



The Advocate

Official Publication
of the Idaho State Bar
Volume 54, No. 5
May 2011

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On the Cover

Pocatello attorney Thomas Dial took this photo of a water lily in Isa Lake at Yellowstone Park in August of 2008.

Section Sponsor

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

Cover art sought

Bar members are encouraged to send their digital photos to Managing Editor Dan Black at dblack@isb.idaho.gov.

Editors

Special thanks to the May editorial team: Gene A. Petty, Jennifer May Schindele, and Hon. Kathryn A. Sticklen.

Letters to the Editor

The Advocate welcomes letters to the editor or article submissions on topics important to the Bar. Send your ideas to Managing Editor Dan Black at dblack@isb.idaho.gov.

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Pete Sisson is a National Board Certified Elder Law Attorney (www.nelf.org) and a VA Accredited Attorney. Since 1993, The Elder Law Firm has helped thousands of Idaho seniors and their families avoid the financial ruin that is caused by long-term care costs.

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ACCESS TO JUSTICE WON'T HAPPEN WITHOUT US

Deborah A. Ferguson
President, Idaho State Bar
Board of Commissioners

While attending the Western States Bar Conference in April, I met a co-author of the Rule of Law Index created by the World Justice Project.



Deborah A. Ferguson

The index is an important new tool for measuring the extent to which different nations adhere to the rule of law and for identifying areas where they can focus efforts to improve. This amazing endeavor offers a comprehensive picture of the extent to which countries adhere to the rule of law in practice.

Significantly, the United States ranks last within both its income and regional groups on providing access to civil justice. (The United States is categorized as a nation in the high income group, and regionally with Western Europe and North America).

This amazing endeavor offers a comprehensive picture of the extent to which countries adhere to the rule of law in practice.

tation by lawyers and other legal professionals is available and affordable. The lack of access to civil justice in the United States is a serious flaw and deficient in our system, undermining our basic democratic values.

The Idaho State Bar and Idaho attorneys must take a leadership role on this pressing issue. The equal access to justice problem is multi-faceted. So are the solutions that are within our control. Access to justice requires that our system be affordable, effective, and impartial.

also urge you to provide legal services for the under served and to support funding, on a state and national level, of legal aid.

This message is not new. The difference now is that the problem grows bigger and threatens our system of justice. It challenges us as lawyers, as Idahoans, and as Americans. The World Justice Project's Rule of Law Index underscores what we already know. We must improve access to our civil justice system.

About the Author

Deborah A. Ferguson has been an Assistant United States Attorney in the District of Idaho since 1995. She practices in the civil division and specializes in federal environmental litigation.

Endnotes

1 Agrast, M. Botero, J., Ponce A. 2010. WJP Rule of Law Index. Washington D.C.: The World Justice Project. http://www.worldjusticeproject.org/.

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RONALD P. RAINEY
(Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Caldwell lawyer, Ronald P. Rainey, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Mr. Rainey admitted that he violated Idaho Rules of Professional Conduct 1.15(c) [Failure to notify third person upon receipt of property] and 3.4(c) [Knowingly disobeying an obligation under the rules of a tribunal].

The Complaint related to Mr. Rainey's representation of a client in a divorce case. Mr. Rainey filed the divorce complaint in June 2008. One of the assets in the divorce was a whitewater boat. At the outset of the divorce case, the Court issued a joint preliminary injunction prohibiting the parties from transferring any property acquired during the marriage, provided that property could be transferred to prosecute or defend the divorce action. The certificate of title to the boat had originally been in both spouses' names, but after the divorce complaint was filed, Mr. Rainey's client had title issued to reflect her as the sole owner, because she believed it was her separate property.

Later in the case, Mr. Rainey filed a motion requesting that his client have sole possession of the boat. In ruling on Mr. Rainey's motion, the Court denied the motion and ordered the boat to remain in storage during the pendency of the action, and that either party had the right to utilize the boat. The Order denied Mr. Rainey's client's request to have sole possession of the boat.

In October 2008, the opponent in the divorce filed a motion requesting that the boat be immediately sold and proceeds be applied to pay certain community debts. Mr. Rainey objected, arguing that the value of the boat had decreased and that it was an improper time of year to sell the boat, that there was an issue whether the boat constituted community or separate property, and that there were other community assets available to sell to pay community debts. On November 6, 2008, the Court issued an oral order denying the motion to sell the boat and ordered that it be appraised.

In November 2008, Mr. Rainey's client delivered a letter to him with a copy

of the title to the boat, indicating that she was transferring the boat to Mr. Rainey. She also requested that Mr. Rainey transfer the title to the boat to his name and that the boat could be sold at a later time. At that time, Mr. Rainey did not do anything with the title except keep it in a secure place in his office. Mr. Rainey's client later communicated to him that it was her ultimate desire that the boat be sold and that Mr. Rainey be paid his attorney's fees from the proceeds of sale.

In January 2009, consistent with his client's desire, Mr. Rainey filed an application for certificate of title to the boat indicating that he paid \$10,000 for the boat, which represented his estimate of the legal fees his client would owe for his services. Mr. Rainey had never seen nor had possession of the boat, but title to the boat was issued to him on January 12, 2009.

From January 12 until March 4, 2009, Mr. Rainey did not disclose to opposing counsel that title to the boat was issued to him on January 12, 2009, despite opportunities to do so. In response to Mr. Rainey's disclosure, opposing counsel filed a motion to void the transfer of the boat, arguing that the transfer violated the joint preliminary injunction issued in the case and the Court's November 6, 2008 ruling denying the motion to sell the boat, which prevented either party from transferring or selling the boat. The Court issued an order voiding the transfer of the boat to Mr. Rainey and ordered that it be immediately sold.

Mr. Rainey admitted, and the Hearing Committee found, that he violated I.R.P.C. 1.15(c) since he did not immediately notify opposing counsel that his client had given him possession of the title to the disputed boat or that title to the boat was issued to him. Mr. Rainey also admitted, and the Hearing Committee found, that he violated I.R.P.C. 3.4(c) on the basis that when he took possession of title to the boat after the Court's November 6, 2008 order denying the motion to sell the boat, since the law of the case prevented either party from transferring or selling the boat, he knowingly disobeyed an obligation under the rules of the tribunal.

The Public Reprimand does not limit Mr. Rainey's eligibility to practice law.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

FIONA A. C. KENNEDY
(Suspension)

On March 30, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Rathdrum attorney Fiona A. C. Kennedy from the practice of law for eighteen (18) months pursuant to I.B.C.R. 507, based on her failure to comply with her conditions of probation following a previous formal charge discipline case. The Idaho Supreme Court's Order followed a Professional Conduct Board Order Recommending Immediate Imposition of Previously Withheld Sanction and an Idaho State Bar (ISB) Motion for Order to Show Cause Pursuant to I.B.C.R. 507.

The Idaho Supreme Court's suspension of Ms. Kennedy's license to practice law stems from an earlier Disciplinary Order of the Court dated May 4, 2010, in which it found that she had engaged in professional misconduct and imposed an eighteen (18) month suspension with all eighteen (18) months withheld, placed her on probation for two years with conditions, and imposed a public censure. One of the conditions imposed on Ms. Kennedy was that she was to remain under a physician's care during the period of probation and that she was to ensure that her physician provide to the ISB quarterly reports on her circumstances commencing on August 15, 2010, and continuing through May 15, 2012. Ms. Kennedy was also to provide a written waiver of the physician-patient privilege or authorization to allow the ISB to obtain information directly from her physician. A second condition of probation was that Ms. Kennedy was to certify in writing to the ISB, under oath, on a monthly basis, that she was acting with reasonable diligence and promptness in representing her clients, that she was keeping her clients reasonably informed about the status of their matters and promptly complying with any reasonable requests for information about representation of her clients, and that her representation of her clients was consistent with her responsibilities under the Idaho Rules of Professional Conduct. Those reports were due to the ISB commencing on June 15, 2010, and continuing due on the 15th day of each month through May 2012.

On January 20, 2011, the ISB filed with the Professional Conduct Board a Motion for Order to Show Cause Pursuant to I.B.C.R. 507 why Ms. Kennedy's withheld sanction should be imposed. In its Motion and supporting documentation,

DISCIPLINE

the ISB alleged that Ms. Kennedy had failed to comply with the conditions of her probation that her physician provide quarterly reports to the ISB and that she provide monthly certified reports to the ISB that she was complying with her obligations under the Idaho Rules of Professional Conduct. As of the date the ISB filed its Motion, no such reports for either condition had been submitted since the issuance of the Idaho Supreme Court's May 4, 2010 Disciplinary Order.

Following a hearing on the motion on March 10, 2011, the Professional Conduct Board recommended that due to Ms. Kennedy's failure to comply with these conditions of probation, the withheld eighteen (18) month suspension be immediately imposed. The Professional Conduct Board also found that Ms. Kennedy had failed to provide the physician-patient waiver to the ISB. In making its determination and recommendation, the Professional Conduct Board concluded that

there was no justifiable basis or grounds for Ms. Kennedy's failure to strictly abide by the terms of her probation as ordered by the Idaho Supreme Court. The Professional Conduct Board further concluded that the tasks required of Ms. Kennedy were straight forward, easily identifiable, and did not impose any great hurdle or burden upon her that would justify her noncompliance.

In its March 30, 2011 Disciplinary Order, the Idaho Supreme Court upheld the Professional Conduct Board's recommendation and ordered that the eighteen (18) month withheld suspension by imposed on Ms. Kennedy. It further ordered that at the conclusion of the eighteen (18) month suspension, Ms. Kennedy shall contact the ISB regarding the necessary steps to re-activate her license.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

Notice to Tom Hale of Client Assistance Fund Claim

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former clients, Jack & Chelsi Joslin, in the amount of \$500. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Notice to Tom Hale of Client Assistance Fund Claim

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former client, Kimberly Curnutt in the amount of \$500. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

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KENNEDY K. LUVAI



Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in **intellectual property matters and complex litigation**, is pleased to welcome **Kennedy K. Luvai**, as an associate with the firm.

Kennedy is a registered patent attorney specializing in patent & trademark disputes, internet law, licensing agreements, and complex commercial litigation. Prior to joining Zarian Midgley, he was an associate at Lindsay Hart Neil & Weigler, LLP, in Portland. Kennedy, a native of Nairobi, Kenya, holds a bachelor's degree in computer science from Brigham Young University and a law degree from the University of Oregon.

Kennedy can be reached at luvai@zmjlaw.com or 208-562-4900.



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Diane K. Minnich
Executive Director, Idaho State Bar

Bar and Foundation activities depend on the volunteer efforts of Idaho lawyers and non lawyers. Hundreds of hours are contributed each year to the committees, sections and activities of the two organizations. What we are able to offer the bar and public in programs, support and education, is greatly enhanced by the time, resources and expertise of volunteers.

Each year, the Bar Commissioners and Idaho Law Foundation (ILF) Directors recruit attorneys interested in serving on a committee or volunteering their time to assist with ISB and ILF programs and activities.

If you are interested in serving as a volunteer, please complete the Volunteer Opportunities form on our website at www.isb.idaho.gov/pdf/advocate/volunteer_opportunities.pdf or email me your preferences. If you have questions about the opportunities listed, please contact me at dminnich@isb.idaho.gov.

Committee appointments are made at the July ILF and ISB Board meetings. In selecting committee replacements, Board members consider geographic diversity, areas of practice and previous or current committee assignments. Many of the volunteer activities are available year round or on a limited basis throughout the year. A few of these activities are highlighted here.

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under 42 USC §1983. Check the box for Civil Rights, Federal Court on the Pro Bono Pledge form for more information. Find a pledge form at www.isb.idaho.gov/pdf/ivlp/ivlp_pledge.pdf. IVLP volunteer attorneys also help immigrant victims of domestic violence or crime to obtain legal status in the US through the Violence Against Women Act or U-visa petitions. Help is needed drafting legal materials for use by volunteer attorneys in representing low-income people on certain topics or for use by members of the public. If you see a need or have a passion, IVLP will work with you to put together a project that makes sense for you.

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Diane K. Minnich

MESSAGE FROM THE WATER LAW SECTION

Arthur B. Macomber
Macomber Law, PLLC

We are looking forward to another fine Idaho spring with a slate of articles to bolster your practice from the Water Law Section of the Idaho State Bar. As the spring real estate market heats up, T.J. Budge advises us on conveyances of water rights. Sarah Higer and Paul Arrington contribute an article on expanding urban-agricultural interfaces and the impact on rights-of-way for water works. Dylan Lawrence analyzes the use of the Idaho Water Supply Bank, both for avoiding forfeiture of a water right, and for selling or leasing water rights where conditions of scarcity exist. Finally, yours truly contributes a statutory analysis of one method to allow a hydropower water



Arthur B. Macomber

Water Law Section	
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right from municipal wastewater. The Water Law Section and the individual writers appreciate any feedback you may have on their contributions, and hope their articles bolster your understanding of Idaho water law.

About the Author

Arthur B. Macomber has an under-

graduate degree in business from George Fox University. Prior to attending the University of California Hastings College of the Law he enjoyed 25 years in business, real estate and construction. Mr. Macomber runs Macomber Law, PLLC with one paralegal in Coeur d'Alene, focusing on real property, land use, water and construction law.

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 Rosters of Commercial Arbitrators and Mediators and the Employment Arbitrators and Mediators of the American Arbitration Association and the National Panel of Arbitrators and Mediators for the National Arbitration Forum. Mr. Clark is also on the roster of mediators for the United States District Court of Idaho and all the Idaho State Courts.

Mr. Clark served as an Adjunct Instructor of Negotiation and Settlement Advocacy at The Straus Institute For Dispute Resolution, Pepperdine University School of Law in 2000. He has served as an Adjunct Instructor at the University of Idaho College of Law on Trial Advocacy Skills, Negotiation Skills, and Mediation Advocacy Skills. He has lectured on evidence law at the Magistrate Judges Institute, and the District Judges Institute annually since 1992.

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A FLUID TRANSACTION: BUYING AND SELLING WATER RIGHTS

T.J. Budge

Racine, Olson, Nye, Budge
& Bailey, Chtd.

We never know the worth of water till the well is dry.

— Thomas Fuller, 1732

As a young boy I raced homemade boats with my preschool classmates down City Creek in Pocatello. We experienced a fundamental lesson in physics — that water flows downhill. That lesson has often met defiance from western water users, evident by the adage that “in the western United States water does not flow downhill, but towards money.”

As Idaho’s demand for a limited resource grows, water right issues will increasingly confront members of the Idaho Bar, particularly when providing advice in relation to business and real estate transactions. Indeed, few farms and businesses can operate without a reliable supply of water. Fortunately, most water needs can be met with enough effort, ingenuity... and money.

Real estate listings for property with water rights often state simply that the sale “includes water rights.” What the buyer may actually receive in terms of the quantity of water, reliability of the water supply, and flexibility of water use is not so simple. Transactions involving water rights require the parties — especially the buyer — to perform additional and unique due diligence analyses to ensure that the transaction meets their expectations.

This article highlights issues that often must be addressed when a business or real estate transaction involves water rights. It does not discuss all of the issues that may arise or how they should be resolved. Rather, the goal of this article is to help members of the Bar spot water right issues that affect their clients and know when to seek the assistance of an experienced water attorney or other professional to complete the transaction.

One caveat: the issues discussed below pertain primarily to water needs that are not supplied by a municipality. Within city limits, water needs are usually met



T.J. Budge

simply by hooking up to the municipal water system and paying the monthly usage fee. In contrast, businesses that are not connected to a municipal water system are on their own to secure a sufficient supply of water to meet their needs.

What is a water right?

Idaho’s waterways are owned by the State as a public trust resource. A “water right” is the right to divert the public waters of the State and put them to beneficial use. A water right is a “usufructuary right,” meaning a right to use, as opposed to a possessory right. In other words, the owner of a water right does not own the water itself, just the right to use it.

A water right is defined by certain “elements” that prescribe how, when, and where water may be used under the right. These elements include the source of water, beneficial use, diversion rate, place of use, and priority date. A water right cannot be used in ways that exceed the parameters of these elements. For example, a water right that is authorized for irrigation cannot be used for industrial purposes without first going through an administrative process to change the beneficial use and potentially other elements of the water right.

Because a water right is defined by the use of water, it is a much more dynamic real property interest than a possessory interest in land. Whereas land is fixed in place and easily observed, water is fluid — it evaporates, freezes, and falls from the sky — and it can be moved from one place to another, used in different ways, intercepted by other water users, or forfeited by nonuse. These unique characteristics create added due diligence obligations for parties to transactions involving water rights.

Verify water right ownership

Title insurance policies typically exclude water rights from coverage. Therefore, buyers cannot simply rely upon a

It is up to the buyer to independently confirm both that the seller owns the water right and that it meets the buyer’s needs.

title report to verify that the seller owns the water right that the buyer desires to purchase. It is up to the buyer to independently confirm both that the seller owns the water right and that it meets the buyer’s needs.

The first step is to obtain a “Water Right Report” from the Idaho Department of Water Resources (IDWR). Water Right Reports identify the water right number, the owner of record, and the elements of use. Prudent buyers will review both a Water Right Report and a title report for the land where the water right is used to verify that the seller owns the water right.

It is not uncommon for a Water Right Report to identify someone other than the seller as the owner of the water right. This could occur because IDWR records were not updated in conjunction with a prior transaction, or because the seller does not actually own the water right. In any case, if a discrepancy occurs, the buyer should require the seller to provide additional evidence to verify that the seller is the true owner of the water right.

Identify the basis of the water right

What is referred to generally as a “water right” may be based upon a permit, license, decree, claim, stock in an irrigation company, or statutorily authorized use. Some of these provide a more concrete entitlement to use water than others. Therefore, it is important that buyers know the basis of the water rights they buy.

The process of developing a new water right begins with submitting an application for a permit to appropriate water to the IDWR. An application is nothing more than a hope for a water right, and is of little or no value to a potential purchaser. If the application is approved, however, then the IDWR will issue a permit to appropriate water. A permit is not a water right, but rather the authorization to develop a water right by diverting water and applying it to beneficial use. A permit is considered an

unperfected water right. Still, a permit holds value because if developed properly the IDWR must issue a license based on the extent of actual water use (which may be less than the permit authorized). A permit is personal property and can be assigned from a seller to a buyer.

A licensed water right has been validated by the IDWR and is a perfected water right. A decreed water right has been judicially verified and is similar to a license. Both are real property rights and are afforded the protections of due process. Therefore, buyers should look to purchase water rights that are based upon licenses and decrees. Permits may be suitable as well, but the assistance of an experienced water attorney is advisable to help determine whether the permit will be licensed to meet the buyer's needs.

A water right may also be based upon a "statutory claim." Statutory claims exist because historically there was a second method of acquiring a water right (in addition to the permit method described above). Prior to 1963 (for groundwater) and 1971 (for surface water) a water right could be obtained simply by diverting water and putting it to use, without filing anything with the IDWR. This approach is commonly referred to as the "constitutional method" of appropriation. The Idaho legislature subsequently passed laws that require users of these water rights to file claims (commonly referred to as a "statutory claims") with the IDWR. A statutory claim is merely that — a claim to a water right. Statutory claims have not been verified by the IDWR or a court and may not provide a valid entitlement to use water. Therefore, buyers should be cautious about buying a water right based upon a statutory claim.

