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EXCITING INITIATIVES IN ENVIRONMENT AND NATURAL RESOURCES LAW AT THE UNIVERSITY OF IDAHO COLLEGE OF LAW

Dean Donald Burnett and Professor Barbara Cosens¹
University of Idaho College of Law

The Environment and Natural Resources (ENR) Section of the Idaho State Bar holds its annual CLE in Boise each January in conjunction with the Idaho Environmental Forum Legislative Preview. Dean Donald Burnett and Professor Barbara Cosens spoke at the luncheon meeting regarding the new environment and natural resource initiatives at the University of Idaho College of Law.²

Environmental, water and natural resource issues are in the forefront of concerns for Idaho and its citizens. The faculty and students of the University of Idaho College of Law are responding to this need by undertaking exciting new initiatives to become leaders in this field of law, a "natural fit" for Idaho. One of the new initiatives being proposed is a Water Resources Program under the College of Graduate Studies and the College of Law. This Program will need approval from the State Board of Education and the University of Idaho Regents. As envisioned, new M.S./Ph.D. degrees in water resources would be offered, with three option areas: Engineering & Science; Science & Management; and Law, Management & Policy; as well as concurrent J.D./M.S. and J.D./Ph.D. degrees in any of the option areas. The proposed degrees form a coordinated effort to create interdisciplinary study options in water resources. The proposed Program has the support of, and will draw participants from the Colleges of Agriculture and Life Sciences; Engineering; Law; Science; Letters, Arts and Social Sciences; and Natural Resources. The Program will include faculty in Moscow, Boise, Idaho Falls, and Twin Falls, and strong collaboration with the Idaho Water Resources Research Institute. Both M.S. and Ph.D. are proposed to be offered in Moscow, Boise, Idaho Falls, Coeur d'Alene and Twin falls, but the offering at off-campus locations will be phased in during the first three years of operation.

The proposed interdisciplinary Program will encompass engineering, natural, and social sciences to advance water resources education, research, and outreach throughout Idaho. The term "water resources" is used here in the broadest sense and those participating in the Program will study how water moves through and interacts with natural systems, and the physical, social, and economic aspects of human interaction with the water cycle. The proposed option areas within the water resources degrees will be integrated by requiring a set of common courses for all students in the Program. The proposed Program will facilitate education and research that influences both the scientific understanding of the resources and how it is managed, and the decision-making processes that are the means to address competing societal values. The option areas will have rigorous entrance requirements, appropriate for each degree, a set of core courses, and a broad range of elective courses.

Nowhere is the need for sustainable use of water and the potential failure to achieve sustainability more evident than in Idaho and other states in the western United States. Growing demand for water stems from multiple factors including urban population growth, agricultural needs, tribal water development, energy demand, habitat requirements, recreational use, and aes-

thetic values. Seven of the ten fastest growing cities in the United States are located in the water-limited West. Idaho has the sixth highest projected population growth rate in the nation –50% in the next 25 years. Most of that growth is in urban areas that compete for the same water resources currently used for irrigated agriculture. Development of tribal water resources in the region has lagged behind that of their neighbors, and only in the past few decades have the proper institutions and funding been made available to being to reverse this disparity. Habitat needs are highlighted by the reality that freshwater fish are the single most endangered vertebrate group in the United States. Furthermore, the Columbia River basin is the primary source of hydroelectric power in the northwest and its waters serve five states, numerous Native American tribes, and two countries. It is also home to twelve endangered salmonid populations, decimated by blockage to migratory routes, dewatering, poor water quality, loss of habitat, competition from hatchery and exotic fish, and commercial fishing.

These competing water resources issues cannot be resolved through a conventional approach in which science, engineering, law, and policy are compartmentalized in university education, research, and outreach programs. Recent studies indicate that graduate education must expand interaction with stakeholders and more proactively engage social and technical challenges. The University of Idaho proposes to take the next critical step in providing engineers, scientists, lawyers, managers, leaders, and citizens with integrated knowledge and problem-solving skills to address water resources problems. In short, we must educate scientists and engineers to be more politically aware and policy makers to be more scientifically knowledgeable.

The opportunity exists for the University of Idaho to become a leader in education and research on water resources at the interface of law, policy, management, science and engineering. Due to the demand for this capability among water management policy institutions, other universities may begin to fill the gap within the next decade. By transforming water resources education at the University of Idaho, the community, state, and region can be provided with the tools to bring our obligations as citizens of the earth in alignment with our ability to extract its benefits. Given the importance of water resources, there can be no greater goal of a land grant university than to lead the region in defining a sustainable future for water resources management and use.

