

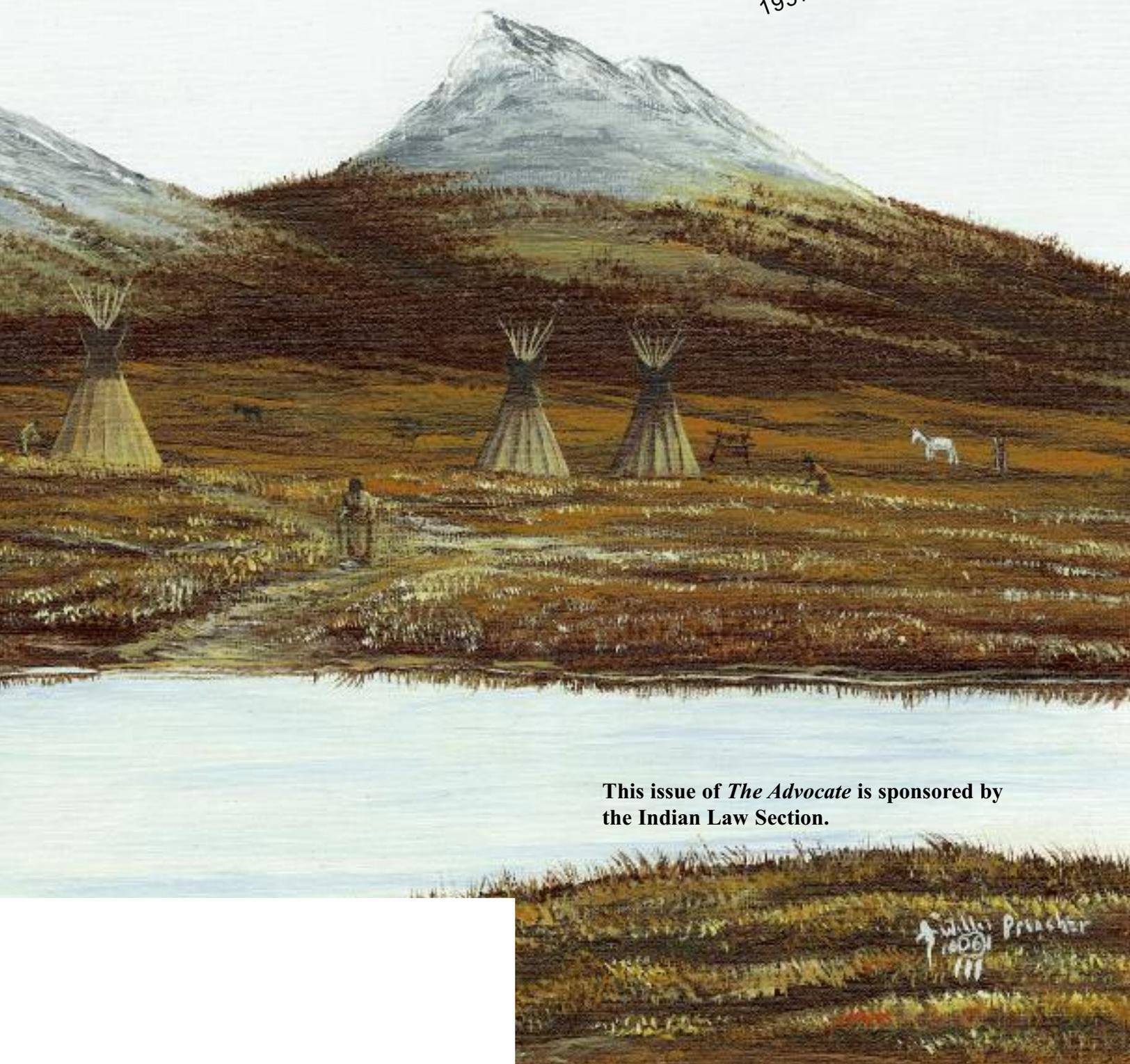
# The Advocate

Official Publication of the Idaho State Bar

Volume 50, No. 5

May 2007

REMEMBERING  
50 YEARS  
1957-2007



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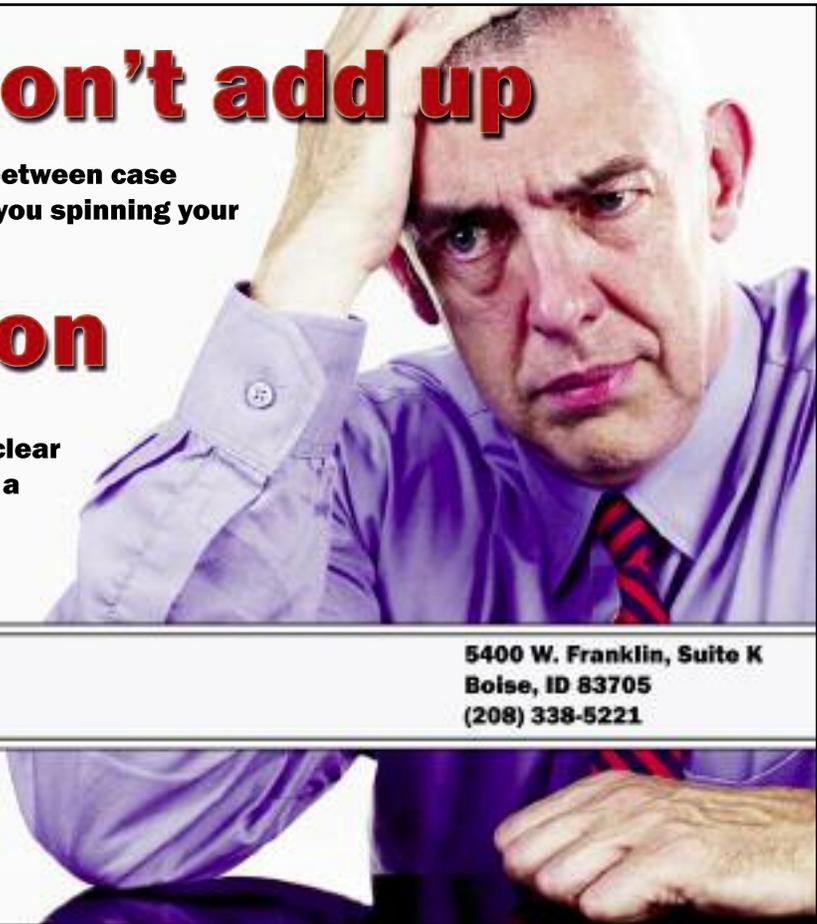


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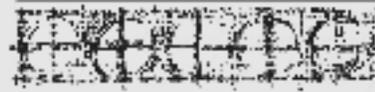
## ON THE COVER

**Willie Preacher**, *American Indian Artist* is a full-blood from the Fort Hall Reservation. Mr. Preacher started his career as a professional artist while still in high school. He serves as the INL EM CAB's representative from the Shoshone Bannock Tribes, a federally recognized Indian tribe. Mr. Preacher is a member of the tribes and is employed as the cultural resources coordinator/ anthropologist and the interim director for the Tribal/DOE Project Agreement in Principle Program.

## SECTION SPONSOR

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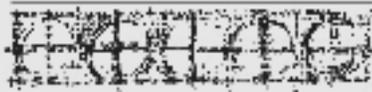


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*Idaho Trial Skills Training - Boise, Idaho March 9 - 10, 2007. The group of notable mentors gather in the Federal Court House before their trials.*

## LETTERS TO THE EDITOR

### Dear Editor:

I wanted to take this opportunity to thank the organizers and attorney and judge mentors involved in the Idaho Trial Skills Training that took place in Boise on March 9 and 10, 2007. As a litigator who practices most often in California, I was absolutely astounded by the caliber of the mentors this program drew. Although I believe that we in Sacramento have a collegial bar, I cannot imagine getting that many seasoned, accomplished litigators in one place for one hour, let alone for two days. Moreover, it was evident that the mentors had dedicated significant time to mastering the materials, and, in many cases, to preparing impressive arguments and witness examinations. In short, this experience reminded me of why I practice in my home state of Idaho as much as I can. The Bar is top-notch, very collegial, and unusually committed to the success of younger attorneys. All involved deserve hearty congratulations for a job well done. I hope this program continues with equal success in the future.

*Kim Sayers-Fay  
Stevens & O'Connell  
Sacramento, CA*

### Dear Editor:

I would like to respond to the President's Message concerning judicial salaries published in the March *Advocate* I agree that our judges are underpaid. I also believe Idaho's teachers, law enforcement officers and especially jurors are underpaid. Several questions that arise. First, are salary structures for judges actually causing any problems? If not, then why do anything? If problems are being created, are they more or less severe than that faced by teachers, police, sheriff and other public servants?

Mr. Banducci's article rightfully praises Idaho Supreme Justice Schroeder, whose service in the Idaho Supreme Court has been exemplary. If we are able to attract and keep the likes of Justice Schroeder at our present pay scale, is there a problem? While is easy and probably accurate to suggest that some qualified candidates will not apply for judicial candidates. If either Justice Schroeder or Mr. Banducci believes Idaho has an unqualified judiciary, let them state as much and we can examine the degree to which this a problem.

I practice in both Washington and Idaho. While Washington pays its judges more than Idaho, I certainly have not seen any difference in overall competency between the two jurisdictions. Recent openings in the First Judicial District where I live have brought out numerous exceptional candidates. People seek the bench for many reasons other than compensation. Again, we do not need a pay scale which draws every conceivable qualified candidate, but rather one that ensures enough qualified candidates to fill the available positions.

I have seen much more convincing data indicating the pay scales in Idaho are resulting in difficulty recruiting and keeping qualified teachers, especially in rural areas. The data indicates to me that there actually is a problem with respect to quality, not merely a potential for difficulty. I have seen similar data with respect to attracting and retaining law enforcement personnel. If either the state legislature or county government is inclined to increase pay, do judges really need a "bump" prior these other professions?

I was also very disappointed that this article did not touch upon pay those serving on juries. I have seen many cases where individuals earning minimal salaries were asked to take weeks from their lives to serve on a jury in situations where their regular employer would not pay them during their absence. While not affecting them day in and day out many years, the impact on these individuals seems to me much greater than that faced by members of the judiciary earning salaries in the top five percent of Idaho workers.

I would certainly be much more supportive of any attempt to raise judicial salaries if that effort were made in connection with seeking help for other underpaid Idaho public servants. I certainly do not believe a case has been made to single out the judiciary for special treatment.

*Irving "Buddy" Paul  
Ewing Anderson, P.S.*

### Dear Editor:

I read with interest the Young Lawyers column, written by Kahle Becker, entitled "What are Endowment Lands, and What Issues Do I Need to Watch Out for When Dealing with Them?"

that was published in the March 2007 issue of *The Advocate*, wherein it was stated that the “statute of limitations do not apply to actions concerning (Endowment Lands)”, citing Hellerud and Peterson.

Peterson advances a compelling argument for the foregoing statement made by the author, since Peterson is premised on a trust theory. However, it would have been interesting had the author discussed, recognized or footnoted the apparent contradiction or the apparent inconsistency between the premise of Peterson and the language in Article IX, Section 7 of the Idaho State Constitution when considering Statute of Limitations involving an action concerning Endowment Lands. The language in Article IX, Section 7 states that the State Board “shall have the direction, control and disposition of the public lands (aka Endowment Lands) of the state under such regulations as may be prescribed by law”. Emphasis supplied. It would appear this language—under such regulations as may be prescribed by law—implicates the applicable Statute of Limitations provi-

sions of the Idaho Code (I.C.5-225) as well as other statutory provisions duly prescribed by the Idaho Legislature, otherwise the language—under such regulations as may be prescribed by law—would appear to have no meaning or significance.

*W. Alan Schroeder  
Schroeder & Lezamiz Law Offices, LLP*

P.S. In the interest of full disclosure, I should note that this apparent contradiction or apparent inconsistency was advanced to a Judge in State of Idaho, ex rel., et al. v. Luther M. Cook, et al., Case No. CV-2006-360 (District Court of the Fourth Judicial District, County of Elmore), but it was not discussed or decided by the Judge. Instead, the Judge cited Peterson. The case settled.

## RECIPROCALLS

*The following lawyers were admitted to the practice of law in Idaho through reciprocal admission.*

*(from February 1, 2007, to March 31, 2007)*

**Bruce Edgar Cox**  
Liberty Lake, WA  
*Gonzaga University*  
Admitted: 3/5/07

**Michael Garth Dustin**  
Idaho Falls, ID  
*Lewis and Clark College*  
Admitted: 3/30/07

**Sharon Louise Fields**  
Bellingham, WA  
*University of Utah*  
Admitted: 3/7/07

**David B. Hansen**  
Liberty Lake, WA  
*Seattle University*  
Admitted: 3/5/07

**Erik Eugene Highberg**  
Spokane, WA  
*Willamette University*  
Admitted: 2/12/07

**Susan Appel McMillan**  
Boise, ID  
*Washington and Lee University*  
Admitted: 2/21/07

**Russell W. Pike**  
Salem, OR  
*Loyola Marymount University-Los Angeles*  
Admitted: 2/12/07

**Nathan Robert Rieth**  
Meridian, ID  
*University of Idaho*  
Admitted: 3/29/07

**Raymond William Schutts**  
Liberty Lake, WA  
*University of Houston*  
Admitted: 2/21/07

**Charles P. Shane**  
Boise, ID  
*Gonzaga University*  
Admitted: 2/1/07

**Randall L Skeen**  
Salt Lake City, UT  
*University of San Diego*  
Admitted: 2/22/07

### ***The Advocate* Remembering 50 Years - Bar Gems -**

- Good faith bargaining requires some breaches must be reasonable.
- Competent counsel is not yet a constitutional right. If there is an excuse, the negligence will always be forgiven.
- ...the parties separated in March, after wife shot at husband with a shotgun which indicates that their split was not friendly.



## NOT A JOKING MATTER

Thomas A. Banducci



When I first heard of J.A.I.L 4 Judges, I thought it was some sort of joke. They aren't laughing in South Dakota, where the J.A.I.L 4 Judges Referendum went to ballot last November.

"J.A.I.L 4 Judges" (Judicial Accountability Initiative Law) proposed a constitutional amendment that would have stripped judges of their judicial immunity and empowered a "special grand jury" of 13 citizens to censure judges for their official legal determinations. Judges would be subject to criminal and civil liability for decisions that "overstepped" judicial authority.

Unbelievable? Consider this: over 33,000 South Dakotans signed petitions to put the referendum on the November 2006 ballot.

Likewise, Colorado's bar was confronted last year with Amendment 40, a term limits law that would have limited the Colorado Supreme Court and Appellate Court justices to 10 years of judicial service. If passed, the constitutional amendment would have forced five of seven sitting Supreme Court justices and seven of 19 state courts of appeal justices to leave the bench.

Supporters of Amendment 40 collected over 100,000 signatures to put the amendment on the ballot. In November, the amendment was defeated, but more than 500,000 Coloradans voted for the measure.

Although J.A.I.L 4 Judges and Amendment 40 may appear as ideas "on the fringe," they should be taken very seriously. The two initiatives are "dressed up" differently, but both are an attempt to intimidate judges. Indeed the national website of J.A.I.L 4 Judges boasts that its organization "has the intimidation factor flowing through the judicial system." This can only serve to threaten judicial inde-

pendence and decision making: judges should not be looking over their shoulders to gauge public opinion or stop to consider how a "special grand jury" might evaluate their decisions.

Legislative initiatives of this sort are not limited to South Dakota and Colorado: Montana Constitutional Initiative 98 failed to make the ballot, but sought recall of judges "for any reason." California and Nevada proposed measures that restricted the government's right in condemnation cases, and took certain elements of those cases out of the hands of judges.

Lest we forget, Congress has recently engaged in efforts to police or limit the judiciary. For example, both houses of Congress introduced bills last year supporting the creation of an inspector general to investigate and monitor the federal bench.

Frustrations with our court system result in anger and mistrust in the judiciary. From a historical perspective, this is not a new phenomenon. Thomas Jefferson was particularly skeptical of the judiciary and its independence from popular control:

"The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent is absolute..."

Today, however, attacks on the judiciary are more intense. Those who support J.A.I.L 4 Judges gather under the banner of judicial accountability, claiming that immunity gives judges carte blanche to ignore the law and legislate from the bench. Inevitably, they support their hypothesis with a discussion of "bad" and "unfair" decisions handed down by a handful of judges. Their solution is to punish judges who "intentionally" overstep their judicial authority. Acts of "judicial malfeasance" include "deliberate dis-

regard of material facts" "ignoring evidence" and "misapplication of law".

Similarly, Amendment 40 claims concern for abuse of power by state judges presuming to rewrite laws that resulted in leniency to convicted murderers, infringing religious freedoms and redefining marriage.

What is touching off this sort of behavior?

In some cases, it is the personal experience of those who have participated in the court system. Contact with the judicial system can leave participants with the perception that it is slow, costly and unpredictable.

In other cases, there is widespread misunderstanding of the court's role. An American Bar Association poll taken in 2005 indicates that courts routinely overruled the will of the majority. As we know, that's not the court's job.

In an earlier Advocate article, I discussed the need to educate voters on judicial qualifications, in the milieu of contested judicial elections. The concern in that context is that uninformed voters may vote for (or against) a judicial candidate unrelated to their expertise, experience and judicial demeanor. In other words, political campaigns for judicial posts can turn on popular issues or unpopular decisions. I concluded that politicized judicial elections can threaten judicial independence, and that, as a Bar, we need to consider ways to educate the public on judicial qualifications before elections take place.

Education seems to be a key element when it comes to defending the judiciary's independence in the face of this "referendum fever." But I doubt that education, alone, will reverse the tide of negativism directed at attorneys, judges and our court system.

Given that the buzz word for these initiatives is "accountability," how does our judicial system measure up in the public eye? How well does the voting public

understand our court system? How cost effective is the litigation process? Are courts accessible to those who need them? Is our system perceived as fair and objective or "all about winning?" As integral participants in the justice system, we are accountable for it. Education along with a good dose of accessibility to and transparency in, our system would go a long way in restoring the public's trust.

I note from the J.A.I.L 4 Judges website that the organization is active in "all fifty states." I also understand that this organization is currently seeking referenda in Florida, Texas and

Colorado. Perhaps we should think proactively about educating our voters now on the importance judicial independence.

**Thomas A. Banducci** is serving a six-month term as president and has been a Bar Commissioner representing the Fourth Judicial District since 2004. He is a partner in the Boise law firm, Greener Banducci Shoemaker. He was admitted to practice in Idaho in 1979, and specializes in litigating complex commercial disputes. He and his wife, Lori live in Boise with their three children, Andrea, Nina and Nick. If you have questions or comments please contact him by email: [tbanducci@greenerlaw.com](mailto:tbanducci@greenerlaw.com).

## NEWSBRIEFS

**ABA Bar Leadership Institute**— Dwight E. Baker, Blackfoot, Idaho State Bar Commissioner joined 300 other leaders of lawyer organizations from across the country at the American Bar Association's Bar Leadership Institute (BLI), in March. The BLI is held annually in Chicago for incoming officials of local and state bars, special focus lawyer organizations, and bar foundations. The seminar provides the opportunity to confer with ABA officials, bar leader colleagues, executive staff, and other experts on the operation of such associations. The group participated in sessions on bar governance, finance, communications, and planning for a presidential term in their organizations. They learned of the many resources available from the ABA for local, state, national, and specialty bar associations and foundations. Dwight will be president of the Bar in 2008-2009.

### JUDICIAL RETIREMENTS

**Hon. Boyd B. White Announces Retirement**—After 24 years on the bench, Bannock County Magistrate Judge Boyd White has announced his retirement effective June 30, 2007. He will assume Senior Judge status on July 1, 2007. A retirement reception will be scheduled for June.

**Hon. John F. Varin Announces Retirement**—Judge Varin announced his retirement after 22 years as a Camas County Magistrate Judge, effective may 31, 2007.

### NEW JUDGES\*

**4th District Appoints New Magistrate Judge**—John T. Hawley, Jr., 53, of Boise, has been appointed magistrate judge in Ada County. He has been self-employed as an attorney in private practice since 1994, where he specializes in adoption and termination of parental rights law; criminal defense law, business law, administrative law, probate and general civil law. From 1991-1994, he was in private practice with the law firm Orndorff, Peterson and Hawley, where he practiced public utility law, litigation and appellate work in Cogeneration, utility and administrative hearings. From 1982-1991, he was in private practice with the law firm Hawley, Troxell, Ennis and Hawley, where is specialized in civil litigation, appellate practice in State and Federal court, construction law, insurance defense and real estate foreclosure. Mr. Hawley also was a deputy prosecuting attorney in Ada County, 1980-1982, where he prosecuted juvenile, felony and misdemeanor cases.

Mr. Hawley holds a Bachelor's of Science degree in Journalism from the University of Idaho and a J.D. from Gonzaga University. He is a member of the American Academy of Adoption Attorneys and the Idaho State Bar; served on the

Salvation Army Advisory Board, 1987-2000; and served as a CASA volunteer attorney, 2002-2006. He also received Martindale-Hubble's A-V Peer Review Rating

Judge Hawley will handle Ada County misdemeanor criminal calendars and juvenile calendars.

**5th District Appoints New Magistrate Judge**—Jason D. Walker, 39 has been appointed magistrate judge in Camas County. He will fill the Honorable John Varin's position who will be retiring from the bench effective May 31, 2007. Mr. Walker has served as Minidoka Prosecuting Attorney since 2003. Since 1999, he was an associate and then partner with the firm Ling, Robinson & Walker in Rupert. He was a law clerk to the late Honorable J. William Hart. He attended Ricks College, Utah Valley Community College, and earned a B.S. degree in 1995 from BYU. Mr. Walker received his J.D. degree from the University of Idaho, College of Law in 1998.

\*When appointed, magistrates serve an 18-month probation. After which, they stand for retention election in the county in which they are seated and, if retained, serve a term of four years.

### ADMINISTRATIVE JUDGES ELECTED

**6th District Judge Peter D. McDermott**— was elected Administrative District Judge in the 6th District, to fill the term of Judge Randy Smith.

**7th District Judge Richard T. St. Clair**—was elected Administrative District Judge to fill the Administrative District Judge term of Judge James Herndon.

**Idaho Court Rules changes and amendments**—The full text of the Idaho Court Rules and amendments can be viewed on the Idaho Courts web page: <http://www.isc.idaho.gov/rule-samd.htm>

### IDAHO STATE BAR DEMOGRAPHIC SURVEY

**Idaho State Bar 2007 Membership Survey**—The week of May 1, you will receive a membership survey by email or hard copy. The survey is designed to take only a few minutes of your time; but it will provide a valuable demographic and economic profile of our members. We urge you to complete the survey. The last survey of this type was in 1999, in order to compare the 1999 members with the 2007 Idaho lawyer, and determine levels of change, we have repeated many of the same questions as well as added updated information and a new section on technology. The survey is anonymous; the specific information you provide will not be available to any officer or staff member of the Idaho State Bar. Please take the time to fill out the survey and submit it to the Idaho State Bar.



## VOLUNTEER OPPORTUNITIES

Diane K. Minnich



The success of Bar and Foundation activities depends on the volunteer efforts of Bar members. The Bar Commissioners and the Foundation Directors are recruiting attorneys interested in volunteering their time and expertise.

The general responsibilities of each committee are outlined in this column. If you are interested in one of the volunteer opportunities listed, please complete the form on page 11 and return it to the ISB/ILF offices (committees listed here, but not listed on the committee request form have no available positions for 2007-08.) If you have any questions about the committees, please contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov) or call (208) 334-4500.

Committee appointments are made at the July ILF and ISB Board meetings. In selecting committee replacements, the board members consider geographic diversity, areas of practice, and other previous or current committee assignments.

### IDAHO STATE BAR COMMITTEES

*Note: Committee appointments are for three-year terms. Chairpersons are appointed for one-year terms.*

**Bar Exam Preparation Committee:** Gathers and reviews questions and analyses for each bar exam. Recruits question writers to prepare questions and analyses. *Meets 4-6 times per year; 5 members.*

**Bar Exam Question Writers:** Drafts questions and analyses for bar exam. *No meetings.*

**Character and Fitness Committee:** Reviews bar exam applicants for character and/or fitness issues. Makes recommendations to the Board of Commissioners on whether applicants should be allowed admission to the practice of law in Idaho. *Meets 4 to 6 times a year; 9 members (2 non-lawyers).*

**Reasonable Accommodations Committee:** Reviews requests and makes recommendations to the Board of Commissioners regarding reasonable accommodations for the bar exam. *Meets as needed; 3 members.*

**Client Assistance Fund Committee:** Reviews claims against Client Assistance Fund for attorney misappropriation of funds due to dishonesty. *Meets as needed; 5 members (2 non-lawyers).*

**Fee Arbitration Panels:** Reviews matters submitted by clients disputing attorney fees. Panels formed as needed. If the disputed amount is \$2,500 or less, it is assigned to a one-lawyer panel; if disputed amount is more than \$2,500, it is assigned to a three-member panel, which includes one non-lawyer.

**Professional Conduct Board:** Exercises general control over attorney discipline. Acts as an "intermediate appellate court" in attorney discipline matters. Receives and considers formal charge complaints, and makes recommendations for disposition to the Idaho Supreme Court. *Meets in three-member panels as needed; 30 members (10 non-lawyers).*

**Unauthorized Practice of Law Committee:** Reviews unauthorized practice of law complaints. Oversees investigations and makes recommendations for disposition to the Board of Commissioners. *Meets twice a year; 4 members.*

**The Advocate Editorial Advisory Board:** Determines the theme, selects/recruits authors for lead articles, and reviews the contents of each issue of *The Advocate*. *Meets the third Wednesday of each month; 10-12 members.*

**Public Information Committee:** Works to foster awareness of the positive role of lawyers and the judicial system in Idaho. Meets quarterly; *12 members (3 non-lawyers).*

**Lawyer Assistance Program:** Oversees the LAP program, which helps and support lawyers who are experiencing problems associated with alcohol and/or drug use or mental health issues. *Meets quarterly. 15-17 members.*

### IDAHO LAW FOUNDATION COMMITTEES

**Idaho Volunteer Lawyers Program Policy Council:** Plans and reviews programs, policies and procedures for IVLP. Makes recommendations to ILF Board of Directors. *Meets quarterly; 13-14 members (3-4 non-lawyers).*

**Law Related Education Committee:** Promotes and oversees law related education programs. *Meets 3-4 times a year; 14-15 members (5-6 non-lawyers).*

**Continuing Legal Education Committee:** Plans and oversees Idaho Law Foundation CLE programming of subjects, speakers, course materials and policies. *Meets three times a year; 15-16 members.*

**IOLTA Fund Committee:** Reviews and considers IOLTA grant applications. Recommends grant recipients to the Board of Directors. *Meets once a year; 10 members.*

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**ILF Law Related Education:** Attorneys are needed to assist with the high school mock trial competition, the Lawyers in the Classroom program, Law Day activities, and help with Youth Court.