Sometimes a seller does not own a permit, license, decree, or claim, but rather stock in an irrigation company. Stock in an irrigation company entitles the stockholder to a proportionate share of the water available under water rights owned by the company. This stock is as good as the company's water rights. It should be noted, however, that the use of irrigation company water is often subject to delivery, use, and transfer restrictions set forth in the bylaws of the company, and an individual's ability to change the way irrigation company water is used can be much more difficult than changing an independently-owned water right. Irrigation companies are typically resistant to any change that may affect other shareholders.

Finally, the Idaho legislature has authorized the use of water for some limited purposes such as household use, in-stream

Because the extent of a water right is ultimately based on the use of water, and can be forfeited for nonuse, what the seller actually owns may differ from what is shown on the paper right.

watering of livestock, and firefighting without a license or decree. These water uses are available to anyone willing to comply with the statute authorizing the use. While the IDWR does not typically maintain Water Right Reports for these water uses, they are valid nonetheless.

Confirm that the "paper right" meets the buyer's needs

A Water Right Report shows what the water right consists of on paper, often referred to as the "paper right." Reviewing the elements (quantity, place of use, etc.) shown on the Water Right Report will enable the buyer to confirm at least on paper that the water right should meet the buyer's needs. However, because the extent of a water right is ultimately based on the use of water, and can be forfeited for nonuse, what the seller actually owns may differ from what is shown on the paper right. Consequently, buyers cannot stop at reviewing the paper right; they must also investigate the seller's actual use of water.

Investigate actual water use

The buyer should investigate the seller's actual use of water to confirm that it coincides with the parameters of the paper right. If the seller has been using water at a different location, for a different purpose, or otherwise in excess of the parameters of the paper right, or if the seller has not used all or part of the water right for more than five years, then additional investigation should be done to determine whether the water right is still valid and whether a change in use will be required for the water right to meet the buyer's needs.

Investigating actual water use is also important to determine the reliability of the water supply that serves the water right. During times of water shortage, water is allocated between water users generally based on the rule that "first in time is first in right." Each water right has a priority date which determines its place in line for receiving available water. Where-

as a relatively early priority water right may always receive water, a relatively late priority right may receive water only for a few days or weeks during spring runoff. Thus, even though a seller has the right on paper to divert and use water, in practice there may be times when water is simply not available to fill the right.

Is a change in use required?

While the dynamic nature of water creates additional work for buyers of water rights, it also presents opportunities. A water right can be moved from one piece of land to another, used in different ways, or captured, stored, and used at a later time. This flexibility rewards entrepreneurial effort and ingenuity.

The ability to change existing water uses to meet future needs is critical because Idaho's existing water supplies are, for the most part, tapped out. Opportunities for obtaining a new water right by applying for a permit are limited. Instead, meeting new water needs most often requires purchasing and changing an existing water right.

Coming up with a way to meet a water need is one-half of the challenge; the other is obtaining government approval. If a buyer desires to move the seller's water right to a new location, or to change the way it is used, the buyer must first apply to the IDWR to change the elements of the right. This can be a lengthy process that often requires technical assistance. Protests may be filed opposing the change, and there is no guarantee of success. Therefore, if a buyer desires to purchase a water right with the intent of changing it, he should evaluate beforehand the likelihood that the IDWR will approve the change, and consider conditioning the closing of the purchase upon such approval.

Put it in the deed

As a real property interest, water rights are conveyed by deed. As an appurtenance to land, a deed conveying land automati-

cally conveys all water rights associated with the land, unless the deed expressly reserves all or part of the water rights from the conveyance. Thus, if a seller wants to sell land and keep all or a portion of the water rights used on that land, it is imperative that the deed expressly reserve the water rights retained by the seller. More than one seller has assumed that he retained ownership of his water rights by not mentioning them in the deed conveying land, only to discover too late that the opposite is true. For attorneys preparing transaction documents, the best practice is to specifically identify all water rights conveyed to the buyer and all water rights retained by the seller (if any).

Upon receipt of the executed deed, the buyer should send a copy to the IDWR with an ownership change form which can be obtained from the IDWR's website. The IDWR will then update its records to reflect the buyer as the owner of the water right.

If the buyer purchases stock in an irrigation company, the stock should be transferred just like any other corporate stock. Typically the seller must sign the reverse side of the stock certificate and convey it to the buyer. The buyer then delivers the certificate to the secretary of the company who will reissue the stock in the buyer's name.

Conclusion

The doctrine caveat emptor is acutely relevant to transactions involving water rights. Attorneys can provide valuable service to their buyer clients by explaining and assisting with the added due diligence requirements discussed above. If discovered before closing, water right issues can usually be resolved cooperatively between the parties. It becomes more difficult and costly after the money changes hands.



About the Author

T.J. Budge is an associate with the law firm of *Racine, Olson, Nye, Budge & Bailey* in Pocatello, Idaho, focusing on real estate, land use, water rights and natural resource issues. He obtained a degree in business marketing from Idaho State University and obtained his law degree from the University of Idaho. He advises various irrigation entities, businesses, farmers, developers, and individuals in water right matters.

Endnotes

- ¹ Walbridge v. Robinson, 22 Idaho 236, 241-42 (1912).
- ² Idaho Code § 42-204; see also Glavin v. Salmon River Canal Co., 44 Idaho 583, 588-89 (1927).
- ³ Idaho Code §§ 42-222(2) and 42-223.
- ⁴ Idaho Code § 42-202.
- ⁵ Idaho Code § 42-203A.
- ⁶ Idaho Code § 42-204.
- ⁷ Hardy v. Higginson, 123 Idaho 485, 490 (1993); Idaho Code § 42-204.
- ⁸ Idaho Code §§ 42-217 and 42-219.
- ⁹ Idaho Code § 42-220.
- ¹⁰ Nettleton v. Higginson, 98 Idaho 87, 90 (1977); Idaho Code § 55-101.
- ¹¹ State v. United States (In re SRBA Case No. 39576), 134 Idaho 106, 111 (2000).
- ¹² Olson v. Bedke, 97 Idaho 825, 830 (1976).
- ¹³ Idaho Code § 42-243 et. seq.

More than one seller has assumed that he retained ownership of his water rights by not mentioning them in the deed conveying land, only to discover too late that the opposite is true.

- ¹⁴ Idaho Code §§ 42-113, 42-201(3), and 42-227.
- ¹⁵ Idaho Code § 42-106.
- ¹⁶ First Sec. Bank v. Idaho, 49 Idaho 740, 744 (1930).
- ¹⁷ Idaho Code § 42-222.
- ¹⁸ Idaho Code § 42-220; Russell v. Irish, 20 Idaho 194, 198-99 (1911).
- ¹⁹ www.idwr.idaho.gov



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A CANAL RUNS THROUGH IT: THE URBAN/AGRICULTURE INTERFACE AND THE ISSUE OF RIGHTS-OF-WAY

Serious issues can arise relating to the maintenance of the diversion works.

Sarah W. Higer
Paul L. Arrington
Barker, Rosholt & Simpson, LLP

Located in central and southwest Idaho and eastern Oregon, the Boise Project is a massive irrigation delivery system. It includes 6 reservoirs, 2 diversion dams, 3 power plants, 7 pumping plants, 720 miles of main canals, more than 1,300 miles of smaller canals and laterals and 650 miles of drains.¹ Annually, the Boise Project generates \$227 million from irrigated crops, \$230 million from livestock, \$8.4 million in power production and \$18.9 million from the nearly 640,000 recreational visits to its facilities, such as Lucky Peak Reservoir.² The operation of the Boise Project also prevents an estimated \$27.8 million in flood damage.³ In the 1880s, when construction of the irrigation works began, Boise's population was less than 2,000. Today the population is nearly 200,000⁴ and the combined population of Ada and Canyon Counties is more than half a million people.⁵

The Boise Project canal system once traversed through open farm land, but now winds its way through busy urban neighborhoods, shopping centers and schools. The New York Canal, one of the Boise Project's largest canals, can be seen running along the Boise Bench immediately behind a seemingly endless row of neighborhoods. This development is not unique to the Treasure Valley. The Twin Falls Canal Company, one of the largest private water delivery companies in the world, has seen extensive urban growth within its service area and now delivers to over 30 pressurized irrigation systems for residential and commercial developments within its boundaries.

The expansion of urban development into historically agricultural areas has many water law implications. Perhaps

The expansion of urban development into historically agricultural areas has many water law implications.



Sarah W. Higer



Paul L. Arrington

chief among these is the impact that development has on the rights-of-way and easements associated with the canals, laterals and other diversion works (we will refer

to all aspects of the delivery system as "diversion works" in this article). The Idaho Code recognizes that rights-of-way are "essential for the operation of" these diversion works.⁶ These diversion works carry water to farmland and frequently stretch several miles. For example, the New York Canal runs approximately 40 miles through the Treasure Valley. The High Line Canal, one of the Twin Falls Canal Company's primary canals, is 46 miles long (its three primary canals total approximately 120 miles combined). The Main Canal of the North Side Canal Company is 99 miles long – stretching across Jerome County in south central Idaho.

Unless water users and developers address issues involving rights-of-way early in the development process, serious issues can arise down the road relating to the operation, repair and maintenance needs of the diversion works on one hand and the development, infrastructure and landscaping of landowners and developers on the other. Fortunately, Idaho law provides guidance on how to address these issues.

Easements/rights-of-way

Chapters 11 and 12 of Title 42, Idaho Code, provide the statutory basis for the rights-of-way associated with a majority of the division works. Idaho Code § 42-1102 provides a right-of-way to the "owners or claimants to land" in two situations: (1) when there is no "sufficient length of frontage on a stream to afford the requisite fall for a ditch ... on their own premises

for the proper irrigation thereof," and (2) when the land "is back from the banks of such stream."⁷ The right-of-way includes:

1. "A right-of-way through the lands of others, for the purposes of irrigation;"
2. "The right to enter the land across which the right-of-way extends for cleaning, maintaining and repairing the ditch;"
3. "The right to occupy such width of the land along the banks of the ditch ... as is necessary to properly do the work of cleaning, maintaining and repairing the ditch;" and
4. "The right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it."⁸

The width of the easement is defined as that which "is necessary to properly do the work."⁹ The actual width must be based on a factual inquiry. The width of the easement for a primary canal, such as the New York Canal, will be much larger than the width of the easement for a small ditch supplying water to a few landowners. Generally the width of the easement "necessary to properly do the work" can be determined by reviewing the historical maintenance practices of the irrigation entity and contacting the irrigation entity.

In addition to providing the scope of the easement, the statutes also provide that the easements do not need to be recorded to provide notice of their existence. Indeed, a possibility for conflict can arise when the easements are not recorded. Idaho Code § 42-1102 provides that the "existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section."¹⁰ In 1981, the Idaho Code was amended to provide that these rights-of-way cannot be lost due to adverse possession.¹¹

Encroachments on rights-of-way

Irrigation entities are required by law to maintain and repair their diversion works.¹² The expansion of urban development into historically agricultural areas can make it increasingly difficult for irrigation entities to perform routine operations, maintenance and repairs on their diversion works. The difficulties only increase with the construction of fences, sidewalks, roads, trees or even houses within the historical right-of-way. In some instances, it may be necessary to remove these encroachments in order to perform the necessary maintenance. The developer or homeowner encroaching on the right-of-way will be required to pay the cost of removing an encroachment as Idaho Code § 42-1209 provides that any encroachment “shall be removed at the expense of the person or entity causing or permitting such encroachments.”¹³

Idaho law provides guidance to help prevent these difficulties by emphasizing the need for early communication between the developers and the irrigation entities. Idaho Code § 42-1209 provides that any “encroachments” on the rights-of-way are prohibited without the express written permission of the irrigation entity.¹⁴ The statute defines an “encroachment” as “any public or private roads, utilities, fences, gates, pipelines, structures or other construction or placement of objects.”¹⁵ Similarly, Policy 5.9-3 of the Ada County Comprehensive Plan provides that “development should not be allowed to disrupt or destroy irrigation canals, ditches, laterals and associated rights-of-way.” It is thus important for developers and irrigation entities to address easements and rights-of-way early on in the planning process. Doing so may prevent problems in the future.

Moving a diversion work

Often landowners or developers want to move the diversion works crossing their properties to, for example, allow for the construction of a home, or to landscape the property. The statutes provide guidance on when and how the landowner or developer may alter a right-of-way on his property. Idaho Code § 42-1207 provides the following limitations on the right to move the diversion work:

1. “The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed ... by the landowner;”

2. “The landowner must make such changes at their own expense;”



Photo courtesy of Sarah Higer

The New York Canal winds its way above a Boise neighborhood. The road at the right provides critical access for maintenance.

3. “Such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit;” and

4. “Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.”¹⁶

Landowners can also pipe and bury the ditch if they meet certain conditions:

1. “The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is ... placed in buried pipe by the landowner.”

2. “The pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done;” and

3. “The landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.”¹⁷

New legislation, enacted by the 2011 Idaho Legislature and signed by the governor, further addresses the landowner’s responsibility for increased operation and maintenance costs by extending landown-

The Ada County Comprehensive Plan provides that “development should not be allowed to disrupt or destroy irrigation canals, ditches, laterals and associated rights-of-way.”

er responsibility to successors in interest. House Bill 138 amended Idaho Code § 42-1207 to “clarify[y] that the operation and maintenance responsibility of a landowner making a change to or burying a ditch, canal, lateral, drain or buried irrigation conduit as provided by the statute shall run with the land of the landowner and shall continue with the landowner’s successor in interest.”¹⁸ The legislation accomplished this by adding the following underlined language to Section 42-1207 “the landowner, his heirs, executors, administrators, successors and assigns, shall be responsible for any increased operation

and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the owner.”¹⁹

Likewise, the owner of the diversion works does not have full authority to move that diversion work around the servient estate. Idaho Code § 42-1207 imposes the following limitations on the right to move the diversion work:

1. “The owner shall have no right to relocate it on the property of another without permission;”

2. “The owner can pipe and bury the ditch within the current easement;”

3. “Any piping must be done in a manner that minimizes disruptions to the landowner and restores the land to the condition of adjacent property as expeditiously as possible;” and

4. “Maintenance of the buried conduit shall be the responsibility of the conduit owner.”²⁰

Section 42-1207 also provides that, if the owner of the diversion works decides to pipe and bury the diversion work, then the “landowner shall have the right to direct that the conduit be relocated to a different route.”²¹ However, the statute provides that “the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation.”²² House Bill 138, discussed above, amended this provision to remove the requirement for a written agreement, and to clarify that the obligation for increased maintenance costs runs with the land.²³

Reiley v. Salem Union Canal Company

A recent decision from Fremont County demonstrates how early communication and cooperation between the landowner and irrigation entity can prevent many future problems. *Reiley v. Salem Union Canal Company*, Case No. 2008-123, Fremont County, provides an example of how problems can arise when a landowner develops in a right-of-way without the permission of the canal company.

In that case, Mr. Reiley sued the Salem Union Canal Company for trespass when the Canal Company removed “brush, trees, and other material” from its right-of-way so that the Canal Company could do its routine maintenance.²⁴ The landowner claimed that the Canal Company did not have any right to enter the property, but that the Canal Company could conduct all of its maintenance from “one side of the canal.”²⁵

The Court held the Canal Company did not trespass with its actions, whereas the Plaintiffs had encroached on the Canal Company’s right-of-way “without the written permission of the Canal Company as required by statute.”

The Canal Company filed for summary judgment, arguing that its actions were consistent with the statutory rights-of-way. The Canal Company also sought a declaratory judgment to “establish their alleged statutory right-of-way.”²⁶

In an order granting the Canal Company’s summary judgment motion, the district court relied on Idaho Code sections 42-1102, 42-1204 and 42-1209. The Court confirmed that the Canal Company “has a right-of-way along both banks of the canal,” and that this right includes a right for “the removal of brush, trees, and other material from the right-of-way constitutes proper and permissible maintenance of the right-of-way.”²⁷ Finally, the district court confirmed that “any encroachment in to the right-of-way is in violation of the statute, if such encroachment is without the written permission of the Canal Company.”²⁸ The Court held the Canal Company did not trespass with its actions, whereas the Plaintiffs had encroached on the Canal Company’s right-of-way “without the written permission of the Canal Company as required by statute.”²⁹

Conclusion

“Eventually, all things merge into one, and a river runs through it.”³⁰

Urban development throughout many areas of Idaho will likely continue to expand into and merge with historically agricultural areas. By addressing the right-of-way issues identified in this article early on in the planning process, developers and water users can address those issues before they arise.

About the Authors

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Endnotes

¹ See United States Bureau of Reclamation website at http://www.usbr.gov/pn/project/boise_index.html#

² *Id.*

³ *Id.*

⁴ See U.S. Census Bureau website at <http://quickfacts.census.gov/qfd/states/16/1608830.html>.

⁵ See United States 2010 Census, population of Ada and Canyon Counties 581,288.

⁶ Idaho Code § 42-1209

⁷ Idaho Code § 42-1102

⁸ *Id.*; see also Idaho Code § 42-1204.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Idaho Code § 42-1208.

¹² See, e.g., Idaho Code § 42-1202, Idaho Code § 42-1203 and Idaho Code § 43-304.

¹³ Idaho Code § 42-1209.

¹⁴ *Id.*

¹⁵ *Id.*; see also Idaho Code § 42-1108 (same).

¹⁶ Idaho Code § 42-1207.

¹⁷ *Id.*

¹⁸ House Bill 138, 2011 Idaho Legislature.

¹⁹ *Id.*

²⁰ Idaho Code § 42-1207

²¹ *Id.*

²² *Id.*

²³ House Bill 138, 2011 Idaho Legislature.

²⁴ *Memorandum Decision on Motion for Summary Judgment & Order* at 6 (Feb. 27, 2009).

²⁵ *Reiley v. Salem Union Canal Company*, Case No. 2008-123, Fremont County, at 5.

²⁶ *Memorandum Decision on Motion for Summary Judgment & Order* at 6 (Feb. 27, 2009), at 1.

²⁷ *Id.* at 5-6 (citing Idaho Code § 42-1102, Idaho Code § 42-1204).

²⁸ *Id.* at 6-7 (citing Idaho Code § 42-1102, Idaho Code § 42-1209).

²⁹ *Id.*, at 7-8.

³⁰ Norman Maclean, *A River Runs Through It*, P. 104 (University of Chicago Press, 1976).

IDAHO'S WATER SUPPLY BANK: MORE THAN JUST A MARKETPLACE FOR WATER

Dylan Lawrence¹
Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.

Attorneys representing clients who already own water rights in Idaho, or who need to obtain the right to use water, should be aware of the State Water Supply Bank. The Water Supply Bank was created by the Idaho Legislature in 1979 primarily to act as a marketplace where those who have extra water can rent or sell their water rights to those who need water.² In addition to this marketplace function, the Water Supply Bank provides two significant advantages for water right owners: (1) while a water right is leased to the Water Supply Bank, it is protected from application of the forfeiture doctrine, and (2) the Water Supply Bank can be used to make temporary changes to the use of a water right.

The Water Supply Bank is managed by the Idaho Water Resource Board (the "Board"),³ though the Idaho Department of Water Resources ("IDWR") has responsibility for the day-to-day administration of the program. In addition to the Water Supply Bank, in certain specific watersheds in Idaho, there are local "rental pools" which are administered by a local committee, with Board and IDWR oversight.⁴ While these rental pools have similar functions to the Water Supply Bank, the specific rules and procedures of those rental pools are outside the scope of this article, which focuses upon the Water Supply Bank program managed by the Board and administered by IDWR.

