

DATE: July 25, 2008
TO: Northwest Power and Conservation Council.
ATTN: Patty O'Toole (by fax: 503-820 2370)
FROM: Charles Pace
RE: Comment on amendments proposed by BPA, NOAA
Fisheries and Action Agencies

In reviewing the amendments proposed by BPA et al. the Council should appreciate that NOAA Fisheries' biological opinions are premised, in part, on a clearly erroneous discussion and analysis of the likely effects on survival/recovery of listed species of the instream flow provisions for the Salmon/Clearwater River basins contained in the 2005 Nez Perce agreement. As you may know, in Paragraph II.A.3 of the Mediator's Term Sheet for the Nez Perce settlement, the tribe and state agreed that flows for streams in the Salmon/Clearwater basins would be established under state law but would be:

- 1) subordinate to all existing water rights permitted under state law; and
- 2) subordinate to all future domestic, commercial, industrial and municipal water rights that may be granted pursuant to criteria in Idaho Code 42-203(A)5.

This raises the issue of whether state law and, in particular, the public interest criteria in IC 42-203(A)5, are or will be protective of instream flows required for successful spawning and rearing of anadromous fish and other species of special concern.

The following excerpt from Georgetown University's Environmental Policy Project provides background information for your review and consideration on the partisan nature of the 2000 Idaho judicial election process and subsequent treatment of instream flow rights reserved under federal law, e.g., for the Frank Church Wilderness of No Return in central Idaho.

Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections

Georgetown University Law Center The Environmental Policy Project

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SUMMARY AND INTRODUCTION

Elections to choose state judges represent a major new battlefield in the political warfare over U.S. environmental policy. But the significance of these electoral contests to environmental concerns has been largely invisible to the general public as well as to professionals in the environmental field. This report seeks to illuminate the importance of the environmental issue in state judicial elections and to encourage greater public involvement in this relatively unfamiliar part of the political process. Key developments discussed in this report include the following:

...

In May of this year, Idaho Supreme Court Justice Cathy Silak was voted out of office as a result of a campaign, led by resource companies and members of the Christian Coalition, attacking her for writing a judicial opinion recognizing federal 'reserved' water rights in designated wilderness and recreation areas.

... Idaho

The recent Idaho Supreme Court election represents the first judicial race in which a state judge has been successfully challenged for reelection based on a ruling in an environmental case. In 1999 Justice Cathy Silak authored an Idaho Supreme Court decision upholding claims by the United States to so-called 'reserved federal water rights' in protected wilderness and recreation areas.

Judge (now Justice) Dan Eismann and his supporters made this controversial decision the focus of his campaign to unseat Justice Silak. The charge that Justice Silak's water rights opinion reflected bias on this issue was arguably undermined by the fact that she joined in two other decisions in which the Court rejected other federal reserved water rights claims by the United States. Nonetheless, Justice Silak's vote in this single case became the focus of public debate, and in May 2000 Idaho voters removed her from office.

The Idaho Judicial Election Process

The five justices of the Idaho Supreme Court serve six-year terms and are elected in (ostensibly) non-partisan elections.⁵⁶ The elections are conducted on a two-year cycle.⁵⁷ If a justice dies or retires before the end of his or her term, the State Judicial Council nominates a panel of potential replacements from which the Governor makes a final selection.⁵⁸ If no candidate in the primary wins a majority, the two leading vote-getters compete in a run off in the general election.⁵⁹ If, as occurred in the Silak-Eismann race, there are only two candidates to begin with, there is no need for a run off and the winner is selected in the primary.⁶⁰

Until 1932, Idaho's judicial election process was openly partisan. In that year, as the result of a pro-Democratic sweep in Idaho and across the country fueled by depression-era popular discontent, two Idaho Republican incumbent justices were defeated at the polls.⁶¹

Idaho's Republican leadership subsequently pressed for a constitutional amendment mandating non-partisan elections.⁶²

As a result of these reforms, Idaho judicial elections, until the 1990s, were largely removed from the political process. Prior to the 2000 election, no incumbent justice had been voted out of office for over 50 years.⁶³ Therefore, incumbent justices faced little real prospect of retribution at the polls for politically unpopular decisions. Furthermore, the process for selecting new justices was largely nonpolitical as well. From the mid 1960s, with the exception of two justices who died in office, every justice resigned his seat rather than retiring at the end of his term.⁶⁴ As a result, the Judicial Council selection procedure mentioned above was used to select every new justice over this period.

In 1998, for the first time in 30 years, the State held an election for an open seat on the Court. In that contentious race, Wayne Kidwell, who was publicly associated with the Republican Party, defeated Mike Wetherell, who was identified as a Democrat.⁶⁵ The 1998 race marked the emergence of a new, essentially partisan judicial electoral process in Idaho. As described below, the partisan character of the electoral process increased in the following election.

