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Official Publication
of the Idaho State Bar
Volume 56, No. 2
February 2013

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On the Cover

This photo was taken by the Greater Idaho Falls Chamber of Commerce along their greenbelt. Idaho Falls has an extensive greenbelt along miles of the Snake River that flows through the center of the city. It is maintained by the City of Idaho Falls, and often receives donations and grants which allow for occasional expansion.

Section Sponsor

This issue of *The Advocate* is cosponsored by the Idaho Legal History Society and the Government and Public Sector Lawyers Section.

Editors

Special thanks to the February editorial team: Tenielle Fordyce-Ruff, Brian P. Kane, Daniel J. Gordon and Anna E. Eberlin.

March/April issue's sponsors: Environmental Law Section

BEHIND THE SCENES AT *THE ADVOCATE*, COLLABORATION CREATES A MAGAZINE

Dan Black
Managing Editor, *The Advocate*

Few people know how *The Advocate* is planned, edited, written and assembled, so I have explained the process below. Nearly every part of the magazine originates from volunteer members of the Bar. Sections play an especially strong role by sponsoring upcoming issues. Many months before their issue, section leaders recruit five to seven writers from their ranks. It is not unusual for authors to spend dozens of hours crafting an article. Their considerable commitment deserves recognition and is greatly appreciated.

Authors within a section often coordinate with each other to avoid duplication and to make sure important topics in their practice area get covered. They follow a list of guidelines for the articles regarding length, use of citations, subheadings and the like. Some articles have multiple authors and these are among the best due to the collaboration that created them. A few article submissions are rejected, but only if they don't fit the format or standards of the magazine.

Authors send submissions to the managing editor, who forwards them to the 12-member Editorial Advisory Board,

(EAB). The EAB reads all the submissions and discusses them with the managing editor during monthly meetings at the Law Center in Boise. The managing editor also receives articles submitted independently of sections. They go through the peer-review process as well. The EAB members identify each article's strengths and shortcomings. They consider readability, completeness and context. Board members want to see a focused, intelligent discussion that sheds new light, shares helpful practice tips or reveals some important development in the law.

The EAB then divides the articles among three editors who directly contact the authors to make constructive comments and to suggest edits. Each author has a unique voice and has considerable control over the revision process. If there is no cooperation on essential substantive matters, the piece might not be published, but such cases are truly rare.

Other contents in the magazine, such as the president's column, the message from the director and court reports, etc. educate the Bar about important topics of the day. Advertising is also essential, not only for covering much of the magazine's cost, but to educate the Bar about top-flight legal services.

After all the pieces are in, I work with Senior Production Editor Bob Strauser and Communications Assistant Kyme Graziano to promptly assemble and proofread the publication before sending it to J&M Printers in Boise.

Hopefully this explanation illustrates how sections, volunteer authors and ISB staff collaborate to make each issue. With lawyers' characteristic scrutiny and diplomacy, the volunteers and staff assemble the best product we can nine months out of the year. I am proud to be part of this process.

Corrections

A photo of Emma Edwards Green, the artist who designed the Idaho state seal, was incorrectly identified in the January issue as the first woman attorney in Idaho. The photo accompanied the article, "Are we there yet?!? A Statistical View of Equality for Women in Idaho."

A computer error resulted in the loss of endnote numbers in the article "No Faith, No Credit, No Union," by Lisa Shultz in the January issue. A corrected version of the article has been placed in the online pdf of *The Advocate* at http://isb.idaho.gov/member_services/advocate/advocate_online.html.

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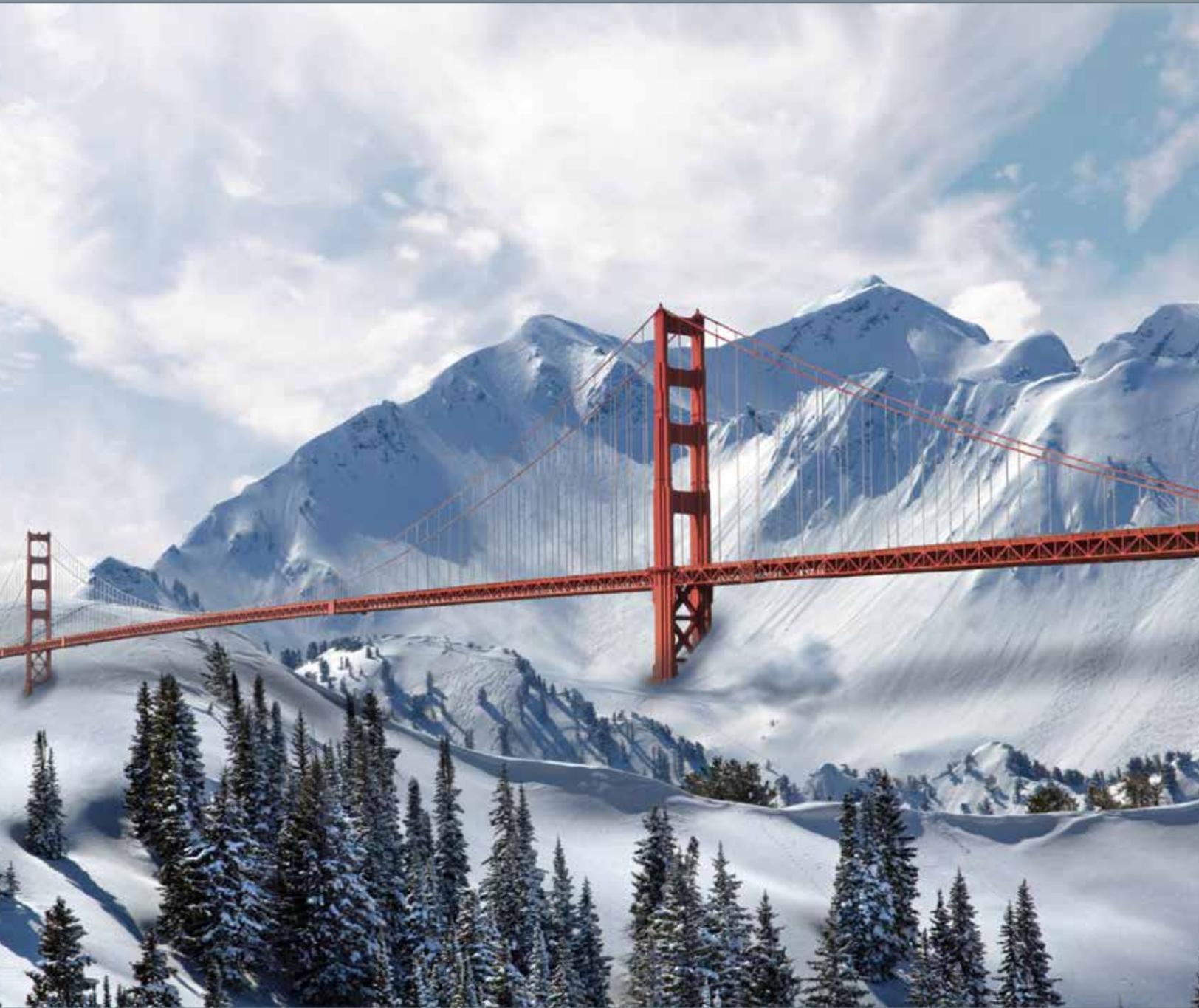
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1115 Albany Street

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February 28 – March 1

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McCall - Shore Lodge, 501 W. Lake Street

March

March 1 – 2

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March

March 8

Annual Workers Compensation Seminar

Sponsored by the Workers Compensation Section

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March 15

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8:30 a.m. – 2:30 p.m. (MST)

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Idaho Falls – Hilton Garden Inn, 700 Lindsay Blvd.

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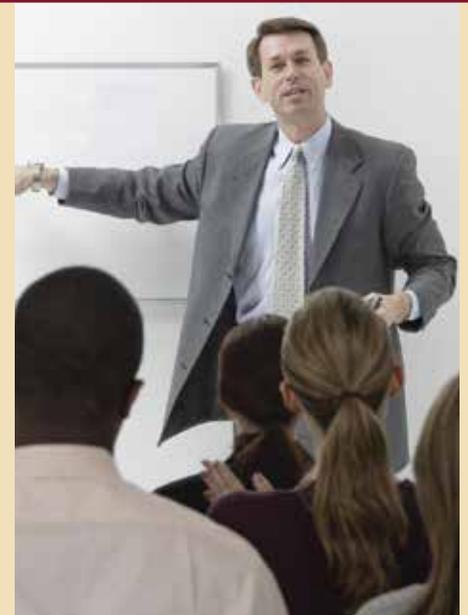
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PRESIDENT'S MESSAGE

SERVICE HAS ITS OWN SET OF OPPORTUNITIES AND PITFALLS

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

As I sit here in my office writing my first article for *The Advocate* I can't help but think about my father. I lost my dad on September 14, 2012. He was 87. Dad practiced medicine for more than 50 years in Coeur D'Alene, Idaho. Of his many qualities, what I admired most was his dedication and commitment to his family, his friends, his patients and his community. As I begin my term as President of the Idaho State Bar, I am mindful of the importance we as lawyers serve in the community. I am also mindful of the problems we all face and the difficulties we all have in running our practices while at the same time balancing the needs of families, friends and clients.

As lawyers, we have the opportunity to make our communities better. We also have the opportunity to get sidetracked and lose sight of the fact that practicing law in the state of Idaho is a privilege. With privilege comes responsibility. As lawyers we have a responsibility to our families, to our friends, to our clients and to our communities.



As you already know, being a lawyer is hard. After all, nothing worth doing is ever easy. The responsibility associated with practicing law never ends and being a lawyer is a full time job. We are lawyers seven days a week and we can rarely, if ever, escape the scrutiny of those who know what we do for a living. For some, that burden is too much to handle. For others, it is empowering and enables us to get involved and to make a difference. I believe as lawyers we should do our level best to make a difference. As my good friend and past president Reed Larsen said in his first article "have I done any good in the world

today." I think about that a great deal. After all, it isn't enough to make a difference. The goal is to make a positive difference. Make a positive difference in the way you interact with your family, your friends, your clients and your community.

One of my favorite poems is "The Man in the Glass" and I think it says a great deal about the responsibility we have as lawyers.

The Man in the Glass

When you get what you want in your struggle for self
And the world makes you king for a day,
Just go to a mirror and look at yourself,
And see what that man has to say.

For it isn't your father or mother or wife,
Who judgment upon you must pass;
The fellow whose verdict counts most in your life
Is the one staring back from the glass.

He's the fellow to please, never mind all the rest.
For he's with you clear up to the end,
And you've passed the most dangerous, difficult test
If the man in the glass is your friend.

You may be like Jack Horner and "chisel" a plum,
And think you're a wonderful guy,
But the man in the glass says you're only a bum
If you can't look him straight in the eye.

You may fool the whole world down the pathway of years.
And get pats on the back as you pass,
But your final reward will be the heart-aches and tears
If you've cheated the man in the glass.

— Dale Wimbrow (c) 1934

As lawyers we should all look at ourselves and think about why we chose to become lawyers. After all, it wasn't because of the billable hours, the time away from family and friends or the difficulties we have all experienced managing our practices or trial calendars. At least I hope that's not why you chose this

We carry their burdens and we are dedicated and committed to representing their interests in a professional and responsible manner.

honorable profession. And it really is an honorable profession. We serve our clients. We carry their burdens and we are dedicated and committed to representing their interests in a professional and responsible manner. We are advocates for those unable to speak or carry the burden themselves. We are trusted advisors and we are responsible for making sure that our clients and the communities we live in understand and appreciate the importance of the rule of law. We all have the ability and the responsibility to make a positive difference in the lives of those we have the privilege to interact with and encounter in the practice of law. Don't waste that opportunity and don't take it for granted. It really is that simple.

About the Author

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

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**DOUGLAS K. KNUTSON
(Suspension)**

On December 28, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Idaho Falls attorney, Douglas K. Knutson, from the practice of law for a period of one year, with 90 days suspension to be served and the remaining 9 months of that suspension withheld, and placing him on probation following any reinstatement.

The Idaho Supreme Court found that Mr. Knutson violated I.R.P.C. 1.3 [“Diligence”], 1.4 [“Communication”], 1.15(a) [“Safekeeping Property”], 8.1 [“Bar Admission and Disciplinary Matters”] and I.B.C.R 505(e) [“Failure to Cooperate with or Respond to Disciplinary Authorities”]. The Idaho Supreme Court’s Disciplinary Order followed a stipulated resolution of an Idaho State Bar discipline case in which Mr. Knutson admitted that he violated those Idaho Rules of Professional Conduct.

Mr. Knutson’s misconduct related to two matters. In the first matter, Mr. Knutson represented a party in a divorce case. Mr. Knutson acknowledged that he failed to act with reasonable diligence and promptness in representing his client, primarily after the trial, by not promptly preparing a proposed supplemental divorce decree. Mr. Knutson also acknowledged that he did not keep his client reasonably informed about the status of her post-trial divorce action.

The second matter related to Mr. Knutson’s use of his trust account. After his operating banking account and personal banking account were closed, he used his trust account for personal matters and thus did not hold the property of clients or third persons in connection with representation separate from his own property, resulting in commingling personal and client funds in his trust account. However, since Mr. Knutson made personal deposits into his trust account, no client trust funds were lost or unaccounted for as a result of such commingling. Finally, Mr. Knutson ac-

knowledged that he failed to respond to Bar Counsel with respect to the grievances underlying the allegations contained in the Complaint.

The Disciplinary Order provides that 90 days suspension will be served and 9 months will be withheld. Mr. Knutson will serve a two-year probation following any reinstatement, subject to conditions specified in the Order. Those conditions include that Mr. Knutson will serve the additional 9 month suspension if he 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 Mr. Knutson’s period of probation; Mr. Knutson must remain under the care of his healthcare providers; comply with any treatment regimen prescribed by his healthcare providers; practice under a supervising attorney; and provide quarterly reports to Bar Counsel concerning his trust account.

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

NEWS BRIEFS

Permanent building fund approves investment in historic courthouse

The Permanent Building Fund Advisory Council (PBFAC) has approved legislative appropriation requests that include \$1.5 million for continued renovation of the old Ada County Courthouse on the Capitol Mall in Boise.

If approved in the 2013 session of the Idaho Legislature, the \$1.5 million appropriation would bring the total appropriated funding thus far up to \$5 million out of \$6 million estimated for the cost of the courthouse’s infrastructure modernization. The Legislature also has appropriated \$176,000 for planning an Idaho Law Learning Center.

The old courthouse, which served as a hall of justice for eight decades, is undergoing phased renovation in preparation for planned use as the permanent home of the Idaho State Law Library and as an educational center for College of Law classes, continuing judicial education programs, and law-related civics education for the public. These synergistic uses will provide a new life for the historic building.

The University of Idaho has raised

more than \$1 million in private funding commitments for the “tenant specific” improvements needed to fulfill the purposes of the renovated building. The proponent agency for the renovation is the Idaho Department of Administration, and the collaborating entities are the Idaho Supreme Court and the University of Idaho.

Further information about the renovation project is available from the Division of Public Works in the Department of Administration. Information about the planned programmatic uses of the building can be obtained from Lee Dillion, the College’s Associate Dean for Boise Programs.

FDIC insurance on IOLTA accounts limited to \$250,000

Congress did not act to extend full FDIC protection for IOLTAs and other non-interest bearing accounts. This means that coverage on IOLTAs will now be \$250,000 per owner, per institution going forward. However, full coverage has now expired on ALL accounts that previously received full FDIC coverage, so IOLTAs are on a level playing field with other types of bank accounts and are not disadvantaged. The increased FDIC coverage was always intended to be tempo-

rory, so it is not likely that Congress will try to reinstate the full coverage.

College moves forward with concurrent juris doctor/professional science masters degree

The University of Idaho College of Law, which already has concurrent degree programs combining Law with Accountancy, Environmental Science, Water Resources, and Bioregional Planning & Community Design, is now offering a concurrent Juris Doctor and Professional Science Masters (JD/PSM) degree. The PSM degree — a part of the University of Idaho’s array of graduate-level interdisciplinary programs — prepares graduates for science-related careers in business, government, or nonprofit sectors. The PSM curriculum currently focuses on sustainability science as it applies to natural resources and the environment. The curriculum merges rigorous study in science with training in management and communication skills necessary for a successful professional career.

Combining the PSM curriculum with the JD curriculum will give concurrent degree recipients a foundation of legal expertise, advanced scientific skills, and

management skills, enabling them to work effectively in business and industry as well as in the legal profession, the judiciary, administrative agencies, and non-profits. The concurrent JD/PSM degree, approved by the law faculty, was endorsed in the fall of 2012 by the University of Idaho Curriculum Committee and Faculty Senate. Further information about the JD/PSM degree is available on the College of Law website and from Professor Barbara Cosens.

Patti Tobias receives national award from National Center for State Courts

In a surprise celebration in the courtroom, Idaho Supreme Court Chief Justice Roger Burdick announced that Patti Tobias was selected for the prestigious Warren E. Burger Award for Excellence in Court Administration, presented to an individual who has made a significant contribution to the field of court administration, and who has contributed to the mission of the National Center for State Courts. The National Center will make a formal presentation in Boise in early 2013.



Patti Tobias

DUI court opens in Fourth District

The Fourth Judicial District Court of Idaho and its collaborative partners has opened a misdemeanor Driving Under the Influence Court in Ada County.

The magistrate-level court program has four phases designed to reduce recidivism and keep the public safe, while helping the offender rehabilitate and break the pattern of alcohol consumption and driving. There are already several misdemeanor DUI court programs across Idaho and the Fourth Judicial District Court will join those efforts.

Funded with assistance from the Idaho Supreme Court and Ada County, the misdemeanor DUI Court is modeled after successful felony drug court programs already in place in Ada County, which require offenders to undergo substance abuse treatment in combination with education, judicial monitoring, formal probation and frequent alcohol/drug testing. The DUI Court is designed for mis-

demeanor offenders who have received a second arrest for Driving Under the Influence of Alcohol and are ready to admit their crime and address their addiction.

Ada County magistrate Judge Thomas Watkins will preside over the DUI Court. The program began its work on Jan. 9.

Idaho Supreme Court issues 2012 annual report

The Idaho courts embraced a major expansion of technology in 2012, according to a report issued in January.

“As the Judiciary continues to move toward “e-everything” in the area of court technology, Idahoans can expect better access, greater convenience and more complete transparency,” Chief Justice of the Idaho Supreme Court Roger Burdick said.

“Despite continuing economic challenges, during 2012 Idaho’s judicial system remained committed to the highest levels of integrity, fairness, independence, respect, excellence, and innovation,” he said, “We remain devoted to service to Idahoans and strive to be a national leader in the administration of fair, timely and impartial justice.”

The full annual report is available on the court’s website: <http://www.isc.idaho.gov/annual-reports>.

Below are some highlights from the report.

The new technological changes are part of the Idaho Judiciary’s core mission of quick resolution without delay or prejudice. Soon Idahoans will be able to file court cases online 24 hours a day, seven days a week. Paying traffic tickets will be accessible from home, case schedules will be posted online, and all documents will be available to interested parties by simply clicking a keyboard and never having to visit the courthouse.

Technological advances include live streaming of oral arguments from the Supreme Court along with Idaho Public Television partnership to post the arguments on the web. A new Idaho state judiciary website aims to be user-friendly and better organized. Also, statewide rollout of digital recording was completed.

Other noteworthy changes include Family Court Services. A recent evaluation of Idaho child protection drug courts shows families who have taken advantage of these services have a higher rate of successful reunifications, shorter out-of-

home placements and are less likely to have reports of maltreatment after case closure. Family Court Services responded to nearly 72,000 requests, a 100 percent increase from five years ago.

Problem-solving courts and sentencing alternatives also broke new ground. Ada, Canyon and Bannock Counties accepted offenders into veterans’ courts this year. These courts work with individuals who have substance use disorders after experiencing post-traumatic stress disorder resulting from combat service. In another notable achievement, 35 babies were born to clean and sober mothers who have attended drug and mental health courts during 2012. That is a total of 283 drug-free births since the program started.

The report also noted that statewide caseloads have begun to level off, and some have shown a gradual decline. A total of 1,047 appeals were filed with the Idaho Supreme Court for 2012. Criminal cases increased by 10 percent, while civil appeals were down 15 percent from last year. District court civil filings continue to level off after a surge in 2009 and 2010. There was a three-percent reduction in filing this year, though caseloads still remain 19 percent higher than they were five years ago.

How pro bono creates an unexpected benefit

Idaho Volunteer Lawyers Program is usually known as a program that matches volunteer attorneys with qualifying clients who need legal services but cannot pay. But in 2012, when the IVLP recruited attorneys to serve emerging businesses such as startups, the volunteers saw a secondary gain. Aside from learning valuable corporate law skills and serving their profession through their pro bono work, some volunteer lawyers found they were being hired to do additional legal tasks for the budding businesses at regular rates.

Volunteer attorney Matthew Taylor relates that giving back to his community was a part of his family upbringing but found some pro bono work has had an unexpected benefit. “Working through IVLP with emerging business clients has given me the kind exposure that marketing and advertising cannot and has paid dividends in the form of return business.”

“We had hoped this would be a ‘win/win’ project as new business owners saw the value a lawyer could bring to their emerging enterprise, and it looks like

we were right” said IVLP Director Mary Hobson.

IVLP started serving emerging businesses because of a grant from the Business and Corporate Law Section.

“They were excited to find a charitable way to use their money that fit with the mission of their Section,” Hobson said. IVLP reports that 29 volunteer attorneys took 49 cases since the project began. “That was more than expected,” Hobson said, and it has turned out to be doubly valuable for many of those volunteers.

First District gets new judge

The investiture ceremony for Hon. Barbara A. Buchanan as a district judge in the First Judicial District took place on Friday, Feb. 1 at the Sandpoint City Hall.

A reception followed at the Tango Café in Sandpoint.

Comments sought on rule change

The Civil Rules Advisory Committee met in November of 2012 and is recommending several amendments to the rules. In addition, the Felony Sentencing Committee is recommending several amendments to Idaho Criminal Rule 32. All of these proposed amendments are available for comment and can be found on the Supreme Court website, www.isc.idaho.gov.

‘Street Law Clinic’ training session to prepare for event

Concordia Law, the Idaho Trial Lawyers Association and other groups have created a “Street Law Clinic,” designed to provide on-the-spot legal advice to walk-in clients to be staffed by Concordia Law students and students from the University of Idaho College of Law, all supervised by

licensed attorneys. The training session covered what the clinic is expected to accomplish, as well as the types of legal advice which might be sought. The clinic is scheduled to begin in February in Boise.

Concordia offers community service

Faculty, staff, students and friends volunteered at the Boise Rescue Mission in December. The crew prepared food boxes for distribution to those in need within our local community, broke down boxes, and moved clothes and other items. The group toured the City Lights home for women and children and met some of the women who participate in the program. On Friday, December 21, members of the School of Law helped set up for the Boise Rescue Mission’s Christmas event, which serves dinner and distributes bags of toys collected through the Toys for Tots program to those in need. Concordia Law also collected and donated 96 toys to the Toys for Tots program this Christmas.

Concordia School of Law selected for national project

Concordia University School of Law has reached an agreement, along with five other law schools, with The Center for Computer-Assisted Legal Instruction (CALI®), to develop a course kit as a part of the Access to Justice Clinical Course Project (A2J Clinic Project). Other schools selected include Columbia Law School, CUNY School of Law, Georgetown University Law Center, UNC School of Law, and the University Of Miami School Of Law.

Each participating institution will develop and document a course model that

uses A2J Author® to teach its students how technology tools can be used to lower barriers to justice for low-income, self-represented litigants. CALI will use those course models to assist other law schools in establishing A2J Clinical Courses as a permanent part of their law school curriculum.

