



# the ADVOCATE

Volume 66 | No. 9

September 2023

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An Update on Idaho Water  
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Aerial view of the Great Salt Lake in Utah. This issue's Featured Article discusses how water level decline in the Great Salt Lake impacts Idaho. Photo credit: Adobe Stock.

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# Dancing in(to) September

Lindsey M. Welfley

**T**hank you for picking up the September issue! We have once again made it through back-to-school season and before we know it we'll be heading into the final quarter of the year.

This issue is sponsored by the Water Law Section and includes articles for the seasoned water law practitioner and casual observers alike – including a featured article that our out-of-state Utah colleagues might find particularly interesting. Lacey Rammel-O'Brien kicks off this issue with an update on the latest in Idaho's Water Adjudication world; this is the update you didn't know you needed! Next, Meghan Carter discusses a recent order issued by the Idaho Department of Water Resources in April of this year that may affect injury to surface water users in the Eastern Snake Plain. Norm Semanko then writes about the "wild card" *Sackett v. EPA* majority opinion and how the definitions of "navigable waters" continue to ebb and flow (pun intended).

In this issue's featured article, James Cefalo explores the impact of the Great Salt Lake on Idaho's water use and encourages Idahoans to pay special attention to how water conservation programs, restoration, and preservation efforts are implemented in the future – all to balance the preservation of Utah's Great Salt Lake with the interconnection to Idaho's water users.

We also include in this issue a recap of our Annual Meeting, held in Boise earlier this summer. A special thank you to all of our sponsors and exhibitors! This event would not be possible if not for your generosity.

We hope to see you next year for the 2024 Annual Meeting back in Boise! And here's to hoping you had a fantastic summer full of the R&R needed to get you through this last stretch of the year!

Best,



Lindsey M. Welfley

Communications Director

Idaho State Bar & Idaho Law Foundation, Inc.

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SEPTEMBER 2023

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### LEILA L. HALE (Public Reprimand)

The Professional Conduct Board has issued a Public Reprimand to Henderson, Nevada attorney Leila L. Hale, based on professional misconduct. The Professional Conduct Board's Order followed a stipulated resolution of a reciprocal proceeding in Idaho based on a Nevada disciplinary proceeding. On February 17, 2023, the Nevada Supreme Court issued an Order of Public Reprimand finding that Ms. Hale violated Nevada Rules of Professional Conduct 1.15(e) [Safekeeping Property] and 1.16(d) [Declining or Terminating Representation]. Those Nevada Rules of Professional Conduct correspond to the same Idaho Rules of Professional Conduct.

The Public Reprimand relates to the following circumstances. Ms. Hale's firm, Hale Injury Law, represented KKD in a contingent fee case after KKD was injured in a two-vehicle accident in September 2018. The at-fault driver worked for Uber but was logged out of the mobile app at the time of the accident and Uber denied coverage. Hale Injury Law subsequently demanded \$100,000 policy limits from

KKD's underinsured motorist policy insurer, and the claim settled for that amount. Hale Injury Law deposited the two-party check into its trust account on December 31, 2019. Ms. Hale withdrew \$25,000 as the firm's fee on January 6, 2020. By April 2020, Hale Injury Law had obtained reductions for KKD's medical bills from approximately 85,000 to 41,000 but did not pay them. On September 17, 2020, Hale Injury Law filed suit on behalf of KKD against Uber and its driver. On September 22, 2020, the Hale Injury Law attorney assigned to KKD's case left the firm to join another firm, TCA. KKD discharged Hale Injury Law the next day and went with TCA and the former Hale Injury Law attorney. On November 3, 2020, Hale Injury Law filed a Notice of Attorney's Lien in KKD's case asserting a 33% fee.

KKD filed a grievance with the Nevada State Bar on April 1, 2021, after discovering that Ms. Hale had withdrawn \$25,000 of the \$100,000 underinsured motorist settlement without her authorization and left her medical bills unpaid.

The Nevada Supreme Court affirmed the Southern Nevada Disciplinary Board's conclusion that Ms. Hale violated Nevada Rule of Professional Conduct 1.15(e) for prematurely taking attorney fees from client funds held in trust and for failing to promptly disburse the remaining funds held in trust after negotiating all the relevant medical liens. The Nevada Supreme Court also agreed with the Disciplinary Board that Ms. Hale violated Nevada Rule of Professional Conduct 1.16(d) based on her continued failure to disburse remaining settlement funds after the client terminated her. The Court concluded that Ms. Hale caused actual injury to KKD because her misconduct deprived her client of access to and use of funds to which the client was entitled for more than two years.

The Public Reprimand does not limit Ms. Hale'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.

### KEVIN M. ROGERS (Resignation in Lieu of Disciplinary Proceedings)

On July 17, 2023, the Idaho Supreme Court entered an Order accepting the resignation in lieu of disciplinary proceedings of Boise attorney Kevin M. Rogers, effective July 14, 2023. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

Mr. Rogers represented a client, R.J., in a civil case involving allegations that R.J. had wrongfully taken his employer's gold coins valued at nearly \$5 million. In August 2019, the district court entered a stipulated injunction prohibiting R.J., and any attorney acting on his behalf, from selling title to any real property owned by R.J. and from withdrawing or transferring more than \$1,000 from any bank account without prior court approval.

R.J. was a titled owner of real property also owned by his nephew. In an effort

to obtain funds while the civil case was pending, R.J. demanded that his nephew repay R.J.'s personal loan that the nephew had used to purchase the property. R.J. also requested Mr. Rogers' assistance in recovering those funds. In March 2020, Mr. Rogers sent an email to the nephew's wife stating that he had advised R.J. that as co-owner of the property, R.J. had the right to one-half of the equity in the property and could enforce that interest upon any sale of the property. The nephew agreed to pay R.J. \$23,000 in exchange for R.J.'s agreement to quitclaim his interest in the property. Mr. Rogers then corresponded with the nephew's title company, which confirmed that it was preparing a quitclaim deed at the nephew's request to remove R.J.'s interest in the property in exchange for a \$23,000 payment. Mr. Rogers notarized R.J.'s signature on that quit-

claim deed and corresponded with the title company about receiving the \$23,000 check.

In April 2020, the title company issued a \$23,000 check payable to R.J. and delivered to Mr. Rogers at his request. Before he deposited that check into his trust account, Mr. Rogers issued a \$23,000 check drawn on his trust account, payable to R.J.'s father. The next day, Mr. Rogers deposited the check from the title company into his trust account. Mr. Rogers did not receive any pecuniary benefit from the deposit of those funds into, or the withdrawal of those funds from, his trust account. He did not inform the district court about the transfer of R.J.'s property interest or the \$23,000 payment resulting from that transfer.

In January 2021, opposing counsel discovered the quitclaim deed and \$23,000



payment and filed contempt motions against Mr. Rogers and R.J. During his contempt hearing, Mr. Rogers admitted that his conduct violated the injunction, but denied that his conduct in notarizing the quitclaim deed, accepting and depositing the \$23,000 check, and issuing the \$23,000 check drawn on his trust account to R.J.'s father, was intentional or knowing. He informed the court that based on R.J.'s representations to him, he had misunderstood R.J.'s interest in the property. The court found both Mr. Rogers and R.J. in criminal contempt and imposed fines and sanctions.

With respect to that conduct, Mr. Rogers admitted that he violated I.R.P.C. 1.2(d) [A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal, including criminal contempt]; I.R.P.C. 1.4(a)(5) [A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not

permitted by the Rules of Professional Conduct or other law]; I.R.P.C. 3.4(c) [A lawyer shall not knowingly disobey an obligation under the rules of a tribunal]; I.R.P.C. 8.4(b) [It is professional misconduct for a lawyer to commit a criminal act, such as criminal contempt, that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects]; I.R.P.C. 8.4(c) [It is professional misconduct for a lawyer to engage in conduct involving misrepresentation]; I.R.P.C. 8.4(d) [It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice]; I.R.P.C. 1.15(a) [A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation in a separate account]; and I.R.P.C. 1.15(d) [Upon receiving funds in which a client or third person has an interest, a lawyer shall promptly notify the client or third person]. Mr. Rogers expressed remorse for that conduct and

cooperated in the disciplinary investigation.

The Idaho Supreme Court accepted Mr. Rogers' resignation in lieu of disciplinary proceedings. By the terms of the Order, Mr. Rogers may not make application for admission to the Idaho State Bar sooner than five (5) years from the date of his resignation. If he does make such application for admission, he will be required to comply with all the bar admission requirements in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of the "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Rogers' 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 July 14, 2023.

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

## Q How to advertise in The Advocate





Idaho State Bar President Gary Cooper (standing) presenting a Milestone award to Linda Cook for her 50 years of admission to the Bar. Photo credit: Lindsey Welfley.

## Lucky to Be an Idaho Lawyer

Gary L. Cooper

**A**t the conclusion of the 2023 Idaho State Bar Annual Meeting, I was passed the gavel to start serving as president for the next year. To be honest, I am apprehensive to take on this responsibility. The Idaho State Bar consists of 7,118 licensed attorneys, about 5,000 of which are active. I have often commented that Idaho is a small bar and we all know each other. Whether that was ever true,

I don't know. I do know that there must be about 7,000 Idaho lawyers I have never met. As a consequence, I worry about why I should suddenly be the president of an organization of lawyers, the vast majority of which I have never met. The fact is that the Idaho State Bar functions, not because of who is serving as president, but because it has a capable and dedicated administrative staff. Diane Minnich has worked for the Idaho State Bar for 38 years -33 as

Executive Director of the Bar and of its charitable arm, the Idaho Law Foundation. She has the institutional knowledge necessary to ensure that we Commissioners do not make the same mistakes that were made in the past. A year and a half ago, Joe Pirtle replaced Brad Andrews as Bar Counsel. Those were big shoes to fill, but Joe has proven that is more than capable of handling the responsibilities of being general counsel to the Bar. Thankfully,



the Bar is in capable hands, regardless of who serves as president.

The Annual Meeting made me proud to be an Idaho lawyer. On the first evening we gathered to recognize the Distinguished Lawyers, the Distinguished Jurist, and the Outstanding Young Lawyer for 2023. As I entered the JUMP facility to go to the reception, I observed five young men and women who I later learned were students at the University of Idaho College of Law. At about the same time the five members of the Idaho Supreme Court walked in. Without missing a beat, the Justices started up a conversation with the students which continued as they went up the elevator to the meeting room. It made me realize how lucky we are to have justices who are so genuinely approachable. Don't get me wrong, they are still pretty intimidating when one stands up to argue before them, but in my opinion, they haven't forgotten where they come from.

If you never attend the Annual Meeting, please make time in your schedule to at least attend the reception for the Distinguished Lawyers, Jurist and Outstanding Young Lawyer, as well as the reception to celebrate those who have been admitted for 50, 60, and 65 years. I promise you will come away feeling good that you decided to become a lawyer and feeling lucky that you decided to practice in Idaho. We had the pleasure to honor Justice Roger Burdick, Larry Hunter, Marvin Smith, and Ashley Marelus this year. All, except Ashley, have devoted 45+ years to the law in Idaho. Their acceptance speeches were authentic and thoughtful. It was easy to see why they are considered "distinguished." Ashley hasn't been around as long, but her video interview showed that she is a super star. She mentioned Alyson Foster and Kristin Bjorkman as role models, which is proof enough that she has excellent judgment and will go far if she walks in their footsteps.

The reception for lawyers who have been admitted for 50, 60, and 65 years is a "must-attend" event every year. Bill Parsons and Dick Smith are legends in Cassia County. Both graduated from the University of Idaho College of Law. Only Bill was able to attend the reception this year. He shared that his and Dick's graduating class

consisted of 13 members. He and Dick have practiced together for 65 years.

Another legend of Idaho law is the Honorable Jesse Walters, who was admitted 60 years ago. He practiced privately for 13 years, served as a District Judge in Ada County for five years, served as one of the original three judges on the Idaho Court of Appeals for 15 years, and then served as a Justice on the Idaho Supreme Court where he retired in 2003. Tony Park, another University of Idaho grad, was also admitted 60 years ago and is equally legendary. He served as Idaho's Attorney General from 1971 to 1975. While he was Attorney General, Tony created the Consumer Protection Agency which continues its work today. Tony Park's legacy is not just based on being elected Attorney General. He employed and trained many lawyers who have distinguished themselves in the practice of law. When we heard from those who were admitted 50 years ago, three of them worked for Tony as Deputy Attorneys General. The likes of Bill Gigray, a respected municipal lawyer, Hon. Ron Bruce, a respected jurist, and Jim Kaufman, a respected estate planner, launched their storied legal careers under the tutelage of Tony Park. Tony's legacy includes the example he set for many young lawyers who were just starting their careers.

It was a pleasure to hear from those who were admitted 50 years ago. Those that attended the University of Idaho College of Law were 3Ls when I started law school in Moscow. Darrel Aherin, a fixture and fierce advocate from Nez Perce County, appeared in a large cowboy hat, but not his largest which is reserved for Idaho Trial Lawyers Association functions. The Honorable Ron Bruce trained Reed Larsen as a law clerk. I am proud to say that Reed is my law partner and a great lawyer. A special treat was the appearance by the 42nd and 43rd women admitted to the Idaho State Bar, both of whom graduated from the U of I College of Law. Lucinda Weiss was the 43rd and a year after graduating, at the age of 24, she was elected prosecuting attorney for Bonner County. She then worked in the legal department of Good-year Tire & Rubber Co. for more than 25 years. The Honorable Linda Cook was the 42nd and served as a magistrate judge

in Bonneville County from 1976 until she transitioned to senior status on December 31, 2010. Jerry Reynolds was also present from the Seventh Judicial District, where he served as a magistrate judge. Another judge, the Honorable William Woodland, served as a magistrate judge and district judge in Bannock County for more than 20 years.

Don Farley and Paul Street both started their private practice legal careers at Moffatt Thomas in Boise. Paul transitioned into the corporate world where he was general counsel for BMCH, a large, publicly traded building products and services company. Don soon became one of the most renowned trial lawyers in Idaho and is still a formidable opponent in the courtroom.

