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Official Publication
of the Idaho State Bar
Volume 58, No. 5
May 2015



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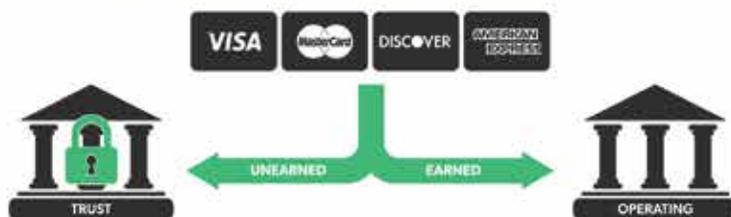


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Join for news and discussion at Idaho-State-Bar.



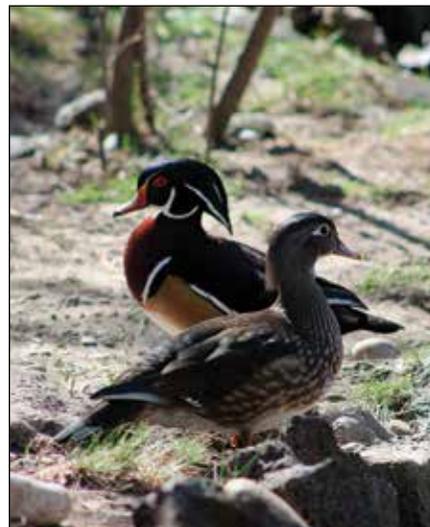
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On the Cover:

The cover photo was taken by Julie Harrison a legal assistant at Evans Keane LLP. Working close to the Boise River and many downtown parks, Ms. Harrison packs her cameras with her every day. Julie encountered this pair of wood ducks at the MK Nature Center one day during her lunch break. She felt like as if the pair stopped to pose for her shot. Ms. Harrison has a strong passion for photography.

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Special thanks to the May editorial team: Angela Schaer Kaufmann, Kristine Marie Moriarty and Amber Champree Ellis.

June/July issue sponsor:

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Have news 'Of Interest?'

The Advocate is pleased to present your announcement of honors, awards, career moves, etc. in the "Of Interest" column. Simply send a short announcement to the Managing Editor: dblack@isb.idaho.gov and include a digital photo.



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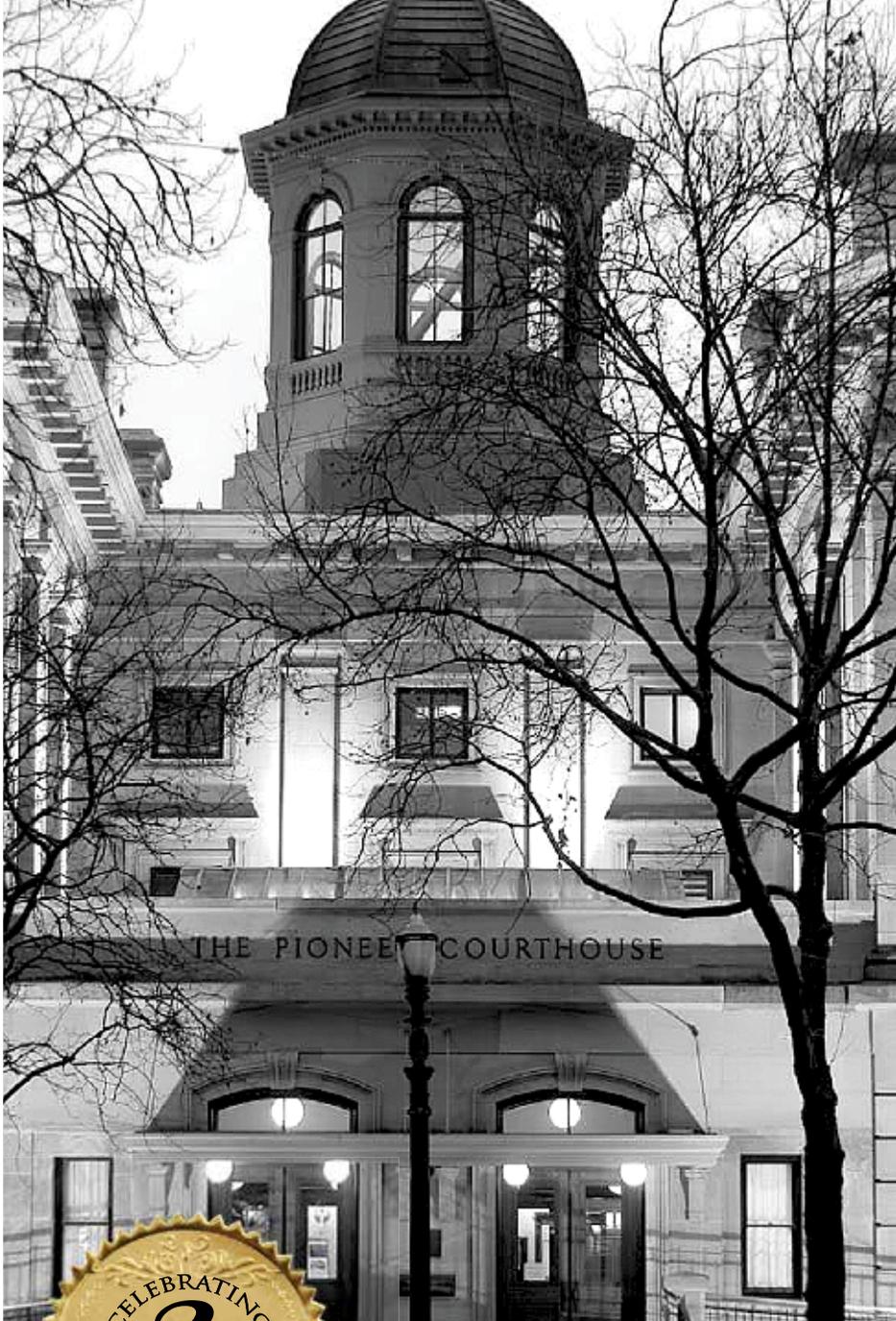
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Mr. Lombardi's resumé is available at: www.givenspursley.com

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Parsons Behle & Latimer is pleased to welcome Susie Headlee to the firm's Boise office and congratulates her on receiving the Bertha Stull Green Award.