Associate Dean of Academics Greg Sergienko and Director of Experiential Learning and Career Services Jodi Nafzger will integrate the A2J model created by Professor Ronald W. Staudt of IIT Chicago-Kent College of Law, into Concordia Law’s curriculum to develop an original course offering at the law school.

“This is a major asset for Concordia Law,” Mr. Sergienko said. “It involves our faculty and students working with first-rate peer institutions around the country.”

Understanding that 80 percent of legal needs of lower-income individuals go unmet each year, the software CALI produces helps create a legal program to turn users’ answers into documents that can be filed in court. This will provide legal help to those who can’t afford lawyers.

The program for students at Concordia Law will launch in the fall of 2013.

Third District has new judge

The bar is invited to an investiture ceremony of the Hon. George A. Southworth on February 8 at 4 p.m. at the Canyon County Courthouse, 3rd floor, Courtroom #2. A reception will be from 5:30 p.m. to 7:00 p.m. at the Broadmore Country Club, Copper Canyon Lounge in Nampa.

Governor Butch Otter appointed Canyon County Magistrate George A. Southworth to serve as a District Judge in the Third Judicial District on January 8.



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IDAHO STATE BAR - 2012 YEAR IN REVIEW

Diane K. Minnich
Executive Director, Idaho State Bar

As we begin a new year, I want to highlight the bar's programs and operations for the past year.

Admissions

The first administration of the Uniform Bar Examination was in February 2012. When the Idaho State Bar adopted the UBE only a few states had adopted the exam, which allows portability of a bar exam score. At the end of 2012, 12 states had adopted the UBE.

Idaho now allows reciprocal applicants from 30 jurisdictions. Last year, 34% of the attorneys admitted in Idaho were reciprocal applicants.

Bar Exam/Reciprocal Admission		
Year	2011	2012
Bar exam applicants	183	215
Pass rate	79%	80%
Reciprocal applicants	73	94

Licensing/Membership

ISB Membership		
12/11	12/12	Percent change
5,622	5,812	3.4%

As of December 2012, of the 5,812 lawyers licensed in Idaho, 4,734 were active members, 193 judges, 28 house counsel, 853 inactive (previously affiliate) members, 2 emeritus and 2 senior members.

Bar Counsel

Discipline/Ethics			
	2011	2012	Percent change
Phone	1,466	1,435	-2.2%
Grievances	447	431	-3.6%
Complaints open	96	57	-40%
Ethics questions	1,546	1,565	1.3%

A new Section, Animal Law was established in late 2012 and will begin operating in 2013.

In 2012, thirteen formal charge cases were opened and 17 cases closed. Of the 17 cases closed, 4 attorneys resigned in lieu of discipline, 9 were suspended, and 5 attorneys received public reprimands.

Fee Arbitration

There was an increase in fee arbitration cases in 2012: 54 cases were opened in 2012 as compared to 41 cases opened in 2011.

Client Assistance Fund

Year	Claims	Total Paid
2011	17	\$121,475
2012	14	\$33,520

There were 21 client assistance fund claims opened in 2012 and 26 claims closed.

Lawyer Referral Service (LRS)

	2011	2012	Percent change
Calls	2,024	2,091	3.4%
Referrals	1,421	1,650	16%

The Lawyer Referral Service Committee has been studying other LRS models and options to improve the quality of the service for attorneys and the public. Some improvements were made in 2012 and additional changes will be considered for this year.

Annual Meeting

The 2012 Annual Meeting was held in Boise. The program featured Dewey Bozella, who spent 26 years in prison for a murder he did not commit. There were also 14 CLE programs, networking opportunities and award presentations. As in the past, attendance in Boise was higher than other locations around the state.

Annual Meeting			
	2011 Sun Valley	2012 Boise	Percent change
Total Attendees	378	533	41%
Attorneys and Judges	237	302	28%

Member Services and Communications

In addition to our regulatory responsibilities, we are committed to providing quality services to bar members. The services are offered to enhance your practice and professional growth. The current list of services offered to bar members can be found on our website: www.isb.idaho.gov. Services include Casemaker legal research library, *The Advocate*, the mentor program, the website, CLE programming, publications, weekly E-bulletin, discounts on services, and section programs and activities.

There are currently 20 ISB practice sections that offer many opportunities for learning, service and networking. A new Section, Animal Law was established in late 2012 and will begin operating in 2013.

Hundreds of volunteers, both lawyers and non-lawyers, volunteer their time and resources each year to assist the bar with providing programs and services. The Idaho legal community's commitment to improving the profession and serving the public is exceptional – Thank you!



GOVERNMENT AND PUBLIC SECTOR LAW SECTION TEAMS UP WITH ILHS

Cheri Ruch

The Government and Public Sector Lawyers Section is pleased to co-sponsor this edition of the *Advocate* with the Idaho Legal History Society.

Though “history” is the overarching theme, history has many dimensions. Our contributors, to whom I am indebted for their work, cover a variety of topics, each providing a historical perspective. I was equally fascinated by the historical overview of the Public Utilities Commission Don Howell wrote as I was by Jenny Grunke’s discussion of Idaho’s liquor laws. Although I work in administrative law, I was unaware of the changes afoot in the Idaho Administrative Code. I appreciated the discussion Professor Seamon and Joan Callahan wrote about the rulemaking process and the recent amendments. Art Macomber provides an interesting perspective on the evolution of land use regulation and Jeremy Chou introduces us to some of the new faces and roles in the 2013 Legislature.

In addition to law and history, the articles our contributors wrote for this issue illustrate the diverse disciplines the Government and Public Sector Lawyers Section represents. Although most of our members work in the public sector, we count many private practitioners among our numbers. Our members practice in board rooms and quasi-judicial hearings as well as the courtrooms across the state. Some members adjudicate administrative proceedings, while others represent parties to those hearings. Our members advise legislators, boards, commissions,

city councils, and other elected officials and public entities. Some prosecute the accused while others defend them. Our “practice” areas include land use, taxation, licensing, open meetings, constitutional law, public utilities, child welfare, water, consumer protection, employment law, insurance, administrative law, and criminal law, to name just a few. The list is endless. However, we are bound by a common interest in the challenges and rewards that come with working in the public sector.

I have spent almost my entire legal career in the public sector and membership in the Government and Public Sector Lawyers Section has been, and continues to be, one of my most rewarding professional activities. If there is an unusual matter involving a public entity, chances are one of our members knows something about it and I find that wealth of knowledge truly amazing. We share that diversity of knowledge with regular CLE sessions at our monthly meetings. We also sponsor a CLE we believe is of wider interest to other members of the bar. This year, we are looking at ways to expand our activities.

If there is an unusual matter involving a public entity, chances are one of our members knows something about it.

Whether you work in the public sector or just have an interest in public sector issues, we have a place for you. The Government and Public Sector Lawyers Section is growing and we invite you to join us.

About the Author

Cheri Ruch became a referee for the Idaho Industrial Commission. There, she reviews appeals and prepares decisions in Unemployment Insurance cases. In addition to the Government and Public Lawyers



Section, Ms. Ruch is an active member of the National Association of Unemployment Appeals Professionals (NAUIAP). She served terms as a member of the NAUIAP Board of Governors 2001-2002 and 2004-2007.

She is a regular contributor to the agenda for the organization’s annual conference and was involved in the development of the NAUIAP Model Code of Judicial Conduct. Ms. Ruch holds a law degree from Vermont Law School and an MPA from Boise State University.

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IDAHO'S ALCOHOL BEVERAGE LAWS: PAST, PRESENT AND FUTURE

Jenny Crane Grunke

Regulation of alcoholic beverages (commonly referred to as liquor law) in Idaho is complex and difficult to explain in a brief article. Liquor law is multifaceted with several different types of licenses and strict protocols on the service and purchase of alcoholic beverages. There are two Idaho agencies involved in licensing and enforcement of alcoholic beverages: The State Liquor Division and the Bureau of Alcoholic Beverage Control.

It is a common misconception that alcohol is regulated like any other commodity.¹ But, such a classification is not viable because no other legalized commodity has the effect alcohol does on society. Experience tells us that a regulated alcohol beverage industry is both necessary and desirable. The difficulty is agreeing on what is the best-balanced approach to regulation and how to modernize current laws that no longer make sense in the 21st century. Even minor regulatory and structural changes to the industry can affect society, businesses and local tax revenue.

So grab your favorite beverage and read this overview of Idaho's liquor laws to learn how they were written in the past, how they are working in the present and how they might change in the future.

The past

Idaho's alcoholic beverage regulation began with a very stringent public policy. In 1889, because of pressure from the Women's Christian Temperance Union and the prohibition sentiment of the day, the delegates at the constitutional convention debated the prohibition section first.² Idaho Constitution Article III, Section 24, survives today and proclaims:

Promotion of temperance and morality. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

This language was purported to be a literal translation of the temperance plank of the 1888 National Republican Convention and was passed with little debate.³

The legislature at the time predicted the prohibition issue would become obsolete.⁴ In 1916, however, Idaho outlawed alcoholic beverages statewide in the general election that added Section 26 to Article III. Section 26 provided:

As a control state, Idaho is the only entity that can sell liquor by the bottle through its own liquor stores.

Prohibition of intoxicating liquors. From and after the first day of May in the year 1917, the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes are forever prohibited. The legislature shall enforce this section by all needful legislation.⁵

Idaho ratified national prohibition in 1918. Prohibition in Idaho, as in most of the other states, led to corruption, and the illegal production and distribution of alcoholic beverages. Bootleggers often brewed liquor in bathtubs in Lewiston, Pocatello and the Treasure Valley.⁶ These illegal operations proved dangerous to consumers who imbibed quickly-made moonshine laced with creosote and embalming fluid.⁷

Idaho repealed the prohibition of beer in 1933 and the prohibition of intoxicating liquors in 1934 when Idaho's Constitution Article III, Section 26 was amended:

Section 26. Power and authority over intoxicating liquors. From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

Eventually Idaho set up two different systems: a control state for liquor and a license state for beer and wine. As a control state, Idaho is the only entity that can sell liquor by the bottle through its own liquor stores. The Idaho Liquor Dispensary, now known as the State Liquor Division, monitors its own stores and contracts with businesses in remote locations to sell liquor by the bottle. Bars and restaurants licensed to sell liquor by the drink are required to purchase their liquor from the Liquor Division.

A liquor control board was the first to oversee licensing for sales of liquor by the drink, and beer and wine by the drink, or for retail. The board was eventually disbanded, and the licensing authority now resides with the director of the Idaho State Police. Idaho adopted a three-tier system for the distribution of beer and wine: retailer, wholesaler/distributor and manufacturer. Stores, bars and restaurants that sell beer and wine at retail cannot purchase alcohol directly from the manufacturer; they must purchase it through distributors or wholesalers. The rationales for the three-tier system are to 1) promote the state's interest in an orderly market, 2) prohibit vertical integration and dominance by a single producer in the market place, 3) prohibit commercial bribery and predatory marketing practices, and 4) discourage and/or prevent the intemperate use of alcoholic beverages.⁸

The present

Idaho still maintains its hybrid system of control and licensing. The public policy to limit consumption of alcoholic beverages, or to promote temperance, can be found in Idaho laws that limit the number, location, types of alcohol products and hours of sales. The promotion of temperance provided the justification to limit the number of liquor licenses issued in Idaho.⁹

In 1959, Idaho Code § 23-903 was amended to create the current quota system for liquor by the drink licenses: only two liquor licenses shall be issued per 1,500 population. (There is no quota on beer and wine licenses.) Liquor licenses in excess of the quota issued prior to 1959 were grandfathered in place. For example, the city of Ketchum, with a population of 2,694, would qualify for two liquor licenses, but it has 10 liquor licenses already allocated.

Idaho Code § 23-908 further provided that a liquor license is transferrable to another qualified applicant. Gradually, smart business people learned that obtaining a liquor license was a good investment. Once issued, the original license could be transferred by a sale or a lease for profit. Business people who never had the intention of being in the business of selling or serving alcohol placed their names on waiting lists in order to obtain one of the few liquor licenses in each incorporated city.

In 1980, in order to stem speculation into liquor licenses, Idaho Code § 23-908 was amended to include the provision that every new license issued to an applicant based on a population increase or one that became available (i.e., not an existing license that was being transferred by a licensee) must be put into actual use by the original licensee for six months or be forfeited back to the state. A new license cannot be transferred for two years after it is issued.

Neither this section nor the actual use provision, however, were enforced by the Bureau of Alcohol Beverage Control until 2004, when the administration at the bureau changed. Before then, licensees were allowed to simply put a valuable liquor license in a file drawer or hang it in a business like an auto dealership where no sales of liquor were made. This hoarding of unused liquor licenses created a scarcity of those licenses in some cities and stunted economic growth.

Eventually, with the enforcement of Idaho Code § 23-908, there are very few speculators left in the market of liquor licenses. For those who actually intend to be in the business of selling and serving liquor by the drink, a surplus of liquor licenses are available in a few cities who have not reached their quota. For example, Nampa, with a population of 82,755 qualifies for 56 liquor licenses. Yet only 50 licenses are currently issued and no one is on the waiting list.¹⁰

The Legislature has also been able to circumvent the quota system by creating specialty licenses that fall outside the quota of two licenses per 1,500 population. By specifically exempting these specialty licenses based on certain criteria, the Legislature has created approximately 18 specialty licenses. Specialty licenses for selling liquor by the drink include, for example, golf courses, airports, race tracks and ski resorts.

There is little doubt that money and politics play a big part in efforts to revise alcohol beverage laws.

Over the years the legislature has discussed eliminating the quota system,¹¹ but that came to an end in 2009, when Governor Butch Otter's task force on liquor laws failed to pass legislation.¹² According to Governor Otter's Chief of Staff, David Hensley, the Governor has not reorganized the task force and has no current plans to attempt a revamping of Idaho's Liquor Act.

A caveat for licensees who transfer their licenses pursuant to Idaho Code § 23-908 — the state recognizes only the current licensee. It gives a transferor no right to renew or to receive notices after they have transferred the license.¹³ A liquor license is a license that is renewed annually and allows the licensee to do something that is otherwise illegal.¹⁴ A transferee who violates the provisions of Title 23 may have the license suspended or revoked, leaving the transferor without the ability to regain the license regardless of an agreement between the parties.

There is little doubt that money and politics play a big part in efforts to revise alcohol beverage laws. (Anyone want to lease a state building to operate a brewery?¹⁵) In a state with a quota system on liquor licenses, the bar and restaurant owners who hold liquor licenses are holding an investment that might be worth hundreds of thousands of dollars if they can transfer it to another qualified licensee. Revenue to Idaho's general fund from beer, wine and liquor taxes and sales equaled \$40.1 million in fiscal year 2012 and are projected to reach \$43.4 million in fiscal year 2013. The counties' and cities' share of revenue from alcoholic beverages was \$26.1 million in fiscal year 2011.¹⁶ Recent amendments allowing cities and counties to approve sales of alcohol on Sundays and Election Day were likely motivated by the possibility of increased revenue both for licensees and government.

Due in part to increased popularity of specialty and craft beers and wine making

in Idaho, the legislature has created a few exceptions to Idaho's three-tier system recently. A brewpub or winery under certain circumstances may retail its products. Direct shipments of wine to consumers from out of state wineries have been approved by legislation. These changes could be indications of what is in store for the future.

The future

Voters and litigants are challenging state alcohol beverage laws from around the country that have been in place since the end of prohibition. Current challenges include privatization in control states, anti-trust litigation on pricing and competition, dormant commerce clause tests against importation, and equal protection challenges to residency requirements for licensing and taxation issues.¹⁷ Challenges to Idaho's laws may not be far behind.¹⁸

The mighty Twenty-First Amendment to the U.S. Constitution, which repealed prohibition and allowed each state to develop its own system for regulating the presence and use of alcohol within its boundaries, met its match in *Granholm v. Heald*, 544 U.S. 460 (2005). The United States Supreme Court in a 5-4 decision ruled that laws in New York and Michigan that permitted in-state wineries to ship wine directly to consumers, but prohibited out-of-state wineries from doing the same, were unconstitutional. Prior to *Granholm*, states viewed the 21st Amendment as more powerful than the dormant commerce clause. The *Granholm* decision sent many states, including Idaho, scrambling to review existing direct shipping and importation laws.¹⁹

In 2011, Washington voters approved the closure of state liquor stores (which were run similar to Idaho's state liquor stores) and required the stores to sell their assets. The referendum now requires the state to license private parties to sell and distribute liquor.²⁰

Southern Wine and Spirits of America has been successful overturning residency

requirements in Texas and Indiana. In Missouri, it attempted to challenge the state law requiring spirits wholesalers to be incorporated in Missouri and have at least 60% of shareholders be bona fide residents of Missouri for at least three years.²¹ The Missouri court held that *Granholt* did not apply in this case and refused to grant a corporation equal protection. The Missouri case is currently on appeal to the 8th Circuit Court of Appeals.

Generally, the taxing of alcoholic beverages depends on the particular beverage's alcohol content and whether it is classified as beer, wine or liquor. In the past, high alcohol content beers and wines did not exist. But, the Nebraska Supreme Court recently held that the Nebraska Liquor Control Commission exceeded authority by classifying and taxing, as beer, flavored malt beverages that contain spirits, (sometimes called alco-pops). Nebraska law defines spirits as beverages that contain alcohol obtained by distillation.²² Gone are the days when statutes could clearly define and tax an alcoholic beverage by its name.

Conclusion

Alcoholic beverages have had an interesting and volatile past. Idaho liquor laws have changed little since the days before statehood. The alcoholic beverages industry, however, continues to modernize. If there is enough political support, the legislature will make small, specialized amendments due to modern influences. In reality, however, the business of selling alcoholic beverages is so wrapped in history and monetary and political interests, that the possibility of extensive modernization to the alcohol beverage laws in Idaho is probably not in the near future.

Now, raise that empty drink you started at the beginning of the article with new appreciation! It wasn't that easy getting it to you.

Endnotes

- ¹ "Alcohol Control Where Are We Headed?" Craig Purser, President NBWA, CAE, Tom Wark, Executive Director, SWRA and Dr. Peter Anderson, MD, PhD, MPH, panelists, 2008 NABCA 15th Annual Legal Symposium on Alcohol Beverage Law & Regulation, March 10-12, 2008.
- ² Idaho's Constitution, The Tie that Binds, Dennis C. Colson, University of Idaho Press, Moscow, Idaho 1991, p. 25
- ³ Id. p. 26
- ⁴ Id. p. 26
- ⁵ Id. p. 27.
- ⁶ "Demon Liquor", Andrew Crisp, Boise Weekly, May 2-8, 2012, Vol. 20 Issue 45, p. 19.
- ⁷ "Alcohol problems and Solutions, National Prohibition and Repeal in Idaho", David J. Hanson, Ph.D., 1997-2012, <http://www2.potsdam.edu>
- ⁸ "Is 'Tied House' Still the Tie that Binds?" Carrie L. Bonnington and Jerry Jolly, NABCA 18th Annual Legal Symposium on Alcohol Beverage Law & Regulation, March 7-9, 2011.
- ⁹ "Idaho's Constitution, The Tie that Binds", Dennis C. Colson, University of Idaho Press, Moscow, Idaho 1991, p. 30.
- ¹⁰ Idaho State Police, Bureau of Alcohol Beverage Control, November 27, 2012.
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- ¹⁵ Andrew Crisp, Back on Tap: Ten Barrel Brewing's Boise Location Moving Forward. Boise Weekly Online Blogs, November 8, 2012, <http://www.boiseweekly.com/CityDesk/archives/2012/11/08/back-on-tap-10-barrel-brewings-boise-location-moving-forward>
- ¹⁶ 2012 Idaho Fiscal Facts, A Legislator's Handbook of Facts, Figures and Trends, Idaho Legislative Services Office, pgs: <http://legislature.idaho.gov/budget/publications/FiscalFacts/current/FF.pdf>
- ¹⁷ *Granholt v. Heald*, 544 U.S. 460 (2005), Washington Initiative 1183, *Authentic Beverages v. Texas ABC*, United States District Court, Western District of Texas, Austin Div., Case No. A-10-CA-710-SS; *Coors Brewing Co. v. Puerto Rico*, Case No. 11-1159, (1st Cir.); *Lebarnoff v. Indiana Alcohol and Tobacco*, Case No. 11-1162 (7th Cir.); *Maxwell's Pic n Pac, et. al. v. Tony Dehner, et. al.*, United States District Court, Western District of Kentucky at Louisville, Case No. 3:11-CV-18-H.
- ¹⁸ Idaho Licensed Beverage Association, <http://www.idahoilba.com/legislative/>
- ¹⁹ Idaho Code § 23-1309A.
- ²⁰ Wash. Sec'y of State, November 08, 2011 General Election Results, <http://vote.wa.gov/results/20111108/measures.html>.
- ²¹ *Southern Wine and Spirits of America v. Division of Alcohol and Tobacco Control*, United States District Court, W.D. Missouri, Central Division. January 17, 2012.
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ACHIEVING REGULATORY REFORM BY ENCOURAGING CONSENSUS

Richard Seamon
Joan Callahan

Government regulation poses a dilemma: We need regulation of private activity to protect public health and safety and to administer public lands and resources responsibly. Yet regulation can stifle economic growth and impair a business's ability to compete with businesses in jurisdictions that impose lower regulatory burdens. Worse yet, ineffective regulation can have these adverse effects without achieving significant public benefits. Consider all of the resources consumed to generate governmentally mandated disclosure forms — in health care settings and consumer transactions, for example — that almost no one reads.

Recognizing the dilemma posed by government regulation, the Idaho Legislature enacted new legislation in 2012 to make the regulatory process more responsive to competing public and private interests, with the aim of producing more effective, less burdensome regulations. The legislation amends the Idaho Administrative Procedure Act to require Idaho agencies to use negotiated rulemaking whenever it is feasible to do so.¹

This article discusses the 2012 Amendments.² The article begins by summarizing the process by which Idaho agencies make rules, then explains how the 2012 Amendments alter that process. Thereafter, the article focuses on how the changes will enable attorneys to advocate more effectively for clients whose interests are affected by state regulations.

The rulemaking process before the 2012 amendments

To understand the 2012 Amendments, you must understand the rulemaking process it affected. The rulemaking process in Idaho is prescribed in the Idaho Administrative Procedure Act (Idaho APA). The Idaho APA ensures public input by prescribing three required steps that Idaho agencies must follow when making rules, and a fourth optional step. The 2012 Amendments affect the fourth, optional step.

With certain exceptions, an Idaho agency must follow three steps to promulgate a rule. First, the agency must publish a notice of proposed rulemaking in an official publication called the Administrative Bulletin. The agency must include in this notice the text of the rule that the agency proposes to promulgate,

The Idaho APA added that agencies were “encouraged” to use negotiated rulemaking “whenever it is feasible to do so.”

so the public knows what the agency has in mind. Second, the agency must give the public at least 21 days to submit written comments on the proposed rule. Third, after considering the public input and making any changes to the rule that the agency considers appropriate, the agency must publish what is called a “pending rule,” to signify that the rule is not final until the legislature has reviewed it. The legislature can approve, modify, or reject the pending rule by concurrent resolution.

In addition to these three required steps, before 2012 the Idaho APA provided a fourth, optional step, to be taken *before* the agency published its notice of proposed rulemaking (the first step described above). The Idaho APA said that before formally proposing a rule, an agency could publish a notice of its intent to promulgate a rule. The purpose of the notice of intent, the Idaho APA explained, was “to facilitate negotiated rulemaking.” The Idaho APA added that agencies were “encouraged” to use negotiated rulemaking “whenever it is feasible to do so.” Thus, the pre-2012 Idaho APA gave agencies the option of using negotiated rulemaking to devise a proposed rule and encouraged them to use that option whenever possible.

