

ISB ENVIRONMENT & NATURAL RESOURCES SECTION

Spring - Summer 2009 Newsletter

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Website Featured Link

The ENR Section Website has a comprehensive list of links to with information on environmental and natural resources law, cases, and policies. This month's featured link is the Idaho Department of Lands Fire Management Bureau. At this site, you can access burn ban and wildfire information. <http://www.idl.idaho.gov/bureau/firemgt.htm>

Idaho Environmental and Natural Resource News

404 Permit for ITD Sand Creek Byway Project Upheld

NICAN v. U.S. Army Corps of Engineers, et al, Docket No. CV 08-181-N-EJL (Dist. Idaho), Memorandum Order, April 21, 2009. Decision regarding 404 Permit issued by the Walla Walla Region of the Army Corps of Engineers regarding the Sand Creek Byway Project, undertaken by the Idaho Transportation Department, in Sandpoint, Idaho. Judge Lodge granted the defendant's motion for summary judgment, and denied the plaintiff's motion for summary judgment, concluding that the Army Corps decision document considered the relevant factors for the project, and adequately explained the Army Corps decision. The court also concluded that the Army Corps complied with applicable guidelines and regulations and explored alternatives to the proposed Sand Creek Byway Plan.

NEPA Compliance Relevant to Defining the Duty of Ordinary Care in Tort Action

Adams v. United States of America, Docket No. CV 03-0049-E-BLW, Memorandum Decision and Order, April 16, 2009. In this case, Judge Winmill issued an order providing that NEPA, a federal statute, may be relevant to defining the duty of ordinary care in a tort action under the Federal Tort Claims Act and state law. "[T]he issue of [BLM's] NEPA compliance could be relevant to BLM's liability" in a FTCA case. Order at 5. Nonetheless, the "BLM will not be found negligent for violating NEPA. Even if the BLM violated NEPA, that means nothing by itself. The BLM's disregard of NEPA only becomes relevant to the degree that it shows that the BLM violated the duty of ordinary care set by Idaho law." Order at 4.

Cory King Found Guilty of Four Safe Drinking Water Act Violations, One False Statement

On April 30, 2009, in Pocatello, ID, Cory

King, owner and operator of Double C Farms cattle feedlot in Burley, Idaho, was found guilty of four violations of the Safe Drinking Water Act for injecting waste into the Snake River Aquifer without a permit. According to the indictment, King installed backflow prevention devices backwards on his facilities' three irrigation wells which allowed the facility to drain the wastewater retention pond into the Snake River Aquifer. The US Attorney's Office prosecuted the case with the assistance of EPA and the Idaho Department of Environmental Quality. King faces a possible fourteen (14) years in prison and thousand dollar fine.

CIEDRA Returns With Fewer Roadblocks to Passage

Representative Walt Minnick is now a co-sponsor of the Central Idaho Economic

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This photograph of wild flowers was taken at Hells Canyon by Courtney Beebe

Idaho Environmental and Natural Resource News

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Development and Recreation Act with the bill's author Representative Mike Simpson. Both Representatives, along with long time supporter Senator Mike Crapo, have reintroduced the CIEDRA legislation under the belief that the current U.S. Congress will be more receptive to passing the legislation. Track the legislation as events unfold at Representative Simpson's website: <http://www.house.gov/simpson/>.

Southeast Idaho Energy Permit to Construct Coal Plant in Power County Issued, Challenged by Multiple Groups

SIE applied for, and received, a DEQ permit to construct a facility to gasify coal and petcoke to produce nitrogenous fertilizers and elemental sulfur in Power County, Idaho. However, the Sierra Club, the Idaho Conservation League, and the Shoshone Bannock Tribes and filed a petition to initiate a contested case with the Idaho Board of Environmental Quality. For the time being, the parties have agreed to a stay of the petition to negotiate a resolution.

