

The Advocate

Official Publication of the Idaho State Bar

Volume 49, No. 2

February 2006



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Volume 49, No. 2

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On the Cover: The picture is an original painting done by Sarah Penney, an enrolled member of the Nez Perce Tribe of Idaho. The Nez Perce, who are known for their horse culture, enjoy dressing up their horses in horse regalia during a parade, for example, but also in certain honoring ceremonies - honoring their ancestors who made sacrifices to ensure the survival of the Nimiipu People. The geometric designs usually tell a story, or are family designs. Ms. Penney holds a Masters Degree in Education from the University of Idaho. A self-taught artist, her artwork is inspired by her Nez Perce heritage and her paintings are reflective of the beauty of family, elders, tradition, and the preservation of Native American culture. You can view more of her artwork at www.penneystudio.com.

This issue of *The Advocate* is sponsored by the Indian Law Section.



Procrastination

Hon. Rick Carnaroli



Remember my last column? Last month, I resolved to make a list and be more organized. It is Thursday night, January 12, and I'm sitting here in my hotel room in Boise. The Board of Commissioner's meeting is tomorrow at the Law Center. I am prepared for that meeting, but it is time to start writing this column... it is due tomorrow morning.

So, what happened? Did I really have writer's block; or did this column carry a lower priority than other things on my "To Do" list? If I take a look in the mirror, I can't lie to myself. I am simply pressed into action now by my own conscious and unconscious choices to do other things until now, when I know I have less than 24 hours to complete my column.

Procrastination is one of my demons. But, I'm not alone. It is part of human nature to give the easy and more enjoyable tasks priority and to save the time consuming and more difficult or unpleasant tasks for another time. And, it is my observation in my years in the legal profession, that lawyers are quite human in this regard. To illustrate, let's look at a file from start to finish.

New files do sit on the corner of our desks from time to time. Often, these files contain the routine matters and familiar issues that do not spark any particular interest for us. On occasion, they contain difficult issues that we do not look forward to working with. It is easy to put off working on these types of files, promising ourselves that we'll get to them tomorrow.

But, we all know it is best not to allow our files to gather dust. It doesn't happen often, but this is how statutes of limitation are missed. This is how lawyers fail to file timely notices of tort claim, timely post-trial motions and timely notices of appeal.

If you are in a position that needs an answer or response, procrastination is dan-

gerous. It is a very uncomfortable task for a lawyer to file or for a judge to hear motions to set aside default judgments. The filing deadline has been missed. The client is unhappy and the lawyer is embarrassed. The judge is asked to take victory from the party that obtained a judgment both quickly and inexpensively.

As the case progresses and discovery and motion practice take place, procrastination can find the spotlight. Discovery is often postponed to explore early settlement. But then settlement discussion either does not take place, or is fruitless. If the progress of the case stalls at the early settlement discussion phase, procrastination results in motions for continuance of trial, or motions to extend pretrial deadlines for discovery or motions. Here again, the client is unhappy because he or she had a trial or hearing date. The lawyer, if not embarrassed, is usually uncomfortable asking the judge for more time. In addition, lawyer who needs more time is at the mercy of both opposing counsel and the opposing party. Opposing counsel normally is sympathetic to the lawyer who is short of time, but his or her client may not give authority to allow more time for pretrial motions or discovery, or to continue trial. The judge has the equally unpleasant tasks of either juggling the calendar to find new dates, or of denying the motion.

The failure to file timely discovery answers is another product of procrastination. Motions to compel and for discovery sanctions are not enjoyable experiences for counsel on either side of the motion. Judges do not really enjoy hearing counsel argue about discovery and sanctions because these motions highlight the fact that the progress of the case towards resolution has stalled.

Too often, true settlement discussion does not take place until the days before trial. It is hard to say that procrastination is the cause of settlement on the courthouse steps, but certainly there are cases that set-

tle only because the parties have not adequately prepared for trial, or have put off settlement discussions until the last minute.

Perhaps we should all strive for a little less procrastination. Procrastination exacerbates the pressures that attend our daily work and delays final resolution. Clients want closure. Lawyers also want closure and to be paid for their work. Judges want to keep their dockets moving and give the parties their day in court.

That being said, it is Friday morning in Boise, Idaho. I am sitting here in my hotel room. This column is due and I'm editing the last draft. I could have done this last night, but decided it could wait until the morning. I read the newspaper before bed. Better hustle. I've got a meeting an hour from now. I think I'll start next month's column tomorrow....

The Hon. Rick Carnaroli succeeded Deb Kristensen as president of the Idaho State Bar Board of Commissioners in July 2005. He is serving a 12-month term as president and has been a Bar Commissioner representing the 6th and 7th Districts since 2003. He received his B.A. from Pacific University in 1980 and his J.D. from Willamette University College of Law in 1985. Judge Carnaroli was admitted to the Bar in 1985. He was later admitted to practice in the U.S. Court of Appeals for the Ninth Circuit in 1993 and to the U.S. Supreme Court in 1999. Judge Carnaroli engaged in litigation practice in both the private and public sectors before taking the bench in October 2004 as a magistrate judge in Bannock County. He is the third member of the judiciary to serve on the Bar's Board of Commissioners. Hon. Rick Carnaroli: (208) 236-7322 or rickc@co.bannock.id.us

NEWSBRIEFS

ABA LEGAL OPPORTUNITY SCHOLARSHIP FOR 2006-2007 – The Scholarship Fund is intended to encourage racial and ethnic minority students to apply to law school and to provide financial assistance to the recipients of the award. \$5,000 of financial assistance is awarded annually to each recipient attending an ABA-accredited law school. An award made to an entering first-year student may be renewable for two additional years, resulting in financial assistance totaling \$15,000. Recipients are selected based on their qualifications for the scholarship and not on the law school they plan to attend. You can obtain an application by calling the ABA's Policy & Governance Group (312) 988-5100, or download a copy of the application from <http://www.abanet.org/fje>. Completed scholarship applications must be postmarked no later than March 1, 2006.

ABA SMYTHE GAMBRELL PROFESSIONALISM AWARDS – Nominations are now being accepted for the Sixteenth Annual E. Smythe Gambrell Professionalism Awards, recognizing projects that enhance professionalism among lawyers. Bar associations, law schools, law firms and other not-for-profit law related organizations are eligible for the awards. The ABA Standing Committee on Professionalism, a component of the ABA Center for Professional Responsibility, will present up to three awards of \$3,500 each during the 2006 ABA Annual Meeting in Hawaii. Award criteria include overall quality, replicability, likelihood of continuation, innovation, success, substantive strength in the area of professionalism, scope and other distinguishing features of the applicant programs. The deadline for entries is March 31, 2006. Entry forms, guidelines and information about previous award recipients are available online at www.abanet.org/cpr/gambrell.html. Questions regarding the awards should be directed to Kathleen Maher (312) 988-5307, e-mail: maherk@staff.abanet.org.

MAGISTRATE JUDGE APPOINTED FOR FOURTH JUDICIAL DISTRICT – **David D. Manweiler**, has been appointed magistrate judge in Ada County. Previous to his appointment he was a member of the law firm Manweiler, Manweiler, Breen and Ball, PLLC, specializing as a litigation attorney. From 1986 to 1998, Mr. Manweiler was a member of the firm Manweiler, Bevis and Cameron, P A, also specializing as a litigation attorney. Since 1992, Judge Manweiler has served as an Adjunct Professor at Boise State University, Department of Criminal Justice. Judge Manweiler holds a Bachelor's Degree in Political Science from the University of Colorado at Boulder and a Juris Doctor from the University of Idaho College of Law. He is a member of the American Bar Association, Idaho State Bar, 4th District Bar Association, the Idaho Juvenile Rules Committee, Idaho Association of Criminal Defense Lawyers, the Idaho Law Foundation, the Idaho Trial Lawyers Association, the National Business Institute, and Idaho Trial Lawyers Association (past president 2000-2001). Judge Manweiler also serves on the Executive Committee, Children at Risk Evaluation Services (CARES) and the Advisory Board of the Idaho Volunteer Lawyers Program (IVLP). Judge Manweiler's court assignment will be to the Ada County juvenile court.

IDAHO LAWYER ASSISTANCE PROGRAM (LAP) – The LAP helps and supports lawyers who are experiencing problems associated with alcohol, drug and/or mental health issues. The program also focuses on educating legal professionals and their family and friends about the causes, effects and treatment of alcohol and drug dependency, depression and mental health problems.

For further information, please contact the LAP by phone at (208) 323-9555, or by email: LAP@southworthassociates.net John Southworth, LAP Program Coordinator, is also available 24 hours a day at (208) 891-4726.

2006-2007 IDAHO STATE BAR ANNUAL DIRECTORY (DESKBOOK) – The DeskBook will be mailed the end of April. If you receive the Advocate you will also receive a copy of the DeskBook. If you would like more copies for your office please call Bob Strauser (208) 334-4500 to place an order, or access our website (Idaho.gov/isb) to download an order form.

NATIONAL BOARD OF TRIAL ADVOCACY (NBTA) NATIONAL CERTIFICATION EXAM - attorneys interested in achieving national trial certification in the specialties of civil, criminal, family law trial advocacy and social security disability advocacy should send an NBTA application prior to March 1, 2006 to be eligible to sit for the April 22, 2006 examination. Contact information: Gwen Coutu, NBTA, (508) 364-6565 or www.nbtanet.org <http://www.nbtanet.org>.

NATIONAL LEGAL FICTION WRITING COMPETITION FOR LAWYERS - SEAK, Inc., a provider of continuing education and professional training for lawyers, is sponsoring the 5th Annual legal fiction writing competition for lawyers. The competition is open to any licensed attorney in the U.S. and its territories. A short story or novel excerpt in the legal fiction genre should be submitted. There is no fee to enter the competition and authors will maintain the original copyright to their materials. A cash prize of \$1,000 will be awarded to the First Prize winner. The deadline for submissions is June 30, 2006. For more information, interested attorneys should contact Kevin J. Driscoll, Esq., at 508/548-4542, or kevin.driscoll@verizon.net



2005—The Year in Review

Diane K. Minnich



The Idaho State Bar has completed another year; a year with new ideas and activities as well as the administration of the Bar's ongoing programs and responsibilities. Below are the highlights of the Bar's work in 2005.

ADMISSIONS

The reciprocal admissions program, in its fifth year, allows attorneys from Oregon, Washington, Utah and Wyoming to be admitted to the Idaho Bar without taking the bar exam. Pursuant to Resolution 05-2, the Bar plans to submit proposed rules to the Idaho Supreme Court allowing the Idaho State Bar to have reciprocity with all other states that allow reciprocal admission.

In 2005, 51 attorneys were admitted through the reciprocal admission process. Since the program began in October 2001, 272 attorneys have been admitted reciprocally.

| Bar Exam | | |
|----------|------------|-----------|
| Year | Applicants | Pass Rate |
| 2004 | 188 | 70% |
| 2005 | 207 | 74% |

As of December 2005, of the 4,709 lawyers licensed by the Idaho State Bar, 3,691 were active members, 158 judges, 34 house counsel members, 819 affiliate members, and 5 emeritus attorneys.

| ISB Membership | | |
|----------------|-------|--------|
| 12/04 | 12/05 | Change |
| 4,596 | 4,709 | 2.5% |

DISCIPLINE

Although phone inquiries and written complaints remained steady, the number of complaints opened again increased considerably as well as the number of ethics questions handled by Bar Counsel and Deputy Bar Counsel.

| Discipline | | | |
|-------------------|-------|-------|--------|
| | 2004 | 2005 | Change |
| Phone inq. | 1,433 | 1,343 | -6% |
| Grievances | 413 | 344 | -17% |
| Complaints opened | 112 | 185 | 65% |
| Ethics questions | 1,326 | 1,490 | 12% |

FEE ARBITRATION

The number of fee arbitration cases filed in 2005 was comparable to 2004; 60 were opened in 2004, 57 cases were opened in 2005.

| Client Assistance Fund Claims | | |
|-------------------------------|-------------|------------|
| Year | Claims Paid | Total Paid |
| 2004 | 10 | \$24,517 |
| 2005 | 16 | \$42,165 |

In 2005, 10 CAF claims were opened and 23 cases were closed.

| Lawyer Referral Service | | | |
|-------------------------|-------|-------|--------|
| | 2004 | 2005 | Change |
| Calls | 8,167 | 8,944 | 9.5% |
| Referrals | 5,451 | 6,090 | 10.5% |

About 38 percent of those individuals that receive a referral contact the attorney. The LRS continues to work closely with IVLP and other agencies to provide referrals for callers to attorneys and other appropriate services.

CASEMAKER

The Casemaker legal research library continues to offer a comprehensive, easily searchable, continually updated database of caselaw, statutes and regulations. The service is available to all Idaho State Bar active members and judges. By the end of 2005 the service was offered in 23 states and continues to improve and expand its legal information database. To access Casemaker, go to the ISB website, www.idaho.gov/isb. Each eligible attorney received a password; your username is your Bar number. If you have any recommendations for improving the Casemaker services, please contact me.

ANNUAL MEETING

The 2005 Annual Meeting was held at Templin's Resort in Post Falls. Meeting evaluations were positive although attendance decreased from the previous years. The Commissioners and staff continue to consider how to alter the annual meeting so it appeals to more attorneys. Suggestions are always welcome.

| Annual Meeting | | | |
|---------------------|---------------|--------------------|--------|
| | 2004 Boise | 2005 Post Falls | Change |
| Total Attendees | 396 | 286 | -28% |
| Attorneys Judges | 246 | 165 | -33% |

CITIZENS' LAW ACADEMY

The Citizens' Law Academy (CLA), a course that educates the public about the legal system and profession, continues to receive enthusiastic reviews from the participants. The program expanded again in 2005; courses for the public patterned after the CLA are now offered in all seven judicial districts.

SECTIONS

One new section was established in 2005, the Law Practice Management Section. The Sections of the Bar continue to actively assist their members with education, public service activities and opportunities to meet and work with attorneys that practice in similar areas. Section membership increased slightly in 2005 from 2,192 in to 2,281.

The work of the Bar is accomplished with the help of hundreds of volunteers each year. The Idaho legal community is committed to improving the profession and serving the public. Special thanks for the time, energy and expertise so many of you devoted to serving the Bar.