Key terminology: lease vs. rental

Before discussing the mechanics of the Water Supply Bank in detail, it will be helpful to clarify some key terminology. While in everyday conversation, the terms "lease" and "rent" may be used interchangeably, those two terms have very distinct meanings in the context of the Water Supply Bank. A "lease" in Water Supply Bank parlance is the act of "depositing" a water right into the Water Supply Bank.⁵ By contrast, to "rent" a water right is the act of "withdrawing" a water right from the Water Supply Bank.⁶

Protecting a client's water rights from forfeiture for non-use is only one of the significant advantages of leasing water rights to the Water Supply Bank.

Protection from forfeiture

A water right that undergoes five consecutive years of non-use may be forfeited, in which case the water right owner loses the water right, and the water reverts back to the state for further appropriation.⁷ In addition, the Idaho Supreme Court has specifically adopted the doctrine of partial forfeiture, which means that a portion of a water right may be forfeited if the water right is *underutilized* for five consecutive years.⁸ In other words, forfeiture does not require that a water right go completely unused for five consecutive years; that doctrine can reduce a water right, even if water is diverted and beneficially used under that right.

One of the big advantages for water right owners who lease water rights to the Water Supply Bank is that the water right is protected from forfeiture during the lease period. Specifically, the five year forfeiture period is tolled while the water right is leased to the Water Supply Bank.⁹ Critically, this protection applies regardless of whether the water right in question has been rented back out from the Water Supply Bank by the lessor or another water user.¹⁰

Protecting a client's water rights from forfeiture for non-use is only one of the significant advantages of leasing water rights to the Water Supply Bank. The Water Supply Bank can also be used to make temporary changes to the use of a water right.

Temporary changes to the use of a water right

Changing the use of, or "transferring," a water right can be a long and expensive process, particularly in those areas of the state where the water sources are already fully allocated. In those areas, IDWR may no longer be processing applications for new water rights, and applications to transfer a water right are more likely to be challenged by other water users. How-

ever, in some situations, the Water Supply Bank can be used to accomplish changes in the use of a water right without going through a full-blown administrative transfer proceeding.

In Idaho, water rights are composed of eight elements:

1. The name and address of the owner;
2. The source of water from which the water right may be diverted;
3. The point of diversion, *i.e.*, the particular location where the water is diverted from the source, generally expressed as a 40-acre "quarter-quarter" section tract of land;
4. The priority date, *i.e.*, the date that beneficial use of the water right began, and that determines who is "first in line" to receive water in times of shortage;
5. The quantity of water that may be diverted, typically expressed in cubic feet per second and/or acre-feet per year;
6. The purpose of use (irrigation, industrial, domestic, etc.);
7. The period of year that water may be diverted (typically the irrigation season for that particular area of the state for irrigation rights, and year-round for most other types of rights);
8. The place of use, *i.e.*, the particular location where the beneficial use of water occurs, expressed in terms of 40-acre "quarter-quarter" sections.¹¹

Under Idaho law, a water right owner may change the point of diversion, purpose of use, period of year, and/or place of use elements of a water right.¹² However, doing so requires the water right owner to complete and file a water right transfer application with IDWR.¹³ IDWR is required to publish notice of the application, after which anyone may protest the application.¹⁴ The filing of a protest converts the transfer application into a contested administrative proceeding which, unless set-



Dylan Lawrence

tlement occurs, must be resolved through a formal hearing.¹⁵ IDWR is required to evaluate the transfer application based upon the following criteria:

1. Whether the transfer would injure existing water rights;¹⁶

2. Whether the transfer would result in an “enlargement” in use of the right to be transferred;¹⁷

3. Whether the transfer is consistent with the conservation of water resources within the state of Idaho;

4. Whether the transfer is in the “local public interest;”¹⁸

5. For a transfer of water out of its basin of origin, whether the change will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates; and

6. Whether the new use of water is a “beneficial use” under Idaho law.¹⁹

Once IDWR issues a decision on a transfer application, that decision can then be appealed to district court and, ultimately, to the Idaho Supreme Court.²⁰

Because of these procedures, a contested water right transfer application can take months, even years, to resolve. This delay can be highly burdensome for a water right owner who needs to change his or her water use on a temporary basis. While Idaho does have a separate, streamlined procedure for temporary water right changes, that applies only when IDWR, with the governor’s approval, has declared a drought emergency for the area in question.²¹ Simply put, it can be difficult to temporarily change the use of one’s water right.

However, the Water Supply Bank is an alternative that can be used to change water use practices on a temporary basis. In fact, Idaho law specifically provides that the rental of water from the Water Supply Bank may serve as a substitute for a proceeding to transfer a water right.²²

In order to change water use through the Water Supply Bank, the water right owner leases his or her water right to the Water Supply Bank, which rents the water right back out to a third party—or to the owner/lessor of the water right—with the changed water right terms. As long as the water right owner is requesting the change for no more than a five-year period, IDWR is not required to publish notice of the proposed change (though it does have authority to do so as it deems necessary in particular cases).²³ IDWR is required to publish notice of proposed changes of more than five years,²⁴ and as

In fact, Idaho law specifically provides that the rental of water from the Water Supply Bank may serve as a substitute for a proceeding to transfer a water right.

with any Water Supply Bank rental application, IDWR evaluates the application against a similar set of criteria as a full-blown water right transfer.²⁵ (Therefore, if the change is needed for more than five years, the advantage of the Water Supply Bank procedure versus a water right transfer is diminished, because the Water Bank process starts looking more and more like a full-blown transfer proceeding.)

Procedures for leasing a water right to the water supply bank

In order to lease or “deposit” a water right into the Water Supply Bank, the water right owner must first file an application to lease the water right to the Water Supply Bank.²⁶ A copy of the application is available on IDWR’s website.²⁷ The application requires general information regarding the applicant, the terms of the water right, and the historical use of the water right.²⁸ In addition, the application requires the applicant to provide information demonstrating that the water right has not already been forfeited prior to the filing of the application.²⁹ Once IDWR receives the application, the agency³⁰ will then review it for completeness and will correspond with the applicant regarding any additional needed information.³¹

IDWR will consider several factors in determining whether to accept an offered water right into the Water Supply Bank. These factors include:

1. Whether available information indicates that the water right has been abandoned or forfeited;
2. Whether the requested rental rate is reasonable;³²
3. Whether acquisition of the water right will be contrary to the State Water Plan;
4. Whether the application is in the “local public interest;”³³ and
5. Such other factors deemed appropriate by the Board.³⁴

If IDWR accepts the offered water right into the Water Supply Bank, it typically includes conditions on the lease acceptance, which may contain restrictions, limitations, and other requirements which

apply to the water right while it is leased to the Bank.³⁵ After acceptance, the applicant then has 30 days to decide whether to accept those lease conditions, or to withdraw the water right from the Water Supply Bank.³⁶

Importantly, one condition that is placed on any Water Supply Bank lease is that the leased water right can no longer be used by the lessor, regardless of whether it has been rented back out from the Bank.³⁷ However, one mitigating factor in this regard is the fact that a water right owner may choose to lease only a portion of his or her water right to the Water Supply Bank, thereby retaining the ability to continue to divert and use the unleased portion of that right.

It is also important to note that a third party who believes he or she is being injured by a Water Supply Bank lease may challenge the lease by filing a petition with IDWR.³⁸ If IDWR determines that interference is occurring, it may then revoke or modify the lease.³⁹ Moreover, “any person feeling aggrieved by a decision or action of [IDWR] shall be entitled to contest the action . . . pursuant to section 42-1701A(3).”⁴⁰ Accordingly, while there are no specific notice provisions in the leasing procedures, there are mechanisms for potentially injured parties to challenge a lease.

Procedures for renting a water right from the water supply bank

Once a water right has been leased (deposited) into the Water Supply Bank, it may then be rented back out (withdrawn) from the Bank by filing an application with IDWR.⁴¹ If the lessor is using the Water Supply Bank to accomplish a temporary change of the use of its water right, it will typically submit the lease application and the rental application simultaneously, and will specify in its applications that the water right is only to be rented by the lessor/applicant. Otherwise, a potential renter can submit its own rental application, and IDWR will determine if there is a water right already leased to the Water Supply Bank which would fulfill the application.

Potential renters can also utilize IDWR's online database of water rights leased to the Water Supply Bank to determine if there are any suitable water rights available.⁴²

As previously discussed, IDWR is required to publish notice of a proposed rental in excess of five years, and has discretion to publish notice of proposed rentals of five years or fewer.⁴³ In addition, applications to purchase water rights or to rent water rights for more than five years require approval by the Board.⁴⁴ IDWR evaluates a rental application based upon the following criteria:

1. Whether there will be injury to other water rights;
2. Whether the proposal would constitute an enlargement of the water right;
3. Whether the water will be put to a beneficial use;
4. Whether the water supply available from rights in the Water Supply Bank is sufficient for the use intended; and
5. Whether the proposal is in the local public interest.⁴⁵

After its evaluation, IDWR may either accept the application, reject it, accept it with conditions, or adjust the quantity of water to be rented.⁴⁶ (Such conditions and adjustments are particularly common to mitigate injury to other water users in areas where water is already tightly allocated, such as the Eastern Snake Plain Aquifer and the Big Wood River Basin.) If the rental application is approved, the renter of the water right will then be required to pay an annual fee. Currently, the default rate is \$14 per acre-foot of water rented, unless the lessor specified a different rate in the lease application. The renter pays this rental fee to IDWR, which then withholds an administrative fee of 10% of the total annual rental and pays the balance to the lessor. If the renter is also the owner/lessor of the water right, or if the lessor and renter have a private lease agreement outside of the Water Supply Bank which governs lease payments, then the renter simply pays the 10% administrative fee to IDWR.

Recent changes to the water supply bank procedures

A number of changes have occurred to the Water Supply Bank program since the summer of 2010. Due in part to the state budget crisis and limited staff resources, by the summer of 2010, there was a significant backlog of Water Supply Bank applications waiting to be processed. Since then, IDWR has assigned more staff resources to the Water Supply

Leases to the Water Supply Bank are now capped at five years. Previously, water right owners could lease their water rights to the Water Supply Bank indefinitely.

Bank program. This has resulted in a significant reduction of the backlog and the amount of time required for processing Water Supply Bank applications.⁴⁷

Another recent change is that leases to the Water Supply Bank are now capped at five years.⁴⁸ Previously, water right owners could lease their water rights to the Water Supply Bank indefinitely. At this time, this five-year cap does not apply retroactively to water rights that had already been accepted into the Water Supply Bank indefinitely as of August 2010.⁴⁹

This past spring the Water Resource Board has also proposed a change to the Water Supply Bank fee structure which was approved by the Legislature. Previously, a water right owner could lease a water right to the Water Supply Bank free of charge. Now, the Board charges \$250 to lease a water right to the Water Supply Bank.⁵⁰ However, the leasing fee is capped at \$500 for instances in which multiple water rights are "stacked" on the same parcel of land.⁵¹

Conclusion

The Water Supply Bank provides a marketplace where those who have extra water can sell or lease their water rights to those who need water. In addition to this market function, the Water Supply Bank protects leased water rights from forfeiture, and allows temporary changes in the use of water rights. Attorneys representing clients who need water, or who own water rights, should be aware of the advantages the Water Supply Bank can provide.

About the Author

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Endnotes

¹ The author would like to thank Ms. Monica Van Bussum, Senior Water Resource Agent with the Idaho Department of Water Resources, for her input on this article. Ms. Van Bussum is responsible for

administration of the Water Supply Bank program.

² Idaho Sess. Laws 1979, ch. 193.

³ Idaho Code § 42-1761.

⁴ See *id.* § 42-1765.

⁵ IDAPA 37.02.03.010.05. Hereinafter, this article will refer to these rules as the "Water Supply Bank Rules."

⁶ Water Supply Bank Rules § 10.08.

⁷ Idaho Code § 42-222(2).

⁸ *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

⁹ Idaho Code § 42-1764; Water Supply Bank Rules § 25.08(e).

¹⁰ *Id.*

¹⁰ See Idaho Code § 42-1411(2). In addition, a water right may contain a variety of conditions which further define or restrict its use. *Id.* at § 42-1411(2)(i).

¹² *Id.* at § 42-222(1).

¹³ *Id.*

¹⁴ *Id.*; see also *id.* at § 42-203A(1)-(3).

¹⁵ Idaho Code § 42-222(1).

¹⁶ In the context of applications for new water rights, IDWR has defined water right injury as (1) reducing the amount of water that will be available to existing water rights; (2) forcing the owner of an existing right to incur unreasonable effort or expense to divert his or her right; or (3) reducing water quality such that an existing water right can no longer be used for its intended purpose. IDAPA 37.03.08.045.01(a) (i)-(iii).

¹⁷ Generally speaking, an enlargement occurs when the change would allow the water right owner to use more water than it had previously or to irrigate a larger area.

¹⁸ "Local public interest" is defined as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource." Idaho Code § 42-202B.

¹⁹ *Id.* at § 42-222(1).

²⁰ *Id.* at § 42-222(5); see also *id.* at § 42-1701A.

²¹ *Id.* at § 42-222A.

²² See *id.* § 42-1764.

²³ Water Supply Bank Rules § 30.02.

²⁴ *Id.* at § 30.02.

²⁵ Compare *id.* § 30.01 with Idaho Code § 42-222(1).

²⁶ See Water Supply Bank Rules § 25.01.

²⁷ "Application to Sell or Lease a Water Right to the Water Supply Bank," available at http://www.idwr.idaho.gov/RulesStatutesForms/WaterRights/PDFs/Water_Supply_Bank_Lease_Application.pdf.

²⁸ *Id.*

²⁹ *Id.*; see also Water Supply Bank Rules §§ 25.02(c), (d).

³⁰ The Water Supply Bank statutes and regulations frequently refer to the Director of IDWR and/or the

Water Resource Board as conducting the review of Water Supply Bank applications. In practice, most of the review and processing of Water Supply Bank applications is performed by IDWR staff members.

³¹ See Water Supply Bank Rules §§ 25.03, 25.04.

³² Frequently, a lease applicant will specify that he or she wishes to receive the "current rental rate" in the lease application. The current rental rate established by the Board is \$14 per acre-foot of water.

³³ "Local public interest" in this context has the same definition as in the water right transfer context previously discussed. Idaho Code §§ 42-202B, 42-1763.

³⁴ Water Supply Bank Rules § 25.06.

³⁵ See *id.* at § 25.07.

³⁶ See *id.* at § 25.08(a).

³⁷ *Id.* at § 25.08(b).

³⁸ Idaho Code § 42-1766(1).

³⁹ *Id.*

⁴⁰ *Id.* at § 42-1766(2) (emphasis added). Section 42-1701A(3) is the general provision governing the procedure for challenging an action by the Director of IDWR.

⁴¹ "Application to Rent Water From the Water Supply Bank," available at http://www.idwr.idaho.gov/RulesStatutesForms/WaterRights/PDFs/Water_Supply_Bank_Rental_Application.pdf.

⁴² "Water Supply Bank Lease Search," available at <http://www.idwr.idaho.gov/apps/ExtSearch/WSB-Search/WSBSearch.aspx>.

⁴³ Water Supply Bank Rules § 30.02.

⁴⁴ *Id.* at § 30.06.

⁴⁵ *Id.* at § 30.01.

⁴⁶ Idaho Code § 42-1763.

⁴⁷ See generally Idaho Water Resource Board, Minutes of Meeting 8-10, at p. 9 (July 23, 2010) (available at http://www.idwr.idaho.gov/waterboard/Meetings_Minutes/PDFs/Meeting%20Agendas/2010/8-10.pdf).

⁴⁸ E-mail from Monica Van Bussum, Senior Water Resource Agent, Idaho Dept. of Water Resources (March 2, 2011).

⁴⁹ *Id.*

⁵⁰ WATER SUPPLY BANK RULES §25.02(f)

⁵¹ *Id.*

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WASTE NOT, WANT NOT: THROWING THE BABY OUT?

Arthur B. Macomber
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In Idaho, a water right is usually granted to a single entity for a single beneficial use and only for the time period that such use continues.¹ However, many water rights in Idaho are used for two beneficial uses, such as stockwater and irrigation.² This note argues that two entities, such as a municipality and a power generation for-profit company, may enjoy two separately recognized rights in water originating from a single diversion point. This could occur by assigning a portion of the original municipal right at the point it becomes wastewater to a for-profit power generator.

What is the “nature of the use” of water?

One of the characteristics of a water right in Idaho is the nature of the use.

“The requirement of beneficial use is repeatedly referred to throughout the Idaho Code. Beneficial use is enmeshed in the nature of a water right, which is explained in I.C. § 42-101.”³ However, Idaho



Arthur B. Macomber

Code section 42-101 discusses the nature of property in water and not specifically the nature of the uses to which it is beneficially put. We can divine from that statute that the nature of a water right is “essential to the industrial prosperity of [Idaho] . . . all [of Idaho’s] agricultural development,” and those applying it to beneficial use must use it economically.⁴ Thus, the nature-of-use element of a water right is better defined as domestic, commercial, industrial, irrigation, stockwater mining, or municipal.

Pursuant to Idaho Code section 42-202B(5), a municipal provider means:

- (a) a municipality that provides water for municipal purposes to its residents and other users within its service area;
- (b) any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or
- (c) a corporation or

Since the word purposes is plural in the statute, the legislature has recognized that a single water right could be used for multiple beneficial purposes.

association which supplies water for municipal purposes through water system regulated by the state of Idaho as a “public water supply” as described in section 39-103(12) Idaho Code.

According to Idaho Code section 42-202B(6), the definition of “municipal purposes” is:

[W]ater for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Power to the people?

The definition of municipal purposes does not appear to include power generation. Normally, water diverted for municipal purposes returns to the control of the State of Idaho after undergoing wastewater treatment, or by surface water runoff into streams, lakes, or underground sources such as aquifers through soil drainage. If a municipality would like to generate power for its citizens prior to the treated waters returning to the “waters of the state, when flowing in the natural channels,” would the Department of Water Resources (IDWR) recognize that beneficial use under the definition of municipal purposes, or would it find a hydropower water right was required?⁵

Idaho Code section 42-203B assumes hydroelectric power is only generated upon natural streams “to the extent such [hydropower] right exceeds an established minimum [stream] flow.” Also, Idaho Code section 42-203C(1) requires a potential hydropower applicant to “appropriate water,” which by definition would be from a natural source diversion.⁶ The

statute does not address the situation of a municipal provider using wastewater that has been previously appropriated for municipal purposes. Therefore, it does not appear Idaho Code presently has a statutory mechanism for a municipal provider to have a water right to generate power from its outgoing wastewater flows prior to the return into the natural hydrologic system.

Splitting the nature of the use

In Idaho, alterations in a water right are governed by Idaho Code section 42-222. This section provides that any person who desires to change the point of diversion or the place, period, or nature of use of the water must apply to the IDWR for approval.⁷ A “water right” is “the legal right, however acquired, to the use of water for beneficial purposes.”⁸ Since the word purposes is plural in the statute, the legislature has recognized that a single water right could be used for multiple beneficial purposes. Therefore, there is an expectation in the law that splitting the nature of the use is allowed.