Finally, although they received no award for their years of service to our profession, Mary York, Justice Colleen Zahn, Justice Jim Jones, Dean Emeritus Don Burnett, Jr., and Judge Karen Lansing provided their thoughts about what we need to do to preserve independence, impartiality, and excellence in Idaho's judiciary. The experience they brought to the discussion of this timely topic can't be matched.

I am in awe from listening to and mingling with the distinguished members of our profession and those who have lived and learned how to practice a very demanding profession for 50, 60, or even 65 years. The Idaho State Bar will be in Boise again next year for the Annual Meeting. If you attend nothing else, make time to come to the receptions for those who have distinguished themselves during their careers and see and hear from some legends. It will make you realize how lucky we are to be Idaho lawyers. We all need to be reminded of that from time to time. See you in Boise in July 2024.



**Gary L. Cooper** was raised in Idaho. He received an undergraduate degree and law degree from the University of Idaho. He has practiced in Pocatello since 1975. For the last 25 years he has practiced with his good friends, Reed Larsen and Ron Kerl. He and his wife, Jane, have three children and five grandchildren.

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# IDAHO VOLUNTEER LAWYERS PROGRAM

## Idaho Volunteer Lawyers Program Report

Jennifer M. Schindele

**T**he Idaho Volunteer Lawyers Program (“IVLP”) is a program of the Idaho Law Foundation, a nonprofit organization with a mission to increase access to legal services and enhance public understanding of the law. IVLP provides a safety net for low-income and at-risk Idahoans facing a civil legal issue who cannot afford legal representation by connecting them with a volunteer attorney with the desire to assist. IVLP screens applicants, recruits volunteers, and coordinates clinics and case assignments.

Currently, the IVLP team is comprised of Jennifer Schindele, Director, Jenni Jordan, Project and Information Services Manager, Becky Freeman, Case Coordinator, Yzabella Eggers and Beamee Kimball, Intake Coordi-

nators, and Stesha Powers, Administrative Assistant.

### Applications, Screening, and Referrals

In 2022, IVLP received 3,371 applications from individuals seeking legal assistance. This year, IVLP is on track to receive approximately 4,000 applications, as each quarter so far approximately 1,000 applications were submitted. Once received, the applicant is screened to determine if he or she needs legal aid or if he or she could benefit from other forms of help such as rental assistance or law enforcement. If the applicant does need legal assistance, the IVLP intake coordinator screens the applicant to determine if he or she is financially eligible for the program. If financially eligible, IVLP will at-

tempt to facilitate a connection between the applicant and a volunteer attorney.

### Providing Access to Legal Services

Last year, over 400 Idahoans received advice and counsel from volunteer attorneys over the phone. Additionally, over 300 Idahoans received advice and counsel through in-person legal clinics. Most, but not all of the in-person legal clinics were held in libraries. Providing legal assistance through library clinics makes assistance more accessible to vulnerable populations. IVLP also placed cases for full representation with volunteer attorneys. While not all eligible applicants are able to receive legal assistance, overall IVLP was able to assist 846 low-income Idahoans in 2022. Over 51 percent of these cases were family



law related with 15 percent being wills and probate cases and 11 percent being bankruptcy or debt defense.

## Pro Bono Opportunities

IVLP provides numerous opportunities for attorneys to perform pro bono work including, but not limited to, telephone advice and counsel clinics, in person clinics held primarily in libraries, one-time events, and cases for full representation. Clinic opportunities are posted on the Idaho Law Foundation website and can be found here: <https://app.joinpaladin.com/!idaho-volunteer-lawyers-program/opportunities/>. All full representation cases needing attorney volunteers are listed in the Pro Bono Opportunities website here: <https://www.idahoprobono.org/>. If attorneys are interested in accessing the Pro Bono Opportunities list, they can contact Jennifer Schindele or Jenni Jordan at 208-334-4500.

## Pro Bono Week

Every October, the American Bar Association (“ABA”) holds a week-long celebration for pro bono. Pro Bono Week is an opportunity to show appreciation for the remarkable pro bono work being done by volunteer lawyers and legal professionals. The upcoming Pro Bono Week is October 23-27. According to the ABA, pro bono work is a professional responsibility and an individual ethical commitment of each lawyer. Numerous organizations are celebrating pro bono week through outdoor events, video contests, and social media campaigns.

Idaho attorneys also recognize the importance of pro bono work in our state. Idaho Rule of Professional Conduct 6.1 dictates that every Idaho attorney should aspire to render at least 50 hours of pro bono service each year. Many Idaho attorneys are committed to pro bono

through volunteering their time and expertise for those in need. This year for Pro Bono Week in Idaho, IVLP will kick off with a free continuing legal education presentation and a reception for those committed to pro bono work. The week will be filled with various clinic opportunities, by telephone and in-person, with a goal of providing legal assistance to numerous low-income Idahoans.



**Jennifer M. Schindele** is the Director of the Idaho Volunteer Lawyers Program. After spending over 16 years practicing family law, Jennifer joined IVLP. Jennifer earned an English degree at

the University of Idaho and completed law school at the University of Idaho College of Law. Jennifer enjoys spending time with her family, playing soccer, and exploring Idaho's outdoors.

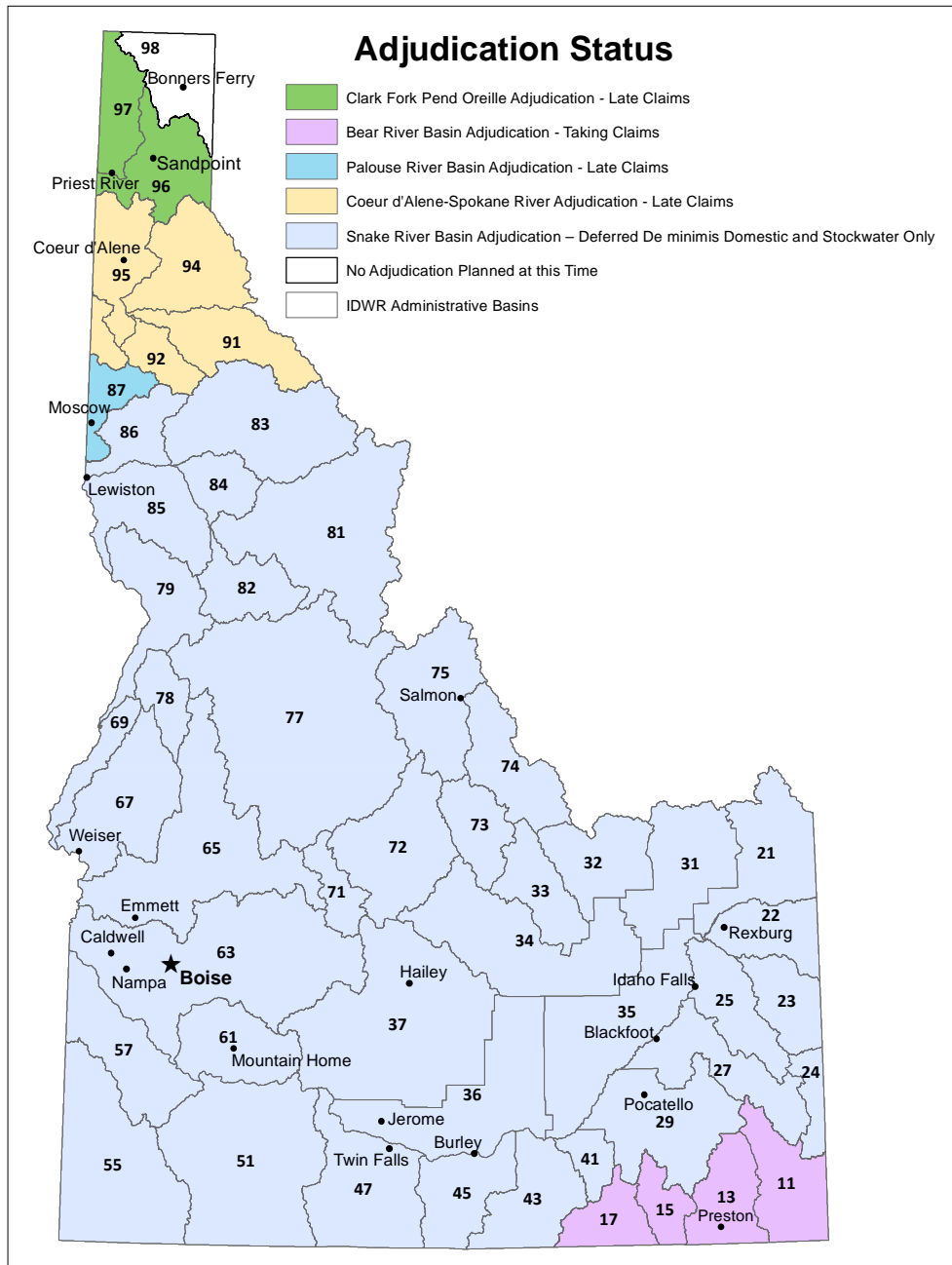
The advertisement features a portrait of Tom Banducci, a man with glasses and a blue suit, on the left. To his right is a dark blue oval containing the text "BANDUCCI" in large white letters and "MEDIATION & CONSULTING" in smaller white letters below it. At the bottom, a dark blue banner contains the headline "A DIFFERENT APPROACH TO SOLVING PROBLEMS" in large white letters, followed by a paragraph of text. At the very bottom of the banner, contact information is listed in white text.

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Courtesy of Sandra Thiel, Principal Water Resource Agent at the Idaho Department of Water Resources.

## Keeping “Current” with the Idaho Water Adjudications

Lacey Rammell-O’Brien

Greek philosopher Heraclitus of Ephesus is attributed with the expression, “No man ever steps in the same river twice, for it’s not the same river and he’s not the same man.”<sup>1</sup> The Idaho Water Adjudications are much like Heraclitus’ river, flowing and changing as they

roll through the state. Long-time followers of the Idaho Water Adjudications know that on November 19, 1987, the Snake River Basin Adjudication commenced and opened decades of litigation.<sup>2</sup> Since that time, four more general stream adjudications have commenced. This article sum-

marizes the changes since October 2020, when the last Water Adjudications update was published in *The Advocate*.<sup>3</sup>

An adjudication is a court proceeding resulting in the judicial determination of water rights claimed by parties asserting validity and ownership of those rights.<sup>4</sup>



The Idaho Water Court, based out of the Fifth Judicial District in Twin Falls, presides over the Idaho Water Adjudications.<sup>5</sup> Pursuant to statute, the Idaho Department of Water Resources (“IDWR”) is not a party to the Adjudications.<sup>6</sup> IDWR’s role is as an “independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported” and to “make recommendations as to the extent of beneficial use and administration of each water right under state law.”<sup>7</sup>

### **Snake River Basin Adjudication (“SRBA”)**

The SRBA remains one of the largest legal adjudications in U.S. history, issuing over 158,000 decrees.<sup>8</sup> The SRBA covered administrative basins in 38 of Idaho’s 44 counties.<sup>9</sup> On August 26, 2014, the Water Court issued the Final Unified Decree. The Final Unified Decree is “conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987[...].”<sup>10</sup> The Court explicitly retained jurisdiction over “[a]ny domestic and stock water right, as defined in Idaho Code § 42-111 (1990), Idaho Code § 42-1401A(5) (1990), and Idaho Code § 42-1401A(12) (1990), the adjudication of which was deferred in accordance with this Court’s June 28, 2012, *Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*.”<sup>11</sup> The Water Court has continued to decree “deferred” domestic and stock water claims in accordance with the Final Unified Decree.

On November 15, 2021, the United States filed a Motion to Adjudicate Deferred *De Minimis* Domestic and Stock Water Claims, asking the Court to set a deadline for the filing of all deferred *de minimis* domestic and stock water right claims in the SRBA.<sup>12</sup> The United States argued that it had waived its sovereign immunity under the McCarran Amendment with the understanding that the “adjudication of rights to the use of water of a river system or other source” would be conclusive as to all water rights within the SRBA.<sup>13</sup> The McCarran Amendment allows for limited waiver of the United States’ sov-

ereign immunity so that it may appear as a party in state court general stream adjudications.<sup>14</sup> The United States argued that the continued taking of deferred claims was in violation of the McCarran Amendment and the Deferral Stipulation executed and filed by the State of Idaho and the United States on December 20, 1988.<sup>15</sup> The Water Court held a status and scheduling conference on February 15, 2022, during which it appointed Special Master Theodore Booth as settlement moderator and stayed litigation.<sup>16</sup> Following months of negotiations, the parties agreed to a further stay of proceedings until December 31, 2023.<sup>17</sup>

### **Coeur d’Alene – Spokane River Basin Adjudication (“CSRBA”)**

The CSRBA is Phase One of the North Idaho Adjudication (“NIA”).<sup>18</sup> On July 8, 2008, the State of Idaho filed a Petition to Commence the CSRBA.<sup>19</sup> On November 12, 2008, Judge John Melanson issued the Commencement Order.<sup>20</sup> The CSRBA contains five administrative basins (91-95) covering Benewah, Bonner, Clearwater, Kootenai, Latah, and Shoshone counties.<sup>21</sup>

State-based claims in the CSRBA are mostly resolved. As of July 5, 2023, there are eight unresolved state-based claims in Basin 95 Part 1 and six unresolved state-based claims in Basin 95 Part 2.