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**ILF Idaho Volunteer Lawyers Program:** Attorneys are needed to provide pro bono assistance to low-income individuals through direct case representation, brief legal services, workshops or mentoring.

**District Bar Associations:** As a member of your local district bar association, you can assist with educational programs, social events, and public service activities.

*We offer our thanks to those of you who have committed your time, expertise and energy to the work of the Bar and Foundation. The organizations are strong, committed and able to provide needed service to the profession and the public because of your volunteer efforts.*

ISB/ILF Committees  
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Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyers can and do make a difference by participating on one of the many committees listed below. Committee assignments are three-year terms and each year there are generally one to three openings available on each committee. Time commitments vary with each committee depending upon its function and meeting schedule. In the appointment process, consideration is given to geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement.

Name: \_\_\_\_\_ Firm: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Have you previously participated as a member of an ISB and/or ILF Committee?

- No
- Yes – Most recent committee assignment(s) \_\_\_\_\_

Please return this form no later than **June 4, 2007**

ISB/ILF Committees  
P.O. Box 895  
Boise, ID 83701

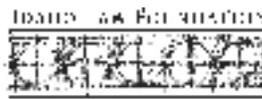
Or email your committee interests to [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov)

*Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below.*

Please indicate your 1st, 2nd, or 3rd choice.



**Idaho State Bar  
Volunteer Committees**



**Idaho Law Foundation  
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- \_\_\_ *The Advocate* Editorial Advisory Board—*meets-monthly*
- \_\_\_ Bar Exam Grading—*takes place twice a year*
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- \_\_\_ Bar Exam Question Writers—*no meetings*
- \_\_\_ Character and Fitness—*meets as needed*
- \_\_\_ Fee Arbitration Panels—*meets as needed*
- \_\_\_ Professional Conduct Board—*meets as needed*
- \_\_\_ Public Information Committee—*meets every other month*
- \_\_\_ Lawyer Assistance Program—*meets quarterly*

- \_\_\_ Continuing Legal Education—*meets quarterly*
- \_\_\_ IOLTA Fund—*meets once a year*
- \_\_\_ Law Related Education—*meets 3 times a year*
- \_\_\_ Idaho Volunteer Lawyers Program Policy Council—*meets quarterly*

\_\_\_ **I would like more information about the Bar's Sections.**

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# MESSAGE FROM THE INDIAN LAW SECTION CHAIR

Ryan Sudbury  
*Nez Perce Tribe*

This year the Indian Law Section of the Idaho State Bar has gone through some big changes. Rob Roy Smith, the Section's co-founder, stepped out of the chair role and into the largely emeritus role of the honorable past-chair of the section. Emily Kane, the former secretary/treasurer, also stepped aside to take some much deserved time off for maternity leave. Bill Bacon volunteered to take over the large shoes left behind by Emily's departure. For my part, I hope to continue on the successful path that Rob and the other co-founders set out for the section.

It has been another big year for the field of Indian law, with courts handing down important decisions in a variety of legal fields. Clay Smith addresses one of these important cases, concerning tribal sovereign immunity from suit, in his article in this issue. Rob Roy Smith tackles another opinion issued by the D.C. Circuit addressing tribal casinos and the applicability of the National Labor Relations Act.

The Ninth Circuit, for its part, recently issued a number of important decisions in the field of Indian law. In *Navajo Nation v. U.S. Forest Service*, — F.3d —, 2007 WL 737900 (9th Cir. Mar. 12, 2007), the court found that the United States Forest Service violated the Religious Freedom Restoration Act by permitting a ski area to use treated sewage to make artificial snow on a peak sacred to a number of tribes in the southwest. On the other side of the coin, the Ninth Circuit found that the Gros Ventre Tribe, the Assiniboine Tribe, and the Fort Belknap Indian Community Council, could not bring a common law breach of

trust claim against the Bureau of Land Management for failing to manage federal lands in a manner that does not impact tribal lands, or tribal interests. *Gros Ventre Tribe v. U.S.*, 469 F.3d 801 (9th Cir. 2006).

If these cases seem beyond your range of knowledge, check out Bill Bacon's article on the twenty questions people most frequently ask Indian lawyers. You can also read the interesting story concerning some of the early history and subsequent development of Indian law in Judge Box's article, *Crow Dog*. On the other hand, if these issues are old hat to you, check out Doug Nash's and Cecilia Burke's article discussing the emerging facets of tribal probate law.

If you are interested in joining the section, or moving into a leadership role, please feel free to contact me. The section generally meets every other month by conference call to tackle issues of concern and discuss the issues of the day in the field of Indian law.

## ABOUT THE AUTHOR

**Ryan Sudbury** is a staff attorney for the Nez Perce Tribe in Lapwai, Idaho. His practice focuses primarily on Indian law and public lands law issues. Mr. Sudbury also serves as an adjunct professor at the University of Idaho School of Law, where he is currently teaching a class in Public Lands and Natural Resources Law.

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# CROW DOG: TRIBAL SOVEREIGNTY & CRIMINAL JURISDICTION IN INDIAN COUNTRY

By Hon. Gaylen L. Box  
Magistrate Judge Sixth Judicial District

Crow Dog really started something on that hot dusty August afternoon in the Dakota Territory in 1881. The Sioux Nation had been fractured by the United States and its members scattered among various reservations. Just outside the Rosebud Indian Agency on the Great Sioux Reservation, Crow Dog shot and killed Spotted Tail, a Brule Sioux chief.

Spotted Tail was recognized at Rosebud as a great chief. He struggled to appease the U.S. Government and keep his tribe together. Crow Dog, a warrior, believed that Spotted Tail was a usurper of power. He wanted to break the power of Spotted Tail. Simply put, Crow Dog and Spotted Tail did not like each other. The controversy was a personal affair as much as a lust for political power. A woman was involved—mixed up in the fray over political power. Rumor had it that Spotted Tail had stolen Medicine Bear's beautiful wife, Light in the Lodge. Medicine Bear was a member of Crow Dog's traditional faction, and Spotted Tail's action was a violation of traditional Brule' custom. Crow Dog vowed to stop Spotted Tail's abuse of power and to avenge the violation of custom.<sup>1</sup>

In one sense, the killing was purely a tribal matter. An Indian had killed another Indian in Indian country. The Sioux Nation dealt with it as it had in similar instances. There was no formal court system; traditional methods of dispute resolution were used. Peacemakers were dispatched to meet with the families and the matter was settled for \$600 cash, eight horses and one blanket to be given to Spotted Tail's family by Crow Dog.<sup>2</sup>

Spotted Tail was not just an ordinary tribal member killed by another tribal member in Indian country. He was a chief, respected by his tribe as well as by many officials in Washington D.C. The furor over his death did not simply die down as the Indian agent hoped it would. Officials in Washington demanded swift action at Rosebud. Crow Dog was immediately arrested and the federal government undertook to prosecute him for murder in the Deadwood Territorial Court. He was duly convicted and sentenced to be hung.

The United States Supreme Court reversed the conviction holding that the United States government had no jurisdiction over the crime of murder when committed by an Indian against an Indian in Indian country.<sup>3</sup> The Court held that Congress never intended criminal laws that otherwise applied within maritime or territorial jurisdiction to apply to crimes committed by one Indian against the person or property of another Indian on an Indian reservation. Tribes were to establish their own self-government and regulate their own domestic affairs and maintain order and peace by the administration of their own laws and customs.<sup>4</sup>

The decision in the Crow Dog case was hailed as a judicial affirmation of the inherent right of Indian tribes to govern their own legal affairs—at least in instances of crimes by Indians against Indians in Indian country. United States Indian jurispru-

dence was heading in the direction of legal pluralism: one system of law based in tradition and culture that applied to Indians on Indian land, and another system derived from our Euro-American experience that applied to non-Indians.<sup>5</sup>

Perhaps predicting the implications of this plurality of laws, the Court suggested that Congress could, if it so desired, attach Indian country to the jurisdiction of the United States district courts.<sup>6</sup> Until Congress acted, however, criminal jurisdiction over Indians in Indian Country was a tribal matter.

## TRIBAL SOVEREIGNTY PRIOR TO CROW DOG

For more than fifty years preceding the Crow Dog decision, states claimed authority to regulate tribes and tribal members on reservations within their boundaries. Most notably, the state of Georgia and the federal government tussled over the Indian jurisdiction issue. When the state of Georgia prosecuted Corn Tassel, a Cherokee Indian, for murdering another Indian in the Cherokee Nation, the U.S. Supreme Court intervened and ordered the state to appear before the Court and show cause why the judgment should not be corrected and Corn Tassel saved from the gallows. It seemed that another famous chief—Chief Justice John Marshall—considered authority over Indian tribes a federal matter. The Georgia legislature convened an emergency session and voted to ignore the edict of the U.S. Supreme Court. In defiance of the Court, Corn Tassel was hung by the state of Georgia on December 24, 1830. His body was returned to his people.<sup>7</sup>

To vindicate the death of Corn Tassel and settle the jurisdictional issue, the Cherokee Nation sued the state of Georgia in the U.S. Supreme Court.<sup>8</sup> *Cherokee Nation v. Georgia* was filed as an original action in the U.S. Supreme Court as a lawsuit between a sovereign foreign nation and a state. The Cherokee Nation sought to prohibit the state of Georgia from executing any of its laws in Cherokee Territory. The original jurisdiction issue was nothing new to Justice Marshall, who had encountered it before in *Marbury v. Madison*.<sup>9</sup> In a “masterwork of indirection”<sup>10</sup> similar to his decision in *Marbury*, the Chief dodged the issue of state authority over Indian tribes and concluded that the Cherokee Nation was not a “foreign nation.” The case was dismissed. Instead of establishing their status as a sovereign foreign nation, the Cherokee Nation walked away from the Court a “domestic dependent nation” and “ward” of the federal government.<sup>11</sup>

The state of Georgia was encouraged and undeterred in its efforts to exert hegemony over the Cherokee Nation. To Georgia's way of thinking, the doctrine of conquest arising out of British occupation of North America extinguished any prospect that Indians held “title” to land. Title to land was vested in the state as a component of state sovereignty. As conquered nations, tribal sovereignty was subservient to state authority; Indians

were subject to the jurisdiction of the government and courts of the states in which they lived.<sup>12</sup>

The state of Georgia boldly enacted laws forbidding the Cherokee tribal council from meeting and banned Cherokee judges from judging. Furthermore, according to Georgia law all persons entering into Indian country had to take an oath of allegiance to the state of Georgia. The Reverend Samuel Worcester, a non-Indian, refused and was arrested by Georgia authorities, convicted, and sent to a Georgia prison. The case made it to the U.S. Supreme Court.<sup>13</sup> In *Worcester v. Georgia*, Chief Justice Marshall concluded that what happens on Cherokee lands was entirely outside of the political control of the state of Georgia. Though they were domestic dependent nations, tribes were not subject to state control. The federal government had exclusive authority over Indian tribes and Worcester's conviction was set aside. He was ordered released.<sup>14</sup> Once again Georgia openly defied the U.S. Supreme Court and refused to release him. Worcester eventually signed the oath and gained his release from prison.

Chief Justice Marshall essentially stood alone in his view of Indian jurisprudence. Not only was the state of Georgia unwilling to follow the law as announced by the Court, the executive branch was also unwilling to support the Court. President Andrew Jackson is reported to have remarked, "John Marshall has made his decision, now let him enforce it!"<sup>15</sup>

#### **CROW DOG'S AFTERMATH**

Such was the state of Indian law for the fifty years preceding Crow Dog. According to the U.S. Supreme Court, states had no criminal jurisdiction over crimes committed by Indians against Indians in Indian country, nor could they enact legislation governing the affairs of tribes on the reservation. *Crow Dog* further denied federal criminal jurisdiction over crimes committed by Indians against Indians in Indian country. To the extent the federal government declined to pass laws regulating reservation activities, the tribes were free to govern themselves. Tribes were left alone to make their own laws. They were "sovereign"—yet not sovereign nations.

This "high pretension to savage sovereignty"<sup>16</sup> was incompatible with national policy, which had evolved into a federal effort to assimilate Indians into Euro-American culture. The natives were to be advanced as fast as possible onto the path of self support. They were not to be "left wandering," doing things their own way. The *Crow Dog* decision, which granted the Sioux Nation the right to enact and apply its own criminal laws, and *Worcester v. Georgia*, which precluded states from exercising authority on reservations, were seen as steps backward by those who supported assimilation.

The spark of tribal sovereignty was caught up in a wind of assimilation. The Bureau of Indian Affairs (BIA) pressed for more federal jurisdiction in Indian country. In 1883 the Secretary of Interior approved rules granting BIA agents authority to create a code of "offenses" criminalizing traditional practices such as war dances and polygamous relationships. The rules were implemented as a function of the Bureau's administrative powers, and represented an executive branch intrusion into the sovereignty of Indian nations. This executive intrusion was upheld

by the U.S. District Court for Oregon in *United States v. Clapox*.<sup>17</sup> The paternalism of the United States was aimed at abolishing the pernicious practices of the Indians and demanding respect for law and order and civilized life as seen by the Bureau of Indian Affairs. The agency provided Courts of Indian Offenses and appointed Indian police officers and tribal judges who could be relied upon to administer the Code. Under the aegis of the Bureau, courts were created as instruments of U.S. policy.<sup>18</sup>

The sovereign right of tribes to control their own legal affairs was further intruded upon by Congress a year after the *Crow Dog* decision. At the time of Crow Dog's crime, federal law exempted Indian tribes from the application of laws that would otherwise apply on federal enclaves. Following the Court's suggestion that Congress had the power to pass laws subjecting Indians to the jurisdiction of the federal government, Congress passed the Major Crimes Act, 18 U.S.C. § 1153, granting jurisdiction over major crimes committed by Indians on reservations to the federal courts. In *United States v. Kagama*,<sup>19</sup> the U.S. Supreme Court upheld the constitutionality of the Major Crimes Act and announced the "plenary powers" doctrine, holding that the power of Congress over Indian tribes is absolute and not affected by treaty rights or tribal sovereignty.<sup>20</sup>

The concept of sovereignty lies at the heart of tribal self government. The argument is that tribes have always been sovereign nations. They have been so "from the time the memory of man runneth not." In its truest sense, sovereignty is not something that can be given. It is inherent. To the extent it has not been taken away it still remains. It is not unusual for sovereignty to be compromised; in fact, this commonly occurs. Individuals, states, and even nations compromise their sovereignty by becoming part of the world community. By their "incorporation within the territory of the United States, and their acceptance of its protection," tribes have necessarily been divested of some aspects of the sovereignty they had previously exercised.<sup>21</sup>

The right of Indian tribes to their own laws to regulate their internal and social relations, so eloquently expressed in *Crow Dog* and confirmed in *Worcester v. Georgia*, teeters on balance with the federal government's "plenary power" to divest tribes of all power. But plenary power is politics, and politics is public policy. Public policy is shaped not only by that which has always been, but also by that which works.

Under the Indian Reorganization Act<sup>22</sup> (IRA), enacted in 1934, many tribes established formal tribal governments that included standard constitutions based on the Euro-American conception of government. Many tribes also adopted Law and Order Codes and established courts to prosecute offenders. Because of a lack of financial resources and for other reasons, many tribes did not create tribal courts but opted instead to use Bureau of Indian Affairs' courts operated under the provisions of the Code of Federal Regulations (CFR). There are approximately twenty-three CFR courts still in existence. To date, 275 out of 560 Indian Nations and Alaskan native villages have formal tribal courts.<sup>23</sup>

#### **FEDERAL INTRUSION INTO TRIBAL IMMUNITY**

While Congress could exercise its plenary powers and completely deprive tribes of criminal jurisdiction, it has not done so.

The Court of Appeals for the Ninth Circuit has noted that Indian tribes, “though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress.”<sup>24</sup> The power to prosecute tribal members for violations of tribal laws is an attribute of “primeval” tribal sovereignty. “It is undisputed that Indian tribes have the power to enforce their criminal laws against tribal members.”<sup>25</sup> The exercise of jurisdiction by tribal courts against tribal members is considered the act of a “dual sovereign” and as such is not a delegation of power from the federal government to the tribes. Consequently, as a matter of constitutional law there can be successive tribal and federal prosecutions for the same offense without violating the double jeopardy clause of the U.S. Constitution.<sup>26</sup>

Generally tribes have extensive authority to proscribe conduct of tribal members and prosecute tribal violators. The Indian Civil Rights Act of 1968,<sup>27</sup> however, limits the punishment that can be meted out to \$5,000 and one year in jail. The Indian Civil Rights Act confers upon tribal members, when prosecuted in tribal court, many of the protections of the Bill of Rights under the U.S. Constitution. An interesting attribute of the Indian Civil Rights Act is that the content and meaning of its provisions is a matter of tribal court interpretation.<sup>28</sup> Tribal courts have yet to go through the long process of interpretation similar to the “incorporation debates” undertaken by the U.S. Supreme Court in determining the content, meaning and applicability to the states of the federal Bill of Rights.<sup>29</sup> It is entirely conceivable that, as an attribute of tribal sovereignty, the meaning tribes ascribe to Indian civil rights may be different from the meaning of civil rights defined by U.S. Supreme Court under the Bill of Rights. The meaning of equal protection, due process and other guarantees contained in the Act could differ when defined by tribal courts wishing to reflect Indian tradition and culture.

If a crime is committed on a reservation by an Indian against a non-Indian, the federal government has jurisdiction to prosecute. Under the General Crimes Act<sup>30</sup> the “general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, . . . extend to the Indian country.”<sup>31</sup> The “laws” extended are those defined in 18 U.S.C. § 7, popularly known as “federal enclave laws.” The Assimilative Crimes Act<sup>32</sup>—also extended to the Indian country by the General Crimes Act—allows the borrowing of state law when there is no applicable federal statute.<sup>33</sup>

The General Crimes Act does not, however, apply to offenses committed by one Indian against the person or property of another Indian in Indian country; nor does it apply to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe.<sup>34</sup> Consequently, tribal courts can effectively preempt federal prosecution for certain victimless crimes if they prosecute and punish a tribal member in tribal court.

The Indian Major Crimes Act,<sup>35</sup> grants jurisdiction to federal courts, exclusive of the states, over Indians who commit any of the listed offenses,<sup>36</sup> regardless of whether the victim is an Indian or non-Indian. It is undecided whether the deference to tribal

sovereignty in the General Crimes Act applies to prosecutions under the Major Crimes Act.<sup>37</sup> The Violent Crime Control and Law Enforcement Act of 1994<sup>38</sup> expanded federal criminal jurisdiction in Indian Country in such areas as guns, violent juveniles, drugs, and domestic violence. Under the Indian Gaming Regulatory Act,<sup>39</sup> the FBI has jurisdiction over any criminal act directly related to casino gaming.

Generally, absent treaty provisions to the contrary, when a non-Indian commits a crime against a non-Indian on an Indian reservation, states have exclusive jurisdiction.<sup>40</sup>

Under Public Law 280, states, such as Idaho, may also have jurisdiction in certain cases to prosecute crimes committed by Indians on reservations. Under Public Law 280 and Idaho Code § 67-5101, state and tribal courts have concurrent jurisdiction over seven areas of law: compulsory school attendance, juvenile delinquency, abused and neglected children, insanity and mental illness, public assistance, domestic relations, and operation of motor vehicles on highways and roads maintained by county, state, or political subdivisions. Indian people who commit crimes related to these areas of concurrent jurisdiction such as domestic violence, driving under the influence on highways and roads maintained by county, state, or political subdivisions, and similar crimes related to areas of concurrent jurisdiction may be prosecuted in state as well as tribal courts. Where Public Law 280 does not apply, states have no jurisdiction to prosecute tribal members for crimes committed on Indian reservations.<sup>41</sup>

## CONCLUSION

The maze of tribal, state, and federal court jurisdictions after *Crow Dog* is difficult to traverse. Tribes have essentially retained the ability to prosecute crimes committed by Indians against Indians on reservations. Even though major crimes are prosecuted in federal courts, some tribes still prosecute offenders in tribal court. Through their tribal courts, Indians have implemented traditional treatment practices such as healing ceremonies, talking circles, peacemaking, sweat lodges, visits with medicine men, sun dances, and contact with tribal elders. Healing to Wellness Courts (Drug Courts) are nothing more than a resurrection of traditional holistic tribal practices. For years tribal courts have employed non-adversarial means of dispute resolution. “It is not,” as Hon. Robert Yazzie, Chief Justice of the Navajo Nation, stated, “*alternative* dispute resolution; it is *original* dispute resolution.”<sup>42</sup>

In sorting out these jurisdictional issues, tribes have persevered against states wishing to exert total control over tribal affairs. They also have been subject to the unilateral assumption of jurisdiction by states, which have been given the option by the federal government under Public Law 280 to assume jurisdiction without tribal permission. Since *Crow Dog*, public policy concerning Indian tribes has been inconsistent—waxing and waning from policies of assimilation to promises of assistance in developing tribal legal institutions. Recognizing tribal judicial practices as essential to the maintenance of the culture and identity of Indian tribes, Congress passed the Indian Tribal Justice Act of 1993.<sup>43</sup> Although the Act promised \$58 million of additional funding annually for tribal justice systems, Congress failed to appropriate funds.<sup>44</sup> Tribal courts, which have been described as

“the most visible manifestation of tribal sovereignty,” continue to struggle to exist.

The *Crow Dog* decision established a principle that has endured—though beaten, battered, diminished, and worn—through the years. Tribal sovereignty is the life blood of self-government, and is jealously defended by all tribes. Every succeeding improvement in the interrelationship among tribal, federal and state courts strengthens that sovereignty. Public policy promotes that which works.

Crow Dog returned to the Rosebud Reservation after his conviction was overturned. He was even more defiant and arrogant. He led the despised Ghost Dancers into the Dakota Badlands in 1890 and opposed the land-allotment policies of the U.S. government. When he was seventy-eight years old he begrudgingly accepted his land allotment.<sup>45</sup> Crow Dog’s eventual acceptance of his land allotment was as symbolic as was his defiance.

#### ABOUT THE AUTHOR

**Hon. Gaylen Box** is a Magistrate Judge in Pocatello, Idaho. He was admitted to practice law in Idaho in 1978 and before the Shoshone Bannock Tribal Court in 1983. He is Co-chair of the Tribal State Court Forum and Chairman of the Publications Committee of the Idaho State Legal History Society.

#### ENDNOTES

- <sup>1</sup> George E. Hyde, *Spotted Tails Folk; A History of the Brule Sioux* 276-304 (Univ. Oklahoma Press, 1961).
- <sup>2</sup> Sidney L. Haring, *Crow Dog’s Case; American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century I* (Cambridge Univ. Press, 1994).
- <sup>3</sup> *Ex Parte Kan-Gi-Shun-Ka* (otherwise known as *Crow Dog*), 109 U.S. 556, 572, 3 S. Ct. 396, 406 (1883).
- <sup>4</sup> *Id.* at 569.
- <sup>5</sup> See Haring, *supra* note 2, at 12.
- <sup>6</sup> *Ex Parte Kan-Gi-Shun-Ka*, 109 U.S. at 559.
- <sup>7</sup> For a further discussion of this episode, see Haring, *supra* note 2, at 30.
- <sup>8</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
- <sup>9</sup> 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).
- <sup>10</sup> ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (Sanford Levison ed., rev. 2d. ed. 1994).
- <sup>11</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1.
- <sup>12</sup> See Haring, *supra* note 2, at 25. See also *State v. George Tassels* 1 Dud 229 (Ga. 1830).
- <sup>13</sup> *Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832).
- <sup>14</sup> *Id.* at 596.
- <sup>15</sup> The remark, often attributed to Jackson, was probably not made by him. However Jackson’s Indian Removal Policy was certainly at odds with the sentiment expressed in *Worcester v. Georgia*.
- <sup>16</sup> See Haring, *supra* note 2, at 17 (quoting *Caldwell v. State*, 1 Stew. & P. 327, 1832 WL 545, \*3 (Ala. 1832).
- <sup>17</sup> *United States v. Clapox*, 13 Sawy. 349, 35 F. 575 (D. Or. 1888).
- <sup>18</sup> See Haring, *supra* note 2, at 186.
- <sup>19</sup> 118 U.S. 375 (1886).
- <sup>20</sup> *Id.* at 384-85.
- <sup>21</sup> *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>22</sup> Indian Reorganization Act, June 18, 1934 (Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*).

<sup>23</sup> National Tribal Justice Resource Center, *Tribal Court History*, at <http://www.tribalresourcecenter.org/tribalcourts/history.asp> (last visited Apr. 4, 2007).

<sup>24</sup> *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976).

<sup>25</sup> In 1991 the ICRA was amended to overturn the U. S. Supreme Court decision in *Duro v. Reina*, 495 U.S. 676 (1990). The *Duro* decision held that tribal courts did not have criminal jurisdiction over non-member Indians. The United States Congress overturned the *Duro* decision by the so-called congressional “Duro-fix” granting tribal court criminal jurisdiction over all Indians, members and non-members.

<sup>26</sup> *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>27</sup> 25 U.S.C. §§ 1301-03.

<sup>28</sup> *Nevada v. Hicks*. 533 U.S. 353 (2001).

<sup>29</sup> See *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937); *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444 (1968).

<sup>30</sup> 18 U.S.C. § 1152.