Although the Water Resources Program is a new initiative, the University of Idaho Law School has long excelled in providing a context for student to study environmental and natural resource law. The following abstracts of papers written by

University of Idaho law students in the spring of 2007 illustrate the range of issues, and depth of discussion that the University of Idaho is already providing in the environmental and natural resource arena. Information on how to obtain copies of the papers may be found on the ENR Section's website at <http://www2.state.id.us/isb/sec/enr/enr.htm>.

Major Energy Facility Siting in Idaho

Trent Belnap³

In 2006, representatives from Sempra Energy presented their plan to build a coal-fire power plant in Jerome County. Currently, the final decision makers in Idaho's siting procedure are local government leaders; however, neighboring states employ a state level siting board. Proponents of local siting authority are reluctant to create another layer of bureaucracy and feel the fate of local lands and residents should remain in the hands of local jurisdictions. Supporters of state level authority assert a state agency is better able to consider the effects major energy facilities would have on the entire state. Idaho's energy goals—"to provide for the state's power generation needs and protect the health and safety of the citizens of Idaho" are better served by a state level siting agency; an agency which is better able to consider the impacts energy facilities would have on the entire state.

Artificial Recharge of the Eastern Snake Plain Aquifer and the Clean Water Act

Matt Darrington⁴

Recent years of prolonged drought, decreased artificial recharge, and sustained groundwater withdrawals have combined to have a deleterious impact on the Eastern Snake Plain Aquifer (ESPA). Among the foremost water issues regarding the ESPA is the possibility of large scale managed recharge, with the goal of maintaining or increasing aquifer productivity. If the ESPA is found to be a tributary of navigable waters, requiring conformity with National Pollutant Discharge Elimination System (NPDES) permitting of the Clean Water Act (CWA), such a permitting requirement would drastically impede the ability of the state to operate managed recharge sites. It is not likely that managed recharge sites fall within CWA jurisdiction; however, if the holding in *Idaho Rural Council v. Bosma* makes it possible for the ESPA to be regulated under the CWA as a tributary to the Snake River, it would prove troublesome to bring recharge sites under the jurisdictional umbrella of the CWA NPDES permitting requirements.

Treasure Valley Air Quality Act

Amber Ellis⁵

The Treasure Valley's population, rapid growth, and geographic and meteorological situation, predispose the area to air pollution events and potential non-attainment under the Clean Air Act (CAA). Once in non-attainment, it is expensive for a state to comply with the CAA, and the CAA holds new industry proposals to higher standards to prevent further air pollution—making it undesirable for business to relocate in a non-attainment area. The Treasure Valley Air Quality Plan emphasizes voluntary and unenforceable control measures, which fail to adequately address the biggest polluter in the Treasure Valley: automobiles. To be effective, this plan must mandate the support and

funding of reliable transit system to enable citizens to reduce their total vehicle miles driven.

Free Trade and International Environmental Law: the WTO as a Framework for Dealing with Internal Environmental Problems

Seth L. Gordon⁶

It took until the later half of the twentieth century, but the international community has finally recognized that globalization has taken a devastating toll on the world's environment. Free and unrestricted access to the world's shared resources, such as the atmosphere, wildlife, and oceans has resulted in over-exploitation and environmental degradation. Multilateral international treaties concerning the environment have proven to be ineffective because the agreements depend on the consent of the parties, and parties are reluctant to consent to effective enforcement mechanisms. The General Agreement on Tariffs and Trade provides exceptions to its general trade rules where environmental concerns are implicated and has provided the impetus for a handful of cases in which the World Trade Organization (WTO) has had to address environmental issues. Because the WTO provides powerful incentives to comply with its rulings (trade sanctions), and it already provides for a mechanism for addressing environmental issues (although in a limited capacity), with minor changes, such as the creation of an advisory panel for scientific matters, it is probably the most viable avenue through which environmental issues can be addressed at the international level.