SUSIE HEADLEE

sheadlee@parsonsbehle.com
208.562.4864

Susie Headlee has joined the firm's Boise office as the marketing and events assistant coordinator. Prior to joining the firm, she was the ADR/Pro Bono Coordinator for the U.S. District Court for the District of Idaho, and served the federal judiciary for more than 20 years working for judges in the Ninth Circuit Court of Appeals in Alaska, California and Idaho. On March 4, Susie was awarded the Bertha Stull Green Award, which is given annually by Idaho Women Lawyers to a woman in the legal community who demonstrates strong commitment to her community, public service and the legal community.

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Upcoming CLEs



May

May 7

New Attorney Program

Sponsored by the Idaho Law Foundation, Inc.

Boise Centre, 850 W. Front Street – Boise

8:00 a.m. (MDT)

4.0 CLE credits of which 1.0 is Ethics – **NAC**

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 0.5 is Ethics

May 13

Idaho Legislative Review

Sponsored by the Idaho Law Foundation, Inc.

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

9:00 a.m. (MDT)

2.0 CLE credits – **NAC**

May 18

Estate Planning Basics

Sponsored by the Taxation, Probate and Trust Law Section and

Young Lawyers Section

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

8:25 a.m. (MDT)

3.5 CLE credits of which 0.5 is Ethics

May 26

Ethics and Clients Money: Trust Funds, Expenses, Setoffs & More

Sponsored by the Idaho Law Foundation, Inc. in partnership with

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Teleseminar/Audio Stream

11:00 a.m. (MDT)

1.0 Ethics credit

May 29

CLE Idaho: Lunch & Ethics (Boise)

Sponsored by the Idaho Law Foundation, Inc.

Ada County Courthouse, 200 W. Front – Boise

Noon (MDT)

1.0 Ethics credit – **NAC**

May (cont'd)

May 29

CLE Idaho: Lunch & Ethics (Twin Falls)

Sponsored by the Idaho Law Foundation, Inc.

Twin Falls County West Facility, 630 Addison Avenue West – Twin Falls

Noon (MDT)

1.0 Ethics credit – **NAC**

May 29

CLE Idaho: Lunch & Ethics (Pocatello)

Sponsored by the Idaho Law Foundation, Inc.

Bannock County Courthouse, 624 E. Center Street - Pocatello

Noon (MDT)

1.0 Ethics credit – **NAC**

May 29

CLE Idaho: Lunch & Ethics (Idaho Falls)

Sponsored by the Idaho Law Foundation, Inc.

Bonneville County Courthouse, 650 N. Capital Avenue – Idaho Falls /

Satellite Locations in each 7th Judicial District Courthouse

Noon (MDT)

1.0 Ethics credit – **NAC**

July



***NAC** — These programs are approved for New Admittee Credit pursuant to Idaho Bar Commission Rule 402(f).

****Dates, times, locations and CLE credits are subject to change. The ISB website contains current information on CLEs.**



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The Public's Fascination with the Law

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

Not long ago, I received an ABA email on items of legal interest. Part of it noted a number of films which had been popular with the public, but which had learning points for us lawyers. The following summary leans heavily on the contributors to that email. (Find links on *The Advocate's* web page or the full article at: http://www.abajournal.com/magazine/article/12_movies_with_pivotal_lessons_featuring_lawyers/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email)

One film reviewed was *Anatomy of a Murder* (1959). It was an Otto Preminger film based on a novel by a former Michigan Supreme Court judge about the trial of an Army lieutenant accused of murdering Barney Quill, a bartender. The lieutenant claimed Quill had raped his flirtatious wife. Ben Gazzara played the foul-tempered defendant, James Stewart the defense attorney and George C. Scott the prosecutor, Dancer, determined to win the trial.

Mary Plant, the mousey young manager of the inn where the murder occurred found a pair of torn panties - supporting the claim of rape. On cross-examination, Dancer treats her as a spurned lover, ready



to give false evidence to discredit Quill. When Pilant seems puzzled, Dancer angrily asks:

"Miss Pilant, were you Barney Quill's mistress?"

Pilant: "No. No, I was not."

Dancer: "Do you know it's common knowledge in Thunder Bay that you were living with Quill?"

Pilant: "No, it's not true. Barney Quill was ..."

Dancer: "Was what, Miss Pilant? Barney Quill was what?"

Pilant: "Barney Quill was my father."

The courtroom buzzes and a stunned Dancer slowly turns away in hopes of limiting his humiliation.

Lesson: Dancer committed the cardinal courtroom sin, asking a question for which he assumed the answer. His miscalculation leaves the witness and defense intact due to his arrogance. (credit to Allen Pusey)

You won't be surprised that another film reviewed was *Legally Blonde* (2001). Reese Witherspoon is a seemingly ditzy sorority girl who is dumped by her boyfriend and then follows him to law school to get him back. Witherspoon plays Elle Woods, initially shunned by her more serious and legally oriented classmates. In the end, she wins the acquittal of Mrs. Brooke Windham, a fitness instructor accused of murdering her wealthy husband.

