

A close-up photograph of a bumblebee on a vibrant pink flower. The bee is positioned on the left side of the frame, facing right. The flower is a dense cluster of many small, bright pink tubular florets. The background is a soft, out-of-focus green, suggesting a natural outdoor setting. The overall image has a bright, natural feel.

# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 56, No. 8  
August 2013

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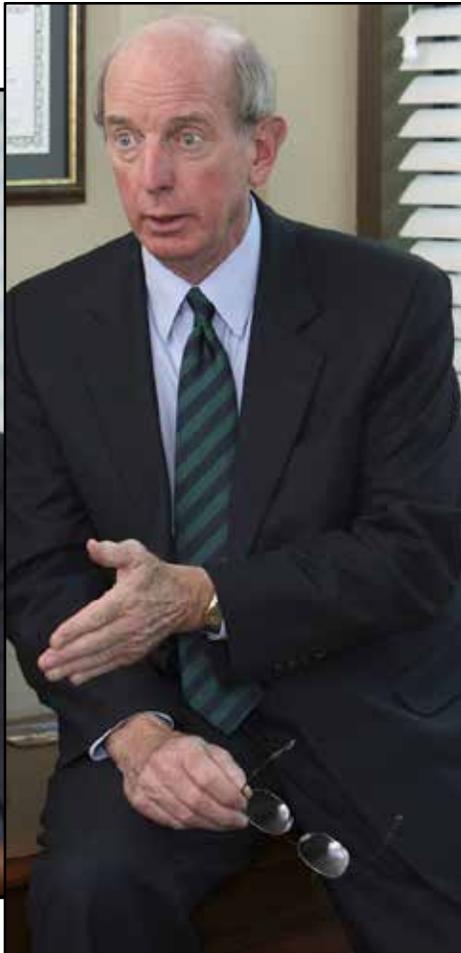
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# The Advocate

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## On the Cover:

The cover photograph "Summer Buzz" was taken by attorney Lane Erickson of Racine, Olson, Nye, Budge & Bailey, Chtd. in Pocatello.

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

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9:00 a.m. (MDT)  
2.0 CLE credits **RAC**

### August 28

*CLE Idaho: Replay and Lunch – Defending Prisoners at Guantanamo: Due Process, International Law & Justice in a Time of Conflict*  
Sponsored by the Idaho Law Foundation  
Community Campus, 1050 Fox Acres Road – Hailey  
11:30 a.m. (MDT)  
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### August 28

*CLE Idaho: Replay and Lunch – Defending Prisoners at Guantanamo: Due Process, International Law & Justice in a Time of Conflict*  
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## September

### September 6-7

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## September

### September 12

*New Negotiated Rulemaking Requirements and Other APA Updates*  
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The Law Center, 525 W. Jefferson – Boise / Statewide Webcast  
3:30-4:30 p.m. (MDT) with a reception to follow  
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### September 18

*Representing Your First or Next Social Security and SSI Disability Claimant*  
Sponsored by the Idaho Law Foundation  
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast  
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### October 2

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### Circumstances Brought Me to a Career in Law

**F**or more than 30 years, lawyers and judges have been my mentors, teachers, colleagues and friends. We came into the profession for various personal reasons. Some of us want recognition, wealth, power, authority, or all of the above. More importantly, I believe that there is a more lasting reason to be a lawyer. That reason is to fulfill a mission of service to our clients. The mission of the unified bar in Idaho, in part, "is to promote high standards of professional conduct; and to aid in the advancement of the administration of justice..." The learning process needed to accomplish the mission starts long before we have the license to practice.

Over the years, columns of past commissioners have shared their personal journeys that differ in specifics but share common themes centered on life's lessons of commitment, perseverance, loyalty and respect. I see no reason to veer from that tradition.

West Virginia was my boyhood home. My mother was one of 12 children and the family farmed along the west bank of the Kanawa River downstream from Charleston. They were flooded out in the 1937 flood and the clan relocated to north central Ohio. On Father's Day weekend the Jordan Family Reunion gatherings were held on the farm near Mansfield, Ohio. The reunion is famous in the county for the sheer size

of the gathering. Sometimes over 300 relatives attend.

At the Jordan family reunions I listened to stories of mountains and rivers from my Uncle Bud. Bud Jordan flew for United Airlines for more 30 years and Boise was his favorite layover. I was fascinated by his stories. Bud owned a mountain ranch in Boise County that was bisected by a crystal clear creek loaded with little rainbow trout. My wife Debbie and I had come through Boise and Boise County on the way to West Virginia University College of Law in August 1976. Above Five Mile Creek the mountains rose quickly and a few miles east of his cabin the Sawtooths cut into the most incredible blue sky I had ever seen. I was hooked. We were here to stay in May 1979.

Long days and athletics helped shape my youth. Another influence was having brothers who became doctors. They have been, and still are, my mentors for difficult matters. My mother was a nurse.

My father owned a small jewelry store and for 42 years worked six days a week. At age 74, less than a month after the last time he locked the door to the store, he died. Dad had a remarkable way of relating to his customers. His deals were sealed with a handshake. He had a consistency of routine like no other person I have ever known. In today's world, it could be said that dad lacked spontaneity but I appreciated knowing that any day at 11 a.m. I could join him for lunch. I played sports as a kid and thankfully that helped open doors to my legal education.

For a brief period of time I was a professional golfer after college, but I soon tired of travel and light paydays. One of my hometown heroes was Bill Campbell, a Princeton grad and 1964 U.S. Amateur Champion. Mr. Campbell recommended me for admission to WVU College of Law and I took his advice.

These are my observations today. Success, however you choose to measure it, comes with time. Humility is a characteristic that is not normally attached to lawyers, but in my experiences the best lawyers are not arrogant or proud. Courtesy to the court and your adversary will always pay off in the long run. Court staff appreciates a thank you. Be patient and check your emotions. Let an urge to send a terse reply email simmer overnight. You might decide it is unnecessary. Your reputation is built over years and can flame out in minutes.

In this space I plan to write about the kinds of things I know enough about to be dangerous, like technology. And indigent defense, which I have practiced for some years. I want to hear your comments about your experiences as lawyers. Email me at [wellmanwilliamh@qwestoffice.net](mailto:wellmanwilliamh@qwestoffice.net).

#### About the Author

**William H. Wellman** is a solo practice attorney in Nampa. Mr. Wellman has his BA from Miami University in Oxford, Ohio '74 and JD from West Virginia University College of Law '79. He has been the contract public defender in Owyhee County since 1986. His wife Debbie is a custody mediator and licensed counselor. They are parent to three adult children, all living in Boise.



## DISCIPLINE

### TERESA A. MARTIN

(Withheld Suspension and Probation)

On June 19, 2013, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney, Theresa A. Martin, from the practice of law for one year with the entire year withheld, and placing her on a 2-year probation pursuant to I.B.C.R. 506(f) and 507. The Idaho Supreme Court's Order followed a Professional Conduct Board recommendation and stipulated resolution of an Idaho State Bar disciplinary proceeding.

The Idaho Supreme Court found that Ms. Martin violated I.R.P.C. 1.2(a) [Scope of Representation]; 1.3 [Diligence]; 1.4 [Communication]; 8.1 and I.B.C.R. 505(e) [Failure to respond to Bar Counsel in a disciplinary matter], with respect to five different client matters that constituted the five counts in the Second Amended Complaint filed in the disciplinary case. Four of those client matters involved post-conviction relief claims and client complaints that Respondent did not keep her clients adequately advised about the status of their petitions for post-conviction relief. In each of those four matters, Respondent

did not file an appeal of the eventual dismissal of those petitions, despite the clients' express requests to appeal the dismissals. In each of those matters, Respondent failed to abide by the clients' objectives regarding the representation, did not diligently pursue their objectives and failed to reasonably communicate with the clients about the status of their post-conviction proceedings. In the fifth client matter, Respondent was appointed to represent a client in a case to terminate the client's parental rights. In that case, Respondent failed to respond to multiple client letters requesting information about his parental rights case and failed to file an appeal as requested. In addition, during the investigation of each of those five disciplinary grievances, Respondent also failed to fully respond to Bar Counsel.

The Disciplinary Order provided that the one-year suspension will be withheld and that Ms. Martin will serve a two-year probation, subject to the conditions of probation specified in the Order. Those conditions include that Ms. Martin will serve the entire year suspension if she admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction

is imposed for any conduct during Ms. Martin's period of probation. In addition, if Ms. Martin admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a private sanction is imposed for any conduct during her period of probation, she will serve 90 days suspension for each private sanction, not to exceed one year. Ms. Martin will also practice under the supervision of a supervising attorney during her probation, who will provide quarterly reports to Bar Counsel's Office. Ms. Martin will also certify in writing, under oath, on a monthly basis, that she is representing her clients consistent with her responsibilities under the Idaho Rules of Professional Conduct.

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

### DOUGLAS K. KNUTSON

(Reinstatement to Active Status)

On July 15, 2013, Douglas K. Knutson was reinstated to the practice of law in Idaho.

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



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### Section members help students

The Environment and National Resources Section recruited some volunteer attorneys to visit area schools in April to coincide with Earth Day. Three teams of two section members engaged classrooms with fun and quirky science themes including a hands-on demonstration of a lemon-powered battery, wind energy, recycling, composting and lawyers' role in environmental issues.

All three of the teams reported that the kids and the teachers were thrilled and invited us all back next year.

### Plans Shape Up for the Federal Bench - Bar Conference

The 2013 Federal Court Bench-Bar Conference in Coeur d'Alene is scheduled for October 4 at the Coeur d'Alene Resort. A slightly different program will be conducted in Boise on November 1.

Chief District Judge B. Lynn Winmill and Chief Bankruptcy Judge Terry L. Myers will start the day out with a "State of the Federal Judiciary" report before breakout sessions featuring contemporary issues.

Attendees can choose among morning breakout sessions. "Bankruptcy Law Practice – Emerging Issues and Pitfalls to Avoid" will be presented by Lawyer Representative Bruce Anderson, Steve McCrea and Jeff Andrews, all North Idaho bankruptcy practitioners. Concurrently, "Civil Law Practice – The iPad Liti-gator" will examine tablet and similar technology in the courtroom and office. Moderated by Lawyer Representative Trudy Hanson Fouser, the presentation will include practical guidance from Adam Bloomberg, of a Dallas, Texas litigation consulting firm, and will be joined by Lawyer Representative J. Walter Sinclair.

Criminal law practitioners can attend "Byte by bye—The Digital Age Comes to Idaho's Federal Criminal Law Practice," which will include a discussion of the use of digital evidence in the courtroom, in search warrants, and in discovery practice, as well as in the realm of Brady obligations and child pornography prosecutions. This session, featuring Andrea George, the Executive Director of the Federal Public Defenders of Eastern Washington, and Assistant United States Attorney Traci Whelan, will also include a description of the changing prosecution initiatives and priorities of the Department of Justice and the U.S. Attorney's office, and the challenges such changes will present for the federal criminal defense bar.

Judge N. Randy Smith, U.S. Court of Appeals for the Ninth Circuit will give luncheon remarks about "How to be Happy in the Practice of Law," and will then present the keynote address, "A Primer on Appellate Practice in the Ninth Circuit: The Critical Importance of the Standard of Review."

The afternoon will also include the traditional question-and-answer judges' panel discussion, which is always a lively session bringing the personal perspective of Idaho's federal judges.

The cost is \$75 for attorneys, and \$35 for law students, clerks and paralegals. CLE credits are pending. A registration form can be found on the United States District/Bankruptcy Court website at [www.id.uscourts.gov](http://www.id.uscourts.gov). If you have questions, please contact Susie Boring-Headlee at (208) 334-9067 or via email at [Susie\\_Boring-Headlee@id.uscourts.gov](mailto:Susie_Boring-Headlee@id.uscourts.gov)

### Sara Thomas named Idaho Criminal Justice Commission Chair

Governor Butch Otter appointed State Appellant Public Defender Sara B. Thomas chairman of the Idaho Criminal Justice Commission. She succeeds Idaho Department of Correction Director Brent Reinke in leading the commission's work to improve Idaho's criminal justice system.

"Because I believe strongly in the Criminal Justice Commission's mission to bring together all branches of government to collaborate for a safer Idaho, I am honored to have the opportunity to serve as its chairman," Thomas said.

The Idaho Criminal Justice Commission was established by executive order of the governor to "promote efficiency and effectiveness of the criminal justice system and, where possible, encourage dialogue among the respective branches of government to achieve this effectiveness and efficiency."

"Sara did a great job leading the commission's work on identifying and addressing challenges facing our criminal defense bar, and was a strong advocate on behalf of the human trafficking legislation approved by the Legislature. As chairman, I know Sara's passion and commitment will continue to help us find collaborative, consensus-based solutions to some of our toughest issues," Governor Otter said. "I'm grateful she's willing to take on this additional responsibility, and I thank Director Reinke for the great job he did guiding the ICJC."

The committee's membership includes representatives from the Attorney General's office, the Idaho Senate, the Idaho House of Representatives, the Department of Cor-

rection, Idaho State Police, Department of Juvenile Corrections, Office of Drug Policy, Idaho Department of Education, Commission of Pardons and Parole, State Appellant Public Defender, Department of Health and Welfare, the administrative director of the State courts, the Idaho judiciary, the Idaho Prosecuting Attorneys Association, the Commission on Hispanic Affairs, the Idaho Sheriffs' Association, the Idaho Chiefs of Police Association, the Idaho Association of Counties, and two at-large citizens. Director Reinke remains a member of the commission.

**Concordia students get summer jobs**

Concordia Law's Director of Experiential Learning & Career Services, Jodi Nafzger, recently announced

the summer externship and internship opportunities that 1L students have secured. Nearly 30 Concordia Law students are working under the supervision of judges and attorneys over the summer session. These opportunities include paid legal work with private law firms and government agencies, as well as externship opportunities with the Idaho Supreme Court, the Third and Fourth Judicial Courts, the Office of the Governor, the Attorney General's Office, Idaho Legal Aid Services, DisAbility Rights of Idaho and Advocates for the West. Some students are working in Utah, Montana, Colorado, Missouri and Washington D.C. Students who participate in the externship program are also enrolled in a course designed to complement their field work and reinforce law-

ying skills and the social and ethical responsibilities of the profession.

**Idaho Academy of Leadership for Lawyers accepts applications until Aug. 9**

Applications are being accepted by the Idaho State Bar for the Idaho Academy of Leadership for Lawyers (IALL). Now in its third year, IALL aims to promote diversity and inspire leadership qualities in the legal profession by presenting proven leadership skills. The program features professional development for a small group of Idaho's most promising lawyers. IALL brings together lawyers from different practice areas with a variety of backgrounds from all across Idaho. The application deadline is Friday, Aug. 9.

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## Executive Director's Report

### 2013 Resolution Process

*Diane K. Minnich*  
 Executive Director, Idaho State Bar

#### Proposed Resolutions – Deadline September 25

Do you, your district bar association, practice section or committee have an issue, proposed rule revision or legislative matter that you think should be voted upon by the Idaho State Bar membership. If so, the fall resolution process, or “roadshow” is the opportunity to propose issues for consideration by members of the bar.

Unlike most state bars, the Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of the Court, or substantive rules governing the bar itself, by act of its bar commissioners, or at its Annual Meeting. Matters referenced above must be submitted to the membership for a vote through the resolution process.



This year, resolutions may include proposed changes to the practical skills requirements, legal intern rules, Idaho Rules of Professional

Conduct, Client Assistance Fund rules, admission fees and allowing electronic voting in bar commissioner elections.

As you may recall, last year the membership considered proposed revisions to Section IV of the Idaho Bar Commission Rules – MCLE. The rules were defeated by a vote of 48% for and 52% against. The issue that raised the most concern among bar members was the increase in the MCLE credit requirement. The Commissioners have decided to submit the rules to the resolution process again this year, keeping the current general credit requirement, 30 hours in the 3-year reporting cycle, a slight increase in the ethics credit, 3

credits for every 3-year reporting cycle. The remaining proposed MCLE rules would be the same as 2012, including allowing credit for published writing and allowing Idaho licensed attorneys whose principal practice is in another state to only comply with MCLE requirements in the state they practice.

Idaho Bar Commission Rule 906 governs the resolution process. Resolutions for the 2013 resolution process must be submitted to the bar office by the close of business on September 25, 2013. If you have questions about the process or how to submit a resolution, please contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov) or (208)334-4500.

The fall resolution process, or “roadshow” is the opportunity to propose issues for consideration by members of the bar.



#### 2013 District Bar Association Resolution Meetings

District	Date/Time	City
First Judicial District	Monday, November 4 at Noon	Coeur d'Alene
Second Judicial District	Monday, November 4 at 6 p.m.	Lewiston
Third Judicial District	Thursday, November 14 at 6 p.m.	Nampa
Fourth Judicial District	Thursday, November 14 at Noon	Boise
Fifth Judicial District	Wednesday, November 13 at 6 p.m.	Twin Falls
Sixth Judicial District	Wednesday, November 13 at Noon	Pocatello
Seventh Judicial District	Tuesday, November 12 at Noon	Idaho Falls

## Thank you

The Annual Meeting brings change in the leadership of the Bar. This year Paul Daugharty from Coeur d'Alene will be replaced by Tim Gresback from Moscow; and Boise attorney Molly O'Leary will be replaced by Trudy Fouser of Boise. William (Bill) Wellman became the ISB President at the close of this year's Annual Meeting.

I offer my thanks to Paul and Molly for their service and commitment of time, resources, and expertise to the bar. Serving as a bar commissioner is time consuming, more than I think many new commissioners appreciate. If you



Paul Daugharty

are from north Idaho, travel time is in addition to the actual time spent in meetings and events. As a sole practitioner, Paul had to juggle his clients, family and practice with the Commissioners' schedule. We appreciate his willingness to serve and the sacrifices he made to do so.

Molly was always there to discuss, evaluate and help consider issues. She is thoughtful and committed to improving the work of the bar. She was a great travel companion also, she enjoys seeing the sites and doing a little shopping along the way.

**Idaho Law Foundation** - As most of you know, former UI College of Law Dean Don



Molly O'Leary

Burnett is now serving as the interim UI President. In his capacity as the College of Law Dean, Don Burnett served as an ex officio voting member of the Idaho Law Foundation for the past 12 years. At the July Board meeting, was replaced by interim Dean Michael Satz.

Interim President Burnett's intellect, commitment to excellence, and collaborative spirit were beneficial to the Foundation. His commitment to the legal profession and Idaho continues to serve as an example to all of us. We thank him for his service to the Foundation. He will be missed as a member of the Idaho Law Foundation Board of Directors.

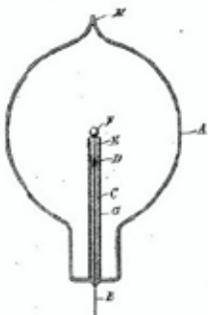


Don Burnett

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"I do not think there is any thrill that can go through the human heart like that felt by the inventor as he sees some creation of the brain unfolding to success... Such emotions make a man forget food, sleep, friends, love, everything." - Nikola Tesla

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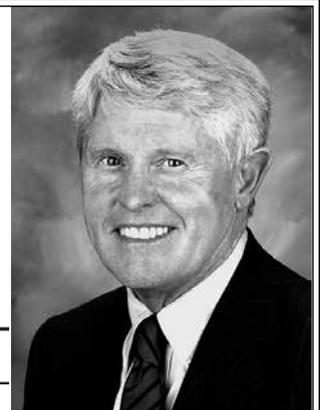
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# Welcome From the Water Law Section

Andy Waldera

It is my pleasure to welcome you to this edition of *The Advocate* sponsored by the Idaho State Bar Water Law Section.

The Section hopes you find the articles interesting and informative. I thank both the authors and the editorial review board for their time and effort because it is these voluntary efforts that make *The Advocate* possible.

Historically, the Section has written about what I consider to be more traditional topics of Idaho Water Law. Topics included agency and judicial interpretations of the prior appropriation doctrine, updates concerning the progress of the Snake River Basin Adjudication (SRBA), and tensions between surface water users and interconnected ground water users under the conjunctive management doctrine. All of these arguably more traditional topics are still very active (though the SRBA is nearing completion after all these years), but there are other issues affecting how Idaho and its water users manage the state's water resources. This edition of *The Advocate* tries to capture some of those other issues and developments.

For example, Dylan Hedden-Nicely wrote about the implementation of the recently adopted Coeur d'Alene Lake Management Plan, jointly developed between the Idaho Department of Environmental Quality and the Coeur d'Alene Tribe, and whether early indications show de-

sired water quality improvements will follow.

Dylan Lawrence covered recent Idaho Supreme Court precedent regarding when a water right crosses the threshold between being a personal property right and real property right.

Norm Semanko provided a much-needed legislative update regarding the water-related legislation enacted during the 2012 and 2013 Legislative Sessions.

Scott Campbell raised awareness of Food and Drug Administration-proposed regulations under the Food Safety Modernization Act that could, if finalized, dramatically alter food production agriculture irrigation practices and cropping decisions across southern Idaho and much of the West.

And, I wrote about federal municipal stormwater regulation under the Clean Water Act, and how national trends are making their way into local regulatory permits.

Aside from the articles, the Section has been active since its last sponsorship of *The Advocate*. Most notably, the Section donated new (matching and more comfortable) chairs to the SRBA Court in Twin Falls. The new chairs replaced those formerly used by the judge, court reporter, court clerks, witnesses, and counsel. The Section also helped fund and complete videoconferencing capabilities between the Idaho Falls office of the Idaho Department of Water Resources and the SRBA Court. Videoconferencing capability

is an important advantage of modern technology allowing for "virtual" appearances in the courtroom without the added time and client expense of travel. Videoconferencing capabilities now exist via the Department offices in Idaho Falls, Boise, and Coeur d'Alene, and the videoconferencing should play a major role in the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA) also pending in the SRBA Court in Twin Falls. The Section has also made financial contributions to other bar-related entities and the University of Idaho's Waters of the West program.

It is an honor to chair this active and robust Section of the Idaho State Bar. And the leadership looks forward to further progressing the charge of the Section. Again, we hope you enjoy this edition of *The Advocate*.

## About the Author

**Andy Waldera** is a partner in the Boise office of Moffatt, Thomas, Barrett, Rock & Fields, Chtd. Mr. Waldera's practice focuses on Water, Environmental/Natural Resources, and Agricultural Land Use law. Mr. Waldera serves as Chair of the Idaho State Bar Water Law Section and is the Idaho Editorial Board member for the *Western Water Law & Policy Reporter*. Andy can be reached at 208-345-2000 or [ajw@moffatt.com](mailto:ajw@moffatt.com).



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# GAUGING THE SUCCESS OF THE COEUR D'ALENE LAKE MANAGEMENT PLAN: AN EXAMPLE OF TRIBAL-STATE COOPERATION

Dylan R. Hedden-Nicely

In 2009, the Coeur d'Alene Tribe, through its Lake Management Department, and the State of Idaho, through the Department of Environmental Quality (DEQ), jointly developed a management plan for Lake Coeur d'Alene. That plan was developed to better manage nutrients flowing into the lake in order to minimize the probability that heavy metals located at the bottom of the lake are released into the water column. The purpose of this article is to outline the stated goals of this unprecedented and unique management plan and to assess whether this structured cooperative effort has been a success.

## Background

Since the days of North Idaho's earliest European settlers, Coeur d'Alene Lake (Lake) has been recognized as "a magnificent sheet of water,"<sup>1</sup> valuable to both people and wildlife for its aesthetic beauty as well as the sustenance it provides. The region surrounding the Lake is home to the Coeur d'Alene Tribe (Tribe), whose members have relied on the Lake since time immemorial for, among other things, "food, fiber, recreation, transportation, and cultural activities."<sup>2</sup> Due to its beauty and unique recreation opportunities, the Lake has more recently become one of the most popular tourism destinations in the state and the region around it has seen a rapid increase in population.<sup>3</sup> This rapid growth, coupled with extensive metals contamination in the Coeur d'Alene River from upstream mining activities in Idaho's Silver Valley, has caused many to be concerned about water quality within the Lake. Specifically, it has been estimated

A primary component of the in-place management of metals is the management of nutrient loading into the Lake.

that "75 million metric tonnes of trace-element rich sediments from mining-related activities have been deposited into the Lake [from the Coeur d'Alene River] since the late 19th century."<sup>4</sup>

To address metals contamination in the Silver Valley, the United States Environmental Protection Agency (EPA) listed a small portion of it on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>5</sup> in 1983.<sup>6</sup> While the extent and location of cleanup under CERCLA in the Silver Valley has greatly expanded since 1983, it has never directly addressed cleanup of metal contamination in the Lake. Instead, EPA determined that "an effective [lake management plan] created outside of the CERCLA defined process, using separate regulatory authorities, would reduce riverine inputs of nutrients and metals that continue to contribute to contamination of the lake . . ."<sup>7</sup>

Pursuant to this policy, the current strategy is to manage these deposits in place.<sup>8</sup> The metals of concern, primarily lead, are bound to sediment that eventually settles to the bottom of the Lake, removing much of the contamination from the water column.<sup>9</sup> However, nutrient loading, partially the result of ad-

jacent land use practices, could create an environment that causes those metals bound to lake sediment to become soluble and release into the water column. Therefore, a primary component of the in-place management of metals is the management of nutrient loading into the Lake.