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DISCIPLINE

NOTICE TO SCOTT L. BURNUM OF SERVICE OF SUMMONS AND COMPLAINT

Pursuant to Idaho Bar Commission Rule 523(a), the Idaho State Bar hereby gives notice to Scott L. Burnum that the Idaho State Bar has filed a Summons and Complaint against him. The Idaho State Bar attempted to serve the Summons and Complaint upon Mr. Burnum by certified mail, return receipt requested at his address as filed with the Idaho State Bar and the certified mail was returned to the Idaho State Bar as unclaimed. Please be advised that service of these documents upon Mr. Burnum shall be deemed complete fourteen (14) days after the publication of this issue of The Advocate. Mr. Burnum, please contact Brad Andrews, Bar Counsel, at the Idaho State Bar, P.O. Box 895, Boise, ID 83701, (208) 334-4500, to obtain copies of the Summons and Complaint referred to in this notice.

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RECIPROCAL ADMISSIONS

The Idaho Supreme Court approved rules submitted by the Bar that allow reciprocal admission with Oregon, Washington, Utah and Wyoming (Idaho Bar Commission Rule 204A). Under these rules, certain Idaho, Washington, Oregon, Utah and Wyoming lawyers can apply to be admitted to practice in the other states without having to take additional bar exams. The following lawyers were admitted to the practice of law in Idaho.

Reciprocal Admission Applicants Admitted
(from December 1, 2005, to December 31, 2005)

Daniel K. Dygert
Logan, UT
University of Arizona
Admitted: 12/19/05

Marty E. Moore
Logan, UT
Florida State University
Admitted: 12/19/05

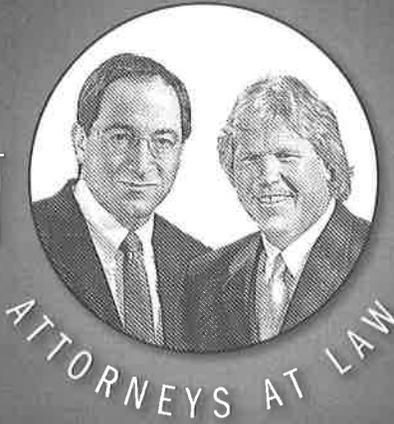
Lance M. Hester
Tacoma, WA
Seattle University
Admitted: 12/23/05

Juliana Christine Matthews Repp
Spokane, WA
Gonzaga University
admitted: 12/14/05

MCLE Extensions

March 1, 2006 is the deadline for the MCLE extension to complete your MCLE requirements. Visit our website at www.idaho.gov/isb for information on upcoming courses, video/audio tapes and online courses. Contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions on MCLE compliance.

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Message from the Indian Law Section Chair

Rob Roy Smith

Morisset, Schlosser, Jozwiak & McGaw

In mid-November 2005, Indian country and Indian law lost one of its great leaders, Vine Deloria, Jr. A member of the Standing Rock Sioux Tribe, Vine Deloria was the consummate champion of Indian rights – on the streets, in the media, in the halls of Congress, and in the classroom.

As an author of more than twenty books, he promoted tribal self-determination. As a historian, he explained Indian cultural beliefs. As an attorney and teacher, he worked tirelessly to affirm tribal sovereignty and to protect sacred sites. Indian law practitioners, and indeed all of us, can learn much from Deloria's words and actions. Deloria once explained his philosophy as follows: "You can bring up very radical things by using a moderate style." Using this style, Deloria helped galvanize social and institutional change that continues to be shaped and reshaped by Indian advocates today.

As Indian advocates continue to push for change, the United States Supreme Court often has the last word in shaping the lives of Native Americans and the powers of tribal governments. The Court has, in the 2005-2006 term alone, granted petitions for certiorari in two Indian law cases, denied certiorari in five other Indian law cases, and another seven petitions for certiorari in Indian law cases are pending. Already argued this term is *Wagon v. Prairie Band Potawatomi Nation*, 04-631, a case discussed in this issue, the holding of which has the potential to dramatically reshape state taxation of Indians and Indian tribes.

A number of other important cases are waiting for a certiorari decision. *Patterson v. New York*, 05-550, is a classic Indian treaty rights case presenting the question whether the Tuscarora Indian Nation's fishing rights, reserved in a 1794 Treaty, could have been ceded to the United States by another Indian tribe. *Skokomish Indian Tribe v. Tacoma Public Utilities*, 05-434, presents the important question of whether a treaty allows for a cause of action for damages against a state municipality for destruction of on- and off-reservation tribal fisheries. Also awaiting a possible date with the Court is a state's challenge to tribal authority to enforce its tribal motor vehicle code off-reservation (*Wagon v. Prairie Band Potawatomi Nation*, 04-1740). Suffice to say, this could be a path-making term for Indian law.

Numerous other Indian law cases are being decided closer to home. In November, in *Squaxin Island Tribe, et al. v. Stephens*, C3-39512, the United States District Court for the Western District of Washington followed the Ninth Circuit's lead in the Idaho tribal fuels tax case *Hammond v. Coeur d'Alene Tribe, et al.*, finding that Washington's motor fuels tax was barred as a matter of federal law as applied to Indian tribes operating retail gasoline stations within Indian reservations, because the legal incidence of Washington's tax falls on the retailer. The court did not decide

whether Washington's motor fuels tax illegally interferes with tribal economic development and should be preempted because the tribes' fuel blending and resale operations generates on-reservation value. In December, the Ninth Circuit Court of Appeals heard *Pakootas v. Teck Cominco*, 05-35153, a challenge brought by the former chairman of the Colville Confederated Tribes, among others, to apply the Comprehensive Environmental Response, Compensation and Liability Act to conduct in Canada that contaminates portions of the Columbia River located within the exterior boundaries of the United States. And, in Idaho, a major Indian law-related case came closer to finality in March of 2005, when the state of Idaho and the Nez Perce Tribe reached an historic agreement addressing traditional Indian water rights and environmental issues confronting all Idahoans in the Snake River Basin Adjudication.

Only time will tell whether any of these cases will become "landmark" decisions in Indian law. Without question, however, as the number of cases concerning Indian legal interests continue to rise, it becomes increasingly important for all Idaho practitioners to be familiar with Indian law. In this issue of the *Advocate*, the Indian Law Section is proud to provide an array of articles as diverse and rich as the field of Indian law itself. From the interplay between Latino and Indian issues in Idaho to questions of who exercises jurisdiction over Indian children, section members explore herein some important facets of this exciting practice. I hope you find these articles both interesting and helpful.

ABOUT THE AUTHOR

Rob Roy Smith is an associate attorney for the Seattle law firm of *Morisset, Schlosser, Jozwiak & McGaw*. The firm practices Indian law exclusively. The firm represents clients in three cases that are pending for certiorari this Term. He is former in-house counsel for the Nez Perce Tribe. He is a co-founder of the Indian Law Section and currently serves as the Section's Chair.

Alternatives to Incarceration for Tribal and Latino Juveniles

Natalie Camacho Mendoza
Camacho Mendoza Law Office

The Native American and Latino communities share priorities in many areas, including the area of public safety. To that end, Tribal leaders and Latinos have held discussions regarding our youth and Idaho's juvenile justice system. I have been fortunate to meet with Tribal leaders from the five Native American Tribes in Idaho, as an attorney and advocate for Idaho's Latino community.

The insidious nature of substance abuse, particularly methamphetamine use, in both the Native American and Latino communities, as well as the recent focus on gang activity, particularly Latino gangs, in Idaho has caused both communities to consider preventative measures to save our youth from possible incarceration or repeated experiences with law enforcement and the corrections system.

THE PROBLEM:

DISPROPORTIONATE INCARCERATION OF YOUTH OF COLOR

A disproportionate number of youth of color are held in detention nationwide. During the period of 1983 to 1997, the numbers of white youth in detention dropped, while the number of minority youth in detention rose to represent the majority of youth in detention.¹ Four out of every five new youth detained were youth of color.²

Research conducted by the Office of Juvenile Justice and Delinquency Prevention (a component of the United States Department of Justice), and the Building Blocks for Youth (a grant-supported alliance of youth advocates, researchers, law enforcement professionals, and community organizers) has documented the impact on minority youth of policies that expand the use of juvenile detention. According to their study, by 1997, in thirty states, minority youth represented the majority of youth in detention. This included states with small ethnic and racial minority populations. The study also showed that minority youth detained exceeded their proportion to the general population in every state, excluding Vermont.³ Data shows that when white and Latino youth with no prior admissions to a detention facility are charged with the same offenses, Latino youth are three times more likely to be incarcerated than white youth.⁴

THE SOLUTION: CULTURALLY-SENSITIVE PROGRAMMING

In some instances, minority youth are detained due to a belief that detention is the only place they will receive treatment.⁵ But diversion programs have been particularly helpful to minority youth. Idaho has joined numerous other states in using diversion programs, typically for non-violent and first time offenders. These programs forgo formal court proceedings, instead referring juveniles to treatment or care programs. Diversion programs decrease the rate of recidivism and avoid or reduce the stigma associated with a court conviction. They are used to improve a youth's social adjustment, strengthen family relationships, enhance self-esteem

and improve decision-making. Diversion programs have also reduced the cost for the state and can make a juvenile justice system more efficient.⁶

While this is a step in the right direction, the Latino and Native American communities agree that culturally- and linguistically-appropriate diversion programs are needed to improve the programs' effectiveness and to give court officials more options. Both the Latino and Tribal communities believe there are effective models available that can be implemented in Idaho.

Linguistically accessible programs are especially necessary where a family does not speak English, or has limited English proficiency. In such instances, parents or guardians can be cut off from communication between their children and decision-makers in the court system, or lack a full understanding of the judicial system's expectations. Particularly, in cases where medical or mental health matters are involved, communication is important so that those involved will understand what is happening to the youth.

Further, interpretation of results of assessments can be mistakenly interpreted if those working within the system do not have the necessary language and/or cultural competency skills. Without the appropriate bilingual services, it becomes problematic to communicate with parents, guardians or families about treatment, counseling and after-care plans for the youth.⁷ Cultural differences can also cause misunderstandings between families and personnel in the justice system.⁸

The Annie E. Casey Foundation has funded studies in several counties in the United States on the issue of disproportionate minority youth confinement.⁹ One such study showed that two counties that had successfully addressed the issue include Santa Cruz County, California and Multnomah County, Oregon. These counties have implemented culturally sensitive programs, thereby improving relationships with communities of color and decreasing the numbers of minorities detained in facilities. These counties also increased the number of contracts given to minority-run community-based organizations providing services to youth; by seeking out people in the community who could make these programs work and thereby creating a closer relationship with communities of color. Changes were also made to make assessment tools more culturally sensitive so as to avoid detaining more minority youth than necessary.

Santa Cruz County recognized the need to have bilingual staff and set goals to increase the number of bilingual staff to match the number of Latino youth in detention.¹⁰ The changes Santa Cruz County made decreased their overall detention rate for Latinos by 43 percent.¹¹

Multnomah County established a series of detention alternatives accessible to youth of color that included shelter care, foster

care, home detention, and day reporting centers. To implement these alternatives, the county contracted with service providers in communities of color where the majority of the youth lived. Cultural training was conducted to raise awareness about overrepresentation of youth of color in conjunction with implementation of substantive and practical management strategies.¹² Between 1994 and 2000, the number of Latinos admitted to Multnomah County detention dropped by half.¹³

The Saginaw Chippewa Tribe, located in Michigan, has also implemented juvenile diversion programs, recognizing the importance of viewing the problem from social, community, and individual perspectives. The Tribe's program evaluates the juvenile's family structure and needs, understanding that a diversion program works when it involves the whole family and community. The Tribe teaches culturally relevant parenting skills and provides community support for the healing the family needs.¹⁴ It also promotes community involvement, offering supportive relationships with authority figures and develops age-appropriate community resources to foster a sense of cultural and historical identity.¹⁵ Further, the Tribe has created an environment in which members of the community are proactive, establishing standards of education, community behavior, individual behavior and a core set of values that are acceptable to all.¹⁶

As the Tribe has recognized, without a connection to community and family, a child is at risk for alienation and a sense of disconnect. If youth feel no one cares, they may turn to criminal activity in order to find some attachment to a larger identity. It is this factor that makes gang activity attractive to both Latinos and Native American youth. The gang becomes their larger identity, a replacement for their own family or community¹⁷.

CONCLUSION

Funding of diversion programs is always an issue and concern. One possible source of funding for substance abuse diversion programs, however, is the federal Access to Recovery ("ATR") grant program.¹⁸ The state of Idaho has received a \$23 million ATR grant to be used over the next three years for the purpose of improving access to substance abuse treatment and improving treatment outcomes. Specifically, the grant is to be utilized to provide services to certain underserved priority groups in Idaho, including Native American populations and Latinos. Diversion programs tailored to these two communities would be a beneficial use of these dollars. Diversion programs as a whole cost Idahoans less money than juvenile detention, possible future recidivism and incarceration in adult prisons. This investment now will benefit all of Idaho.

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The Changing Landscape of Indian Estate Planning and Probate

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Without a historical perspective, Indian law can be a mystifying collection of inconsistencies and anachronisms.
Felix Cohen*

Seventy-one years ago, Felix Cohen, a prominent scholar and writer in the field of Indian law, asserted that an historical perspective is necessary for a clear view of the field of Indian law, which otherwise would seem complex and mysterious. An examination of the law pertaining to Indian wills and probate, however, tends to disprove Cohen's theory. Even with historical perspective, this body of law remains a mystifying collection of inconsistencies and anachronisms to practicing attorneys, and even more so to the Indian people whose lives are affected by the myriad of statutes, court decisions, treaties and administrative regulations that define this body of law. Law pertaining to Indian wills and probate serves as a good illustration, if not a prime example, of a discrete but extremely complex body of law that has historically impacted and continues to impact the lives and property of Indian people directly and indirectly.

The history itself is complex. In summary, it began when tribally-owned reservations were surveyed, divided into parcels of 80 to 160 acres and conveyed to individual tribal members pursuant to the General Allotment Act of 1877¹ and other acts and treaties. These laws reflected a policy that was aimed at eliminating the need for tribal existence and the guardian-ward relationship² by having Indian people turn to agricultural pursuits. Allotted parcels or "Allotments," were held in trust,³ which means that the United States held legal title to the property while tribal members held the right to use the property under beneficial title.

