometimes sediment from the upper reaches of the landscape downstream to the TNW. These ephemeral tributaries may provide habitat for wildlife and aquatic organisms in downstream TNW. These biological and physical processes may further support nutrient cycling, sediment retention and transport, pollutant trapping and filtration, and improvement of water quality, functions that may significantly affect the chemical, physical, and biological integrity of downstream TNW.



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# COEUR d'ALENE SPOKANE RIVER BASIN ADJUDICATION BASINWIDE ISSUES IN NORTH IDAHO

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## SYNOPSIS

The Idaho Water Adjudication Court (the Court) has the power to declare the existence of basinwide issues for the purpose of adjudicating matters affecting large numbers of water rights holders. As that court continues the Coeur d'Alene Spokane River Basin Adjudication (CSRBA) it should consider whether basinwide *quantity* water rights determinations are impacted by water *quality* issues due to hydrologic attributes of the Rathdrum Prairie Aquifer, Spokane River interstate instream flow requirements related to Washington State water quality requirements, and the need for municipal gray water disposal and the elimination of septic systems over the Rathdrum Prairie Aquifer.

## INTRODUCTION

In addition to using the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.), the Court created specialized rules of procedure, including the Snake River Basin Adjudication (SRBA) Administrative Order 1, amended 9/30/96 (SRBA AO1)<sup>1</sup>. The SRBA AO1 allows “[a]ny party to the adjudication [to] file a Motion to Designate [a] Basin-Wide Issue if that party believes an issue materially affects a large number of parties to the adjudication.”<sup>2</sup> A “basinwide issue” is defined as “an issue designated by the Presiding Judge as potentially affecting the interests of a large number of claimants to the use of water within the [adjudicated basin] and the resolution of which will promote judicial economy.”<sup>3</sup> To have the Court recognize a basinwide issue upon motion by a party, that party must state in its pleading: “(a) the issue, in 20 words or less, (b) why the issue is broadly significant and is better resolved as a basinwide issue, (c) the need for its early resolution, (d) the type of right(s) affected by the issue, and (e) a description of how those rights will be affected.”<sup>4</sup> Conversely, the Court may *sua sponte* designate a basinwide issue.<sup>5</sup>

## TIMING OF BASINWIDE ISSUE DESIGNATION

The SRBA AO1 states that any “motion or notice of intent to designate may be filed at any time after the filing of [the Idaho Department of Water Resources (IDWR)] Director’s Report [for a given basin] which raises the issues that are the subject of the motion. The motion shall not be heard until after the objection and response periods to the Director’s Report have run.”<sup>6</sup> Thus, while a motion or notice of intent to designate *may* be filed after the filing of a Director’s Report, only a party’s motion *shall* not be heard until after the objection and response periods to the Director’s Report have run. A reasonable interpretation is that the Court retains the power to designate a basinwide issue prior to the filing of a Director’s Report. It is likely that the SRBA AO1 procedures will be used for the CSRBA, although a redesignation as the Idaho State Water Court Administrative Order number one (ISWC AO1) may be appropriate given that the CSRBA is not the SRBA, and the CSRBA likely is not the final adjudication of water rights within the State of Idaho. Thus, in all three of the proposed North Idaho adjudications<sup>7</sup> the Court arguably has the power to designate on its own initiative basinwide issue(s) prior to the filing of a Director’s Report and without the submission of a party’s filed motion.

## BASINWIDE ISSUES V. GENERAL PROVISIONS

In the SRBA, some basinwide issues were related to the status of parties<sup>8</sup> or statutory and constitutional construction.<sup>9</sup> Some were related to how IDWR should manage the water rights following the final

decree.<sup>10</sup> There is a difference between a basinwide issue and a general provision. A basinwide issue is generally identified during adjudication for the purpose of reaching the decision in the final decree, whereas a general provision is for the purpose of administering water rights by IDWR following the decree.<sup>11</sup> However, while some basinwide issues are resolved during adjudication with no effect on later administration of the right, some evolve into general provisions that are attached to the decrees to assist IDWR in administering the right after the adjudication has ended. The Idaho Supreme Court found the Court’s inclusion of general provisions in its decree so that IDWR could “administer the rights decreed [wa]s not an impermissible delegation” of executive authority to the judicial branch.<sup>12</sup> Therefore, the Court may designate both basinwide issues and general provisions that affect IDWR’s post-decree administration of water rights.

## MEANING OF SENATE BILL 1205

In the CSRBA region, flat topography and ditch works for irrigation serve relatively few water users, in comparison to the more numerous groundwater well users.<sup>13</sup> Thus, conjunctive management of surface and groundwater issues should be vigorously used in the CSRBA region. Additionally, in 2007, the Idaho Legislature passed Senate Bill 1205, which included a provision at Section 5 stating:

It is legislative intent that work on the Northern Idaho Adjudication be limited in this fiscal year to the Rathdrum Prairie water rights and to Idaho-Washington cross-border water issues.<sup>14</sup>

Senate Bill 1205 was a fiscal year 2008 appropriation of funds to IDWR, but within that bill the Legislature did not identify what it believed to be “Idaho-Washington cross-border water issues.” As far as its mention of Rathdrum Prairie water rights, it seems clear that the legislature required IDWR to begin accepting CSRBA claims in the north portion of Basin 95, and to work its way south. However, we can only speculate on what it meant about the substance of Idaho-Washington cross-border water issues. It is reasonable to assume that because the Spokane River is where the majority of the surface water in the CSRBA leaves Idaho that the Legislature meant to indicate that basinwide issues arising related to cross-border concerns should be identified and raised in the initial part of the adjudication process. This provision suggests the designation of basin-wide issues.

Even though a legislatively enacted fiscal year appropriations bill such as Senate Bill 1205 is not a permanent statute, its similar origin, creation, and enactment likely results in a similar judicial branch interpretive methodology. “When interpreting a [legislative enactment], the Court begins with the plain language.”<sup>15</sup> “[I]f the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction. . . . Statutory interpretation begins with the words of the statute, giving the language its plain, obvious and rational meanings.”<sup>16</sup>

Assuming the use of that methodology for interpretation of the Section 5 language in Senate Bill 1205, it is reasonably arguable

### Acronyms

**CSRBA** - Coeur d'Alene Spokane River Basin Adjudication  
**IDEQ** - Idaho Department of Environmental Quality  
**IDWR** - Idaho Department of Water Resources  
**ISWC** - Idaho State Water Court  
**LMP** - Lake Management Plan  
**SRBA** - Snake River Basin Adjudication

that the legislative directive requires IDWR to consider cross-border issues *unrelated to water volume*, its usual agency mission. Against that argument, this is a fiscal year appropriation to IDWR, and to no other agency. Further, Section 5's directive only relates to IDWR's "work," which is primarily related to water volume and not water quality, for which we have a separate state agency, the Idaho Department of Environmental Quality (IDEQ) not included in this Senate Bill appropriation. Unfortunately, the argument that the plain language limits the directive to water volume issues is undermined by the disjunctive phrase "Rathdrum Prairie water rights and to Idaho-Washington cross-border water issues."<sup>17</sup>

The Legislature separated Rathdrum Prairie water rights from Idaho-Washington cross-border water issues. However, while we cannot go into the committee rooms and hallways wherein our law was created to ascertain the Legislature's subjective sense of what required inclusion in that Senate Bill, any North Idahoan who reads the newspaper regularly will quickly discern that water *quality* issues and relations with our neighboring State of Washington are inextricably bound.<sup>18</sup> They are not only bound, but primary in the public mind, especially with the publicity given various reports related to the Rathdrum Prairie Aquifer, the Spokane River, and Lake Coeur d'Alene. Therefore, the legislative directive may be for the IDWR to not only to administer CSRBA surface and groundwater rights using conjunctive management administrative tools, but for it and the IDEQ to work together to design hydrologically-based tools for the conjunctive management of water *quantity* and water *quality* issues. This interpretation of the legislative directive would cogently recognize the natural hydrologic cycle.

### POTENTIAL CSRBA BASINWIDE ISSUE CONSIDERATIONS

A hydrogeologic study of the Rathdrum Prairie Aquifer was funded by Congress in 2003 and finished in 2007.<sup>19</sup> The result was the most comprehensive hydrogeologic study to date of that hydrologic system.<sup>20</sup> One of the findings was that given current uses the aquifer inflows and outflows were nearly balanced.<sup>21</sup> A CSRBA process that takes five to ten years will grapple with growth issues and their impacts on water quantity within that watershed.

In November 2006, Kootenai County Commissioners approved Resolution 2207-09 to form the Rathdrum Prairie Aquifer Protection District<sup>22</sup> to track the quality of the region's drinking water. That taxing district assesses \$8.00 per year against occupied real property parcels in the district.<sup>23</sup>

In June 2008, the Coeur d'Alene Tribe and the IDEQ completed and offered to the Idaho Legislature a Lake Management Plan (LMP) for Lake Coeur d'Alene.<sup>24</sup> "The scope of the 2008 LMP encompasses the entire Coeur d'Alene Lake Basin. The reason for this is practical: loading of the lake with metals, sediments, and nutrients results from activities that occur around the lake, in upland areas, and along tributary streams and rivers."<sup>25</sup> "The scope is intended to follow natural boundaries, *promote integrated solutions*, and maximize the use of available resources to benefit water quality."<sup>26</sup> The added emphasis by italics shows that the Lake Management Plan provides support for an integration of IDWR's and the Court's CSRBA efforts with the tribe's and IDEQ's Lake Management Plan, suggesting an extension of conjunctive management to include water quality would lead to administrative efficiencies and greater cost-effectiveness of water management, administrative processes. Whether the court finds a basinwide issue applicable or merely grounds for including general provisions related to water rights in the CSRBA is an analysis that should be undertaken at the appropriate time.

Idaho Code section 42-1501 states the "public health, safety and welfare require that the streams of this state and their environments be protected against loss of water supply to preserve the minimum stream flows required for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation

values, and water quality." Instream flows for those purposes are a beneficial use in the public interest.<sup>27</sup> The CSRBA lake, aquifer and river volume flows are paramount to resolution of interstate relations with Washington. The origin of the flows, the flows themselves, and the quality of the water in those flows may be suitable as basinwide issues for water rights claimants in the CSRBA. "[M]inimum stream flow is a beneficial use of water . . . for the purpose of protecting such waters from interstate diversion to other states . . . for use outside the boundaries of the state of Idaho."<sup>28</sup>

### CONCLUSION

The CSRBA Court has the power to declare the existence of basinwide issues for the purpose of adjudicating matters affecting large numbers of water rights holders. Even though the structure of Idaho's state agencies does not mirror the single system hydrologic cycle in a single agency, the Court should consider encouraging a four-way conjunctive management approach to basinwide issues and general provisions so that adjudication and future administration of CSRBA water rights consider surface water, ground water, water quantity, and water quality in a set of comprehensive tools for management of North Idaho water.

### ABOUT THE AUTHOR

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### ENDNOTES

<sup>1</sup> *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

<sup>2</sup> *Id.*, citing the then current SRBA AO1(17)(a)(1), now SRBA AO1(16)(a)(1).

<sup>3</sup> SRBA AO1(2)(c).

<sup>4</sup> SRBA AO1(16)(a)(1)(a-e).

<sup>5</sup> *Id.*, at (2).

<sup>6</sup> *Id.*, at (5).

<sup>7</sup> I.C. § 42-1406B, ". . . the Coeur d'Alene-Spokane river basin, the Palouse river basin, and the Clark Fork-Pend Oreille river basins, which do not include basin 98."

<sup>8</sup> *Basinwide Issue #2*: "What is the role of the Director, i.e., the Idaho Department of Water Resources, as a party in this statutory adjudication requiring the judicial determination of each claimant's right to the use of water in the Snake River Basin?" *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 719-720, 947 P.2d 391, 392-393, (1997).

<sup>9</sup> *Basinwide Issue #3*: "Can the legislature expand or reduce the court's jurisdiction in the SRBA after jurisdiction attaches to the parties and subject matter of the action following the issuance of the Commencement Order and the filing of notices of claims?" *State v. U.S.*, 128 Idaho 246, 252, 912 P.2d 614, 620, (1995).

<sup>10</sup> *Basinwide Issue #5*: "[W]hether each of the Test Basins, Director's Reporting Areas 1 (Basin 34), 2 (Basin 36), and 3 (Basin 57), should be subject to general provisions regarding firefighting purposes, irrigation uses, and conjunctive management." *In Re SRBA Case No. 39576*, Order of Consolidation/Separation of Issues, fn. 1 (Aug. 31, 1999); see *Basinwide Issue #10*: "[a]re water rights in Idaho subject to partial forfeiture for nonuse?" *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 729, 947 P.2d 400, 402 (1997).

<sup>11</sup> I.C. § 42-1412(6): "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." For a discussion of general provisions, see *A & B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1997) ("[A] provision regarding firefighting should be included as a general provision in regulations and the period of use for irrigation water rights as the irrigation season.").

<sup>12</sup> *State v. U.S.*, 128 Idaho 246, 262, 912 P.2d 614, 630 (1995).

<sup>13</sup> The total of previously adjudicated water rights between private parties, licenses and permits, and statutory claims for the CSRBA region is 4097, whereas the number of recorded wells is 10,858, per Don Schaff, IDWR Adjudication Bureau Chief, Slide title: Projected Counts, Microsoft

Powerpoint presentation, dated Apr. 17, 2006. In an email dated Oct. 18, 2006, Mr. Schaff stated that for the SRBA region, "IDWR does have records for 42,791 recorded wells [statewide] prior to Nov 19, 1987, but that number was the tip of the iceberg for the number of claims from wells in the SRBA."

<sup>14</sup> S.B. 1205, 59th Leg., 1st Reg. Sess. (Id. 2007).

<sup>15</sup> *In re SRBA, Case No. 39576, Subcase No: 29-11609, Pocatello v. State*, 145 Idaho 497, 180 P.3d 1048 (2008).

<sup>16</sup> *State v. Hagerman Water Right Owners*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997).

<sup>17</sup> S.B. 1205, 59th Leg., 1st Reg. Sess. (Id. 2007).

<sup>18</sup> *Coeur d'Alene River Cooperative River Basin Study*, U.S. Dept. of Agriculture, Sept., 1994; IDWR Order re: Rathdrum Prairie Ground Water Management Plan, Sept. 2005; and see Coeur d'Alene Press Article: *Report: Spokane River on deathbed*, Sept. 2003 (pollution in river threatens downstream users); Coeur d'Alene Press Article: *Tribe takes long look at lake*, Oct. 2003 (management of water quality); Coeur d'Alene Press Article: *We can pay now or pay more later*, Feb. 2004 (sewer management fees to protect prairie); Coeur d'Alene Press Article: *Report calls for river cleanup*, Feb. 2004 (Wash. DOE issues report on Idaho phosphorus pollution); Coeur d'Alene Press Article: *Basin plan scrutinized*, Apr. 2004 (CdA Tribe and IDEQ worry about Lake exclusion from Superfund); Coeur d'Alene Press Article: *Aquifer study bogs down*, Apr. 2004 (Minimal funding, red tape impede two-state project to analyze Rathdrum Aquifer); Coeur d'Alene Press Article: *Plant complement sought*, May 2004 (Post Falls eyes property for land application of treated wastewater); Coeur d'Alene Press Article: *Lakeshore owners brace for water fight*, July 2004 (Fish and Game calls for higher flows for Spokane River).

<sup>19</sup> [http://www.deq.state.id.us/water/prog\\_issues/ground\\_water/rathdrum\\_prairie\\_aquifer/](http://www.deq.state.id.us/water/prog_issues/ground_water/rathdrum_prairie_aquifer/), accessed 3/5/09.

<sup>20</sup> <http://www.idwr.idaho.gov/hydrologic/projects/svrp/>, accessed 3/5/09.

<sup>21</sup> U.S.G.S. Scientific Investigations Report 2007-5041, Summary, (Total estimated mean annual inflow to the aquifer is 1,471 cubic feet per second. Total estimated mean annual outflow from the SVRP aquifer is 1,468 cubic feet per second.)

<sup>22</sup> <http://id-kootenai-assessor.governmax.com/propertymax/rover30.asp?sid=ADDD240227864BD7B05454020E33BC5B>, accessed 3/5/09.

<sup>23</sup> Kootenai Co. Board of Comm. Meeting Minutes, Aug. 2007.

<sup>24</sup> [http://www.deq.state.id.us/water/data\\_reports/surface\\_water/water\\_bodies/cda\\_lake\\_mgmt\\_plan\\_draft\\_0608.pdf](http://www.deq.state.id.us/water/data_reports/surface_water/water_bodies/cda_lake_mgmt_plan_draft_0608.pdf), accessed 3/9/09.

<sup>25</sup> *Id.*, at p. ii.

<sup>26</sup> *Id.*, emphasis added.

<sup>27</sup> I.C. § 42-1501.

<sup>28</sup> *Id.*, and see definition of "minimum stream flow" at I.C. § 42-1502 (f).



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# SALMON, DAMS AND THE ENDANGERED SPECIES ACT JEOPARDY STANDARD

Clay R. Smith

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Perhaps the single most controversial and most consequential, environmental issues in the Pacific Northwest centers on the short-term survival and long-term recovery of anadromous fish species. Idaho itself has a particular interest because four of the species—Snake River spring and summer Chinook, Snake River fall Chinook, Snake River Steelhead and Snake River Sockeye—originate here, migrate to the Pacific Ocean where they mature for periods ranging typically from two to five years, return to breeding grounds to spawn and, generally, die. Their passage to and from the ocean requires not only navigating passage through or around eight dams on the Snake and Columbia Rivers, but also surviving the natural perils of predators and potentially hostile ocean conditions. The return trip for the hardy segment that survives outward migration finds further hazard in the form of ocean and in-river commercial, sport and tribal harvest. It comes as no surprise that only a minute fraction survives to spawn in natal streams.

No less daunting than the task facing these anadromous fish species is the one confronting those governmental entities responsible for carrying out various statutes and treaties that relate to the fish and to the Federal Columbia River Power System (FCRPS) – the source of much of the energy used in the Pacific Northwest. The dams have other critical objectives, including controlling potential flood waters, fostering commercial navigation, and assisting agricultural and municipal development through diversions from their reservoirs. Congress assigned responsibility for the dams’ ongoing operation to the United States Army Corps of Engineers (Corps) and the administration of the power grid to the Bonneville Power Administration (BPA). The Corps’ and BPA’s activities, in turn, are subject to comprehensive environmental regulation, but perhaps chief among the involved statutes is the 1973 Endangered Species Act (ESA).<sup>1</sup>

## THE ENDANGERED SPECIES ACT

The ESA sets out a procedure for determining whether the continued survival of a terrestrial wildlife, fish, insect or plant species is “threatened” or “endangered.” Once so designated or “listed,” a species is protected by the law through (1) substantive and procedural limitations on proposed federal agency actions that may affect it and (2) prohibition of the “take” of an endangered fish or wildlife species by any entity or individual absent authorization from, depending on the species, National Oceanic and Atmospheric Administration (NOAA) Fisheries (formerly National Marine Fisheries Service) or the United States Fish and Wildlife Service (FWS).<sup>2</sup> As to federal agency actions, ESA section 7(a)(2) forbids an agency from undertaking any action that will “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species” deemed critical to its existence by appreciably reducing likelihood of species survival and recovery.<sup>3</sup>

Consistent with its prophylactic objective, section 7 of the ESA requires an agency to consult with either NOAA Fisheries or the FWS *before* undertaking the action that may affect a listed species. Consultation may result in a “biological opinion BiOp” reaching either a “jeopardy” or a “no jeopardy” determination with respect to the proposed action. Where a jeopardy determination issues, NOAA Fisheries or the FWS will suggest, if possible, a “reasonable and prudent alternative” (RPA) to the proposed action deemed consistent with section 7(a)(2). The agency may, and almost always will, substitute the RPA for the originally proposed action.<sup>4</sup> That is because the RPA comes with an “incidental take statement” (ITS) which, in practical

effect, immunizes the agency and its employees from civil or criminal sanctions to the extent that they honor the ITS’s conditions.<sup>5</sup>

## THE FEDERAL COLUMBIA RIVER POWER SYSTEM (FCRPS)

Beginning with Snake River sockeye’s listing as endangered in 1991, NOAA Fisheries designated a dozen other salmon and steelhead species – including the remaining three Snake River stocks—as threatened or endangered within the area affected by FCRPS operations.<sup>6</sup> The sockeye and subsequent listings have resulted in seven biological opinions issued to the Corps and the United States Bureau of Reclamation (BOR) – which also operates facilities considered part of the FCRPS – with all but the first challenged under the ESA.<sup>7</sup> NOAA Fisheries released the seventh opinion in May 2008, and its validity is the subject of ongoing summary judgment proceedings initiated by various environmental groups and the State of Oregon.<sup>8</sup> The State of Idaho intervened in the current action over seven years ago in support of the 2000 FCRPS biological opinion and has continued its support for the subsequent two opinions.

From the outset of litigation over the FCRPS biological opinions, fundamental disagreements have existed over the propriety of the section 7(a)(2) jeopardy standard applied by NOAA Fisheries and the mode of its application. To a substantial degree, the agency’s evolving analytical approaches with respect to both the legal and scientific frameworks within which the jeopardy determination must be made has fueled the controversy.<sup>9</sup> The most recent appellate response to NOAA Fisheries’ efforts is the Ninth Circuit Court of Appeals’ April 2008 decision in *National Wildlife Federation v. NMFS (NWF)*.<sup>10</sup> However, the *NWF* decision has wider significance because it addresses more comprehensively than any other Ninth Circuit opinion three components of section 7(a)(2) jeopardy analysis that are critical generally: the extent to which agency action should be deemed nondiscretionary and therefore outside the scope of the consultation obligation; the role of the “environmental baseline” in determining whether an action will “jeopardize the continued existence of” a species; and the need to assess discretely a proposed action’s impact on the likelihood of a species’ recovery once the action is found not to jeopardize the species’ survival. The remainder of this article discusses *NWF*’s treatment of these issues.