<sup>31</sup> *Id.*

<sup>32</sup> 18 U.S.C. § 13.

<sup>33</sup> *Williams v. United States*, 327 U.S. 711 (1946); *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

<sup>34</sup> There are two other exceptions to the application of 18 U.S.C. § 1152: 1) It does not apply to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively, and 2) by the decision in *United States v. McBratney*, 104 U.S. 621 (1882), absent treaty provisions to the contrary, the state has exclusive jurisdiction over a crime committed in the Indian country by a non-Indian against another non-Indian.

<sup>35</sup> 18 U.S.C. § 1153.

<sup>36</sup> Murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 . . . ), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 . . . within the Indian country.

<sup>37</sup> *Duro v. Reina*, 495 U.S. 676, 680 n.1 (1990).

<sup>38</sup> Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322 (H.R. 3355) (Sept. 13, 1994) (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.).

<sup>39</sup> 25 U.S.C. § 2701 *et seq.*

<sup>40</sup> *United States v. McBratney*, 104 U.S. 621 (1882).

<sup>41</sup> For a chart setting forth criminal jurisdiction on Indian reservations, see [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00689.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm) (last visited April 4, 2007).

<sup>42</sup> Comments from the American Judges Association meeting in Coeur d’Alene, Idaho, in May, 2006.

<sup>43</sup> Public Law 103-176 (1993).

<sup>44</sup> *United States Drug Court Programs Office. Department of Justice. Healing to Wellness Courts: Preliminary Overview of Tribal Drug Courts* (Tribal Law & Policy Institute, 1999).

<sup>45</sup> See Haring, *supra* note 2, at 132.

# 20 QUESTIONS ABOUT INDIAN LAW

William F. Bacon  
*Shoshone Bannock Tribe*

The practice of American Indian law invites many questions from both lawyers and non-lawyers alike. This article lists some of the questions asked most frequently over the years, together with brief answers to those questions.

## **1. DO FEDERAL LAWS APPLY ON INDIAN RESERVATIONS?**

Generally, yes. There are exceptions, however, where (a) the federal law touches upon the exclusive right of self-governance, (b) application of the law would abrogate rights guaranteed in a treaty, or (c) there is some evidence Congress did not intend the law to apply to Indian tribes.<sup>1</sup> The federal circuits are split concerning the application of federal laws of general applicability like the Occupational Safety and Health Act (OSHA).<sup>2</sup>

## **2. DO STATE LAWS APPLY ON INDIAN RESERVATIONS?**

Generally, no. There are exceptions, however, including: (a) Public Law 83-280,<sup>3</sup> (b) the General Allotment Act,<sup>4</sup> and (c) certain federal laws passed between 1953 and 1966. Public Law 83-280 was passed in 1953 and provided a method for states to assume concurrent jurisdiction over certain areas, within Indian country, without a tribe's consent. In 1963, Idaho assumed concurrent jurisdiction in seven areas, without the consent of some tribes.<sup>5</sup> (Since 1968, states can only acquire jurisdiction with a tribe's consent.) The General Allotment Act did not give states any specific jurisdiction in Indian country, but it allowed non-Indians to own fee land within Indian reservations, exposing non-Indian land to state taxation. The third exception consists of laws that expanded state jurisdiction in Indian country by abrogating treaties with certain tribes. In addition, to be enforceable in Indian country, a state law must satisfy the tests of preemption and infringement.<sup>6</sup>

## **3. CAN TAX LAWS BE IMPOSED ON INDIANS IN INDIAN COUNTRY?**

Yes and no. Tribal members are generally subject to federal taxes, but states cannot tax American Indian wages for work done on reservations or for American Indian commercial transactions on reservations. There are limited exceptions, however, for certain state taxes related to transactions by non-Indians on reservations.<sup>7</sup>

## **4. HOW ARE TRIBAL GOVERNMENTS ORGANIZED?**

Many tribes are governed by Business Councils or Executive Committees, with members elected to staggered two-year terms in accordance with tribal constitutions. Other tribes are governed under a more traditional structure.

## **5. ARE TRIBAL GOVERNMENT POWERS LIMITED BY THE U.S. CONSTITUTION?**

No. Even though the U.S. Supreme Court has ruled that Congress has full and complete (plenary) power over Indian tribes through the Commerce Clause of the U.S. Constitution, the Court has also ruled that the Constitution does not limit tribal powers because those powers are inherent and not derived from the federal government.<sup>8</sup> The Indian Reorganization Act of 1934

expressly authorizes Indian tribes to adopt their own constitutions while providing certain civil rights and limitations on tribal government.<sup>9</sup>

## **6. CAN YOU SUE A TRIBAL GOVERNMENT?**

Usually no. Tribal governments enjoy sovereign immunity from suit and, unless there is an express and/or limited waiver of immunity, the tribal government (including its agents and employees), cannot be sued in an official capacity.<sup>10</sup>

## **7. ARE TRIBES IN IDAHO SUBJECT TO FEDERAL SUB-POENA POWER?**

No, unless the tribe has waived its sovereign immunity.<sup>11</sup> This rule varies by federal circuit.

## **8. DO TRIBES HAVE COURT SYSTEMS?**

Yes. Many tribes have trial and appellate judges, court clerks, filing systems, and Law and Order codes. In addition, many tribal courts offer administrative tribal bar exams and sponsor tribal bar associations.<sup>12</sup>

## **9. DO TRIBES HAVE CRIMINAL JURISDICTION OVER NON-INDIANS?**

No. In 1978, the U.S. Supreme Court ruled that tribes do not have criminal jurisdiction over non-Indians.<sup>13</sup> However, non-Indians committing crimes on Indian reservations may be subject to federal or state prosecution.

## **10. DO TRIBES HAVE CIVIL JURISDICTION OVER NON-INDIANS?**

It depends. In 1981, the U.S. Supreme Court held that tribes can exercise civil jurisdiction over a non-Indian if either (a) the non-Indian has a relevant consensual relationship with the tribe, or (b) the non-Indian is doing something that imperils the tribe's political integrity, economic security, or health and welfare.<sup>14</sup>

## **11. CAN YOU ENFORCE STATE JUDGMENTS IN TRIBAL COURT, OR VICE VERSA?**

Usually. There is no specific federal or state law providing comity or full faith and credit of tribal judgments in state court, or vice versa, but most states and tribes have laws giving full faith and credit to a foreign jurisdiction's orders and judgments that do not violate due process rights.

## **12. CAN YOU RECORD A JUDGMENT, SECURITY INTEREST, OR OTHER LIEN ON AN INDIAN RESERVATION?**

Probably not. In fact, there do not appear to be any tribes with public recording systems similar to a county clerk's office or the Secretary of Idaho's UCC recording system. The main reason is lack of funding to implement such a service. Currently, a group of tribal and non-tribal scholars are working on a model law, similar to the UCC, that tribes could adopt.

## **13. DO INDIAN TRIBES COLLECT TAXES LIKE OTHER GOVERNMENTS?**

Yes. For example, many tribes tax cigarette and motor fuel sales.<sup>15</sup> Most tribes earmark cigarette tax revenue for tribal health issues and motor fuel tax revenue for maintenance of trib-

al roads. Tribes do not receive any money from the Millennium Fund that generates millions of dollars in revenue for states each year pursuant to an agreement reached with tobacco companies.

#### **14. DOES THE FEDERAL GOVERNMENT OWE A SPECIAL TRUST RESPONSIBILITY TO INDIANS THAT IS DIFFERENT FROM THE DUTIES OWED TO OTHER CITIZENS?**

Yes. The federal government owes a special trust responsibility to Indians and Indian tribes arising from express and specific language in treaties, statutes, agreements, and executive orders. The federal government only owes other citizens the duty to follow laws and regulations.<sup>16</sup>

#### **15. WHY ARE FEDERAL AND TRIBAL GOVERNMENTS ALLOWED TO HAVE INDIAN HIRING PREFERENCE LAWS?**

The Indian Reorganization Act of 1934 allows federal and tribal governments to give hiring preferences to American Indians, in an effort to address the high rate of unemployment on Indian reservations.<sup>17</sup> Courts have upheld these preferences on the grounds that they are granted to Indians based on a political relationship, not as a discrete racial group.<sup>18</sup>

#### **16. DO AMERICAN INDIANS RECEIVE CHECKS FROM THE FEDERAL GOVERNMENT JUST BECAUSE THEY ARE INDIANS?**

No. This rumor has persisted for generations in the non-Indian world. In fact, the money tribal members ordinarily receive from the federal government is for assets held in trust by the government. For example, the federal government disburses income from Indian trust land leased to other Indians and non-Indians for the benefit of tribal members.

#### **17. HOW DO TRIBES SPEND INCOME FROM GAMING?**

Tribal governments with casinos are required to have federally approved distribution plans.<sup>19</sup> Tribes with casinos use a significant share of gaming revenue to subsidize tribal government operations (e.g., police, fire departments, education). Tribes have also been required to use gaming money to subsidize federal funding shortfalls because, over the years, federal appropriations for services provided by the federal government (under self-determination contracts) have been reduced or increased at rates lower than the rate of inflation. Some tribes distribute a share of remaining funds to tribal members. According to *Time* magazine, the typical per capita distribution for a rural tribe with a casino is approximately \$400 per person per year.<sup>20</sup>

#### **18. WHY DO ONLY SOME TRIBES OFFER TABLE AND CARD GAMES?**

A tribe can offer any and all forms of gaming otherwise authorized in the state where the tribe is located. To offer any additional gaming, or class III gaming like table games and card games against the house, the tribe must obtain the consent of the state in the form of a compact. The National Indian Gaming Commission must also approve the compact.<sup>21</sup>

#### **19. ARE AMERICAN INDIANS ENTITLED TO THE SAME RIGHTS AND BENEFITS AS OTHER STATE RESIDENTS?**

Yes. All American Indians became citizens of the United States in 1924 according to 8 U.S.C. §1401(a)(2). According to the Fourteenth Amendment to the U.S. Constitution, no state shall make or enforce any law that shall abridge the privileges or

immunities of the citizens of the United States nor deny any person within its jurisdiction the equal protection of the laws.

#### **20. WHAT IS THE COBELL LAWSUIT?**

In 1996, Eloise Cobell, a member of the Blackfeet Tribe in Montana, filed what has become the largest monetary damage claim in U.S. history. The Cobell lawsuit seeks more than \$300 billion in damages against the United States for mismanaging tribal trust assets.<sup>22</sup>

#### **ABOUT THE AUTHOR**

**William F. Bacon** has been a member of the Shoshone-Bannock Tribal Bar Association since 1983. He served as a Special Judge for Complex Litigation with the Shoshone-Bannock Tribes for 12 years before being appointed and elected General Counsel for the Tribes in 2001. He graduated from Northwestern University in 1978, the University of Idaho law school in 1981, and is a member of the Idaho State Bar and the Indian law section. He has practiced law in the Pocatello area for 25 years and served as Bannock County Prosecuting Attorney from 1990 to 1992.

#### **ENDNOTES**

<sup>1</sup> *Federal Power Commission v. Tuscarora*, 362 U.S. 99 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

<sup>2</sup> 29 U.S.C. §651 *et seq.*

<sup>3</sup> 25 U.S.C. §§1321 *et seq.*

<sup>4</sup> 25 U.S.C. §§331 *et seq.*

<sup>5</sup> Idaho Code §67-5301.

<sup>6</sup> If the state law conflicts with an area of law that is specifically covered under the U.S. Constitution or federal law, then the state law may be preempted. *Warren Trading Post Co. v. Arizona*, 380 U.S. 685 (1965). The state law must also be tested to determine if it infringes on a tribe's right to make its own laws and be ruled by them. *William v. Lee*, 358 U.S. 217 (1959). To be enforceable, a state law must pass both tests.

<sup>7</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>8</sup> *Talon v. Mayes*, 163 U.S. 379 (1886).

<sup>9</sup> 25 U.S.C. §461 *et seq.*; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>10</sup> *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

<sup>11</sup> *United States v. James*, 980 F.2d 1314 (9th Cir. 1992).

<sup>12</sup> *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>13</sup> *Oliphant v. Suquamish Indian Tribes*, 35 U.S. 191 (1978).

<sup>14</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>15</sup> *Merrion v. Jicarilla Apache Tribes*, 455 U.S. 103 (1982).

<sup>16</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (holding that tribes are dependent domestic nation similar to a guardian-ward relationship).

<sup>17</sup> 25 U.S.C. §§461 *et seq.*

<sup>18</sup> 25 U.S.C. §472; see also *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>19</sup> 25 U.S.C. §2710.

<sup>20</sup> *Look Who's Cashing in at Indian Casinos*, *Time*, Dec. 16, 2002.

<sup>21</sup> Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*

<sup>22</sup> See *Cobell v. Babbitt*, 91 F. Supp.2d 1 (D.D.C. 1999).

# TRIBAL SOVEREIGN IMMUNITY: A PRIMER

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This article discusses the development of the principle—known as tribal sovereign immunity—that Indian tribes are immune from suit unless they have consented or Congress has abrogated the immunity. Tribal sovereign immunity is a judge-made, or federal common law, doctrine finding its roots in a 1919 Supreme Court decision. Since then, the Supreme Court has issued five decisions defining the doctrine's scope and reiterating its continued existence. Although the basic elements of a tribe's sovereign immunity are now settled, application of the doctrine has proved troublesome for lower courts in important respects. The article explores several of those issues. The first involves tribal status issues—*i.e.*, whether the activities giving rise to a suit are properly viewed as being actions by the tribe in its sovereign capacity or actions of an entity distinct from the tribe that is subject to suit. The second concerns the standards for determining whether congressional abrogation has occurred, with special attention paid to statutes of general applicability. The final area is the availability of suits against tribal officers for prospective and/or retroactive relief.

## INTRODUCTION

The general rule is straightforward: federally recognized Indian tribes are immune from suit by any entity or individual, other than the United States, absent their consent or congressional abrogation. Not so easily explained, however, is how this rule came to be and how it should be applied. In this regard, tribal immunity from suit shares many of the complexities associated with the states' general immunity from suit in federal court. As the United States Supreme Court has made clear recently, of the derivation of this immunity was the Constitutional Convention, not the Eleventh Amendment, and has significant exceptions.<sup>1</sup>

Suffice it to say, there is no single substantive issue in Indian law that currently produces more decisional attention than tribal sovereign immunity. A tribe's immunity from suit, for example, will not only preclude obtaining relief against the tribe but also may make relief unavailable against *any* party by virtue of the tribe's indispensable status.<sup>2</sup> This article explores the development and core elements of the tribal sovereign immunity doctrine and several areas—the effect of corporate status, congressional abrogation, and officer capacity suits—where application of the doctrine has proved especially troublesome.

## TRIBAL SOVEREIGN IMMUNITY: ITS FEDERAL COMMON LAW SOURCE AND ATTRIBUTES

The principle that Indian tribes enjoy a broad-based immunity from suit is of relatively recent origin. Its roots lie in a 1919 decision, *Turner v. United States*,<sup>3</sup> where a non-Indian lessee sued the Creek Nation for damages resulting from the destruction of a fence by its members. In a brief opinion, the Supreme Court found that liability was barred “by the general law” because “[l]ike other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or

property due to mob violence or failure to keep the peace.”<sup>4</sup> The Court, however, added a second reason for affirming the lower court's dismissal with respect to the tribe: The federal statute under which the suit had been brought did not provide for suit against the tribe itself—which in any event had been dissolved—and “[w]ithout authorization from Congress, the Nation could not then have been sued in any court; at least without its consent.”<sup>5</sup>

Over twenty years later in *United States v. United States Fidelity & Guaranty Co.*,<sup>6</sup> the Supreme Court relied upon *Turner's* alternative holding to void a monetary judgment entered against a tribe in a prior proceeding. “Indian Nations,” it reasoned, “are exempt from suit without Congressional authorization.”<sup>7</sup> Another quarter century passed before the Court reiterated this rule in *Puyullap Tribe, Inc. v. Department of Game*.<sup>8</sup> There, it found that a state court lacked jurisdiction to enjoin fishing activities by a tribe absent its consent to suit or congressional “waiver” of such immunity.<sup>9</sup> It nonetheless rejected the claim by individual tribal members that they shared in their tribe's immunity.<sup>10</sup> Shortly after *Puyullap*, the Court held in *Santa Clara Pueblo v. Martinez*<sup>11</sup> that, in the absence of an “unequivocal expression” of contrary intent, Congress had not subjected tribes to suit for claims under the 1968 Indian Civil Rights Act<sup>12</sup> and their immunity therefore barred such suit.<sup>13</sup> *Santa Clara Pueblo* further cited *Puyullap* for the proposition that tribal officers were not entitled to claim such immunity as a defense to alleged violation of the Act but concluded, after lengthy analysis, that Congress had not created a private right of action under the statute except where habeas corpus relief was appropriate.<sup>14</sup>

Two subsequent decisions entrenched this sovereign immunity doctrine. The first, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,<sup>15</sup> declined a request to reconsider the doctrine in the context of a state's attempt to recoup from a tribe cigarette taxes that should have been collected from nonmember customers.<sup>16</sup> It made no difference that the state's demand was introduced through a counterclaim in a suit brought by the tribe to have the cigarette tax declared invalid—*i.e.*, “the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief.”<sup>17</sup> The Court left to the legislative branch the task of “dispens[ing] with . . . tribal immunity or . . . limit[ing] it” and noted that “Congress has consistently reiterated its approval of the immunity doctrine.”<sup>18</sup> It did observe that “[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State” and cited to *Ex parte Young*.<sup>19</sup>

The second decision, *Kiowa Tribe v. Manufacturing Technologies, Inc.*,<sup>20</sup> reversed a state court determination that a tribe was not immune from suit to enforce a promissory note related to a business operated outside Indian country. The major-

ity opinion remarked that “[t]hrough the doctrine of sovereign immunity is settled law and controls this case, . . . it developed almost by accident.”<sup>21</sup> Despite “reasons to doubt the wisdom of perpetuating the doctrine” given “modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities[.]” it once again “defer[red] to the role Congress may wish to exercise in this important judgment.”<sup>22</sup> The majority reached this conclusion in the face of acknowledging, as had been the situation in *Citizen Band Potawatomi*, that the state-law-created duty sought to be enforced against the tribe was itself valid.<sup>23</sup>

The series of Supreme Court cases beginning with *Turner* established the basic framework of the tribal sovereign immunity doctrine. This framework has several key attributes that are currently settled:

The immunity is judge-made, or federal common law, in character. It does not derive from the United States Constitution and is subject not only to congressional control but also to federal constitutional restrictions.<sup>24</sup>

The immunity applies to suit in federal or state court brought by any party other than the United States, a federal agency or a federal official.<sup>25</sup>

The immunity applies without regard to the relief sought.

The immunity applies without regard to nature of the controversy itself. It therefore applies equally to tort, contract and statutory enforcement claims.<sup>26</sup>

The immunity applies without regard to where the dispute arises. It therefore applies no differently to claims arising off the reservation set aside for the particular tribe than to on-reservation claims.

The immunity applies without regard to whether the involved tribal activity is subject to regulation under valid federal or state law. It is concerned with remedy, not with underlying liability.

The immunity may be waived by the affected tribe or abrogated by Congress. Any waiver or abrogation must be unequivocal.<sup>27</sup>

Immunity ordinarily does not preclude prospective relief against tribal officers or employees when their actions are alleged to violate federal law.

Immunity does not extend to actions taken by tribal members in their individual capacities.

### **TRIBAL SOVEREIGN IMMUNITY: THREE PROBLEM AREAS**

Although the Supreme Court has blazed the general contours of the tribes’ immunity from suit, actually navigating that path remains a difficult task for courts. Three areas are particularly troublesome: (1) immunity waiver under section 17 of the 1934 Indian Reorganization Act<sup>28</sup> and the related issue of whether an entity is as an “arm of the tribe” for immunity purposes; (2) congressional abrogation; and (3) tribal officer-capacity suits.

### **TRIBAL STATUS ISSUES: IRA SECTION-17-BASED WAIVER AND “ARMS OF THE TRIBE”**

Tribes waive their immunity from suit in one of several ways—under contract, in litigation and through “corporate” action. Complexity can attend each mode of waiver. The United States Supreme Court addressed contractual waiver in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*<sup>29</sup> and

unanimously found that an arbitration provision, which stated in part that “[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof[.]”<sup>30</sup> constituted unequivocal consent to suit in an award-enforcement suit.<sup>31</sup> The Court also dealt with the question of litigation-related waiver in the *Fidelity & Guaranty* decision, where it declined to find that the receivership claim filed on the tribe’s behalf waived immunity except to the extent of a set-off growing out of the same transaction.<sup>32</sup> It is ironic that the third method of waiver has not been examined by the Court despite the greater difficulty which it has caused lower courts.

Section 17 authorizes the Secretary of the Interior to issue “charters of incorporation” to tribes under which, with certain limitations, they “may purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business.” This section has as its animating purpose enabling tribes “to conduct business through th[e] modern device” of corporations.<sup>33</sup> It differs in this respect from section 16 of the Indian Reorganization Act<sup>34</sup> under which tribes may adopt constitutions and bylaws for their internal governance, subject to member ratification and secretarial approval.<sup>35</sup> Because section 17 charters may include immunity waivers, often referred to as “sue and be sued” provisions, disputes have arisen over whether a particular activity was undertaken by the tribal corporation—which could be sued—or the tribe itself—which could not.<sup>36</sup>

Differentiating between actions taken in a section 17 corporate capacity and those taken as a sovereign often demands a detailed factual examination.<sup>37</sup> The Idaho Supreme Court in *Robles v. Shoshone-Bannock Tribes*<sup>38</sup> thus affirmed in a permissive appeal a district court’s ruling that a factual dispute existed over whether the plaintiff—who sought back pay as a result of alleged breach of contract—had been employed by a section 17 corporation subject to a “sue and be sued” clause or by the tribe. It reasoned, as had the lower court, that the plaintiff had raised a material question of fact through submission of an affidavit indicating “he [had] worked for the tribal corporation” and attaching “a notice of appointment which contained the heading ‘Shoshone-Bannock Tribes, Inc.’”<sup>39</sup> A leading law review article has extrapolated from case law a number of considerations, ranging from the entity’s purpose to the degree of tribal council control, relevant to this determination.<sup>40</sup> There is, in short, no easy formula for resolving disputes over whether challenged conduct was taken by a section 17 corporation or by a tribe in its sovereign capacity.

A related analytical issue exists where the sued entity may be an “arm of the tribe” and therefore protected by sovereign immunity. Section 17 is not the exclusive means for tribes to incorporate for business or other purposes—*i.e.*, tribes can create corporate entities under their own laws or those of other sovereigns.<sup>41</sup> The principal legal difference is that, while section 17 corporations retain their tribal status—and, accordingly, sovereign immunity in the absence of a “sue and be sued” waiver—the

other species of corporations are not imbued automatically with such status. Courts nonetheless have resorted generally to a multi-factor inquiry, comparable to that employed in section 17 controversies, to decide whether the corporation constitutes an “arm of the tribe” and shares in the tribe’s immunity from suit.<sup>42</sup>

Most recently, in *Wright v. Colville Tribal Enterprise Corp.*,<sup>43</sup> the Washington Supreme Court issued a splintered decision that directed summary judgment on sovereign immunity grounds in an action brought by a former employee, a pipe-layer, who alleged racial harassment against a “governmental” corporation organized under tribal law and doing business off reservation under a federal construction contract. The corporation was the subsidiary of another tribal corporation wholly owned by the tribal council.<sup>44</sup> The principal opinion on behalf of four justices applied a “bright-line rule” under which sovereign immunity attaches only to “tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws.”<sup>45</sup> Two justices concurred in the result but criticized the principal opinion for deeming irrelevant, on the basis of *Manufacturing Technologies*, “the purpose for which a tribal entity was created.”<sup>46</sup> It thus would have considered the fact that, regardless of the tribe’s lack of responsibility for the corporations’ debts, “[a]ny liability imposed on the corporations could still affect the tribe’s finances”<sup>47</sup> and that “while management of the corporations is separate from the [tribal] council’s daily governmental oversight,” they carried out essential governmental economic functions.<sup>48</sup> Three justices dissented, identifying myriad factual considerations deemed germane to the tribal status issue and finding the matter inappropriate for summary judgment.<sup>49</sup> The three opinions contain a helpful summary of existing precedent and reflect differing approaches to answering the “arm of the tribe” question.

### CONGRESSIONAL ABROGATION ISSUES

Congressional abrogation should be a fairly uncomplicated area from a sovereign immunity perspective. Congress merely has to make its intent “unequivocally” known. Doing so would require explicit application of the involved statute and its private remedies, if any, to Indian tribes. The difficulty arises because much federal legislation is enacted without giving explicit consideration to its applicability to Indian tribes. Courts therefore confront regularly the question whether a law applies *at all* to tribes and, if it does, whether the tribe is subject to private suit.<sup>50</sup>

The threshold inquiry—whether an otherwise silent but general statute applies to tribes—is assisted to some extent by the statement in *FPC v. Tuscarora Indian Nation*<sup>51</sup> that “a general statute in terms applying to all persons includes Indians and their property interests.”<sup>52</sup> Federal courts of appeal, however, have been reluctant to give *Tuscarora* literal effect—albeit on varying rationales. The Ninth Circuit has adopted a three-pronged test that excludes “intramural matters” and contemplates considering extrinsic matters such as treaty rights and legislative history.<sup>53</sup> Other circuits have employed different approaches.<sup>54</sup> In sum, conceptual complexity may well accompany determining whether a statute applies to Indian tribes and is thus enforceable against them by the federal government or against tribal officers

or employees by private parties seeking *Ex parte Young*-like prospective relief.

Even if applicable to tribes, the statute must still pass muster under the “unequivocal” expression standard to allow for private relief against a tribe.<sup>55</sup> Courts engage in the same type of analysis to resolve that issue regardless of whether a statute relates specifically to Indians or has general applicability. A few illustrations reflect some of the analytical considerations.

