

ISB ENVIRONMENT & NATURAL RESOURCES SECTION

Fall 2008 Newsletter

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The Newsletter is Back

The ENR Section produces quarterly newsletters to keep members apprised of upcoming events. Our next newsletter is scheduled for release in November 2008. If you would like to include an item in the upcoming newsletter, please contact Courtney E. Beebe at courtney.beebe@deq.idaho.gov

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Idaho Environmental and Natural Resource News

Settlement of the INL Buried Waste Clean-up Plan.

After a trial on contract issues in *US v. Kempthorn*, 2006 WL 1459843 (D. Idaho May 25, 2006), the United States appealed to the Ninth Circuit. The Ninth Circuit affirmed the result in *US v. Otter*, 270 Fed.Appx. 568, 2008 WL 731048 (C.A.9 (Idaho March 2008)). On July 1, 2008, the parties settled. The official news release can be found at:

http://gov.idaho.gov/mediacenter/press/pr2008/prjul08/pr_031.html

401 Certification in Sand Creek Byway Contested Case Proceeding.

Two members of the ENR Section teamed up in a recent administrative proceeding. ENR Section Chairman Murray D. Feldman, representing the Idaho Transportation Department, and DAG Courtney E. Beebe, representing the Dept. of Environmental Quality, defended the DEQ's 401 Certification

(Clean Water Act) of ITD's Sand Creek Byway Project from a petition filed by the Association of Concerned Sandpoint Businesses. See the ACSB v. DEQ and ITD (Docket No. 0102-07-01) decision at:

http://www.deq.idaho.gov/about/board/precedential_orders.cfm

Northern Idaho Adjudication Begins.

On July 8, 2008, the ENR Section Member Garrick Baxter of the Idaho Attorney General's Office petitioned the Northern Idaho Adjudication District Court (NIA) to begin cataloging and confirming all surface and ground water rights in the Idaho panhandle. For more information about the NIA, go to:

http://www.deq.idaho.gov/about/board/precedential_orders.cfm

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New ENR Section Website

Check out the new ENR Section Website at <http://www2.state.id.us/isb/sec/enr/enr.htm>. The website was recently reorganized and updated thanks to help from our section members and the Idaho State Bar. On the website is a schedule of the ENR Section Lunch CLE's and CLE materials, as well as a list of other events, and Meeting Minutes.

New to the website is a comprehensive list of links. Please see the "Legal

Resources" heading and scroll through links to state, local and national websites containing commonly used Environmental and Natural Resource legal resources. Thanks to all the members of our section who shared links, and if you have more to contribute, please email your link or the information you would like posted to Courtney E. Beebe at courtney.beebe@deq.idaho.gov.

Cases and Publications of the Quarter

Exxon Shipping Co v. Baker,

128 S. Ct. 2605 (Jun. 25, 2008). This case considers the application of punitive damages under the Clean Water Act in regards to the 1989 Exxon Valdez oil spill in the Pacific Ocean, off the coast of Alaska. See also, the Ninth Circuit Opinion of Exxon Shipping Co v. Baker, 490 F.3d 1066 (9th Cir. 2007).

Defenders of Wildlife, et al, v. Hall, et al,

2008 WL 2780917 (D.Mont.) A federal judge in Montana granted a preliminary injunction on July 18, 2008, in favor of the plaintiffs, concluding that it is more likely than not that the Defenders of Wildlife, et al, will prevail on their challenge to the removal of northern Rocky Mountain grey wolves from the Endangered Species list.

Law Review Publication:

ENR Section Vice-Chairwoman Judith Braver has expanded her June/July 2007 Advocate article on global warming into a law review article. The Idaho Law Review will publish Thinking Globally, Acting Locally: the Role of Local Government in Minimizing Greenhouse Gas Emissions from New Development, authored by Judith Braver and Matthew Vespa of the Center for Biological Diversity. Look for it in 44 Id. L. Rev. 589 (2008).