Background on negotiated rulemaking

Negotiated rulemaking is described in the Idaho APA as “a process in which all interested persons and the agency seek consensus on the content of a rule.”³ The negotiated rulemaking process became popular in the 1990s as an informal, non-adversarial way of achieving smarter regulations.⁴ Congress enacted the Negotiated Rulemaking Act in 1990 to encourage federal agencies to use the process.⁵ The Idaho legislature first added analogous provisions to the Idaho APA in 1992.⁶ Idaho was one of several states, including

Washington and Montana, that enacted laws encouraging negotiated rulemaking.⁷

Negotiated rulemaking has several potential benefits for the agency and the public. Negotiated rulemaking can benefit the agency by fleshing out important issues and information before the agency devotes time and effort to drafting a proposed rule. Equipped with that knowledge, the agency should be able to draft a better proposed rule. If the proposed rule can be reached through consensus, it will presumably have buy-in from those whose interests will be affected by it, making the rule easier to enforce and less likely to face a judicial challenge. Negotiated rulemaking can benefit the public by creating an opportunity for public participation before the agency has invested time and effort into — and accordingly begins to get entrenched in favor of — a particular regulatory approach. Furthermore, the opportunity for public participation in negotiated rulemaking can be more informal and personalized by providing more opportunity for give-and-take discussions than the usual process, under which members of the public submit written comments on a proposed rule.

Despite its potential benefits, negotiated rulemaking was not universally embraced by agencies, including agencies in Idaho, in the wake of laws encouraging it. At least three reasons appear to account for many agencies' lack of enthusiasm: First, negotiated rulemaking takes extra agency time and effort, compared to the time and effort needed for an agency to draft a proposed rule with limited public participation. Second, some agencies may believe negotiated rulemaking forces the agency to give up too much control over the regulatory process. That is because to reach consensus, the agency may feel pressure to agree to a proposed rule that, from the agency's perspective, is less than

optimal. Third, agencies often have informal ways to get input from affected interests when drafting a proposed rule, and the agencies may regard these informal methods as less cumbersome, equally effective alternatives to negotiated rulemaking. Whatever the reasons, negotiated rulemaking did not become prevalent, despite legislative encouragement.

The 2012 Amendments were the result of efforts by private industry groups dissatisfied with Idaho agencies' overall response to the 1992 Idaho APA provisions encouraging negotiated rulemaking. Those groups included the Idaho Waters Users Association and the Idaho Association of Commerce and Industry.⁸ Those private interests perceived a lack of consistency among Idaho agencies in (1) their willingness to use negotiated rulemaking and (2) their agency-specific procedures for doing so. In addition, the private interests believed that some agencies went through the motions of negotiated rulemaking without really considering or meaningfully responding to private input. A bill to promote negotiated rulemaking passed the Idaho House in 2008 but failed in the Idaho Senate because of opposition from some Idaho agencies, including the Idaho Department of Health and Welfare and the Idaho Transportation Department.⁹ The same private interests behind the unsuccessful 2008 proposal finally succeeded in obtaining the 2012 Amendments, in large part because they drafted the later legislative proposal after consulting eight Idaho agencies and addressing those agencies' concerns.

2012 amendments

Recall that, before the 2012 Amendments, the Idaho APA made negotiated rulemaking largely optional: It "encouraged" Idaho agencies, "whenever . . . feasible," to use negotiated rulemaking to devise proposed rules. The Idaho APA did not, however, require agencies to explain why negotiated rulemaking was, or was not, feasible for a particular, contemplated rule. Consequently, an Idaho agency arguably could comply with the letter of the Idaho APA, if not the spirit, by deciding — as a general matter and without any formal announcement — that negotiated rulemaking was not feasible for its process of making rules. Furthermore, Idaho agencies that *did* conduct negotiated rulemaking did not have to explain how they responded to the information and comments they received from the public during the negotiated rulemaking process. There was, in other words, no agency "output"

In short, negotiated rulemaking is no longer just encouraged when feasible; it is required, when feasible, for every rule that an Idaho agency is considering promulgating.

that meaningfully responded to the public input.

The 2012 Amendments preclude this laissez-faire approach by establishing three requirements. First, an Idaho agency must now determine — for each and every rule that the agency is contemplating — whether or not negotiated rulemaking is feasible. Second, if the agency decides that negotiated rulemaking is *not* feasible, the agency must publish a written explanation of that decision in the notice of proposed rulemaking. Third, if the agency determines that negotiated rulemaking *is* feasible, the agency *must* use it.¹⁰ In short, negotiated rulemaking is no longer just encouraged when feasible; it is required, when feasible, for every rule that an Idaho agency is considering promulgating, and an agency must explain all determinations of infeasibility.

In addition to these requirements, the 2012 Amendments prescribe new procedures for negotiated rulemaking. The procedures will make the process more consistent across agencies and require the agency to document the substance of the process and not just the procedures. Under the new procedures, when the agency publishes its notice of intent to promulgate a rule, the agency must "state that interested persons have the opportunity to participate with the agency in negotiated rulemaking."¹¹ (Previously, the Idaho APA did not require the notice of intent expressly to mention negotiated rulemaking, though the Attorney General's rules on negotiated rulemaking did impose such a requirement.¹²) Thereafter, the agency has additional responsibilities. "[A]t a minimum," the agency must:

- Give "interested persons" a reasonable amount of time to respond to the notice of intent.
- Give, to all interested persons who respond to the notice of intent, notice of any meetings where interested persons will have an opportunity to discuss the contemplated rule.

- Give to those interested persons who attend the meetings "all information that is considered by the agency in connection with the formulation of the proposed rule," except information exempt from disclosure under the Public Records Act.

- Also give to interested persons who attend the meetings a regularly updated schedule of the negotiated rulemaking and a list of all documents and information pertinent to the proposed rule.

- Summarize in writing "unresolved issues, key information considered and conclusions reached during and as a result of the negotiated rulemaking."

- Make that summary available to people who attended the meetings.

The 2012 Amendments do not define the term "interested persons." Nor do they require the agency to seek out people whose interests may be affected by the contemplated rule. Rather, a person effectively self-identifies as "interested" by responding to the agency's notice of intent. The person apparently must then attend the meetings to be entitled to the information that the 2012 Amendments require the agency to make available. Thus, the 2012 Amendments do not create obligations owed by the agency to the public at large, but only to those who take affirmative steps to demonstrate their interest in a particular contemplated rule.

The official Statement of Purpose for the bill creating the 2012 Amendments makes clear that negotiated rulemaking involves not just negotiation but also the exchange of information. The Statement begins:

Negotiated rulemaking is often a critically important step for state agencies to take in developing rules based on consensus and the best information and expertise available from the private and public sectors.

This statement expresses a rather radical idea. The growth of the administrative

state in the New Deal era reflected the idea that agencies would be repositories of expertise on the social problems with which they were created to deal. Negotiated rulemaking, however, reflects that agencies are not the sole repositories of expertise. To the contrary, vital information and expertise exists outside the agency. Negotiated rulemaking enables (forces) the agency to tap into that information and expertise.

As a whole, the 2012 Amendments restrict Idaho agencies' discretion to avoid negotiated rulemaking. In this sense, you might say that the agencies were the "losers." By the same token, groups affected by regulation are winners: The 2012 Amendments should make it more possible for people whose interests will be affected by an agency regulation (and those people's attorneys) to advocate for those interests from the very beginning of the rulemaking process, when a regulation is little more than a gleam in the agency's eye.

Enforcement of the 2012 Amendment's negotiated rulemaking mandate

Although the 2012 Amendments restrict Idaho agencies' discretion to avoid negotiated rulemaking, the 2012 Amendments also made one big concession to the agencies: The 2012 Amendments bar judicial review of an agency's determination that negotiated rulemaking is not feasible.¹³ Does this bar on judicial review enable an agency to use invalid excuses to avoid negotiated rulemaking? The answer is probably not. In the absence of judicial review, Idaho's executive and legislative branches nevertheless have ways to prevent an agency from evading the negotiated rulemaking mandate.

The governor has a constitutional duty to ensure that the laws are faithfully executed and has many ways to ensure Idaho agencies faithfully execute the 2012 Amendments. For one thing, an Idaho agency cannot promulgate a rule without approval from the office of the governor, which signifies approval (or disapproval) using the Proposed/Temporary Administrative Rules Form (PARF).¹⁴ Thus, the governor's office could refuse to approve an agency's PARF for a rule that the agency improperly refused to use negotiated rulemaking to devise. No doubt the governor has many other informal ways of ensuring agency compliance with the 2012 Amendments.

The legislature can also ensure agency compliance with the 2012 Amendments.

As mentioned earlier, the legislature reviews pending rules before they become final. During the legislative review process of a pending rule, the legislature can review an agency's decision not to engage in negotiated rulemaking. The legislature's review will be aided by the written explanation of infeasibility that the agency is required to publish under the 2012 Amendments. Moreover, if the agency has engaged in negotiated rulemaking, the legislature can determine whether the agency did so in good faith. This determination will be aided by the written summary that the 2012 Amendments require the agency to prepare and distribute to interested persons. As described above, the summary must identify unresolved issues, key information considered, and conclusions reached in the negotiated rulemaking. Interested persons (and their representatives) may decide to appear before the legislature if they dispute the agency's infeasibility determination or its written summary.

Opportunities for advocates

The 2012 Amendments increase the opportunity for public input by people whose interests will be affected by a rule that an Idaho agency is contemplating, and by lawyers who represent those people. That increased opportunity arises when the potential for such input to matter is at its greatest — namely, before the agency puts pen to paper and begins drafting a proposed rule. The lawyer who wants to avail him- or herself of this opportunity most effectively will begin by monitoring agencies' notices of intent to promulgate a rule because those notices provide information for participating in the negotiated rulemaking process as an "interested person."¹⁵ The attorney who participates in the process should remember that effective advocacy requires a high-quality presentation of relevant information and discussion of relevant laws and policies. If despite the lawyer's best efforts the agency does not participate in good faith in the negotiated rulemaking process, the lawyer must determine what sources outside the agency can be brought to bear on the recalcitrant agency. For reasons discussed in this article, the most effective outside sources may very well reside in the governor's office and the Idaho legislature.

In any event, the 2012 Amendments have the potential to achieve meaningful regulatory reform. But that depends on the future efforts of Idaho agencies, ad-

vocates for people whose interests are affected by agency regulation, and existing political controls on agency action.

Endnotes

- ¹ Special thanks to Brian Kane, Assistant Chief Deputy, Idaho Attorney General's Office and Senator Curt McKenzie for their time and sharing their knowledge and perspectives on the legislation and negotiated rulemaking requirements.
- ² 2012 Idaho Sess. Laws, chapter 310, at 856–858 (approved Apr. 5, 2012), codified at Idaho Code (I.C.) §§ 67-5220 & 67-5221.
- ³ I.C. § 67-5220(2).
- ⁴ See generally Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982).
- ⁵ 5 U.S.C. §§ 561–570 (2012).
- ⁶ 1992 Idaho Sess. Laws 793 (Ch. 263, § 9).
- ⁷ Minn. Stat. Ann. § 14.101; Mont. Code Ann. § 2-4-304; Neb. Rev. Stat. Ann. §§ 84-921–84-932; Tex. Gov't Code §§ 2008.001–2008.058; Wash. Rev. Code Ann. § 34.05.310; Wis. Stat. Ann. 227.13; see also 2010 Model State APA § 303; 1981 Model State APA § 3-101.
- ⁸ See Minutes of Senate State Affairs Comm., Idaho Legislature, at 3 (Mar. 7, 2012) (testimony on S. 1366).
- ⁹ See Minutes of Senate State Affairs Comm., Idaho Legislature, at 5–6 (Mar. 12, 2008) (testimony on H. 531a).
- ¹⁰ I.C. § 67-5220(1).
- ¹¹ I.C. § 67-5220(1).
- ¹² IDAPA 04.11.01.812.
- ¹³ I.C. § 67-5220(1).
- ¹⁴ State of Idaho, Office of the Administrative Rules Coordinator, *The Idaho Rule Writer's Manual 16*, available at http://adminrules.idaho.gov/rulemaking_templates/rule_draftmanual.pdf.
- ¹⁵ The Idaho Office of the Administrative Rules Coordinator has set up a web page listing all current notices of intent published by Idaho agencies: http://adminrules.idaho.gov/Negotiated_Notices/index.html.

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STRIKING THE RIGHT BALANCE: LOCAL LAND USE ORDINANCES AND PROPER GOVERNANCE

Arthur B. Macomber

The scope of the police power exercised by the states differs as a reflection of societal values in each jurisdiction. In 1926, the United States Supreme Court approved zoning as an acceptable local government police power.¹ Article XII, § 2 of the Idaho Constitution expressly grants cities and counties the authority to enact police power regulations. This authority is clarified and reinforced through the legislature's delegation of police power to local cities and counties by Idaho Code § 67-6501, et seq., the Local Land Use Planning Act ("LLUPA").² Land use restrictions are not considered a taking under current law unless the regulation removes "all economically beneficial us[e] of [the] property."³

But instead of permitting an unrecognizable boundary, statutes should limit zoning ordinances in a manner that preserves individual property rights.⁴ This article will provide an overview of Idaho's laws and suggests statutory changes that should strike a more appropriate balance between the zoning authority of local governments and preserving the individual property rights of its citizens.

Constitution limits government power

Idaho's Constitution does not grant powers, but it *limits* powers. "A doctrine firmly settled in the law is that a state constitution is in no manner a grant of power. It operates solely as a limitation of power [upon government]."⁵ "The rule that the [S]tate constitution is a limitation and not a grant of powers has most frequently arisen in cases involving the legislative department. However, the same principle has been applied to the executive and judicial department."⁶

Idaho's police power as delegated by Article XII, § 2 to counties and municipalities is plenary upon all subjects, unless a limitation appears in the State Constitution. The danger to liberty is that Idaho's Constitutional limitations are only generally described, but legislative enactments are specific. Thus, it is only a matter of judicial interpretation through parsing and word craft to evade or dilute the constitutional limits by either circumscribing the definition of the scope of the constitutional limit, or by finding the specific legislative enactment does not fall into the scope of the constitutional limit. This judicial outcome is more likely because a passive

A local government's administrative discretion on the definitions of open space and rural character can supplant a property owner's right to use, because the final decision becomes the government's.

court is mindful to respect the acts of the co-equal legislature.

Further, "[t]he burden of showing unconstitutionality of a statute is upon the party who asserts it, and invalidity must be clearly shown."⁷ A Constitutional limit on a statute "must expressly or impliedly be made to appear beyond a reasonable doubt."⁸ Thus, citizens' rights stated in general terms in the Constitution are at risk of being lost, because the State Supreme Court's interpretive method couples the presumption of ordinance validity with the challenger's high burden of proof to improperly tilt the law toward enlargement of government power and away from protection of individual inalienable rights of sovereignty.⁹

Idaho's local government police power applied to land use

"The Legislature, as a function of the police power, has delegated authority to local governments to exercise land use planning powers through the LLUPA."¹⁰ "In addition, the Idaho Constitution grants limited police power to county and city governments."¹¹ The Idaho Supreme Court has interpreted Article XII to place three restrictions on local ordinances, they must:

- (1) 'be confined to the limits of the governmental body enacting the [ordinance]';
- (2) 'not be in conflict with other general laws of the state'; and
- (3) 'not be an unreasonable or arbitrary enactment.'¹²

As to harms to particular property owners, the Idaho State Supreme Court stated, "[i]f the enactment authorizing the exercise of the [police power] authority bears a reasonable relationship to the public health, safety, morals or general welfare, such enactment would be valid within the inherent powers of the legisla-

tive body.¹³ The definition of a "reasonable relationship" is left to the court.¹⁴ "Certainly, zoning restrictions or regulations which limit the right to use private property so as to realize its highest utility should not be extended by implication to cases not clearly within their scope and purposes."¹⁵

The use of a reasonable relationship standard favors increasing government regulation. In the seminal land use case entitled *Village of Euclid* the United States Supreme Court required that the regulation have a substantial relation to public health, safety, or welfare. But, the Idaho State Supreme Court downgraded that standard to require simply a reasonable relationship.¹⁶ In short, because a local government merely needs to assert a reasoned justification in support of government control over a land use decision, this standard has become virtually limitless. Thus, in Idaho, if a local governing board can argue a reasonable position, the zoning ordinance or decisions related to its administration will be upheld, and a property owner's right to choose how to use their land can be entirely supplanted by government discretion, as if it was the true owner.

Zoning with a reasonable relation to the police power undermines constitutional rights

A substantial relation requires a stronger nexus to the police power than simply a reasonable relation. The latter low standard unnecessarily encourages cities and counties to enact land use restrictions with an engineered level of specificity that unnecessarily vitiates private property rights.¹⁷

In Idaho, even aesthetic judgments of property owners are suppressed or even disregarded by local government "planners." In the *Terrazas* case, the Idaho State Supreme Court stated, "[t]his Court

has recognized that aesthetic concerns, including the preservation of open space and the maintenance of the rural character of [a] County, are valid rationales for the County to enact zoning restrictions under its police power.¹⁸

Thus, even determinations regarding the aesthetics of development are not the title owner's decision, but the local government's. How much space is required to be "open space?" What is "open space" anyway? What is "rural character?" A local government's administrative discretion on the definitions of open space and rural character can supplant a property owner's right to use, because the final decision becomes the government's instead of the true owner's.

Idaho statutes place few limits on the local authorities' zoning power.¹⁹ "Determining where particular business uses shall be allowed to expand in a community is normally an appropriate exercise of the police power. Preserving aesthetic values and the economic viability of a community's downtown business core can be a proper zoning purpose."²⁰ This allows local government planners to undertake intricate planning of local economies without information about potential commercial uses which are disbursed among individual property owners, which is why decision-making needs to remain with the individual owner. Having to get permission for a non-harmful land use due to a planner's exacting standards discourages innovation and market-responsive uses of real property.

Also, zoning code violation appeals cannot be judicially reviewed.²¹ The *Highlands* case is a shield protecting local authorities, because it limits judicial review of the exercise of that code enforcement power. Therefore, a local governing entity can not only interpret its own ordinance, but enforce it with no review, unless a declaratory judgment is sued for by the property owner.²² Thus, local governments are emboldened toward an expansionary exercise of their powers of administrative discretion over permissible uses of private property.

Due process does not adequately protect property owners in Idaho

Due process is that process which a government is required to give an individual citizen who is the subject of regulation or other targeted governmental act; the two pillars of due process being notice and a hearing.²³ In Idaho's land-use context it has changed into a process where an individual property owner attempting to use their property not only has to gain the government's approval, but also the

Having to get permission for a non-harmful land use due to a planner's exacting standards discourages innovation and market-responsive uses of real property.

political approval of their neighbors.²⁴ The public hearing requirements trigger and encourage political dissent from neighbors.²⁵ This is not to say a public hearing should not be allowed, but that criteria for approval should not allow neighborhood factions to suppress the applicant's right to use.

The tyranny of the neighborhood is a substantial curtailment of Idahoans' private property rights, if only due to the time and financial expense of overcoming neighbors' objections to a use. On a practical level, the majority of Idaho landowners cannot afford delays or legal fees to first interpret a zoning ordinance and then financially survive political battles with their neighbors. In this respect, current Idaho law improperly favors the wealthy and pits one person against many for elusive and unquantifiable reasons.

A zoning ordinance will not be overturned by a court in Idaho, "unless that decision: (a) violated statutory or constitutional provisions; (b) exceeded the Board's statutory authority; (c) was made upon unlawful procedure; (d) was not supported by substantial evidence in the record; or (e) was arbitrary, capricious, or an abuse of discretion."²⁶

However, "[w]here there is a basis for a reasonable difference of opinion, or if the validity of legislative classification for zoning purposes is debatable, a court may not substitute its judgment for that of the local zoning authority."²⁷ Thus, where such authority responds to aggressive neighbors who bring political pressure to suppress the civil rights of their neighbors, a right to use real property can be destroyed or substantially altered to make the use uneconomical.

In *Terrazas*, the Court analyzed the property owner's challenge and determined no due process rights were violated, the ordinance was not unconstitutional, "substantial competent evidence supported the Board's determination . . . the Board's decision was not arbitrary and capricious[,] and [thus its decision] did not violate Applicants' equal protection

rights."²⁸ The presumption of validity allowed the local government's decision to supplant the property owner's.

The *Terrazas* case evinces that private property rights are not strongly supported in Idaho today, and that almost any defense raised against a zoning ordinance will fail, whether the challenge is based on the constitution, other law, or equity. The mirage of due process is a costly but fruitless delay to the implementation of a local government planner's vision coupled with neighbors' political pressure to suppress a private property owner's civil rights.

Drafting ordinances with inalienable property rights in mind

Local entities should not have power to enact ordinances resulting in the limitless and costly expansion of government power through the use of mathematically exact engineering standards for every conceivable use with unbounded administrative discretion to apply such standards.

To the contrary, local entities should be statutorily required to enact ordinances that give private property owners their full measure of freedom by integrating constitutional protections of the use of real property into the creation, implementation, and administration of zoning and subdivision ordinances beyond simple avoidance of outright takings. The core purpose of the existence of the state is to protect such civil rights.²⁹

Two simple ways to do this would be to require ordinances that presume the validity of the owner's plans instead of the government's modification of it, and raise the government's required burden of proof to a clear and convincing standard using scientific evidence to justify a land use regulation.³⁰

A. Landowner preferences should receive governmental deference

Regulations protective of private property rights should presume the private property owner's plans are valid, unless those plans clearly trigger a police power concern directly affecting health or safety, or creating a nuisance pursuant to com-

mon-law standards.³¹ Local planning and code enforcement costs would be lower, because land use regulations would not be holistic, but only targeted to prevention of a specific harm when triggered by an owner's proposed use.

This accomplishes several worthy goals. Instead of the law encouraging an ever-increasing deference to over-engineered and costly structures of government power, the government would need to justify its curtailment of a property use in each individual circumstance. For an example of an over-engineered and costly legal structure, see www.zoningplus.com/regs/kootenai. If the owner's plans trigger no imminent need to invoke police power concerns for the protection of health, safety, or the prevention of nuisance, the owner could move forward and use his or her land according to that owner's determination of beneficial use. Idahoans need to stop arguing and suing each other over who determines land uses: the title holder or the local government planning czar? The incentives for limiting zoning and subdivision authority include economic development, job creation, and governmental budget reductions.

B. Local land use ordinance requirements should be well grounded in science

The second statutory change would be to increase the burden of proof that the government has to meet to justify its exercise of the police power. Instead of the preponderance of the evidence standard, the government should have to justify limiting an owner's plans by clear and convincing scientific evidence. This would further curtail unaccountable administrative discretion by requiring a scientific justification for an exercise of police power in each case. Some will argue this is too burdensome on the government, but protection of individual rights requires the government be so burdened. Judging by client comments to this author, Idaho property owners are tired of sitting in the back of the bus.³²

This solution may initially appear to encourage litigation by opening the door to a battle of "experts," but this possibility only means the ability of a local government to exercise the police power should be tightly restricted so that only real and present harms are addressed when a development application is made.

Finally, it would be proper for the law to tell neighbors to mind their own business. Unless there is a clear nuisance, or a threat to their health and safety, a neighbor should have no political power to con-

*The government should have
to justify limiting an owner's plans
by clear and convincing scientific evidence.*

trol the use of their neighbor's property. Although a neighbor may be able to register a complaint about use of property, that complaint should not serve to trump the individual right of a property owner.

Conclusion

Idaho's police power over land use as exercised by local entities pursuant to LLUPA is a destructive power that has grown unwieldy and expensive, and has served to significantly diminish private property rights in the state and vigorous economic development. After statutory enactment of the minor changes suggested here, land use ordinances can properly reflect the law's role as a safeguard of inalienable private property rights in Idaho. Instead of drafting ordinances with a gimlet eye toward mere avoidance of impermissible regulatory takings, a higher standard of aspiration in upholding individual rights to use property will be invigorating.

