

ISB ENVIRONMENT & NATURAL RESOURCES SECTION

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Website Featured Link

The ENR Section Website is up and running with a comprehensive list of links to with information on environmental and natural resources law, cases, and policies. This month's featured link is the National Oceanic and Atmospheric Administration. The most up to date weather forecasts and precipitation readings to get you through the winter:

<http://www.noaa.gov/>

Idaho Environmental and Natural Resource News

Idaho Roadless Rule Completed

On August 29, 2008, Lt. Governor Jim Risch released the Final Environmental Impact Statement for the Idaho Roadless Petition he introduced as Governor in October 2006. Idaho's Roadless Petition is now final and categorizes more than 250 roadless areas and creates five management themes that provide a mixed level of protection for land, timber development, and recreational use. On October 16, 2008, the US Forest Service completed its plan for managing 9.3 million acres of roadless national forest land in Idaho. The plan establishes 250 roadless areas, but instead of placing 609,000 acres of roadless land into general forest management as Idaho's Petition requested, the U.S. Forest Service will place 405,000 acres into general forest service management.

Find the Roadless Rule at: <http://roadless.fs.fed.us/documents/rule/index.shtml>

Find a copy of Idaho's Final Petition at: <http://gov.idaho.gov/roadless/petition.html>

Find a copy of the US Forest Service Decision at: <http://roadless.fs.fed.us/idaho.shtml>

There is a division in case law interpreting the roadless rule. In *State of Wyoming v. USDA*, 2008 WL 3397503, (D. Wyo. 2008), the State of Wyoming challenged a final rule promulgated by US Department of

Agriculture and US Forest Service (USFS), that prohibited road construction or reconstruction and timber harvesting in inventoried roadless areas, alleging violation of National Environmental Policy Act (NEPA), Wilderness Act, and Administrative Procedure Act (APA), and seeking declaratory and injunctive relief. The District Court issued a permanent injunction against the final rule's application.

This ruling conflicts with that of *California ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F.Supp.2d 874 (N.D.Cal. 2006). In that case, states and environmental organizations brought an action against US Forest Service (USFS), alleging that the agency issued a State Petitions Rule pertaining to National Forest land without following proper statutory procedures. Parties cross-moved for summary judgment and the District Court granted the motion of the plaintiffs.

Abner J. Schultz Sentenced for Clean Water Act Violation in Salmon, ID.

US District Judge B. Lynn Winmill sentenced Mr. Schultz to six months of home detention and three years probation, as well as a \$30,000 fine for violating the Clean Water Act. Mr. Schultz violated the CWA by discharging 300 cubic yards dredge and fill material and 400 linear feet of pipe into the Salmon River, near the community of North Fork, Idaho. The discharge destroyed trout, steelhead and salmon breeding and incubation

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grounds. The case was prosecuted by US DOJ attorneys and investigated by EPA-CID agents. See the news release at:

<http://www.epa.gov/compliance/resources/cases/criminal/highlights/2008/schultz-abner-09-08-08.pdf>

Wolf Delisting Litigation Ends in Remand; USFWS Reopens 2007 Proposal for Public Comment

On July 8, 2008, in the case of *Defenders of Wildlife, et al, v. Hall, et al*, 2008 WL 2780917 (D. Mont) a federal judge in Montana granted a preliminary injunction 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. On October 14, 2008, the same judge granted a motion by the US Fish and Wildlife Service to remand the case so that the Northern Rockies Wolves could be placed back on the Endangered

Species list.

On October 24, 2008, the US Fish and Wildlife Service reopened its 2007 proposal to de-list the wolves for public comment. Comments will be received until November 28, 2008, at www.fws.gov.

The Idaho Strategic Energy Alliance

In 2007, Governor Otter established the Idaho 25x25 Renewable Energy Council. The mandate was assigned to the Office of Energy Resources ("OER") and was focused primarily upon using agricultural and forestry resources to meet 25% of the state's energy needs by 2025. The OER expanded this initial concept to include sustainable resources, energy efficiency and conservation, and energy development in accordance with the Idaho Energy Plan and changed the name to the Idaho Strategic Energy Alliance ("Alliance").

The purpose of the Alliance is to enable the development of a sound energy portfolio for Idaho that includes diverse energy resources and

production methods, that provides the highest value to the citizens of Idaho, that ensures quality stewardship of environmental resources, and that functions as an effective, secure, and stable energy system. The Alliance is composed of three tiers. At the top is the Governor's Council, which is led by Paul Kjellander, the Director of OER. The Governor's Council is supported by a Board of Directors comprised of representatives from Idaho stakeholders and industry experts. Supporting the Board of Directors are "Task Force" working groups, which are populated with well respected technical experts.