The Allotment Act required that upon the death of the allottee, beneficial ownership would pass in accordance with state laws of intestate succession.⁴ The passage of undivided interests over the generations since the Allotment Act was implemented has resulted in allotments often having hundreds or thousands of individuals holding undivided interests in one allotment. This process, often referred to as "fractionation," has progressed to the point where ownerships as small as one nine-millionth have been identified.⁵ The allotment policy was ultimately recognized as a failure⁶ because it resulted in the loss of over two thirds of Indian lands, some 90,000,000 acres, from Indian ownership by 1934.⁷

The probate of interests in trust allotments and trust personality occurs through a federal probate process.⁸ The federal probate process is backlogged, with some estates pending for years. Non-trust assets in an Indian person's estate may be subject to state and tribal probate as well and, in some instances, probates in all three jurisdictions can be necessary.

In October 2004, Congress passed the American Indian Probate Reform Act ("Probate Reform Act")⁹ which becomes effective in June 2006. The purpose of the Probate Reform Act is to slow or reduce fractionation and facilitate consolidation of frac-

tionated interests through a revision of the law governing Indian wills and probate. The Probate Reform Act is some 47 pages long. Consequently, only a brief description of some of its provisions is possible here. Generally, the Probate Reform Act encourages Indian people to have wills drafted, if for no other reason, than to avoid the effects of the Probate Reform Act if they were to die intestate.

The Probate Reform Act authorizes Indian Tribes, subject to some restrictions, to enact tribal probate codes that will govern the descent and distribution of trust property in the federal probate process.¹⁰ Tribal codes must be approved by the Secretary of Interior and cannot violate federal law.

Testamentary rules, including the rules regarding who can inherit trust property, are defined under the Act.¹¹ Most interests must be devised in trust to eligible heirs, though some interests may be devised in fee to a non-Indian.¹² However, a tribe with jurisdiction over that parcel has the authority to interrupt the fee transfer by paying fair market value to the Secretary of Interior.¹³ Without express language to the contrary, any devise to a class of individuals will be presumed a joint tenancy with right of survivor. The Bureau of Indian Affairs is authorized to partition highly fractionated allotments, which means that it may consolidate ownership of undivided interests in one owner instead of the traditional definition of partition.¹⁴

Perhaps the most significant changes are found in the provisions regarding intestate succession. Rules differ based upon whether the testator's undivided interest in trust or restricted land is greater or lesser than five percent of the whole. If the interest is less than five percent:

- Only a spouse residing on the parcel may take a life estate.¹⁵
- Under the single heir rule, the remainder would go to the oldest surviving child; if no surviving child exists then to the oldest surviving grandchild; if none, to the tribe and, if none, then divided equally among co-owners.¹⁶
- A third party purchase at probate is permitted without the consent of the heir.¹⁷

If the interest is greater than five percent, some of the provisions allow the following:

- Interests will pass to surviving spouse in a life estate without regard to waste and regardless of whether the spouse resides on the parcel at the time of death.¹⁸
- Remainders pass to children who are eligible heirs in equal shares by right of representation.¹⁹
- If no children survive then to grandchildren, then

great-grandchildren, then to surviving parents, then to surviving siblings, then to tribe unless a co-owner offers to purchase the interest.²⁰

- Interests may be purchased at probate only with the consent of the intended heirs.²¹

A thorough study of the Act is necessary to grasp the multitude of changes it creates.

For many years, the Bureau of Indian Affairs (“BIA”) drafted wills for tribal members. In April of 2005, the BIA announced that it would no longer provide this service and it would no longer store wills as it had previously done for decades. These announcements, coupled with the substantial changes wrought by the Probate Reform Act, created a vast void in terms of estate planning services as well as advice and information to tribal members.

The Institute for Indian Estate Planning and Probate (“Institute”) was established in May of 2005 and opened its doors at the Seattle University School of Law on August 1, 2005, with the mission of attempting, at least in part, to meet these needs in Indian Country. The Institute oversees three estate planning projects funded by the Indian Land Tenure Foundation,²² is administering a \$519,000 contract with the Department of Interior for estate planning pilot projects in the Northwest and Great Plains regions, will work to establish new projects as funding permits, will engage in fund-raising activities to support this work and will provide training at all levels on estate planning in Indian Country, including training on the new Probate Reform Act. The Institute will host a national symposium on the Probate Reform Act and estate planning in Indian Country on March 14 and 15, 2006, at the Seattle University School of Law. More information about the Institute is available at <http://www.indianwills.org>.

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* **Felix Cohen**, *Handbook of Federal Indian Law* 2 (1934).

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Doe v. Mann: The Indian Child Welfare Act, The Rooker-Feldman Doctrine, and Public Law 280

Clay Smith
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Most lawyers in Idaho and elsewhere encounter Indian law issues rarely if at all. One area where ordinary practitioners may cross paths with Indian law is in child custody matters subject to the Indian Child Welfare Act. Although litigation under this statute has been limited almost entirely to state court proceedings, a recent Ninth Circuit Court of Appeals decision—*Doe v. Mann*—presages greater lower federal court supervision over state court decision-making. This article uses *Mann* as an opportunity to explore not only the Act's basic requirements in a state like Idaho that has elected under federal law to assume jurisdiction over neglect and abuse proceedings arising on reservation, but also the potential for increased lower-federal court oversight.

Passed in 1978, the Indian Child Welfare Act (ICWA)¹ responded to what Congress viewed as "[t]he wholesale separation of Indian children from their families" through various methods of state court voluntary or involuntary termination of parental rights or other removal of Indian children from their families.² Its importance can be seen in one telling statistic: 46 percent of all reported state court decisions issued between July 2004 and June 2005 and digested under the West system's "Indians" topic heading involved ICWA-related questions.³

Because ICWA focuses on state court "child custody proceedings,"⁴ federal court decisions have been infrequent. The Ninth Circuit's recent decision in *Doe v. Mann*,⁵ however, may signal a change to greater federal judicial oversight of state court decision-making. *Mann* also does double duty by addressing another question significant to Idaho practitioners: the proper application of Public Law 280.⁶ That 1953 statute, as amended, directed six states and permitted others to assume civil and criminal jurisdiction over Indian country within their borders.⁷ Idaho opted to assume jurisdiction over certain civil and criminal matters, including "dependent, neglected, neglected and abused children" and "domestic relations," in 1963.⁸ After a short summary of ICWA's substantive provisions, the Ninth Circuit's reasoning in *Mann* and the decision's possible ramifications with respect to (1) collateral federal-court review of state child custody determinations and (2) the scope of the ICWA "referral jurisdiction" obligation in Idaho are discussed.

THE INDIAN CHILD WELFARE ACT: A BRIEF OVERVIEW

The ICWA imposes various procedural and substantive obligations on state courts when an "Indian child"⁹ is the subject of a child custody proceeding. Central among these obligations are certain limitations on the exercise of state court jurisdiction. Tribes, thus, are given exclusive jurisdiction over all child custody proceedings when the Indian child resides or is domiciled on the involved tribe's reservation "except where such jurisdiction is vested in the State by existing Federal law" or the child is a ward of the tribal court.¹⁰ In foster care and parental rights termination proceedings (but not preadoptive or adoptive placement matters) when the child is not domiciled or does not reside on reservation, the state court is required "in the absence of good cause to the contrary" and subject to tribal court declination, to

"transfer [the] proceeding to the jurisdiction of the [child's] tribe, absent objection by a parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe."¹¹ Notice of the right to intervene in the state court proceeding must be given to any non-party parent or "Indian custodian" and to the child's tribe.¹² The "referral jurisdiction" subsection contains no federal law exception comparable to the proviso in the "exclusive jurisdiction" subsection.

The ICWA supplements state law requirements in child custody proceedings over which state courts exercise jurisdiction. As to foster care placement and parental rights termination proceedings, the party seeking the placement or termination must establish both "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family and that these efforts have proved unsuccessful"¹³ and that continued custody by the parent or Indian custodian will result in serious emotional or physical damage to the child.¹⁴ As to preadoptive and adoptive placement proceedings, ICWA prescribes various safeguards aimed at ensuring that parental consent is voluntary¹⁵ and allows any adoption consent to be withdrawn prior to the final decree.¹⁶ Last, as to state-court placement determinations, the statute mandates that certain preferences be followed, absent good cause, which favor placement with the child's "extended family," with another tribal member or Indian, or with a tribally or Indian-organization sanctioned alternative.¹⁷

The ICWA also authorizes collateral review of state-court child custody proceeding orders:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.¹⁸

The statute thus limits challenges to its jurisdictional requirements and compliance with its standards for the conduct of foster care, parental rights termination and adoptive placement proceedings, thereby excluding actual placement determinations claimed as inconsistent with § 1915. Prior to *Mann*, little federal court recourse to the collateral review provision had been made,¹⁹ and that component of the law was described by one commentator as a "toothless saber."²⁰ The ICWA further authorizes collateral challenges to consensual parental rights termination orders and adoptive placements where the consent was obtained by fraud or duress.

DOE V. MANN

The plaintiff in the *Mann* litigation is a mother whose parental rights were terminated in a California child custody proceeding. She is a member of a federally recognized tribe and resided on its reservation

with her child, also a tribal member, at the time of the proceeding. The mother did not appeal the superior court's termination order but instead sought federal court review under § 1914 a year and a half after the order's issuance.²² A number of issues were raised in the complaint, and the district court issued a decision in 2003 that resolved, *inter alia*, whether the *Rooker-Feldman* doctrine—which generally precludes a collateral attack on a state court judgment in the lower federal courts²³—applies in light of § 1914 and, if not, whether the mother's tribe possessed exclusive jurisdiction over the child custody proceeding through operation of § 1911(a).²⁴ The district court answered both questions in the negative, reasoning that "section 1914 grants federal courts the power to review state custody proceedings such as those here"²⁵ and that Public Law 280 constituted an "existing Federal law" for purposes of depriving the tribe of exclusive jurisdiction under § 1911(a).²⁶ The later holding provided the basis for the mother's appeal to the Ninth Circuit. The court of appeals' analysis was substantially more ornate, but it reached the same conclusion as to both issues.

ROOKER-FELDMAN DOCTRINE ANALYSIS

Like the district court, the Ninth Circuit addressed the *Rooker-Feldman* issue first and similarly found the mother's suit, as a direct challenge to the state court judgment, to be within the doctrine's nominal scope.²⁷ That fact, however, was not deemed dispositive because "[t]he Constitution does not command the *Rooker-Feldman* doctrine" and it therefore can be negated by Congress—as through habeas corpus with respect to state criminal convictions and through the exercise of bankruptcy jurisdiction with respect to the discharge of state judgments related to debts.²⁹ The issue then became, in the court of appeals' view, whether the phrase "any court of competent jurisdiction" in § 1914 encompassed federal district courts.³⁰

In resolving that issue of statutory construction, the Ninth Circuit rejected the proposition that § 1914 itself embodies a grant of subject matter jurisdiction. The critical question consequently became whether it creates an implied right of action to challenge state court child custody proceeding orders that, in turn, gives rise to jurisdiction under 28 U.S.C. § 1331.³¹ The court professed little difficulty on this score, pointing to the 1991 decision in *Native Village of Venetie v. Alaska*³² which found an implied right of action with respect to ICWA's full faith and credit provision in 25 U.S.C. § 1911(d).³³ The existence of such jurisdiction meant, in its view, that the district court was a "court of competent jurisdiction" for § 1914 purposes.³⁴

PUBLIC LAW 280 ANALYSIS

The analysis then shifted to the effect of California's status as a Public Law 280 state. The panel ultimately rejected the state officials' position that the California child dependency statute falls within Public Law 280's grant of criminal jurisdiction but accepted their alternative argument that the statute is encompassed within Public Law 280's extension of state civil jurisdiction over Indian country. The court's analysis was elaborate and, with respect to the scope of Public Law 280 civil jurisdiction, the most extensive ever undertaken by a federal court. The court largely wrote on a clean slate because few federal and court decisions of any relevance exist, and it was therefore required to "navigate the question whether California properly exercised jurisdiction over [the involved child's] dependency proceeding without much of a compass."³⁵

The court of appeals considered first the possible applicability of Public Law 280's criminal jurisdiction component. It found the California's child dependency statutory scheme outside the grant of criminal jurisdiction because "[o]verall" that scheme is "aimed at promoting the best interests of the child, not at prohibiting conduct."³⁶ Thus, "[w]hile some of the circumstances that trigger the statute, such as child abuse, may constitute criminal violations under different parts of the California code, the statute itself does not require proof of a criminal violation nor does it prohibit such conduct."³⁷ Dependency proceedings, moreover, are not "punitive" and are accompanied by "procedural protections" that "lie somewhere between criminal and civil in nature."³⁸ The court reached the same conclusion when the California statute was viewed with reference to the "shorthand" civil regulatory/criminal prohibitory test adopted by the Supreme Court in *California v. Cabazon Band of Mission Indians*.³⁹ That now commonly applied test focuses on whether the regulated conduct "is generally prohibited by the state" as inimical to public policy or "whether the conduct is generally permitted by the state but subject to regulation."⁴⁰ The court found that relying on tribes "for protection of children against abuse and neglect did not violate the state's public policy"⁴¹ and, as such, could not satisfy the criminal-prohibitory standard—a seeming *non-sequitur* since the conduct of individuals, not tribes, vis-à-vis children is regulated under abuse and neglect laws.

Turning to Public Law 280's civil side, the Ninth Circuit defined the issue as whether a California child dependency proceeding is "civil adjudicatory" or more "analogous to a regulatory statute."⁴² The court concluded that it was the former because "[a]t the heart of the . . . proceedings is a dispute about the status of the child, a private individual."⁴³ As a consequence, "child dependency proceedings are more analogous to the 'private legal disputes' that fall under a state's Public Law 280 [civil] jurisdiction than to the [tax or gaming] regimes at issue"⁴⁴ in the two principally relevant Supreme Court Public Law 280 decisions—*Bryan v. Itasca County*⁴⁵ and *Cabazon*.