Endnotes

¹ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926).
² Delegation proper, see *Fernandez v. Alford*, 203 La. 111, 13 So.2d 483 (1943); *Central Maine Power Co. v. Waterville Urban Renewal Authority*, 281 A.2d 233 (Me.1971); *First National Bank v. Maine Turnpike Authority*, 153 Me. 131, 136 A.2d 699 (1957); *Bidlingmeyer v. City of Deer Lodge*, 128 Mont. 292, 274 P.2d 821 (1954); *Foeller v. Housing Authority*, 198 Or. 205, 256 P.2d 752 (1953); *City of Huntington v. State Water Commission*, 137 W.Va. 786, 73 S.E.2d 833 (1953); 16A Am.Jur.2d Constitutional Law §§ 375, 380 (1979).
³ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 2079 (2005); citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013, 112 S.Ct. 2886, 2891 (1992); compare to the catch-all standard promulgated in *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978), or the "fundamental attribute of property ownership" standard in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).
⁴ Idaho Const. Article 1 § 1.
⁵ *Petition of Idaho State Federation of Labor*, 272 P.2d 707, 719, 75 Idaho 367, 379 (1954); citing 11 Am.Jur., *Constitutional Law*, § 18, p. 619.
⁶ *Pettigle*, 272 P.2d at p. 720, 75 Idaho at p. 380; citing *State ex rel. Fritts v. Kuhl*, 51 N.J.L. 191, 17 A. 102 (1889).
⁷ *Eberle v. Nielson*, 78 Idaho 572, 574, 306 P.2d 1083, 1085 (1957); citing *Noble v. Bragaw*, 12 Idaho 265, 85 P. 903 (1906); *Gillesby v. Board of Com'rs*,

17 Idaho 586, 107 P. 71 (1910); *Smallwood v. Jeter*, 42 Idaho 169, 244 P. 149 (1926); *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928); *Williams v. Baldridge*, 48 Idaho 618, 284 P. 203 (1930); *State ex rel. Macey v. Johnson*, 50 Idaho 363, 296 P. 588 (1931).

⁸ *Id.*; citing *Achenbach v. Kincaid*, 25 Idaho 768, 781, 140 P. 529, 533 (1914); see *Diefendorf v. Gallet*, 51 Idaho 619, 637, 10 P.2d 307, 314 (1932); and *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 227, 141 P. 1083, 1088 (1914). Interestingly, a citizen's standard of proof required against a statute is the same as a prosecutor's against a criminal.

⁹ Cooley, Thomas M., *A Treatise on the Const. Limitations*, Little, Brown & Co., p. 28 (1868) ("The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority . . . and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to these fundamental laws.")

¹⁰ *Dry Creek Partners, LLC*, 217 P.3d at p. 1289, 148 Idaho at p. 18; see I.C. § 67-6503.

¹¹ *Id.*; citing Idaho Const. Article XII § 2.

¹² *Id.*, 217 P.3d at p. 1292, 148 Idaho at p. 21, fn. 6; citing *State v. Clark*, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965).

¹³ *Johnson v. Boise City*, 87 Idaho 44, 390 P.2d 291, 295 (1964); citing *White v. City of Twin Falls*, 81 Idaho 176, 338 P.2d 778.

¹⁴ Physical and regulatory takings are not discussed here. There are frequently significant questions regarding whether the imposition of a particular zoning ordinance constitutes a regulatory taking. That analysis is dependent on the application of not only Chapter 80 of Title 67 of the Idaho Code, but also interpretation of U.S. Supreme Court regulatory takings cases, see endnote 3.

¹⁵ McQuillan, *Municipal Corporations*, § 25.72 (3d ed. Ellard 1965); see *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926).

¹⁶ *Collister Fire Protection Dist. v. City of Boise*, 468 P.2d 290, 93 Idaho 558, 569 (1970).

¹⁷ <http://www.zoningplus.com/regs/kootenai/index.aspx?Nav=browse>; accessed 12-31-12. Kootenai County's draft combination zoning and subdivision ordinance presently runs hundreds of pages.

¹⁸ *Terrazas v. Blaine County ex rel. Bd. of Com'rs*, 207 P.3d 169, 174, 147 Idaho 193, 198 (2009); citing *Dawson Enter., Inc. v. Blaine County*, 98 Idaho 506, 518, 567 P.2d 1257, 1269 (1977).

¹⁹ *State ex rel. Kempthorne v. Blaine County*, 79 P.3d 707, 710, 139 Idaho 348, 351 (2003) (neither local zoning regulations nor LLUPA apply to State endowment lands managed by the State Land Board).

²⁰ *Sprenger, Grubb & Assoc., Inc. v. City of Hailey*, 127 Idaho 576, 584, 903 P.2d 741, 749 (1995); and see *Sprenger, Grubb & Associates, Inc. v. City of Hailey*, 133 Idaho 320, 986 P.2d 343 (1999) (Court invalidates City's comp plan based on it missing I.C. § 67-6511 components, where the plan fails to articulate a reason why a particular component is unneeded); see *Sprenger*, 133 Idaho at p. 321-22, 986

P.2d at p. 344-45, “[i]n *Love v. Bd. of Cty. Com’rs of Bingham*, 105 Idaho 558, 671 P.2d 471 (1983), this Court stated “[t]he enactment of a comprehensive plan is a precondition to the validity of zoning ordinances.” *Id.* at 559, 671 P.2d at 472; citing I.C. § 67-6511. Although not explicitly stated in *Love*, it necessarily follows that a valid comprehensive plan is a precondition to the validity of zoning ordinances.”

²¹ *Highlands Development Corp. v. City of Boise*, 188 P.3d 900, 145 Idaho 958, 969-70 (2008) (LLU-PA does not allow judicial review unless a permit is involved).

²² As to a County’s ability to rezone two parcels on one application, “a declaratory judgment action is an appropriate proceeding for making such judicial determination.” *Ciszek v. Kootenai County Bd. of Com’rs*, 151 Idaho 123, 130, 254 P.3d 24, 31 (2011); see *Burns Holdings, LLC v. Madison County Bd. of County Comm’rs*, 147 Idaho 660, 664, 214 P.3d 646, 650 (2009) (rezone not entitled to a direct administrative appeal may be the subject of a declaratory judgment action); *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 962, 188 P.3d 900, 904 (2008) (downzoning decision is subject to judicial relief in an independent action). Presumably, a code violation enforcement action could be challenged by collateral suit too.

²³ *Parsons v. Idaho State Tax Comm’n*, 110 Idaho 572, 576, 716 P.2d 1344, 1348 (Ct.App.1986) (“A targeted taxpayer must receive notice and a reasonable opportunity to be heard”); *Londoner v. Denver*, 210 U.S. 373, 386, 28 S.Ct. 708, 714, 52 L.Ed. 1103, 1112 (1908); see *In re Jerome County Bd. of Com’rs*, 281 P.3d 1076, 1089, 153 Idaho 298, 311 (2012) (“When a relevant statute requires specific notice and hearing requirements for a possible effect of a zoning law on property rights, or in some instances

merely where a body gives such notice and hearing, the action is said to be quasi-judicial in nature. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). The notice and hearing thus becomes necessary for due process, and such requirements may not be dispensed with.”)

²⁴ Idaho Code § 67-6512; Subsection 10-2-1(C)(1)(d),(i),(j),(k), Kootenai Co. Ordinance No. 394 (12-14-06) (Required public hearing process triggers political fights with neighbors).

²⁵ *Id.*

²⁶ *Noble v. Bd. of Comm’rs of Kootenai County*, 148 Idaho 937, 940, 231 P.3d 1034, 1037 (2010); citing *Terrazas v. Blaine County ex rel. Bd. of Com’rs*, 207 P.3d 169, 173-74, 147 Idaho 193, 197-98 (2009).

²⁷ *Knieriem*, 107 Idaho at p. 83, 685 P.2d at p. 824.

²⁸ *Terrazas*, 207 P.3d at p. 181, 147 Idaho at p. 205.

²⁹ Cooley, Thomas M., *A Treatise on the Const. Limitations*, Little, Brown & Co., pp. 36 & 37 (1868) (“State constitutions . . . measure the powers of the rulers, but they do not measure the rights of the governed. [They are] designed for [the peoples’] protection in the enjoyment of the rights and powers which they possessed before the Constitution was made, and [are thus] but the framework of the political government, and [are] necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought . . . It presupposes . . . enough of cultivated intelligence to know how to guard it against the encroachments of tyranny.”)

³⁰ Discussion of the burden of proof in this context is found in the Court’s denial of the petition for rehearing in *Cole-Collister Fire Protection Dist. v. City of Boise*, 468 P.2d 290, 93 Idaho 558, 569 (1970).

³¹ *Moon v. North Idaho Farmers Ass’n*, 96 P.3d 637, 642, 140 Idaho 536, 541 (2004) (Discusses differences between trespass and nuisance); *Payne*

v. Skaar, 127 Idaho 341, 345, 900 P.2d 1352, 1356 (1995) (nuisance); I.C. 52-101, 102, & 107 (statutory nuisance).

³² *Parks v. City of Montgomery*, 92 So.2d 683, 38 Ala.App. 681 (Ala.App. 1957) (Lower court judgment affirmed due to lack of assignments of error being filed on appeal; Ms. Parks guilty of violating Chapter 1, Section 8 of the City Code of Montgomery, Alabama: “she did wilfully refuse or fail to comply with the assignment or reassignment by the officer or agent in charge of a motor vehicle transporting passengers for hire, of a passenger to a division, section or seat on such vehicle designated by such officer or agent for the race to which such passenger belonged.” See General Acts of Alabama of 1947, page 40.)

About the Author

Arthur B. Macomber’s undergraduate degree in business was accomplished at George Fox University. Prior to attending the University of California Hastings College of the Law, he enjoyed 25 years in business, real estate and construction. Mr. Macomber teaches a contracts drafting lab at Gonzaga University School of Law. The Law Office of Arthur B. Macomber is a solo practice in Coeur d’Alene focusing on real property, land use, water and construction law.



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THE PUBLIC UTILITIES COMMISSION - A HUNDRED YEARS OF SERVICE

Don Howell

This article examines the Idaho Public Utilities Commission (Commission or PUC) as it approaches its 100th “birthday” this year. In addition to reviewing the PUC’s history, organization, and authority, three PUC cases are highlighted – each marking an important point in Idaho history and law.

Background and history of the PUC

Prior to the Public Utilities Act’s enactment, competition in the electric power industry was chaotic with utilities erecting duplicated service lines and engaging in cutthroat pricing.¹ Rate wars between competing electric companies were happening all across the United States as well as in Idaho. As Susan Stacy explained in the “History of Idaho Power Company,” in Idaho:

Each [electric] company had different rates, and even within one company rates were not necessarily standard. Towns paying the higher rates called them discriminatory.” Rational connections between the rates and actual cost of delivering power to various classes of customers were hard to find.

[Moreover], electric companies raised or lowered their rates without notice, reinforcing complaints about discrimination and unfair treatment. Rate schedules were not necessarily made available to the public. The most fundamental mystery about the rates was that the public had no way of knowing how much money a power company had invested in its production and distribution system, and therefore had no way to evaluate the fairness of rates.²

In January 1913, then-Governor John M. Haines announced that “the time has come” to create a public utilities commission.³

The Legislature’s review and debate about creating a utilities commission consumed more hours “than any other single issue in 1913.”⁴ Finally, on March 13, 1913, Governor Haines signed into law the “Public Utilities Act.”⁵ The Act created the three-member Public Utilities Commission which was “vested with power and jurisdiction to supervise and regulate every public utility in the State.”⁶ The Act provided that every public util-

The Public Utilities Act permitted the Commission to adopt “rules of practice and procedure” and further provided that the Commission would not be bound by the “technical rules of evidence.”²⁸

ity shall furnish and maintain such service and facility “as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and shall be in all respects adequate, efficient, just and reasonable.”⁷ In addition to regulating utility services, the PUC also regulates the rates for such utility services by balancing the needs of both the consumers and the utility corporation.⁸

The Public Utilities Act became effective on May 8, 1913.⁹ After receiving more than 75 applications for the commissioners’ positions, Governor Haines appointed J. A. Blomquist, A. P. Ramstedt, and D. W. Standrod as the first three commissioners.¹⁰ The commissioners are appointed by the governor, confirmed by the senate, and serve staggered six-year terms.¹¹ Every two years the commissioners elect one of the three members to be president of the Commission.¹² In its first 100 years, the PUC has had 41 commissioners, including one commissioner appointed twice.¹³ The shortest Commission tenure was about six weeks and the two longest serving commissioners have served more than 21 years.¹⁴

The PUC’s authority: What is a ‘Public Utility’?

The definition of what constitutes a “public utility” has expanded and contracted over the last 100 years as the utility industries have changed.

In addition to the existing utilities that currently provide service to customers within Idaho (electric, natural gas, telephone, and water utilities), the 1913 Act gave the PUC regulatory authority over railroads, pipelines, telegraph companies, the transportation of property or passengers by “vessels operating upon the waters of this State,” and the operation of docks, wharfs, and warehouses.¹⁵

In 1929, the Legislature enacted the Motor Carrier Act which authorized the

Commission to regulate “motor carriers transporting passengers and property within the State.”¹⁶ However, with the growth of competition in the trucking industry in the latter twentieth century, Congress preempted the states’ intrastate regulation of trucks and buses.¹⁷ The Idaho Legislature subsequently repealed the Motor Carrier Act in 1999.¹⁸

Airline regulation was added in 1969 but was later preempted by Congress.¹⁹ The PUC’s authority over railroad rates and services was also preempted by Congress.²⁰ More recently, the Legislature updated the scope of the Public Utilities Act by deleting the regulation of telegraph companies and water vessels.²¹

Telecommunications regulation has also changed over time. In 1988, the Idaho Legislature enacted the Idaho Telecommunications Act with the purpose of implementing “a balanced program of regulation and competition.”²² The Commission was prohibited from regulating the emerging communication technologies of paging, cable television, and cellular telecommunications.²³ In addition, the 1988 Act restricted the Commission from setting the rates for intrastate long-distance telephone service or local telephone service to businesses with more than five telephone lines.

As newer technologies reduced the operating costs of telecommunications services and expanded the availability of cellular, cable, and Internet-based telephones, these technologies resulted in more competition to traditional land-line telephone service. This increased competition prompted the Legislature to further limit the Commission’s authority of setting rates for most telecommunications services.²⁴

However, the Commission continues to have regulatory authority over the “non-economic” aspects of telecom-

munications service, “including, but not limited to, such matters as service quality standards, provision of access to carriers providing [long-distance] service, filing a price list, customer notice and customer [protection] rules.”²⁵

The PUC today

Today, the Commission regulates four electric utilities, three natural gas utilities, about 20 local wireline telephone companies, about 100 competitive local exchange telephone companies, approximately 200 long-distance telephone companies, 30 water utilities, three pipelines, and seven railroads. The Commission does not regulate utility services offered by municipal, cooperative, or non-profit entities.²⁶ The Commission employs a professional staff of approximately 50 persons including engineers, rate analysts, accountants, consumer investigators, economists, policy analysts, safety inspectors, and other support personnel. The Idaho Attorney General represents the PUC and has assigned five deputies to the Commission.²⁷

The Public Utilities Act permitted the Commission to adopt “rules of practice and procedure” and further provided that the Commission would not be bound by the “technical rules of evidence.”²⁸ Consequently, the Commission issued its first Rules of Practice and Procedure which became effective on June 1, 1913.²⁹ Because the Commission has operated under its own Rules of Procedure for nearly 100 years, its cases are exempt from the contested case provisions of the Idaho Administrative Procedures Act.³⁰

Any person (not just parties) aggrieved by a final order of the Commission may petition the Commission within 21 days to reconsider its order.³¹ The Commission then has 28 days to “determine whether or not it will grant such reconsideration, and make and enter its order accordingly.”³² Parties aggrieved by a final Commission order must exhaust their administrative remedy by seeking reconsideration before appealing to the Idaho Supreme Court.³³ Appeals from the Commission’s final reconsideration orders go directly to the Idaho Supreme Court.³⁴

Certificates of public convenience and necessity

Besides the Commission’s authority over utility rates, one of its other key regulatory tools is the ability to regulate competition between similar utilities by regulating the service areas for utilities. In particular, the Public Utilities Act provides that utilities are prohibited “hence-

*In Idaho Power & Light Co. v. Blomquist, a 2-1 majority of the Idaho Supreme Court found that the Act was constitutional and that the Commission had the authority to restrict competition.*³⁸

forth” from constructing facilities “without first obtaining from the Commission a certificate that the present or future public convenience and necessity require or will require such construction. . . .”³⁵ One Idaho district court has held that a utility must obtain a “CPCN” before beginning the construction of a utility system.³⁶ Although the Commission has been involved in more than 100 reported Idaho Supreme Court opinions, the requirement to obtain a CPCN contributed to several integral decisions, including the first legal test of the Public Utilities Act and the prohibition of a coal-fired power plant in the Treasure Valley.

The Blomquist appeal

In November 1913, two complaints were filed with the Commission asserting that the Idaho Power & Light Company (Idaho Power) had not obtained a CPCN to serve the cities of Twin Falls and Pocatello. The Commission convened a proceeding and issued two orders in February 1914 finding that Idaho Power was required to obtain a CPCN. Consequently, the Commission ordered Idaho Power to “immediately desist and refrain from further constructing any [facilities] and refrain from furnishing electric service to the cities.”³⁷ Idaho Power filed for reconsideration which was denied.

On appeal to the Idaho Supreme Court, Idaho Power challenged whether the Commission has the authority to restrict competition between/among utilities and whether the Public Utilities Act was an unconstitutional delegation of power to the PUC. In *Idaho Power & Light Co. v. Blomquist*, a 2-1 majority of the Idaho Supreme Court found that the Act was constitutional and that the Commission had the authority to restrict competition.³⁸

Finding that the legislature is empowered to restrict competition under its police powers,³⁹ the *Blomquist* majority declared that when private property is devoted to a public use...

The law is well settled that all property is held subject to the power of the state to regulate or control its use in order to secure the general safety, health, and public welfare of the people, and that, when a corporation is clothed with the rights, powers and franchises to serve the public, it becomes in law subject to governmental regulation and supervision.

There is nothing in the [Idaho] Constitution that prohibits the legislature from enacting laws prohibiting competition between public utility corporations, and the Legislature of this state no doubt concluded that a business like that of transmitting electricity . . . must be transacted by a regulated monopoly, and that free competition between as many companies or as many persons as might desire to put up wires in the streets is impracticable and not for the best interest of the people.⁴⁰

The Court observed that our Legislature and at least 43 other states had concluded that competition between utility corporations is unreasonable and not in the public interest.⁴¹

The Court noted that competition between public utility corporations led to rate wars where each company tries to get an advantage over or destroy the other – usually by cutting rates. By regulating utility rates, the Commission limits the “economic waste” which occurs when utilities provide duplicate services. “It is for the benefit of the public that the highest efficiency be obtained from a public utility and that it serve the public at the lowest cost, and such an end cannot be reached if the community is served by duplicate plants.”⁴² The Court also observed that the Commission has the power to “compel the utility company to give good service for reasonable compensation.”⁴³ In setting utility rates, the rate to be de-

terminated by the Commission in each case “is a reasonable rate – a rate fair to both the consumer and the supplier.”⁴⁴

Turning to the issue of unconstitutional delegation of authority to the Commission, the majority found that there “is nothing in that contention. That question has been settled definitely against the contention of [the utility] by the decisions of many courts.”⁴⁵

The Court observed that because the legislature is not in session full time, there is a strong argument in favor of the delegation of power to a full-time commission under laws established by the legislature. “It would not be possible for the Legislature in the length of time it sits to regulate intelligently the rates, service and other matters which need regulation in connection with utility corporations.”⁴⁶ Once the Legislature has declared that all rates must be reasonable, “the authority to determine what is reasonable is purely administrative, and can be delegated, and was delegated in our public utilities act to the commission.”⁴⁷

Thus, the Idaho Supreme Court upheld the Commission’s authority to regulate competition between utilities as well as set utility rates.

Pioneer Power Plant

The power of the Commission to issue a CPCN also played a role in 1974 when Idaho Power Company petitioned the Commission to build a coal-fired power plant in Ada County, 26 miles south of Boise at a location named Orchard. In November 1974, Idaho Power filed an application requesting authority to build a large power plant known as “Pioneer.”⁴⁸ At that time, the population in Idaho Power’s service area was increasing at an average rate of about four times the national average.⁴⁹ In addition, Idaho Power forecasted that the electric loads for its four classes of customers (residential, commercial, industrial, and irrigation) would continue to increase.⁵⁰ Thus, the utility forecasted a need for a large generating facility to meet its projected load by 1982.⁵¹

Idaho Power’s application for a CPCN was “extremely controversial and [was] a subject of robust debate among the residents of southern Idaho.”⁵² The application was supported by agricultural groups, the Idaho Association of Commerce and Industry, the Idaho Society of Professional Engineers, Bonneville Power Administration, and the State AFL-CIO.⁵³ The opposition included consumer groups, the Ada County Medical Society, various Ada

By regulating utility rates, the Commission limits the “economic waste” which occurs when utilities provide duplicate services

County governments, and environmental groups.⁵⁴ The Commission’s formal record contained more than “5,000 pages of testimony, including evidence presented by the governor, legislators, and other public officials. Governor Cecil D. Andrus was the last witness to testify and he was “adamantly opposed to the construction of the coal-fired plant at the proposed site,” urging the Commission to deny Idaho Power’s application.⁵⁵

On September 17, 1976, the Commission issued Order No. 12663, denying the utility’s application for a CPCN to build the Pioneer project. The PUC’s order addressed two primary issues.

First, the Commission found that the evidence indicated that the cost estimate to construct the Pioneer plant would exceed the value of Idaho Power’s “plant in service.”⁵⁶ Adding the estimated cost of Pioneer to other already-approved construction projects would have resulted in estimated construction costs for Idaho Power and its ratepayers of more than \$1.787 billion between 1975 and 1985.⁵⁷ The Commission found that this “staggering cost” of construction would require “prompt, frequent and substantial rate increases.”⁵⁸

The Commission determined that if Pioneer was constructed as proposed, Idaho Power’s electric rates “would likely increase in excess of 12 percent a year . . . [which would result in] a doubling of rates in seven years.”⁵⁹

Despite these staggering costs, the Commission conceded that the utility would need to increase its generating capacity by 1982 or 1983 to accommodate the projected growth. The Commission acknowledged that its discussion about the significant rate impacts was to illustrate the dilemma between “the economic cost of constructing the Pioneer plant [and] the economic cost of not having adequate supply of electrical energy.”⁶⁰ The

cost of not having sufficient energy was “incapable of calculation.”⁶¹

Second, the Commission declared its primary reason for denying the CPCN application was that it was “not satisfied that the [Pioneer] plant is environmentally and ecologically acceptable in the proposed location.” If the growth and demand for electricity continues as forecasted, the Commission observed that the Company would need additional generating resources but declared that “it must be at a site other than Orchard.”⁶²

The Commission found that Pioneer’s projected effect on air quality was significant. The Commission noted that air pollutants emitted by the plant would include sulfur dioxide, sulfates, oxides of nitrogen, suspended particulates, and fluorides.⁶³ Consequently, the Commission found that the Orchard site is unacceptable “because of its proximity to the state’s most populous and fastest growing region.”⁶⁴

In 1978, Idaho Power withdrew its Pioneer application and continued with its previous plans to increase its electric capacity at its hydroelectric generating facilities.⁶⁵ In addition, the utility subsequently contracted with other electric utilities to acquire coal-fired generation in Wyoming, Nevada, and Oregon.⁶⁶ Not mentioned in the Commission’s order was the fact that an advisory referendum about the Pioneer plant was placed on the May 1976 primary ballot in Ada, Canyon, and Elmore Counties. A majority of voters in all three counties urged the Commission to deny the Pioneer CPCN by 56% of voters in Ada County, by 60% in Canyon County, and by 80% in Elmore County.⁶⁷

Given the denial of Idaho Power’s CPCN application, the utility’s ratepayers were spared from years of double-digit rate increases and residents of southern Idaho were not exposed to the environmental effects of the proposed coal plant.

