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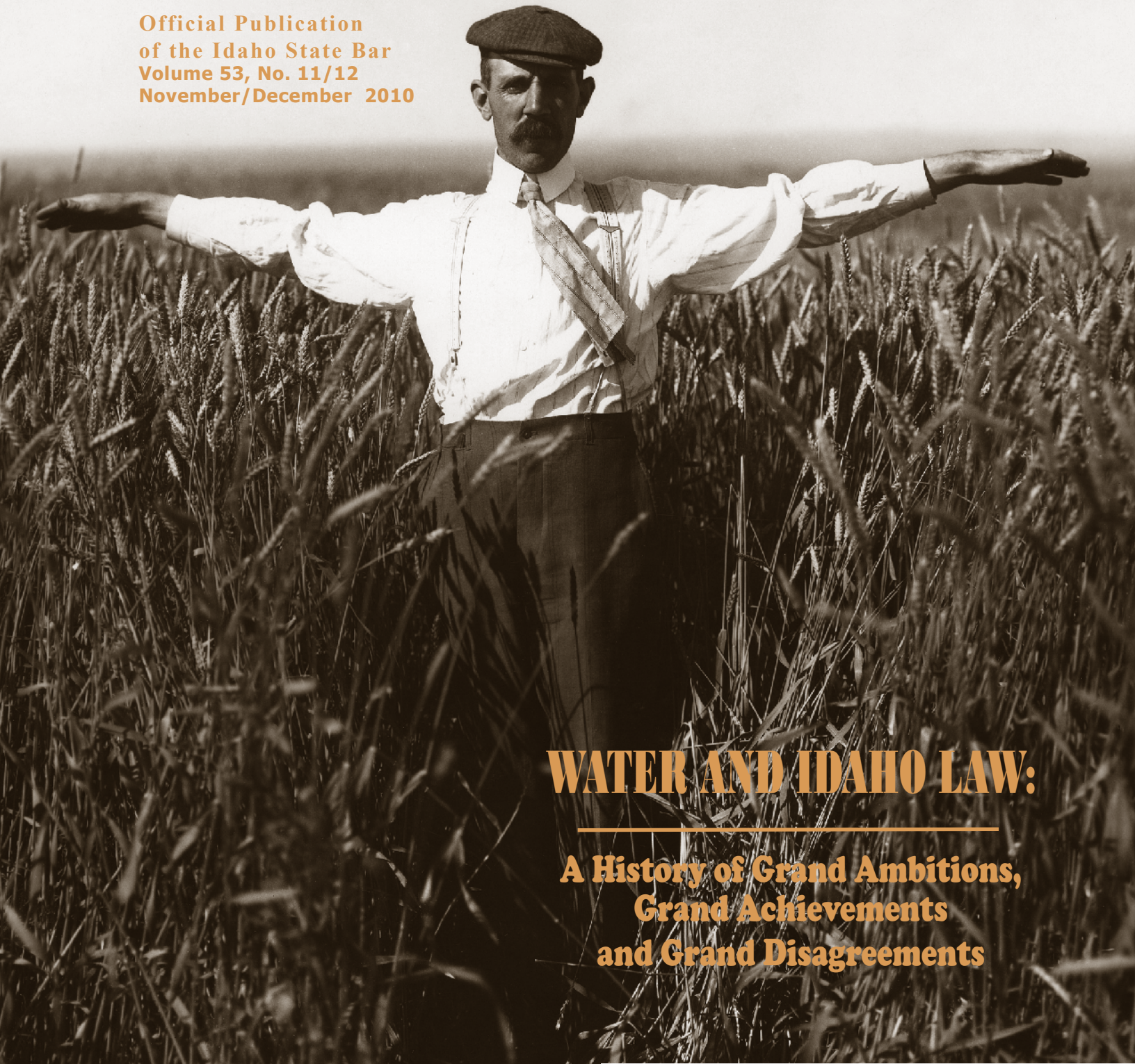

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53 (11/12), November/December 2010

Section Articles

Columns

News and Notices

On the Cover

A Twin Falls area man stands in a wheat field, showing its height. This photo comes from the Idaho State Historical Society's Clarence Bisbee collection. Bisbee was a prominent photographer in the Magic Valley since his arrival in 1906. His artistic images of the Twin Falls irrigation tract document the early development of the area and capture community growth as it occurred during the early years of the 20th century.

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Editors

Special thanks to the November/December editorial team: Sara M. Berry, Daniel Gordon, Tenielle Fordyce-Ruff, Brian Kane.

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Upcoming CLEs

November

November 9
Professionalism Issues Facing the Bench and Bar
Sponsored by Professionalism and Ethics Section
8:30 – 9:30 a.m. (MST) at the Idaho Law Center – Boise, ID
Webcast Statewide
1.0 CLE credit of which 1.0 will be ethics RAC

November 19
Headline News
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (PST) at the Coeur d'Alene Inn – Coeur d'Alene, ID
6.0 CLE credits of which 1.0 will be ethics

December

December 3
Afternoon of Diversity and Ethics
Sponsored by the Diversity Section
1:00 – 4:30 p.m. (MST) at the Idaho Law Center – Boise, ID
3.25 CLE credits of which 1.0 will be ethics

December 3
Headline News
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (MST) at the Hilton Garden Inn
in Idaho Falls, ID
6.0 CLE credits of which 1.0 will be ethics

December 7
Lunch and a CLE Replay
Sponsored by the Idaho Law Foundation
11:45 a.m. – 1:00 p.m. (MST) at the Law Office of Hopkins
Roden Crockett Hansen & Hoopes, PLLC – Idaho Falls, ID
1.0 CLE credit

December (continued)

December 10
Headline News
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (MST) at the Oxford Suites in Boise, ID
6.0 CLE credits of which 1.0 will be ethics

December 14
Lunch and a CLE Replay
Sponsored by the Idaho Law Foundation
11:45 a.m. – 1:00 p.m. (MST) at the Law Office of Hopkins
Roden Crockett Hansen & Hoopes, PLLC – Idaho Falls, ID
1.0 CLE credit of which 1.0 will be ethics RAC

December 16
CLE Blizzard: Program Replay
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:30 p.m. (MST) at THE FLICKS – Boise, ID
6.25 CLE credits of which 1.0 will be ethics

December 14
Lunch and a CLE Replay
Sponsored by the Idaho Law Foundation
11:45 a.m. – 1:00 p.m. (MST) at the Law Office of Hopkins
Roden Crockett Hansen & Hoopes, PLLC – Idaho Falls, ID
1.0 CLE credit

January

January 28
Courtroom Strategy in the 21st Century
Sponsored by the Idaho Law Foundation
9:00 a.m. – 3:00 p.m. at the Oxford Suites – Boise, ID
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IDAHO STATE BAR

President's Message

Lady Justice and the Sleep of the Just

James C. Meservy
President, Idaho State Bar
Board of Commissioners

For many, perhaps most, these are difficult times. Whether we believe life is "fair" or "just" is often based upon our reference point. Often that reference point is found in the circumstances of our youth. Values, opinions, experiences come from family — whether that be at mother's knee or, also in my case, by listening to my dad, grandfathers and uncles argue, discuss, and debate taxation, the role of government, and most other earthly endeavors.

In the law, the symbol of justice is Lady Justice. Wikipedia indicates that she is Justicia, depicting the Roman Goddess of Justice. Lady Justice is the equivalent of the Greek Goddess Dike, the daughter of Themis. The blindfolded Lady Justice represents a justice system that is even-handed; a system wherein justice, fairness and principles of equity are available to all regardless of position, power, money, etc. One would think all would agree with such a noble goal. As lawyers, professionals, the judicial branch of government, how are we doing? The answer to that question will likely bring some disagreement. While asking for your patience, I would like to provide one reference point — mine.

James C. Meservy

I grew up in Dietrich, in Lincoln County during the 1960s. Lincoln County life epitomized the meaning of country, rural, farm life. Our first farm was pretty small, only 40 acres. Grandpa Platz was a printer working for a local paper in Shoshone and later in Arco. Grandma Platz was about 5' tall and white-headed. She never had a driver's license and was tough as nails. Grandma and Grandpa Meservy lived close, farming as well. There truly was a cookie jar full of cookies only a couple of minutes away when young boys cut through the brush on a run.

I submitted my case to my parents, pleading for intervention and release from my inhumane bondage. Dad's response was "I guess you had better learn it" and "It's not going to hurt you any."

Mrs. Lavina O'Donnell was my first and second grade teacher. Both grades were taught in one room in the Dietrich School, which contained grades 1-12. Whether life was fair or not became an issue rather early on. For whatever reason, Mrs. O'Donnell required us, in either first or second grade, to memorize the 23rd Psalm. My parents were not church goers. I would estimate 25% of the community was Catholic, 25% Mormon, 25% some other Protestant denomination, with the last quarter being non-church goers. If you could not recite the Psalm, you had to stay in at lunch until you did. Losing valuable play time with my friends was simply unfair, and unjust. I submitted my case to my parents, pleading for intervention and release from my inhumane bondage. Dad's response was "I guess you had better learn it" and "It's not going to hurt you any." I still remember the time I recited the last word, perfectly, and was told I could go. I ran from the room and down the stairs, at least two or three at a time, to celebrate my release with my friends.

A few years went by and it finally dawned on me that we never had meat at lunchtime on Fridays during the spring of the year. Upon inquiry, my parents said that the Catholics didn't eat meat on Fridays for a period of time in the spring. So, the cooks at the school didn't prepare meat, except fish, during that period (Lent). My first life experience with accommodation. Of course, meat dishes were generally better than cooked spinach, etc., so my protest was registered with the supreme judicial officers. My indignation was met with "It's not going to hurt you any" and "You'll eat whatever is on your plate and be thankful for it." Clemency was somewhat granted in that the overcooked spinach was gross, admitted by the jurists, so placing same in an empty milk carton was understood.

On November 22, 1963, we were sent home from school early. President Kennedy had been assassinated. We watched the television over the next several days. We saw the motorcade travel by the Texas School Book Depository. We saw President Kennedy slump over. We saw the First Lady's reaction and the actions of the Secret Service. We later watched the motorcade as President Kennedy was taken to rest. We watched his son, John, salute the coffin. I suspect my parents had not voted for President Kennedy. Regardless, whether one would say we were all united or all Democrats during those days, it would be the same. We were one. Like many of my generation, I witnessed a murder. We watched, on black and white TV, as Lee Harvey Oswald was to be transported from a Dallas jail. A shot rang out. Dad said "We just saw someone get shot." The replay, seen over and over again, showed Jack Ruby shooting Oswald.

Lincoln County had its own brand of diversity. Post-WWII, there was some anti-Japanese feelings. The bombing of Pearl Harbor resulted in a heavy loss of life at Pearl, and led to horrific losses of life as WWII progressed. Memories have not faded. There were two cafes in Shoshone. The Union Pacific Railroad tracks ran right through the middle of town. On the south side of the tracks was the Man-

hattan Cafe. On the north side of the tracks was the Boston Cafe. Both were run by Japanese families who were successful and raised their families in the community. The owner of the Boston was affectionately known as "Chicken." I'm not kidding. Much like Gooding County and the Boise area, there was a large Basque population. Lincoln County was home to the Saloaga, Legueneche, Lezamiz, Oneida, Pagoaga and Berrichoa, etc., families. I did not know then, nor do I know now, of any racial tensions.

At home, I liked Mickey Mantle and the Yankees. Brother Ken liked Hank Aaron and the Braves. He still does. Brother Kevin liked Willie Mays and the San Francisco Giants. He still does. There were plenty of arguments as to who was best. Contrary to the stereotypes of many about fly-over country and redneck life, no one cared that Aaron and Mays were black. In fact, in later years, a step brother, Kim, befriended a young black teenager and brought him home where he lived for a time. Upon coming home, fresh off my new liberal education, and being guilty of the same stereotype used by others, I launched into a discussion about sensitivity and a form of political correctness. Dad promptly cut me off: "Hey, it's not going to hurt him any." That was the end of that discussion. At least the lawgiver was consistent.

Someone's religious beliefs or faith did not seem to divide the community. One lady often came to our home to pick us up to attend her church meetings or a church activity. Many times I recall sitting with a bunch of kids in the back of her station wagon going to or coming from church. One, being cynical, could contend she went to such lengths because she looked down upon us, and needed to try to convert the heathens. However, I think she just believed the tenets of her faith and wanted to let others have an opportunity to choose for themselves.

When that family's haystack caught fire, it seemed like the whole community was there in a matter of minutes. People brought whatever piece of equipment they had that they thought would help. When someone passed away, food, solace, and comfort came from everyone, regardless of religious affiliation, or lack thereof, or political ideology. Yes, there were disagreements and disputes over fence lines or whatever. But, when the chips were down, when someone needed help, the community responded.

We saw Neil Armstrong walk on the moon. We were encouraged to get an education, to work hard. Nobody in either mom's family or dad's family had obtained a college education. Some had not finished high school. I remember mom telling me "Jim, you can become anything you want to become." We were counseled to work hard and to get an education. Both of my brothers and I graduated from college. We all improved our standard of living. Our parents believed the opportunities of life could be ours if we applied ourselves. They were believers. Not necessarily in a religious sense, but believers in country, opportunity, even society. For the most part, I think folks could sleep at night.

We don't have to be the source of division. We can bring a sense of community, support and comfort to those who are in need of our services.

I know, I know, I was not living in Selma. I was not female. Some of you will quickly point out that circumstances of the 1960s or later did not necessarily benefit everyone the same. I got it. Nonetheless, most people, people in general, felt that life was mostly just, if not mostly fair. The future looked good. Such is not naivete. We knew that life wasn't always fair. Nonetheless, folks believed they could overcome, persevere, etc. Do we feel the same today?

Now, such is not a political statement. In fact, it is probably an anti-political statement. In many ways we are constantly being divided, put into camps so a political party can claim our vote, or at least claim that we should vote this way or that. Lawyers, the profession, the judiciary have something to say about that. The profession can help bring the opportunity for justice to all, or at least access to that opportunity. We don't have to be the source of division. We can bring a sense of community, support and comfort to those who are in need of our services.

We may well disagree on many things, but a goal, over time, has to be to bring people together. Those were the values of the community in which I lived. We can learn a lesson from that. We should pursue truth and true principles, dropping agendas when necessary, for the good of the people, the good of the governed. If attorneys are not engaged in the fight for truth, who is? Wasn't the law school experience of the Socratic Method and the art of advocacy in pursuit of truth? This is not to suggest that jurists legislate from the bench. To the contrary, we must act with the consent of the governed. I suggest we engage the governed and, to the extent we can, individually live our lives, commit our practice, our service, to the lifting up of others and provide hope to them as my parents did for us.

I wonder how Lady Justice, Justicia, sleeps at night. Is she happy with the way things are? My wife, Cherie, is one of those who goes to bed, goes to sleep, and sleeps well. Some call it the "sleep of the just" or "she sleeps the sleep of the just."

I hope Lady Justice can sleep the sleep of the just. I hope you can, too. More importantly, I hope our friends and neighbors, and all people of this great state, can as well, with hope and faith in the future. Again, I think our profession can help with that.

When this message is published it will be the start of the holiday season. I hope you find peace, comfort and the sleep of the just. Ignore the materiality of the season and find solace and comfort in all things dear to you. Merry Christmas, Happy Holidays, Happy Hanukkah, and Best Wishes this holiday season. If you find those well wishes politically incorrect, or if they offend your sense of justice, consistent with ample precedent, I would say "It's not going to hurt you any."

Oh, by the way, Mrs. O'Donnell, wherever you are: "The Lord is my shepherd, I shall not want . . ."

About the Author

James C. Meservy *was raised on a farm in Dietrich, Idaho. He graduated from Dietrich High School in 1971. He attended the University of Idaho, graduating with a Bachelor of Science degree in 1975. He attended the University of Idaho Law School 1976-1979. Jim married Cherie Wiser on July 31, 1979. They have six children: Ashley, Chris, Tyler, Mallory, Baillie, and Jordan.*

Jim is a partner in the law firm Fredericksen, Williams & Meservy, with the firm known presently as Williams, Meservy & Lothspeich.

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Mr. Clark served as an Adjunct Instructor of Negotiation and Settlement Advocacy at The Straus Institute For Dispute Resolution, Pepperdine University School of Law in 2000. He has served as an Adjunct Instructor at the University of Idaho College of Law on Trial Advocacy Skills, Negotiation Skills, and Mediation Advocacy Skills. He has lectured on evidence law at the Magistrate Judges Institute, and the District Judges Institute annually since 1992.

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Don't follow Oregon's lead: Say no to assisted suicide

Dear Editor:

I am an internal medicine doctor, practicing in Oregon where assisted suicide is legal. I write in support of Margaret Dore's article, Aid in Dying: Not Legal in Idaho; Not About Choice. I would also like to share a story about one of my patients.

I was caring for a 76 year-old man who came in with a sore on his arm. The sore was ultimately diagnosed as a malignant melanoma, and I referred him to two cancer specialists for evaluation and therapy. I had known this patient and his wife for over a decade. He was an avid hiker, a popular hobby here in Oregon. As he went through his therapy, he became less able to do this activity, becoming depressed, which was documented in his chart.

During this time, my patient expressed a wish for doctor-assisted suicide to one of the cancer specialists. Rather than taking the time and effort to address the question of depression, or ask me to talk with him as his primary care physician and as someone who knew him, the specialist called me and asked me to be the "second opinion" for his suicide. She told me that barbiturate overdoses "work very well" for patients like this, and that she had done this many times before.

I told her that assisted-suicide was not appropriate for this patient and that I did NOT concur. I was very concerned about my patient's mental state, and I told her that addressing his underlying issues would be better than simply giving him a lethal prescription. Unfortunately, my concerns were ignored, and approximately two weeks later my patient was dead from an overdose prescribed by this doctor. His death certificate, filled out by this doctor, listed the cause of death as melanoma.

The public record is not accurate. My patient did not die from his cancer, but at the hands of a once-trusted colleague. This experience has affected me, my practice, and my understanding of what it means to be a physician.

What happened to this patient, who was weak and vulnerable, raises several important questions that I have had to answer, and that the citizens of Idaho should also consider:

- If assisted suicide is made legal in Idaho, will you be able to trust your doctors, insurers and HMOs to give you and your family members the best care? I referred my patient to specialty care, to a doctor I trusted, and the outcome turned out to be fatal.
- How will financial issues affect your choices? In Oregon, patients under the Oregon Health Plan have been denied coverage for treatment and offered coverage for suicide instead. See e.g. KATU TV story and video at http://www.katu.com/home/video/26119539.html (about Barbara Wagner). Do you want this to be your choice?
- If your doctor and/or HMO favors assisted suicide, will they let you know about all possible options or will they simply encourage you to kill yourself? The latter option will often involve often less actual work for the doctor and save the HMO money.

In most states, suicidal ideation is interpreted as a cry for help. In Oregon, the only help my patient received was a lethal prescription, intended to kill him.

Is this where you want to go? Please learn the real lesson from Oregon.

Despite all of the so-called safeguards in our assisted suicide law, numerous instances of coercion, inappropriate selection, botched attempts, and active euthanasia have been documented in the public record.

Protect yourselves and your families. Don't let legalized assisted suicide come to Idaho.

Charles J. Bentz MD
Oregon Health & Sciences University
Portland, OR

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2010 Pro Bono Award Recipients

Diane K. Minnich
Executive Director, Idaho State Bar


Diane K. Minnich

Again, I encourage you to join the Board of Commissioners, District Bar officers, and your colleagues at the resolution meeting in your district. The meeting schedule is on page 16.

The following attorneys are receiving this year's pro bono awards in their respective districts.

First District

James R. Michaud, Sagle, Idaho


James R. Michaud

Working with the Local Committee of the Idaho Pro Bono Commission, Michaud has established an Advice and Counsel Program co-sponsored by Transitions in Progress. Transitions in Progress is a non-profit organization providing services for the homeless and victims of domestic violence. Volunteer attorneys meet with persons needing legal consultations who cannot afford to pay attorney fees. Sessions are held twice a month at the United Methodist Church in Sandpoint, but attorneys need only volunteer approximately once or twice a year. The organization administers the advice and counsel program scheduling volunteers and clients. The Idaho Pro Bono Commission's First District Local Committee follows up at monthly CLE meetings in Sandpoint and IVLP provides support for the attorneys with malpractice insurance and tracking of volunteer hours. The Local Committee is also developing a list of legal resources for a flyer or brochure. Jim Michaud has also accepted a difficult case from Idaho Volunteer Lawyers Program, (IVLP) and has volunteered to help with family law and other cases.

Second District

Michael E. Cherasia, Moscow. A grandmother needed to obtain guardianship to care for her three young grandchildren because her daughter and son-in-law were not caring for the children properly. The biological parents were in and out of prison as a result of meth use. Child Protective Services was called in on behalf of the children, but closed their case when the grandmother was granted temporary guardianship. She called IVLP to obtain a permanent guardianship to provide lasting stability for the children. The case became difficult and complicated as the story of more extensive drug use on the part of the IVLP client unfolded. Cherasia continued his representation of his client until another more suitable guardian could be found and the children were assured a safe home environment. The grandmother (client) was granted supervised visitation with her grandchild to continue their relationship.


Michael E. Cherasia

Third District

John Cross, Idaho Legal Aid Services, Inc., Nampa, has worked for Idaho Legal Aid Services for 12 years. Co-workers and clients alike admire how hard John works for those he represents. Cross is always willing to help people and goes beyond the usual time requirements of his job, making sure that he has done everything possible for his clients. On his own time, he also helps those who could not be represented by Legal Aid to help them represent themselves in court. Staff members from the domestic violence crisis centers in his area think he's great. John Cross retired once in early 2009, but Ernesto Sanchez, Executive Director of Idaho Legal Aid, convinced him to return to work. Supposedly, Cross works part-time at 60% of a full week, but he never stops at that. John Cross has helped IVLP, Western Idaho Community Action Program (WICAP) and other Court personnel launch a much-needed Family Law Pro Se Clinic for Payette and Washington Counties.


John Cross

Fourth District

The Idaho Immigration Law Pro Bono Network (IILPBN) was organized to respond to an unmet need for low-income persons who are in removal proceedings by Immigration & Customs Enforcement. IILPBN is a great example of commitment, organization, and collaboration of concerned groups and individuals, responding to an unmet need. Responding to an urging from a Portland, Oregon Immigration Judge, Michael Bennett, who pointed out that Idaho was the only state in the region without pro bono representation for those in deportation hearings, the group began with representatives from University of Idaho Immigration Clinic, Catholic Charities, IVLP, Idaho Legal Aid, the Idaho Chapter of the American Civil Liberties Union, and Federal Defender Services of Idaho and also included several private attorneys who do immigration law.

Idaho Immigration Law Pro Bono Network

Key founding leaders were Mikela French, Hall Farley; Monica Schurtman, University of Idaho College of Law, Legal Aid Clinic; Nicole Derden, Law Office of Nicole R. Derden; Maria Andrade, Andrade Law Office, Inc.; Chris Christensen (former law clerk with the Idaho Supreme Court), Andrade Law Office, Inc.; Erik Johnson, Idaho Legal Aid Services; Lisa Barini-Garcia, Roy, Nielson, Barini-Garcia & Platts; Ernest Hoidal, Hoidal Law;

Kristina Wilson, Idaho Supreme Court; Sara Berry, Stoel Rives, LLP; and Monica Salazar, Catholic Charities of Idaho.

The group organized regular informational meetings "Charlas," followed by screenings for those with a Notice-To-Appear at an immigration hearing. Those found to have potentially appropriate cases meet with an attorney for further screening and initial counseling. The types of case likely to be referred to volunteer attorneys are those who are good candidates for cancellation of removal and lawful permanent residence, victims of domestic violence or other crimes or those with a strong case for asylum (and no criminal convictions). The Network members worked with University of Idaho law students on summer externships in developing procedures and provided training for the volunteer attorneys, particularly Mary Grant and Sandy Flores. A first "Charla" was held in October 2009 and Charlas have been conducted every other month since. About 12 people have begun working with pro bono attorneys in their deportation process.

Brenda H. Quick, Quick Law Office, Meridian. Health and Welfare was after a young man for child support payments for a child that DNA testing proved was not his and he came to IVLP for help. He and the biological mother had an affair while she was still married to someone else. The mother told the applicant that the child was not his, so he did not have to worry about it. H&W tested the mother's husband and found him to be the father, but had already entered a default judgment for child support against the IVLP applicant. Because he was in prison when H&W served the papers, the young man did not respond. When he was released, the young man went to H&W to find out why they were still after him. Brenda Quick accepted the case from IVLP and agreed to do what she could to help the man. She found that most of case law does not support overturning a default judgment of paternity.

Brenda H. Quick

She spent hours researching, communicating with the mother and trying to overcome the default judgment. Quick said, "We finally got it done! Now he can get on with his life, without paying child support for a child that no one claimed was his. He is one of the nicest persons I have ever met—gentle and kind and always said thank you."

Dean B. Arnold, solo practitioner, Boise. An elderly couple came to Dean's office last summer, and explained that the husband had been charged with misdemeanor reckless driving based upon the allegations of an adult bicyclist who claimed this gentleman purposely swerved his car in front of her while riding her bicycle and then slammed on his brakes in an attempt to injure her. The gentleman told me the bicyclist had swerved in front of him, and it was his maneuvers to avoid hitting her of which she complained. This was during a time when there had been several bicycle/ auto accidents in Boise – some resulting in fatal injuries to the bicyclists. Regardless of the facts of the case, it was a difficult time to be facing allegations of this nature. After discussing the costs of litigation, it became readily apparent to Dean that this couple could not pay for legal services. He said, "Thinking they had a story to tell – a story that would most likely have to be told to a jury – I immediately offered my services pro bono and agree to represent the gentleman."

Dean B. Arnold

The trial was delayed for numerous reasons, which eventually resulted in the filing of a motion to dismiss for violation of Idaho's speedy trial statute. After some fairly detailed briefing and oral argument, the Court denied that motion and the case was set for a jury trial. After a day-long jury trial, it took the six-person jury about one hour to return a verdict of Not Guilty. Dean looked back and said, "The case will always be one of my favorites. The client and his wife are a wonderful couple; there were interesting pre-trial issues that were briefed and argued; there were difficult trial decisions to make; and there were interesting witnesses to question. Of course, it always helps when your client prevails. But in the end, I will always remember helping a nice man with very limited resources navigate the complicated world of our criminal courts so that he could tell his story to a jury of his peers – which, in the end, is all most of our clients want."

Lisa D. Nordstrom, Idaho Power Company, was nominated by the Fourth District CASA Program. "Lisa Nordstrom has been a CASA volunteer attorney since 2007 and has served 14 children on 10 cases. She has given over 50 hours of her time and has worked tirelessly during the past three years to provide the highest quality counsel for volunteers and staff. Lisa doesn't seem to have the word "no" in her vocabulary when it comes to working with the program. Lisa takes challenging cases and never backs down when it comes to the health and safety of children. Many volunteers and attorneys start off strong, and as time passes, ease out of the work. Lisa has done just the opposite. She continues to be a shining example of the heart of volunteerism. She gives freely out of compassion, care and desire to see children live their lives to the fullest. We are extremely thankful for Lisa and others like her. They are the very fabric of the community, building a better world one case at a time."

Lisa D. Nordstrom

Ryan T. McFarland, Hawley Troxell contributed 60 hours representing a minor and her mother, father and brother in a petition for United States status, allowable as the client was a victim of a crime. McFarland successfully obtained U-Visas for all the clients. He then contacted IVLP about continuing to help this family to obtain permanent residency status, as their U-visas were due to expire shortly. U-Visa cases are complicated with several forms that must be completed and filed with the US Citizenship & Immigration Service, affidavits, and certification from law enforcement of cooperation for prosecution of the perpetrator(s) of the crime.

Ryan T. McFarland

Fifth District

Clayne S. Zollinger, Jr., Rupert, closed two cases in 2010, a divorce involving more than 40 hours and a modification requiring 25 hours. In the first case, Zollinger represented a mother of three young children, two of them with her husband, who was living in Oregon and who had refused to return the children to the mother according to their separation

Clayne S. Zollinger,Jr.

agreement. The father had been arrested for domestic violence and was on probation. The mother feared angering him in case she not is able to get her children back. Zollinger commented that the case was interesting for the jurisdictional issues: "(It) required an ex parte order, a temporary custody hearing, a final trial on the merits. (I) did not keep track of hours on this case, but it took well over 40 hours. It was a lot of work." After that case was closed, Zollinger called IVLP to do the modification case of a mother who sought full custody of her three children because her ex was recently incarcerated for sexually abusing their sons.

Sixth District

Aaron N. Thompson of May, Rammell & Thompson, Chtd., in Pocatello, was nominated by the Sixth District CASA Program. Thompson has been representing the lay Guardians ad Litem in Child Protective Act Placement Hearings since 2001 and is greatly respected by volunteers and staff for the program. Thompson also accepts family law cases and gives Soundstart presentations through IVLP. "I try to volunteer my time when I can, and very much enjoy giving the presentations for the IVLP Soundstart program to folks that need help."

Aaron N. Thompson

Seventh District

Steven A. Richards, Grimes & Reese, PLLC, was nominated by the Seventh District CASA Program: "Steve Richards has been taking CASA cases since 2001. He always takes on a new case when asked and has traveled to outlying counties on cases. Steve's dedication to the CASA program and the children we serve is commendable. The program greatly appreciates all of the time and legal assistance he provides."

Steven A. Richards

Special thanks to Dan Black, Carol Craighill and Kyme Graziano for their contributions to this article, which was the research and most of the writing – I served as the editor.

The Idaho Volunteer Lawyers Program wishes to give special thanks to the Seiniger Law Offices for its donation of the back page of this volume of The Advocate with its compelling image of the significance of pro bono service. Thank you Andrew Marsh and Breck Seiniger for your generous donation, and to all who provide access to justice through pro bono work.

2010 District Bar Association Resolution Meetings

District	Date/Time	City	Location
First	Nov. 9, Noon	Coeur d'Alene	Hampton Inn & Suites
Second	Nov. 10, 6 p.m.	Moscow	Best Western University Inn
Third	Nov. 16, 6 p.m.	Nampa	Brick 29 Bistro
Fourth	Nov. 17, Noon	Boise	The Grove Hotel
Fifth	Nov. 17, 6 p.m.	Twin Falls	Canyon Crest Event Center
Sixth	Nov. 18, Noon	Pocatello	Juniper Hills Country Club
Seventh	Nov. 19 Noon	Idaho Falls	Red Lion Hotel

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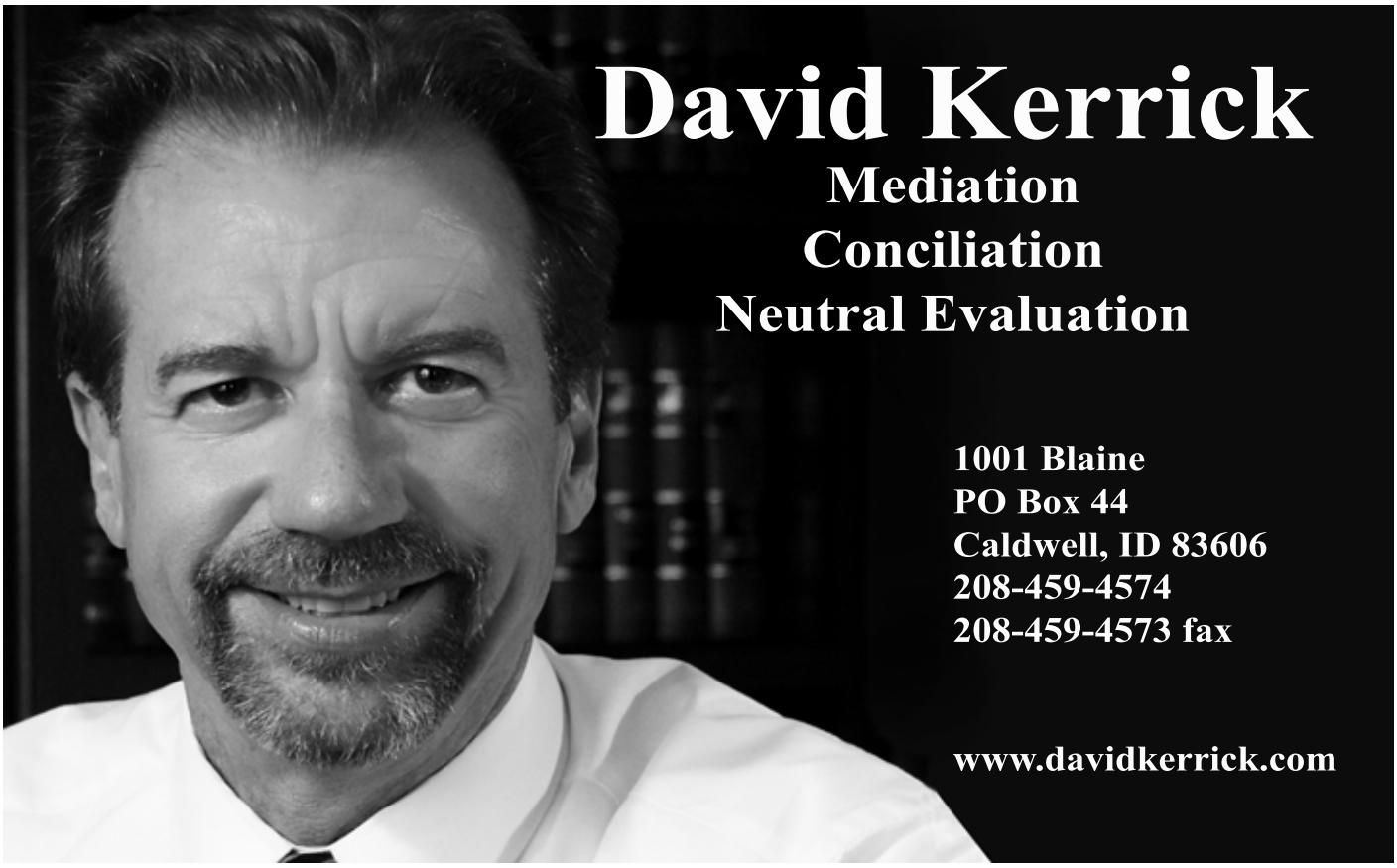
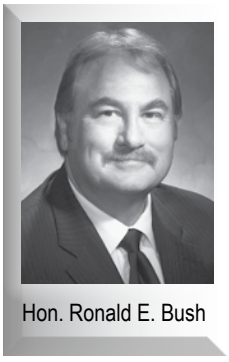


Water and the Law in Idaho: Grand Ambitions, Grand Achievements and Grand Disagreements

Hon. Ronald E. Bush
U.S. Courts, District of Idaho

We "made the desert bloom." It is a metaphor repeated over and again in Idaho, where many such Biblical metaphors are appropos to water's place in Idaho's history, in irrigated "gardens of Eden," and green oases of agricultural plenty. Much as Moses did at the Red Sea, the federal Bureau of Reclamation, private power companies, canal companies and countless farm families, have cleaved and parted our waters, bringing irrigation flows, electrical power and prosperity, including to stretches of our southern plains formerly so arid and barren that the early travelers on the Oregon Trail could not wait to leave them behind.


Hon. Ronald E. Bush

The landscape of the southern half of Idaho is crisscrossed by irrigation projects, dotted by reservoirs behind dozens of dams, and is made verdant by man's sometimes herculean efforts to wrest the rivers from nature's control and bend them to the human will. Our forebears' ambitions for the control of our natural waterways were remarkable in their audacity. Early in the 20th Century, plans were seriously considered to move water from Yellowstone Lake and other waterways of Yellowstone National Park (even on the other side of the Continental Divide) through rechanneling and tunnels into the Snake River basin. Farther west, engineers conceived futuristic plans seemingly drawn by Tom Swift, to re-route certain waters of the Boise River system around and under mountain ranges, far from their natural drainages. Projects that were completed, such as Arrowrock Dam, (the highest in the world when dedicated in 1915), were engineering and construction masterworks.