Multiple beneficial uses of a municipal water right

Idaho Code section 42-222 allows water right users “to change the point of diversion, place of use, period of use or nature of use of all or part of the water.” Therefore, if the nature of use of a municipal water right is 100% for municipal purposes, a municipality should be able to apply for some percentage of that water right to be reallocated for hydropower purposes to the extent that the diverted water leaves the municipal system in the form of wastewater. Allowing a municipality to apply to IDWR for such fractionalization of the water to be diverted into multiple “natures” of use, would appear to be in accord with Idaho Code section 42-206 related to appropriations of water for power purposes, even though a permit to

appropriate water would not be processed by a municipality.⁹

Assignment of the water right for municipal profit

Pursuant to Idaho Code section 42-207, “the holder of a permit to appropriate water for power purposes” may assign such permit through an application process with IDWR. The application process is to make sure the assignee “possesses the qualifications set forth in section 42-206,” and meets other criteria. Since a pending permit for water rights would not be processed for alteration in the nature of the use of an existing municipal right under Idaho Code section 42-222, Idaho Code section 42-248 would apply.

Pursuant to Section 42-248, “all persons owning or claiming ownership of a right to use the water. . . shall provide notice to [IDWR] of any change in ownership of **any part of the water right**. . . within 120 days of [such] change.” (emphasis added.) Therefore, a municipal provider could apply to change the nature of its existing water right to add the beneficial purpose of generation of power from its wastewater. It could then assign or lease that right to a third-party for-profit power generator for either its own municipal

All persons owning or claiming ownership of a right to use the water. . . shall provide notice to [IDWR] of any change in ownership of any part of the water right.

— Idaho Code section 42-248

purposes,¹⁰ if it decided not to become a power generator itself,¹¹ or for such power to be sold for profit into the electrical grid with proceeds from the sale going back into the municipal budget.¹²

About the Author

Arthur B. Macomber has an undergraduate degree in business from George Fox University. Prior to attending the University of California Hastings College of the Law he enjoyed 25 years in business, real estate, and construction. Mr. Macomber runs Macomber Law, PLLC with one paralegal in Coeur d’Alene, focusing on real property, land use, water, and construction law.

Endnotes

¹ I.C. § 42-104.

² See IDWR Water Right No. 37-4171; <http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>.

³ *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 113, 157 P.3d 600, 607 (Idaho 2007).

⁴ I.C. § 42-101.

⁵ I.C. § 42-101.

⁶ I.C. § 42-103.

⁷ I.C. § 42-222(1).

⁸ I.C. § 42-230 (e).

⁹ See I.C. § 42-207.

¹⁰ I.C. § 50-326.

¹¹ I.C. § 50-325.

¹² I.C. § 50-327.



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Boise February 7, 9, 11, 14 and 15
Boise April 4, 5, **6**, and **13**
Coeur d'Alene **April 7**
Lewiston. **April 8**
Boise (Eastern Idaho) May 2, 4, 6, 9 and 11
Boise (Twin Falls) June 1, 3, 6, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2011 Spring Terms of the Supreme Court of the State of Idaho, 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
David W. Gratten
Judges
Karen L. Lansing
Sergio A. Gutierrez
John M. Melanson

5th AMENDED - Regular Spring Terms for 2011

Boise January 11, 13 and 20
Boise February 8, 10, 17, 22
Boise March 8, 10, and 15
Boise April 12, ~~14~~, 19 and 21
Boise May ~~10~~, 12, 17 and 19
Boise June 14, 16, 21 and 23

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2011 Spring Terms of the Court of Appeals, of the State of Idaho 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 for May 2011

Monday, May 2, 2011 - BOISE

8:50 a.m. Evans v. Sayler (EXPEDITED).....#38321-2010
10:00 a.m. Fields v. State.....#36508-2009
11:10 a.m. Twin Lakes Canal Company v. Choules
.....#37058-2009

Wednesday, May 4, 2011 - BOISE

8:50 a.m. State v. Flegel (Petition for Review)..#35117-2008
10:00 a.m. Knowlton v. Wood River Medical Center
(Industrial Commission).....#37360-2010
11:10 a.m. Schneider v. Schneider (EXPEDITED)
.....#37638-2010

Friday, May 6, 2011 - BOISE

8:50 a.m. Suhadolnik v. Pressman.....#37526-2010
10:00 a.m. Phillips v. Erhart.....#36801-2009
11:10 a.m. McDevitt v. Sportsman's Warehouse
.....#37244-2009

Monday, May 9, 2011 - BOISE

8:50 a.m. Fearn v. Steed (Industrial Commission)
.....#37368-2010
10:00 a.m. ACHD v. IPUC.....#37294-2010
11:10 a.m. Schroeder v. Partin.....#37228-2009

Wednesday, May 11, 2011 - BOISE

8:50 a.m. State v. Peregrina (Petition for Review)
.....#37900-2010
10:00 a.m. Wylie v. State.....#37279-2010
11:10 a.m. Jose Aguilar v. Nathan Coonrod, M.D.
.....#36980-2009

Idaho Court of Appeals Oral Argument for May 2011

Thursday, May 12, 2011 - BOISE

9:00 a.m. Loftis v. State.....#35376-2008
10:30 a.m. State v. Jones.....#36841-2009
1:30 p.m. State v. Stark.....#37787-2010

Tuesday, May 17, 2011 - BOISE

9:00 a.m. State v. Pullin.....#37155/37156-2009
10:30 a.m. State v. Smith.....#36845/36879-2009

Thursday, May 19, 2011 - BOISE

9:00 a.m. State v. Hopper.....#37284-2010
10:30 a.m. State v. Burns.....#37585-2010
1:30 p.m. Stetsenko v. State.....#36582-2009

LICENSING CANCELLATIONS

Order to cancel license to practice law for non-payment of 2011 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 2011 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 this Court,

NOW, THEREFORE, IT HEREBY IS ORDERED that the license to practice law in the State of Idaho of the following named persons be, and hereby is, CANCELLED, and said persons are placed on INACTIVE STATUS for failure to pay the 2011 Idaho State Bar License Fees:

DANIEL R. ACEVEDO; MICHELE KAY ANDERSON; KARL BOYD BROOKS; R. ROMER BROWN; PHU HUNG CHAU; JAY PHILLIP CLARK; MICHAEL BRENT COLLINGS; ROGER DEE COX; ELLEN SCOTT ELLIOTT; P. DENISE GILES; LORI DIANE HANSEN; ARDEE HELM JR.; PETER E. HEUSER; ANDREW MICHAEL HYER; JENNIFER DIANNE KONIECZNY; TERRI LYNN LAIRD; STEPHEN KENT MADSEN; MARK JENKINS MILLER; GILBERT L. NELSON; VALERIE JEAN PHILLIPS; DAVID REX PURNELL; LEGENE QUESENBERRY; PERRY M. ROSEN; DEVRA MELINA SIGLERHERMOSILLA; LYNDEN PATRICK SMITHSON; URSULA I. SPILGER; EDGAR JAMES STEELE; JULIE SHANNON TETRICK; JAMES RICHARD THOMPSON; WENDI ANN TOLMAN; DANIEL JOHN WHYTE; KLAUS WIEBE; JENNIFER PAIGE WILKINS; RUSSELL M. WINGE; and JONATHAN H. ZIMMERMAN.

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 3rd day of March 2011.
Daniel T. Eismann, Chief Justice

Order to cancel license to practice law for non-compliance with the MCLE requirements, pursuant to Idaho Bar Commission Rule 406(d)

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 complied with the Mandatory Continuing Legal Education Requirements required by Idaho Bar Commission Rule 406(d), and have not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court;

NOW, THEREFORE, IT HEREBY IS ORDERED that the license to practice law in the State of Idaho of the following named attorneys be, and hereby are, CANCELLED, and said person(s) shall be placed on INACTIVE STATUS for failure to comply with Mandatory Continuing Legal Education Requirements:

STEFAN W. FARR
CLAY DANIEL GEITTMANN
TOM HALE
DAVID C. JACQUOT
MICHAEL A. SCIALES

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the attorneys listed above are no longer licensed to practice law in the State of Idaho until 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 30th day of March 2011.
Daniel T. Eismann, Chief Justice

LICENSING REINSTATEMENTS

Order granting petition for reinstatement as active member in the Idaho State Bar

As of the dates indicated, the following attorneys' licenses were reinstated:

Terri Lynn Laird; Active Status, March 7, 2011.

Klaus Wiebe; Active Status, March 7, 2011.

David Rex Purnell; Active Status, March 9, 2011.

Karl Boyd Brooks; Affiliate Status, March 21, 2011.

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 4/1/11)

CIVIL APPEALS

ATTORNEY FEES AND COSTS

1. Whether the district court abused its discretion by denying attorney fees to the State under I.C. § 12-121 and I.R.C.P. 54(e)(1) solely on the ground the Bayes filed their lawsuit in the exercise of their religious beliefs.

Bayes v. State
S.Ct. No. 38032
Court of Appeals

EASEMENTS

1. Whether the trial court erred in determining the statutory period for the Belstlers to quiet their title against a prescriptive easement was five years, instead of the twenty years required by I.C. § 5-203 that was in effect when they filed their quiet title action.

Belstler v. Sheler (Conine)
S.Ct. No. 37893
Supreme Court

POST-CONVICTION RELIEF

1. Did the district court err in summarily dismissing Santistevan's claim of ineffective assistance of counsel?

Santistevan v. State
S.Ct. No. 37124
Court of Appeals

2. Did the court err in summarily dismissing Polanco's petition for post-conviction relief?

Polanco v. State
S.Ct. No. 36914
Court of Appeals

3. Did the court err in dismissing Carpentier's petition for post-conviction relief in which he alleged ineffective assistance of counsel?

Carpentier v. State
S.Ct. No. 36960
Court of Appeals

4. Did the district court err in summarily dismissing the *Brady* claim presented in Johnson's successive petition for post-conviction relief?

Johnson v. State
S.Ct. No. 37378
Court of Appeals

5. Did the court err in dismissing Kirkland's petition for post-conviction relief?

Kirkland v. State
S.Ct. No. 37458
Court of Appeals

6. Did the district court err in summarily dismissing Ellis' petition for post-conviction relief in which he alleged ineffective assistance of counsel?

Ellis v. State
S.Ct. No. 37328
Court of Appeals

7. Whether the district court erred when it denied post-conviction relief after an evidentiary hearing and rejected Stakey's assertion he was prejudiced by counsel's deficient performance.

Stakey v. State
S.Ct. No. 37391
Court of Appeals

8. Did the district court err by summarily dismissing Imoto's claim of ineffective assistance of counsel?

Imoto v. State
S.Ct. No. 37594
Court of Appeals

9. Did the court err by summarily dismissing Patterson's petition for post-conviction relief and in finding he had failed to raise a genuine issue of fact regarding his claim of ineffective assistance of counsel?

Patterson v. State
S.Ct. No. 37606
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in ruling that a meeting of the minds occurred between the parties on all material terms of the settlement agreement at issue?

Zinman v. Resler
S.Ct. No. 37772
Supreme Court

SUMMARY JUDGMENT

1. Whether the district court erred in determining there was not a genuine issue of material fact with regard to whether Idaho Development's loan to Teton View should be characterized as a loan and not a capital contribution.

Idaho Development, LLC v. ZBS, LLC
S.Ct. No. 37771
Supreme Court

2. Whether the district court erred in holding there was not a genuine issue of material fact concerning whether the 5,000 gallon fuel tank was conveyed to Rencher as part of the purchase and sale agreement or was a fixture on the property.

Rencher v. Brown
S.Ct. No. 37957
Court of Appeals

3. Whether the court erred in finding there were no issues of material fact and in granting summary judgment to Rocky Mountain Power.

Rocky Mountain Power v. Jensen
S.Ct. No. 37998
Supreme Court

4. Whether the district court erred in granting summary judgment to the Idaho Department of Correction and dismissing all of Noak's claims as a matter of law.

Noak v. Department of Correction
S.Ct. No. 37788
Supreme Court

TAX CASES

1. Whether the district court erred by granting summary judgment to the Idaho Tax Commission upholding the Commission's findings of deficiencies.

Kessel v. Tax Commission
S.Ct. No. 37759
Court of Appeals

TERMINATION OF PARENTAL RIGHTS

1. Did the magistrate commit error or abuse its discretion in finding that the facts of the case support termination of the appellant's parental rights?

In the Matter of the Termination of the Parental Rights of 3-11 Doe
S.Ct. No. 38534
Supreme Court

2. Whether it constituted error for the court to have denied the efforts of the mother to prevent the Department from being able to proceed in court with the prematurely filed petition.

In the Matter of the Termination of the Parental Rights of 4-11 Doe
S.Ct. Nos. 38536-38567
Supreme Court

3. Whether there is substantial and competent evidence to support the finding of the magistrate court that Doe had neglected her children within the meaning of I.C. § 16-2002(3)(a).

In the Matter of the Termination of the Parental Rights of 8-11 Doe
S.Ct. Nos. 38601/38602
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 4/1/11)

CRIMINAL APPEALS

DUE PROCESS

1. Did the district court violate Delling's right to due process when it denied his motion challenging the constitutionality of Idaho's abolishment of the insanity defense?

State v. Delling
S.Ct. Nos. 36920/36921
Supreme Court

2. Did the state violate Mendoza's right to a fair trial by committing prosecutorial misconduct during closing argument?

State v. Mendoza
S.Ct. No. 36865
Court of Appeals

EQUAL PROTECTION

1. Did the state violate Foster's right to equal protection when it used its first peremptory challenge to remove the only African-American juror from the jury panel?

State v. Foster
S.Ct. No. 37455
Court of Appeals

EVIDENCE

1. Did the court err by admitting evidence of prior bad acts against Daniels?

State v. Daniels
S.Ct. No. 37816
Court of Appeals

2. Did the district court err by admitting evidence of prior bad acts and in finding the evidence was relevant and not unduly prejudicial?

State v. Reid
S.Ct. No. 36843
Court of Appeals

3. Did the court abuse its discretion in weighing the probative value of evidence of the victim's pregnancy against its potential for prejudice?

State v. Fordyce
S.Ct. No. 36748
Court of Appeals

PLEA WITHDRAWAL

1. Did the district court err when it denied Chavez's motion to withdraw his pleas of guilty?

State v. Chavez
S.Ct. No. 37412
Court of Appeals

2. Did the court lack jurisdiction to consider Elcock's motion to withdraw his guilty plea that was filed more than two years after the judgment became final?

State v. Elcock
S.Ct. No. 38177
Court of Appeals

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the court err in concluding the officers did not violate Patterson's Fifth Amendment right against self-incrimination and in denying his motion to suppress statements?

State v. Patterson
S.Ct. No. 37500
Court of Appeals

2. Did the district court err in granting Mills' suppression motion based on its finding that the named informant, who admitted to making drug purchases from Mills over twenty times, lacked reliability?

State v. Mills
S.Ct. No. 37655
Court of Appeals

3. Did the court err in finding the search warrant was supported by probable cause and in denying Harper's motion to suppress?

State v. Harper
S.Ct. No. 37683
Court of Appeals

4. Did the district court err in denying Garza's motion to suppress evidence found in his car?

State v. Garza
S.Ct. No. 37389
Court of Appeals

SENTENCE REVIEW

1. Did the court abuse its discretion when it revoked Ramirez's probation in light of Ramirez's willingness to seek treatment?

State v. Ramirez
S.Ct. No. 35761
Court of Appeals

2. Did the district court violate Curtis' due process rights to notice and an opportunity to be heard by affirmatively misleading Curtis to believe he had until a certain date to file materials in support of his Rule 35 motion?

State v. Curtis
S.Ct. No. 37724
Court of Appeals

Summarized by:
Cathy Derden
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Michelle R. Points
Idaho Delegate
to ABA House of Delegates

The midyear meeting for the House of Delegates of the American Bar Association (“ABA”) was held on February 14, 2011 in Atlanta, Georgia. I attended as the Idaho State Bar Delegate, once again with Larry Hunter, the Idaho state Delegate, and Tim Hopkins, who serves on the ABA Board of Governors. As I have explained in previous reports, and for those of you who are not familiar with the structure of the ABA, the House of Delegates is the policy-making body of the ABA, which meets twice a year. Resolutions passed by the House of Delegates become official ABA policy, allowing the ABA to thereafter lobby before Congress and with the Executive Branch on matters contained in those Resolutions.



Michelle R. Points

We were overwhelmed with southern hospitality in Atlanta, which made it that much easier to be there on Valentines day without my husband!

We were honored to hear remarks from Georgia Congressman John Lewis. Congressman Lewis worked with Dr. Martin Luther King as a pivotal leader during the civil rights movement. His comments were stark yet simple and forced reflection on the importance of the role of lawyers and judges in our society. Congressman Lewis shouted that the justice system respects the dignity of every human being, through lawyers and judges — that we have an enormous responsibility. It was a very thought provoking and emotional presentation.

There were several Resolutions considered and voted on during the meeting ranging from updating the ECF filing system, to updating the Tax Code to allow the states to recover overdue debts due to them. Other resolutions included one that would urge Congress to amend 28 U.S.C. 2241(d) and 2255(f)(1) to provide equitable tolling of the one-year statute of limi-



tations for filing post-conviction relief when the prisoner who has an attorney has timely requested post conviction counsel to file a petition or motion. Another urged federal, state and tribal officials to develop education programs to assist teachers, parents and children in identify victims and enhancing appropriate interventions to prevent bullying, including cyber bullying and youth-to-youth sexual and physical harassment. Another resolution urged federal, state and local governments to require civic education for elementary, middle and secondary students in public schools and to provide competitive grant funding for such programs.

The “pressing” Resolution that was discussed throughout the meeting was to oppose any proposal to cut funding for the Legal Services Corporation for the Fiscal Year 2011, and urge Congress to support increased funding of the Corporation to the level necessary to provide needed services to low income Americans.

There were also continued discussions throughout the meeting regarding the need to press Congress to increase funding to state and federal courts throughout the Country. Chief Justice Wallace B. Jefferson of Texas remarked on the “State of the State Courts” and reiterated the comments of Congressman Lewis that the rule of law has no meaning without access to the courts.

It was also important meeting for Idaho. Tim Hopkins presented an eloquent and moving tribute to Gene Thomas. Gene first jointed the House of Delegates in 1971 and served on many of its important committees before serving as a member of the Board of Governors and Chair of the House of Delegates from 1980-1982. Gene was elected President of the ABA in 1986. Tim described many

Gene first jointed the House of Delegates in 1971 and served on many of its important committees before serving as a member of the Board of Governors and Chair of the House of Delegates from 1980-1982.

of Gene’s accomplishments and accolades, both inside and outside of the ABA, stating that he was celebrated as a “man of character and depth, dignified, and passionate in pursuit of fairness and justice. Truly one of Idaho’s favorite sons ...” Appreciation for Gene’s work was evident from the applause both before and after Tim’s presentation.

I continue to be humbled when I attend these meetings. I cannot speak for the ABA as a whole, but the House of Delegates is an enormous group of lawyers that work hard, commit countless hours, and are truly committed to seeing that justice is done. I am looking forward to the annual meeting in Toronto in August.

About the Author

Michelle R. Points is the Idaho State Bar Delegate to the American Bar Association House of Delegates. Michelle is a Partner with Hawley Troxell Ennis & Hawley, LLP. Her practice focuses on a wide variety of civil litigation.