The 2000 Candidates

The 2000 judicial race pitted Justice Cathy Silak against an Idaho District Court Judge, Dan Eismann. Eismann won the contest by a margin of 60 to 40 in the primary held on May 23rd. Democratic Governor Cecil Andrus appointed Cathy Silak to the Idaho Court of Appeals in 1990 and appointed her to the Supreme Court in 1993.⁶⁶ In 1994, she won re-election to the Court in a race against Wayne Kidwell (who would successfully run for a seat on the Court in 1998). Prior to her appointment to the bench, Silak served as a prosecutor in the offices of the U.S. Attorneys in New York and Idaho and had a private law practice. She graduated from New York University and Boalt Hall Law School. Immediately prior to becoming a judge, she was Associate General Counsel of Morrison-Knudsen Corp., a large engineering and construction firm. Justice Silak was the first woman to sit on the Idaho Supreme Court.

Justice Silak was fairly easily identifiable as the Democratic candidate. She had been appointed to office by a Democratic Governor. She also had married into what one newspaper reporter referred to as a prominent Idaho Democratic family.⁶⁷ In addition, Silak's volunteer work for the ACLU prior to joining the bench arguably suggested she had liberal political leanings, an argument repeatedly advanced by Eismann's supporters during the campaign.⁶⁸ Dan Eismann had deeper roots in Idaho than Silak, having received both his bachelor and law degrees from the University of Idaho.⁶⁹ He served as a Magistrate Judge for Owyhee County for about a decade, and in 1996 was appointed Ada County District Judge. Eismann described himself as a born again Christian of nearly twenty years,⁷⁰ and, as discussed below, garnered major political support from the Idaho Christian Coalition, which reportedly distributed thousands of voter guides advocating his election over several Sundays preceding the election.

Eismann was easily identifiable as the Republican candidate. Before running for the Supreme Court seat, Judge Eismann was best known for his actions in the Idaho school funding litigation. Like many other state constitutions, the Idaho Constitution prescribes basic standards for the state system of public education.⁷¹ In a replay of similar litigation in other states, Idaho school districts brought suit alleging that the legislature had failed to live up to its constitutional obligation to "provide a means for school districts across the state to fund facilities that provide a safe environment conducive to learning."⁷² Judge Eismann dismissed the case. On appeal, the Supreme Court issued a unanimous ruling reversing Judge Eismann's decision and returning the case for trial on the plaintiffs' claims. Rather than

conduct the trial mandated by the Supreme Court, Judge Eismann formally withdrew from the case. "I took an oath to uphold the Constitution," he said. "To follow the court's directive I would violate my oath of office."⁷³ In general, of course, a trial court judge is bound by the legal rulings of a superior appellate court. For a trial judge to refuse to hear a case based on his view that the appellate court has made an erroneous legal ruling is extremely rare if not unprecedented. If many judges acted so willfully, the administration of justice would be seriously undermined.

Another striking aspect of Judge Eismann's candidacy was the fact that his brother-in-law, Barry Wood, was the presiding judge hearing the long-running Snake River Basin Adjudication case.⁷⁴ As mentioned, a Supreme Court ruling in that case authored by Justice Silak was the focal point of Judge Eismann's campaign against Silak. Thus, were appeals in this case to come before the Supreme Court, Justice Eismann would be reviewing decisions by his brother-in-law in the very case that was the central issue in his election campaign. To make matters more complicated, the Nez Perce Indian tribe filed a motion to disqualify Judge Wood from the case on the ground that he failed, prior to accepting appointment as presiding judge, to disclose to the parties that he and members of his family (not including Eismann) held water claims that could be adversely affected by recognition of the Nez Perce's claims.⁷⁵ Judge Wood denied the disqualification motion.⁷⁶ But he granted the Nez Perce's request for permission to take the disqualification issue to the Supreme Court, and the Supreme Court issued an order allowing the appeal on July 19, 2000.

During the course of the campaign, when questions were raised about the propriety of potentially sitting in review of rulings made by his brother-in-law, Judge Eismann said he would not recuse himself if elected to the Supreme Court. "As long as we do not discuss the cases, which we aren't, there's no requirement" that he recuse himself, he stated.⁷⁷ On August 31, 2000, the Idaho Supreme Court issued an order removing Judge Wood from the Snake River case.⁷⁸ This action followed an opinion by the Idaho Judicial Council concluding that it would be a conflict of interest for Justice Eismann to sit in review of his brother-in-law's decisions, and a subsequent announcement by Justice Eismann that he would recuse himself from the Snake River case in order to abide the Council's decision.⁷⁹ As between the removal of Justice Eismann or Judge Wood, the Supreme Court apparently preferred the removal of Judge Wood.