As would be expected, courts pay particular attention to definitional sections. The Tenth Circuit thus had no difficulty in concluding that the Safe Drinking Water Act abrogates under its employee protection provision tribal immunity against suit because the term “person” is defined to include “municipality” which, in turn, encompasses Indian tribes.<sup>56</sup> Similarly, the Ninth Circuit relied upon its construction of the broadly defined term “governmental unit” in the Bankruptcy Code to determine that tribes are subject to suit in adversary proceedings under the statute.<sup>57</sup> The Second Circuit, by way of contrast, declined to read a statute’s narrow definitional reference to tribes beyond its express terms for abrogation purposes.<sup>58</sup> Also significant are remedial provisions that refer to tribes,<sup>59</sup> but the mere fact that a tribal operation is subject to a statute’s regulatory scheme has been held insufficient to abrogate the involved tribe’s immunity.<sup>60</sup> Courts predictably have refused to rely on amorphous notions of statutory “intent” to supply the requisite explicitness.<sup>61</sup> Absolute silence, of course, deposes of the issue altogether.<sup>62</sup> One court has indicated that the Indian canons of construction, which require ambiguities in treaties or federal laws related to Indian affairs to be resolved in a tribe’s favor, have no role with respect to statutes of general applicability,<sup>63</sup> but the “unequivocal” requirement likely renders the canons’ relevance academic even as to legislation plainly within their reach.

A final issue that mixes the question of abrogation with whether the federal-common-law sovereign immunity doctrine can co-exist with the Constitution is the susceptibility of tribes to criminal and civil process from federal courts. The Ninth Circuit held in *United States v. James*<sup>64</sup> that a tribe possessed immunity against service of a subpoena *duces tecum* in a criminal proceeding.<sup>65</sup> Lower federal courts—including two in the Ninth Circuit—have reached contrary results predicated in part on due process and confrontation clause principles.<sup>66</sup> *James* has been followed by at least one court with respect to federal civil process.<sup>67</sup> This area remains unsettled with the principal issues being, aside from constitutional concerns with regard to federal and state criminal proceedings,<sup>68</sup> whether subpoenas or search warrants implicate a tribe’s immunity from suit and, if so, whether such immunity extends to federal, court-issued civil process.

### OFFICER-CAPACITY SUIT ISSUES

The stringency of the sovereign immunity doctrine is mitigated to some extent, as is the states’ immunity from federal court suit, by possible remedies against tribal officers or employees. Like other aspects of the doctrine, access to officer capacity suits is reasonably well established in some respects but unclear in others.

When prospective relief is requested to enforce federal law, *Santa Clara Pueblo* established that an *Ex parte Young*-like fiction may be applied.<sup>69</sup> Unresolved is whether this fiction encompasses instances where otherwise valid state law is sought to be enforced prospectively, but, given *Citizen Band Potawatomi*, the answer appears to be yes.<sup>70</sup> *Young* relief has been held unavailable to enforce contracts against state officials,<sup>71</sup> and that limitation is recognized with respect to tribal officials.<sup>72</sup> When retroactive relief—*i.e.*, damages—is demanded, courts have required a showing that the officers or employees acted beyond the scope of their authority<sup>73</sup>—a requirement whose meaning is likely determined by reference to federal immunity cases. In the damages context, “scope of authority turns on whether the government official was empowered to do what he did; *i.e.*, whether, even if he acted erroneously, it was within the scope of his delegated power.”<sup>74</sup>

## CONCLUSION

The tribal sovereign immunity doctrine is an integral element of modern Indian law. Like many other components of that law, it is almost entirely judge-made and evolves over time in traditional common law fashion. The pace of that evolution, however, has increased as courts face tribal immunity-from-suit issues more frequently. This article has attempted to distill certain core principles that appear settled and to explore briefly several areas where confusion or unanswered questions exist. While the ultimate answers to those questions cannot be predicted with assurance, it can be said with high confidence that those answers will come from the judiciary. Informed advocacy is thus essential.

## ABOUT THE AUTHOR

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## ENDNOTES

<sup>1</sup> As the Supreme Court held in *Alden v. Maine*, 526 U.S. 706 (1999), the states' immunity from suit in federal court derives not from the Eleventh Amendment but from “the original constitutional design that Congress acted not to change but to restore.” *Id.* at 722. The Eleventh Amendment thus “did not redefine the federal judicial power but instead overruled” *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793). This immunity extends beyond federal court actions to suit before any federal tribunal regardless of the relief sought. *Fed. Mar. Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 760 (2002) (“if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the

administrative tribunal of an agency”). Nevertheless, the Court has recognized not only that states may waive such immunity (*e.g.*, *Alden*, 526 U.S. at 736-37) but also that immunity is unavailable to state officers sued in their official capacity for prospective relief seeking to enforce a federal-law-imposed duty (*e.g.*, *Ex parte Young*, 203 U.S. 123 (1908)). The Supreme Court determined last year, moreover, that the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, embodied an agreement by the states “in the plan of the [Constitutional] Convention not to assert [their] immunity” against suit to enforce “orders ancillary to the bankruptcy courts' *in rem* jurisdiction.” *Cent. Va. Comm'y College v. Katz*, 126 S. Ct. 990, 1002 (2006) (overruling contrary dictum in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). States also have surrendered their immunity from federal court suit by the federal government itself or other states as part of the plan of the Convention. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991). Congress, finally, has authority to abrogate the states' immunity to provide remedies for legislation enacted pursuant to its authority under section 5 of the Fourteenth Amendment so long as such remedies embody “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>2</sup> Decisions applying Fed. R. Civ. P. 19 to dismiss actions because a tribe was a necessary and indispensable party are legion. *E.g.*, *Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 551-53 (4th Cir. 2006) (tribe indispensable party in suit challenging as racially discriminatory a contract between a casino management company and the tribe); *Wilbur v. Locke*, 423 F.3d 1101, 1111-15 (9th Cir. 2005) (tribe indispensable party in suit challenging statute that authorized the governor to contract with tribes over cigarette tax issues); *EEOC v. Peabody W. Coal Co.*, CV 01-01050-PHX-MHM, 2006 WL 2816603 (D. Ariz. Sept. 30, 2006) (tribe indispensable party in challenge by federal agency to employment preference under coal lease with tribe).

<sup>3</sup> 248 U.S. 354 (1919).

<sup>4</sup> *Id.* at 357-58.

<sup>5</sup> *Id.* at 358.

<sup>6</sup> 309 U.S. 506 (1940).

<sup>7</sup> *Id.* at 512.

<sup>8</sup> 433 U.S. 165 (1977).

<sup>9</sup> *Id.* at 172-73.

<sup>10</sup> *Id.* at 173.

<sup>11</sup> 436 U.S. 49 (1978).

<sup>12</sup> 25 U.S.C. §§ 1301-1303.

<sup>13</sup> 436 U.S. at 59.

<sup>14</sup> *Id.* at 59-70.

<sup>15</sup> 498 U.S. 505 (1991).

<sup>16</sup> See *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 155-59 (1980).

<sup>17</sup> 498 U.S. at 510.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 514.

<sup>20</sup> 523 U.S. 751 (1998).

<sup>21</sup> *Id.* at 756.

<sup>22</sup> *Id.* at 757-58.

<sup>23</sup> *Id.* at 755 (“[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them”). Three Justices dissented because, in their view, several reasons existed “not [to] extend the [sovereign immunity] doctrine beyond its present contours” to encompass “a suit that has no meaningful nexus to the tribe’s land or its sovereign status.” *Id.* at 764 (Stevens, J., dissenting). Those reasons included concern over (1) “the Court’s performance of a legislative function” since it “is not merely announcing a rule of comity for federal judges to observe” but, rather, “is announcing a rule that pre-empts state power” (*id.*); (2) the anomaly of bestowing immunity of a scope broader than presently enjoyed by the federal government and the states (*id.* at 765); and (3) the perceived unjustness of not holding governments “accountable for their unlawful, injurious conduct” (*id.* at 766).

<sup>24</sup> See *United States v. Lara*, 541 U.S. 193, 205 (2004)

(Supreme Court’s determinations of inherent tribal authority “reflect [its] view of the tribes’ retained sovereign status as of the time the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant legal circumstances, *i.e.*, from taking actions that modify or adjust the tribes’ status”); *Agua Caliente Band of Cahuilla Indians v. Superior Ct.*, 148 P.3d 1126, 1140 (Cal. 2006) (declining to recognize tribes’ immunity from suit for purposes of enforcing political fair practices act; “[a]lthough concepts of tribal immunity have long-standing application under federal law, the state’s exercise of state sovereignty in the form of regulating its electoral process is protected under the Tenth Amendment and the guarantee clause”).

<sup>25</sup> See, *e.g.*, *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 861 (9th Cir. 1986) (“[I]ike each of the fifty states, the Yakima Nation is not immune from suits brought by the United States”).

<sup>26</sup> The Idaho Supreme Court stated in *Robles v. Shoshone-Bannock Tribes*, 125 Idaho 852, 876 P.2d 134 (1994), that “the term ‘sovereign immunity’ is generally associated with immunity from tort claims” and that in contract cases “the question would be whether, by entering into the contract, the tribal corporation subjected itself to suit.” 125 Idaho at 136, 876 P.2d at 854 n.5. It is unclear whether the Court was making a rhetorical, opposed to a substantive, distinction, but the later-decided *Manufacturing Technologies* leaves no doubt that, for tribal immunity purposes, the applicable standards for tort and non-tort claims do not differ.

<sup>27</sup> *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001) (“To abrogate tribal immunity, Congress must ‘unequivocally’ express that purpose. . . . Similarly, to relinquish its immunity, a tribe’s waiver must be ‘clear’”) (citations omitted).

<sup>28</sup> 25 U.S.C. § 477.

<sup>29</sup> 532 U.S. 411 (2001).

<sup>30</sup> *Id.* at 415.

<sup>31</sup> *Id.* at 422 (The arbitration provision “has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration”). Ensuring that a contractual

waiver, even if broad, embodies a valid exercise of tribal authority can be complex. *E.g.*, *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1286-87 (11th Cir. 2002) (no valid waiver in absence of evidence showing tribal council approval in accordance with immunity-waiver ordinance); see generally Edward Rubacha, *Construction Contracts with Indian Tribes or on Indian Lands*, 26 Wtr. Construction Law 12 (2006) (discussing sovereign immunity issues related to contracting with Indian tribes from a practitioner’s perspective). Congress addressed this issue in a limited fashion through amendments to 25 U.S.C. § 81 in 2000, which require not only that certain contracts involving Indian lands be approved by the Secretary of the Interior but also contain, *inter alia*, breach-of-contract remedies and a sovereign immunity waiver.

<sup>32</sup> 309 U.S. at 511. The *Fidelity & Guaranty* Court relied on *United States v. Bull*, 295 U.S. 247 (1935), which in turn cited an early case, *United States v. Ringgold*, 33 (8 Pet.) 150, 163 (1834), for the principle that “‘when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States.’” 295 U.S. at 262.

<sup>33</sup> Opinion No. M-36515, 65 Interior Dec. 483, 484 (1958).

<sup>34</sup> 25 U.S.C. § 476.

<sup>35</sup> See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (under the Indian Reorganization Act, “tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe”).

<sup>36</sup> *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492-93 (9th Cir. 2002) (“Such ‘sue and be sued’ clauses waive immunity with respect to a tribe’s corporate activities, but not with respect to its governmental activities. . . . The ‘sue and be sued’ clause in the Community’s corporate charter in no way affects the sovereign immunity of the Community as a constitutional, or governmental, entity”); see also *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 979-81 (9th Cir. 2006) (discussing the history of “sue and be sued” provisions in tribal housing authority ordinances, and rejecting that Second Circuit approach that limits the waiver to tribal court actions).

<sup>37</sup> See, *e.g.*, *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1269 (10th Cir. 1998) (noting that the district court had deferred ruling on the question whether the defendant had acted in corporate status because of factual uncertainty, and remanding “to determine whether the tribal corporate entity is both a named and proper defendant in this case”); *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1981) (affirming district court’s determination after trial that the tribe’s “constitutional and corporate entities were separate and distinct”).

<sup>38</sup> 125 Idaho 852, 876 P.2d 134 (1994).

<sup>39</sup> 125 Idaho at 135, 876 P.2d at 853.

<sup>40</sup> William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 176-77 (1994).

<sup>41</sup> See *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (“[w]hen the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe”); *Chippewa Trading Co. v. Cox*, 365 F.3d 538, 545 (6th Cir. 2004) (tribally-controlled corporation chartered under tribal law not entitled to invoke subject-matter jurisdiction under 28 U.S.C. § 1362, which is reserved for tribes, since “[i]t is merely a private corporation organized under a tribal jurisdiction”); cf. *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003) (accepting without substantive analysis assertion that a tribal corporation was an “arm of the tribe” and therefore entitled to assert tribal immunity from suit but not “person” status under 42 U.S.C. § 1983).

<sup>42</sup> *Compare Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 658 N.E.2d 989, 992-93 (N.Y. 1995) (extending sovereign immunity to a non-profit corporation formed under District of Columbia law on the rationale that “[t]ribal subagencies and corporate entities created by the Indian Nation to further governmental objectives, such as providing housing, health and welfare services, may also possess attributes of tribal sovereignty”), with *Runyon ex rel. B.R. v. Ass’n of Village Presidents*, 84 P.3d 437, 440-41 (Alaska 2004) (citing *Ransom* for the principle that a state non-profit corporation could be an arm of a tribe, but holding that the involved entity was not because the shareholders—various Alaska native villages—were insulated from liability for the corporation’s debts and thus not “real parties in interest”); cf. *Seneca-Cayuga Tribe v. Edmondson*, No. 06-CV-0394-CVE-SAJ, 2006 WL 3452702, at \*6 (N.D. Okla. Nov. 29, 2006) (act of incorporation separated the corporation as a legal entity from the tribe itself for Article III standing purposes, since a “corporation is an entity distinct from the shareholders or members and with rights and liabilities not the same as their[s] individually and severally”).

<sup>43</sup> 147 P.3d 1275 (Wash. 2006).

<sup>44</sup> *Id.* at 1277.

<sup>45</sup> *Id.* at 1279.

<sup>46</sup> *Id.* at 1284 (Madsen, J., concurring).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1285.

<sup>49</sup> *Id.* at 1287-88 (C. Johnson, J., dissenting).

<sup>50</sup> E.g., *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 487 (1999) (Price-Anderson Act’s provision for removal to federal court only of state court cases arising from a “nuclear incident” claim did not support requiring exhaustion of tribal court remedies as to such claims, with congressional “inadvertence” suggested as “the most likely” reason for the absence of any reference to tribal courts).

<sup>51</sup> 362 U.S. 99 (1960).

<sup>52</sup> *Id.* at 116. The issue in *Tuscarora* was whether a state agency could exercise eminent domain over tribally owned lands pursuant to section 21 of the Federal Power Act, 16 U.S.C. § 814, which authorizes condemnation of property for the purpose of

constructing or maintaining federally-licensed power projects. 362 U.S. at 100.

<sup>53</sup> E.g., *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (“[a] federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations’”).

<sup>54</sup> See *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (“[t]he *Tuscarora* Court’s remarks concerning statutes of general applicability were made in the context of property rights, and do not constitute a holding as to tribal sovereign authority to govern”); *San Manuel Indian Bingo & Casino v. NLRB*, No. 05-1392, 2007 WL 420116, at \*4 (D.C. Cir. Feb. 9, 2006) (“[t]he *Tuscarora* statement is . . . in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians . . . and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty”) (citations omitted).

<sup>55</sup> E.g., *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (“[n]othing on the face of the Copyright Act ‘purports to subject tribes to the jurisdiction of the federal courts in civil actions’ brought by private parties, . . . and a congressional abrogation of tribal immunity cannot be implied”) (citation omitted); *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1291 (11th Cir. 2002) (tribe immune from claim under the Vocational Rehabilitation Act; “[t]he bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity in this particular instance”).

<sup>56</sup> *Osage Tribal Council v. USDOL*, 187 F.3d 1174, 1181 (10th Cir. 1999).

<sup>57</sup> *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057-58 (9th Cir. 2004).

<sup>58</sup> *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1290 (11th Cir. 2002) (where statute defined “local agency” to include tribes that have “an agreement with the designated State agency to conduct a vocational rehabilitation program under the supervision of such State agency in accordance with [a federally approved] State plan,” a tribe without such an agreement was not subject to liability under the law).

<sup>59</sup> See *Pub. Serv. Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206-07 (9th Cir. 1994).

<sup>60</sup> *Florida Paraplegic Ass’n v. Miccosukee Tribe*, 166 F.3d 1126, 1131-34 (11th Cir. 1998) (Title III of the American with Disabilities Act applies to a tribal casino but does not abrogate tribal immunity with respect to private suit).

<sup>61</sup> *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264-65 (10th Cir. 1998); but see *Vann v. Kempthorne*, No. 03-01711 (HHK), 2006 WL 3720376 (D.C. Dec. 19, 2006) (relying on the Thirteenth Amendment and an 1866 treaty, which required the Cherokee Nation to abolish slavery and to grant the freed slaves, as well as their descendants, “all the rights of

native Cherokees” including an entitlement to elect representatives “according to numbers” to the tribal council, to conclude that the tribe’s immunity was abrogated with respect to an Administrative Procedure Act challenge by descendants to tribal election results).

<sup>62</sup> E.g., *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (*per curiam*).

<sup>63</sup> *San Manuel Indian Bingo & Casino v. NLRB*, No. 05-1392, 2007 WL 420116, at \*5 (D.C. Cir. Feb. 9, 2006) (“[w]e have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application”).

<sup>64</sup> 980 F.2d 1314, 1320 (9th Cir. 1992).

<sup>65</sup> The court of appeals followed *James* with respect to a search warrant issued by a state court with Public Law 280 jurisdiction under 18 U.S.C. § 1162 in *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558–60 (9th Cir. 2002), but that decision was reversed by the Supreme Court on other grounds. *County of Inyo v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003).

<sup>66</sup> See, e.g., *United States v. Juvenile Male 1*, 431 F. Supp. 2d 1012, 1018 (D. Ariz. 2006) (finding that *James* did not control “because the defendant there did not raise constitutional challenges to the claim of immunity”); *United States v. Velarde*, 40 F. Supp. 2d 1314, 1316 (D.N.M. 1999) (“[t]he *James* court did not take into account the duty of this Court, as well as tribal police and other tribal officials, to comply with federal statutory and constitutional protections”); *United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995) (distinguishes *James* on the ground that no constitutional right asserted).

<sup>67</sup> *Catskill Devel., L.L.C. v. Park Place Enter. Corp.*, 206 F.R.D. 78, 86-87 (S.D.N.Y. 2002).

<sup>68</sup> See generally Milton Hirsh, “*The Voice of Adjuration*”: *The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen*, 30 Fla. St. U.L. Rev. 81 (2002).

<sup>69</sup> *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 87 (2d Cir. 2001); *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995). *Young*-like relief thus can be awarded to enjoin tribal actions—whether legislative, executive or judicial—that exceed the tribe’s inherent authority. See *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1471 (8th Cir. 1994); *Wisconsin v. Baker*, 698 F.2d 1323, 1332 (6th Cir. 1983).

<sup>70</sup> The tribe acted as the retailer in *Citizen Band Potawatomi* and therefore was responsible for collecting the state cigarette tax imposed on its customers. 498 U.S. at 507. Although the Supreme Court’s reference to *Ex parte Young* was in the context of suggesting a possible *damages* remedy against tribal officers or employees (498 U.S. at 514), that reference logically can be read *in pari materia* with the earlier reliance on *Young* in *Santa Clara Pueblo* where only prospective relief was at stake. It additionally seems logical not to distinguish between lawful statutory obligations merely because one derives from federal law and the other from state law. See *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 30 (1st Cir. 2006) (“Whatever the scope of a tribal officer’s official capacity, it does not encompass activities that range beyond the authority that a tribe may bestow. . . . It follows from this tenet that

because the Tribe is legally obligated to comply with the State’s cigarette tax scheme, . . . violations of that scheme by the Tribe’s officers fall outside the scope of their official capacity”) (citations omitted), *cert. denied*, 127 S. Ct. 673 (2006).

<sup>71</sup> E.g., *Goldberg v. Ellet (In re Ellet)*, 254 F.3d 1135, 1145 (9th Cir. 2002).

<sup>72</sup> *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212, 1226 (11th Cir. 1999).

<sup>73</sup> See *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (*per curiam*) (plaintiff “cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants’ official or representative capacities and the complaint does not allege they acted outside the scope of their authority”); *Linneen v. Gila Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002) (tribe’s sovereign immunity extended to tribal ranger acting within scope of his authority as to damages claim arising out of detention and alleged threats); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Ct. App. 1999) (“[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are actions of the sovereign, whether or not they are tortious under general law.’ . . . Where the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies”) (citation omitted).

<sup>74</sup> *United States v. Yakima Tribal Ct.*, 806 F.2d 853, 860 (9th Cir. 1986).

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# PASSING TITLE TO TRIBAL LANDS: EXISTING FEDERAL AND EMERGING TRIBAL PROBATE CODES

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Estate planning can be complicated by many factors including the size of a client's estate, a client's desire for a multifaceted process for distributing property, the application of complex laws, taxation issues and a host of other considerations. Estate planning for Indian people takes "complicated" to a new level. Add to the usual complexities of estate planning the fact that an Indian person's estate may be subject to federal, tribal and state laws and jurisdictions for probate purposes, and the new level becomes apparent.

An Indian client may well own property outside the boundaries of an Indian reservation, subject to state laws and probate proceedings. The client's estate may contain property within the reservation boundaries under tribal jurisdiction governed by tribal probate laws and processes. Finally, the Indian client may have interests in "Trust or Restricted Property" that is subject to federal laws and regulations.

"Trust Lands" are real property, generally located within treaty-reserved boundaries. Title in is held by the United States with beneficial title held by the Indian person. "Restricted Lands" are real property title interests held by Indian persons with restrictions placed on the title by the United States. "Trust Personalty" is money, proceeds from trust or restricted land leases or sales, which is held for the individual in a trust account managed by the Bureau of Indian Affairs and Office of Special Trustee for the American Indian. All three forms of trust property are subject to federal law and probated exclusively in federal courts. Consequently, in preparing a will for an Indian client, it may be necessary to prepare a will that meets multi-jurisdictional criteria to be valid.

## BRIEF HISTORY OF TRUST LANDS

In the latter part of the 1800s the federal Indian policy was one of attempting to assimilate Indian people into non-Indian society and culture. One component was the allotment policy of the original treaty reserved lands, implemented by the General Allotment Act.<sup>1</sup> The allotment process called for the breaking up of tribally-owned lands on reservations and conveying parcels ranging in size from 40 to 320 acres to individual tribal members. These allotments were to be held in trust by the United States for the Indian owner for a period of 25 years, after which time, it was expected that the Indian owners would be competent to manage their own affairs.<sup>2</sup> The rationale behind the process was that Indian people would embrace the concept of private land ownership and pursue farming and other agrarian pursuits while abandoning their traditional culture, beliefs and lifestyles. The plan was doomed before it began. Even if Indian people had wanted to convert to agrarian pursuits, the allotments were not large enough to be self-sustainable<sup>3</sup> Not only did the plan fail, but it created a whole new problem.

Under the terms of the General Allotment Act, allotments were to pass according to state laws of intestate succession.<sup>4</sup> Indian people were legally incompetent to create wills, even if they had been so inclined. It was not until 1910 that Congress authorized original recipients of allotments to pass their trust property by will.<sup>5</sup> In 1914, that authorization was extended to Indian people who became owners of interests in trust land by devise or inheritance.<sup>6</sup> Despite these statutes, few Indian people created wills and undivided ownership interests passed from one generation to the next. The net result is a problem now referred to as fractionated ownership. There are some original allotments that now have hundreds, and even thousands of co-owners, who hold their interests in common with each other.<sup>7</sup>

## THE DEVELOPMENT OF A SOLUTION—A FEDERAL PROBATE CODE

In 1983, Congress finally took action to curb the growing problem created by 100 years of failed federal laws and policies when it passed the Indian Land Consolidation Act.<sup>8</sup> Several key provisions were subsequently found unconstitutional and retracted.<sup>9</sup> Amendments were passed to the Act in 2000<sup>10</sup> but uncertified, they never became effective. The most sweeping change in federal law governing Indian wills and estate planning came with the passage of the American Indian Probate Reform Act<sup>11</sup> ("AIPRA"). The Act is extensive.

If an individual passes without a will, a state probate code's primary purpose is to meet the general populations' wishes and desires of providing equitable distribution among legal heirs and protections for the surviving spouse. AIPRA's primary purpose is land consolidation and retention of trust lands in trust status. Secondary for AIPRA are its provisions for equitable distribution to heirs and devisees. For example, the old English rule of primogenitor is applied to small land interests, known in the Act as the Single Heir Rule.<sup>12</sup> Additionally, AIPRA provides that a surviving spouse will receive no intestate interests, other than a life estate.<sup>13</sup> All trust or restricted land interests will be open to purchase at probate,<sup>14</sup> and small intestate interests can be subjected to forced sale at probate with no consent of the heirs required.<sup>15</sup>

AIPRA contains provisions for land consolidation, partition by sale with limited consent requirements, governs the passing of ownership interests in trust property, contains testamentary restrictions, encourages will drafting, defines who are eligible heirs and devisees, and contains specific provisions authorizing and limiting tribal probate codes.

## TRIBAL PROBATE CODE DEVELOPMENT

Indian tribes have always had the inherent power to regulate the passing of a deceased member's property,<sup>16</sup> and many tribes have long had tribal probate codes.<sup>17</sup> However, federal law has always denied application of tribal law to trust or restricted lands

and trust personalty. AIPRA authorizes tribes to adopt tribal probate codes that will govern the descent and distribution of trust or restricted lands located within that tribe's reservation or which are otherwise subject to that tribe's jurisdiction notwithstanding any other provision of law.<sup>18</sup>

Tribal probate codes may include rules of intestate succession,<sup>19</sup> other provisions that are consistent with federal law and policies set forth in section 102 of the Indian Land Consolidation Act ("ILCA") Amendments of 2000.<sup>20</sup> The policies are:

- Prevent further fractionation of trust allotments;
- Consolidate fractional interests and ownership of those interests into useable parcels;
- Consolidate fractional interests in a manner that enhances tribal sovereignty;
- Promote tribal self-sufficiency and self-determination; and
- Reverse the effects of the allotment policy on Indian Tribes.<sup>21</sup>

Thus, there are many provisions that may be included within a tribal code that further these objectives, but which can have a profound impact upon the probate of tribal member estates. These include, for example, altering the intestacy distributions in AIPRA, and providing a definition of spouse, which AIPRA does not do. A definition of spouse could recognize marriages by custom or tradition of a tribe. The inheritance rights of children adopted out might be provided for. Special provisions might also be made to protect family heirlooms and artifacts. Careful consideration should be given to a tribe's customs, interests and desires and steps taken to insure those are addressed to the fullest extent possible in its probate code.