Water rights adjudication: The Swan Falls complaint

Although the Commission does not have regulatory authority over water rights, a ratepayer complaint filed at the Commission precipitated a major turning point in Idaho water law and led to the adjudication of water rights in the Snake River Basin over a period of more than 25 years.

Before the Commission issued its *Pioneer* decision, Matthew Mullaney⁶⁸ and 31 other Idaho Power ratepayers filed a complaint at the Commission against Idaho Power in June 1977. The ratepayers claimed that the utility had failed to protect its hydropower water rights at the Swan Falls dam from depletion by increased irrigation usage, resulting in Idaho Power “wast[ing] its assets and overstat[ing] its capital investment, thus resulting in overcharges to its ratepayers.”⁶⁹ At the time, most of Idaho Power’s electricity was generated by its hydro-facilities. Idaho Power filed a motion to dismiss asserting that the Commission lacked jurisdiction over the subject matter of the complaint. The Commission denied the motion and Idaho Power subsequently answered the complaint by indicating it would file an action in state district court against “applications for water permits [which] were then pending before the Idaho Department of Water Resources.”⁷⁰ Idaho Power’s district court action named as defendants the PUC, the Department of Water Resources, numerous canal and irrigation companies, individual irrigators, and the 32 ratepayers who initiated the complaint at the PUC.⁷¹

In 1979, the district court held that the water right subordination language in Idaho Power’s downstream Hells Canyon license issued by the then-Federal Power Commission (FPC) subordinated all of Idaho Power’s water rights on the Snake River including those it held at the Swan Falls dam. Unlike Hells Canyon, the Swan Falls license issued by the FPC did not include any subordination language.⁷² As later explained by the Idaho Supreme Court, the district court held that the subordination language in the Hells Canyon license “had subordinated all of Idaho Power’s water rights used in hydro power production at all of its facilities on the entire Snake River water shed,” including Swan Falls.⁷³

On appeal, the Idaho Supreme Court overruled the district court and held that the subordination language in the Hells Canyon license only applied to the three dams in the Hells Canyon complex.⁷⁴ The

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were spared from years
of double-digit rate increases.*

Court found that Idaho Power’s water rights at its Swan Falls dam were vested in the early part of the twentieth century.⁷⁵ The Court remanded the case to the district court to determine whether Idaho Power had abandoned or forfeited its water right.⁷⁶

After the Idaho Supreme Court issued its first *Swan Falls* opinion in 1982, the Legislature in 1983 enacted Idaho Code § 61-540 authorizing the governor or his designee to negotiate with Idaho Power to resolve the Swan Falls dispute.⁷⁷ Representatives of Idaho Power, Attorney General Jim Jones, and Governor John V. Evans began negotiating to see if a settlement among the various factions could be reached. In what came to be known as the “Swan Falls Agreement” the parties agreed to settle the dispute. Some of the key elements of the Agreement included: establishing flows at the Swan Falls dam; dropping Idaho Power’s suit against junior water uses; surrendered water rights by Idaho Power would be placed in trust; Congress would ratify the Agreement and the successor to the FPC (the Federal Energy Regulatory Commission) would utilize the Agreement in its licensing activities; and finally, the state would begin an adjudication of water rights in the Snake River Basin.⁷⁸ The adjudication may soon come to an end in 2013 after settling more than 150,000 water right claims since 1987.⁷⁹

While the PUC’s involvement in the Swan Falls dispute ended in 1983, the initial ratepayer Complaint filed at the PUC led to the Snake River Basin Adjudication (SRBA) and what Chief Justice Roger S. Burdick described as “Idaho’s most complex civil case.”⁸⁰ He also observed that the SRBA serves as a “procedural model” for other states throughout the nation.⁸¹

Summary

Although the scope of the Public Utilities Commission’s authority has changed

over the course of the last 100 years, the Commission continues to serve the public interest. The three cases discussed above demonstrate the scope of the Public Utilities Act and its far-reaching effects on Idaho’s ratepayers and citizens. Over the years the Commission has strived to balance the competing interest of ratepayers receiving adequate utility services at fair and reasonable rates, with utilities receiving adequate compensation to finance their operations. This challenge continues into the Commission’s second century.

Endnotes

¹ Susan M. Stacy, *Legacy of Light – A History of Idaho Power Company* at 26, 35 (1991) (*hereinafter Stacy*).

² *Id.* at 35-36.

³ *Id.* at 37.

⁴ *Id.*

⁵ 1913 Sess. Laws, ch. 61, § 1.

⁶ *Id.* § 29.

⁷ *Id.* at § 12(b).

⁸ *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, 243, 141 P.1083, 1089 (1914).

⁹ *Blomquist*, 26 Idaho at 233, 141 P. at 1085.

¹⁰ *Stacy supra* n.1.

¹¹ *Idaho Code* § 61-201.

¹² *Idaho Code* § 61-203.

¹³ Commissioner Paul Kjellander served as a Commissioner in 1999-2007 and is currently serving as president of the PUC.

¹⁴ Commissioner Matthew Mullaney served the shortest period in Jan.-Feb. 1977. Ralph H. Wickberg served about 22 years and Marsha H. Smith has currently served for more than 21 years. Her current fourth term expires in 2015.

¹⁵ 1913 Sess. Laws, ch. 61, § 2.

¹⁶ 1929 Sess. Laws, ch. 267.

¹⁷ ICC Termination Act of 1995, 109 Stat. 899 (1995).

¹⁸ 1999 Sess. Laws, ch. 383, § 13 (repealing the Idaho Motor Carrier Act, Idaho Code, Title 61, Chapter 8).

¹⁹ The Idaho Air Carrier Act, 1969 Sess. Laws, ch. 197 (codified at *Idaho Code* § 61-1101 *et seq.*) was preempted by the Airline Deregulation Act, 92 Stat. 1750 (1978) (codified at 49 U.S.C. 1305(a)(1)). See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992).

²⁰ Staggers Rail Act of 1980, 94 Stat. 1895 (codified in scattered sections at 49 U.S.C. § 10101 *et seq.*); *Interstate Commerce Commission v. Texas*, 479 U.S. 450, 107 S.Ct. 787 (1987).

²¹ 1982 Sess. Laws, ch. 5, § 1 (repealing *Idaho Code* § 61-122, 61-123 defining telegraph line and telegraph corporation); 2010 Sess. Laws, ch. 167, § 1

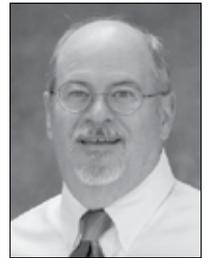
(deleting water vessels). Also, the Commission no longer regulates docks, wharfs and warehouses.
 22 1988 Sess. Laws, ch. 195, § 1, 2 (codified at *Idaho Code* §§ 62-602(1) and 61-121(1), respectively).
 23 *Id.* (codified at *Idaho Code* § 62-603(14)).
 24 *Idaho Code* § 62-622(2), (3).
 25 *Idaho Code* § 62-622(5).
 26 *Idaho Code* § 61-104.
 27 1913 Sess. Laws, ch. 61, § 4 (codified at *Idaho Code* § 61-204).
 28 *Id.* at § 49 (codified at *Idaho Code* § 61-601).
 29 Annual Report of the PUC at 239 (July 1, 1914); IDAPA 31.01.01.
 30 *Idaho Code* § 67-5240.
 31 *Idaho Code* § 61-626(1).
 32 *Idaho Code* § 61-626(2).
 33 *Idaho Code* § 61-627; *Rosebud Enterprises v. Idaho PUC*, 128 Idaho 624, 917 P.2d 781 (1996); *Key Transp. v. Trans Magic Airlines*, 96 Idaho 110, 524 P.2d 1338 (1974).
 34 Idaho Const. Art. V, § 9; *Idaho Code* §§ 61-627, 61-629.
 35 1913 Sess. Laws, ch. 61, § 48 (codified at *Idaho Code* § 61-526).
 36 *Memorandum Decision*, Case No. CVOC 0708918 at 10 (Mar. 10, 2008)(located in PUC Case No. MSW-W-08-01).
 37 Case Nos. F-15 and F-20 (Feb. 18, 1914) (reprinted in the PUC's First Annual Report at 102, 128, respectively (July 1, 1914)).
 38 26 Idaho 222, 141 P. 1083 (1914).
 39 *Id.* at 241-42, 141 P. at 1088.
 40 *Id.*
 41 *Id.* at 250, 141 P. at 1092.
 42 *Id.* at 245, 114 P. at 1090.
 43 *Id.* at 246, 114 P. at 1090.
 44 *Id.* at 243, 114 P. at 1089.
 45 *Id.* at 253, 114 P. at 1092.

46 *Id.* at 254, 114 P. at 1093.
 47 *Id.* at 255, 114 P. at 1093.
 48 IPUC Order No. 12663 at 2 (Sept. 17, 1976) (maintained in the PUC offices).
 49 *Id.* at 6.
 50 *Id.*
 51 *Id.* at 8.
 52 *Id.* at 3.
 53 *Id.* at 1; *Stacy supra* n.1 at 185.
 54 IPUC Order No. 12663 at 1-2; *Stacy supra* n.1 at 180-85. Ms. Stacy was the named representative for the Ada Council of Governments which represented an association of local elected officials. Order No. 12663 at 1; *Stacy* at 183.
 55 *Stacy supra* n.1 at 188.
 56 Order No. 12663 at 11-12.
 57 *Id.* at 12.
 58 *Id.* at 12 citing *Tr.* at 438.
 59 *Id.* at 12-13.
 60 *Id.* at 14.
 61 *Id.*
 62 *Id.*
 63 *Id.* at 16.
 64 *Id.* at 18.
 65 *Stacy supra* n.1 at 189.
 66 *Id.*
 67 *Stacy supra* n.1 at 188.
 68 *See supra* n.15.
 69 *Idaho Power Company v. State Dept. of Water Resources*, 104 Idaho 575, 582, 661 P.2d 741, 748 (1983).
 70 *Id.*
 71 *Id.*
 72 *Id.* at 582-83, 661 P.2d at 748-49.
 73 *Id.* at 583, 661 P.2d at 749.
 74 *Id.* at 586, 661 P.2d at 752.
 75 *Id.*
 76 *Id.* at 589-90, 661 P.2d at 755-56.

77 1983 Sess. Laws, ch. 259, § 2. The Legislature also enacted *Idaho Code* § 61-539 which prohibited the PUC from exercising any jurisdiction regarding "the failure or refusal of an electric corporation to protect its hydro power water rights from depletion or loss."
 78 *Stacy supra* n.1 at 200-203; *Idaho Power Company v. Idaho Dept. of Water Resources*, 151 Idaho 266, 269, 255 P.3d 1152, 1155 (2011); Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A New Look at the Historical, Legal, and Practical Dimensions of Idaho's Biggest Water Right Controversy*, 28 Idaho L.Rev. 573 (1992). The interested reader may also want to review many of the other Law Review and *Advocate* articles addressing this subject.
 79 http://www.isc.idaho.gov/press_releases/state_of_the_judiciaryTEXT_2012.pdf.
 80 *Id.* at 3.
 81 *Id.*

About the Author

Don Howell is a Deputy Attorney General in the Idaho Attorney General's Office and has been assigned to represent the Public Utilities Commission since 1986. The views and opinions within the article are the author's own and should not be imputed to the Attorney General, the Office of the Attorney General, or the Idaho Public Utilities Commission in any way.



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2013 LEGISLATIVE OVERVIEW: A PEEK AT THE HOT-BUTTON ISSUES

Jeremy Chou
Emily McClure

Following months of campaigning, Idaho's recent legislative elections went mostly as expected. Even with a large number of legislators retiring and the impact of redistricting, there were few surprises in the legislative races, and the split between Republicans and Democrats remained the same. The biggest change will be the large number of first-time legislators — there are 32 elected legislators who have never served. Add to that two newly elected legislators who served several years ago (Senator Brandon Durst and Representative John Gannon); and eight House members who moved over to the Senate from last session. In total, 42 members of the legislative body are new from the last session.

A change in leadership, a change in approach?

At the organizational session held on December 6 and 7, 2012, the House and Senate elected its respective legislative leadership and made committee assignments. Generally, leadership elections are intensely personal and private decisions that are made in secret. There is no vote tabulation announced and no opportunity to observe the process; thus, we can only speculate on what motivated the decisions. Probably the most noteworthy change occurred in the House where, for the first time in 30 years, a leader of one of the Houses was replaced by election rather than retirement. The last time was in 1982 when Senator Jim Risch (Boise) ousted Senator Reed Budge (Soda Springs) as Senate President *Pro Tem*.

This time, it was in the House where Representative Scott Bedke (Oakley), formerly the Assistant Majority Leader, was chosen to replace Representative Lawrence Denney (Midvale) as Speaker. Bedke is projecting himself as an inclusive leader — giving committee chairmanships not only to Representative Denney (the important House Resources Committee) but also to other senior members who had supported Representative Denney.

Rounding out House leadership is Representative Mike Moyle who remains the Majority Leader, Representative Brent Crane as Assistant Majority Leader, and Representative John VanderWoude as House Caucus Chair. Notably, both Representatives Crane and VanderWoude are from Nampa. With the organizational ses-



sion completed, 50% of the House committees will have new chairmanships.

The Senate saw challenges to leadership at the three lower positions, but all were rebuffed. The Senate leadership remains unchanged with Senator Brent Hill as the President *Pro Tem*, Senator Bart Davis as Majority Leader, Senator Chuck Winder as Assistant Majority Leader, and Russ Fulcher as Senate Caucus Chair. Notable chairmanship moves include Senator Patti Ann Lodge as the new Chair of Judiciary and Rules, and Senator Jeff Siddoway chairing Local Government and Taxation.

Personal property tax

Framed as the defining issue of the First Session of the 62nd Legislature, elimination of the personal property tax will potentially make adversaries of business and local government. Thus far, industry has indicated that personal property taxes are among its top priorities, according to the Idaho Association of Commerce and Industry (IACI). But counties have indicated that the loss in revenue will have to be replaced by some other means. In his State of the State speech, Governor Otter seemed to indicate support of local option taxes as a revenue replacement. However, will this solution meet the needs of local government and pass muster in a Legislature that is markedly skeptical of new taxes in any form?

Notable chairmanship moves include Senator Patti Ann Lodge as the new Chair of Judiciary and Rules, and Senator Jeff Siddoway chairing Local Government and Taxation.

Health insurance exchange

Another issue that has dominated Idaho's headlines is the state's determination of whether to create a state-run Health Insurance Exchange, or not to act and defer to a federally-created and managed exchange. This remains a question because of dedicated opposition to the Obamacare legislation, upheld by the U.S. Supreme Court. Governor Otter recommended adoption of a state exchange, but the Legislature remains skeptical of such an approach. He has postponed making a

decision to dramatically expand Medicaid services to those who can't afford insurance, another aspect of the Affordable Health Care Act.

Education reform

This past November saw the rejection of the Students Come First legislation from the 2011 Legislative Session. The education reform package was rejected in its entirety at the ballot box. This rejection created tension because the laws had been in effect for approximately one and one-half years, prior to their repeal. At a minimum, intervening amendments as well as the reconstitution of the law prior to adoption of the reform will be needed to insure consistency within the law. Among issues that the Legislature will likely need to address is the school funding formula, whether to continue to offer an early retirement incentive for teachers, pay for performance, and other components affected by the Students Come First legislation.

Mental health reform?

We have heard of some of the big ones: health exchange, personal property tax and education reform. Some of the lesser-known efforts this year will include increased attention to mental health and substance abuse issues in Idaho. Governor Otter has proposed a new secure mental health facility to be added to the state's prison complex.

A 2009 study showed that Idaho's public mental health system provided services to only 16 percent of adults who live with serious mental illness in this state. See National Institute of Mental Health, "Suicide in the U.S.: Statistics and Prevention," 2009. Coupled with the recent tragedy in Connecticut, there will be a concerted effort to address mental health services this year. Watch for increased funding for mental health programs and funding for a new 579-bed secured mental health facility in Idaho.

Miscellaneous issues

In addition to the emphasis on mental health, Speaker Bedke is working to revise the ethics rules to include the creation of a formal legislative ethics committee. This will be a bipartisan effort that may involve both houses of the Legislature. Other, less-publicized efforts will include whether Idaho will follow in the footsteps of Washington state in privatizing the sale of liquor, local option tax and expanded funding for the University of Idaho's law school program in Boise. Governor Otter has also indicated that he is seeking addi-



tional medical seats for Idaho students as well as increased medical residencies to address Idaho's shortage of medical doctors.

A Substantive Session

For the past several years, Idaho's budget has dominated the discussion within the legislature. But, as discussed above, it appears that this year's session may elevate substance in the form of laws. Governor Otter has increased the budget by 3.1%, while continuing to replenish rainy day and reserve funds.

About the Authors

Jeremy Chou is part of the Givens Pursley lobbying team. His background includes opening the first Washington D.C. Office of the Governor for the State of Idaho and working at the Office of the Attorney General, Civil Litigation Division. Jeremy has advised the Idaho State legislature on a number of issues including gambling and procurement issues, and has represented state entities in litigation.



Emily McClure is an attorney and lobbyist with Giv-



ens Pursley. Before joining the firm she clerked for the Honorable Stephen S. Trott and was a legislative assistant to Senator Mike Crapo in Washington, D.C., where she advised on issues including education, labor, and health care.

Among issues that the Legislature will likely need to address is the school funding formula, whether to continue to offer an early retirement incentive for teachers, pay for performance, and other components affected by the Students Come First legislation.

Profile glance: Attorneys in the 2013 Legislature

With the large number of new legislators, many will look to fellow legislators that are also attorneys for advice. These legislator-attorneys include:

Senate Majority Leader Bart Davis (R, 8th Term)

Senator Davis has represented District 13, Idaho Falls, in the legislature since 1998. He has been selected again by his fellow senators to serve as Senate Majority Leader for the 2013 Legislative Session in part for his expertise with parliamentary procedure and in part for his reputation for maintaining civility and mutual respect amongst conflicting voices. Senator Davis graduated from Brigham Young University in 1978 and received his J.D. from the University of Idaho in 1980. His practice with Bart M. Davis Law Office focuses on construction, real property, business and commercial law, including bankruptcy.



Bart Davis

He was Lawyer Representative to the Ninth Circuit Judicial Conference, served 11 years on the Bankruptcy Court Rules Committee and is a founding member and past chairman of the Commercial Law and Bankruptcy Section. He has also served as one of Idaho's lawyer representatives to the National Conference of Commissioners on Uniform State Laws. Senator Davis sits on State Affairs and Judiciary and Rules Committees.

Senator Curt McKenzie (R, 6th Term)

Curt McKenzie graduated in the top 10 percent of his class from Georgetown University Law Center in 1995 after receiving a bachelor's degree from Northwest Nazarene University. After practicing intellectual property law for a Washington, D.C. firm, he returned to Idaho, where he

became a deputy prosecuting attorney and eventually formed his own firm, McKenzie Law Offices, PLLC. His practice focuses on criminal defense, immigration and trademark/intellectual property.

McKenzie was elected to the Senate in 2002 and represents District 13. Senator McKenzie is Chairman of the State Affairs Committee and sits on the Local Government and Taxation Committee. He is also an avid skydiver.

Senator Jim Rice (R, 1st Term)

Jim Rice grew up in Idaho and graduated from Melba High School. He attended Brigham Young University and thereafter received his law degree from William Howard Taft University in California. He was admitted to the Idaho Bar in 2002. His practice with Means Morriss & Rice, PLLC, focuses primarily on family law and Chapter 7 bankruptcy in both Idaho and California. Rice was appointed by Governor Otter to fill the District 10 Senate seat in March 2012. Senator Rice is Vice Chair of Local Government and Taxation and sits on the Transportation Committee.



Curt McKenzie

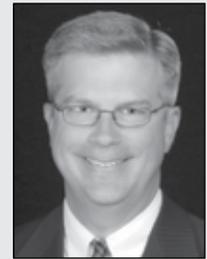


Jim Rice

Senator Todd Lakey (R, 1st Term)

Todd Lakey is serving his first term as the Senator for District 12, in Caldwell. He served as Canyon County Commissioner from 1999-2004 and left to cover the law practice of a member of his military unit who was deployed to Afghanistan. Lakey is a Major in the United States Army

Reserves, Judge Advocate General Corps. He graduated from Brigham Young University in 1990 with a bachelor's degree and received his J.D. from Lewis and Clark Northwestern School of Law in 1993. During law school, Lakey was a member of the Cornelius Honor Society and the Moot Court Honor Board. He is a founding partner at Borton-Lakey Law Offices, located in Meridian. His practice focuses on real estate and business. Senator Lakey sits on Commerce and Human Resources, Health and Welfare and Judiciary and Rules Committees.



Todd Lakey

Representative Lynn Luker (R, 4th Term)

Lynn Luker is a fourth generation Idahoan and has served in the House of Representatives as a Republican from District 15A, Boise, since 2006. He received a bachelor's degree from University of California at Berkeley in 1977 and a J.D. from University of Idaho in 1980, where he was Editor-in-Chief of the Idaho Law Review. After law school, Luker clerked for Chief Justice Robert E. Bakes. Representative Luker is a practitioner at Lynn M. Luker PA. He focuses primarily on worker's compensation, injury and disability law. Luker has been certified as a Workers' Compensation Specialist by the Idaho Trial Lawyers and Idaho State Bar since 1995. He is Martindale-Hubbell AV. Luker is active in the Idaho State Bar and has served as a member of the Idaho Appellate Rules Committee, Director of the Idaho Trial Lawyers' Workers'



Lynn Luker

Profile glance: Attorneys in the 2013 Legislature

Compensation Committee, Chairman of the Idaho State Bar Workers' Compensation Section, Member of the Governor's Advisory Committee on Worker's Compensation, Chairman of the Idaho Trial Lawyers' Workers' Compensation Specialist Certification Committee and Co-chair of the Idaho Trial Lawyers' Governmental Relations Committee. He is also a trained mediator. Representative Luker is the Vice Chair of Judiciary, Rules and Administration and sits on the Local Government and State Affairs Committees.

Assistant Minority Leader Grant Burgoyne (D, 3rd Term)

Grant Burgoyne was recently elected to his third term in the Idaho House of Representatives as a Democrat from District 16A in Boise. Burgoyne graduated with a bachelor's degree from the University of Idaho in 1975 and received a J.D. from the University of Kansas School of Law in 1988. He is the managing partner at Mauk-Burgoyne in Boise, and his practice focuses on labor and employment, business, construction law, insurance law and personal injury. He is a member of the Idaho State



Grant Burgoyne

Bar, the American Bar Association and the Idaho Trial Lawyers Association. Representative Burgoyne sits on the Judiciary, Rules and Administration, Revenue and Taxation and Ways and Means Committees.

Representative Luke Malek (R, 1st Term)

While 31-year-old Luke Malek is a freshman legislator, he is not new to Idaho politics. Representative Malek was the North Idaho Regional Director for then — Governor Jim Risch, a Deputy Prosecuting Attorney for Kootenai County, and is currently a consultant with Community Links Consulting based in Otis-Orchards Washington. He represents House

Seat 4A. Representative Malek received his bachelor's degree from the College of Idaho in 2004 and in 2010, a J.D. from the University of Idaho. Representative Malek sits on the Health and Welfare, Judiciary, Rules and Administration and Local Government Committees.