Another controversial issue in the Idaho judicial contest was race. At a campaign appearance in Idaho Falls, Judge Eismann challenged the view that the death penalty is not being fairly applied across racial lines, arguing that statistics supporting this view fail to take into account all relevant factors. According to a reporter's summary of his remarks: "When blacks kill whites it is often during the commission of a crime, such as theft, Eismann said. But when whites kill blacks the parties often know each other and the crime is committed in a heated moment, a motive that carries a lesser sentence than murder committed during theft or a drug deal."⁸⁰ In other words, according to this view, white murderers are generally less deserving of severe punishment because they tend to know their victims. Not surprisingly, this sweeping, implicitly racist comment generated a good deal of negative comment. A columnist for the Lewiston Morning Tribune wrote: "When I hear some sincerely believed racial myth uttered in public, it makes my head spin. How could anyone in this day and age still buy into stuff like that?"⁸¹

Based on public reports to date, Silak and Eismann raised approximately equal amounts in direct campaign contributions.⁸² Many of the contributors to both candidates are difficult if not impossible to categorize in terms of financial interest or political orientation. However, it is apparent that a good deal of Justice Silak's support came

from prominent Democratic party figures and such interest groups as the Idaho Trial Lawyers Association.⁸³ It is also apparent that Judge Bismann's major supporters included Republican party leaders, resource industries and agricultural interests.⁸⁴ In addition, according to press accounts, Bismann raised nearly one-quarter of his campaign fund from the chairman of the Idaho Christian Coalition and four members of her family.⁸⁵ Apart from these direct campaign contributions, Judge Bismann's campaign was boosted considerably by extensive "independent expenditures" by various different groups on advertising and telephone polling. The exact amount of these independent expenditures is basically unknown and unknowable, but was almost certainly in the hundreds of thousands of dollars.

The Snake River Water Rights Decision

The contest for Justice Silak's seat on the Supreme Court began, in effect, with a blistering editorial on October 14, 1999, in *The Idaho Statesman*, one of the state's largest papers.⁸⁶ The subject of the editorial was the Court's decision a few weeks earlier upholding, by a 3 to 2 vote, a claim by the United States government to federal "reserved" water rights in three designated wilderness areas (Frank Church River of No Return, Gospel Hump and Selway-Bitterroot) and in the Hells Canyon National Recreation Area.⁸⁷ Justice Silak was the author of the majority opinion. The *Idaho Statesman* editorial was remarkably blunt. "Through the handwringing over Idaho's water rights," the editorial began, "there is one quickfix solution available to voters: elect a new Supreme Court Justice." The editorial pointed out that Justice Silak was up for reelection, and "[t]hat leaves an opening for anybody who thinks she was in error." And then, driving home the point, the editorial observed that "all it takes is one change on the Supreme Court - one individual who demonstrates a greater sensitivity to what's at stake, which is Idaho's water sovereignty." The striking feature of this editorial is its disregard for whether Justice Silak's opinion properly applied the relevant law to the facts of the case. Instead, the editorial addressed the Court's decision as if it were purely a matter of political judgment. "Silak should be aware," the editorial warned, "that there it isn't a single Idaho politician in the last 30-plus years - Democrat or Republican - who would dare to run on the platform to allow the federal government to control every drop of water in designated areas of the state."

In a nutshell, the "reserved water rights" doctrine holds that when the United States "reserves" land from the public domain for some special purpose it can also reserve a sufficient quantity of available water to serve the purposes of the reservation. Reserved water rights may be either express or implied. Even in the absence of explicit language in congressional legislation, the U.S. Supreme Court has said, an intent to reserve water will be inferred when the water reservation is necessary to fulfill the purpose of the land reservation. In its October 1 decision, the Supreme Court, affirming the trial court, concluded that the United States could claim reserved rights in the water flowing through the wilderness and recreation areas as of the date the areas were created between 1964 and 1980.

The Court also ruled that the United States was entitled to claim the entire unappropriated flow in order to fulfill the purposes of the reservations. The Court's recognition of this claim meant not only that the United States could block water development inside the areas, but also development outside the areas that would impinge on the federal water rights. Because most of the affected areas were in the headwaters of the affected streams, this aspect of the ruling had little practical significance. However, in the case of the Salmon River and the River of No Return Wilderness, the ruling did potentially affect various upstream developments outside the wilderness area. Moreover, because the ruling recognized the United States' right to claim all remaining water flows as of the date the wilderness area was created, the ruling could, at

least in theory, force the cancellation of some established water uses in the upper reaches of the Salmon River.