The trial is going poorly because the decedent's teenage daughter, Chutney Windham, testifies she was in the shower washing her hair, heard the fatal shot and found

It is one thing to consider Federal Rule of Evidence 104(b), conditional relevance, in the abstract. It's another to realize you have seen Rule 104(b) played out in an entertaining movie.

Brooke standing over her father's body as she came downstairs. Brooke fires her lawyer and engages Elle to defend her in the middle of trial. Cross-examination of Chutney begins poorly, but Elle picks up on a seemingly inconsequential and irrelevant fact - Chutney got a perm earlier on the day of the murder. Turning the tide, Elle points out, the "first cardinal rule of perm maintenance that you are forbidden to wet your hair for at least 20 hours after getting a perm." Chutney's veracity was destroyed.

The lesson (per evidence professor/reviewer): It is one thing to consider Federal Rule of Evidence 104(b), conditional relevance, in the abstract. It's another to realize you have seen Rule 104(b) played out in an entertaining movie. The movie also teaches: Few of us are born great lawyers and many new lawyers will stumble at the beginning. Perseverance is required. Don't give

up. And when you have become skilled at something, mentor others. (credit to Bennett Capers)

The movie *Malice* (1993), involved a woman who sues Dr. Hill for medical malpractice after his emergency surgery for a ruptured ovary and resulted in removal of the healthy ovary, making it impossible for her to ever have children.

In the doctor's deposition, over defense counsel's objections, Hill is asked whether he has a "God complex." Hill insists on answering against his lawyer's advice, so his lawyer tells the stenographer: "Stop typing. This is off the record." Hill answers: "When someone goes into that chapel, and they fall on their knees and they pray to God . . . who do you think they're praying to? . . . [I]f you're looking for God, he was in operating room No. 2 on Nov. 17, and he doesn't like to be second-guessed. You ask me if I have a God complex? Let me tell you some-

thing. I am God. And this sideshow is over." Wonder how the trial came out?

Lesson: First, if you can't control your client sufficiently to stop them from an 'I am God' remark, look into another line of work." Second, the scene illustrates importance of having the stipulation of all counsel to go 'off the record,' as the stenographer may take instruction only from the lawyer paying the bill. It is often sufficient for one attorney to say 'off the record,' but, rules vary by jurisdiction. If you think you're off the record, make sure the reporter's hands aren't moving, or a client's declaration of divinity, or other gaffe, could become sworn testimony in the case." (credit to Sarah Mui)

I also recently received an email with a note about a number of books concerning the legal profession. They look good, so if you are interested, copy, paste

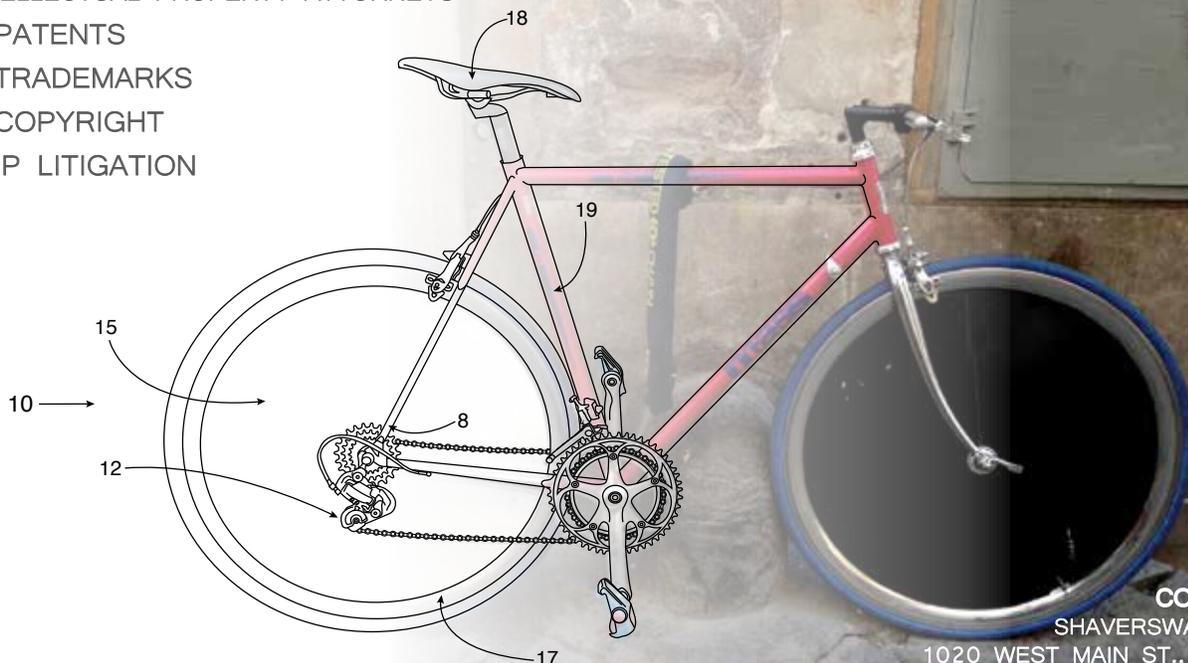
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About the Author

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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LICENSING CANCELLATIONS

Order to cancel license to practice law for non-payment of 2015 license fees

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2015 Idaho State Bar license fees required by Idaho Bar Commission Rule 305(b)(2) and have not given notice of resignation from the practice of law to the Idaho State Bar and this Court;

NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby are, CANCELED FOR FAILURE TO PAY THE 2015 IDAHO STATE BAR LICENSE FEES:

JOHN F. ADLARD; KENNETH PAUL ADLER; DONALD KRIS ANTON; DON AL ASAY; JOHN HASLAM BAILEY; STEPHANIE HALL BARCLAY; KEVIN FRANCIS BARRETT; ROBERT JOHN DEBRY; GAVIN JOHN GIRAUD; DANIAL MATHIAS GIVIDEN; JAMES ERIC GOLDMANN; JON CALVIN GOULD; BRYSON KEITH GREGORY; CARL D. HAMILTON; ALVA ALTON HARRIS; DEAN SAGE HOLTER; CONRAD B. HOUSER; ROBERT MALDEN HUGHES; KATHRYN JEAN IVERS; JEFFERSON RICHARD JEWELL; KIMBALL JOSEPH JONES; MARGARET J. KING; LINDSEY C. KOFOED; BRADEN JOHN LANG; GLENN MCQUISTON LEE; L. RACHEL LERMAN; THOMAS GILBERT MAILE IV; JAN P. MALMBERG; JOHN MOREY MAURICE; JOSEPH IRA MEIN; MICHAEL JAY NELSON; JOSEPH ODDO; STEPHEN J. OLSON; RACHEL ELIZABETH OTTO; DARWIN OVERSON; TERESA JO RAMBOSEK; TYSON ALDEN ROMNEY; DANIELLE MELODY ROWAND; SHALOM RUBANOWITZ; DALE L. RUSSELL; ROBERT

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IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the persons listed above are NO LONGER LICENSED TO PRACTICE LAW IN THE STATE OF IDAHO, unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve, and or publish this Order as provided in the Idaho State Bar Commission Rules.

Dated this 3rd day of March, 2015.
By Order of the Supreme Court
Roger S. Burdick, Chief Justice

LICENSING REINSTATEMENTS

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

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

Joseph Ira Mein; Active Status, 03/09/15
Michael Jay Nelson; Active Status, 03/10/15
Kameron Michael Youngblood; Active Status, 03/17/15
Alva Alton Harris; Active Status, 03/18/15
Darwin Overson; Active Status, 04/15/15

DISCIPLINE

R. Aaron Morriss (Suspension)

On February 25, 2015, the Idaho Supreme Court entered a Disciplinary Order suspending Nampa attorney R. Aaron Morriss from the practice of law for a period of five

years, with all but two years of such suspension withheld, effective January 30, 2015.

The Idaho Supreme Court found that Mr. Morriss violated I.R.P.C. 1.7(a)(2) [Conflict of interest based on personal interests of the lawyer]; 1.8(j) [Sexual relations with a client];

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 in which Mr. Morriss admitted that he violated those Rules.

DISCIPLINE

The formal charge case related to Mr. Morriss's relationships with two female clients. With respect to the first client, Mr. Morris texted the client explicit pictures of himself and engaged in sexual relations with the client during his representation of her in a custody case. With respect to the second client, Mr. Morriss texted the client explicit pictures of himself, took explicit pictures of the client, and engaged in sexual relations with the client during his representation of her in a parental termination case.

The Disciplinary Order provided that upon reinstatement, if any, after the two-year period of imposed suspension, Mr. Morriss will serve a two-year period of probation with terms and conditions that include counseling and the immediate imposition of the withheld period of suspension if he violates the terms of his probation or admits or is found to have violated any Idaho Rules of Professional Conduct for which a public sanction is imposed for conduct that occurred during the probationary period.

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

Mitchell R. Barker (Suspension)

On March 2, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending Nampa attorney, Mitchell R. Barker, from the practice of law for a period of fifteen (15) months, with six (6) months of that suspension withheld and placing him on probation following any reinstatement.

The Idaho Supreme Court found that Mr. Barker violated I.R.P.C. 1.2(a) [Failure to abide by client's decisions concerning the objectives of representation and consult with the client as to means by which those objectives will be pursued], I.R.P.C. 1.3 [Failure to act with reasonable diligence and promptness], I.R.P.C. 1.4 [Failure to reasonably communicate with client] and I.R.P.C. 1.16(a) (2) [Failure to withdraw when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar discipline case in which Mr. Barker admitted that he violated those Idaho Rules of Professional Conduct.

Mr. Barker's misconduct related to his defense of two clients in a civil case. Plaintiff claimed Mr. Barker's clients defaulted on loans secured by promissory notes and personal guarantees. Mr. Barker's clients initially represented themselves in the litigation and were facing a motion to deem requests for admissions admitted and a motion to compel discovery responses. The hearings on those motions were vacated based upon Mr. Barker's appearance. Plaintiff then filed a motion for summary judgment and scheduled a hearing. Mr. Barker did not file any opposition or objection to the motion for summary judgment, failed to provide any discovery responses to Plaintiff and failed to appear at the hearing on the amended motion to compel. After that hearing, Plaintiff filed a separate civil action against

Mr. Barker's clients and another entity controlled by them. That case was eventually consolidated with the other pending case. Mr. Barker then filed a motion to withdraw and affidavit in support stating that he had been suffering from personal health difficulties and had received notice that he had recently been determined to be disabled. He stated he was closing his law practice and that his illness interfered with his representation of his clients. The court granted the motion to withdraw. The clients eventually appeared with new counsel and the case was completed on the merits.