Aside from its "abstract analysis of Public Law 280," the court of appeals buttressed its conclusion with two references to the 1953 law in ICWA, "both of which indicate that Congress intended Public Law 280 states to have jurisdiction over dependency proceedings in Indian country."⁴⁶ It found the first of those references in § 1911(a) itself through the "Federal law" exclusion and the second in 25 U.S.C. § 1918(a) that provides a procedure for tribes "which became subject to State jurisdiction" under Public Law 280 to "reassume jurisdiction" over such proceedings.⁴⁷ "Through use of the term 'reassume,'" the court reasoned, "Congress manifested its awareness that Public Law 280 states would continue to exercise jurisdiction over child custody proceedings, both voluntary and involuntary."⁴⁸ It added that "[s]ection 1918(a) would make little sense unless § 1911(a) permits Public Law 280 states to exercise jurisdiction over child custody proceedings."⁴⁹ The panel then rejected the mother's construction that would have limited Public Law 280 jurisdiction to voluntary—e.g., consensual adoption—proceedings because of, most important, §§ 1911(a) and 1918(a)'s references to "child custody proceeding[s]," a term that is defined to include both voluntary and involuntary proceedings. It deemed those references to reflect a "unitary concept" that did not admit to a distinction between such proceedings.⁵⁰ The mother has filed a petition for writ of certiorari with the United States

Supreme Court seeking review of this aspect of the Ninth Circuit's decision.⁵¹

MANN'S POTENTIAL RAMIFICATIONS IN IDAHO

Increased Re-litigation of Child Custody Determinations

A value often emphasized in child custody and adoption matters is stable, long-lasting relationships between children and their biological, adoptive or foster parents.⁵² So, for example, one of the most contentious issues under ICWA is whether the "best interests" of an Indian child—which often will include the impact of an existing familial relationship being disrupted—should be considered in deciding whether good cause exists not to transfer a child custody proceeding to tribal court under § 1911(b).⁵³ The child's best interests unquestionably become central under the ICWA when actual permanent placement is at issue.⁵⁴ There are accordingly compelling reasons for custodial determinations to have finality, and a core question raised by Mann is the extent to which § 1914 is intended to compromise that admitted value—i.e., to what degree do traditional principles of *res judicata* and collateral estoppel, now often referred to as claim and issue preclusion, cabin the potential for wholesale revisiting of settled child custody decrees?

Primary among the areas where doubt exists is the role of *res judicata* and collateral estoppel in the application of § 1914. The Tenth Circuit, as noted,⁵⁵ has found both doctrines available in federal court challenges by tribes to child custody proceeding orders. The state officials in Mann relied on these cases in advancing claim preclusion as a basis for dismissal before the district court, but that court deemed the Tenth Circuit reasoning inapposite because the involved tribes "had fully litigated the issues in front of a state court, lost, and then tried to have another 'bite at the apple' in federal court."⁵⁶ The mother here, however, raised no ICWA-based defenses before the California trial court, and thus "[a]pplying the principles of preclusion to alleged irregularities in the state custody proceedings . . . does not serve the judicial interest in efficiency or finality."⁵⁷ The Ninth Circuit did not discuss the claim preclusion issue substantively, alluding to the Tenth Circuit decisions only to observe that they did not consider the Rooker-Feldman doctrine.⁵⁸

The availability of *res judicata* and collateral estoppel defenses in challenges to previously entered child custody proceeding determinations must be determined by reference to the law of the state where the judgment was entered.⁵⁹ The Ninth Circuit held prior to Mann that, under California case law, the subject matter jurisdiction of a court could be attacked collaterally if the issue had not been raised and resolved in the prior litigation.⁶⁰ The Mann district court therefore properly concluded that the mother's claim concerning the improper exercise of state court jurisdiction was not barred by *res judicata* given the absence of any ruling on the issue by the California courts.⁶¹ The same result likely would obtain were an Idaho judgment at issue, since Idaho law appears comparable to California's. Non-jurisdictional defenses related to mis- or non-application of §§ 1912 and 1913, in contrast, should be susceptible to *res judicata* regardless of whether actually litigated in the state child custody proceeding⁶² and to collateral estoppel if actually litigated.⁶³ In that regard, the proper characterization of an alleged failure to transfer in accordance with § 1911(b) as a jurisdictional or non-jurisdictional issue for preclusion purposes is a

significant but undecided question.⁶⁴

Impact of Public Law 280 on "Referral Jurisdiction"

The Public Law 280 component of Mann's holding means that California courts need not be concerned over their ability to proceed forward on the merits of child custody proceedings involving Indian children domiciled or residing on reservation. The holding does not address the obligation of those courts under § 1911(b) with respect to Indian children who are not domiciled or resident within their tribe's reservation. That section, again, does not contain a "Federal law" exception. If it is assumed that the referral duty under the latter provision continues unabated, the quite odd situation of being required to refer a proceeding to a tribal court with respect to a child whose ties to the tribe's community is likely to be far more attenuated than those of a child whose proceeding is not subject to referral.

That Congress would have intended such an anomalous policy result seems improbable. This improbability is suggested as a textual matter by ICWA's Public Law 280 retrocession procedures. First, § 1918(a) provides that "[a]ny Indian tribe" subject to Public Law 280 jurisdiction "may reassume jurisdiction over child custody proceedings" by successfully petitioning the Secretary of the Interior. No reason exists to construe the required retrocession to distinguish between "child custody proceedings" involving Indian children residing on reservation and those residing off reservation. Second, § 1918(b) prescribes criteria to guide the Secretary in making the retrocession determination. Those criteria include the following:

In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.⁶⁵

Implicit in this authorization is the notion that the "referral" to tribes required under § 1911(b) is conditioned on the retrocession of "child custody proceeding" jurisdiction for a tribe in a Public Law 280 state. Any other construction renders superfluous the clause "which will enable tribes to exercise referral jurisdiction as provided in section 1911(b)." The Ninth Circuit thus has contrasted non-Public Law 280 states with Public Law 280 states on the basis that, in the former, "the state court must refer the dispute to the appropriate tribal court unless good cause is shown for the retention of state court jurisdiction" but that, in the latter, referral jurisdiction may be exercised only pursuant to secretarial authorization under § 1918 even though the tribe may retain concurrent inherent authority over custody determinations affecting tribal children.⁶⁶

Nevertheless, a literal reading of § 1911(b) can support the proposition that the referral duty exists without reference to retrocession under § 1918. This reading was adopted by the Alaska Supreme Court in *In re C.R.H.*⁶⁷ There, the court overruled *Native Village of Nenana v. State Department of Health and Social Services*,⁶⁸ and two decisions adhering to it,⁶⁹ which had relied on § 1918 for the conclusion that no referral jurisdiction existed with respect to off-reservation resident Indian children.⁷⁰ It reasoned that, in light of Congress' failure to include a "Federal law" exception in § 1911(b) and the subsection's explicit

extension to "any" state court proceeding for foster care placement or termination of parental rights, the provision "authorizes transfer to tribal courts regardless of whether or how P.L. 280 otherwise affects the tribes' jurisdiction."⁷¹ As to the rationale in *Nenana*, the Alaska court simply remarked in a footnote that the earlier case "based its analysis primarily on the language of ICWA section 1918" but that "we now find that section 1911 and not section 1918 controls this legal question."⁷²

The obligation to comply with the referral jurisdiction requirement where the Indian child's tribe is located in a Public Law 280 states presumably will receive further judicial attention at least in Ninth Circuit states, given *Mann and Native Village of Venetie*, if only because § 1911(b)-related notice issues account for a significant share of ICWA litigation. It must be emphasized in this regard that the issue of Public Law 280's effect will arise even where the forum is located in a non-Public Law 280 state, since the logic of those decisions indicates that the question is not whether the forum court is located in a Public Law 280 jurisdiction but whether the child's tribe is. It is equally important to remember that even if no obligation exists to refer a foster care or termination of parental rights proceeding, the other requirements in §§ 1912 and 1913 apply to the proceeding when the merits are determined.

Finally, the Idaho Supreme Court has addressed ICWA's jurisdictional provisions in only one decision, *In re Baby Boy Doe*,⁷³ noting that the district court declined to transfer a proceeding pursuant to § 1911(b) on the basis of a parental objection. The Idaho Attorney General's 1995 *Indian Child Welfare Act Manual*⁷⁴ assumed applicability of the referral provisions in § 1911(b) but did not discuss *Native Village of Venetie*.⁷⁵ There is thus no meaningful Idaho authority to guide divining the relationship between §§ 1911(b) and 1918 in the wake of *Mann*.

ABOUT THE AUTHOR

Clay R. Smith is a Deputy Attorney General in the Natural Resources Division of the Idaho Attorney General's Office, which he joined in March 2001. Prior to assuming his present position, he was employed in the Montana Attorney General's Office as an Assistant Attorney General (1984-1989) and as Solicitor (1989-2001). Mr. Smith was in private practice in Colorado and New Mexico between 1975 and 1983. He received his undergraduate degree from the University of Virginia and his law degree from the University of Denver. Mr. Smith was a co-chief editor for the first and second editions of the *Conference of Western Attorneys General's American Indian Law Deskbook* and chief editor for the third edition published in 2004. He also has been responsible for editing the annual supplements to that treatise. The views expressed in this article are solely his. Nothing in the article should be considered as reflecting the position of the Idaho Attorney General or the Idaho Attorney General's Office as to any issue discussed in the analysis.

ENDNOTES

¹25 U.S.C. §§ 1901-1963.

²H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S.C.A.N. 7530, 7531.

³The percentage was derived from a review of cases generated by the following Westlaw query: to(209) & da(aft 6/30/2004 & bef 7/1/2005). Digested but unreported decisions were excluded.

⁴The term "child custody proceeding" is defined to include four specific types of state court adjudications: foster care placements, termination of parental rights, preadoptive placements and adoptive placements. 25 U.S.C. § 1903(1).

⁵415 F.3d 1038 (9th Cir. 2005), *petition for cert. filed*, No. 05-815 (U.S. Dec. 19, 2005).⁶Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C.

§§ 1321-1325, and 28 U.S.C. § 1360).

⁷As originally adopted, the mandatory states were California, Minnesota, Nebraska, Oregon and Wisconsin, with one reservation excepted from the jurisdictional grant in Minnesota, Oregon and Wisconsin. Id., §§ 2, 4. The number of mandatory jurisdictions was increased to six with the addition of Alaska, then a territory, in 1958. Pub. L. No. 85-615, 72 Stat. 545 (1958). The Alaska inclusion made special provision for the Metlakatla Indian community, which is permitted to exercise criminal jurisdiction over the Annette Islands "in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended."

⁸Idaho Code § 67-5101; see generally Emily Kane, *State Jurisdiction in Idaho Indian Country Under Public Law 280*, 48-Jan *Advoc.* (Idaho) 10 (2005).

⁹An "Indian child" is defined as "any unmarried person who is under the age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4).

¹⁰*Id.* § 1911(a).

¹¹*Id.* § 1911(b).

¹²*Id.* § 1912(a). The term "Indian custodian" is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." *Id.* § 1903(6).

¹³*Id.* § 1912(d).

¹⁴*Id.* § 1912(c) & (f). The "clear and convincing evidence" standard is imposed with respect to foster care placements, while the "beyond a reasonable doubt" standard is imposed with respect to parental rights termination determinations. *Id.*

¹⁵*Id.* § 1913(a).

¹⁶*Id.* § 1913(c). The ICWA further provides that consent to parental rights termination can be withdrawn prior to final decree (*id.*) and that consent to a foster care placement can be withdrawn at any time (*id.* § 1913(b)).

¹⁷*Id.* § 1915(a) & (b). The scope of Indian child's "extended family" is defined in § 1903(2) through the term "extended family member." The child's tribe may modify the order of statutory preferences, and its modification is binding in subsequent placement decision-making "so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c).

¹⁸*Id.* § 1914.

¹⁹*Morrow v. Winston*, 94 F.3d 1386 (10th Cir. 1996) (abstaining *sua sponte* in challenge to state-court adoption proceeding); *Comanche Indian Tribe v. Horis*, 53 F.3d 298 (10th Cir. 1995) (relitigation by tribe of exclusive jurisdiction claim barred by collateral estoppel); *Kiowa Tribe v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985) (relitigation by tribe of ICWA-applicability claim barred by *res judicata*); *Navajo Nation v. District Ct.*, 624 F. Supp. 130, 134-35 (D. Utah 1985) (declining to issue declaratory relief over propriety of state trial court's exercise of jurisdiction where issue pending before state supreme court), *aff'd on mootness grounds*, 831 F.2d 929 (10th Cir. 1987).

²⁰B. J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Law*, 73 N.D. L. Rev. 395, 432 (1997) ("To date, no federal court has invalidated an arguably erroneous state court decision because the majority of federal courts have emasculated their authority to do so under the principles of full faith and credit. Section 1914 has proven to be a toothless saber").

²¹25 U.S.C. § 1913.

²²415 F.3d at 1040.

²³As the Supreme Court explained recently in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517 (2005), the *Rooker-Feldman* doctrine derives from two decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). 125 S. Ct. at 1521. The doctrine construes the Court's jurisdiction under 28 U.S.C. § 1257 over review of state court judgments to deprive lower federal district courts of subject matter jurisdiction, which they otherwise would have, when a direct challenge to the validity of a state court judgment is brought, 125 S. Ct. at 1526. The lesson to be taken from *Rooker-Feldman* is that parties ordinarily must seek review of state court judgments through normal appellate remedies.

²⁴*Doe v. Mann*, 285 F. Supp. 2d 1229 (N.D. Cal. 2003), *aff'd*, 415 F.3d 1038 (9th Cir. 2005).

²⁵*Id.* at 1234.

²⁶*Id.* at 1235-39.

²⁷415 F.3d at 1042 ("Mary Doe's federal claim is . . . a de facto appeal of a state

court judgment").

²⁸*Id.* at 1043.

²⁹*Id.*

³⁰*Id.* at 1045.

³¹*Id.*

³²944 F.2d 548 (9th Cir. 1991).

³³*Id.* at 553 ("[W]e see no reason that Congress would not have intended to give Indian tribes access to federal courts to determine their rights and obligations under the Indian Child Welfare Act. The Act includes an express congressional finding that state courts and agencies have often acted contrary to the interests of Indian tribes"). Section 1911(d) provides that "[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."

³⁴415 F.3d at 1046-47. Although the court of appeals found no need to rely on the Indian canons of construction in implying a right of action to enforce § 1914, it nevertheless observed that "[t]o the extent there is any uncertainty about the scope of federal authority to invalidate state court custody proceedings, a proposition we do not embrace," the canons required any such uncertainty to be resolved in favor of the "conclusion that Indians have a forum in federal court to challenge state child custody decisions." *Id.* at 1047.

³⁵*Id.* at 1053.

³⁶*Id.* at 1056.

³⁷*Id.*

³⁸*Id.* at 1057.

³⁹480 U.S. 202 (1987).

⁴⁰415 F.3d at 1054.

⁴¹*Id.* at 1058.

