



The Advocate

Official Publication
of the Idaho State Bar
Volume 56, No. 3/4
March/April 2013

CC&Rs and Sustainability 26

Fracking Within the Law 31

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Animal Law Rebuttal 51

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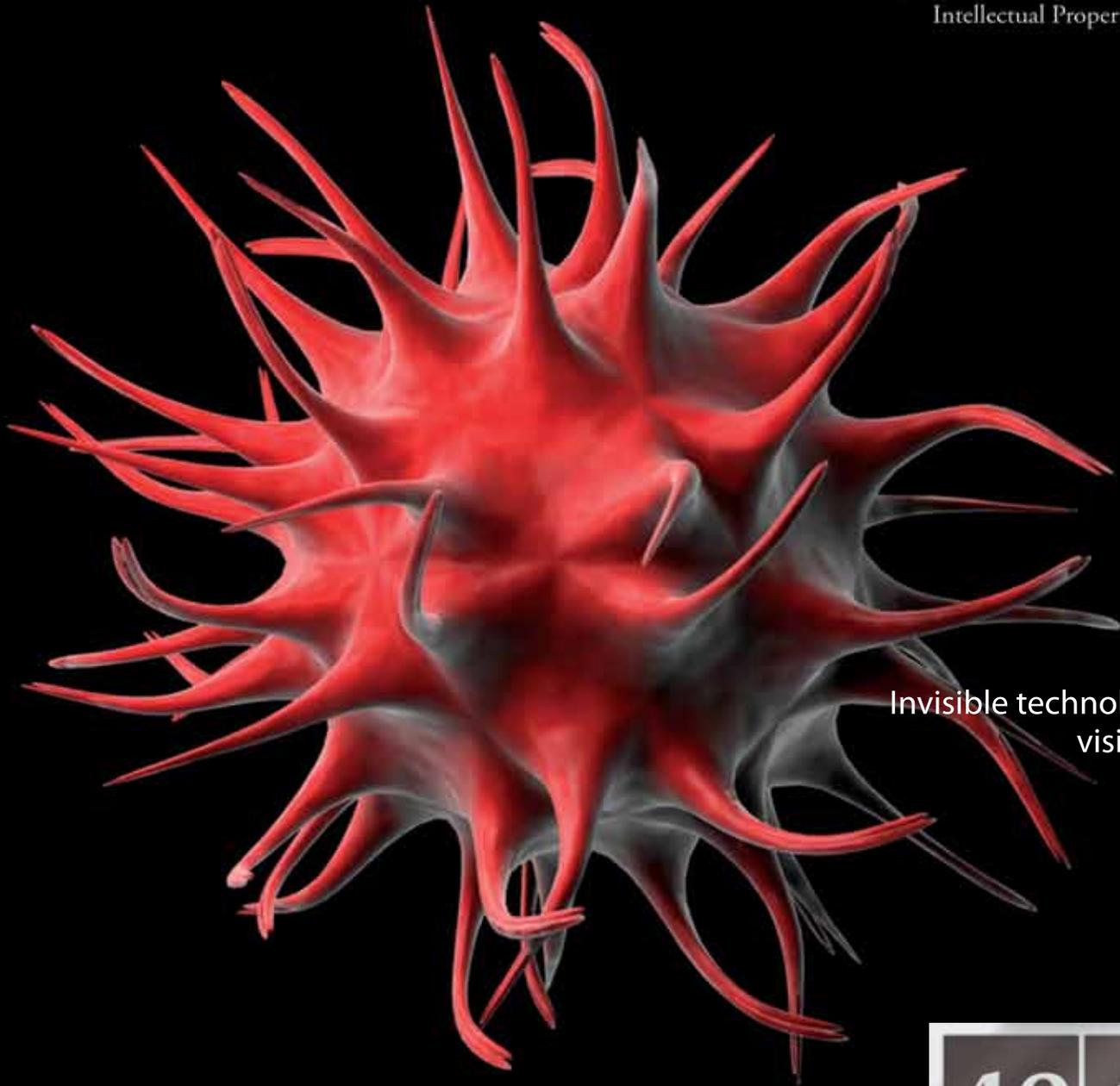
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On the Cover

This photo by Boise attorney Molly O'Leary is of the Boise River and was taken in February of 2006. This work is called "Boise River Drops." © 2006 - Molly O! LLC

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

Editors

Special thanks to the March/April editorial team: Jennifer M. Schindele, Denise Penton and Gene A. Petty.

May issue's co-sponsors: Family Law & Alternative Dispute Resolution Sections.



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~ Brodie Tyler

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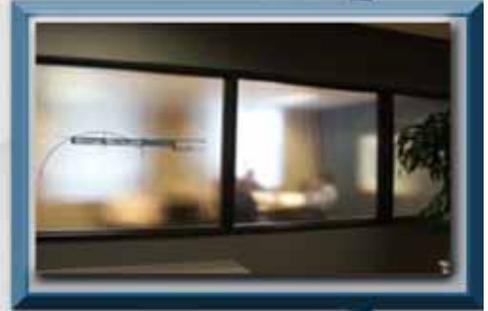
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Sun Valley – Sun Valley Resort, 200 Trail Creek Road

March 15

Annual Flagship Replay: Digital Forensics for Attorneys

Sponsored by the Idaho Law Foundation

8:30 a.m. – 2:30 p.m. (MDT)

5.0 CLE credits

Idaho Falls – Hilton Garden Inn, 700 Lindsay Blvd.

March 29

The Modern Landscape of Agricultural Investment and Land Use in Idaho

Sponsored by the Real Property Section

8:30 a.m. – 4:45 p.m. (MDT)

Sun Valley – Sun Valley Resort

7.0 CLE credits (RAC)

April

April 12

Annual Flagship Replay: Digital Forensics for Attorneys

Sponsored by the Idaho Law Foundation

8:30 a.m. – 2:30 p.m. PDT

5.0 CLE credits

Sandpoint – Best Western Plus Edgewater Resort
56 Bridge Street

May

May 2

CLE Program Video Replay

Sponsored by the Idaho Law Foundation

8:30 – 11:45 a.m. (MDT)

3.0 CLE credits of which 1.0 is ethics (RAC)

Boise – Law Center

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LOYALTY... ATTORNEY MUST BE CANDID TO PROTECT THE CLIENT'S INTEREST

Paul W. Daugharty
President, Idaho State Bar
Board of Commissioners

I was looking at the cover photograph from the January 2013 edition of *The Advocate* and couldn't help but think about my lab Tank. Tank loved to hunt. He loved the water and he loved the sound of ducks dropping on a pond. He was loyal. Better yet, he was a trusted hunting companion who never complained and didn't talk too much. For those of you who hunt, you know those are two qualities that are very hard to find.

Needless to say, when I got the call from the vet on December 14, 2012 that Tank had died on the operating table I was heartbroken. Having to break the news to my son, Jackson, was even harder. After all, the bond between a boy and his dog is legendary. They make movies about it.

As lawyers we necessarily share a similar bond with our clients. We are trusted advisors and counselors. Unfortunately, some clients don't fully understand or appreciate what the attorney-client relationship means or how it is limited by the Rules of Professional Conduct.

We have all had those clients who believe we should only speak when spoken to and we should only say what we think the client wants to hear. For young attorneys the ability to recognize the pitfalls associated with that type of relationship can be difficult to achieve.

Oftentimes the client doesn't fully understand the consequences of their actions. As lawyers we have a duty to "abide by a client's decisions concerning the objectives of representation." See Rule 1.2 of the Rules of Professional Conduct.



The memory of the author's trusted hunting dog, Tank, evokes the special bond between attorney and client, one in which trust and loyalty sometimes dictate taking a difficult path.

However, we can limit the scope of our representation if the limitation is reasonable under the circumstances and we get the client's informed consent. Additionally, we can't counsel a client "to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." See Rule 1.2 (c) and (d) of the Idaho Rules of Professional Conduct.

This is where the lawyer's role as counselor and advisor becomes so important. For those of you who have been placed in this position, you understand how difficult it can be. After all, you have a client who believes he or she knows what is best for them and you have to risk losing the client because you know the course of action is not in their best interest. As lawyers we have to remember that the duty we have to our client is greater than the risk involved. Rule 2.1 of the Rules of Professional Conduct provides in pertinent part that "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In

rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Ultimately we have a duty to provide our clients with candid advice. We have to understand that sometimes in the heat of battle a client can lose sight of the consequences of their actions. Sometimes we as lawyers can lose sight of that fact. We need to understand that winning in a courtroom isn't always a victory and sometimes the best course of action for our clients is walking away from a position that is technically correct but likely to produce adverse results. I know it may not always be easy, but then again the practice of law is not easy.

About the Author

Paul W. Daugharty is in solo practice in Coeur d'Alene where he practices in the areas of business, corporate, real estate and civil litigation. He earned his law degree from Gonzaga University School of Law and is a member of the Idaho and Washington State Bars. Paul has three children: Katherine, a junior at University of Idaho; Emma, a Senior at Lake City High School; and Jack, a Freshman at Lake City High School.



NEWS BRIEFS

Board of Commissioners election notice

Nominations for 2013 ISB commissioner are due by April 2, 2013. Attorneys in the 1st, 2nd and 4th districts will be electing new representatives to the Idaho State Bar Board of Commissioners this spring.

The new commissioners will replace Paul Daugharty, Coeur d'Alene and Molly O'Leary, Boise. Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the 1st and 2nd Districts must reside or maintain an office in the 2nd District.

Commissioners of the Idaho State Bar, the elected governing body of the Bar,

serve for three years, beginning on the last day of the ISB annual meeting following their elections. The Board of Commissioners is charged with regulating the legal profession in Idaho, which includes the testing, admission, and licensing of attorneys, overseeing disciplinary functions and administering mandatory continuing legal education requirements.

Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The executive director must receive nominations no later than the close of business on April 2, 2013. A nominating petition form may be obtained by calling the office of the executive director

at (208) 334-4500 or on the ISB website www.idaho.gov/isb.

Ballots will be mailed to all members eligible to vote in the 1st, 2nd and 4th districts on April 15, 2013. All ballots properly cast and returned to the executive director will be counted by a board of canvassers at the close of business on May 7, 2013.

New Admittees Invited

The Young Lawyers Section invites new admittees to attend a reception at 4 p.m. on May 3 at the Taphouse Pub on 760 W. Main. The reception is hosted and meant to congratulate new members of the Idaho State Bar.

LETTER TO THE EDITOR

Women judges

Re: "Are We There yet?!? A Statistical View of Equality for Women in Idaho" by Nicole Hancock in the January, 2013 issue of *The Advocate*

Dear Editor:

I read with great interest Ms. Hancock's article concerning women in the Idaho judiciary. By this letter I hope to add some additional understanding about the topic.

During the 2000-2003 timeframe there were 15 judicial openings (Supreme Court, Court of Appeals and District Court) in Idaho. During this time, women comprised 13.4% of the applicants and

women were selected for two of the positions; a 13% selection rate. The next five years did show a change. During the 2003-2008 timeframe there were 21 judicial openings, (as defined above), in Idaho. Less than 3% of the applicants were women. It is therefore not surprising that "none of these positions were filed by a woman."

How things changed during the 2009-2012 period! During this time there were nine judicial openings and women comprised over 21% of the applicants and women were selected for 33% of the openings. In this respect the article is correct "... there is a silver lining" i.e. when

women apply there is a greater likelihood of a woman being selected.

The Idaho Judicial Council agrees that it is critical that women apply for judicial positions. As shown by the statistics, when women do apply they stand an excellent chance of being selected for the judicial position. Since the Idaho Judicial Council always strives to select the most qualified applicants, the people of Idaho will be well served by their Idaho judge. . . be it man or a woman.

James D. Carlson
Executive Director,
Idaho Judicial Council

Young Lawyers Say Thanks

The Young Lawyer's Section would like to extend a thank you to all who helped us in our Attorneys Against Hunger fundraiser for the Idaho Food Bank. We would especially like to thank the law firms of Hawley Troxell and Moffett Thomas Barrett Rock & Fields for their continued support of Attorneys Against Hunger. As Premier Sponsors, their generosity was instrumental in this year's success. Both firms exemplify a commitment to legal profession, and to the well-being of the Boise community.

The Section would also like to thank Ritche Eppink, past chair of the section, for his participation in the Challenge. Ritche spent a week living on about four dollars a day. Ritchie's vision and reform transformed Attorneys Against Hunger into an event raising both awareness and funding to help Idaho's less fortunate.

We would also like to thank Strindberg & Scholnick, LLC and Ben McGreevy for their generous contributions. Thank you for your support.



2012 - THE IDAHO LAW FOUNDATION YEAR IN REVIEW

Diane K. Minnich
Executive Director, Idaho State Bar

The Idaho Law Foundation continues to support the public's access to and understanding of the legal system and enhance the competency of practicing lawyers and judges through educational programs. In 2012, Foundation programs provided services to thousands of Idahoans, including students, lawyers, individuals, families and entities providing services to the low income population.

Law Related Education (LRE)

Started in 1985 as a public service program of the Idaho Law Foundation, Idaho's LRE Program is part of a national civics education effort that began in 1978 when Congress passed the Law Related Education Act. Whether working with young people or adults, LRE programs offer participants an avenue to understand the law, court procedures, and our legal system and recognize the rights and responsibilities of citizenship while building positive relationships with members of Idaho's legal community. Program offerings for LRE include:



Mock Trial: Each year, participating teams from high schools all across Idaho prepare and present a hypothetical legal case in a simulated courtroom competition. In 2012, 142 students and 88 volunteers participated in this annual event. Logos School from Moscow represented Idaho at the national mock trial competition and placed 5th, the highest an Idaho team has ever placed.

Turning 18 in Idaho: This publication helps young people understand their rights and responsibilities as they reach the age of majority. Classroom sets are available free of charge to Idaho high schools. In 2012, the Law Foundation distributed over 4,500 copies of the magazine.

Logos School from Moscow represented Idaho at the national mock trial competition and placed 5th, the highest an Idaho team has ever placed.

Citizens' Law Academy: Citizens' Law Academy is a free adult education program that offers a glimpse into the law, our legal system, and the work of lawyers and judges. In 2012, CLA was offered in Boise, Pocatello, and Idaho Falls to 84 participants. LRE is also in the planning stages for an offshoot of CLA, the New American Law Academy, which will be offered to refugees in the Boise area to help them understand the legal system in their new country.

Idaho Volunteer Lawyers Program (IVLP)

IVLP continues to provide legal services to low-income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, clinics and workshops, IVLP served over 1,400 individuals last year. The program works with Idaho Legal Aid Services, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

The Idaho Pro Bono Commission, chaired by Idaho Supreme Court Justice Jim Jones, continues to develop and implement strategies to maximize the involvement of attorneys in pro bono service and to explore the development of means and incentives to support attorneys in providing pro bono services. At the recommendation of the Pro Bono Commission, the Idaho Supreme Court adopted a new rule I.R.C.P. 11(b)(5) Limited Pro Bono Appearance, that allows attorneys to work on a particular task rather than accept total representative of a client. Local pro bono commit-

tees are now active around the state, with a menu of options for how to involve attorneys in pro bono work.

Table with 3 columns: Program, 2011, 2012. Rows include Calls received, Matters handled by volunteer attorneys, Hours donated by volunteer attorneys, Donated services value, and Legal resource, bankruptcy help line calls.

Interest on Lawyers Trust Accounts (IOLTA)

Since the first IOLTA grants were awarded in 1985, over \$6.2 million has been granted to law related programs and services throughout Idaho. The organizations funded in 2012 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, ILF Legal Resource Line, Idaho YMCA Youth Government, Idaho State 4-H Know Your Government Conference, and University of Idaho law school scholarships. Funds granted for 2012 decreased 19% from 2011. Due to the sustained low interest rates, IOLTA grant funds have decreased 118% in the last 3 years. IOLTA grant recipients struggle to meet the need for services as the funds available to provide services continue to decrease.

The new trust account rules, approved through the 2011 resolution process were effective July 1, 2012. The rules changes necessitated new trust account agreements from all banks that hold Idaho attorney trust accounts. The new rules require banks to pay 70% of the federal fund rate or set up comparable rate product for IOLTA accounts. We hope that once the new rules are fully implemented, IOLTA income will begin to increase.

Continuing Legal Education (CLE)

The Foundation and the Idaho State Bar Sections offer legal education programs throughout the state. 2012 overall participation decreased slightly from 2011 mostly due to ISB Sections choosing not to webcast as many CLE programs.

ISB/ILF Continuing Legal Education		
	2011	2012
Total live program attendance	1,903	1,938
Tape/DVD rentals	691	669
Online transactions	1,046	1,219
Webcast attendance/ telephonic	1,094	361

Fund Development

Funding the programs of the Foundation, specifically IVLP and LRE, continues to be challenging. In 2012, IVLP was fortunate to receive funds from the national mortgage foreclosure settlement and IOLTA received funds from a Washington cy pres award. We appreciate the support of our donors and funders, without the support of lawyers, judges and granting organizations, the important work of the Foundation could not be accomplished.

Donations		
	2011	2012
General Fund, IVLP, LRE	\$76,179	\$81,899
Endowment Fund	\$3,300	\$3,200
Total	\$79,479	\$85,099

The Idaho Law Foundation is indebted to the attorneys that volunteer their services and donate their resources to ILF programs and activities. The mission and goals of the organization are only realized with the help and support of our members. Thank You!

Mission Statement:

The Idaho Law Foundation supports the right of all people to live in a peaceful community. Our mission is to educate all people about the role of law in a democratic society, to provide opportunities for people to avoid and resolve conflicts; and to enhance the education and competence of lawyers.

1. Enhance public understanding of and respect for the law and the legal system.
2. Provide and improve access to legal services.
3. Provide programs and services that enhance the competency of members of the Bar.
4. Aid in the advancement of the administration of justice.
5. Generate the necessary funding to fulfill the mission and goals of the organization.
6. Maintain effective administration and management of the Foundation's resources.

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Idaho State Bar 2013 Professional Award Nominations

The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2013 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

Distinguished Lawyer - This award is given to an attorney (or attorneys) each year who has distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens.

Professionalism Awards - The awards are given to at least one attorney in each of Idaho's seven judicial districts who has engaged in extraordinary activity in his or her community, in the state, or in the profession, which reflects the highest standards of professionalism.

Pro Bono Awards - Pro bono awards are presented to the person(s) from each of the judicial districts that have donated extraordinary time and effort to help clients who are unable to pay for services.

Service Awards - Service awards are given each year to lawyers and non-lawyers for exemplary service to the Bar and/or Idaho Law Foundation.

Outstanding Young Lawyer - The purpose of the award is to recognize an Idaho State Bar young lawyer who has provided service to the profession, the Idaho State Bar, Idaho Law Foundation, and to the community and who exhibits professional excellence.

Section of the Year - The Idaho State Bar Practice Section of the Year Award is presented in recognition of a Section's outstanding contribution to the Idaho State Bar, to their area of practice, to the legal profession, and to the community.

Recipients of the awards will be announced in May. The Distinguished Lawyer, Outstanding Young Lawyer, Section of the Year and Service Awards will be presented at the annual meeting. Professionalism and Pro Bono Awards will be presented during each district's annual resolutions meeting in the fall.

Award nominations should include the following:

- Name of the award
- Name, address, phone, and email of the person(s) you are nominating
- A short description of the nominee's activity in your community or in the state, which you believe brings credit to the legal profession and qualifies him or her for the award you have indicated
- Any supporting documents or letters you want included with the nomination
- Your name, along with your address, phone, and email

You can nominate a person for more than one award.

The nomination deadline is March 29, 2013. Submit nominations to:
Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701,
fax (208) 334-4515, dminnich@isb.idaho.gov.

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COME SIT BY MY FIRE¹—

A WELCOME BY THE ENVIRONMENTAL AND NATURAL RESOURCES SECTION

Andrea L. Courtney

A poet who needs no introduction, Shel Silverstein, begins his *Where the Sidewalk Ends* with “The Invitation.” On behalf of the Environmental and Natural Resources Section, I extend to you the same Invitation: “If you are a dreamer, come in.”²

The E&NR Section offers a little something for everybody. We invite you to join us. We come from a variety of practices (corporate, non-profit, government, tribal, litigation, regulatory, etc.). Our members hail from all over Idaho and other states including Washington, Oregon, Utah, and Washington, D.C. Our members hike, camp, ski, fish, raise animals, garden, hunt, rock-climb, raft, run with dogs, and push strollers through parks. Not surprising, we share an interest in the environment and natural resources.

While we enjoy CLEs that span wolf delisting, pricing for wind energy along the Columbia Basin, land trusts, agricultural revisions to local codes, and topical cases like *Sackett v. EPA*, we are also committed to giving back to our communities. Last spring we planted hundreds of willow tree starts along the Boise River in cooperation with Idaho’s Trout Unlimited. This spring we are guest-teaching environmental topics in various elementary, junior high and senior high classes.

We also invite you to read this issue of *The Advocate* and consider its thought-provoking content. Our authors have some flax-golden stories to share. Nick Warden intrigues us with a discussion about a recent Ninth Circuit decision regarding man-made wildfire damages.

This spring we are guest-teaching environmental topics in various elementary, junior high and senior high classes.

Not only did the Ninth Circuit uphold substantial economic damages, but it also upheld even larger “intangible economic benefits.” Find out what that means for wildfire liability.

Kelsey Nunez surveys homeowner covenants, conditions and restrictions (CC&Rs) with an eye toward improving the sustainability of neighborhoods. She analyzes the common barriers to sustainable uses of private property, proposes model language for greener draft CC&Rs, and presents potential means to reform existing CC&Rs.

Ali Nelson takes us to the movies. Using Matt Damon’s latest *The Promised Land* as the backdrop, she explains natural gas hydraulic fracturing (fracking) and addresses the current rubric of federal and state laws and regulations that cover such drilling in Idaho.

Dylan Lawrence considers the impact on federal land exchanges resulting from a 2010 Ninth Circuit decision. He argues that case complicates the analysis of an Environmental Impact Statement required by the National Environmental Policy Act.

And finally, I examine the Bunker Hill Superfund Site in the Coeur d’Alene

area, in particular both the EPA’s recent Record of Decision Amendment focusing cleanup work on the Upper Coeur d’Alene Basin and how the restoration work is funded. I offer a little Idaho mining history for context.