## NWF: AGENCY DISCRETION, THE ENVIRONMENTAL BASELINE, AND RECOVERY IN JEOPARDY DETERMINATIONS

A regulation adopted under the ESA by NOAA Fisheries and the FWS in 1986, 50 C.F.R. § 403, subjects only “discretionary” agency actions to section 7(a)(2) consultation.<sup>11</sup> Twenty-one years later, the Supreme Court upheld this construction of the ESA in *National Association of Home Builders v. Defenders of Wildlife* as “reasonable in light of the statute’s text and overall statutory scheme”<sup>12</sup> and otherwise appropriate for *Chevron*-based<sup>13</sup> deference.<sup>14</sup> The 2004

### Acronyms

**BOR** - Bureau of Reclamation  
**BPA** - Bonneville Power Administration  
**FCRPS** - Federal Columbia River Power System  
**FWS** - Fish and Wildlife Service  
**ITS** - Incidental Take Statement  
**NMFS** - National Marine Fisheries Service  
**NOAA** - National Oceanic and Atmospheric Administration  
**NWF** - National Wildlife Federation  
**RPA** - Reasonable and Prudent Alternative  
**USFWS** - U.S. Fish and Wildlife Service

biological opinion relied in part on the discretionary action requirement and adopted a novel approach to assessing whether the Corps' and the BOR's proposed actions passed section 7(a)(2) muster. NOAA Fisheries created a "reference" FRCPS hydro operation "consist[ing] of the dams and hypothetical regime for operating them . . . most beneficial to listed fishes of any possible operating regime"<sup>15</sup> given the two agencies' obligation under existing statutory authority to operate the facilities for flood control, navigation and irrigation purposes. The reference operation, in sum, embodied NOAA Fisheries' estimate of that set of FRCPS hydro protocols most protective of the listed species which the Corps and BOR could implement consonant with their statutory duty to operate the dams for non-wildlife and fish purposes. NOAA Fisheries then compared the proposed hydro actions against the reference operation to determine, *inter alia*, whether the former appreciably reduced the likelihood of survival and recovery and, when it found no appreciable reduction, ended its jeopardy analysis.<sup>16</sup>

NOAA Fisheries' reference-operation jeopardy model raised two principal issues under section 7(a)(2) and implementing regulations. The first concerned the standard to be used in distinguishing between discretionary actions subject to consultation and nondiscretionary ones excluded from the requirement. The second involved the use of the reference operation, as opposed to the actual "environmental baseline," against which to measure whether the hydro component of the proposed agency actions appreciably diminished the likelihood of affected species' survival and recovery. Although not directly attributable to the reference operation itself, a third issue resulted from the biological opinion's failure to analyze the section 7(a)(2) recovery prong. The Ninth Circuit, like the district court, found "structural flaws" in NOAA Fisheries' approach and resolved each issue against the agency.<sup>17</sup>

#### DISCRETIONARY VS. NON-DISCRETIONARY ACTIONS

The court of appeals declined to "approve [NOAA Fisheries'] interpretation of [50 C.F.R. § 402.03] as excluding from the agency action under review discretionary agency action taken pursuant to a broad congressional mandate" for several reasons.<sup>18</sup> It found the agency's "cramped view" of § 402.03 as a "drastic change from [its] own approach in the 1995 and 2000 BiOps (biological opinions)" and "merit[ing] little deference."<sup>19</sup> It next deemed "not persuasive" the "contention that competing mandates for flood control, irrigation, and power production create any immutable obligations that fall outside of agency discretion."<sup>20</sup> Congress, instead, "has imposed broad mandates which do not direct agencies to perform any specific nondiscretionary actions, but rather, are better characterized as directing the agencies to achieve particular goals."<sup>21</sup> Since the "course of action" proposed by the Corps and BOR is "not specifically mandated by Congress and . . . is not specifically necessitated by the broad [congressional] mandate, that action is, by definition, discretionary and is thus subject to Section 7 consultation."<sup>22</sup>

The *NWF* panel's application of 50 C.F.R. § 402.03 accordingly restricts the nondiscretionary action limitation on the consultation obligation to those instances where an agency is directed to take a particular action when certain conditions are satisfied—the situation in *Home Builders*<sup>23</sup>—or where Congress has prescribed the specific manner for discharging a statutory duty. In the context of FRCPS operations, this reading of the discretionary action requirement precludes the Corps or BOR from operating a hydroelectric facility, or multiple facilities, for a specific congressionally-mandated purpose if that operation does not pass muster under section 7(a)(2)'s no-jeopardy requirement. The court's interpretation of § 402.03 means more generally that the formulation of discretionary action in the Ninth Circuit decision in *Defenders of Wildlife v. EPA, i.e.*, "[w]here the challenged action comes within the agency's decision making authority and remains so, it falls within section 7(a)(2)'s scope[.]"<sup>24</sup> remains largely intact within the circuit despite its reversal in *Home Builders*.

#### REFERENCE OPERATION VS. ENVIRONMENTAL STATUS QUO OR BASELINE

The second issue, again, arose from NOAA Fisheries' use of the reference operation to assess the proposed actions' impact on the hydro component of the environmental *status quo* or baseline.<sup>25</sup> The court of appeals viewed this approach as "conduct[ing] the bulk of [the] jeopardy analysis in a vacuum" and not "focusing . . . on whether the action effects, when added to the underlying baseline conditions, would tip the species into jeopardy."<sup>26</sup> That aspect of its holding arguably has little impact outside the scope of the *NWF* litigation. More broadly significant was the panel's attendant rejection of NOAA Fisheries' argument that "it may satisfy the ESA by comparing the effects of the proposed FRCPS operations on listed species to the risk posed by baseline conditions."<sup>27</sup> The court deemed that approach as merely not worsening a negative population trend line and thereby sanctioning "a listed species . . . be[ing] gradually destroyed, so long as each step on the path to destruction is sufficiently modest."<sup>28</sup> It added in further explanation that "[a]gency action can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition."<sup>29</sup> Thus, "an agency only 'jeopardize[s]' a species if it causes some new jeopardy" and "may still take action that removes a species from jeopardy entirely[] or lessens the degree of jeopardy."<sup>30</sup> The proposed action, in other words, is permissible under section 7(a)(2) to the extent that it does not "deepen[]" jeopardy already present in the environmental baseline "by causing additional harm."<sup>31</sup>

The *NWF* court's analysis effectively requires distinguishing between section 7(a)(2) consultations that concern continuation of an existing project like the FRCPS and those that involve new activities. As to the former, jeopardy will attach even if the proposed action contains improvements that may retard a listed species' "slide into oblivion"<sup>32</sup> if, notwithstanding the improvements, the action will continue the slide. As to the latter, the proposed action will be permitted if it has no appreciably negative impact on the likelihood of the species' survival and recovery even though they are compromised greatly by the environmental baseline.

The potential difficulty embodied in this distinction can be seen in the *NWF* decision where the court of appeals held that "[t]he current existence of the . . . dams constitutes an 'existing human activity' which is already endangering the fishes' survival and recovery."<sup>33</sup> Although the court simultaneously acknowledged that the impact from the dams' existence is apportioned properly to the environmental baseline, as opposed to the "effects of the [proposed] action" itself, the panel's jeopardy-standard analysis raises the possibility that *any* proposed operation of those dams under current agency authority may not neutralize the negative impact of the dams' mere existence if NOAA Fisheries is unable, as a technical exercise, to separate such impact from the operational effects of the proposed action.<sup>34</sup> That possibility would not attend the Corps' and BOR's proposed actions were they to be analyzed in the same fashion as new actions: Whether the likelihood of species survival or recovery will be reduced appreciably from the *status quo* trend line if the proposed action is implemented. The Ninth Circuit's distinction, in short, raises a singularly perplexing issue of statutory construction and application.<sup>35</sup>

#### FAILURE TO ANALYZE THE SECTION 7(A)(2) RECOVERY PRONG

The third issue turned on the *NWF* panel's rejecting NOAA Fisheries' construction of its own consultation regulations. The court held that "the jeopardy regulation requires NMFS to consider both recovery and survival impacts" from a proposed action<sup>36</sup> and that, therefore, "the text of the jeopardy regulation is not 'reasonably susceptible' to the 'survival only' interpretation NMFS now gives it."<sup>37</sup> This holding derived in substantial part from *Gifford Pinchot Task Force v. USFWS*<sup>38</sup> where the Ninth Circuit determined that the adverse-modification component of section 7(a)(2) analysis mandates discrete analysis of both survival and recovery.<sup>39</sup> Unlike *Gifford*

*Pinchot* in which the court invalidated the relevant regulation as an impermissible construction of the ESA, however, the court relied on the preamble and comments to the 1986 consultation rules as leaving open that possibility that, “in exceptional circumstances, injury to recovery prospects alone could result in a jeopardy finding.”<sup>40</sup> It then reasoned that “to recognize such [possible] effects, and to apply the proper ‘joint survival and recovery concept,’ NMFS must analyze effects on recovery as well as effects on survival.”<sup>41</sup> The court also relied on the preamble to the regulations in conceding that survival and recovery “are generally considered together in analyzing effects”<sup>42</sup> but rejected NOAA Fisheries’ “focusing entirely on survival.”<sup>42</sup> “Although recovery impacts may not often prompt a jeopardy finding,” the NWF panel concluded, the failure to address it substantively at all could not be characterized as harmless given “the highly precarious status of the listed fish at issue.”<sup>43</sup>

Whether requiring recovery to be assessed concretely will produce a jeopardy finding that differs from the survival determination in even a small number of consultations is unclear. Indeed, because the court of appeals held that nothing precludes NOAA Fisheries or FWS from engaging in an integrated survival-recovery analysis and because the court explicitly rested its holding on the perceived incorrectness of NOAA Fisheries’ interpretation of the existing consultation regulations rather than the regulations’ inconsistency with the ESA, NWF leaves a conceivably wide berth for an administrative response by the two consultation agencies.<sup>44</sup> Undisputed, though, is that the decision is the first to impose this requirement in a jeopardy context.

## CONCLUSION

For environmental law practitioners in the Ninth Circuit or any lawyer interested in the salmon controversy, the NWF decision is must reading. Its jeopardy analysis breaks new ground in *Home Builders*’ wake as to the discretionary-nondiscretionary distinction; explores the relationship of the environmental baseline to the term “jeopardize the continued existence of” more fully than any prior Ninth Circuit case; and rejects NOAA Fisheries’ long-settled understanding of its own consultation rules as not requiring analysis of section 7(a)(2)’s recovery prong once the survival prong has been found satisfied. The court, finally, addressed these issues in high-stakes litigation affecting not only the future of anadromous stocks in the Columbia and Snake River basins but also a central component of the Pacific Northwest’s economic infrastructure. The singular importance of these issues to the consultation process generally and the parties specifically also almost guarantees that NWF will not be the last word on them.

## ABOUT THE AUTHOR

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## ENDNOTES

<sup>1</sup> 16 U.S.C. §§ 1531-1544. Three other statutes with particular importance for operational and planning purposes for the agencies are the Northwest Electric Power Planning and Conservation Act (*id.* §§ 839-839h), the Clean Water Act (33 U.S.C. §§ 1251-1387), and the National Environmental Policy Act (42 U.S.C. §§ 4321-4347).

<sup>2</sup> The term “take,” as defined in the ESA, means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). ESA section 9 contains a general prohibition against the “take” of endangered species. *Id.* § 1538. NOAA Fisheries and the FWS, however, possess authority under ESA section 4(d) to extend section 9

to threatened species. *Id.* § 1533(d). The FWS has done so for all threatened territorial wildlife and fish species within its responsibility (50 C.F.R. § 17.31); NOAA Fisheries follows a species-specific approach but has extended the “take” prohibition to threatened West Coast salmonids (*id.* § 223.203). NOAA Fisheries has assumed primary jurisdiction over anadromous fish that, like the salmonids here, spend the majority of their existence in marine waters under a 1974 inter-agency agreement (*available at* <http://training.fws.gov>).

<sup>3</sup> 16 U.S.C. § 1536(a)(2).

<sup>4</sup> See *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (“[t]he action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment”).

<sup>5</sup> *Id.* at 158 (discussing 16 U.S.C. § 1536(b)(4)).

<sup>6</sup> See Eugene H. Buck, *Pacific Salmon and Steelhead Trout: Managing Under the Endangered Species Act* at 6 (Cong. Research Serv. May 12, 2008) (identifying all Pacific Coast ESA-listed salmon “evolutionarily significant units” and steelhead “distinct population segments”) (*available at* [www.nceonline.org/NLE/CRSreports](http://www.nceonline.org/NLE/CRSreports)).

<sup>7</sup> *Pac. N.W. Generating Co-op. v. Brown*, 822 F. Supp. 1479 (D. Or. 1993) (declining to reach, *inter alia*, merits of claim that ITS in 1992 opinion improperly conditioned on providing flow augmentation), *aff’d*, 38 F.3d 1058 (9th Cir. 1994); *Idaho Fish & Game Dep’t v. NMFS*, 850 F. Supp. 886 (D. Or. 1994) (invalidating 1993 biological opinion for applying incorrect jeopardy standard and inadequately explaining analytical assumptions), *vacated on mootness grounds*, 56 F.3d 1071 (9th Cir. 1995) (relying on issuance of 1995 biological opinion as moot challenge to 1993 biological opinion); *Am. Rivers v. NMFS*, No. 96-384-MA (D. Or. Apr. 3, 1997) (upholding 1995 biological opinion), *aff’d*, No. 97-36159 (9th Cir. Mar. 8, 1999); *Nat’l Wildlife Fed’n v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003) (invalidating 2000 biological opinion because of improperly defined “action area” and inclusion in RPA of (a) federal actions over which consultation had not taken place and (b) non-federal action not reasonably certain to occur); *Nat’l Wildlife Fed’n v. NMFS*, No. CV-01-640-RE, 2005 WL 1278878 (D. Or. May 26, 2005) (invalidating 2004 biological opinion on the basis of an improper jeopardy standard for survival-determination purposes, a faulty adverse modification finding, and a failure to consider recovery independently in the jeopardy analysis), *aff’d*, 524 F.3d 917 (9th Cir. 2008).

<sup>8</sup> *Nat’l Wildlife Fed’n v. NMFS*, No. CV-01-640-RE (D. Or.). Links to the 2000, 2004 and 2008 biological opinions appear at [http://www.salmonrecovery.gov/Biological\\_Opinions/FCRPS/](http://www.salmonrecovery.gov/Biological_Opinions/FCRPS/).

<sup>9</sup> Professor Michael C. Blumm has co-authored a series of articles discussing, and in large measure criticizing, the first six FCRPS biological opinions. The articles’ analyses underscore the legal and technical complexity attendant to NOAA Fisheries’ section 7(a)(2) decision-making with regard to the FCRPS. Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons from the Columbia Basin*, 74 Wash. L. Rev. 519, 550-58 (1999) (discussing 1993, 1994 and 1995 biological opinions); Michael C. Blumm & Melissa Powers, *Avoiding Dam Breaching Through Offsite Mitigation: NMFS’s 2000 Biological Opinion on Columbia Basin Hydroelectric Operations*, 32 *Env’tl. L.* 241 (2002); Michael C. Blumm, Erica J. Thorsen & Joshua D. Smith, *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 *Env’tl. L.* 709, 735-63, 767-94 (2006) (discussing first six biological opinions); Michael C. Blumm & Hallison T. Putnam, *Imposing Judicial Restraints on the “Art of Deception”*: *The Courts Cast a Skeptical Eye on Columbia Basin Salmon Restoration Efforts*, 38 *Env’tl. L.* 47, 50-57 (2004) (discussing initial Ninth Circuit decision concerning 2004 biological opinion).

<sup>10</sup> 524 F.3d 917 (9th Cir. 2008).

<sup>11</sup> 50 C.F.R. § 402.03 provides that “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.”

<sup>12</sup> 127 S. Ct. 2518, 2534 (2007).

<sup>13</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>14</sup> *Home Builders* reversed another Ninth Circuit decision, *Defenders of Wildlife v. EPA*, 420 F.3d 946 (2005), *reh’g en banc denied*, 450 F.3d 397 (9th Cir. 2006). That reversal had particular importance to the 2004 biological opinion appeal, since the NWF panel had relied extensively upon *Defenders of Wildlife* in a 2007 opinion when addressing the place of discretion in determining the scope of agency action subject to consultation under section 7(a)(2). *Nat’l Wildlife Fed’n v. NMFS*, 481 F.3d 1224 (9th Cir. 2007). The panel responded to a rehearing petition filed as a result of the subsequently-

issued *Home Builders* with the superseding 2008 decision. See *NWF*, 524 F.3d at 927 n.7.

<sup>15</sup> *NWF*, 524 F.3d at 926.

<sup>16</sup> *Id.* at 926.

<sup>17</sup> *Id.* at 927.

<sup>18</sup> *Id.* at 928.

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

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

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

<sup>22</sup> *Id.* at 929.

<sup>23</sup> The substantive issue in *Home Builders* was whether the ESA impliedly repealed the obligation of the Environmental Protection Agency to transfer programmatic responsibility for the issuance of National Pollution Discharge Elimination System permits under the Clean Water Act, 33 U.S.C. §§ 1251-1387, to a state once nine criteria were met. *Id.* § 1342(b). As the majority opinion put it, the effect of the Ninth Circuit's decision in *Defenders of Wildlife* was "effectively [to] repeal the mandatory and exclusive list of criteria set forth in [§ 1342(b)], and [to] replace it with a new, expanded list that includes § 7(a)(2)'s no-jeopardy requirement." *Home Builders*, 127 S. Ct. at 2532.

<sup>24</sup> 420 F.3d at 969. The majority opinion in *Defenders of Wildlife* recognized, on the basis of prior circuit precedent, that section 7(a)(2) does not apply "if the agency in question had 'no ongoing regulatory authority' and thus was not an entity responsible for decision making with respect to the particular action in question" or "where the challenged action was legally foreordained by an earlier decision." 420 F.3d at 968. Consequently, the nondiscretionary action limitation on the consultation duty has a somewhat broader reach in the Ninth Circuit than outlined by the *NWF* court which, given law-of-the-circuit constraints, presumably did not intend to overrule *sub silentio* otherwise valid circuit law. See *Miller v. Gammie*, 335 F.3d 889, 889-90 (9th Cir. 2003) (*en banc*).

<sup>25</sup> The 1986 consultation regulations explain that the environmental baseline "includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. § 402.02. This explanation is set out as part of the "effects of the action" definition under which the term encompasses "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline." *Id.*

<sup>26</sup> 524 F.3d at 929.

<sup>27</sup> *Id.* at 930.

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

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

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

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

<sup>33</sup> *Id.* at 930.

<sup>34</sup> Illustrative of the agency authority issue is debate over the biological and economic merits of breaching the four lower Snake Rivers dams. See generally Michael C. Blumm, *Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia River Salmon* 279-308 (2002) (detailed discussion of the dam-breach issue). Even proponents, however, recognize that the Corps lacks current statutory authority or funding to discontinue the dams' operation and to breach them. *Id.* at 306. Absent this authority, NOAA Fisheries may not suggest an RPA with breach as an element. See 16 U.S.C. § 1536(b)(3)(A) ("[i]f jeopardy . . . is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency . . . in implementing the agency action").

<sup>35</sup> See generally *Endangered Species Act: Law, Policy and Perspectives* 125 (Donald C. Baur & Wm. Robert Irvin eds., 2002) (discussing analytical approaches to "evaluating the effects of existing projects" under section 7(a)(2)).

<sup>36</sup> 524 F.3d at 931.

<sup>37</sup> *Id.* at 932.

<sup>38</sup> 378 F.3d 1059 (9th Cir. 2004).

<sup>39</sup> 524 F.3d at 931-32.

<sup>40</sup> *Id.* at 932.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 932 n.11.

<sup>43</sup> *Id.* at 933.

<sup>44</sup> See generally Jennifer Jeffers, Note, *Reversing the Trend Towards Species Extinction, or Merely Halting It? Incorporating the Recovery Standard Into ESA Section 7 Jeopardy Analyses*, 35 Ecology L. Q. 455, 458 (2008) (the "full extent" of the original *NWF* decision—whose recovery-related analysis was not modified in the amended decision—is yet to be determined because the Services have not finalized guidance regarding the extent to which recovery standards will be applied during section 7 consultation, and no post-*NMF* court decisions have been published addressing this issue").

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# EFFECT OF THE 2009 AMERICAN RECOVERY AND REINVESTMENT ACT ON IDAHO'S STATE REVOLVING FUNDS

Courtney E. Beebe, *Deputy Attorney General*  
Timothy A. Wendland, *CPA, IDEQ Loan Program Manager*

*"...that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT, good; and that in every political institution, a power to advance the public happiness involves a discretion that may be misapplied and abused." James Madison, Federalist Paper No. 41.*

The 2009 American Recovery and Reinvestment Act (ARRA) seeks to provide federal monies to state and local governments to create jobs and improve infrastructure. The focus of the 2009 ARRA is primarily on state transportation and education, as well as the development of alternative energy sources. However, part of the 2009 ARRA will benefit Idaho citizens through an additional federal capitalization grant to Idaho's two state revolving funds (SRFs). As administered by the Idaho Department of Environmental Quality (IDEQ), the SRFs lend money at or below market rates to eligible applicants for the repair, replacement, and enhancement of drinking water and wastewater systems.