Luke Malek

Representative John Gannon (D, 2nd Term)

John Gannon was recently elected as a Democrat to the House of Representatives from District 17A in Boise. Gannon was born in Ross, California and graduated from UC Davis and the University of California's Hastings College of the Law. After law school, he completed the USAR

JAG School and served in the US Army Reserve mostly in a stand-by capacity. Gannon was admitted to practice law in Idaho in 1976 and the Ninth Circuit Court of Appeals in 1989. His practice has

focused primarily on consumer and small business law. Though considered a freshman, Gannon served in the House from 1990-1992. Representative Gannon sits on the Business, State Affairs and Transportation and Defense Committees.

Senator Les Block (D, 3rd term)

Representing District 16, Les Block has integrated community service throughout his career, including serving one term in the Idaho House of Representatives from 2006-2008. He sits on the Health & Welfare, Judiciary & Rules and Transportation Committees.

He received his B.A. and J.D. from the University of California. In his private practice he has served non-profit organizations and served as the Executive Director of the Idaho Human Rights Education Center in Boise.

He received the Idaho State Bar Service Award in 1995 and the Pro Bono Award in 1991. Mr. Bock is also a lifetime fellow of the Idaho Law Foundation. He has written and edited several publications including the Handbook for Idaho Nonprofit Corporations - First, Second and Third Editions.

Representative Ed Morse (R, 1st Term)

From District 2, Ed Morse serves on the Business; Environment, Energy, & Technology; and the Health & Welfare Committees. A member of the Bar, Ed owns a real estate appraisal and consulting firm. Morse graduated from University of Idaho with a B.S. degree and an MBA degree and earned his J.D. from Gonzaga University College of Law.

Representative Vito Barbieri (R, 2nd Term)

From District 2, Vito Barbieri is a retired attorney. He serves on the Business, Local Government and State Affairs Committees. He earned his law degree from Western State University College of Law in Fullerton, California.



Les Block



John Gannon



Ed Morse



Vito Barbieri

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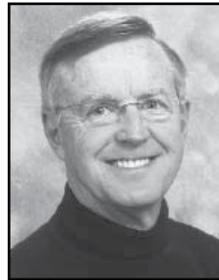
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EMMA COX & THE STAGECOACH: PERSONAL INJURY IN THE 19TH CENTURY

Claudia Druss

This article first appeared in the July, 2010 issue of the Idaho Legal History Society Newsletter.

Emma Cox, a young woman from Silver City, decided to take a free ride on a stagecoach in the fall of 1870. The 18-year-old was not listed as a passenger because she had not paid. The driver offered to let her ride free, up on top with him, as far as the next stage station. During the ride, the stagecoach somehow overturned, and Emma rolled down an embankment, injuring her hip and fracturing her thigh.

Cox was brought to Boise for medical attention. Eventually, Northwestern Stage Company was asked by Cox to pay her medical expenses and the cost of her stay at a Boise hotel, Hart's Exchange. When the company refused to pay, Emma filed suit. Former Idaho Supreme Court Justice John R. McBride, considered to be the best trial attorney in the territory, served as her counsel, seeking damages of \$20,000 on her behalf.

Northwestern Stage was represented by two well-known Boise attorneys who were thought by some to have only moderate courtroom skills: Henry Prickett and H.L. Preston. Judge Joseph R. Lewis presided at the trial in November of 1870.

In court, Cox's attorney graphically illustrated Emma's injuries using the femur and pelvic bones of a Native American woman apparently retrieved from a burial in the Boise foothills. He also tried to have the jury visit Emma in her sickbed at the hotel to see her condition first-hand. Prickett and Preston resisted this move, knowing the damage it could do to their case. They chose instead to accept Emma's written statements about the extent of her injuries.

The stage company sought to prove that Cox was not a paid passenger and had distracted the male driver, thereby causing the accident. However, the jury of mostly single men were said to be clearly sympathetic toward the young woman. She was thought to be very marriageable if she were to receive a large settlement in the case. After several days at trial, the jury awarded Cox the unexpectedly large sum of \$14,000 in damages, an award that was upheld by the Idaho Supreme Court in 1871. Following the Supreme Court decision, Prickett attempted an intricate legal maneuver that involved getting the clerk of the court, Thomas Donaldson, to unlawfully issue a *supersedeas*. Donaldson refused and the ruling stood.

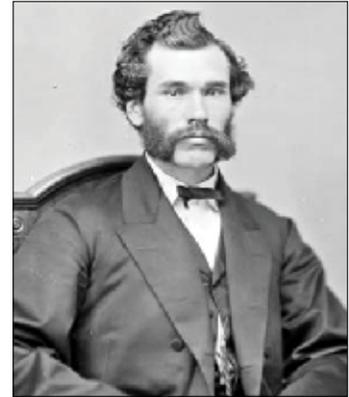


The jury of mostly single men were said to be clearly sympathetic toward the young woman.

Northwestern Stage paid the judgment and Cox's attorneys received half of the sum awarded. The local newspaper reported that Cox quickly spent her share of the settlement purchasing new clothes and jewelry for herself and her friends. Her leg injury did heal, leaving one leg shorter than the other.

One of the jurors later recounted how they had arrived at the amount of damages. They knew Cox had to pay attorney fees, medical costs, and a large hotel bill owed to one of the jurors. So, they took an informal ballot to see how much each juror thought she should get for her injuries. The amounts ranged from \$500 to \$5,000. The jury then agreed to take a final ballot, divide the sum of the balloted amounts by 12 and let the average be the verdict. However, on the second ballot, the jury men changed their numbers dramatically, voting for awards from \$5,000 to \$100,000. These new numbers produced an average of \$14,000, the final amount of the award.

One of the jurors was later reported to say:



Emma Cox's attorney former Chief Justice John R. McBride.

...I wish I had voted for a million dollars damages. I married after the Cox case was settled and have one child and I know that a husband needs all the money his wife might get from a stage company or any other source.

Sources

- *Idaho of Yesterday*, T.C. Donaldson 1941;
- *Idaho Statesman* November 1870, February & March 1871.

About the Author

Claudia Druss is a historical researcher who lives and works in Boise. She is currently researching a book on the history of the legal profession in Idaho for the Idaho Legal History Society.



OSCAR WORTHINE & THE “GREATEST EVENT IN BOISE FOOTBALL”

Ernest A. Hoidal

This article first appeared in the Fall, 2012 issue of the Idaho Legal History Society Newsletter.

“Go, Worthwine, go!” The Chicago crowd of 23,000 fans, half-frozen by cold and snow, leapt to its feet to cheer Oscar Worthwine’s fumble recovery return as the football powers of Cornell and the University of Chicago battled to a 6-6 tie at Marshall Field at the University of Chicago on November 14, 1908. Idaho lawyer Oscar William Worthwine (known as “Worthie” on the U of Chicago team) was born on in 1885 at St. Joseph, Missouri. He was the fourth of five children of William H. Worthwine and Melissa (Hockaday) Worthwine.

Oscar graduated from high school in St. Joseph and enrolled at the University of Chicago where he earned his Bachelor’s of Philosophy and Political

Economics in 1910, as well as his Juris Doctor degree in 1911. At Chicago, the legendary Amos Alonzo Stagg was his football coach. In Stagg’s 1927 autobiography, *Touchdown*, he wrote of Worthwine, “[...]he worked his way through school, won a Phi Beta Kappa key, never missed a practice, a game, a scrimmage in three years and was never hurt.” After the 1909 football season, sportswriters selected Worthwine as the first team fullback for the Western (now Big Ten) Football Conference. Following college, Worthwine headed for Idaho. One of the first lawyers he met in Boise was Branch Rickey who tutored him for the Idaho State Bar examination, which he successfully passed. Worthwine was admitted into practice on December 16, 1911. Rickey was later best known for signing Jackie Robinson as the first black baseball player to play in major league baseball for the Brooklyn Dodgers in 1947. In Idaho, Worthwine taught U.S. History at Boise High School and coached football, girls’ basketball, boys’ basketball, and boys’ track and field for the 1911-1913 seasons. His football coaching record ended with 23 wins, one loss, and one tie while playing Salt Lake, Twin Falls, and Weiser High School teams (imagine those train rides!). On Christmas Day in 1912, the Boise High squad defeated Wendell Phillips High School of Chicago 6-0 in what was said to be the “greatest athletic event in the history of Boise football.” Nearly 2,000 spectators, paying \$1 per ticket, crowded into Cody

Park near Warm Springs and Broadway Avenues (now Dona Larsen Park) to cheer on the local team.

Worthwine joined the firm of Hawley, Puckett & Hawley in 1913 as a clerk and was a partner in the firm of Hawley & Worthwine from 1920 to 1940. He served as the Idaho State Bar’s secretary and was a member of the Idaho Code Commission, a member of the Boise Junior College Board of Trustees (1945-1957), president of the Boise Chamber of Commerce (1938-1939), and chairman of the Boise Chamber of Commerce Committee to select the site of Boise Junior College, now Boise State University. Worthwine formed Bronco Stadium, Inc. to facilitate the building of a 10,500-seat football stadium, which opened at Boise Junior College on September 22, 1950.

After the 1947 football season, Boise Junior College Coach Lyle Smith received a congratulatory letter from Worthwine commending him on his undefeated season. He advised Coach Smith that he did not appreciate uptown coaches giving him advice when he coached at Boise High. Nevertheless, his letter continued for 15 more pages on how the Broncos could do better the next season. In an additional memo to Smith, Worthwine suggested preparing to defend against the use of the “Statue of Liberty” play (2007 Fiesta Bowl, Glendale, Arizona, Boise State University 43–University of Oklahoma 42). Upon Worthwine’s passing in 1960, many prominent Idahoans expressed their praise for an outstanding civic leader. Oscar Worthwine had practiced law for nearly 50 years in Idaho and considered himself “a full Idahoan.” The Idaho Supreme Court formally adopted a resolution of condolence to send to the family:

The passing of Oscar Worthwine is a great loss to the bench and bar and to the people of Idaho,” said Chief Justice Clarence J. Taylor. “We hold much to his long and tireless devotion to the improvement of the administration of justice in the courts of our state.

Gov. Robert E. Smylie said, “His was one of Idaho’s great legal minds and he was a symbol of the highest precepts of the legal profession. His passing is to me and many others a deep personal loss.” A.J. Teske, Secretary of the Idaho Mining Association said, “Mining men throughout Idaho and the Northwest are stunned and saddened by the unexpected death of Oscar W. Worthwine. He was highly esteemed throughout the western mining



Oscar Worthwine in his office in 1949.

industry and widely acknowledged as the dean of mining law attorneys in the state. J.L. Driscoll, Chairman of the Board, First Security Bank of Idaho described him as, “a citizen of unusual stature, one of Idaho’s foremost attorneys of all time, a man of courage and of the highest integrity. Harry W. Morrison, President of Morrison-Knudsen Company, Inc., said,

“Boise loses one of its outstanding citizens in the death of Mr. Worthwine. Calvin Dworshak, President of the Third Judicial District Bar said, “The bar has suffered a great loss in the death of Oscar Worthwine. He was one of the leading workers in the activities of the bar. He was a lawyer’s lawyer.”

Sources:

- Chicago Sunday Examiner, November 1908; Idaho: The Place and Its People, B. Defenbach, 1933;
- Touchdown, A.A. Stagg, 1927; Courier, Boise High School, 1912-1914; Idaho Reports Volume 20;
- Boise State University: Searching for Excellence 1932-1984, G. Barrett, 1984;
- The Idaho Statesman, February 1960.

About the Author

Ernest A. Hoidal, a Boise attorney, is researching Oscar W. Worthwine’s contributions to the state and would appreciate any information regarding Worthwine. Hoidal recognizes Hal Tabb Walker and William Worthwine, grandsons of Worthwine, for their past and continuing invaluable contributions.



JOHN P. GRAY: 20TH CENTURY MINING LAWYER

Scott W. Reed

This article first appeared in the January, 2011, issue of the Idaho Legal History Society Newsletter.

John P. Gray (1881-1939) is Coeur d'Alene's most famous lawyer with an appellate record in state and federal courts probably still unmatched by any other Idaho attorney. The Coeur d'Alene Chapter of Inns of Court, now Bar and Bench, is named for John P. Gray. Gray was born in Ketchum, graduated from Boise High School at age 13, and then from George Washington Law School in Washington, D.C. at age 19. Gray was in the nation's capital working as a page for U.S. Senator Weldon Heyburn after graduation and was admitted to the Idaho Bar in 1902 at age 21.

Gray began practicing in Wallace in 1902 in the office of Senator Heyburn. In his recent book, *The Big Burn* (2009), Timothy Egan writes that Senator Heyburn kept up his law practice in Wallace and:

...serviced his mining clients, using the power of his name on official stationery, his public duties nicely dovetailing with his private interests.

Practicing in the Coeur d'Alene Mining District, Gray soon became deeply involved in mining law. He moved to Coeur d'Alene in 1911 where he purchased a large tract of higher ground overlooking Sanders Beach and Coeur d'Alene Lake. After his death, the property was divided and developed into a number of homes.

One story about Gray that I heard after coming to Coeur d'Alene in 1955 was of an exchange with a client in the pre-title company days in the 1920s and 1930s. Part of the regular practice of Idaho lawyers was writing opinions on the marketability of property. Gray wrote an opinion and sent it with a bill for \$50 to the client. The client came to his office and protested: "The usual price charged by all other Coeur d'Alene attorneys was \$10 for this relatively simple task. Gray's response: "Yes, but their opinions would not have the name John P. Gray."

A search of reported opinions uncovered an incredible record. Between 1902 and 1938, Gray participated as attorney in 190 cases in the supreme courts of Idaho, Washington, Arizona and Connecticut, federal district and circuit courts and the U.S. Supreme Court. Gray is identified in

29 cases in the Eighth and Ninth Circuit Court of Appeals and four cases in the U.S. Supreme Court.

A list of case results from Westlaw identifies Gray in 16 cases in reported U.S. Supreme Court opinions. Twelve of these are one-paragraph memos of denial of *certiorari*. It is highly likely that a number of the identified appeals in state and federal court were dismissed or settled without argument.

Gray was the subject of a laudatory biography in the *Encyclopedia of American Biography* where he was described as "one of the nation's outstanding authorities on mining law..." The biography credits a U.S. Supreme Court case, *Stewart Mining Company v. Ontario Mining Company*, as an historic decision clarifying the issue of extra lateral apex rights under federal law [237 U.S. 350 (1915)].

Gray's practice involved much more than mining. Within Idaho, his most notable non-mining victory was representing Potlatch Lumber Company in a private case to condemn 12 acres for a storage reservoir for logs. *Potlatch Lumber Company v. Peterson* [12 Idaho 769, 88 Pac. 426 (1906)]. The Idaho Constitution allowed condemnation of land by private entities when such condemnation was "necessary to the complete development of the material resources of the state" (Section 14, Article 1).

The court affirmed the condemnation as of great importance to the state, a holding very practical in the first decade of the 20th century when the state and counties had only just begun to build roads, and mining, timber and irrigation companies had to use their own resources without any public money to carry out their projects.

In Coeur d'Alene, Gray became a partner with W.F. McNaughton in cases from 1915 to 1938. McNaughton was appointed to the Idaho Supreme Court in 1930 by Governor H.C. Baldrige, but resigned in 1931 to return to practice in Coeur d'Alene with Gray.

The reasons for the short term are open to speculation. Perhaps Justice McNaughton and his wife simply preferred Coeur d'Alene to Boise. Another possibility was political. At that time judicial races were partisan. McNaughton was a Republican. He may have anticipated the Democratic landslide that brought in Franklin Roosevelt in 1932.

A search of reported opinions uncovered an incredible record. Between 1902 and 1938, Gray participated as attorney in 190 cases in the supreme courts of Idaho, Washington, Arizona and Connecticut, federal district and circuit courts and the U.S. Supreme Court.



Justice William Francis McNaughton Jan. 3 1930 - Dec. 31 1931.

Dr. Mary Sanderson, a descendant of one of Gray's law partners, recounted a family legend about Gray told by Judge McNaughton. On one evening in the 1920s, Gray frantically called McNaughton, who lived nearby, asking for help because a fire had started at his house. McNaughton came quickly to help fight the fire. Gray's response was:

Never mind the fire; we have to hide the bootleg whiskey before the city firemen get here.

Long lost coroner's record sheds light on Bunker Hill & Sullivan inquest

Some time after moving to Coeur d'Alene, attorney John P. Gray apparently borrowed the bound record of the Shoshone County coroner's juries between 1893 and 1901 from the Shoshone County Clerk at Wallace, Idaho. This handwritten volume was kept in the office of the McNaughton & Gray law firm for many years until it was discovered by the daughter of one of the firm's partners. The coroner's reports in the volume began January 16, 1893 and ended September 12, 1901.

During the period covered by the record, inquests averaged about one per month, conducted for the purpose of establishing the cause of a death. The coroner selected a jury of five to seven men for each inquest. The exception to this was the major inquest into two deaths in the 1899 Bunker Hill mill unrest when 11 men were selected as jurors.

In Idaho Territory in the 19th century, and in the first decades after statehood, the coroner was an elected official who generally provided non-professional medical service. In rural, sparsely populated areas, a coroner's inquest by a jury who looked at the body and listened to witnesses was a quick and fairly uncomplicated method of determining if the death had been caused by a criminal action and, if so, making provision for arrest and prosecution.

The inquest process called witnesses to testify under oath, with the jury entering a verdict on the same day. In the Shoshone County volume, many of the juries returned verdicts on deaths in mining accidents. Often the jury would note that the mine owners were not at fault, but on three occasions during the period covered by the volume, the mining company was found to be at fault. The reports also included at least a half a dozen deaths from morphine overdose, suicides, drownings and unknown deaths from medical causes.

In November of 1898, Dr. Hugh France was elected Shoshone County Coroner. Unlike his predecessors, France was a medical doctor and company physician for the Bunker Hill & Sullivan Mining Company. Dr. France was a key player in the 1899 inquest into the deaths of two men during the riot at the Bunker Hill & Sullivan Mine at Wardner, Idaho in which the mill was blown up. Eleven jurors were sworn on May 3, 1899, four days after the men died. Unlike previous one-day inquests, this coroner's inquest took 40

days as 473 witnesses were examined.

The verdict of the coroner's jury on July 5, 1899 was highly critical of the Shoshone County Commissioners who had been warned by a Bunker Hill representative that serious trouble was intended by the union. According to the verdict, "neither one of said commissioners paid the slightest attention to such warning or request." Shoshone County Sheriff James D. Young was also warned of the impending danger and did not respond. The jury also accused the conductor and the engineer of the Northern Pacific train of "moral cowardice and truculent subservience" in cooperating with the union leadership to divert the train.

It further noted that Edward Boyce, president of the Western Federation of Miners, was said to have been in Wardner during the week before the explosion, "...actively engaged in counseling and advising the local officers of the Wardner Miners Union." Attached to the jury verdict as Exhibit A was a list of the mine employees who were absent from their duty post that day and who formed "the riotous, masked and armed mob." The report concluded:

We charge the murders of said Schmidt and Cheyne to have been perpetrated by the said Miner's Unions and their respective members who were present and participated in any of the deeds of that day. Said Miner's Unions and their aforesaid members, were aided and assisted by the said Sheriff Young, Moses S. Simmons, William Boyle and W. R. Stimson County Commissioner.

There were many coroner's inquests over the decades that related to mining accidents in Shoshone County. A 1936 inquest under coroner H.C. Mowrey investigated the death of 10 miners in an accident at the Morning Mine at Mullan, Idaho, owned by the Federal Mining & Smelting Company. The men were in a cage or elevator whose cable broke, dropping them 900 feet to their death, followed by 5,600 pounds of cable. The bodies were so badly mangled that it took some time to determine how many had died. State Mine Inspector Arthur Campbell called it "the worst accident in the history of Idaho mining."

An inquest was convened at Wallace, Idaho the next day at which pieces of the broken cable were examined and 20 miners who witnessed the accident were

Dr. France was a key player in the 1899 inquest into the deaths of two men during the riot at the Bunker Hill & Sullivan Mine at Wardner, Idaho in which the mill was blown up.

interviewed, among others. The inquest concluded that the accident had occurred because too many miners had crowded into the cage, making it too heavy for the cable.

When the inquest report was released, the cause of the accident was disputed by the local miners' unions and the Wallace and Vicinity Trades and Labor Council. Union representatives subsequently filed a complaint with District Judge Albert H. Featherstone asking for a grand jury probe into the inquest. The complaint named state mine inspector Arthur Campbell and the Shoshone County prosecutor John L. Fitzgerald in an alleged cover-up of the poor conditions of the safety devices at the mine. The unions also alleged that the prosecutor was "sitting idly by and letting the state mine inspector perpetrate...an outrage on the community."

Sources

- Unpublished Manuscript by Scott W. Reed;
- *Spokane Daily Chronicle*, October 7 & 16, 1936.

About the Author

Scott W. Reed received his law degree from Stanford Law School in 1955 and was admitted into the Idaho State Bar the following year. In 2012 Mr. Reed received the Distinguished Lawyers Award from the Idaho State Bar at the Annual Meeting in Boise. Scott and his wife Mary Lou reside in Coeur d'Alene.



IDAHO'S FIRST WOMAN LAWYER PRACTICED BEFORE SHE COULD VOTE

Claudia Druss

This article first appeared in the January, 2010 issue of the Idaho Legal History Society Newsletter.

The 1890s was a decade of great change in Idaho. The territory became a state, suffragists agitated for a woman's right to vote, and the first woman was admitted to the practice of law. Helen L. (Nellie) Nichols Young was granted admission to the bar in 1895 by the Idaho Supreme Court a year before women had the right to vote in Idaho.

Nellie Nichols' stepfather, Daniel E. Waldron, was an attorney who moved the family from Nevada to San Francisco and then to northern Idaho in the early 1880s. There he set up practice in the small town of Osburn during the local mining boom. Nellie Nichols began studying law in Waldron's firm as early as 1885. She married miner Orville R. Young in 1887 and began teaching school in Shoshone County in 1888.

Nellie Young's experience with the law was tested in 1892 when a collection action was brought against her husband. As part of the collection action against Orville Young, a bank tried to attach two of Nellie Young's personally-owned mining claims. Nellie hired prominent northern Idaho attorney and late U.S. Senator W.B. Heyburn to represent her in the case. Heyburn argued that the bank's attachment of her claims was improper because the claims had been a deeded gift to Nellie and were her separate property "free from the control of her husband." Her action eventually prevailed in 1895 before the Idaho Supreme Court.

Eight months later Heyburn and W.W. Woods (later a First District Court judge) sponsored Helen L. Young in her application for admission to practice law, attesting that "the applicant possesses the requisite qualification to entitle her to be admitted to practice law." They further explained that she had studied law for more than two years under her stepfather, an attorney in good standing. According to Heyburn and Woods, she had studied an extensive list of legal sources.

At the time of her application to practice law, Idaho statutes limited the admission of attorneys in Idaho to white males.



Helen L. (Nellie) Nichols Young

However, on October 26, 1895, the Idaho Supreme Court (Justices John T. Morgan, Isaac N. Sullivan, and Joseph W. Huston) convened at Lewiston and ordered that Helen Young be "admitted to practice as an Attorney and Counselor in all the Courts of this State."

Young was also active in the woman's suffrage movement and was assigned by the National American Woman Suffrage Association (NAWSA) to take charge of the movement in northern Idaho in 1896. Helen Young and Kate E. Feltham (who also later practiced law) were elected vice presidents of the organization. A few months later, in November of 1896, the Woman's Suffrage Amendment to the Idaho Constitution was adopted, making Idaho the fourth state to grant women the right to vote.

By 1900, Helen Young was teaching school in Shoshone County while her husband served on the school district's board of trustees. In September of that year, Orville Young and another school board member, James Lyle, entered into a contract with Helen Young, hiring her to teach school for \$70 a month. The contract was protested by other school board members because of Orville's financial interest in his wife's employment. However, the case was dismissed in district court and Helen was elected Shoshone County Superintendent of Public Schools by nine votes.