Regulation of water quality in the Lake is split between the State of Idaho, through DEQ, and the Tribe, through its Lake Management Department. In 2001, the United States Supreme Court affirmed that the United States holds title to the submerged lands of the southern third of the Lake in trust for the benefit of the Tribe.<sup>11</sup> The Supreme Court also affirmed the holding of the district court that "[t]he State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the [ ] Lake and St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation."<sup>12</sup> As a result, the State of Idaho currently manages water quality in the northern two-thirds of the Lake while the Tribe is responsible for the management of the southern one-third.

After disagreement that led to attempts by both the Tribe and DEQ to address water quality concerns separately, it became obvious that a joint management plan is neces-

sary to manage a unitary water body such as Lake Coeur d'Alene. As a result, DEQ and the Tribe entered into mediation in 2006 and jointly developed and published the Coeur d'Alene Lake Management Plan (LMP) in March of 2009. The LMP "reflects the Tribe and DEQ's long-held view that collaborative, adaptive, and data-driven approach is needed to manage water quality in Coeur d'Alene Lake."<sup>13</sup> The 2009 LMP "reflects agreement between the Tribe and DEQ, about the state of lake water quality and lake management goals, objectives, and strategies."<sup>14</sup>

### **The Lake Management Plan goal and scope**

The stated goal of the LMP is "to protect and improve lake water quality by limiting basin-wide nutrient inputs . . . which in turn influence the solubility of mining-related metals contamination contained in lake sediments."<sup>15</sup> DEQ and the Tribe jointly implement the LMP through five management objectives that operate in conjunction with current state, federal, and tribal regulation. Those objectives are:

1. Improve scientific understanding of lake conditions through monitoring, modeling, and special studies
2. Establish and strengthen partnerships to maximize benefits of actions under existing regulatory frameworks
3. Develop and implement a nutrient reduction plan
4. Increase public awareness of lake conditions and influences on water quality
5. Establish funding mechanisms to support the LMP goal, objectives, and strategies.<sup>16</sup>

The scope of the LMP is basin-wide because "[a]ctivities throughout the basin influence contribu-

In lieu of sufficient data to gauge the success of the LMP in more quantifiable terms, a good proxy is the degree to which DEQ and the Tribe have worked together to implement these strategies.

tions of metals, sediments, and nutrients."<sup>17</sup> The Tribe and DEQ agree that an "overly narrow focus on lakeside activities would limit the potential for dealing effectively with the key influences on water quality."<sup>18</sup>

### **Gauging the success of LMP strategy implementation**

The consensus among coordinators is that "[i]t is too early to judge the success of the LMP in terms of its stated goal of managing the nutrients in the Lake in order to manage the metals."<sup>19</sup> However, a second metric for gauging the success of the LMP, one that is directly linked to the LMP's ultimate goal, is the degree to which the Tribe and DEQ coordinate and cooperate with one another as they jointly implement the LMP. As part of the 2009 LMP, DEQ and the Tribe set out strategies for achieving each of the five LMP objectives. In lieu of sufficient data to gauge the success of the LMP in more quantifiable terms, a good proxy is the degree to which DEQ and the Tribe have worked together to implement these strategies.

**Objective One: Improve scientific understanding of lake conditions through monitoring, modeling, and special studies.** The initial strategy for implementing Objective One called on DEQ and the Tribe to develop a number of water quality

"triggers." These triggers were defined through the LMP process. If data trends indicate that one of these "triggers"<sup>20</sup> is imminent, the LMP calls for "comprehensive review to identify the causes of the trend and to guide development of a corrective management response."<sup>21</sup> Additionally, the LMP contained a strategy for performing core routine monitoring in the Lake and rivers, which calls on DEQ and the Tribe to coordinate their data collection efforts.<sup>22</sup> Rebecca Stevens, the Tribe's Hazardous Waste Management Program Manager and former LMP Coordinator, states that "coordination of water quality sampling events is key to the success of the monitoring program."<sup>23</sup> While coordination often creates logistical issues, Ms. Stevens has found that monitoring coordination has improved each year since 2009.<sup>24</sup>

### **Objective Two: Establish and strengthen partnerships to maximize benefits of actions under existing regulatory frameworks.**

Strategies for Objective Two include a call for DEQ and the Tribe to "engage with land managers to identify opportunities in annual work plans."<sup>25</sup> DEQ and the Tribe coordinate in this area by attending watershed advisory groups to identify projects that are consistent with LMP goals.<sup>26</sup> A related strategy is for DEQ and the Tribe to support projects developed by other

stakeholders that are consistent with LMP goals.<sup>27</sup> Jamie Brunner, LMP Coordinator for DEQ has said “coordination here is invaluable, as it allows prioritization of projects looking at the watershed boundary, as opposed to political boundaries,” which has allowed for more efficient use of resources.<sup>28</sup> These outreach efforts have helped to improve public opinion of the joint LMP effort by DEQ and the Tribe: “[with] time and [as] local government authorities have changed, the Coordinators are garnering more support [where there was once] past opposition.”<sup>29</sup>

**Objective Three: Develop and implement a nutrient reduction plan.** The first strategy for implementing Objective Three is to develop a basin-wide nutrient source inventory.<sup>30</sup> Based on that inventory, the Tribe and DEQ are to work together to prioritize projects based upon “the nutrient inventory, routine monitoring, cost effectiveness, landowner participation, funding sources, and coordination with existing programs . . . .”<sup>31</sup> The LMP also calls for cooperation between the Tribe and DEQ in the incorporation of both metals and nutrient total maximum daily loads (TMDLs) into the nutrient reduction plan.<sup>32</sup> The Tribe and DEQ are required under the Clean Water Act to identify streams within their respective jurisdictions that do not meet water quality standards and then set TMDLs for those streams that represent the maximum quantity of a particular pollutant that may be added to the non-attaining stream before that stream will meet or exceed water quality standards.<sup>33</sup>

Unfortunately, the science programs developed to implement these strategies have “not been as closely linked as has been anticipated in the 2009 LMP.”<sup>34</sup> Instead, “the science

One step in the right direction  
has been the coordinated effort by DEQ and the Tribe  
to quantify nutrient inputs  
from the St. Maries and St. Joe Rivers.<sup>40</sup>

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program has morphed into [two] more independent programs”<sup>35</sup> However, Jamie Brunner believes that the greatest opportunity for future cooperation between DEQ and the Tribe is in a more coordinated science program.<sup>36</sup> Becki Witherow, former DEQ limnologist,<sup>37</sup> agrees: “DEQ and the Tribe have had a great deal of discussions on the drivers of water quality trends”<sup>38</sup> and “are striving to become more coordinated in terms of the science program . . . .”<sup>39</sup> One step in the right direction has been the coordinated effort by DEQ and the Tribe to quantify nutrient inputs from the St. Maries and St. Joe Rivers.<sup>40</sup> As a result, there has been success in responding to nutrient fluxes during times of flooding and in the coordination of sampling during these important and informative events.<sup>41</sup> “Future goals for the nutrient inventory will involve coordination between DEQ, the Tribe, Watershed Advisory Groups, and property owners to implement nutrient reduction measures as a result of the findings of the joint science team.”<sup>42</sup>

**Objective Four: Increase public awareness of lake conditions and influences on water quality.** The fourth objective calls for the Tribe and DEQ to coordinate in developing local education and outreach programs. Coordination in education and outreach is “essential for the success of the LMP and the overall health

of the lake,”<sup>43</sup> because it is “crucial in delivering a consistent message from a consistent source.”<sup>44</sup> Fortunately, this strategy has also been described as “the area where [DEQ and the Tribe] work together most closely.”<sup>45</sup> Initially, DEQ and the Tribe conducted an education needs assessment to determine whether current information available is “tailored to the wants and needs of the basin community.”<sup>46</sup> This assessment was subsequently used to develop an education and outreach plan.<sup>47</sup> DEQ and the Tribe regularly conduct joint presentations to civic organizations, homeowners’ associations, schools, colleges, etc.<sup>48</sup> Additionally, the Tribe and DEQ worked together to co-produce an educational manual called “Coeur d’Alene Basin Lake\*a\*Syst” (short for “Lake-shore Assessment System”), which is used to collaboratively develop educational programming for local stakeholders.<sup>49</sup>

**Objective Five: Establish funding mechanisms to support the LMP goal, objectives, and strategies.** The final objective, to continue to secure funding, is one that both the Tribe and DEQ thought “cannot be over-emphasized.”<sup>50</sup> While funding continues to be a challenge, DEQ and the Tribe have been creative in seeking out alternative funding sources.<sup>51</sup> The LMP lists a number of core needs, and DEQ and

the Tribe work together to prioritize different projects “based on different criteria, such as cost effectiveness, community acceptance, willingness of landowner participation, availability of funding, partnerships, and applicable regulatory requirements.”<sup>52</sup> Coordination of priority programs eases funding concerns to some degree by “prevent[ing] duplication of efforts and increase[ing] the efficient use of available funding.”<sup>53</sup> Both DEQ and the Tribe continue to be committed to securing funding to ensure those projects prioritized can stay online.<sup>54</sup>

### A successful state/tribe partnership

Perhaps even more critical to the success of the LMP than the implementation of any one objective strategy is the underlying relationship that has developed as DEQ and the Tribe jointly manage the Lake. While it is still too early to determine whether there has been a quantifiable reduction in the rate at which nutrients flow into the Lake, “coordination between the State and the Tribe has been a success.”<sup>55</sup> Laura Laumatia, Environmental Specialist for the Coeur d’Alene Tribe, sees the commitment to cooperation each day: “[a]t the local level, we are in nearly daily communication, and regularly engage in joint planning for our science and education programs. Given that the State and Tribe once needed a mediator to even develop a plan, this seems like a leap forward.”<sup>56</sup> Laura’s counterpart with DEQ, Jamie Brunner, agrees: “given the economic constraints and political complexities . . . I would gauge the success [of the LMP] as very high.”<sup>57</sup>

Successful implementation of the LMP has not been without its challenges. The primary issue, as always, is funding. Finding sources of revenue is a constant battle<sup>58</sup> and has resulted in a “critical gap primarily

For DEQ, the relationships established with tribal staff and leadership have created a mutual respect and level of trust with the Tribe that was not present before the 2009 LMP.<sup>68</sup>

in education and outreach.”<sup>59</sup> Challenges also arise as a result of trying to coordinate two staffs on a day-to-day basis. “[S]ometimes it’s hard to get everyone together, especially in the summer when monitoring and management activities are in full tilt.”<sup>60</sup> Finally, DEQ and the Tribe have different stakeholders and constituents, which creates different external pressures that sometimes interfere with coordination of the implementation of the LMP.<sup>61</sup>

Differences regarding LMP implementation do sometimes arise between DEQ and tribal staff and “at times there are still differing views from the two governments on how to utilize funding for lake related work . . .”<sup>62</sup> However, these disputes best highlight the level of success DEQ and the Tribe have achieved in coordinating implementation of the LMP. As Laura Laumatia put it, “[w]hen our teams have differences, we simply schedule a meeting to discuss them . . . [t]he trust and relationship that have been established have allowed us to speak candidly with each other when issues arise . . . [w]e work as partners, not as opponents.”<sup>63</sup>

The success in coordination of the LMP between DEQ and the Tribe can be attributed to “[s]trong leadership, support from both Tribal and State governments, and increasing acceptance from the public.”<sup>64</sup> Philip Cerna, Director of the Tribe’s Lake Management Department,

attributes the LMP’s success to “individual personalities among staff;” which he believes “ha[s] fostered a strong sense of coordination.”<sup>65</sup> Thus, the success of the LMP can be linked to everyone involved, “the relationships established amongst staff and leadership [and the] ability to be able to trust each other,”<sup>66</sup> that has allowed for effective communication when issues arise. The bottom line for the Tribe is that “the State is our partner and as such we have far more transparency between the DEQ and Tribal Lake Management Department.”<sup>67</sup> For DEQ, the relationships established with tribal staff and leadership have created a mutual respect and level of trust with the Tribe that was not present before the 2009 LMP.<sup>68</sup> The LMP has fostered “face-to-face time, working through tough issues, building trust, [and] speaking with one voice to the public about our common goal.”<sup>69</sup>

### Conclusion

The 2009 Joint Lake Management Plan was born out of the unique joint sovereignty situation at Lake Coeur d’Alene. This has created an opportunity for the Tribe and the State to come together to structure cooperation to jointly manage a critical resource that is important to both. It is still too early to determine whether the ultimate goal of the LMP, to reduce nutrient loading in the Lake in order to manage met-

als contamination in place, will be a success. However, the Tribe and DEQ have developed a coordinated approach to implement many of the LMP strategies in furtherance of the ultimate LMP goal. Perhaps more importantly, the Tribe and DEQ have been successful in creating the positive relationship necessary to accomplish that ultimate goal. There will be bumps in the road as the Tribe and DEQ continue to work together on a complex range of issues involving an important resource; it is the relationship between these two sovereigns that will determine whether they achieve the LMP's ultimate goals.

## Endnotes

1. H.R.Rep No. 1109, 51<sup>st</sup> Cong., 1st sess., 4 (1890).
2. *Idaho v. United States*, 533 U.S. 262, 265 (2001).
3. MAUPIN AND WEAKLAND, WATER BUDGET FOR COEUR D'ALENE LAKE, IDAHO, WATER YEARS 2000-2005: U.S. GEOLOGICAL SURVEY SCIENTIFIC INVESTIGATIONS REPORT 2009-5184 1 (2009).
4. DEPT. OF ENVTL. QUALITY AND COEUR D'ALENE TRIBE, COEUR D'ALENE LAKE MANAGEMENT PLAN 5 (2009) [hereinafter LMP] (quoting HOROWITZ, ET. AL., EFFECT OF MINING RELATED ACTIVITIES ON THE SEDIMENT TRACE ELEMENT GEOCHEMISTRY OF LAKE COEUR D'ALENE, IDAHO. PART II -- SUBSURFACE SEDIMENTS: HYDROLOGICAL PROCESS 35-54 (1995)).
5. 42 U.S.C. § 9601 (1980).
6. LMP at 8.
7. *Id.*
8. LMP at 5.
9. Interview with Becki Witherow, Former DEQ Limnologist for the Coeur d'Alene Lake Management Plan, in Coeur d'Alene, ID (June 10, 2013) [hereinafter B. Witherow]. Unlike other contaminants, zinc is found throughout the water column. While zinc has been found to be harmful to plants, fish, and wildlife, the concentrations found in the Lake are not hazardous to human health.
10. LMP at 16. Nutrients encourage the growth of plant material, and the introduction of too much decomposed plant material at the Lake's bottom has the potential to create anoxic conditions. Anoxic conditions could cause a reaction where those metals bound to sediment to become soluble, re-

leasing them into the water column. *Id.*

11. *Idaho v. United States*, 533 U.S. 262 (2001).
12. *United States v. Idaho*, 95 F.Supp.2d 1094, 1117 (D. Idaho 1998), *aff'd*, *Idaho v. United States*, 533 U.S. 262 (2001).
13. LMP at 11.
14. *Id.* at 3.
15. *Id.* at 12.
16. *Id.*
17. *Id.* at 13.
18. *Id.*
19. Interview with Laura Laumatia, Environmental Specialist, Coeur d'Alene Lake Management, Coeur d'Alene Tribe, in Coeur d'Alene, ID (May 30, 2013) [hereinafter L. Laumatia].
20. *See*, LMP at 43.
21. *Id.* at 18.
22. *Id.*
23. Interview with Rebecca Stevens, Hazardous Waste Management Program Manager, Coeur d'Alene Tribe, in Coeur d'Alene, ID (May 31, 2013) [hereinafter R. Stevens].
24. *Id.*
25. LMP at 21.
26. L. Laumatia, note 19.
27. LMP at 21.
28. Interview with Jamie Brunner, Lake Management Plan Coordinator, Department of Environmental Quality, in Coeur d'Alene, ID (June 12, 2013) [hereinafter J. Brunner].
29. R. Stevens, note 23.
30. LMP at 22.
31. *Id.*
32. *Id.*
33. 33 U.S.C. § 1313(d).
34. B. Witherow, note 9.
35. *Id.*
36. J. Brunner, note 28.
37. The study of limnology has been defined broadly as "covering the biology, physics, and chemistry of all inland waters, including rivers and wetlands as well as lakes." NATIONAL RESEARCH COUNCIL, FRESHWATER ECOSYSTEMS: REVITALIZING EDUCATIONAL PROGRAMS IN LIMNOLOGY 2 (1996).
38. B. Witherow, note 9.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. J. Brunner, note 28.
45. L. Laumatia, note 19.
46. LMP at 26.
47. *Id.* at 27.
48. L. Laumatia, note 19.

The Tribe and DEQ have developed a coordinated approach to implement many of the LMP strategies in furtherance of the ultimate LMP goal.

49. *Id.*
50. LMP at 28.
51. R. Stevens, note 23.
52. LMP at 28.
53. J. Brunner, note 28.
54. LMP at 28.
55. L. Laumatia, note 19.
56. *Id.*
57. J. Brunner, note 28.
58. Interview with Phillip Cerna, Director, Coeur d'Alene Lake Management Department, Coeur d'Alene Tribe, in Coeur d'Alene, ID (May 31, 2013) [hereinafter P. Cerna].
59. B. Witherow, note 9.
60. J. Brunner, note 28.
61. B. Witherow, note 9.
62. R. Stevens, note 23.
63. L. Laumatia, note 19.
64. R. Stevens, note 23.
65. P. Cerna, note 57.
66. J. Brunner, note 28.
67. P. Cerna, note 57.
68. J. Brunner, note 28.
69. L. Laumatia, note 19.

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# Idaho Supreme Court Reminds Water Permit Owners to Be Diligent in Pursuing Licenses

Dylan Lawrence

Shortly after the last water law-themed issue of *The Advocate* came out, the Idaho Supreme Court issued an opinion which provides an important reminder for anyone who owns a water permit now or who may apply for one in the future. In *Idaho Power Company v. Idaho Department of Water Resources*,<sup>1</sup> the Court upheld the inclusion by the Idaho Department of Water Resources (IDWR) of new restrictions in a water right license that did not appear in the preceding water permit. For those of you whose eyes are already glazing over, the one-sentence takeaway from this holding is, “If you own a water permit, you should diligently pursue the permit until IDWR issues the corresponding water right license.” For those of you still reading, the remainder of this article will discuss this holding and its significance for water users going forward in greater detail. In order to fully appreciate the significance and context of the holding, it will be helpful to begin by reviewing the administrative steps involved in obtaining a water right license.

## The administrative process of obtaining a water right

These days, the only way to obtain a new water right is to go through the statutory administrative process in Title 42 of the Idaho Code.<sup>2</sup> This has been the case since 1963 for new ground water rights,<sup>3</sup> and since 1971 for new surface water rights.<sup>4</sup> The first official step of the administrative process is to submit a water right application to IDWR, setting forth the proposed attributes of the diversion and use of water — the name of the applicant, the source of water, the

If you own a water permit, you should diligently pursue the permit until IDWR issues the corresponding water right license.

purpose and period of use, the location of the point of diversion, etc.<sup>5</sup> Once the application is filed, IDWR is required to publish notice of the application, which begins a protest period.<sup>6</sup> If timely protests are filed, the matter becomes a contested administrative proceeding, with IDWR acting as the tribunal.<sup>7</sup> Regardless of whether protests are filed, IDWR is required to evaluate the application against the following statutory criteria:

- Whether the proposed use of water will injure existing water rights;
- Whether the water supply is sufficient to satisfy the proposed use of water;
- Whether the application is made for delay or speculative purposes;
- Whether the applicant has sufficient financial resources to complete the work involved with the proposed use of water;
- Whether the proposed use of water will conflict with the local public interest in the water resource;
- Whether the proposed use is contrary to the conservation of water resources within the State of Idaho; and
- For trans-basin diversions, whether the proposed use of water will adversely affect the local economy

where the source of water originates.<sup>8</sup>

If IDWR finds that the application satisfies these criteria, it then issues a water permit, which sets forth the legal elements and attributes of the water use (source of water, location of point of diversion, quantity, location of place of use, etc.).<sup>9</sup> The permit is the first point in time in which its owner is authorized to begin diverting and using water. However, unlike water rights established by judicial decrees and state-issued licenses, which are treated as real property under the law,<sup>10</sup> water permits have traditionally not been treated as real property, but instead as the right to acquire a real property right by completing the statutory administrative process.<sup>11</sup>

In addition to the statutory elements, the water permit also includes a series of conditions further clarifying or restricting the allowable use of water.<sup>12</sup> Many permit conditions are specific and narrowly tailored to the particular water diversion and use represented by the permit. However, one condition that appears in all permits is the deadline by which the permit holder is required to demonstrate that he or she has fully developed the beneficial use of water authorized by the permit. By statute,

this deadline can be five years or less after issuance of the permit, with the possibility of an extension.<sup>13</sup>

In order to prove beneficial use of water under the permit, the permit holder must submit a statement to IDWR describing the basic details of the water use.<sup>14</sup> That statement must also be accompanied by either a fee payment for IDWR to conduct a field exam and prepare a report to verify beneficial use of water under the permit, or by a field exam report prepared by a certified water rights examiner hired by the permit holder.<sup>15</sup>

If the beneficial use field exam report is acceptable to IDWR, it “shall” issue a license for the water right.<sup>16</sup> Typically, the license closely matches the elements and conditions of the permit. When the license differs from the permit, it is generally because the permit holder did not fully develop the right,<sup>17</sup> or developed it on slightly different terms than provided in the permit. It is less common, however, for the license to include new, substantive restrictions that did not appear in the permit.

The issuance of the license is the first point in time that the water use constitutes a real property right. And, after a license is issued, little else is required of the water user to maintain the validity of the water right, other than actual use of water in accordance with its terms to avoid forfeiture, and payment of water district assessments, if applicable.<sup>18</sup>

### **Factual background of Idaho Power Company v. IDWR**

On December 24, 1975, Idaho Power filed a water permit application with IDWR for the diversion of 5,000 cfs of water for additional hydropower generation at its existing Brownlee Dam facility, part of its Hells Canyon Project on the Snake River.<sup>19</sup> IDWR approved the application and issued the permit on

IDWR conducted the field exam and issued its report on September 8, 1985, and issued the license on November 16, 2007 — more than 22 years later.<sup>23</sup>

January 29, 1976.<sup>20</sup> The permit required Idaho Power to submit proof of its beneficial use of water under the permit by February 1, 1980.<sup>21</sup> After an extension of that deadline to February 1, 1985, Idaho Power submitted such proof on August 7, 1980, after which IDWR issued a letter acknowledging receipt and stating that it would be conducting the field examination prior to issuing a license.<sup>22</sup> IDWR conducted the field exam and issued its report on September 8, 1985, and issued the license on November 16, 2007 — more than 22 years later.<sup>23</sup>

Included within the license was a new condition that did not previously appear in the permit.<sup>24</sup> This new condition provided IDWR with relatively broad authority to reopen and reexamine the use of water under the license, even allowing IDWR to “cancel all or any part of the use authorized” and to “revise, delete or add conditions under which the right may be exercised,” upon making appropriate findings regarding the public interest.<sup>25</sup> IDWR relied upon legislation that had been enacted in 1985 in connection with ongoing water disputes with Idaho Power’s Swan Falls Dam and within the Snake River Basin generally — nine years after the permit had been issued and five years after Idaho Power had submitted its proof of beneficial use — as the basis for inclusion of the new condition in

the license.<sup>26</sup> Granted, by its terms, the 1985 legislation, now codified in Idaho Code Section 42-203B, did provide IDWR with broad authority to subordinate hydropower water rights to other water uses and to limit hydropower water rights to a specific term.<sup>27</sup> However, as previously explained, Idaho Power fulfilled all of its own statutory obligations for obtaining a water right license five years before that legislation became effective.

Therefore, Idaho Power challenged the inclusion of the new condition by appealing under the Idaho Administrative Procedure Act. Idaho Power prevailed at the district court level.<sup>28</sup> According to the district court, “[b]y completing a \$39,000,000 project and beneficially appropriating water under that permit for 27 years, Idaho Power clearly holds something more than the mere hope of a water right.”<sup>29</sup> IDWR then appealed to the Idaho Supreme Court, who reversed the district court and upheld the new condition.<sup>30</sup>

### **The Idaho Supreme Court’s analysis**

The parties raised six discrete issues on appeal to the Idaho Supreme Court.<sup>31</sup> However, some of those issues were specific to the hydropower context, while others were decided on procedural grounds. Rather than discussing all six issues on appeal, this article will focus on those issues

with the broadest applicability to water users in general: (1) whether Idaho Power had a vested water right prior to obtaining a license that precluded IDWR's ability to include a new restrictive condition on the right, and (2) whether IDWR unreasonably delayed in issuing the license.