Practitioners who represent drinking water and wastewater system owners that may be eligible loan applicants should be aware of the benefits, as well as the burdens, of the additional 2009 ARRA funding, and how IDEQ addresses those competing interests. The purpose of this article is to describe the legal structure of Idaho's SRFs, the competing interests involved, and the impact of the 2009 ARRA.

## LEGAL STRUCTURE OF IDAHO'S REVOLVING FUNDS

As authorized by Section 319 of the Clean Water Act (CWA), the federal government provides "seed" money to Idaho each year by making a capitalization grant to Idaho's Wastewater Facility Loan Account<sup>1</sup>, collectively known as the "CWSRF." Similarly, Section 1452 of the Safe Drinking Water Act (SDWA) authorizes a federal capitalization grant to Idaho's Drinking Water Loan Fund<sup>2</sup>, known as the "DWSRF." The State of Idaho matches 20% of each federal capitalization grant, which is a condition of the annual grant award as required by federal law.<sup>3</sup>

IDEQ administers both the DWSRF and CWSRF through a loan program that parcels out the combined federal and state monies to eligible loan applicants by making loans below market value.<sup>4</sup> These loans contemplate (1) that each loan recipient will produce a repaired, replaced, and/or enhanced wastewater or drinking water facility/system that benefits the consumer and the environment, and (2) that the money will be paid back to the CWSRF or DWSRF thereby creating a "revolving" fund – so the same monies may be continually loaned out and the interest paid by the recipient can be used as a hedge against inflation.

The CWSRF assesses a fee on loan repayments, which serves to offset administrative costs, while the DWSRF has not yet been faced with the necessity to implement a fee structure. The expectation is that, eventually, both the CWSRF and the DWSRF will be self-sustaining and will not need additional capitalization grants from the federal government. As discussed below, the additional funding from the 2009 ARRA should aid IDEQ in achieving this goal by providing additional capital that may be continually lent out and repaid in the future.

The standards and requirements that loan applicants must meet to be considered eligible for a loan under Idaho's revolving funds are set forth in the Idaho Rules for the Administration of Drinking Water Loan Program<sup>5</sup> and the Idaho Rules for Wastewater Facility Loans.<sup>6</sup> In addition to these administrative rules, the loan application process is governed by a Loan Account Handbook, which contains forms and describes in detail the loan application process. Only eligible entities may apply for CWSRF and DWSRF loans. An entity is eligible to apply for a DWSRF loan if it owns a public or private community drinking

water system or is a nonprofit noncommunity drinking water system, as defined by the SDWA<sup>7</sup> and the Idaho Rules for Public Drinking Water Systems<sup>8</sup>. Eligible applicants for CWSRF loans include "municipalities and non-point source project sponsors" which have "the ability to establish and maintain a loan repayment source".<sup>9</sup>

## ACCOUNTING FOR COMPETING INTERESTS

The greatest benefit to applying for and obtaining a DWSRF or CWSRF loan is that the applicant is allowed to obtain an interest rate below market value.<sup>10</sup> The 2009 ARRA creates an additional benefit of no interest loans and even one-time principal forgiveness for some eligible entities. Eligible applicants for a DWSRF loan, funded through the normal SRF process (*i.e.*, non-ARRA), may obtain a "disadvantaged loan award," which allows for extension of the term of the loan, principal forgiveness and/or a lower interest rate.<sup>11</sup>

However, these benefits are balanced by limitations in place to account for numerous competing interests of federal and state governments, as well as the interests of the applicants. In order to account for these competing interests, federal capitalization grant and state laws and IDAPA rules place various standards and requirements on both the eligibility of the loan applicant and the individual projects in order to prioritize projects.

One set of major burdens placed on applicants seeking SRF funds are federal cross-cutting requirements. Cross-cutting requirements are essentially the strings attached to the capitalization grants by the federal government, requiring that all loan projects whose "cumulative SRF funding equals the amount of the capitalization grant"<sup>12</sup> meet federal regulations. Cross-cutting measures include: environmental information documents as required by the National Environmental Policy Act,<sup>13</sup> National Historic Preservation Act,<sup>14</sup> Wild and Scenic Rivers Act,<sup>15</sup> Farmland Protection Policy Act,<sup>16</sup> and the Flood Plain Management Executive Order.<sup>17</sup> There are also categories of federal requirements that remain present for all SRF loans that address civil rights issues. However, if the cumulative SRF funding does not exceed the amount of the capitalization grant, these provisions do not apply (*i.e.*, loan recipients that are funded with second round or repayment monies have a lesser burden).

A second obstacle placed on applicants is that the CWSRF and DWSRF do not receive enough annual federal and state funding to loan money to every eligible applicant with a qualifying project, requiring a mechanism to prioritize the competing interests and needs of the applicants. The Idaho Rules for Administration of Water Pollution Control Loans Integrated Priority Ranking System annually ranks eligible applicants who have submitted a letter of interest based on (1)

### Acronyms

**ARRA** – American Recovery and Reinvestment Act  
**CWA** – Clean Water Act  
**CWSRF** – Clean Water State Revolving Fund  
**DWSRF** – Drinking Water State Revolving Fund  
**IDAPA** – Idaho Administrative Procedures Act  
**IDEQ** – Idaho Department of Environmental Quality  
**IUP** – Intended Use Plan  
**SDWA** – Safe Drinking Water Act  
**SRF** – State Revolving Funds

a demonstration that they have the technical, financial, and managerial capability “to ensure the construction, operation and maintenance, and to repay the interest which would be due”<sup>18</sup>, and (2) public health and water quality criteria.<sup>19</sup> Similarly, the Idaho Rules for Administration of Drinking Water Loan Account’s Priority Rating System identifies DWSRF projects for funding on an annual basis, but considers different criteria and a weighted numerical points system.<sup>20</sup>

Thus, the CWSRF Integrated Priority Rating System and the DWSRF Priority Rating System result in an annual Priority List of potential projects. This Priority List is then refined based upon an entity’s readiness to proceed. Readiness to proceed entails such considerations as having an approved facility plan and having completed the revenue bond, judicial confirmation or local improvement district process. Readiness to proceed considerations apply to both the CWSRF and the DWSRF. The refined listing makes up the final Fundable List of projects that are the most “shovel ready.” This Fundable List then becomes part of the annual IDEQ Intended Use Plan (IUP), which is approved by the Board of Environmental Quality and sets forth how the CWSRF and DWSRF funds will be allocated for the upcoming year.

There are many criteria used to account for the competing interests of applicants; however, attorneys should take note that growth -- though a primary driver for seeking expansion, repair or replacement of a drinking water and wastewater system -- will not place an entity very high on the priority list. The goal of the Environmental Protection and Health Act, as well as the CWSRF and DWSRF, is the protection of public health and prevention of water pollution.<sup>21</sup> Therefore, the recent growth of Idaho’s municipalities, while it may impact public health and water pollution, is not in and of itself a primary consideration when determining whether a project will obtain priority ranking on the priority rating lists.

The number of eligible entities and costs of “shovel ready” projects on the priority lists often exceed the available CWSRF and DWSRF funds. Given the rising costs of construction, and reduction of tax revenues, it is expected that this trend could continue for some time. Under the circumstances, an applicant would be well served to approach the SRF process as a process that is most receptive to “shovel ready” projects for owners of systems who have a ranked position on the IUP.

## **IMPACT OF THE 2009 AMERICAN RECOVERY AND REINVESTMENT ACT**

In federal fiscal year 2008, the CWSRF capitalization grant received by the IDEQ loan program was \$3.3 million, allowing IDEQ to establish available resources for state fiscal year 2009 CWSRF loans of \$40.5 million. The federal fiscal year 2008 DWSRF capitalization grant received by the IDEQ loan program was \$8.1 million, allowing IDEQ to establish available resources for state fiscal year 2009 DWSRF loans of \$18.1 million.

The 2009 ARRA provides \$38.7 million in additional federal monies -- \$19.5 million to DWSRF and \$19.2 million to CWSRF. This additional funding is intended to supplement, not supplant, any particular annual capitalization award, and will be in addition to regular annual capitalization grant awards.

The additional funding from the 2009 ARRA does not change how the competing interests of municipalities and sewer districts are addressed by Idaho’s CWSRF and DWSRF (*i.e.*, the process of rating competing applications and funding, according to greatest need, those systems that are ready to proceed). The eligible applicants must still participate fully in the annual Priority Rating System in order to be eligible for the available funds. Accordingly, after passage of the 2009 ARRA, those system owners that have a well established need and “shovel ready” projects will still have the greatest chance to benefit from the SRFs.

Nevertheless, in the future, the additional 2009 ARRA funding should benefit owners of drinking water and wastewater systems

generally by providing more money for repeated lending through the CWSRF and DWSRF, allowing Idaho to take a step closer to making both the CWSRF and DWSRF independent of the need for future federal capitalization grants.<sup>22</sup>

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## **ENDNOTES**

<sup>1</sup> I.C. § 39-2637.

<sup>2</sup> I.C. § 39-7601.

<sup>3</sup> 40 CFR §§ 3135(b) and 3550(g).

<sup>4</sup> I.C. §§ 39-3626 and 7602.

<sup>5</sup> IDAPA 58.01.20.

<sup>6</sup> The Idaho Department of Environmental Quality promulgated changes to the Idaho Rules for Water Pollution Control Loans (58.01.12) and the Idaho Rules for Administration for Drinking Water Loan Account (58.01.20) this year, which were approved by the Board of Environmental Quality on November 12, 2008, and passed by the Idaho Legislature in January 2009. The new rules and change will come into effect *Sine Die* (IDAPA 58.01.12).

<sup>7</sup> 40 CFR §35.3520(a).

<sup>8</sup> IDAPA 58.01.08.

<sup>9</sup> IDAPA 58.01.08.

<sup>10</sup> I.C. §§ 39-2636 and 39-7202.

<sup>11</sup> IDAPA 58.01.20.021.

<sup>12</sup> Cross-Cutting Federal Authorities, A Handbook on Their Application in the Clean Water and Drinking Water State Revolving Fund Programs. EPA, October 2003.

<sup>13</sup> 42 U.S.C. § 4321 et. seq.

<sup>14</sup> 16 U.S.C. § 470 et. seq.

<sup>15</sup> 16 U.S.C. § 1271.

<sup>16</sup> 7 U.S.C. § 4201 et seq.

<sup>17</sup> 11988 and 12148.

<sup>18</sup> IDAPA 58.01.12.010.

<sup>19</sup> IDAPA 58.01.12.020.

<sup>20</sup> IDAPA 58.01.20.020.

<sup>21</sup> *see* IDAPA 58.01.12.003 and 58.01.20.004.

<sup>22</sup> Information on the IDEQ loan process can be found at: [http://www.deq.idaho.gov/water/prog\\_issues.cfm#funding](http://www.deq.idaho.gov/water/prog_issues.cfm#funding)

# CROP RESIDUE BURNING

Lisa Kronberg  
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The open burning of crop residue is an historic agricultural practice in Idaho, as it is in many areas of the country. It is considered an important tool for farmers. But, such burning also produces significant emissions, which if not managed properly, can lead to significant smoke impacts and the endangerment of public health. Consequently, the use of burning by farmers and the potential for smoke impacts on public health have been a contentious and heavily litigated issue in Idaho for a number of years.<sup>1</sup>

This article provides a brief history of the applicable air quality law regarding crop residue burning, a description of the Ninth Circuit Court of Appeals decision in *Safe Air For Everyone v. United States Environmental Protection Agency*, 475 F.3d 1096, amended at 488 F.3d 1088 (9<sup>th</sup> Cir. 2007), the negotiations following the decision, the resulting statute and rules and Environmental Protection Agency's approval of Idaho's State Implementation Plan revision.

## HISTORY OF APPLICABLE LAW

To begin with, it is important to understand the interplay between state and federal law in the regulation of crop residue burning. Emissions from burning crop residue are mostly fine particulate matter regulated under the Clean Air Act (CAA) as PM<sub>2.5</sub>.<sup>2</sup> Parts per million (PM<sub>2.5</sub>) is subject to a National Ambient Air Quality Standard (NAAQS). States develop State Implementation Plans (SIPs) to implement, maintain and enforce the NAAQS. States submit SIPs to the United States Environmental Protection Agency (EPA) for approval pursuant to Section 110 of the CAA.<sup>3</sup> Once provisions within a SIP are approved by EPA, in addition to being enforceable under state law, they are enforceable by EPA and citizens under the CAA.<sup>4</sup> If a state fails to submit an approvable SIP, then EPA develops and enforces a Federal Implementation Plan (FIP) within the state.<sup>5</sup>

In 1970, Section 2,3 (H) of the state of Idaho's Air Quality Rules stated, "the open burning of plant life grown on the premises in the course of any agricultural, forestry or land clearing operation may be permitted when it can be shown that such burning is necessary and that no fire or traffic hazard will occur. Convenience of disposal is not of itself a valid necessity for burning." The rule was approved by EPA and included in Idaho's SIP on May 31, 1972.<sup>6</sup> Idaho's Air Quality Rules were amended in 1982 to prohibit open burning unless it fell within a listed category.<sup>7</sup> Agricultural burning was a listed category.<sup>8</sup>

Three years later, in 1985, the Idaho Legislature enacted the Smoke Management Act, which provided for the open burning of crop residue.<sup>9</sup> The Air Quality Rules were then amended to provide for more specific regulation of agricultural burning as crop residue burning.<sup>10</sup> In 1986, before these specific rules were submitted to EPA for SIP approval, the Idaho Legislature (1) amended the Smoke Management Act to prohibit the Idaho Department of Health and Welfare, Division of Environmental Quality (currently the Department of Environmental Quality (DEQ)) from promulgating rules regarding the open burning of crop residue and (2) repealed the existing Air Quality Rule that addressed the open burning of crop residue.<sup>11</sup> In 1993, EPA approved as a SIP revision numerous changes to the Air Quality Rules, including the repeal of the rule regarding the open burning of crop residue.<sup>12</sup> Thus, the rules stated open burning is only allowed if it falls within a listed category. Agricultural burning or crop residue burning was no longer a listed category. The result of the Legislature's amendment prohibiting DEQ from promulgating rules regarding crop residue burning and repealing the existing rule resulted in unintended consequences.

In 1999, thirteen years after the amendment to the Smoke Management Act prohibiting DEQ from promulgating rules regarding the open burning of crop residue, the Idaho Legislature repealed the

Smoke Management Act and replaced it with the Smoke Management and Crop Residue Disposal Act.<sup>13</sup> This new act gave the Idaho State Department of Agriculture (ISDA) the authority to promulgate rules regarding crop residue disposal and removed the prohibition against DEQ from doing so. DEQ subsequently amended the Air Quality Rules to recognize the open burning of crop residue.<sup>14</sup> This Air Quality Rule, IDAPA 58.01.01.617, provided that the open burning of crop residue was an allowable category of open burning so long as the Smoke Management and Crop Residue and Disposal Act and rules promulgated pursuant thereto are met. This rule was submitted to EPA as a SIP clarification of long existing state law. EPA approved it into the SIP as such.<sup>15</sup>

On September 8, 2005, Safe Air for Everyone (SAFE), American Lung Association and Noel Sturgeon filed a petition for review of the EPA's final action with the United States Court of Appeals for the Ninth Circuit. In their brief, Petitioners argued that the SIP approval did not clarify the SIP, but changed it, asserting that the SIP previously prohibited crop residue burning and now allowed it.

## SAFE v. U.S.E.P.A.

The Ninth Circuit Court of Appeals agreed with the Petitioners, and vacated and remanded the SIP approval.<sup>16</sup> The court directed EPA to consider the amendment a change to the preexisting SIP rather than a clarification. It determined that crop residue burning had been illegal since 1993, or when EPA approved the revision to the SIP that provided open-burning was prohibited unless it fell within a listed category. Because the legislature removed crop residue burning from the rules, it was not a listed category at the time of the 1993 SIP approval. The Idaho Legislature's amendment prohibiting DEQ from promulgating rules regarding crop residue burning and repealing of the existing rule caused unintended consequences. The Ninth Circuit decision resulted in federal law prohibition of open burning of crop residue on "State" lands in Idaho. The Court determined essentially that to "change" the SIP, the State must establish, and EPA must agree, that the revision does not contravene Sections 110(1) and 193 of the CAA.<sup>17</sup>

## NEGOTIATIONS

Within weeks of the decision, the parties to the lawsuit and other key stakeholders began discussions regarding the State ISDA crop residue program and the SIP revision submittal components required to satisfy Sections 110(1) and 193 of the CAA.<sup>18</sup> Parties to these discussions included representatives from SAFE, DEQ, ISDA, EPA, numerous farm organizations and individual farmers who burn crop residue. It should be noted that although the decision did not affect open burning on Indian reservations.<sup>19</sup> All parties recognized the importance to air quality of attempting to coordinate the "State" open burning programs with tribal programs throughout the state.

After several months of negotiations, an independent mediator

### Acronyms

CAA	– Clean Air Act
DEQ	– Department of Environmental Quality
EPA	– Environmental Protection Agency
FIP	– Federal Implementation Plan
IDAPA	– Idaho Administrative Procedures Act
ISDA	– Idaho State Department of Agriculture
NAAQS	– National Ambient Air Quality Standard
PM	– Parts per Million
SAFE	– Safe Air for Everyone
SIP	– State Implementation Plan
USEPA	– United States Environmental Protection Agency

was hired. In December 2007, agreement points were reached. The parties agreed (1) that DEQ would administer the crop residue burning program rather than ISDA, (2) the program should be modeled after the Nez Perce Tribe program, specifically to protect air quality to 75% of the NAAQS, that is not to allow crop burning if ambient air quality levels reach or are forecasted to reach 75% of the NAAQS<sup>20</sup>, (3) to incorporate the transparency aspects of the Washington State Department of Ecology program, (4) to examine the adequacy of the existing ambient air monitoring network, (5) to build in cooperation with other smoke management regulators, (6) to conduct monitoring and exposure studies if grant money is available, and (7) to conduct an air quality analysis prior to authorizing the annual open burning of 20,000 or more acres of bluegrass.

## NEW STATE LAW

House Bill 557 was subsequently negotiated, drafted, passed by the Idaho Legislature, and signed by Governor Otter on March 7, 2008.<sup>21</sup> Effective upon signing, House Bill 557 added Idaho Code § 39-114 to the Environmental Protection and Health Act, repealed the Smoke Management and Crop Residue Disposal Act under ISDA authority, and amended the Idaho Public Records Act, Idaho Code § 9-340D(9) to allow for the disclosure of information regarding property locations of fields to be burned, persons responsible for the burn, acreage and type of crop residue to be burned.

Idaho Code § 9-114 requires a farmer to obtain prior approval from DEQ before burning and prohibits DEQ from granting approval if it determines that ambient air quality levels: “[a]re exceeding, or are projected to exceed, 75% of the level of any national ambient air quality standard on any day, and these levels are projected to continue or recur over at least the next 24 hours”, or “ have reached, or are forecasted to reach and persist at, 80% of the one-hour action criteria for particulate matter pursuant to Section 556 of IDAPA 58.01.01, Rules for the Control of Air Pollution in Idaho.”

Five days after the signing of House Bill 577, the Idaho Board of Environmental Quality approved rule docket number 58-0101, which provides for the open burning of crop residue through a Permit by Rule program.<sup>22</sup> These rules were developed pursuant to a negotiated rule making process, in a very short time frame, by an active group of participants representing a variety of stakeholders. The rules require a farmer to attend training prior to burning, register thirty days in advance of the date of the proposed burn, pay a two dollar per acre fee seven days prior to the burn, contact DEQ for initial approval at least twelve hours prior to the burn, obtain final approval from DEQ the morning of the burn, and submit a post-burn report to DEQ. In making the burn permit determination, DEQ must consider the expected emissions of the burn, proximity of other burns, moisture content of the fuel, number of acres to be burned, crop type and other fuel characteristics, meteorological conditions; and, the proximity of the burn to institutions with sensitive populations, roadways and airports.<sup>23</sup> DEQ must also post on its website whether a given day is a burn or no-burn day, the location and number of acres permitted to be burned, meteorological conditions, available real time ambient air quality monitoring data, and a toll free number to receive requests for information.<sup>24</sup>

## STATE LAW BECOMES FEDERAL LAW

On May 28, 2008, DEQ submitted to EPA for SIP approval Idaho Code § 39-114, rule docket number 58-0101 and the technical analysis to conform with Section 110(l) and 193 of the CAA. On August 1, 2008, EPA published a final rule with an effective date of September 2, 2008, approving and promulgating the SIP revision.<sup>25</sup> Farmers were permitted to burn the week of September 2, 2008.

## FALL BURN SEASON

In the fall of 2008 farmers burned approximately 33,000 acres of crop residue on “State” lands. The vast majority of the burns were approved

in accordance with the SIP Permit by Rule program. DEQ prepared an Annual Report in accordance with IDAPA 58.01.01.622.02 and an Advisory Committee established pursuant to IDAPA 58.01.01.622.03 met on February 17, 2009 to discuss numerous program issues. DEQ initiated approximately a dozen enforcement actions against those farmers that failed to obtain a Permit by Rule, or failed follow its provisions, pursuant to Idaho Code § 39-108.

## THE FUTURE

At the Advisory Committee’s recommendations and in preparation for the spring burn season, DEQ intends to develop, among other things: (1) a revised permit application, (2) a standardized complaint tracking system, (3) an enhanced documentation procedures, and (4) guidelines/procedures for spot burns. DEQ also intends to evaluate how to determine the term “impacts” to sensitive populations and provide outreach to such populations.