In 1925, nearly the entire community of American Falls, which then Chief Justice and former President of the United States William Howard Taft described as "an important town," was relocated from its original townsite on the banks of the Snake River. Houses, general stores, churches, and schools were moved on skids and brick-by-brick to higher ground on a nearby bluff to make room for the American Falls Dam and its reservoir, all testament to the power of water upon not just Congressional appropriations but also upon the judicial view of the power of eminent domain. *See*, *United States v. Brown*, 263 U.S. 78 (1923). In the 1960s, when the unslaked thirst of California growth caused covetous glances at the unappropriated waters of Idaho, forward-thinking lawyers and public officials obtained passage of constitutional authority and a statutory framework for a new state water agency, which became the Idaho Water Resource Board, to "formulate and adopt a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of the state in the public interest" thus foreclosing potential attempts by out-of-state interests to funnel waters away from our borders.

For much of our history, water has been a tool, an implement to be harnessed and applied to some *use*, distinct from the simple fact of enjoying water in its natural state. We use terms such as a "working" river, we "recharge" our aquifers, we "appropriate" and "store" water and treat it as some sort of chattel, as if it could be packaged up and sold on e-Bay. The Swan Falls Dam, one of the earliest built upon the Snake River, was built not to capture water for irrigation, but to provide electricity to operate the bustling mines of Silver City. In my youth growing up in Idaho Falls, and in other communities around the state, the river carried the creamery whey and slaughterhouse offal from the processing plants that sat aside the river banks.

Elsewhere in Idaho, lakes and rivers were preferred locations for sawmills and paper mills, close to the large volumes of water needed to run their industrial operations, and into which to return their effluent. Sewage flowed openly into streams. Mines used water for power and to separate the small fractions of valuable minerals in the huge amounts of ore. In Northern Idaho, the spring freshet provided the water power to transport huge sawlogs down flumes built on mountainsides into the snow-melt flows of the Clearwater River, where log rafts called "wanigans" carried bunks and a cook shack for "peavey" crews moving logs downriver to the mill in Lewiston.

Over time, our attitudes toward water have shifted. We understand and appreciate water in more than a "use and consume" perspective, drawing upon the qualities waterways bring to our communities and the wild places around us. Cities have transformed the industrial alleyways that used to dominate the riverbanks into recreational greenscapes, creating amenities to the local quality of life. We study and regulate the purity of our waters. We debate the competing interests of stored and flowing waters and the interrelationships between our surface waters and the aquifers below. We protect certain streams in their original states. The definition of what it means to "use" water has evolved in the public consciousness, even as legislative and courtroom conflicts about that meaning continue.

This issue dealing with history of the law in Idaho, the fifth year of the Idaho Legal History Society's sponsorship of this issue of the *Advocate*, chronicles some of the history of water and the law in Idaho. This issue contains articles about the history of irrigation, including the federal and state agencies and irrigation companies that dominate any discussion of that topic in Idaho, including the so-called "Committee of Nine." It is a fascinating subject, full of visionaries and dreamers, and in the middle of each chapter is found the efforts of talented Idaho water lawyers. Another article describes the debate and decisions of the framers of the Idaho Constitution about the even-then contentious issues of the ownership and use of water, and the Constitutional revisions that came in later years. We also present the saga of Idaho cases defining the public or private ownership of shorelines on our many lakes, a subject involving interesting combina-

Photo courtesy of Bureau of Reclamation

A ditchrider near Twin Falls checks on the irrigation canal.

Photo courtesy of Hon. Ronald E. Bush

Watermaster badge.

tions of culture, hydrology, and science. Another article tells the story of the epic battle between the last of the New Deal Progressives intent upon turning every drop of Snake River water into a federal power dam that would have flooded nearly the full reach of Hells Canyon, against the changing tide of public opinion and Idaho politics, which swayed toward Idaho Power Company's competing plan to build a series of "run-of-the-river" dams, under private ownership. Also chronicled here is the remarkable back-story of the so-called Swan Falls Agreement, which resolved a potentially cataclysmic courtroom battle between irrigation interests and private power interests.

Much remains unaddressed. We have nothing that discusses at any length the creation and work of the Snake River Basin Adjudication court. That is in part because the universe of those who could do justice to the topic is limited, and because the subject matter may still need some time to "cool to the touch" before a historical reflection is attempted. The significant history of the intersections of environmental law, endangered species, and water law is absent as well, as is any discussion about the meaning of public streambeds, high water marks, and trespass laws in the context of our creeks and rivers (the setting where every trout-fishing lawyer fancies himself or herself a water lawyer).

The articles contained in this issue are authored by some of the very best of Idaho's water and government lawyers and academics, drawn from their considerable expertise and replete with sage and sometimes pithy personal observations about their subjects. I thank all of them for their efforts, and particular thanks go to Al Barker and John Rosholt, who took on this project and recruited most of the authors in addition to contributing terrific articles of their own. A further thank you is owed to Dan Black, the managing editor of *The Advocate* for his editorial acumen and production skills, and to the members of *The Advocate* editorial board, for their valuable assistance in editing and improving the articles.

If this issue has piqued your interest, there is much that has been written in other settings for your further reading. The Bureau of Reclamation has extensive historical materials, and has a collection of articles about the history of the work of the agency, much of which deals with Idaho. The *Idaho Law Review* has much within its covers over the years on these same subjects. Karl Brooks and Dennis Colson have authored full-length books about the subjects of their articles. *Idaho Yesterdays,* the former quarterly journal of the Idaho State Historical Society, has included a number of excellent articles about water law and irrigation in Idaho, most edited by Judith Austin, one of our Idaho Legal History Society board members. Finally, I offer a sales pitch for the work of the ILHS. We encourage your membership and welcome your own contributions to our interesting and important work. See our website at: http://www.id.uscourts.gov/ilhs/ for more information.

About the Author

Judge Ronald E. Bush *was appointed a United States Magistrate Judge for the District of Idaho on October 1, 2008. Previously, he served as a state trial judge for five years and prior to that he practiced law for 20 years in both the Pocatello and Boise offices of the law firm of Hawley Troxell Ennis & Hawley, LLP. Judge Bush received his B.A. degree in 1979 from the University of Idaho and his J.D. in 1983 from The George Washington University College of Law. Judge Bush is a fifth-generation redheaded, fly-fishing, baritone-singing Idahoan who is a former chairman of the board of trustees for the Idaho State Historical Society, co-founder and former president of the Idaho Legal History Society and a former Ninth Circuit Lawyer Representative. At his investiture, his siblings presented him with a trophy recognizing him as the Best Hockey Player from Idaho Falls Ever to Become a Federal Judge.*

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Photo courtesy of Bureau of Reclamation

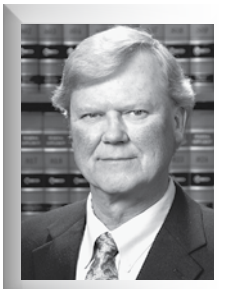
Crews excavate the Main North Side Canal near Jerome in 1905.

Water Rights in the Idaho Constitution

Dennis C. Colson
University of Idaho
College of Law

Introduction

Water rights in Idaho today spring from Article XV of the Constitution of the State of Idaho. An Idaho citizen wanting to understand those rights would find the language of the article opaque, like muddy waters. Why are first six sections of the article devoted to regulating the "sale, rental or distribution" of water? Are regulating these sales and setting the rates to be charged important legislative issues? Where is the prior appropriation principle in there? Why, in the land of private property and free enterprise, does the last section of the Article authorize the state of Idaho to appropriate water and generate hydroelectric power with those waters?



Dennis C. Colson

As with most of the law, some understanding of the origin and history of Article XV sheds a great deal of light upon the meaning of the language and the nature of water rights in Idaho. The first six sections of the Article were written at the 1889 Constitutional Convention; section 7 was adopted by amendment in 1964. Despite the passage of 120 years, the central story line of Article XV has not changed. It is the story of irrigated agriculture struggling to make certain that it is first in line when it comes to water rights in the Idaho Constitution.

There are three important chapters in this story. The first chapter is the 1889 Convention, during which the Idaho Constitution was drafted. The principal challenge to irrigation farmers at the time of the Convention were the privately owned ditch companies appropriating water for resale and distribution to settlers. All six sections of Article XV adopted at the Convention were designed to defeat the challenge by the ditch companies. Waters appropriated by the ditch companies were declared to be a public use, the sale of those waters was a franchise subject to state regulation, and irrigation was declared the exclusive use for those waters. Domestic and agricultural uses were given a preference over prior appropriators.

The second chapter of the Article XV evolution pitted irrigated agriculture against hydroelectric power development. The first power generation plant on the Snake River was built in 1901 at Swan Falls to service the Silver City mines. Five small regional companies with "run-of-the-river" developments merged in 1915 to form Idaho Power Company, and the potential for private large-scale hydroelectric development was created. This potential threatened upstream irrigation interests who managed to amend Article XV to meet the challenge. The original Section 3 created a right to appropriate water which could not be denied. The section was amended in 1934 to qualify the right: "except that the state may regulate and limit the use thereof for power purposes."

The most recent chapter in the Article XV story pitted irrigated agriculture against Los Angeles, which in 1963 was proposing that water be diverted from the Snake River into the Colorado River for the purpose of supplying California and Arizona with more water. To prevent this from happening, Idaho proposed to put all of its water to a beneficial use so that none would be available for a trans-basin diversion. Section 7 was added to Article XV in 1964 to implement this plan. The section created a Water Resource Agency which was empowered to divert waters, engage in hydroelectric power generation, and write a state water plan.

This article provides a more detailed account of the three events which gave rise to the provisions of Article XV, and define water rights in Idaho today.

The ditch companies and irrigation preference

Idaho's Founders convened in Boise City on July 4, 1889, for the purpose of writing a Constitution for the state they hoped Congress would soon create.[1] The Water Rights article was assigned to the Manufactures, Agriculture and Irrigation Committee, chaired by William McConnell. Even though McConnell was representing Latah County at the Convention, as a young man he dug one of the earliest canals in the Territory during the Boise Basin gold days. The remainder of the Committee was drawn from the irrigation counties.[2]

Much of the irrigation development in Idaho between 1860 and 1880 was the product of individual enterprise, simple diversions watering bottom lands. The 1880s brought the railroads to Idaho; privately owned ditch companies followed the railroads and proposed building diversion and distribution systems for profit by selling the water to settlers along the canals. The Territorial Legislature passed the first statute defining water rights in 1881.[3] The statute was designed to control and limit the ditch companies, and was the precedent for many of the provisions of Article XV reported by the Committee.

William McConnell made the Committee's intentions clear on the floor of the Convention: "Let us not place anything in this constitution, which will place those agriculturalists, who are necessarily poor people, in the power of any incorporation which brings out a ditch".[4] He warned that such companies could temporarily withhold water and "compel those men to abandon their properties or sell them out for a mere nothing,"[5] or could "throw that country, which is now attempting to be brought under cultivation, and some of which is already blooming as a garden, out again into a waste."[6]

McConnell was joined by Isaac Coston from Ada County:

> If the water power of this country can be used to prevent irrigation of the country, if it can be held by virtue of a prior right, good-by to all the prosperity that we expect to come from the use of the water in irrigating our plains and developing this country.[7]

Coston also argued that domestic use was the "most sacred purpose to which water could be applied"[8] and that "all using water to drink, for cooking and for the ordinary domestic purposes, have the best right by nature."[9] John Gray from Ada County made the case for an agricultural priority: "I want the farm to have it, because his are the products I live on; I can't live on cotton or wool or anything of that kind; I want something to eat."[10]

By the late 1920s, residents in the Upper Snake River Valley became worried that downstream power generation rights would prevent upstream irrigation development.

The principal opponent to the Committee's report was James Beatty from Alturas, a mining county. Beatty argued that the prior appropriation principle should control: "I know of but one way to regulate it, and that is that the parties first in time hold the water; the parties who come and take up the water for any purpose should be entitled to the use of that water."[11] Beatty thought the Committee was transgressing on property rights: "I don't believe such a law as that would be constitutional, it would be taking away the priority right of one man and giving it to another."[12]

Article XV as reported by the Committee did not require irrigators to pay the prior appropriators when the agricultural preference was invoked. When it appeared that the Convention was going to pass the Committee draft, George Ainslie from Boise Country proposed adding the requirement that compensation be paid. This requirement was strongly resisted by the irrigation delegates. When asked whether he intended to take another man's water without paying for it, Edgar Wilson from Ada County replied, "Yes, of necessity. We exist under peculiar circumstances, and it is necessary that be done; it requires a heroic remedy."[13]

The amendment requiring payment was approved by the Convention, 13 in favor and 12 against. The requirement meant that the agricultural priority would seldom be invoked because it would not be economical to do so. In form, Article XV adopted an agricultural priority principle; in fact, it adopted a prior appropriation system. The Article as amended was approved by the convention, 26 in favor and 16 against. James Beatty was not able to persuade the Convention delegates to adopt a prior appropriation principle, but he was able to persuade his colleagues on the Territorial Supreme Court. Judge Beatty authored the Court's opinion in *Drake v. Earhart*[14] shortly after the Constitutional Convention. The *Drake* opinion became a landmark statement of the prior appropriation doctrine in Idaho and the western states in general, even though the principle was significantly altered several months after it was issued when Idaho electors approved the Constitution.

Irrigation development in Idaho passed through four somewhat overlapping stages, "first was individual effort, then corporate enterprise [the ditch companies], then government aid to private enterprise [1894 Carey Act], and finally large-scale federal reclamation [1902 Newlands Act]."[15] The Ditch Companies which so dominated the development of water resources at the time of the 1889 Convention were burdened heavily by the Water Article incorporated into the Constitution. The companies were further damaged in the financial crash of 1893, and disappeared from Idaho shortly after the turn of the century. This, in turn, rendered much of the language in Article XV dead letter.

Hydroelectric power

The conflict between irrigators and hydroelectric power generation was foreseen at the 1889 Convention by Chairman William McConnell, who predicted:

> You have here [in Boise City], as I understand it, quite a large irrigation canal on this river. Part of the waters of that canal are used today for manufacturing purposes, in generating electricity to light this town. It might occur, as the science and use of electricity become more fully developed in this country, that it will pay the proprietors of that ditch better to use the water entirely for the generation of electricity, and . . . throw that country . . . already blooming as a garden, out again into a waste.[16]

To make certain irrigation had priority, Edgar Wilson moved to amend Article XV by adding "power or motor" after manufacturing in section 3. Wilson thought that hydroelectric generation was something different from manufacturing and was therefore not covered by the proposed language. McConnell thought generating electricity was manufacturing but was willing to second the motion. The amendment failed, probably because the delegates thought the language was inclusive.

The conflict between irrigation and power generation became more heated after the turn of the century.[17] Swan Falls dam was built on the Snake River in 1901. Idaho Power Company was created in 1915. By the late 1920s, residents in the Upper Snake River Valley became worried that downstream power generation rights would prevent upstream irrigation development. The water rights claimed for hydropower were never "sold, rented, or distributed," so were not subject to the irrigation priority in Article XV. A more radical measure was called for, so in 1928 section 3 was amended.[18] The undeniable right to appropriate waters therein provided was qualified: "except that the state may regulate and limit the use thereof for power purposes."

This amendment has played an important role in subsequent water rights development. During the 1950s Idaho granted Idaho Power Company a license to build three hydroelectric dams in Hell's Canyon. One of the limitations imposed by Idaho was a subordination agreement whereby Idaho Power Company agreed to forfeit the water rights as upstream irrigation developed. It was thought for many years that Idaho Power's rights at Swan Falls were subordinated as well, and development occurred without regard to those rights. However, in 1983 the Idaho Supreme Court ruled in *Idaho Power Company* v. *State*[19] that only the rights in Hell's Canyon were subordinated. Suddenly, the state of Idaho went from a partially appropriated to an over-appropriated water system on the Snake River.

The need to sort out the conflicting claims in an over-appropriated system led to the Swan Falls Agreement. In the Agreement, Idaho Power agreed to accept a modest amount of water at the Swan Falls Dam and, in return, Idaho agreed to conduct an adjudication of the upstream water rights with an eye towards protecting the flows at Swan Falls. The Agreement led in turn to the Snake River Basin Adjudication.[20] The Adjudication has

CONSTITUTION OF THE STATE OF IDAHO
Article XV. Water Rights

1. **Use of waters a public use:** The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed by law.

2. **Right to collect rates a franchise:** The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

3. **Water of natural stream – Right to appropriate – State's regulatory power – Priorities:** The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article 1 of this Constitution.

4. **Continuing rights to water guaranteed:** Whenever any waters have been, or shall be, appropriated or used for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters so dedicated shall have once been sold, rented or distributed to any person who has settled upon or improved land for agricultural purposes with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns, shall not thereafter, without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

5. **Priorities and limitations on use:** Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

6. **Establishment of maximum rates:** The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented, or distributed for any useful or beneficial purpose.

7. **State Water Resource Agency:** There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its admission to the Legislature.

been a grand enterprise to determine the date of every water use on the Snake River Plain. This is necessary because Article XV, section 3, states that "[p]riority of appropriation shall give the better right as between those using the water."

California and the Idaho water plan

In 1963 the Los Angeles Department of Water and Power suggested that 2.4 million acre feet of water should be diverted every year from the Snake River near Twin Falls to the Colorado River system to increase the supply of water to southern California and Arizona. Idaho responded quickly, amending Article XV in 1964 for the purpose of creating an Idaho water plan.[21] The goal was to put all of Idaho's water to work for Idaho so that none would be left for Los Angeles.

The 1964 Amendment added Section 7 to the Water Article. Section 7 created a State Water Resource Agency and endowed the Agency with extraordinary powers. The Agency was given the power to "formulate and implement a state water plan for optimum development of water resources in the public interest." To aid in the implementation of such a state water plan, the Agency was given the power to "construct and operate water projects; to issue bonds . . . to generate and wholesale hydroelectric power at the site of production; [and] to appropriate public waters as trustee for Agency projects . . ." The Agency was to be "composed as the Legislature may now or hereafter prescribe," and the Agency's powers were to be exercised "under such laws as may be prescribed by the Legislature."

The Idaho Legislature had earlier made a similar attempt to block growing claims of jurisdiction over the Snake River by the federal government in the 1920s and '30s. The 1935 Legislature created a State Water Conservation Board and endowed it with governmental and administrative powers, as well as the power to condemn and appropriate waters. The Idaho Supreme Court held the statute unconstitutional in *State Water Conservation Board v. Enking*[22] because it denied the undeniable right to appropriate waters in section 3. The 1964 Amendment was designed to overcome this objection.

The 1965 Legislature created the Idaho Water Resource Board to implement the Amendment. The Board issued its state water plan in three parts: 1972, 1974, and 1976. The plan was controversial and unpopular with the Idaho Legislature in part because it provided for minimum stream flows which would limit future irrigation appropriations. As a result, the Legislature decided to usurp the power of the Agency over the water plan. A 1977 statute provided that no water plan could become effective until it had been submitted to the Legislature. In 1978, the Legislature created its own state water plan. The Legislature adopted 14 of the Board's policies, modified 19 of them and rejected four.

In the 1980s, the Director of the Water Resource Board challenged the power of the Legislature, arguing that the Water Article vested in the Board the exclusive power to adopt and implement the water plan. The Attorney General opined that the legislative plan enjoyed a presumption of validity and that there was no "glaring problem" which would rebut the presumption. However, the Idaho Supreme Court disagreed and held in *Idaho Power Co. v. Idaho*[23] that the Board had the exclusive constitutional authority over the plan.

The Legislature was not to be deterred from taking over the state water plan. The following year it proposed an amendment to Section 7 which expressly conferred power over the plan upon the Legislature: "The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan . . . . [A]ny change in the water plan shall be submitted to the Legislature . . . ." The amendment was approved by Idaho electors in the 1984 general election.

Closing

Article XV of the Idaho Constitution records the history of efforts by irrigated agriculture to be first in line for water rights. Irrigation interests have enjoyed only limited success in these efforts. They were able at the 1889 Constitutional Convention to gain protection from, and power over, the ditch companies which were so feared at the time, but the value of this gain soon disappeared with the ditch companies. They were unable at the Convention to gain a meaningful preference over prior appropriators because a narrow majority of the delegates thought that if prior rights were taken they should be paid for. The 1928 Amendment gave Idaho the power to regulate and limit the use of water for power generation and was sufficient to subordinate Idaho Power Company rights in Hell's Canyon in the 1950s, but in the end failed to subordinate a much earlier right at Swan Falls Dam. This failure created the Snake River Basin Adjudication. The 1964 Amendment creating the Idaho Water Resource Board effectively thwarted claims to Idaho waters by Los Angeles, but created a Board independent of the Legislature which proposed in-stream flows and other policies that hindered irrigation interests.

There were disputes over the rights to use the waters of Idaho in the earliest days of the Territory. Those disputes have become more frequent and contentious over time. It cannot be otherwise in a country with so little rainfall; it will be the same far into the future, for as long as the water flows and Idaho grows. The principles in Article XV determine who wins and who loses in these disputes. The history of those principles explains what we see today, and frames the possibilities for the future.

About the Author

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Endnotes

[1] Proceedings and Debates of the Constitutional Convention of Idaho 1889 (I.W. Hart ed., Caldwell: Caxton Printers, Ltd., 1912) [hereinafter Proceedings and Debates]. For a more complete account of Idaho's Constitutional Convention, *see* Dennis C. Colson, Idaho's Constitution The Tie That Binds (Moscow: University of Idaho Press 1991), particularly Chapter 9.

[2] Bingham County: Frank W. Beane, S.F. Taylor, H.O. Harkness; Logan County: W.C.B. Allen; Elmore County: Homer Stull; Ada County: Isaac N. Costin, A.B. Moss; Washington County: E.S. Jewell.

[3] 1881 Idaho Sess. Laws 273-75.

[4] Proceedings and Debates , *supra* note 1, at 1324.

[5] *Id.* at 1120-21.

[6] *Id.*at 1125.

[7] *Id.* at 1123.

[8] *Id.* at 1124.

[9] *Id.* at 1122.

[10] *Id.* at 1142.

[11] *Id.* at 1117.

[12] *Id.* at 1118.

[13] *Id.* at 1359.

[14] 2 Idaho 750, 23 P. 541 (1890).

[15] Carlos A. Schwantes, In Mountain Shadows A History of Idaho (Lincoln: University of Nebraska Press 1991). *See also* Mary Gunnell Lewis, History of Irrigation Development in Idaho (1924) (unpublished Master's thesis, University of Idaho) (on file with University of Idaho); 1 Leonard J. Arrington, History of Idaho 471-81 (Moscow: University of Idaho Press 1994).

[16] Proceedings and Debates, *supra* note 1, at 1125.

[17] G. Young and F. Cochrane, Hydro Era: The Story of Idaho Power Company (Idaho Power Company, 1978).

[18] 1927 Idaho Sess Laws 591, H.J.R. No. 13, ratified at the general election in November, 1928.

[19] 104 Idaho 575, 661 P.2d. 741 (1983).

[20] An Act Relating to the Adjudication of Water Rights, 1985 Idaho Sess. Laws 27.

[21] Proposed by S.J.R. No. 1 (1964, 1st E.S.) S.L. 1965, p. 22, and ratified at the general election, November 3, 1964.

[22] 56 Idaho 722, 58 P.2d 35 (1976).

[23] 104 Idaho 570, 661 P.2d 736 (1983).

Photo courtesy of John Rosholt

Workers raise the Minidoka Dam spillway in 1908.

The Carey Act

John A. Rosholt
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Although many argue that Wyoming's agreement with the State of Idaho to allocate 96% of the waters of the Snake River in Wyoming to Idaho may have been Wyoming's greatest gift to Idaho[1]; it is worth considering whether the Act that brought the water to the land may have been the greater gift. In 1894, Congress approved the Desert Land Act, which was generally referred to as the Carey Act of 1894, after its primary author, Senator Joseph Maull Carey of Wyoming.[2] Much of Idaho's agriculture, including its "Famous Potatoes" owes its success to the adoption and implementation of the Carey Act. This article will provide a brief biography of Senator Carey, an overview of the Carey Act, and reflects on the Carey Act's influence in Idaho to this day.

John A. Rosholt

An act to match his ambition

The man responsible for laying the framework for Idaho's agricultural success started out as a Philadelphia lawyer who moved to Wyoming. Well-educated, Senator Carey possessed an ambitious pioneer spirit. He worked as a rancher, served as U.S. Attorney for the Territory of Wyoming, Associate Justice of Wyoming's Territorial Supreme Court, the Territory's Representative in Congress, and as Mayor of Cheyenne. After statehood, he was elected to the United States Senate for a single term. Senator Carey also was elected Governor of Wyoming, serving a single term as the state's chief executive.[3]

Carey's concept enacted by Congress

Carey's concept was that a law needed to be fashioned to allow individuals and entities to band together to be able to finance the construction of irrigation projects. A proposal similar to a California idea was advanced in Idaho by Governor Frank Steunenberg in the early 1890s. It eventually failed because Idaho wouldn't accept financial responsibility for irrigation projects. Even so, in addition to the five pages of the federal Carey Act statutes,[4] there are some 46 pages of Idaho statutes and citations that pertain to the Carey Act in Idaho.[5]

With so many words to guide the state, developers, and the entrymen, a summary of the process is mandated here. Idahoan Niels Sparre Nokkentved did it best in the description of the Carey Act in his history of the development of the Twin Falls Canal Company, "A Forest of Wormwood":[6]

Much of Idaho's agriculture, including its "Famous Potatoes" owes its success to the adoption and implementation of the Carey Act.

"Carey hadn't given up. In July 1894, he offered two amendments to the Sundry Civil Appropriations Bill. Carey's amendments included the proposals he had withdrawn earlier. The federal government would supply the land, and the state would supervise the construction of irrigation works, canals and ditches, paid for ultimately by the farmers who would settle and farm the land. The act granted one million acres of federal desert lands to each state that chose to participate. The state would contract with a construction company to build the irrigation works, if the company could show sufficient water was available. The details of the irrigation project – the

amount of land, the amount of water and any other requirements – would be set out in the contract with the state. Farmers would be allowed to buy parcels as small as forty acres and up to 160 acres from the state at fifty cents per acre, and they would pay their share of the cost to build the diversion and distribution works."

At p. 60

"The measure became law as a rider to the appropriations bill on August 18, 1894. Simply put, participating states would function as the construction contractor for the irrigation works. Few states were in the legal or financial position to do that. Though the law allowed states to contract with others to do the work, few investors were willing to risk capital without adequate protection. In 1896, Congress amended the act to allow the states to create a lien against the land to cover the cost of construction. The states would hold the land in trust until construction was complete and the land developed. The subsequent irrigation and cultivation of the land would pay it back. Farmers had ten years to pay off the land.

The construction company in turn would raise the money to pay for construction by mortgaging the land, issuing bonds or contracting with settlers to buy water rights. When completed and approved by the state, the project would be turned over to an operating company comprised of the farmers who owned the land. The amount of water available, the sale of water rights and the mechanism for turning the project over to the settlers were set out in a contract. After signing the contract with the state, the construction company had three years to start construction. The land would be patented to the settlers when the project was completed and the land was irrigated, cultivated and occupied, all within ten years."

Idaho: The Carey Act's crown jewel

Two authors have detailed the success of the "Carey Act" in Idaho. First, Idaho Federal Magistrate Mikel Williams authored a piece in 1970, the year after he graduated from law school.[7] The Idaho State Historical Society secured a historical overview of the "Carey Act in the West" by Norm Young (a former Idaho Department of Water Resources (IDWR) Assistant Director) as part of a grant from the National Park Service's "Save America's Treasures" program to catalogue and preserve the collection of 3,700 maps and drawings documenting the development of irrigation in Idaho a substantial part of which involve "Carey Act Dreams."

Photo courtesy of Historic Photo Archives, Portland, Oregon

Those heading West at the end of the 19th Century and in the first part of the 20th Century sought opportunities to farm and profit from the agriculture industry.

Sixty-four applications were filed on federal lands in Idaho, more than in any other state. Parts of Idaho's desert began to produce agricultural bounty from Carey Act developments. Other parts, however, reflected the harsh reality of inadequate water for the arid land projects.

64 applications were filed on federal land in Idaho, more than in any other state.

Lack of project water

For the most part, the sought-after water supplies didn't live up to expectations. Even for the flagship projects of Twin Falls Canal Company (TFCC) and North Side Canal Company (NSCC), the natural flows of the Snake River were inadequate in average years so storage water was sought, and eventually obtained in United States Bureau of Reclamation (USBR) reservoirs. Acquisition of storage water was facilitated by the passage of the "Warren Act"[8] which permitted the Secretary of Interior to sell excess water from storage projects to private canal companies and landowners, but prohibited delivery of such water to lands in excess of 160 acres in a single ownership for an individual.[9]

A trip through South Idaho shows some successful Carey Act developments in addition to TFCC and NSCC. For example: Aberdeen Springfield Canal Company and Big Wood Canal Company. Some less successful ventures included the King Hill Irrigation District (a Carey Act project rescued by the USBR) and the Salmon River Canal Company, a proposed 250,000 acre project that presently serves approximately 20,000 acres, and is still short of water.

While Alfred Golze reported the average size of an irrigated farm in 1940 was only 72 acres,[10] the resurgence in development in Desert Entries in the 1950s (on the order of 50,000 acres per year in Idaho), and the fact that a husband and wife could own 320 acres under the Desert Land Act and not have to live on the farm, may have been the reason for USBR's convenient overlooking of enforcement of the Land Limitation provisions of the Reclamation Act and the Warren Act restrictions to 160 acres per family on all water from USBR Reservoirs.

During the Carter Administration (1976-1980) former Idaho Governor and then Secretary of Interior Cecil Andrus attempted to bring those who received USBR project water into compliance with

the Land Limitation provisions. Idaho's former Director of the Idaho Department of Water Resources was then Commissioner of the USBR. In 1976, approximately 11 million acres received some amount of USBR subsidized project water. The farmers' resentment of Secretary Andrus' efforts led to the enactment of the Reclamation Reform Act (RRA) of 1982, in which Idaho Senator James A. McClure was the pivotal Senator and advocate for the irrigation community. The result was a law permitting the use of acquired USBR project water on 960 acres for a qualified recipient. Corporations were limited to 640 acres.[11] Many reservoir spaceholder-entities who had acquired storage water in Palisades Reservoir in 1960 had secured a contract provision exempting them from the acreage limitations upon repayment of the debt. This provision was also being contested. As it turned out, the RRA facilitated a reasonable land limit, size, and basis for enforcement. The state laws originally enacted in 1895 to facilitate Idaho's acceptance of the Carey Act have remained consistent through the years, governing most situations that might arise both for the original construction companies and later for the successor operating companies that still exist today. Only minor amendments have occurred.[12] Concerns over water transfers have been overcome, although protecting easements and right of ways for ditches, canals, and access thereto is a constant struggle in urban areas.

A revisit to the Carey Act

In the mid 1970s the USBR found itself with a half billion dollars in authorized reclamation projects but no increasing Congressional appropriations to deal with the mandates. The Central Arizona Project was then receiving the lion's share of federal money, (thus the reason for an attempted private financing of the replacement of the American Falls Dam). Desert Land entries had stalled as groundwater became more difficult to obtain. This led to a resurgence in proposing Carey Act projects as the federal law was still on the books. In 1976, the Idaho Legislature attempted to authorize the Idaho Water Resource Board to act as the financial agent for those projects that were being contemplated in the decade. Amendments were secured to the federal law and the state laws to encourage this resurgence in interest. Ultimately, however, although several group proposals were advanced, no projects were constructed under the Carey Act Authority.

Revocation of Federal Carey Act Rules was published in the Federal Register Tuesday, September 12, 1996.[13] Carey Act project owners and operators already obtained substantial exemptions in Federal and State statutes. These exemptions make it difficult to distinguished between Carey Act Projects and Irrigation Districts that exist as quasi-political subdivisions.

Photo courtesy of Bureau of Reclamation

Harvesting potatoes with potato digger. Without water storage and irrigation, many Idaho farms couldn't have produced the state's famous potatoes.

The Carey Act brought irrigation to a million acres in the West and fostered communities, tax base, schools, and industry.

Epilogue

Even though the sun has set on the Carey Act, its development indelibly etches Idaho's landscape and agricultural heartland. The Carey Act brought irrigation to a million acres in the West and fostered communities, tax base, schools, and industry. Not bad for a piece of legislation that was a rider on an appropriations bill in Congress entitled "An Act making appropriations for Sundry Civil Expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes." With this backdrop, it is easy to wonder if passage of the law had anything to do with Senator Carey's defeat in the 1895 elections. Interestingly, Senator Carey was an early member of the Progressive or "Bull Moose" Party supporting the re-election of President Theodore Roosevelt. Perhaps, an enterprising legal historian can also trace Idaho's recent Tea Party efforts to our most influential friend from Wyoming!

About the Author

John A. Rosholt i*s a partner at Barker, Rosholt & Simpson, received a B.A. from the University of Idaho in 1959 and an L.L.B. in 1964. He has represented irrigators for four decades. He earned the Idaho State Bar Professionalism Award in 1994, the Idaho State Bar Distinguished Lawyer Award in 2004, and the University of Idaho Law School Award of Legal Merit in 2008.*

Endnotes

[1] Snake River Compact – I.C. §42-3401

[2] Original act, August 18, 1894, Ch. 301, Section 4, 28 Stat. 422 entitled "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and other purposes."

[3] At one time I suspected that the City of Carey, Idaho had been named for Joseph Carey but research finds that it was originally "Marysville" in 1883 and renamed Carey after the Postmaster James Carey in 1884. Not to be outdone, Burley named their town after Freight Agent, Tom Burley.)

[4] Idaho Code, Volume 1, Federal Laws p. 531, 43 USC 541, et. seq.

[5] Idaho Code §§ 42-2001 et. seq.

[6] Nokkentved, Niels, A Forest of Wormwood, Caxton Printers, Caldwell, Idaho, 2008, at p.59

[7] Williams, Mikel H. *History of Development and Current Status of the Carey Act in Idaho.* Boise, Idaho: Idaho Department of Reclamation, March 1970.

[8] Act of Feb/ 21, 1911, 36 Stat. 925, 43 USC § 523

[9] Reclamation in the U.S., Golze' Caxton, Caldwell, Idaho 1961 @ p.66

[10] Supra, p.66

[11] Reclamation Reform Act, of 1982 (96 Stat. 1263; 43 USC 390 aa)

[12] Idaho Code Section 42-2001 et. seq.

[13] Fed. Register, Vol. 61, No. 176 9/10/96 p. 47725

Significant Legal Milestones in Idaho Water Law: A Reclamation Perspective

Kathleen Marion Carr
U.S. Department of the Interior

Photo courtesy of Bureau of Reclamation

Faced with recurrent cycles of flood and drought, the people of Idaho sought and received funding for Arrowrock Dam for the Boise River. This dam was a significant achievement when constructed in 1915. It was a 384-foot curved gravity arch and the highest dam in the world when constructed. To allow Arrowrock Dam to be built, the planners had to build a 17-mile railroad (that would run every 2 hours with 16 cars filled with gravel and aggregate), a sawmill, a construction site for 1,500 men, a 1,500 kilowatt powerplant for the machinery, and 54 miles of phone lines. An innovative cableway system was developed to dump concrete for 16 hours a day. Without the techniques learned at Arrowrock, neither Owyhee Reservoir nor the greater Hoover Dam would have been built.

Through the Reclamation Act of 1902, the Reclamation Service (now the Bureau of Reclamation) Congress enacted a national program to store floodwaters and build canals for "reclaiming" and settling the arid West. At that time, the irrigation visionaries assumed that Federal dams and canals would subdue the desert through an interactive and cooperative process between homesteaders and Reclamation while following state water laws. Everyone knew this irrigation program was an expensive and ambitious social experiment at great risk of failing. For over a century the Reclamation program faced many difficulties, including the terrible Teton Dam failure and, nearly as terrible to some, "water spreading" (the enlarged use of a federal water right).[1] Numerous difficulties between the vision and the reality had to be worked out, but the Reclamation plan of cooperative federalism, with due deference to Idaho water law, has succeeded in making the desert bloom.

Kathleen Marion Carr

This article reflects on some of the milestones in the legal history of the Reclamation water program. It is selective and excludes the environmental litigation and the Tribal Water Settlements as there is not enough space to recount all the water history involving Reclamation.