Come in. Come in.³

Endnotes

¹ All poetic references are to Shel Silverstein’s “The Invitation” in *Where the Sidewalk Ends* 9 (1974).

² *Id.*

³ *Id.*

About the Author

Andrea L. Courtney is a Deputy Attorney General in the Natural Resources Division representing the Idaho Department of Water Resources. She is serving her second term as Chair of the Environmental and Natural Resources Section. An Idahoan who returned home by way of California six years ago, she received her J.D. and M.S.E.L. from Vermont Law School. The opinions and advice contained herein do not represent the views of the State of Idaho or the Idaho Attorney General’s Office.



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THE NINTH CIRCUIT COMPLICATES THE ENVIRONMENTAL REVIEW OF FEDERAL LAND EXCHANGES IN IDAHO

Dylan Lawrence

Over 60% of the land in Idaho is owned by the federal government, giving it one of the highest rates of federal land ownership of any of the United States.¹ The vast majority of this federal land is managed by either the Bureau of Land Management (BLM) or the U.S. Forest Service (USFS).² And, this federal land is not held exclusively in large contiguous tracts; there are smaller, isolated federal tracts located within even those areas of Idaho that are commonly associated with private ownership. Accordingly, there are situations in which a private party wishes to acquire federal land in order to accommodate a particular project. One option for acquiring federal land is through an exchange of land with the BLM or the USFS under the Federal Land Policy Management Act (FLPMA) (pronounced FLIP-muh).³

Many types of actions by the federal government — including land exchanges — are subject to the requirements of the National Environmental Policy Act (NEPA) (pronounced NEE-puh).⁴ Generally speaking, NEPA requires the federal government to analyze the environmental impacts of a proposed action before it undertakes it. While complying with NEPA is technically the responsibility of the federal government, frequently the need to comply with NEPA is triggered by a proposal or request by a private party to obtain a federal permit or use federal land. Therefore, even though the private applicant is not ultimately legally responsible for NEPA compliance, he or she has a vested interest in making sure the NEPA process is done properly. If a third party convinces a court that the federal agency's analysis does not fully satisfy NEPA, the private applicant's project may be delayed for months, or even years, while the federal government addresses the deficiencies in its prior analysis.

One legal issue that can arise during a federal land exchange is the extent to which NEPA requires the federal government to consider the environmental impacts of activities that are expected to occur after the land exchange takes place. Many types of federal actions inherently have at least the *potential* to affect the environment and are therefore typically subject to NEPA (major interstate highway construction, for example). For many of

If a third party convinces a court that the federal agency's analysis does not fully satisfy NEPA, the private applicant's project may be delayed for months, or even years.

these types of projects, the requirement to conduct the NEPA analysis is usually relatively clear.

A land exchange is different, however, because it is simply a change in ownership that culminates in the execution of a deed⁵ — an action that, in and of itself, does not impact the environment. However, in *Center for Biological Diversity v. Dept. of Interior (CBD)*,⁶ the Ninth Circuit Court of Appeals held that, when faced with a proposal to exchange federal land for private land, the federal agency must look beyond the land exchange itself and actually analyze the environmental impacts of activities that are expected to take place on the land *after it leaves the federal domain*.

One potential consequence of this holding is that it may require the private party to provide, and the federal agency to review, information which may be undeveloped and speculative at the time of the exchange proposal. In addition, for a party interested in a federal land exchange to shorten the sometimes-lengthy NEPA environmental review process, this holding could effectively take away the land exchange as a tool for expediting projects on federal lands. As a Ninth Circuit holding, the *CBD* case and its requirement to look beyond the land exchange itself in evaluating environmental impacts applies to federal land exchanges within Idaho.⁷

Legal background federal land exchanges under FLPMA

FLPMA provides BLM and USFS with authority and discretion to engage in land exchanges with private parties and state governments, as long as the proper standards are met and procedures followed. The following requirements are the most significant:

- Acquisition of lands pursuant to an exchange must be consistent with the federal

agency's overall mission and its applicable land use plans;⁸

- The federal agency must find, in its discretion, that “the public interest will be well served by making [the] exchange,” after consideration of a variety of factors, including, “better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife”⁹
- The lands to be exchanged must be located within the same state;¹⁰
- The lands to be exchanged must be of equal value, subject to an equalization procedure through adjustment of lands to be exchanged, or cash payments where the discrepancy does not exceed 25% of the value of the federal lands;¹¹ and
- The party acquiring federal land must be a U.S. citizen or a corporation subject to the laws of any state or the United States.¹²

Whether to enter into a land exchange is a purely discretionary, voluntary decision by both the private party and the federal agency.¹³ In other words, unless there is specific federal legislation requiring a particular land exchange, FLPMA does not obligate BLM and USFS to entertain a particular land exchange proposal.¹⁴

Environmental review under NEPA

Whenever a federal agency proposes to engage in a “major” action “significantly affecting the quality of the human environment,” NEPA requires the agency to prepare a “detailed statement” analyzing the environmental impacts of the proposed action.¹⁵ This is the “environmental impact statement,” or “EIS.”¹⁶ NEPA requires the federal agency to prepare an EIS that takes a “hard look” at the environmental consequences of its proposed action.¹⁷

The purpose of the NEPA process is not only to ensure that federal agencies consider the environmental impacts of their proposed actions, but also to ensure that the agency will inform the public that it has indeed considered those impacts in its decision-making process.¹⁸ NEPA exists to ensure that the federal agency follows the proper process in its decision-making, but does not dictate a particular result.¹⁹

That said, NEPA decisions may be challenged by third parties through the federal Administrative Procedure Act.²⁰ Therefore, if a court finds the agency's environmental review process to be inadequate, the agency may need to go back and redo its analysis before it may proceed with its proposed action.

State land exchanges distinguished

Like BLM and the USFS, the State of Idaho's Board of Land Commissioners is also authorized to engage in exchanges of state lands.²¹ However, Idaho does not have a statutory analog for NEPA's environmental review process, which only applies to the federal government. Therefore, the issues discussed in this article only apply to exchanges involving state land if the exchange proposal also involves federal land (for example, an exchange between the State of Idaho and the federal government, or a three-way exchange among the state, the federal government, and a private landowner).

Application of NEPA to land exchanges

A potential corollary to the NEPA requirements previously described is that NEPA should not apply to federal actions that do nothing to alter the natural physical environment.²² Accordingly, at least one federal circuit has held that issuing a federal mineral patent is not a "major federal action" which triggers NEPA's requirements, because the mere issuance of the patent, in and of itself, does not enable or authorize the patentee to actually engage in mining operations.²³ Therefore, an obvious question in the context of a federal land exchange is, to what extent does NEPA apply? In other words, does the federal agency confine its environmental review simply to the exchange of lands, or must it look "beyond" the exchange to the private party's expected use of the land after the exchange takes place?

Ironically, in *CBD*, the federal agency *did* evaluate the expected use of the federal land after the exchange. And yet, the Ninth Circuit still found the agency's

An obvious question in the context of a federal land exchange is, to what extent does NEPA apply?

NEPA analysis to be deficient. An explanation of the background and the court's reasoning follows.

In *CBD*, Asarco LLC proposed a land exchange with BLM in order to acquire fee title to unpatented mining claims that it owned on BLM lands in Arizona.²⁴ BLM had already concluded under its FLPMA review that the exchange was in the public interest.²⁵ When BLM prepared its final EIS for the exchange under NEPA, it assumed that the "foreseeable uses of the selected lands are mining-related uses and are expected to occur under all alternatives."²⁶ In other words, BLM did actually acknowledge that the likely use of the federal land after the exchange would be for mining purposes, and *actually analyzed the environmental impacts of mining the federal lands in its EIS*. One would think, therefore, that the BLM met its obligations under NEPA. The Ninth Circuit held otherwise.

In *CBD*, BLM's EIS for the proposed land exchange contained "only a single description of the environmental consequences of mining because the BLM assumed that [such environmental consequences] would be the same under every alternative."²⁷ In other words, BLM assumed that the environmental impacts of mining the federal lands would be the same, regardless of whether the mining took place after a land exchange (in which case the land would be owned in fee simple by Asarco) or without a land exchange (in which case the land would remain in federal ownership). This, in turn, was based upon BLM's assumption that "mining would be conducted in the same manner whether or not the exchange occurred."²⁸

According to the Ninth Circuit, this assumption by BLM violated NEPA because the federal Mining Act of 1872²⁹ would govern the mining operations if the lands remained in federal ownership, but would not apply if the land exchange took place and the federal lands to be mined were conveyed to Asarco.³⁰

What is important to understand in this context is that the Mining Act of 1872 is *not* an environmental law. Instead, it is a real property law that establishes the legal framework for determining who has the legal right to explore and develop minerals within federal lands.³¹ The regulation of the environmental impacts of mining is governed by myriad other federal statutory programs — such as those governing air emissions, water pollution, spills and contamination, and the storage and release of hazardous chemicals — that apply to all industries, including mining, regardless of whether they take place on federal land or private land. Accordingly, one would think that BLM's assumption that the effects of mining would be similar in either scenario was a reasonable one.

According to the court, however, under the federal Mining Act, the owner of mining claims must first submit a mining plan of operation (MPO) to BLM or the USFS before it can engage in mining operations.³² Even though the Ninth Circuit recognized that Asarco had the "right to engage in mining on the selected lands under the Mining Law even if the exchange does not proceed, based on its 747 unpatented mining and mill site claims,"³³ it assumed that the manner of that mining would be "likely to differ" because of the MPO process.³⁴ Therefore, the Ninth Circuit found the BLM's analysis failed to both take the requisite "hard look" at the environmental consequences under NEPA and to satisfy the "public interest" requirement under FLPMA, and therefore remanded the matter back to BLM for further analysis.³⁵

Conclusion

Ironically, in reversing BLM for what it perceived to be a faulty assumption, the Ninth Circuit itself based its reversal upon an assumption of its own that the Mining Act would significantly change the environmental impacts of mining the lands to be exchanged, and is in effect requiring federal agencies to speculate regarding the future uses of the property to be ex-

changed and the impacts of federal law. As the dissenting opinion in *CBD* recognized, the majority's holding means that "the BLM was obliged to determine the exact environmental consequences under hypothetical future MPOs for hypothetical future mines and compare them to the environmental consequences of hypothetical future mines not subject to the MPO requirement."³⁶

While the *CBD* case dealt with a proposed mining project, the implications of its holding are not necessarily limited to the mining context. Various federal laws, regulations, and administrative policies govern the management of federal land, regardless of its intended use. Therefore, the more general implication of *CBD* is that the federal agency must predict how the continued management of federal land under those laws, regulations, and policies would differ from the expected use of the property after the exchange takes place. It is not enough for the federal agency to simply evaluate the environmental impacts of the exchange itself, or even to evaluate the environmental impacts of the expected use of the land after the exchange takes place.

As previously explained, while NEPA compliance is technically the responsibility of the relevant federal agency, private parties whose proposals trigger NEPA have a vested interest in ensuring NEPA compliance. Private parties who propose land exchanges with the federal government in Idaho will want to make sure that the federal agency at least attempts to address the *CBD* holding in its EIS. Otherwise, the applicant risks significant delay for its project, while the federal agency evaluates these issues on remand.

Endnotes

¹ See Natural Resources Council of Maine, "Public Land Ownership by State," available at <http://www.nrcm.org/documents/publiclandownership.pdf>.
² *Id.*

³ 43 U.S.C. §§ 1701, *et seq.*

⁴ 42 U.S.C. §§ 4321, *et seq.*

⁵ 43 U.S.C. § 1716(e); 36 C.F.R. § 254.15(b)(2); 43 C.F.R. § 2201.8(b)(2).

⁶ 623 F.3d 633 (9th Cir. 2010).

⁷ 28 U.S.C. § 41.

⁸ 43 U.S.C. § 1715(b); *see also* 36 C.F.R. § 254.3(f); 43 C.F.R. § 2200.0-6(g).

⁹ 43 U.S.C. § 1716(a); *see also* 36 C.F.R. § 254.3(b); 43 C.F.R. § 2200.0-6(b).

¹⁰ 43 U.S.C. § 1716(b); *see also* 36 C.F.R. § 254.3(d); 43 C.F.R. § 2200.0-6(d).

¹¹ 43 U.S.C. § 1716(b); *see also* 36 C.F.R. § 254.3(c); 43 C.F.R. § 2200.0-6(c).

¹² 43 U.S.C. § 1717.

¹³ 43 U.S.C. § 1716(a); *see also* 36 C.F.R. § 254.3(a); 43 C.F.R. § 2200.0-6(a).

¹⁴ *Id.*

¹⁵ 42 U.S.C. § 4332(C).

¹⁶ *See generally* 40 C.F.R. Part 1502.

¹⁷ *See, e.g., Price Road Neighborhood Ass'n, Inc. v. U.S. Dept. of Transp.*, 113 F.3d 1505, 1509 (1997) (citations omitted).

¹⁸ *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted).

¹⁹ *See, e.g., Northwest Environmental Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997) (citation omitted).

²⁰ *See, e.g., Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994) (citations omitted).

²¹ IDAHO CODE § 58-138.

²² *See generally Douglas County v. Babbitt*, 48 F.3d 1495, 1505-06 (9th Cir. 1995), *cert. denied* 516 U.S. 1042, *leave to file for rehearing denied* 516 U.S. 1185. It should be noted that NEPA has an *extensive* body of case law regarding such issues as whether it applies to a particular federal action, the extent of its application, and the scope and sufficiency of the EIS. Due to this extensive body of case law and the fact that the cases address such a variety of dif-

*It is not enough for the federal agency
to simply evaluate the environmental impacts
of the exchange itself.*

ferent types of federal actions as a factual matter, it is sometimes possible for opposing parties to each find two seemingly conflicting lines of cases which support their respective interpretations of NEPA and what it requires.

²³ *State of S.D. v. Andrus*, 614 F.2d 1190, 1194-95 (8th Cir. 1980), *cert. denied* 449 U.S. 822.

²⁴ *CBD*, 623 F.3d at 636-37.

²⁵ *Id.* at 640-41.

²⁶ *Id.* at 639.

²⁷ *Id.* at 640.

²⁸ *Id.* at 641.

²⁹ 17 Stat. 91, *codified as amended* at 30 U.S.C. §§ 22, 23, 26, 27.

³⁰ *CBD*, 623 F.3d at 642-43, 645-46.

³¹ *See* 30 U.S.C. §§ 22, 23, 26, 27.

³² *CBD*, 623 F.3d at 643; *see also* 30 U.S.C. § 22; 36 C.F.R. §§ 228.4, 228.5; 43 C.F.R. § 2809.11.

³³ *CBD*, 623 F.3d at 643 (citations omitted) (emphasis added).

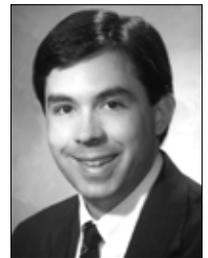
³⁴ *Id.* at 647 (emphasis added).

³⁵ *Id.* at 650.

³⁶ *Id.* at 661.

About the Author

Dylan Lawrence is an attorney with the Boise office of Moffatt Thomas, specializing in water rights, environmental law, and public lands. He has been named an "up and coming" attorney by Chambers USA in natural resources and environmental law. He earned both his B.B.A. and J.D. from the University of Texas.



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CC&Rs AND SUSTAINABILITY: EXPLORING SOLUTIONS TO PROBLEMATIC NEIGHBORHOOD RULES TO CONSERVE NATURAL RESOURCES, REDUCE POLLUTION, AND ENHANCE SELF-RELIANCE

Kelsey Jae Nunez

Many homeowners are becoming increasingly frustrated with CC&Rs that constrain implementation of decisions that save water and energy, reduce toxic pollutant use, and increase self-reliance. Common problematic provisions directly or indirectly reduce freedom to create water efficient, non-toxic landscaping, engage in home-scale food production, utilize energy efficiency measures, and generate renewable energy. To address these issues, the leadership of the Idaho and Montana Chapters of the U.S. Green Building Council (USBGC) are engaging in a public advocacy campaign. As part of these efforts, they produced the original publication, *Greening Your CC&Rs: Strategies to Improve the Sustainability of Your Neighborhood*. By identifying various barriers to sustainability and explaining how to implement preferred language, *Greening Your CC&Rs* empowers homeowners and community managers to make changes that can improve CC&Rs and enhance sustainability efforts in HOA-governed communities. What follows is a synopsis of this document.

The problematic language and preferred alternatives

Water efficient, non-toxic landscaping. More homeowners are realizing the value of replacing non-native, water intensive species of grass, trees and flowers with native and/or drought tolerant species that require less chemical inputs to thrive. Some seek to eliminate grass all together. The types of CC&R provisions that can interfere with these efforts include:

- Strict mandates on the minimum amounts and location of sod or hydro-seeded grass
- Specifications of the number, size, and type of trees and bushes
- Required sprinkler systems and usage requirements
- Prohibitions against “non-living” materials such as rock structures or rain barrels
- Giving “veto” power over landscaping plans to a committee with broad discretion



Broccoli, herbs and vegetables grow in this urban terrace garden. Many condos and even neighborhood CC&Rs prohibit environmentally sustainable practices.

Alternative language to enhance sustainability in common areas and individual lots can:

- Require the HOA to take actions to reduce water needs and chemical inputs on common areas
- Allow homeowners to participate in the appearance of the common areas
- Create general policies that encourage water efficient and native landscaping
- If the community desires a grass requirement, only require the minimum amount needed to accommodate the need for consistency and provide options for native or drought-tolerant species
- Allow cisterns, rain barrels, and other water collection devices to the extent allowed by applicable law
- Establish guidelines for fertilization and weed and pest management that reduce chemical inputs and related pollution
- Enable awareness of chemically treated areas

Gardening and food production. CC&R provisions that outright ban gardening are rare, but several provisions can inhibit some aspects of home food production. These include:

- Restrictions on the location, size and appearance of “outbuildings” or other structures, which could prohibit greenhouses and chicken coops

- Categorical prohibitions against keeping or raising farm and production animals, including poultry, goats, rabbits, bees, etc.
- Restrictions on structures like raised plant beds
- Restrictions on keeping and storing tree clippings, plant waste, and compost piles
- Requirements that garden equipment be stored out of site
- Limits on commercial use of property
- Restrictions on fencing, trellising, or wall construction
- Mandates on specific size, style and color of roofing material that effectively ban rooftop gardening

Alternative language that may work for common areas and individual lots can:

- Designate certain portions of common areas for community gardens and specify how such gardens should be managed
- Encourage water-wise, organic methods in personal gardening
- Enable homeowners to directly engage in the local food economy
- Allow greenhouses, perhaps limited to certain areas of the property and/or subject to specific architectural standards
- Allow compost bins and yard waste piles in appropriate locations
- Allow farm or production animals to the extent allowed by applicable city or county code

Energy Efficiency. Many energy efficiency measures are taken during the construction phase or focus on the interior of the house, so CC&Rs often do not have much influence. However, some provisions have a direct negative impact on energy efficiency. These effects are in addition to the energy impacts of policies that prevent water efficiency. They include:

- Mandates that outside lights be on from dusk to dawn or sunset to sunrise every day
- Bans on exterior clothes lines and similar equipment

Instead, energy efficiency can be increased with language that:

- Provides flexibility for lighting
- Encourages efficient HVAC techniques
- Eliminates prohibitions on clotheslines, or crafts only those restrictions necessary to address modesty concerns

On-Site Renewable Energy Production. Not all types of renewable energy production are available on the neighborhood or home-scale or appropriate in all locations. Yet for those locations with high potential, some CC&R provisions can get in the way, such as:

- Categorical prohibitions against exterior “energy production devices” such as solar panels and small-scale wind generators
- Onerous approval conditions for exterior energy production devices
- Mandates on specific size, style and color of roofing materials

Alternative language can instead:

- Allow the HOA Board of Directors to establish community energy generation
- Reduce or eliminate restrictions on homeowner use of renewable generation devices
- Provide reasonable guidance through the Architectural Review Committee

Catch-all Restrictions. In addition to explicit restrictions, CC&Rs usually have an additional “catch-all” prohibition against creating “unsanitary, unsightly, or offensive conditions” and creating “nuisances.” The meaning of these terms vary from person to person, and what may look like a wise, beautiful desert landscape and home vegetable garden can look “ugly” or “weird” to someone else. In these situations, homeowners may not know what they can and cannot do, and may only realize that they are violating the rules (i.e. offending a neighbor) after work has already begun. While having specific guidance encouraging sustainable practices

can reduce ambiguity, sometimes the best tools in this situation are persuasion and strength in numbers.

Reforming problematic CC&Rs: tools and action plans

While compliance with existing CC&Rs is required by law, homeowners often feel that they are stuck with their CC&Rs, either because they do not understand that an amendment process exists, or the idea of engaging in the process seems formidable. In fact, homeowners can take action in various ways. When there is vague or subjective language that requires compliance with terms like “appropriate,” “complimentary,” and “attractive,” the power of persuasion and use of demonstrative evidence can be helpful. Moving further down the scale of restrictive language are opportunities to obtain a variance. The variance process usually empowers HOAs and architectural committees to consider “circumstances such as topography, natural obstructions, aesthetics, environmental considerations or hardship.” In such cases, homeowners can attempt to persuade the powers-that-be that “environmental considerations” justify the installation of an organic garden, xeriscaping, or outdoor clothesline.

Homeowners can also navigate the existing amendment process, which all CC&Rs have. Of course, different factual scenarios will affect the success of the proposed amendment. For instance, the process of changing CC&Rs in established neighborhoods (which are governed by the HOA and voting homeowners) is not the same as in new neighborhoods (which are still owned by the developer) and requires a different strategy. Trying to change how people behave in or the appearance of common areas is often met with different resistance than changes to governance of individual lots. Even within individual lots, people may react differently to changes that will affect visible areas (front and side yards) and those that are shielded from public view (deep in the back yard). For example, it is not entirely unreasonable for someone to not want to see their neighbor’s underwear hanging out to dry, but really not care if they have a compost pile behind the trees that they cannot see or smell.