⁴²*Id.* The "civil adjudicatory" versus "civil regulatory" distinction derives from *Bryan v. Itasca County*, 426 U.S. 373 (1976). There, the Supreme Court held that a Minnesota personal property tax could not be applied pursuant to Public Law 280-based authority because "the consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws . . . of general application to private persons or private property,' and 'adjudicat[ion],' in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court." *Id.* at 384-85 (emphasis supplied); see *Sheppard v. Sheppard*, 104 Idaho 1, 13, 55 P.2d 895, 1107 (1982) ("Bryan draws a clear distinction between state regulatory and taxing activity, which is not authorized by Public Law 280, and state jurisdiction over private civil actions for divorce, which is authorized by that law").

⁴³415 F.3d at 1059.

⁴⁴*Id.*; see also *id.* ("resting our analysis simply on the Supreme Court's references to private disputes [in Bryan] would create a tortured result that is at odds with the overall structure of ICWA, as well as with the history of Public Law 280 and California child dependency proceedings").

⁴⁵426 U.S. 373 (1976); see note.42.

⁴⁶415 F.3d at 1061.

⁴⁷The mother's tribe had not sought to reassume jurisdiction from California over child custody proceedings pursuant to Public Law 280's retrocession procedures. *Id.* at 1066.

⁴⁸*Id.* at 1061.

⁴⁹*Id.* at 1062.

⁵⁰*Id.*

⁵¹*Doe v. Mann*, No. 05-815 (U.S. Dec. 19, 2005). The petition argues in part that while the Ninth Circuit correctly deemed the term "existing Federal law" in § 1911(b) to encompass Public Law 280, the court misconstrued the latter statute's grant of civil authority to extend beyond voluntary child custody proceedings between individuals—i.e., private adoptions. *Id.*, Petition for Writ of Cert. at 20-21.

⁵²See, e.g., *Doe v. State*, 137 P.3d 758, 761, 53 P.3d 341, 344 (2002) ("the child was in need of permanent bonding that can be provided by a stable family").

⁵³See generally *Amanda B. Westphal*, Student Article, *An Argument in Favor of Abrogating the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions*

of the Indian Child Welfare Act in South Dakota, 49 S.D. L. Rev. 107 (2003) (reasoning, like many other commentators, that at the transfer stage "the question state court judges should be asking is not what is best for the child, but rather who should decide what is best for the child"); Christine Matteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 Santa Clara L. Rev. 419, 441-42 (1998) (summarizing split among courts); cf. Carole Shultz Vento, Annotation, *Construction and Application of the Indian Child Welfare Act of 1978*, 89 A.L.R. 5th 195, § 6 (2001) (collecting cases relevant to transfer decision-making).

⁵⁴E.g., *In re Mahaney*, 51 P.3d 776, 784 (Wash. 2002) (best interests standard applies under both ICWA and state law, and the trial court thus was "entitled to examine the lack of a bond to the parent and the presence of a bond to the children's grandmother, who has been their parent figure for most of their lives").

⁵⁵See note 19.

⁵⁶285 F. Supp. 2d at 1234-35.

⁵⁷*Id.* at 1235.

⁵⁸415 F.3d at 1042 n.5, 1044 n.8.

⁵⁹E.g., *Coeur d'Alene Tribe v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004) ("[w]e 'give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered'"), cert. denied, 125 S. Ct. 1397 (2005) (quoting *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 81 (1984)).

⁶⁰*United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 250-51 (9th Cir. 1992).

⁶¹While "purported judgments entered by a court without jurisdiction over the subject matter are void and as such are subject to collateral attack" (*Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 626, 586 P.2d 1068, 1070 (1978)), no reason exists to believe that claim or issue preclusion cannot arise as to jurisdictional issues actually litigated. Cf. *Burns v. Baldwin*, 138 Idaho 480, 485, 65 P.3d 502, 507 (2003) (extending full faith and credit to a California judgment, notwithstanding a jurisdictional challenge, "where the question of jurisdiction was 'fully and fairly decided'").

⁶²E.g., *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990) (under *res judicata*, "a valid and final judgment extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action grew"); *Hall v. Forsloff*, 124 Idaho 771, 773, 864 P.2d 609, 611 (1993) (*res judicata* applies "'not only as to every matter offered and received to sustain or defeat the claim but also as to every matter that should have been litigated in the first suit'") (quoting *Joyce v. Murphy Land & Irr. Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922)).

⁶³E.g., *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 848, 55 P.3d 298, 302 (2002) (among required elements for collateral estoppel is that "the issue sought to be precluded was actually decided in the prior litigation").

⁶⁴The grounds for differing characterizations are obvious. On one hand, the state court admittedly has threshold subject matter jurisdiction—or else there would be nothing to "transfer" as contemplated under § 1911(b). On the other, the provision's animating purpose is to allocate jurisdiction between state and tribal courts over child custody proceedings involving Indian children. What does seem clear is that the characterization, given its integral relationship to the application of state law-determined preclusion principles, is not subject to a uniform, federal-law prescribed rule of decision. Cf. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) (Congress did not intend an individual state's law to supply definition for the term "domiciled" as used in § 1911(a)).

⁶⁵25 U.S.C. § 1918(b)(2).

⁶⁶*Native Village of Venetie I.R.A. v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991).

⁶⁷29 P.3d 849 (Alaska 2001); see also 2004 Alaska Op. Att'y Gen. 1 (discussing the effect of C.R.H. and, more generally, the status of retrocession under § 1918 in Alaska).

⁶⁸722 P.2d 219 (Alaska 1986).

⁶⁹*In re K.E.*, 744 P.2d 1173 (Alaska 1987); *In re F.P.*, 843 P.2d 1214 (Alaska 1992).

⁷⁰29 P.3d at 852.

⁷¹*Id.* at 853.

⁷²*Id.* at 852 n.13.

⁷³123 Idaho 464, 849 P.2d 925 (1993), appeal after remand, 127 Idaho 452, 902 P.2d 477 (1995).

⁷⁴*Id.* at 468, 849 P.2d at 929.

⁷⁵Office of the Attorney General, *Indian Child Welfare Act Manual* 39-40 (1995).

Idaho Supreme Court

Oral Argument Dates

As of December 23, 2005

Boise Term

Wednesday, February 1, 2006

8:50 a.m. Idaho Conservation League
v. State Dept. of Ag. #31751
10:00 a.m. Schwan's Sales v. ITD #31286
11:10 a.m. American Lung Assoc.
v. Dept. of Ag. #31842

Friday, February 3, 2006

8:50 a.m. Johnson Construction
v. Floyd Town Architects #31448
10:00 a.m. Joseph McNeal v. IPUC #31844
11:10 a.m. Gillespie v. Mountain Park Estates #31805

Monday, February 6, 2006

8:50 a.m. Riley v. W.R. Holdings #31414
10:00 a.m. LJD Holdings v. VFP VC #31749
11:10 a.m. Independence Lead Mines
v. Hecla Mining Co. #31042

Wednesday, February 8, 2006

8:50 a.m. Payette County v. Brandon Bay (Permissive) #31910
10:00 a.m. Sons & Daughters of Idaho
v. Idaho Lottery Comm. #31609
11:10 a.m. Schneider v. Howe #30248

Friday, February 10, 2006

8:50 a.m. Hart v. Hall (Permissive) #31126
10:00 a.m. Madsen v. Thomas #31172
11:10 a.m. Fenn v. Noah #31433

Idaho Court of Appeals

Oral Argument Dates

As of December 23, 2005

Boise Terms

JANUARY

Tuesday, January 10, 2006

9:00 a.m. State v. Wurdemann #30438
10:30 a.m. State v. Harvey #30608

Thursday, January 12, 2006

9:00 a.m. Lieurance-Ross v. Ross #31594
10:30 a.m. VACATED
1:30 p.m. State v. Lawson #30851

FEBRUARY

Thursday, February 2, 2006

9:00 a.m. Smith v. Wolff #31800
10:30 a.m. State v. Lewis #31684
1:30 p.m. State v. Hanson #31257

Tuesday, February 14, 2006

9:00 a.m. State v. Ojeda-Soto #31242
10:30 a.m. State v. Rodriguez #31575
1:30 p.m. State v. Field #31113/31114

Monday, February 27, 2006

9:00 a.m. State v. Powell #31156
10:30 a.m. State v. Jenkins #31683
1:30 p.m. State v. Irwin #30866/31200

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Taxing Times

The U.S. Supreme Court Muddies Indian Law Taxation Jurisprudence Again

Rob Roy Smith
Morisset, Schlosser, Jozwiak & McGaw

In the January 2005 issue of *The Advocate*, I wrote an article about shifts in judicial thinking regarding Indian tax law. In that article I encouraged Idaho practitioners to follow a number of tax law cases with potentially major ramifications for Indian tribes and the state of Idaho. One such case was a decision by the Tenth Circuit Court of Appeals in favor of the Prairie Band Potawatomi Nation, holding that federal law prohibited the state of Kansas from collecting its state motor fuels tax on fuel delivered to the tribe by a non-Indian distributor.¹ On December 6, 2005, in *Wagnon v. Prairie Band Potawatomi Nation*,² the United States Supreme Court overturned the Tenth Circuit's ruling in a major Indian law tax decision. The implication of what the Court has said about the tax relationship between tribes and states, however, remains as murky as it was thirteen months ago.

The Court's decision in the *Prairie Band* case was seven to two in favor of the state of Kansas. The majority ruled that the *White Mountain Apache Tribe v. Bracker* interest-balancing test does not apply to off-reservation transactions involving tribes or tribal members.³ The Court limited the balancing test, one of the fundamental tools available to tribes to preempt state taxation, exclusively to on-reservation transactions between a non-tribal entity and an Indian tribe or tribal member. This decision could usher in either a new era of conflict or of compromise between states and tribes.

THE LATEST WORD ON INDIAN TAX LAW

The Court's majority established the analytical framework for *Prairie Band* by noting that "under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences."⁴ Accordingly, the majority began with the "who," reasoning that where a legislature states where the legal incidence of a tax lies, such "'dispositive language' from the state legislature is determinative of who bears the legal incidence of a state tax."⁵ The majority noted that Kansas law "makes clear that it is the distributor, rather than the retailer, that is liable to pay the motor fuel tax" and concluded that the non-Indian distributor bears the legal incidence of the tax.⁶ The majority also concluded that Kansas' fuels tax is imposed on distributors' off-reservation receipt of motor fuel, resolving the "where" by finding that the taxable transaction occurs off-reservation when the distributor first receives the fuel in the state.⁷

With these fundamental facts disposed of, the majority concluded that the *Bracker* interest-balancing test applies only where "a State asserts authority over the conduct of non-Indians engaging in an activity on the reservation. It does not apply where, as here, a state tax is imposed on a non-Indian and arises as a result of a transaction that occurs off the reservation."⁸ In so doing, the Court expressly limited interest-based balancing to transactions with non-Indians occurring on-reservation, and found that *Prairie*

Band's efforts to apply interest-balancing off-reservation would be an "expansion of the application of the *Bracker* test [that] is not supported by our cases."⁹

WHAT THE COURT'S DECISION MEANS FOR TRIBES AND THE STATE OF IDAHO

Let's begin with what the Court did. The Court changed Indian tax law analysis by limiting interest-based balancing to factual scenarios where the state tax is imposed on non-Indians for on-reservation conduct. However, for the most part, the decision retains the same analysis that the Court has applied for the past twenty-five years in addressing state imposition of taxes on transactions on Indian lands, whether such transactions involve tribes or non-Indians.

First, the Court has not disturbed its holding in *Oklahoma Tax Commission v. Chickasaw Nation*, which established the bright-line rule providing a per se categorical bar on state taxes imposed on Indian tribes within Indian lands.¹⁰ Second, interest-based analysis, requiring a particularized inquiry into the facts to determine whether state, federal, or tribal interests predominate, remains a valid preemption test where a state tax is imposed on non-Indians for transactions with tribes or tribal members on reservation lands.¹¹ Third, the Court did not disturb the reservation value added inquiry, which focuses on the sale and provision of certain goods or services at tribally-constructed facilities on tribal lands.¹² The retention of these three tests suggests that state taxes might still be preempted in many circumstances.

The decision is also important for what the Court did not do. The Court declined to engage in the wholesale revision of Indian taxation jurisprudence requested by state of Kansas and fourteen state *amici*, including the state of Idaho. The states had argued for the elimination of all balancing tests in favor of a simple bright line rule governing all applications of state tax law to transactions involving Indian tribes. Although the Court upheld the Kansas tax at issue and limited *Bracker* interest-balancing to on-reservation conduct involving non-Indians, the Court declined to rewrite existing law to adopt a single bright-line test. This is good news for Indian tribes engaged in cutting-edge economic development activities.

THE FUTURE OF LEGISLATING LEGAL INCIDENCE

The Court also suggested new avenues for states to avoid state/tribal tax conflicts. First, the majority opinion seems to depart from the Ninth Circuit's recent holding in the Idaho fuels tax case *Coeur d'Alene Tribe v. Hammond*,¹³ where the Appeals Court concluded that legislative statements concerning the imposition of the legal incidence of a tax are not dispositive. The *Prairie Band* majority suggested that such statements are, in fact, dispositive,¹⁴ though the Court did not cite *Hammond*, or other cases following it.¹⁵ It is premature to speculate how the Court's statement may

affect future cases challenging state fuels tax statutes like those of Idaho and Washington, given that in interpreting these statutes, courts have rejected legislative proclamations of legal incidence, undertaking instead detailed analyses of the particulars of the tax scheme.

Second, the Prairie Band Court suggested in *dicta* a way that states might avoid thorny Indian tax cases in the future. The majority noted that if a state “would have been free to impose the legal incidence of its fuels tax downstream from the Indian retailers [on consumers], then [states] should be equally free to impose the legal incidence of its fuel tax upstream from Indian retailers notwithstanding the applicability of the interest balancing test.”¹⁶ In other words, the Court suggested that states might best avoid running afoul of Indian tax preemption where state legislators impose the legal incidence of state taxes on distributors.

It remains to be seen whether states will try to follow the Court’s suggestion. Of course, preemption (or the avoidance thereof) is never guaranteed, and tribes could still preempt state motor fuels taxes in such circumstances where a tribe may be acting as a fuel distributor or where sufficient value is being created on the reservation. Nevertheless, the Court’s suggestion is disappointing, as the Court has suggested means to potentially legislate around tribes rather than to encourage collaborative tax relationships between tribes and states where both sovereigns can share in tax revenues.