The Reclamation Law framework

Section 8, Idaho water law, and ownership of federal project water rights

In the early twentieth century, the prior appropriation doctrine dominated western water law. When Congress enacted the Reclamation Act of 1902, the legislation required Reclamation to withdraw from public entry arid Western lands, reclaim the lands through irrigation projects, and then restore the lands to entry pursuant to the homestead laws and the Reclamation Act.[2] Under Section 8 of the Reclamation Act, Congress required Reclamation to defer to state water law in most circumstances involving the "control, appropriation, use or distribution of [Reclamation project] water used in irrigation."[3] Pursuant to the 1902 authority, Reclamation obtained water rights for its projects, provided proof of beneficial use, and submitted documentation of completed project works as required by Idaho law.[4] After Reclamation proved up on the delivery of project water to beneficial uses, the State of Idaho's Reclamation Service – now the Idaho Department of Water Resources (IDWR) – issued a single water right for the project in the name of the United States for the Bureau of Reclamation.

Pursuant to the 1902 authority, Reclamation obtained water rights for its projects, provided proof of beneficial use, and submitted documentation of completed project works as required by Idaho law.

Reclamation held some of these project water rights in Idaho for nearly 100 years without real challenge. Recently, its ownership interests were litigated in the Snake River Basin Adjudication (SRBA) through a bruising court fight. While there was federal case law to suggest that Reclamation did not hold the entire water right in certain Western states, Reclamation believed its legal position was different in Idaho. Here, Reclamation had perfected and held the irrigation water rights as the water purveyor, just as required by Idaho law. Idaho's appropriation laws recognized that the beneficial user did not have to hold title to the water rights.[5]

In 2007, in a seminal court case, *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the Idaho Supreme Court disagreed with Reclamation's opinion of ownership. The Court determined that the beneficial ownership interests of Reclamation project water rights resided with the beneficial users, *i.e.,* the irrigators.[6] The Court based its decision on a reading of federal ownership cases from other states,[7] the Reclamation Act of 1902, the Idaho Constitution, and Idaho statutory and case law.[8] The Idaho Supreme Court concluded that ownership of the project irrigation water rights were derived from both state and federal law and that these rights were not based exclusively on contracts between Reclamation and the irrigation organizations.[9]

The Court's legal conclusion rests upon an understanding of the intent of the Reclamation program for developing project irrigation water rights – a federal initiative with deference to state water law. Federal law typically governs the **interpretation** of the parties' contracts, and the federal contract defines the **responsibilities** of each party unless the duty or obligation is amended or conditioned by a Reclamation or federal statute.[10] None of Reclamation's irrigation rights would have vested if it were not for Reclamation's adherence to state water laws as required by the Reclamation Act of 1902. Similarly, by Reclamation adhering to state water laws as provided by federal authority, Reclamation also has a vested federal property interest in the water rights.[11] Regardless of the size of the federal property interest, a legal interest remains.[12] That federal interest, together with the federal contracts, federal ownership of the facilities, and the irrigators' beneficial ownership, will continue to require the parties to engage in a cooperative relationship just as envisioned by Congress in setting out the Reclamation program in 1902.

Water user organizations

From the outset, Reclamation promoted the creation of strong water user organizations in Idaho. Reclamation personnel drafted model water user association agreements and pressed for state legislation that would give the irrigation districts taxing power, authority to collect federal construction payments, and the ability to enter into repayment contracts with Reclamation.[13] In the 1920s, Reclamation wanted only to contract with irrigation entities that could manage the project and their irrigators.[14] Reclamation believed that strong irrigation entities would prevent irrigators from taking on too much debt given homesteaders' unbounded enthusiasm to reclaim the arid lands and would lift these pioneers up when they despaired that their goals were not easily accomplished. In fact, not only does Idaho have strong irrigation entities, it also has a remarkably strong umbrella organization known as the Idaho Water Users Association (IWUA). The IWUA represents nearly 300 irrigation and water entities in legislative, lobbying, and educational efforts.[15]

Reclamation's authority over project water is based not on what the government owns but on what it gives – publicly subsidized water for irrigation.

Reclamation contracts, project repayment costs, and contract terms

Federal law requires that certain "hard" requirements are built into the irrigation contracts for use of the project water. State law cannot override these requirements. The rationale is that Reclamation's authority over project water is based not on what the government owns but on what it gives – publicly subsidized water for irrigation. Given this subsidy, Reclamation can attach conditions to the use of the project water.[16] These federal contract conditions require the irrigation districts to deliver project water to users within designated geographic boundaries, to supply water to only irrigable acreage, and to restrict the total amount of owned acreage irrigated per person.[17] In recent years Reclamation law has eased some of these restrictions, but not without pain to the parties involved. For example, the Reclamation Reform Act of 1982 increased individual water deliveries to 960 acres but required users (or entire districts) to make choices between old and new law provisions.[18]

The federal contracts, usually either "repayment contracts," which are somewhat similar to mortgages, or "water service contracts," which are more like leases, spell out the length of payment for the construction costs of facilities (dams and canals) and include other limitations such as shortage clauses.[19] The irrigation entities' contracts in Idaho are also known as "spaceholder contracts." This is actually a particular contract provision that gives the irrigation entity a right to irrigation project water as a percentage of total stored reservoir capacity rather than to a set amount of water. Repayment of construction costs is mostly apportioned to the irrigation entities along the same lines as their spaceholder percentage of stored water.

In the early years, numerous legal skirmishes involved what the actual construction repayment costs should include for the Idaho Reclamation projects. Both sides won and lost some cases in determining what costs would ultimately be repaid to the federal treasury. The court determined that Reclamation's discretion in setting construction repayment costs was neither unlimited nor could it be arbitrary.[20] Idaho irrigators discovered that they had to pay their "proper share" of the actual constructions costs, if estimated and correctly published in the public notice and federal contract.[21] Similarly, irrigation entities learned that a federal contract, if not breached by the government, would control the business dealings of the parties.[22]

In the early 1900s the term for construction repayment was set at 10 years through agreements or contracts with individual irrigators. Settlers of the Boise and Minidoka Projects balked because the projects seemed unaffordable. Because of similar irrigators' concerns nationwide, Congress extended repayment terms on federal contracts to 20 years in 1914 and later to 40 years in 1926 to make the projects much more affordable. The basic principle, however, remained the same: the settlers were supposed to pay for all the actual project costs with little to no accrued interest over the repayment term.

By the end of the 1920s, the Bureau of Reclamation started to seek out long-term solutions to a multitude of problems that centered on making and keeping Reclamation fiscally sound and easing still more of the financial burden on the irrigators. One fix agreed to by all was to have Congress incorporate more hydroelectric features into projects to reduce irriga-

tors' construction repayment costs and to utilize the production and sale of surplus electricity as a revenue source. Since Reclamation brought the Minidoka Dam power plant on-line in 1909 as one of first power plants incorporated into a project, this Idaho hydroelectric plant was one of the leading examples of "power" success stories and was a win-win for irrigators, project power, and rural communities.

Operation and maintenance of Reclamation projects

Ongoing operation and maintenance (O&M) expenses were also contentious because Idaho settlers were outraged at having to pay 100 % of the O&M costs of their facilities in addition to the project's construction costs. The language of the 1902 Act did not clearly address when those O&M costs should be turned over to the irrigators for payment. The first time Reclamation ever assessed O&M charges was against the Minidoka Project's irrigators.[23] It did not go unnoticed.

In 1911 dust storms, water shortages, settler rivalries, and Reclamation policy combined to create a near rebellion on the Minidoka Project. The water users succeeded in bringing Reclamation's "legal representatives" to Rupert to meet with members of the Minidoka Board.[24] Although Reclamation refused to apologize for its policies, the result of the meeting provided farmers with new individual contracts that gave them some leniency in assessments and terms.[25] Still, because they had not received all the relief they wanted, the Idaho farmers joined with other farmers from other states to organize a National Water Users Association. The Association's purpose was to pressure Congress to liberalize repayment and O&M policies. The Association won a victory by getting Congress to extend project construction repayment to 20 years from 10 years through the Reclamation Extension Act of 1914.[26] Some farmers in Idaho thought even these reforms fell short. A letter in the Reclamation Record by H.G. Tyson, Jr. of Caldwell, Idaho, argued that Reclamation settlers should not have to repay the costs of the Reclamation projects because river and harbor improvements had no such conditions attached for repayment by Midwest and Eastern cities.[27]

Today, irrigators pay for all project O&M costs that are allocated as reimbursable and assigned to irrigation.[28] Certain costs are non-reimbursable because they also benefit other purposes of the project such as recreation, fisheries or flood control.[29]

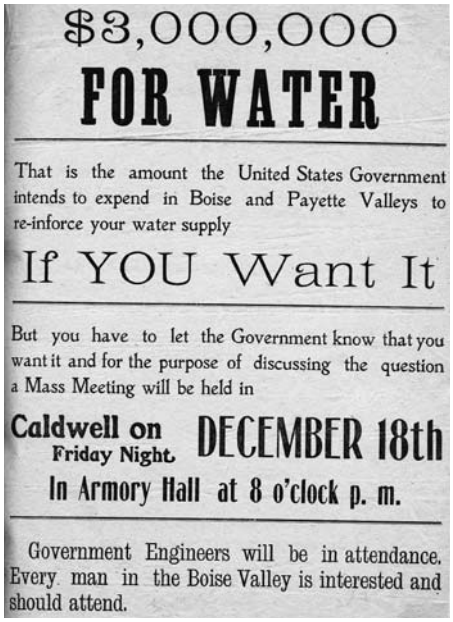
Termination or non-delivery of irrigation water

Idaho irrigation entities were also some of the first in the nation to test whether Reclamation could withhold irrigation deliveries for nonpayment of assessments and whether Reclamation needed to compensate them when project water could not be delivered. In the 1920s, a federal court permitted Reclamation to cease irrigation deliveries when an irrigator became delinquent in the payment of construction and O&M assessments.[30] Similarly, the Court of Appeals for the Ninth Circuit excused the United States' obligation to deliver project water to the Fremont Madison Irrigation District when the Teton Dam failed.[31]

Water banking (aka the "rental pool"), winter water savings, and holdover storage

The 1930s "Dust Bowl" and crisis in farm prices required Reclamation and the irrigators to promote better irrigation and cultivation practices and for Reclamation to adopt multiple-purpose planning. These efforts allowed more water conservation and utilization to mitigate the effects of drought on the farmers. The most farsighted conservation solution, however, was the development of a rental pool to allow project irrigators to lease storage water from willing sellers to willing buyers. Because natural flow rights run out early in drought years, the only reliable source of supply left was water held in storage. This pooling or water banking helps to redistribute water. Idaho was one of the first states in the nation to have a rental pool and to memorialize it through federal contracts and later through state law.[32]

In order for Congress to enact an authorization for new reservoir construction after the Dust Bowl, Reclamation also had to incorporate more carryover storage into its planning process.[33] Congress found it better public policy to authorize and have Reclamation operate storage projects for multiple years' use rather than to have storage projects operate on a "fill and spill" basis.[34] Reclamation could store snow melt, run–off, and flood waters in good years for carry-over to bad or lean water years. To illustrate, the irrigators in the Upper Snake River Basin thought they had adequate supplies following construction of American Falls Reservoir, the largest reservoir in the basin with a capacity of 1.7 million acre feet. However, the drought of the 1930s was so unprecedented that it caught everyone off guard. The drought exposed a serious weakness, that is, the Upper Snake River system lacked


$3,000,000
FOR WATER

That is the amount the United States Government intends to expend in Boise and Payette Valleys to re-inforce your water supply

If YOU Want It

But you have to let the Government know that you want it and for the purpose of discussing the question a Mass Meeting will be held in

Caldwell on Friday Night DECEMBER 18th

In Armory Hall at 8 o'clock p. m.

Government Engineers will be in attendance. Every man in the Boise Valley is interested and should attend.

Idaho was one of the first states in the nation to have a rental pool and to memorialize it through federal contracts and later through state law.

adequate carryover water for consecutive drought years. After nearly a decade of wrangling and planning, Congress authorized the construction of Palisades Dam and Reservoir to bolster supplies in the basin. Palisades Dam was primarily constructed as a carryover storage reservoir with an active capacity of 1.2 million acre feet for use in those consecutive poor water years.[35]

Before Palisades storage water could be delivered, however, Congress required Reclamation to extract promises from the project irrigation entities to cease their winter time irrigation deliveries for 150 consecutive days during the period from November 1 through April 30 of each storage season.[36] The purpose was to make an average annual savings of 135,000 acre feet of water by capturing those diversions above American Falls.[37] These provisions were built into the Reclamation contracts known as the "winter water savings" clauses.[38] Farmers and irrigation

entities had diverted water into canals in the winter time for domestic and livestock purposes. Individually, the amount of water lost to the storage system was insignificant but cumulatively it amounted to a great deal of water that could otherwise be stored. Without those water savings, Congress found that Palisades Reservoir would not have the carry over water needed for the poor to bad water years.

Idaho courts have recognized the right of irrigation entities to carry over water in storage facilities for distribution in succeeding seasons according to the quantities contributed.[39] In a recent contentious water call[40] between surface and ground water users in the Upper Snake River Basin, the Idaho Supreme Court determined that an irrigation entity's carryover storage may be limited by a standard of reasonableness based upon the entity's future needs within the framework of the state's Conjunctive Management Rules.[41] Thus, even though Reclamation contractors have an unlimited right to carryover water in bad years, if they make a water call against other irrigators, the Supreme Court has determined that Idaho's prior appropriation law will not permit carryover for multiple years without regard to the contractors' current or future needs.[42]

Water spreading or unauthorized use of federal project water

In the late 1980s, it came to light that project water was being improperly delivered to thousands of acres of land across the West. The Department of the Interior's Inspector General (IG) investigated the allegations and confirmed that this practice was occurring in various forms, e.g., water delivered outside project boundaries, lands irrigated without state water rights, water delivered to more lands than allowed under federal contract, or water delivered to lands not designated as irrigable. The IG found that Reclamation had failed to collect over $37 million for these water deliveries from 1984 to 1992. The environmental community believed that Reclamation should stop those "excess" diversions and put the water instream. Congress held hearings and pressured both Reclamation and the irrigators to do something about these widespread but unauthorized practices.

About the time water spreading was hitting Idaho, the state legislature adopted first the presumption statutes, and later, when those were repealed in 1994, adopted the enlargement statutes.[43] Through the SRBA, Idaho law confirmed that an enlargement of the use of water was permitted either through a constitutional appropriation, if IDWR never issued a mandatory permit, or as an enlargement so long as the diversion rate for the original right was not increased. The acres irrigated with the enlarged lands received a priority date of the time of their first irrigation. Given the quick action of its legislators and the coincidental timing of the SRBA, water spreading in Idaho was mostly a tempest that blew through the state. Reclamation managers, however, were faced with the need to reconcile contracts and legal authority issues.

Photo courtesy of Bureau of Reclamation

The Teton Dam near Rexburg suddenly failed on first filling of the reservoir in 1976. When it failed, the reservoir was 270 feet deep (at the dam) and drained in less than six hours. The filling and the subsequent rapid draining of the reservoir triggered more than 200 landslides in the river canyon. The dam failure also resulted in the loss of 11 lives and millions in property damage. Today, Bureau of Reclamation engineers assess all Reclamation dams under strict criteria established by its Safety of Dams program.

Title transfer to reclamation project facilities and water rights

Idaho irrigation entities led the way in taking advantage of a federal initiative, Reclamation's Title Transfer policy. In setting up the Reclamation program, Congress required Reclamation to hold the facilities, and the water rights,[44] for the irrigation projects.[45] In 1902 Congress wanted Reclamation to take care of the project investment. That view continued until 1995 when Reclamation released its *Framework for Transfer of Title of Bureau of Reclamation Projects*. This framework set out a consistent, fair and open process to negotiate the transfer of title to appropriate facilities and water rights with all interested stakeholders participating. Once an agreement was negotiated, proponents hoped that Congress would draft

Idaho courts have recognized the right of irrigation entities to carry over water in storage facilities for distribution in succeeding seasons according to the quantities contributed.

and pass legislation to effectuate the title transfer. Burley Irrigation District was one of the first entities to take advantage of the process for some of its facilities and water rights. Other irrigation districts that have engaged in title transfer in Idaho are Nampa & Meridian Irrigation District, Fremont Madison Irrigation District and American Falls Reservoir District #2.

Conclusion

Since the past is prologue for the future, the only constant Reclamation can be sure of in its water future is that there will be change. As former Commissioner of Reclamation John Keys said, "As the Bureau proceeds through the next one hundred years, these things are certain; the values we hold today will change; public policy will continue to change, and Reclamation's mission will continue to change. As the Beatles once sang, 'O bla dah, life goes on.'"[46]

This framework set out a consistent, fair and open process to negotiate the transfer of title to appropriate facilities and water rights with all interested stakeholders participating.

About the Author

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Endnotes

[1] "Federal water right" in this article means a state-based water right and not a federally reserved right.

[2] *Nevada v. United States,* 463 U.S. 110, 115, 103 S. Ct. 2906, 77 L.Ed. 2d 509, 515 (1983).

[3] 43 U.S.C. §§ 327, 383 (2006). *See also California v. United States,* 438 U.S. 645, 98 S. Ct. 2985, 57 L.Ed. 2d 1018 (1978) (noting a consistent and purposeful thread of deference to state water law except in instances where there are specific Congressional directives).

[4] *United States v. Burley,* 172 F. 615 (C.C.D. Idaho 1909) (eminent domain case explaining Reclamation process).

[5] *See Washington County Irrigation Dist. v. Talboy*, 55 Idaho 382, 43 P.2d 943 (1935). *See also Nampa & Meridian Irrigation Dist. v. Barclay,* 56 Idaho 13, 47 P.2d 916 (1935) (Idaho law does not require one who ultimately uses the water to gain title to the water rights).

[6] 144 Idaho at 115, 157 P.2d at 609.

[7] *See, e.g., Ickes v. Fox,* 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937) (Washington); *Nebraska v. Wyoming*, 325 U.S. 589, 65 S. Ct. 1332, 66 S. Ct. 1 (1945); *Nevada v. United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983)

[8] *Id.*

[9] 144 Idaho at 115, 157 P.2d at 609.

[10] *See Orange Cove Irrigation Dist. v. United States*, 28 Fed. Cl. 790, 797 (Fed. Cl. 1993); *Kennewick Irrigation Dist. v. United States,* 880 F.2d 1018, 1032 (9th Cir. Wash. 1989) (Federal law governs the interpretation of contracts between Reclamation and irrigation districts).

[11] *See Twin Falls Canal Co v. Foote,* 192 Fed 583, 594 (C.C.D. Idaho 1911)(water rights held by the government for a federal reclamation project are derived from the same sources but Reclamation holds the rights in a proprietary capacity); *and United States v. Humbolt Lovelock Irrigation Light & Power Co.,* 97 F.2d 38 (9th Cir. 1938)(federal government may obtain water rights appropriated under state system). *See also* 97 Interior Decision No. 2 (July 6, 1989) *Filing of Claims for Water Rights in General Stream Adjudications,* 28-30, wherein it states that Reclamation as the distributor and legal titleholder of the appropriative rights must do what is necessary to preserve, maintain, protect the project rights for the benefit of the project.

[12] *See* Minidoka Project Act of 1997, Pub. L. 105-351, 112 Stat. 3219, wherein Congress authorized Reclamation to transfer ownership of certain project water rights to Burley Irrigation District.

[13] *See* ch. 143, Idaho Sess. Laws 1915 (irrigation districts within state can contract with the United States under federal statutes for, among other things, collection of assessments).

[14] *See* Act of May 15, 1922, 42 Stat. 54 (Congress authorized contracts with irrigation districts on a joint-liability basis); May 25, 1926 Omnibus Adjustment Act, ch. 383, 44 Stat. 636 (required that contracts be executed by water organizations).

[15] *See* the website for the Idaho Water User's Association at http://www.iwua.org/

[16] *Ivanhoe Irr. Dist. v. McCracken,* 357 U.S. 275, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958).

[17] *See Nampa & Meridian Irrigation Dist. v. Petrie,* 28 Idaho 227, 241-42; 153 P. 425, 429-30 (1915) (upholding the Reclamation's right to impose 160-acre limitation on any irrigable lands within a Reclamation project).

[18] 43 U.S.C. § 390dd (2007).

[19] An irrigation entity also may have a "Warren Act" contract for the delivery of irrigation water that is in excess of project requirements. *See* Act of February 21, 1911, ch. 141 (36 Stat. 925).

[20] *See Payette Boise Water Users' Ass'n v. Cole,* 263 F. 734, 741 (D. Idaho 1919); *Payette Boise Water Users' Ass'n v. Bond,* 269 F. 159, 178 (D. Idaho 1920).

[21] *Payette Boise Water Users' Ass'n v. Cole,* 263 F. at 741.

[22] *New York Canal Co. v. United States,* 277 F. 444 (D. Idaho 1913).

[23] U.S. Bureau of Reclamation, The Bureau of Reclamation: History Essays from the Centennial Symposium 398 (U.S. Government Printing Office 2002).

[24] *Id.* at 397-98.

[25] *Id.*

[26] Act of August 13, 1914, ch. 247, 38 Stat. 686-87.

[27] U.S. Bureau of Reclamation, *The Bureau of Reclamation Origins and Growth to 1945* 183-84 (U.S. Government Printing Office 2006).

[28] 43 U.S.C. §§ 492, 493 (2006).

[29] 43 U.S.C. § 485h(b)(2006).

[30] *Mower v. Bond,* 8 F.2d 518, 521 (D. Idaho 1925) (drainage facility costs attributed to the irrigation unit are proper operation and maintenance expense).

[31] *Fremont Madison Irrigation Dist. v. United States Department of the Interior,* 763 F.2d 1084, 1088 (9th Cir. Idaho 1985) (irrigator's property rights were limited by contract provisions that covered the circumstance of the disaster).

[32] *Rayl v. Salmon River Canal Company,* 66 Idaho 199, 211; 157 P.2d 76, 81 (1945).

[33] Michael C. Robinson, Water For the West The Bureau of Reclamation 1902-1977 56-72 (Public Works Historical Society 1979).

[34] *Id.* at 75.

[35] Act of September 30, 1950, Pub. L. No. 864, 64 Stat. 1083.

[36] 64 Stat. 1084 (*see* Section 4 of the Act of September 30, 1950).

[37] *Id.* Reclamation also analyzed that an additional 300,000 acre feet could be saved if diversions below American Falls Dam were ceased in the winter time. *See* United States Department of the Interior, Bureau of Reclamation, *Water Supply for Palisades Reservoir Project, Idaho: Project Planning Report* 1-5.17-1 (October 1946). Reclamation's total goal in 1946 was to save 435,000 acre feet of water annually (135,000 as set out by Congress and the 300,000 below American Falls Dam). *Id.* Through negotiations with the irrigation entities in the Upper Snake River Basin, Reclamation entered into contracts with various winter water savings provisions. These contracts recognized that the water conserved could be credited annually to Palisades Reservoir with a priority over the American Falls Reservoir Right. *See* United States Department of the Interior, *Supplemental Report: Palisades Dam and Reservoir Project, Idaho* 7-8 (June 1949).

[38] *Cf* Contract Between the United States of America and Lowder Slough Canal Company, Ltd., No. 14-06-W-34 ¶ 11(a).

[39] *See American Falls Reservoir Dist. v. Thrall,* 39 Idaho 105, 228 P. 236 (1924); *Board of Directors v. Jorgenson,* 64 Idaho 538, 136 P.2d 461 (1943); *Rayl,* 66 Idaho at 204-05; 157 P.2d at 79.

[40] A water call is when a senior water right holder seeks delivery of water from a junior water right holder though administration of the water rights.

[41] *American Falls Reservoir Dist. #2 v. Idaho Dep't of Water Resources,* 143 Idaho 862, 880; 154 P.3d 433, 451 (2007).

[42] *Id.*

[43] *See* I.C. § 42-1426.

[44] *See* Minidoka Project Act of 1997, Pub. L. 105-351, 112 Stat. 3219, wherein Congress authorized Reclamation to transfer ownership of project water rights to Burley Irrigation District.

[45] 43 U.S.C. § 498 (2006).

[46] U.S. Bureau of Reclamation, The Bureau of Reclamation: History Essays from the Centennial Symposium 800 (U.S. Government Printing Office 2002).

Photo courtesy of Bureau of Land Management

Questions about water rights on the Snake River caused a political fight. The Swan Falls Dam, above, sparked a debate between using water for power or for irrigation.

Reminiscence on the 1984 Swan Falls Water Rights Negotiations

Patrick D. Costello
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College of Law

It would be the most memorable "house call" I ever made as an attorney.

I was driving an old pickup I had borrowed from the Idaho Transportation Department's Pocatello fleet up a back road into the high country above Lava Hot Springs. It began to snow, and the flurries were drifting up on the roadway. As I drove higher into the mountains, the road became a trail, and then a path. At the end of the road, a man on horseback was waiting, along with a second horse. The man was my client, John V. Evans, then-governor of Idaho. I asked with apprehension why he'd brought the second horse. "Why, she's for you, Pat," the governor said. I protested that I had planned to return to Pocatello as soon as we completed our business so I could catch the evening flight back to Boise. I hadn't ridden a horse since high school, and was in my Alexander-Davis lawyer duds, but the governor insisted that we ride back up the snowy trail to the bunkhouse. Governor Evans and his son David (now the Oneida County magistrate judge) were in the middle of the annual cattle roundup on their spread up on Dempsey Creek. After an uncomfortable (for me) ride of maybe 30 minutes (which seemed interminable) we arrived at the tiny bunkhouse, which lacked both running water and electricity. The governor cooked us up some steaks over the wood fire. Then we talked about the latest crisis in the Swan Falls water rights negotiation.

Patrick D. Costello

It was late October, 1984. Since July of that year I had spent nearly every day negotiating on the governor's behalf with Idaho Power Company's lawyer, Tom Nelson,[1] and then-Deputy Attorney General Pat Kole,[2] trying to settle a legal and political war over Snake River water rights. The Idaho Supreme Court had ruled the previous year that the power company's 1901water rights at Swan Falls Dam had not been affected by the power company's subordination of its Hells Canyon water rights to subsequent irrigation projects.[3] That ruling set off a political battle royale. Governor Evans, though a Stanford-educated banker and a usually pro-conservation Democrat, was nevertheless firmly in the camp of the pro-subordination irrigators. "I want Idaho to be the Snake River water-master, not Idaho Power Company," he would frequently declare. Eight bills were introduced during the 1983 session of the Idaho Legislature attempting to subordinate hydropower rights to out-of-stream uses such as irrigation. None of them passed. The pro-irrigation lawmakers tried again during the 1984 session, but, again, were unsuccessful; during that session, however, the Legislature enacted Senate Bill 1180, encouraging the governor and attorney general to try to settle the "7500 law suit", in which Idaho Power had sued about 7500 Snake River water rights holders and applicants. This suit also came to be known as "Idaho Power Company vs. The World."[4]

The governor cooked us up some steaks over the wood fire. Then we talked about the latest crisis in the Swan Falls water rights negotiation.

The war of words

That spring of 1984, the power company mounted a public relations offensive (timed to coincide with legislative

primary election campaigns) to generate support for its position against subordination. Then-Attorney General Jim Jones[5] responded with strongly-worded pronouncements of his own in support of the pro-subordination cause, raising the specter of power company control of all future development in southern Idaho. After the primary elections, Governor Evans wrote to Idaho Power Company President James Bruce, suggesting that, rather than meeting to discuss settlement of the "Idaho Power Company vs. the World" lawsuit, the parties enter into negotiations to resolve the question of future, as well as past, water development in the Snake River Basin.

The three principals (Evans, Jones, and Bruce) met privately in the governor's office in July 1984. After the governor and attorney general complained to Bruce about what they perceived as unfair power company advertisements, Bruce took issue with some of Evans's and Jones's public statements. But eventually, both sides concluded that, if these negotiations were to bear fruit, the war of words in the media would have to be suspended. However, the level of distrust on both sides was such that they each feared the other would use the negotiations to lull the other party into complacency during the fall legislative election campaigns. The principals ultimately agreed to a public relations "cease fire," lasting until October 1. If there was no agreement by then, all bets were off.

Negotiations

Nelson, Kole, and I were then sent off to attempt to work out a settlement. For the next several weeks, we received advice and information from state, federal, and power company hydrologists, economists, farmers, and representatives of conservation, recreation, and sportsmen's interests. It was quite a seminar in Idaho history, politics, and water law.

The three of us quickly determined that, while the state and power company were far apart on the central issue of subordination of hydropower rights, the two sides had many common interests. It was in both the state's and the power company's interests to have enforceable minimum stream flows. No one wanted to be able to "walk across the Snake River on the backs of dead sturgeon," as Tom Nelson would frequently predict would be the result if unchecked high-lift pumping from the Snake River was ever allowed.[6] Policy decisions about the use of this finite resource were hampered by the paucity of data about water usage and hydrology in the basin. The fact that there had never been a general stream adjudication on the entire Snake River meant a water master could not be installed to deliver water at whatever level the parties might ultimately agree was acceptable. In addition to the immediate crisis posed by the Idaho Power litigation, state officials were concerned about the uncertain federal reserved water rights that could be asserted by federal agencies and Idaho's Indian tribes. Commencement of a general stream adjudication would be the only way to force federal agencies and tribes to participate, according to the terms of the McCarran Amendment.[7]

Breakthrough

Conflict creates opportunity. It occurred to us that the strong desire among legislators to put the Swan Falls crisis behind them might make them willing to pay for things like studies and an adjudication, or to enact public interest criteria to regulate future water development, to which they likely otherwise would have been unwilling to agree.

On October 1, 1984, Evans, Bruce, and Jones met again, this time to sign a "Framework for Final Resolution of Snake River Water Rights Controversy." The key provision was a compromise on stream flows. The power company would agree to reduce its water rights at Swan Falls to 3900 CFS in the summer and 5600 CFS during the non-irrigation season, and the state, in turn, would amend the state water plan to enact new minimum flows in the same amounts at the Murphy Gauge below Swan Falls Dam. The state would be allowed, and required, to assert the power company's right in order to firm up the enforceability of its minimum stream flows. Exactly how this would be accomplished legally was purposely left unclear. The word "subordination" was not once mentioned in the document. It did condition the agreement on the commencement of the Snake River adjudication, funding for studies and data collection, and enactment of public interest criteria to guide future development. Enough progress had been made toward agreement that the principals agreed to continue the public relations "cease fire" for awhile longer.

Endgame

Over the next several weeks, Nelson, Kole, and I continued to meet by day to hammer out contractual language, water plan amendments, and legislation to implement the general language of the Framework. Often by night, we were touring the state on board the small state airplane (which had been purchased in the aftermath of the Teton Dam collapse) to appear at public meetings convened by the Idaho Water Resources Board. These were held in Idaho Falls, Pocatello, Twin Falls, Boise, and Lewiston. (After each landing, Tom Nelson would exclaim: "Cheated death again!") The meetings were held to provide public information and receive public comment about the proposed agreement outlined in the Framework. The reception we received at some of the venues for the "Pat, Pat, and Tom" show was less than friendly. After one such presentation, I was publicly called a "loose cannon." The next day I was amused to find that some wag had hung a sign on the cannon on the statehouse lawn which read "SS Costello."

The reception we received at some of the venues for the "Pat, Pat, and Tom" show was less than friendly.

Eventually, all of the terms of the Swan Falls contract had been drafted, save one: the subordination clause. The attorney general's position was that the power company should agree to immediately subordinate its rights. The power company argued its rights should only be subordinated over time as new development was approved according to the public interest criteria set forth in the agreement[8]. It appeared we were at impasse over this issue. That's what I reported to Governor Evans when I went to Dempsey Creek.

After chewing over the issue in the bunkhouse, the governor instructed me to consult with Rexburg water lawyer Ray Rigby and other members of the governor's Swan Falls advisory council before throwing in the towel. The next morning, the governor and I rode back down the trail to the pickup. I took off to confer with Rigby and the others. During these meetings, Rigby came up with the "trust water" concept which eventually broke the impasse.[9]

In the early morning of October 25, 1984, Evans, Jones, and Bruce again met in the governor's office to sign two documents. The first, simply entitled "Agreement," was the main Swan Falls contract, including six pieces of proposed state legislation to set up the trust mechanism and the public interest criteria, to fund various

studies, and, not insignificantly, to commence the general stream adjudication of the Snake River. The second, styled "Contract to Implement Ch. 259, Sess. Laws, 1983," provided for the dismissal of the "Idaho Power Company vs. the World" case on the terms set forth in S.B. 1180.

Implementation of the agreement

The Legislature adopted the Swan Falls legislative package during the 1985 session with surprisingly little controversy or debate, compared to the fireworks over subordination that had marked the preceding two sessions. The Idaho Water Resource Board amended the State Water Plan to conform to the minimum flow and other provisions of the Swan Falls agreement. The final stumbling block to implementation of the agreement was its approval by the Federal Energy Regulatory Commission. That had not been forthcoming by the fall of 1986, so Nelson, Kole, and I went to Washington, D.C. to work with our congressional delegation on a legislative directive to FERC to approve the agreement. Within a week's time Senator James McClure had succeeded in attaching the necessary Swan Falls language to an energy conservation bill then poised for final passage. We headed back to Idaho thinking our work on Swan Falls was finally over. The three of us were chagrined to learn a short time later that, for reasons having nothing to do with the Swan Falls provision, President Ronald Reagan had vetoed the bill! Fortunately, Senator McClure was able to secure passage of the Swan Falls language early in the next Congress.[10]

2009: Another Swan Falls agreement

Of course, the 1984 agreement would not prove to be the end of the Swan Falls controversy. In 2007, Idaho Power filed a lawsuit against the state over the meaning of the "trust water" provision of the 1984 agreement. The district court ruled in the state's favor, and the parties entered into yet another agreement, the 2009 "Framework Reaffirming the Swan Falls Settlement."[11]

Swan Falls legacy

Probably the most important legacy of the Swan Falls agreement was the commencement of the Snake River Basin Adjudication. At the time we estimated it would take 10 years and $28 million to complete the adjudication. It has now taken more than 20 years. According to Clive Strong, chief of the Idaho Attorney General's Natural Resources Division, it is projected to be completed in 2012. The total cost will likely end up being close to three times the initial estimate. In the process, reserved water rights for the Fort Hall Shoshone-Bannock Tribe, the Shoshone-Piute Tribe, and for the Nez Perce Tribe, as well as several federal agencies have been defined and quantified. Idaho is now in a much better position to manage its own water resources as a result.

Photo courtesy of Library Of Congress

A man stands at an irrigation headgate identified as being in Idaho during the early 20th Century. Federal Bureau of Reclamation engineers transformed the arid Snake River plain into a fertile land with dams and reservoirs.

Probably the most important legacy of the Swan Falls agreement was the commencement of the Snake River Basin Adjudication.

About the Author

Pat Costello *teaches Trial Advocacy and Dispute Resolution at the University of Idaho College of Law where he also supervises two of the College's clinics. He is a former Clearwater County magistrate judge, and was legal counsel to Governors John V. Evans and Cecil D. Andrus from 1981-87.*

Endnotes

[1] Tom Nelson is now a Ninth Circuit Judge on senior status.

[2] Pat Kole is now Vice-president for Legal and Governmental Affairs for the Idaho Potato Commission.

[3] *Idaho Power Company v. State of Idaho*, 104 Idaho 575, 661 P.2d 741 (1983). As used herein, subordination means that the holder of a senior water right could not assert the existence of that right to prevent development of other projects, even if the projects adversely impacted the holder's right. Patrick D. Costello and Patrick J. Kole, *Commentary on Swan Falls Resolution,* W. Nat. Resources Litig. Dig, 11, 12 n. 2 (Summer 1985) .

[4] Jeffrey C. Fereday and Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal, and Practical Dimensions of Idaho's Biggest Water Rights Controversy*, 28 Idaho L. Rev.573, 597 (1992)

[5] Jim Jones is now an Idaho Supreme Court justice.

[6] As the negotiations wore on, Tom Nelson demonstrated day after day how to use humor and colorful metaphors instead of bluster and threats to make effective negotiating points. In addition to the dead sturgeon remark, I remember him repeatedly warning what would happen to the Snake River if rutabagas ever reached $100 per sack. Pat Kole told me recently he believed the use of humor to dispel what was a fairly tense atmosphere was one of the keys to the successful conclusion of our negotiations.

[7] 743 U.S.C. § 666

[8] The public interest criteria were: "(i) the potential benefits, both direct and indirect, that the proposed use would provide to the state and local economy; (ii) the economic impact the proposed use would have upon electric utility rates in the State of Idaho, and the availability, foreseeability and costs of alternative energy sources to ameliorate such impact; (iii) the promotion of the family farming tradition; (iv) the promotion of full economic and multiple use development of the water resources of the State of Idaho; (v) in the Snake River Basin about the Murphy Gage whether the proposed development conforms to a staged development policy of up to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four (4) year period." Costello & Kole, *supra* at 17. These criteria were eventually incorporated into Sec. 42-203C, I.C.