A Comparative Analysis of UK and U.S. Styles of Environmental Regulation, With Specific Emphasis on Water Pollution Enforcement

Helen Jackson⁷

Both the United States and United Kingdom's legal systems stem from the common law tradition; however, there are many instances in which the law and policy differ. The United States' system has generally taken a more 'adversarial and legislative approach' whereas the United Kingdom's approach has placed greater trust in the Environment Agency for England and Wales to enforce compliance. The United Kingdom is more concerned with bringing industries into compliance as opposed to using punitive measures for violations, but a range of sanctions are employed to bring industries into compliance: compliance is not a voluntary option. Nonetheless, the approaches of the two countries do differ in that the United States' system appears to take a more formalistic, legal approach, whereas the United Kingdom follows a more policy-oriented approach.

Application of Pesticides to Waters of the United States in Compliance with FIFRA but Inconsistently with CWA

Lisa Johnstone⁸

Today, most environmental laws seek to eliminate or minimize hazardous releases through command and control regulation. Statutes such as the Clean Water Act (CWA) and the Clean Air Act require permits for the discharge of pollutants into the environment and set maximum levels these pollutants can reach in the environment. Historically, pesticides have been excluded from the reach of these two statutes and have primarily been regulated by the Federal Insecticide, Fungicide, and Rodenticide

Act; however, a series of recent Ninth Circuit cases found pesticides to be a "pollutant" within the meaning of the CWA. Under this reasoning a National Pollutant Discharge Elimination System (NPDES) permit will be required anytime a pesticide is applied to water. The EPA responded to the Ninth Circuit decisions by promulgating a new rule, which excludes pesticides applied directly to water from the definition of "pollutant" and consequently the NPDES permitting system. This new rule creates ambiguity in an unambiguous statute by narrowly defining terms that were intended to be so broad that they would include "any material."

NEPA Reform in Relation to Livestock Grazing on Federal Lands in the West

Luke Marchant⁹

Congress enacted the National Environmental Policy Act of 1969 (NEPA) as the first major piece of environmental legislation in what was to become the environmental decade. NEPA was visionary for its time, but what started out as visionary has now grown to 25 pages of regulations, over 1,500 court cases, and several hundred pending lawsuits. NEPA, as interpreted by the Ninth Circuit, prevents grazing permittees from substantively intervening in litigation involving their grazing permits. NEPA was intended to foster participation, encourage the airing of different perspectives, and to draw out information from all sides. Similarly, the judicial process rests on the assumption that an adversarial process involving parties with direct, concrete interests on both side of an issue is likely to produce the best result. Denying this right to participate to ranchers, who in many case have the strongest tangible economic interests in the outcome of that litigation diminishes NEPA as well as the judicial process. NEPA should be amended to allow permittees to participate.

Deficiencies in Regulatory Application of the Clean Air Act: A Case Study

Mark Solomon¹⁰

The Potlatch Corporation's Lewiston, Idaho facility has consistently been one of Idaho's largest air polluters. Cancer rates in the surrounding population are over 12% higher than the Idaho norm. The estimated cancer risk from chloroform exposure alone, prior to process changes at the mill in 1993, is about 40 times higher than exposure to national background chloroform levels. Potlatch's permits are based on the outputs of the Environmental Protection Agency (EPA)-approved Industrial Source Complex Model (ISCST3) for assessing ambient air quality impacts but ISCST3 is a modified second-generation air model designed to measure building downwash effects in non-complex terrain. It is unable to account for meteorological effects consistent with a canyon environment such as daily inversions created by cooler nighttime "capping" of the canyon atmosphere. EPA-approved third generation models that more accurately predict ambient air quality in complex terrain are now available for permitting us; however, neither the Clean Air Act, EPA guidance nor state regulations require application of new models to existing permits. Until and unless a discharger applies for a Permit to Construct that triggers either New Source Review requirements for non-attainment areas or Prevention of

Significant Deterioration analysis for attainment areas, no further modeling is required.

The Addition of Pollutants to the Waters of the United States: Interbasin Water Transfers and the Uncertain Scope of the NPDES

John R. Withers¹¹

After a string of trial court and appeals court cases, the Second Circuit held that the interbasin transfer of turbid water from the Shandaken Tunnel into Esopus Creek constituted a discharge of pollutants subject to the National Pollutant Discharge Elimination System (NPDES) permitting program. Requiring the treatment of transferred water to comply with the effluent limitations of a permit may be prohibitively expensive. If so, the alternative is to stop using the tunnel to provide water to New York City's nine million inhabitants, an alternative that seems untenable. A similar dilemma faces the arid western states, whose 60 million inhabitants and hundreds of thousands of farmers rely every day on thousands of water transfers for their drinking and irrigation water. As the United States Supreme Court wrote in 2004, "it may be that construing the NPDES program to cover such transfers would ... raise the costs of water distribution prohibitively, and violate Congress' specific instruction that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired."