### When does water use under a permit become a vested right?

As to the first issue, the Court cited its prior precedent for the proposition that a water permit, by itself, does not constitute a vested right.<sup>32</sup> As the Court recognized, however, this is a different question than “whether an applicant obtains a vested right upon receiving the permit *and applying the water to beneficial use*.”<sup>33</sup> According to the Court, this was an issue of first impression in Idaho.<sup>34</sup>

Based on prior precedent, the Court indicated that a water permit — an inchoate right — may ripen into a vested right “following proper statutory adherence.”<sup>35</sup> As the Court recognized, there are two possible interpretations of that standard, *i.e.*, whether it is satisfied (1) once the permit holder has done all that is required of it under the statute or, alternatively, (2) once the statutory procedures for obtaining a license have been fully completed, including issuance of the license itself.<sup>36</sup>

In short, the Court concluded that a water right does not vest until the statutory procedures for obtaining a water right license have been fully complied with, including issuance of the license itself by IDWR.<sup>37</sup> In other words, according to the Court, the application of water to a beneficial use pursuant to a water permit is not a vested right.<sup>38</sup> In coming to this conclusion, the Court relied primarily upon the progression of water law in Idaho from focusing solely

upon the actions of the water appropriator to obtain a water right (since, previously one could obtain a water right simply by diverting the water and putting it to beneficial use), to more of a focus on the administrative process that governs the acquisition of new water rights today.<sup>39</sup> The Court also found it significant that IDWR's task in issuing a license is not ministerial, instead requiring IDWR to engage in a detailed analysis of the permit holder's water use prior to issuing the license.<sup>40</sup>

### Legal significance of IDWR's delay

As previously discussed, approximately five years elapsed between when Idaho Power completed its obligations under the water permit and licensing statutes and the time that IDWR conducted its field exam. And, during this time, the legislation providing IDWR with the authority to include the disputed condition in water permits and licenses was enacted. Therefore, Idaho Power argued that its license should be deemed to have been effective as of August 7, 1980 — the date on which Idaho Power completed its last statutorily required step by submitting its proof of beneficial use.<sup>41</sup> IDWR, on the other hand, argued that its delay was reasonable in light of the water disputes involving the Swan Falls Dam and the pendency of the Snake River Basin Adjudication.<sup>42</sup>

While to many, Idaho Power's argument may seem compelling from a practical standpoint, however, the Court did not find IDWR's delay to have any legal significance. According to the Court, “Idaho Power has failed to cite any legal authority... indicating that a water user is entitled to a license by operation of law in the event that [IDWR] delays issuance of the license.”<sup>43</sup> Moreover, “[a]lthough the delay in issuing the license certainly appears to be much longer than one would expect, Idaho Power has failed to demonstrate... that

[IDWR's] delay in issuing the license was unreasonable under the circumstances,” given the reasons adduced by IDWR for the delay.<sup>44</sup>

### Conclusion

In *Idaho Power*, the Idaho Supreme Court upheld the inclusion of a new restrictive condition in a water right license, after the permit holder had fully complied with the licensing statutes. Therefore, the message from the case is clear: Permit owners who have submitted their proof of beneficial use should be diligent in regularly following up with IDWR until a license is issued. Otherwise, the permit owner's use of water is not subject to all of the protections and advantages of a “vested” licensed or decreed water right, potentially subjecting it to, among other things, the inclusion of new restrictions on the water use. Additionally, if the permit owner believes IDWR is taking too long to issue the license, the Idaho Supreme Court has suggested that the permit owner may seek a writ of mandamus pursuant to Idaho Code Section 7-302.<sup>45</sup> That statute “provides an avenue for a party ‘to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station...’”<sup>46</sup>

### Endnotes

1. 151 Idaho 266, 255 P.3d 1152 (2011).
2. IDAHO CODE §§ 42-201, 42-202, 42-229.
3. S.L. 1963, ch. 216, § 1.
4. S.L. 1971, ch. 177, §§ 1, 2.
5. IDAHO CODE § 42-202.
6. IDAHO CODE § 42-203A(1), (2).
7. IDAHO CODE § 42-203A(4), (5).
8. IDAHO CODE § 42-203A(5). These are the statutory criteria that apply to the vast majority of water permit applications. However, there are variations on these criteria within Idaho's water laws for particular types of water appropriations. See, e.g., IDAHO CODE §§ 42-203C (trust water), 42-233 (low temperature geothermal), 42-4003 (geothermal).

9. IDAHO CODE § 42-204.
10. IDAHO CODE § 55-101; *see, e.g., Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984) (citations omitted); *see also* IDAHO CODE § 42-220 (legal effect of water right license).
11. *See, e.g., Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 402, 263 P.45 (1927).
12. *See generally* IDAPA 37.03.08.050.01.
13. IDAHO CODE § 42-204.
14. IDAHO CODE § 42-217.
15. *Id.*
16. IDAHO CODE § 42-219(1).
17. *See generally* IDAHO CODE § 42-219(8).
18. *See generally* IDAHO CODE §§ 42-220 (legal effect of water license), 42-222(2) (forfeiture), 42-617 (water district assessments).
19. *Idaho Power*, 151 Idaho at 268.
20. *Id.*
21. *Id.*
22. *Id.* The *Idaho Power* opinion does not explain why Idaho Power chose to have IDWR conduct the field exam rather than submit a field exam report already prepared by a certified water rights examiner, which would have allowed Idaho Power to retain more control over the timing of the beneficial use field exam. Notably, however, this option was only added to the permitting statutes in 1986—after Idaho Power’s proof of beneficial use had been submitted. Therefore, it may be that conducting its own field exam was not an option for Idaho Power at that time.
23. *Id.* at 270.
24. *Idaho Power*, 151 Idaho at 270.
25. *Id.*
26. *See id.* at 269-70; *see also* IDAHO CODE § 42-203B(6), (7). For a more detailed discussion of the history surrounding the enactment of this legislation, *see Idaho Power*, 151 Idaho at 268-69.
27. *See Idaho Power*, 151 Idaho at 269-70; *see also* IDAHO CODE § 42-203B(6), (7).
28. *Idaho Power*, 151 Idaho at 270-71.
29. *Id.* at 271.
30. *Id.* at 271, 279.
31. *Id.* at 271.
32. *Id.* at 274-75.
33. *Id.* at 275.
34. *Id.*
35. *Id.* (citing *In re Hidden Springs Trout Ranch*, 102 Idaho 623, 625, 636 P.2d 745, 747 (1981)).
36. *Idaho Power*, 151 Idaho at 275.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 276.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 277.
46. *Id.* (citing IDAHO CODE § 7-302).

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# Water Legislation Review: 2012 and 2013

Norman M. Semanko

**T**he last two sessions of the Idaho State Legislature certainly featured several high profile issues, including how to deal with Occupy Boise's encampment across the street from the Statehouse, education reform, and the all-consuming Health Insurance Exchange debate. However, there was plenty of action on water-related legislation, as well. Complete copies of the legislation reviewed here are accessible on the Idaho State Legislature's website at <http://www.legislature.idaho.gov>.

## 2012 Session summary

**Liability for Canal and Ditch Maintenance.** The Legislature enacted S1383a to codify the common law with regard to liability for flooding associated with ditches and canals; that is, canal and ditch managers are only subject to a reasonable care standard, rather than strict liability. In addition, while continuing to be responsible for their own acts or omissions, they are not liable for the actions of third parties or acts of God. See Idaho Code Sections 42-1203 and 42-1204.

**Stream Channel Alteration Violations.** Pursuant to Idaho Code Section 42-3801, a permit must be obtained from the Idaho Department of Water Resources (IDWR) before modifying any stream channel. Unlike most environmental statutes, there is no statute of limitations for enforcement of the stream channel alteration law. Legislation (H400) was enacted to correct this oversight by establishing a two-year statute of limitation, now contained in Idaho Code Section 42-3809(2), consistent with most of Idaho's other existing environmental laws.

**Oil and Gas Drilling.** The Legislature adopted comprehensive oil

Included in the constitutional amendment was protection for existing water rights against any claims that the right to fish includes the right to a minimum amount of water in a stream or lake.

and gas legislation (H464). Section 4 of the bill included water language providing for an exemption from the statutory permitting requirement for low-temperature geothermal use. However, the law authorizes the Director of IDWR to create a contested case and require the applicant to show that no injury or adverse impact will occur to the resource or water rights. See Idaho Code Section 42-233.

**Constitutional Right to Hunt and Fish.** A long-standing proposal to put the right of Idahoans to hunt, fish, and trap in the Constitution was approved by the 2012 State Legislature (HJR2a), and subsequently by the voters. Idaho Const., Art. I, Section 23. Included in the constitutional amendment was protection for existing water rights against any claim that the right to fish includes the right to a minimum amount of water in a stream or lake.

**Comprehensive Aquifer Management Plan.** The Legislature adopted the Comprehensive Aquifer Management Plan (CAMP) for the Rathdrum Prairie Aquifer (H396), developed by the Idaho Water Resource Board in collaboration with a citizen advisory committee. Pursuant to Idaho Code Section 42-1734B(6), the CAMP is now a component of the Comprehensive State Water Plan. This was the second

CAMP approved the Legislature, the first being the Eastern Snake Plain Aquifer CAMP.

**Consent to Use Irrigation Facilities.** H399 was enacted to amend Idaho Code Section 42-202(1), requiring that consent be obtained from an irrigation facility owner or operator for any water right appropriation that proposes to use the facilities. Prior to the legislation, there was no requirement that IDWR even notify the facility owner that someone was proposing to use the facilities.

## 2013 Session summary

**Watermaster Appointments.** Pursuant to Chapter 6, Title 42, Idaho Code, watermasters are responsible for the administration of water rights within a water district. Each watermaster is elected annually by the water users of the district. Legislation (H47) was enacted to allow the director of IDWR to appoint a temporary watermaster until the next water user election in the event of resignation, death, or incapacity of a sitting watermaster. In doing so, the director must first consult with the advisory committee for the water district regarding the appointment. These changes are codified at Idaho Code Section 42-605(10).

**Hydropower Water Rights.** The IDWR director may limit wa-

ter rights for hydropower use to a term of years, after which time the water right may be renewed. H50 provided that, rather than starting the entire water right application and permit process over again at the end of a term, a hydropower water right may be automatically renewed for a period equal to the term of any renewed hydropower project license issued by the Federal Energy Regulatory Commission. These changes were added in Idaho Code Section 42-203B.

**Canal Company Liens.** The Legislature increased the lien period for unpaid Carey Act Canal Company assessments from two years to three years (H128). After that time, the lien must be foreclosed upon or it is lost. This change is codified at Idaho Code Section 42-2205.

**Irrigation District Elections.** H130a addressed the unfortunate situation when someone is elected to serve on an irrigation district board, but is not qualified to hold the office. To hold such an office, an elector must own land within the irrigation district. The new law requires candidates to certify that they meet this qualification—and the other qualifications for the office—and to report any changes in their qualifications to the district. The district may not place an unqualified candidate on the ballot or recognize the election of anyone who is unqualified. In the event that such an election occurs, the existing director carries over in the position until he/she resigns or until the next general election. In no event may an unqualified candidate hold office. These changes are contained in Idaho Code Sections 43-201, 43-203 and 43-208.

**Water Right Permit Extensions of Time.** Pursuant to Idaho Code Section 42-204, the state grants water right permits for up to five years, during which time the development authorized by the permit must

The amended plan ultimately went into effect by operation of law when the Legislature failed to reject or amend it within 60 days of its submittal to the Legislature.



be completed. Extensions can be granted for good cause and for certain delays beyond the control of the owner, including permits granted by the federal government or litigation. H131 provided additional grounds for an extension of time in Idaho Code Section 42-204, including delays resulting from state and local governmental permitting processes. The law also gives the director of IDWR the authority to extend the development period for larger water right permits.

**State Water Plan Amendments.** The Idaho State Constitution authorizes the adoption of a State Water Plan, which the Idaho Water Resource Board may periodically amend and submit to the State Legislature. This year, the Water Board submitted the first such amendments to the State Water Plan since 1996. While a number of questions and concerns were raised about the amended plan in the House Resources and Conservation Committee, and legislation was even introduced seeking to revise the amended plan (H247), legislation approving the amended plan (H38) was approved by the committee and sent to the House floor, where no action was taken. The amended plan ultimately went into effect by operation of law when the Legislature failed to reject or amend it within 60 days of its submittal to the Legislature, as provided for in Art. XV, Sec. 7 of the Idaho State Constitution.

**Water Quality.** H271 updated Idaho's water quality statutes, contained at Chapter 36, Title 39, Idaho Code, by requiring the Idaho Department of Environmental Quality (IDEQ) to consider hydrologic and atmospheric conditions, and to consult with basin advisory groups and watershed advisory groups when designating, revising, or assessing the status of beneficial uses. The legislation codifies practices already in place at IDEQ.

**Oil and Gas.** The oil and gas issue resurfaced during the 2013 legislative session. The Legislature amended Idaho Code Section 42-3908 by establishing bonding authority with IDWR for the decommissioning of Class II (oil and gas) injection wells (H48), and it also authorized a user fee to help cover the costs of the Class II Injection Well Program at IDWR (H49), pursuant to Idaho Code Section 42-3905. The bonding requirement is \$10,000 for each Class II injection well plus one dollar per foot of depth, while the user fee is \$2,500 per well. The law restructures the Oil and Gas Commission, replacing the State Land Board members with governor-appointed citizen members, including someone with water experience (S1049a). See Idaho Code Section 47-317(1).

**Reintroduction of Species.** The Legislature enacted legislation (S1061) reasserting primacy over the

state's fish and wildlife and requiring that any reintroduction of a federally threatened or endangered species onto the land or into the waters of the state must first be approved by the State of Idaho through the governor's office of Species Conservation. This new provision, codified at Idaho Code Section 67-818(5), complements an existing statutory provision, Idaho Code Sec. 67-6302, enacted in 2000, which already requires legislative approval of any species reintroduction proposal.

With the first legislative session now under its belt following redistricting, and an election year on the horizon, the 2014 session of the Idaho State Legislature is certain to feature additional water-related legislation when it convenes next January. In the meantime, the Legislative Interim Committee on Natural Re-

sources is gearing up to meet later this year to discuss the latest developments and hot topics in the world of water resources.

#### About the Author

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The 2014 session of the Idaho State Legislature is certain to feature additional water-related legislation when it convenes next January.

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# Stormwater Control Regulatory Crossroads: Opportunity for Innovation or a Hopelessly Unfunded Mandate

Andy Waldera

**H**ow many of us pay attention to, let alone care, what happens to the water entering street-side storm drains? The number of readers raising their hands are probably few and far between. While seemingly insignificant, urban (or municipal) stormwater is subject to a massive regulatory regimen costing hundreds of millions of dollars per year to implement and maintain. Should we care? The answer to that question depends on personal opinion, but we all bear the costs in one way or another to address what has been called a “major culprit” in the impairment of urban watersheds.

## What is urban stormwater and why is it regulated?

Urban stormwater runoff drains from impervious surfaces in developed areas. The porous and varied terrain of undeveloped landscapes such as fields, forests and wetlands capture, filter, and retain rainwater and snowmelt. Conversely, impervious surfaces in developed areas including roads, parking lots, sidewalks, driveways, and rooftops prevent rainwater and snowmelt from infiltrating into the ground. Instead, water falling on these surfaces flow off of them in unnatural concentrations (both in timing and volume). For example, a typical city block generates more than five times as much stormwater runoff as a wooded area of the same size.<sup>1</sup> These sheet flows require an artificial drainage network for management and disposal purposes.

Historically, storm drain systems employed a “pipe and move” philosophy. This method of stormwater control was more concerned with col-

lecting and disposing of “nuisance” water through the most efficient and least expensive means possible. This meant collecting, concentrating, and disposing municipal stormwater through the use of straight, smooth piped conduits, which further increased the speed and erosional potential of the stormwater collected.<sup>2</sup>

In addition to altering natural runoff rate, volume, and velocity, urban landscapes typically increase the variety and amount of pollutants found in precipitation runoff. Urban stormwater runoff often contains higher concentrations of sediment; oil, grease, and other chemicals deposited by motor vehicles; pesticides and nutrients from lawns, parks, and gardens; viruses, bacteria, and nutrients from pet waste and failing septic systems; road salts and other de-icing materials; heavy metals from roofing materials, motor vehicles, and other sources; and thermal (temperature-based) pollution from dark, solar energy absorbing surfaces such as streets and rooftops.<sup>3</sup>

Depending upon timing and concentration, urban stormwater pollutants can adversely impact riparian and aquatic habitats. Sediment clouds the water column disrupting aquatic plant growth and can fill and choke fish spawning gravels. Excess nutrients can cause algae blooms

A typical city block generates more than five times  
as much stormwater runoff  
as a wooded area of the same size.<sup>1</sup>



that disrupt dissolved oxygen levels. Bacteria and other pathogens can affect human recreation and food supplies. Household chemicals can poison plants, fish, animals, and humans. And, polluted stormwater discharged into surface water bodies that also serve as drinking water supply sources can endanger human health and increases drinking water treatment costs.<sup>4</sup>

The traditional “pipe and move” stormwater control regime often resulted in the discharge of untreated or minimally treated stormwater (both in flow volume and pollutant removal) to the nearest surface water body where the stormwater flowed downstream out of sight and out of mind. According to the U.S. Environmental Protection Agency (EPA), urban stormwater runoff is a leading cause of surface water impairment in nearly 40 percent of the U.S. waterbodies that failed to meet Clean Water Act-mandated local water quality standards.<sup>5</sup>

## The regulatory framework

In 1990, urban stormwater discharges from Municipal Separate Storm Sewer Systems (MS4s) came under regulation of the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) program.<sup>6</sup> This first phase of

urban stormwater control permitting (known as “Phase I”) created permitting requirements for certain categories of stormwater discharges associated with industrial and construction activities, and for discharges from MS4s located in municipalities with a population of 100,000 or more.<sup>7</sup> Currently, the NPDES stormwater program is a two-phased national program that includes permitting requirements for smaller population centers located in “Urbanized Areas.”<sup>8</sup>

The NPDES stormwater program requires regulated entities to apply for NPDES permit coverage and to implement stormwater management controls (known as “best management practices” or BMPs). Regulated entities must develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants to the “maximum extent practicable” to protect water quality. At present the NPDES stormwater program incorporates the use of narrative, rather than numeric, effluent limitations based upon the design and implementation of BMPs.

The municipal stormwater management programs developed and implemented under the NPDES program must include six “minimum control measures” (1) public education and outreach, (2) public participation and involvement, (3) illicit discharge detection and elimination, (4) construction site runoff control, (5) post-construction runoff control, and (6) pollution prevention/good housekeeping. The NPDES stormwater program requires regulated entities to submit annual reports, predicated in part upon water quality sampling data obtained from their MS4 discharges, identifying the BMPs implemented and their performance over time.

In Idaho there are currently 14 NPDES stormwater permits. Permittees include Ada County Highway

Regulated entities must develop, implement, and enforce a stormwater management program designed to reduce the discharge of pollutants to the “maximum extent practicable” to protect water quality.

### Water Law Acronyms:

EPA (Environmental Protection Agency)

CWA (Clean Water Act)

MS4 (Municipal Separate Storm Sewer System)

NPDES (National Pollutant Discharge Elimination System)

BMP (Best Management Practice)

SCM (Stormwater Control Measure)

District, Boise City, Idaho Transportation Department, District No. 3, Garden City, Drainage District No. 3, Boise State University, City of Caldwell, Canyon Highway District No. 4, City of Coeur d’Alene, City of Idaho Falls, Idaho Transportation Department, District No. 6, Lakes Highway District, City of Middleton, City of Nampa, Nampa Highway District No. 1, Notus-Parma Highway District No. 2, City of Pocatello, City of Chubbuck, Bannock County, Idaho Transportation Department, District No. 5, City of Post Falls, and Post Falls Highway District.<sup>9</sup>

Idaho is one of a handful of states in the nation that is a “non-delegated” state for Clean Water Act purposes. Because Idaho has yet to apply for and receive primacy under the Act, all of Idaho’s NPDES permits (both storm and non-stormwater) are drafted and issued directly by EPA.

### Criticism and Regulatory Evolution

Though urban stormwater came under the NPDES regulatory program in 1990, and despite technical advancements in mechanical stormwater BMPs, stormwater-related pollution of the nation’s waters continued to increase while significant gains (pollutant reductions) were made in other point-source contexts. In response to this unwanted trend, the EPA requested the National Research Council’s Water Science and Technology Board (NRC) to review the current state of the NPDES stormwater program and to recommend improvements. In 2008, the NRC released its report entitled *Urban Stormwater Management in the United States (Report)* chronicling several perceived failings of the existing regulatory framework.

According to the Report, urban stormwater runoff is “one of the great challenges of modern water pollution control” because it is a “principal contributor to water quality impairment of waterbodies nationwide.”<sup>10</sup> The Report noted concern not only over urban stormwater’s entrainment of various pollutants gathered from streets, rooftops, and other urban landscapes, but also over urban runoff’s artificial increase in water velocity and volume generated from impervious surfaces.<sup>11</sup> The Report criticized EPA’s current NPDES regulatory program as “unlikely to produce an accurate

or complete picture of the extent of the [urban stormwater] problem,” and called for “radical” changes, including less local discretion and the use of flow or other surrogates for pollution regulation.<sup>12</sup>

The Report criticized the NPDES regulatory structure program’s reliance on relatively ineffective mechanical/engineered SCMs employed as near end-of-pipe treatment as opposed to addressing the issue of pollutant sources.<sup>13</sup> In other words, SCMs were more concerned with collecting, piping, and moving stormwater to the nearest surface water body and attempting to treat pollutants already contained in the water stream than they were with disconnecting stormwater streams and keeping pollutants out of the urban stormwater network as a threshold matter. Thus, the Report recommended that the NPDES permit program use stormwater runoff volume or amounts of impervious cover as surrogates for pollutant loading and that municipalities manage the full spectrum of stormwater flows, not just peak flows.<sup>14</sup>

In response, the EPA initiated formal rulemaking in 2010 to overhaul the NPDES stormwater program.<sup>15</sup> The EPA’s new rule will likely implement a new national stormwater performance standard later this year.<sup>16</sup> The regulatory standard is expected to be flow-based, and focused upon the on-site retention (or disconnection) of urban stormwater, rather than the previous, simplistic, and seemingly ineffective “pipe and move” method of stormwater disposal. If more recent MS4 permits around the country are any indication, including that for the Boise-area MS4 effective February 1, 2013, the anticipated national stormwater performance standard will indeed be largely flow disconnection based.

The EPA’s new rule will likely implement a new national stormwater performance standard later this year.<sup>16</sup>

### **The February 2013 Boise Area MS4 Permit**

EPA issued the latest cycle of the Boise-area MS4 stormwater permit (Permit) on December 12, 2012.<sup>17</sup> The Permit is effective from February 1, 2013, through January 30, 2018. The Boise metropolitan area was one of the NPDES program’s Phase I communities and received its first MS4 permit in 2000.

The Boise MS4 covers several co-permittees, including the neighboring cities of Boise and Garden City, the Ada County Highway District, Boise State University, Drainage District No. 3, and the Idaho Transportation Department District No. 3.<sup>18</sup> The co-permittees administer the Permit according to an inter-governmental agreement governing each organization’s respective responsibilities under the Permit.<sup>19</sup> The Permit governs the MS4’s urban stormwater discharges as well as a select few non-stormwater discharges. As a threshold matter, the Permit forbids stormwater discharges “that will cause, or have the reasonable potential to cause or contribute to, an excursion of Idaho water quality standards.”<sup>20</sup>

Like many systems across the nation, the Boise MS4 system initially developed under the “pipe and move” stormwater disposal regime. Over time, “pipe and move” continued to be the favored method of urban stormwater collection and

disposal, but with some mitigation for peak flow and pollution control. This evolution of urban stormwater treatment and disposal still relied on discharge to the nearest available surface water body, but with some pollutant and flow attenuation through detention basins designed to absorb peak flows and certain pollutants, coupled with rudimentary sand and grease traps providing some level of runoff pretreatment when properly located and maintained. Boise’s prior MS4 permit largely facilitated these methods of urban stormwater disposal.

However, Boise’s new Permit moves away from simple pipe, move, and discharge by incorporating the latest trends in urban stormwater control and disposal: watershed planning and restoration; implementation of low impact development; and the on-site retention (i.e., the disconnection) of stormwater flows during the vast majority of storm events.

### **Subwatershed planning**

Among other Storm Water Management Program (“SWMP”) requirements, Section II.A.4 of the Permit requires the completion of two subwatershed plans.<sup>21</sup> These plans must delineate the existing “storm sewershed” (a.k.a. “subwatershed”), and prioritize locations and opportunities where low impact development (e.g., stormwater infiltration,

evapotranspiration, and/or rainfall harvesting and re-use) can be used to protect or restore receiving waterbody quality and beneficial uses.<sup>22</sup>

Express goals of subwatershed planning include (1) the minimization of impervious surfaces (roads, parking lots, roofs) within each sewer/watershed, (2) the preservation, protection, and restoration of ecologically sensitive areas (such as riparian corridors, headwaters areas, floodplains, and wetlands), (3) the prevention and/or reduction of thermal impacts upon receiving waterbodies through vegetated buffers and the disconnection of discharges from roadways and parking lots, (4) the avoidance and prevention of hydromodification of receiving streams and other waterbodies caused by development, (5) the preservation of trees and other vegetation to promote evapotranspiration opportunities; and (6) the preservation and protection of native soils through soil amendments to improve infiltration opportunities.<sup>23</sup>

### **Stormwater management minimum control measures for areas of new development and redevelopment**

Section II.B.2 of the Permit requires the permittees to adopt a regulatory mechanism (an ordinance) requiring “in combination or alone, stormwater management measures that keep and manage onsite the runoff generated from the first 0.6 inches of rainfall from a 24-hour event preceded by 48 hours of no measurable precipitation.”<sup>24</sup> The Permit requires that the first 0.6 inches of rainfall “be 100% managed with no discharge to surface waters.”<sup>25</sup>

In the event local site conditions prevent the total retention and on-site management of the targeted rainfall amount, that failure must be mitigated by the use of retention or other flow disconnection management techniques elsewhere in

The Permit requires the permittees to have legitimate site-specific reasons why on-site retention cannot be used (cost or difficulty alone are not sufficient reasons).

the same subwatershed (or subwatershed).<sup>26</sup> Further, determinations that the on-site retention requirement cannot be met must be based upon sound, credible technical and logistical data, and “may not be based solely on the difficulty and/or cost of implementing such measures.”<sup>27</sup> Consequently, the Permit requires the permittees to have legitimate site-specific reasons why on-site retention cannot be used (cost or difficulty alone are not sufficient reasons), and those who fail to retain on-site must still mitigate for their discharge elsewhere in the same subwatershed to counterbalance the discharge.