[9] Rather than immediately subordinating the Swan Falls water right, it would be held in trust by the state to be gradually subordinated over time as new water rights were approved according to the public interest criteria set forth in the preceding note. For more thorough discussions of the trust water concept, *see generally*: Clive J. Strong and Michael C. Orr, *The Origin and Evolution of Hydropower on the Snake River: a Century of Conflict and Cooperation*, 46 Idaho L. Rev.119 (2009) and also Fereday & Creamer, *supra,* note iv.

[10] Pub. L. No. 100-216, 101 Stat.1450 (1987)

[11] Strong and Orr, *supra*, note viii, at 166-175.

The Creation and Evolution of the Boise Project Through Collaboration Among Local, State and Federal Interests

Albert P. Barker
Barker, Rosholt & Simpson, LLP

Photo courtesy of Bureau of Reclamation

The spillway delivers water from the Boise River around Arrowrock Dam, constructed in 1915. Its 384-foot curved gravity arch was an engineering marvel.

Tom Davis acquired the first irrigation rights on the Boise river in 1864 to water his orchard growing where Julia Davis Park is now located.[1] Irrigation quickly spread up and down the Boise River. Idaho law evolved to recognize irrigation districts and other water distribution entities.[2] By the turn of the 20th century, irrigation districts and canal systems were well established on the Boise River, but many were struggling to remain viable. Private companies could not raise adequate capital. Dams and larger canals were needed to store floodwaters to deliver water to the sagebrush deserts above the flood plains of the Boise River. These more ambitious projects required even greater capital than was readily available to the individual farmers and the young irrigation entities.

The events that unfolded over the course of the next quarter century to deal with these difficult realities made possible today's vibrant and important agricultural economy of the Boise Valley. To carry out this vision required a unique combination of effort by local farmers, engineers, state and local governments, and the United States Bureau of Reclamation Service.

Albert P. Barker

The early federal role

In 1902, Congress enacted the Reclamation Act[3] to establish funding for "construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories."[4] Congress recognized that states were uniquely situated to control water rights and directed that the federal government's development of water resources would not interfere with state water law, the development would only be for beneficial uses recognized by the states and the water rights obtained would be appurtenant to the land irrigated.[5] The Reclamation Act provided that state law governed the "control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder."[6]

The Act also authorized the United States to withdraw lands necessary for irrigation works and to contract with individual landowners for the use of irrigation water and for repayment of construction costs.[7] Initially, the United States entered into repayment contracts directly with individual water users. The federal government found it increasingly difficult to deal directly with a large number of individual water users, and so it modified this initial approach. Subsequent legislation permitted the Department of the Interior to contract with irrigation districts rather than individual landowners and allowed the irrigation districts to become the successor to the United States.[8] Each irrigation district was required to pay the United States and the landowners were to pay their share of the costs to the irrigation district.[9] The acting Secretary of the Interior explained this shift:

> A general rule upon Federal irrigation projects is to require each person applying for a right to the use of water to file a formal water-right application. This procedure, however, is inconsistent with the irrigation-district plan for the reason that in the later case the water-right vests in the irrigation district which is a quasi-public corporation, and the individual water user has no separable water right, being entitled by the laws of the State to his proportionate share of the water available for the district.[10]

Initially, the United States entered into repayment contracts directly with individual water users.

The Fact Finders' Act of December 5, 1924, required the United States to contract with an irrigation district "whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water-rights contracts between the water users and the United States."[11] The Fact Finders Act was an effort by Congress to save money on operation of federal projects by shifting the costs to local irrigation entities.[12] The irrigation entities with contracts under this Act assumed responsibility for ensuring repay-

ment by water users as well as operation of the project.

Water resource development in the Boise River Valley follows changes in federal law and policy

Water resource development in the Boise Valley closely followed this evolution of federal law. In 1906, the Payette-Boise Water Users Association contracted for the construction of a federal reclamation project, known as the Boise Project. Meanwhile, construction began on the New York Canal by a separate private entity, the New York Canal Company. Unable to complete the canal, in 1906, the New York Canal Company contracted with the United States to turn over the canal to the United States and to incorporate it into the Boise Project.[13] With the United States' involvement, the New York Canal was substantially increased in size and extended to Deer Flat Reservoir (Lake Lowell). This reservoir was completed by 1909 under contract to the United States. By 1915, the United States had also completed Arrowrock Dam and reservoir to provide additional storage necessary to bring more land under irrigation. The dam was the tallest in the world at that time.[14] The 1906 contract delegated to the New York Canal Company the responsibility of managing the Reclamation works, including the canal and Deer Flat Reservoir, and delivering storage water to landowners from Arrowrock Reservoir.[15]

In these early days, the United States issued water rights certificates to individual landowners and assessed liens against their property until all of Reclamation project's costs were repaid.[16] Bedeviled by the cost and headache of dealing with so many individual landowners the Commissioner of Reclamation insisted that the water users of the Boise Valley form irrigation districts by 1926.[17] The Department of Interior even declined to turn over the operation of the Boise Project to the New York Canal Company because of this preference for dealing directly and exclusively with irrigation districts.[18] This federal ultimatum led to formation of the member irrigation districts of the Boise Project Board of Control and the Board of Control itself.[19]

Idaho legislation tracked and accommodated these policy shifts

To accommodate this evolution of federal law and policy, the Idaho legislature passed legislation permitting irrigation districts to enter into agreements with the United States to accept responsibility for reservoir and distribution systems. Irrigation districts were authorized to contract with the United States "for the operation and maintenance of the necessary works for the delivery and distribution of water therefrom under the provisions of the federal reclamation act."[20]

By 1941, it was clear that there was still insufficient water supply stored behind Arrowrock for proper reclamation and irrigation of all lands within the districts.

Idaho statutes, codified in 1925, authorized an irrigation district:

> (W)hen authorized by the qualified electors of the district … [to] acquire, hold and own on behalf of the irrigation district storage rights, capacity, water and water rights in reservoirs constructed by the United States government in cooperation with the district to be disposed of as hereinafter provided.[21]

Additionally, prior to executing such a contract, the members of the district must vote to approve the contract and the local district court must confirm the contract.[22] After notice is published in the local newspaper of the decision to form the district, a confirmation hearing is held where the district court is to "render a final decree approving and confirming all of the said proceedings."[23] Any party who fails to participate in a proceeding under these sections is bound by the district court's decision.[24]

In 1926, the Boise Project's five irrigation districts each entered into substantially similar repayment contracts with the United States.[25] The electors of the districts approved the contracts, as required by Idaho law. Under these repayment contracts, the districts purchased a majority of the space in Arrowrock Reservoir.[26] The districts assumed the repayment obligation of the individual water users who had obtained the water right certificates and also assumed the obligation to pay the operation and management charges and to repay the United States for the construction charges of Arrowrock Dam.[27] The districts accepted responsibility for operation and maintenance of a portion of the Project through the Board of Control.[28]

In each contract, the United States required the district to initiate judicial confirmation proceedings to obtain judicial approval of the contract and to provide the United States with certified copies of all the confirmation proceedings.[29] These contractual conditions mirrored the requirements of state law. In the confirmation proceeding involving the 1926 contract with the Boise-Kuna Irrigation District, the district court recognized that Boise-Kuna was purchasing "a part of the water rights for the lands watered from irrigation works of the Boise Reclamation Project."[30]

In 1928, after the landowners and water users had incorporated their lands and water rights into the Boise Project districts, the certificates were surrendered to the districts, and the United States' lien on the individual lands was released.[31]

By 1941, it was clear that there was still insufficient water supply stored behind Arrowrock for proper reclamation and irrigation of all lands within the districts. The Boise Project districts entered into another contract with the United States for water stored in Anderson Ranch Reservoir, which was then under construction. World War II intervened and Anderson Ranch was not completed until 1948. Once again, the United States required, as a condition of the Anderson Ranch contract approval, that the contract be judicially confirmed in the district court. Idaho law continued to require voter approval and judicial confirmation.

The Supreme Court upholds the validity of the contracts between the districts and the federal government

In 1941 the confirmation order approving the Anderson Ranch contract between Wilder Irrigation District and Reclamation was appealed to the Idaho Supreme Court.[32] This single appellate decision from the judicial confirmation proceedings provides the only reported authority for the validity of the contracts between these districts of the Boise Project and Reclamation.

Certain landowners within the Wilder Irrigation District objected to confirmation of the contract, claiming that the District did not have authority to enter into

the contract, and if it did have authority, the District did not have the authority to grant the United States the authority to substitute project waters for other waters.[33] This second argument challenged a contract provision that contemplated that the United States might, at some time in the future, substitute Payette and Salmon River water for Boise River water.

The Supreme Court ruled 4-1 to confirm the contract.[34] Remarkably, each Justice wrote a separate opinion.

Chief Justice Holden, writing for the Court, upheld the authority of the District to contract with the United States, against a claim that the contract was *ultra vires*.[35] The Court also upheld the District's original 1926 contractual delegation of management of the water delivery system to the Board of Control.[36] The Court then held that substitution of Payette and Salmon water, if it happened in the future, would have to be done so that it did not harm the interests of individual water users within the district and, therefore, the contract was valid. The Chief Justice observed that an irrigation district's authority and existence depends on its ability to furnish water to land owners within the district.[37]

Three Justices wrote separate concurring opinions. Justice Alshie concluded that the substitution clause in the contract was meant "to be beneficial rather than detrimental to the proprietary rights of the water users" and the "contract is intended to preserve and protect the rights of the locators and appropriators of water rather than impair them."[38] He also determined that the contract would not allow a diminution of priority or point of diversion of the water, if the substitution were to occur.[39] Justice Budge concluded that the "landowners and water users, under the terms of the contract, will not be deprived of their water rights or priorities."[40] Justice Koelsch agreed, after extensive review of the history of the Boise Project, that the contracts which authorized management by the Board of Control were valid; he specifically recognized that the "water rights [are] appurtenant to the lands in the Wilder Irrigation District, [and that their] right to water appropriated out of the flow of the Boise River will continue."[41] Justice Koelsch concluded that the contract did not give the United States the authority to ask the water users to surrender or modify their rights to the water.

Due to his concern with the substitution clause, Justice Givens dissented in part.[42] He agreed that the District had the authority to enter into the contracts and delegate authority to the Board of Control. He believed, however, that the substitution clause endangered the landowners' priority rights, particularly where the water to be substituted has not been identified or filed upon. He emphasized that the landowners, "as members of the … irrigation district, are owners of the water rights therein[.]"[43] He argued that the substitution provision "gives the secretary [of the Interior] the right to compel substitution of water for appellants' *existing water rights.*"[44] He stressed that the United States must recognize the right of the state to control the distribution of these waters.[45]

Photo courtesy of Bureau of Reclamation

Arrowrock Diamond Drill Crew poses for a portrait in 1910.

The Boise Project today

The substitution of Payette and Salmon River water for Boise River water has never happened. While there have been many plans to develop a large reclamation project in the Mountain Home area, which was the genesis of the substitution clause,[46] none have ever materialized. The question of the meaning and validity of the substitution clause is purely academic today.

The Boise Project Districts have carried out their obligations under the repayment contracts with the United States and have fully repaid the cost of construction of these facilities.[47] To date, none of the Districts have sought transfer of title to these federal facilities, although the Nampa & Meridian Irrigation District has acquired title to certain drainage facilities.

Recently, the issue of what legal interest the United States, the Districts and the landowners obtained in the water stored in the Bureau of Reclamation reservoirs on the Boise River has been conclusively answered by the Idaho Supreme Court through the Snake River Basin Adjudication (SRBA) process.[48]

In 1941 the confirmation order approving the Anderson Ranch contract between Wilder Irrigation District and Reclamation was appealed to the Idaho Supreme Court.

In the SRBA, the United States claimed title to the water rights stored in the Boise River reservoirs. The Boise River irrigation districts asserted that while the water rights could be held in the name of the United States, the water rights themselves must recognize the Districts' interests.[49] The SRBA district court agreed and held that the water rights must reflect the ownership interests of the irrigation districts. The United States appealed. The Idaho Supreme Court held:

Based upon the United States Supreme Court cases, the Reclamation Act, the Idaho Constitution, Idaho statutory and case law, it is clear that the entity that applies the water to beneficial use has a right that is more than a contractual right. The irrigation entities in this case act on behalf of those who have applied the water to beneficial use and repaid the United States for the costs of the facilities. The irrigation districts hold an interest on behalf of the water users pursuant to state law, consistent with the Reclamation Act and U.S. Supreme Court cases that were properly recognized by the SRBA Court.[50]

The Court then directed the SRBA district court to enter a specific remark recognizing the interests of the districts and their landowners in the water rights.

Today these five Boise Project irrigation districts provide irrigation water to 167,000 acres of land in the Boise Valley.[51] These lands would not have been irrigated if not for the combined efforts of the local water users, the state legislature and the federal government, Congress, the Department of Interior, and the Bureau of Reclamation. The Boise Project supports the agricultural economy of the Boise Valley and provides irrigation to hundreds of homes, parks, and other public and private land in addition to agricultural lands.

Photo courtesy of Boise Project Board of Control

Crews work to prepare lining of the Main Canal. The photo is looking down from about Station 290 on October 24, 1910.

About the Author

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Endnotes

[1] Davis was awarded water right number 1 in the Stewart decree, with a priority date of June 1, 1864. There were several other water rights with 1864 priority dates, including some with June 1, 1864 dates, but Davis has the honor of right number one on the Boise River.
[2] See *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho 310, 68 P. 295 (1902) (upholding the 1899 irrigation district statutes).
[3] Reclamation Act § 1, 43 U.S.C. § 391 (1902)
[4] *California v. United States*, 438 U.S. 645 (1978).
[5] Reclamation of Arid Lands, S. Rep. No. 254, at 2 (1902).
[6] Reclamation Act § 8.
[7] Reclamation Act §§ 3-4..
[8] Act of May 15, 1922, ch. 190, 42 Stat. 541 (codified as amended at 43 U.S.C. §§ 511-12 (year)).
[9] *Id*.
[10] Letter from Acting Secretary of Interior to Senator McNary, the Chairman of the Committee on Irrigation and Reclamation of Arid Lands (May 23, 1921) (on file with author).
[11] Fact Finders' Act of 1924, Subsec. G, 43 Stat. 702 (codified as amended at 43 U.S.C. § 500).
[12] *Strawberry Water Users Ass'n v. U.S.*, 576 F.3d 1133, 1135 (10th Cir., 2009)]
[13] *New York Canal Co. v. United States,* 277 F. 444, 445 (D. Idaho 1913).
[14] http://www.usbr.gov/projects/Facility.jsp?fac_Name=Arrowrock%20Dam
[15] *See New York Canal Co. v. Bond,* 265 F. 228, 229 (9th Cir. 1920); *New York Canal Co. v. Bond,* 273 F. 825 (D. Idaho 1921).
[16] Memorandum from Acting Commissioner, Bureau of Reclamation to Field Offices, October 23, 1926 (on file with author).
[17] Letter from Commissioner Elwood Mead to Senator William Borah (January 5, 1926) (on file with author). At the time of this ultimatum, Arrowrock Reservoir had been completed and water was being delivered to the water users of the Boise Project. *New York Canal Co.*, 265 F. at 229. Previously acquired natural flow rights and interests of the New York Canal Company were also transferred to the districts of the Board of Control. *See New York Canal Co.,* 277 F. at 444.
[18] Letter from Commissioner Elwood Mead to Senator William Borah (January 5, 1926) (on file with author); Letter from Hubert Work, Department of Interior to W. Thompson, President, New York Canal Co. (January 16, 1926) (on file with author).
[19] At that time, the Nampa & Meridian Irrigation District had been created in 1905. It owned, operated and received water through the Ridenbaugh Canal, a function it continues to provide to this day. *Nampa & Meridian Irr. Dist. v. Brose,* 11 Idaho 474, 83 P. 499 (1905). It is unique among the Boise Project districts in having this separate and pre-existing system. The Big Bend Irrigation District was formed pursuant to Oregon law in Malheur County in 1918. The New York Irrigation District, the Boise-Kuna Irrigation District, and the Wilder Irrigation District were each formed in 1925.
[20] I.C. § 43-1803 (1925); *Pioneer Irr. Dist. v. Stone*, 23 Idaho 344, 347, 130 P. 382, 383 (1913).
[21] I.C. §§ 43-1829-1830.
[22] I.C. § 43-1808(a).
[23] I.C. § 43-408.
[24] *Smith v. Progressive Irr. Dist.*, 28 Idaho 812, 822, 156 P. 1133, 1135 (1916).
[25] Letter from Commissioner Elwood Mead to Secretary of Interior (Feb. 9, 1926) (on file with author). These contracts were entered under the Fact Finders Act of 1924 and the Act of 1922 for release of liens and repayment obligations.
[26] The amount of storage space held by different entities in these Reservoirs is on file with the Boise River Water Master.
[27] *Id*.
[28] *Id.*
[29] *Id*.
[30] Ada County Dist. Confirmation Order (April 24, 1926).
[31] Release of Lien form from United States was issued to each irrigation district for all lands within the irrigation district.
[32] *In Re Wilder Irrigation Dist. v. Jorgensen*, 64 Idaho 538, 136 P.2d 461 (1943).
[33] *Id*. at 542, 136 P.2d at 462.
[34] *Id*.
[35] *Id*. at 543-46, 136 P.2d at 462-4.
[36] *Id.* at 545, 136 P.2d at 463.
[37] *Id*. at 550, 136 P.2d at 466.
[38] *Id.* at 551-52, 136 P.2d at 467.
[39] *Id.* at 551-52, 136 P.2d at 467.
[40] *Id*. at 553, 136 P.2d at 468.
[41] *Id.* at 563, 136 P.2d at 573.
[42] *Id* at 565, 136 P.2d at 474.
[43] *Id*. at 565, 136 P.2d at 474.
[44] *Id*. at 567, 136 P.2d at 475 (emphasis in original).
[45] *Id*. at 572, 136 P.2d at 477.
[46] The idea was to move water from Anderson Ranch to the Mountain Home desert and then bring in water from the Payette and/or Salmon basins by tunnels and canals to serve the Boise Project and other Anderson Ranch space holders.
[47] E.g., letters from Bureau of Reclamation to Wilder Irrigation District (Feb. 14, 1991 & Dec. 18, 1991) (on file with author).
[48] *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (Idaho 2007).
[49] These districts involved in this SRBA case as objectors, and as respondents on appeal, included not just the Boise Project districts, but all irrigation entities with space holder contracts in the three Boise River Reservoirs. *Id.* Other irrigation entities from around the state also participated in this seminal case.
[50] 144 Idaho at 115, 157 P.3d at 609.
[51] Acreage records on file with the IDWR and the five irrigation districts.

Photo courtesy of Idaho State Historical Society

Dwight D. Eisenhower sits with governors of Western states at the Idaho State Capitol to kick off his 1952 campaign for president. He opposed a plan by Democrats to create an enormous federal dam in Hells Canyon that would have been higher than Hoover Dam and held more water than Grand Coulee Dam. It was a pivotal campaign issue. Back row, left to right are Hugo Aronson, Montana (not shown); Edwin Mecham, New Mexico; Dan Thorton, Colorado; Douglas McKay, Oregon; J. Bracken Lee, Utah; Arthur B. Langlie, Washington. Bottom: Charles Russell, Nevada; Len Jordan, Idaho; Dwight D. Eisenhower; Earl Warren, California; Frank Barrett, Wyoming. In 1953 Eisenhower appointed California Governor Warren to the Supreme Court.

It Happened in Hells Canyon: Idaho's Role in Shaping Environmental Law

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The Pacific Northwest cradles the world's most hydroelectrified society. Falling westward off the Continental Divide, the Columbia and Snake Rivers frame the region. Ancestral waters that once hosted the world's largest historical salmon migration have yielded an electrical bounty that has driven stunning rates of economic growth. Following construction of the Columbia dams at Bonneville and Grand Coulee, Northwesterners no longer had to scratch out a living by farming, logging, fishing, and mining because the entire

Karl B. Brooks

"The proper role of government, however, is that of partner with the farmer — never his master. By every possible means we must develop and promote that partnership — to the end that agriculture may continue to be a sound, enduring foundation for our economy and that farm living may be a profitable and satisfying experience."

— President Dwight D. Eisenhower
Special Message to the Congress; January 9, 1956

area had been electrified! Electrification brought industrialization, especially to the downriver states. And industry attracted people — lots of them.

Economic change in turn sparked vast social and political changes. Drive past the Micron factory in Boise's Treasure Valley, or watch "creative cultural workers" tap smart phones in Portland to see how dams literally remade the modern (and post-modern) Northwest. Consider as well the deep political divisions separating true-blue Washington and Oregon from deep-red Idaho in every even-numbered year, and ever-spreading cheap power also helped create modern environmental law. The Hells Canyon controversy of 1945-1957 helps explain these distinctive Northwest features. This excerpt from my recent book, *Public Power, Private Dams: The Hells Canyon High Dam Controversy*[1] will illustrate how conflicts and ever-spreading cheap power also helped create modern environmental law.

Most regional hydroelectricity is public power from federal dams built in barely 25 years, from the end of World War II through 1970. But Idaho's key postwar dams are private. In Hells Canyon, on the Idaho-Oregon border some 75 miles northwest of Boise, the federal government tried mightily but failed utterly to build what would have been the world's largest power dam. Had High Hells Canyon been constructed as envisioned by the Bureau of Reclamation, Idaho would be a much different place. The decision not to build the High Dam seems unexpected, almost shocking: Hells Canyon was conceded to be the premier hydro site in the heart of the region most dependent on, and defined by, publicly-generated hydropower. Yet even in an era when the federal government was racing to construct dams throughout the Columbia-Snake Basin, its dam-that-never-was encountered economic limits, public resistance, and natural obstacles too great to overcome.

The Hells Canyon Complex, three relatively modest dams built between 1956 and 1970 by Idaho Power Company, vividly contrasts postwar Idaho with the federal hydroelectric dominion downriver in Oregon and Washington, where executive-branch agencies generate and sell most hydropower. A Boise native, I had never thought much about why Idaho's most important dams were private. Nor had I appreciated the titanic struggle generated when Idaho Power challenged federal plans to dam the Snake River as it pounds through Hells Canyon. Despite early and active involvement in Idaho public life over two decades, two days of pre-trial discovery during my private lawyering days introduced me to the Hells Canyon controversy in 1992. Another decade elapsed before I unlocked its white-hot meaning to postwar Northwestern politicians, lawyers, and ordinary citizens.

Trial lawyers call sifting through old documents "discovery." No truer word describes my growing amazement as I pawed through boxes of yellowing onionskin copies, tattered newspaper cuttings, and faded mimeos in Idaho Power's windowless conference room.

"Discovering" Hells Canyon

As an associate with the Boise office of Holland & Hart, I spent a memorable couple days in the then-new Idaho Power headquarters building. The firm usually represented big, successful businesses, but partner Walt Bithell had agreed to advise and represent the Nez Perce Tribe pro bono in litigation against Idaho Power. The Nez Perce believed their 1855 treaty guaranteed their right to fish – and to catch fish – in their ancestral salmon rivers, particularly the Snake, Salmon, and Clearwater. Our client argued that various federal laws which shielded the eight mainstem federal dams did not bar a claim against a private company that had also transformed water into power by barring migrating adult fish from reaching their upriver spawning grounds and down-running juvenile smolts from reaching the ocean. Dismissal of the tribe's case and settlement of its claims yielded no definitive answer about company liability, but it opened my eyes to the political, ecological, and legal controversy that Hells Canyon unleashed across the nation for nearly 15 years after 1945.

Trial lawyers call sifting through old documents "discovery." No truer word describes my growing amazement as I pawed through boxes of yellowing onionskin copies, tattered newspaper cuttings, and faded mimeos in Idaho Power's windowless conference room. I began muttering, "Here I am a native Idahoan, a politician even, vitally interested in our state's public history, and I had no idea one of the most important postwar struggles about water and power pitted Idaho Power against the United States government."

New Deal power

The New Deal after 1932 set the stage for the Hells Canyon controversy by making the Columbia Basin dependent during World War II on federal hydroelectricity for industrial and urban growth. Southern Idaho's Snake Basin, though, remained Idaho Power's preserve, its irrigation-dominated economy inextricably tied to water storage and diversion according to the near-sacred doctrine of prior appropriation. Ambitious and self-confident by 1945, federal hydroelectric managers then tried to extend their authority upriver from the Columbia to the Snake. By annexing the Snake, a high federal dam in Hells Canyon would push Bonneville Power Administration's dominion to the Continental Divide. New Deal legislation had harnessed national fiscal power to dam-building in the Northwest. New Deal administrators crafted a powerful new executive-branch regime that managed both water and fish. New Deal jurisprudence rationalized both federal administrative discretion and the surrender of state sovereignty over Northwestern migratory fish.

Enactment of the 1944 Flood Control Act reaffirmed public power's Northwestern hegemony by equipping federal hydroelectric managers and their downriver political and economic dependents for a postwar offensive, targeted directly on Hells Canyon. The Army Corps of Engineers, which had built Bonneville Dam above Portland, would provide all its hydropower to the Interior Department. By overseeing both BPA and Reclamation, Interior commanded a nearly inexhaustible economic asset to fuel its drive into the postwar Snake Basin. Cheap publicly-generated hydropower, dedicated to "preference" customers throughout Oregon and Washington, promoted greater electric consumption. Power at postage-stamp rates stimulated more business demand in these public-power and cooperative service areas.

Public Power, the editorial voice of the preference lobby, editorialized in 1950, "Public funds are used to develop a public asset—the rivers of our nation. The most valuable product of the development is hydroelectric energy. . . . By permitting public bodies and cooperatives to buy the energy, the most widespread use is achieved." BPA Administrator Paul Raver told Congress in 1946 that booming downriver demand for public power necessitated more federal dam-building. "The government, as I see it, is now in the position of having undertaken a public utility responsibility of supplying the distributing agencies in the Northwest and therefore the people of the Northwest... with an essential service, and we can't withdraw."

BPA worked in tandem with the Army Engineers and Reclamation Bureau through the new Columbia Basin Inter-Agency Committee. Formed in 1946, CBIAC drew plans for the Hells Canyon offensive and tirelessly promoted the High Dam throughout the region. Until Dwight Eisenhower's inauguration in 1953, CBIAC's public meetings drove the upriver offensive. Equally important, its closed-door negotiations eroded state and federal fish managers' resistance on ecological grounds. The Committee's charter that empowered agency members to serve as BPA's Advisory Board ensured "coordination of activities and avoided duplication of effort." Wearing two hats, federal hydroelectric managers proposed plans, secured appropriations for those plans, and smoothed intra-agency disputes. In 1947 the Corps of Engineers conceded construction responsibility for the High Dam to Reclamation because CBIAC's quiet persuasion greased the deal. That same summer, CBIAC muzzled federal biologists in the Fish and Wildlife Service. Bureaucratic maneuvers enforced scientists' acquiescence to a project they already knew spelled the end of wild fish runs above the mouth of the Salmon and menaced fish populations throughout the region.

Igniting a controversy

Reclamation Commissioner Michael Straus fired the first shot in the Hells Canyon controversy. The Bureau's 1947 Snake Basin Plan astounded observers. High Hells Canyon, its centerpiece, would be higher than Hoover Dam and store more water than Grand Coulee. Straus and his Boise regional office dreamed big because the High Dam would do more than sate downriver public-power customers' ravenous demand. Reclamation's Snake Plan also outlined a breath-taking scheme to redirect the Payette and Boise rivers over and under mountains, into canals gouged out of the Mountain Home Desert east of Boise, to water thousands of new farms needed to feed a projected one million new Northwesterners. The High Dam's power-sales revenue would not only finance this scheme, its surplus of cheap power would industrialize southern Idaho's economy. Two-thirds of America's phosphate rock lay under the Upper Snake Basin. To turn rock into fertilizer took stupendous amounts of energy, but the Bureau saw how Grand Coulee had created the Inland Northwest's aluminum industry in World War II.

High Hells Canyon had to be so big because federal planners intended its mainspring – cheap power – to transform the Snake Basin, as Bonneville and Grand Coulee had the Columbia. Adding more than 1000 megawatts of capacity to the Federal Columbia River Power System, the High Dam would meet electrical demands in Oregon and Washington. Power-sale revenues to public-power customers would fund the permanent subsidy needed to build and operate the Mountain Home Project. Reclamation regional counsel Howard R. Stinson testified that the High Dam, "an essential and key element" for postwar plans, coordinated dam-building, power marketing, and irrigation expansion "to achieve the fullest use of the water resources of the Snake River . . . [so as] to achieve a full development of the land and water resources of the Pacific Northwest." Federal hydro planners dubbed Hells Canyon "one of the greatest hydroelectric possibilities on the continent." The Corps deemed the High Dam "the focal point" of its strategy. Idaho Democratic Senator Glen Taylor proclaimed High Hells Canyon "vital to the strategic water storage and power projects in the entire Columbia Basin," its "vast quantity of low-cost hydroelectric power belonging to all the people of the United States and not intended to benefit any single private individual or corporation."

Truman's version of The New Deal

These bureaucrats and politicians only chorused President Truman. His 1953 farewell address to a national television audience captured the developmental conservation ideology that drove his determined eight-year pursuit of High Hells Canyon. He "dreamed out loud just a little" about how Americans should preserve security in a dangerous Cold War world. His "dream of the future" restated two cardinal principles that had guided his natural-resources strategy, including the Hells Canyon project, since the 1946 State of the Union. First, the national government, both the elected and appointed branches, had to control nature with technology and capital to generate the ever-burgeoning material prosperity that undergirded individual security. And second, permanent economic expansion offered the best guarantee of national security against deadly enemies abroad and their dangerous sympathizers at home.

Truman in full battle cry, at his presidency's apex, demanded Hells Canyon High Dam to redeem the New Deal's unmet promise.

The president cited examples from far away, in time and space, to illustrate his belief that "we can use the peaceful tools that science has forged for us to do away with poverty and human misery everywhere on earth." Drawing on his deep stock of Biblical lore, Truman reminded his audience about the agricultural output once generated in the Tigris-Euphrates Basin and on northeast Africa's temperate savannah. Fascinated with ancient history, he recalled South America's jungles had once nurtured great and populous civilizations. Once American capital and skill helped people unlock nature's storehouse, Truman predicted "developments will come so fast we will not recognize the world in which we now live." And closer to home, his fellow citizens, now enjoying their sixth straight year of postwar prosperity "have learned how to attain real prosperity [so that] all have better incomes and more of the good things of life than ever before in the history of the world."[2]

War and peace, and the way in which American know-how and money could mobilize natural environments, were never far from Truman's mind during his tumultuous eight years in the White House. His first State of the Union address, in January 1946, urged Congress to approve billions of dollars worth of new power dams and desert irrigation projects to forestall postwar depression, like the one that had claimed his fledgling Kansas City clothing business in the early 1920s. Campaigning to save his political life in 1948, he equated his "Fair Deal" postwar agenda with former president Franklin D. Roosevelt's "New Deal." As his great

idol FDR had done so magnificently during the Great Depression and World War II, Truman sought to put his own stamp on aggressive federal exploitation of nature. He belittled his opponents as penny-pinchers. Skeptical about spending new billions on water projects, like the High Dam, they were either selfish corporate stooges or hidebound obstructionists.[3]

Truman in full battle cry, at his presidency's apex, demanded Hells Canyon High Dam to redeem the New Deal's unmet promise. To a trackside crowd in Boise, in May 1950, he commended Democratic majorities in Congress for authorizing over $1.5 billion in new dams and water projects. Breathtaking in scope, Truman's water agenda sought to realize FDR's vision for developing of nature for community betterment. In the Columbia-Snake Basin, the Missouri Basin, and south Florida swamps, federal agencies would build over 150 new systems to redirect water and reshape landscapes. The president urged Congress to authorize the High Dam to complete this concrete necklace and complete the New Deal's agenda. "If we hadn't had the Bonneville and Grand Coulee Dams and the other power projects," Truman proclaimed, "it would have taken us much longer to win the war." The High Dam demanded construction: "if we get that done, nothing in the world can prevent this country from accomplishing its purpose. It will mean an economic development that will keep us the most powerful nation in the world."

Conservation in a dangerous Cold War world, the president insisted, linked national security to economic growth. Two thousand eastern Oregonians gathered at his train in Baker City that same afternoon heard Truman pledge to keep fighting on behalf of High Hells Canyon. "There must be continued development of the natural resources of the Northwest" to promote "full, unified, and coordinated development [of] close to a million kilowatts of power." The High Dam "will help control flood waters, it will help bring a higher standard of living to this entire region, it will help the Northwest keep right on growing."

The next day, after dedicating the new Grand Coulee powerhouse, the president returned to his theme: the High Dam expressed democracy in action, a united people uplifting themselves while improving their own lot in life. At a Pasco, Washington, lunch, Truman reflected on how this place – amidst the world's greatest concentration of hydroelectric dams – revealed "the greatness of our goals." Just 100 miles west of Hells Canyon, 75 miles south of Grand Coulee, 25 miles upriver from McNary, the president flayed High Dam skeptics in and out of the federal government. He ignored his own Fish and Wildlife Service biologists. He belittled fiscal conservatives, even as he struggled to bring his own bureaucracies to heel. High Dam opponents, instead, were partisan snipers, greedy investors, and political opportunists. They had tried and failed to defeat him in 1948. Now, as he pressed to dam Hells Canyon, "they fear some impairment of their selfish interests."[4]

Throughout the controversy, Kulp functioned as irrigators' spider at the center of a web spun from prior-appropriation law, irrigation dollars, and corporate political influence.

First as a local politician urging Kansas Citians to build paved roads and then as a loyal New Deal Senator between 1935 and 1945, Truman had always enthusiastically endorsed nearly every federal exertion of power over nature. He portrayed himself as carrying the conservation torch first lighted by Theodore Roosevelt and then picked up by FDR to restore American capitalism during the Great Depression. Truman in the Congress helped Roosevelt retool Depression-fighting strategies after 1940 into war-winning tools, as federal conservation programs enlisted nature as an ally and retooled the American economy into the Allied arsenal. Truman the president was no innovator. He simply persisted, with the tenacity of a Missouri mule, in executing water-control designs first imagined by TR and then realized by FDR.[5]

Public power meets Idaho Power

Southern Idaho's political and economic leaders envisioned a different postwar future. In May 1947, the Idaho State Reclamation Association (precursor to the Idaho Water Users Association) listened to State Engineer Mark Kulp outline Governor C.R. Robins' suspicions about High Hells Canyon and Reclamation's Snake Plan. Throughout the controversy, Kulp functioned as irrigators' spider at the center of a web spun from prior-appropriation law, irrigation dollars, and corporate political influence. State Engineer since the late 1930s, Kulp's professional skill and bureaucratic clout made him irrigators' and Idaho Power's indispensable inside man. As much as any Idahoan in a corporate board room or official suite, Kulp shaped and expressed irrigators' fierce opposition to the High Dam. State Watermaster Lynn Crandall, reflecting on Kulp's visit to ISRA, told Sen. Taylor that Snake Basin irrigators "are not dupes or agents of the power companies" but "are inclined to be suspicious of the Bureau of Reclamation and Interior Department policies." ISRA felt its members owned Idaho's water, equitably if not legally, and deplored "the determined Government drive to take over the Northwest for public power."

Kulp, Crandall, and ISRA soon persuaded the Idaho State Chamber of Commerce to second its opposition to the High Dam and Snake Basin Plan. Framing the Chamber's letter to Gov. Robins were the state's most powerful banker, biggest building contractor, both ISRA's outgoing and incoming presidents, the Snake's upper and lower basin watermasters, and Idaho Power's board chair and senior vice-president. Visible already in 1947, this coalition held firm against the High Dam for over a decade. Its fighting faith in prior appropriation and irrigated agriculture energized Idaho Power's bid to privatize the Snake in Hells Canyon. Robins announced that fall Idaho's "paramount consideration" hinged on permanently subordinating any new Hells Canyon hydro project to future upstream diversions of irrigation water. Unless any and all stored Hells Canyon water bore a permanent legal servitude to benefit Snake Basin irrigators, Idaho would refuse a water right to the High Dam. "The waters of the Snake River and its tributaries in the southern part of our state," Robins wrote Interior Secretary Julius Krug in fall 1947, "should be utilized and protected for utilization for the development of reclamation in the Snake Basin."

