



CALENDAR

Idaho Legal History Society Full Membership Meeting

January 14, 2015, 4:00 p.m.
 Federal Courthouse
 550 West Fort Street
 Boise, Idaho



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EARLY 20TH CENTURY BRINGS ENVIRONMENTAL LAW

Idaho's foray into environmental law may have begun in the first decade of the twentieth century when farmers sought relief in district court from the effects of mining water pollution. In 1903, Shoshone County farmer Josiah Hill brought a \$12,000 damage

The law protects the lone settler in his rights; let them be ever so meager, as well as the capitalist, the corporation or the individual with its or his millions.

Justice Charles O. Stockslager



Charles O. Stockslager (Illustrated History of Idaho)

suit against the Standard Mining Company, which operated a mine on Canyon Creek, a tributary of the Coeur d'Alene River above Wallace, Idaho. Hill, who lived downstream from the mine, alleged that the dumping of 550,000 tons of mining waste material, including lead and arsenic, into the stream had damaged his property.

The case was dismissed in District Court by Judge Ralph T. Morgan and Hill appealed to the Idaho Supreme Court (*Hill v. Standard Mining Co.*). There, the mining company argued that a finding in Hill's favor would surely result in the closing of all the local mines and the depopulation of Shoshone County. Nevertheless, Justice Charles O. Stockslager found that a mine's right to use water did not include the right to injure a downstream user by polluting the water. Stockslager, writing for the Court, noted that, "The law protects the lone settler in his rights, let them be ever so meager, as well as the capitalist, the corporation or the individual with its or his millions."

Justice James F. Ailshie agreed in part with Stockslager that waste dumping could cause flooding that would damage the land. However, he viewed pollution as a legitimate consequence of the right to use water for mining. In the end, Hill was awarded only his appeal costs. Interestingly, Hill later became a mining investor himself, forming the Hill Mining & Milling Company near Kellogg.

Meanwhile, Idaho's federal court took a different approach to the same issue. Sixty-five farmers living along the Coeur d'Alene River sued Bunker Hill & Sullivan and other mining companies alleging that materials from the mills and concentrators at the mines upstream were polluting the river and poisoning their livestock and crops. Because the companies were out of state corporations, the case was filed in federal court.

To view the pollution firsthand, U.S. District Court Judge James H. Beatty took a boat trip down the river from Cataldo Mission to Coeur d'Alene Lake in 1905. He was not alarmed by what he saw and dismissed the farmers' claims as exaggerated, concluding that the risk of putting miners out of work by closing the mines outweighed the impacts to the farmers. However, Beatty also stated that he would award damages if the parties could establish harm. The Ninth Circuit Court of Appeals upheld Beatty's decision in 1908, noting that mining was

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ILHS ORAL HISTORY COMMITTEE

Oral History Project committee:

Dianne Cromwell, Chair
dcromwell@cableone.net

Chris Cuneo
ccuneo@parsonsbehle.com

Ernest A. Hoidal
eahoidal@hoidallaw.com

Scott Reed
scottwreed@frontier.com

Libby Smith
clerk@id.uscourts.gov

Ron Wilper
dcwilprj@adaweb.net



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550 West Fort Street
Boise, Idaho 83724

A Message from the President

Ernest A. Hoidal



Thank you for your continued support of the Idaho Legal History Society (ILHS), which will be celebrating its tenth anniversary since U.S. District Judge B. Lynn Winmill and then state court Judge U.S. Magistrate Ron Bush formed the ILHS. Our mission is to preserve and promote the public's knowledge of, and interest in,

Idaho's legal history by collecting records, oral histories and other items. We continue to enlist contributing members to serve on our Board of Directors that includes Judge Bush, Judy Austin, Dianne Cromwell, U.S. Magistrate Judge Candy W. Dale, Don Burnett, Ritchie Eppink, Ron Kerl, J. Walter Sinclair, and John Zarian.

Our officers are Ernest A. Hoidal, President; Ritchie Eppink, Vice-President; Susie Boring-Headlee, Secretary; and J. Walter Sinclair, Treasurer. We wish to acknowledge the contributions of our past presidents: Judge Bush, Deb Kristensen, Scott Reed and Judge Ron Wilper, as well as Scott Reed and Larry Westberg who have been instrumental in guiding the ILHS, and are retiring from the Board.