Chief Justice Trout and Justice Walters concurred in Justice Silak's opinion. Two justices (Kidwell⁸⁸ and Schroeder⁸⁹) filed vigorous dissents. They agreed that the legislation establishing the national recreation area included a reserved water right, but argued that the Wilderness Act created neither an express nor an implied water right in the three wilderness areas. They also dissented on the issue of the amount of water reserved. To the extent the United States was entitled to claim water rights in any of the areas, they argued, the government had to prove how much water was actually necessary to fulfill the reservation purposes.

Shortly after the Court issued its ruling, the state, Potlatch Corporation, the cities of Salmon and Challis, three mining companies and fourteen irrigation districts filed requests that the Court rehear the case.⁹⁰ On November 30, 1999, the Court granted the request, a step that requires the concurrence of at least one member of the majority. The case has now been reargued and is pending a decision. As discussed, the charge that Justice Silak's authorship of the decision reflected bias on the water rights question was belied by the fact that Justice Silak joined in another decision issued by the Court the same day rejecting the United States' claim to a reserved water right in federal lands administered by the U.S. Forest Service.⁹¹ Moreover, a few months later, Justice Silak joined in another Court decision rejecting a claim by the United States to a water right to support a national wildlife refuge.⁹²

The Electoral Contest

Following the publication of The Idaho Statesman editorial, a steady torrent of public criticism rained down on the Court. A board member of a large irrigation district in southern Idaho said, "this is setting a precedent that is untenable. We can't live with it. No citizen in the Snake River Plain can live with this decision."⁹³ The mayor of Salmon, Idaho, upstream of the River of No Return Wilderness called it a "devastating and perplexing decision."⁹⁴ A representative of the Farm Bureau Federation said the organization was "astounded with this ruling."⁹⁵ On the other hand, there also were dissenting views about The Idaho Statesman's editorial. One letter to the editor remarked, "What is inexcusable is that you think she should decide cases, not to what she believes the law to be, but to what she believes the voters want."⁹⁶

Judge Eismann effectively launched his campaign to unseat Justice Silak, despite the officially "non-partisan" nature of Idaho judicial elections, by appearing and speaking at a Republican Party fund-raising banquet in Idaho Falls on February 12, 2000. Newspaper accounts of the event indicate that Eismann did not explicitly discuss the water rights case, but it was clearly the target of his remarks. Eismann said the "courts with increasing frequency have been pushing political agendas with decisions 'that reinterpret the Constitution.'"⁹⁷ "They don't trust the people," he said. "Those kinds of justices should be removed from office." In another statement highlighting the importance of the water case, a Republican official at a meeting prior to the banquet called for Silak's removal, stating: "We anticipate having an opponent for her so you will have a choice... In this instance you better get out there and vote or you'll be pretty dry."⁹⁸

A few weeks later, former Supreme Court Justice Robert Huntley, an active member of the Democratic party, filed a complaint with the prosecutor for the county in which the fund raising event occurred.⁹⁹ He alleged that Eismann had violated the constitutional provision that candidates "shall not be nominated nor endorsed by any political party."¹⁰⁰ Violations are punishable by a \$1,000 fine, up to five years in prison, or both.¹⁰¹ Huntley also submitted a copy of the complaint to Attorney General Al Lance and others. In explanation of his decision to

file the complaint, Huntley wrote: "This type of conduct is very serious in that it constitutes an invasion of the independence of the judiciary and will result in judges being fearful of the political consequences if either they write or enter unpopular rulings or happen to be former members of a minority political party."¹⁰²

No charges were ever brought as a result of the complaint, perhaps in part because of a letter the Attorney General's deputy chief of staff sent to Robert Huntley asserting that the law had not been broken.¹⁰³ According to public accounts of the letter, the deputy chief of staff contended that Republican leaders speaking out in favor of Eismann's candidacy at the Republican party event did not constitute party endorsement.¹⁰⁴ Furthermore, he asserted that there could have been no violation of the prohibition against nominating or endorsing judicial candidates because the event occurred before the May primary. "Therefore," he wrote, "no ballot has been created, used or voted on in which the name Judge Eismann, or any other judicial candidate was accompanied by any party designation." As Huntley pointed out in response, the argument was fallacious because the Supreme Court race was going to be decided in the primary given that there were only two candidates in the race. Under the reasoning of the Attorney General's office, the constitutional prohibition against partisan nomination or endorsement of a judicial candidate is meaningless in any race in which there are only two candidates and the selection process is completed prior to the general election.¹⁰⁵

Later, a few weeks before the election, another controversy erupted over a questionnaire submitted to the candidates by the Idaho Christian Coalition asking for their responses to dozens of questions.¹⁰⁶ Justice Silak declined to respond to the specific questions posed but requested that the coalition include in its voter guide a statement to the effect that she had taken and several times reaffirmed an oath to uphold the Idaho and U.S. Constitutions.¹⁰⁷ When the coalition criticized her for not responding, she called the criticism misleading and asserted that it would be improper for her to provide answers to many of the coalition's questions. According to press accounts, the coalition asked such questions as whether the candidates "are pro-life or pro-choice, conservative or liberal, or believe God's laws have a higher authority than state and federal law."