Lands Council v. McNair,

---F.3d---, 2008 WL 2640001 (July 2, 2008): Erika Malmen, ENR Secretary/Treasurer, brings to the attention of the ENR Section this case, involving a challenge to a North Idaho national forest management project and timber sale. In McNair, the 9th Circuit Court of Appeals issued an en banc decision overruling its previous holding in Ecology Center, Inc. v. Austin, 430 F.3d 1057 (9th Cir. 2005), cert. denied, Mineral County v. Ecology Center, Inc., ---U.S.---, 127 S.Ct. 931 (2007). In overruling Ecology Center, the Court noted that it had made three clear errors there. The first error was the Court's overbroad reading of the holding in Lands Council v. Powell, 379 F.3d 738 (9th Cir. 2004), amended by 395 F.3d 1019 (9th Cir. 2005) upon which Ecology Center relied. Second was that it had created a requirement not found in any relevant statute or regulation. Finally, the Ninth Circuit found that it had defied well-established law concerning the degree of deference owed to agencies under the APA's arbitrary and capricious standard of review. "In essence, Lands Council asks this court to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding

wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty," Circuit Judge Milan D. Smith Jr. wrote for the court, in a ruling upholding an earlier decision by U.S. District Judge Edward Lodge. "Lands Council's arguments illustrate how, in recent years, our environmental jurisprudence has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role." A link to the opinion may be found at: [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0E18FFA971562D518825747A006409F7/\\$file/0735000.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/0E18FFA971562D518825747A006409F7/$file/0735000.pdf?openelement)

Southeast Alaska Conservation Council et al. v. U.S. Army Corps of Engineers et al.,

486 F.3d 638 (9th Cir. 2007): Ms. Malmen also shares this case with the ENR Section, noting that on June 27, 2008, the Supreme Court of the United States issued an order granting certiorari review of this 9th Circuit's Opinion. At issue in this case is a Clean Water Act section 404 permit issued by the U.S. Army Corps of Engineers ("Corps") to Coeur Alaska, Inc. for disposal of tailings in a small lake impoundment at its Kensington Gold Project mine in southeastern Alaska. The Corps issued the CWA section 404 permit pursuant to the joint EPA/Corps 2002 regulations defining fill discharge to include tailings, slurry, and other mine material that changes the bottom elevation of a body of water. The Alaska federal district court affirmed the CWA section 404 permit, but the 9th Circuit reversed, ruling that such discharges are nonetheless prohibited by New Source Performance Standards administered by EPA for the CWA section 402 permit program, which strictly limit discharge of process wastewater from gold mine and other mill sources. The Supreme Court's ruling on the merits, expected as soon as next spring, will be of general interest in interpretation and ongoing administration of the section 404 and 402 programs under the Clean Water Act.

DO YOU HAVE SOMETHING TO SUBMIT?

If you would like to include an item in the upcoming newsletter, please contact Courtney E. Beebe at courtney.beebe@deq.idaho.gov

Did You Know ?

Did you know that the EPA has a Criminal Investigation Division (CID) located here in Idaho?

Two special agents are assigned to Idaho and they are located here in Boise. The agents are fully authorized law enforcement agents empowered to enforce environmental laws under 18 USC 3063. EPA-CID Special Agents investigate negligent, knowing, or willful violations of federal environmental laws, and these crimes are prosecuted by the Environmental Crimes Section of the Department of Justice and the US Attorney's Office. Check out the criminal element at:

<http://www.epa.gov/oecaerth/criminal/investigations/environmentalcrime.html>

Did you know that settlement discussions and consent order negotiations in civil and administrative proceedings with Federal or State of Idaho agencies maybe admissible evidence in federal and state criminal and civil proceedings for purposes other than liability for, invalidity of, or the amount of the claim?

At the recent Federal Bar Association Environmental Law CLE, attorney Larry Westerberg noted that Federal Rule of Evidence 408, and the similarly phrased Idaho Rule of Evidence 408, may allow settlement discussions and consent order negotiations in civil and administrative proceedings to be admitted in criminal cases, and vice versa. See, *United States v. Technic Services, Inc.*, 314 Fed.3d 1031, 1045 (9th Cir. 2002) and *Rhoads v. Avon Products, Inc.*, 504 F.3d 1151 (9th Cir 2007).

Did you know that the Idaho Administrative Procedures Act (I.C. § 67-5250) requires State of Idaho agencies to maintain an index of written final orders it intends to rely on as precedent?

These orders can be found on the agency websites, or by calling the Board for the state agency.

Did you know that universal waste "handlers" do not need a RCRA Permit?