Our Oral History Committee Chair has been assumed by Dianne Cromwell, whose committee comprises Libby Smith, Clerk of the U.S. Court, Scott Reed, Ron Wilper, and Chris Cuneo. Judge Jesse Walters and Teri Harbachek are retiring with our sincere thanks. Dianne Cromwell's leadership in arranging volunteer court reporters over the past five years has been outstanding and we offer her, and the volunteer court reporters, our thanks and appreciation.

We have three oral histories in the November/December 2014 issue of *The Advocate*, sponsored by ILHS. These were compiled by Lindsey Hanks, a Boise State University English major who served as a 2014 summer intern with the Idaho State Bar. Lindsey captured from audio tapes, at the Idaho Historical Center, interesting information on the professional careers of Willis Sullivan, Edith Miller Klein and Ben Oppenheim.

As to further oral histories, at the Idaho State Bar Meeting at Fort Hall in July and the Federal Bench Bar Conference in October, Judge B. Lynn Winmill encouraged young lawyers to volunteer to interview judges and attorneys who have been in their profession for 30+ years. This is an outstanding recommendation to preserve and an extraordinary learning opportunity for younger lawyers.

We also hope you enjoy *The Advocate* article from Clive Strong, Idaho Deputy Attorney General, on the culmination of the Snake River Basin adjudication, which is most compelling and historic in scope. Finally, a book review—Max Black, a former member of the Idaho House of Representatives, went the extra mile to add to the Diamondfield Jack Davis legal saga in his newly published book.

Please contact me if you wish to volunteer and contribute to Idaho's legal history.



IWF Opposed Hells Canyon Dams

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given preference over agriculture in the Idaho Constitution. Beatty's successor, Judge Frank S. Dietrich handed down a similar judgment in 1910 in which he found that while there was evidence for injury to downstream farmers, there was no support for holding Bunker Hill responsible for the condition of the water.

After decades of lawsuits, the Idaho Legislature took up the matter of water pollution in 1931, approving an act creating the Coeur d'Alene River and Lake Commission with State Attorney General Fred J. Babcock as its chair.

The Commission was tasked with investigating methods of eliminating industrial waste in the Coeur d'Alene River and Lake. With the help of state and federal agencies, Babcock oversaw a 1932 report finding that about 25,000 acres of land near the Coeur d'Alene River contained toxic levels of lead. Although the report suggested actions to reduce these environmental effects, the state did not act on the recommendations for some time as it struggled first with the effects of the Great Depression, and then with World War II.

The years between the end of World War II and 1970 were significant in the development of environmental law, both in Idaho and throughout the U.S. The discipline emerged over the course of three decades following the war as Americans moved out of doors for recreation. As one historian put it, environmental law was ". . . less a designed philosophical system than a necessary social product. . ." that emerged gradually in the consciousness of everyday citizens. In Idaho, it often intersected with water and hydropower interests.

After World War II, the federal government had plans for a hydroelectric dam in Hells Canyon (the High Dam) that would

extend the power of the Bonneville Power Administration well into Idaho's purview. In 1947, water users, conservation groups, and state government opposed federal plans to extend New Deal-style dam building into Idaho.

Robert E. Smylie, then Idaho's Attorney General and later

its Governor, was a vocal opponent of the High Dam, fearing the loss of Idaho's control of its water rights and the despoiling of scenic Hells Canyon.

Idaho Power Company joined the fray by adding its opposition to the High Dam and proposing to build a private, much smaller dam instead (the Oxbow Project).

The controversy took center stage in the 1952 presidential election when President

Harry S. Truman and

the Democrats supported the High Dam, while Republicans challenged it. Republican nominee Dwight D. Eisenhower launched his presidential campaign at Boise, endorsing Idaho Power's small dam proposal. Idaho Power later expanded its proposed project into the three-dam Hells Canyon Complex endorsed by Idaho Governor Len Jordan, a Hells Canyon rancher.

Jordan also backed Idaho Power's Chief Legal Counsel, R.P. (Pat) Parry who secured the water right for the dam complex and prepared Idaho Power's licensing case for the Federal Power Commission in 1953. The license was issued in 1955 and affirmed by the District of Columbia Circuit Court of Appeals, opening the way to dam construction.