As of July 5, 2023, there are 284 unresolved federal reserved claims across basins 91-95. The United States filed claims to federal reserved water rights as trustee on behalf of the Coeur d’Alene Tribe of the Coeur d’Alene Indian Reservation. The United States cited “*Winters v. United States*, 207 U.S. 564 (1908) and its progeny, as well as the operative documents and circumstances surrounding the creation of the Coeur d’Alene Reservation” as the basis for its claims.<sup>22</sup> The Water Court bifurcated proceedings on the Coeur d’Alene Tribe’s claims.<sup>23</sup> The Water Court first evaluated “entitlement” to particular uses of water, to be followed by the “quantification” stage of the amount of water associated with those uses.<sup>24</sup>

On September 5, 2019, the Idaho Supreme Court issued its decision on the “entitlement” phase of the proceedings, holding that the Coeur d’Alene Tribe

had reserved water rights consisting of domestic uses, agricultural uses, hunting and fishing uses, plant gathering, and cultural uses.<sup>25</sup> The Idaho Supreme Court also affirmed the holding of the Water Court that the Coeur d’Alene Tribe’s water rights included instream flows on the Reservation and that the Tribe voluntarily relinquished rights to off-Reservation instream flows.<sup>26</sup>

Following the decision of the Idaho Supreme Court, the parties agreed to a stay of litigation.<sup>27</sup> They pursued settlement negotiations with a court-appointed mediator.<sup>28</sup> At a status conference held on April 18, 2023, the parties informed the Water Court that mediation had been unsuccessful.<sup>29</sup> On May 26, 2023, the Water Court entered an Order lifting the litigation stay, along with a scheduling order setting trial for April 2026.<sup>30</sup>

### **Palouse River Basin Adjudication (“PRBA”)**

The PRBA is Phase Two of the NIA.<sup>31</sup> On October 3, 2016, the State of Idaho filed a Petition to Commence the PRBA.<sup>32</sup> On March 1, 2017, Judge Eric Wildman issued the Commencement Order.<sup>33</sup> The PRBA covers one administrative basin (87) in Benewah, Latah, and Nez Perce counties.<sup>34</sup> As of July 5, 2023, there are 182 objections to 101 contested subcases in the PRBA, with 2,212 water right claims pending decree.

The rolling hills of the Palouse have set the stage for a shared issue with several players. Among the many individuals and entities that filed claims in the PRBA are the State of Idaho, the City of Moscow, the Potlatch entities, Schweitzer, the University of Idaho, the Nez Perce Tribe, and the United States as Trustee on behalf of the Nez Perce Tribe and Allottees of the Nez Perce Indian Reservation.<sup>35</sup>

At the heart of the United States’ and the Nez Perce Tribe’s objections to state-based claims and the federal reserved claims are two treaties. The first is the Treaty of 1855.<sup>36</sup> The second is the Treaty of 1863, which states in relevant part: “The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished,

and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains from being enclosed; and further, to preserve the perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians.”<sup>37</sup>

The United States argues that a portion of the PRBA includes lands that were ceded by the Nez Perce Tribe as part of the Treaty of 1863. The United States objected to certain state-based claims on the grounds that they should recognize corresponding federal claims for “up to half of the natural spring flow” based on the phrase “for the use in common” in the Treaty.

The Nez Perce Tribe filed joinder in the objection of the United States, arguing that “up to half of natural spring flow” should be recognized in the claims as “expressly reserved for the use of the Tribe and its members.”<sup>38</sup> The federal reserved claims filed by the United States and Nez Perce Tribe closely mirror the state-based surface water claims. Like the federal reserved claims in the CSRBA, the PRBA federal/tribal claims rely on the *Winters* doctrine and related caselaw.

The parties are now subject to a protective order issued by the Water Court.<sup>39</sup> They are currently in negotiations with an eye towards settlement of the United States and Nez Perce Tribe’s objections and federal reserved claims in the basin.<sup>40</sup>

## Clark Fork – Pend Oreille River Basins Adjudication (“CFPRBA”)

The CFPRBA is Phase Three of the NIA.<sup>41</sup> On October 23, 2020, the State of Idaho filed a Petition to commence a general adjudication of all rights arising under state or federal law to the use of surface and ground waters from the Clark Fork – Pend Oreille River basins water system and for the administration of such rights.<sup>42</sup> On June 15, 2021, Judge Wildman entered the Commencement Order for the CFPRBA pursuant to Idaho Code § 42-1406B.<sup>43</sup>

The CFPRBA covers two administrative basins (96 and 97) in Bonner, Boundary, and Kootenai counties.<sup>44</sup> It does not include administrative basin 98.<sup>45</sup> Claims

filing ended in the CFPRBA on June 23, 2023, although second-round service and motions to file late claims may yield more filings. As of June 8, 2023, there have been 7,543 state-based claims and 24 federal reserved claims filed in the CFPRBA.

IDWR anticipates up to 9,000 claims to be filed in the CFPRBA and hopes to have Part 1 of the Basin 97 Director’s Report completed and filed with the Idaho Water Court in 2024.

## Bear River Basin Adjudication (“BRBA”)<sup>46</sup>

On November 20, 2020, the State of Idaho filed a Petition seeking commencement of a general adjudication of all rights arising under state or federal law to the use of surface and ground waters from the Bear River basin water system and for the administration of such rights.<sup>47</sup> On June 15, 2021, Judge Wildman entered the Commencement Order for the BRBA pursuant to Idaho Code § 42-1406C.<sup>48</sup>

The BRBA covers four administrative basins (11, 13, 15, and 17) in Bannock, Caribou, Cassia, Franklin, Oneida, and Power counties.<sup>49</sup> As of June 8, 2023, 816 state-based claims have been filed in the BRBA. IDWR anticipates that approximately 13,000 claims will be filed in the BRBA.

As of July 5, 2023, property owners in Basin 11 have received Commencement Notices alerting them to the need to file their water right claims with IDWR. In addition to the new field office in Preston, Idaho, staff from IDWR’s adjudication section have held a week-long public claim taking workshop in Montpelier, Idaho to help people in Basin 11 file their claims. IDWR is proceeding with a goal of filing the Basins 11 and 13 Director’s Report with the Idaho Water Court in 2026.

## Conclusion

Heraclitus is remembered for his philosophy of constant change. The Idaho Water Adjudications, water users, and law practitioners are not the same as they were in 1987. The evolution of the Adjudications, like the waters of Idaho and those who use them, will guide this winding river toward resolution. The

Idaho Water Adjudications flow onward, collecting claims and issuing decrees that clarify and record how water is being used statewide.



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## Endnotes

1. Daniel W. Graham, “Heraclitus”, *Stanford Encyclopedia of Philosophy* (Summer 2021 Edition), Edward N. Zalta (ed.), <https://plato.stanford.edu/entries/heraclitus/>.
2. Commencement Order, *In re SRBA Case No. 39576* (Nov. 19, 1987).
3. Meghan M. Carter & Jennifer R. Wendel, Water Rights Adjudications in Idaho Have Statewide Impacts, 63 *ADVOCATE* 16 (2020).
4. A “general adjudication” is defined in Idaho Code section 42-1401A(5) as “an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system, except as provided in section 42-1420, Idaho Code, and for the administration of those rights.”
5. <http://srba.idaho.gov/>.
6. Idaho Code § 42-1401B.
7. *Id.*
8. Ann Y. Vonde et al., Understanding the Snake River Basin Adjudication, 52 *IDAHO L. REV.* 53 (2016).
9. IDWR has divided Idaho into over 50 administrative basins to coordinate water management activities.
10. Final Unified Decree, *In re SRBA Case No. 39576* (Aug. 25, 2014).
11. The Court also retained jurisdiction to “resolve any issues related to the Final Unified Decree that are not reviewable under the Idaho Administrative Procedures Act and/or the rules of the Idaho Department of Water Resources”. *Final Unified Decree* at 13.
12. Subcase No. 00-92095, *Motion to Adjudicate Deferred De Minimis Domestic and Stock Water Claims* (Nov. 15, 2021).
13. Subcase No. 00-92095, *Motion to Adjudicate Deferred De Minimis Domestic and Stock Water Claims* (Nov. 15, 2021).
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15. *Id.*
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18. Idaho Code § 42-1406B.
19. Petition, *In re CSRBA Case No. 49576* (Jul. 8, 2008).
20. Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication, *In re CSRBA Case No. 49576* (Nov. 12, 2008).
21. *Id.*
22. Subcase No. 91-7755 et al., *Notice of Claim Federal Reserved Water Right*, (Jan. 31, 2014).
23. Subcase No. 91-7755 et al., *Order Consolidating Subcases; Order Bifurcating Proceedings, Scheduling Order* (Feb. 17, 2015).
24. Subcase No. 91-7755 et al., *Order on Motions for Summary Judgment* (May 3, 2017); *Amended Final Order Disallowing Water Right Claims* (Jul. 26, 2017).
25. *In re CSRBA Case No. 49576* Subcase 91-7755 et al., 165 Idaho 517, 448 P.3d 322 (2019), reh'g denied (Nov. 4, 2019).
26. *Id.*
27. Subcase No. 91-7755 et al., *Order Granting Unopposed Motion to Amend Scheduling Order, Order Staying Proceeding, Order Setting Status Conference* (May 21, 2020).
28. Subcase No. 91-7755 et al., *Order Granting Unopposed Motion for Appointment of Mediator, Order Extending Stay* (June 15, 2021).
29. Subcase No. 91-7755 et al., *Order Lifting Stay* (May 26, 2023).
30. Subcase No. 91-7755 et al., *Scheduling Order on Quantification* (May 26, 2023).
31. Idaho Code § 42-1406B.
32. Petition, *In re PRBA Case No. 59576* (Oct. 3, 2016).
33. Commencement Order for the Palouse River Basin Adjudication, *In re PRBA Case No. 59576* (Mar. 1, 2017).
34. *Id.*
35. Subcase 87-4060 et al.
36. TREATY WITH THE NEZ PERCES, 1855., 12 Stat. 957 (June 11, 1855).
37. TREATY WITH THE NEZ PERCES, 1863., 14 Stat. 647 (June 9, 1863).
38. Subcase 87-4060 et al., *Nez Perce Tribe's Joinder in United States' Objection to Claim* (Jan. 10, 2022).
39. Order Granting Joint Motion for Protective Order, *In re PRBA Case No. 59576* (Mar. 9, 2023).
40. Joint Status Update and Motion for Court Notice of Future Settlement Meetings, *In re PRBA Case No. 59576* (June 8, 2023).
41. Idaho Code § 42-1406B.
42. Petition to Commence Clark Fork-Pend Oreille River Basins Adjudication, *In re CFRBA Case No. 69576* (Oct. 23, 2020).
43. Commencement Order for the Clark Fork-Pend Oreille River Basins Adjudication, *In re CFRBA Case No. 69576* (June 15, 2021).
44. *Id.*
45. Administrative Basin 98 is explicitly excluded from the NIA by Idaho Code § 42-1406B(1).
46. Idaho Code § 42-1406C.
47. Petition to Commence Bear River Basin Adjudication, *In re BRBA Case No. 79576* (Nov. 20, 2020).
48. Commencement Order for the Bear River Basin Adjudication, *In re Case No. 79576* (June 15, 2021).
49. *Id.*

# MEDIATION — AND — ARBITRATION



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## Curtailing Water Use in a Good Water Year?

Meghan M. Carter

No doubt many of you would have seen these or similar headlines this spring: “Possible Water Curtailments Even in a Good Year”<sup>1</sup> and “New Idaho Department of Water Resources Order Would Force 900 Groundwater Users to Curtail Use.”<sup>2</sup> These news stories were in response to an order issued by the Idaho Department of Water Resources (“Department”) in April. The order outlines the updated methodology the Department uses to determine injury to surface water users in the Eastern Snake Plain by ground water users diverting water from the Eastern Snake Plain Aquifer.<sup>3</sup>

Understanding what the headlines mean can stump even a seasoned water law attorney. Fear not, in this article I will provide some history, terminology, and summaries of where things stand today with water use on the Eastern Snake Plain.

### The Eastern Snake Plain Aquifer

This spring’s headlines are rooted in the history of water use on the Eastern Snake Plain and the hydrologic connection between surface water and the Eastern Snake Plain Aquifer (“ESPA”). Surface water percolates through the ground to the ESPA which underlies some 10,800 square miles of southern Idaho.<sup>4</sup> The ESPA has a strong hydrologic connection to the Snake River, and it discharges to the Snake River through gaining reaches and springs. Most natural inputs to the ESPA come from mountain runoff. However, incidental recharge from irrigation practices on the Eastern Snake Plain in the early 20<sup>th</sup> Century massively and artificially increased ESPA water levels and subsequently increased discharge to the Snake River.<sup>5</sup>

In the early 1950s, irrigation practices started to change. Sprinkler irrigation be-

gan to be favored over flood irrigation, and demand for water increased. In addition, pumping technology and cheaper energy prices lead to increased ground water pumping. These trends paired with a series of droughts resulted in reduced water recharge to the aquifer, greater ground water extraction from the aquifer, and a steady decline in the volume of water in the ESPA.<sup>6</sup>

Following a three-year downtrend in aquifer levels, Department data shows 2023’s aquifer levels are approaching the lowest since the 1950s.<sup>7</sup> These declines are occurring despite above average snowpack in the mountains feeding the ESPA this year.<sup>8</sup>

### Interlude for Some Water Law

Idaho is a prior appropriation state, meaning the first (senior) use of water takes priority over subsequent (junior)



uses of that same water.<sup>9</sup> This is a harsh legal doctrine that does not place a value on the type of water use. Nor does prior appropriation allow for reduction of water use across all water users. Instead, the senior user's water right is fully met before junior users can take any water.

The process the Department uses to administer water rights in priority is called water rights administration. If a senior water use is not being met, the water user can file a delivery call with the Department. A delivery call is a request for water rights administration seeking to have the Department ensure senior water uses are met before junior water uses.<sup>10</sup> Once a delivery call is filed, the Department determines whether the senior water use is being materially injured and if so, which junior water rights should be curtailed.

Idaho administers ground water and surface water conjunctively. This means if there is a known and legally recognized hydraulic connection between ground water and surface water, they are administered together in priority.<sup>11</sup> The Department uses a ground water model, the Eastern Snake Plain Aquifer Model ("ESPAM"), to help conjunctively administer water use on the Eastern Snake Plain. ESPAM models ground water inputs and outputs throughout the ESPA based on differing weather and irrigation practices. The effort to develop ESPAM started in 2000.<sup>12</sup> Version 1.1 was used between 2005 and early 2012. Version 2.1 was used thereafter until Version 2.2, was released in 2021.<sup>13</sup>

Because surface water use was generally developed before ground water use, many ground water rights are junior to surface water rights. The dynamic has resulted in fierce conflict between surface and ground water users in the Eastern Snake Plain.

