

# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 58, No. 3/4  
March/April 2015

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**Easement Cases** 35

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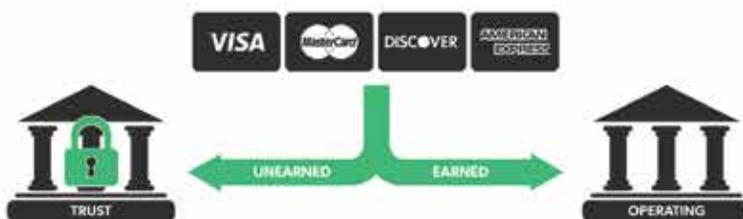


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# The Advocate

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## On the Cover:

The cover photo was taken last August during a road-trip photography adventure to the Redwoods in California. This specific shot was taken just outside of Crescent City, CA, right at sunset. Jennifer Cafferty-Davis is a litigation paralegal at Parsons Behle & Latimer, who greatly enjoys pursuing portrait, wedding, and nature photography.

## Section Sponsors:

This issue of *The Advocate* is sponsored by the Real Property Section.

## Editors:

Special thanks to the March/April editorial team: Amber Champree Ellis, Tenielle Fordyce-Ruff, Jennifer Schindele, Anna E. Eberlin.

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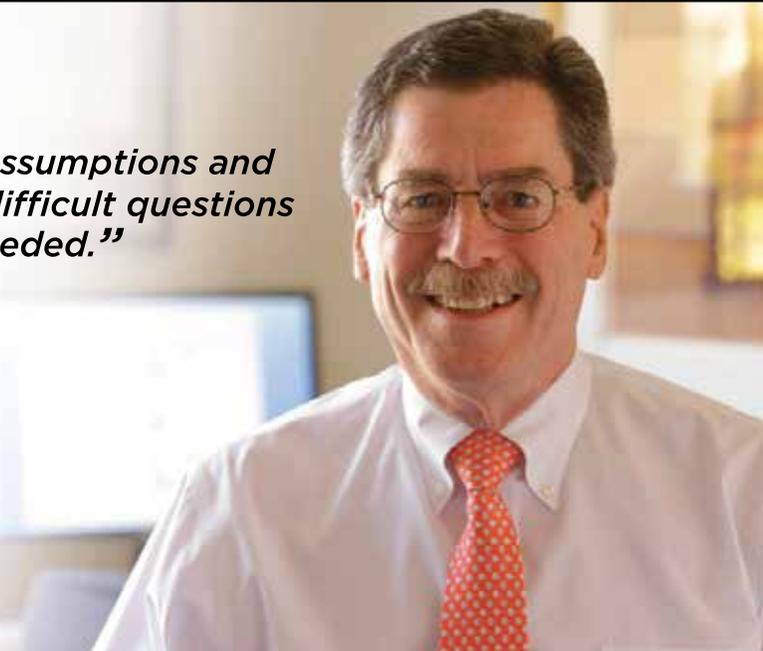
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### March 23

*Ethics for Transactional Lawyers*

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## April

### April 16

*Handling Your First or Next Tenant / Landlord Case*

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9:00 a.m. (MDT)

2.0 CLE credits – **NAC**

### April 17

*Ethics & Digital Communications in the Law Firm*

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11:00 a.m. (MDT)

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### April 29

*Free Trade Agreements - What They Are and How They Work*

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Noon (MDT)

2.25 CLE credits

## May

### May 7

*New Attorney Program*

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Boise Centre on the Grove, 850 W. Front Street - Boise

8:00 a.m. (MDT)

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### May 8

*Digging Into the Numbers: Accounting and Finance for Lawyers*

Sponsored by the Business & Corporate Law Section

The Grove Hotel, 245 S. Capitol Blvd. - Boise / Statewide Webcast

8:00 a.m. (MDT)

6.5 CLE Credits of which .5 is Ethics

### May 13

*Idaho Legislative Review*

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The Law Center, 525 W. Jefferson Street - Boise / Statewide Webcast

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2.0 CLE credits – **NAC**

## Save the Date



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### Access to Justice: Can We do Better?

Paul B. Rippel  
President, Idaho State Bar  
Board of Commissioners

**T**he Idaho State Bar and the Idaho Supreme Court frequently discuss the lack of access to justice by our low-income residents. As you know, our current pro bono rule of professional conduct is aspirational, not mandatory. Still, according to a recent Pro Bono Commission report, we are doing pretty well:

“[I]n 2013, more than 750 public and private attorneys, working in association with the Idaho Volunteer Lawyers Program, provided more than 15,000 hours of volunteer attorney assistance to more than 1,600 low-income individuals and family members, including the provision of legal representation in more than 600 state cases, while in 2013 volunteer lawyers provided 635 hours of pro bono service in federal court cases[.]” Yet it seems that people of modest means are still struggling to receive adequate representation.

The bar did make an effort to provide relief in cases with one or more pro se litigants by approving and implementing the Idaho Rule of Civil Procedure 11(b) (5), Limited Pro Bono Appearance (effective January 1, 2012). That civil rule permits an attorney to appear pro bono for an otherwise pro se party in one or more individual proceedings in an action, often referred to as unbundled legal services. It then, in more



detail, permits a notice of completion of the limited representation to be filed, with the same effect as an order of withdrawal, without the necessity of leave of the court. But the rule only applies if the limited representation was initiated and performed on a pro bono basis.

Generally we see an increase in people filing their domestic relations cases “pro se,” and their filings are not infrequently incomplete or the wrong form, causing problems that adversely impact the workings of our courts. Thus, the question arises, should the Idaho State Bar seek your approval to propose something more or different to further ensure legal assistance to those persons dealing with the legal system, but who do not have significant funds? Presumably, if there is something more, it would also promote greater efficiency in the court system and thus the administration of justice for all people with cases before the courts, not just those of modest means.

An example of something more or different permitted by our neighboring state of Wyoming can be found in their Rules of Professional Conduct at Rules 1.2(a) and 1.2(c). It expressly adopts the concept of providing unbundled legal services, especially to low-income clients, but it does not restrict the ability to act on a limited basis to pro bono representation.

I suspect some practitioners have devised ways to obtain a rapid leave of court to withdraw, and as a practical matter, are providing unbundled legal services. But, would it encourage more representation of people of

modest means if our current rule’s notice of completion procedure was expressly coupled with an ability to charge a fee, versus leave of court to withdraw?

A different aspect of fee-generating unbundled legal services I learned about at a Bar meeting was the benefit to solo practitioners, especially young ones trying to build a practice. These are lawyers needing to bring home the bacon while working to build a steady client base. Expressly being able to charge a fee for limited services creates a synergy that benefits both clients of modest means and lawyers.

Again, the question is, should the Bar seek approval from you, its members, to promote a rule change on providing limited legal services for a fee, with an easy completion procedure? If you have comments or opinions either way, please forward them to the Idaho State Bar for the Commissioners’ consideration, to executive director Diane Minnich at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

#### About the Author

**Paul B. Rippel** is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981. He has practiced in Idaho Falls since clerking for the Hon. Arnold T. Beebe for a year. His wife Alexis is also a U of I graduate and they have a son and daughter living in Portland, Oregon.

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## DISCIPLINE

### Gregory J. Vietz

(Withheld Suspension)

On January 29, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Gregory J. Vietz from the practice of law for a period of 9 months, with the entire 9 months withheld and placing him on disciplinary probation.

The Idaho Supreme Court found that Mr. Vietz violated I.R.P.C. 8.4(b) [Commission of a crime] and 8.4(d) [Conduct prejudicial to the administration of justice]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

In January, 2013, Mr. Vietz was charged in Ada County with two felonies, aggravated assault with a deadly weapon, felony use of a deadly weapon in a commission of a fel-

ony, and four misdemeanors, battery, resisting or obstructing officers, discharge of a firearm within city limits and assault on a police dog. In August, 2013, Respondent entered Alford pleas to two misdemeanors, discharging a firearm within city limits and assaulting a police dog. The court entered judgment imposing a sentence of 28 days incarceration, a fine, public service, and placed Mr. Vietz on supervised probation for two years.

In February, 2013, Mr. Vietz completed a 90-day intensive outpatient recovery program and he has attended a continuing care relapse prevention program. Since August 19, 2013, Mr. Vietz has been randomly tested for alcohol or controlled substances and all tests have been negative.

The Disciplinary Order provides that Mr. Vietz's 9 month suspension is withheld during his disciplinary probation until February 19, 2016

and subject to the terms and conditions of probation, which include: compliance with the terms of his criminal probation; avoidance of any alcohol or drug related criminal acts, or alcohol or drug related traffic violations; participation in a program of random urinalysis; and if Mr. Vietz 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 his period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

The withheld suspension does not limit Mr. Vietz's eligibility to practice law.

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

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## 2015 Annual Meeting scholarships available

The Idaho State Bar is offering a limited number of scholarships to the 2015 Annual Meeting, July 22-24, in Sun Valley. The scholarships include registration fee and a per diem of up to \$50 per day for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would otherwise be unable to attend. To apply for a scholarship, contact the ISB Commissioner who represents your judicial district, or ISB Deputy Director Mahmood Sheikh at (208) 334-4500. Deadline for a scholarship request is Friday, May 8.

## 'Animal personhood' gains legal traction

BOISE - The Idaho State Bar's Animal Law Section is excited to host a presentation by Professor Richard Cupp of Pepperdine University on March 13, who will speak on the topic "Are some animals entitled to legal personhood?"

In late 2013 widely publicized habeas corpus lawsuits were filed in New York seeking legal personhood for captive chimpanzees. Although the lawsuits were dismissed by trial courts, they are now on appeal, and similar lawsuits are likely to be filed in other states.

Professor Cupp will be appearing via webinar; his presentation will introduce the basic concepts of animal legal personhood, and will address some pros and cons of the approach for the interests of both animals and humans.



The presentation will be held at the Idaho State Bar, in the upstairs classroom, on March 13, 2015 from 12-1. This event is free to the public. Refreshments will be provided. CLE credit will be available for Animal Law Section members. Contact Sunrise Ayers at sunriseayers@idahoelgalaid.org with questions about the event.

## Election this spring for Eastern

### Idaho ISB commissioner

Nominations for 2015 ISB commissioner are due by April 7. Attorneys in the Sixth and Seventh Districts will be electing new representative to the Idaho State Bar Board of Commissioners this spring.

The new commissioner will replace Paul Rippel of Idaho Falls. Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the Sixth and Seventh Districts must reside or maintain an office in the Sixth District.

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

Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The executive director must receive nominations no later than the close of business on April 7. A nominating petition form may be obtained by calling the office of the executive director at (208) 334-4500 or on the ISB website [www.idaho.gov/isb](http://www.idaho.gov/isb).

Ballots will be mailed or emailed to all members eligible to vote in the Sixth and Seventh Districts on April 20. All ballots properly cast will be counted by a board of canvassers at the close of business on May 5.

## Idaho Judicial Council has opening

The Board of Commissioners of the Idaho State Bar is accepting applicants for an attorney member of the Idaho Judicial Council for a six-year term that begins on July 1, 2015.

In making its selection, the Commission will be guided by the following statutory considerations, found in Idaho Code Section 1-2101: Appointment shall be made with due consideration for area representation.

Idaho State Bar members interested in the position should submit a letter of interest along with a resume or biographical sketch to the Idaho State Bar office by April 30. Submissions should include information about the applicant and why he or she is interested in the position.

Letters and questions may be directed to: Diane Minnich, Executive Director, Idaho State Bar, P.O. Box 895, Boise, ID 83701, 208-334-4500, [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

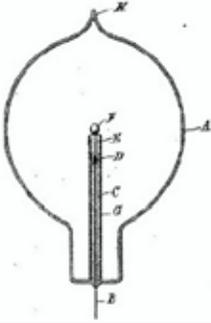
## New award created

The Idaho State Bar Board of Commissioners have created the Distinguished Jurist Award, this award recognizes excellence, integrity and independence by a member of the judiciary. Nominees are selected for their competence, fairness, goodwill and professionalism. Nominations are due March 31. *See page 24 for more information.*

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## Executive Director's Report

### Idaho Law Foundation — 2014 Year in Review

Diane K. Minnich  
Executive Director, Idaho State Bar

The Idaho Law Foundation (ILF) provides services to increase the public's access to and understanding of the legal system and offers educational programs to enhance the competency of practicing lawyers and judges. In 2014, thousands of Idahoans, including students, lawyers, individuals, families and entities that provide services to low income populations, were served by ILF and its programs.

#### Law Related Education (LRE)

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



**High School Mock Trial:** Each year, participating teams from high schools all across Idaho prepare and present a hypothetical legal case in a simulated courtroom competition.

Each year, participating teams from high schools all across Idaho prepare and present a hypothetical legal case in a simulated courtroom competition.

In 2014, 960 students and 112 volunteers participated in this annual event. Ambrose School from Boise represented Idaho at the national mock trial competition after defeating the Logos School in the state championship round.

**Turning 18 in Idaho:** This publication helps young people understand their rights and responsibilities as they reach the age of majority. Classroom sets are available free of charge to Idaho high schools. In the past five years, 80,000 copies of the publication have been distributed to Idaho high schools. Through a grant, the publication has been updated. We are in the process of creating an interactive online version and a Spanish version of the publication.

**Citizens' Law Academy:** Citizens' Law Academy is a free adult education program that offers a glimpse into the law, our legal system, and the work of lawyers and judges. In 2014, CLA was offered in Boise and Idaho Falls.

**New American Law Academy:** This program was offered in 2014

to refugees in the Boise area to help them understand the legal system in their new country. The two sessions of the academy were offered to 62 students representing 6 language groups. In addition, 27 attorneys, law students, a police officer, a social worker, and a paralegal volunteered to help organize the class, give presentations, or provide legal services to the refugees.

**National Mock Trial Competition:** The Idaho Law Foundation will host the National Mock Trial Competition in 2016. Planning and fundraising efforts are well underway. Hosting the national event will showcase our community and the commitment of the Idaho legal profession to civic engagement. We anticipate 1,000 visitors to the National competition in Boise.

#### Idaho Volunteer Lawyers Program (IVLP)

IVLP continues to provide legal services to low-income individuals, families and groups. Through case representation by volunteer attor-

neys, brief services, advice and consultation, clinics and workshops, IVLP served over 1,780 individuals last year. The program works with Idaho Legal Aid Services (ILAS), and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

In 2014, IVLP, ILAS and Disability Rights Idaho started a joint fundraising campaign. In its inaugural year, the campaign, Access to Justice Idaho, raised over \$180,000 to provide support for the three entities, which are the principal providers of free civil legal services for poor and vulnerable Idahoans.

The Idaho Pro Bono Commission, chaired by Idaho Supreme Court Justice Jim Jones, develops and implements strategies to maximize attorney involvement in pro bono service and develop means and incentives to support attorneys in providing pro bono services. Local pro bono committees are active around the state, assisting attorneys in their pro bono efforts.

Idaho Volunteer Lawyers Program		
	2013	2014
Calls received	4,715	4,412
Matters handled by volunteer attorneys	2,111	1,780
Hours donated by volunteer attorneys	12,929	14,200
Donated services value	\$2,585,800	\$2,840,340

### Interest on Lawyers

#### Trust Accounts (IOLTA)

Since its inception in 1985, nearly \$6.5 million in IOLTA funds have been granted to law related programs and services throughout Idaho. The organizations funded in 2014 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law

Related Education, Idaho YMCA Youth Government, Idaho State 4-H Know Your Government Conference, and University of Idaho law school scholarships. Funds granted for 2014 decreased nearly 50% from 2013. Due to the sustained low interest rates and limited grant funds available, IOLTA grant recipients struggle to provide programs and meet the need for services.

### Continuing Legal Education (CLE)

The Foundation and Bar Sections offer legal education programs throughout the state, and provide programming through a variety of delivery methods designed to make programs easily available and accessible.

ISB/ILF Continuing Legal Education		
	2013	2014
Total Live program attendance	1,497	1,627
Tape/DVD rentals	503	492
Online On-Demand Streaming	1,014	1,054
Webcast /Telephonic	472	593

### Fund Development

Sustained funding for Foundation programs, specifically IVLP and LRE, continues to be challenging. We continue to seek new sources of grants and funds. Donations increased in 2014; we appreciate the support of our donors and funders, without the support of lawyers, judges and granting organizations, the important work of the Foundation could not be accomplished.

Donations		
	2013	2014
General Fund, IVLP, LRE	\$70,159	\$114,919
Endowment Fund	\$3,100	\$6,325
Total	\$73,259	\$121,244
Total donors	661	645

In its inaugural year, the campaign, Access to Justice Idaho, raised over \$180,000 to provide support for the three entities, which are the principal providers of free civil legal services for poor and vulnerable Idahoans.

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

### Mission Statement

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

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

# 2015 Professional Award Nominations



The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2015 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

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

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

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

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

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

**Distinguished Jurist Award** - This award recognizes excellence, integrity and independence by a member of the judiciary. Nominees are selected for their competence, fairness, goodwill and professionalism.

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

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

## **Award nominations should include the following:**

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

You can nominate a person for more than one award. Nominations are accepted throughout the year. The deadline for the 2015 award nominations is March 31, 2015.

Submit nominations to:

***Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701  
or email at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).***

# Welcome From the Real Property Section

Hilary M. Soltman

**"D**irt" lawyers are an interesting bunch. I don't mean that personally (although in my experience the field does attract a colorful variety of characters, which is part of its charm), but professionally our practice areas are quite diverse, making us an eclectic group. Nearly 40 percent of the members of the Idaho State Bar's Real Property Section are also members of another Section (or Sections) of the Bar, including Business & Corporate Law, Commercial Law & Bankruptcy, Government & Public Sector Lawyers, Environment & Natural Resources, Water Law, Family Law, and Taxation, Probate & Trust Law. The unifying thread is that we all perform a substantial amount of work involving public or private interests in real property, regardless whether we consider that our "primary" practice area.

I believe the articles in this edition of *The Advocate* reflect our Section's diverse interests even though they focus on fundamental tenets of real property law. This issue features an article that discusses alternative easement theories when attempting to enforce or establish an easement

through litigation; a very timely article looking at the intersection of the increasing use of drones (or "unmanned aircraft systems") and privacy and private property rights in Idaho; a primer on transfers of real property through estate planning vehicles, such as wills or trusts, and the probate process; and a summary of a recent Idaho Supreme Court case involving a title insurance and escrow agent's liability for a critical error in the transfer of real property. We've also included a couple of articles providing helpful guidance when dealing with oil and gas rights in Idaho: one shedding light on Idaho's current regulatory environment (or lack thereof) and some potential developments in the 2015 legislative session, and another highlighting the basic elements of oil and gas leases.

The Real Property Section's main educational goals are to keep our members informed about recent legal or policy developments or events that affect real estate practitioners and provide quality, in-depth programming on selected issues of interest to our membership and the real estate community in general, such as our annual continuing legal education seminars. However, we also appreciate the opportunity to aid those that don't regularly practice

in this area when they are inevitably faced with a legal issue involving dirt (no, you can never truly escape the "bundle of sticks").

Some of these articles tackle current issues that might not initially present themselves as "real property" topics, though all of these topics rest, to varying degrees, upon the foundation of real estate law. The very large umbrella of modern real estate practice keeps our world interesting. With that in mind, I hope the broad range of articles in this edition both engages real estate attorneys and piques the interest of a wider audience. Maybe even "Uncle Sal" will find some useful kernels of (free) real estate wisdom here.

## About the Author

**Hilary M. Soltman** is Underwriting Counsel for First American Title and Escrow Company in Boise, Idaho. She has extensive experience with real estate transactions, commercial development, and real estate financing and secured transactions. Hilary is currently serving as the Vice Chairperson of the Real Property Section of the Idaho State Bar and can be reached at [hsoltman@firstam.com](mailto:hsoltman@firstam.com).



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# Uncle Sal's Gas and Oil Pooling Review and Update

Andrew Hawes

**Y**ou finish eating a nice lunch at your northend home when you receive a call on the way back to the office. It is Uncle Sal from Owyhee County.<sup>1</sup> Uncle Sal is famous for two things: (1) His ham hock sandwiches; and (2) Calling you for free legal advice.