The Disciplinary Order requires that before he can be reinstated following his suspension, Mr. Barker must demonstrate that, medically and psychologically, he will be able to resume the practice of law in a fashion that will not be detrimental to the integrity of the Bar, to the administration of justice or against the public interest. The Disciplinary Order provides that the nine (9) month suspension will be served following Mr. Barker's current suspension, through February 29, 2016. Mr. Barker will serve a two (2) year probation following any reinstatement, subject to conditions of probation specified in the Order. Those conditions include that Mr. Barker will serve the additional six (6) month suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during the period of probation. Mr. Barker must also remain under his physician's care;

DISCIPLINE

comply with any treatment regimen prescribed by his physician and other health care providers; and provide monthly reports to Bar Counsel attesting that he is representing his clients consistent with his responsibilities under the Idaho Rules of Professional Conduct.

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

Dale L. Russell
(Suspension)

On March 30, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending attorney Dale L. Russell for three (3) years. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding.

Mr. Russell was admitted to practice law in Washington and Idaho. On October 28, 2014, the Supreme Court of Washington entered an Order approving a stipulation to a three (3) year suspension. The Washington suspension was effective November 4, 2014. In the Washington disciplinary case, Mr. Russell stipulated to

violations of the Washington Rules of Professional Conduct (RPC). Mr. Russell admitted to two violations of RPC 1.1, five violations of RPC 8.4 (d) and one violation of RPC 1.2(a), 1.4 and 1.7. Those Washington rules correspond to the same Idaho Rules of Professional Conduct.

The Washington disciplinary case related to Mr. Russell's engagement to handle a probate and to set up a special needs trust. The personal representative of the estate lived in Wisconsin. Mr. Russell filed an appointment of a resident agent, which contained an inaccurate statement concerning his wife's eligibility to act as the resident agent in the case. He also directed the personal representative to delegate her rights and responsibilities as personal representative to Mr. Russell's wife, made his wife the sole trustee of the special needs trust and failed to advise the personal representative that the appointment of Mr. Russell's wife, as trustee, was contrary to the terms of the will and the duties of a personal representative. Mr. Russell also represented to a counseling center and its lawyers that his wife was the legitimate trustee of the special

needs trust. Mr. Russell also represented an incompetent person in a guardianship proceeding without the required prior court appointment. Mr. Russell also attempted to obtain the signature of the personal representative on an affidavit purporting to show she had declined to serve as trustee of the special needs trust, when she had not. Finally, Mr. Russell represented multiple clients with concurrent conflicts of interest.

The Stipulation provided for and the Idaho Supreme Court ordered that Mr. Russell's suspension in Idaho would be retroactive to November 4, 2014 and will last until November 4, 2017, and that as a condition of reinstatement to the active practice of law in Idaho, he agreed he will not prepare on behalf of a client any instrument or pleading naming himself or his spouse as personal representative, trustee, guardian, or agent of a personal representative, trustee or guardian, unless Mr. Russell is related to the client as defined by I.R.P.C. 1.8(c).

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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Fund Run raises money for Access to Justice

BOISE - For the second year, volunteer attorneys have put together a community run to raise money and awareness for the Access to Justice Idaho Campaign, a collaborative effort to support programs that help provide legal services to those who most need them. Funds are distributed to the Idaho Legal Aid, Inc., Idaho Volunteer Lawyers Program, and DisAbility Rights Idaho.

The run will be on Saturday, May 16 at 10 a.m. at Fort Boise Park, 600 W. Garrison Street. Start/finish is at the corner of Reserve Street and Mountain Cover Road. Registration is \$25 with all proceeds going to Access to Justice Idaho.

The run/walk is a 3.1 mile course. Food, beverages and prizes will greet the runners and their support crews. Event number and T-shirt are available at the Law Center, 525 W. Jefferson, from 11 a.m. to 2 p.m. on Friday, May 15. Anyone interested in being a volunteer or sponsor can contact Maureen Ryan Braley at mryanbraley@isb.idaho.gov, or call (208) 334-4500.

College of Law joins International Association of Law Schools

MOSCOW – The University of Idaho College of Law recently announced it has joined the International Association of Law Schools (IALS), a private, non-profit, volunteer service organization. The association represents more than 160 law schools and departments. Additionally, the IALS represents more than 5,000 law faculty members from over 55 countries.

“We are committed to excellence through diversity, which directly

aligns with the mission of the IALS,” said Mark L. Adams, dean of the College of Law. “We want to continue to extend our reach globally and prepare our students for global legal practice.”

“We will be glad to contribute our insights to the IALS collective in an effort to improve legal education worldwide. This is definitely collaborative work,” Adams said.

ABA offers free membership for law students

The American Bar Association now offers free membership to all students enrolled at ABA-approved law schools. The membership grants law students access to resources tailored to their interests and needs,

opportunities to build their professional skills plus access to the ABA’s job listings, clerkships, internships and career events.

It includes:

- Access to the ABA Job Board, where members’ resumes are flagged with the ABA logo.
- Opportunities to connect with established lawyers and learn about specialized areas of law through ABA sections, divisions and forums.
- Four digital and print issues of Student Lawyer magazine, plus a digital subscription to the monthly ABA Journal.
- Access to the Free Career Advice Series of monthly webinars on various career-related topics such as in-



Photo by Kyme Graziano

Mary York a partner at Holland & Hart along with her husband Jim Cook, the Executive Director of Idaho Legal Aid Services and their son Jack Cook run the course in 2014 along with about 100 others. All proceeds go to the Access to Justice Campaign.

interviewing wisely, tailoring your career to fit your strengths and putting social media to work for you.