Judge Eismann apparently did provide answers to at least some of the questions on the questionnaire, but neither he nor the coalition would release the responses. However, in a newspaper interview, Judge Eismann provided a synopsis of his answers.¹⁰⁸ For example, in response to the question "Do you believe in the fact that god created all the heavens, earth, creatures, plants and man?", he answered, "I have studied evolution in great detail. I think you can prove scientifically that evolution has not and cannot occur." Question: "Do you believe in the fact that man evolved from life forms in the sea?"; answer: "You would have to have an oxygen-free atmosphere for anything like that to have occurred. The evidence is that this Earth has never had an oxygen-free environment." Question: "Vis-a-vis abortion, are you 'Pro-life?"; answer: "I think abortion is morally wrong."

This controversy prompted the filing of another complaint, this time by Silak supporter Scott Reed, an attorney in private practice in Coeur d'Alene, with the state Judicial Council.¹⁰⁹ Reed asserted that Eismann had violated the official rules of judicial conduct by answering the questionnaire. He pointed to an August 12, 1998, letter from the Judicial Council to candidate Mike Wetherell responding to an inquiry Wetherell had made about the appropriateness of questionnaires he had received soliciting his views on such issues as gun control, capital punishment and abortion. The Council's 1998 letter stated: "It is not appropriate for a judicial candidate to respond to such questions or surveys. However, a candidate may respond to general questions concerning the candidate's background, education, qualifications,

experience and general philosophy on the law." Judge Eismann called Reed's complaint a "political attack" and said, "I don't know of anything that says a judge can't express his religious beliefs."¹¹⁰ As of the date of publication of this report, the complaint was still pending.

In perhaps the most controversial aspect of the race, in the last few weeks before the election an obscure South Carolina-based group financed an illegal "push poll" designed to sway voters against Justice Silak based on her opinion in the Snake River case.¹¹¹ A push poll is an organized campaign to reach individuals by telephone in order to influence their vote, but is conducted under the guise of an informational survey. It is nominally a "poll," but in reality it is designed to "push" voters in favor of a particular candidate. The script of the push poll directed at Silak was released by the Idaho representative of the effort: "Hello, Mr XX? This is XXX calling. I'm conducting a brief survey. Can I ask you one question? Do you support the move by the courts to transfer control over Idaho water rights to the federal government?"

Residents who answered 'no' were told; 'Your opposition to the federal power grab of Idaho water is important. You see, at the May 23 election, Idaho voters will be deciding who will serve on the state supreme court. The current judge, Cathy Silak, is the person most responsible for handing over Idaho water to the federal agents. Her opponent is Dan Eismann. Judge Eismann opposes this giveaway. He is a solid defender of individual freedom and has a record of being fair and honest. The caller was then asked: 'Can we count on you to go to the polls on Tuesday May 23rd and vote for Dan Eismann for state Supreme Court?'¹¹² Immediately after the polling began, Silak's campaign brought suit alleging a violation of a state law requiring pollsters to identify to the people being polled the person or group paying for the poll.¹¹³ On May 16, a District Court judge ruled in favor of the Silak campaign, issuing a restraining order barring further polling. But the judge rejected the campaign's request that the sponsors of the poll re-telephone all those they contacted to inform them who paid for the poll.

Who or what was behind this push poll remains mysterious. The poll was nominally sponsored by an organization called the Citizens for Term Limits Idaho Campaign, based in Hayden Lake, Idaho.¹¹⁴ The actual telephoning was conducted by a Pennsylvania-based telemarketing firm. According to Dan Morgan, leader of the Idaho term limits group, the poll was funded by a \$50,000 check from Lyle Coggan of the Democracy Fund in South Carolina. Research efforts to further identify Coggan or the Democracy Fund have so far been fruitless.¹¹⁵

Finally, in the last few days of the campaign, a virtual advertising blitz was mounted against Silak by a number of groups opposed to her reelection. A political action committee called "Concerned Citizens for Family Values" began running full-page newspaper ads across the state on the Sunday before the election stating, in large letters: "Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains on the Idaho Supreme Court?"¹¹⁶ The ads then went on to suggest that Silak's past involvement with the ACLU in Idaho indicated that she might support national ACLU positions on abortion and homosexuality. Print and radio advertising run by gun advocates suggested that Silak would support gun registration and also opposed her reelection.¹¹⁷ Eismann disavowed any knowledge of or control over these independent efforts on his behalf, though some argued he was less forceful than he might have been in objecting to them.¹¹⁸ Justice Silak called them a "smear," emphasizing that the ads discussed issues which the Court had never addressed and on which she had not stated a view.¹¹⁹