"Yes, Uncle Sal. How are you?" you answer in a monotone voice.

"Good. Good. I need you to leave that communist commune you call the northend and meet me at the Mini-Mart first thing in the morning."

"Well. I have to get the kids ready for a school program ...." you begin.

"Great... Great...See you then. Thanks a million, babe! See you at 6!"

The next day, after leaving your reluctant wife to dress the kids by herself for the wild west school program, you arrive at the Mini-Mart in Marsing at 6:02 a.m. "You're late! Have a seat!" Uncle Sal boldly states as you walk through the Mini-Mart doors.

As you sit down, Uncle Sal suspiciously scans the store. When he sees that the coast is clear, he whispers, "There's been a lot of talk in town lately of this oil boom. I was pumping gas yesterday and heard from Kenny that if a neighbor discovers oil on their property, the law says they can drill on your land and force you to pay for the costs. You know, I've got that property near Murphy..." He then pulls out a ham hock sandwich, sloppily placed in a sandwich bag and slides it carefully across the table. Apparently, this is your fee.

Indeed, you are aware about the recent developments in oil and gas in southeastern Idaho and across into Oregon. According to the Ida-

Mandatory pooling forces a non-consenting owner to be part of group or unit and to pay the operator for costs associated in drilling and maintaining a well.

ho Petroleum Council, annual revenues from production in the area could be up to \$206 million. Even though this is another chapter in your annoying relationship with Uncle Sal, you have an interest in looking into the matter. You have a heart for the guy and the folks of Owyhee County. After all, Silver City, the former county seat, was once one of the most populated and modern cities in the region due to the discovery of rich gold and silver placer deposits found in the Owyhee Mountains. You wonder whether one of Idaho's most illustrious counties is on the eve of another historic "gold rush."

"Uncle Sal, I will need to get back to you," you exclaim. "I know nothing about oil and gas law in Idaho. Why don't you dig out whatever information you have about your Murphy property and I'll go back to the office and see what I can find out."

"Great. See you tomorrow." And with a wink, Uncle Sal added, "And enjoy the sandwich. There's plenty more where that came from."

You make it to your Boise office by 7:30 a.m. You quickly figure out that Idaho has little oil and gas history. Subject to applicable state pooling rules,<sup>2</sup> an owner/lessee of minerals may voluntarily consent to be part of a pool comprised of a group of adjacent land owners/mineral lessees through a lease with a

single oil or gas production company.<sup>3</sup> However, the issue of whether an oil/gas well operator could force landowners/mineral owners to surrender or share mineral interests in a pool and require the mineral owners to contribute to the production costs depends on the applicable state law. Depending on the state, a landowner or mineral owner may be subject to mandatory pooling (also known as "integration"), as set forth under state law or pursuant to an order issued by a governing state agency. Mandatory pooling forces a non-consenting owner to be part of group or unit and to pay the operator for costs associated in drilling and maintaining a well. You nod and tell yourself, "Mandatory pooling. This is what Uncle Sal is really asking about."

Idaho Code sections 47-306 to 47-330 (Oil and Gas Wells — Geologic Information, and Prevention of Waste) provide the legal authority for governing oil and gas wells. This act, along with Idaho Code sections 58-104 (6), 58-105, and 58-127 and Idaho Code sections 67-5201 to 67-5292, establish the Idaho Oil and Gas Conservation Commission (the Commission) and the rules governing oil and gas conservation in the state of Idaho. Under these provisions, the Commission is charged and vested with the authority of

enforcing, regulating and setting administrative rules. The administrative rules governing oil and gas conservation in the state of Idaho are found at IDAPA 20.07.02.

### **Establishment of a spacing unit and well spacing**

You review Idaho Code section 47-321(a) and discover the Commission is required to establish spacing units for each “pool” (except pools that have been developed to a certain stage). A “pool” is defined as an underground reservoir containing a common accumulation of oil or gas or both. Further each zone of a structure that is completely separated from any other zone in the same structure is also a pool.<sup>4</sup> Thus a spacing unit may cover more than one tract of land with separate ownership. So, if Uncle Sal’s land is sitting on a defined pool, it is entirely possible that the Idaho Oil and Gas Commission could establish a spacing unit comprised of his land, and possibly adjacent lands owned by others.

But how many wells can be on a spacing unit? You discover that Idaho Code section 47-321 (d) directly addresses these issues. According to this code provision, an order establishing spacing units shall direct that no more than one well be drilled to and produced from the common source of supply on any unit. The Commission also has the authority to set the location criteria of oil and gas wells for a pool by an order. Absent an order, well spacing shall be set in accordance with the spacing rules set out in IDAPA 20.07.02.330 (2014).<sup>5</sup> For example, under IDAPA 20.07.02.330.01 every well drilled for oil must be located in the center of a 40-acre governmental quarter section, lot or tract, or combination of lots or tracts. Under IDAPA 20.07.02.330.02, every well drilled

for gas must be located on a drilling unit consisting of approximately 640 contiguous surface acres, which shall be on governmental section or lot(s) equivalent or 600 surface acres if the area is not covered by the United States Public Land Survey.

Understanding the concept of a “spacing unit” you wonder if Uncle Sal’s Murphy property becomes part of a spacing unit whether his mineral interests could also be subject to mandatory pooling under Idaho law?

### **Integration of spacing units for production**

As you take a bite out of Uncle Sal’s ham hock sandwich, you review Idaho Code section 47-322, a code provision that covers forced pooling or “integration” in the state of Idaho. Subsection (a) provides that when two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of a spacing unit, the interested persons may integrate their tracts or interests for the development and operation of the spacing unit. If voluntary integration does not occur, any interested person may apply to the Commission, which shall make an order integrating all tracts or interests in the spacing unit and provide for the development, operation, and shared production of that spacing unit.<sup>6</sup>

“On conditions that are ‘just and reasonable?’” you inquire of Vandal, the firm’s golden doodle mascot who is sitting next to you and patiently hoping for a piece of the sandwich to drop on the floor.

Under Idaho Code section 47-322 (c) the integration order shall also provide the following: (1) authorization for the drilling, equipping, and operation, or operation, of a well on the spacing unit; (2) who may drill and operate the well; (3) time and manner in which all the owners in the spacing unit may elect to participate therein; and (4) for the payment by all those who elect to participate therein.

The statute further provides that if there is not a voluntary agreement, the Commission, as a part of the order establishing a spacing unit or units, may prescribe the terms and conditions upon which the royalty interests in the unit or units shall be deemed to be integrated without the necessity of a subsequent separate order integrating the royalty interests. Each such integration order shall be upon *terms and conditions that are just and reasonable*.

“On conditions that are ‘just and reasonable?’” you inquire of Vandal, the firm’s golden doodle mascot who is sitting next to you and patiently hoping for a piece of the sandwich to drop on the floor.

### **Non-election of participation in drilling operations**

What happens if Uncle Sal’s property is located within a spacing unit but he elects not to participate in the costs and expenses associated with

drilling, equipping and operating a well within a spacing unit? Under Idaho Code section 47-322 (c), if requested, an integration order must provide for at least one “just and equitable alternatives” whereby an owner who elects not to participate may elect to surrender his leasehold interest to the participating owners on some reasonable basis and for a reasonable consideration. If the amount of consideration is not agreed upon, the Commission determines the amount. Alternately, such an owner may elect to participate on a limited basis upon terms and conditions determined by the Commission to be just and reasonable.

Finally, if any of the owners drills, equips, and operates, or pay the costs of those activities for the benefit of another person as provided for in an order of integration, then such owners are entitled to the share of production from the spacing unit accruing to the benefitted person, up to the sums payable by or charged to the interest of such other person.

Stuck on the “just and reasonable,” standard you look to see if there are any published integration applications or orders with the goal of understanding what is considered “fair and reasonable” in the eyes of the Commission. After a few minutes, you come across a published application for integration that was submitted by Alta Mesa Services, LP on July 11, 2014.<sup>7</sup> In that application Alta Mesa proposed a spacing unit of 640 acres located in Payette County of which the company owned a majority of leasehold acres. Alta Mesa also requested that it be named as the operator of a proposed well.

Alta Mesa further proposed three alternatives for the Commission to consider in integration order: (1) The owners of the unleased mineral interest execute and deliver to Alta Mesa a one-year oil and gas lease

on Alta Mesa’s proposed oil and gas lease, for fair and reasonable compensation, or in the alternative a bonus of fifty dollars per acre and one-eighth royalty in lieu of the right to participate in the working interest of the spacing unit; (2) The owners of the unleased mineral interests shall be pooled and integrated into the unit with assessment of a reasonable risk factor penalty; (3) The owners of the unleased mineral interests shall participate in the cost of drilling, testing and completion of the test well to be drilled by Alta Mesa on

The owners of the unleased mineral interests shall participate in the cost of drilling, testing and completion of the test well.



the unit, subject to the terms of the uniform modified AAPL Operating Agreement, attachments and authorization for expenditures proposed by Alta Mesa. With respect to the three alternatives, Alta Mesa requested that the unleased mineral owners be given 15 days to elect one of the above methods and in the event no election is made during that time that the Commission issue an integration order providing that the unleased mineral owners shall be deemed to have accepted a bonus of \$50 per net mineral acre as compensation in lieu of a right to participate

in the working interest in the unit and with a one-eighth royalty.

Finally, Alta Mesa requested that due to the risks and costs inherent in drilling the proposed well, that the Commission should fix a reasonable risk factor of the associated costs and expenses at 300 percent for the initial well and 300 percent for any subsequent wells. Ultimately, Alta Mesa’s request was approved by the Commission as presented on a 4-to-1 vote on October 1, 2014.

### **Idaho Oil and Gas Conservation Commission’s proposed new rules**

As you finish the last bite of the ham hock sandwich you see that in 2014 the Commission submitted new rules covering forced pooling to the Idaho legislature for consideration in 2015.<sup>8</sup>

The proposed new rules put meat on the integration frame set under Idaho Code section 47-322 as they specifically address both the consenting and non-consenting landowner in a pool.<sup>9</sup> Under proposed IDAPA 20.07.02.131.02, an owner who elects to participate as a working interest owner will pay the proportionate share of the actual costs of drilling and operating a well allocated to the owner’s interest in the spacing unit and the operator of the integrated spacing unit and working interest owners must enter into a joint operating agreement approved by the Commission in the integration order.<sup>10</sup>

Under proposed IDAPA 20.07.02.131.03, non-consenting working interest owners are entitled to their respective shares of the production of the well, not to exceed one-eighth royalty, until the operator of the integrated spacing unit has recovered up to 300% of the non-consenting working interest owner’s share of the cost of drilling and operating the well under the terms set forth in the integration order. After

all the costs have been recovered by the consenting owners in the spacing unit, the non-consenting owner owns the proportionate share in the well, surface facilities, and production, and will be liable for further costs as if the non-consenting owner had originally agreed to pay the costs of drilling and operating the well. The operator of the integrated spacing unit and non-consenting working interest owners must enter into a joint operating agreement approved by the Commission in the integration order.

Proposed rule IDAPA 20.07.02.131.04 deals with non-elected operator/owner mineral leases. Under this rule an owner may enter into a lease with the operator in accordance with the integration order and will receive a one-eighth royalty. The operator must also pay the leasing owner the same bonus payment per acre as the operator paid to the other owners in the same spacing unit prior to the issuance of the integration order. If an owner fails to make election within the election period set forth in the integration order, such owner's interest will be deemed leased under the terms and conditions of the integration order.

Proposed Section IDAPA 20.07.02.130.01 outlines other requirements one must follow in applying for an integration application. For example, subsection (h) requires that at least 55 percent of the mineral interest owners in the spacing unit support the integration application by leasing or participating as a working interest owner.

Armed with your research, you meet Uncle Sal at the Mini-Mart the following day around noon and report back to him about what you have discovered about the latest and greatest on mandatory integration in Idaho. At the end he hands you a large worn out envelope with five 1977 stamps and states, "here is

the information you wanted." You open the half torn envelope and see on top a copy of the title policy to Uncle Sal's Murphy property. You quickly skim the report and there it is: Special Exception No. 10, which excepts out coverage for any and all matters under a reservation of mineral rights as listed in Jonathon O. Fletcher's conveyance to Uncle Sal of the Murphy property as dated and recorded in the Owhyee County Assessor on December 28, 1976. "Just wonderful," you think before telling Uncle Sal that he doesn't even own the mineral rights. "Well fiddly-dee then," he states. "By the way, what protections and obligations do I have as the owner of the ground to the mineral owner or perhaps an oil guy?" He slides you another ham hock sandwich.

### Endnotes

1. Uncle Sal is a one-of-a-kind character. See Andrew Hawes, *Uncle Sal's Mechanic's Lien Law Review and Case Law Update*, THE ADVOCATE (November 2002).
2. See Sharon O. Flanery & Ryan J. Morgan, *Overview of Pooling and Unitization Affecting Appalachian Shale Development*, 32 ENERGY & MIN. L. INST. 13 (2011).
3. To learn more about the basics of oil and gas leasing, please see Dylan Lawrence's article, *Anatomy of an Oil and Gas Lease*, published in this Advocate edition.
4. See Idaho Code § 47-318(k).
5. At the time of the drafting of this article, the Idaho Oil and Gas Commission had submitted to the Idaho legislature for 2015 consideration new proposed rules Governing Oil and Gas Conservation. Well spacing is found under re-numbered section 120 along with some proposed amendments.
6. The Oil and Gas Conservation Commission of the State of Idaho. Idaho Code section 47-317(b) provides the Commission with the authority and duty to enforce the provisions of Idaho Code Title 47, Chapter 3. Under this section that Commission has the power and authority to make and enforce rules, regu-

lations and orders, and do whatever may reasonably be necessary to carry out the provisions of this act.

7. Please see a copy of the Application of Alta Mesa's July 11, Integration Application at <http://www.idl.idaho.gov/oil-gas/commission/well-permits/Sec%2034%20T9N%20R4W%20Integration%20Application%20dated%207-11-14%20redacted2.pdf>.

8. New pending integration rules at the time of your research for Uncle Sal (January 14, 2015) are found here: <http://www.idl.idaho.gov/oil-gas/Commission/rulemaking/20.0207.1401-Draft-Proposed-Rule.pdf>.

9. Under proposed rule 131.03 an owner who refuses to share in the risk and actual costs of drilling and operating the well is a nonconsenting working interest owner.

10. If adopted, rule 131.01 provides that upon issuance of an integration order by the Commission, the operator of the integrated spacing unit must issue an elections form to all non-leased owners in the spacing unit by certified U.S. mail, return receipt requested. The election form must clearly identify the participation terms, the course of action if an owner does not respond to the election form, and a response deadline. The terms in subsections 131.02, 03, and 04 of these rules are available to non-leased owners in an integrated spacing unit.

### About the Author

**Andrew E. Hawes** serves as General Counsel and General Manager for Western Pacific Timber, LLC which is headquartered in Boise. Mr. Hawes obtained his B.A. from the University of Denver in Political Science in 1992 and his law degree from the University of Idaho College of Law in 1994. He formerly served as President of the Idaho State Bar and is the past Chairman of the Idaho State Bar Real Property Section.



# Anatomy of an Oil and Gas Lease

Dylan Lawrence

## I. Introduction and brief history

While Idaho has a rich history of hard rock mining, in contrast to neighbors such as Montana, Utah, and Wyoming, Idaho has virtually no historical oil or gas production. Between 1903 and 1988, approximately 145 wells were drilled throughout Idaho to find hydrocarbons, with little success.<sup>1</sup> This exploration focused primarily on two areas of the state: the western Snake River Plain — now known as the “Western Idaho Basin” — and southeastern Idaho.<sup>2</sup> In 2005, a private oil and gas company began leasing land in the western Snake River Plain, primarily in Payette, Gem, and Canyon Counties.<sup>3</sup> In 2010, a successor to those leases drilled eleven wells in Payette County, seven of which had “significant shows” of natural gas.<sup>4</sup> Since then, additional wells have been drilled, and as of the writing of this article, one well in the Western Idaho Basin was already producing natural gas, with another fourteen considered to have production potential.<sup>5</sup>

Even though oil and gas development can pose challenges regarding issues such as land use, infrastructure, and environmental protection, the development of such an industry here could have significant benefits for the state including royalty revenue to state and local landowners, increased tax revenue for state and local governments,<sup>6</sup> and increases in spending and employment in the affected areas.<sup>7</sup>

While the Department of Lands has already issued dozens of oil and gas leases for resources within state lands, and the federal government

Private oil and gas leases bear some similarities to mineral leases, however, due to differences in the nature of the deposits and how they are extracted, gas leases are unique and can be quite complex.

recently announced it would open up some federal lands for leasing,<sup>8</sup> a significant percentage of the mineral interest lies within privately owned property. To develop those resources, the drilling companies must secure private leases with the landowners.

Private oil and gas leases bear some similarities to mineral leases, however, due to differences in the nature of the deposits and how they are extracted, gas leases are unique and can be quite complex. Since natural gas appears to be the prevalent resource in southwestern Idaho, and for the sake of brevity, this article will refer to oil and gas leases simply as “gas leases.” Because natural gas production is a relatively recent development in Idaho, landowners in the resource areas and their attorneys should educate themselves in order to protect their interests. Therefore, the purpose of this article is to discuss some of the basic elements and common provisions of a gas lease.

## II. Key oil and gas lease concepts and terms

At this time Idaho has little, if any, jurisprudence regarding gas leases. That most certainly is not the case in states with more established oil and

gas industries. In fact, all of the issues below are the subject of dozens, if not hundreds, of state appellate court opinions. This article is intended to provide a general overview of the elements of a gas lease, not to be a comprehensive discussion of any particular aspect of a gas lease.

### A. Habendum clause

As the courts have recognized, “[a]n oil and gas lease...is both a conveyance and a contract.”<sup>9</sup> In that regard, the “habendum clause” of any conveyance document, including a gas lease, is the clause defining the extent of the interest being conveyed.<sup>10</sup> As such, it is an important element of any gas lease. Interestingly, “while habendum clauses traditionally were used to protect the interests of lessors,...the clauses are now viewed as a protection for lessees.”<sup>11</sup> Commonly, the habendum clause of a gas lease will include the following elements:

- An exclusive grant of the described property from the landowner to the drilling company for the purposes described in the lease;
- A description of the activities the lessee is authorized to engage in, which typically includes the right to explore, drill, extract, produce, and

market oil and gas from the property;

- A list of the substances subject to the lease, typically including oil, gas, and a variety of derivatives and by-products thereof; and
- The right to access and use as much of the surface as is necessary for pipelines, utilities, roads, and other infrastructure needed to produce, store, and market the oil and gas.

In the specific context of gas leases, it is also “[t]he purpose of the habendum clause...to define and limit the *duration* of the lessee’s estate.”<sup>12</sup> Because it is of such critical importance and can be affected by a variety of provisions other than just the habendum clause,<sup>13</sup> the subject of the duration of gas leases is addressed in more detail in Section C herein.

## B. Payment terms

Of course, the lease’s payment terms are very important to the landowner; without them, the landowner would have no reason to sign a lease. Below are the primary categories of payment terms that typically appear in a gas lease.

### 1. Bonus

The bonus is a one-time lump sum payment to the landowner at the time the gas lease is executed, in consideration for signing the lease.<sup>14</sup> Because it is an incentive for the landowner to sign the lease, it is typically completely separate from any rents or royalties in the lease, and is also non-refundable, even if the lessee never explores for or develops oil or gas from the leased property. Typically, the bonus is expressed as a dollar amount per “net mineral acre” being leased.

## 2. Royalty

As with any type of contract provision, the royalty clause can be as simple or as complicated as the parties desire. And, there are a myriad of different types of royalty clauses out there that go far beyond the scope of this article. At its core, the royalty “refers not to the oil and gas in a place, but to a share in the oil and gas produced, and paid as compensation for the right to drill and produce, and does not include a perpetual interest in the oil and gas in the ground.”<sup>15</sup> The royalty is typically expressed as a fraction or percentage of the value of the natural gas produced. The most common royalty rate is 1/8; indeed, that is the standard royalty for oil and gas leases on state and federal land.<sup>16</sup> However, in areas with well-established oil and gas resources, royalties considerably larger than 1/8 are common.