The Emerging Role of the Endangered Species Act in the Settlement of Native American Water Rights

Brian Wonderlich¹²

The Nez Perce Water Rights Settlement of 2004 (NPWRS) "clears the way for a long-term public water policy for Idaho and . . . the Tribe" and resolves one of the largest water rights disputes in the Pacific Northwest. It is especially significant because it was reached in a basin that contains twelve stocks of endangered salmon and steelhead and where, some believe, "there is not a more complex Endangered Species Act [(ESA)] issue right now in the United States." Amongst that complexity, and arguably as a result of it, the NPWRS has become the most recent Native American water rights settlement to run up against significant ESA challenges that the parties to the settlement left unresolved. Specifically, the NPWRS seems to be testing the capacity of the federal government to live up to its duty under section 7 of the ESA to "conserve endangered species and threatened species" while still fulfilling the promise and obligation it makes in this settlement.

ABOUT THE AUTHORS (ENDNOTES)

¹ Professor Barbara Cosens earned a B.S. in Geology from the University of California at Davis, an M.S. in Geology from the University of Washington, a J.D. from University of California Hastings College of Law in San Francisco, and an LL.M. from Northwestern College of Law at Lewis and Clark College. She is admitted to the Colorado, California and Montana State Bars. Her work in hydrothermal geology has taken her to Japan and the Philippines, and she has worked in environmental and water rights dispute resolution negotiations throughout the West.

² At the 2007 session of the Environmental and Natural Resource

Section, **Dean Donald Burnett** and **Professor Barbara Cosens** of the law faculty, made presentations at the CLE workshop, and brought along several of their students who have attended Professor Cosens environmental law course and are interested in pursuing practice in the environmental and natural resource field. Professor Cosens made a presentation in a panel discussion on environmental dispute resolution, presenting details of the multi-party negotiation over the Walker River, which crosses from California into Nevada and terminates at Walker Lake. Competing interests include three Indian tribes, preservation of nearby wilderness and national forests, a Marine Corps training center and an Army munitions storage depot. River water is withdrawn for commercial irrigation, while the water is habitat for the threatened Lahonto cutthroat trout.

³ **Trent Belnap** graduated from Idaho State University with a B.A. in Psychology. He is currently a 2L at the University of Idaho, College of Law. His legal interests include family law, healthcare law, and state government.

⁴ **Matt Darrington** received a B.A. in Political Science from the University of Utah and is currently a second year student at the University of Idaho College of Law. He intends to practice water and natural resource law upon graduation.

⁵ **Amber Ellis** is a third year law student and James E. Rogers Scholar at the University of Idaho. She received her B.A. in English Literature from Portland State University.

⁶ **Seth L. Gordon** is a third year law student at the University of Idaho College of Law. Mr. Gordon graduated from Boise State University magna cum laude and majored in History with an emphasis on American and European Studies.

⁷ **Helen Jackson** graduated from the University of Leeds in

England with a first class honors, LLB law degree. She was awarded the Ella Olesen Scholarship, which is a one-year scholarship open to females who have recently graduated and are from the Isle of Man to study at the University of Idaho.

⁸ **Lisa Johnstone** is a third year law student at the University of Idaho. She graduated in 2002 from Albertson College of Idaho with a B.S. in Biology.

⁹ **Luke Marchant** received a B.S. in Range Science from Brigham Young University. He is currently in his second year of school at the University of Idaho College of Law. After graduation, he plans to practice law in the natural resources arena.

¹⁰ **Mark Solomon** is currently completing his B.S. in Environmental Science with the intention of taking his masters in the University of Idaho's new Water Resources Program.

¹¹ **John Withers** holds a master's degree in Chemical Engineering from the University of Idaho.

¹² **Brian Wonderlich** is a third year law student at the University of Idaho College of Law. He received his undergraduate education from the University of Idaho.



Professor Barbara Cosens, William Fletcher, Susanne Kaye, Tyler Bair, Charissa Eichman, Sean Beck, Erica Mortensen, Jennifer Stephens, Kirstin Eidenbach, and Dean Donald Burnett.