CONCLUSION

The Court’s decision suggests a rejection of judicial efforts to expand interest-based balancing to reflect the reality of economic development within Indian Country. However, this does not sound the death knell for tribal economic development. Whether tribes will begin blending and distributing their own fuel, or whether states and tribes will set aside differences to reach compromise solutions that benefit both governments (and taxpayers), remains to be seen. It is clear, however, that the only two choices available to tribes should not be to operate a reservation enterprise as an “unprofitable venture, or not at all.”¹⁷ Tribes and states must now seek new avenues and creative solutions to the problems posed by double taxation and the legislated economic stagnation of tribal economies.

ABOUT THE AUTHOR

Rob Roy Smith is an associate attorney for the Seattle law firm of *Morisset, Schlosser, Jozwiak & McGaw*. The firm practices Indian law exclusively, representing tribes and Indian businesses across the country. His practice focuses on taxation, economic development, and cultural and natural resource protection. Rob currently serves as the Chair of the Idaho Indian Law Section.

ENDNOTES

¹*Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004), 2546 U.S. _ (2005). A copy of the decision is available at <<http://www.supremecourtus.gov/opinions/05slipopinion.html>>. Justice Thomas delivered the opinion of the Court. Justice Ginsberg, joined by Justice Kennedy, filed a dissent. The dissent expressed its concerns with the harm to tribal self sufficiency caused by the “double taxing” of the Prairie Band’s gasoline station. *Prairie Band*, No. 04-631, Slip

Op. at Dissent 2.

³*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (applying balancing test to determine whether “the balance of federal, state, and tribal interests” enabled state to impose its tax on a tribal transaction with a non-Indian where the legal incidence of the state tax falls on the non-Indian).

⁴*Prairie Band*, No. 04-631, Slip Op. at 4.

⁵*Id.* at 5 (internal quotation omitted).

⁶*Id.*

⁷*Id.* at 9, 12-13.

⁸*Id.* at 1.

⁹*Id.* at 16, 17 (not citing any cases).

¹⁰515 U.S. 450, 453 (1995).

¹¹*Brackernote 3*; see, e.g., *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 836 (1982) (balancing applied to construction concerning on reservation school). The application of interest balancing never guaranteed preemption of the state tax at issue. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 183 87 (1989) (state permitted to impose severance tax on non Indian company leasing tribal lands oil and gas production).

¹²See, e.g., *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987); *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734 (9th Cir. 1995).

¹³384 F.3d 674 (9th Cir. 2004), cert. denied, 73 U.S.L.W. 3513 (Feb. 28, 2005).

¹⁴See *Prairie Band*, No. 04-631, Slip Op. at 5 and accompanying text.

¹⁵See, e.g., *Squaxin Island Tribe v. Stephens*, No. C03-3951Z (W.D. Wash., Nov. 22, 2005) (concluding that legal incidence is not dispositive).

¹⁶*Prairie Band*, No. 04-631, Slip Op. at 14, n.5 (citing *Chickasaw*, 515 U.S. at 460) (discussing placing the legal incidence of state taxation of consumers to avoid potential preemption).

¹⁷*Id.* at Dissent 2.



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CIVIL APPEALS

Arbitration

1. Whether the arbitrator exceeded his authority under the arbitration agreement and under the Idaho Uniform Arbitration Act and acted in manifest disregard of the law by disallowing attorney fees and costs, and whether the court improperly confirmed the arbitrator's decision declining the award of fees and costs.

Mark Mumford v. Cynthia Miller
S. Ct. No. 32061
Supreme Court

**ATTORNEY DISCIPLINE,
SANCTIONS, AND MALPRACTICE**

1. Did the court abuse its discretion by ordering Godbe to pay sanctions for filing a motion as soon as practically possible, which motion the court ultimately granted?

April Godbe v. Hon. John H. Bradbury
S. Ct. No. 31914
Supreme Court

**ADVERSE POSSESSION AND
PRESCRIPTIVE EASEMENTS**

1. Whether construction of gates and fences on the right of way easement of an Idaho irrigation district without the permission of that district violates the terms of I.C. § 42-1209.

Black Canyon Irrigation v. Fred Murphey
S. Ct. No. 31622
Court of Appeals

2. Did the court err in entering summary judgment that respondents have permanent, fixed express and implied easements over the Cold Springs Property?

Roger Turner v. Cold Springs Canyon
S. Ct. No. 31795
Supreme Court

ATTORNEY FEES AND COSTS

1. Are attorney fees and costs recoverable only if prayed for in a pleading?

Cobi Straub v. Donald Smith
S. Ct. No. 31955
Court of Appeals

FORFEITURE

1. Whether the factual findings of the court are supported by substantial evidence.

Nez Perce County v. John Reese
S. Ct. No. 31293
Court of Appeals

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to the Adys and in not allowing the Smiths to amend their complaint to allege a counterclaim?

Kimberly Ady v. Shelly Smith
S. Ct. No. 30214
Supreme Court

2. Whether the trial court erred in granting summary judgment by determining that even if the train's emergency whistle pattern had sounded, it would have made no difference.

Jean Hayes v. Union Pacific Railroad
S. Ct. No. 31764
Supreme Court

3. Whether the court erred in granting summary judgment in favor of Commonwealth despite the fact the district court concluded that appellant's interpretation of the policy was reasonable and equitable.

Point of Rocks v. Commonwealth Land
S. Ct. No. 31959
Supreme Court

EVIDENCE

1. Whether the court's findings of fact are supported by substantial and competent evidence.

Andrew Smith v. Zane Wolff
S. Ct. No. 31800
Court of Appeals

POST-CONVICTION RELIEF

1. Did the court abuse its discretion by failing to appoint counsel to represent Clapp on his petition for post-conviction relief?

Tyler Shawn Clapp v. State of Idaho
S. Ct. No. 31503
Court of Appeals

2. Did the court err when it dismissed Denetclaw's post-conviction claim that he received ineffective assistance of counsel by counsel's failure to properly advise him of the definition of "household member" in I.C. 18-918?

Anthony Denetclaw v. State of Idaho
S. Ct. No. 31755
Court of Appeals

3. Did the court err in denying DuValt's motion, brought pursuant to Idaho Rule of Civil Procedure 60(b), to reactivate his post-conviction petition?

Scott DuValt v. State of Idaho
S. Ct. No. 30907
Court of Appeals

3. Did the district court err by denying Dreier's motion for appointment of counsel because it considered the merits of Dreier's petition prior to appointing counsel?

Arnold Dreier v. State of Idaho
S. Ct. No. 31225
Court of Appeals

4. Did the court abuse its discretion when it denied Friel's post-conviction motion for mental examination made pursuant to I.C. § 18-211?

Michael Friel v. State of Idaho
S. Ct. No. 31482
Court of Appeals

5. Did the court err in summarily dismissing Hayes' post-conviction claims that his counsel was ineffective and his plea involuntary?

Derek Hayes v. State of Idaho
S. Ct. No. 31746
Court of Appeals

6. Did the court err in dismissing Jordan's petition for post-conviction relief because Jordan raised no genuine issues of material fact that, if true, would entitle him to relief?

Christopher Jordan v. State of Idaho
S. Ct. No. 31925
Court of Appeals

HABEAS CORPUS

1. Pollet v West- civil – habeas corpus
Did the court err in ruling Pollet was not entitled to credit for time served on parole?

Terry Pollet v. Olivia West
S. Ct. No. 31927
Court of Appeals

CRIMINAL APPEALS PLEAS

1. Did the court err when it denied Cook's motion to withdraw his guilty plea to a charge of possession of a controlled substance?

State of Idaho v. Guy Michael Cook
S. Ct. No. 31640
Court of Appeals

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the court err in denying the motion to suppress and in finding that the search warrant was valid?

State of Idaho v. Bran Bunting
S. Ct. No. 31655
Court of Appeals

2. Did the district court err by permitting Officer Moeller to testify regarding the carotid restraint technique?

State of Idaho v. Terri A. Payseno
S. Ct. No. 30774
Court of Appeals

3. Did the court err in concluding that officers entered Rodriguez's hotel room with consent of a person who had apparent authority to consent?

State of Idaho v. Matilde Rodriguez
S. Ct. No. 31575
Court of Appeals

4. Did the court err when it denied Sizemore's motion to suppress because the officers stopped and frisked Sizemore without reasonable suspicion?

State of Idaho v. William Sizemore
S. Ct. No. 31577
Court of Appeals

5. Did the court err when it concluded that the prosecutor's signing of a magistrate's name upon being told to do so by the magistrate was a defect in the search warrant mandating application of the exclusionary rule?

State of Idaho v. Cesia Zueger
S. Ct. No. 31761
Court of Appeals

6. Did the court err by denying Zuniga's motion to suppress because the evidence obtained from him was the result of an unreasonable seizure?

State of Idaho v. Eloy Zuniga
S. Ct. No. 30728
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in denying Dolsby's the opportunity to present at trial the statutory defense of misfortune under Idaho Code 18-201 (3)?

State of Idaho v. Larry Dolsby
S. Ct. No. 31636
Court of Appeals

2. Did the district court err by holding, as a matter of law, that a city employee cannot be guilty of misusing public moneys where he uses a credit card, as opposed to cash or checks, belonging to the city to make a private purchase?

State of Idaho v. James D. Pruett
S. Ct. No. 31530
Court of Appeals

3. Was Rogers entitled to an evidentiary hearing before the court terminated him from the drug court program?

State of Idaho v. Paul Rogers
S. Ct. No. 31264
Court of Appeals

SENTENCE REVIEW

1. May the court order a term of probation to begin consecutively to a second, separate term of probation?

State of Idaho v. Paul Clapper
S. Ct. No. 31578/31579
Court of Appeals

2. Whether the court correctly determined that Harvey's absences from supervision tolled his probation period so that it had jurisdiction to revoke probation and thus properly denied Harvey's Rule 35 motion to correct illegal sentence.

State of Idaho v. James Harvey
S. Ct. No. 31732
Court of Appeals

3. Did the court err in requiring Herman to reimburse Gem County for the cost of his public defender?

State of Idaho v. Martin Herman
S. Ct. No. 31335
Court of Appeals

4. Did the court err in denying Neep's motion for the appointment of the State Appellate Public Defender by concluding that, because Neep was ultimately convicted of a misdemeanor offense, he was not entitled to appointment of the SAPD under I.C. 19-870?

State of Idaho v. Brent Neep
S. Ct. No. 31711
Court of Appeals

WAIVER OF COUNSEL

1. Did Dalrymple knowingly, voluntarily and intelligently waive his constitutional and statutory right to assistance of counsel?

State of Idaho v. David Dalrymple
S. Ct. No. 31398
Court of Appeals

EVIDENCE

1. Did the court err in admitting the videotaped interview and other testimonial hearsay into evidence in violation of the Sixth Amendment confrontation clause?

State of Idaho v. Darren Hooper
S. Ct. No. 30728
Court of Appeals

2. Was the evidence presented at trial insufficient to support the jury's verdict finding Oliver guilty of driving under the influence?

State of Idaho v. Stanley Oliver
S. Ct. No. 31645
Court of Appeals

3. Was there substantial competent evidence presented at trial upon which a jury could find beyond a reasonable doubt that Romey assaulted two persons with a deadly weapon?

State of Idaho v. Dean Romey
S. Ct. No. 31101
Court of Appeals

4. Is there sufficient evidence in the record to support a conviction for aggravated battery where no evidence was presented that Skaggs caused great bodily harm?

State of Idaho v. Jeremiah Skaggs
S. Ct. No. 31602
Court of Appeals

PROBATION REVOCATION

1. Did the court violate Clyne's right to due process when it revoked probation without providing Clyne the opportunity to be heard in person and provide witnesses and documentary evidence?

State of Idaho v. Heath Clyne
S. Ct. No. 31769/31799
Court of Appeals

ADMINISTRATIVE APPEALS

Industrial Commission

1. Whether the Commission erred in failing to apply Pierstoff v. Gray's Auto Shop to the statements of Louise Bertagnolli that, had Jackson provided his notice of claim prior to the 60th day after Jackson was found to have suffered from an occupational disease, JST would have taken the same action that it took nearly 110 days after he was found to suffer from occupational asthma, when notice was actually given

Peter Jackson v. JST Manufacturing
S. Ct. No. 32001
Supreme Court

SNAKE RIVER BASIN

Adjudication Questions

1. Whether the district court erred in holding that the United States owns only "nominal legal title" to water within a federal reclamation project in Idaho, while irrigation organizations own "equitable title."