Once these important differences are understood and appreciated, the proposed language must be drafted.³ Promoting the amendment should start with seeking support from the HOA, as it is easier to succeed with leadership’s assistance. Coalition building among neighbors is also advised, as it identifies those who are ready

to vote yes and those who have to be persuaded. As more people become involved, the proposed language may be modified to accommodate varying perspectives. Note that each CC&R document contains specific procedures for scheduling the required meetings, setting the voting day/period, and distributing ballots. As strict compliance is required, consultation with an attorney is recommended.

While working with neighbors and the HOA board to achieve common ground and widely supported change is ideal, sometimes opposition prevails. Other strategies include running for a position on the HOA board to change the dialogue internally or campaigning for state legislation and local ordinances that prohibit sustainability-blocking CC&R provisions or encourage sustainability. For instance, some states and municipalities have pursued and/or enacted legislation that declares CC&R provisions that unduly restrict renewable energy or xeriscaping unlawful or that award additional “points” in the planning and zoning approval process for sustainable communities.

From creative interpretation of existing policies to amendments to statewide legislation, the opportunity for change is vast. For additional information on how you can help green the CC&Rs in your neighborhood, consider *Greening Your CC&Rs*, a comprehensive document crafted by the USGBC as part of its work to transform the built environment and make green buildings available to everyone within a generation.

Endnotes

¹ Covenants, conditions, and restrictions (CC&Rs) are common in many subdivisions and guide the use and occupancy of each individual unit and the common areas.

² Available at, <http://www.usgbcidaho.org/wp-content/uploads/2011/10/USGBC-Greening-your-CCRs-Final-version.pdf>.

³ *Greening Your CC&Rs* provides full-text model language to aid this process.

About the Author

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COMPENSATING THE PUBLIC FOR DAMAGE TO THE ENVIRONMENT: CONFLATING ECONOMIC DAMAGES WITH NONECONOMIC PROOF

Nicholas Warden

What is the value of endangered species habitat? How do we quantify damage to natural resources with no commercial value? Does the environment hold some intangible value for which the public should be compensated if it is destroyed? The Ninth Circuit grappled with these questions in a recent case involving a wildfire on federal land in southern California.¹ The Court rendered a decision upholding an award of \$28.8 million for intangible environmental damages in addition to the \$7.6 million awarded for fire suppression and restoration costs.²

In order to justify this unprecedented award the Court adopted a new hybrid category of damages I simply named “environmental damages”³ for purposes of this article. The Ninth Circuit decision to uphold an award for environmental damages creates a means for compensating the public for damages to environmental resources with no commercial value. It also creates further opportunity for the federal government to seek similar awards for damages to environmental resources on public lands. However, the Court’s decision to uphold the award also undermines longstanding principles of tort law and creates an evidentiary burden for the award of damages that is almost completely arbitrary.

The circumstances giving rise to the controversy

In 2002, a local water district hired Merco Construction Engineers, Inc. (Merco), a general contractor, to construct steel water reservoirs for a housing project in Los Angeles County. Merco subcontracted with CB&I Constructors (CB&I), a company specializing in the construction of large metal structures.⁴ The contract with CB&I contained an incentive clause awarding CB&I additional funds for early completion of the reservoirs. On the afternoon of June 5th, 2002, outside air temperatures in Los Angeles County peaked in excess of 100 degrees Fahrenheit. At that time, CB&I was in the process of constructing two of the storage tanks on a private tract of land roughly one half mile away from the Angeles National Forest. Despite the heat, an employee of CB&I was operating an electric grinder outside and a spark flew into nearby brush. The resulting blaze burned through roughly

The Ninth Circuit decision to uphold an award for environmental damages creates a means for compensating the public for damages to environmental resources with no commercial value.

1,000 acres of private property and roughly 18,000 acres of the Angeles National Forest. The fire became known as the “Copper Fire,” and raged for five days before it was extinguished.⁵

The nature of the damages sought and the decision of the District Court

In June of 2008, the United States filed suit in district court against CB&I and Merco. On September 30, 2009, the jury returned a special verdict holding both CB&I and Merco liable for negligence, and apportioning 65 percent of the fault to CB&I and 35 percent of the fault to Merco. The jury awarded the United States the following damages: roughly \$6.5 million in fire suppression costs, roughly \$500,000 in Burned Area Emergency Response (BAER⁶) damages, roughly \$500,000 in resource damages,⁷ and roughly \$28.8 million in “Intangible Environmental Damages.” Given the jury’s apportionment of fault, CB&I was held liable for roughly \$18.7 of the \$28.8 million environmental damages award⁸.

The additional award sought by the government for environmental damages was stated to represent three distinct harms: the harm to native plants and vegetation in the San Francisquito watershed⁹, the destruction of threatened species habitat¹⁰ within the burn area, and the destruction of the Hazel Dell Mining Camp¹¹. The jury was instructed that “[t]he United States does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, [the jury] must not speculate or guess in awarding damages.¹²” In closing argument, the government suggested a method by which the jury could calculate the amount of environmental damages. The government urged the jury to assign a dollar figure for each acre and

multiply that per acre amount by the total number of acres burned.¹³ Although its method of calculation remains unclear, the jury’s final award of \$28.8 million in damages breaks down into \$1600 per acre of the 18,000 acres burned. The District Court denied CB&I’s subsequent motion to reverse the portion of the award for intangible environmental damages.¹⁴ CB&I appealed, but the Ninth Circuit upheld the damage award in full.

Upholding a new category of compensable damages

The ability of the federal government to recover damages for harm to public lands caused by wildfires is governed by the law of the state in which the fire occurred.¹⁵ In both California and Idaho, tort law draws a sharp distinction between two major categories of damages, *i.e.* economic damages and noneconomic damages. The Ninth Circuit based its decision in large part on the language of California statutes defining economic and noneconomic damages. Those statutes are identical, in pertinent part, to their counterparts under the Idaho Code. Under both California and Idaho statutes, economic damages are defined as “objectively verifiable monetary losses,”¹⁶ while noneconomic damages are defined as “subjective, non-monetary losses.”¹⁷

In general, noneconomic damages are only available in limited circumstances such as personal injury claims where plaintiffs seek damages for pain and suffering, loss of consortium, etc. Noneconomic damages are generally not available in cases involving negligently caused property damage.¹⁸ This longstanding principle is supported by relevant statutes in both California and Idaho.¹⁹ It applies even where the harm suffered by the property owner is of the type typically characterized by noneconomic damages.²⁰

Nevertheless, the Ninth Circuit upheld the award of environmental damages despite the government's characterization of environmental damages as noneconomic. The Court based its holding, in part, on its finding that there is "no case holding that noneconomic damages, as a general category, are precluded in suits alleging harm to property."²¹ On its face, this finding contradicts the long-settled general principle of tort law that noneconomic damages are not recoverable in negligence suits involving harm to property.

Case law addressing the question of whether noneconomic damages are recoverable in wildfire cases is virtually nonexistent. The Ninth Circuit relied heavily upon a California district court case in which the term "environmental damages" was never used, but damages for harm to the soil and wildlife habitat were ultimately awarded.²² However, preliminary research identified no federal or state case originating in California, Idaho, or any other state that speaks to the issue directly. Perhaps this is why CB&I cited a Canadian Supreme Court case as primary authority for the exclusion of noneconomic damages from jury awards in wildfire cases.²³ Therefore, in order to compensate the public for losses to "posterity" and "future generations"²⁴ caused by the fire, the Ninth Circuit upheld a new hybrid category of damages that falls within the general category of noneconomic damages, but is not precluded from cases involving negligent damage to property.²⁵ Moreover, the similarity between pertinent Idaho and California statutes and the absence of case authority expressly precluding an award of noneconomic damages for harm to public lands suggests the Ninth Circuit would have reached the same conclusion under Idaho statutes and case law.

Evidence required for a jury to determine an award of environmental damages

On appeal, CB&I argued that the government had failed to provide the jury with sufficient evidence to properly determine the amount of environmental damages. In its presentation to the jury the government analogized the calculation of intangible environmental damages to the calculation of noneconomic damages in personal injury cases, "including damages for pain and suffering."²⁶ The Ninth Circuit held that analogizing the evidentiary burden for an award of environmental damages to the burden on a plaintiff seeking damages for emotional distress did not mean that the government was imper-

Recent Legislative developments:

The California Health and Safety Code was amended on September 11, 2012 to include section 13009.2, which expressly allows recovery of "environmental damages" such as "damage to wildlife, wildlife habitat, water or soil quality, or plants." Pursuant to legislative action in California, draft legislation RS 21868

was voted to print in Idaho in early February of this year. This Bill would amend section 38-107 of the Idaho Code to expressly restrict damages recoverable from negligently caused wildfires to exclude "intangible environmental damages," and only allow recovery for fire suppression and "tangible restoration costs."

missibly seeking damages for emotional distress.²⁷ The Court further held that the damages sought by the government are only noneconomic in the sense that they are not subject to market-based methods of valuation.²⁸

This finding is problematic, in part because state law generally imposes different requirements for proving the amount of damages, depending on whether they are economic or noneconomic. Jurors are given considerable leeway in determining the value of noneconomic damages based on their assessment of the emotional and psychological injuries sustained by the plaintiff. By contrast, an award of economic damages must generally be supported by a factual basis establishing a value of the property damage suffered. Economic damages may not be supported by mere speculation or conjecture. Indeed, the subjective standards of quantification characterizing the calculation of noneconomic damages is one of the reasons why states such as Idaho and California place statutory limits on the recovery of noneconomic damages.²⁹

The evidentiary standard applied by the district court and upheld by the Ninth Circuit in this case is akin to the standard applied by courts in cases where the plaintiff is seeking damages for pain and suffering. Where the property damaged has no commercial value or market equivalent, its value must be ascertained in some "rational way" and need not be determined with "mathematical precision."³⁰ Therefore, the Court held that in order to justify an award for environmental damages, the government need only present evidence establishing the nature and extent of the damage caused and need not elicit testimony as to the monetary value of the damages.³¹

No other type of economic damages is subject to such a minimal evidentiary burden. State law consistently requires economic damages to be substantiated by testimony that establishes a rational

method for objectively quantifying losses. However, testimony cannot be offered to approximate a monetary value of environmental resources because in many cases they have none. The unquantifiable nature of environmental damages is such that if they cannot be subject to the more rigorous evidentiary burden typically applied to economic damages in cases involving negligent damage to property. Environmental damages cannot be quantified by any market-based system of valuation. Therefore, any award of environmental damages is necessarily speculative.

Conclusion

The Ninth Circuit's solution to this problem is to conflate *economic* damages with *noneconomic* standards of proof. Environmental damages are to be calculated as if they were damages for pain and suffering even though the Court recognizes them as something else. This novel approach undermines two longstanding principles of tort law, namely (1) that the value of economic damages must be established in evidence; and (2) that noneconomic damages are not available in cases involving negligent harm to property. However, adopting this novel approach provides courts with a means of compensating the public for damages to environmental resources with no discernible monetary value. The award of \$1,600 per acre burned is simply the dollar amount that the jury considered reasonable given the extent of the damage caused by the fire and the nature of the damages sought by the government. However, the total amount of damages awarded is not tied to any discernible method of valuation. Therefore, courts should be cautious in granting environmental damages because they represent a near unbridled exercise of discretion by the trier of fact and teeter on the brink of arbitrariness.

That being said, the federal government is tasked with managing public lands as trustee on behalf of the public. The integrity of environmental resources

on public lands clearly has value to the public for both posterity and for future generations. When the integrity of those resources is compromised, the public has a right to be compensated. Allowing awards of noneconomic environmental damages in cases involving negligent damage to public lands may be the only way to make the public whole in wildfire cases.

Endnotes

¹ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012).

² *Id.*

³ The Court categorizes the award as being for “intangible environmental damages,” but the category includes damages to *tangible* property with no commercial value. Therefore, for purposes of this article the award will be described as being simply for “environmental damages.”

⁴ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827, 830 (9th Cir. 2012).

⁵ *Id.* at 830-31.

⁶ BAER damages, or Burned Area Emergency Response costs, refer to the cost of emergency erosion control measures taken immediately after the fire was suppressed.

⁷ Resource damages include the cost of replacing burned signposts and eradicating 40 acres of an invasive bamboo species that rapidly took hold in a portion of the burned area.

⁸ Merco settled with the government prior to the jury entering its judgment for its insurance policy limit of just over \$2 million.

⁹ Expert witness testimony stated that the Copper Fire had burned the entire San Francisquito watershed causing the native chaparral and sage brush to be replaced by nonnative grass species. The dominance of the nonnative species increased the risk of future fires in the watershed. Additionally, erosion was also cited as having increased three fold in the wake of the burn. The area was also closed to hikers for one year and horseback riders for two years. No admission costs are required to enter this area of the Angeles National Forest.

¹⁰ Expert testimony stated that as much as 85 percent of California Red-Legged Frog habitat had been destroyed by the fire and the resulting erosion in the San Francisquito watershed. The California Red-Legged Frog is listed as a threatened species under the Endangered Species Act. The species was identified as having no commercial value. Red Legged Frog habitat can be found in other parts of southern California.

¹¹ The Hazel Dell Mining Camp is located in the

San Francisquito Canyon. Three 1924 mining claims were worked from the camp and abandoned in 1964, at which time the Forest Service acquired the property by quitclaim deed. It is not open to the public. It was destroyed by the Copper Fire and is, therefore, no longer eligible for the National Register of Historic Places.

¹² (SER, 220) (“SER” refers to the Supplemental Excerpts of Record concurrently filed with Appellee’s Answering Brief.) The specific environmental damages sought by the United States that the jury was instructed to consider included damages to the Hazel Dell mining camp, damages due to loss of soil productivity and stability, damages due to loss of water quality and runoff, damages to plant life, damages for loss of wildlife habitat, damages for loss of recreational use of burned land, damages for loss of other use of the burned land, and damages for loss of aesthetic qualities of the burned land.

¹³ It is speculated that the jury ultimately chose the latter method of calculation suggested by the government given the neat division of the 28.8 million dollar award into a round figure of \$1600 per acre of the 18,000 burned.

¹⁴ CB&I filed a motion for judgment as a matter of law arguing: (1) the government could not recover for intangible environmental harm caused by the fire, (2) the government provided insufficient evidence for the jury to properly determine an award for environmental damages, and (3) that the resulting award was grossly excessive. Those three grounds for reversal were the issues considered by the Ninth Circuit on appeal.

¹⁵ *United States v. California*, 655 F.2d 914, 917, 920 (9th Cir. 1980).

¹⁶ Cal. Civ. Code § 1431.2(b)(1); Idaho Code § 6-1601(3).

¹⁷ Cal. Civ. Code § 1431.2(b)(2); Idaho Code § 6-1601(5).

¹⁸ There is one narrow exception to the bar against noneconomic damages for negligently caused property loss in which an occupant of a property, such as a tenant or resident, may recover damages for the annoyance and discomfort caused by trespass. *See, e.g., Kornoff v. Kinsburg Cotton Oil Co.*, 45 Cal. 2d 265, 272 (1955). This narrow exception has no application to the Court’s rationale in the CB&I case.

¹⁹ Cal. Civ. Code § 1431.2(b)(1)-(2); Idaho Code § 6-1601(3)-(5);

²⁰ For example, because pets are considered property, in most jurisdictions, the loss of a pet does not entitle the owner to noneconomic damages despite the pain and suffering or loss of companionship experienced by the pet owner. *See, e.g., Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003).

²¹ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827, 835 (9th Cir. 2012) (emphasis added).

However, the total amount of damages awarded is not tied to any discernible method of valuation.

²² *See, United States v. Union Pa. R.R. Co.*, 565 F. Supp. 2d 1136 (E.D. Cal. 2008).

²³ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827, 836 (9th Cir. 2012).

²⁴ *Id.* at 829.

²⁵ To date, the harms the Court has recognized as falling within this category include harm to biodiversity, damage to native plants and grasses, damage to soil and the undergrowth, damage to abandoned mining camps, and loss of aesthetic value. However, the Ninth Circuit’s rationale in this case suggests that the category could include all damages to public property with no commercial value. *See generally, United States v. CB&I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012); *See also, United States v. Union Pa. R.R. Co.*, 565 F. Supp. 2d 1136, 1143 (E.D. Cal. 2008).

²⁶ (SER, 60); *See, infra*, fn. xii.

²⁷ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827, 838-39 (9th Cir. 2012).

²⁸ *Id.* at 837-38.

²⁹ Cal. Civ. Code § 3333.2; Idaho Code § 6-1603(1).

³⁰ *United States v. CB&I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012).

³¹ *Id.* at 835.

About the Author

Nicholas Warden is a recent graduate of the UC Davis School of Law. He graduated from the University of Southern California with Honors in 2006, and received a Masters of Science in Natural Resources Management with distinction from Oxford University in 2007.



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REGULATING DRILLING IN IDAHO'S PROMISED LAND: SOUND BITES VERSUS SOUND POLICY

Alison M. Nelson

Matt Damon's newest film, *The Promised Land*, presents Damon as a natural gas company employee sent to a small Pennsylvania town to secure the rights to drill for natural gas.

In the film's first scene, Damon's character explains that he doesn't sell towns natural gas; he sells them "the only way to get back." His sales technique focuses exclusively on the money that gas leases can bring to small communities that have lost their factories and traditional industry jobs.

Opponents of the proposed method of drilling — hydraulic fracturing — focus exclusively on potential worst-case environmental impacts. In one of the more dramatic scenes of the film, an environmentalist spills chemicals onto a model farm and lights the landscape on fire.

Perhaps not surprisingly, information regarding the regulations governing hydraulic fracturing is conspicuously absent from the film. This article summarizes the hydraulic fracturing process; identifies just some of the federal, state and local regulations and other controls governing that process; and proposes that these regulations should be at the center of any rational discussion about hydraulic fracturing.

The hydraulic fracturing process

The Idaho Department of Lands ("IDL") defines hydraulic fracturing as "[a] method of stimulating or increasing the recovery of hydrocarbons by perforating the production casing and injecting fluids or gels into the potential target reservoir at pressures greater than the existing fracture gradient in the target reservoir."¹ The injected fluids or gels are made up of a carrier fluid consisting mainly of water; a "proppant" such as sand used to "prop open" fractures²; a thickening agent, friction reducer, and other components that facilitate movement of the proppant; biocide and pH adjuster to maintain water quality; and other chemicals such as surfactants used in recovery of the fracturing fluids.³

When the pressures created by injecting the carrier fluid exceed the fracture gradient of the subsurface rock formations, fractures are created that allow natural gas reserves trapped in the rock to flow into the wells. Along with the natural gas

Snake River Oil & Gas has leased approximately 30,000 acres for the purpose of drilling for natural gas,¹⁹ and Bridge Energy LLC has obtained a number of conditional use permits authorizing drilling in Payette County.²⁰

that is produced by the wells, wastewaters including "flowback" of fracturing fluids and produced water is also generated. These wastewaters may contain fracturing fluids; total dissolved solids, including chlorides; metals; and naturally occurring radioactive materials. While some of the wastewaters can be recycled for use at other wells, any remaining wastewater will require disposal by underground injection, discharge to publicly owned treatment works or centralized waste treatment facilities, or treatment in surface impoundments.

Federal regulation

Although hydraulic fracturing is heavily regulated at both the federal and state levels, it is exempt from select federal regulations. For instance, while underground injection is generally regulated under the Safe Drinking Water Act's Underground Injection Control (UIC) program, the definition of "underground injection" for purposes of that program excludes "underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."⁴ As a result, only those wells using diesel fuel are subject to regulation. In addition, hydraulic fracturing operations are generally not subject to liability under the Comprehensive Environmental Response, Compensation, and Liability Act,⁵ and the amount of air pollutants emitted from a production well is generally small enough that no air operating permit is required.⁶

However, numerous federal regulations govern the disposal of hydraulic fracturing wastewaters. First, EPA's "Oil and Gas Extraction" effluent limitation guidelines in 40 C.F.R. Part 435 of the National Pollutant Discharge Elimination System ("NPDES") program regula-

tions provide that, except in limited circumstances, "there shall be no discharge of waste water pollutants into navigable waters from any source associated with production, field exploration, drilling, well completion, or well treatment (i.e., produced water, drilling muds, drill cuttings, and produced sand)."⁷ In addition, if flowback or produced water is disposed of by underground injection, the UIC regulations apply because the exemption for hydraulic fracturing fluids does not extend to wastewater.⁸ Also, under EPA's general pretreatment regulations, hydraulic fracturing wastewaters may not be discharged to Publicly Owned Treatment Works if they will cause "pass through" or "interference."⁹

In addition, on August 16, 2012, EPA adopted New Source Performance Standards ("NSPS") at 40 C.F.R. Part 60 Subpart OOOO for the oil and natural gas sector and National Emission Standards for Hazardous Air Pollutants ("NESHAP") at 40 C.F.R. Part 63 Subpart HH for oil and natural gas production.¹⁰ The NSPS regulations impose emission standards for VOCs from hydraulically fractured natural gas wells constructed or modified after August 23, 2011, including the use of "reduced emissions completions" and completion combustion devices such as flaring.¹¹ The NESHAP regulations lower the threshold at which leak detection and repair procedures apply, and establish emissions limits for dehydration units used to remove water during well production.¹² (Several provisions of the regulations have been challenged, and EPA has moved that the D.C. Circuit hold the action in abeyance pending EPA's possible reconsideration of certain issues raised in those challenges.)¹³

The penalties for violation of these standards are significant. Civil penal-

ties under the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act can be as high as \$37,500 per violation per day.¹⁴ Also, persons who knowingly violate certain provisions that place another person in imminent danger can face imprisonment for up to 15 years, while organizations may incur a fine of up to \$1,000,000.¹⁵

Moreover, these regulations are continually evolving. EPA is in the process of:

- conducting a study of the potential impacts of hydraulic fracturing on drinking water resources, with the final report scheduled for publication in 2014;¹⁶
- working to revise its existing effluent limitation guidelines for the “Oil and Gas Extraction” industry;¹⁷
- updating the water quality criteria for chloride for the protection of aquatic life, with draft criteria expected to be released in 2013; and
- finalizing guidance confirming EPA’s interpretation that “oil and gas hydraulic fracturing operations using diesel fuels as a fracturing fluid or as a component of a fracturing fluid are subject to UIC Class II requirements,” recommending steps for permit writers to determine whether diesel fuel is used; and suggesting permit terms for well construction and well closure to implement UIC requirements.¹⁸

State regulation

While natural gas reserves are not abundant in Idaho, they are present. For example, Snake River Oil & Gas has leased approximately 30,000 acres for the purpose of drilling for natural gas,¹⁹ and Bridge Energy LLC has obtained a number of conditional use permits authorizing drilling in Payette County.²⁰ To date, IDL has issued 14 permits authorizing oil and gas drilling, with three more permit applications pending.²¹

Although Idaho’s natural gas deposits are located in conventional natural gas reservoirs that do not require hydraulic fracturing,²² small hydraulic fracturing wells may be required to remove drilling muds clogging a reservoir.²³

IDL’s Oil & Gas Conservation Commission has therefore adopted new regulations governing hydraulic fracturing, which went into effect on March 29, 2012. Those regulations require a well application to identify all additives, including proppants, that will be used in the well,²⁴ and to provide a fresh water protection plan, including ground water and

Local communities can also use their traditional land use and zoning powers to regulate, limit, or prohibit hydraulic fracturing.

storm water best management practices and a statement certifying that the owner or operator is complying with Spill Prevention, Control, and Countermeasures requirements.²⁵ In addition, the applicant must certify that all aspects of the well construction meet necessary requirements,²⁶ and must monitor well pressures and notify IDL if those pressures exceed established limits.²⁷ All home owners and water well owners within ¼ mile of the well must be notified of the proposed treatment, and must be given the opportunity to have their water tested at the applicant’s cost, both prior to and after the oil or gas well being treated.²⁸ Those regulations also prohibit the injection of volatile organic compounds (“VOCs”), such as benzene, toluene, ethyl benzene and xylene, and any petroleum distillates into ground water in excess of applicable ground water quality standards, and require prior approval for use of VOCs or petroleum distillates for well stimulation into hydrocarbon bearing zones.²⁹ Also, well treatments to create fractures will not be authorized within 500 vertical feet below fresh water aquifers.³⁰

IDL enforces these rules pursuant to Section 47-325 of the Idaho Code,³¹ which provides for civil penalties of up to \$10,000 for each violation; knowing violations are a misdemeanor carrying a penalty of up to \$5,000, up to 12 months imprisonment, or both.