A tribal probate code may not prohibit the testamentary devise of an interest in trust or restricted land to a lineal descendent of the original allottee<sup>22</sup> or to an Indian who is not a member of the Indian tribe with jurisdiction over such interest<sup>23</sup> unless the code allows eligible devisees to renounce their interests,<sup>24</sup> the opportunity for a devisee who is the spouse or lineal descendent of a testator to reserve a life estate without regard to waste<sup>25</sup> and payment of fair market value to the devisee.<sup>26</sup>

A tribe may adopt rules of intestate succession that differ from the federal rules and which will govern the descent and distribution of trust land subject to its jurisdiction.<sup>27</sup> Tribal probate codes that are intended to govern the descent and distribution of trust or restricted land must be approved by the Secretary of the Interior before they become effective.<sup>28</sup> Tribes do not have the authority to probate trust property interests, even with an approved code, but their tribal code will be applied in the federal probate process.<sup>29</sup> For small fractionated interests, the tribal code will be applied if the following conditions are met:

- a copy of the tribal rule is delivered to the official designated by the Secretary of the Interior to receive copies of tribal rules;
- the tribal rule provides for the intestate inheritance of such interest by no more than one heir, so that the interest does not further fractionate;
- the tribal rule does not apply to any interest disposed of by a valid will;

- the decedent died on or after June 20, 2006, or on or after the date on which a copy of the tribal rule was delivered to the Secretary, whichever is later; and
- the Secretary does not make a determination within 90 days after a copy of the tribal rule is delivered that the rule would be unreasonably difficult to administer or does not conform with the second or third requirements above.<sup>30</sup>

The development and promulgation of an approved tribal probate code provides tribes with an opportunity to ensure that ownership interests pass consistent with tribal practices, customs and interests which may be different than the federal inheritance code provisions.

The tribal code approval process is specified in the Act and requires that the Secretary of the Interior approve or disapprove a code within 180 days.<sup>31</sup> If the Secretary fails to approve or disapprove a code within that time, the code will be deemed to have been approved by the Secretary, but only to the extent that it is consistent with federal law and promotes the policies set forth in section 102 of the ILCA Amendments of 2000.<sup>32</sup> If a tribal probate code or an amendment to an approved code is disapproved, the Secretary must include in the notice of disapproval to the tribe, a written explanation of the reason for the disapproval.<sup>33</sup>

Once approved, any amendment to a tribal probate code must be submitted for approval by the Secretary of the Interior.<sup>34</sup> The Secretary has 60 days to approve or disapprove the amendment after receiving it.<sup>35</sup> If the Secretary fails to approve or disapprove an amendment within that time, it shall be deemed to have been approved, but again only to the extent it is consistent with federal law and promotes the policies set forth in section 102 of the ILCA Amendments of 2000.<sup>36</sup>

An approved tribal probate code becomes effective on the later of two dates: June 20, 2006 or 180 days after the date of approval.<sup>37</sup> Approved codes apply only to estates of decedents who die on or after the effective date of the probate code.<sup>38</sup> Likewise, an amendment to a tribal probate code applies only to the estates of decedents who die on or after the effective date of the amendment.<sup>39</sup> The repeal of a tribal probate code will not be effective earlier than 180 days after the Secretary receives notice of the repeal and will apply only to the estates of decedents who die on or after the effective date of the repeal.<sup>40</sup>

The Secretary is obliged to give full faith and credit to approved tribal probate codes applicable to estates of decedent's whose deaths occur on or after the effective date of the approved tribal ordinance in regulating the descent and distribution of trust lands.<sup>41</sup>

AIPRA contemplates that findings of fact and conclusions of law, as rendered by a tribal justice system may be used as proposed findings of fact and conclusions of law in the adjudication of probate proceedings by the Department of the Interior.<sup>42</sup>

Tribal justice system has the meaning given in Section 3602 of Title 25 of the United States Code which is:

The entire judicial branch and employees thereof, of an Indian tribe, including but not limited to, traditional methods and forums for

dispute resolution, lower courts, appellate courts (including intertribal appellate courts) alternative dispute resolution systems and circuit rider systems established by inherent tribal authority whether or not they constitute a court of record.

Enactment of regulations to allow the use of findings and fact and conclusions of law rendered by tribal justice systems will significantly increase the importance and role of tribal justice systems in the federal probate process.

#### APPROVED AIPRA TRIBAL PROBATE CODES

At present, only two tribes have tribal probate codes approved under AIPRA—the Lummi Nation of Washington and the Oglala Sioux Tribe in South Dakota. They provide examples of different approaches to the development of tribal code provisions, particularly with regard to trust property. Both of these codes are available on line.<sup>43</sup> Many other tribes are in the process of drafting tribal probate codes in anticipation of submitting them for approval. The Nez Perce Tribe of Idaho has recently submitted its draft probate code for approval by the Secretary of the Interior.

#### CONCLUSION

Estate planners need to be cognizant of the role that tribal probate codes may play in the estates of clients who are tribal members or eligible heirs under AIPRA. Tribal probate codes allow tribes to apply tribal tradition, custom and values to the passing of property from one generation to the next through the probate process. This can now be done in the federal probate of trust interests as well if a tribe takes advantage of the authority provided in AIPRA. It is expected that the number of tribal probate codes developed and submitted for approval under AIPRA will continue to grow at a steady pace.

#### ABOUT THE AUTHORS

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**Cecelia E. Burke** is Deputy Director of the Institute for Indian Estate Planning and Probate at Seattle University School of Law. She also serves as Adjunct Professor of Law teaching the Indian Trust and Estates Clinical Course at Seattle University. Ms. Burke is the author of many Indian will and estate planning documents and articles. She provides continuing legal education training to attorneys nationally. Ms. Burke received her B.A. from the University of Washington, and her J. D. cum laude from Seattle University School of Law.

#### ENDNOTES

- <sup>1</sup> 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.* also known as the Dawes Act.
- <sup>2</sup> The 25 year period was extended indefinitely with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended at 25 U.S.C. §§ 461 – 479.
- <sup>3</sup> Homesteaders required a minimum 420 acres for a sustainable ranch or farm.
- <sup>4</sup> 25 U.S.C. § 348.
- <sup>5</sup> Act of June 25, 1910, 36 Stat. 855-856.
- <sup>6</sup> Act of February 14, 1913, 37 Stat. 678.
- <sup>7</sup> The smallest undivided interest in an allotment is one-nine millionth of the total. Testimony of Ross O. Swimmer, Special Trustee for American Indians, House Resources Committee Hearing on S. 1721 (AIPRA), June 23, 2004. One allotment with 505 co-owners of undivided interests requires a common denominator of 220,670,049,600,000 to calculate the allocation of the annual income from the property of \$2,000 to the co-owners. The smallest interest in this allotment will earn \$1.00 – every 32,880 years. If sold for its estimated value of \$22,000.00, the smallest interest would be entitled to \$0.00001824. E-mail from Peter R. Jones, Attorney for the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation to Douglas Nash, April 18, 2006. On file with author.
- <sup>8</sup> Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2517 (1983).
- <sup>9</sup> *Hodel v. Irving*, 481 U.S. 704, 713 (1987); *Babbitt v. Youpee*, 519 U.S. 234 (1997).
- <sup>10</sup> Indian Land Consolidation Act Amendments of 2000, Pub. L. No.106-462, 114 Stat. 1992 (2000).
- <sup>11</sup> 25 U.S.C. §§ 2201 – 2221.
- <sup>12</sup> *Id.* § 2206(a)(2)(D)(iii).
- <sup>13</sup> *Id.* § 2206(a)(2)(A).
- <sup>14</sup> *Id.* § 2206(o).
- <sup>15</sup> *Id.* § 2206(o)(5)(a).
- <sup>16</sup> Powers of Indian Tribes, 55 Interior Dec. 14 (1934).
- <sup>17</sup> [http://www.indianwills.org/TribalGov\\_Downloads/Probate%20Code%20Matrix.pdf](http://www.indianwills.org/TribalGov_Downloads/Probate%20Code%20Matrix.pdf) (accessed March 29, 2007). This matrix of tribal probate codes can be found on the Institute’s website, [www.indianwills.org](http://www.indianwills.org), under “tribal government information” and then under “tribal probate codes.” It is an analysis of pre-AIPRA tribal probate codes found and is not guaranteed to be a comprehensive list of all such codes.
- <sup>18</sup> 25 U.S.C. § 2205(a)(1).
- <sup>19</sup> *Id.* § 2205(a)(2)(A).
- <sup>20</sup> *Id.* § 2205(a)(2)(B).
- <sup>21</sup> Act of Nov. 7, 2000, P.L. 106-462, Title 1, § 102, 114 Stat. 1992.
- <sup>22</sup> 25 U.S.C. § 2205(a)(3)(A).
- <sup>23</sup> *Id.* § 2205(a)(3)(B).
- <sup>24</sup> *Id.* § 2205(a)(3)(B)(i).
- <sup>25</sup> *Id.* § 2205(a)(3)(B)(ii).
- <sup>26</sup> *Id.* § 2205(a)(3)(B)(iii).
- <sup>27</sup> *Id.* § 2206(a)(2)(D)(iii)(II).

- 28 *Id.* § 2205(b)(1).
- 29 *Id.* § 2206(a)(1)(A).
- 30 *Id.* § 2206(a)(2)(D)(II)(aa)-(ee).
- 31 *Id.* § 2205(b)(2)(A).
- 32 *Id.* § 2205(b)(2)(B).
- 33 *Id.* § 2205(b)(2)(D).
- 34 *Id.* § 2205(b)(2)(E)(i).
- 35 *Id.*:
- 36 25 U.S.C. § 2205(b)(2)(E)(ii).
- 37 *Id.* § 2205(b)(3)(A) and (B).
- 38 *Id.* § 2205(b)(4)(A)
- 39 *Id.* § 2205(b)(4)(B).
- 40 *Id.* § 2205(b)(5)(A) and (B).
- 41 *Id.* § 2207.
- 42 *Id.* § 2205(d)(2).
- 43 <http://www.indianwills.org>, under “tribal government information” and then under “tribal probate codes.”

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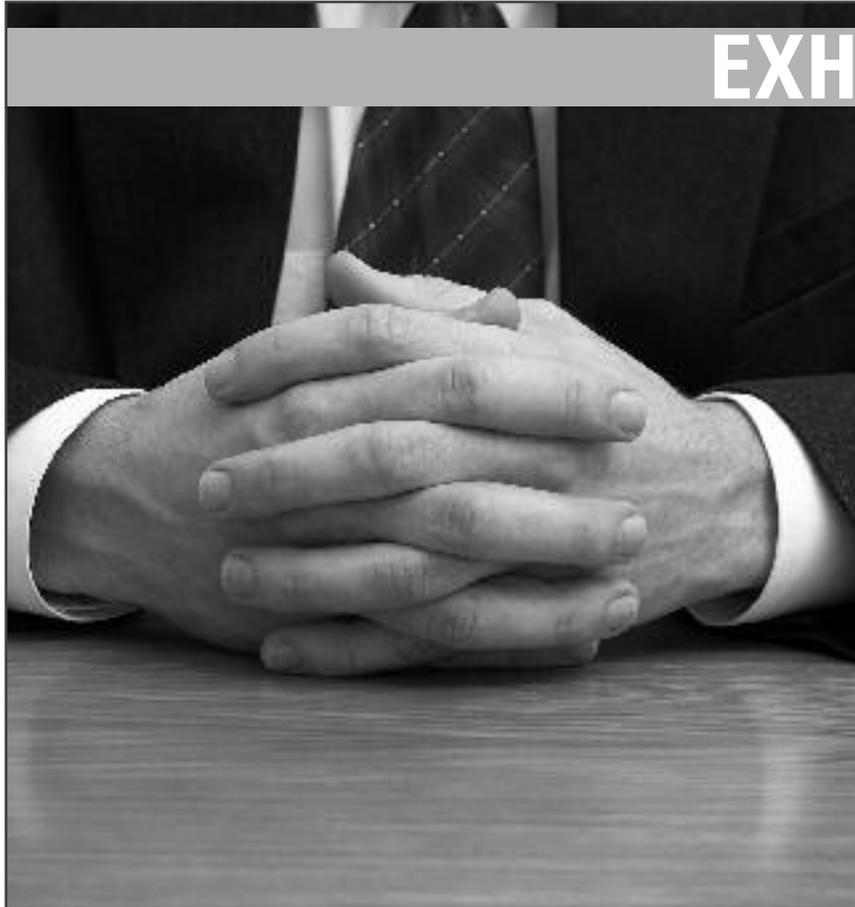
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# IF YOU THINK TRIBAL CASINOS DO NOT HAVE TO COMPLY WITH THE NLRA, THINK AGAIN

Rob Roy Smith

*Morisset, Schlosser, Jozwiak & McGaw*

There has been considerable disagreement among Indian law scholars over the application of federal labor laws to tribal governmental activities taking place at a tribal enterprise within the exterior boundaries of an Indian reservation. On February 9, 2007, the U.S. Court of Appeals for the District of Columbia Circuit released its decision in *San Manuel Band of Mission Indians v. National Labor Relations Board*.<sup>1</sup> This case considered whether the National Labor Relations Board (“NLRB”) may apply the National Labor Relations Act (“NLRA”)<sup>2</sup> to employment activities at a casino operated by the San Manuel Band of Serrano Mission Indians (“San Manuel”) on its reservation in California. The court held that the NLRB “may apply the NLRA to employment at this casino.”

This article explores the evolution of the application of the NLRA to Indian tribes and discusses the ramifications of the *San Manuel* decision. While the decision will be viewed as unfavorable by most Indian tribes, the holding is neither unexpected nor universally applicable.

## **PRIOR APPLICATION OF THE NLRA TO INDIAN TRIBES**

For years, the NLRB, which is the agency responsible for implementing the NLRA, consistently held that Indian tribes and their self-directed enterprises located on Indian reservations were implicitly exempt, as governmental entities, from the NLRA’s jurisdiction.<sup>3</sup> There were two narrow exceptions to this rule: (1) where the tribal enterprise was located off-reservation, and (2) where the enterprise, although located on the tribal reservation, was neither wholly owned nor controlled by the tribe.<sup>4</sup>

These guidelines remained unchanged until 2004, when the NLRB departed sharply from its precedent and asserted jurisdiction over a tribal gaming enterprise operated by San Manuel within the exterior boundaries of an Indian reservation.<sup>5</sup> Adopting a new approach, the NLRB explained that it would approach jurisdictional issues on a case-by-case basis. The NLRB affirmed the need to “afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction” where tribes are engaged in the “particularized sphere” of “fulfilling traditionally tribal or government functions.”<sup>6</sup> However, the NLRB’s ruling asserted jurisdiction over the tribal casino, reasoning, in part, that gaming was not a traditional governmental function.

Until February 2007, no circuit court of appeals had addressed whether the NLRA applies to Indian tribes operating gaming enterprises within Indian reservations. Now, at least one circuit court believes that it does.

## **THE RECENT SAN MANUEL DECISION**

The dispute in *San Manuel* arose out of two unions’ efforts to organize the casino’s employees. The Court of Appeals for the District of Columbia, in its recent decision, addressed the juris-

ditional issues presented in two steps: “(1) would application of the Federal NLRA to San Manuel’s casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) assuming the preceding question is answered in the negative, does the term ‘employer’ in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?”<sup>7</sup>

Answering the first question in the negative, the court then engaged in a lengthy discussion of the law concerning tribal sovereignty and concluded “tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.”<sup>8</sup> The court found, in the context of the San Manuel tribe’s casino, that the NLRA’s “impairment of tribal sovereignty is negligible” because “the Tribe’s activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity.”<sup>9</sup> The court’s determination that gaming is a primarily commercial activity, rather than a primarily governmental activity, at least with respect to this casino, is largely dependent on the facts of this case, as highlighted by this passage from the opinion:

First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino’s employees and customers are not members of the Tribe, and they live off the reservation. For these reasons, the Tribe is not simply engaged in internal governance of its territory and members, and its sovereignty over such matters is not called into question.<sup>10</sup>

Once the court in *San Manuel* found that tribal sovereignty did not bar the NLRB from exercising jurisdiction over labor relations covered by the NLRA, the court determined, as a matter of administrative law, that the NLRB’s decision to apply the NLRA to San Manuel’s casino was not arbitrary or capricious.<sup>11</sup> In this regard, one of the primary arguments rejected by the court was the reasoning that the exemption in the NLRA for “any State or political subdivision thereof” exempted the tribe.<sup>12</sup> The court found that, although the “Tribe’s argument is certainly plausible, [] we cannot say the Board’s more restrictive reading of the NLRA’s government exception is not ‘a permissible construction of the statute’ . . . [because] the Board could reasonably conclude that Congress’s decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists.”<sup>13</sup>

The court also rejected San Manuel’s argument that, by enacting the Indian Gaming Regulatory Act (“IGRA”),<sup>14</sup> Congress intended to give tribes and states a primary role in regulating tribal gaming activities, including labor relations, and therefore, by implication, that Congress foreclosed application of

the NLRA to tribal gaming.<sup>15</sup> The court concluded that “San Manuel reads too much into IGRA” and there is “no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA.”<sup>16</sup>

### THE EFFECT OF THE *SAN MANUEL* DECISION

As stated earlier, the holding in *San Manuel* is neither unexpected nor universally applicable.

The decision is not unexpected because the NLRA has always appeared to be a federal law of general applicability that would likely apply to Indian tribes. The U.S. Supreme Court has long recognized a rule that “general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary.”<sup>17</sup> As held by the court in *San Manuel*, there does not appear to be a clear expression to the contrary for tribes in either the NLRA or IGRA.

Furthermore, the *San Manuel* decision might not apply to all tribes. The court of appeals made it clear in its holding that the NLRA applies to “this Casino,” suggesting that other tribal casinos in other circumstances might not be subject to the NLRA.<sup>18</sup> This is due, in part, to the fact that the NLRA does not apply to all employers of all sizes or employees of all types.<sup>19</sup>

Some tribal casinos are not covered employers under the NLRA. The NLRA, which was enacted by Congress in 1935, gives private sector workers legal rights to join unions and bargain collectively with their employer.<sup>20</sup> The NLRA defines employer unfair labor practices and applies to most large private sector employers.<sup>21</sup> However, significant exemptions from coverage exist for small employers who do not purchase goods or ship goods with a value of at least \$50,000 per year in interstate commerce, and for retail business employers with less than \$500,000 in gross annual sales.<sup>22</sup> In addition, absent discrimination in violation of civil rights laws, the NLRA does not apply to most personnel actions, including discharge—unless employees are protected by an employment contract or collective bargaining agreement.

As a practical matter, labor unions play a limited role in Idaho.<sup>23</sup> Thus, labor unions may not make a push to establish a presence on Indian reservations in Idaho as a result of this ruling.

Therefore, it is not a foregone conclusion that the NLRA now applies to all tribal casinos. Violations of the NLRA are highly fact specific and each Indian tribe must take care to review its practices to determine whether the NLRA would apply to business activities at its casino. Each individual situation should be reviewed independently to determine whether the employer and employee activities at issue may constitute unfair labor practices that violate the NLRA.

### WHAT CAN INDIAN TRIBES DO?

*San Manuel* may seek to appeal the recent decision to the United States Supreme Court.

Absent a reversal on appeal, a congressional response or “fix” is also possible, for a number of reasons. First, the NLRA is over seventy years old and casinos, especially those operated by Indian tribes, were never considered when the Act was originally debated and passed. Second, the NLRB does not assert jurisdiction over horse and dog racing, suggesting that a broader gaming exemption might be possible.<sup>24</sup> Third, Congress might

be willing to delegate federal labor regulation authority to Indian tribes. For instance, Congress could amend the NLRA to exempt from its jurisdiction either Indian tribes generally or, in particular, tribal gaming operations operating under IGRA with a state compact that specifically addresses labor relations and requires tribes to adopt a labor relations ordinance.<sup>25</sup>

Until these issues are resolved in the courts or by Congress, if concerted organizing or union activity is initiated at a tribal casino in Idaho, Indian tribes should refrain from any active involvement on behalf of either employees or the “union” during the organization and formation stage. This course of action is not only prudent but, from the perspective of the tribes, may preclude courts in the Ninth Circuit from applying and/or expanding the *San Manuel* decision into additional areas.

### ABOUT THE AUTHOR

**Rob Roy Smith** is a senior associate attorney for the Seattle law firm of *Morrisset, Schlosser, Jozwiak & McGaw*. The firm solely practices federal Indian law, providing legal and strategic advice to Indian tribes, Alaska Native organizations, tribal businesses, and tribal organizations throughout the country. His practice focuses on taxation, economic development, cultural and natural resource protection. Rob currently serves as the Immediate Past Chair of the Idaho Indian Law Section.

### ENDNOTES

<sup>1</sup> *San Manuel Band of Mission Indians v. Nat'l Labor Relations Bd.*, No. 05-1392 (D.C. Cir. filed Feb. 9, 2007).

<sup>2</sup> 29 U.S.C. § 151 *et seq.*

<sup>3</sup> *E.g.*, *Fort Apache Timber Co.*, 226 NLRB 503 (1976); *Southern Indian Health Council*, 290 NLRB 436 (1988).

<sup>4</sup> *E.g.*, *Sac & Fox Indus.*, 307 NLRB 241 (1992).

<sup>5</sup> *San Manuel Bingo & Hotel Employees & Restaurant Employees Int'l Union*, 341 NLRB 138 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> *San Manuel Band of Mission Indians*, Slip Op. at 8-9.

<sup>8</sup> *Id.* at 15. This finding might be one of the more lasting adverse affects of the decision. The “commercial v. governmental” distinction is haunting tribes in the tax context, where the Internal Revenue Service recently issued a Technical Advice Memorandum finding that Indian gaming does not qualify as a “governmental function” for purposes of tax-exempt financing under 26 U.S.C. § 7871. *See* IRS TAM 200648028; IRS LTR 200648024. Any ruling that equates gaming with a purely commercial enterprise further threatens tribes’ ability to obtain tax-exempt financing for gaming-related projects.

<sup>9</sup> *San Manuel Band of Mission Indians v. Nat'l Labor Relations Bd.*, No. 05-1392, slip op. at 15 (D.C. Cir. Feb. 9, 2007).

<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.* at 17.

<sup>12</sup> 29 U.S.C. § 152(2).

<sup>13</sup> *San Manuel Band of Mission Indians*, slip op. at 19 (internal citation omitted).

<sup>14</sup> 25 U.S.C. §§ 2701 *et seq.* *San Manuel* argued that Section 2710(b)(2)(B) implicitly restricted the NLRA.

<sup>15</sup> *San Manuel Band of Mission Indians*, slip op. at 20.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S.

99, 120 (1960).

<sup>18</sup> *San Manuel Band of Mission Indians*, slip op. at 1.

<sup>19</sup> 29 U.S.C. § 152(2) - 152(3).

<sup>20</sup> *Id.* at § 157.

<sup>21</sup> *Id.* at § 158(a).

<sup>22</sup> *NLRB's Standards to Exercise of Jurisdiction*, 42 LRRM 96 (1958).

<sup>23</sup> Idaho is one of twenty-two states with a right-to-work law. *See* Idaho Code §§ 44-2001 – 44-2009. In general, in a right-to-work state, non-union members are required by law to receive all the benefits of union representation, but pay none of the costs associated with union membership. In 2002, the U.S. Department of Labor reported that 39,000 of Idaho's 547,000 employed wage and salary workers were members of unions. *See* Idaho-Labor, summary of labor statistics, available at <http://www.city-data.com/states/Idaho-Labor.html> (last viewed Feb. 20, 2007). In Idaho, this represents 7.1% of those so employed, compared with a national average of 13.2%. *Id.* Of course, Idaho state law does not apply to tribes within Indian reservations. *E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204-07 (1987).

<sup>24</sup> 29 C.F.R. § 103.3 (stating that "[t]he Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dog racing industries").

<sup>25</sup> None of the gaming compacts between tribes in Idaho and the state of Idaho contain such a provision. *See* National Congress of American Indians, links to gaming compacts by state, available at [http://ncai.org/Gaming\\_Compacts.103.0.html](http://ncai.org/Gaming_Compacts.103.0.html) (last viewed Feb. 20, 2007). California gaming compacts do include such language.

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## THE JUSTICE SYSTEM SUPPORT PROGRAM: JSSP—WORKING IN AFGHANISTAN

Douglas R. Whitney  
*National Center for State Courts*



*Doug Whitney in Afghanistan discussing police prosecution cooperation tactics with one of his students.*

Last August, the National Center for State Courts (NCSC) asked if I would be interested in coming out of retirement to spend a year in Afghanistan working on a State Department funded project called the Justice System Support Program (JSSP). JSSP seeks to improve prosecutor and police skills and cooperation through a formal joint program involving classroom and practical training and in-service mentoring. The JSSP team consists of 18 attorneys, half of whom are working with the national level justice system officials in Kabul and the remainder are deployed in teams to three regional training centers in Herat, Jalalabad, and Mazar-i-Sharif. The JSSP program is operated by the State Department contractor, PAE Government Services, Inc., in partnership with the NCSC.

To make a long story short, I said yes. A few weeks of updating security clearance files, physical examinations, program briefings and training, which included high threat environment convoy operations and weapons familiarization, followed. On November 6, I arrived in Kabul. After spending a couple of weeks of further orientation and Afghan law study at the PAE compound, I was assigned as the Police-Prosecution Coordinator for a three-attorney team in Mazar-i-Sharif in Balkh Province. We will work for the remainder of our tour at the Northern Regional Training Center training and mentoring ten Afghan prosecutors and twenty criminal investigators.