Originally, the Alliance had nine Task Forces: wind, geothermal, hydropower, conservation/energy efficiency, carbon issues, economics/financial, biofuels, biogas, and forestry. At the September meeting of the Board of Directors, the Alliance added three new Task Forces: communications/outreach; solar; and transmission. Also in September,

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Cases and Publications of the Quarter

US Supreme Court to Hear 5 Environmental Cases, 3 from Ninth Circuit:

The Supreme Court of the United States will hear the following five environmental cases this term, and three of the cases are from the Ninth Circuit. Check out the On the Docket at: <http://otd.oyez.org/> for more detailed case summaries.

Winter v. Natural Resources Defense Council, 518 F.3d 658 (9th Cir 2007)

Environmental organizations, which were concerned that the Navy's use of high-intensity, mid-frequency active sonar in training exercises would cause serious harm to various species of marine mammals present in the Southern California waters, sought a preliminary injunction. The Central District of California granted the motion, imposing certain conditions

on the completion of the remaining eight of fourteen scheduled training exercises, and Navy appealed to the Ninth Circuit. The Ninth Circuit affirmed.

Summers v. Earth Island Institute, 490 F.3d 687 (9th Cir 2007)

The Supreme Court has agreed to decide whether environmental groups can sue to overturn an entire U.S. Forest Service regulation or if they are limited to suing to halt programs enacted under that regulation. In

2005, the U.S. District Court for the Eastern District of California issued a nationwide injunction against the Forest Service. And in August 2006, a three-judge panel on the Ninth Circuit

upheld the lower court's decision.

Coeur Alaska v. Southeast Alaska Conservation Council, 486 F.3d 638 (9th Cir. 2007)

This case was noted by Chairwoman Erika Malmen in the last Newsletter as of significance to those practicing in the areas of 404 Permits. The Supreme Court has agreed to decide whether the Army Corps of Engineers has the authority to issue permits

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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 Idaho ranks 13th in the nation for its wind power development potential, and is now 13th in the nation for states improving energy efficiency to respond to high prices, energy security and global warming? According to the Idaho Offices of Energy Resources and the American Council for an Energy Efficient Economy, Idaho has proven and available effective energy strategies, including building codes, transportation and land-use policies, utilities' efficiency programs, financial incentives and support for research. <http://www.energy.idaho.gov/>

Did you know...

that all public drinking water systems that have 15 connections, or serve at least 25 people more than 60 days out of the year are considered "public water systems" and are regulated by the Department of Environmental Quality under the Safe Drinking Water Act and IDAPA 58.01.08? Also, any drinking water system that meets the definition of a public water supply system under I.C. § 39-103(12) must submit plans and specifications for review and approval by DEQ as per I.C.

§ 39-118 before it can be built or significantly modified. http://www.deq.idaho.gov/water/prog_issues/drinking_water/overview.cfm

Did you know...

that the Common Interest Rule of I.R.E. 502 extends the attorney-client privilege to attorneys that represent separate government agencies? Thus, an attorney that represents one government agency and communicates with an attorney for another government agency to develop a policy or permit, or defend an agency action, may claim that the communications between the attorneys are privileged under I.R.E. 502. Courts have identified "[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter," United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir.1989). Most helpful to Ninth Circuit practitioners is that case of Modesto Irrigation District v. Gutierrez, 2007 WL 763370, 15 (E.D.Cal. 2007), where the Ninth Circuit established criteria for when the Common Interest Rule applies.

Cases and Publications of the Quarter

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for dumping dredge or fill dirt into waterways, without satisfying all of the pollution restrictions enforced by the Environmental Protection Agency.

Montana v. Wyoming, 128 S.Ct. 1332 (Mem 2008)

The State of Montana seeks leave to commence an original action to enforce its rights under the Yellowstone River Compact to obtain more water.

Eurodif S.A. v. U.S., 506 F.3d 1051 (C.A. Fed, 2007)

Foreign uranium enrichers filed suit seeking review of antidumping and countervailing duty determinations of Department of Commerce for low enriched uranium (LEU) used in fuel rods. The United States Court of International Trade, Donald C. Pogue, J., 259 F.Supp.2d 1310, vacated and remanded. Commerce upheld determinations. Enrichers appealed. The Court of International Trade, 281 F.Supp.2d 1334, affirmed in part and reversed in part. Further appeals were taken. The Court of Appeals, Prost, Circuit Judge, 411 F.3d 1355, affirmed in part and reversed in part. Rehearing was granted. The Court of Appeals, 423 F.3d 1275, reaffirmed its earlier opinion. Commerce made redetermination. Enrichers appealed. The Court of International Trade, 431 F.Supp.2d 1351, sustained Commerce's remand determination. Government and domestic enrichers appealed.