ELECTRONIC RECORDS BRING IMPROVEMENTS TO THE APPELLATE PROCESS

Michael Henderson
Legal Counsel,
Idaho Supreme Court
and Stephen W. Kenyon
Clerk of the Idaho Supreme Court

On July 1, 2010, the Idaho Supreme Court took another step toward electronic filing with a pilot project designed to encourage and promote the use of electronic appellate records. As a result of this pilot project, civil appellants now have the option to receive an electronic copy of the entire district court case file as the appellate record, or they can receive a traditional paper-based record. Practitioners should be aware of how this process works and the advantages that it will offer.

Only counties that have the capability to scan court files are participating in this process. The following counties have agreed to offer electronic records: Ada, Bonneville, Fremont, Jerome, Madison, Nez Perce, Power and Twin Falls counties. Appellant's counsel can request the appellate record in one of three ways.



Michael Henderson

1. Appellants can have the traditional hard copy record in which the parties se-

lect key documents from the underlying action and request they be included in the appellate record before the Court. The charge is \$1.25 per page for this record.

2. Appellants can request that the entire district court file be scanned at 65 cents per scanned page. The district court will provide the parties a PDF copy of the record on appeal which will contain the entire district court file.

3. In instances where there is a large district court file and a limited appellate scope, parties can choose to have a limited electronic record. This means they can select documents from the district court file to be included in an electronic file (as opposed to having the entire file scanned). To do this, the appellant pays \$100 plus 65 cents per page for selected documents from the district court file.

In addition to the obvious advantage of reducing paper, the second option — requesting that the entire district court record be provided electronically — has other advantages. First, obtaining a copy of the district court file will eliminate the need to stress over building an appropriate record on appeal. Everything that was filed in the district court is automatically included in the record at the Supreme Court. As experienced practitioners know, determining what is included in the appellate record is critical. And you're probably especially aware of this fact if you have been asked during oral argument, "Counsel, where is that in the record?"

Second, the record will contain a PDF copy of everything filed in the district

court file with OCR (optical character recognition) capabilities. What this means is that you will receive a PDF file that can be searched for any reference to a date, name or any other key word. For example, this will allow a party to search for a particular Idaho Code section throughout the appellate file.

Third, this process speeds up the appellate lifecycle as there would be no need for settlement of the record at the district court level because the Supreme Court will receive the entire district court file. In a typical case this could shorten the overall appellate time by six weeks.

When an appellant chooses to receive the record in an electronic form, the parties will also receive a searchable transcript in electronic form. The charge for the transcript will continue to be \$3.25 per page.

We can look forward to a time when electronic records will be available in appeals statewide. The reduced cost to litigants, the availability of searchable records, the certainty of having a complete record, and the more timely resolution of appeals will be among the benefits resulting from this use of modern technology.

About the Author

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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DO SOME SPRING-CLEANING: THROW OUT GRAMMAR MYTHS

Tenielle Fordyce-Ruff
Smith, Fordyce-Ruff & Penny,
PLLC

I love springtime—the birds returning, the flowers growing, the sunshine warming my face. I also love springtime because it gives me a legitimate excuse to simplify my life. I can throw out everything that has bogged me down all winter. I can donate the sweater I haven't worn in two years and toss everything useless in the garbage. (I can also organize all my grammar books and style guides, but that's a topic for another column.)

Unfortunately, many legal writers are bogged down by

useless grammar myths: suggestions that they learned as “rules” early in their schooling. We all sat in an elementary school desk long ago and learned how to compose in English. Unfortunately, many stu-



Tenielle Fordyce-Ruff

dents learned what were *suggestions-to-help-them-become-more-sophisticated-and-better-writers* as *rules-never-to-be-broken*. Here are my top five “rules” you should throw out as you do your spring cleaning.

You can't begin sentences with “and” or “but”

You can. Grammar teachers likely taught us to never begin a sentence with these conjunctions early on, as we were learning to write complete, formal sentences. Sentences that begin with a conjunction are grammatically correct, and many great legal writers, from Oliver Wendell Holmes to Richard Posner, use conjunctions as sentence-starters.

Yes, when used in excess beginning a sentence with “and” or “but” can lead to monotony or a sentence error. Consider this: *The plaintiff filed a complaint. And the defendant filed an answer. And then he filed a motion to dismiss. And then a motion for summary judgment.* That would make any reader want to tear her hair out—it reads like a machine gun firing in your head.

Used appropriately, though, beginning sentences with conjunctions lends life to your writing. A well placed “and” at the



beginning of a sentence can add force to your idea. And a “but” can give your writing simplicity and directness.

You can't begin a sentence with “because”

Grammar teachers likely got tired of students creating fragments by placing a period in front of “because,” so they taught us that sentences couldn't begin with “because.” But they can. (Notice the “but” as sentence-starter?)

We all know fragments can be painful. Consider this:

The defendant argued summary judgment was appropriate. Because there were no genuine issues of material fact.

This fragment can be easily fixed without resort to the “rule”—remove the period. *The defendant argued summary judgment was appropriate because there were no genuine issues of material fact.*

The sentence still works if you reverse the clauses: *Because there were no issues of material fact summary judgment is appropriate.* In fact, this fix creates a more powerful sentence by giving the reason first and removing excess words.

You can't write one-sentence paragraphs

Why not?

Sure, long ago we each sat at a desk and learned about paragraph development, topic sentences, and organization. Because our grammar teachers wanted to make sure they didn't have to read a stack of papers full of single-sentence paragraphs, they created the “rule” that paragraphs must have multiple sentences.

As professional writers we no longer need this limit. Sure, if you produced a long legal document full of one-sentence paragraphs, your writing would appear elementary and undeveloped. On the other hand, the occasional single-sentence paragraph can form a natural transition between ideas or create emphasis. Other

*Here are my
top five “rules”
you should throw
out as you do
your spring
cleaning.*

professional writers use this technique to their advantage, so feel free to deliberately throw the occasional, strategic single-sentence paragraph into your writing.

You can't end a sentence with a preposition

No matter how dutifully you memorized prepositions and learned to never place them right before the period, ending your sentence with a preposition is perfectly acceptable.

Wondering where this “rule” comes from? (See, you didn't cringe; this construct is natural in English.) It derives from the desire to match English rules to Latin rules, and in Latin a preposition cannot come after the word it governs. In English, however, strict adherence to this “rule” leads to absurd results.

Take, for instance, Winston Churchill's famous quote: *“That is the type of arrant pedantry up with which I will not put.”* Churchill made his point. Certainly, ending the sentence with “with” would not hurt nearly as much as the convoluted construction. The sentence is much better

when rewritten: “That is the type of arrant pedantry I will not put up with.”

In many sentences the preposition is part of a phrasal verb or is simply necessary to avoid creating a stilted sentence. For instance, *I’ve read so many single-sentence paragraphs I feel like throwing up*. Or, *What are you waiting for?* Don’t, however, end a sentence with a preposition when the sentence would have the same meaning without the preposition. Take, “*Where’s the library at?*” The “at” is incorrect because “*Where’s the library?*” has the same meaning without the “at.”

You can’t split infinitives

This “rule,” like the prohibition on ending sentences with a preposition, derives from the desire to make English more like Latin. In Latin, and many modern languages, infinitives cannot be split (lire, escribir). This is not the case in English.

Quick grammar lesson: an infinitive is any form of a verb preceded by “to.” For example, “to write” or “to edit.” A split infinitive comes when you place an adverb between the “to” and the root verb.

“Really to understand the law” does not contain a split infinitive, but “to really understand the law” does.

Of course, changing the placement of the modifier can change the meaning of a sentence. Consider these examples:

The attorney decided to flatly state her best argument.

The attorney decided to state flatly her best argument.

The lawyer is being definitive in the first example. She is simply dull in the second.

So, strict adherence to this “rule” can lead to awkward constructions, and it can also lead to “squinting” modifiers and, thus, ambiguity. Take for instance this sentence. *Safeguards should be provided to prevent effectually cosmopolitan financiers from manipulating reserves*. Here, “effectually” could modify either “to prevent” or “cosmopolitan financiers.” If the writer meant it to modify the verb, then splitting the infinitive would avoid the ambiguity and confusion created by following this “rule.”

Once you free your writing from these myths, your writing will be less bogged

down and flow better. Of course, I offer one caveat: if your audience considers these “rules” as “rules-never-to-be-broken” follow them to a tee. If you manage to prune these myths, expect to see new growth in your writing. Ah, spring.

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About the Author

Tenielle Fordyce-Ruff is a member of Smith, Fordyce-Ruff & Penny, PLLC. She clerked for Justice Roger Burdick of the Idaho Supreme Court and taught Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing at the University of Oregon School of Law. She is also the author of *Idaho Legal Research, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law*. You can reach her at tfordyce-ruff@sfrplaw.com.



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ADVOCATES IN ACTION: RECREATION INCLUDES SIGHTSEEING AT PALACES

Stephen A. Stokes
Meyers Law Office, PLLC

From the tone of previous articles, one might get the impression that a deployment is all work; 24-hour operations, all night legal research projects, fast-paced action and constant heightened awareness. In reality, life as an Army attorney has its periods of intense responsibility and its doldrums. Fortunately, we've had the ability to fill the slow times.

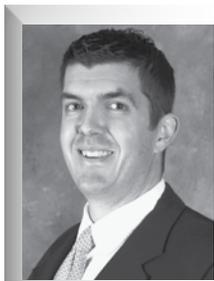
One way to fill the time is to engage in "extreme tourism." There are many fantastic and historically wondrous things to see here; after all, we are stationed in Mesopotamia, the "cradle of civilization." And, as the Victory Base Complex encompasses Saddam Hussein's private playground, many of his palaces and monuments are within a 10 minute drive from the JAG office.

The Al-Faw Palace, also known as the "Water Palace," is the central landmark of the Victory Base Complex. Construction was ongoing during the 1990s and it features extensive and complex water works. Purportedly, Saddam built it to honor Iraqi soldiers who freed the peninsula of Al-Faw from Iranian control.

Victory Over America Palace is another famous landmark. Begun by Saddam to celebrate his "victory" over the United States after the first Gulf War, the structure was never quite completed before it was bombed during the 2003 invasion. Soldiers can also tour the Ba'ath Party

House, which can be seen from the top of the palace. The Ba'ath Party House was also bombed during the 2003 invasion. The Perfume Palace, adjacent to the Victory Over America Palace and the Ba'ath Party House, allegedly earned its name because, as it was a brothel for Uday and Qusay Hussein, it always smelled of perfume. Unfortunately, many of these lavish structures were funded with the failed oil-for-food program at the expense of the Iraqi populace.

From a legal perspective, one of the most interesting places on the VBC is the courtroom where Saddam was tried. The



Stephen A. Stokes



Photo by Stephen A. Stokes

Rays of sunlight pierce the darkness in a bombed-out ballroom inside the Victory Over America Palace.

Iraqi Special Tribunal, consisting of five judges, was formed by the Coalition Provisional Authority in 2003 to try Saddam and his aides on charges of war crimes, crimes against humanity and genocide. Between 2004 and 2006 several trials were conducted. Saddam was eventually convicted and sentenced to death. He was hanged on 30 December 2006.

A short convoy ride brings one to the International Zone (IZ), an area located on the Tigris River in the heart of Baghdad. Probably the most famous landmark in the IZ is the Hands of Victory Arches or the Swords of Qadisiyyah, which are located at each entrance of a large parade ground. Saddam built the arches to celebrate his "victory" over Iran. The 24-ton blades making up the arches were constructed from the weapons of dead Iraqi soldiers that were melted and recast. The hands holding the swords are replicas of Saddam's own hands. Scattered around

The Perfume Palace, adjacent to the Victory Over America Palace and the Ba'ath Party House, allegedly earned its name because, as it was a brothel for Uday and Qusay Hussein, it always smelled of perfume.

the base of the hands are 5,000 Iranian helmets captured from the battlefields of the Iran-Iraq War.

Another notable landmark is the Al Sijood Presidential Palace, which housed the Prime Minister's staff, members of the Cabinet and a Republican Guard camp. The palace was the first of eight sites investigated by UN weapons inspectors in December 2002.

The Ba'ath Party Headquarters is at the heart of the IZ. From the top of the building one can see north toward the Monument to the Unknown Soldier, the Hands of Victory Arches, the Grand Festivities Square and the al Salam Palace. Looking south, one can see the Tigris River, the 14th of July Bridge, the U.S. Embassy, the Al Sijood Presidential Palace, and, off in the far distance, Baghdad International Air Port.

In a previous column, I equated Kuwait with the surface of the moon. Of course, that's not really true – there are areas of desolate desert, but there are also vibrant urban, cultural areas. During our time in Kuwait in November 2010, we had an opportunity to conduct a mission to downtown Kuwait City. A true melting pot, Kuwait City is home to 2.38 million and is the political, cultural and economic center of the emirate.

In addition to visiting the historical landmarks in our Area of Operations, there are many Army-sponsored programs available to boost morale. Of course, there's the gym. It's pretty easy to burn away the day's stresses on the treadmill or weight rack. But, in addition to the gym, the Morale, Welfare and Recreation programming staff has gone out of its way to provide all kinds of activities for soldiers. For example, there's mini-golf, line dancing, poker tournaments, bible studies, fun runs, yoga classes, Tai Kwan Do, Zumba, movie nights and an education center for soldiers. One member of our office (not me) has been particularly taken with going to Salsa dancing night.

Many celebrities come to Iraq on USO-sponsored trips. We've seen musical acts like Avenged Sevenfold, Kicks Brooks, Craig Morgan, En Vogue, Joan Jett, Kellie Pickler, Smashmouth, Chamillionaire, and Charlie Wilson, comedians Robin Williams and Louis Black, and motivational personalities like Lance Armstrong, the UFC fighters, the Cincinnati Bengals Cheerleaders and the Hooters Girls.

The JAG office also tries to entertain itself. Most recently we conducted "Battle-stache Month," which ran from "St. Valenstache Day" through the "Ides of Mustache." The life lesson learned was that we can't (or perhaps shouldn't) grow mustaches. The 116th Cavalry Brigade has



Photo by Stephen A. Stokes

Relaxing during Stetson and Spurs Night. From left: 1LT Steve Stokes, MAJ Rob Holley and MAJ Darren Ream.

also sponsored social events like "Stetson and Spurs Night," which is a good opportunity to have a "near beer," smoke a cigar and enjoy Cavalry traditions.

Units also participate in league sports. Right now it's softball season. The 116th Garrison Command softball team just beat the Base Defense Operations Center team 18 to 6. League play is a good way to foster friendly rivalries and build unit camaraderie.

Of course, none of these adventures or activities can take the place of being home with loved ones, but there is enough to do to help pass the time and to make this deployment as fun as it can be.

About the Author

Stephen A. Stokes received his J.D. from the University of Idaho in 2005. He is an associate with Meyers Law Office, PLLC in Pocatello, Idaho, where he practices in the areas of family law, commercial planning, general litigation, and personal injury. He is a member of the Idaho Association of Criminal Defense Lawyers and the Idaho Trial Lawyers Association. He served as chair of the Sixth District Bar Association Family Law Section. He is also a Judge Advocate

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in the Idaho Army National Guard and is currently deployed to Iraq. He can be reached by email at stephen.stokes@iraq.centcom.mil.

Endnotes

¹ Giving credit where it's due, the specific details describing the historical places in this article were taken from *The Tourist's Guide to Baghdad*, by Paul R. Williams, Lt Col, USAF.

CONSERVATION EASEMENTS: GOOD NEWS AND BAD NEWS

C. Timothy Lindstrom

For those attorneys dealing with donation of conservation easements this is a time for extreme caution. It is also a time of opportunity for farming and ranching clients that may not come around again.

Recent actions by the United States Congress improved the ability of all easement donors to write-off associated deductions, especially farmers and ranchers. That is the good news. The bad news is that these enhanced benefits expire at the end of 2011, and

a series of recent tax court and federal district court decisions have upheld an IRS that is increasingly picky about conservation easement deductions. It has never been more true that one must “read the law; read the law; read the law”¹ before attempting to assist easement donors.

This article is intended to provide a brief overview of both the good developments in Congress and the not-so-good decisions coming from the courts. It starts with a summary of basic concepts.

Basic concepts

Conservation easement: A conservation easement is a restriction on the future use of land. The terms of the restriction are negotiated by a landowner and the holder, that is, a governmental agency or private charity (typically called a “land trust”) that will enforce the restrictions. Conservation easements are “easements in gross” and typically were not enforceable at common law. However, conservation easements in Idaho are authorized by Idaho statute.² Similar legislation exists in 48 other states.³

Conservation easements are voluntary grants by landowners. Their terms are, therefore, what the landowner and the holder agree upon. Without an agreement, there is no conservation easement. Furthermore, the holder has no rights to possess or use the easement land and the landowner retains all rights, including the right to sell, bequeath, gift or otherwise convey the easement land – subject to the easement restrictions. The holder does obtain the right to enter the easement



C. Timothy Lindstrom

land for purposes of monitoring the landowner’s compliance with the easement and enforcing easement terms, if necessary. Conservation easements do not allow public access to easement property unless the landowner wishes to include that in the easement.

Tax Benefits: For conservation easements that are donated or “bargain sold” both state and federal tax benefits are available. A bargain sale is a sale of property to a public charity or governmental agency for less than the fair market value of the property. Provided that the buyer and seller intend it, the difference is considered a charitable donation by the seller that is deductible.⁴

Federal tax law allows easement donors to deduct the value of a conservation easement donation from their income for federal income tax purposes. Federal law also recognizes the reduced value of land subject to a conservation easement for estate tax purposes in determining a decedent’s adjusted gross estate allowing a decedent’s executor to exclude 40% of the restricted value of easement land, up to \$500,000, from a decedent’s estate.⁵

Idaho law also allows an income tax deduction for the charitable donation of a conservation easement.⁶ However, Idaho law expressly provides that the reduction in value of land due to a conservation easement may not be taken into account for purposes of local real property taxation.⁷

Therefore, the donor of a conservation easement is able to enjoy a federal income tax deduction, reduction in federal estate taxes and an Idaho income tax deduction.

Limitations and requirements: Although the terms of a conservation easement are up to the landowner and prospective holder of the easement, conservation easement terms must meet federal tax law requirements to be deductible.⁸ In addition,

to successfully claim a deduction for the donation of a conservation easement, numerous federal requirements for the substantiation of the donation must be met, including a qualified appraisal of the value of the easement.⁹ In other words, it is not enough to ensure that the language of the easement meets federal requirements, it is also necessary to ensure that the deduction is properly claimed and documented.

As discussed below, failure to meet any of the substantiation requirements risks the deduction. Unfortunately, there are few cures for failure to meet any federal requirements.¹⁰ Such failures may cost the donor the deduction but leave the easement land in a permanently restricted state.¹¹

The good news

At the end of 2010 Congress renewed provisions of the tax code that allowed both individuals and corporations accelerated write-offs of deductions for donations of conservation easements. These provisions do much to make deductions for conservation easement donations more useful for all donors, in particular those whose primary source of income is farming or ranching. However, these enhanced write-off provisions expire at the end of this year (being applicable to donations made in 2010 and 2011 only) unless Congress extends them.