Idaho Power seized the initiative in the controversy by proposing what ultimately became its private-power alternative to the Hells Canyon High Dam. Filed in summer 1947 as the "Oxbow Project," the company envisioned a small run-of-river dam one-seventh as tall as the High Dam,

to create a reservoir one-ninth the size of High Hells Canyon, producing roughly one-tenth of the federal behemoth's hydro output. Company president Thomas E. Roach had learned the Northwest power business in Oregon, but had no intention of ever capitulating to federally-managed public power, as he believed his downriver colleagues had done in the 1946 "Tacoma Statement." Roach, like other conservative businessmen in postwar America, equated public power with public planning and government economic controls. His Spokane counterpart, Washington Water Power president Kinsey M. Robinson, told a Spokane audience in 1952 that the High Dam and all federal power projects menaced free enterprise and individual liberty. "Planned economy has stepped out from around the corner," Robinson warned, "and is now waiting for us on the sidewalk unless we take a greater interest in the affairs of our communities, the state, and the nation."

Pivoting the controversy after 1952

Idaho Power's opposition to Hells Canyon High Dam became a centerpiece of the presidential campaign of 1952. Truman and the Democrats had made Hells Canyon an article of faith for liberals nationwide. Republicans countered by inserting a head-on challenge to the High Dam in their presidential candidate's first official campaign speech. Boise seems an odd place to launch a presidential campaign, but the GOP nominee, Dwight Eisenhower, gave his first national campaign address on the Statehouse steps in August 1952. He ridiculed the High Dam as "a massive Snake River monument to political maneuver and federal pre-emption**,"** an expensive tribute to "a theory which had failed." The general vowed to "liberate the Pacific Northwest" from the clutch of "federal power zealots" who staffed "a government that implies a philosophy of the left" and "has only one solution to every problem: further extension of the power of the federal government." Eisenhower's message echoed Idaho Power's. Idaho Power's amplified the national conservative reaction against two decades of New Deal economic regulation.

The Republicans' sweeping 1952 victory completely recast the Hells Canyon controversy. Eisenhower matched Franklin Roosevelt's record victory margin in 1936 by taking two-thirds of Idaho's votes in an election that saw 80 percent of the state's adults go to the polls. He also won Oregon. But election of feisty Gracie Pfost to Idaho's first district, soon nicknamed "Hell's Belle" for her fierce advocacy of the High Dam, ensured a vivid rhetorical struggle once the Republicans took office. Eisenhower quickly remodeled the Federal Power Commission to ensure it rejected the High Dam and endorsed Idaho Power. The company smoothly exploited the new tide by essentially tossing its Oxbow project and unveiling what became the three-dam Hells Canyon Complex in fall 1952. New Interior Secretary Douglas McKay, an Oregonian who had long fought on Idaho Power's side, soon satisfied private-power supporters by formally ordering the Reclamation Bureau to withdraw its High Dam proposal and urging the FPC to license Idaho Power's competing project.

Idaho Governor Len Jordan whooped privately about the direction Eisenhower was steering the Hells Canyon controversy. "I am sure that we can work out a resource program that will make sense," he wrote, endorsing Idaho Power's chief counsel R.P. "Pat" Parry for a high-level Interior post. Although Parry did not get (nor particularly want) a sub-cabinet job, he did command legal and political power few private Idaho attorneys have ever rivaled. He was simultaneously, as 1953 opened, seeking a water right for Idaho Power's Hells Canyon complex from the State Engineer, preparing the company's FPC licensing case, and representing Gov. Jordan as the state's lead negotiator on Snake flows with its Northwest neighbors. Parry's role defined conventional rules that separated private rights from public service, a vivid reminder of the reality that, in Idaho, natural-resources policy has often been made in the crowded intersection where politics, capital, and law collide.

From summer 1953 through summer 1956, Idaho Power pressed its case for an FPC dam license against fierce opposition from what remained of the tattered New Deal liberal coalition that invested public power with near-sacred significance. Pat Parry secured the license, thanks to a commission weighted with private-power advocates. And, in an ironic twist neither FDR nor Truman would have appreciated, New Deal precedents made the FPC license nearly bullet-proof when challenged on appeal. The District of Columbia Circuit Court of Appeals unanimously affirmed the company's license in 1956. The Supreme Court denied *certiorari* in 1957. And Congress rang down the curtain on the Hells Canyon controversy that same spring by turning back freshman Idaho Senator Frank Church's and irrepressible Representative Gracie Pfost's bid to authorize the High Dam.

From consensus to environmental conflict

A powerful political consensus, rooted in the New Deal's celebration of public power, propelled federal hydroelectric ambitious upriver toward Hells Canyon and the Snake Basin after 1945. Growing resistance to both federal ambition and public dam-building derailed the upriver offensive. Idaho Power won the right to dam Hells Canyon because a decisive segment of the American people lost faith in the New Deal dream of building the world's biggest dam to generate more of the world's cheapest electricity. Idaho's landscape was largely preserved but substantially altered.

Photo courtesy of Karl Brooks

Engineers measure the geography for a dam in Hells canyon.

About the Author

Karl Brooks *is an Associate Professor of History and Environmental Studies and Courtesy Professor of Law, on leave from the University of Kansas while serving as President Obama's Regional Administrator for Region 7, (Missouri, Iowa, Nebraska and Kansas) of the U.S. Environmental Protection Agency.*

Endnotes

[1] Karl Boyd Brooks, Public Power, Private Dams The Hell's Canyon High Dam Controversy (2006).
[2] Farewell Address, reprinted in Richard Kirkendall, *Harry's Farewell,* 26-31.
[3] Alonzo Hamby, *Beyond the New Deal, Harry S. Truman and the Fair Deal, Man of the People: Harry S. Truman.*
[4] *Public Papers of the Presidents: Harry S. Truman* (1950), 344-46, 351-52, 373; Brooks, "A Legacy in Concrete," 299-322.
[5] Lowitt, *New Deal in the West*; Nash, *American West Transformed*; Hirt, *Conspiracy of Optimism*; Gunther, *Inside U.S.A.*

Irrigation Water Drainage Development in the Treasure Valley

Scott L. Campbell
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

Photo courtesy of Scott L. Campbell

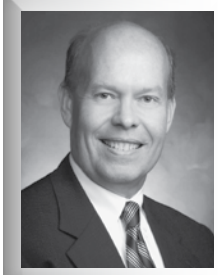
Electric dredge excavating creates runoff for saturated soils near Nampa at the Purdam Slough drain on Lemp's Ranch around 1914.

On July 30, 1887, The Caldwell Tribune described that area of Idaho as "a resort for jack rabbits and badgers." Then irrigation projects brought Boise River water to the land. In early 1886, two major canals began to deliver water to the area and allow development of irrigated farms and ranches.

By December 1901, Pioneer Irrigation District was formally organized and confirmed by judicial action. This allowed the completion of an extensive system of main canals, lateral ditches, and related facilities that eventually provided a reliable supply of irrigation water to 34,000 acres in Canyon County.

From 1890 to 1915, sagebrush lands upgradient of the Pioneer lands either had already been developed with irrigation systems or plans for development were proceeding. Soon, the United States Reclamation Service started to implement the major irrigation system improvements of the Boise Project. Over 200,000 acres of desert lands were converted to habitable agricultural properties by the addition of irrigation water from the Project.

Unfortunately, contrary to expectations, this expansion of irrigated agriculture in the Treasure Valley caused a new contradiction — too much water. In Pioneer, owners began complaining of waterlogged lands as soon as December 1904. Because of Pioneer's location, down-gradient from the lands on the benches above the Boise River, the increase of subsurface water from irrigation of formerly desert lands rapidly caused elevated groundwater levels. Irrigation within Pioneer from its system also contributed to the problem.



Scott L. Campbell

Because the Reclamation Service recognized its role in causing the problem, in part due to the Boise Project facilities, it began working with Pioneer and the Nampa & Meridian Irrigation District to develop solutions. No one had contended with this problem before. Because major irrigation projects on this scale had never been attempted before, the Reclamation Service and the irrigation districts had to create something new.

The problem continued to worsen over the ensuing 10 years, until June 1914, when electric powered dredges began to construct an interconnected system of major drains.

The drains came almost too late for some landowners. In Pioneer, a district of 34,000 acres, approximately 12,000 acres had standing water or were too waterlogged to sustain crops. Drainage of the excess water became the new imperative. Fortunately, the drains provided ancillary benefits: drainage water would supply an additional source for lands within the District which could not be irrigated with the relatively junior Boise River water rights of the District. Consequently, the engineering plans developed by the Reclamation Service included "feeder ditches," which were to convey the water captured by the drains to the Pioneer irrigation delivery system. At this point, Lake Lowell (now Deer Flat Reservoir) was the only significant irrigation storage reservoir in the Boise River drainage.

The planned drainage system worked. Over approximately five years, pursuant to cost repayment contracts with the Districts, the Reclamation Service built hundreds of miles of major open drains throughout the Boise Project. Construction started in Pioneer, because it had the most serious problems and it was closest to the Boise River, the necessary terminus of each drain system. Construction then proceeded into the higher elevation lands of the Nampa & Meridian Irrigation District.

This network of drainage ditches and interconnecting "feeder canals" continues to operate today, providing an essential component in the intricate web of irrigation water delivery and removal that allowed a former "resort for jack rabbits and badgers" to become a productive agricultural region, a center of commerce, and a pleasant residential environment for so many.

About the Author

Scott L. Campbell *is a native of the Treasure Valley and his practices has emphasized water resources, environmental litigation, and irrigation law since 1985 when he began representing the Pioneer Irrigation District. He earned his law degree from the University of Idaho College of Law in 1978. Much of the factual information and the photograph for this article came from "A History of the Pioneer Irrigation District, Idaho, An Initial Report 1884-1938," prepared by Jennifer Stevens, Ph.D., Stevens Historical Research Associates, Boise, Idaho.*

The American Falls Reservoir Project

John A. Rosholt
Barker, Rosholt & Simpson, LLP

A necessary project for Idaho's agricultural success

A damsite near American Falls had been discussed for over 30 years. It became a high priority in the 1920s as a panacea to supply late-season irrigation water so crops on a near million acres could be finished each year. This is a sketch of the efforts of Idahoans to work with the federal government and also to get them out of the way when necessary.

Water short from the start

A common malady among early promoters and developers of irrigation projects in Idaho's Upper Snake River Valley was the over-estimation of the water supplies. Not only did the watersheds not yield the amount of water sought for use in average years, but absolute disaster occurred in drought years when natural flows of the rivers and streams declined sharply in the early summer months to the point that only the earliest priorities obtained adequate supplies. By the early 1920s, Water District #36, a surface water delivery political subdivision of the state (now Water District 01), had already experienced major shortages.[1]


John A. Rosholt

The District had experienced drought and conflict among its members in 1919 while trying to sort out the natural flow of the river and the Jackson Lake Reservoir storage water and delivering it to those properly entitled. The 1919 conflict led to the establishment of the Committee of Nine as advisors to the Water District's watermaster so as to obtain proper allocation without conflict.

One of the projects most impacted by shortages was the North Side Canal Company's (NSCC) 160,000 irrigated acres in Jerome, Gooding, and Elmore Counties. With only 400 cubic feet per second of early priority natural flow rights available after the river went on regulation, and storage shortages and heavy transmission losses of over 30% in their canal to deliver its Jackson Lake storage water, NSCC was sometimes out of water by the first week in July.

Senator Borah realized what a problem it would be for Idaho farmers to raise the money, but agreed to get started right away.

In the 1920s, NSCC's general manager was a visionary named Russell E. Shepherd. In some short water years he had been able to swap supplies with upper valley irrigators in order to get NSCC crops to maturity. But Shepherd realized that finding a long term solution for these shortages in the future was a necessity for the survival of NSCC farmers. Although talked about since the early 1890s, the serious work to obtain a reservoir storage project at American Falls was begun around 1920. The United States Bureau of Reclamation (USBR) had selected the dam site, but the proposed reservoir behind the dam would inundate the town of American Falls, thus increasing project costs by $3 million dollars – the estimated cost to move the town.

The Idaho congressional delegation in 1920 consisted of William E. Borah and John Nugent as senators, and Addison T. Smith and Burton L. French as representatives. The delegation is credited with securing the initial appropriation of $1.75 million dollars to start the project.[2] There were other strong Idaho supporters for the project too –Governor D.W. Davis and State Engineer Warren Swenson were proactive.


Sen. William E. Borah

Idaho's interface with Interior Secretary Albert Fall

Reclamation projects in the 1920s could only go forward with the blessing of the Secretary of the Interior. After a ride of 100 miles around the American Falls reservoir site in 1923, Secretary Albert Fall was unimpressed with the project. He disfavored the project for several reasons: Idaho farmers were already behind in their payments to the federal government; a town would have to be moved; a $1 million payment to Idaho Power Company would be required to buy its cooperation; the project would require changing Union Pacific track and raising the railroad bridge; buying certain Indian lands for the reservoir would be required; and congressional resistance to this kind of expenditure was running high. Only Barry Dibble of the U. S. Bureau of Reclamation responded that these kinds of problems were just part of the job.[3]

Undaunted, Director Arthur P. Davis continued to develop plans and draft the necessary contracts. All of the relevant documents were forwarded to Secretary Fall. That gentleman, however, spent the following six weeks at his Three Rivers ranch in Texas with his old friend Edward L. Doheny. He was indifferent to the project and out of communication. Fortunately, the reservoir project was "saved by the intelligence, energy, and devotion of its powerful friends." Foremost among these leaders were Irvin E. Rockwell, Dr. W.F. Howard, Arthur P. Davis, Governor D.W. Davis, John W. Hart, Russell E. Shepherd, the original Committee of Nine, Warren G. Swendsen, and William E. Borah. Sidney Z. Mitchell, President of the Electric Bond and Share Company, promised that Idaho Power Company would support the project "until hell freezes over."[4]

Encouraged by this support, Rockwell traveled to Washington D.C. and explained the problem to Senator Borah, who successfully persuaded Secretary Fall to reach a compromise. Secretary Fall stated the agreement thus: "You agree now (February, 1923) to have that money put on my desk by November 1, 1924, or you hadn't better start anything . . . ." Senator Borah realized what a problem it would be for Idaho farmers to raise the money, but agreed to get started right away.

Secretary Fall was difficult, but Senator Borah was clearly up to the task, and forced the compromise as a result of a face-to-face meeting. Rockwell reports in "The Saga of the American Falls Dam" of the late arrival of Senator Frank Gooding (who replaced Senator John Nugent in 1921) to the meeting:

Before I could turn around we had entered and Borah was greeting Fall as we closed in and became seated. Pulling up his chair Borah began in his quiet fashion to explain the object of our visit. They were talking things over in a quiet, easy way during which Borah called me to his side and with prodigal comment presented me to Secretary Fall, asking me to tell him about the painful distress of our people, especially of my neighbors in American Falls, caused by quitting work there. I had just begun getting warmed up in describing our picklement as the door opened with a bang! and, without closing it, in rushed Frank Gooding, sounding out a roar like a blast from the Sawtooths, and, in reaching Fall's desk, trampling my feet on the way. Edging Borah aside and facing the Secretary, shouting and cursing by note, true to form, he pounded the desk with clenched fist, yelling 'Why in hell ain't I in on this? I am here to tell you that I won't stand for any goddam foolishness about quitting American Falls; I want you to understand bygod that you can't do that to us while I am in the United States Senate, and we'- by this time the Old Man (Fall), rising to his feet and breaking in on Frank's harangue, exploded with: 'Get to hell out of here. Go make that speech on the Hill. You can't put it over here.'[5]

Photo courtesy of John Rosholt

The American Falls townsite before it was moved to make way for a reservoir in the 1920s.

AFRD advances $2.7 million Department of Interior

Ironically, the Gooding area became the largest single irrigation entity beneficiary of the American Falls Reservoir as the American Falls Reservoir District #2 eventually secured 400,000 acre feet of space in the 1,700,000 acre foot reservoir. (An acre foot of water is the amount that would cover one acre with one foot of water – 325,850 gallons).

Sen. Frank R. Gooding

In addition to the $700,000 appropriation to acquire Indian lands that would be required for reservoir purposes in connection with the construction of the American Falls reservoir[6], Secretary Albert Fall also insisted that the irrigators bring $2.7 million dollars up front in 1924 before the Bureau of Reclamation could proceed with the project. This was a high bar for the farmers. After the American Falls Reservoir District (AFRD) bonded and delivered $2.7 million to the Interior Department, there were other requirements. The Act of June 5, 1925[7] provided that no part of this money or part of the 1924 appropriation could be used until all Indian lands were acquired into U.S. ownership and other contractual requirements had been met.

To raise the money in advance, Secretary Fall and Reclamation officials proposed a "Super District" in which all of the entities that needed storage water from this project would come together in one district and be responsible for repayment of their proportionate share of the bonds that were to be sold to secure the monies that were needed. AFRD was the result of that effort, and it still exists as a steward of over 450,000 acre-feet of the American Falls Reservoir storage water. As it turned out, the bonds were paid on schedule at 6% interest. At present, 35 space holder entities have contract rights to 1,672,590 acre feet of space.[8]

Fifty years as a worthy project

The American Falls Reservoir filled in 1927, the first year after construction. But prior to closing of the dam to create the reservoir, the 350 buildings of the City of American Falls had to be moved one mile to higher ground. In *The Whole Dam Story* by American Falls area resident Ella Marie Rast, gives the following credit for the project's success:

> September 28, 1927, the formal dedication honoring the men of vision and dedication that had made it possible, was held.

Prior to closing of the dam to create the reservoir, the 350 buildings of the City of American Falls had to be moved one mile to higher ground.

No one person claims the idea but the credit ought to go to Bert Perrine who fought for the dam for fifty years, since 1892. Congress had sent him to investigate the feasibility of a dam at this site. Despite publicity by Guy Flemmer, and promotional efforts by R.E. Shepherd and Major Reed, the project had met with resistance.

Completion of the dam transformed the desert into green gold. The feat happened because a few dedicated leaders fought against insurmountable obstacles over many years to finally secure a reliable source of water and remove the fear of drought. Impounding upper Snake River waters in the reservoir represents a mighty achievement.[9]

A revolting development — bad concrete discovered — 1973

Major dams were thought to endure for 100 years. In 1973, less than 50 years after construction, the USBR announced that alkali in the aggregate used in the concrete in the American Falls Dam construction could cause the concrete to crumble and the dam fail under certain circumstances. They identified ice loads against the dam in the winter as a major potential problem. As a result, in 1972, storage restrictions were imposed, limiting the reservoir to 66% of capacity until the ice melted each spring. Such restrictions represented the potential loss of 600,000 acre feet of the reservoir's storage capacity. Repairs to the dam became an immediate need.

Unfortunately, in 1973, there were nearly $1 billion of backlogged congressionally authorized USBR projects. Congressional appropriations were slow in coming. The Columbia Basin and the Central Arizona water projects were annually taking the major share of federal appropriations. Some in the USBR and in Congress estimated it could be 10 years before the American Falls Dam repairs might receive federal money as a reclamation project.

A new financing for an old dam

In 1973, AFRD and NSCC's attorney Raymond Patton Parry of Twin Falls met with Hogg and IPC officials and suggested rehabilitating the American Falls Dam as a private project using a Falling Water Contract with IPC in the financing. An early offer by IPC to provide a free rehabilitation up to $17.5 million of the dam cost was then discussed with the congressional delegation who put legislation on a fast track, all because of the critical need for a full supply of water at the reservoir and an inability of the USBR to obtain funding in the near future. Support and quick work by then Senators Frank Church and Jim McClure resulted in federal legislation authorizing a private replacement of a government dam, to be coordinated by AFRD and the 35 space holder entities.

Raymond Patton Parry

This Act of Congress, approved December 28, 1973[10] authorized the American Falls Reservoir District as "Constructing Agency" to contract with the Secretary of the Interior to finance and provide for the construction of the dam and related facilities. After construction, the United States government was to hold title to the dam.

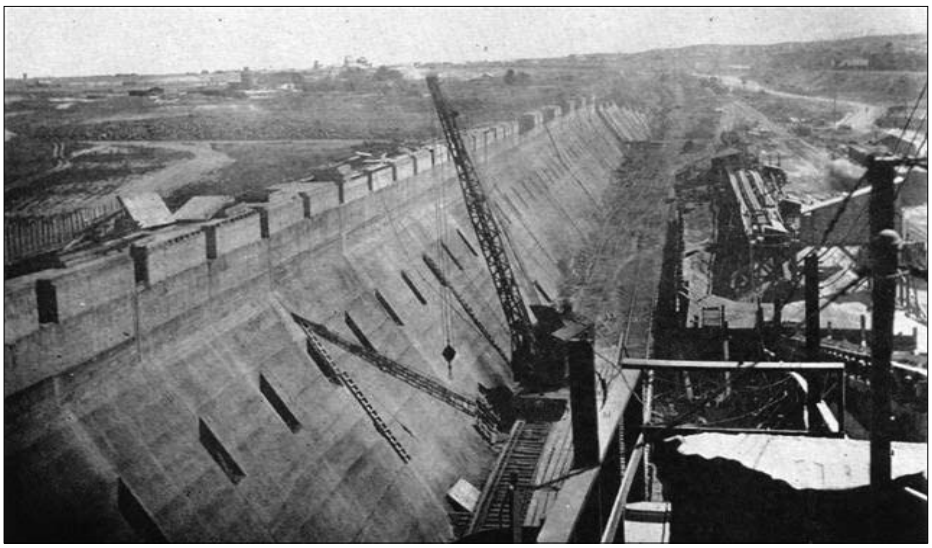


Photo courtesy of John Rosholt

American Falls Dam in 1921.

U.S. conditions for a private dam replacement

Because the legislation was the first concerning a private replacement of a government dam, the final act contained many precautions. The irrigators agreed to:

1. Not increase the reservoir level or size.
2. Indemnify for past and continuing bank erosion.
3. Build a four-lane river crossing.
4. Obtain USBR approval of all plans and designs.
5. Build recreation and fish and wildlife enhancement facilities.
6. Design and construct water quality facilities to assure that the water coming through the power penstocks would meet the state water quality standards for dissolved oxygen.
7. Pay for USBR's unused penstocks in the old dam.

The Act also provided that the United States would pay the project costs of the Michaud Division of the Fort Hall Reservation Project. The Idaho Legislature adopted Chapter 22 of Title 43 of the Idaho Code to facilitate the bond issue. While it bordered on special legislation, since bond counsel drafted it, the statutes passed muster for the bond opinion.

The contract negotiations took more than 80 meetings with principals and lawyers of the USBR, IPC, AFRD, and the other space holder groups. While the contracts were being negotiated, Contractor Bechtel Corporation of San Francisco prepared plans that suggested a cost over and above the $17.5 million offered by IPC to pay on tax-exempt bonds of AFRD. To complete the project, AFRD was required to obtain another congressional bill assuring that interest on the bonds would be tax exempt in order to meet the conditions of IPC's offer and to obtain IPC's guarantee to assure saleability of AFRD's bonds.[11]. Some called it a Christmas gift from Senator McClure.

Sen. Jim McClure

Support and quick work by then Senators Frank Church and Jim McClure resulted in federal legislation authorizing a private replacement of a government dam, to be coordinated by American Falls Reservoir District and the 35 space holder entities.

Because of litigation filed by disgruntled space holders who didn't want to pay anything on the cost overrun, the United States stepped up to pay the portion of the project costs which exceeded IPC's payments. The costs were paid pursuant to the Reclamation Safety of Dams Act,[12] again aided by McClure. Most of the overrun amount was attributable to "interest during construction" accruing on the interim financing notes because the AFRD bonds couldn't be issued until 1980 when the litigation was finally dismissed.

A happy ending

The American Falls dam and Reservoir still constitute a major asset for Idaho in spite of all the adversity. Required to bring $2.7 million in upfront money in 1924 to obtain a USBR construction start, and to finance privately in the 1970s when replacement was necessary, the project is a monument to self-help. While most USBR project obligations are interest-free on the amounts to be repaid by the contracting project space holders, AFRD paid 6% interest in the 1920s on $2.7 million in bonds. In the 1970s, initiative was again required to protect the project and continue its optimum use. It is a tribute to the grit of Snake River Basin irrigators.

About the Author

John A. Rosholt i*s a partner at Barker, Rosholt & Simpson, received a B.A. from the University of Idaho in 1959 and an L.L.B. in 1964. He has represented irrigators for four decades. He earned the Idaho State Bar Professionalism Award in 1994, the Idaho State Bar Distinguished Lawyer Award in 2004, and the University of Idaho Law School Award of Legal Merit in 2008.*

Endnotes

[1] The District takes in all of the Snake River Basin in Idaho above the Milner Dam near Burley to the Wyoming border.

[2] Merrill D. Beal & Merle W. Wells, History of Idaho 164-69 (1959). The $1,735,000 appropriation was part of the Sunday Civil Expenses Appropriations Act for 1922 (Act of March 4, 1921, Ch. 161, 41 Stat. 1367) to purchase a new town site and to provide for the removal of the buildings that would be flooded by the reservoir.

[3] Beal & Wells, *supra* note 1, at 165.

[4] *Id.*

[5] Irvin E. Rockwell, The Saga of American Falls Dam 53 (Hobson Book Press. 1947). Whether or not vanity was involved in the relationship between Senators Borah and Gooding, it was fairly common knowledge they did not like each other much. And Gooding was no lockstep ideologue. He was astute enough to be flexible. He resisted the temptation, for example to take on Borah – a beloved figure in Idaho – because Gooding knew he'd lose. "Borah and Gooding started out as friends, then split largely over Progressive issues," Stapilus said. "My sense of what happened with Borah in 1907 was that Gooding's side of the a party decided the best thing to do about Borah, who had broad popularity personally, was to get him out of the state (by having the Legislature elect him to the U.S. Senate) And so they did. There was more to it than that, of course, but I think that was a critical factor. Borah's popularity was broad, including a good many Democrats and independents, and he was a Silver Republican back in the '90s. Gooding was a mainline conservative Republican."
Steve Crump, *The Father of Idaho Conservatism*, Times-News Magic Valley.com, August 15, 2010.

[6] Act of May 9, 1924, Ch. 151, 43 Stat. 117.

[7] 43 Stat. 417; 43 U.S.C. § 600.

[8] The Teton flood in the 1975 is credited with filling the American Falls Reservoir with 30,000 acre-feet of sediment, thus reducing the capacity for storing water.

[9] Ella Marie Rast, The Whole Dam Story (Bloomington, 2004).

[10] Act of December 28, 1973, Pub. Law 93-206, 87 Stat. 904.

[11] Act of December 23, 1975, Pub. Law 94-164, 94th Congress H.R. 9968.

[12] Act of November 2, 1978, Pub. Law 95-578, 92 Stat. 2472.

[13] Laton McCartney, Teapot Dome Scandal 148 (Random House 2008).

Photo courtesy of Jerry Rigby

The Snake River at American Falls in 1908 before construction of the American Falls Dam.

Serendipitious victories with the federal government

The staff of the United States House Ways and Means Committee was reluctant to propose an amendment to the Tax Code to insure AFRD's bonds would be tax exempt. Many attempts were made to meet with Ways and Means Committee Chairman Al Ullman of Oregon with no success. Ullman's staff stonewalled AFRD's representatives. After a week of walking the halls of Congress, now Ninth Circuit Judge Tom Nelson and John Rosholt (then partners in Parry's firm) gave up and decided to return to Idaho to contemplate their next move. As they attempted to board a flight to Chicago, they found it full and had to upgrade to first-class to stay on board. They found themselves sitting across the aisle from Chairman Ullman, who cordially listened to AFRD's proposal all the way to Chicago. Two weeks later, the amendment was included in the "Revenue Adjustment Act of 1975."

At the time, it was also suspected that the U.S. Treasury Department didn't like the proposed amendment to the Tax Code because of the loosened restrictions on tax exempt bonds. Idaho Congressman George Hansen, the ranking Republican on the House Banking Committee, wanted to help. He called Treasury Secretary William Simon to a meeting at his office to discuss the matter. AFRD attorneys got news of the meeting about four hours before it was scheduled. Calls to the Congressman and to AFRD's Bond Counsel Phillip Holm at Chapman and Cutler in Chicago resulted in Holm catching a flight to make the meeting. Just as the meeting began, the voting bell rang, and Congressman Hansen left the meeting, giving Attorney Holm an uninterrupted hour to explain the most complicated issues to Secretary Simon and his staff. The following week, the opposition from the Treasury Department disappeared.

Adventures in the Sagebrush Desert

William F. Ringert
Ringert Law, Chtd.

The Desert Land Act (DLA) of 1877[1] covered most of the states west of the 100th meridian,[2] including Idaho. The DLA encouraged the development of public lands in the western United States by offering 640 acres of vacant desert land (later reduced to 320 acres in 1891) to individuals for $1.25/acre.

These "entrymen" were required to pay 25 cents/acre down, acquire a source of water, construct an irrigation system, and cultivate 1/8 of the land in the "entry." Residence in the state was required, but an entryman did not have to actually live on the improved land.

An initial three-year-period was allowed to complete the irrigating and cultivating requirements. When finished, the entryman submitted a final "proof," consisting of affidavits from two credible witnesses and payment of the final $1/acre, upon which a patent conveying title was issued by the Secretary of the Interior.

Sound simple? Maybe it was in the late 1800s, but as often is the case when politics and administrators are involved, things became increasingly complicated over the years.

Post-World War II Idaho

In the late 1940s, a few Desert Land Entries (DLE's) had been developed in Southern Idaho using deep-well pumps (which had only recently been perfected) to supply the necessary irrigation. Throughout the 1950s and early 1960s, an impressive area of DLEs was developed using those same Southern Idaho wells. J. Blaine Anderson, a prominent attorney and, later, a U.S. District and Ninth Circuit judge, handled the legal work for many of those entrymen, as did a number of other lawyers.

William F. Ringert

During the 1960s and 1970s the Idaho Power Company constructed large dams and power plants on the Snake River, contributing to an abundant supply of electricity. Moreover, the economic feasibility of high-lift pumping from the Snake River had already been demonstrated by developers like the West End Project in the Dry Lake area south of Nampa. Sprinkler irrigation had proven to be successful too, with irrigation supply companies and farm equipment dealers eagerly selling their products, equipment, and services.

Photo courtesy of Bureau of Reclamation

Minidoka Dam trestle in 1905.

With this backdrop, it is not surprising that projects large and small began popping up from Blackfoot to Weiser. I became involved as counsel for several of those ventures and, even, as an entryman in one of them. While this development activity was heating up, there was also a considerable amount of activity in the arena of public land policy.

Evolution of Public Lands Management[3]

The Kennedy Administration increasingly seemed to have a particular interest in the management and administration of the federal domain. Secretary of the Interior Stewart Udall was a driving force in the push for change and some of his minions were very aggressive in their efforts to persuade Congress that changes were necessary. The 1964 Report of the Public Land Law Review Commission was a harbinger of things to come, recommending major changes in management policy. One can readily surmise that some of the attitudes were already changing within the Department of the Interior.

Up to that point, it had become common practice for entrymen to enter into arrangements with a developer to construct the requisite irrigation system and prepare the land for farming. After the developer farmed the land for several years, the entryman would then have a producing farm, free and clear. The Department of Interior recognized this practice as a legitimate method for development of a DLE in *Williams v. Kirk*.[4]

After the developer farmed the land for several years, the entryman would then have a producing farm, free and clear.

Williams v. Kirk

In *Williams*, several entrymen contracted with a corporation to construct an irrigation system to supply water for reclamation and irrigation of the land entries. The cost to the entrymen was $100 per acre. Payment of the full $100/acre was due upon "issuance of the receiver's final receipt or other indicia of title from the United States . . . ."[5] However, the entrymen had the option of selecting 20 acres themselves, while conveying the balance of the land to the corporation in full payment of the $100/acre obligation. At that time, the Department of Interior thought such arrangements to be reasonable, practical, and lawful, reasoning:

> The object of the law is to effect reclamation of arid land and make it productive. One may properly aid his kindred or even a friend or person to whom his benevolence, affinity, duty, benignity, or confidence in a promise to repay, moves him, so long as he does not seek indirectly in this way to obtain title.

> Of these necessary requisites there is no room to doubt. The water company has expended more than three dollars per acre for all the entries within its projected lines, it has credited the necessary sum as paid by or for Mrs. Kirk, the works undertaken were obviously undertaken and money expended in a way and for a purpose honestly intended to effect reclamation of Mrs. Kirk's land, as well as other in that vicinity. In Bedford v. Clay, affirmed by the Department (unreported), your office held that: 'This office can not seek the source of money expended for purposes of reclamation or determine private interests under indefinite contracts with reference to such work. These are matters for local courts. Sufficient it is if an entryman causes, in good faith, expenditure of the required amount in permanent improvements for the purpose of reclaiming the entered land.' This is the rule applicable. Mrs. Kirk's entry is within it.[6]

However, over 50 years later, in *U.S. v. Sherman*,[7] the Department of Interior thought otherwise.

U.S. v. Sherman

The first of the high-lift DLE projects in Idaho was the Indian Hill Project south of Hammett in Owyhee County, which included about 4,000 acres. There, 12 entrymen contracted with an irrigation company to build a system to deliver water from the Snake River to the entry lands – some 500 feet above the river. Although the entrymen were to pay $100/acre upon receipt of title from the United States, they later contracted with Hood Corporation ("Hoodco") to develop and farm the land for 20 years at a cost of $200/acre - with a 5% credit - for each year Hoodco so farmed the land. Hoodco retained all crop revenue.[8]

The irrigation system was constructed and farming began in 1963 – the entries having been "allowed" on March 13 of that year. Five entrymen submitted final proof on July 2, 1963 and patents (title-conveying documents) were issued to them in September. Yet, between these dates, an administrative contest was filed against the entries which, ultimately, the Director of the Bureau of Land Management ("BLM") dismissed, remanding the cases to the Boise Land Office "for appropriate administrative action."[9]

At the request of Secretary of the Interior Stewart Udall, the stipulated record was then reviewed by the Department of Interior's Solicitor, Frank Barry.[10] Solicitor Barry opined that the key words "held" and "by assignment or otherwise" within the DLA's applicable statutes had meanings far beyond any previous interpretation, concluding that the agreements entered into by the entrymen created holdings in excess of the 320-acre limit and amounted to prohibited assignments to a corporation for its benefit. Solicitor Barry therefore recommended that the BLM Director's decision "be set aside, that proceedings be instituted against those contestees who had not been issued patents, and that the cases in which patents had been issued be transmitted to the Department of Justice for initiation of actions to cancel the patents."[11]

After lengthy administrative hearings, Secretary Udall cancelled the entries.[12] Ironically, the land in the Indian Hill entries was later traded by the BLM to a single owner and now is being farmed as a large single unit by a local farmer.

Ironically, the land in the Indian Hill entries was later traded by the BLM to a single owner and now is being farmed as a large single unit by a local farmer.

The Sailor Creek and Black Mesa DLE Projects

While the BLM Director's Indian Hill Project decision was still in effect, two other DLE projects were going forward at Sailor Creek and Black Mesa – both in Elmore County. The Sailor Creek entrymen were friends and relatives of Pat Morris and Allen Noble; the Black Mesa entrymen were members of the Grigg and Anderson families. The Cottonwood Mutual Canal Company (Cottonwood) was the source of water for the Black Mesa entries, while a private water company, Sailor Creek Water Company ("SCWC"), was the source for Sailor Creek.[13]

Originally, the Black Mesa entrymen contracted to buy shares in Cottonwood and Cottonwood contracted to build the irrigation system. After the entries had been allowed in February of 1964, the entrymen, on January 29, 1965 (while the BLM Director's Indian Hill decision was still the Department of Interior's latest interpretation of the DLA), cancelled the construction contract with Cottonwood and (1) contracted with Grigg and Anderson (a partnership comprised of members of the Grigg family and of the Anderson family) to develop the land, and (2) entered into 10-year "Farm Operating Agreements" with Grigg and Anderson, under which the entrymen were to annually receive sufficient payments to cover their obligations under the construction and land development contracts and the income tax on that revenue.