Other agencies are also responsible for regulating aspects of hydraulic fracturing in Idaho. For instance, the Idaho Department of Water Resources has primary responsibility for administering the UIC program in Idaho,³² while EPA maintains authority over the NPDES program in Idaho.³³

Local controls

Local communities can also use their traditional land use and zoning powers to regulate, limit, or prohibit hydraulic fracturing. The fictional Pennsylvania town

in *The Promised Land* scheduled a vote so the residents could decide whether to allow hydraulic fracturing in the town. Although this referendum process is not in place in many local communities, regulation of local land uses by requiring a conditional use permit or special use permit is common, and such permits can be denied if the proposed use is not compatible with existing uses. Some communities have banned hydraulic fracturing in certain zoning areas — or altogether — but those restrictions have been the subject of heated litigation regarding regulatory takings and preemption.

Response to Hollywood

The Promised Land ends with an overbearing appeal to the townspeople to take care of their community — to choose the environment over money by voting to prohibit hydraulic fracturing in the town. That appeal to fear leaves no room for a reasoned discussion about hydraulic fracturing.

In response to the film, both the natural gas industry and environmentalists have encouraged moviegoers to learn more about hydraulic fracturing. In areas where hydraulic fracturing operations are common, as in Pennsylvania, the Marcellus Shale Coalition has reportedly sponsored a commercial to be shown before the film that directs viewers to a website, <http://www.learnaboutshale.org>, which provides more information about the hydraulic fracturing process, its environmental and economic impacts, and governmental oversight and regulation of the industry.³⁴ In addition, the Sierra Club has published a list of discussion questions about the film.³⁵

The governing federal, state, and local regulations, as well as additional regulations under development, should be central to any discussion about the issue, shifting the focus from misperceptions fostered by sound bites in films like *The Promised Land* to the development, ad-

ministration, and enforcement of sound policies designed to minimize environmental risks. Unfortunately, rational discourse doesn't sell as many tickets as Hollywood sensationalism.

Endnotes

- ¹ IDAPA 20.07.02.010(24).
- ² See IDAPA 20.07.02.010(42).
- ³ IDL, *Questions and Answers Regarding Hydraulic Fracturing* ("IDL Q&A") at 3, available at <http://www.idl.idaho.gov/adminrule/20-07-02/20-07-02-QA-hydraulic-fracturing.pdf> (last visited Jan. 24, 2013).
- ⁴ 42 U.S.C. § 300h(d)(1)(B)(ii).
- ⁵ See 42 U.S.C. § 9607(a); 42 U.S.C. § 9601(14) (defining "hazardous substance" to exclude natural gas).
- ⁶ See 40 C.F.R. § 63.761 (providing that the term "major source" shall have the same meaning as in 40 C.F.R. § 63.2, except that emissions from any oil or gas exploration or production well shall not be aggregated with emissions from other similar units to determine whether the emissions points are major sources).
- ⁷ 40 C.F.R. § 435.32. Those regulations apply to "all facilities engaged in the production, field exploration, drilling, well completion and well treatment in the oil and gas extraction industry" located inside the inner boundary of the territorial seas. See 40 C.F.R. § 435.30.
- ⁸ See 42 U.S.C. § 300h(d)(1)(B).
- ⁹ See 40 C.F.R. § 403.5(a)(1).
- ¹⁰ EPA, *Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews*, 77 Fed. Reg. 49,490 (Aug. 16, 2012). That action also revised the applicability provisions of 40 C.F.R. Part 63 Subparts KKK and LLL; established sulfur dioxide emission standards for onshore natural gas processing plants; and adopted standards applicable to natural gas transmission and storage facilities. *Id.*
- ¹¹ See 40 C.F.R. § 60.5375; 40 C.F.R. § 60.5360.
- ¹² See 40 C.F.R. § 63.769(b); 40 C.F.R. § 63.765.
- ¹³ See *American Petroleum Institute v. EPA*, No. 12-1405 (D.C. Cir. filed Jan. 16, 2013).
- ¹⁴ See 33 U.S.C. § 1319(d); (establishing civil penalties under the Clean Water Act); 42 U.S.C. § 300h-2(b)(1) (establishing civil penalties under the Safe Drinking Water Act); 42 U.S.C. § 7413(b) (establishing civil penalties under the Clean Air Act); 40 C.F.R. § 19.4, Table 1 (adjusting the amount of civil penalties for inflation).
- ¹⁵ 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 7413(c)(5) (A).

¹⁶ EPA, *Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources: Progress Report*, EPA 601/R-12/011 (Dec. 2012), available at <http://www.epa.gov/hfstudy/pdfs/hf-report20121214.pdf> (last visited Jan. 16, 2013).

¹⁷ See EPA Notice of Final 2010 Effluent Guidelines Program Plan, 76 Fed. Reg. 66,286 (Oct. 26, 2011).

¹⁸ See EPA, *Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels – Draft: Underground Injection Control Program Guidance #84*, available at <http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hfdieselfuelsguidance508.pdf> (last visited Jan. 16, 2013).

¹⁹ See Katherine Wutz, *Legislature Allows "Fracking" in Idaho: Oil and Gas Extraction Rules Opposed by Environmental Advocates*, (Feb. 8, 2012), available at Idaho Mountain Express & Guide, <http://www.mtexpress.com/index2.php?ID=2005140652> (last visited Jan. 16, 2013).

²⁰ See, e.g., Payette County Planning & Zoning Commission, *Findings of Fact, Conclusions of Law and Order IN the Matter of the Request by Bridge Energy LLC for a Conditional Use Permit to Allow the Company to Drill Exploratory Oil and Gas Wells, to Construct Drilling Towers, for Drilling, Completion and Production Operations of an Oil and Gas Well on Property Owned by Island Capitol LLC Which will be Operated on Property Zoned A-Agricultural (granting a conditional use permit)*.

²¹ See IDL, *Oil and Gas Permits*, available at <http://www.idl.idaho.gov/bureau/oil-gas/permits/drillpermits.html> (last visited Jan. 16, 2013).

²² IDL Q&A at 2.

²³ *Id.*

²⁴ IDAPA 20.07.02.055(01)(c)-(d). However, confidential business information may be protected from disclosure to the public. See IDAHO CODE § 9-340(D).

²⁵ IDAPA 20.07.02.055(01)(k)(i)-(ii).

²⁶ IDAPA 20.07.02.055(01)(l).

²⁷ IDAPA 20.07.02.055(04).

²⁸ IDAPA 20.07.02.055(01)(m).

²⁹ IDAPA 20.07.02.056(02).

³⁰ IDAPA 20.07.02.055(07)(b).

³¹ IDAPA 20.07.02.380.

³² EPA, *Idaho Department of Water Resources: Underground Injection Control Program Approval*, 50 Fed. Reg. 23,956 (June 7, 1985).

³³ See EPA, *State NPDES Program Authority*, available at http://www.epa.gov/npdes/images/State_NPDES_Prog_Auth.pdf (last visited Jan. 16, 2013).

³⁴ Mark Drajem, *Fracker Ad Clashes on Screen With Damon's "Promised Land,"* (Jan. 4, 2013), avail-

In response to the film, both the natural gas industry and environmentalists have encouraged moviegoers to learn more about hydraulic fracturing.

able at Bloomberg, <http://www.bloomberg.com/news/2013-01-04/fracker-ad-clashes-on-screen-with-damon-s-promised-land.html> (last visited Jan. 16, 2013); Jeff Brady, *Drilling For Facts Under the "Promised Land" Fiction*, available at NPR, <http://www.npr.org/2013/01/04/168562019/drilling-for-facts-under-the-promised-land-fiction> (last visited Jan. 16, 2013).

³⁵ See Sierra Club, *Conversation around Promised Land*, available at http://sierraclub.typepad.com/files/promised_land_discussion.pdf (last visited Jan. 16, 2013).

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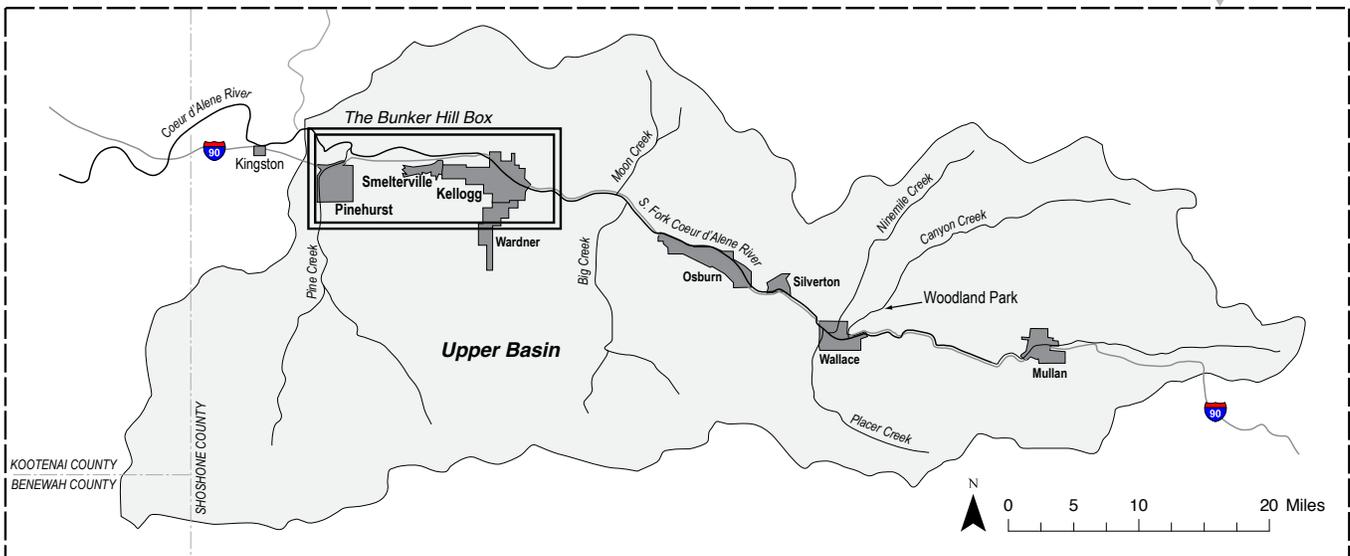
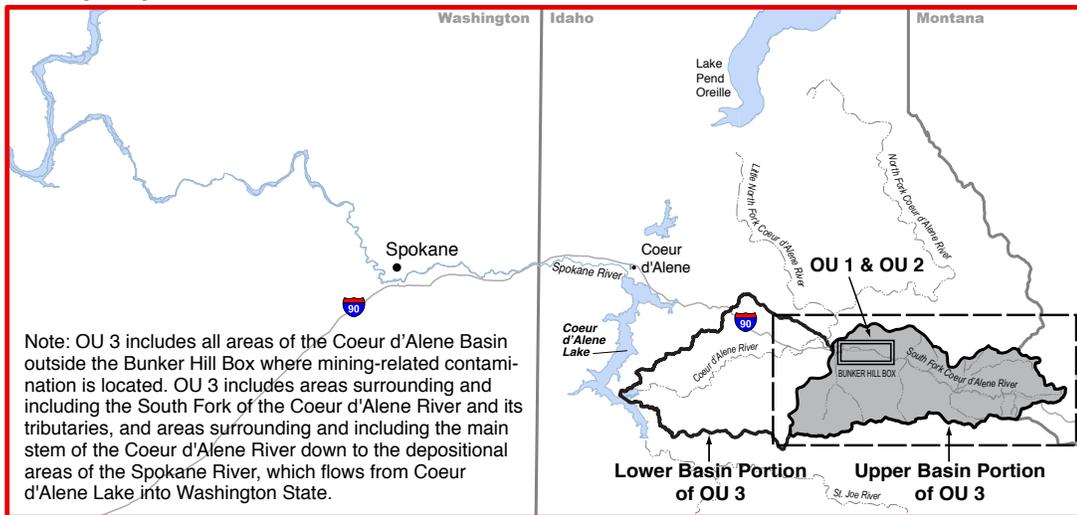
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Vicinity Map of Coeur d'Alene Basin



OU = Operable Unit

Note:

The river corridor portions of the South Fork of the Coeur d'Alene River and Pine Creek located within the Bunker Hill Box are considered to be part of OU 3.

Figure 1-1
Location Map

*Record of Decision (ROD) Amendment
Upper Basin of the Coeur d'Alene River
Bunker Hill Superfund Site.*

RECENT DEVELOPMENTS CONCERNING THE BUNKER HILL SUPERFUND SITE

Andrea L. Courtney

Last fall, the U.S. Environmental Protection Agency (EPA) issued an Interim Record of Decision Amendment (RODA) for the Bunker Hill Mining & Metallurgical Complex Superfund Site in Northern Idaho.¹ This Superfund site is a “mega site” both because of its geographical size and the volume and nature of its contamination. It is one of the largest and most complex hazardous sites in the nation.

The RODA identifies a 30-year plan of remedial and remedy protection actions to

address century-old mining-related contamination in the upper part of the Coeur d'Alene Basin. With the focus on protecting human health and the environment, the RODA outlines the plan for cleaning up contamination and preventing recontamination. Somewhat surprisingly, the available funding is significant.

This is a case study in our own backyard worth watching – as lawyers and as citizens.² Certainly practitioners in many areas will see direct relevance, i.e. real estate, health, government, environmental, and commercial, just to name a few.

As Idahoans or those living nearby, the ongoing work in the Coeur d'Alene Basin should be of interest for a myriad of reasons, including human health and that of the environment, effects on recreation, a significant long-term federal presence within the state, encouraging mining stewardship, and local job training and creation for work associated with the Bunker Hill cleanup. This article offers an abbreviated update to this ongoing tale.

History: If we only knew then

The Coeur d'Alene Basin spans nearly 1500 square miles of Northern Idaho

bookended by Montana and Washington. It is the watershed of the Coeur d'Alene Lake within Shoshone, Kootenai and Benewah Counties and the Coeur d'Alene Reservation and the Spokane River flowing from Coeur d'Alene Lake into Washington.³ After a small gold rush in the 1880s, the region grew to become one of the leading silver, lead and zinc producing areas in the world.⁴

The mining activities were concentrated in the Upper Basin, a 300 square-mile portion along the South Fork of the Coeur d'Alene River (SFCDR) and its tributaries downstream to the confluence of the South and North Forks of the Coeur d'Alene River.⁵ The ore-processing and smelting operations centered in a 21 square-mile Bunker Hill "Box" within the Upper Basin which includes the towns of Wardner, Kellogg, Smelterville, and Pinehurst.

The excavation of millions of tons of rock from underground mines left waste rock and "tailings" throughout the Basin which leach cadmium, lead, zinc, and other metals into the surface water and groundwater.⁶ The size of the tailings varied from small to smaller, like fine sand.⁷ Lead exposure proves dangerous because it can cause adverse neurological development, kidney damage, learning and behavioral problems, and decreased IQ in children.⁸

For many years, mining companies commonly disposed of tailings by discharging directly into waterways, returning to underground fill, or impounding or stacking on surface soil.⁹ Some of the companies worked together to build dams on the SFCDR out of tailings for impoundment.¹⁰ Flooding destroyed those dams, pushing the tailings onto adjacent land and farther into the floodplain.¹¹ Later, the companies attempted to prevent tailings from reaching Lake Coeur d'Alene by constructing the Cataldo Dredge in 1932.¹² It operated for 36 years and removed over 32 million tons of tailings from the river.¹³

By 1968, the mining companies in the aptly named Silver Valley were impounding their mine tailings.¹⁴ However, well over 64 million tons of tailings containing approximately 880,000 tons of lead and 720,000 tons of zinc have been discharged into the Basin's waterways.¹⁵ Twenty miles of the SFCDR and 13 miles of its tributaries are unable to sustain reproducing fish populations; some are devoid of fish.¹⁶ For over 60 years, the

After a small gold rush in the 1880s, the region grew to become one of the leading silver, lead and zinc producing areas in the world.⁴

area's smelters refined silver, lead, zinc, and other metals but also produced air emissions laden with sulfur dioxide, lead particulates and other contaminants, "killing hillside vegetation and in the 1970s causing documented cases of lead poisoning in local children."¹⁷

EPA steps both in and out of the box

The federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) became law in 1980. Under CERCLA, the EPA may exercise authority to protect human health and the environment in response to hazardous releases.¹⁸ Once a remedial investigation and feasibility study¹⁹ has been conducted, the EPA issues a Proposed Plan, seeks public comment on the Proposed Plan, and then makes a Record of Decision (ROD) of the selected remedy.²⁰ The high blood-lead level in the children living in the Basin spurred the EPA's involvement. In 1983, the EPA placed the Bunker Hill Site on the first Superfund National Priorities List.²¹ In 1986, the EPA began cleanup efforts, mainly removing contaminated soil from residences inside the Box and replacing the bad soil with clean fill.²² In 1991, the EPA issued a ROD for the populated areas in the Box, and in 1992, the EPA issued a ROD for the "non-populated" areas in the Box.²³

The EPA expended much time and money to protect human health in the Box through the 1990s. Their efforts and those of other federal departments, the State of Idaho through multiple agencies, the Coeur d'Alene Tribe, various community groups, and volunteers spanned the decades. Yet relevant studies showed more was needed and moving beyond the Box was necessary.²⁴ Because of the "profound environmental degradation that affected the Basin," the EPA exercised its authority to address cleanup outside the Box.²⁵ In 2002, the EPA issued an interim ROD for the entire Coeur d'Alene Basin

to the Spokane River.²⁶ After receiving over 6700 comments on the Proposed Plan²⁷ estimated to cost \$1.3 billion, the EPA downsized its to-do list.²⁸ While its scope covers the Basin, the 2012 RODA primarily focuses work efforts on the Upper Basin.²⁹

RODA funding

To address the staggering scope of harm, the EPA estimates the action plans of the RODA will cost \$635 million.³⁰ "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous waste contamination may be forced to contribute to the costs of cleanup."³¹ Mining companies may be held jointly and severally liable for hazardous waste releases which occurred before CERCLA was enacted, unless they show a basis for subdividing the liability.³² Mining companies are also liable for post-enactment "re-releases," or any passive migration of hazardous waste via seepage, leaching or otherwise due to flowing water.³³

The EPA and the State of Idaho joined the Coeur d'Alene Tribe's suit against a number of mining companies, mainly Hecla Mining Company and Asarco Incorporated.³⁴ In 2003, after a protracted trial with 100 witnesses, over 8500 exhibits and 16,000 pages of trial transcript, the federal district court found the two remaining defendants liable under CERCLA for response costs and damages to natural resources.³⁵ It further found that the mining waste has contaminated the surface water and groundwater as well as the soil and sediment. The metal content in groundwater exceeds drinking water standards, and in the surface water, it is toxic to aquatic life.³⁶ Riparian areas along the SFCDR suffer marked reductions in vegetation.³⁷ The lead levels adversely affect certain species of birds in the lower Coeur d'Alene Basin wetlands.³⁸ The tundra swan and certain species of fish have been seriously impacted.³⁹

At the trial, the court apportioned liability between Asarco and Hecla, reserving damages for a second phase of trial.⁴⁰ The court found the tailings in the waterways caused the hazardous condition in the Basin, determined liability was divisible and therefore apportioned liability based on the volumetric calculation of each company's tailings discharged into the waterways: Asarco was responsible for 22% of the tailings; Hecla for 31%.⁴¹

Befitting this mega-site, the EPA announced in December 2009 the largest Superfund settlement in history. As part of Asarco's bankruptcy plan of reorganization, Asarco would pay \$1.79 billion as a global settlement between Asarco and the U.S.⁴² Nearly \$500 million of that settlement funded an environmental trust created to maximize value while funding cleanup work outside the Box.⁴³

At the conclusion of Asarco's bankruptcy proceeding, the court dismissed Asarco from the case. The court stayed the damages proceeding to foster continued settlement negotiations between Hecla and the plaintiffs. The other significant portion of funding for Bunker Hill cleanup comes from the consent decree with Hecla.