Two years later, the teaching contract decision was reversed on appeal to the Idaho Supreme Court and the contract was held to be void by Chief Justice Ralph P. Quarles. Later that year, Helen Young lost her bid for re-election as school district superintendent by more than 300 votes.

Helen Young became a Christian Scientist in 1902 while living at Wallace, Idaho. She and Orville seem to have separated sometime after 1902 and she moved to New York City to continue her Christian Science studies. By 1906, she qualified as a Christian Science "practitioner," someone who is employed to "practice purely spiritual healing." She also wrote extensively on Christian Science topics and compiled a book entitled *Scriptural Healing: Arranged from the Bible*, published in 1907.

Young worked as a practitioner in Manhattan until 1915 when she moved to Butte, Montana briefly before returning to New York in 1918. She left on a tour of Europe, Asia, and the Middle East in 1924. At that time, her passport application listed her as a widow five years younger than her actual age. The application also listed her as having been married to Orville Young in 1890 and widowed

She had studied law for more than two years under her stepfather, an attorney in good standing.



W. B. Heyburn (above) and W.W. Woods sponsored Helen L. Young in her application for admission to practice law in Idaho.

in 1909. In contrast, U.S. Census records show that Orville was alive and living in Shoshone County until his death in 1924. The 1910 census records show him as divorced.

Little else is known about Helen Young's life. She died in New York in 1951.

Sources

- *The First 50 Women of the Idaho Bar*, D.K. Kristensen, 2005;
- U.S. Census 1880-1920; *Idaho Statesman* 9/17/1902.

About the Author

Claudia Druss is a historical researcher who lives and works in Boise. She is currently researching a book on the history of the legal profession in Idaho for the Idaho Legal History Society.





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COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice
Roger S. Burdick

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

1st AMENDED - Regular Spring Term for 2013

Boise January 9, 11, 14, 16, and 18
Boise February 11, 13, 15, 20, and 22
North Idaho April 2, 3, 4, and 5
~~Boise April 10~~
~~Eastern Idaho May 1, 2, and 3~~ 6, 7, 8, 9 and 10
~~Boise May 8 and 10~~
Twin Falls June 4 and 5 5 and 6
Boise June 3, 10, and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge
Sergio A. Gutierrez

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

1st AMENDED - Regular Spring Term for 2013

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

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Argument for February 2013

Monday, February 11, 2013 – BOISE

8:50 a.m. Gordon Ravenscroft v. Boise County #39323-2011
10:00 a.m. Jack L. Garrett v. Thelma V. Garrett #38971-2011
11:10 a.m. Matthew Mazzone v. Texas Roadhouse, Inc.
..... #39337-2011

Wednesday, February 13, 2013 – BOISE

8:50 a.m. Peter Kaseburg v. Dept. of Lands #38917-2011
10:00 a.m. State v. Donald Michael Keithly
..... #39033/39034/39035/39036-2011
11:10 a.m. Echo T. Vanderwal v. Albar, Inc. #38085-2010

Friday, February 15, 2013 – BOISE

10:00 a.m. Leon Phillips v. Roy Jacobson #38666-2011
11:10 a.m. AED, Inc. v. KDC Investments, LLC #38603-2011

Wednesday, February 20, 2013 – BOISE

8:50 a.m. City of Meridian v. Petra, Inc. #39006-2011
10:00 a.m. Holli Lundahl Telford v. Hon. David C. Nye
..... #39497-2011
11:10 a.m. Brian P. Woodworth v. DOT #38884-2011

Friday, February 22, 2013 – BOISE

10:00 a.m. Darryl Harris v. The Bank of Commerce ... #39204-2011
11:10 a.m. Syringa Networks, LLC v. Dept. of Administration
..... #38735-2011

Idaho Court of Appeals Oral Argument for February 2013

Tuesday, February 12, 2013 – BOISE

9:00 a.m. State v. Moses #38871-2011
10:30 a.m. State v. Stark #39885-2012

Tuesday, February 19, 2013 – BOISE

10:30 a.m. State v. Greco #39618-2012

Thursday, February 21, 2013 – BOISE

10:30 a.m. Mickey v. Halinga #39973-2012
1:30 p.m. Perez, Jr. v. State #38892/38893-2011

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

CIVIL APPEALS

Attorney fees and costs

1. Is I.C. § 12-117 the exclusive source under which the Board of Trustees of Mountain Home School District may seek attorney fees when prevailing on breach of employment contract claims?

Sanders v. Board of Trustees of Mountain Home School Dist. No. 193
S.Ct. No. 40013
Supreme Court

Bond forfeiture

1. Whether Sun Surety possessed a private right of action to challenge the criminal court's bond forfeiture in an independent civil action.

Sun Surety Insurance Co. v. Fourth Judicial District
S.Ct. No. 39791
Court of Appeals

Divorce, custody, and support

1. Whether *Nab v. Nab*, a 1988 Court of Appeals decision, and *Rodriguez v. Rodriguez*, a 2011 Court of Appeals decision, precluded a hearing on Adams' motion to modify custody and support when Adams was found in criminal contempt and not civil contempt.

Slane v. Adams
S.Ct. No. 39766
Supreme Court

Employment

1. Did the trial court err in dismissing Frogley's retaliation claim and in concluding there was no evidence the reason his employment was terminated was a pretext?

Frogley v. Meridian Joint School District
No. 2
S.Ct. No. 39945
Supreme Court

Evidence

1. Did the court abuse its discretion in disregarding the affidavit of the surveyor submitted by the Campbells in support of their motion for reconsideration and in denying the motion?

Campbell v. Kvamme
S.Ct. No. 39650
Supreme Court

New trial

1. Did the court abuse its discretion in denying the plaintiff's motion for a new trial under I.R.C.P. 59(a)(6)?

Blizzard v. Lundeby
S.Ct. No. 39774
Supreme Court

Post-conviction relief

1. Whether the district court erred in summarily dismissing the petition as untimely and in finding Hyer was not entitled to equitable tolling.

Hyer v. State
S.Ct. No. 38903
Court of Appeals

2. Did the court err in dismissing Leonard's petition after an evidentiary hearing and in finding counsel was not ineffective for failing to file a motion to suppress?

Leonard v. State
S.Ct. No. 39067
Court of Appeals

3. Did the court err in denying Eby's petition for post-conviction relief after an evidentiary hearing?

Eby v. State
S.Ct. No. 39301
Court of Appeals

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

Hadden v. State
S.Ct. No. 39589
Court of Appeals

5. Did the district court err by summarily dismissing the claim that counsel was ineffective for failing to appeal from the denial of Martinez's Rule 35 motion?

Martinez v. State
S.Ct. No. 39584
Court of Appeals

Quiet title

1. Did the court err in ruling that the plat dedicated a common use easement for all lot owners?

Ross v. Dorsey
S.Ct. No. 39152
Supreme Court

Summary judgment

1. Did the court err in concluding the Guaranty Agreement drafted by ITB was unambiguous?

Idaho Trust Bank v. Christian
S.Ct. No. 39781
Supreme Court

Tort immunity

1. Did the court err in concluding that discretionary immunity was applicable to the decision to change the type of storm gutter system at a particular intersection in Lewiston?

Zimmerman v. City of Lewiston
S.Ct. No. 40057
Supreme Court

Termination of parental rights

1. Did the court err in finding that John Doe had abandoned the minor children pursuant to I.C. § 16-2005(1)(a)?

Doe v. Doe (2012-15)
S.Ct. No. 40517
Court of Appeals

CRIMINAL APPEALS

Instructions

1. Did the court err in its instruction regarding the definition of malice as it related to the charge of malicious injury to property?

State v. Skunkcap
S.Ct. No. 34746/34747/38249
Court of Appeals

Probation revocation

1. Did the court abuse its discretion when it failed to reduce Cornelison's sentence *sua sponte* upon revoking probation?

State v. Cornelison
S.Ct. No. 39616
Court of Appeals

Prosecutorial misconduct

1. Did the court err when it denied Burtness's motion for mistrial based on a claim that the prosecutor vouched for the State's witnesses during closing argument thereby violating his right to a fair trial?

State v. Burtness
S.Ct. No. 39260
Court of Appeals

Search and seizure – suppression of evidence

1. Did the court err in denying Flores' motion to suppress and in finding there was consent to search?

State v. Flores
S.Ct. No. 39649
Court of Appeals

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

2. Did the court err in denying MLDC's motion for return of unlawfully seized property under I.C.R. 41(e)?

State v. Ruck
S.Ct. No. 39830
Supreme Court

3. Did the district court err by affirming the magistrate ruling that breath testing results were admissible against Besaw in his trial for DUI?

State v. Besaw
S.Ct. No. 39874
Court of Appeals

4. Did the court err in finding the warrantless entry into Posey's home fell under the community caretaking exception to the warrant requirement?

State v. Posey
S.Ct. No. 39899
Court of Appeals

Sentence review

1. Did the court abuse its sentencing discretion by focusing on the underlying lewd conduct charge in sentencing Hubbard on a failure to register as a sex offender conviction?

State v. Hubbard
S.Ct. No. 39449
Court of Appeals

2. Whether the court erred by revoking probation and by not reducing Peterson's sentences *sua sponte* pursuant to I.C.R. 35.

State v. Peterson
S.Ct. No. 39146/39147/39783
Court of Appeals

3. Whether the district court erred at sentencing by permitting the prosecutor to read a statement by a co-defendant, Espinoza, into the record without allowing Martinez the opportunity to confront Espinoza or present rebuttal evidence.

State v. Martinez
S.Ct. No. 39440
Court of Appeals

4. Did the court abuse its discretion when it relinquished jurisdiction over Hansen?

State v. Hansen
S.Ct. No. 39664
Court of Appeals

5. Did the court commit fundamental error by considering Favini's competency evaluation at sentencing?

State v. Favini
S.Ct. No. 39123
Court of Appeals

Withheld judgment

1. Did the denial of Guess' motion for I.C. § 19-2604(1) relief constitute a breach of the plea agreement or a violation of Guess' due process rights?

State v. Guess
S.Ct. No. 39646
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Summarized by:
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THE OTHER FOUR-LETTER WORDS

Tenielle Fordyce-Ruff

By February, the winter doldrums have hit. I love all four seasons in Idaho, but I'm tired of short days. I long to play outside without several layers of clothing. I hope to someday feel my toes again. In fact, after coming inside and stripping off layers of wet clothing and drying off two large dogs, I'm ready to let a few four-letter words escape. (I don't, of course.) But, this instinct got me to thinking — what else makes me want to let four-letter words fly? (Bad writing, of course.)

Some struggles in writing come from pesky four-letter words. Not the kind that result from muddy dog prints on the wood floors — the kind that result from not being quite sure of the correct way to use certain words in our writing. So, to celebrate the shortest month of the year, I thought we could learn about some short, four-letter words that tend to give us fits: that, they, whom, data, and none.

That

The most common question I receive about *that* is when it's necessary for a sentence. I think we writers feel tension because we have all heard the rule to omit *that* whenever possible to shorten our writing, but we don't know exactly when *that* is necessary.



For many of the common verbs of speech or thought — say, claim, hear, think, know, or believe — you can safely omit *that*. These verbs, called bridge verbs, don't carry any meaning beyond saying or thinking. Your ear probably tells you that omitting *that* after these verbs is fine.

The plaintiff claimed that the defendant was negligent.

The plaintiff claimed the defendant was negligent.

Other verbs that carry extra meaning beyond simple thought and speech tend to need the *that*. Take, for instance, the verb yell. This non-bridge verb means to say something in a particular way, and it sounds slightly odd if you leave out the *that*.



She yelled he was dangerous.

She yelled that he was dangerous.

Beyond sounding off, however, sometimes omitting the *that* creates a miscue for the reader. Transitive verbs, those that can take a direct object, need to be followed by *that* when there isn't a direct object in the sentence.

The student acknowledged being a member of a minority might have helped him be admitted to law school.

Because this sentence omits the *that* after *acknowledged* the reader takes the noun phrase *being a member of a minority* as a direct object. But once the sentence continues, the reader has to return to the beginning and re-parse the sentence. Including a *that* prevents this misreading.

The student acknowledged that being a member of a minority might have helped him be admitted to law school.

Omitting *that* with nouns can sometimes create miscues, too. With nouns, *that* can introduce adjective clauses or clauses that explain what the noun is. If the noun is followed by an adjective clause, it's fine to omit the *that*.

The testimony [that] the defendant gave was not credible.

But, if the noun is followed by a clause that explains the noun, omitting the *that* creates confusion for the reader.

The court held the defendant was given credit for time served.

In this example, it's unlikely the court actually held the defendant, so omitting the *that* creates a miscue for the reader.

With nouns, that can introduce adjective clauses or clauses that explain what the noun is.

The court held that the defendant was given credit for time served.

They

This pesky pronoun creates headaches for legal writers when we replace a collective noun.

The jury should not be misled about the witness's credibility when they consider her testimony.

The *they* in this sentence is incorrect. Jury is a collective noun. Many common nouns in legal writing are groups of people who can function as one unit: jury, committee, appellate court, majority, board, team, family, audience, crowd, and number. The names of companies and corporations are also collective nouns. These nouns tend to function as a unit, so they are replaced by *it* instead of *they*.

The jury should not be misled about the witness's credibility when it considers her testimony.

Whom

Whom is another pronoun that sometimes makes writers want to curse, but there is simple trick for remembering when to use *whom*. Before we get into examples, let's review a little grammar.

We use *whom* when we are referring to the object of a clause — the object is having the action in the sentence done to it.

The judge sanctioned him for contempt.

In this example, *him* is the object of the sentence. If you didn't know the gentleman's name, you would ask:

Whom did the judge sanction?

In fact, to know when to use *whom*, use this handy trick: If you could answer the question with him, use *whom* when forming the question. And remember, both him and whom end with "m."

Data

Data can create confusion in our writing, too. Both "The data is correct" and "The data are correct" are standard usages. So, the problem with using *data* comes when we also have to use it in a sentence with a verb or replace it with a pronoun because *data* can be either a mass noun or a count noun.¹

Quick refresher: Mass nouns are used for things that cannot be counted or numbered (like information). Mass nouns always take a singular verb. Count nouns, on the other hand, are distinct objects that can be counted and numbered (like facts). These nouns always take a plural verb.

So, because data can be both a mass noun and a count noun, it can correctly take both a singular and a plural verb. How you use it is a style and preference choice, although its use as a mass noun is more formal. But, if you use it as a mass noun, make sure to use a plural verb and replace it with a plural pronoun.

The names of companies and corporations are also collective nouns. These nouns tend to function as a unit, so they are replaced by it instead of they.

Many of these data are useless because of their lack of specifics.

And, if you use it as a count noun, make sure to use a singular verb and replace it with a singular pronoun.

Much of this data is useless because of its lack of specifics.

If, however, you begin a clause with data and drop the definite article, treat it as a count noun and use the singular verb and pronoun.

Data over the last few years suggest the unreliability of eyewitness identifications.

None

Like data, *none* can be either singular or plural. To determine which to use, decide whether you are trying to say not one or not any. If you mean "not one," use a singular verb with none.

None of the witnesses is present.

Likewise, use a singular verb if *none* is followed by a mass noun.

None of the water is polluted.

If you mean "not any," use a plural verb with none.

None of the facts are disputed.

Conclusion

Now that you can use these pesky little four-letter words correctly, go play in the snow. It will be gone soon enough, and I, for one, will long for the opportunity to go outside without wearing sunscreen on every inch of my skin.

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Endnotes

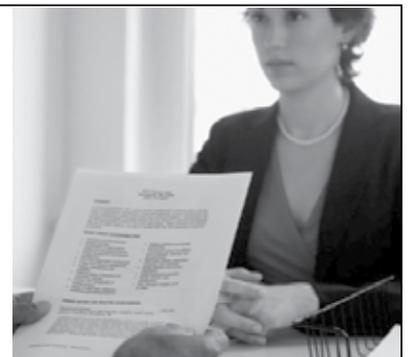
¹ For more advice on using mass nouns and count nouns correctly, see *Confusing Word Pairs*, The Advocate (Jan. 2012).

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@cu-portland.edu or tfr@rainey-lawoffice.com.

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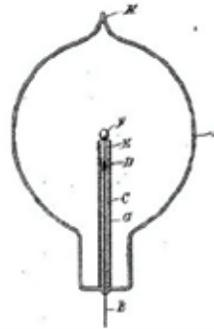


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IN MEMORIAM

Alan F. Williams 1964 - 2012

Alan F. Williams died on Dec. 30, 2012, in Tacoma, Wash. Mr. Williams joined the University of Idaho College of Law faculty in 2006. He held a baccalaureate degree from Virginia Tech and a law degree (with honors) from the Georgetown University Law Center in Washington, D.C. Professor Williams is a member of the bars of Colorado and Virginia.

Before joining the faculty he completed 20 years on active duty in the U.S. Marine Corps, including serving as a Special Assistant U.S. Attorney, Chief Prosecutor, and Defense Counsel. During the non-lawyer portion of his Marine Corps career, Professor Williams served as commanding officer of the largest permanently stationed contingent of Marines in the Republic of Korea.

As an intelligence officer, he served in the Operations Directorate of the National Security Agency, and in a tactical signals



Alan F. Williams

intelligence unit in Hawaii, as well as numerous overseas locations throughout the Far East.

A Korean linguist, Professor Williams graduated with honors from the Defense Language Institute in Monterey, California, prior to being deployed to the Republic of Korea. In his last assignment in the Marine Corps, he served as a military judge in the Eastern Judicial Circuit of the Navy-Marine Corps trial judiciary.

At the College of Law, his teaching included Criminal Law, Criminal Procedure, Civil Procedure, Evidence, and Trial Skills.

Professor Williams was a published scholar on national security legal issues. In addition, he served on the Idaho Supreme Court's Committee on Civil Jury Instructions and Evidence Rules Advisory Committee. For several years he coached the College's mock trial competition team, and he coached national criminal procedure moot court teams that received "best brief" honors in 2011 and 2012.

Maj. Donald L. Nickels U.S. Army (Ret.) 1942 - 2012

Donald Leo Nickels, 70, of Moscow, died on July 18, 2012, at Deaconess Medical Center in Spokane.

Mr. Nickels grew up in Missouri, and graduated college from Southwest Missouri State University in 1964, having attended the ROTC program there. Upon graduation, Don was commissioned in the U.S. Army. He proudly served in the Army for more than 20 years. During his military tenure Don was sent to Vietnam twice, where he was awarded two Bronze Stars and received many other medals and citations during his career. He also served in Missouri, Kansas, Germany, Texas, Georgia and Maryland. He retired in 1984.

After retiring, he went on to earn his master's degree in criminal justice at Central Missouri State. The family then moved to Moscow in 1986, where he attended the University of Idaho Law School, earning his J.D. in 1989. He became a member of the Idaho State Bar that same year.

Don is survived by his wife of 37 years, Linda, and his son, Ronald, of Moscow.



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Scott Randolph elected to partner at Holland & Hart

Scott Randolph was elected to the partnership at Holland & Hart LLP. Randolph represents clients before the Idaho Human Rights Commission, the Equal Opportunity Commission, and in state and federal courts throughout Idaho, as well as in the United States Court of Appeals for the Ninth Circuit. His experience includes virtually all aspects of complex commercial litigation, in addition to defense of claims involving trade secrets, non-competes, breach of fiduciary duty, disability discrimination, sexual harassment, and wage and hour disputes.



Scott Randolph

Mark Peters opens solo firm

Mark T. Peters, Sr. is pleased to announce the opening of his law firm, Peters Law, PLLC. The office is located at 1111 S. Orchard St., Ste. 200, Boise, Idaho 83705. Mark's practice involves company formation and governance, contract negotiation and drafting, family law, real estate, wills and trusts, guardianships and conservatorships, and civil litigation. Mark was originally admitted to the State Bar of Michigan in 1980 and was admitted to practice in Idaho in



Mark T. Peters, Sr.

2009. Mark is an active member of the Real Property and the Business and Corporate Law Sections of the ISB. Mark is a member of the Boise East Rotary Club. He lives in Boise with his wife, Nora.

Holland & Hart selects new office manager

Corporate and Labor & Employment attorney Nicole Snyder has been chosen to manage Holland & Hart's Boise office. In addition to overseeing strategic development for the office, Snyder will manage recruiting and marketing efforts, as well as other responsibilities related to the firm's partnership. She succeeds Murray Feldman, who has managed Holland & Hart's Boise office since 2008, leading its growth to the top tier of largest Idaho law firms.



Nicole Snyder

Gene Ritti joins OfficeMax legal department

Gene Ritti has joined the OfficeMax litigation team as Associate General Counsel. Mr. Ritti joins OfficeMax from Hawley Troxell where he was a senior partner and co-chair of the firm's litigation department. OfficeMax (formerly known as Boise Cascade Cor-



Gene Ritti

poration) and Hawley Troxell have had a strong partnership for many years, and Mr. Ritti has been outside counsel to the company on several significant litigation matters.

Mr. Ritti currently serves as a member of the Civil Procedure Rules Committee for the U.S. District Court, District of Idaho. Mr. Ritti is also the chairperson of the Leadership Council for the American Lung Association, Mountain Pacific Region and serves on the Board of Trustees of the Idaho Shakespeare Festival. He received his undergraduate degree from Villanova University and his law degree from Duke University.

Erika Malmen promoted to partner at Perkins Coie

Erika E. Malmen of Boise has been promoted to partner at the Boise office of Perkins Coie. Erika is a member of the Environment, Energy & Resources practice, representing clients in permitting, compliance, and litigation under various statutes including the National Environmental Policy Act (NEPA), Clean Water Act (CWA), Clean Air Act (CAA), Federal Land Policy & Management Act (FLPMA) and the Endangered Species Act (ESA). Erika's practice also includes state water law, real estate and procurement. Prior to joining Perkins Coie, Erika was as an attorney with the Office of the Solicitor, U.S. Department of the Interior and served as Acting Special Assistant to the Solicitor.



Erika E. Malmen

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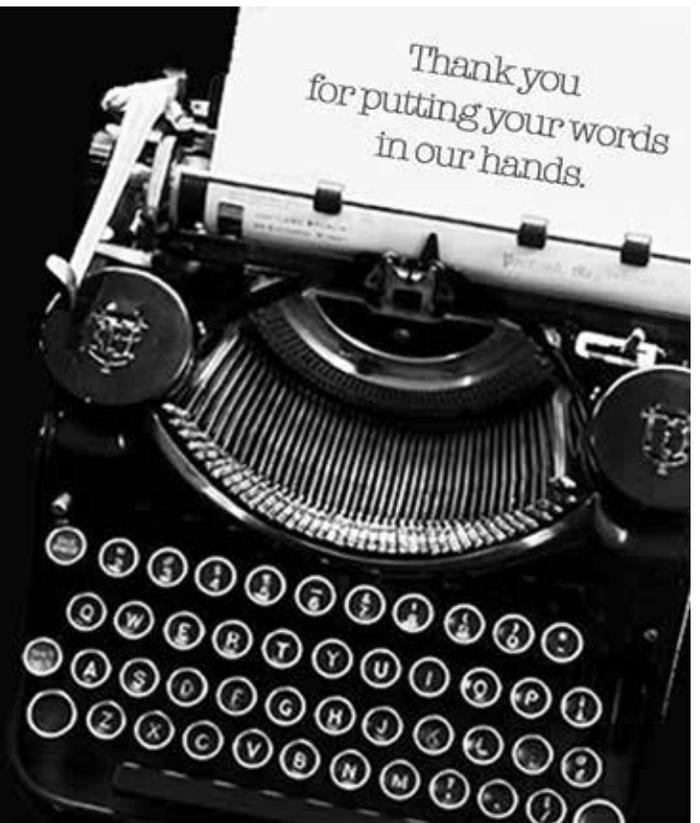


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The spoken word perishes; the written word remains.