## The Surface Water Coalition Delivery Call

In 2005, conflict between surface and ground water users over reduced availability of surface water came to a head. A group of surface water irrigation entities, known as the Surface Water Coalition ("Coalition") filed a delivery call with the

Department, asking for the Department to curtail junior ground water use to ensure adequate water supply for senior surface water users.<sup>14</sup>

The Coalition's delivery call alleged that "data collected by the United States Bureau of Reclamation over the past six years indicates an approximate 30% reduction in reach gains to the Snake River between Blackfoot and Neeley, a loss of about 600,000 acre-feet."<sup>15</sup> Further, "[t]he recently recalibrated ESPA ground water model identifies ground water pumping as a major contributor to declines in the source of water fulfilling senior surface water rights."<sup>16</sup>

The Director of the Department issued an interlocutory order within a month of the Coalition's delivery call,<sup>17</sup> amending or supplementing the order several times, ultimately issuing his seventh supplemental order in 2007.<sup>18</sup> A hearing was held in 2008.<sup>19</sup>

After the hearing, the Director issued an order, concluding that "[g]round water pumping has hindered [Coalition] members in the use of their water rights by diverting water that would otherwise go to fulfill natural flow or storage rights."<sup>20</sup> However, he ultimately determined that "junior ground water users could continue to divert if they provided water in the amount of predicted shortage to members of the SWC that were attributable to their depletions."<sup>21</sup>

The Director also concluded that "requiring curtailment to reach beyond the next irrigation season involves too many variables and too great a likelihood of irrigation water being lost [...]"<sup>22</sup> Therefore, the Director held that ongoing administration is needed, which brings us to the "Methodology Order" and its subsequent amendments through 2023.<sup>23</sup>

## The Methodology Orders

Because the Coalition's water supply varies from year to year, ongoing administration requires a yearly evaluation of water availability and water need. That yearly evaluation is outlined in what is known as the Methodology Order, first issued in 2010 (and amended numerous times since). The Methodology Order is "a single, cohesive document by which

the Director will quantify material injury in terms of reasonable in-season demand and reasonable carryover."<sup>24</sup>

The terms "material injury," reasonable in-season demand ("RISD"), and "reasonable carryover" represent key concepts in the Methodology Order. "Material Injury" is defined as "[h]inderance to or impact upon the exercise of a water right caused by the use of water by another person as determined in accordance with Idaho law [...]"<sup>25</sup> A determination of material injury depends upon a number of factors, including the amount of water available from the senior's water source, the efficiency of the senior's water system, and the availability of alternative points of diversion for the senior's water rights.<sup>26</sup> RISD is the projected volume of water needed during the relevant evaluation year to grow crops within each entity's service area.<sup>27</sup> The RISD is calculated using historic demands of a baseline year or years ("BLY") as "corrected during the season to account for variations in climate and water supply between the BLY and actual conditions."<sup>28</sup> Reasonable carryover is "the difference between a baseline year demand and projected typical dry year supply."<sup>29</sup>

The Methodology Order outlines nine steps for making a material injury determination each year. The steps can be summarized as follows. In April, the Department makes a prediction of how the demand of the upcoming irrigation season compares to the previous year's carryover. If there is a predicted shortage, ground water users must demonstrate "their ability to secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the injured members of the [Coalition]."<sup>30</sup> Next, during the mid-irrigation season (usually in July), the Department will evaluate actual crop water needs, issue a revised forecast of supply, and establish when ground water users must provide the Coalition with water that year.<sup>31</sup> At the end of the irrigation season, the Department determines the amount of carryover water that is owed to the Coalition.<sup>32</sup>

The process outlined in the Methodology Order allows the Department to timely administer water rights in the Eastern Snake Plain so that the Coalition does not suffer material injury to its water rights.

## Changes to the Methodology Order

The Methodology Order has been amended several times to address legal findings made by the Water Court<sup>33</sup> upon judicial review. However, the Fifth Amended Methodology Order, issued in April 2023, made changes based on the Department's further data acquisition and additional analyses. The changes were made because "the Director should use available data, and consider new analytical methods or modeling concepts, to evaluate the methodology."<sup>34</sup>

Specifically, the Fifth Amended Methodology Order contains two significant changes. First, while the Fourth Amended Methodology Order used an average of the years 2006, 2008, and 2012 for the BLY, the Department determined that data obtained from 2014-2021 indicated that particular average of years no longer satisfied the criteria for a BLY.<sup>35</sup> The Director found that the criteria for a BLY were satisfied by 2018 and 2020.<sup>36</sup> The Director then selected 2018 as the new BLY, concluding that using 2018 for the BLY "protects the senior while excluding extreme years from consideration."<sup>37</sup>

Second, the ESPAM analysis was changed from steady-state to transient simulation. Steady-state is a condition of a system that does not change in time,<sup>38</sup> whereas transient simulation attempts to predict changes over time. Early versions of ESPAM used a steady-state analysis to calculate impacts of water use on the ESPA. When using a steady-state analysis, ESPAM "can only model increases in aquifer discharge to the Snake River resulting from continuous curtailments of an identical magnitude and location until the impacts of curtailment are fully realized."<sup>39</sup> This calculation does not account for the time to reach steady-state or when the impacts would be realized. The current ESPAM can perform a transient simulation which "predict[s] the timing of changes in river reach gains."<sup>40</sup>

To illustrate the difference between steady-state and transient model simulation, the Director ran ESPAM simulations using both steady-state and transient for 2023. The Director found that curtailment using the steady-state analysis will

only offset 9-15% of predicted shortfall, while a transient analysis will offset the full predicted shortfall.<sup>41</sup> This means that using transient analysis stands to provide the senior water users more water at the time and place needed. But it also means that the Department would have to curtail more junior ground water rights to meet the needs of the Coalition in a particular year.

The Director of the Department held a hearing on the Fifth Amended Methodology Order in June 2023. On July 19, 2023, the Director issued two orders. The first, Post-Hearing Order Regarding Fifth Amended Methodology Order, addresses the issues discussed at the hearing.<sup>42</sup> The second, a Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover ("Sixth Amended Methodology Order"),<sup>43</sup> "correct[s] data in the Fifth Methodology Order found to be in error during the June 6 Hearing" and edits "other non-substantive matters in the Fifth Methodology Order."<sup>44</sup> The Sixth Amended Methodology Order did not change the selection of BLY or the use of transient model simulations. It is expected that a petition for judicial review of the orders will be filed. Although the Sixth Amended Methodology Order is not yet set in stone, it nevertheless has implications for all water users in the Eastern Snake Plain, surface and ground water users alike.

## Why it Matters

In April 2023, based on the Fifth Amended Methodology Order, the Director determined that "ground water rights bearing priority dates later than December 30, 1953, must be curtailed to produce the volume of water equal to the predicted" shortfall.<sup>45</sup> This is much earlier than curtailment dates determined in April in prior years. For example, the curtailment date for 2022 was December 25, 1979,<sup>46</sup> in 2019 it was August 25, 1991,<sup>47</sup> and in 2016 it was February 8, 1989.<sup>48</sup> While the mid-season evaluation of actual need showed there was no shortfall,<sup>49</sup> the changes present in the Fifth and Sixth Amended Methodology Orders are still relevant as they will continue to apply in the future.

Ordering curtailment or mitigation for a larger pool of ground water users can be costly. The April 2023 predicted shortfall was 75,200 acre-feet of water.<sup>50</sup> To put that in perspective, one acre-foot of water is 325,851 gallons and one dairy cow is estimated to need 35 gallons of water per day.<sup>51</sup> The cost for water right rentals is \$23 per acre-foot, which equates to almost \$1.73 million.<sup>52</sup> In years where there is a water shortfall, the option to rent may not be available. The uncertainty of water right rentals has resulted in ground water users implementing multiple mitigation strategies, such as compensating for their use with ground water recharge or reducing the amount of water used.<sup>53</sup> Ground water recharge requires infrastructure and ground water users must spend money not only to build the infrastructure but to identify a suitable site and obtain water rights. Reduction of water use means less crops grown, and less money earned, which affects livelihoods and the Idaho economy. This is an issue that affects so many in Idaho, so keep your eyes open for further headlines.



**Meghan M. Carter** is a deputy attorney general representing the Idaho Department of Water Resources. She's been in her position for 10 years and is amazed at

what she still doesn't know about Idaho water law. The views expressed in this article do not reflect those of the Office of the Attorney General or IDWR.

## Endnotes

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4. Wesley Hipke, Paul Thomas, and Noah Stewart-Maddox, Idaho's Eastern Snake Plain Aquifer Managed Aquifer Recharge Program, 60 Groundwater 648, 648 (2022).

5. *Id.* at 648–49.

6. *Id.* at 649.

7. Interview with Jennifer Sukow, Engineer, Idaho Dept. of Water Resources (July 5, 2023).

8. *Water Supply Snow Water Equivalency*, Idaho Department of Water Resources (Mar. 16, 2021), <https://idwr.idaho.gov/water-data/water-supply/snow-water-equivalency/>.

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11. IDAPA 37.03.11.010.03.

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15. *Id.* at ¶ 16.

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19. The three-year delay between the initial conflict and the hearing on the conflict stemmed from requests for schedule changes and a case challenging the Conjunctive Management Rules, the administrative rules governing a delivery call between surface and ground water users.

20. Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation, 29, *In the Matter of Distribution of Water to Various Water Rights*

*Held by or for the Benefit of A & B Irrigation District, et al.* (Idaho Dept. of Water Resources, filed Apr. 29, 2008), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/swc-delivery-call/SWC-20080429-SWC-Rec-Order.pdf>.

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22. *Id.* at 5.

23. *Id.* at 6.

24. Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, 2, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et al.*, No. CM-DC-2010-001 (Idaho Dept. of Water Resources, filed June 23, 2010), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20100623-Amended-Final-Order.pdf>.

25. IDAPA 37.03.11.010.14.

26. IDAPA 37.03.11.042.

27. *Id.* at 12.

28. Final Order Regarding the Surface Water Coalition Delivery Call, *supra* note 21, at 5.

29. Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, *supra* note 24, at 22.

30. *Id.* at 34–36.

31. *Id.* at 36.

32. *Id.* at 37–38.

33. Per Idaho Supreme Court Administrative Order, all petitions for judicial review regarding the administration of water rights from the Department are assigned to the Adjudication Court of the Fifth Judicial District. Administrative Order, *In the Matter of the Appointment of the SRBA District Court to Hear All Petitions for Judicial Review from the Department of Water Resources Involving Administration of Water Rights*, (Dec. 9, 2009), available at <http://srba.state.id.us/Images/sct%20order.pdf>.

34. Fifth Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover, *supra* note 3, at 1.

35. *Id.* at 11.

36. *Id.* at 12.

37. *Id.*

38. *Id.* at 30.

39. *Id.*

40. *Id.*

41. *Id.*

42. Post-Hearing Order Regarding Fifth Amended Methodology Order, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et al.* (Idaho Dept. of Water Resources, filed (July 19, 2023), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20230719-Post-Hearing-Order-Regarding-Fifth-Amended-Methodology-Order.pdf>.

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44. *Id.* at 2.

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46. Final Order Regarding April 2022 Forecast Supply (Methodology Steps 1-3), 5, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et al.* (Idaho Dept. of Water Resources, filed Apr. 20, 2022), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20220420-Final-Order-Re-April-2022-Forecast-Supply-Methodology-Steps-1-3.pdf>.

47. Final Order Regarding April 2019 Forecast Supply (Methodology Steps 1-3), 6, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et al.* (Idaho Dept. of Water Resources, filed Apr. 11, 2019), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20190411-Final-Order-Regarding-April-2019-Forecast-Supply-Steps-1-3.pdf>.

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51. Water Use Information, <https://idwr.idaho.gov/water-rights/water-use-information/>.

52. Water Supply Bank Pricing, <https://idwr.idaho.gov/iwrb/programs/water-supply-bank/pricing/>.

53. IGWA's Amended Notice of Mitigation, *In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A & B Irrigation District, et al.* (Idaho Ground Water Appropriators, Inc., filed June 1, 2023), available at <https://idwr.idaho.gov/wp-content/uploads/sites/2/legal/CM-DC-2010-001/CM-DC-2010-001-20230601-IGWAs-Amended-Notice-of-Mitigation.pdf>.

**GJORDING FOUSER** is pleased to welcome **MADISON** to our team!



**Madison Miles is a trial lawyer** having litigated cases in state courts, including the Idaho Supreme Court and Court of Appeals, and administrative agencies. She has had more than 50 criminal and child protection trials. She most recently served as a Lead Deputy Attorney General representing the Idaho Department of Health and Welfare.



Madison is a **third-generation Idahoan**. She graduated from Parma High School and then received her **B.S. and J.D. from the University of Idaho**.

Madison enjoys traveling, water activities (boating, wake surfing, swimming — she can tread water for over an hour!), reading, gardening, and cheering on her kids in their extracurricular activities.

In 2022, Madison was one of Idaho's professional leaders who was honored as an **"Accomplished Under 40" by the Idaho Business Review**.

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## ***Sackett v. EPA*: North Idaho's Clean Water Act Wild Card<sup>1</sup>**

Norman M. Semanko

**T**he Clean Water Act (“the Act”) has become fertile ground for extensive litigation in the federal courts. And no issue has been more prominent than the Act’s jurisdictional trigger term, “navigable waters,” defined in the Act simply as “the waters of the United States” (“WOTUS”).<sup>2</sup> This determines whether projects and other activities require federal permits to discharge into, dredge, or fill waters.<sup>3</sup> The most recent addition to this series of cases, *Sackett v. Env’t Prot. Agency*,<sup>4</sup> provides an updated definition of WOTUS and comes to us from Bonner County. This article provides a brief background of the litigation before *Sackett*, the route by which *Sackett* arrived in the Supreme Court of the United States, the Court’s updated definition of WOTUS as provided in *Sackett*’s majority opinion, and some thoughts on what comes after *Sackett*.

### **Setting the Stage for *Sackett***

For 50 years, the question of what constitutes “the waters of the United States” was left to the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers to determine through rulemaking and associated guidance and manuals. While the U.S. Supreme Court came tantalizingly close to announcing a WOTUS test in *Rapanos v. United States*,<sup>5</sup> it ultimately failed to deliver a majority opinion in that case.