## CONCLUSION

Because all stakeholders worked closely together to develop a program that enhanced the protection of public health in conjunction with providing farmers the ability to burn, it may be that litigation in this area has come to an end. It is now up to DEQ to administer and enforce the program and the farmers to comply with the program. Increased awareness through education is key. For more information visit DEQ’s website at

[http://www.deq.idaho.gov/air/prog\\_issues/burning/crop\\_residue\\_burning.cfm](http://www.deq.idaho.gov/air/prog_issues/burning/crop_residue_burning.cfm).

## ABOUT THE AUTHOR

*Lisa Kronberg is a Deputy Attorney General who has worked with DEQ air quality program staff for the last 15 years. Previously she practiced at Stoel Rives and before that Holland and Hart. She received a B.S. in Business Management and Sociology from Montana State University in 1983 and graduated with high honors from the University of Montana Law School in 1989. The analysis in this article is solely hers and should not be attributed to the Idaho Attorney General’s Office or the State of Idaho.*

## ENDNOTES

<sup>1</sup> *Safe Air For Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (rejecting claim that residue burning violated Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k), cert. denied, 544 U.S. 1018 (2005). *Safe Air for Everyone v. USEPA*, No. 05-73383, 2006 WL 3697684 (9th Cir. Dec. 15, 2006) (denying petition for review of final rule promulgated by EPA that regulates air pollution on Idaho’s Coeur d’Alene Indian Reservation). *Safe Air for Everyone v. Idaho*, 469 F. Supp. 2d 884 (D. Idaho 2006) (granting motion to dismiss action alleging violation of Americans with Disabilities Act and Rehabilitation Act), appeal dismissed pursuant to voluntary motion, No. 06-36080 (9th Cir. Mar. 28, 2008). *Safe Air for Everyone v. Idaho*, No. CV06-68-EJL, 2006 WL 2413007 (D. Idaho Aug. 18, 2006) (denying motion for preliminary injunction in ADA/RA action). *Safe Air for Everyone v. Idaho*, No. CV06-68-EJL, 2006 WL 1663579 (D. Idaho June 6, 2006) (denying motion for temporary restraining order in ADA/RA action and directing further briefing on motion for preliminary injunction). *Moon v. N. Idaho Farmers Ass’n*, 140 Idaho 536, 96 P.3d 637 (2004) (rejected federal and state constitution-based challenge to nuisance-trespass immunity provision in Idaho Code § 22-4803A(6)), cert. denied, 543 U.S.146 (2005). *Moon v. State*, No. CV 03-2622 (Idaho 1st Jud. Dist., Kootenai County) (Jan. 9, 2007) (order granting summary judgment with respect to claim for negligent training or warning against State of Idaho under Idaho Tort Claims Act) *Am. Lung Ass’n v. State*, 142 Idaho 544, 130 P.3d 1082 (2006) (rejecting IAPA claim to 2005 economically viable determination under Idaho code § 22-4803(1)). *Am. Lung Ass’n v. State of Idaho, Dep’t of Agric.*, No. CV-2003-01459 (Idaho 1st Jud. Dist., Bonner County) (Mar. 3, 2005) (rejected IAPA claim to 2004 economically viable determination under Idaho Code § 22-4803(1)) *Safe Air For Everyone v. State Dep’t of Agric.*, 145 Idaho 164, 177 P.3d 378 (2008) (rejected Idaho Open Meeting Law claim with respect to December 2005 meeting among federal, state and tribal representatives at which, inter alia, 2005 field burning activities and possible modifications to existing regulatory practices were discussed).

<sup>2</sup> Particulates with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers, 40 CFR § 50.7. It should be noted that the particulate matter NAAQS has changed over the years from total suspended particulate (TSP) to PM<sub>10</sub> and since 1997, PM<sub>2.5</sub>.

<sup>3</sup> 42 U.S.C. § 7410

<sup>4</sup> 42 U.S.C. §§ 7413 and 7604

<sup>5</sup> 42 U.S.C. § 7410(c)

<sup>6</sup> 37 Fed. Reg. 10842, 10861 (May 31, 1972)

<sup>7</sup> Air Pollution Rule § 1-1152.02  
<sup>8</sup> Air Pollution Rule § 1-1153.08  
<sup>9</sup> 1985 Idaho Sess. Laws Chapt. 248 (H.B. 246)  
<sup>10</sup> Air Pollution Rule § 1-1153.07(a)-(c)  
<sup>11</sup> 1986 Idaho Sess. Laws Chapt. 325 (H.B. 659)  
<sup>12</sup> 58 Fed.Reg 39, 445, 449 (July 23, 1993)  
<sup>13</sup> 1999 Idaho Sess. Laws Chapt. 378 (H.B. 243)  
<sup>14</sup> IDAPA 58.01.01.617 (2003)  
<sup>15</sup> 70 Fed.Reg. 39, 658 (July 11, 2005)  
<sup>16</sup> 475 F.3d 1096, amended at 488 F.3d 1088 (9<sup>th</sup> Cir 2007)  
<sup>17</sup> 475 F.3d at 1119  
<sup>18</sup> 42 U.S.C. §§ 4710(6) and 7515  
<sup>19</sup> 40 C.F.R. § 49.2  
<sup>20</sup> 40 C.F.R. § 49.10410(i)  
<sup>21</sup> 2008 Idaho Sess. Laws Chapt. 71 (H.B. 557)  
<sup>22</sup> See IDAPA 58.01.01.617 through 623  
<sup>23</sup> IDAPA 58.01.01.621.01  
<sup>24</sup> IDAPA 58.01.01.623  
<sup>25</sup> 73 Fed.Reg. 44915 (August 1, 2008)

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# THE AMBITION FOR NEW ENERGY TRANSMISSION: UPDATE ON NATIONAL CORRIDOR DESIGNATIONS AND STATE SITING PRIORITIES

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The market for electricity has been gathering much attention as the need to develop new sources of energy and to upgrade and expand the network of electricity transmission lines grows. Federal, state, and local governments all play an important role in the integration of the national grid system.

Several recent developments will affect the transmission of electricity in Western states, including Idaho. This article reviews three federal decisions and a new piece of Idaho legislation that all aim to expedite the process of authorization and siting of transmission lines.

## THE DESIGNATION OF ENERGY CORRIDORS ON FEDERAL LAND IN THE 11 WESTERN STATES

In November 2008, several federal agencies began implementing Section 368 of the Energy Policy Act of 2005 and issued the Programmatic Environmental Impact Statement for the Designation of Energy Corridors on Federal Land in the 11 Western States (PEIS).<sup>1</sup> Section 368 directed the Secretaries of Agriculture, Commerce, Defense, Energy and the Interior to consult with the Federal Energy Regulatory Commission, states, tribes, appropriate local governments, affected utility industries, and other interested persons to designate corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on federal land in the Western states.<sup>2</sup>

Prior to issuance of the PEIS, the permitting of energy transport right-of-ways (ROWs) required applications and attendant environmental review in each administrative area through which the project would pass. As most energy transport projects pass through multiple administrative areas managed by one or more federal agencies (and often state and private lands), a more streamlined federal application process was needed.<sup>3</sup> Accordingly, after implementation of the action proposed in the PEIS, only one application for federal authorization and only one supporting environmental review will be required to permit energy transport ROWs within Section 368 corridors.<sup>4</sup>

To facilitate this “one stop shop” application process, Section 368 directs the federal agencies to develop interagency operating procedures whereby an applicant may submit an application in the offices of any of the affected agencies, and the agency that receives the application will perform an initial review.<sup>5</sup> If the application survives the initial review, the affected agencies will assign a responsible federal official to oversee the review and processing of the application as authorizations from each affected agency are obtained.<sup>6</sup>

The Section 368 corridors were designated through a four-step process. First, an “unrestricted conceptual West-wide energy transport network” was developed to represent an “interconnected set of paths along which energy could theoretically move throughout the western states.”<sup>7</sup> This step considered energy demand areas, energy supply areas, and existing congestion points (*i.e.*, energy transmission bottlenecks). Second, the physical, environmental, and regulatory constraints; land ownership issues; existing transmission infrastructure; and public concerns were analyzed. This analysis adjusted the unrestricted conceptual network and identified preliminary energy corridors that would ensure continuity through jurisdictional boundaries and avoidance of impacts to sensitive resources.<sup>8</sup> Third, the preliminary energy corridors were further refined based on input from agency personnel involved with the management of federal lands. This step provided confirmation that the designated corridor locations would be consistent with the specific management needs of the affected land management units.<sup>9</sup> Finally, a draft PEIS was issued and the designations were further refined based on input from public comments; affected agencies; and units of state, tribal, and local governments.

The total energy corridor areas designated in the final PEIS include approximately 3.3 million acres.<sup>10</sup>

## THE FOREST SERVICE AND BLM AMENDMENTS TO LAND MANAGEMENT PLANS

The PEIS required the federal agencies administering land in which the federal energy corridors were designated to amend their land use (or equivalent) plans accordingly. On January 14, 2009, both the Department of Agriculture Forest Service (Forest Service) and the Department of the Interior Bureau of Land Management (BLM) issued their amendment decisions, designating several corridors in Idaho.

The Forest Service’s record of decision set forth a number of amendments to several land management plans (LMPs) based on the PEIS.<sup>11</sup> The Forest Service’s record of decision included amendments to 38 LMPs to designate approximately 957 miles of energy corridors on Forest Service land in the Western states.<sup>12</sup> In Idaho, 16 miles of Forest Service corridors were designated in amendments to the Targhee National Forest LMP and the Idaho Panhandle National Forest LMP (corridors illustrated in Figure 1).<sup>13</sup> The Targhee National Forest

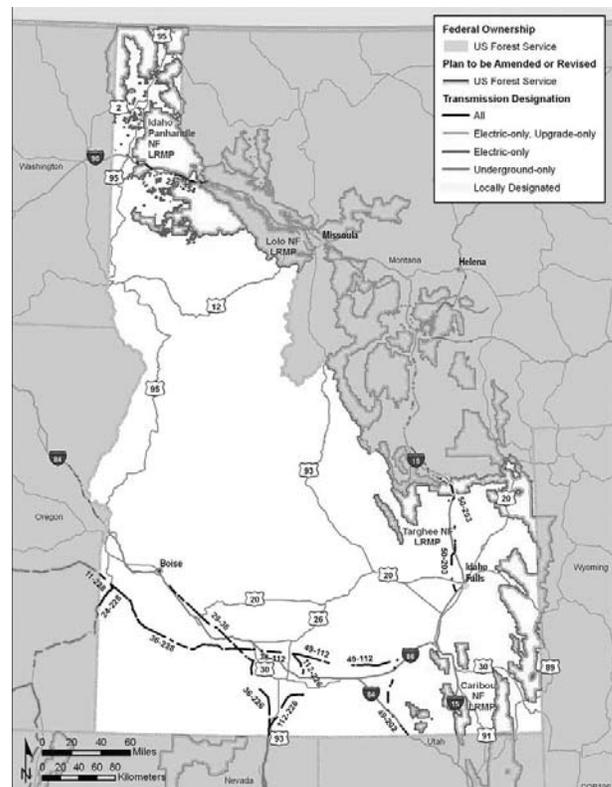


Figure 1—Amendments to Forest Service Corridors in Targhee National Forest and the Idaho Panhandle National Forest.

### Acronyms

- BLM** – Bureau of Land Management
- LMP** – Larson-Miller Parameter
- MFP** – Management Framework Plans
- PEIS** – Programmatic Environmental Impact Statement
- RMP** – Resource Management Plans
- ROD** – Record of Decision
- ROW** – Right-of-Ways

contains approximately 1.8 million acres in southeastern Idaho and western Wyoming, and the corridor is located south of the Montana border near Interstate 15. The Idaho Panhandle National Forest contains about 2.5 million acres of land in northern Idaho, eastern Washington and western Montana, and the corridor crosses through the North Idaho panhandle near Interstate 95.

The BLM's record of decision amended 92 BLM Resource Management Plans (RMPs) and Management Framework Plans (MFPs) to designate approximately 5,000 miles of energy corridors on BLM lands in the Western states.<sup>14</sup> The BLM designated 296 miles of energy corridors in Idaho through amendments to 11 RMPs and MFPs: Big Desert MFP; Bruneau MFP; Cassia RMP; Coeur d'Alene RMP; Jarbidge RMP; Kuna MFP; Malad MFP; Medicine Lodge RMP; Monument RMP; Owyhee RMP; and Twin Falls MFP (corridors illustrated in Figure 2).<sup>15</sup> The corridor through the Coeur d'Alene management area is near Interstate 90, while the rest of the corridors traverse southern and eastern Idaho.

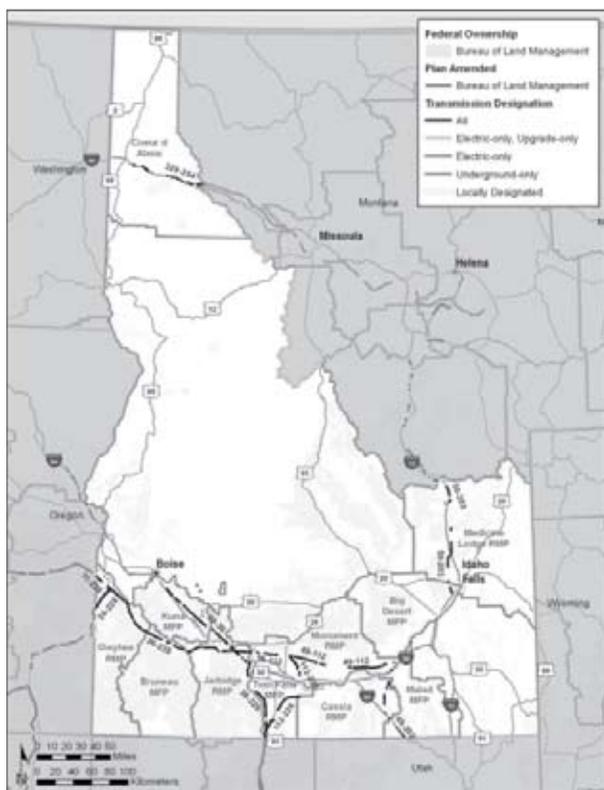


Figure 2 – Energy Corridors designated by BLM in Idaho.

The PEIS and accompanying Forest Service and BLM amendments apply to federal lands only, and applicants who seek to cross non-federal lands remain subject to the independent application processes of the applicable non-federal entities, such as states, tribes, and units of local government.

### IDAHO LEGISLATION GRANTING PRIORITY SITING STATUS

No centralized transmission siting authority exists in Idaho, and the application requirements vary depending on the applicant and project location. The Idaho Public Utilities Commission (PUC) has jurisdiction over transmission line applications submitted by public utilities.<sup>16</sup> Counties are required to analyze transmission issues in their comprehensive plans, but each county establishes its own siting requirements.<sup>17</sup> Cities also have permitting authority over utility transmission facilities sought to be constructed on lands within their control.<sup>18</sup>

To expedite the processing of large-scale transmission projects, the Idaho legislature made a targeted change to the PUC application process by passing H.B. 7, which Governor Otter signed on February

19, 2009.<sup>19</sup> Paul Kjellander, the Administrator of the Office of Energy Resources, advocated for H.B. 7 because of his view that “[t]ransmission is the critical component in providing for Idaho’s energy needs.”<sup>20</sup> Mr. Kjellander also stated that “[t]he existing transmission system is at or near capacity and efforts to facilitate the timely processing of applications for critical infrastructure is essential.”<sup>21</sup> H.B. 7 will go into effect on July 1, 2009 and adds a new section to Chapter 5, Title 61, of the Idaho Code.

Under the new law, any person intending to construct high voltage transmission lines in Idaho (*i.e.*, those with an operating level capacity of 230,000 volts or more with associated substations and switchyards) may file an application with the PUC seeking priority designation for its project.<sup>22</sup> In reviewing this application, the PUC must consider whether the proposed construction will: (i) benefit Idaho customers and the Idaho economy; (ii) improve electric transmission capacity and reliability in Idaho and the region; and (iii) promote the public interest.<sup>23</sup>

If the PUC grants the application for priority designation, “state agencies subsequently involved in the permitting or siting process for such electric transmission facilities shall be required to give the application priority or immediate attention as it relates to reviews, permits, reports, studies or comments.”<sup>24</sup> Neither the substantive decision-making authority of the state agencies nor the authority of units of local governments is affected by H.B. 7.<sup>25</sup>

H.B. 7 addressed an issue that is important for the future of Idaho’s economy—the need to expand the existing transmission grid to bring new sources of energy to market. Other issues that continue to merit discussion, however, include *how* and *where* to generate the new sources of energy that will be connected by these new transmission lines.

### ABOUT THE AUTHOR

**Kelsey Jae Nunez** is an associate at Givens Pursley LLP in Boise. Her practice focuses primarily on environmental and natural resources litigation, energy, and land use with an emphasis on renewable energy, sustainable development, and green building. While at Pepperdine University School of Law, she authored a comprehensive article on renewable energy related transmission issues entitled *Gridlock on the Road to Renewable Energy Development: A Discussion about the Opportunities and Risks Presented by the Modernization Requirements of the Electricity Transmission Network*. The 2008 article can be viewed at <http://law.pepperdine.edu/organizations/jbel/publications/vol1/Nunez - Final.pdf>.

### ENDNOTES

- <sup>1</sup> Final Programmatic Environmental Impact Statement (PEIS) for the Designation of Energy Corridors on Federal Land in 11 Western States (DOE/EIS-0386) (November 2008); available at <http://corridoreis.anl.gov/documents/fpeis/index.cfm>. The PEIS did not consider or approve any specific projects or applications of rights-of-way or other permits.
- <sup>2</sup> The eleven Western states include Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. PEIS at S-1. Two agencies took the lead in drafting the PEIS—the Department of Energy and the Department of the Interior Bureau of Land Management. The three cooperating agencies were the Department of Agriculture Forest Service (Forest Service), the Department of Defense, and the Department of the Interior Fish and Wildlife Service.
- <sup>3</sup> PEIS at S-6.
- <sup>4</sup> PEIS at S-7.
- <sup>5</sup> PEIS at S-6 to 7.
- <sup>6</sup> PEIS at S-7.
- <sup>7</sup> PEIS at S-20.
- <sup>8</sup> PEIS at S-21.
- <sup>9</sup> *Id.*
- <sup>10</sup> PEIS at S-22 to 23.
- <sup>11</sup> USDA Forest Service Designation of Section 368 Energy Corridors on

National Forest System Land in 10 Western States (January 14, 2009); available at [http://corridoreis.anl.gov/documents/docs/WWEC\\_FS\\_ROD.pdf](http://corridoreis.anl.gov/documents/docs/WWEC_FS_ROD.pdf). New Mexico is not included because no corridors cross Forest Service lands in New Mexico.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at D-4.

<sup>14</sup> Approved Resource Management Plan Amendments/Record of Decision (ROD) for Designation of Energy Corridors on Bureau of Land Management-Administered Lands in the 11 Western States (January 14, 2009); available at [http://corridoreis.anl.gov/documents/docs/Energy\\_Corridors\\_final\\_signed\\_ROD\\_1\\_14\\_2009.pdf](http://corridoreis.anl.gov/documents/docs/Energy_Corridors_final_signed_ROD_1_14_2009.pdf).

<sup>15</sup> *Id.* at A-22.

<sup>16</sup> Idaho Code § 61-526. Another provision granting the PUC transmission siting authority is Idaho Code § 67-1701 *et seq.*, which applies to the siting of transmission facilities in "national electric transmission corridors" that have been designated by the Secretary of Energy under Section 1221 of the Energy Policy Act of 2005. These corridors are not the same corridors as Section 368 corridors, and no Section 1221 corridors have been designated in the state of Idaho. See <http://nietc.anl.gov/> and [http://law.pepperdine.edu/organizations/jbel/publications/vol11/Nunez\\_-\\_Final.pdf](http://law.pepperdine.edu/organizations/jbel/publications/vol11/Nunez_-_Final.pdf) for more information on the Section 1221 corridors.

<sup>17</sup> Idaho Code § 67-6508(h).

<sup>18</sup> *Id.* at § 50-328.

<sup>19</sup> The full text of H.B. 7 can be accessed on the Idaho legislature's website, and is available at <http://www.legislature.idaho.gov/legislation/2009/H0007.htm>.

<sup>20</sup> Minutes of the February 6, 2009 meeting of the Idaho State Senate Resources & Environment Committee.

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

<sup>22</sup> H.B. 7, 2009 Leg., 1st Sess. (Id. 2009) (cited provision to be codified at Idaho Code § 61-516(3)).

<sup>23</sup> *Id.* (cited provision to be codified at Idaho Code § 61-516(4)).

<sup>24</sup> *Id.* (cited provision to be codified at Idaho Code § 61-516(3)). Under the future Idaho Code section 61-516(2)(b), a state agency "means every state department, division, commission or board." *Id.*

<sup>25</sup> *Id.* (cited provision to be codified at Idaho Code § 61-516(1)).

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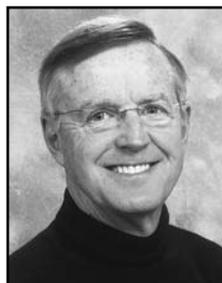
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# RETHINKING REGULATIONS: LOCAL LABORATORIES INVENTING A SUSTAINABLE IDAHO

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This essay argues that before Idaho can approach sustainability – of its natural resources as well as its neighborhoods, communities and culture – the state government must be willing to allow for increased experimentation at the local level, including in areas currently pre-empted by state-wide programs.