However, after learning of Solicitor Barry's opinion in the Indian Hill Project case, on advice of counsel, the Black Mesa operating agreements were cancelled and the entrymen (the Grigg and Anderson partnership and others) operated on year-to-year verbal agreements – with more than $1.4 million already invested, that seemed logical.

Earlier, at Sailor Creek, the entries were allowed in November of 1963, with construction of the water system and preparation of the land following. In April of 1964, a widely publicized dedication ceremony was held at the Snake River pump station. BLM personnel and officials, local and state dignitaries, officials of the Idaho Power Company, suppliers and contractors, and many others were in attendance and invited to view the headquarters area, as well as the construction and farming operations. SCWC performed the farming as sub-lessee of Morris and Noble, to whom the entrymen had leased the entries – the leases were for two years, with two, five-year renewal options. The rent varied from $22.50-$30/acre annually. All operating costs were paid by the tenant, who retained all crop proceeds. This arrangement enabled the entrymen to meet annual debt payments on the water system, pay property taxes, and also pay income tax on the debt reduction.

Final proof of the Sailor Creek entries was filed in June of 1964. Shortly before the two-year statute of limitations expired, the BLM filed administrative contests against the entries. After more than 30 days of hearings and an extended briefing period (the entrymen's first brief was 324 typewritten pages), the administrative law judge ruled for the entrymen on all issues and dismissed the complaints.

On appeal, the Interior Board of Land Appeals ("IBLA") reversed, applying the interpretation of the DLA created in the Indian Hill Project case.

The IBLA, in turn, was reversed on appeal to the U.S. District Court for the District of Idaho. Blaine Anderson, the presiding judge, drew to some extent on his experience in private practice and affirmed the IBLA decision as to the DLA's interpretation, but held that the BLM (having been informed of the arrangements between the entrymen and SCWC) was estopped to apply retroactively the "new" interpretation of the DLA. Judge Anderson allowed the entrymen several months to divest themselves of the "disqualifying" assignments, after which the BLM was directed to issue patents to the entrymen. On appeal, the Ninth Circuit reversed Judge Anderson, however further proceedings following remand did not change the results.

During this time, the Black Mesa entries also were contested with rulings in favor of the BLM at all stages.

Finally, with respect to the Sailor Creek Project, then-Senator James A. McClure took an interest in the plight of the entrymen and sponsored a private bill to reinstate the entries, allow the entrymen to perform acceptable cultivation, and submit new final proof. The bill passed and the Sailor Creek entrymen once-and-for-all acquired title to their entries in 1988 – 25 years after the applications were originally made.

In contrast, most of the Black Mesa Project entrymen became weary of the cost and effort and the Black Mesa Project entries were deleted from the bill. A few of them stayed with the efforts to preserve their water rights and, in recent years, obtained a significant return from sales on those rights. Ultimately, the BLM traded the Black Mesa Project land to a two-owner LLC and it has been farmed since the early 1990s as a larger, single unit. Another irony.

The Bell Rapids and Grindstone Butte DLE Projects

The last two major DLE projects were the Bell Rapids Project and Grindstone Butte Project – each developed in the early 1970s in Elmore and Twin Falls Counties. Bell Rapids covered over 20,000 acres and Grindstone Butte covered about 14,000 acres. Both required water to be lifted 500-600 feet from the Snake River. Because the BLM's interpretation of the DLA was well-known to all by the 1970s, the entries in these two projects did not encounter the pitfalls of the Indian Hills Project, the Sailor Creek Project, and the Black Mesa Project. All the entries went to patent.[14]

The DLA and the bottom line

Idaho has been well-served by the DLA. Tens of thousands of acres of productive, valuable land have been placed in private ownership and on tax rolls, making significant contributions to the local and state economies. These lands are the base for a large portion of Idaho's potato and sugar beet production, and produce grains and alfalfa for the growing dairy industry.

As for the future, it seems doubtful that very much DLE activity will occur. The high cost of energy, the uncertain economy, the existing demands on the water supply, and the extremely difficult task of obtaining favorable classification and land use management decisions all weigh heavily against new projects. Let me just say it was good while it lasted, but I wouldn't advise any young lawyers to spend a lot of time learning desert entry law any time soon.

Photo courtesy of Bureau of Reclamation

Workers stand at the coffin gates of the Minidoka Dam in 1906.

About the Author

William Ringert *is a founding shareholder at Ringert Law, Chartered and was a founding director of the ISB Water Law Section. He graduated from University of Idaho (Agriculture) in 1953 and from SMU law school in 1962. In retirement at Hammett, Idaho, he owns (with his wife) and operates a vineyard and winery.*

Endnotes

[1] 43 U.S.C.A §§ 321 *et seq*.

[2] A line of longitude extending through North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas.

[3] Included below is a recitation of events based largely on my own, personal recollection and a brief review of some of the Department of Interior reported decisions.

[4] *Williams v. Kirk*, 38 Pub. Lands Dec. 429 (1910).

[5] *See id*. at 431.

[6] *See id*. at 435.

[7] *U.S. v. Sherman*, 73 Interior Dec. 386 (1966).

[8] *See id*. at 409.

[9] *See id*. at 392.

[10] Solicitor Barry's opinion is set out in Idaho Desert Land entries. *See Idaho Desert Land Entities – Indian Hill Group*, 72 Interior Dec. 156 (1965).

[11] *See Sherman*, 73 Interior Dec. at 392-93.

[12] *See id*. at 389-90.

[13] For a full account of the Department of Interior's version of events, visit *U.S. v. Grigg*, 82 Interior Dec. 123 (1975).

[14] As an entryman and as counsel for the Grindstone Butte Project, I was directly involved in its development, considering it a rewarding and enlightening experience. Its basic structure was a tenancy-in-common, which owned (based on acreage) the irrigation system and project improvements and contracted for the necessary construction work. The entrymen and owners of some included private land obtained loans from various lenders, backed by take-out commitments from Travelers Insurance Company, to finance their shares of the costs. A mutual canal company obtained the water permits and contracted to operate and maintain the system. Operating rules were adopted to insure proper delivery of water. Operating and maintenance costs were based on acreage and power costs eventually became based on actual water deliveries. Many of the entrymen were farmers from other parts of Idaho, conducting their own farming operations. Others contracted with custom farmers to conduct the farming at the entrymen's expense. My arrangement was for work at prevailing custom rates with a bonus if certain revenue levels were reached. All in all, the BLM was satisfied with the arrangements and the work, and patents, were issued on all the Grindstone Butte Project entries by 1977 or 1978. Over the span of 37 years since Grindstone Butte Project started, many of the entrymen have died, others have suffered financial setbacks, and some just wanted to move on to other endeavors. As a result, most of the land now is owned by one family and the entire project is farmed as a single, large, unit. One more irony, but that seems to be the norm for most of the high-lift operations today.

The Development of Water Rights and Water Institutions In the Upper Snake River Valley

Jerry R. Rigby
Rigby, Andrus & Rigby, Chtd.

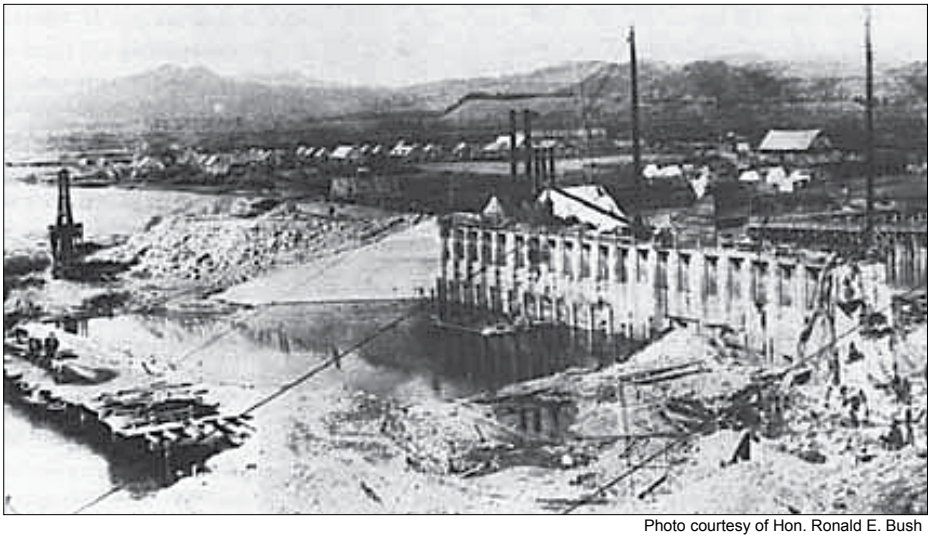


Photo courtesy of Hon. Ronald E. Bush

Reconstruction work on the Jackson Dam in 1915.

Introduction: Water, water everywhere

Although water is among the Earth's most plentiful resources, 95 percent is salt water within the Earth's oceans and seas, 4 percent is frozen in the polar icecaps, leaving a mere 1 percent of useable fresh water for the myriad needs of civilization. This 1 percent is contained in the Earth's lakes, rivers, atmosphere, soil, vegetation and underground aquifers. Furthermore, of this 1 percent that is liquid fresh water, only about one-half is readily available for use by humans. This fact is why water (and its availability) has been increasingly referred to as the "oil of the 21st Century."

Jerry R. Rigby

Much of the West is arid land. Settlement of this land has required diversion of water and with each diversion of water, a new opportunity for conflict arises. For example, as the measurement and the diversion of water have become increasingly precise, a "developing neighbor" who might impact one's right has also become more distant than just one's adjacent neighbor. This ongoing conflict over a finite resource has been the driving force in the creation and promulgation of water right laws and procedures in the western United States. Coupling the ever present conflict over water's myriad uses with instances of drought make Idaho a particularly noteworthy forum for this analysis of the evolution of water law and management.

Recognizing the significance of water as a resource in Idaho, this article will examine the impact of Mother Nature on the status quo, the formation of and effects of the Committee of Nine, and the creation of the Idaho Water Resources Board. Finally, the article will conclude with an examination of the Swan Falls Litigation and Agreement ending with the formation of the Snake River Basin Adjudication. The approximate dates of the events and additional resources for this article are taken from several noted available materials, including *Pioneer Irrigation Upper Snake River Valley*, Kate B. Carter, 1955; *Development of Snake River Irrigation*, Henry C. Eagle (Watermaster of Idaho Water District No. 36 which includes the Upper Snake River Valley), 1967; and *The Origin and Evolution of Hydropower Subordination Policy on the Snake River: A century of Conflict and Cooperation*, 2010, 46 Idaho L. Rev. 119.

Mother Nature upsets the status quo: A new approach is needed

Initially, water was plentiful enough that there were few conflicts among those who diverted. It should be noted that the reason the numerous water rights on the Upper Snake were all able to divert their full water rights was that even though one has the right to divert a certain amount of water, one may not require diversion of the total c.f.s[1] right on a "24/7 basis." Furthermore, because crops actually only consume a small portion of the water actually diverted, the excess water may return to the river either in the form of return flows or by sinking into the aquifer to return to the river at some point down the river. Thus even though the river was heavily appropriated, the amount of water available coupled with the manner in which the water was put to use, allowed for enough water to go around.

But a drought in 1905 created a need for a new approach to management of the water. A drought occurred during that year which caused the Snake River to actually go dry for several miles in the vicinity of Blackfoot (with similar events happening in Teton County streams). The problem was severe because there were no reliable records available to determine who was junior to those rights being deprived of their water. The only solution available to those injured was to bring suit to adjudicate the water rights of the Snake River above Blackfoot. The resulting ruling became known as the "Rexburg Decree of 1910" which has been described as the "Bible" of individual water rights for that reach of the Snake River from 1910 until the present Snake River Adjudication. Shortly thereafter, in 1913 the "Foster Decree" was decided in a similar manner for those diversions below American Falls. Although there have been supplemental decrees to the above and similar decrees

A drought occurred during that year which caused the Snake River to actually go dry for several miles in the vicinity of Blackfoot, (with similar events happening in Teton County streams).

in other tributaries to the Snake, these two decrees dominate the administration of water rights in the Upper Snake River.

With surface water rights now mostly decreed, it was soon discovered that storage rights were required in order to insure that a full water supply was available for the valuable crops which required water beyond the spring runoff of surface water. Therefore, a network of storage dam facilities was built by the federal government through the Bureau of Reclamation, including Jackson Lake, Milner and Minidoka from 1906 to 1915. In order to manage and shepherd the storage water down the rivers "on top" of the river's surface water to the storage water's intended users, the 1909 Idaho Legislature authorized the appointment of a special deputy state engineer to supervise the running of stored water in the Upper Snake River. Thereafter, storage reservoirs such as American Falls (Priority 1921), Island Park (Priority 1935) and eventually Palisades (Priority 1939) were built in order to add to the stability of the water supply for the various water users. In most cases, individual canal companies and irrigation districts subscribed to a defined number of acre feet storage rights within the various reservoirs.

Photo courtesy of Bureau of Reclamation

Power production and distribution was pioneered on the Minidoka Project in 1909-10. The Minidoka Dam created a 50-foot head for hydroelectric generation allowing a 7,000 kilowatt powerplant to pump water for irrigation and for surplus commercial sales. Minidoka farmers enjoyed the benefits of electrical energy decades before many other towns and rural areas.

The origin and creation of the Committee of Nine

From the authority granted to it by the Newlands Reclamation Act (1902), the Bureau of Reclamation began to take on large water storage projects in order to provide long term storage for thirsty farms in the late season. It also provided a means whereby agricultural interests could afford to pay their fair share of such projects at terms which allowed payment over many years at reduced interest rates. The first of such projects for the Upper Snake was the building of Jackson Lake Dam in Wyoming (1911-1916) for the benefit of the Minidoka Project located below American Falls.

Unfortunately, the release of the waters stored in Jackson Lake added to an already tense situation based on the newly aligned priorities within stored water. Although the earliest rights on the Snake were held by water users in the Idaho Falls area, they were ordered to close their headgates later in the season even though there was water in the river. Due to releases from Jackson Dam, the water in the River was considered storage water for those who had subscribed for the water in the Minidoka Project and not natural flow water which could otherwise be diverted by the earlier priority natural flow rights. Tension began from the time Jackson Dam had first been built and then increased when the dam was raised in 1916.

Once again Mother Nature intervened and added to the tension when a severe drought in 1919 resulting in substantial crop losses up and down the river. This event caused widespread opposition by the early natural flow water right holders due to a recognition by the state engineer and several consultants that they were unable to ascertain with any substantial degree of certainty what amount of water flowing down the Snake below Jackson was storage water and what amount was natural flow water. This difficulty was magnified when taking into consideration such unknowns as incidental losses to the river, timing of releases vs. diversions, evaporation, the means of measuring flow and their interaction with the aquifer. Hotly debated meetings and hearings were held up and down the river.

A committee born of conflict

Just when it seemed that the National Guard would be required to enforce the matter, the water rights holders up and down the river recognized that they would have to take the matter into their collective hands in order to restore the peace and create a management plan involving compromises. This event evidenced a growing belief that a committee was required of stakeholders throughout the basin above Milner Dam in order to deal with the management issues of the river for the future where flexibility and cooperation could help lessen the severe losses which would otherwise have been sustained. Beginning in 1923 and formalized a year later by a 1924 water distribution agreement (with its origins going as far back as 1906's completion of Jackson Lake Dam), an advisory committee was formed known as the "Committee of Nine." The Committee was the first collaborative institution on the river. It comprised leaders from nine different regions in the Upper Snake River above Milner Dam, who represented their individual regions to democratically manage a river that was still subject to protection of individual water rights. The Committee selected John W. Hart (a powerful voice and dynamic personality), of Rigby, Idaho as its initial chairman. Mr. Hart ably served

Due to releases from Jackson Dam, the water in the River was considered storage water for those who had subscribed for the water in the Minidoka Project.

as chairman until his death in 1936. The Committee's first Watermaster was G. C. Baldwin who managed the distribution of water on the river until 1930 when he was succeeded by Lynn Crandall.

A trusted management choice

Although somewhat light as far as statutory powers, the Committee has earned the respect and trust of its water users, the federal government and others interested in Idaho water so as to almost erase the term "advisory" from most of its defined or accepted functions. The obvious initial task of the Committee is to negotiate an allocation of water between natural rights and stored rights holders. Using the best evidence available, the Committee of Nine help to determine the proper allocation of released stored water vs. natural flow. Together with the water district (initially Water District 38 and now Water District 01) the committee hires a water master (thereafter appointed by the State Engineer/Director) and studies methods of river operation on the Snake River to manage the diversions pursuant to the various Decrees while protecting individual water rights. It also passes on the annual budget and operational resolutions to be adopted by the water users of the District. Early Watermaster Lynn Crandall defined the Committee of Nine's role as "acting in the capacity of the Board of Directors of a corporation of which the watermaster acts as manager."[2] The Committee of Nine role has been invaluable as a forum for stakeholders to work out their differences among themselves as well as between themselves and the Bureau of Reclamation (the operator of the reservoirs).

Idaho's water bank

Although informal water rental agreements began as early as 1932 (when water was rented for $.17 per acre-foot), it wasn't until 1979 when the Idaho Legislature formalized the program of annual leases of storage water entitlements. The legislation set into law a 1976 policy recommendation of the state water plan which had called for the creation of a "water supply bank . . . for the purpose of acquiring water rights or water entitlements from willing sellers for reallocation by sale or lease to other new or existing uses."[3] The responsibility for the water supply bank was placed under the Idaho Water Resource Board.

The basic intent of the bank is for a temporary transfer of water from willing sellers to willing buyers, for either new or existing uses in the Upper Snake River Basin. The Committee of Nine was appointed by the Water Board in 1979 to be the local committee for water bank administration in Water District 1, which runs from Wyoming to the Milner diversion. As such, it promulgates rental pool procedures (as confirmed by the Director and the Water Board) for the efficient annual rental of storage water among water users in the Upper Snake River and provides a mechanism for water rentals to power interests below Milner as well as additional stream flow for endangered species. It continues today setting prices and conditions under which water can be rented from the pool.

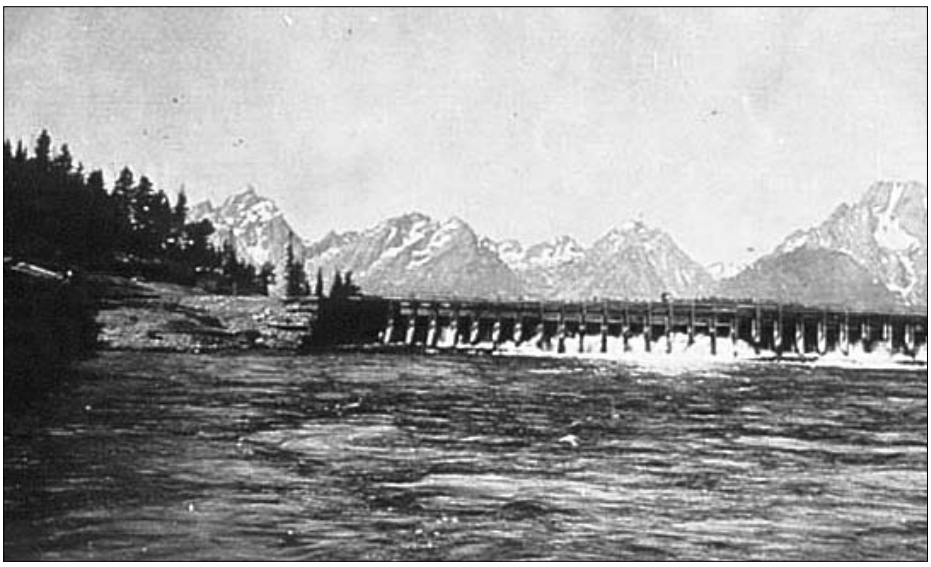


Photo courtesy of John Rosholt

The Jackson Lake log dam in 1906 provided late season stream flow. The dam failed in1908.

Nimble management in changing environments

The Committee of Nine's usefulness and importance has only increased as issues and demands for water outside historical uses have continued to grow.

The one thing that all outside interests have discovered, is that notwithstanding the internal disputes including those which initially brought the Committee of Nine together, any time their collective water rights are challenged by interests outside of Water District 01, the Committee quickly and efficiently comes together in a unified defense of their rights. The Committee has proven its willingness to dedicate the necessary time and money to protect those rights. Excellent examples of such dedication include the following: acting on Idaho's behalf in the settlement of the important Compact between Idaho and Wyoming for the division of the Snake River between the two states; negotiating the Fort Hall Settlement Indian Water Rights Agreement in 1990; litigating and negotiating the Nez Perce Settlement Agreement of 2005[4]; and defending Water District 01 users' water rights in the Snake River Basin Adjudication against the Federal Government. Recently, the joint defense includes those demands on their water stemming from other endangered and threatened species and the Environmental Protection Act.

The Committee of Nine's usefulness and importance has only increased as issues and demands for water outside historical uses have continued to grow.

The need and creation of the Idaho Water Resource Board

During the mid 1960s, it became evident to the Legislature that outside interests in Idaho's water, including those of the federal government, were lining up to challenge Idaho's sole right to manage its waters. As a pre-emptive strike against myriad out of state interests in Idaho's

water, the Idaho Water Resources Board was created under the authority of Article XV, § 7 of the Idaho Constitution. The creation of this board effectively kept out-of-state users, neighboring and distant state requests for transfer, and the federal government at bay. This constitutionally created board consists of 8 members throughout Idaho (4 from specific areas and 4 at large) appointed by the governor and confirmed by the senate. The powers granted to the board include the right to hold the position of Idaho's water resource agency and to conduct planning studies of basins including the obligation to formulate, adopt and implement a comprehensive state water plan for the "conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest."[5] Additional duties of the board include: the ability to file for and own water rights by court decree for specific water projects and minimum stream flows in the public interest; to finance the rehabilitation and repair of existing irrigation projects and facilities; and to act on behalf of the state in actions or negotiations with the federal government or other states' proceedings.

Swan Falls -The final conflict leading up to the SRBA

Based upon a ratepayer action taken against IPCO seeking an order directing it to take all actions necessary to protect and defend its remaining water rights in the Snake River for hydroelectric power production, IPCO filed an action against the State of Idaho and 7,500 other water users in 1977 seeking a declaration that its rights at Swan Falls were not subordinated to upstream irrigation uses. This action eventually ended up in the Supreme Court of Idaho which ruled that even though other IPCO hydroelectric facilities downstream of Swan Falls DID contain the subordination language, such language "specifically does not subordinate the water rights of Idaho Power at Swan Falls."[6] Certain aspects of the case were remanded, and having failed to achieve satisfaction in the judicial forum, the water users turned to the legislature.

Water users responded by attempting to pass legislation which effectively subordinated Swan Falls. IPCO stood on the side of the ratepayers and opposed the water users legislation which the legislature defeated. A modified and highly restrictive form of subordination passed, but due to opposition from the attorney general and governor, was ultimately vetoed. Recognizing the high degree of risk involved in ongoing adversarial proceedings, the parties entered into negotiations.

The most difficult issue was subordination to future upstream development. The parties compromised and the Idaho Power Company's water rights were subordinated down to 3900 c.f.s. at the Murphy Gage. This was based upon the 3,300 c.f.s which had previously been set as a minimum flow by the Water Board plus 600 c.f.s. (resulting in 3,900 c.f.s. minimums during the summer and 5,600 c.f.s. during the winter months). Although a break in the impasse had brokered, the negotiations then broke down over subordinating of the unused flows to future uses.

Ray Rigby, a past State Senator, noted water rights attorney and past advisor/member of various state committees was asked by Governor Evans to chair a task force to help resolve the conflict. Drawing upon his experience as an attorney in child adoption cases where the natural parents' rights are terminated, he was aware that the temporary custody of the child is held by the state in the form of a so-called "trust" until an adoption actually occurs. Treating the in-stream flows as the custodial rights to the baby, Mr. Rigby proposed that the state hold these rights in trust until such time as future development legally acquired the rights.

Conclusion: Out of conflict, order

This resolved the Swan Falls controversy with the final condition that the state would begin a "McCarran" adjudication - which is a federal statute allowing a state court to adjudicate all federal water rights within a basin, providing the adjudication incorporates the entire basin and includes all rights, regardless of ownership or beneficial use. The Snake River Basin Adjudication began in 1987 by the filing of a complaint in the Fifth Judicial District Court in furtherance of the terms of the settlement. When complete, this adjudication will fully and finally establish the priority rights for water users throughout Idaho's Snake River Basin. Slated for completion in around 2012, this history of conflict may soon become the model for successful water management.

Drawing upon Rigby's experience as an attorney in child adoption cases where the natural parents' rights are terminated, he was aware that the temporary custody of the child is held by the state in the form of a so-called "trust" until an adoption actually occurs.

Ray Rigby

About the Author

Jerry R. Rigby *is managing shareholder in the law firm of Rigby, Andrus, and Rigby, Chartered. He has been with the firm for 31 years, and is admitted to practice in Idaho and the Ninth Circuit. Mr. Rigby is a past Chair of the Idaho Water Resources Board, and a current member. Governor Otter appointed Mr. Rigby to his 4th Term in 2007. He is also an executive member of the Western States Water Council, a position to which Governor Otter appointed him in 2008. Mr. Rigby practices in the areas of Business, Water Law, Electric Cooperative Law, Estate Planning and Litigation.*

Endnotes

[1] Water is measured in increments known as "cubic feet per second" which is a measurement of the flow of the water. This measurement is abbreviated "c.f.s."

[2] *Pioneer Irrigation Upper Snake River Valley*, Kate B. Carter, 1955

[3] Statement of Purpose, H.B. no. 165 as amended (1979). On file with the author, and available in the State Legislative Library. *See also* 1979 Idaho Session Laws, 560-562, Ch. 193.

[4] This litigation and negotiated settlement were particularly important because primary among the claims of the Nez Perce was one for virtually all of the water in the Snake River with a priority date of "time immemorial". The loss of this water would have been devastating to Idaho's agricultural industry in particular.

[5] *See* Idaho Code 42-1734 & 42-1734A

[6] See *Idaho Power Company vs. State*, 104 Idaho 575 at 586, 661 P.2nd 741 at 752 (1983).

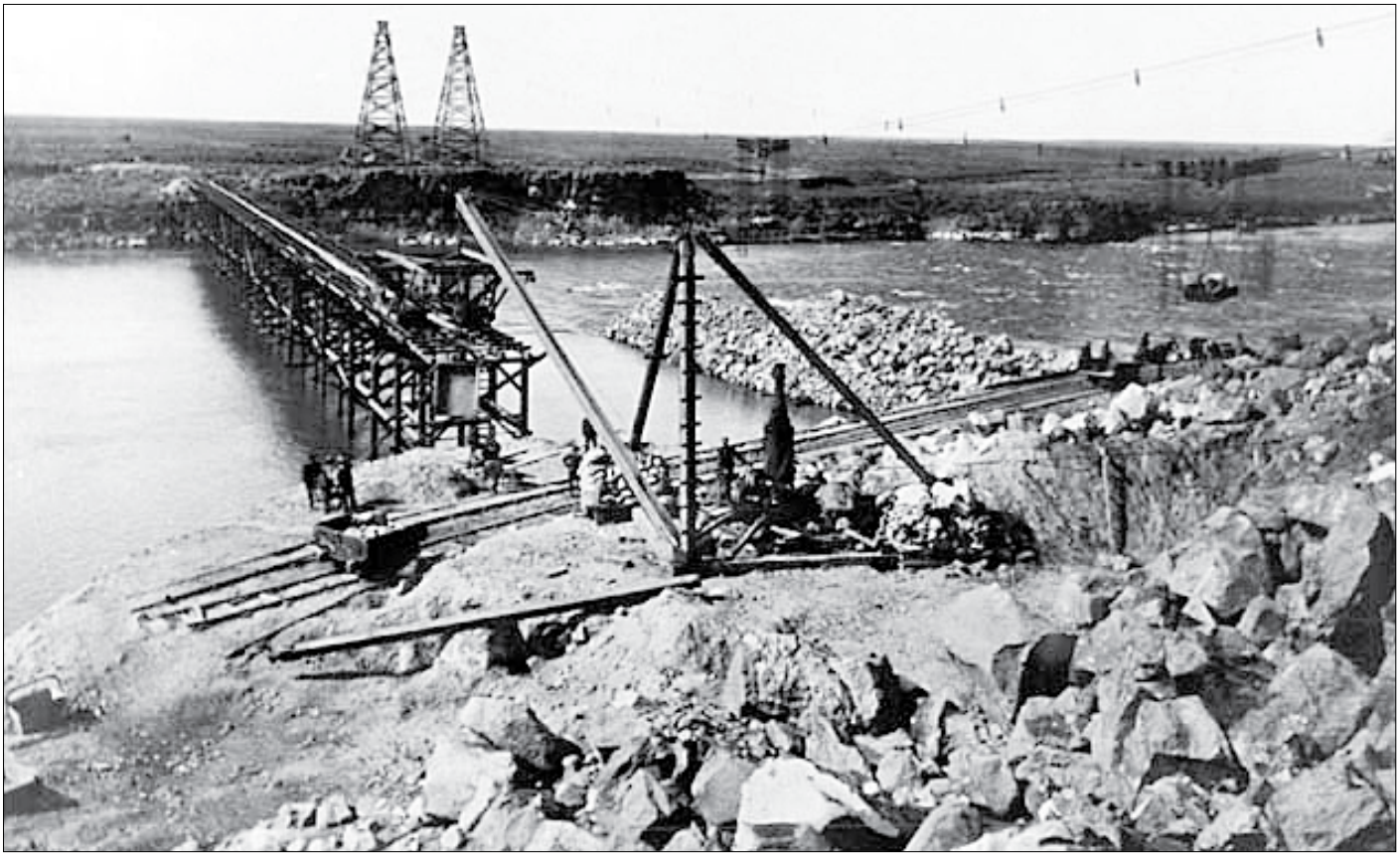


Photo courtesy of Bureau of Reclamation

Minidoka Dam as it appeared during construction in 1905.

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Nothing Ordinary About the Law of High Water Marks

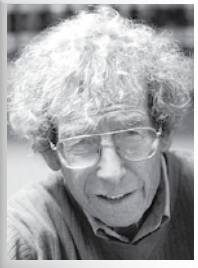
Scott W. Reed
Scott W. Reed Attorney at Law

The important and defining decisions in Idaho begin with rivers, not lakes.

Idaho is divided by climate: wetter in the north, drier in the south. The difference affects how the residents look at water. In the irrigated Snake River Plain, water is for growing. In the Panhandle, with lovely lakes and abundant flowing clear rivers, water is for playing. Throughout the state, water is for fighting. Inevitably, law and litigation reflect these differing interests.

Adjudication on the Snake River has produced decades of administrative and court contests involving hundreds, if not thousands, of attorneys protecting claimed priorities to diversion rights. The 2006 Legislature decreed basin wide adjudication for north Idaho. The initial reaction of many Panhandle residents was bafflement and then suspicion that the state was engaged in some nefarious scheme to interfere with the rivers and lakes in some costly bureaucratic boondoggle.

The water-is-for-playing view has generated a fair amount of litigation as well. The emotional impact on those on both sides of such suits has reached the same high level as water-is-for-growing cases in South Idaho. The attempt here is to review several cases that ended in the Idaho Supreme Court involving determination of the ordinary high water mark after statehood and, most recently, recognizing that before statehood it did not matter. The list does not include decisions at the district court level that were not appealed.


Scott W. Reed

OHWM: Is there a line in the sand?

Concentration here will be upon the natural and Ordinary High Water Mark (OHWM) as identified and applied to lakes. Here the courts are drawing a line in the sand between what the property owners decide is their exclusive ownership to the water and what the public citizen beach lovers believe they have a right to enjoy as incident to going to the lake.

The important and defining decisions in Idaho begin with rivers, not lakes. The earliest cases held that the riparian owner on a navigable river owned all the way to the thread (middle) of the stream.[1] In 1915, the Idaho Supreme Court in *Callahan v. Price*[2] applied the U.S. Supreme Court decision in *Scott v. Lattig*[3] to hold that the state holds title to all lands underlying navigable waters up to the OHWM.[4]

Definition of the OHWM has varied across the nation and has been interpreted differently by federal agencies. In *Raide v. Dollar*[5] the Idaho Supreme Court adopted a vegetation line test. The vegetation test was subsequently codified by the Idaho Legislature when it enacted I.C. § 58-104(9) which provided:

> The term "natural or ordinary high water mark" as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient period to deprive the soil of its vegetation and destroy its value for agricultural purposes.

On the Snake River: A discernable vegetation line

The first reported lake case applying the OHWM, *Driesbach v. Lynch,*[6] dealt with the question of determining the location of the OHWM of Lake Pend Oreille in order to establish the littoral boundaries of adjacent properties. The opinion mentioned the problem of the difficulty of applying the vegetation test at a particular site where there were rocks, not vegetation, which later became key at Hayden Lake.[7]

Heckman Ranches, Inc. v. State of Idaho Department of Lands[8] involved title to an "island" and channel area on the Snake River near Whitebird. The Idaho Supreme Court approved the testimony of William Scribner, Chief of the Bureau of Navigable Waters, applying on the river bank the definition of OHWM. The opinion quoted the Scribner testimony at length. Scribner identified a "very definite escarpment etched in the sand;" he pointed out that "the vegetation . . . (above) . . . that . . . line . . . becomes steadily more dense . . . ."[9] Scribner further testified that:

> "[W]ave action in quiet bodies of water will destroy the value of land for agricultural purposes. Current in and along and adjacent to rivers will do the same thing."[10]

In the early days and continuing through the 1960s, most lakeshore property was not very valuable and was mostly owned by Idaho residents who regarded those using the lakeshore as members of the immediate community. Sparse population meant limited public use of private lakeshore. Inevitably, those playing upon the beaches came to include a growing number of strangers, many of them young and given to partying and playing some time into the night. The first notable lakeshore use confrontation came on Coeur d'Alene Lake in a growing city known, unlike its south Idaho counterparts, for both playing and partying.

Sanders Beach I: The gracious gentleman prevails

The first lawsuit, *Haman v. Fox,*[11] arose at Sanders Beach on Coeur d'Alene Lake east of Tubbs Hill and west of what was then the Potlatch lumber mill. Dr. Ted Fox joined with his neighbor to construct a seawall on the strip of property south of East Lakeshore Drive extending 20 feet closer to the water than the existing wall. Dr. Fox was a beloved family physician who wrote a weekly column giving free medical advice in the local paper. Nonetheless, many long-time residents were outraged at the blocking of part of "their" beach and started a lawsuit through the Attorney General.

The new wall was a fair distance above the summer storage level of 2128 feet, so the OHWM was not an issue. Instead, Haman offered a selection of theories coming from decided cases in other states: easement by prescription, dedication, custom, and, from Oregon, dry sand. Fourteen witnesses, including Coeur d'Alene's then mayor, testified as to continuous summertime use of the area enclosed by the wall dating back to the 1920s.[12] District Judge Watt Prather found the element of open, notorious, continuous and uninterrupted

use for monthly prescriptive period to be fully satisfied. However, the case on this theory collapsed. On cross-examination by attorney Eugene Miller, every one of the witnesses agreed that Dr. Fox had directly or impliedly given permission to users and several accurately described him as a "gracious gentleman."[13] The other theories were dismissed at the district court level and on appeal. Thus ended the first of what became a long string of Sanders Beach cases.

KEA loses, but wins the Public Trust Doctrine

Coeur d'Alene Lake was the subject of the next lake case in chronological order, but again not involving the OHWM.[14] Although this suit also failed, there was a major environmental victory in that the opinion adopted the Public Trust Doctrine for all navigable Idaho rivers and lakes.

In 1978, the Spokane-based Panhandle Yacht Club applied to the Idaho Department of Lands for a 112-slip dock for sailboats at Arrowpoint, which is at the west end and south side of Wolf Lodge Bay, a mile across the water south of Sanders Beach. Kootenai Environmental Alliance protested at the administrative hearing, appealed the granting of the permit to the district court and, having lost again, appealed to the Idaho Supreme Court. The initial opinion was three-two against the Kootenai Environmental Alliance, but one of the three justices in a separate opinion appeared to agree in part with one of the dissenting justices. The Alliance moved for and received a rehearing. Between the time of the motion and the granting of the rehearing, the California Supreme Court adopted the Public Trust Doctrine in the Mono Lake case.[15] On rehearing, the majority opinion by Justice Robert Huntley reviewed all of the major public trust cases beginning with *Illinois Central Railroad Co. v. Illinois*[16] and concluded, "The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources."[17] The Idaho Supreme Court determined that the Lake Protection Act[18] set standards that roughly matched the Public Trust Doctrine and that the director had complied with these standards in the granting of the permit.