Meanwhile, the Idaho Wildlife Federation (IWF), through its attorney Bruce Bowler, began its opposition in 1954 to any new dams in Hells Canyon or on the Salmon or Clearwater Rivers in deference to wildlife and wildlife habitat. Bowler also advocated for tougher Idaho laws controlling



Hells Canyon Dam under construction. (Idaho Power Company)

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Idaho Attorney General Fred J. Babcock

Northern Idaho native Fred Babcock was born at Mica Bay in Kootenai County in 1891, the son of a farmer. He graduated from Coeur d'Alene High School and attended the University of Idaho where "Bab," as he was known, graduated in law in 1916. After serving in World War I, he taught school for a time.

Babcock was admitted to the Idaho bar in 1924, and set up a mining law practice at Lewiston, Idaho. He also served as Nez Perce County prosecuting attorney (1926-1928).

In 1928, Babcock was in a party of deer hunters that included local court stenographer Charles S. Boren. During the hunt on John's Creek, Boren accidentally shot and killed their hunting guide, Charles W. Hindman, mistaking him for a deer. Local prosecutor Frank E. Fogg determined that no inquest would be held and no charges were filed in the incident.

After moving to Boise, Babcock served as assistant attorney general and in 1930 was elected Idaho's attorney general on the Republican ticket. For his work, he received an annual salary of \$4,000 (compared to \$5,000 for the Governor and Chief Justice



Fred J. Babcock
(Defenbach 1933)

at the time).

As attorney general, he dealt with the prison escape of the infamous serial killer Lyda Southard in 1931, and served as chair of a commission on industrial water pollution in Coeur d'Alene River & Lake.

He was a member of the editorial board of the University of Idaho's short-lived *Idaho Law Journal* in 1932, writing an article clarifying the powers and duties of the state attorney general. The *Journal* lasted only three years for lack of funding—a casualty of the Great Depression.

Babcock's interest in history led him to

serve as an officer in the Historical Society of Idaho Pioneers. He was also a member of the Idaho Chapter of Sons of the American Revolution.

He moved to California during the 1950s and died there 1973 at the age of eighty-one.

Source: *Idaho: The Place and Its People*, B. Defenbach, 1933.

Bowler's Work Paves Way for Environmental Law

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dredge mining and for the end of DDT spraying in the Boise National Forest. His work for the IWF would play a significant role in the development of environmental law, both in Idaho and nationally, as he innovated the principles and tactics of the discipline.

Although the groundwork for Idaho environmental law was laid in the 1950s and 1960s, legal work expanded vastly in the 1970s as environmental legislation came to the forefront in Idaho and elsewhere in the nation. A series of federal and state environmental laws protecting wildlife, water, soil, and human health were enacted—all of which faced testing in the courts. Thousands of lawsuits would be filed in the coming decades as nearly all environmental documents were challenged, most in federal court.



Sources: "Turn of the Century: A Time of Trial, Troubles, Travail and Triumphs," S.W. Reed, in *Justice for the Times*, ed. C.F. Bianchi, 1990;

Before Earth Day: The Origins of American Environmental Law, 1945-1970, K.B. Brooks, 2009;

"It Happened in Hell's Canyon: Idaho's Role in Shaping Environmental Law," K.B. Brooks, *The Advocate* 53:11-12, 2010;

The Eisenhower Years, M.S. Mayer, 2010.

Living with Lead: An Environmental History of Idaho's Coeur d'Alenes, 1885-2011, B.D. Snow, 2012.

Judge John E. White's Homestead Case Decided in U.S. Supreme Court

A dispute over a homestead claimed by the patriarch of one of Idaho's political dynasties made its way to the U.S. Supreme Court in 1909, thrusting his family into the public eye. John E. and Roberta White came to Idaho from the southern U.S. in 1890. He was born in Mississippi and she was from Louisiana. After accepting a position as a Western Union telegraph operator, John White relocated to the Clark's Fork area of northern Idaho.

The Whites were staunch southern Democrats and John quickly became active in local civic affairs, first as a justice of the peace and later as a probate judge.

The White family settled on property near the railroad where he worked in 1891. Part of that property, in what became the town of Clark's Fork, was also claimed by the Whitcomb family who filed suit against White in district court. Lawyer (and family member) John B. Whitcomb filed a petition in 1908 in First District Court declaring the White's homestead ownership invalid and members of his own family as the legal owners of the property. Upon review of the case, the judge decided in favor of the White family and awarded damages to them. Whitcomb appealed the case to the Idaho Supreme Court, which affirmed the lower court decision, but set aside the damages awarded to White.