- Free monthly continuing legal education webinars, which deal with real legal issues in different practice areas.
- Access to member-only discounts on everything from Sprint cellular packages to Hertz car rentals to Brooks Brothers clothing.

Law students can enroll online at www.americanbar.org/abalawstudents or by calling the ABA Service Center at 800-285-2221.

Call for Nominations:

Richard C. Fields Civility Award

The Idaho State Bar Professionalism & Ethics Section and Concordia University School of Law invite nominations for the Richard C. Fields Civility Award. Dick Fields was consistently recognized for his service, professionalism, and leader-

ship within the Idaho State Bar and was known in the legal community as an advocate for civility in the practice of law. Dick received the Idaho State Bar’s Distinguished Lawyer award in 2000 and chaired the Dean’s Advisory Council at Concordia Law since its inception in 2009, until his passing in April, 2014.

In honor of his memory and the legacy he left for future generations of lawyers in Idaho, nominations are sought for an Idaho lawyer who demonstrates a commitment to professionalism and civility in the profession. Send an email to Dean Cathy R. Silak (csilak@cu-portland.edu) and Sherry A. Morgan (smorgan@adaweb.net) with the name of the attorney and a paragraph describing the attorney’s commitment to civility in the profession by June 30, 2015. The Richard C. Fields Civility Award will be presented at Concordia Law’s Professionalism & Ethics Orientation, a program Dick

helped create, on at noon on August 22, 2015.

Annual Meeting Scholarships

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- a day for travel and lodging. To apply, contact ISB Deputy Director Mahmood Sheikh at (208) 334-4500 by May 8.

Correction to caption

In the February issue of *The Advocate*, incorrect information was provided and is corrected below. On page 61, the caption to the picture “Firm Celebrates 100 Years” stated that Robert Stephan practiced with the firm from 1958 to 1991. In fact, he practiced with the firm from 1948 to 1992.



Photo by Dan Black

Trial Skills Academy mentors take a break between courtroom sessions at the federal courthouse in Boise. Organized by the Litigation Section the workshops paired new and experienced attorneys in all manner of courtroom strategy and techniques.



ISB/ILF Volunteer Opportunities

Diane K. Minnich
Executive Director, Idaho State Bar

Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyer and non-lawyer volunteers ensure that ISB and ILF programs, activities and services are available to the public and the members. We thank those of you who continue to serve the legal profession through volunteer service. We encourage those of you who have not taken advantage of the volunteer opportunities to give it a try. As many of you already know, volunteer service can provide many rewards.

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



Time commitments vary with each committee or program activity depending on the function and meeting schedule. Committee assignments are based on interest, geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement. The list of bar and foundation committees that may be in need of volunteers this coming year follows.



ISB: Advocate Editorial Advisory Committee, Character and Fitness, Client Assistance Fund, Lawyer Assistance Program, Lawyer Referral Service, Professional Conduct Board, and Reasonable Accommodations.

ILF; Continuing Legal Education, Idaho Volunteer Lawyers Program, Law Related Education. More information on each committee is available on our website:

- Idaho State Bar Committees: www.isb.idaho.gov/general/committees.html
- Idaho Law Foundation Committees: www.isb.idaho.gov/ilf/committees.html

Many attorneys are also involved in one of the 21 Sections of the Bar, District Bar Associations, providing pro bono service through the Idaho Volunteer Lawyers Program, or participating in Law Related Education programs such as the High School Mock Trial program or lawyers as-

Committee assignments are based on interest, geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement.

sisting with student civic education
If you are interested in serving as a volunteer, please email me your preferences. If you have questions about the opportunities listed here or on our website please review the committee information on the ISB website or please contact me at dminnich@isb.idaho.gov.

ISB/ILF Committees Volunteer Opportunities

For information on the specific duties and responsibilities of specific committees visit the ISB website “under ‘About Us.’”

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below. Please indicate your 1st, 2nd, or 3rd choice.

Idaho State Bar Volunteer Committee Interest

1. _____
2. _____
3. _____

Idaho Law Foundation Volunteer Committee Interest

1. _____
2. _____
3. _____

I would like more information about the Bar Sections.

I would like more information about the District Bar Associations.

I would like more information about participating in the ILF’s Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.

I am interested in providing pro bono service through the ILF’s Idaho Volunteer Lawyers Program.

Name: _____ Firm: _____

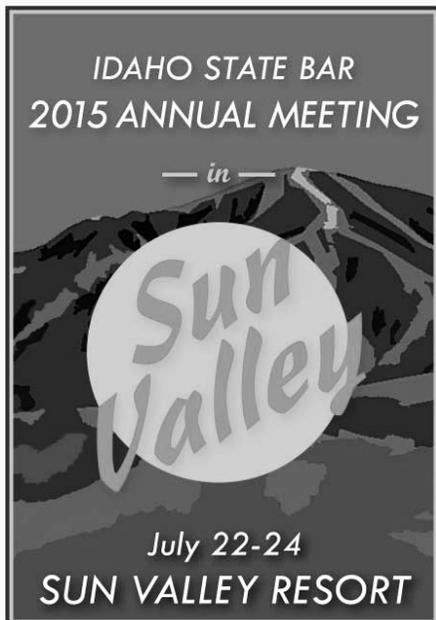
City: _____ Email: _____

Have you previously participated as a member of an ISB and/or ILF Committee?