In *Rapanos*, a plurality opinion of four Justices, authored by Justice Scalia, concluded that “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”<sup>6</sup> Under the plurality test, “the waters of the United States” are relatively permanent bodies of

water connected to traditional interstate navigable waters through a continuous surface connection.<sup>7</sup> One Justice concurred with the plurality in the result (that wetlands near ditches and drains that eventually emptied into navigable waters at least 11 miles away were not jurisdictional under the Act) – but not in its reasoning. This broader interpretation of jurisdiction under the Act found that “the waters of the United States” include those waters and adjacent wetlands that possess a “significant nexus” to traditional navigable waters.<sup>8</sup>

Since *Rapanos*, the scope of “navigable waters” has gone back and forth – expanding and contracting – thereby resembling a game of ping pong between different Presidential Administrations.<sup>9</sup> All of that changed with the U.S. Supreme Court’s May 25, 2023 ruling in *Sackett v. EPA*.<sup>10</sup> Interestingly enough, the story begins and ends in North Idaho.

## The Sacketts' Route to the Supreme Court

Michael and Chantell Sackett own a small piece of property near Priest Lake, in Bonner County, Idaho. The Sacketts wanted to build a home on their lot and began to fill it with dirt and rocks in preparation for the construction. The EPA stepped in and issued a compliance order to the Sacketts, threatening civil penalties of approximately \$40,000 per day and informing them that their activities violated the Act because their property contained jurisdictional wetlands. The Sacketts maintained that the EPA had no jurisdiction over their property under the Act.<sup>11</sup>

After several years of proceedings, the U.S. District Court entered summary judgment for the EPA and the Ninth Circuit affirmed, holding that the Act covers adjacent wetlands with a significant nexus to traditional navigable waters and that the Sacketts' lot satisfied that standard.<sup>12</sup> The Supreme Court granted certiorari to decide the proper test for determining whether wetlands are "waters of the United States."<sup>13</sup>

At the time that *Sackett* was under consideration in the Ninth Circuit, litigation brought in numerous federal district courts by states and various groups, challenging the regulatory definition of WOTUS, was calculated to result in the issue ultimately being taken up by the U.S. Supreme Court. As predicted, however, *Sackett* proved to be the wild card that actually made it to the Supreme Court.<sup>14</sup>

## The Sackett Majority Opinion Explained

Justice Alito delivered the opinion of the Court on behalf of a majority of five Justices.<sup>15</sup> The Court held that the Act only applies to wetlands that have a "continuous surface connection" with "waters of the United States."<sup>16</sup> In doing so, the opinion expressly adopted Justice Scalia's plurality opinion from *Rapanos*. It also rejected Justice Kennedy's "significant nexus" test.<sup>17</sup>

The *Sackett* majority opinion adopted Justice Scalia's *Rapanos* conclusion that "waters" in the Act encompasses "only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are

described in ordinary parlance as streams, oceans, rivers, and lakes," also referred to as "traditional navigable waters."<sup>18</sup> Further, the opinion concluded that wetlands are included within "waters of the United States" and must therefore "qualify as waters of the United States in their own right." The wetlands must be "indistinguishably part of a body of water that itself constitutes waters of the United States."<sup>19</sup> As the plurality stated in *Rapanos*, the term "waters" in the Act "may fairly be read to include only those wetlands that are as a practical matter indistinguishable from waters of the United States, such that it is difficult to determine where the 'water' ends and the 'wetland' begins."<sup>20</sup> Such "indistinguishability" only "occurs when wetlands have a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between 'waters' and wetlands. [...] Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."<sup>21</sup>

## What's Next?

Even with the *Sackett* majority opinion now firmly in place, litigation is sure to continue, including ongoing challenges to the Biden Administration's WOTUS Rule,<sup>22</sup> which is underpinned by the now defunct "significant nexus" test.<sup>23</sup> Already, the Biden Rule has been stayed in 27 states – including Idaho – while the federal courts ultimately proceed to determine its validity under the Act.<sup>24</sup> Idaho and Texas have jointly filed a motion for summary judgment, seeking to strike down the Biden WOTUS Rule in its entirety as being in violation of the Supreme Court's holding in *Sackett*.<sup>25</sup>

In the meantime, the Biden Administration has indicated that it will revise its existing WOTUS Rule no later than September 1, 2023, in an attempt to conform to the Supreme Court's decision in *Sackett*.<sup>26</sup> This move may also be susceptible to legal challenges, depending upon how the rule change is accomplished – with or without notice and an opportunity for public comment – and whether it is successful in actually adhering to the Court's pronouncements in *Sackett*.

Whether the game of regulatory ping pong is over or not, *Sackett* proved itself as the wild card in what turned out to be a winning hand before the U.S. Supreme Court.



**Norman M. Semanko** is the Managing Shareholder in the Boise office of Parsons, Behle & Latimer. His practice includes a variety of natural resource and environmental law matters, with a particular emphasis on water. He readily admits to occasionally playing penny-ante poker (yes, the joker is a wild card) while growing up in North Idaho.

## Endnotes

1. A wild card is "an unknown or unpredictable factor" Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/wild%20card>. Accessed 6 Jul. 2023.
2. 33 U.S.C. § 1362(7).
3. 33 U.S.C. §§ 1342, 1344.
4. 143 S. Ct. 1322 (2023).
5. 547 U.S. 715 (2006).
6. 547 U.S. at 739 (plurality opinion).
7. 547 U.S. at 742, 755 (plurality opinion).
8. 547 U.S. at 759, 779-780 (opinion of Kennedy, J.).
9. Norman M. Semanko, *Red Paddle-Blue Paddle: Clean Water Act Ping Pong*, 64 Advocate 22 (2021).
10. 598 U.S. \_\_\_, 143 S.Ct. 1322 (2023).
11. See generally, *Sackett v. EPA*, 566 U.S. 120 (2012) (also known as "Sackett I" to distinguish it from the 2023 case) (holding that EPA compliance order was final agency action and therefore subject to review under the APA).
12. 8 F.4th 1075, 1091-93 (2021).
13. 595 U.S. \_\_\_ (2022).
14. 64 Advocate 22 (2021).
15. The Ninth Circuit's decision was reversed and remanded, 9-0. In addition to Justice Alito's majority opinion, concurring opinions were penned by Justices Thomas, Kagan, and Kavanaugh.
16. 143 S.Ct. at 1322.
17. *Id.* at 1341-43.
18. *Id.* at 1336-37 (citing 547 U.S. at 739).
19. *Id.* at 1339.
20. 547 U.S. at 742.
21. 143 S.Ct. at 1340.
22. 88 Fed. Reg. 3004 (2023).
23. *Id.* at 3006, 3143.
24. <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (accessed July 6, 2023).
25. *States' Motion for Summary Judgment*, Case No. 3:23-cv-00017 (S.D. Tex. June 28, 2023).
26. <https://www.epa.gov/wotus/amendments-2023-rule> (accessed July 6, 2023).





Great Salt Lake, May 5, 2023. Photo by Lincoln Graves, KUTV News.

## The Great Salt Lake and Idaho

*James R. Cefalo*

In recent years, there have been numerous news articles about the causes and impacts of declining water levels in the Great Salt Lake. Idahoans may feel that Great Salt Lake water levels are Utah's problem. Idaho does, however, have an interest in the Great Salt Lake, because the lake is fed by streams that arise in or flow through Idaho. This article contends that Idahoans should become familiar with the Great Salt Lake issues and monitor the ac-

tions the federal government and the State of Utah are taking to address the decline in lake levels. This article provides some basic facts about the Great Salt Lake and its relationship to the Bear River. Additionally, it describes how changes in laws, regulations, and policies related to the Great Salt Lake could affect water users in Idaho, particularly those water users located in the Bear River Basin. The State of Idaho and its water users in the Bear River Basin should carefully monitor the actions intended to restore the Great Salt Lake to

ensure those actions do not negatively impact water users in Idaho.

### Great Salt Lake Basics

The Great Salt Lake is a terminal lake, meaning it has no natural outlet to the ocean.<sup>1</sup> It is the largest saline lake in the Western Hemisphere.<sup>2</sup> The major tributaries to the Great Salt Lake are the Jordan River, which collects water from rivers and streams in the mountains surrounding Salt Lake City and Provo, the Weber River, and



the Bear River.<sup>3</sup> Of these three rivers, the Bear River is the largest tributary, accounting for approximately 60% of the fresh water entering the lake each year.<sup>4</sup>

Water levels in the Great Salt Lake have been regularly monitored since the pioneers entered the Salt Lake Valley in the mid-1800s.<sup>5</sup> In 1986, the lake reached a historic maximum level at an elevation of 4,211.7 feet above sea level.<sup>6</sup> At that level, the surface area of the lake is over 3,300 square miles.<sup>7</sup> In November 2022, the lake reached a historic low at an elevation of 4,188.6 feet above sea level, roughly 23 feet lower than the high point in 1986.<sup>8</sup> At the historic low water level, the surface area of the lake is only 950 square miles.<sup>9</sup> To conserve water and prevent evaporation, the State of Utah has blocked off channels to the north arm of the lake, significantly reducing the active surface area of the lake.<sup>10</sup>

## Bear River Basics

The Bear River is an interstate stream that flows through the southeast corner of Idaho.<sup>11</sup> Its headwaters are in the Uinta Mountains in Utah.<sup>12</sup> The Bear River flows from Utah into Wyoming, near Evanston, then back into Utah, then back into Wyoming, then flows into Idaho just east of Montpelier.<sup>13</sup> The Bear River flows north from Montpelier to Soda Springs, then turns south and flows past the communities of Grace and Preston before flowing back into Utah north of Logan, Utah.<sup>14</sup> The river flows into the Great Salt Lake on the east side of the lake, just west of Brigham City, Utah.<sup>15</sup> Although the Bear River is over 500 miles long, it empties into the Great Salt Lake just 90 miles from its headwaters.<sup>16</sup>

In Idaho, the Bear River is primarily diverted for direct irrigation use. It is also diverted to fill Bear Lake, an augmented natural lake that also serves as a storage reservoir for downstream irrigators. Water users in Wyoming and Utah also divert water from the Bear River and its tributaries, primarily for irrigation use.<sup>17</sup>

In 1958, Idaho, Utah, and Wyoming adopted the Bear River Compact to resolve disputes about water deliveries in the Bear River Basin.<sup>18</sup> The Compact was amended in 1980 to include provisions about future water development within the basin.<sup>19</sup> The

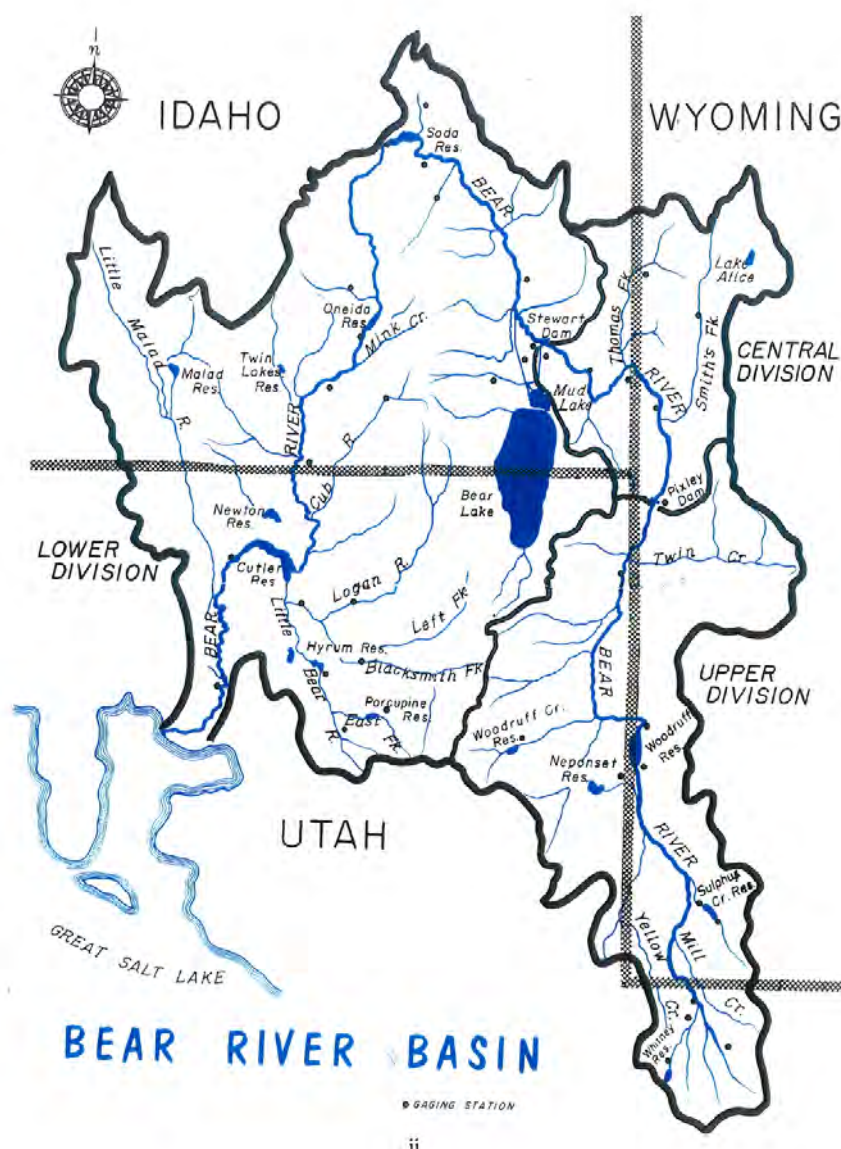
Amended Compact has many fascinating nuances that could entertain a water law attorney for hours. However, for purposes of this article it is sufficient to note that Idaho participates in a federally approved interstate compact which addresses water deliveries on the Bear River during times of shortage and governs future development of water resources within the river system.

Although the Amended Compact describes a process to initiate formal administration of water rights by priority date in the Lower Division (which extends from Bear Lake to the Great Salt Lake), the states of Utah and Idaho have voluntarily

administered water rights in the Lower Division without regard to the Idaho-Utah state line. In other words, water rights on the main channel of the Bear River between Bear Lake and the Great Salt Lake are currently regulated against a common priority date.