An important related issue is which, if any, expenses the lessee may deduct from the value of production before calculating royalties. Landowners prefer no such deductions such that the royalty is calculated on the larger “gross” production, while drilling companies may wish to reduce payments to the landowner by deducting certain expenses from production before calculating the

royalty. Indeed, this issue has been frequently litigated.<sup>17</sup> For example, an appellate court in Texas recently affirmed an award of \$700,000 in back royalties against a drilling company for improperly deducting post-production expenses before payment of royalties.<sup>18</sup>

## 3. Rentals

As discussed in more detail in Section C herein, if the initial term of the lease expires before gas is produced, the lease may allow the lessee to extend the term of the lease through the payment of rentals to the landowner. These can take the form of a traditional “delay rental,” typically a fixed amount of money paid monthly, quarterly, or annually in order to extend the lease.<sup>19</sup> Or, where the lessee has drilled a well that would be producing gas but-for lack of access to a market or pipeline, these may take the form of “shut-in” rentals.<sup>20</sup>

## C. Terms affecting the duration of a gas lease

Before signing a gas lease, landowners should understand the term of the lease, and the various mechanisms by which the lease can be extended.

At its core, the royalty “refers not to the oil and gas in a place, but to a share in the oil and gas produced.”

## 1. Primary term

Gas leases typically include an express “primary term” provision for a defined number of years. “The primary term of an oil and gas lease is a period during which the lessee has the option of maintaining the lease without drilling upon the property by paying delay rentals.”<sup>21</sup> As with any lease term, the length of the primary term can be subject to negotiation. It is not uncommon for proposed leases to have a primary term in the 3-5 year range.

## 2. Option to extend

In addition to the initial primary term, gas leases typically also include an option to extend the primary term. Like the bonus, the option is usually expressed as a certain dollar amount per net mineral acre that will continue to be leased after the option is exercised. As with the initial primary term, it is not uncommon for the option to allow the lessee to extend the term of the lease for an additional 3-5 years. Therefore, it may be possible for the lease to be in effect for several years — perhaps even up to 10 years — without any exploration, development, or production activity on the leased property.

## 3. Pooling and integration<sup>22</sup>

Most gas leases have “pooling” provisions, allowing the lessee to combine the leased property with other nearby properties for well drilling and royalty payment purposes. While pooling provisions by themselves do not extend the gas lease, other provisions in the lease may allow the lessee to extend the lease by conducting activities on other lands that are “pooled” with the leased

land.<sup>23</sup> Therefore, it is important to understand pooling in order to fully appreciate the various ways the term of the lease can be extended.

Natural gas is diffuse and does not adhere to property, political, or other arbitrary manmade boundaries. And, given advances in drilling techniques, a single gas well is capable of producing gas from a relatively large area. Because of these two factors, drilling wells within each individual tract of leased land would be wasteful because it would result

Many leases specify that production of gas “in paying quantities” extends the lease.<sup>30</sup>

in the drilling of unnecessary wells. Stated another way, without pooling, many individual parcels of land would not be developed because, by themselves, they would not financially justify the drilling of a well.<sup>24</sup>

In order to address this reality, most gas-producing states utilize drilling and spacing units. In Idaho, the default rule allows only one gas well within a 640-acre government section (though this can be changed based upon the particular geology of the resource).<sup>25</sup> The owners of the gas interests within these “spacing

units” may voluntarily pool or “integrate” their interests for the purpose of developing the resources within the unit.<sup>26</sup> When this occurs, “all royalty interest owners in the land subject to the lease share in production no matter where the well is drilled on the leasehold.”<sup>27</sup>

While most gas leases contain an express pooling provision, in the absence of such voluntary “integration,” the Idaho Oil & Gas Conservation Commission may issue an order requiring integration, including the terms and conditions for sharing in the production from the spacing unit.<sup>28</sup> At the time of the drafting of this article, the Commission had proposed a rule that would allow a drilling company to pool all of the mineral interests within a spacing unit as long as it had the agreement of 55% of the mineral interest owners within the unit.<sup>29</sup> (For a more in-depth discussion of forced pooling, please see Andy Hawes’s accompanying article in this issue of *The Advocate*.)

## 4. Production in paying quantities and conducting “operations”

Most, if not all, gas leases extend the life of the lease for as long as gas is produced from the leased premises or lands pooled therewith. Many leases specify that production of gas “in paying quantities” extends the lease.<sup>30</sup> In addition, even if profitable production is not occurring at the end of the primary term, many leases also allow the lessee to extend the lease if it is engaged in “operations,” which typically includes a broad array of activity on a gas well, such as drilling, testing, reworking, deepening, or repairing the well.<sup>31</sup> Again, such drilling “operations” usually extend the lease if they are conducted

on a well within the leased premises or lands pooled therewith.

### 5. Shut-in

A lease may also be extended beyond its primary term if the lessee has completed the drilling of a “shut-in” well on the leased premises, or lands pooled with the leased premises. Typically, a shut-in well is a well that has been completed, but from which production is not occurring due to a lack of access to a pipeline or market.<sup>32</sup> (Indeed, most of the wells that have been completed in southwest Idaho are currently considered to be “shut-in” wells.) Normally, however, when a well is shut-in, the lessee must pay an annual shut-in rental or royalty to the landowner in order to keep the lease in effect.

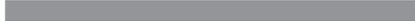
### 6. Reasons beyond lessee’s control

Many proposed gas leases also contain a force majeure clause allowing the lease to extend beyond its primary term, even if production or operations are not occurring, if such lack of activity is due to causes beyond the lessee’s control. As with any provision, this provision is open to negotiation, but as initially proposed in many gas leases, these clauses are often somewhat vague and therefore potentially much broader in scope than traditional “force majeure” clauses, which usually excuse performance under relatively extreme and/or well-defined circumstances.<sup>33</sup>

### D. Surface protection provisions

Idaho is, of course, a highly agricultural state, and many Idahoans make their livings off of the land. Therefore, what happens on the surface of the land is understandably of critical importance to them.

The potential for viable natural gas production in Idaho is certainly an intriguing prospect that could provide a variety of benefits.



Most gas leases initially proposed by the drilling companies contain some provisions that relate to protection of the surface, though they can be very general. Typically, the lessee is authorized to use as much of the surface as is reasonably necessary in order to explore for and develop the gas resources, and is required to reimburse the landowner for damages to the surface and to restore the land once the gas operations have concluded.<sup>34</sup> It is also common for the lease to contain setback requirements, *i.e.*, to prohibit gas operations within a certain distance from existing structures.

Understandably, many landowners find these rather general provisions unsatisfying, instead preferring to specify more detail regarding the drilling company’s activities while on the property and regarding the scheme and mechanisms for reimbursing the landowner for land that is used or damaged by the operations. There are, of course, a myriad of surface protection issues that can be addressed in a lease, a more detailed discussion of which is outside the scope of this article.

### E. Other provisions

There are a variety of other categories of provisions that commonly appear in gas leases, including war-

rancies, title issues, indemnification provisions, insurance requirements, *etc.* However, as with surface protection provisions, many of these types of provisions will already be familiar to most Idaho attorneys and are therefore outside the intended purpose and scope of this article.

### III. Conclusion

The potential for viable natural gas production in Idaho is certainly an intriguing prospect that could provide a variety of benefits (and, of course, some challenges) to the state. If that occurs, Idaho attorneys will need to develop expertise in oil and gas leasing in order to protect their clients’ interests. I hope this article is a helpful first step in that regard for many of the readers.

### Endnotes

1. ZACHARY JOHNSON, PHILIP S. COOK, JAY O’LAUGHLIN, AND KENTON BIRD, POLICY ANALYSIS GROUP, COLLEGE OF NATURAL RESOURCES, UNIVERSITY OF IDAHO, OIL AND GAS RESOURCE EXPLORATION AND DEVELOPMENT POLICIES IN IDAHO, REPORT No. 33, at p. 2 (Dec. 2013) [hereinafter POLICY ANALYSIS GROUP].
2. JOHN D. MCLEOD, IDAHO GEOLOGICAL SURVEY, THE SEARCH FOR OIL AND GAS IN IDAHO, GEONOTE 21 (1988).
3. POLICY ANALYSIS GROUP, note 2, at 4.
4. *Id.*
5. Brian Smith, *Cassia County Land for Lease in State Oil and Gas Auction*, TIMES-NEWS, Aug. 29, 2014.

6. Pursuant to Idaho Code § 47-330, there is a 2.5% tax on the value of oil and gas produced, which is divided among the state, the county where the production occurs, and the cities within that county.

7. POLICY ANALYSIS GROUP, note 2, at 26-27.

8. Keith Ridler, *BLM Plans to Hold Payette County Lease Sale for Potential Oil, Gas Land*, IDAHO PRESS-TRIBUNE, Dec. 26, 2014.

9. *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788, 792-94 (W.Va. 1986) (citation omitted).

10. See BLACK'S LAW DICTIONARY 710 (6<sup>th</sup> ed. 1990); see also generally *Latham v. Garner*, 105 Idaho 854, 864-65, 673 P.2d 1048, 1058-59 (1983) (Bistline, J., dissenting).

11. *T.W. Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261, 271 (Pa. 2012) (citation omitted).

12. *McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788, 793 (W.Va. 1986) (emphasis added) (citation omitted).

13. *Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 507 (Tex. App.—Waco 1997) (“the habendum clause is not the ultimate determiner of the duration of an oil and gas lease...[t]he lease may provide elsewhere for the modification of the term stated in the habendum”).

14. See generally *BP America Production Co. v. Zaffirini*, 419 S.W.3d 485, 409-98 (Tex. App.—San Antonio 2013).

15. *Kopp v. Baird*, 79 Idaho 152, 162, 313 P.2d 319, 324 (1957) (citations omitted).

16. 43 C.F.R. § 3103.3-1 (default 12.5% royalty for onshore oil & gas leases of federal land); IDAHO CODE § 47-805 (royalty for oil and gas leases on state land shall not be less than 12.5%).

17. The opinion in *Garman v. Conoco, Inc.*, 886 P.2d 652, 657-58 (Colo. 1994) includes an interesting summary of which state supreme courts have held that post-production costs are and are not deductible.

18. *Chesapeake Exploration, L.L.C. v. Hyder*, Case No. 04-12-00769-CV, Tex. Ct. of App., 4<sup>th</sup> Dist., March 5, 2014.

19. See generally *Rice v. Hillenburg*, 766 P.2d 182 (Kan. App. 1988).

20. See *infra* Part II.C.5.

21. *Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 506, n.3 (Tex. App.—Waco 1997).

22. Many of the issues discussed in this article are complex, but pooling is perhaps the most complex of them all. This brief discussion hardly does the topic justice, but hopefully it effectively describes the concept.

23. See *Browning Oil Co., Inc. v. Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000) (“[p]ooling allows a lessee to join land from two or more leases into a single unit...[o]perations anywhere within the unit are treated as if they occurred on all the land within the unit, and production from a well on the pooled unit is treated as occurring on all the tracts pooled into the unit”).

24. See generally *Kysar v. Amoco Production Co.*, 93 P.3d 1272, 1276-78 (N.M. 2004).

25. IDAPA 20.07.02.330.02. By the time this article has been printed, this provision may have been renumbered to 120.02.

26. IDAHO CODE § 47-322(a).

27. *London v. Merriman*, 756 S.W.2d 736,

739 (Tex. App.—Corpus Christi 1988).

28. IDAHO CODE § 47-322(a).

29. “Rules Governing Oil and Gas Conservation in the State of Idaho,” Idaho Administrative Bulletin Vol. 14-9 (Sept. 3, 2014) (to be codified at IDAPA 20.07.02.130).

30. See *T.W. Phillips Gas and Oil Co. v. Jedlicka*, 42 A.3d 261 (Pa. 2012).

31. See *Samano v. Sun Oil Co.*, 621 S.W.2d 580 (Tex. 1981).

32. See generally *Levin v. Maw Oil & Gas*, 234 P.3d 805 (Kan. 2010).

33. See generally *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000); *Sun Operating, L.P. v. Holt*, 984 S.W.2d 277 (Tex. App. —Amarillo 1998).

34. State law also requires reclamation of the land once the drilling and production activities have concluded. IDAPA 20.07.02.325 (proposed to be renumbered to Section 510 upon adoption of pending rule).

#### About the Author

**Dylan Lawrence** is a partner with *Varin Wardwell* in Boise, specializing in water rights, environmental, and natural resources law. He has advised multiple landowner clients regarding oil and gas leases in the Western Idaho Basin and southeast Idaho.



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# The Belt and Suspending Approach to Easement Cases

Travis J. Sorenson

**W**hen filing a case to enforce an easement, you should always use the belt and suspenders approach by pleading alternative theories. This article discusses the basic theories of easement law to provide options for attorneys who do not generally practice real property law. The author witnessed another attorney almost lose a case because he failed to plead alternative legal theories in a utility easement case. By pleading alternative theories, a fallback position is available if one theory unexpectedly fails due to facts discovered as the case progresses.

The near-miss involved a dispute between two homeowners in which Neighbor A's (who we will call Smith) utility line ran across Neighbor B's (who we will call Jones) property to connect to the public utility line thereon. When Smith needed access to Jones' property to repair the private section of the utility line, a dispute broke out. Jones refused to let Smith enter and dig up the utility on his property fearing that his property would be damaged.

Smith's attorney made a case for an express easement but failed to plead or argue for an easement under other theories because apparently it seemed obvious that the original developer recorded an express easement for the utility.

At trial, the Court rightfully found there was no express easement because the recorded express easement was an easement in gross reserved only for the original developer. Because it was an easement in gross, the easement was personal to the developer; it did not transfer to

When the utility needed repair neither the city nor Smith held an express easement allowing access for maintenance.

the city when it took over responsibility of the public line, or to Smith when he took ownership of the private line. Therefore, when the utility needed repair neither the city nor Smith held an express easement allowing access for maintenance.

The judge in that case was savvy enough to see an easement under different theories without help from Smith's attorney. Smith would have lost completely and had no access to fix his utility if the judge had not taken judicial notice of other easement theories.

Relying on the court to initiate alternative legal theories is a dangerous litigation strategy. Understanding and pleading alternative easement theories can keep your clients from losing litigation if one theory fails because new information is brought to light during discovery.

## Easements under Idaho law

In general, an easement is an interest in the land of another consisting of the right to use the land for a specific purpose.<sup>1</sup> In Idaho, there are four methods by which an easement can be created: express easement, implied easement by prior use, implied

easement by necessity, and easement by prescription. Each type of easement can be appurtenant or in gross.

An appurtenant easement is one in which there is both a dominant and servient estate.<sup>2</sup> The owner of the dominant estate is the holder of the easement, and the servient estate is the property across which the easement lies for the benefit of the dominant estate.<sup>3</sup> An appurtenant easement will run with the land, meaning that when the land is conveyed, the easement will also be conveyed, and the easement cannot be separated from it.<sup>4</sup>

On the other hand, easements in gross are personal to the party holding the easement, and they do not run with the land and cannot be transferred.<sup>5</sup> There is an easement in gross when there is a servient estate but no dominant estate.<sup>6</sup> Most utility easements are easements in gross, and cannot be transferred.

## Express easements

To create an express easement there must be (a) a writing that satisfies the statute of frauds; and (b) it must be clear from the writing that the parties intended to create a servitude.<sup>7</sup> There are no magic words nec-

essary to create an express easement, but the writing must show the parties intended to create a servitude.<sup>8</sup> If there is no writing or the writing does not show an intention to create a servitude, the express easement will be unenforceable.<sup>9</sup>

In Idaho, the statute of frauds for conveyances of real property are found in Idaho Code §§ 9-503 and 55-601. The grantor must sign the writing creating an easement and the property must be positively identified in a manner that does not require divergence into parol evidence.<sup>10</sup> The writing does not need to be signed by the grantee, and must at least identify the servient estate, which is the property subject to the easement.<sup>11</sup> If the easement is appurtenant, the conveyance instrument must identify both the servient estate and dominant estate or estates.

Even when there appears to be an express easement, there are several reasons why your case for express easement could fail. As in the Smith-Jones case discussed above, it may fail because it was created as an easement in gross, and there was a failed attempt to convey it. Because easements in gross are personal to the party holding the easement, they cannot be transferred.<sup>12</sup> Most utility easements cannot be transferred because they are easements in gross.

Appurtenant easements, on the other hand, may fail if one not holding title to the dominant estate attempts to enforce it.<sup>13</sup> Because appurtenant easements run with the land, the easement cannot be separated from it.<sup>14</sup> When one attempts to separate an easement appurtenant from the land by conveyance, the easement fails.<sup>15</sup> Appurtenant easements may also fail if the dominant and servient estates are brought into common title ownership.

Additionally, an express easement may fail if the writing was not recorded, and a subsequent purchaser bought it without actual notice.<sup>16</sup>

Because your express easement may fail, you should always make a case for easement by implication and easement by prescription if the facts support it. This belt and suspenders approach will keep your client from losing in litigation.

### **Implied easements**

Easements can be created by implication. Idaho courts have recognized two types of implied easements including implied easement by prior use and implied easement by way of necessity.<sup>17</sup>

### **Implied easements by prior use**

The *prima facie* case for implied easement by prior use includes: “(1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonable necessary to the property enjoyment of the dominant estate.”<sup>18</sup>

It should be noted that to create an implied easement by prior use

the easement must only be “reasonably necessary.”<sup>19</sup> The reasonable necessary standard is something less than absolute necessity.<sup>20</sup> A property does not need to be landlocked for a court to find that an easement is reasonably necessary.<sup>21</sup> In determining what is reasonable, a court will “balance the respective convenience, inconvenience, costs, and other pertinent facts.”<sup>22</sup>

*Thomas v. Madsen* is a simple example of an easement created by prior use.<sup>23</sup> The case involved a 50-acre parcel owned by members of the Thomas family.<sup>24</sup> Different sections of the property were conveyed to the Thomas children, including the Plaintiff Dale Thomas (Thomas).<sup>25</sup> In turn, Thomas gifted part of his property to his son Dale Roy Thomas (Dale Roy).<sup>26</sup> The road that provided access to Thomas’s property ran across Dale Roy’s property.<sup>27</sup> The road had been used by the family to access Thomas’s property for over 100 years.<sup>28</sup>

Later, Dale Roy’s property was lost to the bank in foreclosure, and eventually sold to the Defendant Madsen.<sup>29</sup> After taking possession, Madsen locked and chained a gate across the road, which Thomas cut in order to access his land to feed his cattle.<sup>30</sup> A lawsuit followed.<sup>31</sup> The

Even when there appears to be an express easement, there are several reasons why your case for express easement could fail.

Court affirmed the district court's finding that Thomas had an implied easement by prior use across Madson's property.<sup>32</sup> The Court made this finding despite the fact that Thomas's property was bordered by a public highway because the Court found there was reasonable necessity when Thomas would have taken considerable expense to build a new road.<sup>33</sup>

### Implied easement by way of necessity

An implied easement by way of necessity may become relevant in a case when there was no prior use or, when the prior use was not carried on long enough to show it was intended to be permanent. The primary difference between an implied easement by prior use and an implied easement by necessity is that the later requires a higher degree of necessity.<sup>34</sup>

The *prima facie* case for an implied easement by way of necessity requires a showing of: "(1) unity of title and subsequent separation of the dominant and servient estates; (2) necessity of the easement at the time of severance; and (3) great present necessity for the easement."<sup>35</sup> While element two can be satisfied by reasonable necessity, element three requires a higher degree of necessity – what the courts have termed "great present necessity."<sup>36</sup> Great and present necessity usually means the claimed easement is the only way to access the property.<sup>37</sup> Great and present necessity does not exist if there is alternate access, even if the alternate access is extremely inconvenient or expensive.<sup>38</sup>

### Easement by prescription

In some situations, the strongest case may be a prescriptive easement,

even if there is an express easement in writing. An example of this is when the written document has limited the easement to a certain scope, but for many years the actual use of the property has greatly exceeded the scope of the express easement. The general rule is that the easement holder may not exceed the intended use of the easement.<sup>39</sup> However, if an easement holder exceeds the intended use of the easement for the statutory period, the easement holder may have expanded it thereby creat-

In many situations, the parties in a prescriptive easement lawsuit are not the same parties that were present when the use began.

ing more robust rights by prescriptive use.<sup>40</sup> In this situation, the written document may no longer govern the scope of the easement, because of the expansion caused by prescriptive use.<sup>41</sup>

To prove a case for prescriptive easement, a landowner must show by clear and convincing evidence there has been use that is "(1) open and notorious, (2) continuous and uninterrupted, (3) adverse and under a claim of right, (4) with the actual or imputed knowledge of the owner of the servient tenement (5)

for the statutory period of [five or 20] years."<sup>42</sup> Use that is permissive is not considered adverse.<sup>43</sup>

In many situations, the parties in a prescriptive easement lawsuit are not the same parties that were present when the use began. When a claimant provides proof of open, notorious, and uninterrupted use there is a presumption created that the use was adverse and under a claim of right, but only if there is no proof of how the use began.<sup>44</sup> In this situation the burden of proof shifts to the opposing party to show the use was not adverse, but rather permissive.<sup>45</sup> This presumption can be a weakness for a party defending against a prescriptive easement, but an asset to the party bringing the claim.