- No Yes – Most recent committee assignment(s) _____

Please return this form to:
ISB/ILF Committees
P.O. Box 895
Boise, ID 83701

Or email your committee interests to dminnich@isb.idaho.gov



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Welcome from the Environment and Natural Resources Law Section

Alison M. Nelson

Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. defines "environmental law" as the "collective body of rules and regulations, orders and statutes, constraints and allowances that are all concerned with the maintenance and protection of the natural environment." This definition encompasses a wide variety of issues, the breadth of which is evident in the activities sponsored by the Environment and Natural Resources Law Section of the Idaho State Bar.

The Section offers CLE programs during the majority of its monthly meetings, which are scheduled for the fourth Wednesday of the month from January through May and September through November. Recent programs addressed a proposal to transfer control of certain federal lands to the state of Idaho; regulations governing the transportation of crude oil and natural gas; a wrap-up of the Snake River Basin Adjudication; and protection of the Greater Sage-Grouse.

The Section also hosts an annual CLE program focused on "Science in Litigation" that we hope will appeal to Section and non-Section members alike. This year's program addressed the admission of evidence

and working with experts and featured perspectives from the courts, experts, and practitioners throughout the state.

Finally, the Section sponsors an issue of *The Advocate* every two years. In this issue, Emmi Blades discusses the Idaho Department of Environmental Quality's efforts to obtain authorization to administer the National Pollutant Discharge Elimination System permitting program. Then U of I Law Professor Jerry Long reflects on water resource issues from the Biobío River Basin by examining similarities and differences between the Biobío and the Columbia River Basin. Then, April Pope discusses the importance of the Idaho State Department of Agriculture's energy crop permitting program to biofuel research. And in my article I summarize existing incentives for development of solar energy and consider the potential impact of the Environmental Protection Agency's proposed regulations limiting carbon dioxide emissions from existing electricity generating units. Finally, Mark Torf and Dylan Lawrence recommend due diligence beyond a Phase I Environmental Site Assessment to identify non-compliance and other issues that may limit construction or expansion of a facility.

The Environment and Natural Resources Law Section provides education on contemporary legal issues affecting the natural environment in Idaho. We hope these programs and articles are of interest, whether they help in your day-to-day practice or simply provide some insight into developments and trends in the varied field of environmental law.

The Section's activities this year would not have been possible without the efforts of Dylan Lawrence and Elizabeth Swisher in planning for monthly meetings; of Emmi Blades in organizing the Section's annual CLE program; and of Nick Warden in coordinating the submission of articles for this issue of *The Advocate*.

About the Author

Alison M. Nelson is senior counsel at Husch Blackwell LLP, a full-service litigation and business law firm with 600 attorneys in locations across the United States and in London. Ali is a member of the firm's Energy and Natural Resources Strategic Business Unit, with a focus on environmental law. She is also the Chair of the Environmental & Natural Resources Law Section of the Idaho State Bar.



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The Time is Now for a State-Operated Pollutant Discharge Elimination System Permitting Program in Idaho

Emmi Blades

Would you be surprised to learn that Idaho is one of only four states where the United States Environmental Protection Agency (EPA), and not the state, administers the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) program?¹ That is all about to change. In 2014, the Idaho Legislature directed the Idaho Department of Environmental Quality (DEQ) to seek authorization from EPA for a state-operated pollutant discharge elimination system permitting program.

This article provides an overview of the NPDES program, Idaho’s current role, and the need for change; steps the state must take in order to receive primacy in the NPDES permitting program from EPA; an expected timeline; and costs and benefits of gaining authorization to administer a state-run program.

The NPDES program, Idaho’s current role, and the need for change

The NPDES program was established by Section 402 of the Clean Water Act (CWA), and requires that all facilities that discharge pollutants from any point source into waters of the United States must obtain a NPDES permit.² Individual and general permits comprise the two basic types of NPDES permits. Individual permits are written specifically for individual facilities, whereas general permits may cover multiple facilities within one industry or multiple facilities from different industries

NPDES Program	Current Number
Major facilities with individual NPDES permits (Includes POTWs)	41
Minor facilities with individual NPDES permits (Includes POTWs)	134
Clean Water Act (CWA) §316 Program	
Power Plants that require CWA §316 review	0
Publicly Owned Treated Works (POTWs)	
All POTWs (With or without pretreatment programs)	125
POTWs with pretreatment programs	13
POTWs with pretreatment programs and authority to regulate CIUs and SIUs	0
CIUs and SIUs regulated directly by state for pretreatment	0
Wet Weather Dischargers Inventory	
Combined sewer overflows	0
Municipalities with sanitary sewer overflows	0
General Permit Programs (Facilities regulated under a general permit)	
Concentrated animal feeding operations	0
Stormwater dischargers	1,645
Aquaculture dischargers	94
Other facilities	188
Notes: CIU = Categorical Industrial User, SIU = Significant Industrial User	

with a similar discharge.³ Individual permits are issued for a specific time period not to exceed five years and the facility must reapply prior to the expiration date.⁴ General permits “may only be issued to dischargers within a specific geographical area such as city, county, or state political boundaries; designated planning areas; sewer districts or sewer authorities; state highway systems; standard metropolitan statistical areas; or urbanized areas.”⁵ All permits consist of a minimum of five general sections: a cover page, effluent limits, monitoring and reporting requirements, special conditions, and standard conditions. NPDES permits include limits to ensure discharges do “not harm water quality or the public’s health.”⁶

Under Section 402(a) of the CWA and EPA’s NPDES regulations, EPA may authorize state governmental

entities, among others, to implement parts, or all, of the NPDES program.⁷ Idaho’s current role “is to certify that NPDES permitted projects comply with state water quality standards. . .” (or deny or waive certification) before a federal NPDES permit can be issued.⁸ If DEQ does not act on a request for certification within one year, the certification requirement is deemed waived.⁹