To encourage settlement, CERCLA permits responsible parties to pay less than the full extent of damages, and instead, according to their abilities.⁴⁴ The U.S. conducted a thorough review of Hecla's proprietary and confidential internal financial information; afterwards, the plaintiffs agreed to settle for \$263.4 million plus interest.⁴⁵ At that time, the federal government had already spent over \$230 million on cleanup and estimated costs for remaining work would exceed \$2 billion.⁴⁶ In September 2011, the court entered the consent decree after finding the settlement fair, reasonable and consistent with CERCLA.⁴⁷ The Hecla settlement mainly repaid the EPA for past response costs and future actions in the Box as well as the State of Idaho and Coeur d'Alene Tribe for a management plan for the Coeur d'Alene Lake.⁴⁸

Highlights of the RODA

The RODA is not perfect. CERCLA mandates the EPA achieve permanent and significant reduction in volume, toxicity or mobility of the hazardous substances.⁴⁹ Far less comprehensive than the 100-year list of actions in the Proposed Plan and much cheaper, the RODA is an interim remedy.⁵⁰ Because it is a scaled back framework of action, it is possible the

The focus on the Upper Basin was purposeful. Cleaning upstream means a cleaner downstream.

RODA will not meet the water quality and other cleanup goals.⁵¹ In response to public comments, the RODA does not include certain work found in the Proposed Plan, notably the construction of a river liner (saving nearly \$300 million) and mine and mill sites slated for cleanup (reduced from 345 to 145). Also to address public comments, the EPA used the RODA to clarify its commitment to maximizing cleanup while minimizing disruption to active mining work.

The RODA framework garnered general agreement from the interested tribal and governmental stakeholders, but each identified issues of concern with approach, prioritizing both in terms of work and in terms of money, geographic scope, etc.⁵² Nonetheless, the EPA gets the final say because of CERCLA's power.

The focus on the Upper Basin was purposeful. Cleaning upstream means a cleaner downstream. Here is a sampling of what the EPA seeks to accomplish in the Upper Basin to meet the goals of (a) improved water quality, (b) protecting earlier cleanup work from recontamination, (c) cleaning up contaminated sources, and (d) preventing contamination from moving downstream:

- Excavation and consolidation of waste rock, tailings and floodplain sediments;
- Capping, regrading and revegetation of tailings and waste rock areas;
- Collection and treatment of contaminated adit discharges, seeps and groundwater;
- Stream and riparian stabilization actions in watersheds where sediment removal actions are implemented;
- Additional expansion and upgrades of the Kellogg Central Treatment Plant to treat water collected from the Basin that meets discharge standards;
- Continued implementation of the Institutional Controls Program, administered by the Panhandle Health District, to protect human health;⁵³

- Specify actions, such as culvert replacements, channel improvements, small diversion structures, and asphalt ditches, identified in the Upper Basin communities of Pinehurst, Smelterville, Kellogg, Wardner, Osburn, Silverton, Wallace, and Mullan; and

- Identification of similar generalized remedy protection actions that are expected to be needed in Upper Basin side gulches (residential areas outside the listed communities).⁵⁴

Anticipated benefits of the RODA include the following: reduce exposure to contaminated soil and sediment, reduce significantly the transportation of dissolved metals in the Coeur d'Alene River system from the Upper Basin, minimize potential for recontamination, protect human health and the environment, and improve the socio-economic conditions via overall water quality improvements and additional jobs for related work, redevelopment and tourism.⁵⁵

Work pursuant to the RODA is underway. At the end of October 2012, the EPA issued its Draft Implementation Plan, the technical document outlining cleanup plans for the next decade, and sought public comments through December 2012. On-the-ground work is slated to begin in spring of 2013. Watch for Explanations of Significant Differences if the EPA makes significant changes to the RODA and fact sheets if only minor changes are made. Also stay tuned for each five-year review, the regular large-scale evaluation of effectiveness of the selected remedy and success reducing the volume, toxicity or mobility of hazardous substances.⁵⁶

The historic efforts continue to restore the Coeur d'Alene Basin. Take advantage of the front-row view. Hopefully the time and money invested, leadership, coordination of work, and commitment from community groups, government agencies, tribes, and businesses will lead to more success.

Endnotes

¹ For your own copy of the nearly 500 page RODA, visit the EPA's website at <http://yosemite.epa.gov/r10/cleanup.nsf/sites/bh+rod+amendment#RODA>.

² There is not enough space in this issue of *The Advocate* to cover other facets of this fascinating story. For instance, the Basin Environmental Improvement Project Commission's leadership and coordination (see ch. 81, Title 39 Idaho Code and <http://www.basincommission.com/>); the role of the Panhandle Health District and its continuing efforts (see IDAPA 41.01.01.500 and <http://www.phd1.idaho.gov/index.cfm>); the area's mining history vital to "the industrialization of this country and in defending this country in times of war" (see *U.S. v. Hecla Ltd.*, Nos. 96-0122-N-EJL, 91-0342-N-EJL, 94-0206-N-HLR, 2011 WL 3962227, at *6 (D. Idaho Sept. 8, 2011)); and the Rails to Trails' success (see <http://parksandrecreation.idaho.gov/parks/trail-coeur-d-alenes> and <http://www.cdatribe-nsn.gov/LakeMngmt/CDATrailProject.aspx>).

³ See RODA, Part I § 1.0; Memorandum of Agreement for the Basin Environmental Improvement Project Commission (Aug. 13, 2002), p. 1, <http://www.basincommission.com/BEIPC-MOA.pdf>.

⁴ RODA, Part II § 2.1.

⁵ RODA, Part I § 1.0.

⁶ Clifford J. Villa, *Superfund vs. Mega-sites: The Coeur d'Alene River Basin Story*, 28 COLUM. J. ENVTL. L. 255, 259-60 (2003).

⁷ *Coeur d'Alene Tribe v. Asarco, et al.*, 280 F. Supp. 2d 1094, 1104 (D. Idaho 2003).

⁸ RODA, Part III § 3.2.4; Cleaning Up Community Areas at the Bunker Hill Superfund Site, <http://yosemite.epa.gov/r10/cleanup.nsf/bh/cleaning+up+community+areas+at+the+bunker+hill+superfund+site> (last visited 1/8/13); Panhandle Health District 1 "Lead," <http://www.phd1.idaho.gov/institutional/lead.cfm> (last visited 1/11/13).

⁹ *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1104.

¹⁰ *Id.* at 1105.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1101.

¹⁵ Villa, note 6 at 260. The Coeur d'Alene Tribe references 72 million tons of tailings. See <http://www.cdatribe-nsn.gov/cultural/environmental.aspx>. The EPA estimates nearly 100 million tons of tailings. See Cleanup Work, EPA fact sheet, <http://yosemite.epa.gov/r10/CLEANUP.NSF/bh/Cleanup+Work>.

¹⁶ RODA, Part III § 3.2.2.

¹⁷ Villa, note 6 at 260.

¹⁸ 42 U.S.C. § 9604 (2012).

¹⁹ 40 C.F.R. §§ 300.430(d)-(e) (2012).

²⁰ 42 U.S.C. §§ 9617(a)-(b) (2012).

²¹ Villa, note 6 at 260.

²² *Id.* at 260-61. Recognizing the EPA's first priority was to cleanup residential properties which posed a risk to children six years of age or younger, other efforts included cleanup at schoolyards, common areas, commercial properties and street rights-of-way. In 2003, all schools within the Box requiring cleanup were addressed as well as all playgrounds and parks. See EPA's Frequently Asked Questions about the cleanup of the Bunker Hill Superfund site, <http://yosemite.epa.gov/r10/cleanup.nsf/bunkerhill/frequently+asked+questions> (last visited 1/2/13).

²³ U.S. EPA Record of Decision: Bunker Hill Mining and Metallurgical Complex, Populated Areas Operable Unit (1991) & U.S. EPA Record of Decision: Bunker Hill Mining and Metallurgical

Recognizing the EPA's first priority was to cleanup residential properties which posed a risk to children six years of age or younger, other efforts included cleanup at schoolyards, common areas, commercial properties and street rights-of-way.

Complex, Non-Populated Areas Operable Unit (1992), <http://cfpub.epa.gov/superrods/index.cfm?fuseaction=data.siterods&siteid=1000195>.

²⁴ Villa, note 6 at 276-77 (recounting a 1996 Idaho Department of Health and Welfare study that revealed, among other concerning findings, that the percentage of children living outside the Box under six years of age with elevated blood-lead levels was almost the same as for those children living in the Box).

²⁵ *Id.* at 269-71 (describing how *United States v. ASARCO Inc.*, 214 F.3d 1104 (9th Cir. 2000) left standing the EPA's position that its NPL listing included areas of the Coeur d'Alene Basin outside the Box where mining contaminates were located).

²⁶ U.S. EPA Record of Decision: Bunker Hill Mining and Metallurgical Complex, Operable Unit 3 (2002), <http://cfpub.epa.gov/superrods/index.cfm?fuseaction=data.siterods&siteid=1000195>.

²⁷ Coeur d'Alene Basin ROD Amendment Site Update August 2012, <http://yosemite.epa.gov/r10/cleanup.nsf/sites/bh+rod+amendment#RODA>.

²⁸ RODA, Part III § 3.9.1.

²⁹ Work in the Lower Basin continues, however, in accordance with the 2002 interim ROD. An interim RODA for the Lower Basin is likely in the next few years.

³⁰ RODA, Table 12-13.

³¹ 280 F. Supp. 2d at 1126-27.

³² *Id.* at 1111-13.

³³ *Id.*

³⁴ Many of the other mining companies who caused releases were defunct, and others entered into settlements before trial.

³⁵ 280 F. Supp. 2d at 1101, 1113-14.

³⁶ *Id.* at 1106.

³⁷ *Id.* at 1123.

³⁸ *Id.* at 1106-07.

³⁹ *Id.* at 1107.

⁴⁰ *Id.* at 1119-21.

⁴¹ *Id.* at 1120-21.

⁴² See American Smelting and Refining Company (ASARCO) Bankruptcy Settlement, <http://www.epa.gov/compliance/resources/cases/cleanup/cercla/asarco/index.html> (last visited 1/23/13). The payment will be used at over 80 sites throughout the nation and divided in accounts for other federal departments.

⁴³ See Asarco Bankruptcy Settlement EPA Funded Sites and Communities, [\[munity.html\]\(http://munity.html\) \(last visited 1/23/13\).](http://www.epa.gov/compliance/resources/cases/cleanup/cercla/asarco/com-</p></div><div data-bbox=)

⁴⁴ 42 U.S.C. § 9622(a) (2012).

⁴⁵ *Hecla*, 2011 WL 3962227 at *6.

⁴⁶ Becky Kramer, *Hecla says \$263 million pollution settlement possible*, THE SPOKESMAN-REVIEW (Feb. 25, 2011), <http://www.spokesman.com/stories/2011/feb/25/hecla-pay-263-million-mining-waste/>.

⁴⁷ *Hecla*, 2011 WL 3962227 at *2 (citing *U.S. v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1152 (9th Cir. 2010)).

⁴⁸ Notice of Lodging of Consent Decree, 76 Fed. Reg. 35471 (June 17, 2011); RODA, Part III § 3.9.3.

⁴⁹ 42 U.S.C. § 9621(b) (2012).

⁵⁰ 40 C.F.R. §§ 300.430(a)(ii)(B), 300.430(f)(1)(ii)

(C)(1).

⁵¹ RODA, Part II § 12.0.

⁵² RODA, Part I pp. 15-32.

⁵³ The ICP applies to all land within the Basin affected by releases of hazardous substances. A set of rules and regulations to ensure the integrity of clean soil and protective barriers, the ICP is geared towards excavation, construction and renovation projects. See the Panhandle Health District's Institutional Controls, <http://www.phd1.idaho.gov/institutional/institutionalindex.cfm> (last visited 1/31/13).

⁵⁴ RODA, Part II § 12.1.2.

⁵⁵ RODA, Part II §§ 12.1.4.2, 12.1.4.5, 12.2.4.2, 12.2.4.5.

⁵⁶ See 42 U.S.C. § 9621(c) (2012).

About the Author

Andrea L. Courtney is a Deputy Attorney General in the Natural Resources Division representing the Idaho Department of Water Resources. She is serving her second term as Chair of the Environmental and Natural Resources Section. An Idahoan who returned home by way of California six years ago, she received her J.D. and M.S.E.L. from Vermont Law School. The opinions and advice contained herein do not represent the views of the State of Idaho or the Idaho Attorney General's Office.





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COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice
Roger S. Burdick

Justices
Daniel T. Eismann
Jim Jones
Warren E. Jones
Joel D. Horton

2nd AMENDED - Regular Spring Term for 2013

Boise January 9, 11, 14, 16, and 18
Boise February 11, 13, 15, 20, and 22
North Idaho April 2, 3, 4, and 5
Coeur d' Alene April 2, 3, and 4
Lewiston April 5
Eastern Idaho May 6, 7, 8, 9, and 10
Boise May 3
Idaho Falls May 6 and 7
Pocatello May 8 and 9
Twin Falls June 5 and 6
Boise June 3, 10, and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Term for 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.

Idaho Supreme Court Oral Argument for April 2013

Tuesday, April 2, 2013 – COEUR D'ALENE

8:50 a.m. Benjamin Morris v. Hap Taylor & Sons
(Industrial Commission) #39747-2012
10:00 a.m. Karl L. Roesch v. Daniel L. Klemann
VACATED #39836-2012
11:10 a.m. State v. Preston Adam Joy #38190-2010

Wednesday, April 3, 2013 – COEUR D'ALENE

8:50 a.m. Leslie Jensen Edwards v. Mers #38604-2011
10:00 a.m. Lon N. Peckham, D.M.D. v. Board of Dentistry
#39758-2012
11:10 a.m. Tracy Gagnon v. Western Building Maintenance, Inc.
#39816-2012

Thursday, April 4, 2013 – COEUR D'ALENE

8:50 a.m. Robert Siegwarth v. Opportunity Management Co.
#39445-2011
10:00 a.m. Katherine H. Harris v. Independent School District #1
(Industrial Commission) #39968-2012
11:10 a.m. American Bank v. Wadsworth Golf Construction Co.
#39415-2011

Friday, April 5, 2013 – LEWISTON

8:50 a.m. John M. McVicars v. Bret Christensen #38705-2011
10:00 a.m. Lillian Hatheway v. Board of Regents of the University
of Idaho #39507-2012

Please note:

**The Idaho Supreme Court has scheduled
no Oral Arguments during March of 2013.**

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COURT INFORMATION

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge
Sergio A. Gutierrez

Judges
Karen L. Lansing
David W. Gratton
John M. Melanson

1st AMENDED - Regular Spring Term for 2013

Boise..... January 8, 10, 15, and 17
Boise..... February 12, ~~14~~, 19, and 21
Boise..... March 12, 14, and 15
Moscow..... March 19 and 20
Lewiston..... March 21
Boise..... April 9, 11, 23, and 25
Boise..... May 14, 16, 21, and 23
Boise..... June 11, 13, 18, and 20

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Term for 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 Court of Appeals Oral Argument for March 2013

Tuesday, March 12, 2013 – BOISE

9:00 a.m. State v. Martinez #39440-2011
1:30 p.m. Sun Surety Insurance Co. v. Fourth Judicial District
..... #39791-2012

Thursday, March 14, 2013 – BOISE

10:30 a.m. State v. Hansen #39664-2012
1:30 p.m. Leonard v. State #39067-2011

Friday, March 15, 2013 – BOISE

10:30 a.m. Jane Doe v. John Doe (EXPEDITED) #40517-2012

Tuesday, March 19, 2013 – MOSCOW

9:00 a.m. Kimbley v. Transportation Department #39829-2012
10:30 a.m. In the Estate of Almon D. Manes #39911-2012
1:30 p.m. Beyer v. Transportation Department #39886-2012

Wednesday, March 20, 2013 – MOSCOW

9:00 a.m. Platz v. Transportation Department ... #39805/39806-2012
10:30 a.m. State v. Posey #39899-2012
1:30 p.m. State v. Wright #39483-2011

Thursday, March 21, 2013 – LEWISTON

9:00 a.m. Besaw v. Transportation Department #39759-2012
10:30 a.m. State v. Besaw, Jr. #39874-2012
1:30 p.m. Trottier v. Transportation Department #39949/39994-2012

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- Honorable David Kress
- James Doyle
- Laura Hogue
- Gabriel McCarthy
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- Dr. John Christensen

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 2/1/13)

CIVIL APPEALS

Adverse possession and prescriptive easements

1. Did the district court err in refusing to consider and admit additional proffered evidence relevant to the location of the easement in the area specified on the second remand which was for the purpose of accurately and precisely locating the easement?

Akers v. D.L. White Construction
S.Ct. No. 39493
Supreme Court

Collective bargaining

1. Absent a demonstrated material change in bargaining position, does the Idaho Collective Bargaining Act compulsorily compel an employer to continue bargaining relative to any and all unresolved issues even after having met and conferred in good faith, having participated in the fact-finding process, and having been unable to reach an agreement on a contract pursuant to I.C. § 44-1805?

Local 4578 Intl. Assoc. of Firefighters v. City of Ketchum
S.Ct. No. 39558
Supreme Court

Habeas corpus

1. Whether the court erred in granting summary judgment dismissing Waidelich's habeas corpus petition.

Waidelich v. Wengler
S.Ct. No. 40019
Court of Appeals

Jurisdiction

1. Did the district court have subject matter jurisdiction to review the petitions for judicial review when the Board's actions were legislative functions and the petitions were not filed until over four months after the decisions were made?

Power Cnty. Pros. Atty. v. Power Brd. of Cnty. Commis.
S.Ct. No. 40112
Supreme Court

Post-conviction relief

1. Did the court err in dismissing Murray's claim that counsel was ineffective for failing to advise him of his rights under *Estrada v. State*?

Murray v. State
S.Ct. No. 39400
Supreme Court

2. Did the district court err by summarily dismissing Gerdon's third petition for post-conviction relief?

Gerdon v. State
S.Ct. No. 39300
Court of Appeals

3. Did the district court err by summarily dismissing Urrizaga's petition for post-conviction relief?

Urrizaga v. State
S.Ct. No. 39479
Court of Appeals

4. Whether the court erred in summarily dismissing McCulloch's post-conviction petition.

McCulloch v. State
S.Ct. No. 38815
Court of Appeals

5. Whether the court erred when it summarily dismissed Thorngren's application for post-conviction relief.

Thorngren v. State
S.Ct. No. 39596
Court of Appeals

6. Did the court err in summarily dismissing Moore's petition for post-conviction relief, in which he claimed ineffective assistance of counsel?

Moore v. State
S.Ct. No. 39523
Court of Appeals

7. Did the district court err in denying Rainey's motion for appointment of counsel and in summarily dismissing his petition for post-conviction relief?

Rainey v. State
S.Ct. No. 40194
Court of Appeals

Procedure

1. Whether strict compliance with I.R.C.P. § 11(b)(3) is required prior to default judgment being entered against a party after his or her attorney withdraws.

McDavid v. Kiroglu
S.Ct. No. 39254
Court of Appeals

Protection orders

1. Whether the holding in *Ellibee v. Ellibee*, 121 Idaho 501 (1992) should be overruled resulting in the application of a clear and convincing standard in domestic violence protection order cases.

Turner v. Turner
S.Ct. No. 39975
Supreme Court

Quiet title

1. Whether the district court erred in finding deeds, absolute in form, the terms of which were not ambiguous, were in fact mortgages, and failed to recognize and apply the complete, substantive legal standards.

Steuerer v. Richards
S.Ct. No. 39274
Supreme Court

Summary judgment

1. Did the court err in granting summary judgment to the IDL and in finding Cook had failed to comply with the ITCA?

Cook v. Idaho Dept. of Lands
S.Ct. No. 39984
Supreme Court

2. Did the court err in not recognizing a cause of action for alienation of affections of child and/or malicious interference with family relations?

Hopper v. Swinnerton
S.Ct. No. 39077/39078/39079
Supreme Court

3. Did the court err in granting summary judgment to Spudnik Equipment Company in this products liability suit for defective design?

Liberty Northwest Insurance Co. v. Spudnik Equipment Co.
S.Ct. No. 39957
Supreme Court

Tax cases

1. Is a writ of mandate a proper remedy to compel the filing of Idaho income tax returns?

Tax Commission v. Grunsted
S.Ct. No. 39736
Court of Appeals

Termination of parental rights

1. Whether the court erred in terminating the parent's rights under the best interest analysis.

Dept. of Health & Welfare v. Doe (2012-16)
S.Ct. No. 40598
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 2/1/13)

CRIMINAL APPEALS

City code violation

1. Did the district court err in reversing the magistrate's finding that Wilks was guilty of maintaining junk motor vehicles on residential property in violation of Fruitland City Code 8-2B-2(B).

State v. Wilks
S.Ct. No. 39441
Court of Appeals

Evidence

1. Whether the evidence presented at trial was insufficient to support Osterhoudt's conviction for malicious injury to property.

State v. Osterhoudt
S.Ct. No. 40063
Court of Appeals

2. Was there substantial and competent evidence for the trier of fact to find beyond a reasonable doubt that Beadz was guilty of injury to a jail?

State v. Beadz
S.Ct. No. 39387
Court of Appeals

3. Was the evidence presented at trial insufficient to demonstrate Calver's conviction for felony custodial interference?

State v. Calver
S.Ct. No. 39637
Court of Appeals

4. Did the magistrate err in finding the proper foundation had been laid for the admission at trial of Donndelinger's BAC results?

State v. Donndelinger
S.Ct. No. 39999
Court of Appeals

Expungement of records

1. Did the district court err in concluding that I.C. § 20-526A provides for expungement only of juvenile records adjudicated under the Juvenile Corrections Act and thus does not authorize expungement of juvenile records associated with magistrate court convictions?

State v. Doe (2012-07)
S.Ct. No. 39272
Court of Appeals

New trial

1. Did the court err in concluding the motion for new trial was untimely and that it did not have jurisdiction to proceed?

State v. Smith
S.Ct. No. 39704
Court of Appeals

Pleas

1. Did the court abuse its discretion by denying the motion to withdraw the guilty plea when it was made before sentencing?