This past January, on an unseasonably warm Saturday afternoon, I spent a few hours wandering around the hills east of Moscow on my bicycle. A couple of weeks before, a substantial rainstorm and 50° temperatures had melted much of our early-winter snowpack. On a bicycle, the effects of water on the land are readily apparent, particularly where water and roads intersect and interact. Every ditch or depression showed signs of substantial water flow — flattened grass extended well above the apparently typical high-water marks, new undercuts adorned ditch and stream banks, new channels cut across pastures, and a few areas had even pulled the road graders out of their winter hibernation (complete with temporarily forgotten “water over road” signs).

A few weeks later, I sat in a small seminar room with 11 law students discussing potential new approaches for addressing non-point source water pollution. A few students suggested, perhaps half-heartedly, a more aggressive state-wide (or maybe even federal) regulatory regime, in which agency personnel could walk the state’s waterways looking for pollution sources to be regulated (and perhaps prosecuted). My own thoughts returned to that January bike ride, and I suggested that rather than being a waterway issue – which could be approached by focusing on individual lakes, streams and rivers – this was a landscape issue, requiring a much broader and more holistic approach that climbs out of the streambeds and walks the upland farms, fields and roadways.

This insight is nothing new, of course, and Congress – not always a paragon of wisdom in these matters – recognized early on that a national program might not address non-point source pollution in an effective fashion that would also be accepted, however begrudgingly, by landowners or the state and local governments accustomed to regulating land use. More to the point of this essay, neither is this insight about a landscape approach necessarily about sustainability in any obvious sense, particularly given its typical presentation as primarily a jurisdictional question. But I believe, to the contrary, that it is specifically, and perhaps exclusively, about sustainability, precisely because it is a jurisdictional question. Achieving sustainability requires that we rethink our approach to regulating our Idaho landscapes.

## **UNSUSTAINABLE NOTIONS ABOUT SUSTAINABILITY**

“Sustainability,” or its more focused cousin “sustainable development,” is approaching cliché status in some circles. Even Wal-Mart, generally not considered a leader on these issues, is attempting to incorporate sustainability principles into its operations. Here at the University of Idaho, the University President hosts an annual Sustainability Symposium; we have a student created, funded and staffed Sustainability Center; and a newly established “Building Sustainable Communities” initiative. These are worthy endeavors, and sustainability – in the abstract – finds few detractors. If anything, recent economic conditions have intensified the public’s desire to discover more sustainable approaches to a variety of issues. But that last point – suggesting that we desire sustainability on a “variety of issues” – raises a few

largely unaddressed questions about how we might achieve a truly sustainable Idaho. First, and most significant, we have yet to engage in a real discussion about what a sustainable Idaho might look like. And second, not yet knowing the end we hope to achieve, we are necessarily unable to create a pathway – including specifically the legal tools or approaches – that will take us there.

Sustainability is not a new concept, and we have created a variety of legal tools to approach sustainability with respect to specific resources, particularly in the public lands context. Perhaps most famous of these ‘sustainability’ approaches is in the National Park Service Organic Act, which provides that the parks shall be managed in a fashion “as will leave them unimpaired for the enjoyment of future generations.” The NPS Organic Act is not the only public lands statute to incorporate sustainability principles. The Multiple Use and Sustained Yield Act of 1960 included the concept in its title, and defines “sustained yield” as: “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land.” The National Forest Management Act also contains multiple references to renewable resource management and sustained yield of forest resources. And even the Federal Land Policy & Management Act states that it is the policy of the United States that “the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition[.]”

These notions of sustainability are relevant to Idaho because so much of the state falls within the purview of these federal statutes. Decisions regarding national forest management can affect Idaho communities in significant ways, even when those decisions only directly address lands in neighboring states. Agency decisions in Yellowstone National Park can have substantial effects on land-use patterns in southeast Idaho; even the approval of a ski area expansion entirely in Wyoming can affect the culture and personality of Idaho towns.

But a sustainable Idaho is about more than federal lands sustainability, and not only because Idaho citizens primarily live and rely on the non-federal lands. The current federal notion of sustainability, as articulated in the public lands statutes, is unnecessarily limited and fails to address several potentially more important aspects of Idaho life. For anyone with more than a very recent history in our state, the ongoing changes to Idaho’s personality, cultures, and landscapes are increasingly obvious. Our neighborhoods, communities, and social networks “feel” the stress of our demographic transformations just as our forests, farms, ranchlands and water supplies do. All of these elements contribute to our vision of place and are worthy of sustaining. Thus an Idaho notion of sustainability requires consideration not only of timber supplies or rangelands, but of the people and communities that live in and rely on those places.

## **AUTHORIZING IMAGINATION, ACHIEVING VISIONS OF PLACE**

Communities and neighborhoods change, and perceptions of place and purpose evolve with those changes; the sustainable Idaho we seek today is not necessarily the Idaho of 1950, 1970

or even 2000. And perhaps more significant, there is no single sustainable Idaho. Mackay has a different vision of its purpose and future than does Ketchum, just as Sandpoint imagines something different for itself than Preston. What is sustainable in these places should not be decided in Boise anymore than it should be decided in Washington, D.C. A community's purpose, and the vision of how that community might be sustainable into the future, is discovered as that community works through the process of creating itself, neighborhood by neighborhood. Purpose emerges as each community imagines its future, and it is not until the community creates what is possible that it can determine what it wants, and thus what it can and should sustain.

How does this relate to my January bike ride, and more importantly, how does it relate to the Idaho legal community? After discussing my bike ride, and the general issue of non-point source pollution, with my class, I returned to my office and spent a few moments reviewing the structure of the Water Quality Division of the Idaho Department of Environmental Quality. There are 13 regional water quality managers in Idaho who are responsible for Idaho's ~107,000 miles of streams and rivers and ~522,000 acres of lakes. That's an approximate average of 8,300 river miles, 40,000 acres of lakes, and 6,365 square miles for each of those water quality managers, who despite being assisted by committed and capable assistants, understandably might feel overwhelmed by the landscapes before them. In contrast, Latah County, for example, is 1,077 square miles; if Latah County wanted to create a water quality manager with a similar level of responsibility, on a land-area basis, it would need just 1/6 of one person to provide the same level of attention allowed at the state level. But Latah County, like every Idaho county, has potentially hundreds of individuals interested in, and committed to, finding creative solutions to the problems in their place. A community-based, or even a watershed-based, water quality program would incorporate those ideas of purpose and place that are unique to each of Idaho's communities.

But water quality is merely one component of a sustainable Idaho. Idaho's citizens and communities desire healthy ecosystems, vibrant neighborhoods, stable and growing local economies, and real places to belong and return to. And those communities are in the best position to discover how to achieve those goals and create those places. The crucial task is to provide Idaho cities, towns and counties the freedom to imagine their own purpose and discover what sustainability means in their own neighborhoods and communities, and then more importantly, to grant them the legal authority to implement that vision. As each city, town, county, or even watershed or organic region creates its own purpose, and then goes about the process of implementing that purpose, all Idahoans will share in the successes and failures of these many different Idaho laboratories, increasing the chance that each separate community will achieve its own vision of sustainable place.

In case the point has been too subtle so far, achieving a sustainable Idaho may – and in fact, likely will – require the state to change its own approach to resource management and land-use regulation in order to allow specific communities to achieve their own visions of sustainable place. In a few recent cases, Idaho courts have limited – perhaps unnecessarily – the ability of local communities to experiment with new approaches to protect their own valued resources and create and achieve a community vision of sustainability. These limitations – whether dealing with water quality or quantity, the use of land, ecosystem preservation, or more generally the creation of place – present unfortunate and

unnecessary road blocks on the pathway toward a sustainable Idaho.

## CONCLUSION

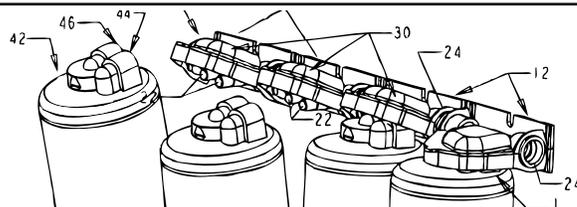
There is nothing radical about suggesting that Challis, for example, might be better situated to understand itself than Boise is. In fact, maybe Boise has something to learn from Challis about protecting its own communities, neighborhoods and natural resources. Until we allow each community the freedom and legal authority to develop its own vision, we cannot know if any single vision is the best vision for that place—particularly a single vision imposed by a somewhat distant and potentially disconnected decision maker. An Idaho democracy of communities – in this case a democracy allowing each community an equal voice and equal authority in our collective quest to achieve a sustainable Idaho – is the necessary precondition to the full application of our individual and collective intelligence and creativity to the task of creating a sustainable Idaho.

## ABOUT THE AUTHOR

**Jerrold A. Long** is an associate professor of law at the University of Idaho College of Law in Moscow, specializing in land use and environmental law. He was hired by the College of Law as part of its commitment to the Waters of the West Strategic Initiative. Professor Long grew up in Rexburg where he graduated from Madison High School. He received a B.S. in Biology from Utah State University and a J.D. from the University of Colorado-Boulder. After practicing for several years in the Cheyenne, Wyoming office of Holland & Hart LLP, Professor Long returned to graduate school at the University of Wisconsin-Madison, where he recently received a Ph.D. in Environment and Resources.

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## IDAHO COURTS

### HIGHLIGHTS OF THE 2009 RULE AMENDMENTS

Catherine Derden  
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Idaho Supreme Court Rules Advisory Committees

#### Supreme Court Rules Advisory Committees

*The following is a list of rule amendments that have gone into effect since January 1, 2009, or that will go into effect on July 1, 2009. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.*

#### SUPREME COURT RULES ADVISORY COMMITTEES

The following is a list of rule amendments that have gone into effect since January 1, 2009, or that will go into effect on July 1, 2009. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.

#### IDAHO APPELLATE RULES

The Appellate Rules Advisory Committee, chaired by Chief Justice Daniel Eismann, met on November 3, 2008, and recommended a number of amendments to the rules. In addition, a subcommittee was appointed at that time to consider a rule on expediting appeals in certain custody cases. The subcommittee's proposal was later circulated and approved by the Committee. Based on the Committee's recommendations, the Supreme Court has adopted the following amendments, effective July 1, 2009.

**Rule 5. Special Writs.** Currently Rule 5, which addresses filing an original petition for a writ, does not require service on any other parties. Although no response is required unless requested by the court, in some cases it is important that the affected parties be given notice. The amendment adds a provision that, except for petitions filed by prisoners, service by mail is required on all the affected parties. This requirement would also apply to those seeking to intervene in a petition for a special writ. The amendment incorporates into Rule 5 the current Rule 43, which outlines what happens once the court issues a writ or wants a response to a petition. Rule 43 has been eliminated.

**New Rule 11.1. Appealable judgments and orders from the magistrate court.** This new rule specifies that orders granting or denying a petition for termination of parental rights or adoption are appealable to the Supreme Court as a matter of right.

**Rule 12.1. Permissive appeal in custody cases.** The amendment adds language that the filing of this motion stays the time for appealing to the district court until the Supreme Court enters an order granting or denying the appeal. Once the appeal is granted the notice of appeal must be filed within 14 days. The appeal will then be expedited as set out in new Rule 12.2.

**New Rule 12.2. Expedited review.** This new rule sets out the procedure for expediting appeals in custody cases that are brought as a matter of right pursuant to new Rule 11.1 or by permission pursuant to Rule 12.1. The record and transcript must be prepared within 21 days. The appellant has 21 days to file a brief, the respondent then has 21 days to file a brief and the reply brief is due in 14 days. Oral argument, if requested, must be heard within 120 days of the filing of the notice of appeal.

**Rule 13(b)(15). Stay upon appeal—powers of the district court - civil actions.** The amendment addresses what happens to a bond or cash deposit when the award itself is upheld but the case is remanded for a new determination of the amount owed, and provides the court may continue or modify the bond. It also provides that any cash deposit may be applied to the judgment upon filing of the remittitur from the Supreme Court.

**Rule 17. Notice of appeal—contents.** The added language requires the appellant to provide an address, phone number and email address, although no email address is required for parties who are appearing *pro se*. The appellant must specify in the notice of appeal whether the transcript is to be provided in hard copy, electronic format or both.

**Rule 31** was recently amended to provide that copies of all exhibits be sent to the

Supreme Court instead of the original exhibits. Since many cases have numerous documentary exhibits, copying the exhibits is raising the cost of the record when not every exhibit may be relevant to the appeal. Thus, for civil cases, in an effort to save time and money, the amendment states the appellant must designate the exhibits that are to be copied and sent to the Supreme Court. The changes to this rule are also reflected in the form for the notice of appeal.

**Rule 18. Notice of cross-appeal—contents.** The same amendments that are made to Rule 17 are made to this rule.

**Rule 19. Request for additional transcript or clerk's or agency's record—payment.** The amendment requires the person making the request to specify the format for any additional transcript. The subsection on requesting compressed format has been deleted as compressed format is now required. The amended form reflects the approved changes.

**Rule 24(a). Reporter's transcript—number—estimated fees.** The reporter is now required to furnish an original hard copy, an additional hard copy and one electronic copy of the transcript to the Supreme Court and the language about a computer searchable disk in ASCII format has been eliminated. The reporter is to prepare one copy of the transcript for the appellant and one for the respondent with each electing whether to receive it in hard copy or electronic format. Once the cost of the original transcript has been paid, an additional copy in electronic format may be obtained for \$20.00.

**Rule 25(f). Reporter's transcript—contents—recorded testimony.** The amendment clarifies the rule is referring only to transcribing previous testimony taken under oath, such as from a preliminary hearing or deposition, and does not refer to

recorded evidence, such as a traffic stop or recorded drug buy.

**Rule 26. Preparation and arrangement of reporter's transcripts.** The compressed format for transcripts is required. The rule as amended also requires a notice of lodging be filed by the reporter once all transcripts requested from that reporter have been completed and lodged. The notice is to be file stamped and made part of the clerk's record.

**Rule 28(b). Preparation of clerk's or agency's record—content and arrangement.** The notice of lodging filed by the reporter has been added to the standard record in both civil and criminal cases on appeal.

**Rule 29(b). Settlement and filing of reporter's transcript and clerk's or agency's record.** The language referring to the number of transcripts filed with the Supreme Court is updated to conform to the other rule amendments.

**Rule 30(a). Augmentation or deletions from transcript or record.** The amendment deletes the sentence referring to the number of copies required in Rule 32(e) since the number of copies for motions to augment is different than other motions.

**New Rule 30.2. Augmentation of record on appeal with copy of an ordinance.** The new rule allows a party to file a motion to augment the record on appeal with an ordinance by filing a certified copy of the ordinance and a statement that it was in effect at the time of the action or occurrence at issue in the appeal. The same may be accomplished by stipulation.

**Rule 31(a)(1). Exhibits, recordings and documents.** The amendment specifies that it is copies of requested exhibits that are sent to this court on appeal in civil cases, and adds a provision that pictures or depictions of child pornography are not to be sent to the Supreme Court in criminal appeals unless specifically ordered by the court.

**Rule 35. Content and arrangement of briefs.** A statement has been added that all references to a minor shall be by use of initials or a designation other than a minor's name. Now that many briefs are being scanned and placed on Westlaw and Lexis this action is being taken to protect the minor's privacy.

**Rule 41(d). Attorney fees on appeal.** A reference to paralegal fees has been included in the amount of fees, similar to Rule 54 of the Civil Rules of Procedure.

**Rule 47. Service of court opinions, orders, and other documents by the clerk.** With the exception of parties appearing *pro se*, all parties must provide an email address, and attorneys representing a person on appeal must provide a current email address to the Idaho State Bar.

#### **IDAHO RULES OF CIVIL PROCEDURE**

The Civil Rules Advisory Committee, chaired by Justice Warren Jones, met on January 9, 2009, and recommended the adoption of new Rule 45(i) on Interstate Depositions and Discovery, which is based on the Uniform Interstate Deposition and Discovery Act approved by the National Conference of Commissioners in August of 2007. The Supreme Court has adopted this new rule effective July 1, 2009.

**Rule 28(e). Depositions to be used in other states.** Effective July 1 this rule will be repealed, as the subject matter will be covered in new Rule 45(i).

**New Rule 45(i)(1)–(8). Interstate depositions and discovery.** Under this rule, litigants can present a subpoena issued by the trial state to the clerk of the Idaho court where discoverable materials are sought. Once the clerk receives the foreign subpoena, the clerk will issue a subpoena for service on the person or entity to which the original subpoena was directed. The rule requires minimal judicial oversight and eliminates the need for obtaining local counsel in Idaho, or for filing a miscellaneous action in the discovery state. Discovery authorized by the subpoena is to then comply with the rules of the state in which the discovery occurs. This is a rule that will not have much impact on Idaho lawyers. An Idaho lawyer will only be involved should the subpoena be challenged. While the court rules do not generally have comments, comments are included in this rule. The comments are needed to help out of state attorneys and the comments conform to the uniform act.

**Rule 83(a). Appeals from decisions of magistrates.** The amendment references the fact that appeals in certain custody cases must be taken directly to the Supreme Court.

#### **IDAHO CRIMINAL RULES**

The Criminal Rules Advisory Committee, chaired by Justice Roger Burdick, met on September 5, 2008. At that time a subcommittee was appointed to develop a proposed rule on the procedure for arraignments on probation violations that was later approved by the Committee. The Supreme Court has approved the following amendments, effective July 1, 2009.

**Rule 5. Initial appearance before magistrate - Advice to defendant - Plea in misdemeanors - Initial appearance on grand jury indictment.** The amendment eliminates language referring to probation violations since a new rule has been adopted specifically dealing with this.

**New Rule 5.3. Initial appearance on probation violations.** The new rule sets out the procedure to be followed whether the arrest is pursuant to an arrest warrant issued by the court or pursuant to an agent's warrant. It also provides for a finding of probable cause if pursuant to an agent's warrant, setting of bail if appropriate, and a time frame for transporting probationers to the sentencing county if in custody. Though not part of the rule, the Idaho Department of Correction is also making changes to the information on the agent's affidavit and warrant.

**Rule 29(a). Motion for judgment of acquittal.** A sentence has been added that, in the event the court dismisses the charged offense, the court must consider whether the evidence would be sufficient to sustain a conviction on a lesser included offense.

**Rule 33.3. Evaluations of persons guilty of domestic assault or domestic battery.** The amendment to this rule was recommended by the Domestic Assault and Battery Evaluator Advisory Board, chaired by Judge Gary DeMeyer. The amendment to the rule updates citations to I.C. § 18-918 and make all references to the Domestic Assault and Battery Evaluator Advisory Board consistent throughout the rule. A reference to "National Criminal History Check" has been added to (c)(2)(k) to clarify what domestic violence evaluators need to obtain from local law enforcement when conducting a criminal records check in the course of an evaluation. The amendments to this rule took effect on March 1, 2009.

#### **IDAHO MISDEMEANOR CRIMINAL RULES AND INFRACTION RULES**

The Misdemeanor/Infraction Rules Committee met on August 29, 2008, with Vice-Chair, Judge Michael Oths, and recommended several amendments. The amendments took effect on February 1, 2009, with the exception of the amendment to Rule 5. The citation forms must be amended by July 1, 2009, although they can be amended sooner.

**New Misdemeanor Rule 2.1 and a New Infraction Rule 2.1. Social Security Numbers.** These new rules provide that only the last 4 digits of social security numbers should be used on filed documents.

**Misdemeanor Rule 5. Uniform Citation.**

A box has been added to the uniform citation form for officers to indicate whether a commercial vehicle is involved.

**Misdemeanor Rule 13(b). Bail Schedule.**

A higher bond for second and third offenses for driving without privileges was added. In addition, the bonds on certain Department of Transportation permit offenses have been raised.

**Misdemeanor Rule 14(b). Disposition of citations by written plea of guilty – Limitations - Deferred payment agreements.**

This rule sets a limit on the offenses where a written plea of guilty and fine can simply be mailed to the court without a court appearance and a limit of \$194 now applies to permit offenses from the Department of Transportation. This amount has been raised to \$500 so that citations for these offenses may be mailed to the court with payment.

**Infraction Rule 9(b). Judgment- Fixed penalty for infractions.**

A fixed penalty for speeding in a school zone was added in the amount of \$100 plus court costs for a total of \$141.50.

**IDAHO RULES OF EVIDENCE**

The Evidence Rules Advisory Committee, chaired by Chief Judge Karen Lansing, met on June 16, 2008, and recommended the following rules that were adopted effective January 1, 2009.

**Rule 803(23). Medical or dental tests and test results for diagnostic or treatment purposes.**

This new rule allows for the admission of a written, graphic, numerical, symbolic or pictorial representation of the results of medical or dental tests performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the sources of information or other circumstances indicate lack of trustworthiness.

**Rule 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.**

This new rule provides that the requirement of authentication as a condition precedent to admissibility of items described in Rule 803(23) is satisfied by a showing that the proposed exhibit identifies the person or entity who conducted or interpreted the test, the name of the patient, and the date when the test was performed, and that notice was given in accord with subsection (2) of the rule. The rule also has a subsection on objections.

**Idaho Juvenile Rules**

The Juvenile Rules Advisory Committee is chaired by Judge John Varin.

**Rule 19. Standard for commitment to the Department of Juvenile Corrections.**

The Idaho Supreme Court recently amended I.J.R. 19 to require a screening team be convened before a juvenile offender is committed to the Idaho Department of Juvenile Corrections. The rule notes the composition of the team and the factors the team is to consider. This amendment was effective January 28, 2009.