Remembering Supreme Court Justice Byron J. Johnson

Byron J. Johnson, a retired Idaho Supreme Court Justice, a poet, and friend, died of cancer of the lower jaw on December 9, 2012. I first met Byron in 2005 when we served together on the inaugural committee of the Idaho Legal History Society, where he was a founding member. At the time I remember thinking this man is extraordinary; he just seemed larger than life. He regaled us with stories and insights, he knew everyone, and I came to admire him deeply. Each year I learned a bit more about Byron and my admiration continued to grow.

By Susie Boring-Headlee

Byron's interest in the law began in high school. When he was a senior at Boise High School, he would spend his lunch hours in Carnegie Public Library reading books that "didn't have anything to do with his courses." One noon hour he discovered a book called *Prisoners at the Bar* written by Francis X. Busch, which described what the author considered to be the four outstanding criminal trials in the history of our country. The first trial was the Bill Haywood case, Sacco Vanzetti, Loeb/Leopold, and Bruno Hauptman, who was a kidnapper of the Lindberg baby. Byron also first learned about Clarence Darrow, again on his lunch hour, after reading Irving Stone's biography.

After graduating from college, Byron attended Harvard College of Law where he graduated in 1962. As a young law student, he served as vice-president of the Harvard Voluntary Defenders, the first law student defender program in the nation. He worked with the Massachusetts Defender's Committee that handled all of the appointed work in that part of the state. Byron became enamored of criminal defense work and even began attending criminal jury trials in Boston to observe.

From 1962 to 1972, Byron practiced law in Boise with the firm that became Elam, Burke, Jeppesen, Evans, and Boyd. From 1972 to 1977, he practiced with the firm that became known as Webb, Johnson, Redford, and Greener. From 1977 to 1988, he practiced alone, and in December 1987, Governor Cecil Andrus appointed him to the Idaho Supreme Court, filling the vacancy created by the death of Charles R. Donaldson. In 1992, Byron was elected to a six-year term on the Court and from 1993 to 1997, he was Vice-Chief Justice.

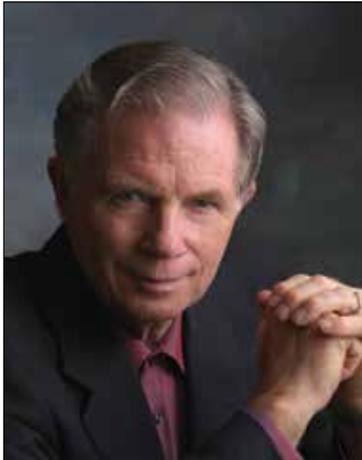
At the conclusion of his term in 1999, Byron pursued other passions including preserving Idaho's rich legal history, providing information on oral histories, writing poetry, and myriad other projects. He worked tirelessly for the Idaho Legal History

Society and in 2005, the Society instituted the annual Byron J. Johnson Service Award, which recognizes individuals who further its mission.

As a young law student, he served as vice-president of the Harvard Voluntary Defenders, the first law student defender program in the nation.

In early 2006, with approval from the Society's Board, Byron approached Idaho Public Television (IPTV) about filming a documentary regarding the assassination of former Governor Steunenberg and the subsequent trial of Big Bill Haywood, which he referred to as *The Trial of the Century*. When IPTV informed Byron he would need to initially raise \$100,000 in cash (not pledges), he was undaunted.

By October 2006, Byron had raised the full \$100,000 and filming began in mid-November with David Grover, who wrote *Debaters and Dynamiters*, who assisted. Byron rode shotgun for the entire production. The movie, eventually named *The Assassination*, was filmed in May 2007 at the old Borah Post Office. It premiered in early November 2007 at the Egyptian Theatre, where Byron made a cameo appearance as an audience member during the trial. The film rang of authenticity due to superb acting, period clothing, and the use of actual trial testimony from Bill Haywood and Harry Orchard. Idaho Public Television selected the docudrama as its most interesting program of the year.



Oral history project captures personality, vision of the law

B yron's oral history was taken in 2007 by Judge Ronald Wilper. I found it fascinating and thought-provoking, and have included portions that I found interesting:

Q. And you also played on the varsity baseball team at Harvard, did you not?

A. Yes. I did. I was on the varsity team for two years, and my third year, I guess you would say I was the leading pitcher. I had a record of 6 and 2 in my senior year and 4 and 1 in my junior year.

Q. And I won't ask you to boast, but I know personally that you pitched a no-hitter against Yale.

A. No. It was a shutout.

Q. Oh, a shutout. I'm sorry.

A. Some people would like to call it a no-hitter. It was actually a 5-hitter, but it was a shutout. It was probably the proudest day of my life because my parents, my grandparents, my sister, my wife-to-be, all were in the stands. So it was a great day.

Q. As a defense attorney, how did you pick a jury? Did you have any particular method?

A. Well, there was a man who was in charge of the Massachusetts Defender's Committee. His name was Wilbur Hollingsworth. When I was a law student third year, I said to him at a social event we had one time, "Mr. Hollingsworth, could you help me about how to pick a jury?"

He said, "I'll send you a paper I wrote many years ago." This man had tried, he estimated, 100 murder cases. He was a very unassuming man. And he said, "Read it, and then forget it. It all comes from right here. It comes from your gut."

I had another experience. I tried a civil jury case in which my co-counsel was a Canyon County attorney, whose name I am blocking on at the moment. I'll think of it. But he had a system where he would rate the prospective jurors based on everything he could find out about them before the trial, give them a rating of 1 through 4, 1 being the best as I recall and 4 being the worst. And so I adopted that process, but I would scour city directories, people that I knew that lived next door to them, anybody I could find out and rate them beforehand so I had a starting point and didn't rely entirely upon the voir dire examination.

But I also learned that after the '72 primary campaign for the U.S. Senate, I had a remarkably better sense of who to pick as jurors because I had spent six months on the streets of Idaho talking to a wide variety [of] people who would encounter me with no background. I didn't know who they were. And I began to get a sense of what people were interested in from that experience.

I found trying a jury trial after I had that experience was much different than it was before.

Q. Did your success rate improve?

A. Well, all I can say is, from 1972 to 1974, I didn't lose a criminal jury trial.



Byron Johnson poses during one of the three "practice wakes" he held for his friends and family.



Chief Justice Byron Johnson conceived and promoted the public television drama "The Assassination," about one of the most famous trials in the nation. He played a small role on screen, as shown.

Johnson's poems open up a window to his soul

After retiring from the bench, Byron continued to lead a rich life dedicating himself to his other lifelong passion of studying and writing poetry. Each winter Byron would make his annual trek to Grandjean, Idaho, where he would ski into a rustic cabin on the South Fork of the Payette River and remain for an entire month. He once told me he looked forward to the solitude and that it provided him time to refresh his soul.

In 2012 Byron wrote his memoir, *Poetic Justice*, which was originally intended for his family only. Later, however, at the encouragement of friends, it was published by Limberlost Press, and a book signing was held in May at The Cabin in Boise where Byron served as past President.

With permission, I have included my favorite poem from his memoir:

. . . . I look back on those five summer trips to the South Fork of the Payette as one of the favorite times of my life. The South Fork is where I feel most at home and at peace with myself, as this poem I wrote a few years ago tells you.

My Soul is Flowing in this River

it echoes in the river's roar
rolling over rocks worn smooth
by time's eternal rush
bubbling with laughter

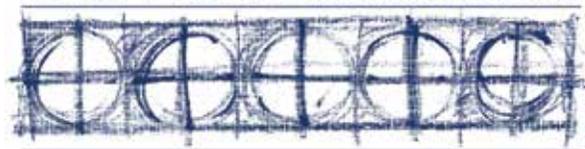
of afternoon on its beaches
glistening with the pleasure
of cool evenings around a campfire near its waves
mother-father river
you baptized me
in the numbing chillness of your mornings
cuddled me
in the rumble of your nights
taught me
the ways of fishes in your ripples

I love you
like the brother
I never had
like the lightness of the mid-day breeze
that touches the deepest places where I am

you are my refuge
and my strength
you give me peace
when trouble comes
you never fail
to wash my sins away

you'll be there
when my body turns to dust
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in your everlasting flow

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Will Isenberg from Logos School in Moscow makes his closing arguments during the championship round of the 2012 Idaho High School Mock Trial Competition at the Idaho Supreme Court in front of mock trial volunteer judges Tonya Westenskow and Mikela French.

ASSISTANCE NEEDED FOR 2013 MOCK TRIAL COMPETITION

Right now, high school students across Idaho are preparing for trial while they learn about trial court rules and procedures. It's time for the annual *Idaho High School Mock Trial Competition*. The mock trial program is recognized as one of the most exciting, hands-on educational opportunities available to Idaho's high school students. Mock trial fosters a better understanding of the legal system and promotes affinity among the legal community, educators and students.

As the 2013 mock trial season gets underway, the Law Related Education Program needs the help of Idaho attorneys. Competition staff is currently looking for judges and attorneys to serve on volunteer jury panels for regional and state competitions. Volunteers receive a judging handbook with case materials and other important information about the mock trial competition and then spend a day or an evening as part of three-person panels during two or three trials conducted by teams.

Competition dates and times are as follows:

- **Saturday, March 2, 2013:** Regional Competition at the Canyon County Courthouse in Caldwell from approximately 8 a.m. to 5 p.m.
- **Saturday, March 2, 2013:** Regional Competition at the Bonneville County Courthouse in Idaho Falls from approximately 8 a.m. to 5 p.m.
- **Saturday, March 9, 2013:** Regional Competition at the Nez Perce County Courthouse in Lewiston from approximately 8 a.m. to 5 p.m.
- **Wednesday, March 20, 2013:** First Night of the State Quarterfinal Competition at the Ada County Courthouse in Boise from approximately 4 to 10 p.m.
- **Thursday, March 21:** Second Night of the State Quarterfinal Competition at the Ada County Courthouse in Boise from approximately 4 to 10 p.m.

The Law Related Education Program is also working to meet its goal of raising \$10,000 in donations to support the ongoing operations of the mock trial program. Donations are used for direct student sup-

Please consider helping to make this year's mock trial competition successful for Idaho students.

port in the mock trial program and will help defray expenses such as food, travel, and lodging for competing students.

Please consider helping to make this year's mock trial competition successful for Idaho students. Contact Carey Shoufler at (208) 334-4500 or cshoufler@isb.idaho.gov for more information about donating or volunteering for the mock trial program.

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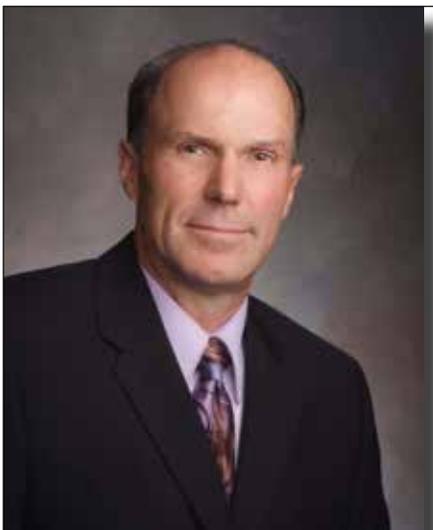
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The Idaho Legal History Society was organized in 2005 by Chief Judge B. Lynn Winmill, United States District Court, District of Idaho, and United States Magistrate Judge Ronald E. Bush, District of Idaho.

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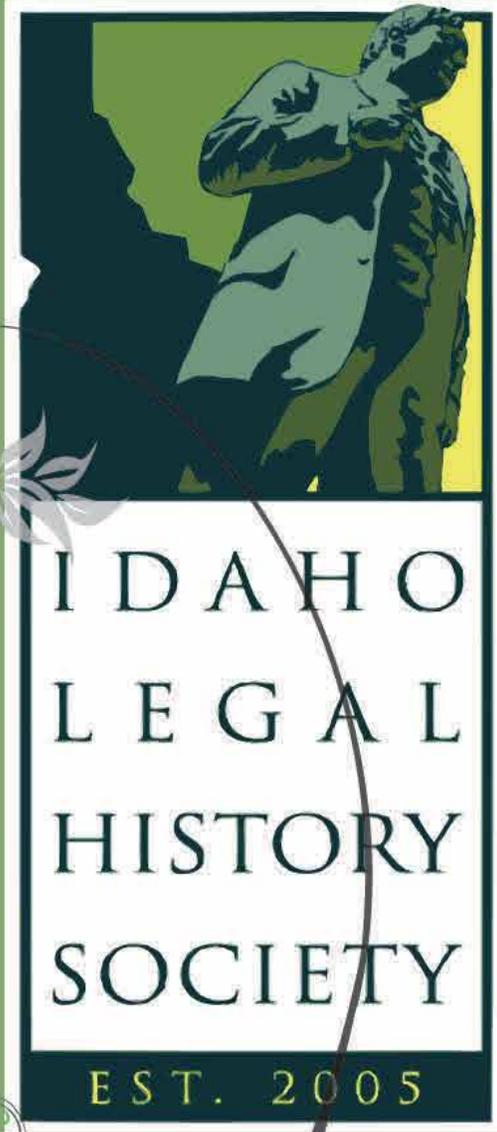
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Bruce joined the firm in 2005. He previously practiced in a construction law and civil litigation firm, and prior to that clerked for Idaho Supreme Court Chief Justice Linda Copple Trout. Bruce has tried cases in both state and federal court, has argued before the Idaho Court of Appeals, the Idaho Supreme Court, and the United States Court of Appeals for the Ninth Circuit, and has practiced before the Idaho Human Rights Commission and the Equal Employment Opportunity Commission. He graduated as a Distinguished Military Graduate from the Army ROTC program and served in the United States Army on active duty and in the National Guard as a field artillery officer.

Bruce practices in the areas of litigation, with particular emphasis in municipality and public entity defense; employment law; general business and real estate litigation; wills, trusts, and probates. Bruce is licensed to practice law in all courts in the state of Idaho and the U.S. Court of Appeals for the Ninth Circuit.

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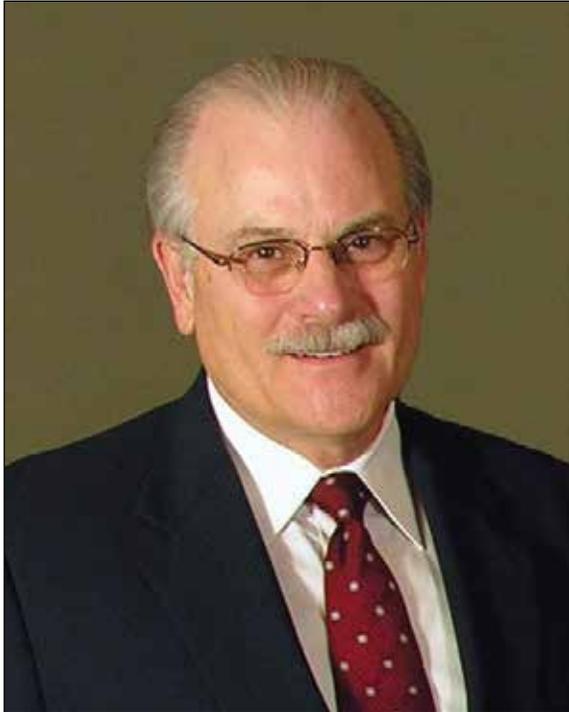
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Through his personal battle with addiction John Southworth has learned that there is no cure for the disease, and that it can be fatal, if the appropriate education and steps to recovery are not taken. This knowledge is the driving force behind John's motivation to educate others about addiction, and it also plays a major role in John's continued sobriety of over 20 years. He has had both personal and professional experiences in the field of substance abuse and mental health for more than 40 years.

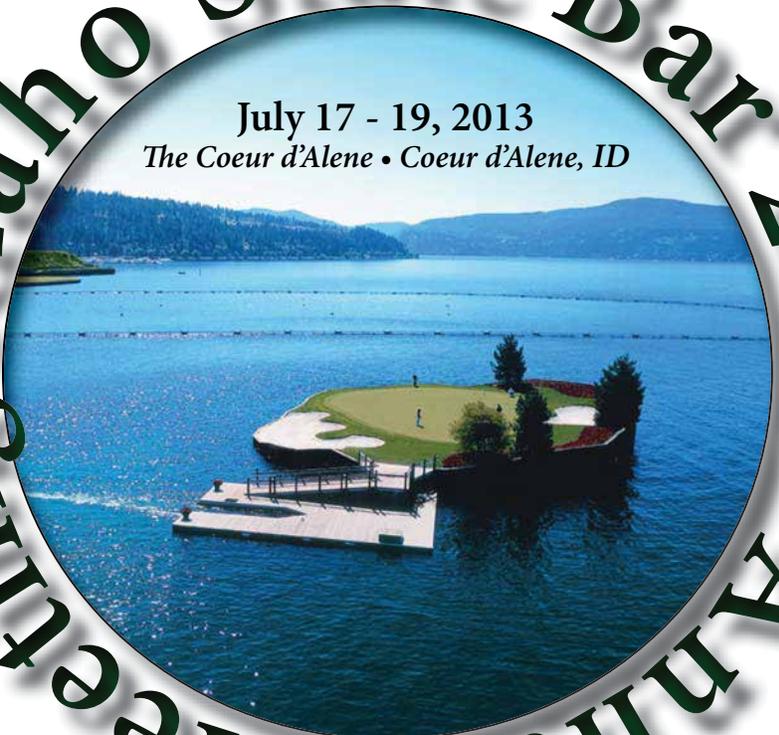
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Special thanks to the Attorney Liability Protection Society (ALPS) for providing a grant to support the program

Meeting Idaho State Bar 2013 Annual Meeting

July 17 - 19, 2013
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Educational & Networking Opportunities

Attendees may earn over 8.0 CLE Credits, of which 2.0 are Ethics. Programs offered by:

- *Idaho Law Foundation Continuing Legal Education (CLE) Committee*
- *Idaho State Bar Practice Sections*
- *Institutions of Higher Learning*

Additionally, several social events allow for reconnecting with friends and meeting new people:

- *Plenary Session*
- *Distinguished Lawyers Dinner*
- *Bar Presidents' Reception*
- *Service Award Luncheon*
- *50 and 60 Years of Admission Celebration*
- *Exhibitor Hall*

North Idaho Hospitality

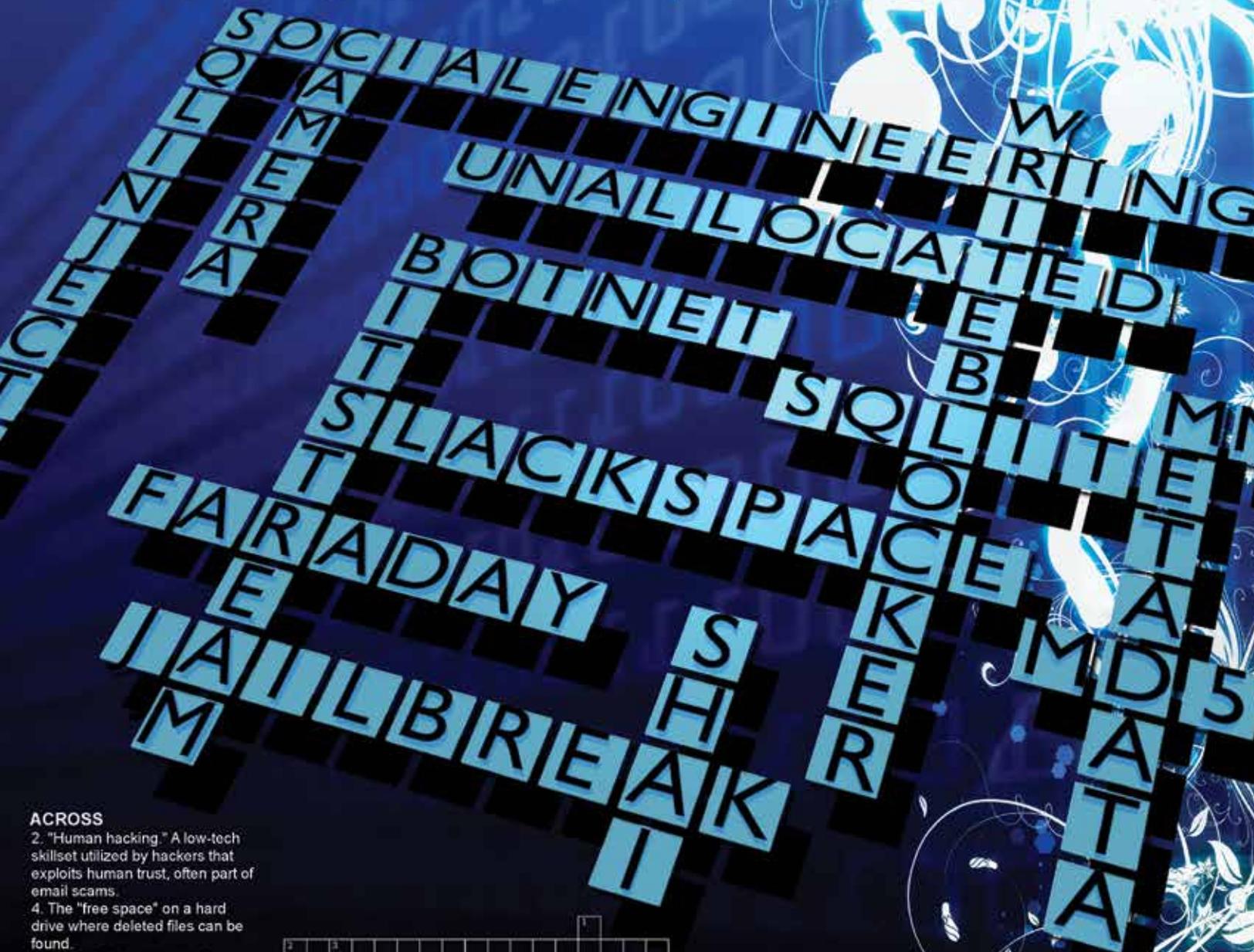
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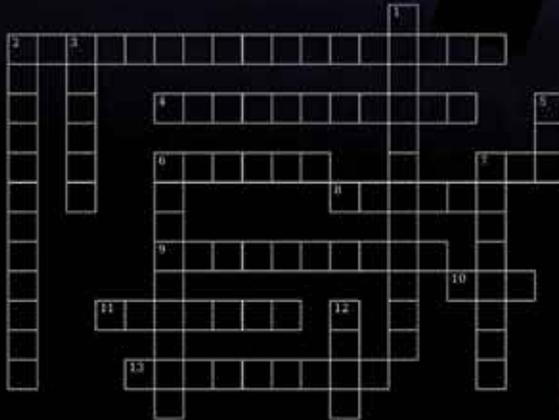
****Be sure to tell them you are attending the Idaho State Bar 2013 Annual Meeting****

Filling in the blanks to your digital evidence puzzles.



ACROSS

2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.
4. The "free space" on a hard drive where deleted files can be found.
6. A type of "virus-network" that utilizes infected victims for combined computing, DDOS attacks, and more.
7. Format of cell-phone picture messages.
8. On Android devices, databases of evidentiary value are stored in this format.
9. Extra space at the end of a file where deleted data can exist.
10. Algorithm used to ensure evidence integrity; the "data fingerprint."
11. Type of container used to shield seized mobile devices from radio waves.
13. Verb: to gain administrative access on an iOS device.



DOWN

1. Hardware device used to ensure that evidence drives are not contaminated during acquisition.
2. A common web vulnerability where a hacker executes malicious code to alter a database.
3. The first piece of hardware a forensic examiner reaches for when responding to a computer-crime.
5. Text message format, limited to 160 characters.
6. Term for forensic disk images containing every bit of an evidence drive.
7. "Hidden" data such as date-time stamps and GPS coordinates, often part of picture files.
12. Newer type of cryptographic hash, also used to verify evidence integrity.

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¹"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.

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