The Permit’s on-site runoff retention/management requirement is a significant development effectively disconnecting stormwater streams from receiving waterbodies such as the Boise River and its tributaries. This is because 0.6 inches of rainfall over a 24-hour period represents approximately 95% of all storm events occurring in the Boise area.<sup>28</sup>

The current Permit vests the permittees with the local discretion to determine how new development and redevelopment will accommodate the on-site retention requirement. However, the Permit requires the investigation, use, and incentivizing of low impact development measures such as soil amendments, bioretention, evapotranspiration, rainfall harvesting, engineered infil-

tration, and any combination thereof capable of meeting the retention requirement.<sup>29</sup>

Permit Section II.B.2 also requires permittee selection and design of three low impact development (LID) pilot projects designed to evaluate LID effectiveness for purposes of on-site urban stormwater retention.<sup>30</sup> Each pilot project must (1) manage runoff from at least 3,000 square feet of impervious surface, (2) involve transportation-related location(s) (including parking lots), and (3) treat a tributary drainage basin of at least 5 acres in size.<sup>31</sup>

The Permit also requires the completion of “at least” one project resulting in the disconnection of an existing MS4 outfall through the use of vegetated swales, engineered wetlands, or other similar techniques.<sup>32</sup> The permittees must also identify and prioritize riparian areas for permittee acquisition and protection.<sup>33</sup>

In addition to the foregoing standards governing urban stormwater runoff from areas of new and redevelopment within the MS4, the Permit also requires the retrofitting of existing stormwater infrastructure with LID techniques when repairing existing public roads and parking lots.<sup>34</sup> The permittees “must evaluate” the feasibility of incorporating runoff flow reduction LID techniques into the repair project, and the permittees “must use” the flow reduction practices when they are

found to be technically feasible.<sup>35</sup> The permittees must track their retrofitting projects through reporting of the project design, project costs, and estimates of flow and pollutant reductions achieved as compared to more traditional stormwater design practices.<sup>36</sup>

Permit Section II.B.4 requires the permittees to evaluate the feasibility of infrastructure retrofitting throughout the entire MS4 as well.<sup>37</sup> By the end of the permit cycle in 2018, the permittees must submit a report identifying all locations within the MS4 where retrofit projects are feasible, identify retrofitting funding sources, and outline retrofitting schedules for project completion that will be carried over into the next permit cycle.<sup>38</sup>

### Funding difficulties

The creation and installation of stormwater control programs is expensive. For example, in October 1999, the EPA Office of Wastewater Management analyzed the projected costs associated with implementation of the Phase II stormwater regulations (the stormwater regulations bringing smaller “Phase II” MS4s into the regulatory fold). The analysis projected annual costs ranging between \$847.6 and 981.3 million dollars in 1998 dollars.<sup>39</sup> The projected municipal cost constituted \$297.3 million of the total projected costs.<sup>40</sup> Recall that these cost projections are Phase II-related only and do not account for the implementation of the Phase I regulations before them.

More recently, a municipal stormwater NPDES permit issued in San Diego County, California is projected to impose compliance costs ranging between \$2.8 and \$5 billion over an 18-year timeframe.<sup>41</sup> Granted, Idaho is not California (California’s environmental regulatory regime is often considered excessive), but EPA

The Idaho Supreme Court has had occasion to strike down stormwater utility fee ordinances as an unauthorized tax.<sup>42</sup>

writes Idaho’s NPDES permits, and is actively supporting and defending the California-issued permit. So, where does the money come from? That is a good question, particularly in Idaho where the Idaho Supreme Court has had occasion to strike down stormwater utility fee ordinances as an unauthorized tax.<sup>42</sup>

When faced with the daunting task of complying with the Phase II NPDES stormwater program requirements, the City of Lewiston enacted Ordinance No. 4512 creating a stormwater utility and corresponding fee for the operation and maintenance of the city’s MS4.<sup>43</sup> Lewiston enacted the ordinance as an exercise of its municipal police powers to generate a reliable source of stormwater control funding and to free up approximately \$700,000 of general tax funds previously dedicated to its Street Maintenance Program budget.<sup>44</sup>

Ordinance 4512 imposed a fee against all property owners within the city using rates based upon “equivalent residential units” (an approximation of the quantity of impervious surfaces present on residential and non-residential properties).<sup>45</sup> The ordinance-derived stormwater fee applied to all property regardless of whether property drained to Lewiston’s MS4.<sup>46</sup>

In considering whether Ordinance 4512’s stormwater fee constituted a permissible fee as opposed

to an unauthorized tax, the Idaho Supreme Court noted that a fee is a “charge for a direct public service rendered to a particular consumer, while a tax is a forced contribution by the public at large to meet public needs.”<sup>47</sup> Ultimately, the Court held that Lewiston’s stormwater “fee” amounted to an unauthorized tax largely because (1) Ordinance 4512 did not contain any provisions of direct regulation, nor was it incidental to regulation, and (2) the stormwater utility did not provide any product or service directly based upon user consumption of a commodity — all property owners were charged the “fee” regardless of actual drainage to the MS4 infrastructure.<sup>48</sup>

While there is no question that NPDES permitting requirements must be implemented, the manner in which the costs associated with that implementation are best paid remains a delicate subject. Generally speaking, NPDES programs are largely funded through development impact fees. This funding mechanism may work well for areas of new and re-development (though the substantial fees do draw the ire of the development community), but such fees do not necessarily address retrofitting or disconnection requirements in previously developed areas. The EPA is not a stranger to unfunded mandates, and the NPDES Stormwater Program is, for the most part, another example of this trend.

## Endnotes

1. *Protecting Water Quality from Urban Runoff*, EPA 841-F-03-003 (February 2003).

2. *Id.*

3. *Id.*; see also, California Stormwater BMP Handbook (Municipal), p. 1-5 and Table 1-1 (<http://www.cabmphandbooks.com>) (January 2003).

4. *After the Storm, A Citizen's Guide to Understanding Stormwater*, EPA 833-B-03-002 (January 2003).

5. National Pollutant Discharge Elimination System (NPDES) Stormwater Frequently Asked Questions (<http://cfpub.epa.gov/npdes/faqs.cfm>) (January 2013); see also, Federal Water Pollution Control Act (*i.e.*, the "Clean Water Act"), § 303 (33 U.S.C. § 1313) and 2000 National Water Quality Inventory.

6. Clean Water Act § 402 (33 U.S.C. § 1342); see also, 55 FR 47990 (November 16, 1990). While the NPDES stormwater program regulates stormwater runoff from certain industrial and construction sites, the focus of this article is the municipal/urban stormwater portion of the program. An "MS4" is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a state, city, town, borough, county, parish, district, association, or other public body (created to or pursuant to state law) including special districts under state law such as sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the Clean Water Act that discharges into waters of the United States; (ii) Designed or used for collecting or conveying stormwater; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2." See 40 CFR 122.26(b).

7. 55 FR 47990 (November 16, 1990).

8. 64 FR 68722 (December 8, 1999). At present, the NPDES stormwater program regulates "large," "medium," and "regulated small" MS4s. A "large" MS4 is a system located in an incorporated place or county with a population of 250,000 or more. "Medium" MS4s serve incorporated places or counties with populations between 100,000 and 249,999. Regulated "small" MS4s are those located in "urbanized areas," areas comprising one or more central places, together with adjacent densely settled area (urban fringe), that cumulatively possess a residential population

of 50,000 or more, and an overall population density of at least 1,000 people per square mile as determined by the U.S. Census Bureau.

9. Current NPDES Permits in Idaho (<http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/Current+ID1319>).

10. *Urban Stormwater Management in the United States*, p. vii.

11. *Id.*

12. *Urban Stormwater Management in the United States*, pp. 3; 101-103; 445-49.

13. *Urban Stormwater Management in the United States*, pp. 7-9; 101-103.

14. *Urban Stormwater Management in the United States*, pp. 3 and 5.

15. Proposed National Rulemaking to Strengthen the Stormwater Program (<http://cfpub.epa.gov/npdes/stormwater/rulemaking.cfm>).

16. *Id.*

17. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012).

18. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), p. 3.

19. *Id.*

20. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), p. 5.

21. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), pp. 7-8.

22. *Id.*

23. *Id.*

24. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), pp. 14-15.

25. *Id.*

26. *Id.*

27. *Id.*

28. Fact Sheet, NPDES Permit No.: IDS-027561, pp. 9-10.

29. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), pp. 14-15.

30. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012),

pp. 16-17.

31. *Id.*

32. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), pp. 16-17.

33. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), p. 17.

34. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), pp. 17-18.

35. *Id.*

36. *Id.*

37. *Authorization to Discharge Under the National Pollutant Discharge Elimination System* (Permit No. IDS-027561; December 12, 2012), p. 25.

38. *Id.*

39. *Economic Analysis of the Final Phase II Storm Water Rule* (October 1999), pp. ES-3 and ES-14.

40. *Id.*

41. EPA Defends Costs of Strict California Stormwater Permit Seen As Model; *Inside EPA's Water Policy Report*, Vol. 22, No. 10 (March 2013), pp. 10-11.

42. See *Lewiston Independent School District No. 1 v. City of Lewiston*, 151 Idaho 800 (2011).

43. *Id.* at 801.

44. *Id.* at 806.

45. *Id.* at 802.

46. *Id.*

47. 151 Idaho at 805, quoting *Brewster v. City of Pocatello*, 115 Idaho 502 (1988).

48. 151 Idaho at 806.

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# Food Safety Irony: A Bitter Pill to Swallow

Scott Campbell

**C**ongress responds to crisis. It also responds to the perception of crisis. Between 1996 and 2010, the FDA documented 131 outbreaks of foodborne illness tied to contaminated produce, causing 14,000 cases of sickness and 34 deaths.<sup>1</sup> This translates to an average of 1,000 illnesses and fewer than 3 deaths per year in a population of over 315 million people.

But, because of illnesses and some deaths attributed to foodborne bacteria, Congress enacted Public Law 111-353 in January 2011, known as “FDA Food Safety Modernization Act” (“FSMA” or “Act”).<sup>2</sup> “The FSMA was signed into law by President Obama on January 4, 2011, to better protect public health by helping to ensure the safety and security of the food supply. FSMA embraces preventing food safety problems as the foundation of a modern food safety system.”<sup>3</sup>

On January 4, 2013, pursuant to mandates of FSMA, the Food and Drug Administration published proposed rules imposing science-based standards for growing, harvesting, packing and holding produce on domestic and foreign farms under Section 105 of the Act. It is one of five proposed rule-makings that will fundamentally alter the food safety regulations in the United States. The proposed, so-called “produce rule” is currently open for public comment until September 16, 2013.<sup>4</sup>

The pending proposed rules set growing, harvesting, storing, and processing standards for virtually all fruits, vegetables, or nuts normally eaten raw. The proposed rules impose new federal controls in (1) agricultural water, (2) biological soil amendments, (3) health and hygiene, (4) animals in growing areas, and (5) equipment, tools, and buildings.



The proposed restrictions upon use of irrigation water for growing covered crops will have devastating impacts.

## Standards and conditions

Subpart E of the proposal deals with standards for use of agricultural (irrigation) water. It imposes many conditions on food producers. First, at the start of growing season, producers of covered crops, including sprouts, leafy greens, melons, tomatoes, peppers, strawberries, and the onions grown in Idaho, among other vegetables and produce typically consumed in their raw and unprocessed state, must inspect the entire water system under their control to identify conditions that are reasonably likely to introduce known or reasonably foreseeable hazards into or onto covered produce or food contact surfaces.<sup>5</sup> The proposed inspection requirements extend to the source of a producer’s water supply and the land uses adjacent to and nearby the source. Consequently, the proposed rules require producers to evaluate potential water quality implications arising from neighboring land uses and to control for (or protect against) those potentially adverse land uses to the extent possible.

Proposed rules require producers to evaluate potential water quality implications arising from neighboring land uses.



Second, producers must also regularly inspect all water sources under their direct control to keep them free of debris, trash, domesticated animals, and other possible sources of contamination to the extent practicable and able under the circumstances.<sup>6</sup>

Third, the proposed regulations require that producers maintain all water distribution systems, including storage and regular inspection, to prevent the systems from being a source of contamination of covered crops.<sup>7</sup> This inspection and maintenance requirement is directed at water supply and distribution infrastructure downstream of the source, such as pumps, water lines, and spray nozzles.

Fourth, the Act also requires producers to protect regulated crops from contact with pooling water.<sup>8</sup> Consequently, producers must use “protective barriers or staking” if covered crops could come into contact with “pooling of water.”

Finally, all producers of covered crops who use surface water for irrigation must test their water every seven days.<sup>9</sup> If tests reveal *E. coli* greater than 235 colony forming units (CFU) per 100mL for any single sample, producers must immediately cease using the water.<sup>10</sup> Before producers can resume use of the water, they must re-inspect their entire water system, correct the cause of contamination, and re-test the water to verify compliance. Instead, producers can treat the water in compliance with Section 112.43.

### **Burdens imposed on producers**

The FDA forecasts that costs associated with the proposed regulations could reach upwards of \$30,566 per farm per year.<sup>11</sup> Overall, the FDA projects regulation implementation costs will exceed \$450 million domestically.<sup>12</sup> However, until implementation efforts actually occur, it is impossible to know what the true financial impact will be.

While the financial and administrative burdens of the proposed regulations are concerning enough, subsection 112.42(d) of the Act is particularly devastating for covered operations. The section mandates that producers of covered crops must immediately cease use of their water sources and their distribution system if they determine or have reason to believe that the water is not of adequate sanitary quality. Then they must not use the water until they re-inspect the entire water distribution system under their control, identify the cause of the problem, correct it, test the water, and verify it meets the quality standard. This effectively



leads to the cutoff of irrigation water, which in arid climates such as southern Idaho can (and likely will) doom entire crops.

Instead of this process, producers can elect to treat the water with chemicals under the procedures of section 112.43. Unfortunately, however, no chemicals have been developed or approved for such treatment. Therefore, costs for such treatments have yet to be determined, though they will likely be substantial.

### **Practical effects of new regulations**

Water quality testing will force many producers to change crops. Currently, southwest Idaho and southeast Oregon produce the world’s fifth largest dry onion crop. This crop production will cease if the proposed rules are adopted because of the strict *E. coli* standards.

Because of the extensive re-use of irrigation water in arid climates (one man’s wastewater is another’s irrigation water), virtually no canal distribution system in southwest Idaho or southeast Oregon (among other areas throughout the western United States) can satisfy the proposed *E. coli* standard. The proposed rules, unless substantially changed before

Virtually no canal distribution system in southwest Idaho or southeast Oregon (among other areas throughout the western United States) can satisfy the proposed *E. coli* standard.

final adoption, will likely force abandonment of the onion crop in those areas of Idaho and Oregon. The potential impacts of the proposed rules upon other crops, such as tree fruit, grapes, berries, melons, and others could also be devastating.

Unfortunately, this well-intentioned change to regulation of food production in the United States could have a stark boomerang effect. As proposed, the regulations are likely to dramatically reduce or eliminate production of covered

crops in this country. In contrast, foreign food production will not be subject to these heightened federal restrictions. Consequently, the real world result of this new regulatory approach may actually increase the presence of foodborne bacteria in our food supply because of increased reliance upon foreign supplies. This irony will be hard to swallow.

Unfortunately, this well-intentioned change to regulation of food production in the United States could have a stark boomerang effect.

### Endnotes

1. Fact Sheet on the FSMA Proposed Rule for Produce: Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption.
2. 21 U.S.C. § 2201 et seq. (2013).
3. Fact Sheet on the FSMA Proposed Rule for Produce: Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, available at: <http://www.fda.gov/Food/guidanceregulation/FSMA/ucm334114.htm>.
4. See FDA Docket No. FDA-2011-N-0921.
5. § 112.42a.
6. § 112.42b

7. § 112.42c
8. § 112.42(e).
9. FSMA Section 112.44
10. This standard is as stringent as Idaho's water quality standard for recreation waters used for public swimming.
11. 78 FR 3503 (January 16, 2013).
12. *Id.*

### About the Author

**Scott Campbell** is a partner in the Boise office of *Moffatt Thomas Bar-*

*rett Rock & Fields, Chtd.* His practice includes representation of water users throughout Idaho involving natural resources and environmental issues. He is currently serving a two-year term as Co-Chair of the Water Quality Task Force of the National Water Resources Association.



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#### 1<sup>st</sup> AMENDED - Regular Fall Term for 2013

Idaho Falls .....	August 21
Pocatello .....	August 22 and 23
Boise .....	August 27 and 28
Coeur d'Alene .....	September 11 and 12
Moscow .....	September 13
Boise .....	September 27 and 30
Boise .....	November 1, 4 and 6
Twin Falls .....	November 6, 7 and 8
Boise .....	December 2, 4, 5, 9 and 11

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Judges  
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David W. Gratton  
John M. Melanson

#### Regular Fall Term for 2013

Boise .....	August 13, 15, 20, and 22
Boise .....	September 10, 12, 17, and 19
Eastern Idaho .....	October 7, 8, 9, 10, and 11
Boise .....	October 15, 17, 22, and 24
Boise .....	November 12, 14, 19, and 21
Boise .....	December 10 and 12

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2013 Fall 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 Supreme Court Oral Argument for August 2013

#### Wednesday, August 21, 2013 – IDAHO FALLS

8:50 a.m. Ashton Urban Renewal v. Ashton Memorial (Judicial Review) ...	#40348-2012
10:00 a.m. Keybank National Association v. PAL I, LLC .....	#38645-2011
11:10 a.m. Dallas L. Clark v. Shari's Management Corporation (Industrial Commission) .....	#40393-2012

#### Thursday, August 22, 2013 – POCATELLO

8:50 a.m. Geff Stringer v. William Bryan Robinson (Industrial Commission) .....	#40087-2012
10:00 a.m. Intermountain Real Properties, LLC v. Draw, LLC .....	#40335-2012
11:10 a.m. Norman Riley v. Spiral Butte Development, LLC .....	#40061-2012

#### Friday, August 23, 2013 – POCATELLO

8:50 a.m. David Taft v. Jumbo Foods, Inc. ....	#39364-2011
10:00 a.m. Robby Mowrey v. Chevron Pipe Line Co. ....	#39346-2011
11:10 a.m. Donald E. Steurer v. N.E.M. Richards .....	#39274-2011

#### Tuesday, August 27, 2013 – BOISE

8:50 a.m. State v. Estaban Brunet .....	#39550-2012
10:00 a.m. State v. Joseph Richard Clinton (Petition for Review) .....	#40461-2012
11:10 a.m. Amy Beth Slane v. Stephen Wayne Adams .....	#39766-2012

#### Wednesday, August 28, 2013 – BOISE

8:50 a.m. Grouse Creek Wind Park v. IPUC (EXPEDITED).....	#39151-2011
10:00 a.m. Wade Frogley v. Meridian Joint School District No. 2 .....	#39945-2012
11:10 a.m. Erick Virgil Hall v. State (Permissive Appeal) .....	#38528/38704-2011

### Idaho Court of Appeals Oral Argument for August 2013

#### Tuesday, August 13, 2013 – BOISE

10:30 a.m. State v. Ellis .....	#39226-2011
1:30 p.m. State v. Gillespie .....	#39426/39427-2011

#### Thursday, August 15, 2013 – BOISE

9:00 a.m. State v. Olivas, Jr. ....	#39682/39683-2012
10:30 a.m. Gould v. State .....	#39738-2012
1:30 p.m. State v. Rhall .....	#39950-2012

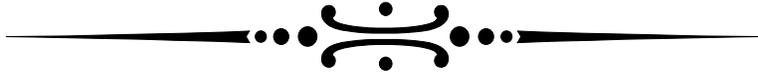
#### Tuesday, August 20, 2013 – BOISE

1:30 p.m. State v. Ritchie .....	#39920-2012
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#### Thursday, August 22, 2013 – BOISE

9:00 a.m. State v. Alfaro .....	#38500-2011
10:30 a.m. State v. Johnson .....	#39870-2012

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**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 6/1/13)**

**CIVIL APPEALS**

Divorce, custody, and support

1. Did the magistrate court err in its characterization of the proceeds of the defendant's personal injury settlement as community property?

*Duhon v. Olbricht*  
S.Ct. No. 40572  
Court of Appeals

2. Whether the court erred when it denied post-conviction relief after an evidentiary hearing and rejected Barnes' claim she received ineffective assistance of counsel due to a conflict of interest arising from her attorney's concurrent representation of a co-defendant.

*Barnes v. State*  
S.Ct. No. 40092  
Court of Appeals

Protective orders

1. Whether the court improperly entered the order granting the motion to enforce a protective order previously entered to protect the confidentiality of certain documents.

*Syson v. Ford Motor Co.*  
S.Ct. No. 40075  
Supreme Court

Foreclosure

1. Does the transfer of Renshaw's note from the lender to a successor result in an automatic assignment of the deed of trust that must be recorded prior to commencement of non-judicial foreclosure proceedings under I.C. § 45-1505(1)?

*Renshaw v.  
Mortgage Electronic Reg. Systems*  
S.Ct. No. 40512  
Supreme Court

3. Did the court err when it summarily dismissed Reid's petition for post-conviction relief, finding Reid failed to allege a genuine issue of material fact?

*Reid v. State*  
S.Ct. No. 39850  
Court of Appeals

Public records request

1. Did the district court err by ordering the disclosure of records of a police investigation of an officer-involved shooting while the matter was being reviewed by the Canyon County Prosecuting Attorney?

*Wade v. Taylor*  
S.Ct. No. 40142  
Supreme Court

License suspension

1. Was the evidence sufficient to prove that Dabrowski's impairment was caused by an intoxicating drug?

*Dabrowski v. Dept. of Transportation*  
S.Ct. No. 40201  
Court of Appeals

4. Whether the court erred by summarily dismissing Plaster's petition for post-conviction relief.

*Plaster v. State*  
S.Ct. No. 40193  
Court of Appeals

Substantive law

1. Did the court err in concluding the Idaho Petroleum Clean Water Trust fund is a state agency for the purposes of I.C. §§ 6-902 and 6-905?

*Albar, Inc. v.  
Petroleum Storage Tank Fund*  
S.Ct. No. 40564  
Supreme Court

Planning & zoning

1. In granting the variances, did the Board err in a manner that requires reversal pursuant to I.C. § 67-5279(3)?

*Shinn v.  
Clearwater County Commissioners*  
S.Ct. No. 40436  
Supreme Court

5. Did the court err by summarily dismissing Sanchez's petition for post-conviction relief and by denying his request for counsel?

*Sanchez v. State*  
S.Ct. No. 40579  
Court of Appeals

Summary judgment

1. Did the court err in finding Clark owed a fiduciary duty of loyalty as a matter of law to the Hillards in connection with the execution of the 2010 written crop share lease, even though Clark had already been the Hillards' tenant for two full crop seasons prior to the written lease?

*Murphy Land Company v. Clark*  
S.Ct. No. 39898  
Supreme Court

Post-conviction relief

1. Did the court err in summarily dismissing Eberley's petition for post-conviction relief in which he raised claims of ineffective assistance of counsel?

*Eberley v. State*  
S.Ct. No. 39944  
Court of Appeals

6. Did the court err by summarily dismissing Joyner's petition for post-conviction relief?

*Joyner v. State*  
S.Ct. No. 39547  
Court of Appeals

7. Did the court err in denying DNA testing of the blood stain and summarily dismissing the petition?

*Harrell v. State*  
S.Ct. No. 40010  
Court of Appeals

**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 6/1/13)**

2. Whether property donated to the Panhandle Boy Scout Council by Fitze in 1929 to be “used perpetually as a camp for boys” formed a charitable trust between the donor, the charitable organization and the beneficiary class of Boy Scouts.

*Camp Easton Forever, Inc. v. Inland Northwest Council*  
S.Ct. No. 40375  
Supreme Court

Termination of parental rights

1. Whether the magistrate court erred in granting the motion to set aside on the grounds of misconduct of an adverse party.

*Jane (2013-11) Doe v. John Doe*  
S.Ct. No. 41048  
Supreme Court

Unjust enrichment

1. Did the magistrate err in granting Laird’s motion for judgment on the pleadings and dismissing Tobin’s claim for unjust enrichment?

*Tobin Restoration v. Laird*  
S.Ct. No. 40260  
Supreme Court

**CRIMINAL APPEALS**

Due process

1. Did the prosecutor engage in a pattern of misconduct in the cross-examination of a defense witness that requires reversal of Parmer’s conviction?