**Rule 49(a). Right of appeal (C.P.A.).**

The amendment adds a sentence advising that a party may also seek permission to appeal to the Supreme Court pursuant to I.A.R. 12.1.

**IDAHO COURT ADMINISTRATIVE RULES**

**Rule 32. Records of the judicial department – examination and copying - Exemption from and limitations on disclosure.**

The Rule 32 Committee is chaired by Justice Jim Jones and there were a number of amendments to this rule that were effective February 1, 2009.

Arrest warrants are exempt from disclosure for the protection of officers and so that the persons who are named in the warrants are not given the opportunity to conceal themselves or flee. The amendment to the rule excepts bench warrants from this exemption, since bench warrants are generally issued in open court.

The rule was amended to clarify that screening reports prepared by Family Court Service Coordinators or their designees are exempt from disclosure. Many appellate cases bear “John Doe” or “Jane Doe” titles, making it difficult to distinguish one case from another by their titles. The rule was amended to allow for other anonymous designations, such as fictitious names or initials. The rule was also amended to permit the temporary sealing or redacting of court records to preserve the right to a fair trial.

The rule will now allow an extension of the time for response to a public records request from three working days to ten working days when the longer period of time is needed to locate or retrieve the requested records. This is consistent with the public records statutes.

The fee for copying judicial records that are not in a case file may now be set either by the Supreme Court or the Administrative District Judge. The rule as amended clarifies that the provisions of Idaho Code § 9-338(8) apply to these requests. This

will allow for the charging of a fee for the labor costs associated with locating and copying records when: (1) the request is for more than 100 pages of paper records; (2) the request includes records from which nonpublic information must be deleted; or (3) the actual labor associated with locating and copying the records exceeds two person hours.

**Rule 47. Criminal History Checks.**

This rule was amended effective March 24, 2009, and allows the Supreme Court to utilize an individual’s criminal history check more than once if an individual seeks to be placed on multiple Supreme Court rosters without requiring the individual to undergo multiple checks so long as the fingerprints are not more than one year old.

The various rules advisory committees meet annually as the need dictates. 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 <http://www.isc.idaho.gov/commlist.html>.

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## THE HON. STEPHEN S. TROTT: FROM NUMBER “1” TO THE NINTH CIRCUIT—THE JOURNEY OF A HIGHWAYMAN

Jay H. Berg  
Cornicello & Tendler, LLP

*And still on a winter's night,  
they say, when the wind is in the trees, When the moon  
is a ghostly galleon tossed upon cloudy seas, When the road is a  
ribbon of moonlight over the purple moor, A highwayman comes  
riding— riding—riding— A highwayman comes riding,  
up to the old inn-door.<sup>1</sup>*

The Towne Crier Café on Route 22 in Pawling, New York, will never be confused with an old English inn, even though it was once a stagecoach stop. Instead, for the last thirty-five years, this Southwestern-themed roadhouse has been one of the main venues for live blues and folk music in the Northeast.<sup>2</sup> Its lounge walls are covered with the photographs of the hundreds of musicians who have appeared there over the years. And it was on the night of December 12, 2008, that the Highwaymen, the old folk music group from the early 1960s, who reached the top of the pop charts with the gospel song, “Michael, Row the Boat Ashore,” came to call.

The Highwaymen are truly unique in the annals of American folk music. Not only are four of its original five members still with the group, two are graduates of Harvard Law School, including the Honorable Stephen S. Trott, a senior judge of the United States Court of Appeals for the Ninth Circuit, whose chambers are in Boise, Idaho. If being an old folkie from the days of Bob Dylan and a federal appeals court judge from Boise, Idaho seems somewhat incongruous, the anomaly does not much bother Judge Trott, who brushes it off with a brisk “it’s music.”<sup>3</sup> Still, there is something intriguing—and inspiring—about watching a law-and-order jurist who was appointed to the Bench by no less a conservative than President Ronald Reagan, mount a stage in upstate New York, and sing out, in a clear, strong, baritone, the following lines from the classic Cuban folksong, *Guantanamera*:

*“Con los probes de la tierra  
quiero yo mi suerte echar.” With the poor people of  
the earth I cast my lot.<sup>4</sup>*

It was called the Great Urban Folk Music Revival, and although one musicologist dates it from 1940<sup>5</sup>, it didn’t really get rolling until 1958, when three collegiate folk musicians from Northern California called the Kingston Trio took a post-Civil War folksong about a twenty-year-old Confederate veteran who had been sent to the gallows in 1868 for murdering the cousin of his former lover, and improbably turned it into a number-one record titled “Tom Dooley.”<sup>6</sup> Within months other folk groups began springing up on American college campuses. From the University of Washington came the Brothers Four.<sup>7</sup> Gonzaga University produced the Chad Mitchell Trio.<sup>8</sup> Then there were the Limelites, led by the radical, eccentric bassist Lou Gottlieb, who had recently received his Ph.D. in musicology from the University of California at Berkeley.<sup>9</sup>

Meanwhile, back East, at Wesleyan University in Middletown, Connecticut, Judge Trott, who plays guitar and mandolin, teamed up with four fraternity bothers—Chan Daniels, Dave Fisher, Steve Butts and Bob Burnett—and formed a folk group called the Clansmen. The Clansmen performed traditional Irish and Celtic

music at fraternity parties and local colleges, and anywhere else they could draw a crowd. Following their sophomore year they ventured into New York City looking for a summer job. To their utter astonishment, a promoter offered them a quarter of a million dollars to quit school and go on the road.<sup>10</sup>

Fortunately for Judge Trott and the group, they met a level-headed music professional named Ken Greengrass, who became their manager, and has remained so to this day. Greengrass wisely insisted that the boys stay in school. He also insisted they change the name of the group. Thus were born the Highwaymen, from the Alfred Noyes poem of the same name.<sup>11</sup>

Through Greengrass, the group was able to procure a recording contract with United Artists Records. In 1959, they recorded an LP at a private studio in New Jersey.<sup>12</sup> The album contained 12 cuts, two of which were released as a single: the rousing, sea shanty, “Santiano,” and the old Negro spiritual, “Michael” a/k/a “Michael, Row the Boat Ashore,” which had first appeared in a book entitled *Slave Songs of the United States* that had been published in 1867.<sup>13</sup>

Interestingly, “Michael” was the “B” side of the record. “Santiano” was supposed to be the hit. Only things didn’t work out that way. “Santiano” languished while “Michael” flourished, thanks largely to the efforts of an independent record distributor who convinced a number of New England disk jockeys to give it air time. By the summer of 1961, the old slave song was the number one single in the nation.<sup>14</sup>

“Michael” was followed by “Cotton Fields,” a largely forgotten Huddle Ledbetter (“Leadbelly”) song about the hardships of sharecropping, which the late singer’s estate had never even bothered to copyright.<sup>15</sup> “Cotton Fields” charted on November 27, 1961, eventually reaching number 13.<sup>16</sup>

But the end was near. Judge Trott, who had been accepted into Harvard Law School, left the group in August 1962. The others hung on for a few more years, adding a new member, but they were never able to replicate their early success. In the fall of 1964, they decided to disband.<sup>17</sup>

Ironically, it would take a lawsuit to rejuvenate the group’s career. In the late 1980s, four giants of country music, Johnny Cash, Waylon Jennings, Kris Kristoffersen and Willie Nelson, decided to form a country music group called the Highwaymen. When Judge Trott and the Wesleyan Highwaymen got wind of what Cash and the Nashville Highwaymen had done, they brought a lawsuit in Federal District Court in Los Angeles.<sup>18</sup> Had the case been litigated, the appeal would have gone to the Ninth Circuit. “Kind of gives new meaning to the term ‘home court advantage,’ don’t you think?” Judge Trott likes to quip to his audiences.<sup>19</sup>

The suit was settled amicably with the two groups agreeing to perform a concert at the Universal Amphitheater in Los Angeles in

1990.<sup>20</sup> The Original Highwaymen—as the group has since taken to call itself, in order to differentiate it from its country cousin—have been performing regularly ever since, albeit it on a part-time basis.

Judge Trott likes to tell a humorous story about going up to Willie Nelson at the Universal concert, and asking him how he and the other humbug Highwaymen could have so brazenly usurped the group's name. "After all," Judge Trott said to Nelson, "you were there in the sixties, we were there in the sixties, you knew we were the Highwaymen." To which Nelson replied, "If you can remember the sixties, you must not have been there."<sup>21</sup>

Putting aside the obvious innuendo, in a sense, Nelson was right: Judge Trott *wasn't* there in the sixties. At least not in the way that so many of his more politically-minded, activist, musical contemporaries were.<sup>22</sup> For Judge Trott, music was never a weapon. It was merely a means to an end; make a little money for grad school, and have some fun along the way.<sup>23</sup>

After graduating from Harvard Law, Judge Trott headed West, where he went to work for Los Angeles County District Attorney Evelle Younger. In 1981, he was appointed United States Attorney for the Central District of California. Two years later he went to Washington to work as an Assistant Attorney General in the Criminal Division. In 1986 he became Associate Attorney General, the third-ranking official in the Department of Justice. He was nominated by President Reagan for a seat on the Ninth Circuit in 1987 and was confirmed by the Senate the following year.<sup>24</sup>

Once appointed to the bench, Judge Trott set up shop in Boise, where he and his wife Carol, still reside. He chose Boise in large measure due to the city's unpretentiousness. He likes the fact that people call him Steve and not Your Honor.<sup>25</sup> Since relocating to Boise, Judge Trott has served as president of the Philharmonic Association, giving pre-concert lectures at The Morrison Center.<sup>26</sup> He has also lectured on Abraham Lincoln at Boise City Hall,<sup>27</sup> and is on the Board of Directors of the Children's Home Society, where he is house magician.<sup>28</sup>

As far as children are concerned, Judge Trott, the father of two grown daughters, has proven to be an especially passionate advocate. Take, for instance, his strident dissent in *United States v. Curtin*.<sup>29</sup> Kevin Eric Curtin had been convicted of arranging a rendezvous with a minor over the internet, and then traveling across state lines to have sex with her. The conviction was reversed on appeal, on the grounds that the District Court had erroneously admitted into evidence five salacious, fictionalized stories that had been extracted from Curtin's personal digital assistant ("PDA") at the time of his arrest. The five selected stories (140 had actually been found on the PDA) were admitted pursuant to Rule 404(b) of the Federal Rules of Evidence, to show Curtin's intent. But according to the majority, the stories did not fall within the ambit of Rule 404(b) in that it was not illegal to possess them, and that, in any event, the stories did "not reveal a relevant modus operandi to commit the charged crime, and [were thus] inadmissible."<sup>30</sup>

In a blistering thirty-one page dissent, Judge Trott found that the five stories were relevant, as Curtin had claimed that it was not his intention to meet a minor when he traveled across state lines, but to hook up with a mature woman who was merely *pretending* to be a minor. But as Judge Trott aptly pointed out in his dissent, of the 140 stories found on Curtin's PDA, not one "was about daddy/daughter role playing with adults."<sup>31</sup> Judge Trott then went on to chastise the majority for misconstruing Rule 404(b), stating that "[m]y colleagues have made relevant literature off limits in the Ninth Circuit as a matter of law,"<sup>32</sup> thereby "effectively hamstringing

the capability of the law to cope in this Circuit with adults who see children as sexual prey."<sup>33</sup>

Judge Trott's view ultimately prevailed. The next year, the Ninth Circuit, sitting en banc, reversed, holding that the five stories were in fact admissible.<sup>34</sup> More important, the Ninth Circuit held that simply because reading material is lawful does not mean that it is automatically beyond the reach of Rule 404(b).<sup>35</sup>

Given Judge Trott's career as a prosecutor, one could argue that his decision in *Curtin* was predictable. But that would be incorrect. Indeed, in an article that appeared in *Legal Times* in November 1993, Judge Trott was called "The Conservative in the Middle," who just as often sides with the defense as the prosecution. His wariness of government witnesses can be seen in an article that he authored in 1996 for the *Hastings Law Journal*, in which he warned young prosecutors of the perils of relying on the testimony of convicted felons simply to secure convictions.<sup>36</sup> He also treks back to Harvard once a year to lecture Alan Dershowitz's law students on prosecutorial ethics. As Professor Dershowitz points out, Judge Trott "is particularly tough on young prosecutors who break the law or turn sharp corners."<sup>37</sup>

If anyone has any doubts about that, all one needs to do is read Judge Trott's blistering criticism of the prosecution in *Commonwealth of the Northern Mariana Islands v. Bowie*.<sup>38</sup> Bowie was convicted of premeditated murder based solely on the testimony of four accomplices who had cut deals with the prosecution. The problem was that the testimony of the four accomplices was false and the prosecutor knew it. In particular, the prosecutor was in possession of an unsigned letter from one of the perpetrators, in which the author admitted to the murder, and stated that he and three of his accomplices had agreed to lay the blame for the killing solely on Bowie. The prosecutor, however, took no steps to ascertain the identity of the writer, or to even investigate whether there had in fact been a concerted effort to frame Bowie for the murder. That was too much for Judge Trott, who sharply criticized the prosecutor for shirking his duty to the defendant and the criminal justice system by in effect suborning perjury.<sup>39</sup>

Notably, it is not just errant prosecutors who have bourn the brunt of Judge Trott's wrath. Wayward defense attorneys and judges have also felt his ire. Two cases stand out: *Frazer v. United States*,<sup>40</sup> and *Summerlin v. Stewart*.<sup>41</sup>

In *Frazer*, Judge Trott reversed the defendant's conviction for bank robbery, on the grounds that the defendant had been denied effective counsel. In particular, the defendant's court-appointed counsel had called him "a stupid nigger son of a bitch" for refusing to accept a plea deal that the lawyer had negotiated on his behalf. The lawyer then went on to tell Frazer that if he insisted on going to trial, he could forget about receiving any kind of effective legal representation.<sup>42</sup>

While conceding that his decision to reverse the decision of the District Court "may cost the government a conviction," Judge Trott stated that "to hold otherwise would carry with it the unaffordable cost of tolerating what our Constitution and our laws tell us is intolerable."<sup>43</sup>

In *Summerlin*, Judge Trott ruled that the defendant, who had been sentenced to death for bashing in the skull of a debt collector—after first raping her—was entitled to an evidentiary hearing to ascertain if the trial judge—who was subsequently disbarred for his chronic, illegal use of marijuana<sup>44</sup>—was debilitated at the time that he determined that Summerlin must die.<sup>45</sup> Quoting from *Measure for Measure* ("He who the sword of heaven should bear should

be as holy as severe”),<sup>46</sup> Judge Trott wrote that “[t]he Constitution may not entitle everyone to the wisdom of Solomon, but it does at a minimum entitle everyone to judicial judgment not impaired by mind-altering illegal drugs. We see no cause to be concerned about the stability of the justice system by pausing here to make sure that the Constitution has been respected and that the State will not take life without due process of law.”<sup>47</sup>

It is that profound respect for the Constitution and the Bill of Rights, even in the face of such a heinous crime as the one committed by Summerlin that has been the hallmark of this Highwayman’s jurisprudence. It is a reverence that transcends even the exigencies of September 11<sup>th</sup>. As Judge Trott stated at a conference that was held at Boise State University in 2003, “[s]o far, the terrorists have done more than anyone I can think of to take away our liberties. We had a tremendous thing going for us prior to 9/11, and we’ve dropped back a couple of notches.”<sup>48</sup>

Yet Judge Trott is also a realist. In a speech that he delivered to the Commonwealth Club of California, he stated that “[t]he genius of our Constitution is that it is marvelously and reasonably adaptable to almost any circumstance.” Continuing on, he added that “[t]he touchstone of many of our constitutional guarantees is a two-sided coin: What is the need and what is reasonable? Those questions can only be answered by circumstances.”<sup>49</sup>

Not surprisingly, Judge Trott’s commitment to the rule of law is best summed up in one of the songs that he and the Highwaymen sang the night that they performed at the Towne Crier Café. It is a song of struggle that was written by the Irish singer/songwriter and peace activist, Tommy Sands.<sup>50</sup> The song is called, “Your Daughters and Your Sons,” and it is as elegant and passionate a plea for justice, freedom and equality as any judicial decision that Judge Trott—or any other judge for that matter—has ever written. It goes like this:

*Your weary  
smile that proudly hides the  
chain marks on your hand, As you bravely  
strive to realize the rights of every man. And tho’  
your body is bent and low, a victory you’ve won,  
for You’ve sowed the seeds of justice in your  
daughters and your sons.*<sup>51</sup>

And therein lays the real legacy of this folk-singing jurist from the Ninth Circuit.

#### ABOUT THE AUTHOR

**Jay H. Berg** is a member of the New York City law firm of Cornicello & Tendler, LLP. He has written about folk music for the *New York Times*. His articles on legal issues have appeared in the *New York State Bar Real Property Law Journal* and the *Riverdale Press*.

#### ENDNOTES

<sup>1</sup> ALFRED NOYES, *The Highwayman*, in POEMS BY ALFRED NOYES 45, 54 (MacMillan 1913).

<sup>2</sup> Barbara Stewart, *Now Playing in Pawling*, N.Y. TIMES, January 19, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9801E6D61031F93AA25752C0A9659C>.

<sup>3</sup> Interview with Stephen Trott, Pawling, N.Y. (Dec. 12, 2008).

<sup>4</sup> Pete Seeger and Julian Orban, *Guantanamo*, from a poem by Jose Marti, original music by Jose Fernandez Dias (Joseito Fernandez) (Fall River Music, Inc. 1965) (1963) reprinted in RISE UP SINGING: THE GROUP SINGING SONGBOOK 24 (Peter Blood & Annie Patterson eds., Sing Out! 1992) (1988).

<sup>5</sup> ROBERT D. COHEN, RAINBOW QUEST: THE FOLK MUSIC REVIVAL & AMERICAN SOCIETY, 1940-1970 (University of Massachusetts Press 2002).

<sup>6</sup> *Id.* at 129-131.

<sup>7</sup> The Brothers Four, [http://en.wikipedia.org/wiki/The\\_Brothers\\_Four](http://en.wikipedia.org/wiki/The_Brothers_Four).

<sup>8</sup> Robert Shelton, *Introduction* to THE MITCHELL TRIO SONGBOOK (Quadrangle Books 1964).

<sup>9</sup> Lou Gottlieb-The Limeliter. [http://www.limeliter.net/lou\\_gottlieb.html](http://www.limeliter.net/lou_gottlieb.html).

Coincidentally, Gottlieb too would make it into the law books, when he unsuccessfully tried to deed to God a parcel of unwanted land that he owned in Southern California. See, *God as Landlord*, TIME, July 20, 1970, available at <http://www.time.com/time/magazine/article/0,9171,977095,00.html>.

<sup>10</sup> Dave Fisher & Steve Kolanjian, *Introductory Notes* to MICHAEL, ROW THE BOAT ASHORE: THE BEST OF THE HIGHWAYMEN (EMI Records 1992). See also, Stephen Trott, *Introduction/Highwaymen Name Story*, on THE HIGHWAYMEN IN CONCERT (2002).

<sup>11</sup> *Fischer & Kolanjian* at 2 The poem also inspired folksinger Phil Ochs, who set it to music, and recorded it on his second album, I A’INT MARCHING ANYMORE (Elektra 1965).

<sup>12</sup> *Fischer & Kolanjian* at 2.

<sup>13</sup> Michael Row the Boat Ashore, [http://en.wikipedia.org/wiki/Michael\\_Row\\_the\\_Boat\\_Ashore](http://en.wikipedia.org/wiki/Michael_Row_the_Boat_Ashore).

<sup>14</sup> Bruce Eder, *The Highwaymen/ Biography*, <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:hpftxqe51d0e=T.1>.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> Liner Notes to *Cotton Fields*, MICHAEL, ROW THE BOAT ASHORE: THE BEST OF THE HIGHWAYMEN. See note 14.

<sup>17</sup> *Eder*, note 18, at 3.

<sup>18</sup> David Margolick, *Law: At The Bar; The Highwaymen Come Singing, Singing, Much to the Chagrin of the Originals*, N.Y. TIMES, August 30, 1990, available at <http://query.nytimes.com/gst.fullpage.html?res=9C0CE0D61238F930A357BC0A96695>.

<sup>19</sup> Stephen Trott, *The Other Highwaymen Story*, on THE HIGHWAYMEN IN CONCERT (2002). See note 14.

<sup>20</sup> Alex Kozinski, *Law and Popular Culture: How I Narrowly Escaped Insanity*, 48 UCLA L. REV. 1293 (2001), available at <http://notabug.com/kozinski/popularlaw> at 8. See also, Margolick, note 22 at 2. See also, Trott, note 23, *The Other Highwaymen Story*.

<sup>21</sup> Trott, note 23, *The Other Highwaymen Story*.

<sup>22</sup> Peter, Paul and Mary immediately come to mind. Then there was Pete Seeger, Phil Ochs, Bob Dylan, Joan Baez and countless others.

<sup>23</sup> Trott interview, note 4.

<sup>24</sup> Steve Alpert, *Stephen Trott: The Conservative ‘In The Middle,’* LEGAL TIMES, November 8, 1993, at 2, 25. Trott took senior status in 2005. See, *Ninth Circuit Judge Trott To Take Senior Status*, METROPOLITAN NEWS ENTERPRISES, May 4, 2004, <http://www.metnews.com/articles/trott05040.htm>.

<sup>25</sup> Trott interview, note 4.

<sup>26</sup> *The Original Highwaymen/ Our Group/ Steve Trott*, <http://www/originalhighwaymen.com/p3trott.htm>.