Additionally, statutory period for prescriptive use was changed by the legislature in 2006.<sup>46</sup> Prior to 2006, the statutory period was merely five years; however, it is now 20 years.<sup>47</sup> The five-year statutory period probably applies to a claimant who fulfilled the five-year statutory period before 2006, but brought a claim after 2006, although the Court has not pronounced this except in vague terms.<sup>48</sup> Presumably in this situation, the easement rights vests in the adverse claimant when the statutory period is fulfilled regardless of whether it has been adjudicated. Therefore, a party's case may remain viable if the adverse use is more than five years but less than 20 and if the rights arguably vested by operation of law under the five year statute prior to 2006.

### Conclusion

Always use the belt and suspenders approach and plead multiple theories when bringing an easement case if the facts support them. Ex-

press easements can fail even when it seems obvious. If your express easement case fails, your fallback position is a case for implied easement or easement by prescription. Sometimes there will be a case for both an implied easement and a prescriptive easement. The prescriptive easement rights could be more robust than the express easement rights. Pleading multiple easement theories could ensure your client does not lose in litigation.

If your express easement case fails,  
your fallback position is a case for implied easement  
or easement by prescription.

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## Endnotes

1. *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 714, 152 P.3d 581, 585 (2007); citing *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005).
2. *King v. Lang*, 136 Idaho 905, 909, 42 P.3d 698, 702 (2002).
3. *King*, 136 Idaho at 909.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Tower Asset Sub Inc.*, 143 Idaho at 714, 152 P.3d at 585 (citing *Shultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 951 (1976)) (citing I.C. § 9-503); *McReynolds v. Harrigfeld*, 26 Idaho 26, 140 P. 1096 (1914).
8. *Id.* (citing *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (quoting *Seccombe v. Weeks*, 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct. App. 1989))).
9. *Ray v. Frasure*, 200 P.3d 1174, 1177, 146 Idaho 625, 628 (2009) (citing *Hoffman v. S V Co., Inc.*, 102 Idaho 187, 190, 628 P.2d 218, 221 (1981) (citing 72 Am.Jur.2d Statute of Frauds § 285 (1974); 73 Am.Jur.2d Statute of Frauds § 513 (1974))).
10. *Id.* (citing *Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003)).
11. *Id.* (citing *Garner v. Bartschi*, 139 Idaho 430, 435, 80 P.3d 1031, 1036 (2003) & *Machado v. Ryan*, 153 Idaho 212, 218, 280 P.3d 715, 721 (2012) (citing *Hodgins v. Sales*, 139 Idaho 225, 233, 76 P.3d 969, 977 (2003))).
12. *King*, 136 Idaho at 909, 42 P.3d at 702.
13. *Id.*
14. *Id.*
15. *Id.*
16. I.C. § 55-812.
17. *Davis v. Peacock*, 133 Idaho 637, 642, 991 P.2d 362, 367 (1999).
18. *Id.*
19. *Id.* at 643, 991 P.2d at 368.
20. *Id.*
21. *Machado v. Ryan*, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012).
22. *Id.*
23. *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392 (2006).
24. *Id.*
25. *Id.* at 637, 132 P.3d at 394.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Thomas*, 132 P.3d at 395-96, 142 Idaho at 638-39.
33. *Id.* at 638-39, 132 P.3d at 395-96.
34. *Machado*, 153 Idaho at 219, 280 P.3d at 722.
35. *Id.* (citing *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009) (quoting *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994))).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Villager Condominium Ass'n, Inc. v. Idaho Power Co.*, 121 Idaho 986, 988, 829 P.2d 1335, 1337 (1992).
40. *Id.*
41. *Id.*
42. *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006) (citing I.C. § 5-203).
43. *Id.*
44. *West v. Smith*, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973).
45. *Id.*
46. *Capstar Radio Operating Co. v. Lawrence*, 283 P.3d 728, 737 n.2, 153 Idaho 411, 420 n.2 (2012); I.C. § 5-203 (2006).
47. *Capstar Radio Operating Co.*, 153 Idaho at 420 n.2, 283 P.3d at 737 n.2; I.C. § 5-203 (2006).
48. *Capstar Radio Operating Co.*, 153 Idaho at 420 n.2, 283 P.3d at 737 n.2.

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# Conveying Real Property Into a Revocable Living Trust

Lincoln Strawhun

**Y**ou may think that a Trust is only for people with a lot of money. You may also think a Trust is only for people with a family farm or homes in multiple states. However a Trust can be beneficial in many situations. Knowing how one works and the process of transferring real property into the Trust will help your clients decide if it is right (or wrong) for them.

This article covers the differences between Trusts and Wills, and discusses the benefits and drawback of using both revocable and irrevocable Trusts in estate planning. For clarity's sake, I capitalize the names of types of documents. And throughout, I use the term, "you," to describe your clients or people in general. The terms "house" and "real property" are used interchangeably.

How you convey real property into a Trust is easy (you deed it). However, determining whether or not it is in a person's best interest to hold real property in a Trust and knowing some of the considerations that go along with it — even if you are just asked to draft the Deed and are not the Trust drafting attorney — helps create the best service for the client.

## A Trust vs. A Will

A Trust is different from a Last Will and Testament in that a Will has no influence at all when you are alive.<sup>1</sup> It only comes into effect once the day comes that you pass away and is validated by the local probate court. A Trust becomes effective the day that you sign it. It applies when you are alive and healthy; if and when you get sick; and for when the day comes that you pass away. It also includes rules for the people you

A Trust is considered a private family document and will only be subject to court jurisdiction as a last resort to remedy a dispute.

name to help you — what they can do and what they cannot do.

Whereas your Will names a "Personal Representative," your Trust names a "Successor Trustee."<sup>2</sup> A Will is a public document, which can theoretically be obtained by anyone once it is filed with the probate court. A Trust is considered a private family document and will only be subject to court jurisdiction as a last resort to remedy a dispute. Trusts are not recorded (unless it is a Deed of Trust, but that's more of a Deed and less of a Trust and not covered here). A Certificate of Trust is a two-page trust summary given to third parties such as banks, financial advisors, realtors, etc. in lieu of giving them the actual Trust document for efficiency's sake and to maintain as much privacy as possible.

A common misperception is that a Will avoids probate; it doesn't. A Will is a ticket to probate. A Trust avoids probate — your estate is settled privately without going through the courts. A Will requires two witnesses of your signature; a Trust does not require witnesses — it only requires a notary (technically it does not even require that).

Simply defined, probate is the court process to change title of a deceased person's assets.<sup>3</sup> It also allows for creditors to get paid for debts the person left behind. As part of the

process, the estate's Personal Representative (aka Executor or Administrator) files all required pleadings with the court. Once the process is finalized, the Personal Representative executes an Executor's Deed to convey real property from the deceased person's estate to the beneficiaries.

Probate happens in the county where the person lived or where the person had property. So what happens if a person has a house in Idaho and another house in Nevada? That would be a probate double feature; two attorneys for the price of...two attorneys. Probate in Idaho must occur according to Idaho rules, while probate in Nevada must occur according to Nevada rules.

How long does probate take? Nationally, the average length is one year. However, that figure is somewhat distorted by the complicated (nightmare!) cases lasting several years compared with the straightforward ones that last several months.

## Trusts: Benefits and Revocable vs. Irrevocable

Think of a Trust as a set of rules. You choose the rules and how they pertain to your current and future circumstances. When you buy a home, you do so as Trustee of their Trust (instead of as an individual

person). If you happen to forget to do this, you can always deed the house into the Trust later.

One of the benefits of having real property held in a Trust, is that title is transferred to the property owner's beneficiary without the hassle, expense and time of probate. The Successor Trustee simply deeds the house from the Trust to the beneficiary. So where even a straightforward probate can take several months to transfer the house, transferring under a Trust can take a few days (and with the same inheritance tax benefit that happens through the probate process). And yes, one Trust can hold multiple homes in multiple states. So the Idaho/Nevada scenario above could have been remedied with one properly executed Trust.

A Trust can be simple or complex. It can be three pages long. It can be 93 pages long. It can be for a single person or a married couple or a couple who is not married. You can have multiple Trusts or a Trust with sub-trusts built into it based on changing circumstances. There are numerous types. The most common is a Revocable Living Trust ("RLT"). As the name implies, an RLT can be amended or revoked after it is initially set up. These contrast with various types of *Irrevocable* Trusts that cannot be changed or revoked once they are set up.

Why would someone set up an Irrevocable Trust? To have the effect of making a gift because of the irrevocable nature of it means the person does not control it anymore and thus, does not own it anymore (while still retaining some sort of benefit from doing so). This is frequently a qualification tool for certain types of government benefits. It's also a tool for married couples who want to ensure their assets will go to their kids if they die before their spouse (as op-

## Trusts and Mortgages

Practice tip: if the real property has a mortgage balance, when you deed it into an Irrevocable Trust, the entire balance of the mortgage comes due!

This happens because it's like selling the real property to a new owner (the Trust). This effect does not happen with RLTs.

posed to their surviving spouse remarrying and leaving everything to the new spouse and his or her kids).

When you set up a Trust with your attorney, you decide how it works. You are usually the *Trustor* (the person setting up the Trust), the *Trustee* (the person running the trust) and the *Beneficiary* (the person benefitting from the Trust). If your name is Molly Treadstone, then it's called *The Molly Treadstone Living Trust* or something similar. If you are a couple, then the *Molly and Wally Treadstone Living Trust*. And both of you are the trustors, trustees and beneficiaries.

Once signed, a Trust must be *funded*.<sup>4</sup> This is where conveying the house comes into play. If you own a house before you've set up your Trust, then once you've set up your Trust, you deed the house from Grantor (you and your co-owners) to the Grantee (Trustee of the Trust). For example, "for value received, *Molly Treadstone* conveys to *Molly Treadstone, Trustee of the Molly Treadstone Living Trust* the following real property (address and legal description)."

## Potential pitfalls of a trust

Sadly, many people go through the trouble of setting up a Trust for the benefits discussed above and never properly fund it by conveying the house to the Trust. This happens for several reasons. One scenario that trips people up is when they move. Initially, they set up a Trust, convey the house into the Trust, live in the

house for a number of years, then they move. When they move, they forget to purchase the new house as a Trustee for the Trust — or alternatively to buy the house as an individual then deeds it into the Trust. This is a frequent occurrence for people who set up a Trust in one state and live in that state, then move to a new state. (They assume the Trust no longer applies or simply forget about the Trust when coping with the transition of moving).

Another scenario is the "Schedule A" syndrome. When a Trust is initially set up, there's typically a provision that says "all property in Schedule A is transferred to the Trust" as a way of showing a funding intent. This "Schedule" will list the address of the house. So people go along with the misconception that the Trust now controls the house. However, the county does not know anything about the "Schedule" because the County Recorder does not see it. Remember, a Trust is not recorded. So there is no public mechanism for conveying the house into the Trust except via Deed.

The type of Deed (Warranty, Quit Claim, etc.) does not really matter. What does matter is that it include the exact name of the previous Deed's Grantee to match the new Deed's Grantor. It also must have the same legal description as the previously recorded Deed.

Does a home conveyed into a Trust still qualify for homestead protections? Yes. However as part of the re-titling process, you may get some push-back from the county. Under

Idaho Code § 63-703(4), when the home is titled under the name of a Trust, the homeowner must declare to the county that the homeowner is a beneficiary of the Trust. This is usually accomplished by providing the county with the Certificate of Trust that summarizes the name of the Trust as the homeowners, that the homeowner is the Trustee, and that the homeowner is the beneficiary of the Trust before the county will re-title the house from the homeowner's name to the name of the Trust.<sup>5</sup>

### Fraud alert

A client may walk into your office seeking defense against foreclosure under the guise that their house should be protected because it is in a Trust or bankruptcy stay. The scheme goes like this: 1) you buy a house; 2) you deed all of it or a portion (usually 15%) of it to a Trust that does not hold any of your other assets; 3) the Trustee of this Trust is essentially a Shell Trustee who has no true relation to the property owner whatsoever and typically has an interest in many other properties — the case I had, the Trustee was named on over 50 other properties!; 4) when you don't pay the mortgage up to the point of foreclosure, the Trustee declares bankruptcy or adds the house to an existing bankruptcy to delay the foreclosure under a bankruptcy stay.

Eventually, the scam fails once the creditor or bankruptcy court re-

When the home is titled under the name of a Trust, the homeowner must declare to the county that the homeowner is a beneficiary of the Trust.

alizes that the Shell Trustee has no real interest in the property. The scammer also frequently messes up part of the process — such as trying to write their own Deed by pulling some template off the Internet but not knowing that they are supposed to record it. Until the powers that be get wise, the scammer has had the benefit of living rent free (but face the eventual detriment of explaining to their spouse why they are getting kicked out of their house).

It's been said that the only limitation to a Trust is the drafting attorney's imagination. (The scheme noted above stretches the limits of that imagination). But there are many legitimate and legal reasons why people choose to put real property into a Trust. And as attorneys, we can help ensure people do so for the right reasons. Happy drafting!

### Endnotes

1. Idaho Code Title 68, chapters 1 – 14, and Idaho Code Title 15, chapters 7 & 8

govern Trusts. Idaho Code Title 14, chapter 2, part 5 governs Wills.

2. A Personal Representative in a Will is also frequently called the "Administrator" or "Executor." The Successor Trustee in a Trust is also sometimes called a "Fiduciary." A Fiduciary may also be the person acting under a Power of Attorney document (instead of a Trust) when the property owner is still alive.

3. Idaho Code Title 15, chapter 3 of the Uniform Probate Code.

4. Sometimes this is called "feeding" the trust; it's the process of retitling assets (house, car, bank accounts) from the individual person(s) who set up the Trust into the name of the Trust

5. Idaho Code § 68-115, *Contents of Certification of Trust*, does not require this last component, so many drafting attorneys don't include it and must draft a new affidavit adding this detail.

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### Get the Deed

Practice tip: Contact the county where you'll be recording the Deed, give the County Recorder or Assessor the address and ask for a copy of the last recorded Deed. It will cost \$2 for this service. But that is better than recording a new Deed with the informa-

tion that you think is accurate only to have to record a Corrective Deed once the Recorder rejects the conveyance into the Trust because you were missing a middle initial or using a short-form legal description.

# Claims Against a Title Insurer — Considering the Lessons From *Cummings v. Stephens*

J. Todd Taylor

I have a great admiration for the members of the bar who take up and effectively plead the causes of clients within the parameters of our judicial system. I take an equal amount of pride in the ability of our judiciary to consider and decide complex legal issues. However, that pride and admiration make it no more difficult to become troubled when the judicial process fails to yield an outcome that the conscience finds acceptable. Such is the result, at least in part, in the recent case of *Cummings v. Stephens*, decided by the Idaho Supreme Court on September 19, 2014.<sup>1</sup>

## Facts

In the *Cummings* case, the defendant, Stephens, had entered into a real estate contract for the sale of land in Bear Lake County. The original purchaser under the contract assigned its rights to acquire the property to Cummings in exchange for \$50,000. Prior to executing the contract, Stephens owned two parcels of land, one large parcel (270 acres) west of a dividing right of way and the other, smaller parcel (83 acres) east of the dividing right of way.

After Stephens listed the property for sale and before the real estate contract was signed, Stephens' real estate agent requested a preliminary title report from a title insurance and escrow company (Title Insurer). The Title Insurer prepared a preliminary title commitment and legal description to be employed in the contract and, ultimately, the closing documents. According to the findings of fact entered by the Dis-

The Title Insurer had willingly admitted they were aware that the sale was only to include the 270-acre parcel and they had erroneously prepared the legal description.

trict Court, Stephens at no time desired or intended to sell the smaller, 83-acre parcel east of the dividing right of way. However, the original title commitment issued by the Title Insurer included both of the parcels owned by Stephens, as well as two parcels not owned by Stephens. Subsequently, the Title Insurer, before recording the deed, corrected part of its error and excluded the two parcels not owned by Stephens from the legal description; however, the Title Insurer's initial efforts to correct its error fell short in that the deed it recorded at closing included the 83-acre parcel on the east side of the right of way.

## Claims between buyer and seller

The Title Insurer, upon being informed by Stephens of the "errant" inclusion of the 83-acre parcel and after failed attempts to reach Cummings, unilaterally re-recorded the deed with a "corrected" legal description which excluded the 83-acre parcel east of the right of way. Cummings produced an affidavit of the real estate agent who had shown him the Stephens' property, which indicated that he had informed Cummings that the 83-acre parcel

was included in the conveyance under the real estate contract. This mistake in the formation of the agreement resulted in Cummings bringing the specific claims that Stephens had breached the deed covenants, for conversion of the 83-acre parcel, slander of title and a claim for damages arising from emotional distress. In addition, third party claims were alleged against the Title Insurer.

In resolving the claims between Cummings and Stephens, Justice Eismann's opinion made clear that the failure of Cummings to allege claims for quieting title to the 83-acre parcel, to void the corrective deed and for rescission of the contract were factors in the outcome. Though the Court dispensed with a number of claims brought by Cummings against Stephens and those claims and the portions of the Court's opinion addressing those claims have their own lessons to convey, the primary focus of this article is the Court's resolution of the third party claims against the Title Insurer.

## Third party claims<sup>2</sup>

In addressing the third party claims against Title Insurer, the District Court originally awarded dam-

ages to Cummings in the amount of \$50,000, the amount paid for assignment of the contract from the original purchaser. That result followed, in no small part, due to the fact that the Title Insurer had willingly admitted they were aware that the sale was only to include the 270-acre parcel and they had erroneously prepared the legal description. In reaching the award to Cummings, the District Court held that the Title Insurer had failed to use ordinary care in preparing the legal description, which resulted in harm to Cummings.

The portions of the Court's opinion which address the third party claims aptly illustrate that there is a vast divide between a contract for the purchase of an abstract of title and a title insurance transaction. The former is an agreement which imposes an obligation on the abstractor "to make a full and true search and examination of the records relating to or affecting the title of the land in question..."<sup>3</sup> In distinguishing between an abstracting agreement and a title insurance transaction, the Supreme Court, citing the Idaho abstractor bonding statute, held that an abstractor "may be liable for any and all damages that may accrue to any party or parties, by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by such person."<sup>4</sup> Whereas, with a title insurance transaction, the Court, relying on its prior opinion in *Anderson v. Title Ins. Co.*, provided that "[a]n insurance policy is a contract and must be construed the same way as other contracts. Title insurance policies are governed by the same general rules and principles of interpretation and construction as other insurance policies."<sup>5</sup>

The contract which is evidenced, ultimately, by a title insurance pol-

icy, must be interpreted against the applicable provisions of the Idaho Code. Unlike similar statutes in other jurisdictions, Section 41-2708(1) of the Idaho Code does not mandate a "reasonable search" of title in relation to a title insurance transaction. The Idaho Code provides only that "a search and examination of the title" shall be made prior to issuing a policy of title insurance. The title insurance provisions of the Idaho Code also make clear that the business of issuing title insurance policies does not include the business of preparing and issuing abstracts of title.<sup>6</sup> Stated differently, abstracting and selling title insurance are two distinct business services, subject to different legal theories of recovery and the parties relying on such services may come to hold vastly different claims for damages in the event mistakes are made by an abstractor when compared to the claims that may lie when mistakes are made by an insurer.