*State v. Parmer*  
S.Ct. No. 39203  
Court of Appeals

Evidence

1. Was there substantial evidence to support the jury verdicts finding Sunday guilty of possession of methamphetamine?

*State v. Sunday*  
S.Ct. No. 39169/39170  
Court of Appeals

2. Did the court abuse its discretion by admitting the victim’s out of court statement on its conclusion that the statement was both an excited utterance and a statement made for purposes of medical diagnosis or treatment?

*State v. Paulk*  
S.Ct. No. 39534  
Court of Appeals

3. Did the district court err by admitting four autopsy photographs without conducting the balancing test required under Rule 403?

*State v. Johnson*  
S.Ct. No. 39573  
Court of Appeals

4. Was the evidence sufficient to establish Barrera’s guilt on the charge of aggravated assault?

*State v. Barrera*  
S.Ct. No. 39564  
Court of Appeals

5. Was the evidence sufficient to support Bradshaw’s conviction for felony destruction of evidence when the statute is interpreted using the rule of lenity?

*State v. Bradshaw*  
S.Ct. No. 39943  
Court of Appeals

6. Was there sufficient evidence to support the magistrate’s finding of guilty on Cornelsen’s battery charge?

*State v. Cornelsen*  
S.Ct. No. 40623  
Court of Appeals

7. Was there substantial and competent evidence presented at trial to support the jury verdict finding Ferreira guilty of aiding and abetting trafficking in a controlled substance and aiding and abetting in delivery of a controlled substance?

*State v. Ferreira*  
S.Ct. No. 39744  
Court of Appeals

Jurisdiction

1. Did the court err when it affirmed the magistrate’s order concluding the juvenile court lacked jurisdiction to waive a former juvenile into adult court because the former juvenile is now over 21 years of age?

*State v. John (2012-10) Doe*  
S.Ct. No. 40369  
Supreme Court

Other

1. After entering a guilty verdict on the enhancement, did the court err by *sua sponte* reviewing the hearing for unpreserved evidentiary error and concluding that testimony related to Carmouche’s social security number should have been disregarded?

*State v. Carmouche*  
S.Ct. No. 38554  
Court of Appeals

Pleas

1. Did the court err in denying Mack’s motion to withdraw his guilty plea?

*State v. Mack*  
S.Ct. No. 39164  
Court of Appeals

2. Whether the court abused its discretion in denying Adams’ motion to withdraw his guilty plea made after sentencing.

*State v. Adams*  
S.Ct. No. 39875  
Court of Appeals

3. Did the court lack jurisdiction to consider Munyon’s motion to withdraw his guilty plea?

*State v. Munyon*  
S.Ct. No. 40351  
Court of Appeals

Restitution

1. Did the court abuse its discretion in ordering restitution for the victim’s economic losses incurred as a result of Houser’s criminal conduct?

*State v. Houser*  
S.Ct. No. 39903  
Court of Appeals

**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 6/1/13)**

2. Did the court err in ordering Vanslyke to pay over \$7,000 in restitution for losses suffered by the victims of his theft crime?

*State v. Vanslyke*  
S.Ct. No. 40172  
Court of Appeals

Search and seizure –  
suppression of evidence

1. Did the court err in denying Haugland’s motion to suppress evidence found as the result of a traffic stop?

*State v. Haugland*  
S.Ct. No. 39854  
Court of Appeals

2. Did the district court err in granting Petersen’s suppression motion based on its conclusion there was insufficient probable cause to believe there would be evidence found in the passenger compartment in Petersen’s car after evaluating the totality of the circumstances?

*State v. Petersen*  
S.Ct. No. 39643  
Court of Appeals

3. Did the court err in denying Huck’s motion to suppress in which he challenged the basis of his traffic stop?

*State v. Huck*  
S.Ct. No. 40139  
Court of Appeals

4. Did the court err in its factual finding that Larosa voluntarily consented to the officer’s entry and search of her house?

*State v. Larosa*  
S.Ct. No. 40221  
Court of Appeals

Sentence review

1. Did the court err when it denied Evans’ motion for credit for time served?

*State v. Evans*  
S.Ct. No. 39888  
Court of Appeals

2. Did the court abuse its discretion when it denied Hathaway’s Rule 35 motion following probation revocation?

*State v. Hathaway*  
S.Ct. No. 40097  
Court of Appeals

Substantive law

1. Did the district court err when it denied Schall’s motion to dismiss in which he challenged the felony enhancement based on his prior DUI conviction in Wyoming?

*State v. Schall*  
S.Ct. No. 39891  
Court of Appeals

2. Did the court err in determining Nevada’s DUI statute is a substantially conforming foreign criminal violation for purpose of enhancement pursuant to I.C. §§ 18-8005(6) and (10)?

*State v. Juarez*  
S.Ct. No. 40135  
Court of Appeals

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# How the Law Values Our Animal Companions

Adam Karp

In the March edition of *The Advocate*, Amy Lombardo authored *Idaho Law Regarding the Measure of Damages for Animals Need Not Be Revisited*,<sup>1</sup> a response to my article *The Animal World Takes a Special Place in Society and Our Courtrooms*.<sup>2</sup> I seek to evaluate and rebut Ms. Lombardo's contentions so each reader may draw conclusions based on a complete recitation of common and statutory law in Idaho.

**Contention:** “Accordingly, the current measure of damages for an animal in a lawsuit is the replacement value of the animal. In Idaho, this has been established statutorily and by case law.”

To support this contention, Ms. Lombardo quotes I.C. § 25-2807. However, that Section does not specify “replacement value.” Rather, it commands application of the “usual rules of evidence relating to values of personal property” to establish value of an animal in any civil or criminal proceeding.<sup>3</sup> The Section cites no specific rule of evidence to limit moving parties to replacement value because no such evidentiary rule exists. If anything, Section 25-2807 endorses the view that authentic, relevant, nonhearsay or hearsay-accepted evidence may be considered to determine an animal's value.

In *Hurtado v. Land O'Lakes, Inc.*, the Idaho Supreme Court confirms that the destruction of personalty yields a measure of damages that “is the value of the property at the time and place of its destruction.”<sup>4</sup> Furthermore, “the owner of property” is “qualified to testify to its value.”<sup>5</sup>

Ms. Lombardo then cites *Gill v. Brown*,<sup>6</sup> a nearly 30 year-old decision not decided by Idaho's highest court and whose discussion of property valuation is complete *dictum*. In *Gill*,

The question of value of an animal companion remains one of first impression in Idaho.

the Court of Appeals explains, “[t]he **sole issue** is whether the Gills' complaint alleges facts that, if proven, would permit them to recover damages for mental anguish.”<sup>7</sup> Indeed, there is no evidence that the Gills even assigned error to the issue of whether the value of an animal is market, replacement, or other. They focused exclusively on the *sua sponte* pretrial ruling denying them recovery of any general damages. Accordingly, the question of value of an animal companion remains one of first impression in Idaho.

With no disrespect to the donkey, the animal at issue in *Gill* is not a species typically falling in league with the class of animal companions who sleep at the foot of the bed or lay in one's lap. *Gill* did not touch upon how to value domesticated animals who become members of the family. *Gill* also did not consider the *per se* intrinsic value doctrine for personal effects and household goods. *Gill* is ripe for judicial revisiting and analytical distinction to keep pace with social mores of Idahoans.

But one need not convince the highest court to invoke intrinsic value in the right circumstance. Three decades before *Gill*, the Idaho Supreme Court decided *State ex rel. Rich v. Dunlick, Inc.*,<sup>8</sup> upholding a jury instruction that permitted the jury to consider “special value” of land taken by eminent domain, to

ascertain damages. “If the land possessed a special value to the owner which can be measured in money, such owner has a right to have that value considered in the estimation and determination of the damages sustained. The value of the land taken should be estimated with respect to the use to which it is peculiarly adapted and the purpose theretofore made of it by appellant in the operation of its plant.”<sup>9</sup>

The Supreme Court of Idaho also acknowledged the *per se* intrinsic value rule, where a plaintiff may recover the intrinsic value of certain types of property as a matter of law, without even needing to allege or prove lack of market value.<sup>10</sup> Typically, this rule of compensation applies to household goods, kept for personal use and not sale, as well as wearing apparel. In *Condie v. Swainston*, the Idaho Supreme Court cited to the Washington Supreme Court case of *Kimball v. Betts*,<sup>11</sup> which applied the rule to such items at a forced sale under void process, and the Oregon Supreme Court case of *Barber v. Motor Inv. Co.*,<sup>12</sup> which applied the rule to such converted items, in support of a holding that reversed the lower court for limiting the claimant to the market value for pieces of galvanized siphon.

Turning our eyes south to New Mexico yields a nearly 80-year-old decision applying the *per se* intrinsic

value rule to a dog. In *Wilcox v. Butt's Drug Stores, Inc.*,<sup>13</sup> the New Mexico Supreme Court upheld the trial judge's award of \$150 for the value of "Big Boy," a King Charles Spaniel who died from strychnine poisoning in a pharmacist malpractice case. The defendant argued that the judgment should be limited to \$10, the alleged "market" or "pecuniary" value of Big Boy. The Court disagreed with the conclusion that "damages for the wrongful destruction of a dog must be limited to market value or pecuniary value."<sup>14</sup>

Let us revisit *Restatement of Torts* § 911 (1939) to identify the class of items for which there is only an intrinsic value. Comment *e* to Section 911 ties together the dog, the family portrait, and second-hand clothing and furniture (as addressed by *Kimball* and *Barber*):

*e. Peculiar value to the owner.* The phrase "value to the owner" denotes the existence of factors apart from those entering into exchange value which cause the subject matter to be more desirable to the owner than to others.

Some things may have no exchange value but may be valuable to the owner; other things may have a comparatively small exchange value but have a special and greater value to the owner. The absence or inadequacy of the exchange value may result from the fact that others could not or would not use the things for any purpose, or would employ them only in a less useful manner. Thus a personal record or manuscript, an artificial eye or a dog trained only to obey one master, will have substantially no value to others than the owner. The same is true of articles which give enjoyment to the user but have no

The phrase "value to the owner" denotes the existence of factors apart from those entering into exchange value which cause the subject matter to be more desirable to the owner than to others.

substantial value to others, such as family portraits. Second-hand clothing and furniture have an exchange value, but frequently the value is far less than its use value to the owner. In such cases it would be unjust to limit the damages for destroying or harming the articles to the exchange value.<sup>15</sup>

**Contention:** "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. It may also include evidence of pedigree, breeding, and whether its offspring would be valuable, as well as other reasonable and necessary expenses. Thus, Idaho law provides for recovery of economic losses for the value of an animal."

Take Orbit, our 26-year-old, neutered male, orange tabby whom my wife adopted from a shelter at the age of two for probably less than \$50 in 1989. By Ms. Lombardo's calculation, one would be lucky to get more than a few bucks for Orbit. But this presumes that animals can be replaced. Ask any shelter or humane society and they will tell you that not only have they never had such a cat surrendered by owner or found as a stray, but if such a cat were to exist, they would likely find none to

adopt him at that age - in part due to the need to treat Orbit with bidaily subcutaneous fluid therapy, oral doses of liquid and pill medication, and transdermal methimazole application to treat his hyperthyroid condition. Specifically, no replacement could ever be found who matches the phenotypic and genotypic characteristics of Orbit, not to mention his personality and the extent to which he enlivened the household, provided stability (my wife described him as her "rock"), and delighted us with his gentle and loving manner, all which made him so precious.

On the other hand, let us take Ms. Lombardo's argument to the logical conclusion, backed by the rules of evidence, IRE 702. A true "replacement" in the genetic sense only (recall the nature vs. nurture debate) would require that the tortfeasor produce a clone. Such evidentiary tack does not suffer forays into a plaintiff's emotional distress, excessive sentimentality, or human-animal bond. Therefore, let Ms. Lombardo's replacement value guide Idaho courts, at six figures per non-human decedent, the price to clone at Sooam Biotech Research Foundation in Seoul, Korea.

**Contention:** "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."

While this statement accurately reflects the national trend with respect to negligently-inflicted harm to animals, it is egregiously false with respect to other culpable mental states. Consider applicable case law from Alaska, Arizona, California, Delaware, Indiana, Iowa, Kentucky, and Washington.<sup>16</sup> And of course we cannot forget the Idaho Court of Appeals case mentioned above, *Gill v. Brown*.<sup>17</sup>

**Contention:** “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 distress... 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?”

Ms. Lombardo ignores the plain language of the opinion of *Gill*, which permits the claim of negligent infliction of emotional distress and only upheld dismissal of the negligent infliction of emotional distress claim because the Gills could not show physical injury, not because they suffered distress over the death of a donkey. And last year, the Idaho Supreme Court reaffirmed the cognizability of negligent infliction of emotional distress and the symptomatology requirement.<sup>18</sup> Accordingly, provided a plaintiff can furnish evidence of physical manifestation arising from the negligent injury or death to an animal, negligent infliction of emotional distress remains cognizable. And most plaintiffs predictably and understandably suffer several of the enumerated ailments upon death of an animal.

**Contention:** “Idaho courts would be wise to decline to revisit the debate regarding the

Last year, the Idaho Supreme Court reaffirmed  
the cognizability of negligent infliction of emotional distress  
and the symptomatology requirement.<sup>18</sup>

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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.’”

As noted above, the debate never took place in Idaho. Furthermore, devaluation proponents like Ms. Lombardo assume that the word “sentimental” sweeps far more broadly than as actually defined. Consider the Washington Supreme Court’s reasoning in *Mieske v. Bartell Drug Co.*,<sup>19</sup> in which the Mieskes brought developed movie film to Bartell Drug for splicing onto larger rolls. Dozens of canisters filled with irreplaceable memories were subsequently lost or destroyed due to the negligence of the defendant, who deemed rolls of raw negative sufficient compensation. Plaintiffs argued that the memories, while contained on the film, had no market value, and could not be replaced or restored. They added, however, that the memories were so unique that some other measure of damages must exist to ensure full compensation. The Washington Supreme Court agreed, affirming the jury’s award of \$7,500<sup>20</sup> as the actual value of the film to the plaintiff. Wrestling with the question of establishing

the “value to the owner” under the intrinsic value measure of damages, the Court addressed the recoverability of “sentimental value.” In upholding the trial court’s jury instruction, it noted that:

In essence it allowed for recovery for the actual or intrinsic value to the plaintiffs but denied recovery for any **unusual** sentimental value of the film to the plaintiffs or a fanciful price which plaintiffs, for their own special reasons, might place thereon.<sup>21</sup>

By distinguishing “usual” sentimental value from “unusual” sentimental value, however, the Court expressly permitted some element of sentimental value. *Mieske* emphasized that the measure of damages is determined by the “value to the owner,” which is intrinsic value.<sup>22</sup> Further, the *Mieske* court was careful to narrowly interpret the phrase “sentimental value” so as not to exclude usual and customary sentiment:

What is sentimental value? The broad dictionary definition is that sentimental refers to being “governed by feeling, sensibility, or emotional idealism ...” **Obviously that is not the exclusion contemplated by the statement that sentimental value is not to be compensated.** If it were, no one would recover for the wrongful death

of a spouse or a child. Rather, the type of sentiment which is not compensable is that which relates to “indulging in feeling to an unwarranted extent” or being “affectedly or mawkishly emotional ...”<sup>23</sup>

**Contention:** “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.”

This refrain occurs with alarming frequency despite a complete lack of empirical evidence. And Ms. Lombardo’s citation to Schwartz et al., *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*,<sup>24</sup> does nothing to change this, for nowhere in the entire article do the authors cite to one study that proves the probability (or even the very real possibility) that the sky will actually fall in the form of a mass exodus of veterinarians from the field or skyrocketing costs of care. Instead, Schwartz (like Ms. Lombardo) just recycles the fits of unsupported doomsaying by lawyers and veterinarians who substitute their own opinions for actual evidence.

Erudite sources have acknowledged the two basic functions of the law of torts – to deter future conduct through a finding of liability and to compensate the injured person for damages sustained.<sup>25</sup> Yet some veterinarians disingenuously rely on the human-animal bond for their livelihoods but contend that their malpractice should be economically fixed at fair market value. To restore equilibrium to this doctrinally unfair alignment, and to use the civil justice system to provide both compensation and deterrence, requires discipline.

Erudite sources have acknowledged the two basic functions of the law of torts – to deter future conduct through a finding of liability and to compensate the injured person for damages sustained.<sup>25</sup>

Private litigation is a poor and highly costly substitute for discipline. Financial recovery will both entice lawyers to proceed on contingency and incur tens of thousands of dollars in expert fees and litigation costs, as well as effectively deter misconduct by the class of defendants who might have to pay such judgments.

Permitting veterinarians to prey upon intrinsic valuation in the operating room (charging many times over the cost to adopt or purchase the patient) but insisting upon market value in the courtroom, and a depreciated one at that, is inimical to the public interest to protect humans and animals from unprofessional health care providers when those charged with so doing shirk their statutory mandates.

*Fiat justitia ruat coelum*,<sup>26</sup>

## Endnotes

1. THE ADVOCATE, March/April, 2013, p.51.
2. THE ADVOCATE, Aug. 2012, p.68.
3. Idaho Code Section 25-2807.
4. 153 Idaho 13, 21, 278 P.3d 415, 423 (2012).
5. *Id.*
6. 107 Idaho 1137, 1138 (Ct. App.1985).
7. *Id.* (emphasis added).
8. 77 Idaho 45, 54 (1955).
9. *Id.*
10. *Condie v. Swainston*, 62 Idaho 472, 112 P.2d 787 (1940).
11. 99 Wash. 348 (1918).

12. 136 Or. 361 (1931).
13. 38 N.M. 502, 35 P.2d 978 (1934).
14. *Id.* at 979.
15. *Restatement of Torts* § 911, cmt. e (emphasis added).
16. See Alaska: *Mitchell v. Heinrichs*, 27 P.3d 309, 311-12 (Ak. 2001); Arizona: *Kaufman v. Langhofer*, 223 Ariz. 249, 254 and 256 fn.13 (2009); California: *Plotnik v. Meihaus*, 146 Cal. Rptr.3d 585, 598-99 (Cal. App. 4, 2012); Delaware: *Naples v. Miller*, 2009 WL 1163504 (Del. Super. 2009), at \*3 and fn.9; Indiana: *Lachenman v. Stice*, 838 N.E.2d 451 (Ind. App. 2005); Iowa: *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996); Kentucky: *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky. App. 2002); Washington: *Sherman v. Kissinger*, 146 Wash.App. 855, 873 fn.8 (2008) allows recovery of emotional distress damages for intentional torts to animals and remarks it is consistent with the modern rule; *Womack v. von Rardon*, 133 Wash.App. 254 (2006) creates cause of action for malicious injury to a pet.
17. 107 Idaho 1137 (1985).
18. *Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 750 (2012).
19. 92 Wn.2d 40 (1979).
20. In 2013 dollars, this figure approaches \$27,000.
21. *Mieske*, 92 Wn.2d at 45 (emphasis added).
22. *Id.* at 44-45 (citing *Rest. of Torts* § 911 (1939)).
23. *Id.* (emphasis added, citations omitted).
24. 33 Pepp. L. Rev. 227 (2006).
25. See *Restatement* (2nd) *Torts* § 901 (1979), Learned Hand, 3 A.B.C.N.Y. Lectures on Legal Topics 87 (1926).
26. I write this rebuttal in the memory of Orbit, who died at our home on Mar. 2, 2013. His veterinarian for most of his life came out in the middle of the night to perform the euthanasia. With deep gratitude for his devotion and expertise and intuitive grasp of the topics conveyed herein, I write this rebuttal in his honor, as well.

# The True Cost of a Legal Education

W. Dustin Charters

**M**any Idaho attorneys decided to go to law school after receiving career advice in college. At one time, the advice was sound: solid career prospects, the opportunity to earn good money, and the tuition was bearable. However, times have changed. Tuition has increased exponentially and the job market is not what it used to be. This article is a brief summary on how to make repaying student loan debt more manageable for recent law school graduates. This article also serves as a backdrop to another pressing question—is law school still affordable for the Idaho legal market?

## The initial problem: Cost of attendance

Over the last quarter century, law school tuition has consistently doubled the rate of inflation.<sup>1</sup> For example, in 1990 the average cost of attendance nationally for public law school (in-state residents) was \$8,505. That year, the average cost for private law school was \$16,997. Ten years later — 2000 — the average cost of attendance for a public law school (in-state residents) was \$20,256, with the cost of attendance of a private school rising to \$34,256. In 2011, the average cost rose to \$36,561 and \$53,629 per year for private schools and public schools (in-state residents), respectively.<sup>2</sup> According to the University of Idaho's website, the full cost of attendance for the 2013-2014 school year will be \$31,518 per year for Idaho residents and \$44,594 for nonresidents.

Subsequently, incoming law students are taking on more student loan debt, rather than receiving assistance from outside sources such as parents, working through school, or

receiving grants and scholarships. In 2010, law students borrowed on average \$75,728 for public schools and \$124,950 for private law schools.<sup>3</sup> The rising costs have increased so significantly, an American Bar Association commission stated, “[t]he combination of the rising cost of a legal education and the realities of the legal job market mean that going to law school may not pay off for a large number of law students.”<sup>4</sup>

For as expensive as law school tuition is, receiving federal money is too easy. Unfortunately, too many federal loan documents are signed without the borrower even reading the repayment terms. Compounding the problem, students are not required to attend courses on debt management. Moreover, career advice regarding the probability of future employment comes after taking out the loans. This system is flawed: a prospective law student should determine whether law school is economically feasible prior to entering law school, not after.

## Repayment plans

Repaying law school debt is not a “one size fits all” proposition. Recent law school graduates have multiple options for repaying law school debts.<sup>5</sup> Student loan repayment also does not start until after a three month grace period. This grace pe-

A prospective law student should determine whether law school is economically feasible prior to entering law school, not after.

## From the headlines

As of press time, Congress was locked in a fight over how to prevent student loan rates from doubling from 3.4 percent to 6.8 percent.

According to a report by the Joint Economic Committee, for the average student graduating in 2011, college debt amounts to 60 percent of their annual income. At around \$1.1 trillion, student debt now exceeds auto loans and credit cards as the largest source of household debt, not including home mortgages. They predict that a doubling of loan rates would cost a student, who borrows an average amount of about \$27,000 to finance their education, an additional \$2,600.

riod is immensely helpful to most law students because in those three months those graduates will be taking the bar and, hopefully, settling into a new legal job.

Automatically, all borrowers are placed into the standard repayment plan. Under this plan, a fixed monthly amount is paid for 10 years until the loans are paid in full. Idaho residents attending the University of Idaho College of Law, borrowing the full cost of attendance all three years will have an \$1,088 student loan payment.<sup>6</sup> Oh and by the way, that

amount does not include any undergraduate debt. Simply put, most new attorneys cannot afford that amount each month.

The hypothetical Idaho borrowers above may “extend” the standard repayment plan, described above, to 15, 20, or 25 years.<sup>7</sup> Extending the repayment plans reduces the monthly debt from \$1,088.13 (standard 10 year plan) to \$839.34 (15 years), \$721.77 (20 years), and \$656.27 (25 years). Of course, the longer the loan term, the more interest paid over the course of the loan.

Another option is a graduated repayment plan. This plan steadily increases with time; hopefully matching increases in salaries. Payments start low and increase every two years for the loan’s duration.<sup>8</sup>

Student loans can also be repaid using formulas based on the borrower’s adjusted gross income. Three such plans are available: Income-Contingent Repayment (ICR); Income Based Repayment (IBR); and Pay as You Earn Plan.

The ICR plan is compatible with Direct loans.<sup>9</sup> The amount owed each month is calculated using the borrower’s: adjusted gross income (AGI); family size; and total loan indebtedness. Under the ICR plan, monthly payments are the lesser of:

1. The amount if the borrower repaid his or her loan in 12 years multiplied by an income percentage factor that varies with the borrower’s annual income, or
2. Twenty percent of the borrower’s monthly discretionary income.<sup>10</sup>

Any remaining loan balance is forgiven after twenty-five years of qualifying payments.

On the other hand, the IBR plan is only available to individuals who (1) obtained their first loan on or after October 1, 2007; (2) have partial financial hardships; and (3) have loans from an IBR eligible lender.<sup>11</sup> A partial financial hardship is any-

Student loans can also be repaid using formulas based on the borrower’s adjusted gross income.

time the monthly amount owed under the 10 year standard plan is higher than the monthly amount required under IBR.<sup>12</sup> Obviously, this approach is slightly circuitous; the borrower, prior to being eligible for IBR, must calculate the monthly IBR payment.

The monthly IBR payment is 15 percent of the borrower’s discretionary income, i.e., the borrower’s AGI minus one and a half times the poverty level for the borrower’s family size. Payments are adjusted annually require yearly documentation of income and family size.<sup>13</sup> IBR payments continue until the loan balance is paid off, forgiven at 25 years, or the borrower’s income increases and the standard repayment plan offers a lower monthly payment.<sup>14</sup> If the borrower’s income falls below a certain threshold, payments will cease. During this time, the borrower is technically not repaying the student loan; however, the time still counts toward the years required for forgiveness.<sup>15</sup>

In 2010, Congress enacted the Health Care and Education Reconciliation Act.<sup>16</sup> The act created the Pay as You Earn Plan. The plan operates much like the previous IBR, but lowers the income threshold to 10 percent of a borrower’s discretionary income. The plan also reduces the time period for loan forgiveness from 25 to 20 years. To be eligible for this plan, a borrower must have fed-

eral direct loans, but not the Direct Plus loans. The plan is also limited however to “new borrowers,” which means zero student loan balance on October 1, 2011, and student loan disbursements on or after October 1, 2011. In other words, a borrower with loans from 2007 or earlier cannot benefit from this program.