## Bear River Diversions and Great Salt Lake Levels

Some advocates for restoring the Great Salt Lake contend that the recent decline in lake levels is caused by an increase in diversions by upstream farmers and ranchers, particularly in the Bear River



Diagram/map of the Bear River system spanning portions of Idaho, Utah, and Wyoming. Common use map courtesy of the Bear River Commission.

Basin. This contention fails to consider important nuances of water use in the Bear River Basin and is often presented as an attack on irrigators.

Water has been diverted from the Bear River and its tributaries for irrigation use since the late 1800s. In Idaho, many of the water rights for irrigation use from the Bear River or its tributaries bear priority dates senior to 1900, meaning the water rights were developed prior to 1900 and have been used for irrigation since the rights were first developed. In drought years, like 2021 and 2022, because of a limited surface water supply, the only water rights from the Bear River and its tributaries receiving water through most of the summer are those rights with priority dates senior to 1900. In drought years, junior water rights (those with priority dates later than 1900) on the Bear River and its surface water tributaries have little impact on water levels in the Great Salt Lake because those water rights receive little or no water.

As part of the 1980 Amended Compact, the states of Idaho, Utah, and Wyoming agreed to track future depletions in the Bear River Basin.<sup>20</sup> In April 2023, the Bear River Commission approved a report summarizing the depletions occurring in the Bear River Basin since 1976.<sup>21</sup> According to the report, since 1976, there have been only 14,410 acre-feet of additional depletions developed above Stewart Dam (located near Montpelier, Idaho) and only 11,307 acre-feet of additional depletions developed between Stewart Dam and the Great Salt Lake.<sup>22</sup> In total, the water developments occurring after 1976 only consume approximately 26,000 acre-feet of water. To put that number into perspective, at the historic low water level in November 2022, the Great Salt Lake contained approximately 4.5 million acre-feet of water.<sup>23</sup>

The 2023 report shows there have been very minor changes to the annual depletions occurring in the Bear River Basin since 1976. In fact, in some areas of the basin, total depletions are lower today than in 1976.<sup>24</sup> The Great Salt Lake hit its maximum recorded lake level in 1986. The total water use from the Bear River has only slightly increased since 1986, yet the lake levels

have declined dramatically. What has changed? The answer is simple: snowpack, or lack thereof. Between 1982 and 1986 (the historical maximum lake level), the Bear River Basin had consecutive years of above-average snowpack. In the 10 years prior to 2023, the Bear River Basin had only one year with snowpack significantly above the average (2017), four years with near average snowpack (2014, 2016, 2019, and 2020), and five years of below average snowpack (2013, 2015, 2018, 2021, and 2022).<sup>25</sup>

To a large extent, the use of surface water in the Bear River drainage has remained steady for nearly 150 years, particularly in drought years, when junior rights are curtailed. Despite this steady historical irrigation use, the Great Salt Lake reached a maximum recorded lake level in 1986. Although water users in the Bear River Basin have some impact on lake levels, it seems unfair to solely blame those water users for the current woes of the Great Salt Lake.

### **Future Development in the Bear River Basin**

It is important to note that the opportunities for additional water development in the Bear River Basin in Idaho are quite limited. In Idaho, the Bear River and its tributaries have been considered fully appropriated during the irrigation season since the early 1980s. In 2001, the Bear River Basin in Idaho was designated as a Ground Water Management Area (“GWMA”), pursuant to Idaho Code § 42-233b. As such, the depletions (consumptive use) associated with new ground water uses (except for small domestic and stock water uses) must be fully mitigated by commensurate reductions in consumptive use.

The Malad River originates in Idaho and flows into the Bear River in Utah. In November 2015, the Idaho Department of Water Resources issued a moratorium on new appropriations from ground water in Malad Valley. Like the Bear River GWMA, new consumptive uses of ground water in Malad Valley (except for small domestic and stock water uses) must be fully mitigated.

Utah has taken similar steps to restrict future development in the Bear River Basin in Utah. Because of concerns about Great Salt Lake levels, on November 3, 2022, Governor Cox of Utah issued Proclamation No. 2022-01, suspending the appropriation of the surplus and unappropriated water of the Great Salt Lake and its tributaries, including the Bear River.<sup>26</sup> The proclamation does not have a specific term or sunset provision but does call for the State Engineer to prepare a report evaluating whether the proclamation should remain in effect.<sup>27</sup>

### **Federal Action**

The federal government is also acting on Great Salt Lake concerns. In December 2022, President Biden signed the *Saline Lake Ecosystems in the Great Basin States Program Act of 2022*, which authorizes the United States Geological Society (“USGS”) to create a program “to assess and monitor the hydrology of saline lake ecosystems in the Great Basin,” including the Great Salt Lake.<sup>28</sup> The USGS will work with Tribal, Federal, and State agencies, nonprofit organizations, universities, and local stakeholders to prepare a report describing specific actions needed to improve data collection for the assessment of saline lakes in the West.<sup>29</sup> The act allocates \$25 million over five years to complete the report and implement the assessment and monitoring programs.<sup>30</sup> Of note, the act states that it shall have no effect on existing water rights, interstate compacts, or the management and operation of Bear Lake.<sup>31</sup>

### **“Saved Water” for the Great Salt Lake**

On March 14, 2023, Governor Cox of Utah signed S.B. 277, which significantly revised Utah’s laws related to water conservation. S.B. 277 creates an “agricultural water optimization” program, which allows Utah irrigators to apply for grants to install water conservation infrastructure. The statute identifies the water conserved through these infrastructure projects as “saved water.” In addition, S.B. 277 describes a process by which a water user in Utah can file a change application



(transfer application) to designate a portion of their water right as “saved water.” The saved water can then be sold or leased to others and possibly sold or leased to the State of Utah to increase water levels in the Great Salt Lake.<sup>32</sup> Moving saved water to a new location or dedicating the saved water to a new use raises concerns about injury to other water users and enlargement of use. The following hypothetical illustrates these concerns.

Assume Farmer Stewart diverts water from Canyon Creek. Also assume Stewart’s existing irrigation system is fairly inefficient – open ditches and flood irrigation. Although Stewart diverts 10 cubic feet per second (cfs) of water, his crops only consume about 60% (6 cfs) of the water. The remaining 40% (4 cfs) returns to Canyon Creek, either on the surface or subsurface, and is used to satisfy downstream water rights. Assume Stewart now installs pipelines and a drip irrigation system to become more efficient. Stewart’s crops continue to consume about 6 cfs, but now Stewart only diverts 6 cfs because his system is so efficient. The remaining (undiverted) 4 cfs is “saved water.” If the 4 cfs is simply left in the creek, it could still be used to satisfy downstream water rights. If, on the other hand, Stewart is allowed to sell or lease the 4 cfs to another water user or dedicate the 4 cfs to lake recovery, the 4 cfs is no longer available to satisfy downstream water rights. To satisfy downstream water rights (that used to rely on the 4 cfs of return flow from Stewart), upstream junior water rights (possibly junior water rights in other states) would have to be curtailed to replace the 4 cfs of saved water sold or leased by Stewart.

In Idaho, a water user may convey all or a portion of a water right to another person. Idaho Code § 42-222(1) states that this type of conveyance can be approved, provided the change does not injure other water rights or result in an enlargement of use under the original right. To protect against injury and enlargement, when a water user proposes to change the nature of use of a water right, such as from irrigation to municipal use, the State of Idaho limits the new use to the consumptive portion of the water right to be changed. Statutes governing change applications in



Agricultural operations in Franklin County, Idaho. Photo from Idaho Farm Bureau Federation, idahofb.org.

Utah contain similar protections against injury and enlargement.<sup>33</sup>

It is unclear whether S.B. 277 revises Utah’s protections against injury and enlargement for change applications involving saved water. S.B. 277 distinguishes between “depletion reduction,” which means a “net decrease in water consumed,” and “diversion reduction,” which means a “decrease in the net diversion amount from that allowed under a water right.”<sup>34</sup> In one section, S.B. 277 suggests that water users will only be able to convert depletion reductions from irrigation use to “saved water.”<sup>35</sup> In other areas, however, S.B. 277 states that “saved water” is comprised of depletion reductions and diversion reductions.<sup>36</sup> This is a critical question. If “saved water” includes diversion reductions and can now be dedicated to fully consumptive uses, like Great Salt Lake restoration, there could be significant injury and enlargement impacts for upstream water users, including water users in Idaho.

The Great Salt Lake is a unique and valuable ecosystem and Utah’s efforts to restore and preserve the lake are commendable. These restoration and preservation efforts, however, cannot come at the expense of water rights or water users in Idaho. Over the coming years, as Utah begins to apply S.B. 277, Idahoans must pay close attention to how the water conservation program is implemented to ensure that changes involving “saved water” do not shift impacts to water users in Idaho.



**James R. Cefalo** is the Eastern Regional Manager for the Idaho Department of Water Resources (“IDWR”). He received a bachelor’s degree in civil and environmental engineering from the University of Utah and a J.D. from the University of Colorado. James was born and raised in Brigham City, Utah, which lies just east of the Bear River Migratory Bird Refuge. The opinions expressed in this article are the author’s and are not the opinions or position of IDWR or the State of Idaho.

## Endnotes

1. Wayne Wurtsbaugh, Craig Miller, Sarah Null, Peter Wilcock, Maura Hahnenberger, Frank Howe, *Impacts of Water Development on Great Salt Lake and the Wasatch Front*, WATERSHED SCIENCES FACULTY PUBLICATIONS (Feb. 24, 2015).
2. *Great Salt Lake*, UTAH DIVISION OF WATER RESOURCES, <https://water.utah.gov/great-salt-lake/>.
3. Wurtsbaugh, *supra* note 1, at 1.
4. *Id.*
5. *Great Salt Lake*, *supra* note 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Great Salt Lake*, *supra* note 1; UTAH EXEC. ORDER 2023-02 (Feb. 23, 2023) (ordering the Utah Division of Forestry, Fire, and State Lands to raise the berm around the causeway bridge, which spans the channel connecting the North Arm of the Great Salt Lake to the main body of the lake, to 4,192 feet above sea level); see also Ben Winslow, *Water now spilling over emergency causeway berm in the Great Salt Lake*, Fox 13 News, <https://www.sltrib.com/news/2023/05/03/water-now-spilling-over-emergency/> (reporting that



water was spilling over the emergency berm in May 2023 because of increased lake levels).

11. <https://bearrivercommission.org/docs/Bear%20River%20Basin%20Map-goodscan.pdf> (diagram of Bear River Basin prepared by the Bear River Commission).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *The Bear River*, Wyoming State Water Plan, WYOMING WATER DEVELOPMENT OFFICE, <https://waterplan.state.wy.us/BAG/bear/briefbook/bcompact.html>.

17. *Id.* (Between Idaho, Utah, and Wyoming, over 500,000 acres are irrigated from the Bear River and its tributaries).

18. The Bear River Commission, an entity created through the Bear River Compact, prepared an excellent report of the disputes and negotiations leading up to the ratification of the 1958 Compact and the 1980 Amended Compact. The report, written by Wallace N. Jibson and titled "History of the

Bear River Compact," can be found on the commission's website: <https://bearrivercommission.org/docs/History%20of%20Bear%20River%20Compact.pdf>.

19. I.C. § 42-3402, Article V.

20. I.C. § 42-3402, Article V(C).

21. 2019 Depletions Update (April 18, 2023) at 2. The 2019 Depletions Update is a report prepared by the Technical Advisory Committee for the Bear River Commission and does not identify authors by name. It was adopted by the commission at its annual meeting on April 18, 2023.

22. *Id.* An acre-foot of water is a measurement of volume, one foot deep covering one acre, and is equal to 325,850 gallons of water.

23. See Robert L. Baskin, *Calculation of Area and Volume for the South Part of the Great Salt Lake*, UNITED STATES GEOLOGICAL SURVEY (2005), <https://pubs.usgs.gov/of/2005/1327/PDF/OFR2005-1327.pdf>.

24. 2019 Depletions Update (April 18, 2023) at 2 (Utah's depletions downstream of the Idaho-Utah state line are 5,336 acre-feet less today than in 1976).

25. [https://www.nrcs.usda.gov/Internet/WCIS/AWS\\_PLOTS/basinCharts/POR/WTEQ/assocHUCut\\_8/bear.html](https://www.nrcs.usda.gov/Internet/WCIS/AWS_PLOTS/basinCharts/POR/WTEQ/assocHUCut_8/bear.html) (displaying annual snowpack data collected by the U.S. Natural Resources Conservation Service).

26. Utah Proclamation 2022-01, UTAH CODE § 73-61 (Nov. 3, 2022). The proclamation restrictions do not apply to non-consumptive uses or appropriations of small amounts of water. *Id.*

27. *Id.*

28. Pub. L. No. 117-318, 136 Stat. 4421 (2002).

29. *Id.*

30. *Id.*

31. *Id.*

32. Amy Joi O'Donoghue, *Shift in Utah Water Law could be 'Game changer' for the Great Salt Lake*, DESERET NEWS (March 7, 2023).

33. UTAH CODE § 73-3-3(1)(e).

34. UTAH CODE § 73-10g-203.5(7) and (8).

35. UTAH CODE § 73-10g-208(1)(a).

36. UTAH CODE §§ 73-10g-203.5(10), 73-10g-208(2).

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Justice Roger S. Burdick giving remarks after accepting this year's Distinguished Jurist Award. Photo by Lindsey Welfley.

## Recap of 2023 Idaho State Bar Annual Meeting

Teresa A. Baker

The 2023 Idaho State Bar Annual Meeting was held in Boise at Jack's Urban Meeting Place ("JUMP") from July 19th through the 21st.

The meeting kicked off with the Distinguished Lawyer, Distinguished Jurist, and Outstanding Young Lawyer Awards Reception on Wednesday evening. The awards ceremony began with Outgoing President Laird B. Stone serving as the Master of Ceremonies with over 150 guests in attendance. The recipients of the 2023 Distinguished Lawyer Awards were Larry C. Hunter of Boise and Marvin M. Smith of Idaho Falls. The Distinguished Jurist Award was presented to the Honorable

Roger S. Burdick, former Chief Justice of the Idaho Supreme Court. The Outstanding Young Lawyer Award was presented to Ashley R. Marelius of Boise. Each award recipient was introduced with a short video of an interview by a colleague or friend and then each graciously accepted their award at the podium. Ms. Marelius' award was accepted by her law partners, as she was unable to attend.