State v. Steinemer
S.Ct. No. 39869
Court of Appeals

Probation revocation

1. Whether the Supreme Court denied Thompson due process and equal protection when it denied his motions to augment the record with various transcripts from prior proceedings.

State v. Thompson
S.Ct. No. 39504/39515
Court of Appeals

2. Did the district court abuse its discretion when it failed to reduce Williams' sentences *sua sponte* upon revoking probation?

State v. Williams
S.Ct. No. 39540/39541
Court of Appeals

3. Did the district court abuse its discretion when it revoked Liles's probation and when it failed to further reduce his sentence *sua sponte*?

State v. Liles
S.Ct. No. 39537
Court of Appeals

Relinquish jurisdiction

1. Did the court abuse its discretion when it relinquished jurisdiction?

State v. Brunet
S.Ct. No. 39550
Supreme Court

Search and seizure –
suppression of evidence

1. Did the court err when it found West's traffic stop was not unreasonably extended by the deployment of a drug dog and denied West's motion to suppress?

State v. West
S.Ct. No. 38802
Court of Appeals

2. Did the court err in finding Stone's statements made to law enforcement were voluntary and in denying Stone's motion to suppress those statements?

State v. Stone
S.Ct. No. 39299
Court of Appeals

3. Did the district court err when it denied Madrid's motion to suppress his statements and when it found they were not obtained in violation of the Fifth Amendment?

State v. Madrid
S.Ct. No. 40015
Court of Appeals

Sentence review

1. Did the court abuse its discretion when it denied Brown's request to present testimony on his Rule 35 motion and denied his motion without considering the new information he provided in support?

State v. Brown
S.Ct. No. 38347
Court of Appeals

2. Did the court err in denying Loftis's Rule 35 motion to correct an illegal sentence?

State v. Loftis
S.Ct. No. 39670
Court of Appeals

3. Did the court abuse its discretion when it relinquished jurisdiction following a period of probation, and denied a Rule 35 motion?

State v. Askew
S.Ct. No. 39749
Court of Appeals

4. Whether the district court erred in determining the magistrate court lacked discretion to suspend any portion of the community service imposed as required by I.C. § 37-2738.

State v. Garcia-Pineda
S.Ct. No. 39782
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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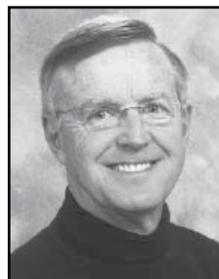
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IDAHO COURTS

Chief Justice Roger S. Burdick
Idaho Supreme Court

State of the Judiciary Address

January 24, 2013

Mr. Speaker and distinguished members of the Idaho House of Representatives, my colleagues on the Supreme Court and Court of Appeals, and fellow Idahoans.

Mr. President, Mr. President Pro Tem, and distinguished members of the Idaho Senate, my colleagues on the Supreme Court and Court of Appeals, and fellow Idahoans.

I bring greetings from Idaho's judiciary who handled over 436,000 filed cases and 655 filed appeals in 2012.

I am proud to report to you on the performance and continued accountability of Idaho's third branch of government. Like many of you in this body, we rely heavily on evidence-based practices supported by quantifiable research. My remarks today will describe how the judiciary uses those in furtherance of its mission to provide justice through the timely, fair and impartial resolution of cases.

First are the efforts of our problem solving courts. This is not business as usual. The problem solving court model starts with intense supervision by a judge of a criminal or civil case. This supervision is supported by a multidisciplinary team whose members have significant experience in the field. The problem-solving team monitors, educates and recommends needed action until the participant complies with the necessary requirements. This work necessitates increased analysis, resources, and time, that by all quantifiable research works. The fact that it works can be seen in the expansion from drug courts to mental health courts, to domestic violence courts, to child protection courts and now to veteran's courts. All three branches of government have found this type of problem-solving team approach works and saves counties and state correctional dollars, keeps our communities safe, and holds offenders accountable.



Our goal of quantifiable results is also seen in our Advancing Justice Initiative. The Advancing Justice Initiative was begun to provide assurance that we do our business as efficiently as possible. In that regard, a court committee headed by Senior Judge Barry Wood has been analyzing Idaho's court system. That work includes contacts with Idaho Department of Correction, law enforcement, attorneys, judges, and clerks and analyzes each and every case type which is filed in Idaho. This analysis has helped to identify inefficiencies and to see what processes can be reformed to speed resolution of our citizens' problems. This is not an analysis that is aimed only at speed; it is also an analysis of quality. As a result of the data demands of this initiative, as well as the critical need to upgrade our statewide case management system that you have supported since the 1980's, Idaho's courts have adopted a new vision for court technology.

Our vision includes real-time data from every court in the state immediately available to every other court and to all individuals who require access to court information. This real-time data transfer allows enforcement of court orders for the protection of victims and communities. This capability will extend to every

*The Advancing
Justice Initiative
was begun to
provide assurance
that we do our
business as
efficiently as possible.*

courthouse in Idaho. We are now working diligently on getting that infrastructure in place.

We also envision an expanded statewide telepresence for litigants, attorneys, judges and the public. Our magistrate and district judges travelled over 309,000 miles last year to preside over hearings in courthouses across the state. By the use of advanced technology, mileage costs and travel time will be significantly reduced and attendant cost savings to law enforcement will be realized. Just as

private enterprise relies on telepresence to conduct business in the new economy, we will embrace this new technology and look for the efficiencies it will provide.

As part of our technology analysis, we are examining how better to collect those fines, fees and other obligations on a coordinated statewide basis. We know there will be significant efficiencies achieved if that can be done.

Our technology plans were started by an in-depth analysis and assessment of our existing systems by three of the nation's foremost experts on court technology. That assessment is available on our website for all of you to examine and read. Following that assessment, a committee was formed to chart dynamic and broad policy decisions for the coming years concerning our use of technology for Idaho's citizens. When I use the word "dynamic," it is actually an understatement. In the thirty-one years that I have been a judge in the Idaho court system, I can't remember a time when the Idaho courts have been as responsive to our citizens' needs and accountable for our performance. Efforts are underway which will affect Idaho's judiciary for decades. We anticipate coming to you next session with a more complete analysis of revenue options as our plans evolve for the electronic filing of all court papers. As we move to "paperless courthouses," we anticipate some of these improvements can be funded by court users, and significant savings realized by counties and courts.

As I reported last year, we have continued with our recruitment efforts to make sure that we are attracting the most qualified judges available. We now hold open discussion groups in those counties where district judges are being replaced concerning the benefits of starting a career in the judiciary and to answer any and all questions concerning that career and application process. During judicial council interviews, we have heard numerous times from applicants who were encouraged by this opportunity to step forward and consider applying for a district judge position.

Despite these and other efforts we have a significant problem in recruiting district judges. The Judicial Council can rarely send a full slate of four names to the governor for appointment. In our surveys, and interviews with bar members and judges, it has become apparent that the district judgeship is no longer a highly sought-after judicial position. The reasons are many -- the overwhelming workload that many district judges face



in terms of numbers, as well as complexity; the prospect of contested election; as well as the inadequate compensation of that position.

You might ask why are potential applicants so concerned with the prospect of contested elections? The Legislature has wisely placed practice and age requirements on judicial candidates and applicants. The chosen attorney has built a clientele and other professional relationships that must be completely terminated to take a judicial position. If the judge loses a contested election, those clients are gone. The judge must start from scratch, replicating that prior book of business. When you factor in the ethical constraints on a judge's conduct, fund raising, and time away from a full judicial caseload to run an election, you begin to understand the high stakes to a potential applicant and his or her family.

While we have a judiciary that is nationally recognized for its commitment to excellence, performance, and accountability, Idaho ranks 46th in compensation for its general jurisdiction judges. We have recognized for many years there is a need to improve the salary of district judges so we can attract highly qualified private attorneys to that position. We can do better. We will be presenting a comprehensive analysis this session of the need to recruit the most qualified district judges.

I reported last year that we were re-energizing our guardianship and conservatorship work in reaction to the "graying" of America. Did you know the numbers of Idahoans sixty and older grew by 44% - from 2000 to 2010? From 2010 to 2030 it is estimated to increase by 65%. There are now over 6200 active guardianship and conservatorship

I can't remember a time when the Idaho courts have been as responsive to our citizens' needs and accountable for our performance.

cases in Idaho, with over 300 million dollars in assets monitored last year by court personnel. This will only increase. I am pleased to report that the guardianship and conservatorship committee headed by Judge Chris Bieter of Ada County has made significant progress. Idaho courts were singled out as a voting delegate to attend the 3rd National Guardianship Summit. We have fixed our vision for Idaho on evidence-based solutions. We look forward to our work with the legislative and executive branches to re-examine all statutes and court rules to make sure that Idaho meets its responsibilities to its oftentimes most vulnerable citizens.

We are also requesting the legislature repeal the sunset provision of House Bill 687, which added an emergency surcharge to felony, misdemeanor and traffic infraction cases. The general fund will not permit you to fill a funding gap over 4 million dollars if the surcharge sunsets. Since you enacted it in 2010, the emer-

gency surcharge has kept the courthouse doors open in each of your counties and provided for such beneficial programs as drug courts, mental health court, and family courts. The repeal of the sunset provision is vital to the judiciary's constitutional role to solve people's disputes and keep our communities safe.

Even with the surcharge, the Court was unable to fill four magistrate judge positions. We have now been able to fill two of those positions. We wish to thank the county officials for their patience and ability to manage with senior retired judges until we could refill those positions. We plan to fill the two remaining vacancies in September, 2013 and early 2014. Numerous court employee positions, however, remain vacant statewide and significant reductions have been made in all court operations.

It is bedrock function of government to properly fund a justice system. A justice system largely based upon user fees cannot continue to provide the requisite funds to protect our communities nor timely resolve our complex civil disputes. At some point the debt load of offenders will not be able to fund that justice system or the attendant agencies that rely on these fees for revenue. This is a recognition which is being debated in statehouses throughout the nation and an area we, as a state need to monitor.

The word "court costs" quite frankly is misleading. Did you know 152 cities share \$6.9 million in "court costs" yearly? The 44 counties disburse \$16.3 million in 23 different ways. State entities receive a total of \$26.3 million; the general fund, \$5 million; and other state entities \$21.3 million. These are in addition to restitution to victims. This basket is about full and Idaho must proceed carefully when adding to the court cost or fee basket. We hope that a statewide analysis through the Criminal Justice Commission will help you in this regard.

So how can you and other interested citizens follow a branch of government that is so dynamic — so bent on improvement? We promote openness and accountability through the expanded use of the Idaho judiciary's web-site. You can look at all Supreme Court and Court of Appeals opinions on line, the minute they are published. You can follow us on Twitter for Supreme Court and Court of Appeals hearing dates and locations. Since August, 2012, the Supreme Court's Boise oral arguments are streamed on Idaho Public Television's website. I have heard many legislators say they use the

In the near future, this Legislature will consider, for the first time in many decades, an analysis of improving the public defense system in each of our counties.

district court and magistrate division case information available on-line through our data repository, but we also acknowledge it needs to be modernized. Court assistance, self-help information and forms are available online as a partial answer to the large increase in the number of Idahoans who are proceeding in court without attorneys. Lastly, we invite all legislators to attend interviews in your home counties when the Judicial Council or your Magistrate Commissions interview new judicial candidates.

You can also find on the website all of the rules of the Idaho courts and any impending amendments to those rules. I would like to recognize Judges Russell Comstock and David Day for their vision for specialized rules of procedure for family courts. They and a court committee worked for three years on those rules and we thank them. Their idea came to fruition when their committee's rules became a one-year pilot project in Ada County.

In the near future, this Legislature will consider, for the first time in many decades, an analysis of improving the public defense system in each of our counties. It is a basic tenet of our judicial system to be fair to those persons brought before the court, accused by the state of crimes which may take their liberty, their reputation, and their purse.

It can be argued that our statewide system of public defense for those citizens who cannot afford their own private attorney is not balanced throughout the state nor within the courtrooms of Idaho. The Governor's Criminal Justice Commission has made progress in identifying some of the areas that you will need to consider on a public policy basis. We leave it to your solemn analysis as to how Idaho can approach this problem in the near future. The Idaho judiciary supports the appointment of an interim legislative committee to review these issues and we pledge to support that committee with

information upon which you can make these important decisions. This is not an issue of guilty persons going free, but of Idaho's citizens sharing in a criminal system that is fair to all concerned.

As a final note, none of this work can be done without the numerous county clerks, bailiffs, attorneys and others who provide the administration arm of the courts. This statewide collection of professionals is guided by Patti Tobias, the Administrative Director of the Courts. Many of you know her as a true professional and friend. Now she has been appropriately awarded the nation's highest award. This month she was given the Warren E. Burger award for excellence in court administration by the National Center for State Courts. A formal presentation is set for early February and you are all invited. Please join me in a round of applause for this remarkable Idahoan.

In closing, I hope I have given you a glimpse of a judiciary which is dynamic. A judiciary whose members are constantly striving to improve its competency and efficiency, to fulfill its duty as an independent third branch of this great State's government. I hope I have perked your interest so you can contact us for more information.

Thank you.

About the Author

Chief Justice Roger S. Burdick received his Bachelors of Science degree in Finance from the University of Colorado in 1970 and graduated from the University of Idaho School of Law in 1974.

In January 2001, he was appointed the Administrative Judge for the Fifth Judicial District. In August, 2003 he was appointed to be the fifty-third Justice of the Idaho Supreme Court by Governor Dirk Kempthorne. He served as Vice Chief Justice of the Idaho Supreme Court from August 1, 2007 until July 31, 2011. On August 1, 2011, he began serving a four-year term as Chief Justice of the Idaho Supreme Court.



Federal Court Corner

KEEPING EMAIL ADDRESSES CURRENT IN THE ELECTRONIC CASE FILING (ECF) SYSTEM

James Kim

Back in December, I received a letter from my old law school, and I automatically assumed it was the year-end giving communications to alumni. However, the letter was a reminder asking alumni to make sure that the law school had the most up-to-date email. The letter further stated that the school sent important news and updates for alumni by email, and the alumni office was concerned about electronic communications not being received. The letter ended by stating that “As a reminder, we encourage all of our alumni to check your online profile to ensure that our email is accurate.”

This personal letter reminded me that Clerk’s Office also relies heavily on accurate emails in our Electronic Case Filing (ECF) System to communicate with our ECF users about case related information, as well as important communication from the Clerk’s Office. For example, in addition to the notices of electronic filing you receive for your cases, the Clerk’s Office uses the email addresses to send out important information about upcoming changes and upgrades to the ECF System.

Over the past year, the Clerk’s Office has seen an increase in invalid emails in our ECF system. In addition, through conversations from users through our Help Desk, the Clerk’s Office has also found that ECF users are not always aware that primary ECF account holder is responsible in keeping the email addresses up to date and accurate. As you may already know, the District Court’s Local Civil Rule 5.1(b) and the Bankruptcy Court’s Local Rule 5003.1(b) have established ECF procedures. The ECF procedures require attorneys registered in ECF to ensure that their accounts contain accurate information such as the email address and firm name. You can get to the ECF Procedures by going to the following URL: http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf



As a reminder, please be sure to check your ECF accounts to make sure we have accurate emails for you as well as the secondary emails you have listed in our account. The Clerk’s Office wants to ensure that our electronic communications are delivered, and received by our users. If you require any assistance or any have questions about your ECF user account and email address, please call our ECF Help Desk at (208)334-9258.

About the Author

James Kim is the Chief Deputy of Operations for the U.S. District and Bankruptcy Court for the District of Idaho. James has worked in both the state and federal court systems for the past 13 years.



*Over the past year,
the Clerk’s Office
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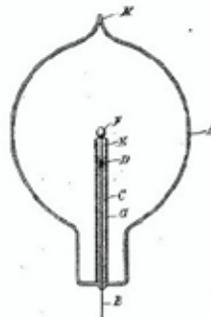
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TO VERB OR NOT TO VERB

Jason Dykstra

Recently, a discussion of verbs derived from nouns resonated with the students in my legal writing class. The examples discussed included the good, the bad and the downright ugly. Following class, students continued to contemplate verbing, sharing examples and even cartoons.

As Calvin explained to Hobbes in Bill Watterson's 1992 comic strip:

Calvin: I like to verb words.

Hobbes: What?

Calvin: I take nouns and adjectives and use them as verbs. Remember when "access" was a thing? Now it's something you do. It got verbed. . . . Verbing weirds language.

Hobbes: Maybe we can eventually make language a complete impediment to understanding.

Conscientious verbing can enhance the effectiveness of your legal writing, while careless verbing can breed ambiguity and imprecision.

What is verbing?

The metamorphosis of nouns into verbs, commonly called verbing or verbification, reflects a time-honored tradition in the English language of coining new uses from familiar words. Linguists use the term "functional shifting" to describe the conversion of nouns into verbs and vice versa. Verbing is common. By one estimate, about twenty percent of all verbs in English derive from nouns.¹

Almost any noun can be verbed. Some verbed nouns are easy to identify because they don't change form when they become verbs: *stump*, *mouse* and *torpedo*. But, the transformation of other nouns into verbs requires the addition of an *-ize*, *-ate*, *-ify*, or *-ization*.

Verbing bastardizes language.

The history of verbing

Many verbed nouns thrive only briefly before disappearing from the English lexicon. The verbed nouns that stand the test of time convey vivid images or describe innovative activities. For example, some of our oldest verbed nouns derive from animal behavior:



The children were horsing around before the fire started.

The crafty lawyer outfoxed his opponent.

The language in the contract parrots the form book.

Often surname-inspired verbs expire with their namesake. However, a few surname-inspired verbs long outlive their namesake. We continue to *boycott*, without giving much thought to Captain Charles Boycott, the Nineteenth century Irish land manager shunned in his community for evicting farmers from their homes. Few have heard of the Eighteenth century German physician, Franz Anton Mesmer from whose name derives the verb *mesmerize*. Almost all of our milk is *pasteurized*, thanks to French chemist Louis Pasteur.

Verbing often reflects the rapid evolution of contemporary culture; we create verbs to describe new activities:

We faxed the discovery responses yesterday.

Before deciding to take the case, he googled the potential client.

I counseled my client to be very careful when facebooking.

In our leisure time, we may fish, ski, run, skateboard, mountain bike or rollerblade.

Many newly minted verbs experience a quick demise. Mercifully, the verb *Eastwooding* survived for only a few weeks in the wake of last summer's Republican National Convention. Others linger for a period of time. For example, a few people still *Hoover* their carpets, *Thermos* their beverages, or *Simonize* their cars.

Those who would prefer to fossilize English have long derided the practice of verbing.

The debate over verbing

Perhaps because new verbs often are the progeny of contemporary culture, the practice of verbing tends to raise the hackles of language mavens. Those who would prefer to fossilize English have long derided the practice of verbing. Twenty years ago, an editorial in Britain's *Guardian* newspaper decried verbing as a "filthy" habit that defaced the English language.² Similarly, Benjamin Franklin wrote to the lexicographer Noah Webster to enlist his assistance to stem the tide of rampant verbing:

During my late absence in France, I found that several new words have been introduced. From the noun "notice" a new verb "noticed" was produced. Also "advocate" led to "advocated," and "progress" to "progressed." . . . If you should happen to be of my opinion with respect to these innovations, you will use your authority in reprobating them.³

Despite hundreds of years of derogation, verbing remains commonplace and perhaps even an integral part of English. From ancient verbs turned out from nouns, like rain, thunder and snow to modern converts like “pimp my ride.”⁴ In the law, we advocate for clients, *Shepardize* citations, contract with vendors; we even prepare estate plans to gift.

Shakespeare masterfully derived colorful verbs from nouns like peace, uncle and ghost. In *Hamlet*, Horatio describes the gathering of an army of thugs by explaining that young Fortinbras hath “shark’d up a list of lawless resolute . . .”⁵ In *King Richard the Second* the Duke of York proclaims: “Grace me no grace, nor uncle me no uncle . . .”⁶ From the genius of Shakespeare to Cormac McCarthy⁷, storytellers have explored and exploited the creative potential of verbing.

When to verb a noun

At its best, verbing transfers the reader’s knowledge gleaned from an existing noun to a newly minted verb. Thanks to this cross-pollination, a mention that one *skis* in the winter concisely conveys a precise image.

Writers should verb nouns when conveying an image that absent verbing might require the writer include an inefficiently wordy explanation. For example, try to efficiently and precisely explain rollerblading, fly fishing, or juicing a carrot without resorting to verbing.

The plaintiff was hit by a car while using rollerblades to transport herself down the sidewalk.

It’s much easier and cleaner to state:
While rollerblading down the sidewalk, the plaintiff was hit by a car.

The dangers of verbing are significant in legal writing. Good legal writers attempt to convey their message with plain English rather than convoluted legalese. When writers grasp at vague nouns

Good legal writers attempt to convey their message with plain English rather than convoluted legalese.

turned into vaguer verbs, the results can render relatively straight-forward concepts abstract.

For example, attempts to meet and confer with opposing counsel regarding a discovery dispute could be described in an affidavit as follows:

The Affiant attempted to contact opposing counsel in order to meet and confer.

However, the use of precise and descriptive terms could enhance the efficacy of this testimony:

Attempting to meet and confer, the Affiant left numerous voicemails, sent a letter, and e-mailed opposing counsel.

At its worst, verbing can render writing almost incomprehensibly vague. Consider the following example of verbing gone wrong:

The parties dialogued but conflicted over incentivizing which will need to be languaged.

Whatever occurred seems important, but it cannot be readily divined from the example. It would be easily understood, however, if the nouns weren’t verbed.

The parties disagreed about incentives during their negotiations, so that language will need to be worked out later.

And, we writers risk confusing the reader when we discuss de-risking transactions, promise deliverables, or pledge to solutionize problems.

To Conclusionize

Verbing enriches our language by economically conveying information with precision. As such, verbing can enhance the effectiveness of your legal writing. However, careless verbing can impart confusing ambiguity and imprecision into your writing.

Endnotes

¹ Richard Nordquist, What is Verbing?, About.com, [http:// grammar.about.com/od/grammarfaq/f/verbingfaq.htm](http://grammar.about.com/od/grammarfaq/f/verbingfaq.htm) (last visited Dec. 31, 2012).