Lastly, a borrower should be aware of a repayment plan’s tax consequences. Forgiven student loan debt is taxable income. In other words, amounts forgiven by the federal government are taxed according to the individual’s tax bracket. This can result in significant tax burdens.

### Going into public service

Many Idaho attorneys attended law school to help fellow Idahoans or to protect Idaho’s environment. Going into public service can also help law school graduates with high student loan debt. Congress enacted the College Cost Reduction and Access Act of 2007, which established the Public Service Loan Forgiveness (PSLF) program.<sup>17</sup> Under the enactment, student loan indebtedness is forgiven after 10 years of qualifying public service. The enactment’s aim was to incentivize public service work and to make it feasible for graduate students to pursue public service careers. To obtain PLSF’s benefit, borrowers must make 120 payments as part of the Direct Loan program.<sup>18</sup> The Direct Loan debts in-

clude Stafford Loans (subsidized and unsubsidized), Federal Direct PLUS Loans, and Federal Direct Consolidated Loans. Borrowers can participate in any of the repayment plans listed above as long as the plans have longer than 10-year terms.

To be eligible for loan forgiveness, the borrower must be employed in a public service organization. This includes: (1) government organizations;<sup>19</sup> (2) 501(c)(3) nonprofits; and (3) private, non-profit organizations that provide a public service. The borrower must also be employed “full-time,” which is based on how the borrower’s employer defines full time, with a minimum threshold of 30 hours per week. Fortunately, the full-time requirement can be met by combining part-time positions at multiple eligible public service organizations.

The PSLF program has two major benefits. First, loan forgiveness occurs after 10 years. Second, the amount forgiven does not trigger any tax consequences.<sup>20</sup> In other words, after 10 years of service an individual is no longer indebted to the federal government for student loans, nor will he or she owe the IRS.

## Examples

Two examples are calculated below to show the relief available, both in the long- and short-term. The examples also demonstrate the advantages and disadvantages of selecting each plan. Each example is a hypothetical attorney, each recently graduating with \$125,000 in debt.<sup>21</sup> The only difference is Ex. 1 chose a public service position as a county prosecutor and Ex. 2 entered private practice. Ex. 1 has a starting income of \$40,000 per year, with yearly raises of 3%. Ex. 2 has a starting income of \$50,000 per year, with yearly raises of 5%.<sup>22</sup>

Ex. 1 Public service

	Standard	Extended	IBR	ICR
<b>Monthly Payments</b>	\$1,438.50	\$867.59	\$290.56 — 379.12	\$486.17 — \$634.34
<b>Total Payments</b>	\$172,620.71	\$ 104,110.80	\$39,971.68	\$66,880.27
<b>Total Interest Paid</b>	\$47,620.71	\$76,847.20	\$39,971.68	\$66,880.27
<b>Amount Forgiven</b>	\$0	\$97,736.40	\$160,605.72	\$137,500.00
<b>Tax Liability</b>	\$0	\$0	\$0	\$0

Ex. 2 Private practice

	Standard	Extended	IBR	ICR
<b>Monthly Payments</b>	\$1,438.50	\$867.59	\$415.56 — \$1,438.50	\$652.83 — \$1,469.25
<b>Total Payments</b>	\$172,620.71	\$260,277.10	\$263,690.45	\$249,266.37
<b>Total Interest Paid</b>	\$47,620.71	\$135,277.10	\$164,627.57	48,197.69
<b>Amount Forgiven</b>	\$0	\$0	\$39,254.87	\$0
<b>Tax Liability</b>	\$0	\$0	\$10,991.36 <sup>1</sup>	\$0

## Community property laws

Congress created repayment plans based on a borrower’s income and the PLSF program to help further reduce the financial burden of high student loan indebtedness. A married borrower also can repay their student loans irrespective of their spouse’s earnings.<sup>24</sup> However, that foresight did not take into account the nine community property states.<sup>25</sup>

Congress amended the Higher Education Act allowing a married borrower to calculate IBR repayment solely on the basis of the borrower’s own AGI, and not that of the borrower’s spouse.<sup>26</sup> A married borrower seeking such relief must file his or her tax return as a married individual filing separately. This enables the borrower’s AGI to reflect only the borrower’s earnings.

This process is available to all borrowers. The process, however, is only advantageous to a borrower earning moderately less than his or her spouse. Each borrower must do a cost-benefit analysis to see whether filing separately is cost effective compared to the lower monthly student loan repayments. Married borrowers who file separately cannot claim certain tax deductions and credits,

The PSLF program has two major benefits. First, loan forgiveness occurs after 10 years. Second, the amount forgiven does not trigger any tax consequences.<sup>20</sup>

including: the student loan interest deduction, the child care credit, and the earned income credit.

For married borrowers living in Idaho, or any other community property state, the amendment to the Higher Education Act does not fix this penalty. Married Idaho borrowers are permitted to file separate federal tax returns, but the community property laws still impute the married couple’s wages. Thus, a borrower living in Idaho who files separately must still calculate AGI using half of their income and half of their spouse’s income. As noted, IBR is based on the borrower’s AGI. Thus, a higher earning spouse will increase

a borrower's AGI, which results in higher monthly payments. The opposite is also true, if the borrower's spouse makes less income, then the borrower's IBR repayment will be less.

Below is an example of this marriage penalty. Hypothetical borrower in Ex. 1 is the same as above. Ex. 3 is the same borrower, but is now married to a spouse earning \$80,000 a year.

The marriage penalty costs the same borrower, with the same job, income, and IBR repayment plan \$20,005 over the life of the loan.

A solution may be found in a pre or post nuptial agreement, where spouses may agree in writing that income acquired during marriage is the separate property of the spouse who earned the income.<sup>27</sup> The consequences of entering into an effective pre or postnuptial agreement affect more than how student loan repayment debt is calculated, however. Borrowers should seek the advice of a family law attorney to make a fully informed decision.

## Conclusion

Congress enacted laws reducing the burden of high monthly student loan payments.<sup>28</sup> It is important to remember that every situation is unique and no plan is the "best." However, Congress can only do so much because lower monthly payments are only a fraction of the equation. Prospective law students must be educated on the costs of attendance, repayment plans, the job market in their preferred locale, and their likelihood for success before, during, and after law school. The days of going to law school on an uneducated whim are gone.

## Endnotes

1. Maimon Schwarzschild, *The Ethics and Economics of American Legal Education Today*, 17

Ex. 1 Public Service

	Standard	Extended	IBR
<b>Monthly Payments</b>	\$1,438.50	\$867.59	\$290.56 — \$379.12
<b>Total Payments</b>	\$172,620.71	\$ 104,110.80	\$39,971.68
<b>Total Interest Paid</b>	\$47,620.71	\$76,847.20	\$39,971.68
<b>Amount Forgiven</b>	\$0	\$97,736.40	\$160,605.72

Ex. 3 Public service with higher earning spouse

	Standard	Extended	IBR
<b>Monthly Payments</b>	\$1,438.50	\$867.59	\$466.31—\$608.40
<b>Total Payments</b>	\$172,620.71	\$ 104,110.80	\$64,149.00
<b>Total Interest Paid</b>	\$47,620.71	\$76,847.20	\$64,149.00
<b>Amount Forgiven</b>	0	\$97,736.40	\$140,600.38

J. CONTEMP. LEGAL ISSUES 3, 5 (2008)

2. See *ABA Charts for Law School Tuition 1985-2011 and Average Living and Book Expenses for Single Students Living on Campus*, available at [http://www.americanbar.org/content/dam/aba/ad-administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/average\\_living\\_book\\_expenses.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/ad-administrative/legal_education_and_admissions_to_the_bar/statistics/average_living_book_expenses.authcheckdam.pdf) and [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/lis\\_tuition.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lis_tuition.authcheckdam.pdf)

3. *ABA Chart Average Amount Borrowed for Law School 2001 – 2010*, available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/avg\\_amnt\\_brwd.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf)

4. ABA Commission on the Impact of the Economic Crises on the Profession and Legal Needs, *The Value Proposition of Attending Law School* 3 (November 2009).

5. It is important to note that deferring or forbearing one's loans is not a repayment plan. Time spent deferring, or in forbearance, does not count as a payment towards any plan that requires a set number of monthly payments.

6. All statistical information comes from the loan calculators available at <http://www.finaid.org/calculators/>. This number also assumes an interest rate of 6.8%.

7. See <http://studentaid.ed.gov/repay-loans/understand/plans/extended>. To be eligible for the extended plan, the borrower must meet two criteria: have more than \$30,000 in direct loan debt and (2) cannot have had an outstanding balance on a direct loan as of October 7, 1998

8. The amount cannot be less than the interest that accrues between monthly payments.

9. Including Direct Subsidized and Unsubsidized Loans, Direct PLUS loans, and Direct Consolidation Loans. However, Direct PLUS Consolidation Loans do not qualify under

The marriage penalty costs the same borrower, with the same job, income, and IBR repayment plan \$20,005 over the life of the loan.

this plan. See <https://www2.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlindex2.html>.

10. "Monthly discretionary income equals your AGI minus the poverty level for your state of residence and family size, divided by 12." <http://www2.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/-dlindex2.html>. See 42 U.S.C. §9902(2) for the poverty guidelines. See also 34 C.F.R. § 682.215(5) (2009).

11. To use IBR, a borrower need not consolidate. The borrower only has to borrow. However, as detailed below, a borrower with a government-guaranteed loan from a financial institution, as opposed to a federal direct loan, must consolidate to obtain the benefits of forgiveness after ten years in a public service job.

12. 34 C.F.R. § 682.215(4) (2009).

13. FedLoan, a Department of Education servicer, instead of using the IRS 4506-T form, has an electronic consent waiver that allows

the borrower to enter their social security number and simply click an agreement box.

14. At this point, the borrower could elect to continue on with the IBR plan or start repaying under the standard repayment plan. Important to note, the amount due under the standard repayment plan will be calculated from the beginning of the repayment process and not from the point of election.

15. See <http://studentaid.ed.gov/repay-loans/understand/plans/income-based>. ("While you have a partial financial hardship, interest that accrues but is not covered by your loan payments will not be capitalized, even if interest accrues during a *deferment* or *forbearance*").

16. Pub. L. No. 111-152, 124 Stat. 1071 (2010) (codified at 20 U.S.C. § 1001).

17. See College Cost Reduction Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified at 20 U.S.C. § 1078).

18. The 120 months do not need be consecutive. However, late payments do not count toward forgiveness, nor does the months the borrower is in forbearance or deferment.

19. This includes government positions at the federal, state, local, and tribal levels and other agency jobs.

20. I.R.C. §108(f) (The indebtedness forgiven is not income if the loan was a "student loan" that was "made by . . . the United States" in order "to assist the individual in attending" a university, and the loan instrument provided that the debt would be "discharged if the individual worked for a certain period of time in certain professions for any of a broad class of employers.").

21. In 2011, the average loan indebtedness for a law school graduate was \$125,000. See Ethan Bronner, *Law Schools' Applications Fall As Costs Rise and Jobs Are Cut*, NEW YORK TIMES, January 31, 2013, at A1, available at [http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?\\_r=0](http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0).

22. The above examples assume a household size of one, a student loan interest rate of 6.8%, and a 3% growth rate for the poverty level, and consumer price index. Examples also assume \$80,000 in subsidized loans and \$45,000 in unsubsidized loans. Cited yearly are Adjusted Gross Incomes. Examples use a 5.8% discount rate.

23. Assuming a 28% tax bracket.

24. Pub. L. No. 110-153, 121 Stat. 1824 (2007) (codified at 20 U.S.C. 1098e(d)).

25. In the United States there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.

26. Pub. L. No. 110-153, 121 Stat. 1824 (2007).

27. See Idaho Code § 32-906(1).

28. For a short period of time, Congress even reduced the interest rate for new borrowers to 3.4%, but as of July 1, 2013, the rate reverted back to the historical level of 6.8%.

### About the Author

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An Idaho native, he obtained a degree in political science from Gonzaga University and a J.D. from the University of Idaho. He can be reached at [wdc@powerstolman.com](mailto:wdc@powerstolman.com).



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# An Update on Attorney Fees in Cases Involving Governmental Entities

Stephen Adams

**T**he issue of whether attorney fees and costs can be awarded in cases involving governmental agencies and subdivisions has been in continual flux for the past few years. Though there are numerous statutes which conceivably allow for attorney fees in cases involving governmental entities<sup>1</sup>, the case law regarding these statutes has been confusing. This article will discuss the history of some of these issues, and will further discuss some of the recent changes which clarify which statutes apply to which situations.

## Attorney fees in civil actions

A number of statutes indicate that, based on their plain language, they apply to civil actions involving governmental entities. For example, Idaho Code § 12-117 states that it applies when the adverse parties are “a state agency or a political subdivision and a person.”<sup>2</sup> Attorney fees are also allowed to be awarded to the “claimant [or] the governmental entity” under the Idaho Tort Claims Act.<sup>3</sup> Attorney fees are mandatorily awarded<sup>4</sup> to the prevailing party in cases involving a commercial transaction or contract pursuant to Idaho Code Section 12-120(3), which specifically provides that a “party” to a commercial transaction includes “the state of Idaho or political subdivision thereof.”<sup>5</sup> Attorney fees and costs may also be awarded in cases involving requests for public records.<sup>6</sup> This list is not exclusive, as there are numerous sources under which attorney fees may be awarded in cases involving governmental agencies and subdivisions.

Though there are many statutes that allow for attorney fees in cases involving governmental entities, until recently the Idaho Supreme

The “exclusive basis” language in *Hagerman* has recently become a basis for denying fees under any other statute.

Court’s decisions seemed to limit the award of attorney fees to just one or two statutes. In 1996, the Idaho Supreme Court issued an opinion holding that there was “legislative intent to make the standard of Idaho Code § 12-117 the basis for an attorney fee award against a state agency, rather than the tests encompassed under the private attorney general doctrine.”<sup>7</sup> This ruling essentially held that the private attorney general doctrine was no longer a valid source of attorney fee awards in cases involving state agencies and governmental subdivisions and was later followed in *State v. Hagerman Water Right Owners, Inc.* (HWRO), 130 Idaho 718, 726, 947 P.2d 391, 399 (1997). However, in *Hagerman*, the Supreme Court utilized broader language than was perhaps necessary:

An award of attorney fees against the [agency] pursuant to the private attorney general doctrine was improper. Idaho Code § 12-117 provides the exclusive basis of an award of attorney fees against a state agency.<sup>8</sup>

The “exclusive basis” language in *Hagerman* has recently become a basis for denying fees under any other statute. For example, in 2002, attorney fees were awarded under Idaho Code § 12-120(3) to a school district as a prevailing party in an action

involving a teacher contract.<sup>9</sup> However, in *Potlatch Educ. Ass’n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010), the Idaho Supreme Court denied a school district an award of attorney fees under Idaho Code § 12-121 because, relying on *Hagerman*, Idaho Code § 12-117 was “the exclusive means for awarding attorney fees for the entities to which it applies.”<sup>10</sup>

This language in *Potlatch* resulted in a number of apparently conflicting decisions. For example, in a 2008 case under the Idaho Tort Claims Act (“ITCA”), the Idaho Court of Appeals stated that Idaho Code § 6-918A “is the exclusive provision for awarding attorney fees under the ITCA, including claims on appeal. Therefore Idaho Code § 12-117 does not apply to this case.”<sup>11</sup> But two years later in *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010) (another ITCA case), and without any discussion of the 2008 Court of Appeals Case, the Idaho Supreme Court relied on *Potlatch* to state that Idaho Code § 12-117 was the exclusive basis for an attorney fee award, and that Idaho Code § 6-918A was not applicable.<sup>12</sup>

A similarly confusing result occurred in *Henry v. Taylor*, 152 Idaho 155, 267 P.3d 1270 (2012), a case arising out of a request for public documents. In that case, attorney fees

were requested under multiple statutes, including Idaho Code §§ 12-117 and 9-344(2).<sup>13</sup> After explaining that Idaho Code § 12-117 was the “exclusive basis for awarding court costs and attorney fees in an action between a person and a state agency,” the Supreme Court held that Idaho Code § 9-344(2) was exclusive under the circumstances of *Henry*.<sup>14</sup>

Between 1996 and 2013, there were at least 11 reported cases which indicated that Idaho Code § 12-117 was the “exclusive” source of attorney fees in cases involving governmental agencies or subdivisions, or which utilized language discussing § 12-117’s exclusivity.<sup>15</sup> Eight of those cases were decided after *Potlatch*. However, during that same time period, there were eight cases involving governmental agencies and/or subdivisions in which attorney fees were awarded under other statutes beside Idaho Code § 12-117<sup>16</sup>, and a number of other cases that discuss multiple attorney fee statutes (but do not discuss exclusivity of any statute over another).<sup>17</sup>

This confusion has recently been rectified by the Idaho Supreme Court. In *Syringa Networks, LLC v. Idaho Dep’t of Admin.*, No. 38735, 2013 WL 1276493 (Idaho Mar. 29, 2013), attorney fees were requested under a number of statutes, including Idaho Code § 12-120(3) and § 12-117. The Supreme Court stated that

The district court denied an award of fees under section 12-120(3) based upon our holding in [*Hagerman*], wherein we stated, “Idaho Code § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency.” That holding has been followed in subsequent cases, but it is incorrect.<sup>18</sup>

The Supreme Court went on to state that “section 12-117(1) is

But the Supreme Court declined and instead affirmed that under Idaho Code § 12-117, the court could not award attorney fees in judicial reviews of agency decisions.<sup>26</sup>

not the exclusive basis upon which to seek an award of attorney fees against a state agency or political subdivision, but attorney fees may be awarded under any other statute that expressly applies to a state agency or political subdivision, such as sections 12-120(3) and 12-121.”<sup>19</sup> Presumably, this means that in any civil action involving a governmental entity, the full panoply of applicable attorney fee statutes is again available to the parties, and parties need not worry whether a particular statute is “exclusive” as to any other statute.

### Attorney fees on judicial review

Another issue which has recently been in flux is the state of attorney fees in agency proceedings and judicial reviews of such proceedings. Historically, Idaho Code § 12-117 was utilized as a source of attorney fees in administrative proceedings and judicial reviews.<sup>20</sup> However, in *Rammell v. Idaho State Dep’t of Agric.*, 147 Idaho 415, 210 P.3d 523 (2009), the Idaho Supreme Court held that administrative agencies could not award attorney fees under Idaho Code § 12-117.<sup>21</sup> Courts, on the other hand, could still award attorney fees under that statute when reviewing appeals of agency decisions.<sup>22</sup>

Shortly thereafter, the Idaho Legislature attempted to abrogate the *Rammell* decision by altering the language of Idaho Code. § 12-117.<sup>23</sup>

However, this attempt apparently backfired. After the changes were made to Idaho Code § 12-117, the Idaho Supreme Court issued two decisions stating that the new language allowed administrative agencies to award attorney fees under Idaho Code § 12-117, but courts sitting in review of those decisions could not. First, in *Smith v. Washington Cnty. Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010), the Supreme Court stated that “as amended, Idaho Code § 12-117(1) does not allow a court to award attorney fees in an appeal from an administrative decision.”<sup>24</sup> The reasoning for this decision, in part, was that judicial reviews of agency decisions were not a “civil judicial proceeding,” which, according to the Supreme Court, started with the filing of a complaint under Idaho R. Civ. P. 3(a)(1), as opposed to an appeal (as happens in a petition for judicial review).<sup>25</sup>

This logic was affirmed shortly thereafter in *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 264 P.3d 916 (2011). In *Sopatyk*, Lemhi County requested that the Supreme Court overrule *Smith* as bad law, but the Supreme Court declined and instead affirmed that under Idaho Code § 12-117, the court could not award attorney fees in judicial reviews of agency decisions.<sup>26</sup>

As was predicted previously in *The Advocate*<sup>27</sup>, the Legislature moved swiftly to again remedy this

situation. In the 2012 session, the Legislature again modified Idaho Code § 12-117, so that the relevant language now reads:

(1) Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the non-prevailing party acted without a reasonable basis in fact or law.

...

(5) For purposes of this section:

...

(c) "Proceeding" means any administrative proceeding, administrative judicial proceeding, civil judicial proceeding or petition for judicial review or any appeal from any administrative proceeding, administrative judicial proceeding, civil judicial proceeding or petition for judicial review.<sup>28</sup>(emphasis added)

Based on this language, it is clear that the Legislature intended to provide that attorney fees could be awarded under Idaho Code § 12-117 in administrative proceedings and in appellate reviews of those proceedings.

Presumably, it would appear that the Legislature intended to abrogate the rulings in both *Smith* and *Sopatyk*, along with any cases that relied on them. However, that does not mean that *Smith* and *Sopatyk* are without any judicial bite. For example, Idaho Code § 12-117 only applies when there are "unwarranted

Thus, neither a government employee nor employer can obtain attorney fees under Idaho Code § 12-120(3) for an administrative employment decision or judicial review of that decision.



legal challenges."<sup>29</sup> What if the parties seek a mandatory attorney fee award related to an agency employment decision? For example, what if attorney fees are sought in a judicial review of a school board's decision relating to termination of a teacher employment contract?<sup>30</sup> Under the *Syringa Networks* case, attorney fees can now be sought under Idaho Code § 12-120(3), which applies to employment contracts.<sup>31</sup> This statute requires a mandatory award of attorney fees to a prevailing party.<sup>32</sup> Though many changes have been made to Idaho Code § 12-117 to get it to apply to both administrative agency decisions and related appeals, no such changes have been made to Idaho Code § 12-120(3) or Idaho Code § 12-121. Both of those sections still say that they apply to "any civil action"<sup>33</sup>, and do not include the new "proceeding" definition the Legislature incorporated into Idaho Code § 12-117 in 2012. As both *Smith* and *Sopatyk* (and a number of other cases) explicitly state, "civil actions" do not include judicial reviews of agency/political subdivision decisions.<sup>34</sup> Thus, neither a government employee nor employer can obtain attorney fees under Idaho Code § 12-120(3) for an administrative employment decision or judicial review of that decision.

In summary, the issues surrounding Idaho Code § 12-117 appear to be more or less cleared up with regard to both administrative decisions and judicial review. However, although the Supreme Court has decided to allow attorney fee awards to (or against) a governmental subdivision or agency under any applicable statute, it is questionable whether any other statute can apply in the administrative agency/judicial review realm.

## Conclusion

The Idaho Supreme Court and the Idaho legislature are doing a good job of ensuring that attorneys work for their pay (at least when it comes to understanding attorney fee statutes). In civil cases involving governmental agencies or subdivisions, recent case law makes it clear that attorney fees may be awarded under any applicable statute (and not just Idaho Code § 12-117). However, when there is an administrative proceeding or judicial review of such proceeding, it appears that attorney fees are only available under Idaho Code § 12-117. Other statutes that would normally apply (such as Idaho Code § 12-120(3) in decisions relating to employment issues), have been relegated to waiting on the back burner to see if the legislature will update them in the same way it has updated Idaho Code § 12-117.

## Endnotes

1. Such statutes include I.C. § 12-117 (a statute specifically dealing with attorney fees in cases involving governmental entities), 12-120(3) (dealing with attorney fees in contract or commercial transactions), 12-121 (general statute regarding attorney fees), 6-918A (attorney fees allowed in tort claims cases), and 9-344 (attorney fees allowed in cases involving the Public Records Act).

2. I.C. § 12-117(1).

3. I.C. § 6-918A.

4. *Downey Chiropractic Clinic v. Nampa Rest. Corp.*, 127 Idaho 283, 287 – 88, 900 P.2d 191, 195 – 96 (1995) (“I.C. § 12-120(3) generally mandates an award of attorney fees to the prevailing party”).

5. I.C. § 12-120(3).

6. I.C. § 9-344(2).

7. *Roe v. Harris*, 128 Idaho 569, 573, 917 P.2d 403, 407 (1996), *abrogated by Rincover v. State, Dep’t of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999).

8. *State v. Hagerman Water Right Owners, Inc. (HWRO)*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997) (emphasis added), *abrogated by Syringa Networks, LLC v. Idaho Dep’t of Admin.*, No. 38735, 2013 WL 1276493 (Idaho Mar. 29, 2013).

9. *Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002).

10. *Potlatch Educ. Ass’n v. Potlatch Sch. Dist.* No. 285, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010).

11. *Beehler v. Fremont Cnty.*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008).

12. *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010).

13. *Henry v. Taylor*, 152 Idaho 155, 161, 267 P.3d 1270, 1276 (2012).

14. *Id.* at 162, 267 P.3d at 1277.

15. See *State v. Hagerman Water Right Owners, Inc. (HWRO)*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997), *abrogated by Syringa Networks, LLC v. Idaho Dep’t of Admin.*, 38735, 2013 WL 1276493 (Idaho Mar. 29, 2013); *Westway Const., Inc. v. Idaho Transp. Dep’t*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003); *Potlatch Educ. Ass’n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 635, 226 P.3d 1277, 1282 (2010); *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010); *Lake CDA Investments, LLC v. Idaho Dep’t of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010); *Smith v. Washington Cnty. Idaho*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010); *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 818, 264 P.3d 916, 925 (2011); *Kepler-Fleener v. Fremont Cnty.*, 152 Idaho 207, 213, 268 P.3d 1159, 1165 (2012), *reh’g denied* (Jan. 30, 2012); *City of Osburn v. Randel*, 152 Idaho 906, 910, 277 P.3d 353, 357 (2012); *Arambarri v. Armstrong*, 152 Idaho 734, 741, 274 P.3d 1249, 1256 (2012), *reh’g denied* (May 7, 2012); *State, Dep’t of Transp.*

In civil cases involving governmental agencies or subdivisions, recent case law makes it clear that attorney fees may be awarded under any applicable statute (and not just Idaho Code § 12-117).