Extracurricular Activities

The Idaho Grape Growers and Wine Producers

Commission has launched a new website at <http://www.idahowines.org/> to provide information on the history of wine in Idaho, wineries and vineyards in your area, and a list of resources for picking a great local bottle. Take your palate one step further and explore obtaining your very own degree in enology and viticulture through the UC Davis On-line Certificate Program.

<http://wineserver.ucdavis.edu/>

Flagstone Pavers from BLM

If you like the look of flagstone patios and sidewalks, but do not like the price, the BLM Salable Mineral Free Use Permit may be for you. Call your local BLM office and obtain a permit that allows you to remove 1 ton of rock over thirty (30) days from a BLM quarry.

<http://www.blm.gov/id/st/en/prog/minerals.html>

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.

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, learn more about the Frank Church: River of No Return Wilderness, with these selections:

Fighting the Odds: The Life of Senator Frank Church

by Leroy Ashby and Ron Gramer, Pub. 1994.

Objective Biography of Senator Church's 24 year career.

Trails of the Frank Church: River of No Return

Wilderness

by Margaret Fuller, Pub. June 2003.

If it's a trail in Idaho, then Margaret Fuller of Weiser, Idaho has hiked and documented its terrain, including the vast Frank Church Wilderness.

Wilderness Forever Howard Zahniser and the Path to the Wilderness Act

by Mike Harvey and William Cronon, Pub. 2007.

History of the Wilderness Act that begat the Frank Church: River of No Return Wilderness in Idaho.

Section Happenings

ENR Section Sponsors May 2009 Advocate Issue

Reminder that the ENR Section is sponsoring the May 2009 Advocate Issue. Submissions will be due in March of 2009. 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!

ENR / IEF ANNUAL CLE January 28, 2009

Mark your calendars for the January 28, 2009, Crystal Ball Room, Hoff Bldg, Boise, ID. Planning is in the works, with a proposal for a multi-panel discussion regarding sustainable, multiple use of Lake Cascade and Thomas Sansonetti as a proposed lunch speaker. Contact ENR Chair Erika E. Malmen, Esq., if you would like to be involved.

ENR Mentor Program

In the past, the ENR Section has participated in mentoring students from the University of Idaho Environmental Law Society. The ELS has again expressed interest in meeting with members of the ENR Section for mentoring. Contact ENR Chair Erika E. Malmen, Esq., if you would like to be involved.

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Paul Kjellander reported to the Idaho Legislature and explained that the Task Forces were developing reports and recommendations that will work their way through the Governor's office and to the Legislature. In addition, the Conservation/Energy Efficiency and Biogas Task Forces are developing legislative proposals that will be submitted during the 2009 session. For more information on the Idaho Strategic Energy Alliance, visit http://www.energy.idaho.gov/idaho_strategic_energy_alliance/

Northern Idaho Adjudication Status

ENR Section member Laura Schroeder contributes this article regarding the status of the Northern Idaho Adjudication. The NIA remains in limbo while the Fifth Judicial District Court determines whether it is possible to defer adjudication of de minimus domestic and stock water uses under the McCarran Amendment. Pursuant to Idaho Code § 42-1406B(1), the State of Idaho petitioned the Fifth Judicial District Court of Idaho on July 8, 2008, to commence a general adjudication of the waters of Northern Idaho. However, at the commencement hearing held on August 28, 2008, the Coeur d'Alene Tribe, by special appearance, challenged the court's jurisdiction to determine whether the deferral of de minimus domestic and stock

water uses from the adjudication is consistent with the terms of the McCarran Amendment. Through the McCarran Amendment, the United States waives sovereign immunity and consents to be joined as a defendant in suits involving the comprehensive adjudication of the water rights within a particular river system.

In 2008, the Idaho Legislature amended the Water Code to provide for the deferral of the adjudication of de minimus domestic and stock water rights in this adjudication. The deferral was to be allowed only if the court determined that the de minimus rights could be deferred under the McCarran Amendment. While the United States entered into a stipulation with the State of Idaho regarding the procedures to be followed for the joinder and adjudication of the de minimus water rights prior to the filing of the petition to commence, in a post-commencement hearing memorandum, the United States requested the court to deny the State's petition because of jurisdictional concerns. Until this issue is resolved and a commencement order issued, the adjudication remains on hold. It is anticipated that the Fifth Judicial District Court of Idaho will rule on this matter within the next few weeks.

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.



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