² *Id.*

³ Gertrude Block, Language Tips, 82-Jan.N.Y.St. B.J. 54 (January 2010).

⁴ Technically, the phrase “pimp my ride” is arguably a double anthimeria, the noun has been verbed and the verb nouned.

⁵ *Hamlet*, Act 1, Scene 1. Available at <http://shakespeare.mit.edu/hamlet/hamlet.1.1.html>

⁶ *The Life and Death of Richard the Second*, Act 2, Scene 3. Available at <http://shakespeare.mit.edu/richardii/richardii.2.3.html>

⁷ Scott Esposito, Cormac McCarthy’s Paradox of Choice: One Writer, Ten Novels, and a Career-Long Obsession, *The Quarterly Conversation*, <http://quarterlyconversation.com/cormac-mccarthy-paradox-of-choice> (last visited January 12, 2013).

About the Author

Jason G. Dykstra practices with the law firm of Meuleman Mollerup LLP and teaches Legal Research and Writing as a part-time professor at Concordia University School of Law. His practice focuses in the areas of business litigation, estate planning and business transition planning.



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IDAHO LAW REGARDING THE MEASURE OF DAMAGES FOR ANIMALS NEED NOT BE REVISITED

Amy Lombardo

A recent article by Adam P. Karp, published in *The Advocate*, “The Animal World Takes a Special Place in Society and Our Courtrooms,” argued that the changing demographics of society (where animals often become part of the family) warrant a new approach to economic and non-economic damages awarded for harm to a domestic animal. The article further contended that courts nationwide are making progress to increase damages available to plaintiffs where the value of an animal is at issue and suggested Idaho should do the same.

This article will illustrate the opposing viewpoint: that Idaho law already fully and fairly compensates an animal owner for loss of a pet; including awarding economic damages for the value of an animal, and provides for additional damages in situations where outrageous conduct may warrant it. This article will discuss the current law, why it sufficiently covers the value of animals, and the public policy and legal implications should a change occur.

This is not an issue of whether one is pro-animal or not, but sound public policy and legal precedent dictate that increasing the value of damages in this area of animal law is unnecessary, impractical, and would have unintended consequences.

By compensating for economic loss, Idaho law fully and fairly compensates a pet owner for injury to a pet

Historically, the lives of Idahoans have been inextricably tied to the need and deep respect for domesticated animals. The common activities of ranching, farming, or even crossing the plains to arrive in this land involved obvious reliance upon domestic animals. Idahoans have traditionally considered these animals, including pets, to be critical to our very existence.

Economic damages

Both domesticated pets and domesticated commercial animals were historically deemed to be the personal property of their owners under the law.¹ This makes some sense, as household pets Fifi and Fido and most farm animals cannot file their own lawsuits for damages. The valuation of animals as personal property has survived to present day in the vast major-

Idaho law already fully and fairly compensates an animal owner for loss of a pet; including awarding economic damages for the value of an animal.

ity of states, including Idaho.² Accordingly, the current measure of damages for an animal in a lawsuit is the replacement value of the animal.³ In Idaho, this has been established statutorily⁴ and by case law.⁵

However, this does not mean that a plaintiff in an animal law matter will always recover only nominal damages. The replacement cost of the animal may include costs related to the purchase of a new animal of the same breed – including immunization, neutering, and comparable training, as well as lost profits of the owner proximately caused by the injury.⁶ It may also include evidence of pedigree, breeding, and whether its offspring would be valuable,⁷ as well as other reasonable and necessary expenses. Thus, Idaho law provides for recovery of economic losses for the value of an animal.

Non-economic damages are not necessary for full compensation

Despite the animal law article argument to the contrary, an Idaho pet owner need not recover for non-economic damages to be fairly compensated. The overwhelming majority of states have found that an animal owner cannot recover for emotional distress for harm to one’s pet, or for loss of companionship.⁸

Like many states, Idaho has severely limited the circumstances wherein a litigant may recover for emotional loss for negligent infliction of emotional distress when no physical injury to the litigant is present.⁹ There are also limited circumstances where a litigant may recover for injury to another person. For example, loss of consortium (or the care, comfort, and society of the deceased) in a wrongful death matter is limited to only one’s heirs, and the monetary amount awarded in the state is limited to \$250,000 (as of

when the statute was passed, the number is adjusted by statute for inflation).¹⁰ Idaho’s common Jury Instruction 9.05 reads, “[d]eath is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow. There can be no recovery for any pain or suffering of the decedent prior to death.”¹¹

The animal law article suggests a good faith basis exists to argue that the law regarding the measure of damages for a pet in Idaho should be overturned, based upon dicta from the Idaho case *Gill v. Brown*. However, *Gill* only outlines that negligent infliction of emotional distress may be a viable cause of action for loss or injury provided an owner can show objective physical evidence of the distress.¹² The *Gill* court specifically held that it was not persuaded to depart from the general rule that denies recovery for mental anguish suffered by the property owner.¹³ It was only error in that case for the trial court to *sua sponte* order a claim of mental anguish stricken from the complaint in a motion to dismiss when the Complaint alleged that the defendant recklessly shot and killed the plaintiff’s donkey which was both a pet and a pack animal. The *Gill* case established only that if a plaintiff meets the stringent criteria for intentional infliction of emotional distress – requiring extreme and outrageous conduct—would an animal owner be awarded damages for emotional suffering.¹⁴

Criminal penalties and enhanced damages are appropriate for intentional acts

There must be a distinction made between the argument to increase the value of an animal under the law, which would have negative consequences in litigation against veterinarians, and those cases where there is evidence of a grave, inten-

tional injury to an animal, or outrageous behavior by an individual. In Idaho, the legislature passed recent legislation to increase penalties for those who opt to harm an animal. This statute, which the animal law article states is a step in the right direction, addresses the problem of those individuals who would intentionally harm an animal and punishes those who engage in these behaviors, without increasing the legal value of an animal.¹⁵

Idaho courts would be wise to decline to revisit the debate regarding the value of damages for a domestic animal, and to follow the reasoning of courts all over the country which have found that “the claim for emotional distress arising out of the malicious destruction of a pet should not be confused with a claim for the sentimental value of a pet, the latter claim being unrecognized in most jurisdictions.”¹⁶

Public policy implications

If the death or injury of an animal is determined to be an event that is worth more money than the replacement value of the animal, the unintended result will be more litigation for increasingly questionable claims.

For example, in Alabama a plaintiff sued a railroad for striking his dog with a train while the plaintiff was *hunting near a railroad track*.¹⁷ The Alabama Supreme Court affirmed an award based on evidence regarding the dog’s hunting qualities to increase that award.

In my own practice in Virginia, a lawsuit was filed by a plaintiff alleging that a veterinarian made an error in cosmetic surgery performed on his dog. The dog — Rambo — had been subjected to three different surgeries at the request of his owner to ensure that Rambo’s synthetic testicles had been placed and implanted perfectly. When, during the third surgery a complication developed which was allegedly attributable to the amount of scar tissue present at the dog’s incision sites, the dog owner sued. This potential type of claim is currently not worth an exorbitant amount, but had the animal or damage to the animal been valued at considerably more, the case would have necessitated much more time, effort and expense of the parties and the court.

In California, the Fourth District Court found that “permitting plaintiffs to recover emotional distress damages for harm to a pet would likely increase litigation and have a significant impact on the courts’ limited resources.”¹⁸ It opined, “[t]he court is not about to recognize

*The court noted, furthermore, that extending emotional distress damages to owners of companion animals for veterinary malpractice may have an unknown or even a chilling effect on the cost and availability of veterinary care.*²⁰

a tortious cause of action to recover for emotional distress due to the death of a family pet. Such an expansion of the law would place an unnecessary burden on the ever burgeoning case loads of the court in resolving serious tort claims for injuries to individuals.¹⁹ The court noted, furthermore, that extending emotional distress damages to owners of companion animals for veterinary malpractice may have an unknown or even a chilling effect on the cost and availability of veterinary care.²⁰

To simply make the value of an animal worth more upon death, or to allow for non-economic or emotional distress damages in civil lawsuits, would regularly and disproportionately impact veterinarians, and would ultimately shift the burden of higher practice costs to veterinarians. These questionable claims will cause an increase in malpractice insurance premiums for veterinarians, and, as argued by the American Veterinary Medical Law Association and various law review articles,²¹ the state would see a rise in the cost of litigating the cases against veterinarians. This has the potential to make the care and maintenance of everyone’s animals more expensive.

Therefore, it is an incorrect assumption from the animal law article that a higher valuation under the law would benefit animals and their owners. If damages increase, so too does the cost of litigating. Ultimately, the cost of veterinary services would likely increase, and owning a fully-insured and fully cared-for pet may become cost-prohibitive.

Conclusion

There is no pressing need to overturn decades of legal precedent and an Idaho statute to increase the value of an animal under the law. While there are many rare and novel issues presented in the area of animal rights law, to the extent that self-professed animal rights lawyers seek to increase damages or allow damages for

emotional distress for the owner of the animal, I am hopeful that the Idaho courts will not revisit or alter this longstanding and virtually nationwide precedent. Although animals are and have always been revered in the State of Idaho, the sound public policy for Idahoans remains: damages awarded for harm to a domestic animal is the fair market value of that animal.

Endnotes

¹ *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958) (remanding for damages only as the district court failed to apply the rule that plaintiffs were entitled to the market value of their horses and burros, but instead relied upon a theory that the animals taken were unique because of their peculiar nature and training, and *could not be replaced*).

² See, e.g., *Parker v. Mise*, 27 Ala. 480 (Ala. 1855) (animals are property and holding that wrongful killing of an animal is subject to nominal damages, with punitive damages for reckless disregard), *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985) (animals’ market value determined at the time of death and does not include subjective estimations of the animal’s value); *Roman v. Carroll*, 621 P.2d 307 (Az. Ct. App. 1980) (holding that a poodle is personal property pursuant to a state statute and no damages permitted for negligent infliction of emotional distress from witnessing injury to property); *Elliot v. Hurst*, 817 S.W.2d 415, 423 (Ark. 1991) (damages limited to fair market value of animal at the place and time of death).

³ See, *Hurtado v. Land O’Lakes, Inc.*, 153 Idaho 13, 278 P.3d 415, 423 (2012); *Skaggs Drug Ctrs., Inc. v. City of Idaho Falls*, 90 Idaho 1, 10, 407 P.2d 695, 699 (1965).

⁴ Idaho Code provides that “[d]ogs are property; and when the value of any dog is material in any civil or criminal proceeding in this state, the same may be established under the usual rules of evidence relating to values of personal property.” Idaho Code Ann. § 25-2807 (West 2012).

⁵ “[T]he measure of damages when personal property is destroyed by the tortious conduct of another is the fair market value of the property.” *Gill v. Brown*, 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985).

⁶ *Hatahley* 257 F.2d at 923-925.

⁷ *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996).

⁸ See, e.g., *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 557-58 (Cal. Ct. App. 2009) (owner cannot recover emotional distress damages after a veterinarian’s negligence as the acts were neither directed at the plaintiff nor done in her presence), *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151 (S.D.N.Y. 1994) (holding that no cause of action existed under New York law to recover for pain and suffering or loss

of companionship.); *Kondaurov v. Kerdasha*, 629 S.E.2d 181 (Va. 2006) (Plaintiff-motorist could not recover damages for emotional or mental anguish suffered because of concern for injuries to her dog who was riding in the vehicle at the time of the accident); *Goodby v. Vetpharm, Inc.*, 947 A.2d 1269, 1274 (Vt. 2009) (cat owners who sued veterinarians and a pharmaceutical company that manufactured a medicine that allegedly killed plaintiff's cats were not permitted to recover on their claim of negligent infliction of emotional distress because they were never the objects of negligent acts of the veterinarians and pharmacy, were never in physical danger themselves, nor in fear of imminent danger. The court declined to adopt a special exception to recover noneconomic damages for the loss of their feline personal property, citing it as a legislative function.); *Mitchell v. Heinrichs*, 27 P.3d 309 (Alaska 2001) (Alaska Supreme Court specifically declined to allow plaintiff to include sentimental value to plaintiff as a component of the actual value); *Kaufman v. Langhofer*, 222 P.3d 272, 273 (Ariz. Ct. App. 2009) (plaintiff not permitted to recover emotional distress or loss of companionship damages since veterinarian's negligence did not directly harm plaintiff. The court also noted it was inappropriate to expand Arizona common law to allow a pet owner to recover emotional distress or loss of companionship damages because that would offer broader compensation for the loss of a pet than for the loss of a human)..

⁹ *Gill*, 107 Idaho at 1138, 695 P.2d at 1277.

¹⁰ Idaho Code Ann. § § 5-311, 6-1603 (West 2012).

¹¹ IDJI 9.05 – Damages for Wrongful Death.

¹² The article states, “*Gill* implies the cognizability of negligent infliction of emotional distress provided that objective physical manifestations accompany the emotional disturbance.”

¹³ *Gill*, 107 Idaho at 1138, 695 P.2d at 1277.

¹⁴ This article does not discuss another issue which the animal law article advocates for – damages to

The court declined to adopt a special exception to recover noneconomic damages for the loss of their feline personal property, citing it as a legislative function.

the animal for its emotional suffering – but based on the wrongful death jury instruction, wherein human is not entitled to pain and suffering prior to death, it follows that Idaho is not likely to award emotional damages for pain and suffering to such a legal entity.

¹⁵ Idaho Code Ann. § § 25-3504, 25-3520A (West 2012). Idaho Code § 25-3504 is also the subject of a pending bill in the legislature which, as of the date of this article submission, seeks to further strengthen the penalties against those who intentionally harm animals by including a definition of torture, among other things.

¹⁶ *Banaszczyk v. Kowalski*, 10 Pa. D. & C.3d 94, 97 (Pa. Com. Pl. 1979).

¹⁷ *Louisville & N.R. Co. v. Watson*, 94 So. 551, 554 (Ala. 1922).

¹⁸ *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2009).

¹⁹ *Id.*

²⁰ *Id.*

²¹ For a more in depth analysis than space permits here regarding the compelling public policy and practical reasons for not increasing an animal's legal value, and a discussion of resulting harm to veterinarians, owners, and the animals themselves, see

Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 229 (2006).

About the Author

Amy A. Lombardo is an Idaho native and a trial attorney at Parsons Behle & Latimer in Boise. She concentrates her practice in the areas of professional liability, products liability, and government relations. She has represented numerous veterinarians in her practice in Virginia and Washington, D.C. and looks forward to the day when her two small boys are old enough to help take care of a pet.



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IN MEMORIAM

Dwight Franklin Bickel 1931-2013

Dwight Franklin Bickel, 81, died on Jan. 16, 2013, at his home in Phoenix, Ariz., following a recent illness. Dwight grew up in Trilla and Charleston, Illinois.

Dwight began college at the University of Michigan, served in the Air Force during the Korean War, then attended the University of Illinois where he earned his B.S. degree, followed by his J.D. degree in 1957. He began practicing as a lawyer in Charleston and in the next year he and his family moved to Boise, where he served as Assistant Attorney General from 1959-1963, and started a private law practice that he continued for the rest of his life.

Although Boise remained his home base, Dwight moved several times to pursue different business opportunities during his professional career. He was admitted as a lawyer in Illinois, Idaho, Hawaii and Arizona, as well as the US Tax Court and the United States Supreme Court.

Later in his career, Dwight specialized in trust and estate work. His proudest professional achievements were the books he authored, one for the general public, *The Real Truth About Living Trusts*, and a lawyers' reference book, *Living Trusts Forms and Practice*, that will be a preeminent resource for lawyers across the country



Dwight Franklin Bickel

for many years to come. The Idaho State Bar honored his 50 years of service as an Idaho lawyer at a ceremony in Sun Valley that he attended with his oldest son. In 2010, Dwight moved to Arizona to concentrate on his trust and estate work.

Over his lifetime Dwight pursued many interests, including playing the trombone in a jazz band, acting at the Boise Little Theatre (earning a Beulah award in 1963) and teaching at Central Michigan University and Boise State University. He was active in politics, including attempts for Ada County Prosecuting Attorney and Idaho State Senate.

Two highlights for him were his years of practice as Bickel & Bickel with his son Dwight, and running a bike shop, The Spot, with his son Justin. He also shared office space and referrals with his daughter Debbie, to help establish her CPA practice.

Dwight is survived by his children: son Dwight A. Bickel, Edmonds, Wash., daughter Deborah A. (Bickel) Little, Middleton, Idaho, and son Justin D. Bickel, Kuna, Idaho. He was preceded in death by his parents, his wife Cindy, and his only sibling, Melvin Bickel, Jr.

Tyler James Henderson 1970 - 2013

Surrounded by family and friends, Tyler James Henderson died on Jan. 23, 2013 at St. Luke's Meridian Hospital. Tyler was born to Donald and Sally Henderson in Bakersfield, Calif. on Nov. 5, 1970. The Henderson family moved to Boise, Idaho in 1972.

The family moved to Bellingham, Wash., where he attended Western Washington University and met the love of his life, Marni. After graduation, he proposed to Marni and they moved to Spokane to attend Gonzaga University Law School.

With a law degree in hand and the announcement of his first son, Tyson, he accepted a position at Lane Powell, in Seattle. When his second son Trevin was born, he wanted to move back to Boise to share the outdoors with his family. In June 2005 he moved back to Idaho with a position at Moffatt Thomas.

In 2005 he started volunteer coaching with MPAL and later served on the board. He coached many of the same kids from MPAL flag football until their completion of the Optimist Football program. He taught the boys respect, dignity and good sportsmanship.

He is survived by his wife of 22 years, Marni, his two sons, Tyson (12) and Trevin (8), his parents Don and Sally Henderson, his brother Trent (Lucy and son Jaxon), grandmother Constance Maki and many other loved and cherished cousins, nieces, nephews and in-laws. The family thanks the entire Mountain States Tumor Institute and Integrative Medicine staff during Tyler's journey with cancer.



Tyler James Henderson

OF INTEREST

Karen Silva joins Capitol Law Group

Capitol Law Group, PLLC announced that Karen Silva has joined the firm as a partner. Ms. Silva is an experienced civil litigation attorney who focuses her practice on family law issues including divorce, child custody modifications, adoptions, estate planning, and criminal defense. She also has extensive business experience



Karen Silva

having managed and developed a solo law practice for more than 10 years.

Ms. Silva earned a B.A. in English, cum laude, from Boise State University, and her J.D. degree from the University of Idaho. She is a volunteer attorney with the Family Advocates CASA program representing children in abusive or neglected situations. During law school, she interned in the University of Idaho's clinical law program and argued before the Ninth Circuit Court of Appeals. She also received a NAPIL Summer Rural Legal Corps Fellowship working with Idaho Legal Aid Services serving low-income and migrant farm workers throughout southern Idaho.

Most recently, Karen owned and managed Silva Law Offices, PLLC, where she developed a general legal practice. Ms. Silva also has experience in insurance defense, employment law, business law, and personal injury cases. Ms. Silva can be reached at 208.424.8872 or ksilva@capitollawgroup.com.

Holland & Hart adds Bart Harwood to its Boise office

Holland & Hart LLP announced the addition of Bart Harwood to the firm's Business, Corporate and Finance practice group.

Mr. Harwood advises business owners on a variety of commercial and real estate

transactions. He also assists clients with trust administration and estate planning.

He is a member of Business Law, Real Property, and Probate and Trust Law Practice Sections of the American Bar Association, as well as the Idaho Association of Defense Counsel, and the Boise estate planning council. Harwood holds a J.D. from University of Idaho College of Law.



Bart Harwood

Perkins Coie welcomes Anastasia Lang to the firm's Boise office

Perkins Coie LLP is pleased to welcome Anastasia (Ana) Lang to its Emerging Companies practice group. Ana is based out of the firm's Boise office.

Ms. Lang focuses her practice on corporate formation, venture capital financings, mergers and acquisitions, technology transfer transactions and general business counseling. She represents companies in transactions across a wide array of industries including, software, digital media and Internet services.

She received her J.D. from Chapman University School of Law and her B.S. from California State University, Sacramento.



Anastasia (Ana) Lang

New firm includes Kumm & Reichert

Kelly Kumm welcomed Shane T. Reichert as a partner in the newly-formed law firm, Kumm & Reichert, PLLC (formerly Kumm Law Offices, PLLC).

Mr. Reichert began his career in Wenatchee, Wash., focusing on criminal defense, especially Driving Under the Influence (DUI), Personal Injury and Worker's Compensation. During his time in Washington, Mr. Reichert also served



Shane T. Reichert

as President of the Chelan-Douglas County Young Lawyers Division.

Reichert continues to focus his practice on criminal defense (federal, felony and misdemeanor), personal injury, and family law, including divorce, custody, child support and adoption. Kumm & Reichert, PLLC is located in Pocatello and can be reached at (208) 232-4051 or www.krlawfirm.com.

Jeremy C. Vaughn joins Stephan, Kvanvig, Stone & Trainor

The law firm of Stephan, Kvanvig, Stone & Trainor has welcomed attorney Jeremy C. Vaughn to the firm as a part-time associate where his practice will focus on litigation, estate planning, probate, business formation and family law. Mr. Vaughn received his BS from the University of Idaho in 2002. He is a 2005 graduate of the Marshall-Wythe School of Law at the College of William & Mary in Virginia. He had a private practice in Burley, Idaho from 2005-2006; law clerk to the Honorable Don L. Harding with the Sixth Judicial District of Idaho in Soda Springs from 2006-2007; Deputy Public Defender, Twin Falls County, 2007-2009; Deputy Prosecuting Attorney, Gooding County, 2009 to present; Deputy Prosecuting Attorney, Camas County, 2010-2012.

Mr. Vaughn is an Idaho native and a longtime member and volunteer for the Boy Scouts of America, active in several Masonic organizations and an active volunteer with Jobs Daughters International on the local and state level. Stephan, Kvanvig, Stone & Trainor is located in downtown Twin Falls, Idaho and can be reached at 208-733-2721 or at skst@idaho-law.com



Jeremy C. Vaughn

Tobias honored with award

Administrative Director of the Courts for the State of Idaho, Patricia Tobias, has received the 2012 Warren E. Burger Award, one of the highest awards presented by the National Center for State Courts. It is given to an individual who has made significant contributions in the field of court administration. Her work as an innovator, leader, administrator and competence were all mentioned in her nomination.