<sup>27</sup> Diane Ronayne, *Judge Trott to teach class on Lincoln*, IDAHO STATESMAN, January 13, 2008, available at [http://www.idahostatesman.com/418\\_story/263290.html](http://www.idahostatesman.com/418_story/263290.html).

<sup>28</sup> *The Original Highwaymen*, note 30 at 2.

<sup>29</sup> United States v. Curtin, 443 F.3d 1084 (9<sup>th</sup> Cir. 2006).

<sup>30</sup> *Id.* at 1092.

<sup>31</sup> *Id.* at 1099.

<sup>32</sup> *Id.* at 1124.

<sup>33</sup> *Id.* at 1126.

<sup>34</sup> United States v. Curtin, 489 F.3d 935 (9<sup>th</sup> Cir. 2007).

<sup>35</sup> *Id.* at 955.

<sup>36</sup> Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

<sup>37</sup> ALAN DERSHOWITZ, LETTERS TO A YOUNG LAWYER, 150 (Basic Books 2005) (2001).

<sup>38</sup> Commonwealth of the Northern Mariana Islands v. Bowie, 243 F.3d 1109 (9<sup>th</sup> Cir. 2001).

<sup>39</sup> *Id.* at 1113-1114, 1118-1119, 1122-1125.

<sup>40</sup> Frazer v. United States, 18 F.3d 778 (9<sup>th</sup> Cir. 1994).

<sup>41</sup> Summerlin v. Stewart, 267 F.3d 926 (9<sup>th</sup> Cir. 2001), *opinion withdrawn on other grounds*, 281 F.3d 836 (9<sup>th</sup> Cir. 2002).

<sup>42</sup> *Frazer*, 18 F.3d at 780.

<sup>43</sup> *Id.* at 785

<sup>44</sup> In the Matter of the Disbarment of Philip Walter Marquardt, 503 U.S. 902 (1992).

<sup>45</sup> *Summerlin*, 267 F.3d at 953.

<sup>46</sup> *Id.* at 948.

<sup>47</sup> *Id.* at 956.

<sup>48</sup> CONFERENCE REPORT, FREEDOM & SECURITY: TRADING

LIBERTY FOR SECURITY? 14 (Presented on Oct. 2, 2003 at Boise State University, Boise, Idaho), *transcript available at [www.andruscenter.org](http://www.andruscenter.org).*

<sup>49</sup> *Id.* at 2.

<sup>50</sup> Not to be confused with the rock and roll singer from the 1950s and 1960s.

<sup>51</sup> Tommy Sands, *Your Daughters and Your Sons* (Ebn Grove Music, 1979) reprinted in RISE UP SINGING: THE GROUP SINGING SONGBOOK at 22. See note 4.



Back row, left to right: Dave Fisher, flute; Judge Trott, harp; Chan Daniels, Charango. Front row, left to right: Bob Burnett, guitar; Steve Butts, banjo. Taken in 1961,

# Then and Later



# COURT INFORMATION

## OFFICIAL NOTICE SUPREME COURT OF IDAHO

**Chief Justice**  
Daniel T. Eismann  
**Justices**  
Roger S. Burdick  
Jim Jones  
Warren E. Jones  
Joel D. Horton

### Amended - Regular Spring Terms for 2009

Boise . . . . . January 12, 14, 16, 21 and 23  
Boise . . . . . February 9, 11, 13, 18 and 20  
**Coeur d'Alene . . . . . April 6, 7, and 8**  
**Moscow . . . . . April 9**  
**Lewiston . . . . . April 10**  
**Boise (Eastern Idaho) . . . . . May 4, 6, 8, 11 and 13**  
**Boise (Twin Falls) . . . . . June 8, 10, 12, 15 and 17**

### Regular Fall Terms for 2009

Boise . . . . . August 19, 21, 24, 26 and 28  
Boise . . . . . September 18 and 21  
Pocatello . . . . . September 23 and 24  
St. Anthony . . . . . September 25  
Twin Falls . . . . . November 4, 5 and 6  
Boise . . . . . November 9 and 12  
Boise . . . . . December 2, 4, 7, 9 and 11

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2009 Spring Terms of the Idaho Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

## OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

**Chief Judge**  
Karen L. Lansing  
**Judges**  
Darrel R. Perry  
Sergio A. Gutierrez  
David W. Gratton

### 4th Amended - Regular Spring Terms for 2009

Boise . . . . . January 20 and 22  
Boise . . . . . February 10 and 19  
Boise . . . . . March 10, 12, and 13  
Boise . . . . . April 14, 16, and 17  
**Boise (Law Day at Timberline H.S.) . May 1**  
**Boise . . . . . May 14 and 15, 19 and 21**  
**Boise . . . . . June 16 ~~18, 23,~~ and 25**

### Regular Fall Terms for 2009

Boise . . . . . August 18, 20, 25 and 27  
Boise . . . . . September 15, 17, 22 and 24  
Boise . . . . . October 13, 15, 20 and 22  
Boise . . . . . November 10, 13, 17 and 19  
Boise . . . . . December 8, 10 and 15

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2009 Spring Terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

## Idaho Supreme Court

Oral Argument Dates  
As of April 10, 2009

### Monday, May 4, 2009 - BOISE

8:50 a.m. . . . . Bach v. Harris. . . . . #31716  
10:00 a.m. . . . . Bach v. Harris. . . . . #31717  
11:10 a.m. . . . . Harris v. State. . . . . #34570

### Wednesday, May 6, 2009 - BOISE

10:00 a.m. . . . . Chapman v. Chapman. . . . . #34614  
11:10 a.m. . . . . American Pension v.  
Cornerstone Home Builders. . . . . #34697

### Friday, May 8, 2009 - BOISE

8:50 a.m. . . . . Bird v. Bidwell. . . . . #35314  
10:00 a.m. . . . . Gold v. Lockwood Engineering. . . . . #34817  
11:10 a.m. . . . . Indian Springs v. Andersen. . . . . #34623

### Monday, May 11, 2009 - BOISE

10:00 a.m. . . . . Bradford v.  
Roche Moving & Storage. . . . . #34854  
11:10 a.m. . . . . Johnson v. Johnson. . . . . #35509

### Wednesday, May 13, 2009 - BOISE

8:50 a.m. . . . . Rammell v.  
Dept. of Agriculture. . . . . #34927  
10:00 a.m. . . . . State v. Turpen . . . . . #34994  
11:10 a.m. . . . . Bynum v.  
Dept. of Health & Welfare. . . . . #35790

### Monday, June 8, 2009 - BOISE

9:00 a.m. . . . . Boudreau v. City of Wendell . . . . . #35077  
10:00 a.m. . . . . State v.  
Canyon Vista Family  
Limited Partnership . . . . . #34485  
11:10 a.m. . . . . Aardema v.  
U.S. Dairy Systems Inc . . . . . #35218

### Wednesday, June 10, 2009 - BOISE

8:50 a.m. . . . . Panike & Sons Farms v. Smith. . . . . #35062  
10:00 a.m. . . . . Callies v. O'Neal . . . . . #34968  
11:10 a.m. . . . . Rollins v. Blaine County. . . . . #33658

### Friday, June 12, 2009 - BOISE

8:50 a.m. . . . . Hurtado v. Land O'Lakes Inc. . . . . #35003  
10:00 a.m. . . . . Orrock v. Appleton . . . . . #35064  
11:10 a.m. . . . . IDHW v. Matey. . . . . #34483

### Monday, June 15, 2009 - BOISE

8:50 a.m. . . . . Houston v. Whittier. . . . . #35287  
10:00 a.m. . . . . Berg v. Kendell. . . . . #34763/35154  
11:10 a.m. . . . . First American Title Insurance v.  
Chandler. . . . . #33695

### Wednesday, June 17, 2009 - BOISE

8:50 a.m. . . . . Allbright v. Allbright. . . . . #35783  
10:00 a.m. . . . . St. Alphonsus v. Ada County. . . . . #34962  
11:10 a.m. . . . . Van v. Portneuf Medical Center. . . . . #34888

## Idaho Court of Appeals

Oral Argument Dates  
As of April 10, 2009

### Friday, May 1, 2009 - BOISE (LAW DAY at TIMBERLINE H.S.)

9:00 a.m. . . . . State v. Schultz . . . . . #33255/33256

### Thursday, May 14, 2009 - BOISE

9:00 a.m. . . . . State v. Turney . . . . . #33154  
10:30 a.m. . . . . State v. Ciccone . . . . . #32179  
1:30 p.m. . . . . State v. Harrison . . . . . #33705

### Friday, May 19, 2009 - BOISE

9:00 a.m. . . . . Trickett v. Nelson . . . . . #35528  
10:30 a.m. . . . . State v. Sturgis . . . . . #33670/34853

### Tuesday, June 16, 2009 - BOISE

9:00 a.m. . . . . Action Collection v. Jackson . . . . . #35226  
10:30 a.m. . . . . Hughes v. State . . . . . #35132  
1:30 p.m. . . . . Olson v. Montoya . . . . . #34915

## LICENSING CANCELLATIONS

### ORDER TO CANCEL LICENSE TO PRACTICE LAW FOR NON-PAYMENT OF 2009 LICENSE FEES

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2009 Idaho State Bar license fees required by Section 3-409, Idaho Code, and have not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court,

**NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby is, CANCELLED, and said persons are placed on INACTIVE STATUS FOR FAILURE TO PAY THE 2009 IDAHO STATE BAR LICENSE FEES:**

**DANNIS MARLON ADAMSON; MICHAEL MARSHALL ANDERSON; JOSEPH H. BAIRD; ELLEN MARIE BOLDMAN; MATTHEW CRAIG CAMPBELL; CHARLES EVERETT DUPONT JR.; SARAH CATHERINE CUNNINGHAM DURANSKE; JOHN DOUGLASS ELORRIETA; DEE ELLEN GRUBBS; DAVID WILLIAM HALEY; JULIA ANNA HILTON HARTY; L. SANDERS JOINER; STEVEN DAVID KLEIN; ROBERT WILLIAM LAWSON; DARREN LANCE MCKENZIE; ARTHUR DUNCAN MCKEY; LISA JONES MESLER; DAVID ROY MINERT; ADAM MICHAEL NEBEKER; ANGELO LUIGI ROSA; KIMBERLY L. SHARKEY; MARY ANN HORCHER SMITH; H. THOMAS STEVENSON; PAMELA JANE TARLOW; SCOTT S. THOMAS; MARTHA WHARRY TURNER; AND SUZANNE WEST.**

**IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN,** that the above named persons are no longer licensed to practice law in the State of Idaho unless otherwise provided by an Order of this Court.

**IT FURTHER IS ORDERED** that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

**DATED** THIS 3RD DAY OF MARCH 2009.

Daniel T. Eismann, Chief Justice

### ORDER TO CANCEL LICENSE TO PRACTICE LAW FOR NON-PAYMENT OF 2009 LICENSE FEES

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following attorney named below has not paid the 2009 Idaho State Bar license fees required by Section 3-409, Idaho Code, and has not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court,

**NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of CHERI L. BUSH be, and hereby is, CANCELLED and she shall be placed on INACTIVE STATUS FOR FAILURE TO PAY THE 2009 IDAHO STATE BAR LICENSE FEES.**

**IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN** that CHERI L. BUSH shall no longer be licensed to practice law in the State of Idaho unless otherwise provided by an Order of this Court.

**IT FURTHER IS ORDERED** that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

**DATED** this 19th day of March 2009.

Daniel T. Eismann, Chief Justice

## LICENSING REINSTATEMENTS

As of the dates indicated, the following attorneys' licenses were reinstated:

DARREN L. MCKENZIE; Active Status, March 6, 2009.

JOSEPH H. BAIRD; Active Status, March 17, 2009.

MATTHEW CRAIG CAMPBELL; Active Status, March 23, 2009.

ANGELO LUIGI ROSA; Out of State Active Status, March 31, 2009.

JULIA ANNA HILTON HARTY; Affiliate Status, March 31, 2009.

## MULTI-FACETED EXPERIENCE: IMPARTIAL AND INSIGHTFUL DISPUTE RESOLUTION



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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Update 04/01/09)

**CIVIL APPEALS**

**DIVORCE, CUSTODY, AND SUPPORT**

1. Whether the district court erred in vacating the findings of the magistrate on child support and remanding for consideration of the district court's decision.

*Olson v. Montoya*  
S.Ct. No. 34915  
Court of Appeals

2. Whether the trial court abused its discretion in finding clear and convincing evidence that it is in the best interests of the children to have the parental relationship with their father terminated.

*Doe v. Doe*  
S.Ct. No. 35784  
Supreme Court

**EVIDENCE**

1. Was there substantial, competent evidence to support the jury's verdict?

*Coombs v. Curnow*  
S.Ct. No. 35157  
Supreme Court

**HABEAS CORPUS**

1. Did the district court abuse its discretion in dismissing O'Kelly's petition as de minimis?

*O'Kelly v. Madison County*  
S.Ct. No. 35420  
Court of Appeals

**LAND USE**

1. Did the district court err in finding that Ada County complied with statutory provisions and procedural due process requirements?

*Dry Creek Partners, LLC v. Ada County Commissioners*  
S.Ct. No. 35641  
Supreme Court

**POST-CONVICTION RELIEF**

1. Did the district court err in summarily dismissing claims 7(b) and 7(d) of McCormack's petition for post-conviction relief?

*McCormack v. State*  
S.Ct. No. 35229  
Court of Appeals

2. Did the court abuse its discretion when it dismissed Hust's untimely petition before ruling on his request for counsel?

*Hust v. State*  
S.Ct. No. 35246  
Court of Appeals

3. Did the court err when it summarily dismissed Alvarez's petition for post-conviction relief?

*Alvarez v. State*  
S.Ct. No. 34688  
Court of Appeals

4. Did the court err in dismissing Hughes' claim that his attorney rendered ineffective assistance of counsel by not being present during Hughes' psychosexual evaluation?

*Hughes v. State*  
S.Ct. No. 35132  
Court of Appeals

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

*Harvey v. State*  
S.Ct. No. 34958  
Court of Appeals

6. Did the court err in finding Holm failed to prove his trial counsel provided ineffective assistance of counsel with respect to the defense of involuntary intoxication?

*Holm v. State*  
S.Ct. No. 35296  
Court of Appeals

**PROCEDURE**

1. Whether there is substantial and competent evidence in the record to support the Industrial Commission's findings that Smith's letter of appeal was untimely filed.

*Smith v. Idaho Dept. of Labor*  
S.Ct. No. 35651  
Supreme Court

**SUBSTANTIVE LAW**

1. Whether the revenue allocation scheme, pursuant to the Local Economic Development Act, violates the provision of the Idaho Constitution prohibiting municipalities from incurring an indebtedness or liability exceeding income and revenues for a specific year without the assent of a super majority of electors as provided in the Idaho Constitution, Article VIII § 3.

*Urban Renewal Agency v. Hart*  
S.Ct. No. 35435  
Supreme Court

2. Did the district court err in refusing to consider the doctrine of accord and satisfaction?

*Action Collection Services, Inc. v. Jackson*  
S.Ct. No. 35226  
Court of Appeals

3. Whether Hansen's due process rights were violated rendering the default judgment void when he received no notice of default judgment entered against him as a result of Meyer's failure to certify an address to the clerk of the court in the application for default judgment?

*Meyers v. Hansen*  
S.Ct. No. 35534  
Supreme Court

4. Whether the court erred in holding the plaintiffs lack standing to challenge the constitutionality of I.C. §§ 67-429B and 67-429C on the basis the relief sought would not result in cessation of the gaming activity alleged to cause the injury in fact.

*Knox v. State*  
S.Ct. No. 35787  
Supreme Court

5. Did the district court have jurisdiction over property sale proceeds obtained from a voluntary sale of property, when the sale was made without any judicial action, thereby acting beyond the scope of its statutory authority pursuant to I.C. § 6-501?

*Troupis v. Summer*  
S.Ct. No. 35449  
Supreme Court

**CIVIL APPEALS**

**SUMMARY JUDGMENT**

1. Did the Losees, as moving parties, meet the initial burden of establishing the absence of a genuine issue of material fact?

*Losee v. The Idaho Company*  
S.Ct. No. 34887  
Supreme Court

2. Did the district court err in determining the school district did not breach the Professional Leave provisions of the Master Agreement entered into between the PEA and the School Board by refusing to allow a teacher to use a professional leave day to complete the requirements for a Master's Degree in Education?

*Potlatch Education Ass'n v. Potlatch School District*  
S.Ct. No. 35606  
Supreme Court

**WATER LAW CASES**

1. Did the court err in holding that Big Lost River Irrigation District has unfettered discretion to distribute apportioned water below the Mackay Dam without regard to the 1936 judicial apportionment?

*Nelson v. Big Lost River Irrigation District*  
S.Ct. No. 35543  
Supreme Court

**CRIMINAL APPEALS**

**DUE PROCESS**

1. Were Riggins' rights to due process and a fair trial violated by prosecutorial misconduct in the case?

*State v. Riggins*  
S.Ct. Nos. 34707/34816  
Court of Appeals

**EVIDENCE**

1. Did the court err by denying Cheever’s motion for a judgment of acquittal on the burglary charges because, at most, the evidence showed that he aided and abetted and did not actually enter the building?

*State v. Cheever*  
S.Ct. No. 35000  
Court of Appeals

**PLEAS**

1. Whether the court abused its discretion in denying Wolf’s post-sentencing motion to withdraw his guilty pleas

*State v. Wolf*  
S.Ct. No. 35309  
Court of Appeals

**SENTENCE REVIEW**

1. Did the court abuse its discretion in relinquishing jurisdiction and imposing the original sentence when it found probation was not a viable option?

*State v. Nevarez*  
S.Ct. No. 35166  
Court of Appeals

2. Did the court err when it corrected McGray’s illegal sentence without McGray being present?

*State v. McGray*  
S.Ct. Nos. 34169/35244  
Court of Appeals

**Summarized by:**  
**Cathy Derden**  
**Supreme Court Staff Attorney**  
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# FEDERAL COURT CORNER NEW FEDERAL COURTHOUSE OPENS IN COEUR D'ALENE

Tom Murawski  
United States District and Bankruptcy Courts



Despite the numerous challenges posed this past winter by record snowfalls in Northern Idaho, on March 16<sup>th</sup>, 2009 the District and Bankruptcy Courts for the District of Idaho held a Community Celebration in connection with the recent opening of the new Federal Courthouse in Coeur d'Alene. The day-long event, attended by members of the Bar, media and public, featured: oral arguments before a three-judge Panel from the Ninth Circuit Court of Appeals; a Bench-Bar CLE Seminar sponsored by the Idaho Chapter of the Federal Bar Association and the Courthouse Dedication Ceremony.

The Three-Judge Panel included Senior Ninth Circuit Appellate Judges David R. Thompson of San Diego and Stephen S. Trott of Boise and Ninth Circuit Judge N. Randy Smith of Pocatello. The free CLE Seminar featured a courtroom demonstration of evidence presentation and video conferencing capabilities, plus updates by Chief District Judge B. Lynn Winmill, Chief Bankruptcy Judge Terry L. Myers and Chief Magistrate Judge Candy W. Dale. Among the dignitaries who spoke at the Dedication Ceremony were District of Idaho Chief Judge B. Lynn Winmill, District Judge Stephen McNamee, Chair of the Ninth Circuit Space & Security Committee, Senior Ninth Circuit Appellate Judge David R. Thompson, Sandi Bloem, Mayor of the City of Coeur d'Alene, and Susan Kim from

the Administrative Office of the U.S. Courts in Washington, D.C.

The three-story structure, located on Mineral Drive in a forest-like setting off Highway 95 and adjacent to the Hecla Mining Building, contains two full-size courtrooms and judges chambers, a Grand Jury Room, Clerk's Office and ancillary space. It also houses Probation & Pretrial Services, the U.S. Marshal Service, U.S. Attorney's Office, and U.S. Trustees.

The innovative use of curved hallways, the extensive amount of glass which captures both the natural light and warmth of the sun, automated solar window shades and a variety of creative art pieces, including the 3-dimensional "We the People" excerpt from the Constitution, together with state-of-the-art automation and video presentation systems, all combine to make this a truly unique example of modern courthouse architecture. The Idaho Legal History Society and the Art Committee, chaired by Barry McHugh, donated the art work for this new facility. You can take a virtual tour of the new Coeur d'Alene Courthouse at: <http://www.id.uscourts.gov/photos/cda-courthouse/index.html>.

We hope that this new Courthouse will better serve the needs of the Court, Bar and Community in Northern Idaho for many years to come.

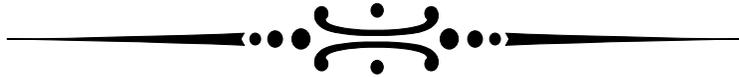


*Senior Ninth Circuit Appellate Judge David R. Thompson of San Diego; Ninth Circuit Judge N. Randy Smith of Pocatello; and Senior Ninth Circuit Appellate Judge Stephen S. Trott of Boise.*



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## OF INTEREST

### — IN MEMORIAM —

#### **HON. ROBERT WINSTON BENNETT 1921-2009**

**Robert Winston Bennett** of Boise, attorney and retired Magistrate Judge, passed away from natural causes on April 10, 2009 at the age of 87. Robert was born in Boyd, KY. on Oct. 12, 1921 to Cora Hensley and Jacob Lloyd Bennett. Boyd was a rural crossroads that boasted a grocery store, bank and service station. Robert's father was the town banker, which also meant that he was the cashier, loan officer and janitor. The family lived in an apartment upstairs. Robert spent his early childhood in northern Kentucky and was graduated from high school at Georgetown, KY. He enrolled in Georgetown College, but his education was interrupted by the start of WWII.