The Mantra of Judicial Activism

One final, striking aspect of the race, and a point that only becomes clear after reviewing scores of news accounts of the election, is the consistent focus by Judge Eismann and his supporters on the issue of "judicial activism." From the day he announced his campaign and in virtually every public statement thereafter, Judge Eismann and his supporters attacked what they called "judicial activism."¹²⁰ In emphasizing this theme, Eismann's campaign borrowed a page from Republican or Republican-leaning judicial candidates across the country.

It was of little consequence that Justice Silak asserted that she was a "strict constructionist,"¹²¹ and repeatedly affirmed, I am "not an activist judge."¹²² Like proverbial denials of wife beating, Justice Silak's protests about the charge of "judicial activism" appeared to reinforce her opponent's message. Based on the actual positions of the candidates, there was little reason to think that Justice Eismann would be a less "activist" member of the Court than Justice Silak. Indeed, if anything, based on his history and campaign platform, Justice Eismann seems likely to be more activist than Justice Silak.

For example, Eismann's refusal to accept the Supreme Court's binding interpretation of the Idaho Constitution in the school funding case represents, by any standard, a highly "activist" judicial step.¹²³ His open political advocacy, despite his position as a judge, of "pro-life" positions that are inconsistent with binding U.S. Supreme Court precedent on the issue also appears to smack of activism. And with respect to the central issue in the race, the Snake River case, the thrust of his campaign's criticism of Justice Silak's opinion was not that it was wrong as a matter of law but rather that it was out of step with sentiments of Idaho voters; a justice who endorses deciding cases based on popular sentiment rather than legal precedent would seem to fit the definition of a judicial activist. In the end, it is difficult to discern any legitimate content to the charge of "judicial activist" made by Judge Eismann and his supporters against Justice Silak.

One newspaper columnist commented on the apparent contradiction between Judge Eismann's stated fidelity to "strict construction" and his cavalier approach to complying with Idaho's constitutional guarantee of a "non-partisan" election. Referring to Judge Eismann, Bill Hall wrote, "These constitutional wobblers now thumbing their noses at the requirement are fair-weather friends of strict construction. They are laughing up their dark sleeves at the virtue of a non-partisan judiciary."

Notes

⁵⁶ Idaho Constitution, Article V, section 5.

⁵⁷ Id.

⁵⁸ Idaho Code, section 1-2102.

⁵⁹ Idaho Code, section 34-1217.

⁶⁰ Judges on the Idaho Court of Appeals and District Court are also elected. See Idaho Constitution, Article V, section 11; Idaho Code, sections 1-702, 1-2404, and 34-616.

⁶¹ Betsy Russell, "Battle Looms Over Electing Justices," The Spokesman-Review (May 28, 2000).

⁶² See Idaho Constitution, Article VI, Section 7.

⁶³ Betsy Russell, "Battle Looms Over Electing Judges," The Spokesman-Review (May 28, 2000).

⁶⁴ Scott Kidd, "Courts Shouldn't Write Their Own Rules," Idaho Falls Post Register (April 2, 2000).