Thursday morning, July 20th, began with a Plenary Session in which President Stone gave an update on the state of the Bar and Idaho Supreme Court Chief Justice G. Richard Bevan gave an update on the state of the Idaho Courts. President Stone then

introduced the keynote speaker, Jerry V. Teplitz, J.D., Ph.D. Dr. Teplitz spoke on the importance of attorney well-being and gave participants techniques and tools to increase their level of energy and productivity to better serve clients and themselves. A total of 5.5 CLE credits were offered on Thursday with two different breakout sessions offered. The late afternoon CLE session featured a session entitled "*Preserving Independence, Impartiality, and Excellence in Idaho's Court System: A Remarkable Judiciary, If You Can Keep It,*" and featured a distinguished panel that was moderated by Idaho State Bar Commissioner Mary V. York. The panel included Justice Jim Jones,



Former Chief Justice of the Idaho Supreme Court, Hon. Karen L. Lansing, retired member of the Idaho Court of Appeals, J. Philip Reberger, Idaho Judicial Council, and Donald L. Burnett, Jr., Dean Emeritus at the University of Idaho College of Law and an inaugural member of the Idaho Court of Appeals. The session was informative and thought provoking for all.

During a Noon luncheon, the Idaho State Bar and Idaho Law Foundation Service Awards were presented with over 125 people in attendance. Seven lawyers from around the Gem State who have provided volunteer time to support the work of the Bar and the Law Foundation were honored including:

Mia Bautista of Moscow, Charles "Clay" Gill and Emily MacMaster of Boise, Casey Simmons of Coeur d'Alene, Brent T. Wilson of Salt Lake City, along with Debbie Dudley, the recently retired controller of the Idaho State Bar. Howard Burnett of Pocatello and William "Bill" McAdam of Sandpoint were also honored but were unable to attend. When the awards program concluded the Idaho Law Foundation held their Annual Meeting led by President Fonda L. Jovick of Sandpoint.

The Milestone Celebration and Awards Reception: Celebrating 25, 40, 50, 60 & 65 Years of Admission was held Thursday evening with over 130 people in attendance. The longest admitted member of the Bar in attendance was William Parsons, a 65-year member and was joined by 60-year attorneys Tony Park and Hon. Jesse Walters. The 50-year attorneys in



Outgoing President Laird Stone (left) passing the gavel to incoming President Gary Cooper (right). Photo by Lindsey Welfley.

attendance included Darrel Aherin, Ron Bruce, Linda Cook, Don Farley, James "Jim" Kaufman, Doug Nelson, Jerry Reynolds, Milton Slavin, Paul Street, Ron Twi-

legar, Cindy Weiss, and Hon. William Woodland. Each of these attorneys were presented with a plaque and each gave a highlight of their career. The 40- and 25-year attorneys were also honored with lapel pins for their attendance and dedication to the profession.

On Friday, July 21st, an additional 4.5 CLE credits were offered to conference participants with two sets of CLE breakout sessions and the final plenary session. This year, the annual "Lessons from the Masters" was called "*Lessons from the Bench*" and featured Justice Colleen D. Zahn, Idaho Supreme Court, Hon. Debora K. Grasham, U.S. Magistrate, District of Idaho, and Hon. Nancy A. Baskin, Fourth Judicial District.

At Noon, a networking BBQ was held with the Section of the Year Award presented to the members of the Employment and Labor Law Section. President Stone then passed the gavel to incoming President Gary L. Cooper who will serve as president until the next Annual Meeting in 2024. Lastly, the door prizes from our exhibitors were drawn from the meeting attendees who visited the exhibit hall.

The Annual Meeting would not be possible without the support of our sponsors. This year's sponsors included platinum sponsors Idaho Trust Bank and the Fourth District Bar Association, gold sponsors University of Idaho College of Law and Clio, silver sponsors River's Edge Mediation and the Idaho Community Foundation, and bronze sponsor Eagle Creek Recovery.

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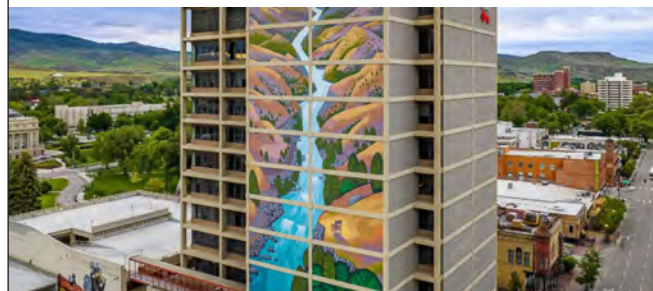
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### Regular Fall Term for 2023 1st Amended February 28, 2023

Boise .....	August 16
Blackfoot .....	August 23
Pocatello .....	August 24
Twin Falls .....	August 25
Boise .....	September 6 and 8
Coeur d'Alene .....	September 20 and 21
Boise .....	September 28
Boise .....	November 1, 3, 6, 8 and 13
Boise .....	December 4, 6 and 8

By Order of the Court  
Melanie Gagnepain, Clerk

**NOTE:** The above is the official notice of the 2023 Fall Term for the Supreme Court of the State of Idaho 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

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Judges  
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Molly J. Huskey

### Regular Fall Term for 2023 1st Amended 08/09/2023

Boise .....	August 22, 24, 29, and 31
Boise .....	September 12, 14, 19, and 21
Boise .....	October 5, 10 and 12
Boise .....	November 2 and 16
Boise .....	December 5

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Melanie Gagnepain, Clerk

**NOTE:** The above is the official notice of the 2023 Fall Term for the Court of Appeals of the State of Idaho 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.

## Court Information – Oral Arguments

### Idaho Supreme Court Oral Arguments for September 2023

(All times are local – subject to change due to COVID-19)

8/15/23

#### Friday, September 8, 2023 – Boise

8:50 a.m. Davis v. Blast Properties.....	#50491
10:00 a.m. SNAP! Mobile v. Vertical Raise.....	#49483
11:10 a.m. SNAP! Mobile v. Vertical Raise.....	#49418

#### Wednesday, September 20, 2023 – Coeur d'Alene

8:50 a.m. Midtown Ventures v. Capone.....	#49679
10:00 a.m. State v. Kimbley.....	#49207
11:10 a.m. ....	OPEN

#### Thursday, September 21, 2023 – Coeur d'Alene

8:50 a.m. Krall v. Hagadone Hospitality.....	#50064
10:00 a.m. ....	OPEN
11:10 a.m. ....	OPEN

#### Friday, September 22, 2023 – Boise via Zoom

2:00 p.m. IDHW v. Jane Doe (2023-24).....	#50868
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#### Thursday, September 28, 2023 – Boise

8:50 a.m. Davis v. George & Jesse's Les Schwab.....	#49535
10:00 a.m. Milus v. Sun Valley Co.....	#49693
11:10 a.m. State v. Parsons.....	#50523

### Idaho Court of Appeals Oral Arguments for September 2023

(All times are local – subject to change due to COVID-19)

8/15/23

#### September 14, 2023

9:00 a.m. Williams v. State.....	#48467
10:30 a.m. State v. Hoover.....	#49955
1:30 p.m. Sweet v. State.....	#49981



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*Meridian Clinic: October 24th from 5-7 PM*

*Nampa Clinic: October 26th from 12-2 PM*

- *Pro Bono Legal Clinic hosted by the Association of Corporate  
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## CASES IN ALPHABETICAL ORDER BY CATEGORY – JULY 2023

### CIVIL APPEALS

#### Attorney Fees

Whether the district court's attorney fee award allowed Respondents' attorneys to recover twice for services for which they had already been paid under a third-party fee arrangement.

*Von Puckett v. Evans*  
Docket No. 50292  
Court of Appeals

#### Damages

Whether the trial court abused its discretion by granting Plaintiff's motion for a new trial or additur when the jury could have arrived at its damage award other than by passion or prejudice.

*Snap! Mobile, Inc. v. Vertical Raise, LLC*  
Docket No. 49418  
Supreme Court

#### Discovery

Whether the district court abused its discretion by concluding no good cause existed to excuse Plaintiff's failure to comply with the scheduling order and the discovery rule governing expert witness disclosure.

*Cannon v. Teel*  
Docket No. 50220  
Court of Appeals

#### Divorce/Custody

Whether the district court erred in affirming the magistrate's judgment awarding sole legal and physical custody of the parties' three youngest children to Respondent.

*Fischer v. Roundy*  
Docket No. 50257  
Court of Appeals

#### Insurance

Whether the district court erred by interpreting the underinsured motorist coverage statute, I.C. § 41-2502, narrowly to allow the insurance company to deny wrongful death coverage for the named insured and his heirs.

*Lanningham v. Farm Bureau Mut. Ins. Co.*  
Docket No. 50441  
Supreme Court

#### Post-Conviction

Whether Petitioner met his burden of proving that trial counsel rendered ineffective assistance by failing to object at sentencing when the trial court rejected the binding plea agreement but did not give Petitioner an opportunity to withdraw his plea.

*Reilly v. State*  
Docket No. 49520  
Court of Appeals

Whether the district court was precluded by *res judicata* from conducting an evidentiary hearing and granting post-conviction relief on an ineffective assistance of counsel claim that had previously been summarily dismissed.

*Branigh v. State*  
Docket No. 45397  
Court of Appeals

Whether the district court erred when it dismissed the entire petition for post-conviction relief without giving Petitioner notice of its intent to dismiss the claims not addressed by the state in its motion for summary disposition.

*Best v. State*  
Docket No. 49974  
Court of Appeals

#### Torts

Whether Idaho recognizes an independent cause of action for negligent infliction of emotional distress in a veterinary malpractice case.

*Schrivver v. Raptosh*  
Docket No. 49818  
Supreme Court

#### Worker's Compensation

Whether the district court erred by concluding that Plaintiff's personal injury suit against his employer was barred by the exclusive remedy rule of Idaho's Worker's Compensation Act.

*Clover v. Crookham Co.*  
Docket No. 50200  
Supreme Court

## CRIMINAL APPEALS

#### Credit for Time Served

Whether time served as a condition of probation must be calculated pursuant to I.C. § 18-903(2) when addressing a term of probation prior to imposition of sentence.

*State v. Bujak*  
Docket No. 49921  
Supreme Court

#### Evidence

Whether the district court erred by admitting I.R.E. 404(b) evidence that Defendant had previously used methamphetamine and concluding that such evidence was relevant to prove Defendant's knowledge and intent.

*State v. Rodriguez*  
Docket No. 49993  
Court of Appeals

#### Harmless Error

Whether the Supreme Court's holding in *State v. Mitchell*, 104 Idaho 493 (1983)—that a district court's erroneous denial of a defendant's motion to dismiss the information for lack of probable cause is necessarily harmless where the defendant was later convicted following a fair trial—should be overruled because it is inconsistent with the harmless error test announced in *State v. Perry*, 105 Idaho 209 (2010).

*State v. Muthafar*  
Docket No. 49435  
Supreme Court

#### Jury Instructions

Whether the district court erred by refusing Defendant's request to instruct the jury on a necessity defense and concluding there was insufficient evidence to support a jury finding on each element of the defense.

*State v. Porter*  
Docket No. 49370  
Court of Appeals

#### Separation of Powers

Whether I.C. § 19-2520G(3)'s consecutive sentence mandate violates the Idaho Constitution's strict separation of powers requirement by impermissibly encroaching upon a sentencing court's inherent authority to choose whether to impose consecutive or current sentences.

*State v. Barr*  
Docket No. 49376  
Supreme Court

#### Speedy Trial

Whether Defendant had a constitutional right to a speedy retrial following his first trial and successful appeal.

*State v. Ish*  
Docket No. 49412  
Supreme Court

**Summarized by:**  
**Lori Fleming**  
**Supreme Court Staff Attorney**  
**(208) 334-2246**

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## Lincoln Strawhun 1970-2023

Lincoln passed away on April 21, 2023, after a very brief battle with cancer. A graduate of Ave Maria School of Law, Lincoln was a deputy attorney general with the State of Idaho and a Lieutenant in the United States Navy Reserves. Though very accomplished in his career, he would say that his greatest achievement was being a dedicated and loving father to his three daughters, Betina, Barcelona, and Iliana, and a loving husband to his wife, Beatriz. Lincoln's greatest joy was bringing happiness to his family. We will miss him forever and a day.

## Gregor S. Chvisuk 1956-2023

Friends are mourning the loss of Gregor Chvisuk, 66, of Framingham, Massachusetts who died on June 10, 2023. He was born on July 16, 1956, in New Haven, Connecticut to Samuel and Theresa Chvisuk. He attended the University of New Haven where he received his B.S. degree in accounting in 1978. He attended the University of Pennsylvania Law School, graduating in 1983.



Following law school, he moved to Idaho Falls, Idaho where he was associated with Holden, Kidwell, Hahn & Crapo. Gregor thrived in the mountain west; enjoyed golf, skiing at Grand Targ-ee and Jackson Hole, and accompanying his law partners on annual deer hunts. He is remembered as having a keen legal mind who related well to clients and associates. He attended New York University obtaining an LL.M. in taxation in 1990.

He relocated to Framingham, Massachusetts to settle with family and engaged in an active legal practice focused on taxation. He remained a member of the Idaho State Bar until 2012. He is survived by his sister, Terry.

## William H. O' Riordan 1947-2023

William "Hugh" O' Riordan was born in Chicago, Illinois on June 3, 1947 to Francis O' Riordan and Elvira O' Riordan (McHugh) and died in the Intensive Care Unit at St. Luke's Regional Medical Center, Downtown Boise in the evening of July 2, 2023.



He passed away peacefully, with dignity and with much compassion, with his wife of almost 54 years, Kaye, at his side.

Hugh was first and foremost a lawyer. He was a lawyer's lawyer in the true sense of that term. From national policy-making cases to helping right a local injustice for a school kid, many of his clients also became his friends – he was consulted so much and helped so many.