The Court in *Cummings*, following prior rulings in *Anderson* and *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, found it significant that the Idaho legislature chose to omit the word "reasonable" from the provision of the Idaho Code which provides the conditions precedent to issuing a title insurance policy.

In short, title insurers do not have a duty to conduct a reasonable search of title before issuing a policy. Echoing the result in *Brown's Tie*, the Court in *Cummings* intimated that it has long been the rule in Idaho that only abstractors of title, and not title insurers, may be held liable for damages arising from negligence and, instead, title insurance policies are where one must look to ascertain the duties that exist between the parties in a title insurance transaction.<sup>7</sup>

While, it's important to note that footnote [3] within the *Brown's Tie* opinion acknowledged that the plaintiff's breach of contract and breach of fiduciary duty actions remained viable in the court below, it's clear that preparing a legal description and issuing a title commitment (or policy) do not rise to the level of providing abstract services and, instead, are simply steps the title insurer takes in the preparation for issuing a title insurance policy.<sup>8</sup> It's also important to note that the *Anderson*, *Brown's Tie* and *Cummings* opinions acknowledge that facts could exist which indicate that a title insurer had performed additional services or otherwise expressly assumed duties which could make the insurer liable on a negligence theory. However, none of those opinions found such facts and circumstances. Instead, the

The District Court held that the Title Insurer had failed to use ordinary care in preparing the legal description, which resulted in harm to Cummings.

*Cummings* Court noted there was “no evidence that the [Title Insurer] assumed the duty of being an abstractor of title.”

In reaching its ruling, the *Cummings* Court noted that Cummings failed to sue the Title Insurer for a rescission of the title policy that did not insure the property described in the commitment or real estate contract. The Court relied on the lower court’s finding that the Title Insurer had “not acted negligently in performing any action insofar as it relates to its business as an insurance agent” and reversed the judgment against the Title Insurer.

### Conclusion

“A recurrent criticism of lawyers, judges, law professors, and other members of the legal profession is that they appear to suffer from the curious delusion that everything that is worth knowing is found in judicial opinions and other legal texts.”<sup>9</sup> The stringent interpretation of the law in the *Cummings* case is, at least to me, troubling. The fact that Cummings produced evidence of his belief that the 83 acre parcel was to be included in the sale, the clear admission by the Title Insurer of their error in preparing the legal description and that Stephens had told them expressly that the 83-acre parcel was not to be included, point to a different outcome, one in which the Title Insurer should have been held liable for Cummings’ demonstrable damages.

Judge Posner once posited that litigation under the applicable procedural rules “is not supposed to be merely a game, a joust, a contest; it is also a quest for truth and justice.”<sup>10</sup> In the end, it seems that truth and justice prevailed in relation to the

claims between Cummings and Stephens; however, the reversal of the judgment of \$50,000 against the Title Insurer and the failure of the Court to award fees against the Title Insurer in favor of Cummings, when considered against the Title Insurer’s egregious errors in this matter, fail to satisfy the interests of justice. In the author’s humble estimation, the

The Court relied on the lower court’s finding that the Title Insurer had “not acted negligently in performing any action insofar as its relates to its business as an insurance agent.”



greatest lesson to be learned here is one of pleading practice. That is, given the repeated comment upon Cummings’ failure to bring certain claims against Stephens and the Title Insurer, one can quickly ascertain that alleging any and all plausible (though not frivolous) theories and letting the judiciary sort them out, may be the best practice after all.

### Endnotes

1. *Cummings v. Stephens*, 40793-2013 (Idaho 2014).
2. It is worth noting that in dispensing

with Cummings’ alleged tort of bad faith of an escrow agent, the Court didn’t dismiss the possibility of adopting such a theory of recovery and instead dispensed with the claim by virtue of the fact that Cummings failed to challenge the factual findings that would have prevented him from prevailing under such a theory. Thus, it is possible that when the right case presents itself, the Court could adopt a new theory of recovery in the form of a bad faith claim against an escrow agent. The escrow functions; however, weren’t the focus of Cummings’ claims and, instead, the Court resolved the matter by reference to the insurance transaction between the Title Insurer and Cummings and the documents which were a part of that insurance transaction.

3. *Id.* at 24, citing 1 Am. Jur. 2d *Abstracts of Title* § 11 (2005).
4. *Id.*, citing Idaho Code § 54-101.
5. *Anderson v. Title Ins. Co.*, 655 P.2d 82, 103 Idaho 875 (1982), citing *Walters v. Marler*, 83 Cal.App.3d 1, 147 Cal.Rptr. 655 (1978).
6. *Cummings* at 25, citing *Brown’s Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 764 P.2d 423, 115 Idaho 56 (1988).
7. *Brown’s Tie*, citing *Doolittle v. Morley*, 77 Idaho 366, 372, 292 P.2d 476, 481 (1956) and *Cummings* at 25.
8. *Brown’s Tie* at 428.
9. *Freeman United Coal Mining Co. v. Hilliard*, 65 F.3d 667, 669 (7th Cir. 1995).
10. *Ash v. Wallenmeyer*, 879 F.2d 272, 275 (7th Cir. 1989).

### About the Author

**J. Todd Taylor**, a native Mississippian, earned his B.A. in Accounting from Mississippi State University and attended law school at Mississippi College in Jackson, Mississippi. He then attended the University of Florida’s Levin College of Law and obtained an LL.M. in Taxation. He practices in real property law, taxation, business law, estate planning and estate administration as a principal in the law firm of Randall | Danskin, P.S.



# Trespass, Privacy, and Drones in Idaho: No Snooping Allowed!

Arthur B. Macomber

In Idaho, regardless of the lawful geographic position of the drone operator, Idaho law prohibits the flying of drones<sup>1</sup> into properly posted private property airspace without permission of the title owner or possessor of that airspace.<sup>2</sup>

In Idaho, real property includes land<sup>3</sup> and land includes airspace.<sup>4</sup> Rights in and limitations on the use of airspace in Idaho are governed by state statute and federal law, the latter through the commerce clause of the U.S. Constitution.<sup>5</sup> However, in Idaho Code “Flight *in* aircraft over the lands and waters of this state is lawful. . .,” which implies a person inside the aircraft, not flight of a remote-piloted drone.<sup>6</sup>

This article discusses possible actions damaged individuals may have against drone operators: both civil and criminal trespass, and<sup>7</sup> violations of privacy rights. It first discusses, however, the pertinent state and federal law governing drones.<sup>8</sup>

## Drones are aircraft

Both Idaho and federal law include drones in the definition of aircraft. Idaho statutory definitions of the word “aircraft” differ depending on which chapter of Title 21 is consulted.<sup>9</sup> Idaho Code section 21-101(b) definitions are only “as used in this chapter,” so it makes sense the definition in Chapter 2 should control interpretation of the legislature’s intent related to unmanned aircraft systems, because the only section of Idaho law related to such systems is in that Chapter 2.<sup>10</sup> Therefore, Idaho statutes likely include unmanned aircraft systems as “aircraft” because they are for “navigation of or flight

In an age of identity theft and cyber warfare, imminent danger to multiple personal and property interests may occur if one’s privacy is violated.

in the air,” by “any contrivance” known “or hereinafter invented” for flight not used primarily as safety equipment.<sup>11</sup>

This interpretation is supported by the Idaho Code definition of “unmanned aircraft system” as “an unmanned aircraft vehicle, drone, remotely piloted vehicle, remotely piloted aircraft or remotely operated aircraft that is a powered aerial vehicle that does not carry a human operator, can fly autonomously or remotely and can be expendable or recoverable.”<sup>12</sup>

The Federal Aviation Administration now includes unmanned aircraft systems within the definition of the term aircraft.<sup>13</sup> A November 18, 2014 NTSB Opinion and Order stated “the clear, unambiguous plain language of 49 U.S.C. § 40102(a) (6) and 14 C.F.R. § 1.1: an ‘aircraft’ is any ‘device’ ‘used for flight in the air.’ This definition includes any aircraft, manned or unmanned, large or small.”<sup>14</sup> Thus, a plain reading of Idaho and federal law includes unmanned aircraft in the definition of aircraft.<sup>15</sup>

## Common-law tort damages and drones

Flight in Idaho is lawful unless it interferes with an owner’s existing

use or is imminently dangerous to persons or property.<sup>16</sup> “Imminently dangerous” would likely include the operation of an unmanned vehicle that could strike a person.

For instance, an NTSB Order acknowledged

the aircraft [flew], *inter alia*, ‘directly towards an individual standing on a . . . sidewalk causing the individual to take immediate evasive maneuvers so as to avoid being struck by [the] aircraft’; ‘through a . . . tunnel containing moving vehicles’; ‘under a crane’; ‘below tree top level over a tree lined walkway’; ‘under an elevated pedestrian walkway’; and ‘within approximately 100 feet of an active heliport.’<sup>17</sup>

Certainly, it would be imminently dangerous in Idaho if a person could be in a moment physically struck by a flying drone.

Flight could be unlawful in Idaho if “imminently dangerous” were more expansively defined to include causation of tort damages to a privacy right. In an age of identity theft and cyber warfare, imminent danger to multiple personal and property interests may occur if one’s privacy is violated.

In Idaho, owners or operators of aircraft operated over the lands or waters “shall be liable for injuries or damages to persons or property on or over the land or water beneath, caused by . . . flight of aircraft . . . , in accordance with the rules of law applicable to torts on land in this state.”<sup>18</sup>

Reading the plain language, injuries to persons or property likely means physical injuries. Conversely, the statutory inclusion of the additional word “damages” indicates more than physical injuries are contemplated. Arguably, damages to persons includes tort damages pursuant to an argument that a privacy right has been violated.<sup>19</sup> Violations of privacy rights may occur, whether a physical entry trespass to the property of another occurred. Physical entry trespass is conceptually familiar, so it is discussed first.

### Trespass in Idaho

“Trespass is a tort against possession committed when one, without permission, interferes with another’s exclusive right to possession of the property.”<sup>20</sup> Private owners suffering unlawful entry can sue for a civil trespass,<sup>21</sup> or they can call the police and press charges for criminal trespass.<sup>22</sup> A trespasser is “a person who goes or remains upon the premises of another without permission, invitation or lawful authority. Permission or invitation may be express or implied.”<sup>23</sup> The difference between a civil trespass and a criminal trespass depends on whether a criminal statute clearly mandates indictment, fine, and or imprisonment for those defined acts.<sup>24</sup> If the criminal statute’s plain language mandates punishment for trespass, it is criminal trespass.<sup>25</sup>

Idaho’s criminal statutes define “entering” real property to mean “going upon or over real property either in person or by causing any object, substance or force to go upon or over real property.”<sup>26</sup> “Causing any object” likely includes causing a drone to fly. Entering the property of another without permission and with notice as given by conspicuous posting is a misdemeanor.<sup>27</sup> Pertinently, the 2014 Idaho aeronautics privacy statute does not require entry.<sup>28</sup> Statutory trespass requires the interloper “enter upon the real property,” and it is unlikely the word “upon” includes flight.<sup>29</sup>

Thus in general, an Idaho private property owner can bring common-law and statutory action for civil trespass, or notify the police that a criminal trespass has been committed if a non-owner causes an unmanned aircraft to enter the owner’s airspace. However, a dispositive finding by an Idaho court whether civil or criminal trespass occurred may only be reached by determining whether the non-owner unmanned aircraft operator was exercising a “right of flight.”<sup>30</sup>

### Civil trespass and drones

Since property in Idaho includes the air space above it, a person flying a drone into airspace owned by an-

other without permission is trespassing, subject to the right of flight. If a person without permission enters the real property of another with notice that such entry is a trespass, “and nonetheless continues his trespass, the landowner plaintiff may be entitled to punitive damages.”<sup>31</sup> Therefore, while the definitions of “permission” and “entry” will refine the issue, flying a drone into private property airspace should initially be analyzed as a common-law tort.

### Criminal trespass and drones

Idaho’s criminal statutes define criminal trespass using essentially the same criteria of entry to property without permission from the owner, where the person entering has notice of the property boundary and thus will be trespassing.<sup>32</sup> However, Idaho criminal statutes, while including only entry without permission to posted property to be prosecutable as trespass,<sup>33</sup> usually require some form of damage to be done to the real or personal property found past the posted boundary.<sup>34</sup>

An interesting question is whether a court would limit a complainant to the remedy in the aeronautic statutes for unlawful drone flight to a privacy tort civil action,<sup>35</sup> or whether it would use the definition of “entry” in Idaho Code Section 6-202A to

Since property in Idaho includes the air space above it, a person flying a drone into airspace owned by another without permission is trespassing, subject to the right of flight.

find a civil trespass.<sup>36</sup> Both civil and criminal trespass statutes define “entry” to include “objects” going “over real property.”<sup>37</sup> It is unlikely a court would simply use the definition of “entry” from either civil or criminal trespass statutes for an aeronautics privacy tort violation by a drone because the trespass statutes clearly limit the use of that definition to the specific type of trespass alleged.<sup>38</sup> Good legal counsel will not second-guess a court, but will plead trespass and in the alternative a tort violation to cover all the bases.

### Privacy and drones

Certain uses of unmanned aircraft in Idaho are prohibited without “written consent,” even if entry into the airspace owned by another does not occur.<sup>39</sup> These activities, “absent a warrant,” (except for emergency responses for health and safety), include surveillance of persons or property, gathering evidence or information about a person or property, “photographically or electronically record[ing] specific [ ] persons or specific [ ] private property is a dwelling, “farm, dairy, ranch or other architectural industry.”<sup>40</sup>

Thus, even if an unmanned aircraft system operator in Idaho stands on a public street where she is legally allowed to be, she cannot fly her unmanned aircraft in the air above that public street to watch specific persons or specific private property that may abut that public street without written consent of the persons being watched or the property owner.<sup>41</sup> For this reason, the statute as written is overbroad because it prohibits photographic aerial capture of then-presently occurring “constitutionally-protected speech activity, such as protests, speeches, or rallies.”<sup>42</sup>

In short, the Idaho aeronautics statutes protect individual privacy interests by allowing a civil cause of action, instead of merely barring trespass using aircraft through physical entry.<sup>43</sup> The statute includes language stating it applies “absent a warrant,” mentions a private dwelling’s curtilage,<sup>44</sup> while ignoring the U.S. Supreme Court’s “open fields” doctrine.<sup>45</sup> By ignoring the open fields doctrine, Idaho statutes protect privacy interests more strictly than does the United States Constitution’s Fourth Amendment, which

In short, the Idaho aeronautics statutes protect individual privacy interests by allowing a civil cause of action, instead of merely barring trespass using aircraft through physical entry.<sup>43</sup>

only protects “people and not places.”<sup>46</sup> Idaho law may over-protect privacy, whether privacy is defined as the privacy of persons, or the privacy of their activities, whether such activities are on private property or not.

### Conclusion

Idaho property owners’ rights to exclude others can be enforced by actions for common-law or statutory civil trespass, but posting private property is encouraged to retain the enforcement using prosecutorial

causes of action for criminal trespass and to remain a good neighbor.<sup>47</sup> Trespass by physical entry may be found if unmanned aircraft enter private airspace, but even without entering private airspace, privacy rights of individuals and their activities is protected from snooping operators of such drones.

### Endnotes

1. I.C. § 21-213(1)(a). Idaho statutes call drones “unmanned aircraft systems.”
2. I.C. §§ 21-213; 6-202; 6-301; 6-302; and 6-303. Both fee simple private and public owners and lessees have exclusionary and privacy rights in real property. I.C. §§ 21-203; 55-101; 55-101A; 6-202; 6-301; 6-302; 6-303; 18-7008; and 18-7011.
3. I.C. § 55-101.
4. I.C. §§ 55-101A; and 21-203 (“ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight”).
5. I.C. §§ 21-203 (“right of flight”); 21-204 (“flight in aircraft” implies a person inside such aircraft; versus “flight of aircraft.”); 49 U.S.C. §§ 106 (authorizes F.A.A.), and 40101(a)(6) - (12), inclusive, et seq. (policy related to benefits of federal regulation to interstate commerce); U.S. Const. Art. 1 §§ 8, 9 (commerce clauses); see *Roark v. City of Caldwell*, 87 Idaho 557, 394 P.2d 641 (1964) (state and federal statutes regarding use of airspace must be read in conjunction with each other).
6. I.C. § 21-204 (emphasis added).
7. I.C. §§ 21-213(3(a)); 6-202; 6-301; 6-302; 6-303; and 18-7008.
8. I.C. § 21-213(2).
9. I.C. §§ 21-101 (“navigation of or flight in the air for the carriage of pilots or passengers”), as amended by S.L. 2013, ch. 107 § 1 (Jul. 1, 2013) (emphasis added); 21-201 (“navigation of or flight in the air” not necessarily for carriage, and excepting safety equipment); and 21-701 (more general: no carriage or safety equipment in definition).
10. I.C. § 21-201(a) (“‘aircraft’ means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equipment”).
11. *Id.*

12. I.C. § 21-213(1)(a); S.L. 2013, ch. 328, § 1, eff. Jul. 1, 2013.

13. *Huerta v. Pirker*, NTSB Docket CP-217, Op. and Order No. EA-5730, p. 12 (Nov. 18, 2014).

14. *Id.*

15. *Roark v. City of Caldwell*, 87 Idaho 557, 562, 394 P.2d 641, 646 (1964) (Idaho aeronautics statutes must be read “in conjunction with [federal statutes] under the commerce clause of the United States Constitution, as interpreted by the Supreme Court of the United States.”

16. I.C. 21-204. This article does not address whether a violation of an owner’s privacy pursuant to Idaho Code § 21-213 constitutes an interference with the exercise of a residential or commercial right to use real property.

17. *Huerta v. Pirker*, NTSB Docket CP-217, Op. and Order No. EA-5730, p. 2 (Nov. 18, 2014).

18. I.C. § 21-205.

19. I.C. § 21-213(3).

20. *Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 549, 916 P.2d 1264, 1274, (1996); see *Jaquith v. Stanger*, 79 Idaho 49, 54, 310 P.2d 805, 808 (1957).

21. Idaho Code §§ 6-202; 6-301; 6-302; Idaho Civil Jury Instruction 3.19.1 – Trespasser, definition; and 4.40 – Trespass – issues.

22. I.C. § 18-7008, 7011.

23. Idaho Civil Jury Instruction 3.19.1.

24. *U.S. v. Briggs*, 50 U.S. 351, 355 (1850) (cutting any timber on protected lands, “whether reserved for naval purposes or not” is an act “clearly indictable” using plain language reading of statute).

25. *Id.*

26. I.C. § 18-7011(1) (“as used in this sub-

section and in section 18-7008”).

27. *Id.*

28. I.C. § 21-213.

29. I.C. § 6-202.

30. I.C. § 21-204.

31. *Weaver v. Stafford*, 34 Idaho 691, 700, 8 P.3d 1234, 1243 (2000); see *Aztec Ltd., Inc. v. Creekside Inv. Co.*, 100 Idaho 566, 570, 602 P.2d 64, 68 (1979).

32. I.C. § 18-7011.

33. I.C. § 18-7008(A)(9).

34. I.C. § 18-7008(A)(1) (cutting timber); (A)(4) (digging or taking away materials); (A)(6) (destroying fencing); (A)(10) (killing the owner’s dog).

35. I.C. § 21-213(3).

36. I.C. § 6-202A.

37. I.C. §§ 6-202A; 18-7011(1).

38. I.C. §§ 6-202A (“as used in section 6-202”); 18-7011(1) (“in this subsection and in section 18-7008, Idaho Code”).

39. I.C. § 21-213(2).

40. *Id.* at (2)(a)(ii).

41. *Jeremiah Hudson and Nick Warden, Narrowing the Drone Zone: The Constitutionality of Idaho Code § 21-213*, *The Advocate*, Sept. 2014, at 23, 25 (I.C. § 21-213 may be overbroad).

