

ISB ENVIRONMENT & NATURAL RESOURCES SECTION

Summer - Fall 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 University of Idaho Extension Office. You can find information regarding gardening, farm and ranch management, and animal science. <http://www.extension.uidaho.edu/>

Idaho Environmental and Natural Resource News

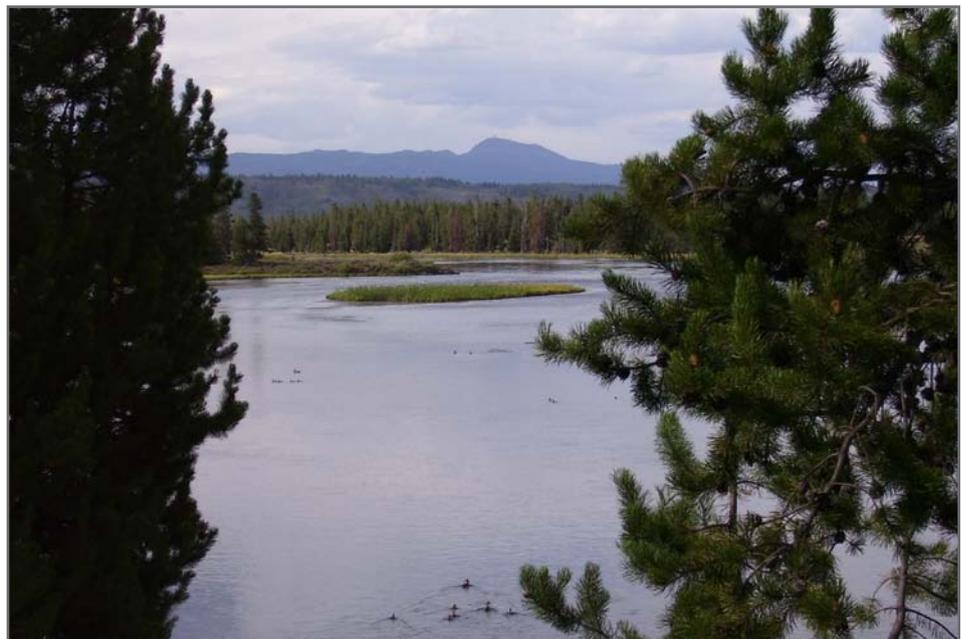
Salmon Recovery

The federal action agencies, NOAA and the Northwest Power and Conservation Council have produced draft recommendations for research, monitoring and evaluation of salmon and steelhead populations in the Columbia Basin. The agencies will conduct a series of stakeholder workshops over the next several months to prioritize RM&E requirements for the 2008 FCRPS BiOp.

Lake Fernan Road Project

The Center for Justice and Gonzaga Environmental Law Clinic sent a letter

to the Federal Highway Administration giving notice of intent to sue the FHA and its contractor for Clean Water Act violations at the 404 permitted Fernan Lake Road Project north of Coeur d'Alene, Idaho. These groups represent the Idaho Conservation League and the Kootenai Environmental Alliance, and allege that stormwater run off from the project has severely impacted the water quality of Fernan Lake. Under the citizen suit provisions of the CWA, the FHA has 60 days from receipt of the letter to correct the problems or face a lawsuit for enforcement of the 404 permit and 401 certification conditions.



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.

Cases and Publications of the Quarter

Casitas Municipal Water District v. United States

The waster district and the government entered into an agreement in 1956 to build the Ventura River Project, which provides water to Ventura County in exchange for the "perpetual right to use all water" made available through the project. In 2003, the Bureau of Reclamation advised the water district to provide more flow through the project to assist migrating, endangered steelhead trout. The water district released the water and built a fish ladder, but simultaneously sued the government alleging a taking in violation of the Fifth Amendment. The lower court found for the government, but on appeal the Ninth Circuit reversed, stating that "Casitas will never get the water back." The Solicitor General has declined to file a petition for certiorari, and critics of the decision to allow the opinion to stand believe that confusion regarding the application of the takings clause to water rights will continue as a result.