*v. HJ Grathol*, 153 Idaho 87, 278 P.3d 957, 963 (2012).

16. See *Hummer v. Evans*, 132 Idaho 830, 833, 979 P.2d 1188, 1191 (1999); *Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002) (attorney fees awarded to Board of Trustees under I.C. § 12-120(3)); *Clark v. State, Dep’t of Health & Welfare*, 134 Idaho 527, 532, 5 P.3d 988, 993 (2000); *Huyett v. Idaho State Univ.*, 140 Idaho 904, 911, 104 P.3d 946, 953 (2004); *Beehler v. Fremont Cnty.*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008); *Sadid v. Idaho State Univ.*, 151 Idaho 932, 942, 265 P.3d 1144, 1154 (2011); *Henry v. Taylor*, 152 Idaho 155, 162, 267 P.3d 1270, 1277 (2012); *Noak v. Idaho Dep’t of Correction*, 152 Idaho 305, 314, 271 P.3d 703, 712 (2012), *reh’g denied* (Mar. 12, 2012).

17. See *Treasure Valley Concrete, Inc. v. State*, 132 Idaho 673, 677-78, 978 P.2d 233, 237-38 (1999) *overruled by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012); *Cox v. City of Sandpoint*, 140 Idaho 127, 133, 90 P.3d 352, 358 (Ct. App. 2003); *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312-13, 109 P.3d 161, 166-67 (2005); *Jenkins v. Barsalou*, 145 Idaho 202, 207-08, 177 P.3d 949, 954-55 (2008) (attorney fees were requested under both I.C. § 12-117 and § 12-121; the Supreme Court awarded fees, but did not say under which statute); *Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008) (see also n. 6); *City of McCall v. Buxton*, 146 Idaho 656, 667, 201 P.3d 629, 640 (2009); *Allied Bail Bonds, Inc. v. Cnty. of Kootenai*, 151 Idaho 405, 415, 258 P.3d 340, 350 (2011); *Chavez v. Canyon Cnty., State, ex rel. its Duly Elected Bd. of Cnty. Comm’rs*, 152 Idaho 297, 305, 271 P.3d 695, 703 (2012).

18. *Syringa Networks, LLC v. Idaho Dep’t of Admin.*, No.38735, 2013 WL 1276493 (Idaho Mar. 29, 2013)

19. *Id.*

20. T. Hethe Clark, *The Curious Case of Idaho Code Section 12-117: Who Gets Paid?*, 55 ADVOCATE 26 (2012)

21. *Rammell v. Idaho State Dep’t of Agric.*, 147 Idaho 415, 423, 210 P.3d 523, 531 (2009).

22. *Id.*

23. T. Hethe Clark, *The Curious Case of Idaho Code Section 12-117: Who Gets Paid?*, 55 ADVOCATE 26 (2012). See also *Pioneer Irr. Dist. v. City of Caldwell*, 153 Idaho 593, 288 P.3d 810, 819

(2012), *reh’g denied* (Nov. 29, 2012) (discussing that the Idaho legislature abrogated the holding in *Rammell* by changing the statute).

24. *Smith v. Washington Cnty. Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010).

25. *Id.*

26. *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 818-19, 264 P.3d 916, 925-26 (2011).

27. T. Hethe Clark, *The Curious Case of Idaho Code Section 12-117: Who Gets Paid?*, 55 ADVOCATE 26, 27-28 (2012).

28. I.C. § 12-117 (2013) (emphasis added).

29. T. Hethe Clark, *The Curious Case of Idaho Code Section 12-117: Who Gets Paid?*, 55 ADVOCATE 26, 28 (2012).

30. See I.C. § 33-513(5)(m).

31. *Willie v. Bd. of Trustees*, 138 Idaho 131, 136, 59 P.3d 302, 307 (2002).

32. *Downey Chiropractic Clinic v. Nampa Rest. Corp.*, 127 Idaho 283, 288, 900 P.2d 191, 196 (1995).

33. See I.C. §§ 12-120(3) and 12-121.

34. See *Smith v. Washington Cnty. Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010); *Sopatyk v. Lemhi Cnty.*, 151 Idaho 809, 818, 264 P.3d 916, 925 (2011); *Lake CDA Investments, LLC v. Idaho Dep’t of Lands*, 149 Idaho 274, 285, 233 P.3d 721, 732 (2010) (n.6); *Sanchez v. State, Dep’t of Correction*, 143 Idaho 239, 243, 141 P.3d 1108, 1112 (2006).

## About the Author

**Stephen Adams** is an Adjunct Professor of Legal Studies at Utah Valley University, and is licensed to practice law in both Idaho and Utah. He is a graduate of Vanderbilt University Law School, and has represented numerous governmental entities in Idaho. He is currently putting his wife through law school, and spends most of his time trying to keep his two young daughters from destroying the house.

# Idahoans Aren't Getting the Legal Help They Need

Patrick Costello

**T**ens of thousands of low-to moderate-income Idahoans are not getting their legal needs met, according to a University of Idaho report.

The study, performed by the College of Law and the Social Science Research Unit, is the first step in identifying needs and working to make improvements. The college and other policy makers will use the results to make decisions regarding how to meet the needs of underserved populations in Idaho.

"This study confirms what many of us in the profession have long suspected: access to civil justice is an ideal we are far from realizing here in Idaho," said Michael Satz, College of Law interim dean. "It is my intention to use this information to show the continued need for a strong state College of Law and the need to provide the opportunity to train as lawyers in the state capitol, bringing that knowledge back to the communities our students come from."

The study assessed the legal needs of Idahoans in the last year in non-criminal matters. The study found that households with lower incomes were less likely to get legal help than those homes with higher incomes. Specifically, in Idaho, households at or below 200 percent federal poverty levels were found to be twice as likely as the general population to have unmet legal needs.

The study also found that Idahoans needed the most assistance in accessing public benefits and debt collection matters. Significant levels of unmet legal needs were also identified in family law cases, especially custody and child support, housing matters, and consumer transactions.

The study also found that Idahoans needed the most assistance in accessing public benefits and debt collection matters.

Below is the executive summary of the report, which can be viewed in full at:

<http://web.cals.uidaho.edu/ssru/files/2013/06/LegalNeedsReport1.pdf>

## Idaho legal needs assessment

The College of Law and the Social Science Research Unit at the University of Idaho conducted a statewide assessment of unmet legal needs in Idaho. The study included three primary data collection efforts: a statewide telephone survey of the general public, an Internet survey of judges, attorneys, court clerks, and victims' advocates, and several semi-structured interviews with key stakeholders. In total, 879 households completed the telephone survey, 156 individuals completed the stakeholder Internet survey, and eight interviews were conducted. These results will be used to assist the College of Law and policy makers within the state to make decisions regarding how to meet the needs of underserved populations in Idaho.

The survey included questions about households' civil legal needs over the past 12 months in the following areas of law: family law, domestic abuse, immigration, housing & utilities, discrimination, identity theft, employment, consumer issues, public benefits and services, probate, and health care.

## Stakeholders group surveyed cross-section of legal field

To gain the perspective and insights of members of the law profession, including attorneys, judges, court clerks, and advocates, we conducted a web-based survey of members of those professions. The Idaho State Bar (ISB) assisted with the survey effort. Sections (ADR, Commercial Law and Bankruptcy, Diversity, Employment and Labor Law, Family Law, Government and Public Sector Law, Health Law, Indian Law, Litigation, Real Property, Taxation, Probate, and Trust Law, Workers Compensation, and Young Lawyers) within the ISB were selected based on the relevance of their areas of law practice and the survey was forwarded to those members by the ISB. In addition, the survey was forwarded to all the judges and court clerks in the state. It should be noted that while the survey was not a probability based sample and the response rate was low, the main goal of this survey was to target those who are likely to encounter low- or moderate-income clients in civil cases and assess what types of legal services are most likely to not be met for those individuals.

## Percentage of households with legal issues in the past twelve months

- The areas of law that had the highest percentage of households with legal needs in the past 12 months include: public benefits and services (36 percent), debt collection (19 percent), probate (14 percent), collecting unpaid debts (13 percent), and utilities (10 percent).

- Areas of law with very low levels of need include immigration (<1 percent), foreclosure (<1 percent), malpractice (2 percent), leasing to others (2 percent), domestic violence (2 percent), and accidents (3 percent).

- The estimate for the total number of households in Idaho in which someone has experienced problems related to child custody, guardianship, and child support in 2012 is 16,000.

- The estimate for the total number of households in Idaho in which someone has experienced legal issues related to debts and debt collection in 2012 is 78,000.

- No statistically significant differences existed among the different judicial districts with respect to legal needs, though some variability among districts in areas related to debt collection and public benefits and services may be of practical significance.

### Unmet legal needs in Idaho

- For those households with legal needs in the past 12 months, the majority did not obtain legal assistance.

- Over a quarter (28 percent) of households in Idaho had legal issues with respect to public benefits and services and did not obtain legal advice.

- Nearly one in five (17 percent) of households in Idaho had issues related to debt collection and did not obtain legal advice.

The estimate for the total number of households in Idaho in which someone has experienced legal issues related to debts and debt collection in 2012 is 78,000.



- Just over 10 percent of households had issues related to payment of debts owed to them and did not obtain legal advice.

- Households at or below 200 percent of federal poverty guidelines were significantly more likely to have unmet legal needs than the population as a whole.

- Over 60 percent of households in poverty had issues with public benefits and services.

- Nearly a third (31 percent) of households in poverty had legal issues related to debt collection.

- One in five households in poverty (20 percent) faced issues related to access to health care.

- Households at or below poverty were twice as likely as the general population to face issues related to their rental unit, divorce, child custody, adult guardianship, domestic violence, access to health care, and accidents.

### Stakeholder assessment of legal needs in Idaho

- Stakeholders as a group tended to underestimate the percentage of cas-

es that proceed pro se (34 percent), relative to the actual number of pro se cases in Idaho recorded by the Idaho Supreme Court (58 percent).

- Stakeholders perceive that the types of cases most likely to lack legal representation are family law, debt collection, and housing.

- Over 80 percent of stakeholders listed cost as the primary reason that individuals do not seek legal assistance, and 57 percent state that the clients would have had better outcomes had they been represented by an attorney.

- The two largest problems caused by pro se representation that stakeholders perceive are adverse outcomes for the client, and lengthening and delaying the court proceedings.

- State support for legal services was ranked as the best option for addressing unmet legal needs by a plurality of the respondents.

For more information about this study, please contact: Emeritus Professor Patrick Costello, legal needs study coordinator at the College of Law (c1stello@gmail.com); Michael Satz, interim dean of the College of Law; or the Social Science Research Unit Project Manager, Stephanie Kane (skane@uidaho.edu).

# Uniform Business Organization Code — Comments Accepted

Dale Higer

In 2011 the Uniform Law Commission (a/k/a NCCUSL) approved the Uniform Business Organization Code (UBOC), an act with two objectives:

(1) to harmonize, to the extent possible, the substantive provisions and the language in similar provisions in all the uniform unincorporated entity acts; and

(2) to create a Code that would be structured like the Uniform Commercial Code and include in Article 1 (the Hub) general provisions applicable to all unincorporated entities including definitions, Secretary of State filing provisions, annual reports, permitted names, registered agents, foreign entities, and administrative dissolution; in Article 2 the merger, interest exchange, conver-

sion, and domestication provisions found in the Model Entity Transactions Act (META); and in Articles 3-8 (the Spokes) the Uniform Partnership Act (UPA), the Uniform Limited Partnership Act (ULPA), the Uniform Limited Liability Company Act (ULLCA), the Uniform Statutory Trust Entity Act, the Uniform Limited Cooperative Association Act, and the Uniform Unincorporated Nonprofit Association Act (UUNAA).

Since Idaho has already adopted META, the Model Registered Agents Act, UPA, ULPA, ULLCA, and UUNAA (1995), the Harmonized Uniform Business Organization Code Committee (HUBOC), began working with the Idaho Commission on Uniform State Laws, began reviewing the UBOC in the fall of 2011 and completed that review in January 2013.

The committee did not make any substantive changes to Idaho's existing acts other than to accept the harmonizing of the UBOC, except for UUNAA, which retains the 1995 version as harmonized. In late March, the Idaho Senate introduced Idaho's version of the UBOC as SB1254 for the purpose of giving members of the Idaho Bar and the public a chance to review and make comments on this legislation.

If you have any comments, get in touch with David Jensen at Moffatt Thomas, Boise or Dale Higer, Boise. Any comments will be reviewed by the Legislative Committee, and if appropriate, incorporated into SB1254 for reintroduction in next year's legislative session. In the meantime, the Legislative Committee is reviewing Idaho's Model Corporation Code and Model Nonprofit Corporation Code for inclusion as spokes in the UBOC.

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# Back to Basics II: Parts of Speech

Tenielle Fordyce-Ruff

I frequently include tidbits of grammar to help my readers understand the more nuanced advice I'm discussing in a particular column. But many readers have let me know that they would like an easy guide to the various parts of a sentence. I think that's a great request. It's much easier to write and edit if you understand how the words on a page create a sentence.

In English, we classify words into eight parts of speech: noun, pronoun, verb, adjective, adverb, preposition, conjunction, and interjection. These classifications are based on how a word functions within a sentence, not necessarily on the word itself. Think about the last time you looked up a word in a dictionary—remember how a single word could be both a noun and an adverb, for instance. Grammar really is, after all, functional in operation.

When a word trips you up as you write or edit a sentence, you just might have a problem with its usage as that part of speech. So, we will look briefly at each of the eight parts of speech to help you understand how the words on your page are functioning.



## Nouns

We probably all remember this from grade school — a noun is a word indicating a person, place, or thing. Nouns come with their own set of classifications: nominative, objective, or possessive. Nouns can be proper or common, concrete or abstract, singular or plural. Nouns can also be collective.

Nouns need to agree in number with the rest of the sentence.



Both lawyers filed their briefs early.

Each lawyer filed her brief at the last minute.

Nouns also tend to trip us up when we are using a collective noun. We need to make sure to use a singular pronoun or verb to go with that noun.

The jury was deadlocked. Its members couldn't agree on liability.

The board is meeting.

## Pronouns

A pronoun is a word used in place of a noun (the noun replaced is then called the antecedent). Although most pronouns function as substitutes for nouns, some can act as adjectives by modifying a noun. Pronouns are classified according to their usage: personal, possessive, reflexive-intensive, demonstrative, interrogative, relative, indefinite, and reciprocal.

Pronouns create a host of problems. Indeed, pronoun usage is so complex, I've written three different columns dedicated to pronouns and haven't yet covered everything.<sup>1</sup> But, I'll highlight the basics here. Pro-

nouns must agree in number, gender, and person with its antecedent, and they must unambiguously refer to the correct antecedent.

## Verbs

Verbs are the words that express action in a sentence, and can be composed of both a main verb and a helping verb. The main verb of a sentence will always change form when it's put into a different tense.

Usually, I use Westlaw.

Yesterday, I used LexisNexis.

I am using Casemaker now.

The last example had a helping verb: am. English has 23 helping verbs. *Have, do, and be* can also function as main verbs. Their various forms make up most of the list of helping verbs: *have, has, had, do, does, did, be, am, is, are, was, were, being, and been*. The remaining helping verbs don't change form and are called modals: *can, could, may, might, must, shall, should, will, and would*. *Ought to* is sometimes classified as a modal, too.

And, verbs can be followed by words that look like prepositions,

but are so closely associated with the verb that they make up part of its meaning. In fact, *make up* in the last sentence illustrates this point.

### Adjectives (and articles)

An adjective is a word used to modify or describe a noun or pronoun. Adjectives usually tell the reader which one, what kind of, or how many.

*The younger man broke the window of the pawnshop. (Which man?)*

*The defendant stole rare valuable old coins. (What kind of coins?)*

*Eleven jurors agreed on the defendant's guilt. (How many jurors?)*

Most adjectives come before the noun they modify, but adjectives can also follow linking verbs.

*Good medicine always tastes bitter.*

*Justice is blind.*

These adjectives describe the subject of the sentence, even though they might be far away in sentence placement. (Bitter describes medicine; blind describes justice.)

Finally, articles are sometimes classified as adjectives and are used to mark nouns. English has three articles: *the*, *a*, and *an*. When referring to a specific noun, use the definite article *the*, otherwise use *a* or *an*.

### Adverbs

Adverbs are words that modify a verb or verbal, an adjective, or another adverb. When adverbs modify a verb, they tell the reader when, where, how, why, under what conditions, or to what degree.

*We must move quickly. (Move how?)*

*Read the best briefs first. (Read when?)*

When adverbs modify adjectives or other adverbs, they tend to intensify or limit the intensity of the word they modify.

*Be extremely nerdy about grammar, and you will be very lonely.*

Finally, negators (*not*, *never*) are classified as adverbs.

### Prepositions

A preposition is a word or words placed before a noun or pronoun to form a phrase that modifies another word in the sentence. Almost always this prepositional phrase functions as an adjective or an adverb.

English has a limited number of prepositions. Prepositions tend to create little to no trouble for native English speakers. There are, however, a few accepted idiomatic expressions that break the rule.

*Minors are treated different from adults in the criminal justice system. (not different than)*

*Be sure to check a good dictionary for usage advice. (not sure and)*

### Conjunctions

Conjunctions join words, phrases, or clauses and indicate the relationship between the elements they join. Understanding the various types of conjunctions can help punctuate sentences correctly and can even help us write complete sentences.

Coordinating conjunctions connect grammatically equal elements. These seven conjunctions — *for*, *and*, *nor*, *but*, *or*, *yet*, *so* — can be used to join two independent clauses. Be careful, however, to put a comma before the coordinating conjunction if it is used this way.

*The negotiation worked, and the case settled.*

Correlative conjunctions come in pairs, and they, too, join grammatically equal elements.

*Both fraud and constitutional violations must be pled with specificity.*

Subordinating conjunctions introduce subordinate clauses and indicate their relationship to the rest of the sentence: *after*, *although*, *as*, *as if*, *because*, *before*, *even though*, *if*, *in*

*order that*, *rather than*, *since*, *so that*, *than*, *that*, *though*, *unless*, *until*, *when*, *where*, *whether*, *while*.

Recognizing these conjunctions will help you recognize when you have created a sentence fragment.

*After the jury selection.*

Conjunctive adverbs are adverbs used to indicate the relationship between independent clauses. *Accordingly*, *consequently*, *furthermore*, *instead*, *moreover*, *still*, *therefore*, and *thus* are a few of the more common conjunctive adverbs. Be careful when using these types of adverbs to join two independent clauses. They take a semicolon instead of a comma.

*The negotiation didn't work; instead the case went to trial.*

### Interjections

Interjections are words used to express emotions, most commonly surprise. We rarely use interjections in legal writing, but if you do choose to use one, use an exclamation point. *Wow! That was a lot of grammar for one day.*

### Sources

- Diana Hacker, *A Writer's Reference*, 337-344 (3d ed. 1995)
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, §10 (2d ed. 2006).
- Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 276 (3d ed. 2011).

### Endnotes

1. Problems with Pronouns Part III: Gender-Linked Pronouns, *The Advocate* (June/July 2013); Problems with Pronouns Part II: Personal, Reflexive, and Possessive Pronouns, *The Advocate* (June/July 2012); Problems with Pronouns: Part I, *The Advocate* (March/April 2012)

### About the Author

**Tenielle Fordyce-Ruff** is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Rainey Law Office, a boutique firm focusing on civil appeals. You can reach her at [tfordyce@concordia.edu](mailto:tfordyce@concordia.edu) or [tfr@raineylawoffice.com](mailto:tfr@raineylawoffice.com).

## IN MEMORIAM

### Stuart Waller Carty 1944 - 2013

Stuart Waller Carty, of Boise, Idaho, passed away on June 2, 2013, at St. Luke's Hospital in Boise, Idaho, after a courageous battle with cancer. Born in Cleveland, Ohio, to Col. Douglas Felix and Miriam Rose Carty, Stuart was the first of five brothers. Stuart received his B.A. Degree from the University of Tennessee, where he was in the ROTC and graduated as a 2nd Lieutenant. He served four years as an Air Force Officer at Travis Air Force Base during the Vietnam War.



Stuart Waller Carty

Stuart returned to the University of Tennessee where he completed his law degree in 1974. Then he married Martha Davis of Signal Mountain, Tennessee. After completing his law degree, Martha and Stuart moved to Boise and went to work for the Attorney General's Office. He later went into private practice with Chip Houst and Rick Dredge. He was most recently practicing at Carty Law. Stuart practiced before state and federal courts and was a member of Idaho Trial Lawyers, American Association of Justice, National Rifle Association, Safari Club of America, Full Gospel Business Men Fellowship and Discovery Church (formerly known as Boise Valley Christian Communion Church). Stuart and Martha were avid hunters and traveled the world in pursuit of wild game.

### Allen Richard Derr 1928 - 2013

Idaho attorney Allen Derr, known for arguing the hallmark *Reed v. Reed* case in front of the U.S. Supreme

Court in 1971, died on June 10. His wife, Judy Peavey-Derr, sister Jane Betts, and close friends Jesse and Harriet Walters, were by his bedside.

A small man in stature, but big in thought, deed, and spirit, Allen fought for justice and peoples' rights from an early age. Allen's father, a five-term Senator from Bonner County and Democratic nominee for governor of Idaho in 1958, brought the family to Boise for the session each year. The Derr farm kids received unwanted attention from authorities and others for various acts such as roller skating in the Capitol or staging fights at Hotel Boise where crowds would gather and throw money which was later used for ice cream. At age 17 Allen's parents gave permission for him to join the World War II effort. He joined the Marine Corps and was sent to China in 1945. He returned to Idaho and graduated from high school in his dress uniform. He also served in the Air Force during the Korean War. He was accepted at several colleges, including Stanford and Harvard but chose the University of Idaho. He majored in Journalism, pledged the TKE fraternity, and served as the editor of *The Argonaut*.

Upon graduation Allen worked as the editor for the TKE National Magazine in New Augusta, Indiana. After four years he decided to become a lawyer.

During these years Allen met and married Miriam E. Ross Larson, started law school, was a correspondent for the Lewiston Tribune, Spokane Chronicle, and Spokesman Review. His first job after law school in 1959 was as Assistant Attorney General for the State of Idaho. One year later he opened his private practice, eventually practicing with brothers, Jim, and Jesse Walters. Divorced, he met and married Helen Evans. They were married for 28

years when she passed in 1992. It was during these years that Allen argued the *Reed v. Reed* case in front of the U.S. Supreme Court. It was the first successful sex discrimination case in United States history. His role began when he represented an Ada County woman.

Sally and Cecil Reed, a married couple who had separated, were in conflict over which of them to designate as administrator of the estate of their deceased son. Each filed a petition with the Probate Court of Ada County asking to be named. Idaho Code specified that "males must be preferred to females" in appointing administrators of estates and the court appointed Cecil as administrator of the estate, valued at less than \$1,000. Sally Reed was represented by Allen, who argued that the Fourteenth Amendment forbids discrimination based on gender. He was assisted by Ruth Bader Ginsburg, who later became a U.S. Supreme Court Justice.

In 1967 he became one of the Founders of the Idaho Trial Lawyers' Association, was a longtime Director of the Idaho Press Club, and was selected by the *Idaho Statesman* for their "Portrait of a Distinguished Citizen" award. In 1993 Allen, a Democrat and past state president of the Young Democratic Club of Idaho whose grandfather had also served in the Idaho Legislature as a Democrat, married Judy Peavey, a Republican, precinct committee person, and with strong family ties to the Republican party.

The ACLU recognized him in 2002 with the Idaho Freedom Award, the Idaho State Bar honored him with the Professionalism Award



Allen Richard Derr

## IN MEMORIAM

in 2002, the University of Idaho bestowed upon him the Alumni Association Hall of Fame award in 2005, and he was featured, along with his client, Sally Reed in the book "Days of Destiny Crossroads in American History."

His final request was he hoped friends and family would support the pro bono program at the University of Idaho College Of Law.

### **John Sherwood Chapman 1936 - 2013**

A champion of the arts and world peace, John Sherwood Chapman died on July 8 in Boise, accompanied by his spouse and partner of 34 years, Steve Champion.

John was born July 6, 1936, in Twin Falls, Idaho, the son of Marshall Byron Chapman and Dorothy Parsons Chapman. His paternal grandfather, John William Chapman, arrived in Boise, in a wagon train on the Oregon Trail in August, 1864. In 2010, The Sun Valley-Ketchum and Hailey Chambers of Commerce named Chapman "Citizen of the Year" for the Wood River Valley. John was known for his tireless work in support of the arts, historic preservation and environmental and humanitarian causes. He graduated from Stanford Law School in 1961 and was employed in Boise by Jess Hawley of the law firm of Hawley & Hawley in Boise, and

later with the firm of Hawley Troxell, Ennis & Hawley. In 1964 he opened his own law practice in Boise and later merged his firm with I. F. Martin and C. Ben Martin, as Martin Chapman & Martin and later Martin Chapman Park & Burken.