42. *Id.*

43. *Id.* at (2)(a)(i).

44. *State v. Beck*, 2014 Op. No. 82 (Idaho Ct. App. 2014) (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984) (“curtilage” is “the land immediately surrounding and associated with the home”).

45. *Id.* (citing *Hester v. United States*, 265 U.S. 57, 59 (1924) (special protections of the Fourth Amendment are “not extended to the open fields”).

46. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 351 (1967) (an individual within a phone booth had a reasonable expect-

*Roark v. City of Caldwell*, 87 Idaho 557, 562, 394 P.2d 641, 646 (1964) (Idaho aeronautics statutes must be read “in conjunction with [federal statutes] under the commerce clause of the United States Constitution, as interpreted by the Supreme Court of the United States.”



tation of privacy from outside listening devices, because “the Fourth Amendment protects people, not places”).

47. *Robert Frost, Mending Wall* (1914).

### About the Author

**Arthur B. Macomber** is the managing attorney for *Macomber Law, PLLC*. His 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. *Macomber Law, PLLC* focuses on real property, land use, water, and construction law.



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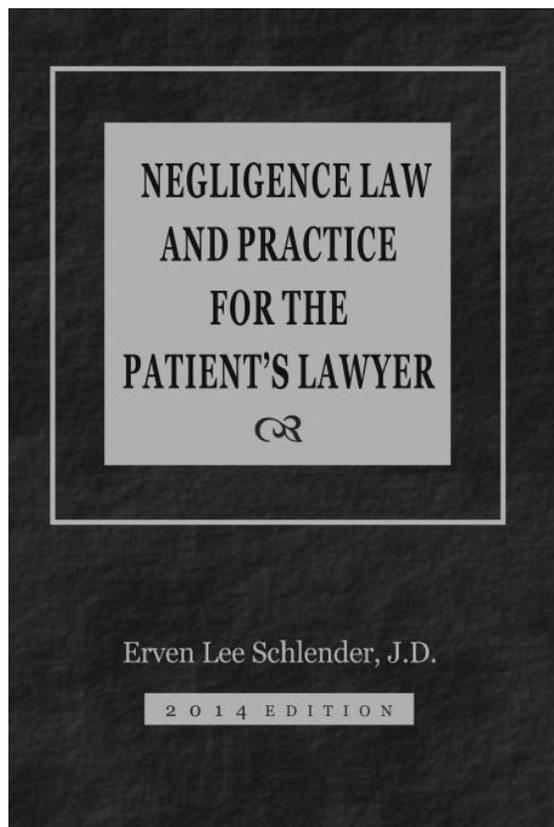
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*E. Lee Schlender is a member of the Idaho and Washington Bars; certified as a specialist in medical malpractice law by the American Board of Professional Liability Attorneys and in civil law; National Board of Trial Advocacy. Publications include “Medical Negligence for the Patient’s Lawyer” isbn 0-9711450-0-8, 228 pages 2001. He presently serves on the CLE board of the Washington State Bar Association.”*



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**Regular Spring Term for 2015**  
*2nd Amendment – 01/09/15*

Boise ..... January 12, 14, 16 and 20  
Boise ..... February 13, 17 and 18  
Boise (Concordia University School of Law--501 W. Front Street) .....  
..... February 20  
Boise ..... March 2  
Boise ..... April 1 and 14  
Coeur d'Alene ..... April 7 and 8  
Lewiston ..... April 9  
Boise ..... May 4, 6 and 8  
Idaho Falls ..... May 12  
Pocatello ..... May 13  
Boise ..... June 1, 3 and 5  
Twin Falls ..... June 9 and 10

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2015 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Supreme Court  
Oral Argument for March 2015**

*1st Amendment 01/29/15*

**Monday, March 2, 2015 – BOISE**

8:50 a.m. .... Open  
10:00 a.m. *IDHW v. John (2014-25) Doe* ..... #42675  
11:10 a.m. *Lamont v. Lamont* ..... #42588

**Idaho Court of Appeals  
Oral Argument for March 2015**

*1st Amendment 02/05/15*

**Thursday, March 5, 2015 – BOISE**

9:00 a.m. *State v. Detwiler* ..... #41125  
10:30 a.m. *State v. Harris* ..... #41697/41698  
1:30 p.m. .... Open

**Tuesday, March 17, 2015 – BOISE**

9:00 a.m. .... Open  
10:30 a.m. *Peterson v. State* ..... #41415  
1:30 p.m. .... Open

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

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Judges  
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**Regular Spring Term for 2015**  
*5th Amendment – 02/12/15*

Boise ..... January 13, 15 and 22  
Boise ..... February 19, 24 and 26  
Boise ..... March 5 and 17  
Boise ..... April 9, 16, 21 and 23  
Boise (Law Day – Capital High School) ..... May 1  
Boise ..... May 12, 14, 19 and 21  
Boise ..... June 9, 11, 16 and 18

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**Idaho Supreme Court  
Oral Argument for April 2015**

*Dated 02/05/15*

**Wednesday, April 1, 2015 – BOISE**

8:50 a.m. *Garner v. Garner* ..... #41898  
10:00 a.m. *James v. City of Boise* ..... #42053  
11:10 a.m. *Colafranceschi v. Briley* ..... #41742

**Tuesday, April 7, 2015 – COEUR D'ALENE**

8:50 a.m. *Sevy v. SVL Analytical (Industrial Commission)* ..... #41994  
10:00 a.m. *Greenfield v. Wurmlinger* ..... #41178  
11:10 a.m. *Poledna v. Thorne Research (Industrial Commission)* .....  
..... #42220

**Wednesday, April 8, 2015 – COEUR D'ALENE**

8:50 a.m. *State v. McNeil* ..... #42629  
10:00 a.m. *State v. Haynes* ..... #41924  
11:10 a.m. *State v. Riendeau* ..... #41982

**Thursday, April 9, 2015 – LEWISTON**

8:50 a.m. *Podsaid v. Outfitters & Guides* ..... #41397  
10:00 a.m. *State v. Green* ..... #41736  
11:10 a.m. *Idaho H&W v. John (2014-26) Doe* ..... #42700

**Tuesday, April 14, 2015 – BOISE**

8:50 a.m. *State v. Hurlles (Petition for Review)* ..... #42205  
10:00 a.m. *Melugin v. AG Express (Industrial Commission)* ..... #42190  
11:10 a.m. *Gordon v. Hedrick* ..... #42191

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**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 2/1/15)**

**CIVIL APPEALS**

**Attorney fees and costs**

1. Did the district court err when it denied Sky Canyon's request for trial level attorneys' fees and costs on the grounds that the Idaho Supreme Court's decision prevented it from awarding fees on remand?

*Sky Canyon Properties v.  
The Golf Club at Black Rock*  
S.Ct. No. 42216  
Supreme Court

**Summary judgment**

1. Did the court err in finding there was no fiduciary duty owed by U.S. Bank to the Skinners when the bank had exclusive control over disbursement of insurance funds received to rebuild their home?

*Skinner v. U.S. Bank Home Mortgage*  
S.Ct. No. 42065  
Supreme Court

2. Whether the district court erred in its application of the standards set forth in I.R.C.P. 56 in determining whether material issues of fact and law existed, which issues precluded the granting of Bank of America's summary judgment motions.

*Countrywide Homes Loans, Inc. v. Sheets*  
S.Ct. No. 42063  
Supreme Court

**Termination of parental rights**

1. Whether the court erred in finding the State presented clear and convincing evidence that Doe neglected the child; specifically, evidence of failure to provide parental care and failure to comply with the case plan.

*Idaho Dept. of Health & Welfare v.  
John Doe (2015-01)*  
S.Ct. No. 42821  
Supreme Court

**CRIMINAL APPEALS**

**Competency determination**

1. Did the 2010 retroactive determination that Hawkins was competent in January of 2008 violate due process?

*State v. Hawkins*  
S.Ct. No. 41621  
Supreme Court

**Confrontation**

1. Did the court violate Bennett's right to confront his accusers when the court limited defense counsel's cross-examination of a witness?

*State v. Bennett*  
S.Ct. No. 41355  
Court of Appeals

**Evidence**

1. Whether the court abused its discretion by allowing a defense witness to be impeached with a misdemeanor conviction.

*State v. Kubat*  
S.Ct. No. 41675  
Court of Appeals

2. Did the court err in ruling that Lopez-Orozco's brother was an unavailable witness and then admitting his preliminary hearing testimony?

*State v. Jorge Lopez-Orozco*  
S.Ct. No. 40859  
Supreme Court

**Search and seizure –  
suppression of evidence**

1. Did the court err in finding the permanent tenant who stayed in the bedroom gave consent to search and in denying Gonzales' motion to suppress?

*State v. Gonzales*  
S.Ct. No. 42010  
Court of Appeals

2. Did the court err in denying Shelton's motion to suppress evidence found in her purse and in finding her detention was not illegally extended?

*State v. Shelton*  
S.Ct. No. 42041  
Court of Appeals

3. Did the court err in denying Burdett's motion to suppress and in finding his encounter with an officer was consensual?

*State v. Burdett*  
S.Ct. No. 42440  
Court of Appeals

4. Did the court err in denying Cooke's motion to suppress and in finding his traffic stop was supported by reasonable suspicion?

*State v. Cooke*  
S.Ct. No. 41833  
Court of Appeals

5. Did the court err in finding statements Taylor made during the execution of a search warrant were voluntary and not coerced and in denying his motion to suppress?

*State v. Taylor*  
S.Ct. No. 41888  
Court of Appeals

6. Did the court err in denying Davis's motion to suppress and in finding officers had sufficient probable cause to arrest and search Davis?

*State v. Davis*  
S.Ct. No. 41790  
Court of Appeals

**Summarized by:  
Cathy Derden  
Supreme Court Staff Attorney  
(208) 334-3868**



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## Idaho Courts

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Chief Justice Roger S. Burdick  
Idaho Supreme Court

### State of the Judiciary Address February 2, 2015

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It is always a great pleasure to discuss with you the State of the Judiciary. It is an honor to address you and each year I have carried a theme – be it of change or demographics. This year’s theme is transformation.

Because of your foresight last year, the Idaho judiciary has a solid foundation to build upon to address retention and recruitment of Idaho’s judges; initial funding for our modern case management technology and attendant move to electronic records and filing; and finally your significant change to Idaho’s criminal justice framework with the Justice Reinvestment Initiative.

#### Snake River Basin Adjudication final decree

Starting with the theme of “transformation” I can think of nothing more appropriate than the completion of the Snake River Basin Adjudication. This event puts Idaho as a leader in the nation. The ceremonial signing of the final decree of the Snake River Basin Adjudication headlined by Justice Antonin Scalia marked the end of the largest water adjudication ever finished in United States history. This signing was the capstone of 26 years of unprecedent-

The Idaho judiciary has a solid foundation to build upon to address retention and recruitment of Idaho’s judges.

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ed cooperation between the Idaho legislature, executive branch and the judiciary leading to the cataloging of over 150,000 water rights of Idaho’s citizenry. The effort took the combined efforts of five district judges, four governors and hundreds of legislators, and the SRBA administrative staff but it will prove its worth in the future.

The legislature is correct to continue this cataloging throughout the state. Water is vitally important in Idaho’s history, today, and for the future. How do we manage it and grow without knowing who owns what? Congratulations again are in order for an important job well done.

#### Strong court administration continues

We continue transformation in our court administration. Patti Tobias, our Administrative Director of the Courts for 20 years resigned to take a new position with the Nation-

al Center for State Courts in Denver, Colorado. Her service was marked by unrelenting energy, unwavering respect and love for Idaho’s court system, especially its trial judges and her absolute honesty in approaching this body and the executive branch to accomplish the State’s work. We thank her again for her vision and work throughout the years.

Gladly, she continues with us in the ongoing implementation of the Justice Reinvestment Act through our contract with the National Center for State Courts.

The Supreme Court continues to search for her replacement. To date we have reviewed 84 applications from throughout the nation. In an attendant move, the Court formally appointed former Chief Justice Linda Copple Trout as the interim Administrative Director and Senior Judge Barry Wood as the deputy director. Both have proven over the last months to be very adept at continuing the strong administration of the Idaho Judiciary. It is unprec-

edented in the nation to have a former Chief Justice come back to serve as Administrative Director. We are very grateful for her service. I can say without reservation both have the complete trust and backing of the Idaho judiciary.

Justice Trout and Judge Wood's work has been helped by the strong leadership of our Division Directors, Janica Bisharat, Andrea Patterson, Roland Gammill, Kerry Hong, and Kevin Iwersen. They had previously fashioned a transition plan under Patti's leadership and have continued their exemplary service. Thanks to all of our administrative staff during this transition.

### **Continued demographic change**

I want to touch upon the theme from last year of demographic change and the importance of the Court's ongoing efforts to recruit the "best and brightest" from the ranks of Idaho's lawyers and magistrate judges.

This demographic change is illustrated by the many retirements on the district and appellate bench with many more likely to come in the near future. Eighteen district and appellate judges have retired since 2009 and as of June 30, 2014, another 34 (63%) are eligible to retire within the next five years. In January three more retired. Additionally 24 magistrates will have retired by the end of this month. It is crucial during this time of transition that we continue to recruit the most highly qualified individuals to serve in the judiciary and that we ensure that they are fully trained and supported.

I would also like to take time to thank those attorneys familiar with our judicial candidates for participating in the Idaho State Bar surveys.

We need trustworthy responses from those attorneys who know our judicial candidates. I want to encourage all Bar members to continue to support this important source of information to our Magistrate Commissions and the Judicial Council.

Lastly, another thank you to the Idaho Legislature for your continuing commitment to judicial salaries. House Majority Leader Mike Moyle and Senate Majority Leader Bart Davis were instrumental in last year's legislative session helping us to address the need for competitive salaries. We also thank the chairs of our germane committees Senator Lodge and Representative Wills for ongoing support.

### **Technology transformation**

We continue on our odyssey for the transformational overhaul of the court's statewide case management and computer system. This system is well named – Odyssey. This new technology configuration will consolidate the 44 servers throughout the State to one in-house web based server in Boise with redundancy in Meridian. Moving to this shared platform will allow the Idaho judicial branch to dramatically improve

data quality, information sharing and incorporate consistent practices and forms across all of our courts.

This new technology will also favorably impact all of Idaho's law enforcement, governmental agencies and our citizens who depend upon the courts for up to date information. It is hard to explain the amount of vital information produced and disseminated by the courts on a routine basis. We are mindful of this and are working hard to accommodate those needs. Efforts are underway to also preserve our historical data by converting it to our new system as part of this transformation to electronic court records.

At this date we are on budget and on schedule to pilot this spring the program in Twin Falls County. I would like to take this opportunity to recognize the Twin Falls County Commissioners and other local officials for their efforts to pilot this program. I especially want to thank two elected clerks of the court, Twin Falls County Clerk, Kristina Glascock and Ada County Clerk, Chris Rich for their efforts. They have not only worked closely with us, but have marshalled county personnel for the data conversion efforts.

This new technology configuration will consolidate the 44 servers throughout the State to one in-house web based server in Boise with redundancy in Meridian.

We continue to keep a close eye on the technology fund revenues you have authorized. If there is a down-turn in case filings it will necessarily impact available funds. If that happens we will have to come to you to solicit your advice to help bridge the gap.

### **Safe, secure, and accessible county court facilities**

In 2012 I spoke to you of the need for renovation or new construction of court facilities throughout the state. The court together with the counties has done a survey of physical facility needs and the need is great. We are moving ahead to help counties have access to information and plans in conjunction with the National Center for State Courts. In fact later today the National Center for State Courts will give a presentation to our elected clerks, county commissioners and court personnel on court facilities. This is an area of great need not only for the safety of citizens and employees but also for prudent use of county funds.

### **Guardianship and conservatorship initiatives continue**

I am very proud of the progress of our Guardianship Committee. In the last two years they have surveyed existing rules and statutes, reviewed national standards and made needed statutory and rule changes. The committee continues to work on future legislative initiatives to give guardians, conservators, and the protected persons as well as interested parties further guidance and clarification of rights, obligations and procedures. We hope to present you with future legislation to make sure all interests have been considered.

### **Continued focus on the “reinvestment” of the justice reinvestment initiative**

I have been licensed to practice law since 1974 and I believe your enactment of the Justice Reinvestment Initiative is the most important change, indeed a transformation, in criminal justice during my career.

Senate Bill 1357 passed last year because of the hard work of all three branches of state government and

We must continue a vision for the long course, moving all aspects of the criminal justice system to a scientific and evidence-based sentencing and correctional practice.

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the Council of State Governments Justice Center. Its introduction generated a tremendous amount of work and debate among our 45 district judges and thankfully you listened.

It has properly focused our state on evidence based practices which devote resources to community based programs rather than building more prison walls. Additionally

JRI calls for a rejuvenation of “what works” within the prisons themselves and finally it strengthens the procedures and decision making of our parole system.

To make JRI a success, we must continue a vision for the long course, moving all aspects of the criminal justice system to a scientific and evidence-based sentencing and correctional practice. This will not be accomplished overnight or without additional resources. It will take years to train and change the attitudes and practices historically entrenched in all aspects of the criminal justice system. It is vital that the Legislature stay committed to the reinvestment of correctional savings to the goals of community supervision, training of probation officers, and community rehabilitation resources.

### **Public defender reform**

Another criminal justice commitment made last year is improvement of the county-based public defender system.

The Idaho Legislature took notice that since 1923 in *State v. Montroy* that all citizens accused of crimes have a right to a “fair and impartial trial and every reasonable opportunity to prepare a defense.” Most importantly – “in a case of indigent persons accused of a crime, the court must assign counsel to the defense at public expense.” We hope further study, education, and resources will result in a new, creative approach to this constitutional duty.

The creation of the Public Defense Commission, with its Executive Director, Ian Thompson, has already resulted in numerous new training opportunities for criminal law practitioners. The Commission continues to explore new ways to

help county commissioners furnish public defense services. It is an exciting first step.

### Interpreting services are needed

Besides public defense in a criminal case, there is a vital issue of due process and equal access to justice that needs resources and analysis – foreign language interpretation. It is axiomatic that if a person cannot understand the court proceedings and the court cannot understand them, there can be no due process of law.

Because of Idaho's rural nature, many counties lack access to professional, qualified court interpreters. Providing language access goes beyond locating a bilingual person to provide interpreting or translating services. While being bilingual is a needed prerequisite, it does not sufficiently qualify a person to serve as an interpreter or translator for the courts.

In 2014, court interpreters were secured for 47 different languages and this trend will only increase. In the future we will be coming to you for additional resources to assist trial courts in constructing a statewide, coordinated program of recognition, training and accessibility to language assistance.

### State of the Judiciary remains strong

In summary, the State of Idaho's judiciary is very strong by any benchmark. We have all but finished the original SRBA, the largest in the nation's history. Our recruitment efforts for the "best and brightest" have been expanded and strengthened. We have drilled down to analyze and identify delay in every case type through our Advancing Justice Initiative.

In 2014, court interpreters were secured for 47 different languages and this trend will only increase. In the future we will be coming to you for additional resources to assist trial courts in constructing a statewide, coordinated program of recognition, training and accessibility to language assistance.



Our creative approach to old issues has resulted in over 66 courts statewide following a problem solving model. New procedural rules and techniques have been adopted to help divorce litigants get through this emotional experience in a more expedient way. Additionally, high conflict divorces and child custody cases have been given more and varied resources.

We have embarked on an aggressive program to bring our Guardianship and Conservatorship procedures up to date. Our technology initiative is a sea-change in how we will file cases, handle those cases, keep and disseminate our records. We are looking at all alternatives including bridging gaps with senior judges, before coming to you and our counties for new judgeships.

We are strong but that doesn't mean there are not challenges ahead. I've mentioned a few – Justice Reinvestment Initiative implementation and most importantly REINVESTMENT, public defender improvement, court facilities at the county level, interpretive resources, competitive salaries and new judicial positions. We are truly embarked on a transformational period in our court's history. We will keep you in-

formed and stand ready to assist in these important policy decisions for all Idahoans.

Because of the remarkable working relationship we have with the Legislature and Governor, we can and will continue our shared vision of excellence for a safe and strong future for all Idaho citizens.