After a period of assessing the needs of the justice system in this area, student selection and vetting, we began the first module of a six-month training and mentoring course. The focus is on

police-prosecution cooperation, which has been rarely the case in the past. We hope training them to work closely together will improve investigation, case management and court preparation, while lessening the incentives and opportunity for corruption. Our students have an average of about ten years of experience, and can all read and write (unlike some of the judges and many of the police). Some fought with the northern alliance, some were jailed by the Taliban, and most spent the Taliban era as refugees in Pakistan or Iran. All of the prosecutors are graduates of either Kabul or Balkh University law school, which is a three-year undergraduate degree in either formal or Sharia law. We are teaching only Afghan formal law—hoping to obtain a reasonable balance with Sharia and customary tribal law practices, as the people gain trust in the formal law system. Each team member has his or her assigned excellent interpreter, as all of the students speak only Dari and Pashto, the two national languages.

The first five weeks was in our classroom—six hours a day, five days a week. We taught crime scene management, witness and suspect interviewing techniques, basic instruction in the new constitution and criminal procedure code, which most of the police and some prosecutors had never seen in print until we gave them copies. Student work groups worked up cases using fact patterns from actual Afghan cases in kidnapping, rape, larceny, and homicide. Next we will do ten weeks of mentoring—with periodic seminars and one-on-one sessions here at the training center and weekly visits to their offices, courts, and police stations. This will be followed by another classroom module and a second mentoring period—finishing up the course in August.

The police and prosecutors have very few resources. The police sometimes have to take taxis to crime scenes. There are few computers, only a few desks, little fingerprinting equipment.



*Doug Whitney's office building in Mazar-i-Sharif in Balkh Province.*

There is virtually no forensic laboratory capability except in Kabul—400 miles away, and that is very rudimentary. The pay for our police students has just been raised to about \$600.00 per month and the prosecutors are hoping for a raise that will bring them up to the same level. Surprisingly, we do have four women prosecutors in our class. They are active and vocal participants in class discussions and are really committed to doing well in their legal careers. They do not wear burkhas. The defense bar in Afghanistan is essentially non-existent, although there are familiar constitutional provisions for right to counsel, silence, and presumption of innocence. There is an ongoing effort to build a good defense bar, and that will certainly enhance the trust of the people in their system. The criminal justice system is essentially a European style inquisitorial system as opposed to a common law based adversarial system. Adapting to those ideas has been surprisingly easy for us, and I think Judge Bill Hamlett would be proud of my lectures on criminal intent and defining the elements of an offense.

For a long time, there has been little or no Taliban style activity in this area. However, for security reasons, our daily life here on the ten acre RTC is pretty restricted. We do have a well equipped fitness center, and the food is better than usually found in a semi-military environment. Our quarters and offices are in 8x16' half sections of a 32' long conex shipping containers stacked on top of each other. They are quite comfortable composition paneled walls, ceiling and floor, with a nice bathroom/shower. We have cable TV with CNN, History, Discovery, National Geographic, and a scattering of Indian/Nepalese channels. There is also a DVD player and high speed internet connection. The RTC has two-story guard towers and gates manned by Romanian guards. The fence is topped by concertina wire, and

there are a couple of large sandbag bunkers that should work fine in the event of mortar attack. We get outside once a week or so to make an airfield pick up, visit the provincial government offices, or to shop at the German or Swedish military exchanges. There is very little U.S. military presence in this part of the country. We travel in convoy of two armored pickup trucks, wearing body armor. We have former U.S. Army ranger security team chiefs and three armed Gurkha guards for each trip outside the wire. There are about 75 non-Afghans on the compound. Most of them are American police officers who are running the basic police academy, training about 300 new officers for the Afghanistan National Police.

In summary, I am really enjoying this assignment, as a great way to cap my two careers, first as a soldier for some twenty years, and second as a prosecutor in Idaho. I encourage any Idaho Bar members who have a bent to try something different for a while to inquire through the NCSC. Many of our team members are not long-time prosecutors or experts in international law, and they are doing good work.

**Douglas R. Whitney**, is currently in Afghanistan working with the Justice System Support Program The JSSP is operated by the State Department contractor, PAE Government Services, Inc., in partnership with National Center for State Courts (NCSC). Doug is a graduate of the University of Idaho College of Law and has been a member of the Bar for 20 years. If you would like to correspond with Doug his email is [dwhitney@pae-group.com](mailto:dwhitney@pae-group.com)



*Afghan's transit system.*



## FEDERAL COURT CORNER

Tom Murawski  
*U.S. District and Bankruptcy Courts*

**The Honorable N. Randy Smith Appointed to Ninth Circuit Court of Appeals**—On February 15, 2007 the U.S. Senate unanimously confirmed President Bush’s nomination of Idaho State Court Judge N. Randy Smith to the United States Court of Appeals for the Ninth Circuit. He fills a judgeship vacant since November 14, 2003, when Judge Thomas G. Nelson of Boise assumed senior status. Judge Smith was appointed as a district judge for Idaho’s Sixth Judicial District in 1995. He won reelection in 1998 and 2002. Since 2004, he has served as the court’s administrative judge. Prior to coming onto the bench, he practiced as a civil litigator with the law firm of Merrill & Merrill, focusing on corporate civil litigation and insurance defense cases. Born in Logan, Utah, Judge Smith received his B.S. degree in 1974 from Brigham Young University and his J.D. from BYU’s J. Reuben Clark School of Law in 1977. Judge Smith was sworn-in on March 19th at a ceremony held at the U.S. Courthouse in Pocatello, where he will have his chambers.

The Ninth Circuit Court of Appeals is authorized 28 active judgeships and currently has one vacancy. The Ninth Circuit Court of Appeals hears appeals of cases decided by federal trial courts and agencies in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, plus the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. For fiscal year 2006, the court reported approximately 14,636 appeals filed.

**Change in Bankruptcy Forms effective April 1, 2007**—A rise in the Consumer Price Index has necessitated the change of certain Bankruptcy Forms, effective as of April 1, 2007. These include: **Form 1** - Voluntary Petition; **Form 6C** - Schedule C - Property Claimed as Exempt ; **Form 6E** - Schedule E - Creditors Holding Unsecured Property Claims; **Form 7** - Statement of Financial Affairs; **Form 10** - Proof of Claim; **Form**

**22A** - Statement of Current Monthly Income & Means Test (Ch 7); **Form 22C** - Statement of Current Monthly Income & Calculation of Commitment Period (Chap 13). These revised forms, as well as a chart reflecting the dollar amount increases referenced in the various U.S. Code Sections, are available on the Court’s website,

**The Honorable Mikel H. Williams appointed Chief U. S. Magistrate Judge**—United States Magistrate Judge Mikel H. Williams became Chief Magistrate Judge effective April 1, 2007. He replaces U.S. Magistrate Judge Larry M. Boyle who served in this capacity for the past seven years. Judge Williams was appointed as the first full-time U.S. Magistrate Judge for the District of Idaho in 1984. Prior to his appointment as a Magistrate Judge, Judge Williams was a partner in the Boise law firm of Collins, Manly and Williams. He also served as an Assistant United States Attorney, and served four years of active duty in the United States Army, receiving his commission in the Judge Advocate Generals Corps.

Judge Williams received his undergraduate degree from University of Idaho in 1966, and his law degree from the University of Idaho College of Law in 1969. Judge Williams is a past chairman of the Ninth Circuit Magistrate Judges Association; a member of the Ninth Circuit Defenders Committee; Chairman of the District Court Local Rules Committee; and a member of the American Inns of Court. Judge Williams holds the rank of Lieutenant Colonel, Retired in the United States Army Reserves. Judge Williams has taught the Practical Skills Seminar for the Idaho Law Foundation since 1987 as well as the Federal Law Updates program. He has published *The History of the Development and Current Status of the Carey Act in Idaho*, Idaho Department of Water Resources, 1967 and was instrumental in

the development of a series of criminal forms now available in Spanish.

**Federal Bar Association CLE Program**—On May 4, 2007, the Idaho Chapter of the Federal Bar Association is sponsoring an all-day CLE Program at the James A. McClure Federal Bldg & U.S. Courthouse in Boise, to be held in Courtroom #3 on the 6th Floor. The topics will include Bankruptcy, Evidence Presentation, Trends in Jury Trials and Ethics. Presenters include the Honorable Richard C. Tallman of the Ninth Circuit Court of Appeals, Chief U.S. District Judge B. Lynn Winmill and U.S. Bankruptcy Judge Jim D. Pappas. The cost is \$50 for FBA members and \$65 for non-members. A registration form and additional information is available on our website at

**Fourth Location Added to Annual District Conference/Federal Practice Program Schedule**—Twin Falls has been added as a fourth location by the District of Idaho for its upcoming 2007 Annual District Conference/ Federal Practice Program. The Program will also be presented in Lewiston, Pocatello and Boise. The tentative dates for the “road show” are in the process of being finalized. Please check our website for on-line registration and all of the detailed information contained in the program flyer.



**Tom Murawski** is an Administrative Analyst with the United States District and Bankruptcy Courts. He has a J.D. and Masters in Judicial Administration.

## COURT INFORMATION

### OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice  
Gerald F. Schroeder

Justices  
Linda Cople Trout  
Daniel T. Eismann  
Roger S. Burdick  
Jim Jones

#### Regular Spring Terms for 2007

**Boise (Eastern Idaho appeals).....**May 2, 4, 7, 9, and 11

#### Regular Fall Terms for 2007

**Coeur d'Alene .....**September 4 and 5

**Lewiston.....**September 6 and 7

**Idaho Falls.....**October 3 and 4

**Pocatello.....**October 5

**Boise .....**October 10 and 12

**Boise .....**November 2 and 5

**Twin Falls .....**November 7, 8, and 9

**Boise .....**December 3, 5, 7, 10, and 12

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2007 Fall Terms of the Idaho 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.

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge  
Darrel R. Perry  
Judges

Karen L. Lansing  
Sergio A. Gutierrez

#### Regular Spring Terms for 2007

**Boise.....** May 8 and 10

**Boise.....** June 5, 7, 12, and 14

#### Regular Fall Terms for 2007

**Boise.....** August 14, 16, 21, and 23

**Coeur d'Alene (Northern Idaho term)**  
..... September 10, 11, 12, 13, and 14

**Hailey (Eastern Idaho term)**  
..... October 3, 4, and 5

**Boise.....** October 11

**Boise.....** November 6, 8, 13, and 15

**Boise.....** December 11 and 13

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of setting of the year 2007 Fall Terms of the Court of Appeals, 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.

### IDAHO SUPREME COURT ORAL ARGUMENT DATES As of April 20, 2007

#### Wednesday, May 2, 2007 – BOISE

8:50 a.m.	State v. Smith (Petition for Review)	#33714
10:00 a.m.	<b>OPEN</b>	
11:10 a.m.	Workman v. State (Petition for Review)	#33620

#### Friday, May 4, 2007 – BOISE

8:50 a.m.	State v. Field (Petition for Review)	#33654
10:00 a.m.	Ater v. Idaho Bureau of Occupational Licenses	#33143
11:10 a.m.	Myers v. Qwest	#32852

#### Monday, May 7, 2007 – BOISE

8:50 a.m.	State v. Yzaguirre	#33048
10:00 a.m.	Karel v. Idaho Department of Finance	#33191
11:10 a.m.	Cafferty v. Idaho Department of Transportation	#32818

#### Wednesday, May 9, 2007 - BOISE

8:50 a.m.	<b>OPEN</b>	
10:00 a.m.	Cristo Viene Pentecostal Church v. Paz	#32280
11:10 a.m.	Downey v. Vavold	#33279

#### Friday, May 11, 2007 - BOISE

8:50 a.m.	Foley v. Grigg	#33059
10:00 a.m.	JP Morgan Bank v. Cougar Crest Lodge	#33855
11:10 a.m.	Rackliff v. Vrable	#33025

### IDAHO COURT OF APPEALS ORAL ARGUMENT DATES As of April 18, 2007

#### Thursday, May 1, 2007 – BOISE, Borah High School

10:00 a.m.	State v. Meister	#30152
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#### Thursday, May 8, 2007 – BOISE

9:00 a.m.	State v. Burtlow	#32999
10:30 a.m.	State v. Metzger	#32813
1:30 p.m.	State v. Cruz	#31880

#### Thursday, May 10, 2007 – BOISE

9:00 a.m.	State v. Mintun	#33038
10:30 a.m.	State v. Goodrick	#32511/32512



## IDAHO COURTS

Michael Henderson  
Legal Counsel, Idaho Supreme Court

### IDAHO'S SUBSTANCE ABUSE AND MENTAL HEALTH PROBLEMS: A FOUR-WAY PARTNERSHIP

The continuing success of Idaho's drug courts and mental health courts over the past decade has been the result of a partnership among the judiciary, the Legislature, state agencies, local governments and communities. At this year's session, the Legislature demonstrated its enthusiastic support for the court's efforts to address substance abuse and mental health problems in constructive and innovative ways.

Perhaps most noteworthy was the increase in funding for drug and mental health courts. By passing HB 180, the Legislature increased the annual transfer of funds from the liquor account to the Substance Abuse Treatment Fund from \$1,200,000 to \$2,080,000, and added a transfer of \$680,000 to the Drug Court, Mental Health Court and Family Court Services Fund. This bill also provided for a transfer of \$440,000 to the newly-created Drug and Mental Health Court Supervision Fund, which will be used by the Department of Correction for the supervision of offenders in drug and mental health courts. These measures will significantly increase the number of offenders who can be admitted to these courts. This should yield benefits in lower rates of recidivism, and savings of dollars that would otherwise be spent on incarcerating these offenders.

Last year, the Legislature formed an interim committee to examine mental health and substance abuse treatment delivery systems. This year the Legislature took action on several of that committee's recommendations. These included:

- **SB 1142**, which will allow juvenile courts to order substance abuse assessments and community-based treatment for convicted juveniles.
- **SB 1149**, which authorizes sentencing courts in adult criminal cases to order substance abuse

and mental health assessments and community-based treatment as a condition of probation.

- **SCR 109**, which will enlist the joint efforts of the Department of Health and Welfare, the Department of Correction, the Department of Juvenile Corrections, and the judiciary in developing standard statewide assessment tools for mental health and substance abuse.

Other noteworthy bills in this area were HB 106, which enacted a statute formalizing the Office of Drug Policy (the office formerly known as the drug czar), and which directs the Interagency Committee on Substance Abuse Prevention and Treatment to develop and submit a coordinated budget request for appropriations for substance abuse prevention and treatment; and SB 1147, which creates the Teen Early Intervention Mental Health and Substance Abuse Specialist program. This bill creates a pilot project to provide school districts in rural areas with substance abuse and mental health counselors.

The efforts of drug courts and mental health courts in Idaho's most populous county will also be assisted by the creation of a new district judge position in Ada County. Since the last new district judge was added in Ada County in 1998, the county's population has increased 29%, and judges have been devoting long hours outside of their normal daily schedules to preside over drug and mental health courts. The new position will go far to relieve the burden and assist in the functioning of these specialized courts.

Noteworthy bills that also will affect the courts include:

- **HB 171**, which makes several technical corrections and improvements in the Child Protective Act and revises the language pertaining to "reason-

able efforts" to avoid the removal of children from their homes to assure compliance with federal requirements.

- **SB 1061**, which will make guardianship a permanent placement option for children in Child Protective Act cases, and will also give the a court in a CPA case jurisdiction over any guardianship proceeding involving the child.

- **HB 124**, which extends the statute of limitations for the crime of failure to report child abuse or neglect from one year to four years.

- **HB 127 and 129**, which authorize courts to impose electronic or global positioning system tracking as a condition of release on bail, and allow leaving the area of restriction imposed by such a condition to be prosecuted as a criminal escape.

- **SB 1161**, which gives bail bonds companies more time to locate and return defendants who have failed to appear in court. Currently, these companies must return the defendant within 90 days after the order of forfeiture to avoid paying the forfeited amount of bail. Beginning July 1 of this year, they will have 180 days.

\* \* \*

In an earlier column, I discussed the implications of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). That case held that a hearsay statement in a criminal case is admissible under the Confrontation Clause only where the declarant is unavailable and the statement is "non-testimonial"; the Court abandoned the earlier "reliability" test of *Ohio v. Roberts*, 448 U.S. 56 (1980). I mentioned in the earlier column that the

Court had before it a case in which it would determine whether the holding in *Crawford* was retroactive. The Court has now issued its decision in *Whorton v. Bockting*, 127 U.S. 1173 (2007), reversing a 9th Circuit decision and holding that *Crawford* is not retroactive. Thus, the holding in *Crawford* will apply only to those cases that were still pending at the trial court level or on direct appeal at the time that *Crawford* was decided.



**Michael Henderson** is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law

Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine and Twin Falls Counties.

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
*(UPDATE 04/01/07)*

**CIVIL APPEALS  
 PROCEDURE**

1. Whether the district court erred in dismissing Highland Developments administrative appeal from the Boise City Council.

Highland Development v.  
 City of Boise  
 S.Ct. No. 33174  
 Supreme Court

**PROPERTY USE**

1. Did the district court err in upholding the decision of the Kootenai County Building and Planning Department to deny Spencer's application for a site disturbance permit?

Larry Spencer v.  
 Kootenai County  
 S.Ct. No. 33060  
 Supreme Court

**ATTORNEY FEES AND COSTS**

1. Did the court abuse its discretion by awarding an excessive amount of attorney fees?

Action Collection Service v.  
 Steven Pankey  
 S.Ct. No. 33400  
 Court of Appeals

2. Whether the court erred in finding that Latah County did not act without a reasonable basis in fact or law under I.C. § 12-117, entitling Naylor Farms to an award of attorney fees and costs.

Ralph Naylor Farms v.  
 Latah County  
 S.Ct. No. 33422  
 Supreme Court

**SUBSTANTIVE LAW**

1. Whether the court misapplied the "clean hands" doctrine in dismissing Pinkham's affirmative defense of laches, based on misconduct that was unrelated to Garcia's twenty-three year delay in bringing her action to disinter their son's remains.

Catherine R. Garcia v.  
 Albert L. Pinkham  
 S.Ct. No. 33330  
 Supreme Court

2. Did the trial court improperly deny Terra Hug's motion for judgment notwithstanding the verdict?

Greg Obendorf v.  
 J.R. Simplot Company  
 S.Ct. No. 31195  
 Supreme Court

3. Once the court identified the liquidated amounts due to plaintiff, did the court err by not awarding prejudgment interest?

Rickey L. Ross v.  
 Susan Clarke Ross  
 S.Ct. No. 32914  
 Court of Appeals

**INSURANCE**

1. Can ICRMP enforce a policy provision that purports to restrict coverage in a jointly written uninsured/underinsured motorists provision further than allowed by I.C. § 41-2502?

Brandon Andrae v.  
 Idaho Counties Risk Mgmt.  
 S.Ct. No. 33250  
 Supreme Court

**SUMMARY JUDGMENT**

1. Did the court err in ruling that the claims of C-Systems, Inc, in this case against McGee for participating in a civil conspiracy to convert the assets of C-Systems are barred by res judicata and claim preclusion?

C Systems, Inc. v.  
 Richard McGee  
 S.Ct. No. 33233  
 Supreme Court

2. Whether a complaint sufficiently gives notice of claims based on breach of contract, including the tort of bad faith, where the complaint expressly seeks an award of damages for bad faith breach of contract, alleges the existence of a contract, states facts relating to conduct amounting to a breach of contract, and expressly asserts that defendants' conduct gives rise to the tort of bad faith.

Seiniger Law Offices v.  
North Pacific Ins.  
S.Ct. No. 33192  
Supreme Court

#### **TERMINATION OF PARENTAL RIGHTS**

1. Was the magistrate's decision to terminate parental rights supported by substantial and competent evidence?

Dept. of Health and Welfare v.  
John Doe  
S.Ct. No. 33366  
Court of Appeals

#### **DIVORCE, CUSTODY, AND SUPPORT**

1. Did the magistrate court err in finding Mary Koester in criminal contempt and in imposing sanctions that included serving two days in jail?

Mary Ann Koester v.  
William R. Koester  
S.Ct. No. 33094  
Court of Appeals

#### **POST-CONVICTION RELIEF**

1. Did the court err in dismissing Murillo's claims of ineffective assistance of counsel?

State of Idaho v.  
Orlando Chavez Murillo  
S.Ct. No. 33035  
Court of Appeals

#### **HABEAS CORPUS**

1. Is it cruel and unusual punishment to predicate release on parole, whether wholly or in part, upon the treatment of the sex offender, when treatment is unavailable?

Sidney Dopp v.  
Olivia Craven  
S.Ct. No. 32966  
Court of Appeals

2. Did the court abuse its discretion in dismissing Dopp's petition for writ of habeas corpus in which he claimed his due process and equal protection rights were violated in the parole process?

Sidney Dopp v.  
Commission of Pardons and Parole  
S.Ct. No. 32589  
Court of Appeals

#### **CRIMINAL APPEALS SENTENCE REVIEW**

1. Did the court err in its decision not to place Braaten on probation after a second period of retained jurisdiction?

State of Idaho v.  
Timothy G. Braaten  
S.Ct. No. 33161  
Court of Appeals

2. Has Jones failed to show that his sentence of life with thirty years fixed is an illegal sentence under Idaho's unified sentencing laws?

Raven Jones v.  
State of Idaho  
S.Ct. No. 33206  
Court of Appeals

3. Has Murphy failed to show that his concurrent sentences of life, with forty years fixed, are illegal life sentences under Idaho's unified sentencing laws?

State of Idaho v.  
Michael David Murphy  
S.Ct. No. 33008  
Court of Appeals

4. Whether the court erred in its factual determination of the losses suffered by the victim or abused its discretion in ordering Smith to pay over \$100,000 in restitution.

State of Idaho v.  
Katherine Smith  
S.Ct. No. 31830  
Court of Appeals

#### **EVIDENCE**

1. Whether insufficient evidence existed to prove the elements of driving without privileges independent of Webb's admission.

State of Idaho v.  
Nicholas Stacey Webb  
S.Ct. No. 32692  
Court of Appeals

#### **MOTION FOR NEW TRIAL**

1. Did the court abuse its discretion when it denied Hayes' motion for a new trial and in finding Hayes failed to establish that the evidence offered in support of his motion was new evidence that he could not have discovered with reasonable diligence and produced at trial?

State of Idaho v.  
Michael Theron Hayes  
S.Ct. No. 32947  
Court of Appeals

**Summarized by:**  
**Cathy Derden**  
**Supreme Court Staff Attorney**  
**(208) 334-3867**

## ALTERNATIVE DISPUTE RESOLUTION

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 Roster of Commercial 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 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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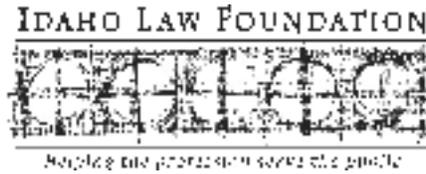
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## LAW RELATED EDUCATION PROGRAM COMPLETES ANOTHER SUCCESSFUL MOCK TRIAL SEASON

For the fourth consecutive year, Logos Secondary School from Moscow won Idaho's Annual High School Mock Trial Competition, sponsored by the Idaho Law Foundation. Chris Schlect, Logos' teacher coach related, "This is our first-ever team comprised entirely of seniors. Two of them are four-time state champions. I find myself in awe of what these kids have accomplished, and consider myself uniquely privileged to spend the time with them that I do."

The 2007 mock trial season included 34 teams who began the competition in one of four regional tournaments held throughout Idaho on March 2 and 3. This year's case pits freedom of speech against separation of church and state.

From the regional tournaments, 12 teams advanced to the state tournament held in Boise on March 19 and 20. The teams who advanced included:

The semi-final rounds of the state competition, held on

### ADVANCING MOCK TRIAL TEAMS

#### IDAHO FALLS

Blackfoot High School  
Highland High School

#### NORTHERN IDAHO

Lake City High School  
Logos Secondary School  
(2 teams)

#### TWIN FALLS

Kimberly High School  
(2 teams)

#### TREASURE VALLEY

Boise High School (2 teams)  
Centennial High School  
Mountain View High School  
St. Ambrose High School

Tuesday morning, March 20 at the Federal Courthouse in Boise, included the four teams who advanced from the quarterfinal rounds on Monday, March 19 at the Ada County Courthouse. These four teams included two teams from Logos Secondary School, as well as St. Ambrose High School from Boise and Centennial High School from Meridian.

In the championship round held at the Idaho Supreme Court on March 20, Logos defeated St. Ambrose High School from Boise. The Honorable Jim Jones, Supreme Court Justice, presided over the case. The Honorable Byron Johnson, former Supreme Court Justice, and Russ Heller, Boise School District's Educational Services Supervisor for Social Studies joined him on the judging panel.

During a debrief session after the championship round, the judging panelists complimented the participants for their impressive presentation skills and ability to think on their feet while arguing a complex legal case. Logos will now advance to the National High School Mock Trial Championship in Dallas, Texas on May 10 through 12.

Over 150 volunteers and ILF staff ensured a successful mock trial season. For Mike Lojeck, an attorney with the Ada County Public Defender's Office, volunteering as a judge for the compe-

tion brought back memories. "I participated in the competition as a high school student and was very grateful to the attorneys and judges who volunteered their time that year. Now that I am practicing law myself, I was excited to be able to give something back. I found it to be an extremely rewarding experience."

Another volunteer judge Dara Labrum said, "Watching the kids put on their presentations is a humbling and awe-inspiring experience. The quality of their work is really quite amazing. As a young attorney, it is also a rich opportunity to work with the other judges on the panel, from the community members to senior attorneys, and especially the presiding judge."

After winning state, the Logos mock trial team has now turned its attention to preparing for the national tournament, where the hope to best last year's 9th place finish. In addition to studying the national case materials and developing their case strategy, these enterprising young people are also working to raise money to help cover the costs for attending the national tournament. Team members have formed an ad hoc rock band called The Cubes and are organizing a concert fundraiser.