Enhanced write-off for individuals: Charitable deductions for donations of conservation easements are subject to an annual limitation. Until 2006 the annual limitation was 30% of the donor’s “contribution base.”¹² In 2006 Congress amended the law for “qualified conservation contributions” to allow deductions to be used against 50% of the donor’s contribution base.¹³ That provision expired at the end of 2009 and donors were again subject to the 30% limitation. In Decem-

A series of recent tax court and federal district court decisions have upheld an IRS that is increasingly picky about conservation easement deductions.

ber 2010 Congress re-instated the 50% write-off for donations made in 2010 and 2011. This provision expires at the end of this year and the 30% limitation will apply once again.

Generally speaking, unused portions of charitable donations may be carried forward and used against future income for up to five years.¹⁴ This law applied to deductions for conservation easement donations until 2006 when Congress amended the law to allow deductions for “qualified conservation contributions” to be carried forward for fifteen years.¹⁵ That provision also expired at the end of 2009 and was reinstated by Congress in December 2010 for donations made in 2010 and 2011. This provision also expires at the end of this year.

Enhanced write-offs for farmers and ranchers: Congress also renewed a special write-off provision for “qualified conservation contributions” made by donors if more than 50% of the donor’s income is from the “business of farming.”¹⁶ Under this provision qualified donors may write-off such deductions against 100% of their contribution base¹⁷ and carry unused portions of such deductions forward for fifteen years.¹⁸

The donor’s income must qualify for the 100% write-off in the year of the donation only. Thereafter the donor’s income from the “business of farming” can be as little as zero and unused portions of the deduction may still be written off against 100% of the donor’s contribution base and carried forward for fifteen years.

In order to qualify for the 100% write off the easement document must provide that the easement land “remain available for agricultural or livestock production.”¹⁹ This is not a requirement that the easement land be actively used for such production, only that it “remain available” for such production.

Enhanced write-offs for C corporations: C corporations, which are taxed as entities separate from their shareholders (unlike “S” corporations which are taxed more or less like partnerships) may deduct no more than 10% of their taxable income annually for charitable donations, including donations of conservation easements.²⁰ However, under provisions applicable for 2010 and 2011 donations only, C corporations qualify for the 100% write-off and fifteen-year carry-forward for “qualified conservation contributions” provided that more than 50% of the corporation’s income is from the “business of farming” in

These rulings underscore the importance of complying with even the seemingly most trivial requirements.

the year of the donation.²¹ In order to be eligible the corporation’s shares cannot be “readily tradable on an established securities market at any time.”²²

Enhanced write-offs for S corporation shareholders: As noted above, S corporations are not taxed at the corporate level.²³ Income and deductions flow through to the shareholders in proportion to their interests in the corporation. However, shareholders may use only deductions generated by the corporation, including deductions for charitable donations, to the extent of their basis in their shares. Every deduction passing through to an S corporation shareholder reduces that shareholder’s basis by the amount of the deduction.

However, Congress’s actions in December allow S corporation shareholders to deduct the corporation’s qualified conservation contributions without respect to their basis in their shares. The unlimited pass-through provision applies only to that portion of the donation that would have represented taxable gain in the donated property had it been sold instead.²⁴

The bad news

In a series of decisions the United States Tax Court and the United States Federal District Court have denied taxpayer deductions for conservation easement donations when the donor failed to properly substantiate the deduction. These rulings underscore the importance of complying with even the seemingly most trivial requirements.

The requirements: In order to successfully claim a deduction for the donation of a conservation easement the following requirements must be met:

1. In general, the conservation easement document must comply with the requirements of Code §170(h) and Regulations §1.170A-14. Substantiation of the deduction must comply with the provisions of Regulations §1.170A-13.

2. The donee organization must provide a written acknowledgment of the donation that (i) describes the property contributed; (ii) states whether the donee provided any “goods or services” (which would include payments made in bargain sale transactions) to the donor in exchange for the donation; and (iii) if goods or services were provided a description and good faith estimate of the value of the goods or services. This letter must be provided prior to the date upon which the donee files the return claiming the deduction or the due date of such return, whichever is earlier.²⁵

3. The donor must obtain a “qualified appraisal” of the value of the conservation easement. The appraisal cannot have been done earlier than 60 days prior to the actual donation, or later than the due date for the return (plus extensions) on which the deduction will be claimed.²⁶ Note that the rules for appraisals of conservation easements include requirements that are not found in the Uniform Standards of Professional Appraisal Practice (USPAP) or Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA) appraisal guidelines.²⁷ If the appraised value of the conservation easement is \$500,000 or more the donor must include a complete copy of the appraisal with the return.

4. Form 8283 and the schedule required by the instructions to this form must accompany the return.²⁸ The form must be filled out completely and signed by the appraiser and the donee organization.

5. If there is a mortgage on the property the mortgage holder must subordinate the mortgage to the easement.²⁹

Acknowledgment letter: In three recent decisions courts have denied deductions because of the donor’s failure to comply with acknowledgement letter requirements. In one instance the letter was provided by the donee, but only after the donor’s return was under audit.³⁰ In

the other the acknowledgment failed to describe the property contributed.³¹ In a third decision another court ruled that the signature of the donee organization on the easement substantially complied with acknowledgment letter requirements.³² However, in a more recent decision the tax court ruled that an agreement between the donor and donee regarding a conservation easement did not qualify as a proper acknowledgement and denied an easement deduction.³³

Qualified appraisal: In the past audits focused on easement valuation. In the 30 cases thus far reported dealing with easement valuation, donors have been able to salvage an average of 62% of the easement value originally claimed on the return.³⁴ Recently the IRS has been successful at denying easement deductions because appraisals fail to comply strictly with tax law requirements. These challenges are not about how much of a deduction the donor should get, but whether a deduction should be allowed at all.

The U.S. District Court for the Northern District of Illinois recently denied a deduction for the donation of an historic façade easement because the appraisal failed to include the appraiser's qualifications and failed to describe the protected façade (although the structure was described).³⁵

The tax court denied a deduction because the donor's Form 8283 did not include the date and manner of acquisition of the property or the cost or other basis of the property.³⁶ In addition, the appraisal itself did not describe the property contributed, did not include the terms of the deed of easement, did not include a statement that it was prepared for income tax purposes, and did not provide the method and specific basis for valuing the easement.

Jumping in the other direction, the tax court upheld a deduction even though the appraisal was done more than three months prior to the donation, failed to state the date upon which the donation was made, did not include the required statement that the appraisal was prepared for income tax purposes, and did not state the fair market value of the appraised property as of the date of donation. The court ruled that these flaws were "insubstantial," in part because the information lacking from the appraisal had been provided to the IRS in the Form 8283, and because the appraisal had been provided, but it just had been prepared earlier than allowed by the Regulations.³⁷

There may never a better time than 2011 to assist the right kind of client in a conservation easement donation.

Mortgage subordinations: In another recent case³⁸ the tax court denied a deduction because an outstanding mortgage was not properly subordinated to a conservation easement.³⁹ Because the subordination allowed the mortgage holder first rights to any proceeds resulting from the condemnation or destruction of the protected property the court ruled that the easement had not been granted in perpetuity.⁴⁰

Sham transactions: Sham transactions⁴¹ have been associated with complex business schemes contrived to avoid taxes. In a recent case the IRS attempted to deny a deduction in a conservation transaction by applying the related "step-transaction doctrine."⁴² The case did not involve a conservation easement but instead a series of bargain sales of land to a conservation organization. To summarize an extensive and complex opinion, the tax court ruled that there was substance to the transaction challenged other than tax avoidance.⁴³ Despite the outcome, this case serves as a "wake-up call" to practitioners engaged in conservation transactions in general. There is no reason why conservation transactions cannot be successfully challenged as shams. As the tax benefits for qualified conservation donations increase (and in some cases are supplemented by generous state tax credit programs⁴⁴), the temptation to "work the system" is growing.

Cash Donations: Easement holders often request that cash donations accompany easement donations to cover the costs of monitoring enforcement. This is typical and appropriate given the requirements imposed by the Regulations that holders have the means necessary to enforce easements.⁴⁵ Deductibility of such payments depends upon whether they are truly voluntary. Where the holder requires the payment it may be treated as a "*quid pro quo*" payment, which is not deductible.⁴⁶

In a recent case the IRS challenged the deduction for a cash donation on the grounds that the holder accepted the easement donation only because the cash donation was made.⁴⁷ The court denied a summary judgment motion by the government on this issue because it felt that even if the donation was made as a "*quid pro quo*" the question remained whether the cash donation exceeded the value of the benefit the donor received from acceptance of the easement.⁴⁸ Upon reconsideration of this matter the tax court agreed that the cash contribution was both voluntary and was not part of a "*quid pro quo*" exchange.⁴⁹

In a second case the Tax Court denied the donor's deduction of a cash payment because it found that the payment had been "required" by the holder as a condition of acceptance of the easement donation.⁵⁰ The donor did not make the "dual-character" payment argument.

Substantial Compliance: The doctrine of "substantial compliance" is the last resort for the attorney whose client has failed to strictly comply with tax requirements. It is highly unreliable. No one should relax diligence in complying with tax rules and rely on "substantial compliance" as a safety net. The 7th Circuit Court of Appeals says it best:

"Reading the Tax Court's decisions on the subject of substantial compliance is enough to make one's head swim. Tax lawyers can have no confidence concerning the circumstances in which noncompliance with regulations governing the election of favorable tax treatment will or will not work a forfeiture. . . ."⁵¹

Conclusion

It is right and proper for any practitioner representing a client in the donation of a conservation easement to be a little bit paranoid. However, one must learn to deal with paranoia because there may never a better time than 2011 to assist the right kind of client in a conservation easement donation.

About the Author

C. Timothy Lindstrom is a graduate of the University of Virginia Law School and an active member of the Idaho, Wyoming, Michigan and Virginia Bars, Lindstrom specializes in conservation tax law. He is author of *A Tax Guide to Conservation Easements* (Island Press, 2008) and numerous professional articles, and a frequent lecturer nationally. He can be reached at ctlesq@hotmail.com. (Question on citation using “code” is that the Code of Federal Regulations? Code refers to U.S. Code, as pointed out in footnote 1 below. Regulations are “Regulations.”)

Endnotes

¹ A caution repeated frequently by Stephen J. Small, one of the principal authors of Treasury Regulations §1.170A-14 governing the deductibility of conservation easement donations. Note: all references in this article to the United States Code will be to “Code” and all references to the Treasury Regulations will be to “Regulations.”

² Idaho Code §§55-2101 *et seq.*

³ North Dakota is the only state that does not provide statutory authority for perpetual conservation easements.

⁴ Code §§1011(b) and 170. For purposes of this article any reference to donation is intended to include bargain sale.

⁵ See Code §§2031(a) and 2031(c). A conservation easement contributed in a decedent’s will is recognized as a charitable deduction from the decedent’s estate under Code §2055(f). In addition, a decedent’s heirs may elect to direct the decedent’s executor to contribute a conservation easement after the decedent’s death and before the due date (plus extensions) for the estate tax return, in which case both a charitable contribution deduction from the estate and the 40% exclusion are available to reduce estate tax, provided that no income tax deduction is claimed for the easement. Code §§2031(c)(8)(A)(iii) and (C) and 2031(c)(9).

⁶ See Idaho Code §§63-3011(A) through (C).

⁷ Idaho Code §§55-2109.

⁸ Code §170(h) and Regulations §1.170A-14.

⁹ See Regulations §§1.170A-13(c)(2) and (f). The value of a conservation easement is typically determined by comparing the fair market value of the easement property before and after the easement is in place. See Regulations §1.170A-14(h)(3)(ii). The requirements for qualified appraisals are rigorous and extensive. See Regulations §1.170A-13(c)(3).

¹⁰ Taxpayers who fail to strictly comply with regulatory requirements and are challenged by the IRS typically argue that they have “substantially” complied. However, the doctrine of substantial compliance unpredictable and unreliable. See, e.g., *Bond v. Commissioner*, 100 T.C. 32, 41 (1993); *Simmons v. Commissioner*, T.C. Memo. 2009-208, 14 (2009); *Bruzewicz v. United States*, 604 F.Supp.2d 1197, 1203 (N.D. Illinois 2009); and *Scheidelman v. Commissioner*, T.C. Memo. 2010-151, 12 (2010).

¹¹ By their terms, conservation easements must be permanent in order for their contribution to be deductible. They cannot be conditioned upon the success of claiming a deduction. Furthermore, once conveyed conservation easements become public property (if conveyed to a governmental agency) or a charitable asset (if conveyed to a land trust). Public property or charitable assets cannot be returned easily, if at all. For an example See *Hicks v.*

Dowd, 157 P.3d 914, 2007 WY 74 (Wyo. 2007) and the follow up case of *Salzburg v. Dowd* filed by the Wyoming Attorney General in Wyoming’s Fourth Judicial District, CV 2008-0079, and subsequently settled. These cases involved the attempted termination of a conservation easement by the Board of County Commissioners of Johnson County, Wyoming in response to a request by the Dowds. After seven years of litigation the case was settled and the conservation easement remains in the hands of the Johnson County Scenic Preserve Trust.

¹² Contribution base is adjusted gross income under Code §62, computed without regard to any net operating loss carryback to the taxable year under Code §172. Regulations §1.170A-8(e).

¹³ Code §170(b)(1)(E). Note that “qualified conservation contributions” include conservation easements and contributions of land in fee, provided that the donor retains a “qualified mineral interest” in the land. See Regulations §§1.170A-14(b)(1) and (2).

¹⁴ Regulations §1.170A-10(c)(1)(ii).

¹⁵ Code §170(b)(1)(E)(2).

¹⁶ The “business of farming” is defined in Code §§170(b)(1)(E)(v) and 2032A(e)(5). It includes most farming and ranching activities typical in Idaho.

¹⁷ Code §170(b)(1)(E)(v)(I).

¹⁸ *Supra*, note 16.

¹⁹ *Supra*, note 18.

²⁰ Code §170(b)(2)(A).

²¹ Code §170(b)(2)(B).

²² Code §170(b)(2)(B)(I).

²³ See Code §§1361(b) and 1366(a) – (c).

²⁴ Code §1367(a)(2). The items of “loss and deduction” referenced in subparagraph B of this provision include charitable contribution deductions. This is an unusually obscure provision. Translated, what it means is that the portion of a deduction for the contribution of property (including conservation easements) that represents gain in the value of that property over the corporation’s basis in the property passes through to shareholders without regard to their basis in their shares. The portion of the deduction that represents the corporation’s basis in the property can only pass-through to the extent of the shareholders’ basis in their shares. Also note that basis in a conservation easement is different than basis in the underlying property. See *A Tax Guide to Conservation Easements*, *supra* note 2 at 113 for an explanation and example of basis in a conservation easement.

²⁵ Regulations §1.170A-13(f).

²⁶ Regulations §1.170A-13(c)(3). Regulatory requirements for qualified appraisals are extensive and few appraisers understand the requirements or, if they do, comply fully with them. An attorney representing a conservation easement donor should make certain that the appraisal meets all of the requirements.

²⁷ See Regulations §1.170A-14(h). The requirements of the Regulations for conservation easement appraisals take precedence over any industry guidelines or more generalized regulatory or statutory rules.

²⁸ Regulations §1.170A-13(c)(4).

²⁹ Regulations §1.170A-14(g)(2).

³⁰ *Gomez v. Commissioner*, T.C. Summ. Op. 2008-93. This case involved a cash contribution, but the requirements are the same for conservation easement contributions.

³¹ *Bruzewicz v. U.S.*, 604 F. Supp. 2d 1197 (N.D. Ill. 2009).

³² *Simmons v. Commissioner*, T.C. Memo 2009-208.

³³ *Schrimsher v. Commissioner*, TC Memo 2011-71 (2011)

³⁴ Table of valuation cases by the author adapted from Scott D. McClure, Steven E. Hollingworth and

Nicole D. Brown “Courts to IRS: Ease Up on Conservation Easement Valuations” appearing in *Tax Notes*, August 2010.

³⁵ *Supra*, note 31.

³⁶ *Scheidelman v. Commissioner*, T.C. Memo 2010-151. In this case the appraiser determined the value of the easement by applying a percentage to the fair market value of the property before the easement was in place. The court found that this approach, which was based on a generalized percentage, rather than specific comparables, did not constitute a qualified appraisal. Criticism of the percentage approach to easement valuation has been included in a number of easement cases including *Strasburg v. C.I.R.*, T.C. Memo 2000-94 (2000); *Nick R. Hughes v. Commissioner*, T.C. Memo. 2009-94 (2009); and *Bruzewicz*, *supra* note 31. Instructions to Form 8283 expressly prohibit the use of percentages in appraising donating property, as does IRS CCA [Chief Counsel Advisory] 2007 38013 with respect to valuation of façade easements.

³⁷ *Consolidated Investors v. Commissioner*, T.C. Memo. 2009-290 (2009); see also *Schrimsher*, *supra* note 33.

³⁸ *Kaufman v. Commissioner*, 134 T.C. 9 (2010).

³⁹ Regulations §1.170A-14(b)(2).

⁴⁰ *Supra* note 38 at 8. The IRS brief filed in this case cited several examples of what it considered to be proper subordinations, including one by the Compact of Cape Cod Conservation Trusts. Unfortunately, there is insufficient room in this article to replicate the form here.

⁴¹ The phrase “sham transactions” is intended to be inclusive of the various labels applied to efforts to challenge tax-related transactions for lack of substance, including the economic substance doctrine, the business purpose doctrine, and the step transaction doctrine.

⁴² *Klauer v. Commissioner*, T.C. Memo. 2010-65 (2010). See also *Historic Boardwalk, et al v Commissioner*, 136 T.C. 1, 23 (2011) for a more recent case in which the IRS unsuccessfully attempted to challenge an investment structure intended partially to distribute historic preservation credits to taxpayers.

⁴³ The opinion exhaustively examined the various tests for applying the step-transaction doctrine, which is instructive.

⁴⁴ In Colorado and Virginia, to mention two examples, easement donors receive a credit against state income tax that can be sold to other taxpayers.

⁴⁵ Regulations §1.170A-14(c)(1).

⁴⁶ See *Hernandez v. Commissioner*, 490 U.S. 680 (1989)

⁴⁷ *Kaufman*, *supra*, note 37.

⁴⁸ Under “dual-character” contribution principles if someone makes a donation expecting “goods or services” in exchange, but the value of the donation exceeds the value of the goods or services received and if the difference is intended by both parties as a charitable donation, the difference is deductible. See *U.S. v. American Bar Endowment*, 477 U.S. 105, 116 (1986).

⁴⁹ *Kaufman v. Commissioner*, 136 T.C. 13 (2011).

⁵⁰ *Scheidelman*, *supra* note 35.

⁵¹ *Prussner v. U.S.*, 896 F.2d 218, 224 (7th Cir. 1990); see also *Bond v. Commissioner*, 100 T.C. 32, 40-41 (1993) *Ney v. Commissioner*, T.C. Summary Opinion 2006-154 (2006); *Gomez*, *supra* note 31; *Bruzewicz*, *supra* note 32; *Simmons*, *supra* note 33; *Consolidated Investors*, *supra* note 36; *Scheidelman*, *supra* note 37; *Lord v. C.I.R.* T.C. Memo. 2010-196 (2010); *Hendrix v. United States*, 106 AFTR 2d 2010-5373 (S.D. Ohio, Eastern Division, 2010).



