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## McKay v. Boise Project Bd. of Control, No. 28660, 2004 Idaho LEXIS 149 (Idaho 2004)

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upheld the circuit court's reversal of the 1996 Order, but remanded the case to LUC to clarify whether LCI had violated the 1991 Order.

*Kyle K. Chang*

## IDAHO

**McKay v. Boise Project Bd. of Control, No. 28660, 2004 Idaho LEXIS 149 (Idaho 2004)** (reversing the lower court's award of damages for the destruction of a cash crop when the Boise Project Control Board raised the reservoir water level pursuant to a flowage easement since the plain language of the easement contained no ambiguity, the activity remained within the parameters of the easement, and the activity was reasonable; affirming the lower court's holding that the Boise Project Control Board does not qualify for immunity because the decision to raise reservoir levels was operational and not discretionary).

In 1979 the Boise Project Control Board ("Project") obtained a flowage easement from a judgment that allowed the Project to raise the level of water in the Hubbard Reservoir to 2,771 feet for any routine irrigation purpose. The judgment did not require the Project to give any notice before changing the water level in the reservoir. In 1992 Darwin and Patricia McKay ("McKay") leased a parcel of land located on the Hubbard Reservoir, which they used to grow turf grass as a cash crop. During the spring of 1997, the Project raised the water level in the Hubbard Reservoir to 2,767.8 feet as part of a plan to provide water for irrigation. The high water damaged a portion of McKay's crop.

McKay sued the Project for the damage to his crop in the District Court of the Fourth Judicial District. McKay claimed the Project negligently used the flowage easement and the Project intentionally trespassed on his leasehold. The district court rejected the Project's defense of governmental immunity for performing discretionary functions. The district court then awarded McKay damages because the Project breached its duty to manage the flowage easement in a reasonable manner and in accordance with the 1979 judgment. Accordingly, the district court issued a permanent injunction that changed the scope of the flowage easement from allowing flooding for routine irrigation operations the Project may desire, to provide that the Project can only flood McKay's estate in the good faith pursuit of legitimate irrigation goals. The Project appealed the district court's decision to the Supreme Court of Idaho.

On appeal, McKay argued he lacked privity to the 1979 flowage easement. McKay asserted he was not a party to the 1979 judgment and thus not bound by that judgment. However, the court determined McKay failed to raise the issue in a timely manner as required by Idaho Appellate Rule 15. Therefore, the court refused to consider the issue of privity.

Next, the court reversed the district court's determination of negligence by finding no ambiguity in the plain language of the easement and no unreasonable activity by the Project. The court held the 1979 judgment contained no ambiguity given the plain language of the easement that allowed the Project to raise the water level for any activity supporting the irrigation of fields. Since the Project did not raise the water level above 2,771 feet and their purpose supported irrigation, the Project's activities did not violate the plain language of the easement. Additionally, the court noted McKay planted his crop below the 2,771-foot level at his own risk. The court also held McKay lacked standing to assert wasteful use of water as a violation of an alleged duty owed to him, because the statutes relied upon by McKay only allowed negligence claims by other users of the water, the State, or a servient estate to an easement only if the waste directly caused the harm. McKay did not qualify as one of these categories. Therefore, McKay could not recover under a theory of waste; the Project could not act negligently if it did not owe McKay a duty to act reasonably in regards to waste.

Finally, the court addressed the Project's claim of immunity. The court held that only discretionary functions carried out by a governmental entity and its employees retain immunity from tort claims. The court considered routine matters, such as the decision of the Project to raise the reservoir water level for irrigation purposes, operational in nature and not subject to immunity.

In conclusion, the court reversed the permanent injunction, vacated the lower court's damage award, and remanded for further proceedings.

*David B. Oakley*

## LOUISIANA

**Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. Ct. App. 2004)** (affirming the grant of a permanent injunction prohibiting hunters from entering private land because: (1) no public access right existed to private land subject to intermittent flooding, (2) no public use right existed to private waterways merely because the waterway was navigable, and (3) public use right to banks of navigable public waterways did not include right to hunt).

The Buckskin Hunting Club ("Club") filed suit in the 16th Judicial District Court, Parish of Iberia, seeking an injunction to prohibit further trespassing by a group of hunters who had entered land leased by the Club without permission. The hunters claimed in defense that navigable public and private man-made waterways through the land, as well as intermittent flooding, both created a public right to use the land surrounding the waterways. The district court, after considering