Idaho Roadless Rule Challenged in Federal Court

In January 2009, the Sierra Club and Earthjustice, as well as a coalition of other national and regional conservation groups, challenged Idaho's Roadless Rule in Federal District Court, alleging that the rule unlawfully impacts endangered and threatened species, and authorizes activities in previously protected areas. You can track the case at: www.earthjustice.org.

"Oust" Trial Underway

In the case of Adams, et. al, v. United States, CV 4:03-cv-00049-BLW, the plaintiffs, numbering over one hundred Idaho farmers, allege that the BLM's use of the herbicide "oust" to eradicate cheet grass damaged crops. According to Idaho Department of Agriculture tests, the DuPont-manufactured herbicide had drifted, via strong winds and dry, fire-charred soil, onto the nearby farms and damaged crops. The Plaintiff's allege that over 100,000 acres in eleven counties were damaged, resulting in millions of dollars in lost revenue. The BLM suspended its use of "oust" as a tool of fighting cheet grass.

Obama Administration Rule Changes

Hold on to your hats and seats because the Obama Administration is changing environmental and natural resource regulations at a rapid pace.

Agricultural Pesticide Restriction Proposed to Protect Steelhead and Salmon

The NMFS has asked EPA to restrict the use of three pesticides that threaten the survival of Pacific steelhead and salmon. The three pesticides are carbaryl, carbofuran, and methomyl, which can kill not only the fish, but the insects that the fish rely on for a food source. The EPA has one year to implement restrictions. Find out more at: <http://www.epa.gov/espp/litstatus/effects/comments-2nd-draft.pdf>.

EPA Proposed Endangerment Finding on Greenhouse Gases

The EPA Administrator Lisa Jackson is proposing to find that current and projected amounts of greenhouse gases in the atmosphere threaten the public health and welfare of future generations. Additionally, the EPA is proposing to find that combined emissions from vehicles contribute to concentrations of greenhouse gases in the atmosphere and therefore climate change. New regulations to follow...Read more at: <http://epa.gov/climatechange/endangerment.html>.

Obama Administration Throws Out Bush Administration ESA Consultation Rules

The Interior and Commerce Departments are reinstating requirements for government agencies to consult with federal biologists before undertaking projects that might threaten plants and animals. The move overturns Bush administration rules finalized last December and returns to regulations that have governed the management of federal agencies since 1996. Read more at the Department of Interior website: www.doi.gov.

Obama Administration Seeks to Overturn Bush Administration Mining Rule in Court

Secretary of the Interior Ken Salazar took steps to overturn a Bush Administration last minute rule, the so called "buffer zone rule," that allows for mountaintop mining waste to be dumped near streams. Justice Department lawyers said in court filings that the rule should be vacated because the U.S. Fish and Wildlife Service had not been consulted about its effect on threatened and endangered species, and requested remand further negotiated rulemaking will provide both parties the chance to avoid further lawsuits over the issue. In March, the Environmental Protection Agency announced it was cracking down on mountaintop removal by taking a closer look at 150 to 200 permits pending before the U.S. Army Corps of Engineers.

Superfund Tax Presumed to Return, Appears in Obama Administration Budget

Until 1996, a collection of three excise taxes levied on petroleum and chemical companies and a special income tax on corporate profits provided the primary source of revenue for EPA's Superfund branch to clean up so-called "orphan sites." Congress last reauthorized the Superfund Tax in 1990, it expired at the end of 1995, and, as a result, the Super "fund" dwindled to essentially nothing by 2003. The Obama Administration has proposed a budget item that, starting in fiscal year 2011, would reinstate the Superfund Tax. Two bills to reauthorize the Tax were recently introduced in the House of Representatives, and a companion bill in the Senate is likely to follow.