- ⁶⁵ Mark Warbis, "Observers Worry Race for Supreme Court Has Become Politicized," *The Idaho Statesman* (April 22, 2000).
- ⁶⁶ See www.justicecathysilak.com.
- ⁶⁷ Gene Fadness, "The Battle for the Supreme Court," *Idaho Falls Post Register* (May 21, 2000).
- ⁶⁸ See, e.g., Gene Fadness, "State GOP Chairman Endorses Eismann," *Idaho Falls Post Register* (May 19, 2000) (quoting the Republican Party Chairman accusing Silak of promoting "the liberal, judicial activism she advanced as a co-founder of the Idaho ACLU").
- ⁶⁹ Gene Fadness, "The Battle for the Supreme Court," *Idaho Falls Post Register* (May 21, 2000).
- ⁷⁰ *Id.*
- ⁷¹ Article IX, section 1 of the Idaho Constitution requires the legislature to "establish and maintain a... thorough system of public, free common schools."
- ⁷² *Idaho Schools for Equal Educational Opportunity v. State of Idaho*, 976 P.2d 913, 914 (Id. 1998).
- ⁷³ Angie Gaddy, "Supreme Court Race Has Political Feel," *The Spokesman Review* (April 9, 2000).
- ⁷⁴ Gene Fadness, "Idaho Judge Sees No Conflict in Court Appeals for Water Rights," *Post Register* (May 18, 2000).
- ⁷⁵ See "Motion to Set Aside All Decisions, Orders and Judgments of Judge J. Barry Wood in Consolidated Subcase No. 03-10022 and Motion to Disqualify Judge R. Barry Wood and Memorandum in Support Thereof," filed February 22, 2000.
- ⁷⁶ See "Response to United States' Motion for Status Conference and Order on Nez Perce's Motion," filed February 23, 2000.
- ⁷⁷ Gene Fadness, "Idaho Judge Sees No Conflict in Court Appeals for Water Rights," *Post Register* (May 18, 2000).
- ⁷⁸ Michael Journee, "Supreme Court Removes Wood from Water Case," *The Times-News* (September 1, 2000).
- ⁷⁹ Michael Journee, "Eismann Won't Hear Adjudication Cases," *The Times-News* (August 31, 2000).
- ⁸⁰ Gene Fadness, "High Court Candidate Eismann: Death Penalty is Applied Fairly," *Idaho Falls Post Register* (May 7, 2000).
- ⁸¹ Bill Hall, "A Judge Explains Why White's Murder Safer," *Lewiston Morning Tribune* (May 10, 2000). In yet another odd twist, despite his strong support from the Christian Coalition, Judge Eismann worked as a counselor for Planned Parenthood in the 1970's, a fact apparently unearthed or in any event circulated by supporters of Justice Silak. See Betsy Russell, "Occasional Slips in Speechifying," *The Spokesman-Review* (May 20, 2000). According to a columnist for *The Idaho Spokesman*, Eismann counseled pregnant women "about options --including abortion -- at a time when Idaho made that illegal for anyone but a medical professional." *Id.* Eismann's campaign manager reportedly responded to this disclosure by stating that "the judge changed his views after he became a born-again Christian in 1983." *Id.* Some indication of how radically Eismann's views had changed on the subject is suggested by his statement at a 1993 antiabortion rally describing the pro-choice movement as "the spiritual forces of evil." See Marty Trillhaase, "Cheers and Jeers," *Idaho Falls Post Register* (May 5, 2000). Eismann later submitted an official apology to the State Judicial Council for participating in this rally while serving as a magistrate judge.

- ⁸² See Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).
- ⁸³ Idaho Secretary of State, Schedule of Contributions, Justice Cathy Silak Campaign 2000 (for period 1/1/00 to 5/7/00).
- ⁸⁴ Idaho Secretary of State, Schedule of Contributions, Eismann for Idaho Supreme Court (for period 2/14/00 to 5/7/00).
- ⁸⁵ Betsy Russell, "Occasional Slips in Speechifying," The Spokesman-Review (May 20, 2000).
- ⁸⁶ Editorial, "Idahoans Could Place Water Rights Issue in Their Hands," The Idaho Statesman (October 14, 1999).
- ⁸⁷ In re Snake River Basin Adjudication, 1999 WL 778325 (October 1, 1999).
- ⁸⁸ In re Snake River Basin Adjudication, 1999 WL 778325, at 53-72 (October 1, 1999).
- ⁸⁹ In re Snake River Basin Adjudication, 1999 WL 778325, at 72-83 (October 1, 1999).
- ⁹⁰ Rocket Barber, "Idaho High Court to Rehear Water Case," The Idaho Statesman (December 1, 1999).
- ⁹¹ United States v. City of Challis, 988 P.2d 1199 (1999).
- ⁹² In re SRBA Minidoka National Wildlife Refuge, 996 P.2d 806 (2000). Apart from the Snake River Basin Adjudication case, Justice Silak's opponents took her to task for two other decisions, neither of which she authored but in which she joined the majority opinion reversing lower court rulings. See "Courts, Silak Exasperate Conservative Legislators," The Press (March 13, 2000). In Doe v. Garcia, 961 P.2d 1181 (Id. 1998), the Court reversed a trial court's dismissal of a tort suit based on a hospital's alleged negligence in hiring an employee who sexually abused the plaintiff, who was a minor, after meeting him and treating him at the hospital. The hospital's hiring process had allegedly failed to uncover the fact that the employee had previously been discharged from a similar position for sexual abuse of a patient. The Court, which decided the case 4 to 1 in favor of the plaintiff, ruled that the trial court erred in by not allowing the plaintiff to proceed to trial on his claim. The second case, Idaho Schools for Equal Educational Opportunity v. State of Idaho, 976 P.2d 913 (Id. 1999), discussed above, involved a claim that the state's method for funding school facilities violated the provision of the Idaho Constitution stating that the legislature must "establish and maintain a...thorough system of public, free common schools." The Supreme Court reversed Judge Eismann's ruling dismissing the case.
- ⁹³ Gene Fadness, "Wilderness Area Water Rights - Opinions Varied on Impact of Court Ruling," Idaho Falls Post Register (October 14, 1999).
- ⁹⁴ Stanley B. Davis, "Idaho's Supreme Court Carries Water for the Feds," Idaho Falls Post Register (October 17, 1999).
- ⁹⁵ Greg Nelson, "Editorial," The Idaho Statesman (November 4, 1999).
- ⁹⁶ Carl E. Olsson, Letter to the Editor, The Idaho Statesman (October 27, 1999). See also Emil R. Berg, Letter to the Editor, The Idaho Statesman (October 22, 1999) ("The Statesman's editorial attacking Justice Cathy Silak for authoring the opinion recognizing federal water rights in wilderness areas displays an amazing ignorance of the role of the courts in a constitutional republic.")
- ⁹⁷ Gene Fadness, "Republicans Unveil Choice for State's Supreme Court," Idaho Falls Post Register (February 13, 2000).
- ⁹⁸ Id.