In re MTBE S.D.N.Y, Case No. 00 MDL 1898, (July 14, 2009)

One of the important questions left unanswered by the U.S. Supreme Court's opinion in *BNSF v. US*, Docket Nos. 07-1601; 07-1607, is the quantum of proof necessary for apportionment of liability in a Superfund case. In a decision issued last week in *In re MTBE*, S.D.N.Y. Case No. 00 MDL 1898, Docket No. 352 (July 14, 2009), a New York District Judge held that: (1) a fact finder may rely on the "available evidence" in apportioning liability among joint tortfeasors; and (2) the burden of production necessary to support a showing of divisibility is "low."

In Frontier Communications Corp. v. Barrett Paving Materials

A federal district court in Maine appears to have earned the distinction of being the first to address the "arranger liability" portion of the Supreme Court's opinion in *BNSF v. US*. On a motion to dismiss the court held that plaintiffs had alleged facts that were sufficient to raise a material issue as to whether an operator of a rail yard "intended" to dispose of waste down a sewer which reached an adjacent waterway. It therefore denied the defendants' motion.

In National Cotton Council v. EPA

The Sixth Circuit Court of Appeals recently granted the U.S. Environmental Protection Agency's (EPA) request for a two-year stay of the court's January 7, 2009 decision which made applications of aquatic pesticides subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements. The stay gives EPA, and the states which are delegated the authority to enforce the NPDES program, until April 9, 2011 to develop, propose and issue NPDES general permits for pesticide applications covered by the Sixth Circuit's decision. The stay also provides a temporary reprieve for hundreds of thousands of regulated entities nationwide, including farms and timberlands.

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

The US Supreme Court held that the Army Corps of Engineers, rather than EPA, has jurisdiction to issue permits under the Clean Water Act for the discharge of wastes into navigable waters. The decision: 1) affirms that discharges allowed by the Corps under 404 "do not require permits from the EPA" under 402 of the CWA; and 2) sustains the Corps' and EPA's reading of the relationship between

those two sections of the CWA, despite the fact that the interpretation was based on internal memoranda rather than formal rulemaking or regulations that would have required Chevron deference.

CLEs & Section Happenings

After all the work on the Advocate, we are taking a summer break. There are no CLEs planned at this time, but look for an announcement for the September 2009, lunch CLE and the August 2009 ENR Section Business meeting.

Book a Month Reading Challenge

Environmental and Natural Resource lawyers can escape the heat and relax with one of these big summer reads:

[The River of the Mother of God: and Other Essays by Aldo Leopold](#)
University of Wisconsin Press, 400 pages (1992).

[Nature Writings. The Story of My Boyhood and Youth; My First Summer in the Sierra; The Mountains of California; Stickeen; Essays](#)
by John Muir, Library of America, 989 pages (1997).

[Henry David Thoreau: Collected Essays](#)
Library of America, 703 pages (2001)

Did You Know ?

*Did you know that the Supreme Court of the United States overturned the Ninth Circuit this year in fifteen of sixteen cases, four of which concerned environmental and natural resource issues? SCOTUS reversed the Ninth Circuit in the cases of *Coeur Alaska Inc. v. Southeast Alaska Conservation Council*, *BNSF Railroad v. U.S.*, *Summers v. Earth Island Institute*, and *Winter v. Earth Island Defense Council*.

*Did you know newly appointed Justice Sonia Sotomayer wrote the opinion in *Riverkeeper v. EPA*, concluding "that the Clean Water Act does not allow cost to be used when deciding what technology would best minimize environmental impacts. The Clean Water Act requires remedies that "reflect the best technology available for minimizing adverse environmental impact." This opinion was overturned by SCOTUS in *Entergy Corp. v. EPA*; *PSEG Fossil, LLC v. Riverkeeper, Inc.*; *Utility Water Act Group v. Riverkeeper*.

ENR Section Website

Check out the ENR Section Website at http://isb.idaho.gov/member_services/sections/enr/enr.html. 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.



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