Following the attack on Pearl Harbor, Robert enlisted in the US Army Air Corps. He attended training schools at Kelly Field and Big Springs, TX. He was graduated as a Second Lieutenant and was then transferred to Gowen Field in Boise. While training in Boise, he met Mary Martha Stockton who was the fashion artist for the Mode. Their first date was April 10, 1943. Robert was transferred to Wendover and Kearny for training as a bombardier. After a long distance proposal Mary Martha traveled by crowded troop train for their wedding in South Sioux City, NE on July 4, 1943. Robert and his wife were stationed in Sioux City, IA before he was assigned to a B17 crew for overseas duty. Starting in June 1944 he flew 34 combat missions with the 358th Squadron, 303rd Bomb Group, 3rd Air Division, 8th Air Force stationed at Molesworth, England. He participated in four major battles, among which was the Normandy break-through where 5,000 planes were in the air at the same time. He also participated in the St. Lo relief of entrapped troops. He received, among other citations, the Distinguished Flying Cross and the Air Medal with Oak Leaf Clusters. His unit received a Presidential Unit Citation. When he returned to the U.S. in November 1944, Robert served as a squadron officer at airfields in Texas until he was Honorably Discharged from Duty in December 1945.

Robert attended Ohio State University and earned a degree in law. He was always a supporting fan of the Buckeyes. After graduation in 1949, the family moved to Boise where he worked for a title company as an attorney. In 1951 the family moved to Pocatello where he started a private law practice and handled a variety of civil and criminal cases.

In 1974 he was appointed Magistrate Judge in the Idaho 6th Judicial District and was retained by the voters for four terms until he retired in 1989. He received a Special Award of Honor from the Board of Commissioners of the Idaho State Bar upon his retirement. They returned to Boise in 1990 and he was asked to substitute for judges around the state for many years until he chose to completely retire and enjoy some of his hobbies more fully.

Judge Bennett was active in civic matters as president of the Southeast Idaho Bar Association, a Boy Scout commander, president of the local Camp Fire Girls and served in various leadership positions in his churches. He was an active member of the Keystone Lodge No. 81 of the Masons, the Pocatello Scottish Rite, and the El Korah Shrine and the Boise Court No. 31 Royal Order of Jesters. He was an avid fly-fisherman duck and pheasant hunter, golfer and outdoor enthusiast. He and Mary Martha were members of a gourmet supper club and he enjoyed being with his grandchildren and friends. He enjoyed meeting people and always made new friends wherever he went. It was a special treat for him to have coffee with his golfing buddies each week, even when it rained or he couldn't play actively anymore. Robert enjoyed his life to the fullest and lived it with enthusiasm and gratitude.

He is survived by his wife, Mary Martha and three children: Robert Jr. and his wife Holly of Carmichael, Ca., Marta Sue Sandmeyer and her husband Greg of Boise, and Jon Stockton Bennett and his wife Marianne of Leavenworth, WA. His brothers Sherwood of Dublin, OH. and James of Hypoluxo, FL. and his sister Rena Lou Lightner and her husband Walter of Lexington, KY. also survive him. He has five grandchildren: Todd Bennett and his wife Jackie of Tracy, CA., Rita Bennett of Leavenworth, WA., Emily Schmoker and her husband John of Seattle, WA., and John and Victoria Sandmeyer of Boise. He has two great-grandchildren: Brenden and Sean Bennett of Carmichael, CA.

#### **PATRICK VICTOR COLLINS 1955-2009**

**Patrick Victor Collins** passed away at his home on March 8, 2009 after a courageous battle with melanoma. Patrick was born in Aberdeen, SD on February 14, 1955 to Victor and Lucille Collins. He attended Plana School, a two-room country school with one other person in his class, his best friend, Rod Everson. They shared a wonderful childhood filled with fishing at the "Jim" River, hunting

gophers and riding their motorcycles. Pat grew up on a small farm near Columbia helping with milking cows, feeding cattle and growing crops. He was active in 4-H, and served as President of the Brown County 4-H Council. He attended junior and senior high school in Groton, SD. Upon graduation from Groton High School, Pat attended South Dakota State University as a Briggs Scholar. In 1977, he graduated with a B.S. in Economics with high honors.

On August 14, 1976; Pat married Margaret Cameron of Pierpont, SD. In each other they found their lifelong friend, lover, partner and true companion. Their marriage was blessed with two incredible sons, Cameron in 1984 followed by Christopher in 1987. In 1980, Patrick received his J.D. from Stanford Law School. At that time Pat and Margaret moved to Boise, ID where Pat began his legal career at Quane, Smith, Howard and Hull. In 1981, in keeping with his degree in Economics, he moved to the Idaho Department of Finance. In 1983, he was hired as assistant General Counsel for First Interstate Bank of Idaho. In 1987, he was recruited by Hawley Troxell Ennis and Hawley to work in its banking practice group. Pat's law practice centered on banking and real estate law; and he continued the firm's representation of the Idaho Banker's Association which began with Jess Hawley in the 1960s. During his years at Hawley Troxell he served in the capacity of leader of the Banking Practice Group, head of the Business Department and on the Board of Partners. For the past six years he was honored to serve as Managing Partner of the firm. Pat is a past president of the Board of Directors of the Friends of Children and Families, Inc. (Head Start), and served on the Idaho Business Coalition for Excellence in Education.

He served as a member of the board of directors of the 2009 Special Olympics World Winter Games, and in the capacity of General Counsel. Pat began playing the guitar at age 11.

Music had a profound influence throughout his life, and he never stopped playing. He made his college spending money by singing in a rock n' roll band. His boys grew up listening to dad sing and play his guitar; and he was thrilled when they both followed in his foot steps and learned to play. Over the years Pat wrote and home-recorded many original songs. One of the high points of his life was going to Nashville this past August to professionally record six of his songs.

Pat was preceded in death by his parents and an infant brother. He is survived by his wife, Margaret, and their sons, Cameron

and Christopher, his brothers Daniel (Carol) and Timothy, and his sister Colleen Jensen (Jerry). Following his diagnosis, Pat's mantra became "I will live each day with optimism, humor and joy".

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### **JOSEPH CHARLES BURGESS 1941-2009**

**Joseph Charles Burgess**, 67, of Idaho Falls, died Tuesday, Feb. 24, 2009, at his home of natural causes. He was born September 4, 1941, in Franklin, PA, to George Sinclair Burgess and Mary Elizabeth Norton Burgess. He grew up in Massillon, Ohio, and graduated from Pery High School in 1959. He earned a B.S. from the University of Akron in Ohio, then obtained his doctorate from the State University of New York at Buffalo. He later earned a law degree at Ohio State University. He had lived in Buffalo, N.Y., Santa Clara, CA, and Pocatello and McCammon, ID, Columbus, OH, and Idaho Falls.

Joe married Ginger Nye September 4, 1963, in Massillon, OH, and they were later divorced. He married Barbara Smith March 17, 1979, in Racine, Wisconsin, and they were later divorced. He was a professor of philosophy and English at universities in New York, California and Idaho. Teaching was his first love. After he earned his law degree he worked in Idaho Falls and McCammon and served as assistant district attorney in Idaho Falls. He then worked at Anderson, Pike and Bush in Idaho Falls and taught at Idaho State University until his retirement. His students referred to him as "Dr. Joe."

He served as an acolyte at St. Timothy's Episcopal Church in Massillon, OH, for many years. In his youth he was active in the Boy Scouts of America and earned his Eagle Scout Award. He enjoyed writing poetry and had his photography and writings published in literary journals. He enjoyed sports cars and liked to drag race. He was an avid animal lover, was a junior champion of the NRA and collected coins. In his later years he really enjoyed the computer.

Survivors include two sons, Charles Norman Shaver, Houston, TX, and James Joseph (fiancee Amanda) Smith-Burgess, Pocatello, ID; a daughter, Brigitte Barbara (Jamie) Sanow, Idaho Falls, ID; two sisters, Helen Carr, Keller, TX, and Patricia (John Shelley) Burgess, Shaker Heights, OH.

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### **JOHN XAVIER COMBO 1922-2009**

**John "Jack" Xavier Combo** passed away April 3, 2009 in Idaho Falls, ID from an ongoing battle with cancer. He was born July 3, 1922 in Butte, MT to James Emmett

and Mary Edmunda Fleming Combo. After graduation from Boys Central High School he worked for the Silver Bow County Road Dept. When it was 30 below zero he was out spreading sand on the streets of Butte. He graduated from the Montana School of Mines with a B.S. in Geological Engineering and later received a Professional Degree in Geological Engineering.

He served as a commissioned officer in the Navy during WWII on a Sub-chaser in the Marshall Islands. Following the war, Jack attended Georgetown Law School in Washington, D.C. He married his Butte sweetheart, Eileen Sullivan during a Christmas break from law school. After graduation, he worked for the Atomic Energy Commission in Grand Junction, CO. In 1962, he transferred to Idaho Falls to serve as Chief Counsel to ERDA (later the Department of Energy) and then became Deputy Manager and Acting Director of the INEEL Site. Upon retirement from DOE, Jack went into private practice with his son Bill. He was a member of the Montana and Idaho Bar Associations. He served 18 years as a Board Member with the Idaho Transportation Department, serving as Board Chair for many of the years. He considered all the employees at ITD as extended family. Jack's accomplishments were many and varied, but you never heard about them from him. While he was Chief Counsel, Deputy Director, and Acting Director at DOE he was instrumental in acquiring the land for the current University Place. Jack was appointed as Vice Chair of the Library Committee to locate and build a new library. He was very proud of the library and a plaque bears his name. He also was an advocate for education his entire life.

As a true Irishman he knew that the road to success was through education. During his service on the Idaho Transportation Board, Jack was instrumental in obtaining funding in Idaho Falls for the Sunnyside Bridge and the expansion of Sunnyside Street. Worker safety and training was always a foremost importance in his mind. There is a training room named for him at the state ITD office in Boise and another in the Rigby ITD office. No matter where he worked Jack greeted employees by their first name and with a smile, no matter their position or title in life.

He and Eileen loved to take their travel trailer out and enjoy time away. He was proud of his children and grandchildren, always showing them off to others and letting those people know about each one's accomplishments. Jack enjoyed those loving family moments; he always took photos to capture those special times. Jack was happiest when surrounded by his family.

Jack is survived by his wife of 61 years, Eileen; their 6 children-John (Jeanne) Combo

of Phoenix, AZ.; Mary Ellen (Jeff Jaksich) Combo of Olympia, WA; Bill (Trish) Combo of Idaho Falls, ID; Kathryn (Mike) Koloski of Boise, ID; James (Sandy) Combo of Coeur d'Alene, ID; Brian (Annette) Combo, of Minneapolis, MN.; his brother Dr. Daniel (Sheila) Combo, of Missoula, MT.; his sister, Sister Marie de Paul Combo, of Kansas City, KS.; and 14 grandchildren. Jack leaves a legacy of service to his country and his community and devotion to his family and faith.

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### **RALPH H. JONES JR., 1923-2009**

**Ralph H. Jones Jr.**, 85, longtime Pocatello resident and attorney, passed away early Friday morning, March 20, 2009, at his home, of congestive heart failure. He was born Oct. 13, 1923, in Pocatello, along with his twin sister Rula Merle, his only sibling. They loved each other dearly and shared life with each other until her passing in February of 2006. He lived in Pocatello, ID, all of his life except for the time he served in the military and when he attended law school at Stanford University. He was an attorney by profession and practiced with his family's law firm, Jones, Pomeroy & Jones, until he retired last year at the age of 84. He served in the military from 1942-1946. He arrived in France in the winter of 1944, six months after the D-Day invasion.

He married Colleen Harmon on July 14, 1951, in Provo, UT. Together they had three children: Judy Myrle, Ralph Douglas, and Julianne. Colleen passed away on March 26, 1973. In December 1973, he married Marie Lang in Newport Beach, CA. Marie has been a faithful companion, tenderly and lovingly caring for him until his passing.

At the time of his passing, his mind was remarkably sharp. He remembered all of the family birthdays and important dates. He loved to call all of his dear family members daily, not only with his trivia question for the day and the weather update, but also often added a "colorful" joke, updated sports info, and the rundown on the poker game he stayed up watching the night before. His family was his world and he also had many, many friends from all walks of life, whom he entertained, loved and cared for.

Ralph loved his cabin in Mackay, and he loved every part about it; the fishing, wildlife, cottonwood trees, hummingbirds, his BBQ grill, but mostly the friendships he developed over the many years of summers together. He always said Mackay added ten years to his life. Ralph was also very appreciative of all the wonderful good deeds offered him by family, friends, care-takers, and doctors.

Ralph was a loving, kind, gracious soul, who would do anything for anyone he could help; he was generous to a fault.

Ralph is survived by his wife Marie, his three children, seven grandchildren and seven great-grandchildren, as well as three step-children, Kristy Reed, Milton H. Lang, Jr., and Lisa Pratt, three grandchildren, and three great grand children.

— RECOGNITION —

**Michael C. Creamer** and **Erik J. Bolinder**, partners were recently appointed to the Givens Pursley, LLP, Executive Committee. Michael and Erik will be joining L. Edward Miller, Christopher J. Beeson and John M. Marshall.

Michael's particular areas of expertise include water rights, public lands, mineral, environmental and natural resources law, and consultation and litigation involving telecommunications and energy law.

Erik's practice areas focus on business mergers and acquisitions, entrepreneurship, business development, private securities, commercial and real estate transactions, and land use planning.

**Yvonne Vaughan** is an associate of Anderson, Julian & Hull LLP. She received a B.A., with high honors, in Political Science with a minor in Criminology & Law from the University of Florida in 2002. She went on to receive her J.D. from the University of California, Berkeley, Boalt Hall School of Law in 2005. She was a Law Clerk for the Honorable Jim Jones, Idaho Supreme Court from 2005-2006. Prior to joining AJH, she was an associate with Greener Burke Shoemaker. Her practice area is primarily concentrated in the areas of general civil litigation, commercial litigation, insurance defense, and real estate litigation.

**Robert J. McCarthy**, an Idaho Bar member since 1989, has been recognized by the Oklahoma Bar Association with its 2008 "Courageous Lawyer Award." The

Award is given "to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession." Mr. McCarthy gave testimony last year in the long-running Cobell v. Kempthorne class-action suit that sought an accounting of Indian trust funds. He was recently named as General Counsel to the United States Section of the International Boundary and Water Commission, in El Paso, Texas.

**Brian Hansen** was recently elected into the Holland & Hart partnership. He recently rejoined Holland & Hart in the Boise office in 2006. He was also with the firm's Salt Lake City office from 1994 - 1997. In between, he served as Sr. Vice President, General Counsel and Corporate Secretary for MPC Computers and as Area Vice President, Legal and Corporate Secretary for Micron Electronics. Brian has experience in a broad range of business and commercial matters, including mergers, acquisitions, international transactions, securities, license and distribution agreements, and real estate. In 1996, he spent several months working at the law firm of Vial y Palma in Santiago, Chile. In 1987, he graduated *Summa Cum Laude* in economics from Brigham Young University. He attended the University of Virginia School of Law, during which time he was the Executive Editor of the Virginia Environmental Law Journal, and received his J.D. in 1990. He is admitted to practice law in Idaho, Utah and the United States Supreme Court.

The Meridian law firm of **Foley Freeman, PLLC** is pleased to announce Joshua J. Sears and Patrick J. Geile as the firm's two newest partners.

**Josh Sears** represents clients in all types of civil and criminal litigation, as well as contract and transactional issues, business formation, and wills and trusts. He received a B.A. from The College of Idaho in 1999 and his law degree from the University of

Idaho College of Law in 2004. He clerked for a year for Hon. Juneal Kerrick in Idaho's Third Judicial District before joining Foley Freeman in 2005. He is a member of the Idaho Trial Lawyers Association, the Idaho Association of Criminal Defense Lawyers, and the American Inn of Court No. 30. He is a graduate of Leadership Meridian, and currently serves as president of the Eagle/Garden City Rotary Club. He is on the Board of Directors for Ride for Joy, a Treasure Valley non-profit organization providing therapeutic horse riding for children with special needs.

**Patrick Geile** represents clients in financial workouts, creditor's rights, business, bankruptcy, consumer bankruptcy, domestic relations, and general litigation matters. He received a B.A. from the University of Puget Sound in Tacoma, Washington in 2000 and his law degree from the University of Idaho College of Law in 2004. He is a member of the Commercial Law and Bankruptcy and the Family Law sections of the Idaho State Bar. He is a graduate of Leadership Meridian, and currently serves as a Big Brother with the Big Brothers Big Sisters Program. He is a board member for the Meridian Chamber of Commerce.

**Sandra L. Clapp**, an Eagle lawyer, has been named by Mountain States Super Lawyers magazine as one of the top 2009 attorneys in Idaho for trust and estates. The selections for Super Lawyers are made by Law & Politics, a division of Key Professional Media of Minneapolis, Minn.

— ON THE MOVE —

**Kahle Becker** has left the Office of the Attorney General & The Idaho Department of Lands to open his own firm **J. Kahle Becker, Attorney at Law**. His practice focuses on natural resource law, public land exchanges & auctions, contract drafting and disputes, as well as general & personal injury litigation. He can be reached at 208-333-1403 and from kahlebeckerlaw.com.

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## VACATION RENTALS BY OWNER

### WEST MAUI HAWAII

Spacious two bedroom, two bath oceanfront condo with panoramic views of stunning sunsets over Lanai and Molokai. Located at the Hololani in West Maui, Hawaii. [www.hololani.com](http://www.hololani.com). Fully Equipped Kitchen \* Washer Dryer \* Heated Fresh Water Pool \* Cable TV \* Weekly Maid Service \* Underground Parking. Minimum 7 nights. Adults only and no smoking or pets. Call for special rates/discounts available to members of ISBA. (208) 863-8639.

# UPCOMING CLEs

## May 2009

### May 1

*President Lincoln as a Model of Civility in the Legal Profession*  
Sponsored by the Idaho Law Foundation  
12:30 – 1:00 p.m. at the Ada County Courthouse  
.5 CLE Credits

### May 7

*CLE Program Replays - An Ounce of Prevention is Worth a Pound of Cure*  
Sponsored by the Idaho Law Foundation  
9:30 – 11:30 a.m. at the Law Center, Boise  
2.0 Ethics Credit **RAC Approved**

### May 7

*CLE Program Replays - Maintaining an Ethical Law Practice (Lunch will be provided)*  
11:45 – 12:45 p.m. at the Law Center, Boise  
1.0 Ethics Credit **RAC Approved**

### May 8

*Idaho Practical Skills*  
Sponsored by the Idaho Law Foundation  
Boise Centre on the Grove  
6 CLE Credits **RAC Approved**

### May 15

Business and Corporate Section Annual Seminar  
Boise Centre on the Grove

### May 28

*Transactional Tips from a Litigator*  
Sponsored by the Young Lawyers Section  
8:30 - 9:30 a.m. at the Law Center, Boise  
1 CLE Credit **LIVE WEBCAST STATEWIDE**

## June 2009

### June 18

*Intellectual Property Law*  
Sponsored by the Intellectual Property Law Section  
8:30 - 9:30 a.m. at the Law Center, Boise  
1 CLE Credit **LIVE WEBCAST STATEWIDE**

### June 25, 2009

*Keeping Your Clients out of Employment Litigation*  
Sponsored by the Young Lawyers Section  
8:30 - 9:00 a.m. at the Law Center, Boise  
1 CLE Credit **LIVE WEBCAST STATEWIDE**

## July 2009

### July 8-10, 2009

*Idaho State Bar Annual Conference*  
Boise Centre on the Grove  
CLE Topics Include:

- *Law Firm Management in Hard Times*
- *Goldmine of the 1040*  
—Family Law Litigation Application
- *Briefing Tips from Judges and Clerks*
- *Recent Developments in Idaho Highway Law*
- *Recent Developments in Municipal Law*
- *EEOC: Changes in the ADA:Retaliation, Employer Good Practices and Workplace Investigations*
- *The Future of the Practice of Law*

## September 2009

### September 11

*Annual Estate Planning Seminar*  
Sun Valley, Idaho  
Room Reservations Call 1-800-786-8259

## October 2009

### October 2

*Idaho Practical Skills*  
Sponsored by the Idaho Law Foundation  
Boise Centre on the Grove

\*RAC - Reciprocal Admission Credits

# COMING EVENTS

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](http://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.

## MAY

1 *The Advocate* Deadline  
1 Law Day  
1 4th District Bar Association 2009 Liberty Bell Award, Rose Room, Boise  
7 Idaho State Bar Admission Ceremony, Boise Center on the Grove  
8 Idaho State Bar Board of Commissioners  
12 District Bar Presidents Orientation  
20 The Advocate Editorial Advisory Board  
25 **Memorial Day: Idaho State Bar Closed**

## JUNE

1 *The Advocate* Deadline  
5 Jackrabbit Bar Meeting, Santa Fe, NM  
17 The Advocate Editorial Advisory Board

## JULY

1 *The Advocate* Deadline  
3 **Independence Day: Idaho State Bar Closed**  
8 Idaho State Bar Board of Commissioners  
8 - 10 **Idaho State Bar Annual Conference, Boise Centre on the Grove**  
9 Idaho Law Foundation Board of Directors Meeting  
15 The Advocate Editorial Advisory Board  
27 - 29 Idaho State Bar Exam, Boise Centre on the Grove and Moscow  
30 - 8/5 ABA/NABE/NCBP/NCBF Annual Meeting, Chicago, IL



**SAVE  
THE  
DATE  
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