Ever since, in decisions that are nearly always in favor of issuance of a commercial dock permit, the Idaho Department of Lands claims compliance with the Public Trust Doctrine. To protesting neighbors and others not on the State Land Board or within the Department, this "compliance" is lip service only. The Department's use of the Doctrine disregards the meaning of the Public Trust Doctrine as explained in the landmark Law Review Article by Professor Joseph Sax.[19]

Photo courtesy of Idaho Department of Commerce

Competition for lakeside uses relies on the Ordinary High Water Mark precedent and the Public Trust Doctrine. A dispute between the Panhandle Yacht Club and the Kootenai Environmental Alliance over a 112-slip dock on Coeur d'Alene Lake helped establish how Idaho's courts view the issue.

Coeur d'Alene Lake I: Lower level loses

It had long been the contention of the Coeur d'Alene Lakeshore Owners Association that the OHWM should be marked at 2121 feet above sea level. The theory was that the historic level of 2121 feet had been drastically altered by construction of three electric power dams at Post Falls on the Spokane River in 1907, with a later addition to the height in the 1940s. The Post Falls dams were operated by Washington Water Power (now AVISTA) to maintain a summer level of 2128.

In 1991, with the complete backing of the Coeur d'Alene Lakeshore Owners Association, Marvin Erickson filed suit seeking to claim title to 2.5 acres in Kidd Island Bay.[20] Erickson's claim was based on ownership of dredge spoil created in the late 1950s and early 1960s which left only 0.17 acres above 2128 feet in the summer.

The attorneys for Erickson presented a variety of evidence: an 1892 survey, a finding by the Department of Interior that Kidd Island had actually been connected to the nearby land at time of statehood, and multiple accounts of homesteads occupied on riparian land below 2128 feet. District Judge Craig Kosonen found in favor of Erickson and quieted title as sought. The State appealed.

To protesting neighbors and others not on the State Land Board or within the Department, this "compliance" is lip service only.

Relying on the *Heckman* case with the necessary Scribner evidence test requiring identification of a vegetation line on the soil, the Idaho Supreme Court reversed.[21] The holding was that old surveys and dead tree stumps did not meet the burden of proof, particularly in light of testimony from the state's experts asserting that the correct OHWM was at 2128 feet. However, the Court did not enter judgment establishing 2128 as the proper level but instead simply held that *Erickson* had not established a lower level by clear and convincing evidence.[22]

Hayden Lake

The lengthiest litigation concerning lake levels in the Panhandle was on Hayden Lake involving an appeal first relying on the Public Trust Doctrine.[23] The Idaho Supreme Court reversed the grant of summary judgment.[24] On remand, the district court quieted title in the landowners, and the subsequent appeal to the Idaho Supreme Court focused entirely on the OHWM.[25]

The case had an unusual beginning. The Hayden Lake Watershed Improvement District had been created in the early 1960s for the purpose of operating the control outlet at Hayden Lake which manages the lake level. The District held title to the five acres which included the dike.

In 1985, an individual who had voluntarily assumed chairmanship of the Watershed District publicly announced the intention of the district to construct a public beach, docks, and a parking lot along the dike, particularly on property to which Idaho Forest Industries (IFI) held title. IFI felt threatened and filed suit to enjoin the project. The district tendered the defense to the State of Idaho, which then became the real defendant represented by the attorney general who conducted a vigorous defense claiming the IFI property to be lakebed.

Hayden Lake is unusual. The outlet flows over the rock surface of the Rathdrum Aquifer and presently disappears within a few hundred yards.

What was the OHWM on Hayden Lake in 1911?

Establishing the OHWM remained elusive. In 1911, suit was brought by an irrigation district against a company owned by F. Lewis Clark, a rich mining executive who had a mansion on the south shore of Hayden Lake near the outlet.[26] Clark had a dike constructed across the outlet for a private road for his new car to go from his mansion to Spokane. The dike cut off the irrigation water to what the plaintiff's pleadings described as hundreds of acres of intensely cultivated farmland for fruit trees, berries, vegetables and melons with improvements in excess of $100,000 and with more land for sale.[27]

The uncontested fact was that Matthew Hayden (who won the right to name the lake in a poker game) had farmed some of the land east and uplake from the dike. There was a whirlpool about a quarter mile east uplake where the water disappeared into the aquifer. In 1882, Hayden, in an effort to expand his tillable land and to hasten the drainage in the spring, dynamited the whirlpool to increase the flow.

Photo courtesy of Idaho Department of Commerce

Hayden Lake's historic whirlpool played a role in changing the current and past lake levels.

The dynamiting had the opposite effect and closed the whirlpool. The water level rose, and Hayden could no longer farm. Since the OHWM is to be determined as of statehood in 1890, there was a question not raised by the 1911 lawsuit as to whether the lake level should be determined before or after the whirlpool had been destroyed. The 1911 suit was settled without a court determination.

Coeur d'Alene tribal brave takes a dive

Hayden Lake had been an important place of habitation of the Coeur d'Alene Indians before the 1890s. A 1936 Indian lore publication reciting Coeur d'Alene tribal legends tells the story of a young brave fishing in a canoe on Hayden Lake who was caught in the whirlpool, taken down into the aquifer, and then emerged alive three days later along the Spokane River near Post Falls. The publication was admitted at trial as an exception to hearsay under Idaho Rules of Evidence 803(a)(16). When the question was again litigated during the 1990s, First District Judge Gary Haman found the legend admissible but not credible.

Judge Haman waited until January 19, 1999 to issue a 36-page Memorandum Opinion in which he concluded that the state had not carried the burden of proof as to the location of the OHWM. The measurement by the state's experts of discernable high water marks differed by nearly one and one half feet. Judge Haman did not find it unusual that a navigable lake would "have many different levels of ordinary, high water, particularly if it is determined by application of the vegetative standard" spread over 100 years.[28]

In 1882, Hayden, in an effort to expand his tillable land and to hasten the drainage in the spring, dynamited the whirlpool to increase the flow. The dynamiting had the opposite effect and closed the whirlpool.

The opinion, affirmed on appeal, was that the OHWM of Hayden Lake could not be determined.[29] The state has regulatory powers over the beds and waters of lakes as of the present date regardless of the OHWM.[30]

Coeur d'Alene Lake II: Line in the sand meaningless

Back to Coeur d'Alene Lake and Sanders Beach. Dr. Fox died. With two exceptions, the ownership of the lots adjoining the beach passed on to newcom-

ers, mostly from other places, who did not tolerate strangers on "their" private beach. One of the new owners built fences from both sides of his lot to the summer storage level of 2128. The city sought and obtained an injunction to remove the fence but subsequent appeals have left the issue unresolved and the fence intact.[31]

Confrontations between the property owners and would-be public beach users increased as the twentieth century ran out. The city police were regularly called upon to arrest alleged "trespassers," but the *Erickson* decision had left the OHWM undetermined. In 2004, the city filed a declaratory judgment action seeking a judicial determination of the location of the OHWM so it could respond by either arresting trespassers or disregarding the complaints of private owners about trespass. The suit named all of the private owners, the Sanders Beach Preservation Association, Inc., and the Idaho State Land Board.[32]

The private landowners initially claimed the 2121 elevation sought in the *Erickson* case. The Association provided an expert opinion that the line of vegetation, applying the Scribner test from *Heckman* Ranches, was above 2137 feet at the east end of Sanders Beach. The vertical elevation difference between 2128 feet and 2137 feet translated to about 30 feet horizontal between the summer storage level and below the sand base below the Jewett House.

The private property owners shifted upward to accept the summer storage level of 2128 feet as being the OHWM. The private owners introduced the power company records of low and high elevations covering 112 years in which the level sought by the Association had been reached in only 17 of 112 years of record. District Judge Jim Judd heard argument and entered a preliminary injunction as sought by the city to leave the whole beach open to the public subject to certain conditions. Thereafter, Judge Judd, in response to the cross motions for summary judgment by all parties, fixed the level of 2130 feet as the OHWM.

Appeals were filed by the property owners and the state. On September 22, 2006, the Supreme Court reversed, holding that the OHWM is not necessarily determined by whether vegetation is in a particular place and that the WWP dams did not raise the OHWM.[33] The summer storage level of 2128 was accepted as of the OHWM for Coeur d'Alene Lake.[34] The property owners had sought ownership of littoral rights which they described as descending to the low water mark. Judge Judd denied that claim and the Supreme Court agreed holding that recognizing such a littoral right would violate the Public Trust Doctrine.[35]

Photo courtesy of Idaho Department of Commerce

Coeur d'Alene Lake Offers public recreation, but it's not always clear who owns the beach.

Herman Lake

The most recent Panhandle lake case resulted in an opinion from the Idaho Supreme Court upon a legal theory that had never occurred to counsel for either plaintiffs or defendants or to the district judge.[36]

Herman Lake is a pretty, 30-acre shallow lake in Boundary County close to the Canadian border. The entire lakeshore was owned by the Hostermans on the north and the Hubbards around the rest of the lake. The Mesenbrinks owned land to the north that does not presently touch the lake.

From the commencement of the lawsuit, the parties argued, and all of the testimony was based upon, the opinions cited above about the OHWM and Idaho Code § 58-104(9).[37] Before the suit was filed, the Mesenbrinks had applied for a dock permit; Hosterman and Hubbard protested on lack of riparian ownership. The Idaho Department of Lands refused to issue a permit because shoreline ownership was in dispute.[38] The Mesenbrinks named the state as the lead defendant.

A government survey made in 1898 recited that the property now owned by the Mesenbrinks had touched upon the lake requiring a meander offset. Hosterman/Hubbard experts presented soil evidence that the Mesenbrink's property could never have been under the lake. The Mesenbrinks countered with the argument that the lake had in the past 50 years receded.

The Mesenbrinks countered with the argument that the lake had in the past 50 years receded.

The State Land Board, on the advice of the attorney general, determined that Herman Lake was not navigable at the time of statehood even though it had been included in the state list of navigable lakes.[39] Herman Lake is clearly navigable. For 30 years, there had been a resort with rental boats on the north shoreline. The water in most places was at least 10 feet deep, easily surpassing the floating six-inch log test for navigability.[40] The attorney general applied the definition of navigable waters as "being used, in their ordinary condition, as highways for commerce on the date of statehood, under the federal test of navigability."[41]

Upon the eve of trial, the Mesenbrinks and the state stipulated for dismissal of the state.[42] This dismissal the week before trial did not result in any change in direction for the parties. Judge James A. Michaud's decision in favor of the Mesenbrinks cited all of the above OHWM cases, as did the briefs on appeal for both parties. The oral

argument on appeal was all about the OHWM. The unanimous opinion written by Justice Eismann began by describing Herman Lake as "non-navigable" and then went back to 1910 to *Lattig v. Scott*[43], which followed the common law rule that riparian owners on non-navigable waters take title to the center of the lake. The court held that lines of the respective properties were to be drawn from the ends of the meander lines to middle of the lake. The Mesenbrinks were entitled to ownership into the bed of the lake without regard to the OHWM.[44]

The state had no ownership of the beds of non-navigable waters and neither the Public Trust Doctrine nor the Lake Protection Act applied. This abdication was the first of its kind in an OHWM case.

The state had no ownership of the beds of non-navigable waters and neither the Public Trust Doctrine nor the Lake Protection Act applied.

Conclusion

Lake and river-front property is very valuable, up to $3,000 per front foot according to the county assessor on certain shores on Hayden and Coeur d'Alene Lakes. The Sanders Beach litigation carried with it a high emotional impact upon both public users and private owners. The Herman Lake decision will most likely not have any future counterparts. The state's long list of navigable lakes has very few that would meet the "used in commerce at statehood" test, but the attorney general is not likely to recommend more abandonments. The vegetation test will continue to be used except when the court decides that it is not useful. Whatever level is chosen will be the same all around the lake. The future solution for obtaining public access is far more likely to come from purchase than from lawsuits.

About the Author

Scott W. Reed *graduated from Princeton University in 1950 and Stanford Law School in 1955. He has been a sole practitioner in the Coeur d'Alene area since 1956. Mr. Reed was a member of the Idaho Water Resource Board from 1971 to 1988, and a member of the Board of the National Audubon Society for 18 years. Mr. Reed represented one of the parties in the Hayden Lake, KEA, Sanders Beach, and Herman Lake cases, as well as the Haman v. Fox case. He and his wife Mary Lou are the proud parents of Bruce and Tara.*

Endnotes

[1] *Jordan v. Hurst*, 10 Idaho 308, 77 P. 784 (1904); *Lattig v. Scott*, 17 Idaho 506, 107 P. 47 (1910). In 1913, the United States Supreme Court reversed *Lattig* based on an interpretation of the title to navigable waters transferred to Idaho upon statehood. *Scott v. Lattig*, 227 U.S. 229 (1913).
[2] 26 Idaho 745, 146 P.2d 732 (1915).
[3] 227 U.S. 229 (1913).
[4] 34 Idaho 682, 204 P. 469 (1921).
[5] 34 Idaho 682, 203 P. 469 (1921).
[6] 71 Idaho 501, 234 P.2d 446 (1951).
[7] *Id.* at 507, 234 P.2d at 452.
[8] 99 Idaho 793, 585 P.2d 540 (1929).
[9] *Id.* at 798, 585 P.2d at 545.
[10] *Id.* at 799, 785 P. at 546.
[11] 100 Idaho 140, 544 P.2d 1083 (1970).
[12] *Id.* at 144 n.1, 544 P.2d at 1087 n.1.
[13] *Id.*
[14] *Kootenai Envtl. Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983).
[15] *Nat'l Audubon Soc. v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983).
[16] 146 U.S. 387 (1892).
[17] 105 Idaho at 632, 671 P.2d at 1095.
[18] I.C. §§ 58-1301 to -1312.
[19] Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970) (cited in *Kootenai Envtl. Alliance*, 105 Idaho at 628, 671 P.2d at 1091).
[20] *Erickson v. State*, 132 Idaho 208, 970 P.2d 1 (1998).
[21] *Id.* at 210-13, 970 P.2d at 4-7.
[22] *Id.*
[23] *See* I.C. §§ 58-1201 to -1203.
[24] *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 733 P.2d 733 (1987).
[25] *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.,* 135 Idaho 316, 17 P.3d 260 (2000).
[26] *Hayden-Coeur d'Alene Irrigation Co. v. Hillyard Townsite Co.*, No. 3179 (8th Dist. Ct. Idaho Apr. 22, 1912).
[27] *Id.*, Affidavit of Kennedy J. Hawley.
[28] Memorandum Opinion at 12 (on file with author).
[29] 135 Idaho at 321–22, 17 P.3d at 265-66.
[30] I.C. § 58-1302.
[31] *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310 (2006).
[32] *See In re Sanders Beach*, 143 Idaho 443, 147 P.3d 75 (2006).
[33] *Id.* at 447-48, 147 P.3d at 79-80.
[34] *Id.* at 454, 147 P.3d at 86.
[35] *Id.* at 453-54, 147 P.3d at 85-86.
[36] *Mesenbrink v. Hosterman,* 147 Idaho 408, 210 P.3d 516 (2009).
[37] *Id.* at 409-10, 210 P.3d at 517-18.
[38] *Id.*
[39] *Id.* at 410, 210 P.3d at 518.
[40] *S. Idaho Fish & Game Ass'n v. Pimbo Livestock, Inc*., 96 Idaho 360, 528 P.2d 1295 (1974).
[41] I.C. § 58-1202(3).
[42] *Mesenbrink*, 147 Idaho at 410, 210 P.3d at 518.
[43] 32 Idaho 506, 107 P. 427 (1910).
[44] 147 Idaho at 412, 210 P.3d at 520.

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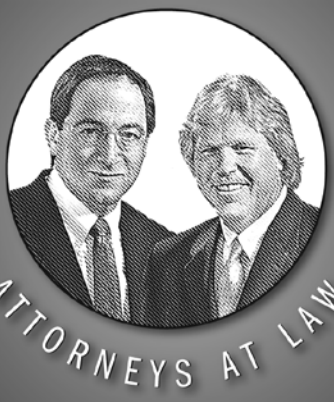
CHASAN  WALTON

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OFFICIAL NOTICE
SUPREME COURT OF IDAHO

Chief Justice
Daniel T. Eismann
Justices
Roger S. Burdick
Jim Jones
Warren E. Jones
Joel D. Horton

2nd AMENDED - Regular Fall Terms for 2010

Boise. . . . . .August 23, 25, 27 and 30
Boise . . . . . .September 1
Idaho Falls, Pocatello and Boise. . . . . .September 22, 23, 24, 27 and 29
Boise . . . . . .October 1
Coeur d'Alene, Moscow, Lewiston and Boise. . . . . November 3, 4, 5 and 8
Boise and Jerome. . . . . December 1, 2, 3, 6 and 8

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2010 Fall Terms of 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

Chief Judge
Karen L. Lansing
Judges
Sergio A. Gutierrez
David W. Gratton
John M. Melanson

3rd Amended - Regular Fall Terms for 2010

Boise. . . . . .July 21
Boise. . . . . August 10, 12 and 19
Boise. . . . . September 8 and 14
Boise. . . . . .October 14, 19 and 21
Boise. . . . . .November 9, 12, 16 and 18
Boise. . . . . .December 7 and 9

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2010 Fall Terms of 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.

Comment sought for proposed rules

The Criminal Mediation Committee is proposing a new rule on criminal mediation. In addition, the Idaho Supreme Court is considering a civil rule on protecting personal information in court files. Minutes and the proposed rules are posted on the court's website on http://www.isc.idaho.gov/rulesamd.htm. under the Idaho Criminal Rules and the Idaho Rules of Civil Procedure. Your comments and suggestions are welcomed. Please send them to cderden@idcourts.net by November 30.

Idaho Supreme Court

Oral Argument for December 2010

Wednesday, December 1, 2010 – BOISE
10:00 a.m. Page v. Pasquali III.....#36429
11:10 a.m. State v. Urrabazo.....#33459/33460

Thursday, December 2, 2010 – BOISE
10:00 a.m. Rogers v. Household Life Insurance Co.....#36746
11:10 a.m. Ginther v. Boise Cascade Corp. (Industrial Commission) .....#36126

Friday, December 3, 2010 – JEROME
8:50 a.m. Kelley v. Yadon.....#36705
10:00 a.m. Farm Bureau Mutual Insurance v. Schrock.....#37172
11:10 a.m. St. Luke's Magic Valley Regional Medical Center v. Gooding County.....#36839
1:30 p.m. Idaho Ground Water Appropriators v. Clear Springs Foods .....#37308

Monday, December 6, 2010 – BOISE
10:00 a.m. Hall v. State.....#35055
11:10 a.m. Vickers v. Lowe.....#36619

Wednesday, December 8, 2010 – BOISE
8:50 a.m. Giltner Dairy, LLC v. Jerome County.....#36528
10:00 a.m. Zingiber Investment v. Hagerman Highway District ....#36298/36840
11:10 a.m. IDHW v. Jane Doe I (2009-21).....#37220

Idaho Court of Appeals

Oral Argument for November 2010

Tuesday, November 9, 2010 – BOISE
9:00 a.m. Oppelt v. State.....#37234
10:30 a.m. State v. Emery.....#37171
1:30 p.m. Jacobson v. State.....#36257

Friday, November 12, 2010 – BOISE
10:30 a.m. Miner v. Miner.....#37069
1:30 p.m. Torrence v. McCay.....#35747

Tuesday, November 16, 2010 – BOISE
9:00 a.m. State v. Truman.....#36194
10:30 a.m. State v. Gomez.....#35209
1:30 p.m. Dept. of Health & Welfare v. Doe.....#37912

Thursday, November 18, 2010 – BOISE
9:00 a.m. State v. Mosqueda.....#36620
10:30 a.m. Masterson v. DOT (telephone conference).....#37385
1:30 p.m. Lazinka v. State.....#36854

Third District Rule Change

NOW, THEREFORE IT IS HERBY ORDERED that the amendment to the Local Rules of the District Court and Magistrate Division of the Third Judicial District is hereby adopted as follows:

When a misdemeanor charge is pending to which the court has not accepted a guilty plea, and the prosecutor wishes to amend the charge to a greater offense, the prosecutor may file a Motion for Leave of Court to Amend and the presiding judge shall rule upon the motion to amend prior to accepting a change of plea to the original misdemeanor charge.

Dated this 7 day of July, 2010.

By Order of the Supreme Court
Daniel T. Eismann

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 10/1/10)

CIVIL APPEALS

Attorney Fees and Costs

1. Did the trial court err in determining that an action seeking to recover on a claim of breach of warranty from sellers of real estate used in commercial farming and a gravel pit operation was not an action to recover on a commercial transaction for purposes of an award of attorney fees under I.C. § 12-120(3)?

Garner v. Povey
S.Ct. No. 37561
Supreme Court

Divorce, Custody, and Support

1. Whether the court erred in not dividing the 401(k) instead of simply awarding the full amount of the 401(k) to the respondent thus giving him an unequal distribution of the community estate.

Moffett v. Moffett
S.Ct. No. 37383
Court of Appeals

Habeas Corpus

1. Did the district court err in dismissing Lightner's petition for writ of habeas corpus on *res judicata* grounds?

Lightner v. Sex OffenderClass. Board
S.Ct. No. 37028
Court of Appeals

Land Use

1. Whether the district court erred in concluding the Board was required to determine the legal scope of a private agreement granting a road easement in order to find that the subdivision has access to a public road.

Jasso v. Camas County
S.Ct. No. 37258
Supreme Court

2. Whether the county is estopped from claiming a violation of Ordinance No. 374.

Stafford v. Kootenai County
S.Ct. No. 37320
Supreme Court

3. Does the Kootenai County Board of Commissioners have authority to change the zoning of two parcels of property by a procedure which swaps the zone of each parcel?

Ciszek v. Kootenai County Board Of Commissioners
S.Ct. No. 37562
Supreme Court

Post-Conviction Relief

1. Did the court err by summarily dismissing Wright's petition for post-conviction relief?

Wright v. State
S.Ct. No. 37331
Court of Appeals

2. Whether the district court erred by summarily dismissing Papse's petition for post-conviction relief without appointing counsel.

Papse v. State
S.Ct. No. 37446
Court of Appeals

Substantive Law

1. Did the Department of Health and Welfare err in concluding Peterson's countable resources exceeded program limits and thus he was not eligible for Medicaid benefits or food stamps?

Peterson v. Department of Health and Welfare
S.Ct. No. 37408
Court of Appeals

Summary Judgment

1. Did the district court err in granting summary judgment to IDHW on Patterson's retaliation claim under the Idaho Human Rights Act, I.C. § 67-5901 et seq.?

Patterson v. Department of Health & Welfare
S.Ct. No. 37416
Supreme Court

Wills

1. Did the court err in ruling that the DBL mortgage lien against the trust should be the sole obligation of Jerry Beus?

Beus v. Beus
S.Ct. No. 37384
Supreme Court

CRIMINAL APPEALS

Due Process

1. Did the court err in failing to grant Salinas' motion to dismiss his felony injury to a jail charge because the damage alleged by the state is not the kind of injury contemplated by the statute?

State v. Salinas
S.Ct. No. 37197
Court of Appeals

Restitution

1. Did the district court err by concluding Campbell did not agree to pay restitution on uncharged criminal conduct in exchange for the state's agreement not to bring charges arising from that conduct?

State v. Campbell
S.Ct. No. 37222
Court of Appeals

Search and Seizure – Suppression of Evidence

1. Did the court err when it denied Peery's motion to suppress evidence Peery discarded while fleeing?

State v. Peery
S.Ct. No. 37097
Court of Appeals

2. Did the district court err in suppressing Turek's motion to suppress evidence which was seized during a probation home visit?

State v. Turek
S.Ct. No. 36596
Court of Appeals

3. Whether the district court erred when it denied Simon's motion to suppress and found the officer did not unlawfully extend the traffic stop while waiting for a drug dog to arrive.

State v. Simons
S.Ct. No. 36165
Court of Appeals

4. Did the district court err in denying Erickson's motion to suppress evidence derived from an illegal search of his vehicle?

State v. Erickson
S.Ct. No. 35587
Court of Appeals

Sentence Review

1. Did the district court err when it denied Charlton's motion for credit for time served?

State v. Charlton
S.Ct. No. 36997
Court of Appeals

2. Did the court abuse its discretion when it failed to *sua sponte* order a mental health evaluation to assist the court in determining the appropriate disposition of Hanson's probation violation?

State v. Hanson
S.Ct. No. 37436
Court of Appeals

3. Was Odom entitled to credit for time served on an Idaho conviction once he was served with an Idaho bench warrant while he was incarcerated in Louisiana on a separate criminal charge and conviction?

State v. Odom
S.Ct. Nos. 36951/36952/36953
36957/36958/36959
Court of Appeals

Substantive Law

1. Whether I.C. § 18-8504(1)(a), which criminalizes recruiting criminal gang members, is unconstitutionally overbroad on its face and as applied for punishing the exercise of free association.

State v. Manzanares
S.Ct. No. 35703
Supreme Court

2. Did the district court lack authority to dismiss Poe's felony conviction pursuant to I.C. § 19-2604 when Poe had not at all times complied with the terms and conditions of probation?

State v. Poe
S.Ct. No. 37351
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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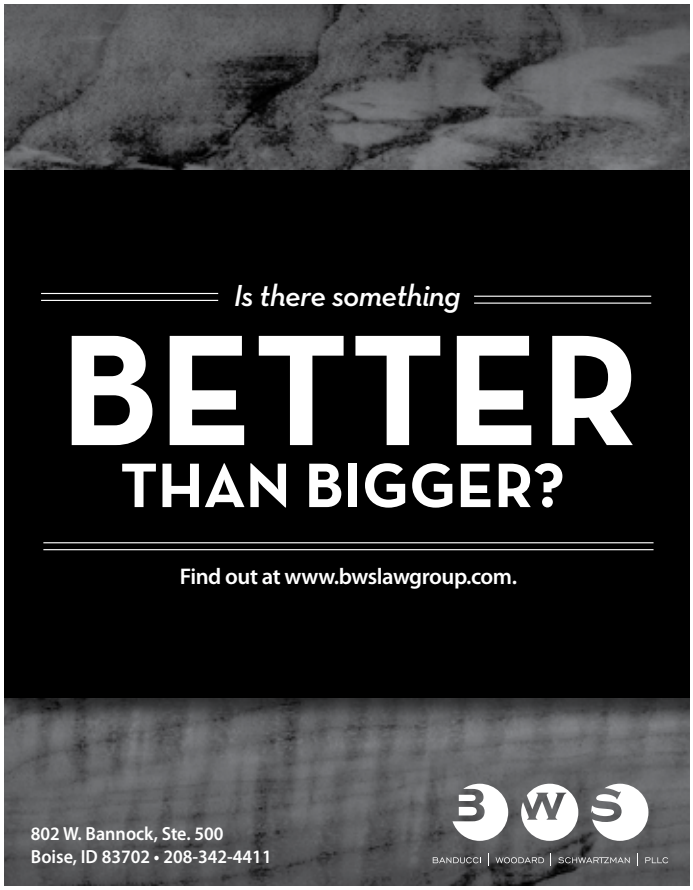

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TRIO OF RETAINED JURISDICTION OPTIONS BRINGS PROMISE OF IMPROVED OUTCOMES IN CRIMINAL CASES

Michael Henderson
Legal Counsel,
Idaho Supreme Court

Many judges say that sentencing criminal defendants is the most difficult part of their job. Of course, it is always challenging to make a decision that will have such a profound effect on all concerned – the person convicted, the victims, their families, and so many others in the community.

But is also difficult because judges hope that their decisions will make a difference, will actually result in a safer, more humane society. When it's a question of locking up a truly dangerous individual for a long time, the choice may actually be easier. But what if the offender, with the right help, may actually be salvaged and become a productive citizen? Are there alternatives available that have a chance of bringing about that result?

Problem solving courts – drug courts, mental health courts, DUI courts, and domestic violence courts – have provided new and promising ways of addressing the causes of criminal behavior and reducing recidivism. Now, another sentencing alternative, retained jurisdiction, has been enhanced to include additional roads to rehabilitation.

Michael Henderson

Before July 1 of this year, I.C. § 19-2601(4) allowed a judge imposing sentence for a felony to retain jurisdiction over a defendant for the first 180 days of the sentence. Most offenders on retained jurisdiction were sent to the program at the North Idaho Correctional Institution (NICI) at Cottonwood, where issues related to education, substance abuse, and suitability for employment are addressed. Afterwards, the offender's sentence is reevaluated by the court; more than 80 percent of those who are given retained jurisdiction are later placed on probation. (Female offenders have similar retained jurisdiction programs available at the South Boise Women's Correctional Center and the Pocatello Women's Correctional Center.)

Now, the Department of Correction has added two other alternatives for offenders on retained jurisdiction, providing a trio of options. The first of these new options is the Correctional Alternative Placement Program (CAPP), which began operating in July of this year. Located south of Boise near other DOC facilities and operated by the Management Training Corporation, CAPP offers an intensive 90-day treatment program for low to moderate risk male offenders and addresses substance abuse and cognitive issues. It is a 432 bed facility, currently housing more than 300 offenders. As of mid-October, it had already produced 50 graduates.

The second new option is the Therapeutic Community Retained Jurisdiction Program (TC rider). Located at NICI, the TC rider program began operation in September of this year and has 132 beds for male offenders. This program will also be provided for female offenders at the South Boise Women's Correctional Center, with 16 beds available. The TC rider will be a 270-day program for higher-risk inmates with elevated substance abuse issues and criminal orientation. Sex offenders, however, will be ineligible for the program.

The TC rider will be a 270-day program for higher-risk inmates with elevated substance abuse issues and criminal orientation.

The length of the TC rider made it necessary to amend the retained jurisdiction statute to allow completion of the program before the court could reevaluate the offender's sentence. This was accomplished during the 2010 legislative session with the passage of SB 1383, which amends I.C. § 19-2601(4) to allow judges to retain jurisdiction for a period of up to the first 365 days of a felony sentence. When judges retain jurisdiction in the future, they will generally do so for the full 365-day period allowed by the statute. Their sentencing order may also include a recommendation of which of the three op-

tions – the traditional retained jurisdiction program at Cottonwood, CAPP, or the TC rider – would be most appropriate for the particular offender. The final determination of which option to use will be made by the Department at the Reception/Diagnostic Unit (RDU) based on an assessment of the risk, needs, and health care of the offender. If the RDU assessment results in the offender being assigned to a program other than the one recommended by the sentencing judge, the court will be notified immediately.

The increased 365-day length of the period of retained jurisdiction may cause some defense counsel to view this as a less attractive outcome for their clients than the earlier 180-day rider. In fact, however, only those offenders sent to the TC rider are likely to spend more time on retained jurisdiction than they would have previously. And since these are the higher risk offenders, they are also those who would have been more likely to be sentenced to straight prison time under the previous statute, rather than having the court retain jurisdiction. Those offenders who are sent to the 90-day CAPP program may actually spend less time on retained jurisdiction than they would have previously.

The increased 365-day length of the period of retained jurisdiction may cause some defense counsel to view this as a less attractive outcome for their clients than the earlier 180-day rider.

Throughout the development of the trio of options, the Department has worked closely with judges and the Administrative Office of the Courts to ensure clear lines of communication and thorough cooperation during this transition. The Department projects that by fiscal year 2014, these programs will have reduced the forecast DOC inmate population by 458 beds, resulting in a reduction of $8,321,000 in the anticipated increase in incarceration costs. Only time will tell how effective these new options will be. But the result may well be decreased incarceration costs, safer communities, and salvaged lives.

About the Author

Michael Henderson *is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine and Twin Falls Counties.*

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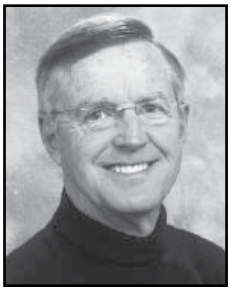

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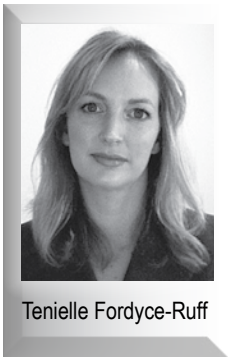
Attaching People to their Problems: Eliminating Passive Voice and Vague – "ing" Words from Your Writing

Tenielle Fordyce-Ruff

I enjoy curling up with a good mystery as much as the next person. For me, curling up with a great page-turner can make a dreary day positively blissful. I don't, however, appreciate mysteries when they appear in legal writing. All legal problems share one characteristic: people. I don't want to be in the dark about who's doing what when I'm reading a brief. I want the writer to make that basic information clear.

Humor me, and imagine coming across this during your busy day:

> A puzzling caper at the local museum of modern art needed to be solved quickly, so the facts were examined by the detective. Last night, everything was being prepared for opening might of the much-anticipated exhibition of self-portraits. It was discovered by the cleaning crew that one painting had been defaced. When the crime scene was studied closely by the detective, it was revealed that a portrait of a man had been scribbled on with red crayon. It was decided a visit needed to be paid to the man whose self-portrait had been given a mustache.



Tenielle Fordyce-Ruff

Or this:

> Solving this assault with a dessert fork was a priority because snacking on éclairs from Monsieur Gourmand's patisserie was enjoyable when not working. Questioning the witness led to information that the crime occurred while preparing some chocolate-filled delights. Two vital clues were then uncovered when pointing out an abandoned razor near the scene and hinting that the new waiter might be involved.

Now, once the thoughts of great art and gourmet chocolate are out of your head, imagine you're a judge trying to decipher these paragraphs and understand the case before you. Scratching your head? If you're confused it's because the author has detached the people from the problem.

Legal writers often unknowingly use the passive voice or vague –"ing" words to create detachment. The problem with this is threefold: it leaves the reader wondering who is doing what, it's boring, and it's confusing. Fortunately, getting rid of detachment in your writing is easy if you identify and eliminate passive voice and vague –"ing" words.

Passive voice

Conceptually, it is easy to understand that writing should be active—the actor should be doing the action in the sentence (grammatically, the actor should be the subject of the sentence). Yet, because writers know whom they are talking about, they forget to put that person in the sentence to help the reader understand. This familiarity inadvertently creates passive sentences that can confuse an unfamiliar reader.

So, how can you tell if your sentence is passive or active? Gear up for a little bit of grammar, but just a little bit.

Passive voice contains (1) a form of the verb "to be" and (2) a past participle. Don't worry if you can't remember what a past participle is, there is a simple trick to help you identify passive voice—the verb will always be two words. For instance, each of the following sentences is passive.

> The brief *was filed*.
>
> The car *is being stolen*.
>
> The prosecution's motions *were granted*.

Too much time *had been spent* composing interrogatories.

Notice that each sentence contains a two-word verb and the first verb is always a "to be" verb.

To find the passive voice in your writing, you can scan your writing looking for "to be" verbs, or you can use your word processor's "find" function to search for be, am, is, are, was, were, being, and been. Once you have found the "to be" verb, look for a second verb ending in –d, -ed, -n, -en, or –t. (It's important to check that the second verb is a past participle because "to be" can be used actively, such as, "I am spending time composing interrogatories.")

After you have found the two-word verb, check the sentence to see if the person doing the action is the subject of the sentence. If she isn't, re-write the sentence. A case in point: "The prosecution's motions were granted" should read, "The judge granted the prosecution's motions."

However, be careful when re-writing. Writers, sometimes realize that they haven't identified who is doing what, so they attempt to help the reader by adding the word "by" followed by the actor. For instance, "The brief was filed by Tenielle" is still passive, although it doesn't leave the reader wondering who filed the brief. So, while this helps the precision problem created by passive voice, it still creates a boring sentence. The active option is "Tenielle filed the brief."

Vague '–ing' words

The second type of detachment is using vague –"ing" words. Not all –"ing" words are vague. Words ending in –"ing" frequently appear in English. However, when an –"ing" word hides the subject of a sentence, it creates boredom and confusion. For example, each of these sentences contains a vague –"ing" word.

> *Spending* excess time composing interrogatories wasted my evening.
>
> *Filing* the brief was a wonderful way to end the workday.
>
> The arsonist caught the thief *while hiding* the murder weapon.
>
> *After testifying* the truth came to light.