United States of America v. Pioneer Irrig.
S. Ct. No. 31790
Supreme Court

Summarized by:

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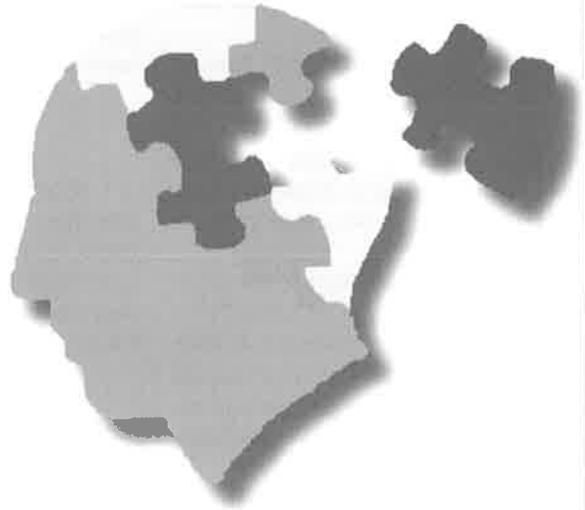
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February 2006 Idaho State Bar Examination Applicants

(As of January 11, 2006)

Listed below are the applicants who have applied to sit for the February 2006 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the Board of Commissioners in a signed letter by February 10, 2006. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

Douglas Gregg Abenroth
Burley, ID
Willamette University

Gregory Patrick Arakawa
Benicia, CA
Southwestern University

Merideth Colleen Arnold
aka Merideth Colleen Arnold Bigler
Donnelly, ID
Northeastern University

Melissa Kay Aston
Burley, ID
Willamette University

Shawn Parker Bailey
Boise, ID
Brigham Young University

Ruel Melvin Barrus
Meridian, ID
Arizona State University

Robert A. Bartlett
St. Maries, ID
University of Idaho

Stephanie Bennett
aka Stephanie Portela
Meridian, ID
Thomas Jefferson School of Law

Heidi Bode
Boise, ID
Franklin Pierce Law Center

Tessie Anan Buttram
Lawton, IA
Creighton University

Timothy Sol Callender
Boise, ID
University of San Diego

David Christopher Carroll
Spokane, WA
Oklahoma City University

Matthew Martin Chakoian
Seattle, WA
Drake University

David Alan Christensen
Bishop, CA
Brigham Young University

Leah Anne Clark-Thomas
aka Leah Anne Clark
Hailey, ID
University of Idaho

Erol Tyran Cobanoglu
Boise, ID
Thomas Jefferson School of Law

Sean Jeffrey Coletti
Twin Falls, ID
University of Connecticut

Cleve Byrd Colson
Pocatello, ID
University of Idaho

David Christopher Cooper
Boise, ID
University of Kansas

Michael D Davidson
Caldwell, ID
Gonzaga University

Charlene Winnette Davis
Boise, ID
University of Idaho

Juniper L. Davis
Moscow, ID
Lewis and Clark College

Luke Waldron Davis
Boise, ID
University of Idaho

Kristen Aynn Denker
aka Kristen Aynn Buckley
Boise, ID
John Marshall Law School

Merritt Lynn Dublin
aka Merritt Lynn Bingham
Boise, ID
University of Arizona

Melissa Anne Finocchio
aka Melissa Finocchio Burdekin
Boise, ID
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Marcus Lee Fontenot
Ville Platte, LA
Loyola University-New Orleans

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Lewiston, ID
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Deborah Alison Gates
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Santa Clara University

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aka Shelby Christine Harrell
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Fresno, CA
University of Idaho

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aka Bernadette Marie Curtis
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University of Utah

Theodore William Graham
Hailey, ID
Stanford University

Helaman Scott Hancock
Coeur d'Alene, ID
University of Idaho

Rusty Breck Hansen
Chubbuck, ID
University of Idaho

Paul Martin Harrigan
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Stanford University

Amy Suzanna Hart
Boise, ID
Hamline University

Jonathan Russell Hay
New York, NY
Harvard University

Jeffrey Pat Heineman
Boise, ID
Creighton University

Nathan Joel Henkes
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University of Wyoming

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Daniel T. Eismann
Roger S. Burdick
Jim Jones

Amended Spring Terms for 2006

Boise.....January 4, 6, 9, 11 and 13
Boise.....February 1, 3, 6, 8 and 10
Boise (Twin Falls appeals).....
March 1, 3, 6, 8 and 10
Coeur d'Alene.....April 3, 4, and 5
Lewiston.....April 6
Boise.....April 10
Boise (Eastern Idaho appeals).....
May 1, 3, 5, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 Spring Terms of the Supreme Court, 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.

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COURT OF APPEALS OF IDAHO

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Darrel R. Perry

Judges
Karen A. Lansing
Sergio A. Gutierrez

Regular Spring Terms for 2006

Boise January 10, 12, 17 and 19
Boise February 2, 14, and 27
Eastern Idaho.....March 13, 14, 15, 16 and 17
Moscow.....April 10, 11, 12, 13 and 14
BoiseMay 9, 11, 16 and 18
Boise.....June 6, 8, 13 and 15

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Merlyn W. Clark

Mr. Clark serves as a private hearing officer, federal court discovery master, neutral arbitrator and mediator. He has successfully conducted more than 500 mediations. He received the designation of Certified Professional Mediator from the Idaho Mediation Association in 1995. Mr. Clark is a fellow of the American College of Civil Trial Mediators. He is a member of the National Rosters of Commercial Arbitrators and Mediators and the Employment Arbitrators and Mediators of the American Arbitration Association and the National Panel of Arbitrators and Mediators for the National Arbitration Forum. Mr. Clark is also on the roster of mediators for the United States District Court of Idaho and all the Idaho State Courts.

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.

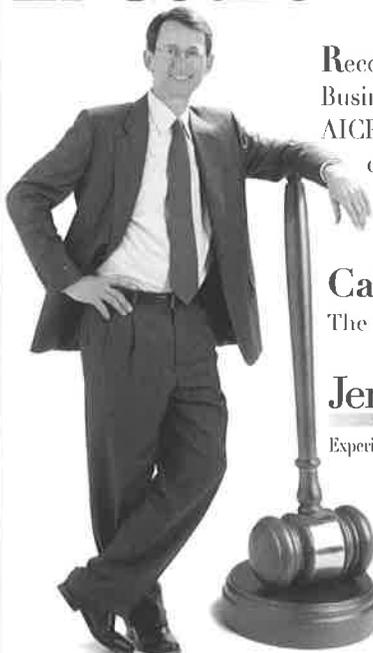
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- IN MEMORIAM -

Simon Spencer Martin
1945 – 2006



Simon Spencer Martin, 60, of Idaho Falls died Jan. 10, 2006. He was born Nov. 23, 1945 in Idaho Falls to Henry and Chloe Martin. He graduated from Idaho Falls High School and received a bachelor's degree in history and a juris doctor degree in law from the University of Idaho. He was a commissioned officer in the U.S. Army.

During his legal career Mr. Martin also acted as managing partner of the family ranch and farm operation. When he retired he was the Senior Staff Counsel for the U.S. Department of Energy's (DOE) Idaho Operations Office in Idaho Falls. Prior to working for the DOE he had been employed as a deputy Ada County prosecuting attorney in Boise, Idaho. He had also been a partner in the law firms of Albaugh, Smith, Pike & Martin; and Hansen, Boyle, Beard & Martin of Idaho Falls. He served on the Idaho Falls Public Library board of directors from 1980 to 1990, and served a term as chairman. He was admitted to practice before all state and federal courts in the state of Idaho, the U.S. Court of Appeals for the 9th Circuit, and the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims and the U.S. Supreme Court.

Mr. Martin is survived by his wife, Delores, of Idaho Falls; his son, Spencer (Emily) Martin of Moscow; and his sister, Margaret Martin (Keith) Kennedy of Idaho Falls. He was preceded in death by his parents.

-On The Move-

Michael S. Bissell and **Richard D. Campbell** are pleased to announce the opening of their new firm **Campbell & Bissell, PLLC**. Their address is 416 Symons Building, 7 South Howard Street, Spokane WA 99201, (509) 455-7100, www.campbell-bissell.com



Mr. Bissell represents and advises business owners in all types of matters. He has extensive litigation and mediation experience in a variety of areas, including real estate, contract, construction law, OSHA/WISHA, insurance, and general business matters. Mike earned his B.S. degree, summa cum laude, from the University of Idaho and his J.D. from the University of Washington. He is admitted to practice law before the state and federal courts in Washington, Idaho, Alaska, and the United States Court of Federal Claims. Prior to becoming a lawyer, Mike was an armor officer in the United States Marine Corps. His email is mbissell@campbell-bissell.com



Mr. Campbell has developed an extensive practice in construction law and is frequently requested to speak on construction law related topics. Mr. Campbell advises businesses, primarily those in construction, and represents those entities in mediation, arbitration and in court at the trial and appellate levels. Rich earned his B.S. degree from the University of Idaho and his J.D. Degree, cum laude, from Gonzaga University School of Law where he was a Thomas More Scholar and Executive Editor of the Law Review. He is admitted to practice before the state and federal courts in Washington, Idaho and Montana, as well as the Ninth Circuit Court of Appeals and the United States Court of Federal Claims. Prior to becoming a lawyer, Rich was an infantry officer in the United States Marine Corps. His email is rcampbell@campbell-bissell.com.



Anderson, Julian & Hull LLP, a Boise-based insurance defense firm, is pleased to announce that **Glenda M. Talbutt** is an

associate of the firm. Ms. Talbutt earned her Bachelor of Science degree, cum laude, in criminal justice from the University of South Carolina in 1984. She went on to receive her legal assistant certification, with honors, from the University of San Diego in 1994. She received her J.D. in 1997 from the University of Oregon. Ms. Talbutt was a Law Clerk for the Honorable Byron Johnson, Idaho Supreme Court from 1997-1998. Before joining Anderson, Julian & Hull she was a senior associate for five years with Brady Law, Chartered, in Boise. Her practice area will be primarily concentrated in the areas of insurance defense, education law, employment law, personal injury, and guardianships.



The law firm of **Hall, Farley, Oberrecht & Blanton, P. A.** is pleased to announce that **John T. Herndon** has joined the firm as their Administrator.

Mr. Herndon has more than 15 years of administrative experience with the firm of Elam & Burke, P.A., as well as over 12 years as an Administrator and Financial Consultant in Boise, Portland, and in New York City with the international accounting firm, Deloitte & Touche. He also served as a financial planning and budgeting manager for Boise Cascade Corporation. Mr. Herndon is a native of Salmon, Idaho. He earned a business undergraduate degree from the University of Idaho and a Masters degree from Denver University. He is the brother of Idaho Seventh Judicial District Court Judge, James Herndon of Blackfoot.



Michael D. Pogue and **Amanda A. Breen** have joined **Lawson & Laski, PLLC** as associates in its Ketchum office. **Mr. Pogue** received his J.D. from the University of San Francisco. His areas of practice include commercial

law and litigation. He also has a broad range of experience counseling companies on intellectual property and licensing issues. He can be reached at mdp@lawsonlaski.com.



Ms. Breen received her bachelor's degree from Stanford University and her law degree from the University of Utah. Her practice is concentrated in all areas of litigation, particularly in real estate and construction litigation. She can be reached at aab@lawsonlaski.com.

-Recognition-

John Swayne, Clearwater County Prosecuting Attorney from 1987 to his passing away on June 28, 2005, was posthumously awarded the Mills-Adler Award for the Prosecuting Attorney's Association at the recent Idaho Association of Counties annual conference. This is the highest award that can be given by the prosecuting Attorney's Association through the Idaho Association of Counties (IAC). Mr. Swayne is only the fourth Prosecuting Attorney to receive this great honor. This award began in 1993 as a way to recognize elected officials that have made significant contributions to the improvement of the Idaho Association of Counties through their dedicated services. The Mills-Adler Award is named in honor of two distinguished elected officials, the late Darwin Mills, Lincoln County Sheriff, and the late Betty Adler, Payette County Treasurer. Both Darwin Mills and Betty Adler exemplified the qualities all county elected officials attempt to strive for. Mr. Swayne served as Clearwater County Prosecuting Attorney for over 18 years. He was active in the Idaho Prosecuting Attorneys' Association, serving as president and as a mentor. He additionally made it a priority to attend IAC meetings and District meetings as often as possible.



Mark S. Freeman, Meridian, was selected as Meridian's 2005 Man of the Year. He is a partner in the law firm of Foley Freeman Borton, PLLC, a longtime member of the Meridian Chamber of

Commerce, serves on numerous committees, is a board member, and was President in 1995. He received the Chamber of Commerce President's Award in 1987 and 1992. Mr. Freeman is a member of the Rotary Club of Meridian, serving on numerous committees and as President, and was named a Paul Harris Fellow. He has also served on the Greater Boise Rotary Foundation, and was named a Robert S. Gibb Fellow in that organization. He is a member of the Meridian Optimist club, and serves on the Board of Directors of the Boys and Girls' Club of Ada County. He has served on the Meridian Education Foundation Board, and is a member of the National School Board Council of Attorneys. He served as a coach and umpire for Meridian Little League, served as an assistant coach for Meridian PAL soccer, and is also a supporter of the Meridian High School Band.



Susan M. Graham, The Graham Law Office, P.A., Boise, has successfully passed the National Elder Law Foundation's (NELF) examination for certification in Elder Law. The NELF is the only organization approved by the American Bar Association to offer certification in the area of Elder Law. An attorney certified in this field has an in-depth working knowledge of the legal issues that impact the elderly. There are 320 Elder Law specialists nationwide and Ms. Graham is one of three in Idaho. She is a board member and past President of the American Association of Trust, Estate and Elder Law Attorneys, past President of the Treasure Valley Estate Planning Council, and a member of the National Academy of Elder Law Attorneys. She was named an Accredited Investment Fiduciary by the Foundation for Fiduciary Studies, a nonprofit organization devoted to the development and enhancement of fiduciary standards of care for trustees, investment committee members and investment advisors. Ms. Graham has a Masters Degree in Business Administration from Boston University. She received her J.D. from the University of Idaho College of Law.



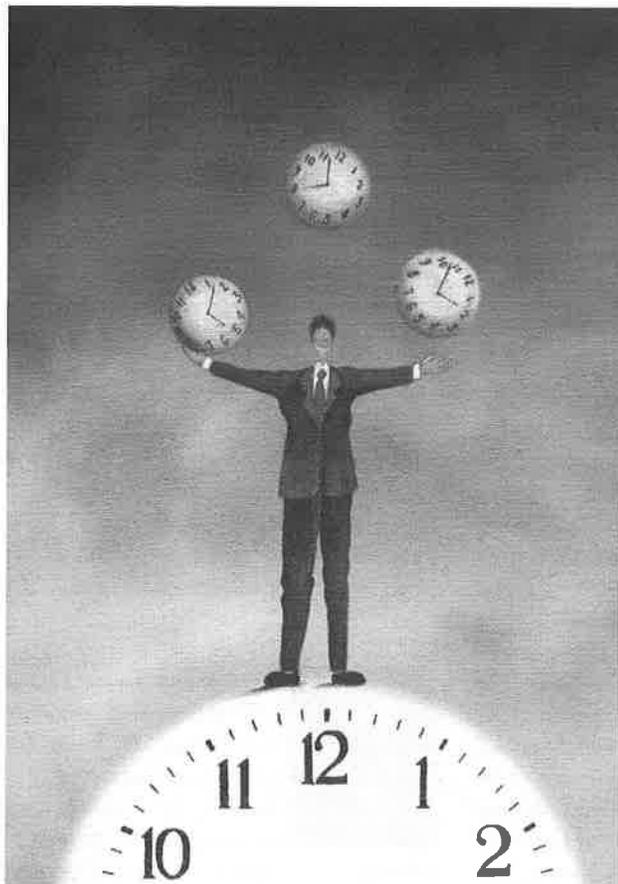
McAnaney & Associates, PLLC is pleased to announce that **Jason D. Melville** has become a partner of the firm. Mr. Melville's practice includes estate planning, business representation and succession planning, administration of estates, and tax planning and tax dispute resolution. Before joining the firm, he practiced law with Perkins Coie LLP and Brassey, Wetherell & Crawford in Boise. Jason is a graduate of Brigham Young University (B.A.), Texas Tech University School of Law (J.D.), and the University of Washington School of Law (LL.M. in Taxation). Mr. Melville can be contacted at McAnaney & Associates, PLLC, 1101 W. River Street, Suite 100, Boise, Idaho 83702, (208) 344-7500, jdm@mctaxlaw.com.