For information about volunteering for or making a contribution to the Idaho High School Mock Trial Program, contact Carey Shoufler, Law Related Education Director, at 208.334.4500.

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The Idaho Law Foundation would also like to thank that following people and organizations for their generous support of the 2007 mock trial season.

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## Idaho Volunteer Lawyers Program Special Thanks

Over the last several months a diverse group of volunteer attorneys, paralegals, and students has helped the Idaho Volunteer Lawyers Program (IVLP) provide assistance to low income people from Ada and Canyon County who are planning to file their family law cases pro se. Thanks to the efforts of the Access to Justice Committee, Idaho residents are now able to obtain forms for filing a variety of actions including divorce, custody, and modification of court decrees either free online or for a nominal charge at the courthouse. Nevertheless, many low-income people require help getting through the instructions and filling out all the forms in a way that accurately describes their situation and requests the appropriate judicial relief. Fortunately, attorneys from the **Ada County Prosecutors office, Greener Banducci Shoemaker, PA**, law clerks from the **Idaho Supreme Court**, paralegals from the **Idaho Paralegal Association**, and even students at **Boise State University** have stepped in to help.

Attorneys from **Hawley Troxell Ennis & Hawley, LLP** have already volunteered to staff the upcoming May clinic. Family

law experts, **Steven Beer, Audrey Numbers** and **Allison Brace** have attended the workshops to provide expert family law advice and assistance to individuals and the volunteers helping them.

IVLP's Pro Se Family Law Clinics offer an option for volunteer attorneys to provide very valuable assistance to a low-income person or family without committing to case representation. No family law experience is required. Clinics occur in the evening each month. All forms and other supplies are provided. As **Scott Randolph** who helped out at the clinic in April stated, "the clinic provided me with a great opportunity to assist a member of our community in a time of need." The community and IVLP appreciate the help of Scott and all our volunteers.

If you are interested in volunteering, please contact Mary Hobson, IVLP Legal Director at 334-4510 or [mhobson@isb.idaho.gov](mailto:mhobson@isb.idaho.gov)



*Volunteer attorneys from Greener Banducci Shoemaker, PA and Law Clerks of the Idaho Supreme Court who assisted low-income individuals with the preparation of pleadings for their pro se filings on March 13th: L to R: Jennifer Reinhardt, James Strong, Yvonne Vaughan, Scott Randolph, and Dan Gordon.*



*Members of the Ada County Prosecutor's office and family expert, Allison Brace, who conducted the Family Law Pro Se Clinic on January 9th. Standing L to R: Whitney Welsh Jankiancz, Alison Brace, Lorna Jorgensen, Gene Petty and Patrick Grace. Seated L to R: Claire Tardiff and Tessie Buttram.*



*Members of the Introduction to Paralegal Studies class at Boise State volunteered April 12th to assist IVLP participants with pro se forms and filings. Pictured L to R, front row are Ashleigh Wildman, Kathryn Gines, and Laura Dille. Back row: Instructor Ralph Blount, Jolene Anderson, and Instructor Al Gill.*

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 Since 1978, Idaho Volunteer Lawyers Program has helped thousands of people who were not wealthy, had no legal training, and needed legal assistance with family law issues.

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## FIRST TO FILE OR FIRST TO OFFEND? DEMAND LETTERS AND PREFERRED LITIGATION FORUMS

Jason E. Prince  
*Stoel Rives*

The following vignette explores the role demand letters can play in not only potentially resolving your client's dispute without resort to litigation, but also in securing your client's preferred forum if litigation ensues:

Jay Bradley's Blackberry rings. Upon answering, Jay hears the agitated voice of Justine Lemaire, the CEO of A-Town, Inc., an Idaho corporation. According to Justine, an Arizona corporation called Domco, Inc. has breached its contract with A-Town by failing to pay a recent invoice for \$100,000. Earlier today, however, when she spoke with Nick Johnson, the CEO of Domco, he suggested that A-Town had breached the contract by delivering non-conforming goods. Nick claimed that A-Town's breach of contract relieved Domco of its duty to pay the \$100,000.

A-Town and Domco share a longstanding business relationship, and Justine hopes the two companies can sort out their differences without resort to litigation. That being said, if Domco does not pay its bill soon, A-Town will not hesitate to sue. She asks Jay to draft a demand letter to Domco that politely requests payment of the \$100,000 and merely hints at the possibility of A-Town pursuing legal action against Domco.

As Jay scurries back to his office, he ponders the fact that Domco may end up suing A-Town for breach of contract in Arizona, forcing A-Town to litigate in Domco's backyard. Such a scenario would not make the client happy, because Justine has repeatedly expressed A-Town's strong preference for litigating in Idaho.

Suddenly, a term he once heard in law school flickers through his mind: first-to-file rule. Unable to recall the details of this rule, or determine how it might impact his demand letter to Domco, Jay stops by the office of his favorite associate, Bonnie Denny, and asks her to research the way federal courts in the Ninth Circuit apply the first-to-file rule.

Bonnie reports back to Jay the following morning. According to her research, the first-to-file rule provides that "when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with the second action."<sup>1</sup> A district court must consider three threshold factors when deciding whether to apply the first-to-file rule: (1) the chronology of the two actions, (2) the similarity of the parties, and (3) the similarity of the issues.<sup>2</sup> In other words, if Domco sues A-Town in Arizona federal court before A-Town sues Domco in Idaho federal court, and the Arizona and Idaho lawsuits involve substantially similar parties and issues, then the Idaho court will generally dismiss A-Town's lawsuit under the first-to-file rule.

Nevertheless, Bonnie explains, even where the first-to-file rule's three threshold factors are satisfied, a district court "has

the discretion to dispense with the rule for reasons of equity."<sup>3</sup> For example, a district court will not enforce the first-to-file rule if the first-filing party's action constitutes an "anticipatory suit." Generally, a lawsuit qualifies as "anticipatory" when the plaintiff filed it upon "specific, concrete indications that a suit by the defendant was imminent."<sup>4</sup>

Jay instantly realizes why the first-to-file rule came to mind after Justine asked him to draft the demand letter to Domco. Basically, A-Town's ability to litigate its dispute with Domco in its preferred forum of Idaho may depend on whether Jay's letter to Domco contains "specific, concrete indications" of an "imminent" lawsuit.

Baffled by his own brilliance, Jay begins to analyze the situation. On the one hand, he could follow Justine's instructions and draft a demand letter to Domco that merely hints at the possibility of A-Town taking legal action. This approach would probably increase the likelihood of resolving this dispute without spoiling A-Town and Domco's longstanding business relationship. However, Domco might subsequently sue A-Town in Arizona before A-Town sued Domco in Idaho. If so, according to Bonnie's research, the Idaho court would probably hold that Jay's demand letter did not contain "specific, concrete indications" of an "imminent" lawsuit, and, therefore, would dismiss A-Town's suit on first-to-file rule grounds.<sup>5</sup>

On the other hand, Jay could take a harder line in his demand letter and expressly inform Domco that, if it does not comply with A-Town's demands within ten days of receiving his letter, A-Town will file a lawsuit in the U.S. District Court for the District of Idaho. Again, Domco might subsequently sue A-Town in Arizona before A-Town sued Domco in Idaho. If so, the Arizona court would likely hold that Jay's demand letter provided Domco "specific, concrete indications" of an "imminent" lawsuit, and thus would dismiss Domco's suit as "anticipatory."<sup>6</sup> Yet, such an overt threat of litigation might risk offending Domco and undermine A-Town's efforts to diplomatically resolve the dispute.

Equipped with Bonnie's research, Jay picks up the phone and dials Justine's number. A-Town might decide to stick with its original plan of extending an olive branch to Domco and merely hinting at the possibility of litigation. However, it might choose to maximize its chances of litigating in Idaho by providing "specific, concrete indications" of an "imminent" lawsuit, even if it means potentially rubbing Domco the wrong way. Ideally, Jay and Justine will manage to agree on language that accomplishes both of A-Town's goals. In any event, as the phone begins to ring, Jay takes quiet pride in knowing that he will at least help his client make a fully informed decision.

## ENDNOTES

<sup>1</sup> *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982).

<sup>2</sup> *Gen. Prods. Mach. Shop, Inc. v. Systematic Inc.*, No. CV-06-99-E-BLW, 2006 WL 2051737, at \*1 (D. Idaho July 20, 2006).

<sup>3</sup> *Id.* at \*2.

<sup>4</sup> See *Ward v. Follet Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994); see also 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 57.42[2][b][i][C] (3d ed. 2006).

<sup>5</sup> See, e.g., *Guthy-Renker Fitness, LLC v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 271 (C.D. Cal. 1998) (holding that a demand letter's "veiled threats of legal action" were insufficient to trigger the anticipatory-suit exception to the first-to-file rule).

<sup>6</sup> See, e.g., *Z-Line Designs, Inc. v. Bell'O International LLC*, 218 F.R.D. 663, 666 (N.D. Cal. 2003) (applying the anticipatory-

ry-suit exception where the second-filing party's demand letter warned that it would "'commence[] an action in an appropriate United States District Court'" if the first-filing party refused to comply with its demands by a specified deadline).

## About the Author

**Jason E. Prince** is an attorney at *Stoel Rives LLP* ([www.stoel.com](http://www.stoel.com)), a regional business law firm, where he focuses on complex contractual disputes. He graduated from Davidson College with an A.B. in English in 1999, and from the University of Cambridge (U.K.) with an M.Phil. in Land Economy in 2000. In 2005, he earned a J.D. from the University of Notre Dame Law School, where he served as Editor in Chief of the *Notre Dame Law Review*. Prior to joining *Stoel Rives*, he served as a law clerk to the Honorable Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit.

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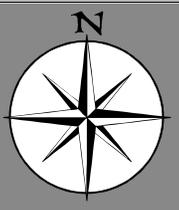
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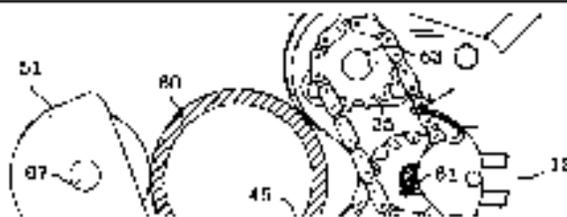
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- 1 *The Advocate* Deadline
- 1 July Bar Exam Second Applicant Deadline
- 3 Idaho State Bar Admission Ceremonies,  
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- 4 **CLE: Idaho Law Foundation present: Practical Skills, Boise Centre on the Grove**
- 7 **CLE: Business and Corporate Law Section present: Current Issues in Structuring Mergers and Acquisitions**
- 11 Idaho State Bar Board of Commissioners Meeting
- 16 **CLE: Young Lawyers Section present: Keeping Your Client out of Employment Litigation**
- 16 The Advocate Editorial Board Advisory Meeting
- 18 **CLE: Idaho Law Foundation present: Handling Your First or Next Grandparent Guardianship Case**
- 28 **Memorial Day – Law Center Closed**

### June 2007

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- 1 The Advocate Deadline
- 1 **CLE: Idaho Law Foundation present: High Tech Ethics: Law Firm Risk Management on the Digital Frontier**
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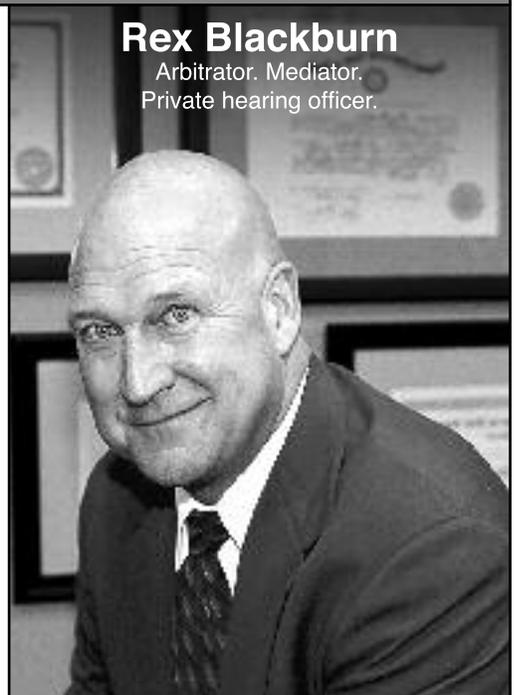
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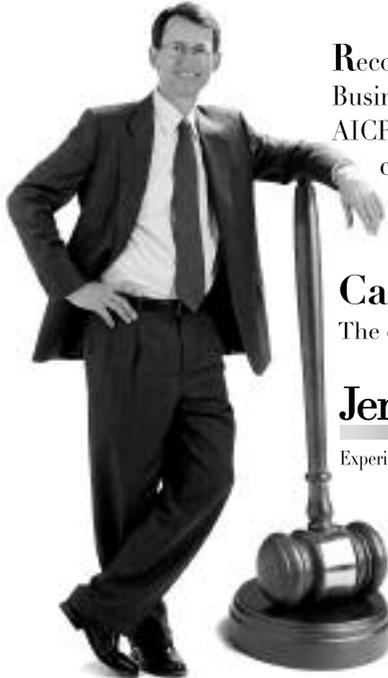
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**PERCE HALL  
1913-2007**

**ISB Distinguished Lawyer**

**Perce Hall**, 93, Mountain Home, died Feb. 28, 2007, at the Marquis Care Center in Boise. Perce was born March 14, 1913, in Hyrum, Utah. He lived in the Malad and Pocatello Valley area when he was growing up. He graduated from Malad High School and attended Idaho State University for two years. He then entered the University of Utah Law School and graduated in 1936. He worked his way through school during the depression as a janitor and other similar jobs. Perce was the first person in his family to earn a college degree.

He was admitted to the Idaho State Bar in 1937 when only two lawyers passed the bar. At age 23, he began practicing law in Mountain Home with Eugene Anderson. Anderson moved to Boise in 1938 and Perce was a solo practitioner until he formed a partnership with Robert W. Rowett in 1959. Rowett became a judge in 1970 and Jay Friedly joined the firm in 1972. The firm is now known as Hall, Friedly and Ward. He served for many years as the city attorney for Mountain Home and was the prosecuting attorney for Elmore County in the 1940s. He was the attorney for the Elmore County Highway District for 60 years.

Perce had a distinguished law practice. He practiced actively and fully for 65 years until he had a stroke in September of 2001. In 1997, Perce received the Idaho State Bar Idaho Distinguished Lawyer Award, the highest award given by the Idaho State Bar. In 1985, he was honored in the Idaho Statesman's Portrait of a Distinguished Citizen. His reputation as an attorney was based on his integrity and reliability in dealing with his fellow lawyers, his family noted. "He was a man on whose word you could rely."

Perce also was active in numerous civil activities including receiving the Boy Scouts Silver Beaver award. He was a charter member of the Mountain Home Elks Lodge, Chairman of the Elmore County Red Cross and Chairman of the Elmore County Republican Party. Perce married his lifetime love, Orpha Harris, in 1937. They were happily married for 67 years before Orpha died in 2004. Perce and Orpha did everything together including skiing, hunting, fishing and, most significantly, his family said, golfing. Perce was instrumental in the location and construction of the golf course in Mountain Home. For nearly four years he went to the proposed location and picked up and removed rocks for two to three hours every night. The fruits of his labors paid off when the course was finally constructed. Perce and Orpha spent many years of enjoyment on the course.

Perce is survived by: his two sons, Dr. Stanton H. and his wife, Sharon (Price) Hall, of Seattle, Wash., and Richard E. and his wife, Tonya (McMurtrey) Hall, of Boise; seven grandchildren and five great-grandchildren. He was preceded in death by his wife, Orpha, one brother and two sisters.

**THOMAS W. FEENEY  
1922-2007**

**Thomas William Feeney**, 84, Lewiston passed away February 21, 2007, of natural causes. Tom was born July 31, 1922, in Lewiston, to Thomas Ambrose Feeney and Christine Cecilia Young Feeney. He joined the Calvary unit of the Idaho National Guard before World War II broke out, and spent 39 months with the U.S. Army in the field artillery in the Pacific Theater. He recalls celebrating his 21st birthday in a foxhole in New Guinea. He did his officer's training in Australia and was commissioned as a 1st lieutenant. After the war was over, Tom enrolled at the University of Idaho and joined the Alpha Tau Omega fraternity. It was there that he met Harriet Sue Oxley of Boise, Idaho and they married on August 17, 1946. This union resulted in a wonderful 60-year love affair and produced five loving children.

Tom graduated from the University of Idaho Law School in 1950, and was admitted to the Idaho Bar. He was the attorney for the Port of Lewiston since its inception in the late 1950s until his retirement. He was also the attorney for the Lewiston Orchards Irrigation District between 1955 and 1992. He served on several Idaho State Bar committees and spent many years grading bar exams for new law school graduates. He served as President of the Clearwater Bar Association. He was honored in the Who's Who in the West compilation of noteworthy persons. His favorite part of his general law practice was facilitating adoptions. Tom was very active in the Lewiston community. The Boys and Girls Club of America was close to his heart. He served on the board for decades. He was president as well as receiving the Man of the Year and received their prestigious Gold Medallion Award. He spent many happy years coaching their football teams. He was also very involved in the Chamber of Commerce, serving as the president. He was an active member in the Lewiston Jaycees, the Lewiston Elks, the Nez Perce County Republican Central Commission, and the University of Idaho Alumni Association. He loved time spent with Idaho's oldest investment club, Clearwater Investor's Club and served as their president.

He is survived by his wife of 60 years, Harriet (Hattie Sue) Feeney; and his five children, and 10 grandchildren: Michael Thomas Feeney of Lewiston, wife Marilyn, and children Lauren Joanne and John William; Christine Anne Dixon of Meridian, husband Dennis (now deceased), and children Ashley Anne and husband Ryan Kenneth Dowell, and Anne Mackenzie; Catherine Jo Janis of Boise, husband John and children Ryan Cody and Jeffrey Kyle; Nancy Susan Hatfield of Japan, husband Steve and children Tyler Marshall and Samuel Ambrose; Richard Perry Feeney of Washington and children Amanda Jo and Natalie Renae.

**JANICE E. HAMILTON  
1919 – 2007**

**Idaho's First 50 Women Lawyer**

**Janice Elizabeth Hamilton**, age 87, of Coeur d'Alene, ID, died February 24, 2007 at Kootenai Medical Center. She was born March 23, 1919, in Lansing, Michigan to Reverend William

L. and Alice (Smith) Oliver. Shortly after her birth, the family moved to East Lansing where Janice received her schooling, graduating from high school and attending Michigan State College. She married Clarence "C.J." Hamilton on January 21, 1939. In 1940, they moved to Wallace, Idaho. In 1941, they moved to Moscow, Idaho where they lived until C.J. was called to active duty for W.W. II. Janice moved back to Lansing and remained there until the end of the war, rejoining C.J. in Moscow until his graduation from law school in 1948. With the exception of the war years, she had been a proud resident of Idaho since 1940.

While raising three children she attended North Idaho College and ultimately received her undergraduate degree from the University of Idaho in 1961. Mrs. Hamilton almost immediately began a four-year legal clerkship in the study of law in her husband's law office, followed by one semester of law school at the University of Idaho. She subsequently successfully passed the Idaho Bar Examination and was admitted to the practice of law in 1966. She was the 35th woman to be admitted to the Idaho Bar. Additionally, according to Dr. Bell, long-time Dean of the University of Idaho Law School, Mrs. Hamilton was the last person ever admitted to practice law by the Idaho State Bar as a result of directed study by a lawyer during a clerkship.

Janice was a member of the Eastern Star (Queen Esther Chapter), Ladies of the Oriental Shrine, and was very active in Daughters of the Nile, having been Queen of the El Karnak Temple in Spokane in 1976. She was also a past president of the Coeur d'Alene Chapter of the Jaycee-ettes and a long serving member of the Coeur d'Alene Civil Service Commission. Mrs. Hamilton was an avid world traveler, having visited nearly every country in the world. She also traveled to the North Pole and to Antarctica.

She is survived by a daughter and son-in-law, Jill and Richard Jurvelin of Coeur d'Alene; a son and daughter-in-law, William and Gerlinde Hamilton of Coeur d'Alene; three lovely granddaughters, Jilann Carlson, Janelle Shaffer, and Nicole Hamilton; seven wonderful great-grandchildren; and her special caregiver, Bessie Kline. She was preceded in death by her parents; a son, Captain Jack J. Hamilton USA, Ret.; her brother, William L. Oliver Jr.; her sister, Barbara Oliver Davis; and her husband C.J. Hamilton in 2005.

### **BEVERLY B. HANCOCK**

**1937–2007**

#### **Founder of the BLSA and IDALS**

**Beverly Bothne "Bev" Hancock**, age 69, of Boise, died at home of congestive heart failure, February 16, 2007. Bev was born in Menomonie, Wis. on May 7, 1937 to O.J. and Lorraine Bothne. She grew up in Twin Falls, Idaho, graduating from high school there in 1955 and moving to Boise the same year. In 1965, she married Ken Hancock in Seattle, Wash. They moved to Boise in 1967, where she lived until her death. Mr. Hancock died in 1998.

Bev worked as a legal secretary in Seattle and Boise for many years and served as an attaché in the Idaho Legislature during eight sessions over a period of 33 years. In 1975, Bev became the first Executive Director of the Idaho Trial Lawyers Association.

She held that position for a total of eight years and also served as the Association's lobbyist. She was the founding president of the Boise Legal Secretaries Association, the Idaho Association of Legal Secretaries and the Idaho Society of Association Executives. She was awarded a lifetime membership in BLSA and IDALS in 1981. Always willing to provide leadership when needed, she also served as President of such organizations as the Les Bois Toastmistress Club, the Eagle Library Board of Trustees and three homeowners associations. A breast cancer survivor, Bev was for many years a volunteer for the American Cancer Society's Reach for Recovery Program. An accomplished and humorous public speaker, she addressed audiences on topics as varied as parliamentary procedure, keys to getting organized, how the legislature works and the problem with shoulder pads. She could whip up a poem or a parody about almost anything. She was a remarkable woman, wife and mother, and will be deeply missed by her family and friends.

Bev is survived by her mother, Lorraine Bothne, of Garden City, daughter Stephanie Lane of Boise, daughter Lorianne Hancock of Hot Springs, Mont., son Robert Hancock and wife Kathi of Boise; sister and brother-in-law Mary and Carlos Grant of Boise; granddaughter Andrea Carroll, and grandsons Alexander and Maxwell Hancock, all of Boise; stepsons Craig Hancock and wife Shelly, and Steve Hancock; grandsons Nathan Hancock, Brenden Hancock and Ethan Hancock, and granddaughter Tiffany Hancock, all of Washington State; and many nieces and nephews. She was preceded in death by her father, and sister Judie McReynolds.

### **RICHARD B. KADING**

**1930-2007**

**Richard B. Kading, Jr.**, 76, passed away Monday, Feb. 19, 2007 at University Hospital in Portland, Ore. Richard was born March 26, 1930 at St. Luke's Hospital in Boise, Idaho. His loving sister, Edith, was born at the same time. Edith is his twin and two people never enjoyed a more wonderful and enduring relationship than Richard and Edith. Richard was the son of Idaho pioneers, Richard B. Kading, Sr. and Lydia Parker Kading. Richards grandfather, Aaron F. Parker came to Idaho in 1874, and in 1876 participated in the Nez Perce War. In 1878, he was a participant in the Sheepeater Campaign and was decorated for that endeavor. Aaron Parker was the first Regent appointed to the University of Idaho. Parker was one of the authors and signers of the Idaho State Constitution. Richard was the great nephew of Hosea B. Eastman who came to Idaho in 1864. Mr. Eastman settled in Silver City, Idaho, where he built and owned the Idaho Hotel. He was also involved in mining, and after making a fortune, moved to Boise, where among other entrepreneurial ventures, he owned the Overland Hotel, built and owned the Eastman Building, founded the Boise City National Bank, and was founder and general manager of the Boise Artesian Hot and Cold Water Company. Mr. Eastman built the famous and beautiful Natatorium, which, unfortunately, was destroyed in 1934.

Richard graduated from Boise High School where he was an honor student. He and his sister, Edith, enrolled at the University of Oregon and graduated in 1952. While at the University of Oregon, Richard had the honor and distinction of being the

Commanding Officer of the University of Oregon R.O.T.C. Unit. As a result of this distinction, Richard was offered and accepted a commission in the Regular Army. He attained the rank of Captain, the same rank his father attained while serving in World War One. In 1954, while serving his country, Richard met and married Hope Cutkomp. She was a positive leader, and at one time ran as a Republican for Lieutenant Governor of Idaho. She was honored by The Idaho Statesman as a Distinguished Citizen. Hope and Richard were the parents of three children: Prentice, Lydia and David. Hope was stricken with cancer and passed away in 2000.

Richard left the Air Force in 1955, and immediately enrolled in the Law School at the University of Idaho. He received his law degree in 1958. Shortly thereafter, he went to work as an Assistant United States District Attorney. Kenneth Bergquist had been appointed United States District Attorney and Richard fondly remembered time spent working for Mr. Bergquist. In 1962, Richard joined what at the time was referred to as the Eberle Law Firm. Richard remained with the firm and today it is referred to as Eberle Berlin Kading Turnbow McKlveen & Jones, Chtd. Richard was a born litigator who truly enjoyed the give and take of the courtroom. His motivation was always to do his best for all who sought his counsel, which he did with great presence and gracious eloquence. A kind and honorable man, he was part of a very elite cadre of jurists whose impact has created an enduring legacy. He imparted a zest, a passion, a genuine commitment and a profound respect for the law. Richard was most humbled by the peer recognition bestowed upon him during his very distinguished legal career, including his admission to the American College of Trial Lawyers and the American Board of Trial Advocates. He devoted many years to the objectives of the Idaho Association of Defense Counsel. He spoke often of his pride in being selected as a member of the Inns of Court, whose members act as mentors and promote professionalism and civility among members of the bar. Throughout not only his career, but also his lifetime he was a trusted friend, a confidante, and a mentor to so many.