Upset by the loss of damages, White appealed the ruling to the U.S. Supreme Court, which agreed to hear the case in 1909. The Whites chose Washington D.C. attorney Albert Allen to represent them. The Supreme Court ruled in favor of them and affirmed their damage award.

However, the issues in this case extended beyond the legal to the personal. Some White family members felt that the case went all the way to the U.S. Supreme Court because of the family politics. As Democrats and southerners, the Whites stood in contrast to many of their neighbors. The community animus



John E. White homestead.

Judge White may be at right and son Compton at left.

swirling around efforts to remove them from their homestead even led to their son Compton's involvement in a shooting at a local saloon. Although Compton was arrested for the shooting, he was later released because of procedural violations.

The White family, however, went on to succeed in both business and politics. Judge John White was also a farmer

and cattleman who later invested in the lumber industry with Compton. After the successful resolution of his land claim, White continued his thriving businesses, including serving as president of the Clarinda Copper Mining Co in Bonner County.

Meanwhile, Compton was active in the local community, managing the family businesses while also working for the railroad. His fortune took an astonishing turn in 1925 when a storm uprooted trees on his property, revealing a large vein of galena ore beneath. This successful galena mine was later said to have provided the funding for Compton White's entry into Idaho politics.

Compton White, Sr. was elected to Congress as a Democrat beginning in 1932. There he served a total of eight terms.

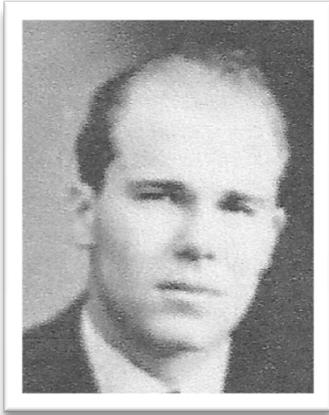
White's interest in reclamation projects led him to work on the Committee on Irrigation, tasked with analyzing the effects of federal water projects on farming. His work on the Silver Purchase Act of 1934 was a major boon to the Idaho silver mining industry. Son Compton White Jr. followed in his footsteps and was elected to Congress in the early 1960s.

Unfortunately, family patriarch John White did not live to see the political successes of his son and grandson. He was found dead in his barn in 1919 at the age of sixty-six after suffering a heart attack while pitching hay.



John E. White obituary photo from an old newspaper clipping.

Sources: A Political Dynasty in North Idaho, 1933-1967, R.J. Doyle 2004; Supreme Court Reporter, Vol. 29, U.S. Supreme Court, 1909.

20TH CENTURY PROFILE*Environmental Lawyer W. Bruce Bowler*

Bruce Bowler, 1936
(University of Idaho Yearbook)

Pioneer conservation lawyer Bruce Bowler was born at Shoshone, Idaho, in 1911. He attended the University of Idaho where he received his law degree in 1938. Bowler practiced law in Boise for fifty years, laying the groundwork for what would become the field of environmental law. Over the course of his career, he donated thousands of hours to wildlife and wilderness conservation causes and was active in the Ada County Fish and Game League and the Idaho Wildlife Federation, established in 1936. Bowler helped put the initiative on the ballot to create the Idaho Fish and Game Commission in 1938. He was also instrumental in writing legislation that resulted in Idaho voters approving a 1954 initiative to regulate dredge mining.

In 1960, Bowler served as counsel for the Idaho Wildlife Federation's challenges to the construction of proposed dams on the Snake River. He won a major victory before the U.S. Supreme Court in 1967 when Justice William O. Douglas ruled that the Federal Power Commission must consider environmental concerns in dam projects. The 1970s brought work on limiting mining in the White Cloud Mountains and establishing the Sawtooth National Recreation Area and the River of No Return Wilderness.

Bowler served on many advisory boards including the National Advisory Board of the Bureau of Land Management (1964-1972), the Idaho Water Pollution Control Advisory Council (1952-1971), Bonneville Power Administration's Regional Advisory Council (1968-1980), the Roadless Area Task Force (1975-1977), and the Idaho Research Advisory Council (1955-1965). He died at Boise in 2002.

Sources: Northwest Digital Archives, "Guide to the Bruce Bowler Papers 1894-2002," Idaho State Historical Society (2010). <http://nwda-db.wsulibs.wsu.edu>

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