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RON STEPHENSON: PATIENCE COUNTS WITH ATTORNEY DISCIPLINE AND OTHER DIFFICULT DECISIONS

Dan Black
Managing Editor, The Advocate

Since 1997, Ron Stephenson has faithfully served as a non-lawyer member of the Professional Conduct Board, (PCB). That's the Idaho State Bar committee that reviews discipline matters. The most important quality for that position, he said, has been patience. Board members must carefully read extensive documentation, hear arguments and avoid jumping to conclusions until the matter is fully considered. Only then, Ron said, can a board member help develop a recommendation to the Idaho Supreme Court for potential discipline.

Looking back, Ron said patience helped him overcome personal challenges as a young man and when he was Commissioner of the Big Sky Conference, a job that required diplomacy and judgment to accommodate fans, coaches, athletic directors, college presidents and the media.

These days Ron leans heavily on a rich lifetime of practicing good judgment. Diagnosed with advanced cancer, the 67-year-old resigned his position on the PCB in March. Ron's doctors don't expect him to live beyond the summer. Speaking by phone from his Boise home, Ron was upbeat, lucid and at ease. He spoke about his service on the PCB, his 14 years as Commissioner with the Big Sky Conference and about his most difficult judgment call – to stop treatment for his illness.

"I'm totally comfortable talking about all of this," Ron said. "We're prepared for the next level, whatever that is." He was keen to reflect on the legal profession.

Ron praised the attorneys he's worked with on the committee, as well as Bar Counsel staff. He said that the attorneys he's worked with have been consistently courteous and professional. That also goes for attorneys appearing on discipline charges. "Even those with money problems or drinking problems, they were willing to get help," Ron said. "Over the years, I became more and more impressed with the legal profession."

Ron said he would have liked to continue on the PCB but his diminishing physical and mental strength wouldn't allow it. It was a decision that gives him some time to spend with his wife, children and grandchildren. And he can say goodbye to the people who have been important influences.

The importance of a good coach

As a youth in Twin Falls, Ron got into trouble. Without direction, he found himself on the high school football team, where he developed a deep respect for head coach Paul Ostyn. The coach taught discipline and sportsmanship, and eventually helped Ron get a football scholarship to Boise Junior College. Now 86, Coach Ostyn drove from Twin Falls in late March to reconnect. "We had a real nice visit," Ron said, emotion rising in his voice. "I'm so grate-

ful we had a chance to recollect the times we had together." Without that scholarship, he said, things could have turned out differently.

At Boise Junior College, Ron played his freshman year under football coaching legend Lyle Smith, the man for whom the BSU field is named. They developed a lasting friendship. After working four years as assistant athletic director at the University of Idaho, Ron went to work in 1971 for Lyle as assistant athletic director.

Of the many lessons Ron took from his mentor, it was his approach to problem-solving that made its strongest impact. "Many times we'd sit around in the evening and try to figure something out. He'd say,



'Let's go home and see how it looks tomorrow.' It's amazing how time gives perspective."

As assistant athletic director and later, as Commissioner of the Big Sky Conference, Ron used those skills well. "I learned to be a good listener - remain silent. There were times when people would say something and it would be hard to swallow. You don't need to confront them. If they are lying, it will come out."

Good people, good deeds

Ron said he was especially glad to have contributed to NCAA committees and served as President of the University Commissioners Association. He

also served as president of the Idaho State University Alumni Association and served on the Boise State University Alumni Board. On four occasions, he earned the *Big Sky Conference Coach of the Year Award* in tennis.

"I had an absolutely rewarding career. No regrets," Ron said. Some of that satisfaction came from working with good friends and associates. For the most part, he said, those lacking integrity "tend to get washed out of a profession fairly early."

Through the years, dealing with human foibles in college athletics and in lawyer discipline, Ron's view of human nature had not wavered. He has always thought people were basically good, a view challenged only a couple of times, for instance, when unscrupulous college coaches and money were involved. And there were only a couple of attorneys brought before the PCB that didn't reflect well on the profession.

I learned to be a good listener - remain silent. There were times when people would say something and it would be hard to swallow. You don't need to confront them. If they are lying, it will come out.

Serving on the PCB sub-committee to rewrite the rules, Ron enjoyed learning about the culture of the legal profession. "I was amazed at the amount of discussion about a particular word. At first, I thought 'that's absurd,' but really it does matter." He complimented PCB chair Karen Gowland and fellow board members for their dedication, fairness and objectivity.

In her remarks during the 2007 Annual Meeting, at which Ron was given the Idaho State Bar Service Award, Gowland said, "The Conduct Board could not function effectively without the wisdom and insight of lay members like Ron. These members provide the girder of integrity to these proceedings and play

a key role in ensuring they are conducted with the interest of the public in mind."

Making peace and preparing to die

While his career and public service required careful deliberation and judgment, Ron has also needed those traits to make tough decisions about his illness. After he was diagnosed last spring, Ron underwent intense radiation and chemotherapy. After surgery, a CAT scan showed the cancer was gone. However, on his six-month follow-up in February, the cancer had returned, and two tumors were seen on his liver. The cancer had metastasized and would continue to spread quickly. His doctor outlined treatment options: More radiation and chemo. The chances for survival were thin.

"I asked him, 'with all your experience, if you were me, what would you do?'" Ron said. "Would you continue treatment?" Bless his heart, the doctor looked at me and the look in his eyes told me what I needed to know. He said 'no I wouldn't,' and I told him 'thank you.' I appreciated him so much."

Ron followed up, "Can you please walk me through the dying process?" There would be less and less physical and mental energy, more sleeping and hospice care would alleviate pain. He could spend time with loved ones without the debilitating effects of more therapy. "That night I slept better than any day in my life," Ron said. "I guess I was at peace with myself."

"I know what's going to happen to me, it's going to happen to you, it will happen to everyone," Ron said. "I have absolutely no concerns."

Not active in any religion, Ron said he has always thought "there's something out there. There's got to be something beyond man."

Certainly, Ron said, he will miss his wife, Barbara, his children Mike and Mark, and grandchildren. "I hate to leave my family. I've tried to see that they are in good shape."

He remembers what it was like caring for his mother, who spent the last 18 months of her life in a nursing home. In and out of a coma, she was fed through a tube and couldn't recognize or interact with others. "That was devastating," he said. Ron visited her as often as possible, and decided then he wanted a better quality of life approaching death, "and not to be burdensome."

His own family wanted Ron to continue treatment, just in case it might prolong his life. "They wanted me to. But said the final decision was mine. By the time we got back from seeing images of the tumors on my liver, they were accepting and respectful."

Part of the reason Ron allowed an interview at this time in his life, was to shed light on end-of-life issues and encourage more discussion and understanding. Looking back, Ron said, he feels grateful for those who made his life so rich, like his family and mentors, such as coach Paul Ostyn and BSU's Lyle Smith.

"I have found no one on this world with more integrity than Lyle Smith," Ron said. "If I got one thing I got from him, I hope it was that."

As for dying, Ron said evenly, "I don't mind."

BELLWOOD LECTURE EXPLORES MIDDLE EAST REVOLUTIONS

Dan Black
Managing Editor, The Advocate

No one saw it coming. Millions of people mobilized in mere weeks across the Middle East, demanding an end to corruption, repression and authoritarian rule. And while no one knows what the Middle East will look like after the revolutions, ultimately, things will get better, according to Dr. Haleh Esfandiari, an author, scholar and human rights advocate. She founded the Middle East Program at the Woodrow Wilson International Center for Scholars and was the slated speaker at University of Idaho's Bellwood Lecture in Moscow on April 29 and for a short talk in Boise on April 28.

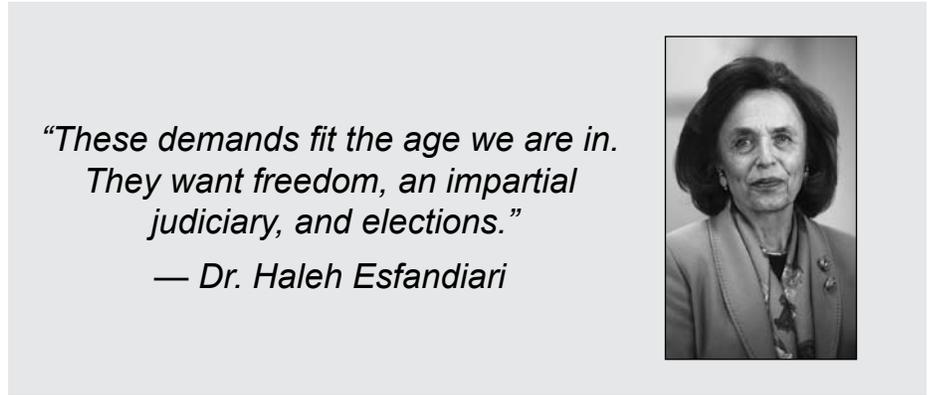
She spoke by phone from Washington, D.C. in early April and outlined some topics she expected to cover during her visit to Idaho. Dr. Esfandiari said she expected to talk mostly about the "Arab Spring," which includes revolutionary movements in Tunisia, Egypt, Libya, Syria, Yemen and Bahrain. She said the movements share some common elements but reflect the cultures and grievances of each individual country.

Dr. Esfandiari was born and raised in Iran, which she fled with her husband and daughter during the 1979 Islamic Revolution. In 2006, she returned to Iran to care for her 93-year-old mother and was harassed, robbed, detained and finally charged with trying to overthrow the government. An international campaign won her freedom. She wrote about her experience in the book, *My Prison, My Home: One Woman's Story of Captivity in Iran*.

Dr. Esfandiari built a distinguished career advocating human rights, rule of law, cultural understanding and women's rights. She taught at Princeton University and is currently in high demand for media interviews and speaking at various civic and academic institutions.

In Idaho, she expected to talk about the seeds of the Arab Spring, which she said were planted in the liberal North African country of Morocco in the 1990s where a "one million signatures campaign" asked for reforms. The king implemented those democratic reforms, and held free elections. Neighboring countries took note, as did Dr. Esfandiari. There were other contributing elements.

Education in the region rapidly increased over the past two decades, Dr. Esfandiari said, along with greater ex-



pectations of employment opportunities. But the jobs never materialized. Repression and corruption in many countries remained, as opposition groups were stifled. Pressure has been building in the region for decades. Half of the region's population is 25 years old or younger, she said, and they are much more connected through technology and media than previous generations.

Women are also pushing, for reforms including raising the minimum age of marriage, rules against polygamy, and protections through better family courts. Women have a great deal at stake. While 65 percent of the students in Iran are women, only 28 percent of those with jobs are women. In another example, Esfandiari said the minimum age for marriage was raised in Iran to 9, and more recently to 13. A girl sold into marriage will have difficulty ever getting an education, a career or have any sense of autonomy. Personal rights, she said, need to include better protections in matters such as child custody cases and for divorce.

"These demands fit the age we are in," said Dr. Esfandiari, adding that the young protesters hope that one of them could be elected president one day. "They want freedom, an impartial judiciary, and elections."

Asked if there is a danger that Islamic militants could gain access to power, Dr. Esfandiari said people wrongly worry about the Muslim Brotherhood. She said that if we believe in democracy, we must accept the results of free and elections. "We can't have it both ways," she said.

"If Egypt can have free and fair and elections and produces a modern constitution with rights, it will have ripple effects in the region. These revolutions are indigenous movements. We need to respect this."

Will it work? "I'm one of those optimists," she said. "But it won't happen right away."

In an interview before the Bellwood Lecture, Dr. Haleh Esfandiari spoke by phone with Idaho State Bar Communications Director Dan Black and ISB Commission President Deborah Ferguson. They were joined via conference call by the ISB Board of Commissioners, who were meeting in Twin Falls.

The purpose of the Sherman J. Bellwood lectures program is to bring learned individuals to the state of Idaho, and the University of Idaho campus in order to allow students the opportunity to discuss, examine, and debate subjects related to the justice system. Speakers are prominent and highly regarded local, regional and national leaders who cover a wide-range of topics.

2011 IDAHO SUPREME COURT MEMORIAL ADDRESS

John Barrett

*Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.*

I am honored to have been selected to recall the professional lives of the lawyers at the memorial ceremony commemorating these judges and lawyers.

Being asked to deliver this memorial address is somewhat like being asked to attend a reunion with old friends. The mere thought of such an assignment brings back vivid memories of my association with many of these lawyers with whom I came in contact over my legal career which now spans 52 years. I am certain that many of you have memories of your association and contacts you have had with these same lawyers over the years.

As a supreme court justice of the state of Vermont stated: "I am reminded that everything we do in law has a connection to the past, and that we revere tradition." And so it is that we recall the lives of the lawyers and judges in this memorial ceremony.

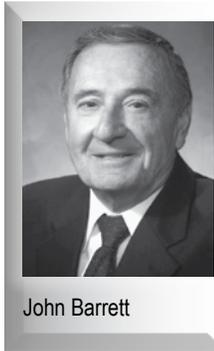
Of these 25 lawyers I had the opportunity to be personally acquainted with and to work with (or against – as the case may be) 17 of them. Many were personal friends, two were law school classmates, many were those with whom I socialized and one was a partner with whom I practiced law during my entire legal career.

Of those I did not know personally, I have read their obituaries and other available material about them and was impressed by the many accomplishments of these individuals. What these lawyers were able to accomplish during their lifetime is truly remarkable.

In reviewing where these lawyers came from, it is interesting to note that about two-thirds of them came from states other than Idaho such as Oregon, Utah, Washington, Wisconsin, Nebraska, New Jersey, Delaware, Tennessee and North Dakota.

Of those who grew up in Idaho, they came from all parts of the state including Idaho Falls, Pocatello, Boise, Priest River, Coeur d'Alene, St. Anthony and Emmett.

Many of these lawyers, before entering the profession, had very diverse backgrounds and occupations such as business



John Barrett

Many were personal friends, two were law school classmates, many were those with whom I socialized and one was a partner with whom I practiced law during my entire legal career.

owner, rancher, bartender/waiter, fire fighter, realtor, haberdasher, newspaper reporter, public school teacher, forester and secretary to a governor.

The undergraduate studies of these lawyers consisted of studies and degrees in education, political science, journalism, theology, forestry, business administration and accounting.

It is interesting to note that more than two-thirds of these lawyers attended law school in states other than Idaho such as Columbia, University of Washington, Gonzaga University, Northwestern University, University of Utah, Georgetown, University of Colorado, Creighton University, California Hastings College of Law and Dickinson Law School. Unlike myself, many of them graduated with honors.

Of these lawyers, more than one-half served in the military, including all branches, with some serving in combat zones during World War II and the Korean War and some received military awards consisting of the silver star, bronze star and combat area service awards.

With these varied backgrounds, their service to the legal profession, their respective communities and the state of Idaho is impressive, to say the least. Their time and talents were devoted to worthy causes that cover a broad spectrum of interests. Recognizing that we simply cannot succeed without the contribution of others, it is only fitting that we acknowledge what these lawyers contributed to the state and their respective communities which exemplifies the legal profession's ideals of public service: Idaho state legislator, volunteer fireman in local communities, leaders of charitable groups and service organizations, board members and officers of local hospitals, advisory boards of Idaho colleges and universities, leadership roles for youth organizations, founders and leadership roles of the performing arts, leaders in local public schools and

library groups, serving in their respective religious groups as elders, Sunday school teachers and church leadership roles. Some as city councilman, chambers of commerce and county boards, creation of scholarship foundations for needy students and serving as adjunct professors at the University of Idaho College of Law.

Time expended by this group of lawyers and contributions of their talent directly related to the legal profession have been considerable: Presidents of their respective district bar associations, presidents of the Idaho State Bar, chairman and member of the house of delegates of the American Bar Association, president of the American Bar Association, service on various committees of the Idaho State Bar and Idaho Supreme Court, public defenders and prosecuting attorneys, dean of the University of Idaho College of Law, participants in legal pro bono programs in all parts of the state and president of the Idaho Prosecuting Attorneys' Association.

Many of these lawyers received awards recognizing their contributions both to the legal profession and their respective communities: Idaho State Bar Achievement Award, Idaho State Bar Professionalism Award, Idaho State Bar District Lawyer Award, Paul Harris Fellow Award of the Rotary International Club, Chamber of Commerce Distinguished Service Award and Idaho Statesman Distinguished Citizen Award.

When we look at the many contributions these lawyers made to their respective communities, the state and to the legal profession, it becomes clear to all of us that the practice of law involves much more than simply "making a living." Bryan A. Garner, in *Elements of Legal Style*, aptly notes: "law is not just a bunch of dusty old precepts to be applied with humdrum objectivity. It is alive, blood courses through its veins, as often as not, to apply legal rules you must weigh, judge and ar-

gue folkways and human foibles. And to that, well, you must have a heart.”

Given the time and effort that these lawyers devoted to the worthy causes in which they were involved, it is apparent that these professionals, in their respective practices, were doing much more than simply “making a living” by being lawyers. In my judgment, the most effective way to mentor is by example, and these lawyers set a good example of how to become a positive force in the profession and the community. Each, in their own way, left this place in much better condition than they found it. It is incumbent on the rest of us to follow the example set by these professionals.

These lawyers, for the most part, were faced with the problem of how to balance an intense and interesting professional life with an equally intense personal and family life. One has to recognize, as these lawyers did, that the choice of one necessarily sacrifices some aspects of the other. Yet, these lawyers, more often than not, were able to achieve that balance. A common theme becomes apparent, when reflecting upon the professional and personal lives of this group, and of at least equal importance to their profession was their devotion to their families, friends, and communities.

Many of these lawyers, with whom I had contact and associated with, both pro-

fessionally and on a personal social basis, in my judgment, exhibited the highest standards of the profession, integrity, honesty, civility and the uncanny ability to “get along with people.” The lives of these lawyers have had a profound influence on those with whom they were closely associated, both professionally and in their personal lives.

In “the traits, qualities and characteristics of highly effective lawyers” authored by The Honorable Larry Boyle, U.S. District Court Magistrate, it is stated that “a lawyer cannot separate the qualities of his or her practice of law from the qualities of his or her life. It is important to be well balanced.” As the author observes, this provides insight into the traits of highly effective lawyers.

This trait is one that was possessed by each of these 25 lawyers.

It has been said, time and time again, that we owe a great debt to those who have come before us. In this case, given the contributions of these lawyers, that debt is enormous. Let us pledge to repay it in kind so our legacy can at least be equal to that left to us by this esteemed group of lawyers.

A complete listing of those deceased Idaho Judges and Attorneys can be found on page 57 at www.isb.idaho.gov/pdf/advocate/issues/adv11marapr.pdf.

The lives of these lawyers have had a profound influence on those with whom they were closely associated, both professionally and in their personal lives.

About the Author

John Barrett focuses his practice in the area of workers' compensation, representing insurance companies and self-insured employers, providing insurance coverage analysis for clients, and most recently acting as an arbitrator in personal injury and disability cases. Mr. Barrett was chairman of an ad hoc committee formed to review federal and state Americans with Disabilities Act (ADA) laws and draft amendments to effect the ADA under Idaho law.

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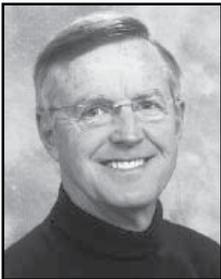
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Photo by Dan Black

Carol McDonald will retire in mid-May after 24 years working for the Idaho State Bar.