The law firm **Evans Keane LLP** is pleased to announce that **Jeremy P. Pisca** has been admitted as a partner of the firm. Mr. Pisca's practice is concentrated in the areas of real estate, construction, business and government relations. He serves as a lobbyist for the Idaho Building Contractors Association and as legal counsel to the Idaho Association of Realtors. He holds a law degree from the University of Idaho, and a Bachelor of Arts degree in political science from Boise State University.

-Announcements-

BLSA . . . the association for legal professionals will hold its monthly educational meeting on Tuesday, February 21, 2006 at 5:30 p.m. The education topic will be Understanding the Guardian Ad Litem Program. The speaker will be Tina Freckleton with the CASA Program. The meeting will be held in the U.S. Bank Building, 2nd floor, 101 S. Capitol Blvd., Boise, Idaho. For more information and to RSVP, please contact Bert Barton, PLS at 385-5372.



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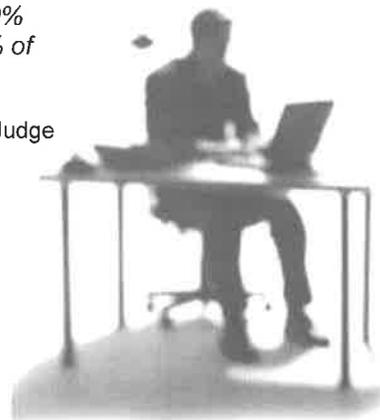
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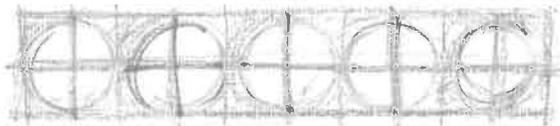
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The Idaho Law Foundation



Law Related Education

Lawyers in the Classroom

During the week of February 6-10, your colleagues will be in classrooms throughout the state helping students gain a better understanding of civil rights and the significant court cases that led to passage of the civil rights amendments to the U.S. Constitution.

The February teach-in week is the third of four opportunities this school year for lawyers to provide law-related information to Idaho students. The first two teach-ins focused on Constitution and Bill of Rights Day. The last teach-in opportunity will focus on Law Day with a theme of Separate Branches: Balanced Powers.

To date, 78 lawyers have signed up to participate in this project that has reached nearly 1000 students in Idaho. Statewide media coverage of individual lawyers and the project has been very positive.

Lawyers in the Classroom: Partners in Education is a project sponsored by the Law Related Education Program (LRE) of the Idaho Law Foundation. LRE will be recruiting lawyers and teachers for the 2006-07 school year in April.

Mock Trial Competition Begins February 25



Students throughout Idaho will begin presenting their cases and hoping for a chance to win the ultimate award—the chance to represent Idaho at the National Mock Trial Competition in Oklahoma in May. Regional competitions in Twin Falls and Coeur d'Alene will be held on February 25, while Idaho Falls and Boise will host competitions on March 4. The top teams from these regional competitions will advance to the state competition that will be held in Boise on March 14-15, at the Ada County, Federal and Supreme Courts.

The Mock Trial Case for 2006 is a civil case, *Franklyn v. Cartwright*. Franklyn is a student who is burned in a fire that happens in a barn owned by Cartwright. Cartwright rented the barn to two high school students who were supposedly storing equipment for their summer lawn business in the barn. Instead, the enterprising students open a bar and casino in the barn. It is during a night when

students are gathered to game and drink that the fire occurs. Franklyn is badly burned by the fire that was caused by faulty electrical wiring inside the barn. The barn owner's defense is that he had no knowledge that his barn was being used for a purpose other than the one he agreed to when he rented it to the two young men. To find out more about the exciting conclusion to this case, tune into the competition in your area. Results will also be posted on the Bar's website the day after each competition.

Eighty-one attorneys, judges and community leaders will act as competition judges statewide. Another 15 attorney and community volunteers will spend countless hours organizing and conducting the competitions.

The Mock Trial Competition is coordinated by the Law Related Education Program of the Idaho Law Foundation. Law Related Education empowers young people by providing practical information about the law and the legal system and educating youth about how they can become effective, participating citizens.

For more information about Mock Trial or Law Related Education contact Becky Jensen, at bjensen@isbidaho.gov or (208) 334-4500.

Idaho Volunteer Lawyers Program

SPECIAL THANKS

The total value of legal services donated by Idaho State Bar members and other legal professionals through the IVLP in 2005 was **\$1,606,958**—not a trivial number. While the higher-than-usual amount is due in part to IVLP's "cleaning up" old CASA cases, it points to the significant contributions Idaho attorneys have made over many years. The 132 attorneys listed below represented (some cases still open) IVLP clients in divorce, modification, custody, guardianship, wills, non-profit incorporation, immigration, bankruptcy, civil rights, consumer or SSI cases in 2005. The value of the attorney's services far exceeds the numbers we write on the books. How can you put a number to what it means to a grandparent to be able to legally protect and provide for grandchildren who have been neglected or abused by their own parents? We cannot say thank you loud enough to these wonderful volunteers.

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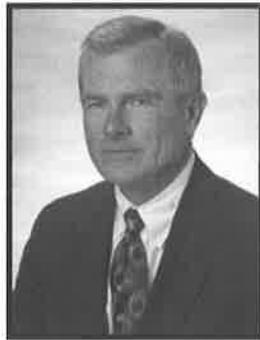
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Idaho Network to End Domestic Violence & Trafficking Against Immigrants

Kelly Miller

Idaho Coalition Against Sexual & Domestic Violence

In May 2005, Legal Momentum facilitated a six-state Summit on Domestic Violence and Immigrant to bring attorneys, victim advocates, and law enforcement together to develop strategies to address domestic violence and immigration issues in their states. Professor Monica Schurtman, University of Idaho, College of Law, served as the team leader for Idaho and invited representatives from over ten organizations including Catholic Charities, Idaho Legal Aid Services, the Idaho Coalition Against Sexual & Domestic Violence, and the private bar to participate.

As a result of the Summit, the Idaho Network to End Domestic Violence & Trafficking Against Immigrants was formed with the mission to work together to reduce and eliminate domestic violence and sexual assault against immigrants. The Idaho Network to End Domestic Violence & Trafficking Against Immigrants' goals are to identify statewide and regional resources; strengthen access to statewide and regional resources; establish infrastructure to enhance services; and create a unified voice. The Network now has more than sixty members including representatives from immigration service providers, prosecutor's offices, the Attorney General's Office, domestic violence and sexual assault service providers, law enforcement, women's advocacy organizations, and private attorneys.

The Idaho Network to End Domestic Violence & Trafficking Against Immigrants is actively working to alert immigrant victims of domestic violence, domestic violence and sexual assault service providers, law enforcement, and the private bar of provisions under the Violence Against Women Act, whereby those who are or have been

spouses or children of United States citizens or lawful permanent residents may qualify for immigration status under the VAWA provisions. Generally, the self-petitioner must show through "any credible evidence" that he or she was subjected to physical abuse or extreme mental cruelty and that they have "good moral character." The self-petitioner must also show evidence of a good faith marriage whereby the applicant must show that they did not marry your abuser solely for the purpose of gaining immigration status in the United States.

In 2000, Congress extended immigration relief to immigrant victims of sexual assault, human trafficking, and other violent crimes who cooperate in criminal investigations or prosecutions. Immigrant victims can obtain immigration relief without their abusers' cooperation or knowledge. Despite the ability to qualify for legal immigration under the Violence Against Women Act, many eligible immigrant victims of domestic violence, sexual assault, child abuse, or trafficking are still being deported.

In an effort to strengthen legal resources for immigrant victims of domestic violence, the Idaho Network to End Domestic Violence & Trafficking Against Immigrants conducted a free CLE on Immigration Basics at Idaho POST Academy on November 17, 2005. Over eighty-five persons attended the training, including attorneys, law enforcement, victim advocates, and domestic violence service providers. Robert Mather, Department of Homeland Security USCIS provided an overview of the immigration process and information on how to determining a client's immigration status. Monica Schurtman, Professor University of Idaho College of Law, Kathryn Railsback, Attorney, and Anna Almerico

with Catholic Charities Domestic Violence Immigration Program

Under the Violence Against Women Act. And Wendy Olson, Assistant U.S. Attorney reviewed federal statutory criminal laws relating to domestic violence and immigration.

Attorneys experienced in the complicated self-petition process as well as other legal remedies under VAWA have agreed to mentor attorneys willing to represent immigrant victims of domestic violence pro bono through the Idaho Volunteer Lawyer's Program. Additional trainings are planned for Moscow and for Pocatello in 2006. Attorneys are invited to become members of the Idaho Network to End Domestic Violence and Trafficking Against Immigrants. Meetings are held every two months and are facilitated by the Idaho Coalition Against Sexual & Domestic Violence. For more information on the Idaho Network to End Domestic Violence & Trafficking Against Immigrants contact Kelly Miller, Legal Director, Idaho Coalition Against Sexual & Domestic Violence at kmiller@idvsa.org or call 208 384-0419.

ABOUT THE AUTHOR

Kelly Miller is the Legal Director for the Idaho Coalition Against Sexual & Domestic Violence.

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ATTORNEYS AT LAW

The firm is pleased to announce that

JOHN R. KORMANIK
has become a shareholder of the firm

Mr. Kormanik, is a 1998 *magna cum laude* graduate of California Western School of Law. He became a member of both the California Bar and Idaho Bar in 1998. Mr. Kormanik is also admitted to the U.S. District Court, District of Idaho. Since joining White Peterson in 2003, Mr. Kormanik has focused his practice in the areas of business litigation, employment law, medical malpractice and other complex litigation. Mr. Kormanik is an active member of the Third District Bar Association and the Idaho and American Trial Lawyers Associations.

White Peterson, P.A., is a full service law firm serving clients throughout the region. For over three decades the attorneys of White Peterson, P.A. have offered practical advice and effective litigation to help our clients manage the present and plan for the future.

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(dates & locations may change)

24th Annual Commercial Law & Bankruptcy Section Seminary

February 16-18, 2006
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February 23, 2006
Law Center, Boise

Increase your comfort level next time you find yourself in federal court by participating in an interactive presentation addressing motion practice in federal court. So popular at this past July ISB Annual Meeting, our premier faculty has consented to presenting again.

You'll learn how to avoid the ten most common discovery mistakes made by both plaintiffs and defendants in federal court. Participate and watch as discovery motions are argued and listen as **Magistrate Judge Mikel H. Williams** rules on the motions and explains his reasoning. Then, follow the same case and enjoy the interactive presentation as **Chief District Judge B. Lynn Winmill** provides specific guidance on how to present oral argument as either the moving party or the opposing party during dispositive motions.

Finally, you will glean new understanding about federal jury trials and

the directive of the Jury Trial Improvement Committee and the survey results regarding how to improve jury trial practices in the Federal Courts.

Condominium Development and Condominium Owners Associations
Sponsored by ISB and Real Property Section

February 24, 2006
Centre on the Grove, Boise

The theme for this year's Real Property Annual Seminar is "Condominium Development and Condominium Owners' Associations". Topic include:

Introduction to condominium law
Warranty Issues, Construction Claims and Defects and Developer Liability
Drafting Condominium Documents
Workers Compensation Section
Annual Seminar

Workers Compensation Annual Seminar

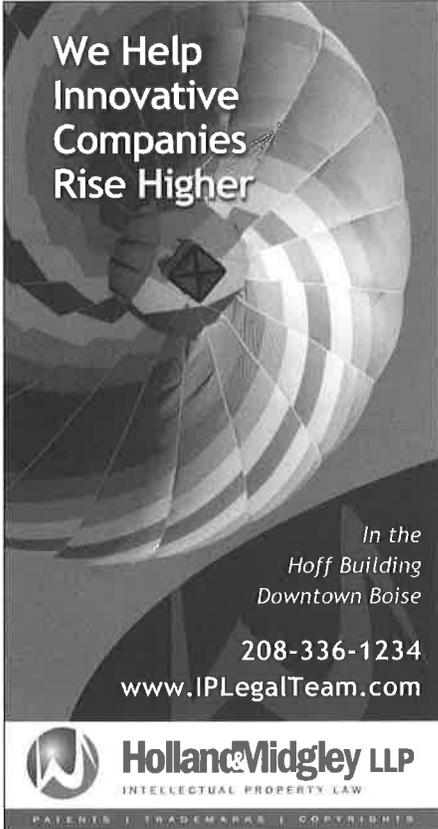
Sponsored by the ISB Workers Compensation Section

March 10, 2006
Sun Valley Resort
Sun Valley, Idaho

Please join the Section for this year's important seminar on Workers Compensation law. The agenda will include hot topics and the most recent information on trends in the practice.

"Mark Your Calendar" for the May 4, 2006 ISB Business and Corporate Law Section Annual CLE. It will be held at the Boise Centre on the Grove.

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(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 1 *The Advocate* Deadline
- 1 Licensing Deadline
- 1 Public Information Committee Meeting
- 15 *The Advocate* Editorial Advisory Board
- 15 **CLE: Young Lawyers Section Boise**
- 16 – 18 **CLE: Commercial Law & Bankruptcy Seminar, Coeur d'Alene**
- 20 **ISB/ILF Office Closed for President's Day**
- 20 – 22 February 2006 Bar Exam, Boise Centre on the Grove
- 23 **CLE: Idaho Law Foundation: Familiarity Breeds Comfort, Boise**
- 24 **CLE: Real Property Section Seminar, Boise**
- 24 ISB Board of Commissioners Meeting

MARCH 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 1 *The Advocate* Deadline
- 1 Final Licensing Deadline
- 10 **CLE: Workers Compensation Section Seminar, Sun Valley**
- 15 *The Advocate* Editorial Advisory Board
- 22 Alternative Dispute Resolution Section Meeting
- 24 Bar Exam Preparation Committee
- 28 Practice Section Council Meeting

These dates include Bar and Foundation meetings, seminars, and other important dates. All meetings will be at the Law Center in Boise unless otherwise indicated. Dates might change or programs may be cancelled. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

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