His family moved from Chicago to Tucson, Arizona when he was in high school due to his mother's health. He graduated from the University of Arizona with a B.A. in 1969 and a J.D. in 1972. Hugh was very proud of having been a lawyer for 50 years. He and Kaye met while both working in the University of Arizona library as undergraduates, and they married in August of 1969. They then moved to the Washington, D.C. area where Kaye finished her last year of law school and Hugh worked for the U.S. Department of Agriculture, the Pacific Legal Foundation, and then the Office of the Solicitor, U.S. Department of Interior handling mine health and safety cases all over the coal region. He also earned his LL.M. in environmental law from George Washington University School of Law in 1979. While in Washington, D.C. he was most proud of helping to found the Washington Legal Foundation. Hugh and Kaye decided that six years in Washington, D.C. was enough, moved to Boise in 1978, and never looked back!

Hugh was Chief of the Natural Resources Division, Office of the Idaho Attorney General from 1978-1980 and then

practiced environmental law with several firms large and small, regional and local, building a diverse practice, traveling extensively around the country for years, and then tapering off to do more international travel, spend more time up in the Ketchum/Sun Valley area, and get together with the Old Timers Group. During his active law practice, one of the things he was most proud of was his work on a National Academy of Sciences Committee on Remediation of Buried and Tank Waste.

He was a proud father. Daughter, Moira, was born in 1980 in the same hospital he died in.

He is survived by his wife, daughter, son-in-law, two granddaughters, older brother, Nicholas, and his many, many friends.

## Rebecca J. Vaage 1962-2023

After a rich life filled with laughter, adventure, and faithfulness, Rebecca Joy flew beyond this world on July 9, 2023, passing in her mountain home near Orofino, surrounded by her loving family.



Becky was born to Pastor Stan and Bev Satre on March 20, 1962, in Rochester, Minnesota. She joined sisters Mary, Kris, and Sue, with Kathy soon to follow. The family relocated to Sioux City, Iowa, until returning to Minnesota when Becky was in eighth grade.

Like her parents and sisters, Becky chose St. Olaf College to continue her education. She majored in French and history, spending time abroad studying in France and traveling in Europe. Becky and John Vaage met in the spring of 1983, and they would spend the next 40 years together. They were married by Stan at Abiding Savior Lutheran in Mounds View, Minnesota on December 28, 1985.

Becky joined John in Idaho, where the young couple camped, fished, and hiked their way through the beauty of

the mountains and forests. Becky completed her education with a Juris Doctorate from the University of Idaho College of Law in 1990. She worked as a clerk for District Judge Harold Kalina, as a legal editor for West Publishing, and owned her own practice for over 20 years.

By no means a typical attorney, Becky took guff from no one, but her kind and generous heart was geared to help people. She loved doing adoptions

and helping young people navigate to a safer place.

Becky and John welcomed their son, Jack, in 1991, and his brother, Karl, followed in 1994. Becky felt called to an adoption, and the family traveled to China in 2004 to gather Annie. A special bonus was the birth of granddaughter Audrey in 2013. Becky's fierce momma bear spirit lives on in all those she protected.

A certified master gardener in Minnesota and Idaho, she loved to tend her

plants when her busy schedule allowed. She also had a soft spot for the Special Olympics and our many friends there. The SO motto became her own: "Let me win. But if I cannot win, let me be brave in the attempt."

Pancreatic cancer could not dampen Becky's stubbornly optimistic spirit, and it could not touch her resilient soul. It's as if she simply decided to ride on ahead and secure the best campsite. A lifelong Lutheran, her faith was unwavering.

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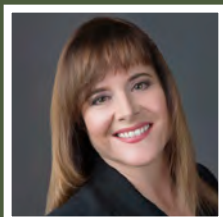
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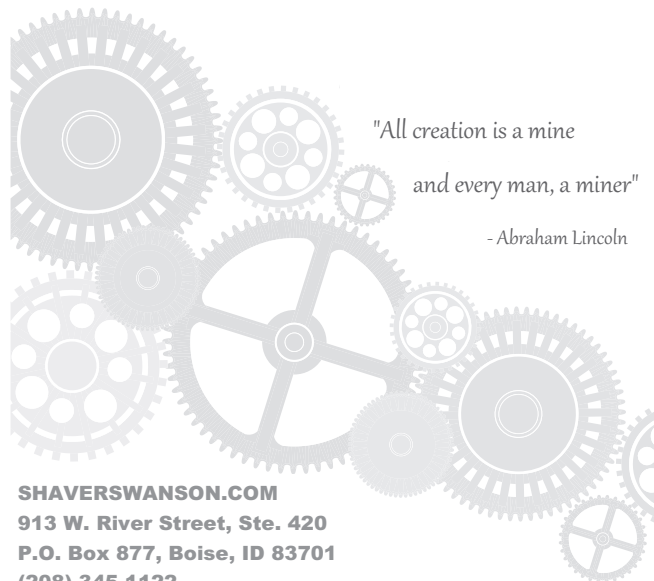
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## Hawley Troxell names Susan Olson as the firm's CEO

BOISE – Hawley Troxell's Board of Directors and Equity Partners are pleased to announce they have named Susan Olson as the firm's CEO. As the CEO, Susan will provide leadership on firm finances, operations, growth, and business initiatives.

Susan joined Hawley Troxell in 2001 after spending time in the health care and finance industries. Guided by the firm's objectives, culture, and the ethical requirements of the legal profession, Susan is responsible for all financial and operational functions of the 100+ attorney law firm with seven offices covering Idaho and the Inland Northwest of Washington. She is at the forefront of the firm's mergers and acquisition strategies. It is Susan's duty to ensure the firm meets its financial goals and objectives and has the proper operational controls and people systems in place to achieve the firm's business objective – exceptional client services. Susan provides constant attention to the improvement of the organization to ensure financial strength and operating efficiencies of the business of law.

Susan was the first women Board President of Hillcrest Country Club, Treasure Valley CFO Forum President, American Lung Association Leadership Council Chair, College of Business and Economics Advisory Council Membership Chair, and Association of Legal Administrators Past President of the Idaho Chapter.

She has been honored with the Women's & Children's Alliance, Tribute to Women & Industry Award (2003), Idaho Business Review's Women of the Year (2018), and Idaho Business Review's Excellence in Finance (2021).

Susan received her B.S. in business administration from Lewis Clark College, her M.B.A. from Boise State University, and earned her Certified Legal Manager Certification.

## Cable Huston announces new partner

PORTLAND, OR – Cable Huston is pleased to announce that Tyler Whitney

has joined the firm as a partner in its Energy & Utility and Government practice groups. Whitney primarily represents public and consumer-owned utilities around the Pacific Northwest, advising in complex regulatory matters, negotiating and drafting complex power agreements, and providing general counsel services.

## Alycia Moss of Moss Immigration Law Firm joins Hawley Troxell

BOISE – Hawley Troxell and Alycia Moss of Moss Immigration announced they are coming together to enhance and expand services for clients throughout Idaho and the Inland Northwest. Hawley Troxell will add an immigration practice area and expand operations in Boise, Coeur d'Alene, Idaho Falls, Pocatello, Reno, Spokane, and Yakima.

A graduate of the University of Idaho College of Law, Alycia is passionate about law and immigration. She works with corporations, educational institutions, and other organizations to make the best choices for employees, students, or other beneficiaries and to execute those choices with maximum success. Her practice assists individuals with citizenship, green cards/permanent residency, student visas, exchange visas, work visas, tourist visas, asylum, victim visas, humanitarian parole, deferred action, DACA, deportation defense, special immigrant juvenile status, and appeals. Alycia's practice also supports immigrant entrepreneurs, who are central to new-business creation in the U.S. and starting businesses at an increasing rate. Alycia is licensed in Canada as a Barrister and Solicitor to practice Canadian immigration law.

The addition of immigration law expertise continues Hawley Troxell's recent commitment to strengthening its client services through strategic growth. On January 1, 2023, Hawley Troxell also joined forces with a team of attorneys from Witherspoon Kelley, adding offices in Spokane, Coeur d'Alene, and Yakima.

## Carey Shoufler selected to serve on National Conference of Bar Foundations Board of Directors

BOISE – Carey Shoufler, the Idaho Law Foundation's Development & Law Related Education Director, was selected to serve on the Board of Directors of the National Conference of Bar Foundations. NCBF leaders are chosen from across the country to advance law related philanthropy for the legal community and serve as a resource for the nation's Bar foundations.



## Borton-Lakey Law and Policy welcomes new attorneys

MERIDIAN – Mitchell Coats has joined Borton Lakey law offices as a member of its litigation practice group. Before joining Borton-Lakey, Mitchell served as the Chief Deputy Prosecutor of Boise County. Mitchell graduated from Temple University, Beasley School of Law with an LL.M. in trial advocacy after earning his law degree and his B.S. in agriculture science from the University of Idaho. Prior to law school Mitchell blazed the trail for Brazilian Jiu Jitsu in Idaho as a highly decorated BJJ competitor. Mitchell is recognized as being the first American to earn his black belt in Brazilian Jiu Jitsu from the most decorated team in the World, Alliance-Rio De Janeiro, Brazil, and he competed in several professional MMA fights and also coached top ranked fighters in the UFC. Taking the fight to the courtroom, Mitchell's practice at Borton Lakey focuses on complex civil and criminal litigation in state and federal courts.



Bryan Norton has joined Borton-Lakey law offices as its newest associate attorney. He is admitted to practice before all Idaho courts, as well as the Federal District Court for the District of Idaho, and the Court of Appeals for the Ninth Circuit. Prior to law school Bryan joined the Army where he was part of a small group accepted into the 75th Ranger



Idaho State Bar 2023 Resolution Meetings				
District	District Bar President	Meeting Date	Meeting Location	Meeting Time
<i>First District</i>	Zack Jones	Thursday Nov. 2	TBD	12 noon
<i>Second District</i>	Brennan Wright	Thursday Nov. 2	TBD	6:00 p.m.
<i>Third District</i>	Jeff Phillips	Monday Nov. 13	College of Idaho Caldwell	6:00 p.m.
<i>Fourth District</i>	Jen Hearne	Tuesday Nov. 14	TBD	12 noon
<i>Fifth District</i>	Anja Rodriguez	Thursday Nov. 9	Blue Lakes Country Club 1940 Blue Lakes Grade - Jerome	6:00 p.m.
<i>Sixth District</i>	Jason Brown	Thursday Nov. 9	Juniper Hills Country Club 6600 S. Bannock Highway, Pocatello	12 noon
<i>Seventh District</i>	H. Alayne Bean	Wednesday Nov. 8	Hilton Garden Inn 700 Lindsey Blvd. Idaho Falls	12 noon

Regiment, as part of the United States Special Operations Command. After four years, Bryan was honorably discharged from the military and became a police officer in Washington State. He served in various capacities in law enforcement, including as a Sergeant supervising a squad of officers, as a Team Leader on the SWAT team, as an accident reconstructionist, and as a drug recognition expert. After 16 years, he retired from law enforcement and attended the University of Idaho College of Law, graduating in 2015 and earning a place on the Dean's List each semester. Bryan focuses his legal practice on family law, real estate law, municipal law, estate planning, and employment/labor law.

## Desk Book Phase Out Plan

STATEWIDE – Beginning in Spring 2024, members who wish to receive a hard copy of the Desk Book Directory must affirmatively opt-in. Alternatively, you will also have the option to receive the new Idaho State Bar Rule Book instead. In February 2023, the Board of Commissioners approved a multi-year phase out plan after which the printed version of the Desk Book Directory will no longer be available. Please watch your

email inboxes and mailboxes closely for more information in the coming months!

## 2023 Resolution Process

STATEWIDE – The Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of the Court, or substantive rules governing the Bar, by act of its bar commissioners, or at its Annual Meeting. Matters referenced above must be submitted to the membership for a vote through the Resolution Process.

Idaho Bar Commission Rule 906 governs the Resolution Process. Resolutions for the 2023 Resolution Process must be submitted to the Bar's office by the close of business on September 25, 2023. If you have questions about the process or how to submit a resolution, please contact Diane Minnich at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov) or (208)-334-4500. The Resolution meeting schedule is listed above; all times noted are local time.

## United States District and Bankruptcy Courts, District of Idaho Notice to Interested Member of the Idaho State Bar

STATEWIDE – The judges of the United States District and Bankruptcy Courts

for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Court for a three-year term to replace Katie Ball. In addition to Ms. Ball, the District of Idaho's current Lawyer Representatives are Sonyalee Nutsch, Howard Belodoff, DeAnne Casperson (emeritus), and Alexandra Caval (emeritus).

Effective November 1999, the Board of Judges adopted a Lawyer Representative Selection Plan, based upon current bar membership, which ensures statewide representation. This plan calls for selection of lawyer representatives as follows: 2024 – 6th or 7th Districts; 2025 – 3rd or 5th Districts; 2026 – 4th District; 2027 – 1st and 2nd Districts; 2028 – 4th District; 2029 – repeat above.

Based upon the Plan, this year's lawyer representative must come from the 6th or 7th Districts. Applicants are required to: 1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system; 2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and



be willing and able to actively contribute to that end; 3. Be willing to assist in implementing Conference programs with the local Bar; and 4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

Typical duties include serving on court committees, reviewing recommen-

dations on the use of the Court's non-appropriated fund, developing curriculum, assisting with the planning for the District conference, serving as a representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Any persons

interested in such an appointment should submit a letter setting forth their experience and qualifications, **no later than September 22, 2023**, to the following: Stephen W. Kenyon, Clerk of the Court, clerk@id.uscourts.gov.



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- 26** *Ethics, Disqualification and Sanctions in Litigation*  
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- 27–29** *2023 Annual Estate Planning Conference*  
*Shore Lodge – McCall*  

- 29** *Fall New Attorney Program*  
*Boise Centre East – Boise*  
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## October

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| <b>6–11</b> <i>Trial Skills - Balloon Fiesta</i> | <b>24</b> <i>Ethics of Identifying Your Client: It's Not Always Easy</i> |
| <b>12</b> <i>Annual Bellwood Lecture</i>         | <b>26–28</b> <i>Annual Family Law Conference</i>                         |
| <b>17</b> <i>Ethics in Discovery Practice</i>    |  |

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