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 Idaho Administrative Procedures Act requires a party to file a petition for review within twenty eight (28) days of issuance, not service, of an agency's final order? Occasionally in the Idaho Rules for Administrative Procedures (IDAPA) that apply to individual agencies, a rule will state that a party must file a petition for review of a final order to district court within twenty eight (28) days of service. However, this holdover is inconsistent with I.C. § 67-5273, which states that "A petition for judicial review of a final order must be filed within twenty eight (28) days of the issuance of the final order . . . or if reconsideration is sought, within twenty-eight (28) days after the decision there on." See also the case of Erickson v. Idaho Board of Registration of Professional Engineers and Professional Land Surveyors, 2009 WL 540651, the Idaho Supreme Court declared that a Board's decision on reconsideration of its final order is not a "final order" and must be appealed within a different time frame.

CLEs & Section Happenings

ENR Section Lunch CLE Legislative Update with Senator Kate Kelly – May 27, 2009,

Senator Kate Kelly will present her annual CLE on environmental and natural resource legislation considered by the Idaho Legislature this year. The materials for the CLE will be posted on the ENR Section Website.

ENR Section May 2009 Advocate

The May 2009 Advocate, sponsored by the ENR Section, was a success! This great issue contains articles regarding the Endangered Species Act, Idaho Crop Burning Rules, the Clean Water Act and NPDES Permit Issues, and the 2009 American Recovery and Reinvestment Act. Also, the winning photo was submitted by Liz Donick and is on the cover. Thanks to all who submitted. In this newsletter, see some other submissions, including a self portrait on the Bruneau River submitted by Kahle Becker, and a photo of wild flowers at Hells Canyon by Courtney Beebe.

Cases and Publications of the Quarter

BNSF Railroad v. United States, Docket Nos. 07-1601; 07-1607.

In a momentous 8-1 decision with broad implications for cleanups at the nation's hazardous waste sites, the United States Supreme Court held on May 4, 2009: (1) that EPA cannot hold parties liable under CERCLA as "arrangers" for disposal unless they "intended" their wastes to be disposed of; and, (2) that liable parties at a multi-party Superfund site are not jointly and severally liable if a "reasonable basis" exists to apportion their liability. The decision, authored by Justice Stevens, holds that where a portion of the liability at a Superfund rests with defunct or insolvent parties, the government will have pick up those parties' "orphan" shares -- in this case 91% of the liability, which was attributed to a defunct chemical distributor.

Carlsbad Technology v. HIF Bio, Docket No. 07-1437.

The question presented in this case was "Whether a federal court order remanding a case to state court after declining to exercise supplemental jurisdiction is subject to appellate review." The court concluded that "when a district court remands claims

to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§1447(c) and (d)." Justice Clarence Thomas wrote for the majority opinion.

Arthur Anderson v. Carlisle, Docket No. 08-146.

This case presented two questions: 1) Does Section 16(a)(1) of the Federal Arbitration Act confer appellate jurisdiction over an appeal from a motion to stay proceedings under Section 3 of the FAA when appellants are non-signatories to the arbitration agreement; and 2) Does Section 3 of the Federal Arbitration Act allow a federal district court to stay proceedings when non-signatories to an arbitration agreement can attempt to enforce the arbitration agreement under contract and agency law? SCOTUS answered both questions yes, holding that "the Sixth Circuit had jurisdiction to review the denial of petitioners' request for a §3 stay and that a litigant who was not a party to the relevant arbitration agreement may invoke §3 if the relevant state contract law allows him to enforce the agreement."

Book a Month Reading Challenge

Environmental and Natural Resource lawyers enjoy a good summer read as much as everyone else, but its' really time to get outside and take advantage of Idaho's environment. This summer make your way through the rediscover what is outside your office window with the help of these guides:

Hike Lewis and Clark's Idaho

by Mary Aegerter and Steve Russell, University of Idaho Press (2002)

Idaho: A Climbing Guide

by Tom Lopez, Mountaineers Books, (September 2002)

Idaho Discovered

by Kirk Anderson, Stoecklein Publishing (2000)

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.

ENR Section Website

Check out the 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.



This photograph of the Bruneau River was taken by Kale Becker

The ENR Section produces quarterly newsletters to keep members apprised of upcoming events. Our next newsletter is scheduled for release in August 2009. 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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