Check out 40 CFR 270.1(c) and discover that permits for the treatment, storage or disposal of hazardous waste requires a permit. However, "universal waste handlers," as defined by 40 CFR 273, do not need such a permit under 40 CFR 270.2(c)(vii). Small quantity handlers are persons who "handle" less than 11,000 pounds, and large quantity handlers handle over 11,000 pounds of universal waste. Is your client a universal waste handler, transporter or generator?

Did you know that the EPA has a Free Online Library System?

EPA's online library is the most comprehensive listing of and index to tens of thousands of EPA published documents. <http://www.epa.gov/libraries/ols.htm>. The library is located in Denver, CO, and a staff of six librarians can help you find any publication you are looking for.

Did you know that under Title 11, Chapter 3, Subchapter IV, Section 362(b)(4), of the bankruptcy code, the filing of a bankruptcy petition does not stay actions by a governmental unit to enforce such governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment?

Thus, if a state or federal agency files for a preliminary injunction under I.R.C.P. 65(c) or (b) exercising its police and regulatory powers, bankruptcy will not stay the issuance of the injunction.

Idaho Environmental and Natural Resource News

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Crop Burning Program Expected to Begin September 2, 2008.

The new DEQ Crop Burning Program discussed by DAG Lisa Kronberg during the ENR Section February Lunch CLE is expected to begin as planned. On Friday, August 1, 2008, the EPA approved the revised Idaho SIP (State Implementation Plan). A copy of the Federal Register Document approving the SIP is located at:

<http://www.epa.gov/EPA-AIR/2008/August/Day-01/>.

Registration for the program and information can be found at:

http://www.deq.idaho.gov/air/prog_issues/burning/crop_residue_burning.cfm

Extracurricular Activities

Historical Art

The Bureau of Reclamation has paintings, photographs, and oral histories depicting construction and maintenance of irrigation projects in the west. These beautiful items can really spruce up an office. See the galleries at: <http://www.usbr.gov/history/overview.html>

U of I Extension Office launches new "Idaho Landscape and Garden" website.

Can't keep those billbugs out of your lawn? Looking for ways to grow tomatoes in Bonner County? Always wanted to be referred to as a "Master Gardener"? U of I Extension Offices can help. See the new site at: <http://www.extension.uidaho.edu/idahogardens/>. U of I extension offices also offer other services, such as agricultural research results, youth programs, conservation information.

Book a Month Reading Challenge

Environmental and Natural Resource lawyers occasionally have a chance to read something besides Environmental Impact Statements and CFRs. This quarter bone up on your history with these selections:

Irrigated Eden: The Making of an Agricultural Landscape in the American West

by Mark Fiege and William Cronon, Pub. Aug 2000.

Innovative study of irrigation in southern Idaho's Snake River Valley and the resulting "baffling ecology."

American Earth: Environmental Writing Since Thoreau

by Bill McKibben, Pub. 2008.

A collection of speeches, essays and poetry from Americans over the last two centuries. Great for finding those quotes you always wanted to make your briefs more interesting.

Theodore Rex

by Edmund Morris, Pub Nov. 2001.

Comprehensive biography of President Theodore Roosevelt which chronicles his efforts to conserve millions of acres of wilderness in the American West.

Read something recently that got you thinking? Want to share a classic title with the ENR Section members? Email your suggested fiction or non-fiction book title to Courtney E. Beebe at courtney.beebe@deq.idaho.gov.

Section Happenings

Lunch CLE September 17, 2008:

"Greenhouse Gas Monitoring Report," with Robert Wilkosz, DEQ Air Program, at the Idaho State Bar, 525 Jefferson Street, Boise, ID 83702, or call in at (208) 334-4500. Good for .5 CLE Credits. *TENTATIVE*

ENR Section Elections

It's that time of year! ENR Section Officers and At-Large Council Members nominations are underway. The Section is receiving nominations for all positions until elections occur in September 2008 by email. In particular, there are at large council positions remaining without any nominations! Contact our Secretary/Treasurer Eric Malmen if you are interested in serving the ENR Section!

ENR Section Sponsors May 2009 Advocate Issue

Reminder that the ENR Section is sponsoring the May 2009 Advocate Issue. If you would like to participate by submitting an article or an idea for an article, please let the ENR Section Chair or Vice Chair know

by email.

Also, there has been discussion of bringing back the Photograph Contest, where ISB members will submit photographs for the ENR Section May 2009 Advocate Issue and the winning photograph is placed on the cover. Get clicking!

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