You can use two easy tricks to identify vague –"ing" words. First, vague –"ing" culprits frequently come at the beginning of a sentence, so you can quickly scan your document looking at the first word or two of each sentence to see if it ends in –"ing." Second, vague –"ing" words pop up after the words after, although, before, by, due to, if, instead of, since, though, through, upon, when, whereas, and while. You can use your word processor's "find" function to search for these words and then check to see if an –"ing" word follows it. Generally, if you find an –"ing" word in one of these two spots, the subject won't be clear to your reader, and you will need to fix your sentence.

Fixing vague –"ing" words is easy. First, you explicitly state the subject, and second, you turn the vague –"ing" word into the verb in your new sentence. This can help the reader easily identify the actor and make the sentences more interesting for the reader. Consider this: "Spending excess time composing interrogatories wasted my evening" can become "Bob spent too much time composing interrogatories and wasted my evening." This fix lets the reader know that *Bob* spent too much time composing, and it's simply a much more interesting sentence.

Generally, if you find an –"ing" word in one of these two spots, the subject won't be clear to your reader, and you will need to fix your sentence.

In addition to creating more interesting sentences, fixing vague –"ing" words can help eliminate confusion. "The arsonist caught the thief while hiding the murder weapon" has two possible meanings and leaves the reader wondering *who* was hiding the murder weapon—the arsonist or the thief? The fix for this sentence should clear up that confusion and let the reader know exactly what transpired: either "The arsonist caught the thief, who was hiding the murder weapon" or "While the arsonist was hiding the murder weapon, he caught the thief."

Conclusion

So, now that I've helped you put the people back in your writing, I'm off to the chocolate shop. Some nice dark chocolate is just what I need to perk me up before my trip to the museum. That's another way to spend a blissful afternoon!

About the Author

Tenielle Fordyce-Ruff *is a member of the Idaho State Bar. She clerked for Justice Roger Burdick of the Idaho Supreme Court and taught Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing at the University of Oregon School of Law. She is also the author of Idaho Legal Research, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law.*

Sources

The mysterious examples are adapted from Bonnie Trenga, The Curious Case of the Misplaced Modifier: How to Solve the Mysteries of Weak Writing, 9, 29 (2006).

Megan McAlpin, *Writing with Clarity: Finding and Fixing the Passive Voice*, Oregon State Bar Bulletin, July 2007.

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Advocates in Action: Idaho Attorneys Prepare for Mission in Iraq

Stephen A. Stokes
Meyers Law Office, PLLC

Photo courtesy of Stephen A. Stokes

MAJ Ream (left) and MAJ Paul Boice (right) set up laptop computers in the JAG office at Camp Selby Mississippi. The soldiers are training before deployment to Iraq.

The entirety of the JAG office arrived at Camp Shelby, Mississippi, our first stop on the road to Iraq, on September 20 and 21, 2010. Once on the ground in Mississippi, we went about the business of occupying our office, setting up our computers and office equipment and, of course, making sure our most crucial sensitive item – the office coffee pot – made the trip in one piece.

The first several days at Camp Shelby involved processing through medical and administrative screenings. One of the main purposes of our time at Camp Shelby is to identify any soldiers with lingering medical, personnel or legal issues and fixing those issues prior to mobilizing. Soldiers with unfixable issues are released from active duty and sent back to Idaho. If a soldier is identified as having a legal issue, it is the JAG office's responsibility to work with the soldier's chain of command and the civilian court system in Idaho to work out the soldier's trouble.

Another major purpose of our time at Camp Shelby is training. Training is being conducted for all soldiers in the areas of convoy operations, IED countermeasures, gas-mask verification, weapons operation, rifle marksmanship and basic soldier skills. We have also received training on the Army's new military up-armored vehicle, the Mine Resistant Ambush Protected (MRAP) vehicle.

Stephen A. Stokes

JAG-specific training is also being conducted. SFC Rey Leija, as the non-commissioned officer in charge, is coordinating training for our enlisted paralegals. It is their responsibility to prepare investigation reports, actions for non-judicial punishment and act as liaisons between the subordinate commanders and the Brigade JAG office. Our paralegals must be thoroughly up to speed on new developments in law and policy prior to heading to Iraq. On October 18-20, First Army, the major Army command responsible for ensuring that the 116th CBCT is ready to go to Iraq, will be delivering theatre-specific JAG training to our attorneys and paralegals.

In addition to training, the attorneys in the JAG office have been busy working their respective lanes. The legal assistance mission has been active. Over the first three weeks at Camp Shelby, I met with 57 soldiers seeking legal advice. Estate planning and divorce topped the list of consultations, with several clients seeking counsel on the Servicemembers Civil Relief Act, consumer debt issues, adverse Army administrative actions and child custody. I also worked with several attorneys in Idaho to obtain signatures from soldiers on legal documents, and I provided advice to Idaho attorneys, who are representing soldiers back home, on the interplay between Army regulations and pending family law cases.

MAJ Paul Boice has been working military justice cases. To date, he has worked on four non-judicial punishment cases under the Uniform Code of Military Justice. Active duty servicemembers are subject to the UCMJ, which is the military criminal code. The UCMJ is made up of traditional common-law crimes as well as military specific offenses. Since our arrival at Camp Shelby, servicemembers have been prosecuted for various acts of misconduct such as insubordination, falsifying a urinalysis test and illegal drug use. MAJ Boice has also been training subordinate commanders on military justice issues, adverse administrative actions, and the rules and regulations regarding search and seizures and military investigations.

MAJ Darren Ream has been working hard as the Brigade Judge Advocate, a member of the Brigade Commander's personal staff, and the face of the JAG office. In that capacity, he has been briefing JAG activities to the Brigade Commander, attending staff meetings, writing the legal portion of the Brigade's operating orders, and generally managing the activities of the JAG office. He is also performing a variety of unique administrative, contract, and fiscal law reviews, which helps keep things interesting.

The 116th Cavalry Brigade Combat Team will be at Camp Shelby for approximately the next 30 days. During that time, our JAG mission will continue as described above. Next month, I will detail our day-to-day living and how we are making do in this austere environment while still accomplishing our mission.

About the Author

Stephen A. Stokes *received his J.D. from the University of Idaho in 2005. He is an associate with Meyers Law Office, PLLC in Pocatello, Idaho, where he practices in the areas of Family Law, Commercial Litigation and Planning, General Litigation, Personal Injury and Workers Compensation. He is a member of the Idaho Bar, the Idaho Association of Criminal Defense Lawyers and the Idaho Trial Lawyers Association. He served as chair of the Sixth District Bar Association Family Law Section. He is also a Judge Advocate serving as a First Lieutenant in the Idaho Army National Guard and is currently deployed to Iraq. He can be reached by telephone at 208-233-2141 or 208-406-2861 or by email at stephenandrewstokes@gmail.com or stephen.a.stokes@us.army.mil.*

Licensing and MCLE Compliance

Annette Strauser
ISB Membership Administrator

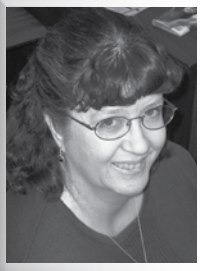
Online courses are a great way to avoid the hassle of ordering and returning rented programs.

Licensing

The 2011 licensing packets will be mailed in mid November. The licensing deadline is February 1, 2011. Your payment and paperwork must be received in our office by that date. Postmarked is not enough. If it is not received by February 1, you must also pay the appropriate late fee - $50 for active and house counsel members and $25 for affiliate and emeritus members. The final licensing deadline is March 1, 2011. All licensing fees and paperwork must be received by that date. If your licensing is not complete by March 1, your name will be given to the Idaho Supreme Court for cancelation of your license.

Paying online

Online licensing renewal will be available again this year. Attorneys or their firms may complete the licensing paperwork and pay their fees online. Payments can be made by credit card or check. There will be an additional, minimal fee for paying by credit card. Information on how to access the portal will be included in the licensing packets and will be emailed to the membership. A link to the portal will also be on our website at www.isb.idaho.gov once the licensing packets have been mailed. Note: the only way to pay by credit card is through the online licensing program.



Annette Strauser

MCLE compliance

If it is your year to report your mandatory continuing legal education (MCLE) credits, you will receive a MCLE certificate of compliance in your licensing packet. The deadline for obtaining the required MCLE credits is December 31, 2010. However, the certificate of compliance does not have to be submitted until the February 1 licensing deadline.

You must have at least 30 Idaho approved MCLE credits (of which at least two must be approved ethics credits) by the end of your reporting period. Check your attendance records on our website at www.isb.idaho.gov. Remember, only Idaho MCLE approved courses can be used to meet the MCLE requirements. Approved courses will appear in your attendance records if we received verification from the sponsor that you attended the course. If you attended courses that do not appear in your attendance records, use the "Search Approved Courses" page on our website to verify they are approved. As long as the course has been approved for Idaho MCLE credit, simply add it to your certificate of compliance before signing it. Most certificates of compliance will have written additions and corrections.

There will be many courses offered in November and December. We post a list of upcoming approved courses on our website. We also have a library of DVDs, CDs and video/audio tapes available for rent and we have online courses available. Information about the rental programs and online courses is on our website.

Online courses are a great way to avoid the hassle of ordering and returning rented programs. They are video and audio streaming versions of our courses that are available at your convenience 24 hours a day. They are an easy way to get MCLE credits when you want them. Visit our website to see the available courses.

Remember, the limit for self-study credits is 15 per reporting period. If you take an online recorded course, it will always be considered self-study. Watching a DVD or videotape is self-study if you watch it on your own. If you can get at least one other Idaho attorney to watch a DVD or videotape with you, it is not considered self-study. Getting together with another member of the Bar is a good way to obtain live credit.

If, despite your best efforts, you do not think you will be able to complete the MCLE requirements by the December 31 deadline, you can request an extension until March 1, 2011. To get the extension, pay the $50 MCLE extension fee with your licensing or send us a separate written request with the extension fee. Credits earned during the extension period will be counted toward your reporting period that ended in 2010. Your certificate of compliance should not be submitted until the requirements have been met. However, the rest of your licensing must be submitted by the Feb. 1 deadline to avoid the late fee. The final deadline for submitting your completed certificate of compliance is March 1, 2011. If you have not completed the MCLE requirements by March 1, your name will be given to the Idaho Supreme Court for cancelation of your license.

Questions

We want to make the licensing process as easy and trouble-free as possible. If you have questions or need more information, please contact us at (208) 334-4500.

For licensing and MCLE information, contact Annette Strauser (astrauser@isb.idaho.gov) or Jenay Hunt (jhunt@isb.idaho.gov) in the Licensing/MCLE Department.

For an update on the status of the online licensing renewal portal, contact Annette Strauser at the phone number or email address above.

If you are interested in renting a DVD, CD or video/audio tape, contact Eric White (ewhite@isb.idaho.gov) in the Member Services Department.

For more information on licensing, MCLE, the list of upcoming courses, the list of rental programs and online courses, etc. – visit our website at www.isb.idaho.gov.

Online Licensing Renewal

You have the option of completing and paying your 2011 licensing online. The advantages of online licensing:

- Eliminate missing or incomplete forms.
- Pay by credit card or check.
- Print a receipt as soon as the process is complete – if paid by credit card.
- Avoid late fees - pay online by credit card from anywhere instantly.

More information about online licensing renewal will be on our website at www.isb.idaho.gov after the licensing packets are mailed in mid-November. Contact the Licensing Department at (208) 334-4500 or astrauser@isb.idaho.gov if you have any questions.

R. Bruce Owens
Attorney at Law

of the Firm,

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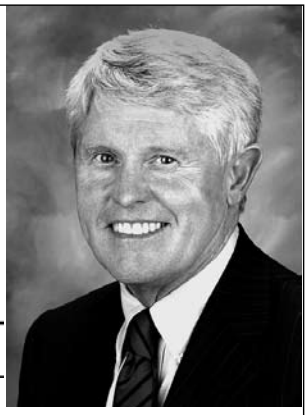
Admitted ID and WA



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Eric Olson, Judge Castleton earn Idaho's top judicial awards

A Bonneville County Mental Health Court Coordinator and a former Franklin County Magistrate Judge have been selected to receive the Idaho Judiciary's most prestigious awards.

Bonneville County Mental Health Court Coordinator, **Eric Olson**, was presented with the 2010 Kramer Award, and the Director of Judicial Education for the Idaho Supreme Court and former Magistrate Judge, Lowell Castleton, was selected as the 2010 Granata Award recipient. The recipients are chosen annually by virtue of their significant contributions to the Idaho judicial system. Both awards were presented September 20 at a meeting in Idaho Falls.


Eric Olson

The Kramer Award, named in honor of the late District Judge Douglas D. Kramer, is awarded to the person who best exemplifies excellence in judicial administration, by character and action. The Granata Award, named in honor of the late District Judge George G. Granata, Jr., is awarded to the trial judge who best exemplifies the professionalism evidenced by Judge Granata during his more than 20 years of judicial service.

The Kramer Award recipient, Eric Olson, currently serves as the coordinator for three adult mental health courts, two juvenile mental health courts and one misdemeanor diversion mental health project, as well as the supervisor of the regional juvenile drug court coordinator responsible for three juvenile drug courts. Olson was instrumental in implementing the first mental health court in Idaho, and its immediate success in diverting severely mentally ill offenders from prison was largely due to his hard work. The pilot court was awarded a United States Department of Justice Mental Health Court grant in 2002; in 2003 this court was recognized as one of five national learning sites for mental health courts by the Department of Justice.

Olson has been the acknowledged clinical expert, role model and mentor to all of Idaho's mental health courts and their coordinators and he is in constant demand throughout the United States. He has provided much assistance in the development of the crisis intervention team training for law enforcement agencies in eastern Idaho.

Judge Lowell Castleton, this year's Granata Award recipient, was involved in creating the first domestic violence court in Ada County and is regarded as one of the leaders in the areas of guardianship and conservatorship. He worked with the late Judge Patricia Flanagan to develop the conservator handbook, and continues to look for ways to enhance process in conservatorships and guardianships. Judge Castleton's many years of service include being a member of the Supreme Court Education Committee, the Fairness and Equality in the Courts Committee, the Idaho Governor's Task Force for Children at Risk, and the Idaho Network for Children.


Hon. Lowell D. Castleton

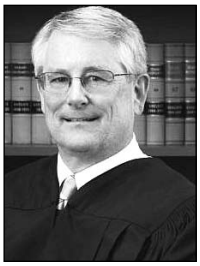
Judge Castleton earned his undergraduate degree in Political Science from Brigham Young University and his law degree from the University of Utah. In 1975 he started the law practice of Williams and Castleton. In 1983 he became a Magistrate Judge in Franklin County. He served as a Magistrate Judge until his retirement in 2002. Presently Judge Castleton is the director of Judicial Education for the Idaho Supreme Court, and serves as a senior judge. He has become nationally renowned as an educator and is able to use his expertise in bringing the best presenters and programs to Idaho.

Through his 27 years of service, he has continually embodied the noble characteristics that the Granata Award acknowledges.

Judge awarded Social Justice Award

The Catholic Charities of Idaho Marie D. Hoff Social Justice Achievement Award this year is given to Judge Michael R. McLaughlin, District Judge, of the Ada County Mental Health Court. The Marie D. Hoff award recognizes a person or organization that seeks to call forth and engage people in order to transform social structures that perpetuate injustice and poverty and lives out their faith through following the principles of Catholic social teaching.

Michael McLaughlin grew up in Mountain Home, in a Catholic family. His father and grandfather were lawyers, and despite the normal teenage struggle not to be like his parents, Michael showed an aptitude in law. He attended the University of Idaho and received his law degree in 1976. He moved back home with his wife and first child and began the practice of law with his father. Michael later became a prosecuting attorney and purchased his father's practice when his father retired in 1984. In 1990, Michael 'as part of his law practice' was doing mediation and arbitration work. It was at this time that he became a magistrate judge and at age 41, with three sons, life was good. In 1997, he was appointed as a district judge by Governor Batt, moved to Boise and in 2005 he helped set up the Ada County Mental Health Court. "I feel blessed when I was asked to be judge for the Mental Health Court and feel this was the right thing to do."


Hon. Michael R. McLaughlin

The Mental Health Court provides a continuum of care (usually two years) in helping the most vulnerable people such as people who have little or no family or support systems, are low-income, have poor job skills, many have substance abuse issues, and many cannot afford to maintain prescription medication or psychiatric care. These are people who have committed a felony and have been diagnosed with mental illnesses that include bi-polar disorder, schizophrenia, or chronic and persistent depression. Judge McLaughlin was the visionary who set up the current system, though he would humbly say it took the effort of many. Prior to Judge McLaughlin, resources such as the Dept. Health and Welfare, Dept. of Corrections, Division of Vocational Rehabilitation, substance abuse counselors, National Alliance for the Mentally Ill, the Prosecuting Attorney and Defense Counsel were not collaboratively working together on each case. Through the efforts

of Judge McLaughlin, now these and other agencies are working together on a case by case basis with individuals. "It is really hard to see people every day self-destructing in court due to their mental illness and other issues." When asked what keeps him going day after day, Judge McLaughlin said, "I say a prayer to St. Jude before going into court; this gives me strength. I see so much potential in these people. I know what I am doing is God's work and my prayer life sustains my calling."

The real change, according to Judge McLaughlin, is "my colleagues are more sensitive to people with mental health issues. I have seen a significant change in prosecuting attorneys and they now refer many more people who are mentally ill to the Mental Health Court program." Many of the people that enter the Mental Health Courts succeed in finishing the two-year program. Currently none of the graduates of the program have committed new crimes, which means these people could go back to jail. If these same people were in the regular courts, 80 percent would fail because they violated their probation. As of today, 38 people have graduated from the Mental Health Court program. Judge McLaughlin related that one man, Jon, said after graduating "I never felt better in my life since starting the program and getting my medication regulated."

Judge McLaughlin further said, "All their lives, these people with bi-polar disorder, schizophrenia and chronic depression have been told, "you are no good" and "you are a failure." But when we take these folks and put them in a highly structured atmosphere with hands-on collective coordination of help, we empower people to get out of this cycle of self-destruction." A greatest intangible reward for these defendants is the reunification with their families and friends.

Attorney admitted to American College of Trial Lawyers

Gary L. Cooper has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.

The induction ceremony at which Gary became a Fellow took place recently before an audience of approximately 1,078 persons during the recent 2010 Annual and 60th Anniversary Meeting of the College in Washington, D.C.

Gary L. Cooper

Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years trial experience before they can be considered for fellowship.

Membership in the College cannot exceed 1 percent of the total lawyer population of any state or province. There are currently approximately 5,790 members in the United States and Canada, including active Fellows, Emeritus Fellows, Judicial Fellows (those who ascended to the bench after their induction) and Honorary Fellows.

The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession. Qualified lawyers are called to Fellowship in the College from all branches of trial practice. They are carefully selected from among those who customarily represent plaintiffs in civil cases and those who customarily represent defendants, those who prosecute them. The College is thus able to speak with a balanced voice on important issues affecting the legal profession and the administration of justice.

Gary is married to Jane Cooper and is a partner with Reed W. Larsen in the firm of Cooper & Larsen in Pocatello.

2011 Licensing Packets

The 2011 licensing packets will be mailed in mid-November. If you have not received your packet by December 3, please contact the Licensing Department at (208) 334-4500 or astrauser@isb.idaho.gov. The licensing deadline is February 1, 2011.

MCLE Extensions

If you are unable to complete your MCLE requirements before the end of the year you can request an extension until March 1, 2011. To receive the extension, send a written request to the Idaho State Bar MCLE Department and pay the $50 extension fee. All the credits from any courses attended to complete your MCLE requirements will be counted as part of your 2008-2010 report. They cannot be applied to your 2011-2013 report. All MCLE requirements must be completed by March 1, 2011 — no further extensions are given. Remember, the rest of your licensing is still due by February 1, 2011. If you have any questions about MCLE compliance or licensing, please contact the MCLE Department at (208) 334-4500 or astrauser@isb.idaho.gov.

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Calkins, Aaron Lee
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Coyne, Justie Dee
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Green, Robert Joseph
Kootenai County Prosecutor's Office
Coeur d'Alene, ID 83816

Halladay, Jolene C.
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Hanson, Matthew Brent
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Holleran, Brian John
Meuleman Mollerup, LLP
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Hoopes, Benjamin Edward
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Houston, Joseph David
Jardine, Stephenson, Blewett & Weaver, PC
Great Falls, MT 59403

Hurlbutt, Bryan
Idaho Supreme Court
Boise, ID 83720-0101

Jensen, Tahja Lee
Emmett, ID 83617

Johnson, Megan Laurisa
Sagle, ID 83860

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Larsen, McCord
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MacKenzie, Alaine Holly
Kooskia, ID 83539

Marshall, Ryan L.
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Mau, Jason R.
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Boise, ID 83720-0101

Mayberry, Christopher Michael
Boise, ID 83704

Maybon, Shawn Clark
Homedale, ID 83628

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McCurdy, Christopher-David Caverhill
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McGrady, Kassandra Jean
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Boise, ID 83720-0101

McNeely, Michael Shawn
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McNulty, Katherine Anne
Boise, ID 83706

McNulty, Patrick William
Holland & Hart, LLP
Boise, ID 83702

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Morrise, Matthew Reid
Provo, UT 84601

Morse, Carmen Michelle Thomas
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Boise, ID 83709

Murdock, Katherine Leah
Berg & McLaughlin, Chtd
Sandpoint, ID 83864

Naess, Jason Ronald
U.S. District Court, District of Idaho
Boise, ID 83709

Naylor, Jacob Hallmark
Fourth District Court
Boise, ID 83702

Photo by Dan Black

The mother, wife and son of new admittee Richard Samuel Bower proudly look on during the swearing-in ceremony. At right is Betty Bower as Lyndi Bower holds her son, Samuel Bower.

Nolta, Paige M.
Moscow, ID 83843

O'Dowd, Lukas David
Pennaluna & Company, Inc.
Coeur d'Alene, ID 83814

O'Dowd, Megan S.
Idaho Supreme Court
Boise, ID 83720-0101

Onosko, Benjamin Martin
Ada County Court
Boise, ID 83702

Paul, Valerie
Provo, UT 84604

Peschka, Ashley Brooke
Bannock County Prosecutor's Office
Pocatello, ID 83201

Peterson, Nathaniel
Carson City, NV 89701

Price, Aaron Stephen
Woodland Hills, CA 91367

Punkoney, William Louis IV
White Peterson
Nampa, ID 83687

Reisenauer, Jacob Edward
Law Offices of Magyar, Rauch & Thie, PLLC
Moscow, ID 83843

Richardson, Kyle Raymond
Eagle, ID 83616

Robins, David Gregory
Kootenai County Prosecutor's Office
Coeur 'd Alene, ID 83816

Roletto, Martha Teresa
Roletto Law
Coeur d'Alene, ID 83815

Rolig, Whitney Marie
U.S. Department of Commerce
Washington, DC 20230

Romankiw, Lindsey Rae
Hopkins Roden Crockett Hansen & Hoopes, PLLC
Idaho Falls, ID 83405-1219

Ryan, Ferrell Spencer III
Racine Olson Nye Budge & Bailey, Chtd.
Pocatello, ID 83204

Schou, Kyle O'Neal
Boise, ID 83712

Shriver, Matthew K.
Meridian, ID 83642

Simmons, Sarah Quinn
Idaho Supreme Court
Boise, ID 83720-0101

Skinner, Phil N.
San Diego, CA 92129

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Admitted 09/30/10 Unless Otherwise Indicated

Smith, Nicholas A.
Hawley Troxell Ennis & Hawley, LLP
Boise, ID 83701

Splan, Kimberly Susan
Splan Law Office
Moscow, ID 83843

Stephenson, April Lea
Idaho Falls, ID 83404

Steven, Eric Michael
Eric M. Steven, PS
Spokane, WA 99201

Taggart, Steven Lyle
Idaho Falls, ID 83404

Talmon, Geoffrey D.
Boise, ID 83714

Thorleifson, Erik H.
Campbell & Bissell, PLLC
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Vial Fotheringham, LLP
Portland, OR 97223

Voss, M. Anne
Canyon County Prosecutor's Office
Caldwell, ID 83605

Wager, Edwina Eyre
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Boise, ID 83701-1756

Williams, Tyler David
Fourth District Court
Boise, ID 83702

Williamson, Isaac Burton
Ada County Court
Boise, ID 83702

Yoshimura, Cody Takeo
Moscow, ID 83843

Yribar, Ann Nicole
Idaho Court of Appeals
Boise, ID 83720-0101

Ysursa, Jessica Mockbee
Eagle, ID 83616

Zeyer, Hyrum Mason
Melba, ID 83641

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Matthew Shriver (center) and other admittees to the Idaho State Bar recite an oath.

Updates to Idaho State Bar Attorney Directory
9/2/10 – 10/1/10

Alkire, John Durwood
Alliance Packaging
Renton, WA

Allen, Lawrence Gale
Office of the Attorney General
Boise

Asay, Brent Ellis
Utah Labor Commission
Bountiful, UT

Bachand, William R.
Bachand Law Office
Phoenix, AZ

Belnap, William Lyman
Belnap Stewart Taylor & Morris, PLLC
Boise

Berntson, Jeanne Diane
Idaho Falls

Bilow, Robert Lee
Boise

Blackburn, Stephen Eugene
Blackburn Law, PC
Meridian

Boggs, Margaret H.
The Huntley Law Firm, PLLC
Boise

Bond, Brook Bernard
Zarian Midgley & Johnson, PLLC
Boise

Bosworth, Susan Elizabeth
Susan E. Bosworth, Attorney at Law
Mountain Home

Bower, Daniel Wayne
Belnap Stewart Taylor & Morris, PLLC
Boise

Brass, Hannah Athlyn
ACLU of Idaho
Boise

Bridge, Mary Elizabeth
Boise

Brindle, Paul Richard
Apache Corporation
Midland, TX

Brindle, Susan Renee
Midland, TX

Brown, Kent M.
Callister Nebeker & McCullough
Salt Lake City, UT

Buckham, Brian Robert
Idaho Power Company
Boise

Butler, David John
Eagle

Cahoon, Bradley R.
Snell & Wilmer, LLP
Salt Lake City, UT

Call, Brian Charles
U.S. Air Force
APO AP,

Campbell, Matthew Craig
Durango, CO

Cerafici, Tamar Jergensen
The Cerafici Law Firm, LLC
Frederick, MD

Chapman, John S.
Hailey

Chess, Laura A.
Social Security Administration
Boise

Cornish, Judy A.
Moscow

Cuneo, Christopher Joseph
Zarian Midgley & Johnson, PLLC
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Davis, Susan LaRae
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Di Meo, Armand Albert Jr.
Social Security Administration
Albuquerque, NM

DiMaggio, Frank V.
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Boise

DiMaggio, Kathleen A.
Boise

Dinsdale, Justin Schorr
Houston, TX

Donohue, Douglas Ayres
Idaho Industrial Commission
Nampa

Drescher, Hon. Stephen Wesley
Weiser

Dustin, Michael Garth
Meacham & Dustin, PLLC
Idaho Falls

Eaton, Donald James
Boise

EchoHawk, Larry Jack
U.S. Department of the Interior
Arlington, VA

Eichman, Charissa Ann
Boulder, CO

Eklund, Kenneth Watson
Olympia, WA

Ellsworth, Bryce Bland
Ada County Prosecutor's Office
Boise

Eng, Carol Lee
Carol L. Eng, PS
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Esser, Timothy H.
Esser & Sandberg, PLLC
Pullman, WA

Eustermann, John Matthew
Stoel Rives, LLP
Boise

Evans, Blaine F.
Evans Keane, LLP
Boise

Finocchio, Melissa Anne
Eagle

Fletcher, William Kendall
Canyon County Prosecutor's Office
Caldwell

Garlish, Richard Joseph
Idaho Power Company
Boise

Gates, Deborah Alison
Richard Alban Law Office
Nampa

Gee, Gavin M.
Idaho Department of Finance
Boise

Gerry, Darlene Elaine
Idaho State University
Pocatello

Gibbons, Daniel Jeffrey
Witherspoon Kelley
Spokane, WA

Grant, Douglas Loren
Auburn, WA

Green, James Bartlett
Green & Green Law Firm
Pocatello

Hancock, Lorie J. Harris
Sisters, OR

Hanks, R. Mackay
Hanks Law Office, PLLC
Idaho Falls

Hansen, Scott William
Lewis Hansen Waldo Pleshe & Flanders, LLC
Salt Lake City, UT

Haukaas, H. Craig
Bayfield County District Attorney's Office
Washburn, WI

Heacock, Laurel
Oglethorpe Power Corporation
Tucker, GA

Heide, Douglas Scott
Pocatello

Herberholz, Dana Michael
Zarian Midgley & Johnson, PLLC
Boise

Herrington, William Lynn
Sagle

Herzog, Vern E. Jr.
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Huntsman, Robert Ames
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Hyams, David Martin
Denver, CO

Updates to Idaho State Bar Attorney Directory

9/2/10 – 10/1/10

Hyde, Nathan Ronald
Lehi, UT

James, Daniel Dixon
Las Cruces, NM

Jensen, Shaina Justine
Boise

Johnson, Rexford Alan
Zarian Midgley & Johnson, PLLC
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Jolley, Justin Rand
Law Office of Justin Jolley, PLLC
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Jones, Karin Dwelle
Stoel Rives, LLP
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Jones, L. Lamont
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Jurgens, Anna Karen
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Craig C. Kosonen, Attorney at Law
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Exeter, NH

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Jerome

Larsen, Tyler James
Ray, UT

Lawlor, Edward John
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Hope

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Lapwai

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Meridian

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Miner, Susan Diane
Edgewater, FL

Moburg, Mark Bruce
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Coeur d'Alene

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Stewart, Monte Neil
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Decatur, GA

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Susan Wildwood, Chtd.
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Lorton, VA

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Portland, OR

Wright, James Slyfield
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Zarian, John Naya
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MEDICAL/LEGAL CONSULTANT GASTROENTEROLOGY

Theodore W. Bohlman, M.D. Licensed, Board Certified Internal Medicine & Gastroenterology Record Review and medical expert testimony. To contact call telephone: Home: (208) 888-6136, Cell: (208) 841-0035, or by Email: tbohlman@mindspring.com.

FORENSIC ENGINEERING EXPERT WITNESS

Jeffrey D. Block, PE Civil, Structural, Building Inspection, Architectural, Human Factors and CM Coeur d'Alene Idaho. Licensed ID, WA, CA. Correspondent-National Academy of Forensic Engineers, Board Certified-National Academy of Building Inspection Engineers. Contact by telephone at (208) 765-5592 or email at jdblockpe@verizon.net

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"The spoken word perishes; the written word remains."

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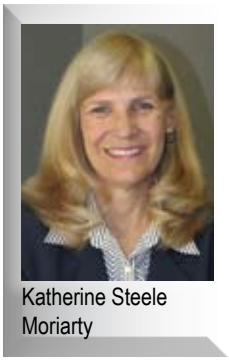
Katherine Steele Moriarty
President of the Idaho Law Foundation, Inc.

A gift to the Idaho Law Foundation is more than a simple donation - it is an investment in the people of Idaho and the future of the legal profession in Idaho.

Lately it seems like there's bad news everywhere we turn. From high unemployment to cuts in education, there are a lot of people in our communities who are hurting. It's enough to make the most optimistic among us feel a little bit hopeless.

On the days when I start to feel that way, I try to put my focus on what I can do to help. It's one of the reasons I joined the Idaho Law Foundation Board of Directors – to become involved with an organization that makes a tangible difference in Idaho communities. I know I'm not alone in my efforts to help.


Katherine Steele Moriarty

In my years as an attorney, I have been continually impressed by the generosity of our legal community. But the question is: why should you give your resources to the Idaho Law Foundation?

If you have ever received a letter from the Idaho Law Foundation, you may have noticed the tag line underneath our logo: Helping the Profession Serve the Public. I wonder, though, how many of us take the time to really think about the many ways the Law Foundation helps us serve the public.

What other organization do you know that dedicates their time and resources to serving the public on behalf of the legal community? The staff and volunteers for the Idaho Law Foundation work tirelessly to find new and innovative ways to increase access to justice and enhance public understanding of the legal system through our cornerstone programs.

Idaho Volunteer Lawyers Program organizes private attorneys across the state to provide legal services to Idaho's low-income residents. IVLP works closely with many providers of legal services, such as Idaho Legal Aid Services, Inc., CASA, and the Pro Bono Commission, to increase the availability of legal services to Idahoans who do not have the resources to hire an attorney for their civil legal issues.

The Law Related Education Program provides Idaho students at all grade levels the tools to reinforce learning while helping build positive relationships between students and members of Idaho's legal community through activities such as high school mock trial, lawyers in the classroom, the Turning 18 in Idaho magazine, and Citizens' Law Academy.

Both IVLP and LRE have an impressive record of achievement. Just in the last year, Law Foundation programs have:

- Helped provide direct legal services to over 1,200 low income litigants
- Responded to over 1,000 people who called with legal questions
- Supported 300 high school students who participated in mock trial
- Taught 2,500 students lessons about the law and our legal system
- Printed and distributed over 50,000 copies of the Turning 18 in Idaho magazine

The Law Foundation continues to find new and innovative ways to improve the lives of Idaho citizens, even in the most difficult of economic times. However, the Law Foundation cannot meet its goals and continue its important work without your help. The Law Foundation relies upon the charitable contributions of attorneys like you. This holiday season please consider making a tax-deductible donation to the Idaho Law Foundation.

A gift to the Idaho Law Foundation is more than a simple donation - it is an investment in the people of Idaho and the future of the legal profession in Idaho. Your gift will have lasting effects by providing Idaho's disadvantaged citizens with the legal assistance they need, and creating a positive image of Idaho's legal profession.

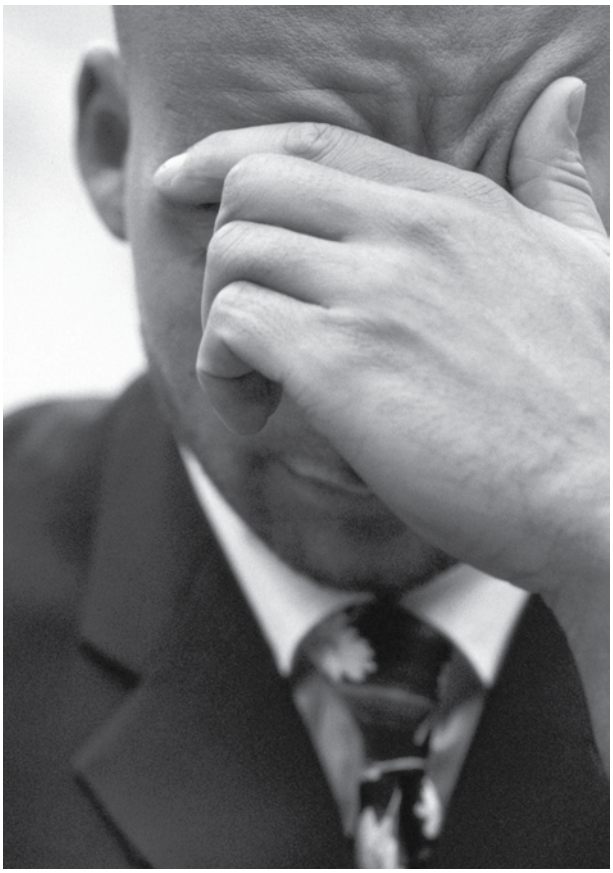
I am asking for your help. Would you consider a tax-deductible donation of $100 or more? Of course, any donation amount is always welcome. You can donate through a designation on your 2010 Licensing Form or by visiting www.idaholawfoundation.org and clicking on the "Make a Donation" link.

If you need additional information about the Law Foundation, please contact Carey Shoufler, the Foundation's Development Director. She will be happy to answer any questions you may have. You can reach her at (208) 334-4500 or cshoufler@isb.idaho.gov.

Thank you for your support. May this holiday season bring joy, happiness, and goodwill to you and your loved ones.

About the Author

Katherine Steele Moriarty *is the President of the Idaho Law Foundation. She received her J.D. from the University of Idaho and was admitted to the Idaho State Bar in 1991. Ms. Moriarty is a member of the Idaho State Bar and the Employment and Labor Law Section of the Idaho State Bar. Ms. Moriarty previously has served as President of the Seventh Judicial District Bar Association. Ms. Moriarty is Senior Counsel for Battelle Energy Alliance, LLC.*



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