John was very active politically, starting as a Boise precinct committeeman and eventually serving as treasurer of the state Democratic Party, on the executive committee of the state Democratic Party, and as Democratic National Committeeman for Idaho from 1974 to 1984.

For four years he represented the 15 western states on the executive committee of the Democratic National Party. John was a delegate to the Democratic National Convention on three different occasions, was acquainted with two Presidents and dined at the White House on several occasions.

During the 1970s, while serving as chairman of the Boise Planning and Zoning Commission, John was instrumental in creating the Boise Greenbelt Park. He also served as President of the Boise Chapter of the American Red Cross, President of the Boise United Way, and President



John Sherwood  
Chapman

of the Boise Rotary Foundation. John also served on the Board of Directors of the Boise Art Museum, The Boise Philharmonic, and as President of the Board of Ballet Idaho was instrumental in bringing Ballet Idaho to Boise from the campus of the University of Idaho. He also served as Chairman of the Idaho Commission on the Arts, and in 1994 was given the Governor's Award for the Support of the Arts by Governor Andrus. Mr. Chapman said one of the most rewarding accomplishments of his life was serving as first president of the Gamma Mu Foundation. Chapman founded the Gamma Mu Foundation in 1988 at the Cloverley ranch and was instrumental in raising substantial capital for its endowment, which is dedicated to helping rural AIDS patients throughout the United States.

In 2009 he received an honorary Doctor of Humane Letters degree from his alma mater, the University of Idaho. John served as Chairman of the Advisory Board of the Martin Institute at the University of Idaho for over 30 years and worked closely with his mentor, Dr. Boyd Martin to make the Martin Institute a reality. In 2010 he endowed the John S. Chapman Chair of World Peace at the Martin Institute and has worked hard to bring peace to the world through his many endeavors.

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**Janaé M. Ball becomes principal**

Randall Danskin, PS announced that Janaé M. Ball became a principal of the firm in Spokane. She is licensed to practice in Idaho and Washington, and practices in labor and employment law. Ms. Ball formerly practiced law at K & L Gates and Paine Hamblen. She is a graduate of Gonzaga University School of Law. Ms. Ball can be reached at (509)747-2052 or jmb@randalldanskin.com.



Janaé M. Ball

**Susan Moss joins Lukins & Annis, PS**

Lukins & Annis, PS, is pleased to announce that Susan Moss recently joined the Coeur d'Alene office as an associate attorney. Ms. Moss earned her B.S, summa cum laude, from the University of Oregon. She graduated from the University of Idaho, College of Law with her J.D., summa cum laude, in 2006, after attending Georgetown University Law for her third year. Ms. Moss, who focuses on commercial litigation, has also practiced at O'Melveny & Myers LLP in Washington, D.C., and at Banducci Woodard Schwartzman PLLC, in Boise.



Susan Moss

**Idaho Falls Times News features John Rosholt**

At 75, John Rosholt is a walking history book of important water law cases and details that have shaped

the Magic Valley and the West for the past 40 years. In recognition of his contributions to the state, Mr. Rosholt was inducted last month into the University of Idaho's Hall of Fame for his contribution to water rights law.



John Rosholt

Rosholt earned his law degree in 1964 from the University of Idaho and was admitted to the Idaho State Bar the same year. Shortly after, he went to work for R.P. Parry, who was then known as the "King of Water" in Idaho. In 1966, the nine-attorney law firm in Twin Falls was one of the largest practices in the state.

"I was lucky," he said. "Parry paid me to research water law a few months. I really took to it."

**Teresa A. Hill has joined K&L Gates as a partner**

K&L Gates welcomes Teresa Hill to its Boise office. Ms. Hill focuses her practice in the area of energy and infrastructure projects and transactions. Prior to joining K&L Gates, Ms. Hill was a partner at Portland law firm Stoel Rives LLP. Teresa holds a J.D. from University of Utah S.J. Quinney College of Law and a M.S. in Sociology from the University of Utah.



Teresa Hill

**Hawley Troxell welcomes new attorney**

Hawley Troxell is pleased to welcome Dane A. Bolinger to its Boise office as an associate attorney in the

litigation, insurance, and real estate groups. Mr. Bolinger's practice involves defending companies in a variety of litigation matters.

Bolinger formerly practiced law at Swanson, Martin, & Bell, LLP in Chicago, Illinois. He received his J.D., summa cum laude, from the John Marshall Law School in 2008, and his B.A. from Indiana University Bloomington in 2002. During his time at John Marshall Law School, he was a member of the Saul Lefkowitz Moot Court Team, and a recipient in 2006 of the Fred F. Herzog Scholarship for academic excellence.



Dane A. Bolinger

**Seiniger writes chapter for book**

A chapter contributed by Boise attorney Wm. Breck Seiniger, Jr. was recently published by Thomson Reuters, called "Representing Plaintiffs in Workplace Injury Cases: Leading Lawyers on Determining Claim Credibility, Achieving Successful Resolution, and Staying up-to-Date on Changes in the Workers Compensation Act." He wrote the section on "Overcoming Challenges and Key Considerations in Workers Compensation Litigation." The publication is part of Aspatore's "Inside the Minds" series.



Wm. Breck Seiniger, Jr.

**Linda Pall retires from University of Washington**

Moscow attorney Linda Pall, winner of this year's Idaho State Bar

## OF INTEREST

Diversity Section's "Justice for All Award," has announced her retirement from associate professorship and as coordinator of business law for the College of Business at Washington State University.

The College of Business acknowledged her 27 years with the College of Business and six additional years teaching political science and communications in May. An additional retirement celebration will be held Saturday, Aug. 3, from 4 to 6 p.m. at Pall Plaza at the 1912 Center, Third and Van Buren, in Moscow.



Linda Pall

### Varin, Wardwell & Thomas adds Anne Kunkel to firm

Boise firm Varin, Wardwell & Thomas announced the expansion of their practice with the addition of Anne Kunkel as an equity principal. She brings nearly 12 years of experience spanning several practice areas

to the firm, and will lead its real estate practice.

Kunkel's real estate experience encompasses finance and transactions for developers, lenders and borrowers of all sizes.

"Anne will be a welcome addition," said William Wardwell, the firm's managing member. "Her unique practice areas and vast experience will be immensely valuable to clients. She also has a knack for building strong client relationships. We are thrilled to add someone of her caliber to our growing firm."

Upon Kunkel's arrival, the firm will transition to its new identity – Varin, Wardwell, Thomas & Kunkel.

Kunkel graduated from Northwestern School of Law, Lewis & Clark College in 2001. She earned her B.A. in Political Science from the University of Kentucky in 1998. She is also the president and one of the



Anne Kunkel

founding members of CREW Idaho, a group aimed at progressing the careers and success of commercial real estate women. Kunkel was formerly a Partner at Givens Pursley in Boise.

### Leslie R. Weatherhead joins Lee & Hayes

Boise firm Lee & Hayes, PLLC welcomes Leslie R. Weatherhead to the firm and their litigation practice group. Mr. Weatherhead has practiced litigation for more than 30 years. He has extensive experience with complex commercial, securities and environmental cases in federal, state and appellate Courts.

Prior to joining Lee & Hayes, Mr. Weatherhead was a partner with the Witherspoon Kelley firm where he worked on several high-profile cases. Weatherhead received his undergraduate degree from the University of Oregon and his J.D. from the University of Washington School of Law.



Leslie R. Weatherhead

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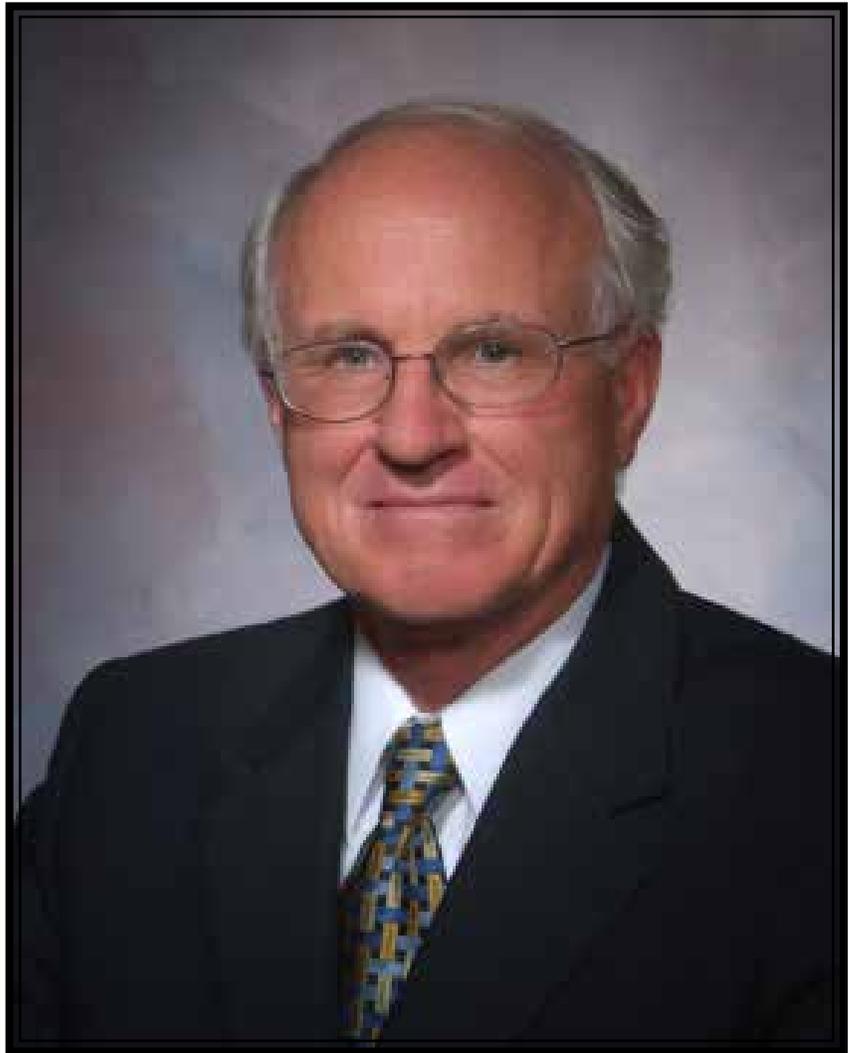
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# 2013 Idaho State Bar Distinguished Lawyer

## Dwight E. Baker – A Journey of Meaningful Work

When difficult situations arise he asks himself, “What would Blaine (Anderson) and Lou (Racine), do?”



Dwight E. Baker

**B**lackfoot attorney Dwight Baker cultivates a law practice that now consists almost entirely of mediation. Rounding out a career steeped in polite dispute, he notched about 1,000 mediations over the last decade, making him one of the state’s elder statesmen in both litigation and mediation.

His journey from chemistry teacher to litigator, to Idaho State Bar President and mediator has been a natural progression for a high-achiever in search of an ever more meaningful place in the world.

He didn’t always know he would be a lawyer. As an educator fresh out of college, he got to know his students’ parents in Blackfoot. They told Dwight he should study law and that he would be a good lawyer. So Dwight enrolled at the University of Idaho College of Law and then began his practice in 1971.

Cultivating characteristics for a successful practice, he said, primarily involves a positive

attitude. Professionalism and success require a “meaningful, down-to-earth connection with other attorneys and clients, which requires good communication,” he said.

“Good trial lawyers have a capacity to relate to people,” which Dwight said he can manage. It helps to be charismatic, a quality he quickly denies having. Those who know him say Dwight makes up for any lack in charisma with humility and sincerity.

His values reflect those of his parents and the simple lessons in nursery rhymes he learned as a child. Later, those same values were refined by working with great attorneys. Throughout the years, Dwight said, when difficult situations arise he asks, “what would Blaine (Anderson) and Lou (Racine), do?”

“Both of whom have received this award,” he points out.

As a commissioner for the Idaho State Bar he came to understand the level of accomplishment associated with the Distinguished Lawyer Award. With his characteristic humility Dwight said, "There are so many people more deserving, objectively speaking."

But out of respect for the previous recipients, he said he could share a little about the values that have defined his own practice. Dwight tries to avoid "expensive game-playing, posturing and unnecessary competitiveness that sometimes goes on," he said. These were values that developed early in his career.

When he was starting out at the firm of Furchner, Anderson and Martsch, Dwight suggested the firm buy a legal ethics book for the office. The partners responded that "if you have to read about ethics from a book, you are too close to the line."

Another important lesson in his early career was being appointed to represent indigent defendants in criminal matters. At that time, attorneys for indigent criminal defendant cases were assigned by judges.

"On reflection," he said, "it was an important opportunity to try cases. I had four first-degree murder cases as a young attorney."

Those opportunities gave him good experience trying a wide variety of cases in challenging circumstances. "Lou (Racine) always sort of took me under his wing," he said.

In 1980, Dwight joined the firm of St. Clair Hiller in Idaho Falls and "the bar was set high," he said. "We expected a lot out of each other."

The intensity of litigation eventually gave way to mediation. "I have worked with some great clients. We all have the opportunity

*In 1980, Dwight joined the firm of St. Clair Hiller in Idaho Falls and "the bar was set high," he said. "We expected a lot out of each other."*

to listen and learn from our clients," he said.

It was during a road trip with Fred Hoopes, Dwight recalled, when he was complaining that "I had lost some of my spark for the practice," and Fred encouraged a new level of service – to run for bar commissioner.

"Service is a big part of professionalism," Dwight said, which ultimately helps each attorney develop "your own way to do the best you can to effectively represent your clients."

In the end, Dwight has found that "the best outcomes are win-win," a formula that led him into the more social services world of mediation, which takes up the bulk of his current practice.

"We tend to be peacekeepers," he said. "We all fulfill that role."

Ray Rigby once said we are social engineers."

And even those who come away from mediation with virtually nothing can appreciate mediation. "They write personal letters of appreciation," he said. "By the end, at least they understood why they didn't get what they wanted."

"Mediation is what you did in the first grade when your two best friends wouldn't talk to each other. Both sides need to walk away with something. It's a matter of empowerment. You validate them as people. They want to be heard."

The journey from science teacher to litigator, bar president and finally mediator has been one of constant learning, Dwight said.

"You have to be yourself - be comfortable in your own skin." And in characteristic humility he quickly added, "I'm not sure I am."

## Snapshot

Idaho State Bar Professionalism Award - 1997

Served on Idaho State Bar Board of Commissioners – 2006 -2009

Served on Bingham County Hospital Board – 9 years

Serves as President,  
Industrial Development Corporation of Bingham County

# 2013 Idaho State Bar Distinguished Lawyer

## Walter H. Bithell – An Advocate With Passion for Collaboration and Self-control

*“We were just honest and candid. I think that’s healthy for professional and personal growth.”*

Over the course of his 40 years trying cases, Walter, (Walt), H. Bithell has developed an approach that makes practicing law enjoyable - almost like a hobby.

“I have learned you can contend without being contentious,” Walt said. “You can still be an extremely vigorous advocate.”

For Walt, developing that sense of professionalism was exemplified by older attorneys in Boise who took time to share their knowledge and strategies with him as a young lawyer.

From 1972 to 1984 he practiced with Langroise, Sullivan and Smylie, a firm that in 1984 joined with Holland and Hart, where Walt continues working alongside a few of the lawyers he practiced with when he started there. “Thirty years later, and we still are a great support for each other.” Those lawyers include Fred Mack, Larry Prince and Steve Anderson, who now works at another firm.

One colleague in particular,



Walter (Walt) H. Bithell

John Ward, has been a longtime touchstone: “We somehow developed the ability to be open and honest with each other. We seldom socialized outside of work. We were just honest and candid. I think that’s healthy for professional and personal growth.”

### **His secret weapon**

Walt maintains a level of

comfort and ease in his practice by trying to take the high road, never harboring grudges or trying to get even. “I have found that there were lawyers who were disingenuous. Although I’ve had a suspicion, I didn’t confront them. I wasn’t naïve. I just don’t think the law is advanced by yelling at each other. It’s not my nature to be nasty with

people.”

By being even-keeled and focusing on the case at hand, Walt said he achieves an important goal: “I want to be in control of myself and the case. Once words are out, it’s hard to take them back. Litigation is hard enough anyway.

“Lawyers say and do things that come back to haunt you. And once it happens, the case is more contentious. Some lawyers feed off that. I’m not one of those. I’ve seen depositions where the attorney screamed and shouted. It’s not a healthy way to practice law.”

Staying clear of negative entanglements, Walter said he can enjoy the many opportunities of collegiality in the profession. “Most lawyers are competent and trustworthy,” he said. “That’s what makes it so enjoyable.”

### How it all happened

Trying cases can be stressful, but Walt knew instantly he belonged in a courtroom: “I remember my first trial. It was terrifying. Exhilarating. It was, ‘Wow! This is OK!’ You’re at the OK Coral and all that’s left is the shout-out.”

Did he win decisively? “No, I lost. But I enjoyed it. Most everyone wants to be a trial lawyer while in law school. But not many are suited for it. I liked the competitiveness and plowing new ground. When representing plaintiffs, by the time you get to court, you believe in your client’s cause.”

Once he caught the bug, he set about finding his own style. With an undergraduate degree in accounting, Walt was asked to challenge the Idaho Tax Commission on its uniform law for distributing taxes. After the judge ruled Walt reflected on the amount of money involved.

“That was when I realized the power of the courts,” Walt said.

As a young solo practitioner, he asked the best lawyers to advise

*“I remember my first trial. It was terrifying. Exhilarating. It was, ‘Wow! This is OK!’”*

him on cases. “I made it a point to go visit with senior lawyers at other firms,” Walt said.

“It was a form of respect.”

Those consultations brought a wealth of wisdom and experience, “They would just unload on me,” he said. “I ended up getting more mentoring than some attorneys in their firms.”

Over the years, Walt continued to seek the guidance and perspective of other attorneys: “I remember meeting four or five other plaintiffs’ lawyers about working with each other. That was the germination stage of what became the Idaho Trial Lawyers Association. The seminal moment was when we realized we needed to

communicate with each other. So I got involved with the ITLA. It was a great way to formalize it. It was very comforting.”

“If you were depressed, lonely, that’s no way to practice law,” Walt said. “That’s no way to live.”

And on that topic, Walt credits his own greatest advocate: “I’ve been terribly supported by one person through all this – my wife, Sherry. She’s had her own life, her own career, but always been caring and supportive of me.”

By emphasizing the best among people over many years Walt now enjoys the results of a practice befitting a distinguished lawyer – a litigation practice that is more like a hobby than a burden.

## Snapshot

Idaho State Bar Professionalism Award 2006

Served on Idaho State Bar Board of Commissioners 1996-1998

Past member, Idaho Law Foundation Board of Directors

Idaho Trial Lawyers Association 2006, Trial Lawyer of the Year

President, Idaho Trial Lawyers Association, 1981-82

University of Idaho Alumni Association,

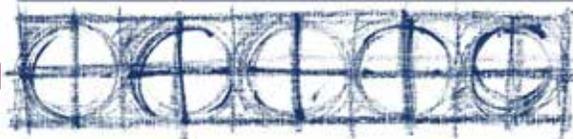
University of Idaho Silver and Gold Award, 2001

2012 Litigation Counsel of America,

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(formerly American Trial Lawyers Association)

Litigation Counsel of America Idaho State Delegate Co-Chair



## IVLP Thanks Volunteer Lawyers Making a Difference Through Legal Link

**L**aurinda O'Dell, Housing Administrator for St. Vincent de Paul in Coeur d'Alene, has served four years as the coordinator of the weekly Legal Link clinics. At Legal Link, volunteer attorneys offer lower-income people information on available resources to assist them with their legal issues.

O'Dell writes, "As a legal administrative assistant by degree, Legal Link was one of the best parts of my job . . . The rewards of successful client outcome was by far the greatest, but just seeing the expressions of relief when I talked with clients, even BEFORE they met with an attorney –

just knowing they had finally found some ground to land on – made all the world of difference for me and hugely offset the sadness of the legal need in our lower-income population here in Kootenai County."

David Lohman, one of the founders of Legal Link and an active volunteer attorney concurs with O'Dell's assessment: "the work is not difficult, does not take a lot of time and the rewards are immeasurable."

In addition to screening participants, getting them to the event, gathering and organizing the documents they will need to be productive, and helping them while they wait, the staff makes sure everyone

has dinner from the shelter's evening meal program.

Lohman said this project helps him to have an immediate connection with people he wants to help but who he may not see in his own private practice. If an attorney at Legal Link decides to represent someone as a result of meeting at the clinic, the attorney can choose to represent the participant for a matter or on a more limited basis.

Lohman noted he has been able to use the new limited representation rule for pro bono attorneys (IR.C.P. 11(b)(5)) to assist some Legal Link participants, thereby further enhancing the benefits participants may receive from the clinic experience.

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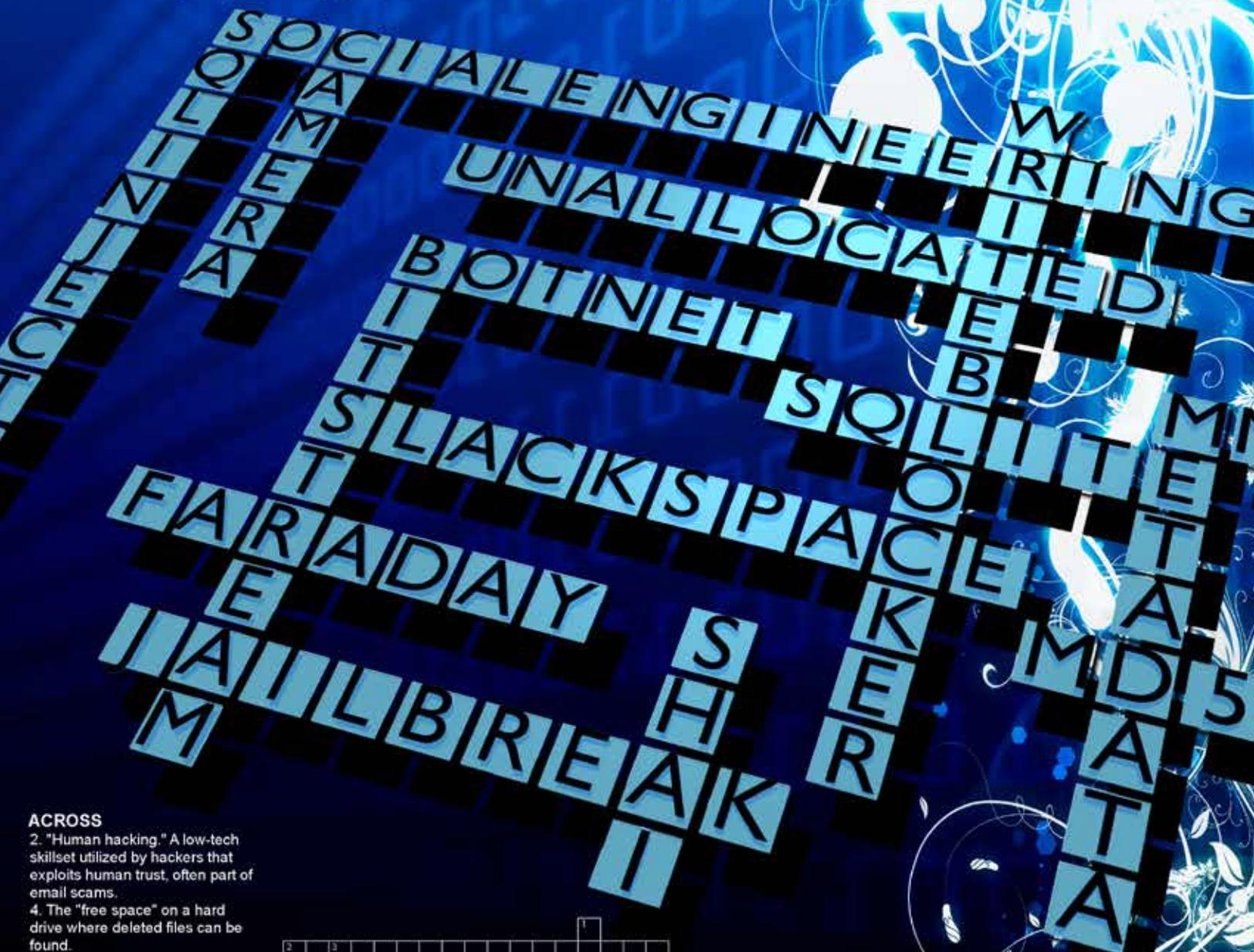
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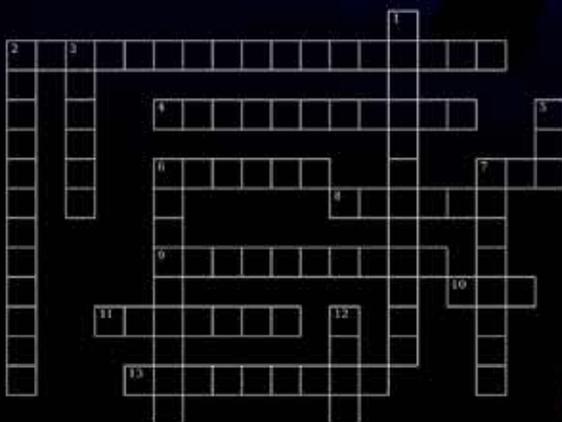
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2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.
4. The "free space" on a hard drive where deleted files can be found.
6. A type of "virus-network" that utilizes infected victims for 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.
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