God bless.

### About the Author

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

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



# Personal Liability Under the Idaho Sales Tax Act

John McGown  
Dustin Liddle

**L**awyers often advise business owners to use a corporation or limited liability company (LLC) to shield owners from personal liability. Lawyers also typically inform their clients to follow corporate formalities so that creditors cannot “pierce the corporate veil.” However, the Idaho State Tax Commission (Commission) has the power to pierce this corporate veil even though corporate formalities have been followed. This article provides a detailed discussion of the Commission’s power to reach owners, officers and employees of a corporation or LLC to collect Idaho sales and use taxes<sup>1</sup> and looks to analogous federal law for guidance as to the scope of this power.

## Who may be liable for unpaid taxes under I.C. § 63-3627?

Business owners and managers with authority to act on behalf of businesses should be aware of the personal liability imposed for failure to remit certain types of taxes. For example, with regard to federal employment taxes, Section 6672 of the Internal Revenue Code (“§ 6672”) provides that any person required to “collect, truthfully account for, and pay over” employment taxes is a “responsible person” and may be personally liable for a penalty equal to the amount of any unpaid employment taxes. It is imperative that Idaho business owners and managers appreciate the similar personal liability imposed for failure to remit Idaho sales and use taxes. Specifically, Idaho Code Section 63-3627 (I.C. § 63-3627) imposes personal liability on any individual with the “duty to account for and pay over” any sales or use tax imposed upon a taxpayer

This liability, however, can extend to others with authority to determine which creditors get paid and which do not.

of which the individual is “an officer, member, or employee.”<sup>2</sup>

First, regarding who is liable, I.C. § 63-3627(a) provides:

Every person with the duty to account for and pay over any tax which is imposed upon or required to be collected by any taxpayer under this chapter on behalf of such taxpayer as an officer, member or employee of such taxpayer, shall be personally liable for payment of such tax, plus penalties and interest, if he fails to carry out his duty.

This “duty” to account for and pay over sales or use tax is interpreted broadly and may apply to multiple individuals connected with a particular business.<sup>3</sup> No Idaho appellate level case law has defined the scope of this duty, but decisions from the Commission look to determinations identifying “responsible persons” under § 6672 when determining liability under I.C. § 63-3627. Determining whether an individual is a responsible person in the context of § 6672 requires determining whether the individual had sufficient control to authorize the payment of employment taxes.<sup>4</sup> Accordingly, individuals with a controlling interest or corporate officers who participate in decisions concerning the payment of creditors will be deemed to be responsible persons and may be

personally liable for unpaid employment tax under § 6672 and by extension for unpaid sales or use taxes under I.C. § 63-3627. This liability, however, can extend to others with authority to determine which creditors get paid and which do not. Factors relevant to this determination include an individual’s (i) duties as outlined in the corporate bylaws or other relevant documents, (ii) status as a corporate officer, director or general partner, and (iii) ability to sign checks on behalf of the business.<sup>5</sup>

For officers or other employees with discretion in determining payments to creditors, fear of reprisal from superiors, shareholders or other individuals is unlikely to provide a defense.<sup>6</sup> At the other end of the spectrum, those with ultimate authority over a business’s finances generally cannot protect themselves by delegating such duties.<sup>7</sup>

The Commission has addressed the scope of the duty under I.C. § 63-3627 in only a few instances. In one decision, the Commission found a non-member employee of an LLC personally liable under I.C. § 63-3627 after determining she had discretion to determine which creditors the LLC would pay.<sup>8</sup> The Commission further noted that the employee (i) admitted to preparing the sales and withholding tax returns at issue, (ii) had check signing author-

ity, and (iii) negotiated with state compliance staff regarding the payment of sales and use taxes.<sup>9</sup> Despite acknowledging that the employee did not have formal authority to act on behalf of the LLC, the Commission ultimately concluded she was indirectly given such authority by the LLC's principal (who was the employee's son).<sup>10</sup> In another decision, the Commission found an individual personally liable for the sales and use tax owed by an out-of-state business.<sup>11</sup> The Commission noted that the individual was (i) president of the out-of-state business, (ii) present in Idaho during the applicable activities, and (iii) director of the out-of-state business's Idaho operations.<sup>12</sup> Lastly, in one other decision, the Commission found an individual personally liable under I.C. § 63-3627 after noting he was (i) listed on the Sales and Withholding Tax application as an officer and contact person and (ii) listed as an officer on information filed with the Idaho Secretary of State.<sup>13</sup>

### **Who may be liable for the penalty under I.C. § 63-3627?**

Second, regarding the imposition of penalties, I.C. § 63-3627(b) provides:

Any such individual required to collect, truthfully account for, and pay over any tax imposed by this chapter who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

In addition to owing the unremitted sales or use tax, individuals who “willfully” fail to uphold their duty under subsection (a) of I.C. § 63-3627 could face a penalty equal to the full amount of the unpaid tax at issue. Idaho law does not define “willfully” in this context, and the decisions from the Commission by and large fail to expressly address the penalty imposed by subsection (b) of I.C. § 63-3627.

In connection with § 6672, “willfully” has been defined to mean any “voluntary, conscious and intentional act.”<sup>14</sup> Using this definition, most individuals found liable under subsection (a) of I.C. § 63-3627 could presumably be subject to the penalty imposed by subsection (b). Looking to § 6672 for guidance, an individual may possess the duty described in subsection (a) of I.C. § 63-3627, but nonetheless be found to have not acted willfully due to his or her lack of knowledge of the unpaid sales or use tax. For instance, in the context of § 6672, a retired business owner was determined to be a “responsible person” due to his 20 percent ownership in the business and influence over its affairs.<sup>15</sup> But the court ultimately concluded he did not willfully or with reckless disregard cause the business's failure to remit the tax and withholdings at issue because the retired business owner believed the business's taxes were being paid on time.<sup>16</sup>

The above notwithstanding, case law illustrates that an individual found to be a responsible person with respect to unpaid employment taxes will also be found to have acted willfully in the majority of cases. In the few decisions in which the Commission has discussed liability under I.C. § 63-3627, however, the Commission appears hesitant to assess the 100 percent penalty imposed by subsection (b). While the reason for this hesitancy is unclear, it could be (i) due to the Commission's desire to apply I.C. § 63-3627 consistent with § 6672, which does not by itself impose personal liability in excess of the underlying tax at issue, or (ii) simply that such a penalty would be overly punitive. Nonetheless, case law interpreting willfulness in the context of § 6672 suggests that, at least in theory, this penalty could be assessed by the Commission in many instances.

Note that, as expressly provided in subsection (b), violators of I.C. § 63-3627 can be subject to additional penalties.

### **Conclusion**

Misguided owners and managers of cash-starved businesses may be tempted to put off the remittance of Idaho sales or use taxes in the hope of keeping the business up and running a little longer. Well-informed advisors should advise their clients

Case law illustrates that an individual found to be a responsible person with respect to unpaid employment taxes will also be found to have acted willfully in the majority of cases.

of the high personal costs of letting these taxes go unpaid. It is also imperative that tax advisors stress the importance of their clients keeping them up to date regarding any correspondence received from the Commission. Ignoring correspondence from the Commission can be costly.

Failure to protest a notice of deficiency determination from the Commission within sixty-three (63) days will cause the entire deficiency to be assessed and become due.<sup>17</sup> The Idaho Supreme Court, in the only appellate decision citing I.C. § 63-3627, found three officers of a corporation personally liable solely as a result of their failure to timely protest their respective notices of deficiency.<sup>18</sup> Given the personal liability and onerous penalties, tax advisors must educate their clients of the importance of complying with I.C. § 63-3627 and promptly dealing with any issues that may arise when Idaho sales or use taxes go unpaid.<sup>19</sup>

### Endnotes

1. Note that Idaho "use tax" applies to the value of goods used by Idaho residents where (i) no Idaho sales taxes is collected during the transfer of such goods and (ii) where such transfers would otherwise be subject to Idaho sales tax. I.C. § 63-3621.
2. See also Idaho State Tax Comm'n Rule 35.01.02.118.01 (imposing personal liability for payment of the tax, penalty and interest due from the corporation or partnership on "[i]ndividuals including corporate officers and employees with the duty to cause a corporation or a limited liability company to file a sales tax return or to pay sales tax when due"); Idaho State Tax Comm'n Rule 35.01.02.118.02 (imposing a penalty, in addition to the tax, "equal to the total amount of unpaid tax").
3. Idaho State Tax Comm'n Decision No. 19641 (Apr. 3, 2007) ("The term 'responsible person' is broad and may include many individuals connected with a corporation, and more than one individual may be the responsible person.").
4. *United States v. Jones*, 33 F.3d 1137,

1140 (9th Cir. 1994) (finding that "an individual who does not have the authority and control to pay the payroll taxes may not be 'responsible'" and that the "most critical factor was having 'significant control over the enterprise's finances'"); Idaho State Tax Comm'n Decision No. 11664 (Jun. 1, 1998) ("Any corporate officer or employee with the power and authority to 'avoid the default' or to direct the payment of the taxes is a responsible person within the meaning of section 6672."); Idaho State Tax Comm'n Decision No. 19641 ("This authority is generally found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursement of funds.").

It is also imperative that tax advisors stress the importance of their clients keeping them up to date regarding any correspondence received from the Commission.

5. *Jones*, 33 F.3d at 1140.
6. See, e.g., *Ferguson v. United States*, 317 F. Supp. 2d 945, 957 (S.D. Iowa 2004) ("Instructions from a superior not to pay taxes do not . . . take a person otherwise responsible under section 6672(a) out of that category.").
7. See, e.g., *Kinnie v. United States*, 994 F.2d 279, 284 (6th Cir. 1993).
8. Idaho State Tax Comm'n Decision No. 19641.
9. *Id.*
10. *Id.*
11. Idaho State Tax Comm'n Decision No. 14799 (Jan. 30, 2001).
12. *Id.*

13. Idaho State Tax Comm'n Decision No. 13277 (Jan. 1, 1999).
14. *Davis v. United States*, 961 F.2d 867, 871 (9th Cir. 1992).
15. *Pitts v. United States*, 2001 U.S. Dist. LEXIS 6334, 5-8 (D.Ariz. 2001).
16. *Id.* at 8.
17. Idaho Code §§ 63-3045 and 63-3631.
18. *State Tax Comm'n v. Western Electronics, Inc.*, 99 Idaho 226, 227-28, 580 P.2d 72, 73-74 (1978).
19. A version of this article appears at <http://www.hawleytroxell.com/2014/04/personal-liability-under-the-idaho-sales-tax-act/>.

### About the Authors

**John McGown, Jr.**, is of counsel in the Boise office of the law firm of Hawley Troxell Ennis & Hawley LLP. His practice emphasizes general tax, estate planning, tax disputes (with an emphasis on disputes with the Idaho State Tax Commission) and tax exempt organizations. He is currently teaching estate planning at the University of Idaho College of Law. He has written numerous articles and has been published in *The State and Local Tax Lawyer*, the *Idaho Law Review*, *The Journal of Taxation*, and the *ACTEC Law Journal*.



**Dustin Liddle**, is an attorney in the Boise office of the law firm of Hawley Troxell Ennis & Hawley LLP. He is a member of the firm's tax and corporate law practice groups. His practice emphasizes federal and state tax matters. He has presented on a variety of different tax topics. Mr. Liddle is also a licensed CPA in the state of Idaho.



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# Feeling Possessed: The Use of the Genitive Case

Tenielle Fordyce-Ruff

**M**aybe it's just the end of the winter, but I always go a little stir crazy this time of year. Not like Jack Nicholson in *The Shining*, of course. But I do long for a nice long walk in the sunshine with those dogs of mine. Or to do a little gardening with my husband in our yard. Or to get away from my students' gripes about having to write a 20-page appellate brief in a mere six weeks.

Wow — there was lot of possessing in that paragraph! In fact, we tend to do a lot of possessing in writing (or we write about a lot of possessing).

So let's take a closer look at possession in the English language.

## Possession: A brief lesson

In English we use the genitive case of nouns to express possession. Sometimes the genitive case is called possessive, but that is too narrow a term. Genitive nouns can function in seven different ways.

The genitive case can show ownership (Tenielle's car), a relationship (Tenielle's assistant), agency (Tenielle's real estate agent), the role of the subject (Tenielle's application), the role of the object (Tenielle's release), or an idiomatic shorthand form of an "of" phrase (one day's time).<sup>1</sup>

Our focus today will be on the ownership function of genitive nouns.

## Possessive formation

The genitive case is formed different ways, depending on both the noun and its usage in the sentence.

The genitive of a singular noun is formed by adding an 's.

*Amanda's car is white.*



When the singular noun ends in an "s," still add the 's.

*Mr. Jones's car is yellow.*

Form the genitive of a plural noun that ends in an *s* or *es* by adding just an apostrophe.

*My parents' car is blue.*

*The Joneses' car is also blue.*

If a plural noun is irregular, the genitive is formed by adding an 's.

*The women's cars were green.*

Compound nouns take the appropriate ending on the last word in the compound.

*My brother-in-law's truck is red.*

*The Society of Friends' bus is yellow.*

Indefinite pronouns also take an 's. (Indefinite pronouns refer to no specific person or thing; everyone, someone, no one, something.)

*Someone's car was ticketed.*

*Everyone's car was damaged during the hailstorm.*

Sometimes, too, the preposition *of* may precede a noun to express possession.

*The windshield of the car was cracked.*

The choice between the two genitive markers is mostly a matter of style.

*The car's name. . .*

*The name of the car. . .*

There are a few expressions, however, that sound right only in the *of-genitive* formation.

*When his car slid on the black ice, it felt like the end of everything.*

*When his car slid on the black ice, it felt like everything's end.*

## Individual and joint possession

Things get a little trickier, however, when there are multiple nouns in a sentence. So let's move on to how to differentiate between individual and joint possession.

If two or more people together own something, mark only the last noun as genitive. Let's say you're trying to tell someone about my car. You could write:

*Tenielle and Charlie's car is white.*

This is because my husband and I own the car together.

But if the nouns are both in the genitive case, the sentence would tell

you that each person owns a separate thing.

*The mechanic worked on Pam's, Amanda's, and Bo's cars.*

The mechanic was busy — he serviced three different cars, owned by three separate individuals.

### Double possessives

Unfortunately this isn't about owning twice as much of something: *She had two luxury cars.* Instead, double genitives are formed with both the genitive case and the word *of*.

*It was a habit of Susan's to change her oil yearly.*

Now, the use of the double genitive confounds some people. Why would you use both genitive markers — the 's and *of*? Shouldn't you write instead: "*It was a habit of Susan to change her oil yearly.*"?

No. Think about it this way: if you were to use pronouns, you would use possessive pronouns.

*It was a habit of hers to change her oil yearly.*

Not:

*It was a habit of she to change her oil yearly.*

Now you know that the double genitive is correct, but why would you want to use it? It can shift the focus of the sentence to the object.

The focus above is now on the *habit* of changing oil, not on *Susan*.

### Possessives and gerunds

Finally, if the noun or pronoun in your sentence modifies a gerund, use the genitive case or possessive pronoun. Remember, a gerund is a verb form ending in *ing* that functions as a noun.

*We had to pay a fine for Chad's driving without a license.*

*We had to pay a fine for his driving without a permit.*

Here, because "*driving without a license*" and "*driving without a permit*" both function as nouns, the use of the genitive case, *Chad's*, and the possessive pronoun, *his*, is correct.

### Conclusion

Now that you understand a little more about possession in the English language, I will leave you. I see the sun peaking out and I need to wash my car!

### Sources

- The University of Chicago Press, *The Chicago Manual of Style*, 207-08 (16th ed. 2010).
- Diana Hacker, *A Writer's Reference*, 150 (3d ed. 1995).

If you were to use pronouns, you would use possessive pronouns.

*It was a habit of hers to change her oil yearly.*

Not:

*It was a habit of she to change her oil yearly.*



### Endnotes

1. The University of Chicago Press, *The Chicago Manual of Style*, 207 (16th ed. 2010).

### 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 Fisher Rainey Hudson. You can reach her at [tfordyce@cu-portland.edu](mailto:tfordyce@cu-portland.edu) or <http://cu-portland>.



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Hon. H. Reynold George	Idaho City	January 20, 2014
Hon. Eli "Bud" Ponack	Lewiston	March 20, 2014
Hon. Robert Claude Brower	Blackfoot	October 12, 2014
Hon. Watt Edmund Prather	Meridian	December 19, 2014

## ATTORNEYS

ATTORNEYS	RESIDENCE CITY	DECEASED
Melrose Jed Pritchett, Jr.	Boise	January 27, 2014
James Harold Paulsen	Coeur d'Alene	January 31, 2014
James Edmund Bruce, Jr.	Boise	February 20, 2014
David Samuel Eismann	Bayview	March 17, 2014
Charles Paul van Ormer	Boise	April 1, 2014
Jeffrey Andrew Child	Coeur d'Alene	April 5, 2014
Richard C. (Dick) Fields	Boise	April 23, 2014
Bob Melton Brown	Coeur d'Alene	May 1, 2014
Charles Arthur Daw	Boise	May 1, 2014
Kirk B. Hadley	Pocatello	May 3, 2014
Diane Marie Tappen	Boise	May 12, 2014
Michael D. Kinkley	Spokane, WA	May 13, 2014
Thomas Allen Miller	Boise	July 7, 2014
Stanley G. Cole	Paul	August 7, 2014
Robert Wesley "Bob" Speck	Spokane, WA	August 8, 2014
Merle Jay Meyers	Pocatello	August 29, 2014
Edwin Brent Small	Pocatello	September 10, 2014
Heidi VanCleave Gudgell	Port Angeles, WA	September 21, 2014
Gordon Siddoway Thatcher	Rexburg	October 1, 2014
Nanette Hedrick Songer	Boise	October 7, 2014
Brett Robert Fox	Boise	October 8, 2014
Sean Collins Beaver	Boise	November 21, 2014
William Warren "Bill" Nixon	Coeur d'Alene	November 27, 2014
James B. Green	Pingree	December 26, 2014

## IN MEMORIAM

### Michael D. Mike Kinkley 1955 - 2014

Michael D. "Mike" Kinkley passed away May 13, 2014 at the age of 58 after a fierce fight with cancer. Mike was born to Richard and Sallie Kinkley on June 4, 1955, and grew up in Columbus Ohio. A graduate of the Ohio State University and Gonzaga School of Law he practiced in Spokane as a trial and appellate lawyer for more than 31 years.

His passion for law was matched by his enthusiasm for the outdoors and exceeded only by his love for his two sons. Mike was a collegiate lacrosse player for the Ohio State University, and an avid boater, skier, hiker, fisher and scuba diver.

Mr. Kinkley is best known professionally for representing consumers seeking economic justice against the unlawful practices of banks, payday lenders and collection agencies. He successfully represented consumers in more than 30 consumer class action lawsuits in state and federal courts returning millions to the community.

He was the Washington and Idaho state chair and a board member of the National Association of Consumer Advocates and also served as the chairman of Consumer Protection Section of the Washington Association for Justice.

Mr. Kinkley is survived by his two sons, Scott and Robert, (Spokane), as well as his mother, Sallie, and sisters, Kathleen and Susan.



Michael D. Mike  
Kinkley

### Jim Raymond Doolittle 1928 - 2015

Jim Doolittle died February 2 at his home in Caldwell. He was born in Portland to Ada and Edwin Doolittle and was raised in Boise. His family consisted of his mother, Ada, and siblings, Bruce, Corinne and Wally. As a single-parent family during the Depression, they moved often and eventually settled on Warm Springs Avenue in Boise.

Mr. Doolittle graduated from Boise High School in 1947. He enlisted in the U.S. Air Force in July of 1948 during the Korean War and received an honorable discharge in 1952. He married Wanda Gene Nicholas of Fort Worth, TX in 1952.

Mr. Doolittle utilized the GI Bill to attend Boise Junior College, The University of Idaho and Baylor University where he completed an accelerated law school program in only 27 months. He was grateful to Baylor University for loaning him funds for completion of his last semester after his GI Bill expired, and he was a lifelong contributor to the University.