Beth Coonts receives WCA Tribute to Women and Industry Award

Hawley Troxell attorney Beth Coonts has been awarded the Women's and Children's Alliance (WCA) 20th Annual Tribute to Women and Industry (TWIN) award. As a TWIN recipient, Ms. Coonts along with other honorees will be recognized at an awards luncheon on March 13 at the Boise Centre.

Ms. Coonts is a member of Hawley Troxell's civil and commercial litigation group where she focuses on creditor rights and defense of wrongful foreclosure claims. Her practice also includes aiding clients in the areas of commercial litigation, mediations, and arbitrations.

Ms. Coonts received her law degree in 2007 from the University of Idaho College of Law. She has been a member of the Big Brothers Big Sisters board of directors since 2010 and the community outreach program as a big sister since 2009. She is also a member of Boise Young Professionals, and previously assisted individuals in obtaining immigration status under the Violence Against Women Act.



Beth Coonts

Hawley Troxell is a longtime supporter of the WCA and is proud to be a Safety Level Sponsor of the 2013 TWIN Awards.

New Administrative Law Judge selected for First District

Judge Lansing L. Haynes has been elected as the Administrative District Judge (ADJ) for the First Judicial District. He assumes those duties on April 1, starting a three-year term. As ADJ, Judge Haynes will apportion the workload for the district judges, assign cases and make policies and procedures, while continuing his current judicial duties. He was selected by a majority vote of district judges in the First District and will replace Judge John T. Mitchell in the position.

Judge Haynes was appointed to the bench by former Governor, now U.S. Senator, James Risch in August 2006. He was elected by popular election in 2010. Judge Haynes currently serves on the Idaho Supreme Court's Sentencing Committee as well as the Death Penalty Counsel Review and Recommendation Committee.

OF INTEREST



Steven Andersen



Thomas Banducci



Amanda Brailsford



Benjamin
Schwartzman



Brent Bastian



Tim Kurtz



Dara Labrum Parker



Jennifer Schrack
Dempsey



Stephanie
Westermeier

Northwest attorneys form new civil litigation law firm

Civil trial lawyers Steven Andersen and Thomas Banducci are forming a new law firm that includes Benjamin Schwartzman, Wade Woodard, and Amanda Brailsford.

The resulting Boise-based trial practice firm — Andersen Banducci PLLC — specializes in complex, high-stakes litigation and represents both defendants and plaintiffs. Andersen Banducci trial attorneys were lead counsel for verdicts and settlements in excess of \$400 million. Attorneys in the firm practice litigation involving business, insurance, banking, intellectual property, class actions, product and professional liability claims, securities fraud, multidistrict litigation, federal and state antitrust violations, injury and multiparty tort claims and labor and employment issues.

The firm's five principals have each pursued their elite practices for decades. Mr. Andersen has tried more than 100 civil cases to verdict. Meanwhile, Mr. Banducci has litigated complex commercial issues in more than 20 states.

In all, the firm boasts nine attorneys. In addition to the founding partners, the Andersen Banducci team includes partners Jennifer Schrack Dempsey and Brent Bastian and associates Dara Labrum Parker and Tim Kurtz.

The practice is located in the U.S. Bank Plaza in downtown Boise at 101 S. Capitol Blvd., where it will occupy Suite 1600. The firm's phone number is (208) 342-4411.

Andersen Banducci PLLC attorneys are licensed to practice in Idaho, Washington, Oregon, California, New Mexico, Texas, and the District of Columbia. Visit www.andersenbanducci.com for more information.

Corporate Counsel Association gives awards

The Association of Corporate Counsel, (ACC), Mountain West Chapter presented awards to three in-house attorneys for outstanding service to their organizations and community. Nominated by their peers and selected by a committee, these three exemplify the attorney who goes beyond expectations to ensure an ethical and compliant environment. Those honored at a recent gala at the Stueckle Sky Center at the Bronco stadium include:

Stephanie Westermeier of Boise is general counsel for Saint Alphonsus Health System, Inc., which includes four hospitals. In 2010 she assisted in the formation of Saint Alphonsus health System, including the creation of a governance structure and the integration of four hospitals into a new system. Stephanie was

honored with the "Outstanding Corporate Counsel" award.

Stephanie worked at Givens Pursley LLP, in Boise from 1991 to 2001. She has received professional recognition including the Tribute to Women in Industry award in 2000 and the Idaho Business Review 2007 Woman of the Year Award. In 2008 she was selected to serve as a panelist at the American Bar Association's Rule of Law Forum and she serves on the Executive Committee of the Idaho State Bar Health Law Section.

She served on the Bishop Kelly High School Foundation Board and its Executive Committee. She is also an officer of the St. Joseph's Catholic School fundraising board. Stephanie currently is the president of the board of the Idaho Tort Liability Reform Coalition.

Originally from Boise, Adam Richins chose engineering as his profession. He graduated with a B.S. in Civil Engineering from Columbia University and a B.S. in Mathematics from the University of Puget Sound. He worked extensively with in-house counsel in Seattle to resolve a multi-million dollar dispute and he developed an appreciation for the role of an attorney. So he changed careers.



Adam Richins

Adam graduated with honors from the University of Washington Law School and clerked for Hon. Stephen Trott at the Ninth Circuit Court of Appeals. Adam was honored with the "Outstanding New Corporate Counsel" award.

Currently, Adam is Idaho Power's chief counsel for litigation and claims, contracts and procurement, environmental compliance and security. With his project management and engineering background, Adam negotiates high-stakes commercial agreements, while also providing practical legal advice to various business units within Idaho Power.

OF INTEREST

Ryan McFarland has deep ties to the Boise area, having grown up in Boise and returned after earning his law degree from University of Michigan Law School. Ryan worked from 2006-2012 for Hawley Troxell, Ennis & Hawley LLP, Idaho's largest law firm, where he practiced in the Commercial Litigation Group. Ryan was presented with the "Pro Bono/Community Service" award.



Ryan McFarland

His practice focused on Real Property litigation, Intellectual Property litigation and Internet Law litigation as well as Creditors Rights. While at Hawley Troxell, Ryan represented clients in trial courts throughout Idaho, as well as in the Idaho Court of Appeals and the Idaho Supreme Court. Ryan regularly practices before the U. S. District Court and the U.S. Bank-

ruptcy Court. Ryan has argued cases before both the Idaho Supreme Court and the Ninth Circuit Court of Appeals. In November, Ryan accepted an in-house counsel position with Scentsy, Inc.

He serves the community in several ways, including roles for his church, regular pro bono work, in youth soccer, as a wrestling coach, and on the Executive Board of the Salvation Army – Boise Corps.

Perkins Coie Promotes Three to Counsel in Boise Office

Perkins Coie LLP is pleased to announce that three Boise attorneys have been promoted from associates to counsel. The new counsel represents a full range of Perkins Coie practice areas within the Boise office:

Tonn Peterson is counsel with the firm's litigation practice and focused on commercial litigation, labor and employment, and business disputes.



Tonn Peterson



Cheryl Allaire

Cheryl Allaire is counsel with the firm's business practice and counsels clients in diverse industries and stages of growth.

Nicholas Taylor is counsel with the firm's emerging companies and mergers and acquisitions practices.



Nicholas Taylor

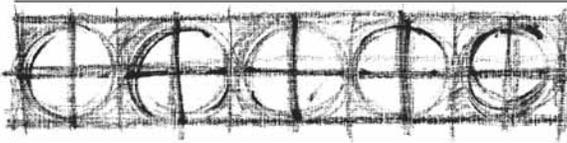
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2012 IDAHO VOLUNTEER LAWYERS PROGRAM VOLUNTEERS

Please join us in saying a special thanks to the **765** Idaho attorneys who accepted or completed pro bono assignments in family law, immigration, consumer protection, wills, benefits, foreclosure matters, nonprofit corporation issues and other special needs for IVLP applicants in 2012. Some of the volunteers took up the challenge to represent or assist prisoners in federal court litigation, stepped in to represent Court Appointed Special Advocates in a child protection cases, or helped a grandparent rescue an innocent grandchild from a dysfunctional home by establishing guardianship. The **IVLP Wall of Fame** also includes the names of attorneys or judges

who participated in other IVLP activities including: Advice and Counsel sessions given at Senior Centers, at the St. Vincent DePaul Center in Coeur d'Alene, various Community Legal Services or on the Bankruptcy Helpline. Volunteers also participated in the Pro Bono Immigration Law Network's "Charla" (education presentation and case screening) & Case Review Panel, **Soundstart** (proactive education and motivation sessions for low-income parents) and Volunteer Lawyers for Emerging Businesses (assisting small business owners with their legal needs). Attorney members of the Idaho Pro Bono Commission and the IVLP Policy Council are also listed.

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 David E. Alexander, *Pocatello*
 Jared Wayne Allen, *Idaho Falls*
 Elizabeth K. Allen, *Nampa*
 Debra J. Alsaker-Burke, *Boise*
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 Scott T. Blotter, *Sandy, UT*
 Ralph R. Blount, *Boise*
 Richard C. Boardman, *Boise*
 Tamara L. Boeck, *Boise*
 Nicholas T. Bokides, *Weiser*

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 Paul Gary Butikofer, *Rigby*
 D. Kirk Bybee, *Pocatello*
 Brett Raymond Cahoon, *Pocatello*
 Dennis L. Cain, *Boise*
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 Kari M. Campos, *Idaho Falls*

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 Nicole Lee Cannon, *Twin Falls*
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COUNT PRO BONO HOURS FOR THE 6.1 CHALLENGE: FOURTH DISTRICT DEADLINE IS APRIL 5

Once again district bars are challenging their members to tally their hours of pro bono and join in a little friendly competition. The Fourth District Bar Association has several categories which is a reminder that every attorney has an opportunity to perform pro bono service. Fourth District attorneys are asked to report their pro bono hours by April 5.

Typically, the Fifth, Sixth and Seventh District Bars do something similar, though with fewer categories, and later in the year. Those

competitions usually measure pro bono hours donated from May 1 to Sept. 1, though an announcement is expected this spring. The Seventh District hosts an annual Pro Bono Golf Challenge in early September.

Fourth District Bar Association President Teresa Hill said “The 6.1 Challenge is a great opportunity to recognize the lawyers in the Fourth



Teresa Hill

District who give back to the community, but more importantly, I hope it inspires others to follow their lead. Imagine the impact we could have on our community if every one of the 1,700 lawyers in our district exceeded the recommended 50 hours of service.”

The Fourth District’s 6.1 Challenge recognizes and encourages pro bono service from individuals, law offices and those in both corporate and government settings. The Idaho Volunteer Lawyers Program assists by documenting the bar’s pro bono efforts that it reports to

the American Bar Association, the community and other organizations. The data is also helpful to develop accurate information on volunteer work being done by attorneys throughout the State of Idaho.

To participate in the Fourth District competition, submit your (and/or your firm’s) qualifying pro bono hours and public service activities performed from April 1, 2012-April 5, 2013 to IVLP by April 5.

Find more information at: <http://www.isb.idaho.gov/ilf/ivlp/challenge.html>
http://www.isb.idaho.gov/pdf/ivlp/6.1_challenge_volunteer_hours_form.pdf



Photo by Dan Black

Late winter and early spring is Mock Trial season. The Idaho Law Foundation organizes the competition each year with assistance from volunteers, donors, educators and parents. The program also relies on attorneys and non-attorney community members to serve as coaches, judges, and competition support. Regional competitions are March 2 and 9, and state competition is March 20-22.

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RESIDENCE CITY

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Weiser, ID

Malad, ID

DECEASED

March 14, 2012

May 11, 2012

September 10, 2012

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Roger B. Wright

James C. Paine

Lawrence G. Smith

Christopher Davis Bray

Elisabeth Ann McSweeney Curtis

John E. Clute

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James Faber Wickham

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Twin Falls, ID

Moscow, ID

Boise, ID

Boise, ID

Twin Falls, ID

Boise, ID

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Boise, ID

DECEASED

January 27, 2012

February 1, 2012

February 5, 2012

February 15, 2012

March 9, 2012

March 28, 2012

April 17, 2012

May 1, 2012

June 16, 2012

June 21, 2012

June 28, 2012

July 2, 2012

July 2, 2012

July 18, 2012

July 26, 2012

August 6, 2012

October 8, 2012

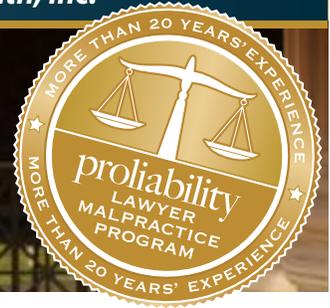
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I have just released a special report that reveals the real-life, client-attracting secrets used by other successful attorneys... all of which are online methods that can be done-for-you by other people, leaving you as the beneficiary in just a span of 28 days.

Inside You'll Discover...

1. The ABC System to Turning Your Website Visitors into New Clients
2. How to Gain the Trust of Your Prospects Before Meeting Them
3. 3 Methods of Turning Your Website into a Magnet for New Clients

Any Special Requirements?

None. Other than the tiniest bit of ambition and decisive action.

I'm positive that any lawyer serious about getting more cases can copy what I've taught and done for others... once they have my report which explains everything in a step-by-step, easy to follow fashion.

A Smokin' Hot Bonus!

Don't fly blind while being online without this 16 page report. I'm including it as an extra free bonus, "The 5 Dangerous Trends Facing Attorneys Online (Whether you have a website or not)"

Why You Would NOT Want to Get This Report:

Any reason I can think of to say 'No' is, frankly, a mistake. A measly \$12 investment for a "spelled-out-for-you" full color report is a no-brainer. The only person at risk of making a huge profit here is you, when you get the report and put it into action!

Think this is a bunch of B.S.?

At times while operating your business you've had serious doubts as to whether you've made the right decision or done the right thing.

I understand how you feel and some of my happiest clients felt the same way before we worked together and here is what one of them wrote me in a letter:

"Several of my clients have mentioned to me that the reason they chose me over other qualified attorneys was my website."

Also from the same letter...

"You taught me that the best website in the world cannot capture clients unless clients can find it! ...I'm proud to have another tool and relationship to help my clients to reach their goals- you!"

~ Matthew Taylor, Taylor Law Offices

Numbers don't lie either. One of my client's online visibility skyrocketed by a whopping 670% last month alone. Who wouldn't want these results?

Imagine That...

- Your online visibility has also multiplied by more than 6 times.
- Your website's traffic has doubled.
- Twice the percentage of visitors to your website are contacting you.

What would all this mean to your practice? Of course, you could get more clients from your website. You could be more selective and only take on the best cases. Your revenue could increase. You could help more people.

Your Next Step

Naturally, you have 2 choices:

1. You can put this letter away, think it over, and maybe miss out on this life-changing opportunity, or...
2. Invest in yourself and your future. Send me twelve bucks for the report and start taking on more new cases.

I trust you will make the right choice.

~ Brodie Tyler

To: **Dox Marketing**
950 W Bannock St #1100
Boise, ID 83702

YES, Brodie. Rush me my copy of "How to Start Getting 5-8 More Clients From Your Website in the Next 28 Days" plus the Free Bonus Report for only \$12⁰⁰.

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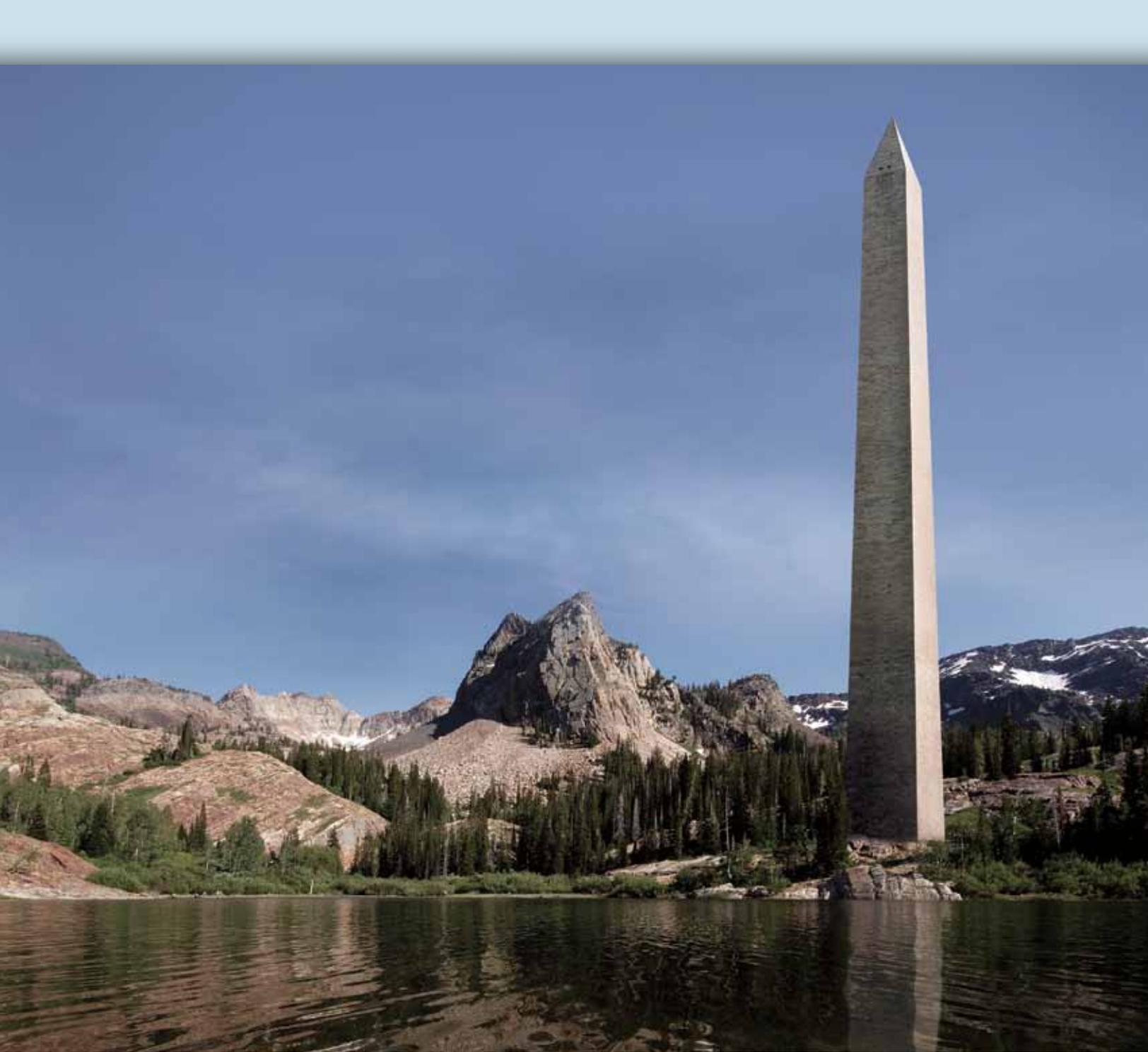
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Filling in the blanks to your digital evidence puzzles.



ACROSS

2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.

4. The "free space" on a hard drive where deleted files can be found.

6. A type of "virus-network" that utilizes infected victims for combined computing, DDOS attacks, and more.

7. Format of cell-phone picture messages.

8. On Android devices, databases of evidentiary value are stored in this format.

9. Extra space at the end of a file where deleted data can exist.

10. Algorithm used to ensure evidence integrity; the "data fingerprint."

11. Type of container used to shield seized mobile devices from radio waves.

13. Verb: to gain administrative access on an iOS device.

DOWN

1. Hardware device used to ensure that evidence drives are not contaminated during acquisition.

2. A common web vulnerability where a hacker executes malicious code to alter a database.

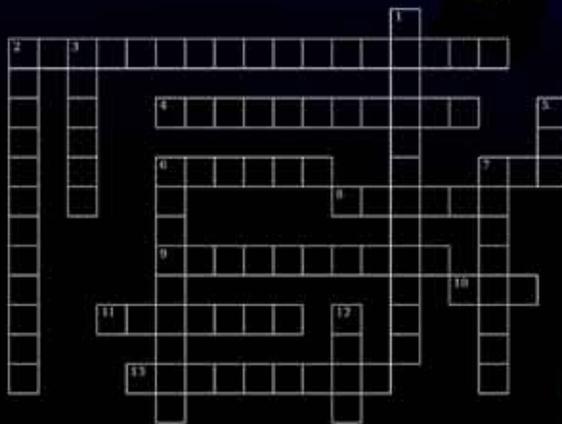
3. The first piece of hardware a forensic examiner reaches for when responding to a computer-crime.

5. Text message format, limited to 160 characters.

6. Term for forensic disk images containing every bit of an evidence drive.

7. "Hidden" data such as date-time stamps and GPS coordinates, often part of picture files.

12. Newer type of cryptographic hash, also used to verify evidence integrity.



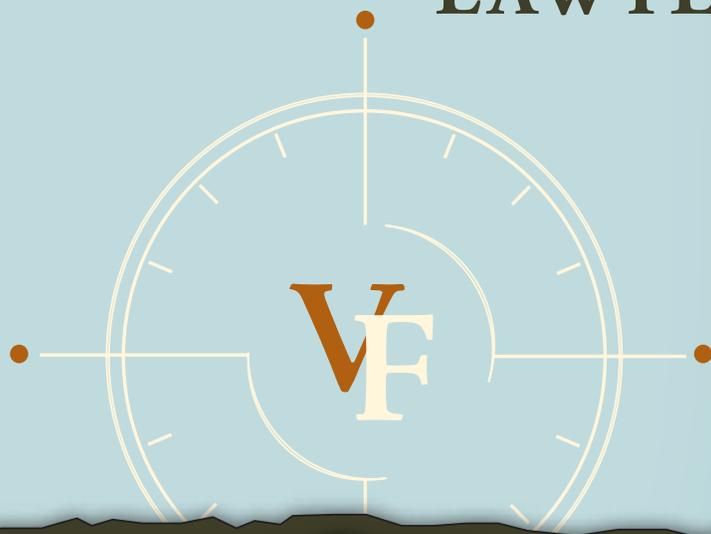
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