Richard loved to fish and hunt, and was a proven expert at both. He spent many days, along with his sister, Edith, skiing on slopes throughout the west. He enjoyed flying and for several years flew his own plane for business and pleasure. Richard was a true Renaissance man. He never lost his dignity, was always a gentleman and was a man of courage. He was his own man. In 2001, Richard met and married Judy Settle. They divided their time between their two homes, one in Boise, and the other a beautiful home located on a great stretch of beach on the Oregon Coast. The family learned early on that Judy is a loving and devoted wife who did everything possible to help Richard during his ordeal. Richard was preceded in death by his father and mother, and his sister, Sylvia Kinsinger. In addition to his wife, Judy, Richard is survived by his sister Edith (Mrs. Marshall Lockman), his sister Anne (Mrs. J. Reed Peterson) and his brother-in-law, Robert E. Kinsinger. Richard is also survived by his daughter, Prentice, and her children Mitilene, Miriam and Bryce. Richard's son, David, and his wife, Renee, along with their children Parker and Coral, reside in Boise, as does his daughter Lydia and her husband, John Primecevera. He is also survived by

two very special people in his life, Mary Ann and Delos Newcomer.

## **RICHARD H. SEELEY 1915-2007**

**Richard H. Seeley**, age 91, died March 10, 2007 in Boise, Idaho. He was born on the family farm in a "prove-up shack" near Hazelton on May 30, 1915, to James Ross (JR) Seeley and Hannah Spencer Seeley. He attended schools in the Hazelton area and after graduation from high school worked on the family farm for a year before attending the University of Idaho. A typical young college student he didn't know what he wanted to do so he entered law school "because I didn't know anything about it and it sounded interesting," graduating with a degree in law in 1938. While studying for the bar exam, he accepted a job in Jerome, Idaho as Deputy Sheriff where he learned the skill of "sitting on the back of my head" in a patrol car. He passed the Bar in 1939, and was elected Jerome County Prosecuting Attorney, a position he held until his retirement in 1984. In addition, he had a successful private practice and was the Jerome City Attorney. At his death he was one of the two oldest licensed attorneys in Idaho.

More important to him than the practice of law was his family. He married Victoria Cassels Scott, whom he had met in an economics class at the University of Idaho, on May 25, 1940 in Nampa, Idaho. They eloped and were secretly married for a time because during the war years in Idaho female schoolteachers couldn't be married. His first child, Vickie, was born July 13, 1941 followed quickly by his first son, Jim, who was born on Richard's 27th birthday, May 30, 1942. Peg was born Feb. 8, 1946, and Don on July 29, 1949. He always was, and will continue to be, a guiding force for his children, all of whom he put through college. He instilled in them humor, wit, independence, sincerity, curiosity, tenacity and the importance of being true to one's self and family.

In addition to his family and vocation, he was an avid golfer and fisherman and loved a good game of poker with his many friends. Having been introduced to golf by Victoria's Scottish relatives he became an avid golfer and was instrumental in the formation, construction, and later expansion of Jerome Country Club. He was a voracious reader, especially of history, who could tell you who every presidential candidate and running mate was, even those who lost, and knew facts and anecdotes about historical events unknown to the casual reader. He loved music especially classical and country, Mother Maybelle Carter being a favorite. The knowledge gained farming as a child showed up in his beautiful flower gardens and yard. After retirement, he and Victoria lived in Sun City West, Ariz., before moving to Boise, Idaho at the turn of the century. He was preceded in death by his parents; J.R. and Hannah Seeley, his sisters Helen (Grant) Roylance, Ada (Van) Emerson, Dortha Seeley, an unnamed infant sibling, his grandson Jason Barlow, and many longtime friends. He is survived by his wife of nearly 67 years, Victoria, of Boise, his children; Vickie Barlow (Ron Jacobs) of Perrinton, Michigan, Jim Seeley (Rae) of Lincolnshire, Illinois, Peg Montgomery of Boise, Idaho, Don Seeley (Terri) of Perrinton, Mich., four grandchildren; Jeff Barlow of Seattle, Wash., Anna

Seeley of Portland, Ore., Sara Montgomery of Boise, Idaho, and Megan Seeley of Reno, Nev., and one great grandson, Jacob Barlow of Perrinton. Though a quiet and sometimes shy man he left his mark on all who met him. To the end he was a gracious, considerate, and often humorous man who chose to "sneak out" after those close to him had left his bedside for the night.

**JERRY V. JENSEN**  
**1952 - 2007**

**Jerry V. Jensen** died at his home southwest of Buhl on April 7, 2007. Jerry was born June 14, 1952, to Gerald and Janice Jensen. He grew up on his grandfather's farm and attended Buhl schools, graduating from high school in 1970. He went to college at College of Idaho (now Albertson College), graduating in 1974 with a degree in biology. The spring semester of his junior year he was part of science expedition to the Barrier Reef in Australia, an experience that changed his perspective on his plans for his future. While in college, he was active in band and music ensembles, playing the trumpet.

He married Christine Hagerman of Wendell in 1974, and they had two girls, Erica and Amy. Christine died suddenly in 1987. After some postgraduate study at Idaho State University, Jerry entered law school, graduating with a Juris Doctor degree from Lewis and Clark School of Law in Portland, Ore. He was admitted to the Oregon Bar in 1980 and the Idaho Bar in 1984. Jerry joined the John Rosholt law firm, practicing in the Boise and Twin Falls offices. He left the firm in 2001 to continue practicing at his home in Buhl.

In 2004, he married Mary Wasko Sass, and together they cooked and gardened and raised orchids and tropical plants in their solarium. Jerry pursued his lifelong interest in science and world affairs in books and on the Internet. Part of his butterfly collection is on display at the Herrett Museum.

Jerry is survived by his wife, Mary; his two daughters, Erica Zimmerman (Luke) of McMinnville, Ore., and Dr. Amy Jensen of Pittsburgh, Pa.; and his parents, Gerald and Janice Jensen of Buhl.

**—RECOGNITION—**

**Peter G. Barton** has joined Givens Pursley LLP as an Associate Attorney in the Real Estate and Corporate Practice groups. He earned his Juris Doctor from Harvard Law School, where he was a member of the Harvard Negotiation Law Review. Before law school, Peter earned a B.S.E. from Duke University in Civil and Environmental Engineering and then was a design and consulting engineer for more than four years. After law school, he clerked for the Hon. Peter C. Dorsey, U.S. District Judge for the District of Connecticut. While at the U.S. Department of Justice, Peter drafted successful appellate briefs to the U.S. Court of Appeals for the Eight Circuit and to the U.S. Court of Appeals for the Ninth Circuit. Peter joins Givens Pursley after practicing law for several years at a large, international law firm in Washington, D.C. Peter's practice focuses primarily on real estate and corporate transactions and on land use issues.

Peter is a member of the New York and District of Columbia Bars and is also admitted to practice before the U.S. Court of Appeals for the District of Columbia, the U.S. Tax Court, the U.S. Court of International Trade, the U.S. Court of Federal Claims, the U.S. District Court for the District of Columbia, and the U.S. District Court for the District of Connecticut.

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**Larry Prince**, a long-time Holland & Hart partner and Boise bankruptcy and commercial litigation and transactions lawyer, is the new administrative partner for the Boise office of the Rocky Mountain Regional law firm of Holland & Hart. In addition to continuing his legal practice, he will now guide the Boise office's overall business and delivery of a full-range of legal services offerings to the firm's clients. He succeeds Newal Squyres, who was administrative partner of the Boise office from 2003 to 2006. He is a fellow in the American College of Bankruptcy, is listed in *The Best Lawyers in America* and Chambers USA's ranking of leading business lawyers, and has practiced in Idaho for more than 30 years.

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**John N. Zarian**, of the Boise office of Stoel Rives LLP, has been selected as a Fellow of the American Academy of Trial Counsel. John holds a law degree from the University of Southern California and a master's degree in finance from the University of Utah. He has served as lead counsel in a wide range of matters involving intellectual property and complex business litigation, as well as class action, securities and antitrust cases. He is licensed to practice law in the States of Idaho and California, as well as the District of Columbia and the U.S. Supreme Court. He has earned Martindale-Hubbell's highest ratings for professional skills and ethical standards, as recognized by his peers, and was named as a Southern California Super Lawyer in 2006.

John is a member of the Boise Committee on Foreign Relations, an executive committee member and vice-chair of the University of Utah's Olpin Club, and a member of the Publications Advisory Board for the USC Law School.

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**Cynthia A. Melillo**, Givens Pursley LLP was recognized as a 2007 Tribute to Women in Industry (TWIN) honoree. TWIN honorees are selected annually through a nomination process in recognition of women who have made significant contributions to their professional field and/or organization.

Cynthia joined Givens Pursley in 1998 where she is currently a partner practicing primarily in the areas of real estate and corporate/business transactions. Cynthia currently serves as the vice chair of the Real Property Section of the Idaho State Bar. She has conducted several continuing legal education seminars on commercial leasing and condominium development. Cynthia also participates in the Boise Metro Chamber of Commerce Leadership Boise program.

Cynthia received a B.A. in Political Science from the University of Southern California and a Master's Degree in Political Thought from the University of Kent in Canterbury, England. She received her J.D. from the University of Arizona

School of Law. Prior to beginning her law practice, Cynthia worked in the education field as a classroom teacher and community education specialist.



Ken Arment is at the far left of picture.

**Ken Arment**, Arment Law Offices, McCall, won a Bronze Medal in Curling at the 2007 Idaho Winter Games in McCall.

**Vivian Otero-Epley**, Meuleman Mollerup LLP has been honored with the National Association of Women in Construction's (NAWIC) Future Leader of the Year Award. Ms. Otero-Epley serves on the Board of Directors of the Idaho Chapter of NAWIC, a volunteer organization that awards scholarships for construction-related studies. Prior to joining Meuleman Mollerup in 2003, Ms. Otero-Epley had twenty years of experience working in the construction and development industry. Meuleman Mollerup represents construction and real estate clients in matters related to general business activities and commercial litigation. The firm supports NAWIC's core purpose of enhancing the success of women in construction.

In addition to serving on NAWIC's Board of Directors, Ms. Otero-Epley is the Administrator for the Idaho State Building Authority, the 2007 Vice-Chair of the Idaho Associated General Contractors Associates Committee, a member of the Boise Metro Chamber of Commerce State and Federal Legislative Committee, and Idaho Women Lawyers. She volunteers in support of local non-profit organizations such as the March of Dimes, Northwest Children's Home, and Whitney Women's Chorale.

**John M. Howell** has been named a partner in the law firm of Brasseley Wetherell Crawford & Garrett LLP, located at 203 W. Main St. in Boise. John's practice focuses upon tort defense,

including products liability, medical malpractice, and general commercial litigation. He also has a real estate and business practice. Prior to joining the firm, John served as a law clerk to the Honorable Cheri C. Copsey. He is a graduate of the University of Idaho College of Law and St. John's University.

**—ON THE MOVE—**

The firm of **EBERLE, BERLIN, KADING, TURNBOW, McKLVEEN & JONES, Chartered**, is relocating its offices to the BOISE Building, 1111 W. Jefferson St., Ste. 530, Boise, ID 83702. Our current Post Office box number, telephone numbers, fax number and email addresses will remain the same. Our office will be closed on Friday, May 18th, and resume business on Monday, May 21st.

**Dan Taylor**, Jeffrey J. Hepworth, P.A. & Associates, has opened an office at 151 N 5th, PO Box 1806, Twin Falls, ID 83301, (208) 734-0702. He was previously employed with the Twin Falls Prosecuting Defender's office. His office practice will concentrate on criminal law, personal injury, and workers compensation.

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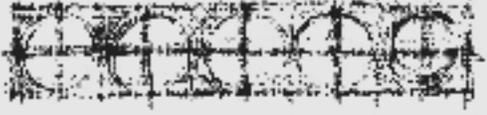


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3/27/07 - 4/1/07

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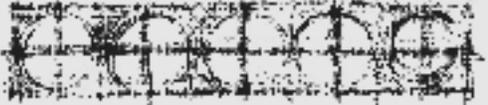
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## LICENSING CANCELLATIONS

### ORDER CANCELLING LICENSE TO PRACTICE LAW FOR NON-PAYMENT OF 2007 LICENSE FEES

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2007 Idaho State Bar license fees required by Section 3-409, Idaho Code, and have not given notice of withdrawal from the practice of law to the Idaho State Bar and the Court.

NOW, THEREFORE, IT HEREBY IS ORDERED that the license to practice law in the State of Idaho of the following named persons is hereby cancelled, and said persons are placed on inactive status for failure to pay the 2007 Idaho State Bar license fees:

DANNIS MARLON ADAMSON; JOSEPH H. BAIRD; PHILLIP M. BARBER; CHRISTOPHER WESLEY CALL; RAY E. CUNNINGHAM; ALLEN KENT DAVIS; DANE A. DEVEAU; HUGH OWEN EVANS; DEBORAH ALISON GATES; RICHARD JOSEPH GOMEZ; BLAIR JOHN GROVER; DOREEN CLARA GUENTHER; MORRIS O. HAGGERTY; SCOTT WILLIAM HANSEN; GRETCHEN HERBISON;

ROBERT WILLIAM HORN; FIONA ALLISON CRINKS KENNEDY; DOUGLAS KENT KNUTSON; VANESSA A. LAIRD; STANLEY ALAN MCALISTER; JOHN M. MCCALL; JAMES BENJAMIN MEADE II; GRAHAM M. MILES; MICHELE KAY MORIN; AARON H. NEMEC; MAX GREGORY NICOLAI; THOMAS KELLY OKAI; THEODORE CLARKE PETERS; VALERIE JEAN PHILLIPS; KATRINA TERESE SATHER; FRANK GRAHAM SMITH; PAUL R. TABER III; OMAR R. VALVERDE; AND JULIE MARIE WICKETT.

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the above-named persons are no longer licensed to practice law in the State of Idaho unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

DATED this 5<sup>th</sup> day of March 2007.

By Order of the Supreme Court  
Gerald, F. Schroeder, Chief Justice

## LICENSING REINSTATEMENTS

### ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR

The Court issued an Order, March 2, 2007, that DANNIS MARLON ADAMSON be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, March 21, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Dannis Marlon Adamson is reinstated to Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 22<sup>nd</sup> day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

### ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR

The Court issued an Order, March 5, 2007, that JOSEPH H. BAIRD be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, March 8, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Joseph H. Baird is reinstated to Active Status for 2007 and the Idaho State

Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 8<sup>th</sup> day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

### ORDER GRANTING PETITION FOR REINSTATEMENT AS OUT-OF-STATE ACTIVE MEMBER IN THE IDAHO STATE BAR

The Court issued an Order, March 5, 2007, that ROBERT WILLIAM HORN be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A Motion for Reinstatement was filed, March 22, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Out-of-State Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the MOTION FOR REINSTATEMENT be, and hereby is, GRANTED and Robert William Horn is reinstated to Out-of-State Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Out-of-State Active Attorney License on receipt of this Order.

DATED this 28<sup>th</sup> day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

### ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR

The Court issued an Order, March 5, 2007, that FIONA ALLISON CRINKS KENNEDY be removed from the list of attorneys entitled to practice law in Idaho and placing her on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, March 19, 2009.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Fiona Allison Crinks Kennedy is reinstated to Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 20th day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

**ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR**

The Court issued an Order, March 5, 2007, that DOUGLAS KENT KNUTSON be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, December 1, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Douglas Kent Knutson is reinstated to Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 15th day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

**ORDER GRANTING PETITION FOR REINSTATEMENT AS AFFILIATE MEMBER IN THE IDAHO STATE BAR**

The Court issued an Order, March 5, 2007, that VANESSA A. LAIRD be removed from the list of attorneys entitled to practice law in Idaho and placing her on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A Petition for Reinstatement was filed, April 2, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Affiliate Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Vanessa A. Laird is reinstated to Affiliate Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 9th day of April 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

**ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR**

The Court issued an Order, March 5, 2007, that THEODORE CLARKE PETERS be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, April 17, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Theodore Clarke Peters is reinstated to Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 18th day of April 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

**ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR**

The Court issued an Order, March 5, 2007, that PAUL R. TABER, III, be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2007 Idaho State Bar licensing requirements. A PETITION FOR REINSTATEMENT was filed, March 6, 2007.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing, IT HEREBY IS ORDERED that the PETITION FOR REINSTATEMENT be, and hereby is, GRANTED and Paul R. Taber, III is reinstated to Active Status for 2007 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order.

DATED this 6th day of March 2007.

For the Supreme Court  
Dorothy Beaver for Stephen W. Kenyon, Clerk

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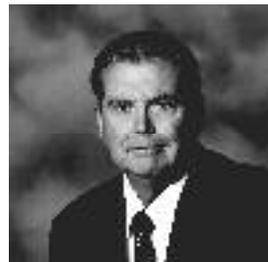
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# May/June CLE COURSES

## MAY

### **Idaho Practical Skills Seminar**

Friday May 4, 2007

Sponsored by the Idaho Law Foundation

8:30 a.m. to 3:30 p.m.

Boise Centre on the Grove

6.0 CLE Credits of which 1.0 is Ethics Credit

RAC Approved

### **Current Issues in Structuring Mergers and Acquisitions**

Monday May 7, 2007

Sponsored by the Business and Corporate Law Section

8:30 a.m. to 5:00 p.m.

Boise Centre on the Grove

6.0 CLE Credits pending

RAC Approved

### **Keeping Your Client out of Employment Litigation**

Wednesday May 16, 2007

Sponsored by the Young Lawyers Section

8:30 a.m. to 9:30 a.m.

Law Center, Boise

1.0 CLE Credits

RAC Approved

### **Handling Your First or Next Grandparent Guardianship Case**

Friday May 18, 2007

Sponsored by the Idaho Law Foundation

8:30 to 10:00 a.m.

Law Center, Boise

1.5 CLE Credits

RAC Approved

## JUNE

### **High Tech Ethics:**

Law Firm Risk Management on the Digital Frontier

Friday June 1, 2007

Sponsored by the Idaho Law Foundation

8:30 a.m. to 10:30 a.m.

Law Center, Boise

2.0 CLE Credits of which 2.0 are Ethics

RAC Approved

### **Rule 11 in Intellectual Property Cases**

Wednesday June 6, 2007

Sponsored by the Professionalism and Ethics

Section and the Intellectual Property Law Section

8:00 a.m. to 9:00 a.m.

Law Center, Boise

1.0 CLE Credits of which 1.0 is Ethics

### **The Art of the Deal**

Wednesday June 20, 2007

Sponsored by the Young Lawyers Section

8:30 a.m. to 9:30 a.m.

Law Center Boise

1.0 CLE Credits

## COMING IN JULY

**IDAHO STATE BAR 2007 ANNUAL MEETING**

**JULY 18 TO 20, 2007**

**BOISE CENTER ON THE GROVE**

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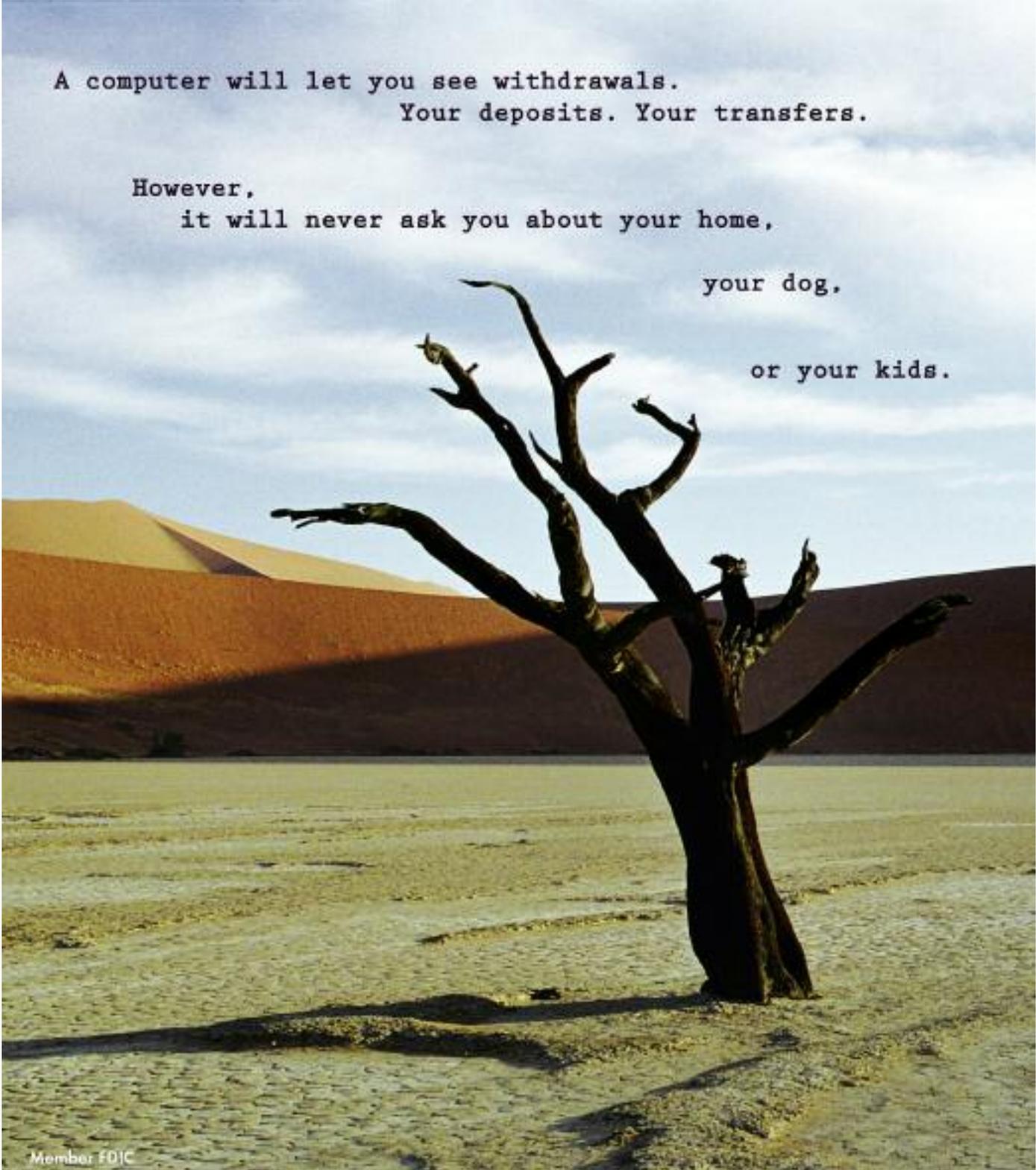
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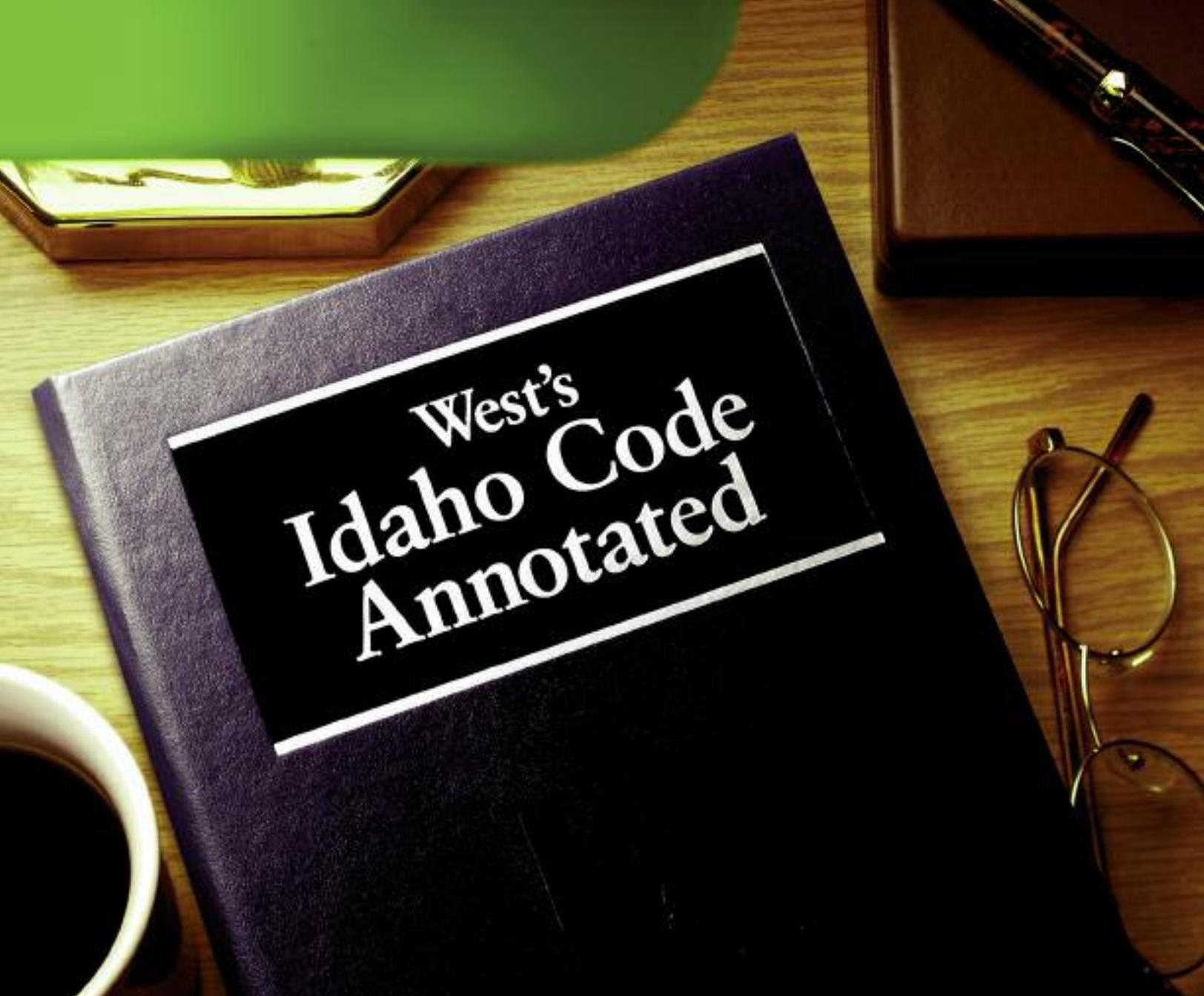
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