- ⁹⁹ Gene Fadness, "I.F. Fundraiser Was Scene of Law Breaking, Former Justice Says," Idaho Falls Post Register (February 22, 2000).
- ¹⁰⁰ Idaho Constitution, Article VI, section 7.
- ¹⁰¹ Idaho Code, section 18-2315.
- ¹⁰² Gene Fadness, "I.F. Fundraiser Was Scene of Law Breaking, Former Justice Says," Idaho Falls Post Register (February 22, 2000).
- ¹⁰³ Gene Fadness, "Speech by Judge at Republican Event Lawful, Idaho Attorney General Says," Post Register (March 1, 2000).
- ¹⁰⁴ Id.
- ¹⁰⁵ Id.
- ¹⁰⁶ Michael R. Wickline, "Justice Wants Group to Note Oaths She Has Taken," Lewiston Morning Tribune (May 3, 2000).
- ¹⁰⁷ Id.
- ¹⁰⁸ Dan Popkey "Eismann Plays Religion Card in Supreme Court," The Idaho Statesman (May 9, 2000).
- ¹⁰⁹ Angie Gaddy, "Attorney Claims Judge Violated Rules," The Spokesman-Review (May 11, 2000).
- ¹¹⁰ Id.
- ¹¹¹ Betsy Russell, "Eismann Denies Role in Anti-Silak Push-Poll," The Spokesman-Review (May 13, 2000).
- ¹¹² Betsy Russell, "Anti-Silak Calls Legal, Activist Says," The Spokesman-Review (May 19, 2000).
- ¹¹³ 200 Idaho Laws Ch. 153 (effective April 3, 2000).
- ¹¹⁴ Betsy Russell, "Anti-Silak Calls Legal, Activist Says," The Spokesman-Review (May 19, 2000).
- ¹¹⁵ Information directory lists no phone number for a Democracy Fund or a Lyle Coggan in South Carolina. The names could not be located in various other information databases. The South Carolina Secretary of State has no record of any corporation named the Democracy Fund.
- ¹¹⁶ Gene Fadness, "Ad Says Silak Could Bring Gay Marriage to Idaho," Idaho Falls Post Register (May 21, 2000).
- ¹¹⁷ Betsy Russell, "Voters Oust Justice Silak for Eismann," The Spokesman-Review (May 24, 2000).
- ¹¹⁸ Mary Trillhaase, "A Politician Seeks the Bench," Idaho Falls Post Register (May 21, 2000).
- ¹¹⁹ Gene Fadness, "Ad Says Silak Could Bring Gay Marriage to Idaho," Idaho Falls Post Register (May 21, 2000).
- ¹²⁰ See, e.g., Gene Fadness, "Republicans Unveil Choice for State's Supreme Court," Idaho Falls Post Register (February 13, 2000); Gene Fadness, "State GOP Chairman Endorses Eismann," Idaho Falls Post Register (May 19, 2000). See also Angie Gaddy, "Supreme Court Race has Political Feel," The Handle (April 9, 2000) ("The contest [for the Supreme Court] is supposed to be non-partisan - but the race is already rife with politics and accusations of judicial activism.")
- ¹²¹ Gene Fadness, "The Battle for the Supreme Court," Idaho Falls Post Register (May 21, 2000).
- ¹²² Angie Gaddy, "Idaho Supreme Court," The Spokesman-Review (May 18, 2000).
- ¹²³ As stated by an editorial writer for The Spokesman Review, referring to Judge Eismann's actions in the school funding case, Eismann "said judges

should interpret the Constitution and the laws according to the intent of the drafters. The problem is, he seems to think he's the only judge who knows what they mean." Editorial, "Discipline, Gravitas Keys to Credibility," The Spokesman-Review (May 20, 2000).