Mr. Doolittle moved back to Idaho and raised five children, mostly in the Caldwell area. He practiced law for 15 years and in May of 1977 was appointed as a District Judge of the Third Judicial District, a position he held until his retirement in December of 1993.

His wife died in 1990 and Mr. Doolittle married Lynn Martin in



Jim Raymond  
Doolittle

2001. Mr. Doolittle enjoyed bird hunting, camping, motorcycles, billiards and most of all fishing.

He is preceded in death by his mother, Ada; siblings, Bruce, Corinne and Wally; his wife Gene, daughter, Anna Lucinda and grandson, Robert Dyas Jr. He is survived by his wife, Lynn; daughter, Rebecca (Scott) Smith; son, Brantley (Suzanne) Doolittle; daughter, Melissa (Jerry) Nowland; daughter Shawn Judd; nieces, nephews, grand and great-grandchildren.

### Susan Marie Hepburn 1949 - 2015

Susan Marie Hepburn, 65, passed away on Monday, Feb. 2, 2015, in Sandpoint.

Susan was born on Sept. 11, 1949, in Brooklyn, N.Y., to Mils and Marie Pearson. She received her bachelor and master degrees from C.W. Post University in New York, her Juris Doctorate degree from the University of Washington, School of Law, and her Ph.D. from Gonzaga University.

Susan's career included corporate finance and legal positions; including advocacy work for the disabled and elderly. She was appointed to the Governor's Committee on Disability Issues in Washington state and was awarded the 1999 Civil and Legal Rights Appreciation Certificate.

She married George H. Hepburn Jr. on Nov. 20, 2008, at his home in



Susan Marie Hepburn

## IN MEMORIAM

Sandpoint. She suffered multiple health problems over the next seven years including aneurysms and heart failure, during which time she was in constant rehabilitation and therapy.

In spite of her ailing health, she remained a vibrant companion and helpmate to George. Susan loved her two cats who comforted her through difficult times.

She is survived by her husband, George Hepburn of Sandpoint; a son, Lawrence Scouras of Alaska; nine grandchildren, 13 great-grandchildren; and six stepchildren.

## OF INTEREST

### New staff attorney joins Idaho nonprofit

BOISE - The Centro de Comunidad y Justicia (CCJ) is pleased to announce that Les Bock has joined its organization as a staff attorney.



Les Bock

Mr. Bock will help lead Proyecto Vecinos CCJ's Immigrant Rights Project, and provide family-based immigration services to Latino and low-income immigrant families throughout southwest and south central Idaho. Mr. Bock will also provide legal support for the organization's community-based education and health equity initiatives.

From 2008 to 2014, Mr. Bock served as a Democratic Idaho State Senator, representing the 16th District, where he was Assistant Minority Leader from 2010 to 2013. He was a member of the Idaho House of Representatives from 2006 until 2008.

Prior to serving in the Idaho Legislature, Les was the Executive Director of the Idaho Human Rights Education Center from 2001 to 2005, and he was a partner with Dillion, Bosch, Daw & Bock from 1992 to 2005.

### Heather Conder joins C.K. Quade Law, PLLC

BOISE - C.K. Quade Law, PLLC has recently added a team member. Heather Conder joins the firm as an Associate Attorney. She attended University of Utah, graduating in 1999 with a B.A. in English. She attended Regent University School of Law and graduated in December 2003. She has acted as an advocate for refugees with disabilities, lobbied for the rights of homeschoolers in Idaho and worked in humanitarian efforts overseas. She will practice in the areas of elder law, disability law, estate planning and related litigation.



Heather L. Conder

### Angstman, Johnson changes name, adds partner

BOISE - Angstman, Johnson & Associates, PLLC, announces it has changed the name of the firm to "Angstman Johnson, PLLC," and added a new partner to the firm, Matthew T. Christensen.

Mr. Christensen has been an attorney at Angstman Johnson since 2008. Prior to that he worked for several firms in the Meridian area. Matt maintains a well-developed commercial law practice.

In addition to practicing law, Mr. Christensen frequently presents continuing education courses to other attorneys. He also is an adjunct professor at the University of Idaho College of Law, teaching real estate transaction and international business transaction courses.



Matthew T. Christensen

### Nicole Snyder elected to Holland & Hart management committee

BOISE - Holland & Hart LLP is proud to announce that Nicole Snyder has been elected to the firm's Management Committee. The five-person Management Committee oversees the management and strategic direction of the entire law firm, which has more than 470 attorneys in 15 offices across the Mountain West and Washington, D.C.

"I am excited to welcome Nicole and express our appreciation for her willingness to take on the responsibilities that come with serving on the Management Committee," said Liz Sharrer, Chair of the firm. "She has had great success as the Administrative Partner of



Nicole Snyder

our Boise office, and the skills she has demonstrated in that role will make her a very valuable member of the Management Committee.”

Snyder is based in the Boise office and has served as that office’s Administrative Partner for two years. “During Nicole’s tenure, the Boise office moved into new office space, grew from 37 to 45 attorneys, and made huge strides towards the goal of increasing the firm’s prominence in the Idaho market,” said Sharrer.

Snyder is a member of the firm’s Corporate Practice group serving clients in matters involving mergers and acquisitions, corporate governance, debt and equity financing, venture capital, restructurings, and other complex business transactions.

**Holland & Hart hires Thomas Chandler**

BOISE – Thomas Chandler has joined Holland & Hart’s Boise office as a partner in the firm’s corporate group. His practice will focus on counseling established and emerging companies, corporate governance, and mergers and acquisitions.

Chandler has more than 35 years of experience representing businesses at all stages of the business lifecycle, from entity formation through shareholder agreements, share issuance, sale of stock and assets, mergers and acquisitions, and dissolution. He is a trusted advisor to management, board members, and owners on issues impacting corporate governance.

Prior to joining Holland & Hart, Chandler practiced for many



Thomas Chandler

years at Hawley Troxell in Boise, where he chaired that firm’s corporate practice group.

“We have known Tom for a long time and feel very fortunate to have such a highly reputable practitioner and quality person join our growing force in Boise,” said Brian Hansen, administrative partner of Holland & Hart’s Boise office.

**WSU honors Linda Pall on MLK Day**

MOSCOW - Washington State University named attorney Linda Pall as one of its Martin Luther King Jr., Distinguished Service Award recipients. The awards were given at a January 22 ceremony at WSU in Pullman. Ms. Pall retired after 26 years of teaching law courses and serving as Coordinator of Business Law for WSU’s College of Business.

She served on Oregon Women’s Commission, is a longtime member of the Latah County Human Rights Task Force and was a prime mover in the creation of the City of Moscow’s Human Rights Commission.

**New Alternative Dispute Resolution Administrator named for the District of Idaho**

The United States Courts for the District of Idaho are pleased to announce that Keith Bryan has been selected as



Linda Pall



Keith Bryan

its new Alternative Dispute Resolution Administrator.

Mr. Bryan graduated with a Bachelor of Science degree in Political Science from the University of Oregon in 2007. Since joining the federal court in October, 2010, he completed the Michigan State University Judicial Certification Program in 2014, focusing his capstone experience on Alternative Dispute Resolution processes and court unit efficiency through dispute resolution. Mr. Bryan is also currently enrolled in the Federal Judicial Center’s Federal Court Leadership Program, a two-year curriculum designed to develop and promote successful leaders within the federal judiciary.

Mr. Bryan may be reached at (208) 334-9067 or [keith\\_bryan@id.uscourts.gov](mailto:keith_bryan@id.uscourts.gov).

**Carey Shoufler noted for helping refugee community**

The Idaho Office for Refugees announced 12 nominees for this year’s Idaho Refugee Recognition Awards, including Idaho Law Foundation Development & Law Related Education Director Carey Shoufler. She is also oversees the ILF Mock Trial and the Lawyers in the Classroom programs. Her work organizing and producing the New American Law Academy drew attention from the Idaho Office for Refugees.

All the nominees were recognized at the Idaho Refugee Recognition Awards Luncheon on Feb. 10 in the Jordan Ballroom at Boise State University.



Carey Shoufler

**OF INTEREST**

**Christopher Sherman joins Nevin, Benjamin, McKay & Bartlett**

BOISE – Christopher Sherman has joined Nevin, Benjamin, McKay & Bartlett as an associate attorney. Mr. Sherman’s practice will focus primarily on criminal defense in state and federal court.

Mr. Sherman graduated from Yale Law School in 2009 and received his undergraduate degree from the College of Idaho. Following graduation from Yale, Mr. Sherman worked for an environmental ethics non-profit in Chicago, Illinois and the Canyon County Public Defender’s Office.

Nevin, Benjamin, McKay & Bartlett was founded over 30 years ago and presently consists of eight attorneys. The firm focuses on criminal defense, criminal appeals and select civil litigation.



Christopher Sherman

**Diversity Section honors Susie Boring-Headlee**

BOISE - At the retirement party for Susie Boring-Headlee on Jan. 30, the Idaho State Bar Diversity Section honored her longtime support and service with an inscribed glass pitcher. Ms. Headlee served on the committee for many years and helped with all the group’s major projects, including the 220<sup>th</sup> Bill of Rights celebration.

From remarks made by Diversity Section member Linda Pall:

“Whether it was her effective, fair and creative challenges to her prison inmate clients and in her mediation duties for the Court, or her continuing belief in the worth, capabilities, talents and ideas of her friends and colleagues, Susie shared her im-



Susie Boring-Headlee

mense credibility with the rest of us – making whatever we were about better, more worthy, and of course, more fun.”

**More Top 50 Women honored**

In addition to those listed in February’s *Advocate*, two more Idaho attorneys made Idaho’s Top 50 Women as named by the Idaho Business Review. They are: Ilana Rubel, house representative for District 18, Idaho House of Representatives and partner at Fenwick & West LLP, Boise, and Nikeela R. Black, attorney and professional racehorse jockey, from Greenleaf.



Ilana S. Rubel



Nikeela R. Black

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## A Special IVLP Thanks to Kersti Kennedy

Andrew Jenkins

**K**ersti Kennedy graduated from the University of Washington School of Law in 2012 and promptly began working at Idaho Legal Aid. “I learned many practical skills at Idaho Legal Aid that I didn’t learn in law school,” she said. There was such a high case load that she had to hit the ground running. She also worked on cases in which the other party had been in prison, an aspect she found particularly interesting. Kersti later met Idaho Volunteer Lawyers Program Legal Director



Kersti H. Kennedy

Mary Hobson at a Third District Bar Association meeting where they began talking about pro bono cases.

Kersti decided to accept a pro bono case only two years out of law school. “I wanted a case with a client who really wanted to improve their life,” she said. This came in the form of a mother of two who wanted to protect her children. The children’s father was in prison for sexually abusing one of the mother’s family members that had been living with them.

Asked why she took this particular case, she said, “There is a high demand for family law, and I worked on some similar cases at Idaho Legal Aid.”

Asked why she took the case so soon after graduating from law school, Kersti said, “Mary wasn’t worried, so neither was I.”

She also referred back to the large case load she tackled while at Legal Aid. “My former supervisor at Idaho Legal Aid served as a resource if I had any questions.”

With her former supervisor, and the resources that are accessible through Idaho Volunteer Lawyers Program, Kersti was well equipped to handle this case.

Kersti has a message for those considering doing pro bono work: “Find something or someone that you really care about and wouldn’t mind doing for free. If you have a good client, then it won’t feel like you’re working for free.” It is a fantastic way to keep your skills up and build a resume, she said.

If you are encouraged by Kersti’s choice to help with the Idaho Volunteer Lawyers Program, please call (208)334-4510 to contact Mary Hobson.



### Donation to IVLP

Bank of the Cascades presents a check for \$1,500 to the Access to Justice Idaho Campaign, which raises money for the Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, Inc. and DisAbility Rights Idaho. From left are Sunrise Ayers, Pamela Howland, Lori Hilton, Walt Sinclair, Tonya Westenskow, Rod Gere, Anna Almerico and Jim Cook.



## 6.1 Challenge Needs Pro Bono Entries

The annual friendly competition once again highlights pro bono work done by Fourth District attorneys. The deadline for submitting completed forms to the IVLP office is April 3.

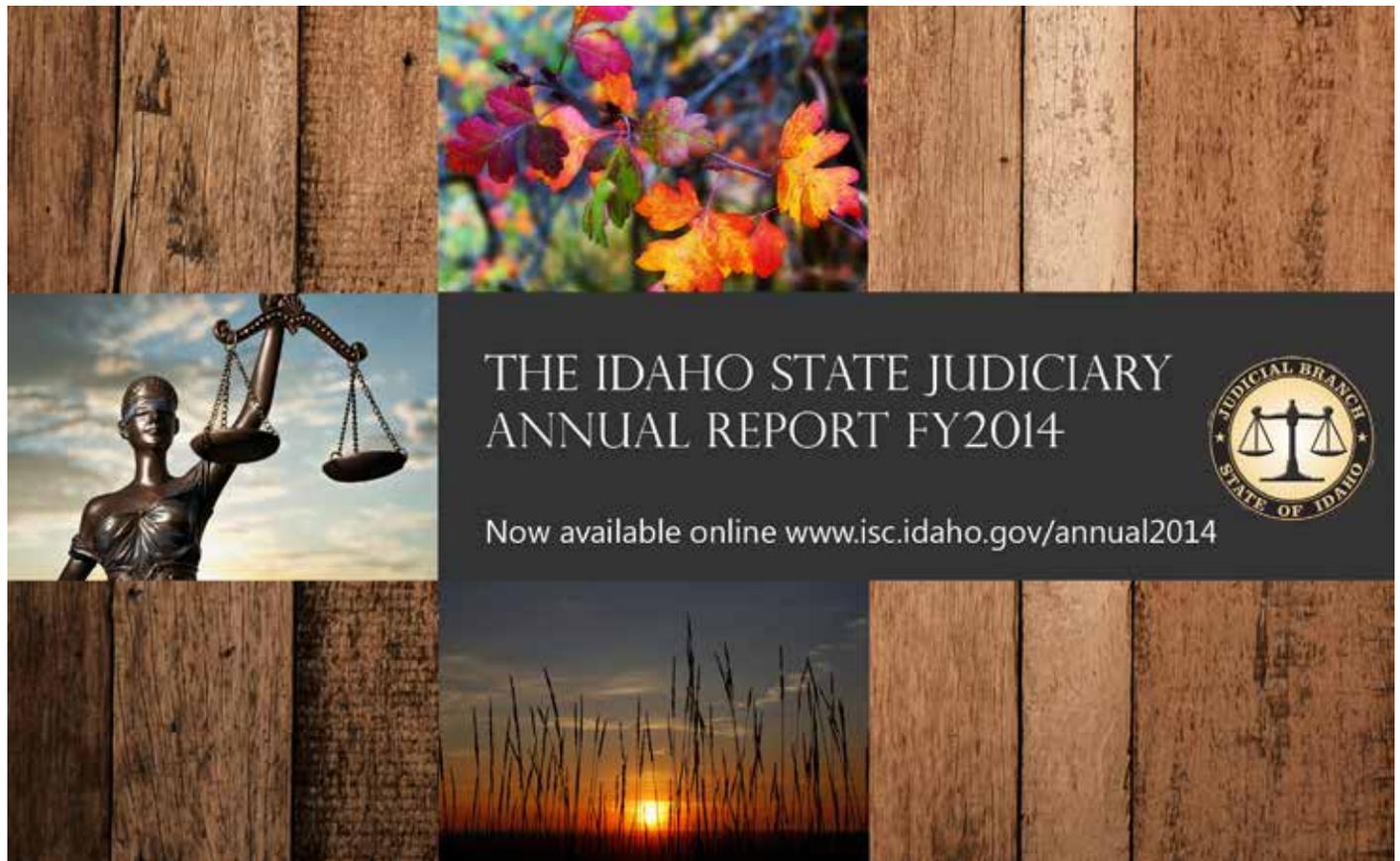
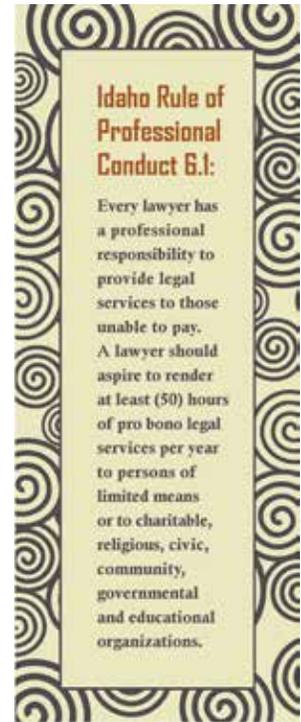
The event is named after Idaho Rule of Professional Conduct (IRPC) 6.1, and is designed to encourage and formally recognize the pro bono service activities by members of the Fourth District Bar.

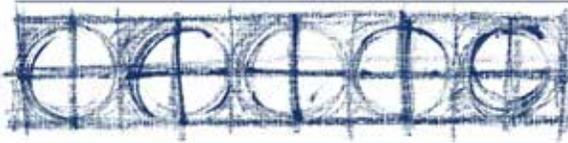
IRPC 6.1 states that every lawyer has a professional responsibility to provide legal services to those unable to pay. It says every lawyer should aspire to render at least 50

hours of pro bono legal services per year to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations.

The Fourth District Bar will recognize its members who have met the challenge of IRPC 6.1 by announcing the names of its members completing the 6.1 Challenge during a reception in the Spring 2015 and publishing this list on the website of the Idaho Law Foundation and in *The Advocate*.

To participate, check the web site <http://isb.idaho.gov/ilf/ivlp/challenge.html>, and download a form to fill out your hours.





## Interest on Lawyers Trust Accounts (IOLTA) Program 2015 Grant Recipients

### **Idaho Legal Aid Services, Inc. - \$27,600** **The Domestic Violence Project**

For civil legal assistance to low-income survivors of domestic violence, sexual assault, and stalking. Funds will be allocated among ILAS offices for client representation, including protection orders, divorce, custody, modifications, wrongful evictions, and other legal actions.

### **Idaho Law Foundation, Inc. - \$18,600** **Idaho Volunteer Lawyers Program**

For general support of of the Idaho Volunteer Lawyers Program, which provides legal services to Idaho's poor through referral of appropriate civil cases to volunteer attorneys statewide.

### **Idaho Law Foundation, Inc. - \$16,200** **Law Related Education Program**

For support of civic education for young people. Program components include a statewide mock trial competition for high school students, teacher training, resource materials, and Citizens' Law Academy.

### **Treasure Valley Family YMCA - \$500** **The Youth Government Program**

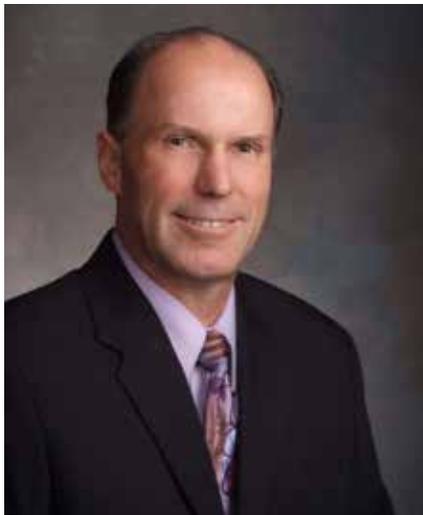
For scholarship funds for youth who otherwise would not be able to attend the annual statewide model legislative and judicial session for high school students.

### **Idaho State 4-H Office - \$500** **The Know Your Own Government Project**

For general support of the Idaho State 4-H Know Your Government Conference which provides 8<sup>th</sup> and 9<sup>th</sup> grade Idaho 4-H members an opportunity to participate in a mock legislative session and learn about the Idaho judicial system.

### **U of I College of Law - \$1,600** **Scholarship Program**

To award Public Interest Fellowships to encourage students to, and reward them for, taking unpaid summer positions that serve the public interest.



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Drug or alcohol abuse

Changes in energy, eating or sleep habits

Trouble concentrating or remembering things

Loss of interest or pleasure, dropping hobbies

Guilt, feelings of hopelessness, helplessness, worthlessness, or low self-esteem

A Johns Hopkins study found that lawyers suffer from depression at a rate 3.6 times higher than the general employed population.

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