CAROL McDONALD LEAVES LEGACY: A FAIR AND IMPARTIAL BAR EXAM

Dan Black
Managing Editor, The Advocate

On Test Day, Admissions Director Carol McDonald arrives early to make sure everything is in order. Before the aspiring attorneys file in, and before every Bar exam since 1988, Carol makes time for a private moment: “I pray that those who are prepared, will pass, and that everyone will behave themselves.”

That simple aspiration has worked out. Carol’s towering competence and precision helped as well. She’s been there, always prepared and watching as two decades of attorneys approach the all-important milestone.

Everything about the bar exam needs to be perfect. And when testing season rolls around, the one with a calm, collected demeanor – that’s Carol.

Working with people in the legal profession has been the highlight. “I have a strong allegiance to the legal profession,” she said. “I have met the finest people in the legal community.”

She has lawyers in her family and worked for two Justices of the Peace before working for the Idaho State Bar.

While at the Bar, Carol has worked with the Council of Bar Admissions Administrators, an elite cadre of exam administrators from around the country. She served as chair in 1999-2000, when the organization celebrated its 25th anniversary. She said one of the most rewarding parts of her job has been developing lasting friendships in the legal profession and with her counterparts in other states.

Carol has seen the bar exam change over the years to become more standardized, with fewer essay questions, increased character and fitness monitoring, accommodate those with disabilities and examinations that allow computerization. She was in on the ground floor of the Uniform Bar Exam, which will be offered for the first time in Idaho next February.

Carol started at the Idaho State Bar in 1987 as office coordinator for the pro

bono program, but took a job the next year as membership and admissions coordinator. The position morphed over the years to Admissions Director.

Getting things to run smoothly, she said, has meant both staying current on issues for bar examiners and paying tremendous attention to detail. These requirements were a perfect fit for Carol.

After each exam gets graded, there is a “grader’s dinner” and last month the volunteer graders recognized Carol for her service, with the president of the Bar giving special praise.

She said retirement will include spending more time with her grandchildren, traveling and serving as a board member for the Idaho Museum of Mining and Geology. She is also looking forward to more kayaking, both in lakes and on the ocean.

“It’s tough saying goodbye to people,” Carol said. “I’d like to thank everyone I worked with for all the support and the camaraderie.”

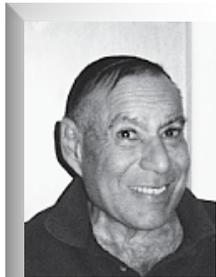
IN MEMORIAM

Jack Richard Hathaway 1941-2011

Jack Richard Hathaway died on Jan. 19, 2011. Jack grew up in Chicago before entering the military in 1962. He attended Sonoma State University and received a BA and Masters in Psychology. Jack moved to California in 1970 and spent 10 years working with the San Diego County Probation Department, Juvenile Division. In 1981 he moved to Idaho and worked as a probation and parole officer in Lewiston. In 1984, Jack attended the University of Idaho and graduated in 1986, passing the bar exam in 1987 and worked in Lewiston before moving to Orofino. He is survived by his children James W. Hathaway, Vivian McKinney, Amber Oser; mother Marvel F. Hathaway; brother David and wife Diane.

Paul Levy 1950 -2011

Paul Levy died Feb. 17. Born in New York, Paul grew up in India and New Jersey. He graduated Magna Cum Laude from Yeshiva University before attending Georgetown Law School, graduating with honors. Mr. Levy moved to Idaho in 1976, where he married Marcia Bondy and had two daughters, Sari and Rebekah. He practiced law in Boise for nearly 20 years at Boise Cascade. He later started a private law practice before retiring in 1997. He was recognized by the United Way for his outstanding pro bono contribution to the community. Survivors include his wife, Shelly Levy, daughters Rebekah and Sari Levy, stepdaughter Lori



Paul Levy

Gayle, stepson Andy Levis, brother Philip Levy and Father Harris Levy.

James A. McClure 1924 - 2011

James A. McClure, a longtime public servant and U.S. Senator from Idaho, died Feb. 26, 2011. Jim grew up in Payette and spent his time at his grandparents' farm in Council.

During WW II, he earned college credits in the Navy's V-5 aviator program. He later joined the Navy and was stationed in Pocatello, Des Moines, Tulsa, Minneapolis and Pensacola.

After the war, Jim returned to Moscow and graduated from the University of Idaho Law School in 1950. While there, he met Louise Miller, a fellow singer with the Vandaleers and they married. Jim joined his father's law practice in Payette, where, as the youngest attorney in town, he was expected to become prosecuting attorney which he did.

Jim later served in the Idaho Senate, (1961-1966), the U.S. House of Representatives (1967-1972) and the U.S. Senate (1973-1990). As a supporter of the arts, Jim served as a member of the board of the Kennedy Center for the Performing Arts and the U of I's Lionel Hampton Jazz Festival.

With Louise, he conceived and sponsored an exhibit of work by Idaho artists at the Smithsonian in Washington, D.C., the first-ever state art exhibit at the Smithsonian. Both he and Louise were recognized for their efforts last fall with an Idaho Governor's Award for Lifetime Achievement in the Arts.



Sen. James A. McClure

Jim lived his convictions by being a role model for life-long learning, quietly supporting the educational endeavors of many individuals and publicly advocating for the sustainability, advancement of, and access to, higher education.

Jim suffered a debilitating stroke in December, 2008. As soon as his recovery allowed him to come home, he did. While his body was failing his spirit didn't waiver.

Jim was preceded in death by his parents, his oldest brother Bob who died in WWII and his brother Ray who died last October. He is survived by his wife, Louise, his sister (Jean Parton), two sons Ken and David, and daughter, Marilyn.

The family suggests memorial donations could be made to the James A. and Louise M. McClure Center for Public Policy at the University of Idaho, to the Idaho Youth, or other charities.

Emmett Michael Corrigan 1980- 2011

Emmett Michael Corrigan, Meridian, died on March 11, 2011. Emmett married Ashlee Harmon in 2004 in the Mount Timpanogus, Utah L.D.S. Temple. They had five children, Bostyn, Bailey, Teage, Kaleeya, and Tytus. Emmett graduated from Centennial High School, received his B.S. from Utah State University and completed his JD in Law from Gonzaga University in Spokane, Washington. He played football at Centennial High and Ricks College. He joined a firm in Boise and specialized in bankruptcy and criminal defense law. Emmett loved skiing, outdoor sports and barbecue.



Emmett M. Corrigan

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OF INTEREST

Internet law expert joins Zarian Midgley legal team

Kennedy Luvai has joined Zarian, Midgley and Johnson, PLLC (Zarian Midgley) as the firm's newest associate. Luvai has significant experience in matters involving Internet law, patents, trademarks and defamation. His practice at Zarian Midgley will focus primarily on intellectual property litigation and commercial litigation.



Kennedy Luvai

Luvai is a registered patent attorney who is also licensed to practice law in the states of Oregon and Washington. He earned his Bachelor of Science in Computer Science and Minor in Mathematics from Brigham Young University and his Juris Doctor from the University of Oregon.

Prior to joining Zarian Midgley, Luvai was associated with the law firm of Lindsay Hart Neil and Weigler in Portland, Oregon.

Martelle Law Offices, LLC is now Martelle, Bratton & Associates

Martin Martelle is proud to welcome Sarah Bratton as partner. Ms. Bratton has an LL.M. in Taxation from the University of Washington and is an active member of



Martin Martelle



Sarah Bratton

NACBA; the only organization dedicated to consumer bankruptcy issues.

Martelle, Bratton & Associates specialize in tax problem resolution, complex business and personal bankruptcy (both Chapter 7 and 13), and are very well versed in discharging taxes and handling bankruptcy.

Ms. Bratton will also be handling mortgage modifications and other foreclosure alternatives.

The firm is located in Eagle, Idaho. Mr. Martelle or Ms. Bratton may be reached at (208) 938-8500.

Idaho attorney Tom Banducci to teach law in Eastern Europe

Banducci Woodard Schwartzman PLLC founding partner, Tom Banducci, has been selected as a visiting professor for the Center for International Legal Studies and will be teaching law at Belarus State University in Minsk, Belarus in Spring, 2011.

Through its Senior Lawyers' Program, the Center for International Legal Studies places experienced Common Law practitioners in visiting professorships at institutions in East Europe and the former republics of the Soviet Union.

More than 290 senior lawyers have taken up appointments in the first three years of the program. The Center, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, offers short-term appointments to as many as 80 senior lawyers a year. A "senior lawyer" has at least 20 years of significant practice experience in the area in which he or she proposes to lecture.

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Tom Banducci

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Photo by Dan Black

Student “attorneys” listen to instructions from the judges, (Idaho Supreme Court Justice Roger Burdick, Chief Justice Daniel T. Eismann and Russ Heller). Logos School won the state title in a close championship round. From left are Logos team members Will Isenberg, Sarah Nadreau, and Emily Carlson. From Coeur d’Alene High School is Taylor Stewart.

MOCK TRIAL: POISE AND PREPARATION PAY OFF

Well-versed in the case, their arguments ready, over 200 smartly-dressed high school students fill the Ada County Courthouse hallways. Mock trial has reached its zenith. Like all state finals for school competitions, tension in the air breaks only occasionally to nervous laughter. Nerves aside, coaches and students will tell you what really matters – preparation.

In the courtroom, these teenagers show nothing but confidence. Pacing the well, the mock attorneys make opening arguments, draw out their witnesses, cross-examine, make objections, responses and closing arguments. They know the case and the procedures inside and out.

For 24 teams across Idaho, it was another year of mock trial, part of the Idaho Law Foundation-sponsored Law Related Education program. The March 23 to 25 event was a culmination of a tremendous amount of effort and coordination among attorneys who serve as volunteer coaches or judges, teachers, and Idaho Law Foundation staff. The case was written last year by Law Related Education Director Carey Shoufler along with a group of volunteer attorneys including Mike Fica, Greg Dickison, Ted Tollefson, and

Brenda Bauges. This year’s case writers also included Gary Brush, an accident reconstruction expert with the Idaho State Police who, among other invaluable assistance, recreated and photographed the accident scene for the case.

The mock trial committee wanted a contemporary case that would explore issues familiar to teens. The simulated trial was a civil case that included allegations of texting while driving and an accident between a car and bicycle. Some schools offer mock trial as an extra-curricular activity, but budget cuts in recent years have made it more difficult for some teams to make it to competitions. While the coaches, (each team must have a teacher and attorney coach), work with the students, a small army of 104 volunteer “judges” brush up on the case, the mock trial rules and what’s allowable as evidence.

The preparation and competition help students understand the legal process and help improve proficiency in basic skills such as listening, public speaking, reading, and reasoning.

This year 24 teams participated in one of three regional competitions held

in Lewiston, Pocatello, or Caldwell. Because of the decreased number of teams, all teams were invited to state competition and 21 of the 24 teams decided to participate. The state competition also included four quarterfinal rounds over two evenings.

“In past years, we have invited a total of 12 teams to participate in two quarterfinal rounds,” said LRE Director, Carey Shoufler. “This year we doubled the number of teams participating and the number of rounds for the state competition. It was a lot of work, but I think it made the competition more meaningful to the teams who participated. Overall, I think it was a great success.”

After four quarterfinal rounds, four teams moved on to the semi-final rounds held at the Federal Courthouse in Boise. The teams included: Logos School from Moscow, Coeur d’Alene High School, Lewiston High School, and Vallivue High School. The final competition was held at the Idaho Supreme Court between Logos and Coeur’ d Alene Logos won the championship round in a very close match.

— Dan Black

MOCK TRIAL 2011

Participating Teams

Blackfoot High School
(2 teams)
Boise High School
(2 teams)
Caldwell High School
Centennial High School
(2 teams)
Coeur D'Alene High
School (2 teams)
Kimberly High School
(2 teams)
Lewiston High School
(2 teams)
Logos School (2 teams)
Mountain Home High
School (2 teams)
New Plymouth High
School
Orofino High School
Rocky Mountain High
School (2 teams)
The Ambrose School
(2 teams)
Vallivue High School
(2 teams)

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Mock Trial Committee

Brenda Bauges
Dave Lloyd
Gary Brush
Greg Dickison
Mike Fica
Ted Tollefson

Mock Trial Volunteers

Jonah Shoufler
Riley Burns
Tori Talbutt
Trapper Stewart

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Pocatello Regional

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Dave Bagley
Dorothy Fica
Jeff Cronin
Joan Thompson
Judge Stephen S. Dunn

Lewiston Regional

Adam Green
Edward J. Lawlor
Edwin L. Litteneker
Jamie Shropshire
John F. Porter
Judge Mike Griffin
Julie S. Kane
Kinzo Mihara
Nicholas Lepire

Caldwell Regional

Anne-Marie Kelso
Barbara J. (Bobbi) Richart
Brent Gunnell
Chris Christensen
Dave Lloyd
Dave R. Auxier
Elizabeth K. Allen
Judge Patrick Owen
Judge Ronald Wilper
Judge Susan Elaine Wiebe
Kenley E. Grover
Kristin Heckenlively
Kyra D. Wittmann
Lance L. Fuisting
Laura Mattern
Michael Florian
Patrick Taurel
Rhea Safford
Sheila McGregor
Shelli D. Stewart

State Competition

Becky Jensen
Brad Andrews
Brent Ferguson
Brent Marchbanks
Cam Behrens-Shoufler
Chief Justice Daniel T.
Eismann
Christina Coats
Colleen D. Zahn
Cynthia Yee-Wallace
Edith L. Pacillo
Emil Berg
Erin J. Wynne
Gary Brush
Glenda Talbutt
Greg Gleason
Heather McCarthy
Jana Gómez
Jason Monteleone
Jeff Simmons
Jeff White
Jennifer Schrack Dempsey
Jessica Lorello

Jill M. Twedt
Joanne Rodriguez
Joanne Station
Jodi Nafzger
Joseph C. Miller
Judge Cheri Copsey
Judge Christopher Bieter
Judge Daniel Steckel
Judge James Cawthon
Judge Michael Reardon
Judge Mike Wetherell
Judge Theresa Gardunia
Judge Stephen S. Trott
Justice Jess Walters
Justice Roger Burdick
Katie Garcia
Kenley E. Grover
Kevin A. Griffiths
Kierstin Fiscus
Kimberlee Irby
Kitty Fleischman
Laura A. Chess
Linda Gram
Lynn Norton
Lynne Lamprecht
Margy Lundquist
Marie Callaway
Mary Hansen
Megan Goicoechea
Melissa Maxwell
Mikela French
Paula Haroldsen
Phil Tuttle
Richard Alan Eppink
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Walt Donovan
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Stephen C. Smith, former Chairman of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings in Washington, Idaho, Hawaii, and Guam.

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PATRICK GEILE INTEGRATES STEADY PRO BONO INTO HIS REGULAR PRACTICE

What is it like being a pro bono hero? Not too harrowing, reports this bankruptcy lawyer

Dan Black
Managing Editor, The Advocate

There are many ways to satisfy the pro bono requirement outlined in Rule 6.1. Some lawyers want to help a family in crisis while others are willing to take a criminal defense case, no matter how complex or lengthy. Truly, they are heroes.

Patrick Geile takes a low-key approach. A bankruptcy attorney, he said he likes to keep a single pro bono case open to mix in with his regular workload. A typical bankruptcy takes about six months to close. When Patrick closes his pro bono case, he opens another. He gets the satisfaction from pro bono, but at his own pace.

Patrick set up his pro bono strategy with an insider's perspective. During law school, he served as an intern at the Idaho Law Foundation's Idaho Volunteer Lawyers Program (IVLP). He screened clients and prepared material for volunteer attorneys. He saw that some cases were complex and gut-wrenching, while others were fairly straight-forward. When he joined the Bar, he knew pro bono would be a part of his professional life.

Now, he chooses pro bono clients from among the people he sees in his own practice and sends them to the Idaho Volunteer Lawyers Program for screening and simple case preparation. "The clients get told 'he's doing it for free, so be on time, be organized,'" Patrick said. "They do a good job."

Pro bono consistently adds to job satisfaction, Patrick said, and bankruptcy cases are perhaps less "emotionally draining" than a family law or criminal defense case. Of course, bankruptcy cases can be complex, lengthy and emotional, but less so. Patrick found a good fit.



Photo by Dan Black

Patrick Geile talks about a pro bono strategy that works for him.

"It makes you feel good to help others. It's a little vacation from worrying about the business side of things. They are always the best clients."

Idaho Volunteer Lawyers Program's legal director, Mary Hobson, said the Bar's pro bono responsibilities could be satisfied with legal services for those who can't afford an attorney, no matter what type of law. She said Patrick, like many volunteer attorneys, is an unsung hero. He smoothly integrates pro bono cases into a regular work schedule, which helps prevent burnout.

A partner at Foley Freeman, LLC, in Boise, Patrick said his firm has been very supportive.

It's a little vacation from worrying about the business side of things. They are always the best clients.

"You grant your clients a great deal of relief and you help them move forward," he said.

To volunteer, contact IVLP at 334-4500.

Upcoming CLEs

May

May 12

Current Issues in Immigration Law

Co-Sponsored by the Business and Corporate Law Section and the International Law Section

1:00 – 3:00 p.m. (MST) at the Ameritel Inn, Pocatello

2.0 CLE credits

May 13

First or Next Wrongful Death Case

Sponsored by the Idaho Law Foundation

8:30 a.m. – 9:30 p.m. (MST) at the Idaho Water Center, Boise / Webcast

1.0 CLE credits ~ RAC*

May 18

Drafting Your First or Next Employment Contract, Non-Competition Agreement and Employee Handbook

Sponsored by the Young Lawyers Section

8:30 – 9:30 a.m. (MST) at the Law Center, Boise / Webcast

1.0 CLE credits ~ RAC*

May 20

Employment Benefits in Divorce in Community Property States and Elder Issues in Family Law: Ideas for Idaho and Idaho Review

Sponsored by the Family Law Section

9:00 a.m. – 4:30 p.m. (MST) at the Owyhee Plaza, Boise

5.5 CLE credits

June

June 15

Maintaining an Ethics Law Practice

Sponsored by the Young Lawyers Section

8:30 – 9:30 a.m. (MST) at the Law Center, Boise / State-wide webcast

1.0 CLE credits of which 1.0 is ethics ~ RAC*

June 24

Water Law Essentials and Update for Business Lawyers and Marketing to and Representing Generation Y Clients

Sponsored by the Business and Corporate Law Section

1:30 – 3:30 p.m. (PST) at North Idaho College, Student Union Building, Blue Creek Room, Coeur d'Alene

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July

July 13 – 15

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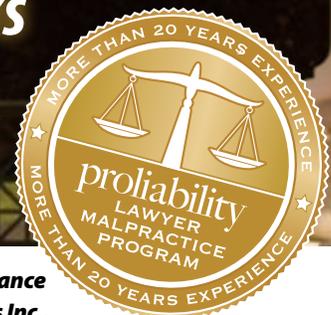
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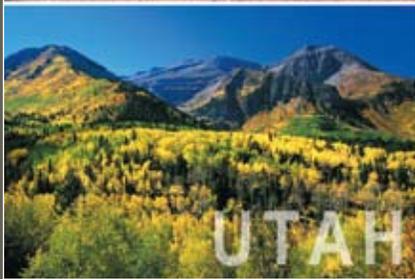


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