Why is state primacy over NPDES permits important? As the following table demonstrates, there are over 2,000 facilities/activities covered under NPDES permits in Idaho:¹⁰

While most permits are good for five years, “there is a long backlog of expired permits awaiting EPA action, and a number of Idaho entities continue to operate with expired NPDES permits.”¹¹ It is estimated that approximately 65 percent of permits in Idaho are current.¹²

Work to be done: The Idaho Pollutant Discharge Elimination System program

The Idaho Legislature revised Idaho Code in 2014 via House Bill No. 406 to “direct DEQ to seek EPA authorization for a state-operated pollutant discharge elimination system permitting program. . .” – in other words, to seek primacy for the NPDES program.¹³ This new program will be called the Idaho Pollutant Discharge Elimination System (IPDES) program, and broadly speaking, will include writing and issuing permits, conducting annual inspections, managing the required data, maintaining compliance assurance/enforcement, and administering the program.¹⁴ DEQ plans to implement a four-year sector-specific IPDES program phase-in likely starting with municipal permits, proceeding annually through industrial and general permits, and concluding with stormwater and biosolids components.¹⁵

The Idaho Legislature set a tough deadline, as DEQ must submit Idaho’s application for a state NPDES program no later than September 1, 2016.¹⁶ The application must include

- a letter from the Governor requesting review and approval of the program submission;
- a memorandum of agreement (authorized by the Idaho Legislature) with the regional administrator of EPA;
- a complete program description;
- a statement of legal authority/Attorney General’s statement; and
- copies of all applicable state laws and regulations including those governing state administrative procedures.¹⁷

The Idaho Legislature set a tough deadline, as DEQ must submit Idaho’s application for a state NPDES program no later than September 1, 2016.¹⁶

The Idaho Legislature must also enact implementing legislation and revise the Idaho Code if needed.¹⁸

To receive primacy in the NPDES permitting program from EPA, DEQ must complete several tasks:¹⁹

- Develop a funding strategy, which DEQ anticipates will consist of a combination of sources including annual user fees paid by permit holders, state general funds, and federal CWA grant funds.
- Demonstrate the capability of delivering the NPDES program by hiring and training staff with expertise in program administration, permit preparation and enforcement, data management, fiscal office support, and legal support.
- Prepare guidance documents to “[d]etermine water quality-based effluent limits, reasonable potential-to-exceed determinations, mixing zones, and other program implementation documents.”
- Negotiate the memorandum of agreement mentioned above.
- Negotiate and promulgate administrative IPDES rules that meet the requirements of the CWA and 40 CFR 123.²⁰

DEQ has initiated negotiated rulemaking to implement Idaho Code § 39-175C. The rules, which

will be found under a new DEQ rule chapter, ‘Rules Regulating the Idaho Pollutant Discharge Elimination System Program’ (IDAPA 58.01.25), must include permitting provisions that are as stringent as those required by federal law and regulations, but, per the Idaho Legislature, not more stringent or broader in scope than the CWA and its implementing regulations.²¹ DEQ has proposed that some “rule language may be incorporated by reference from 40 CFR 122, 124, 125 and 133 with respect to required NPDES program components such as technology based effluent limits, transfer and termination of permits, confidentiality, and other components identified as being applicable to state programs.”²² As part of the rulemaking process, DEQ also “proposes to negotiate certain elements of the IPDES program including the permit application process, the appeals process, the fee structure, and compliance enforcement with IPDES permits.”²³

Expected schedule

DEQ expects the negotiation phase of rulemaking to be complete by June 2015.²⁴

Following notice of the proposed rules, public comment, responses to public comment, and presenta-

tions to the Board of Environmental Quality, DEQ plans to submit a complete application to EPA by September 1, 2016, in accordance with requirements of Idaho Code § 39-175C.²⁵ Within 30 days of receipt of the application, EPA must make a “completeness determination.”²⁶ If the application is complete, EPA will undertake a formal review process which is anticipated to take at least a year.²⁷ Within this timeframe for review, EPA will engage in a public participation process which includes noticing the application for public review and comment and public hearings; hold discussions with other federal agencies; and obtain a recommendation/concurrence from EPA offices of General Council, Enforcement and Compliance Assurance, and Office of Water.²⁸

Costs and benefits

Managing permits for Idaho’s NPDES-permitted facilities will require the equivalent of about twenty-six full time DEQ employees dedicated to the program, at a total cost of \$2.7 million per year.²⁹ The 26 positions are projected to include seven program management positions; 11 positions in permitting; and eight positions in compliance, inspection, and enforcement.³⁰ One benefit of a state-run program is that Idaho state employees with experience understanding Idaho-specific issues and familiarity with most of the regulated community will oversee the IPDES program. In addition, permittees will have only one set of rules and regulations and one agency with which to interact.³¹ DEQ explains that “[w]hile permittees must expect that protective, substantive permitting requirements will remain, they

can look forward to gaining access to permit writers and other staff with local experience and knowledge and experiencing a streamlined timeline for issuing permits.”³² DEQ’s stated goal for the IPDES program “is for it to be a positive development both for the environment and regulated entities.”³³

Summary

Idaho is on track to receive primacy in the NPDES permitting program from EPA. While DEQ must accomplish a huge amount of work in order to submit Idaho’s application for the IPDES program by September 1, 2016, primacy in the NPDES permitting program will allow Idaho state employees to tackle the long backlog of expired permits awaiting action and streamline the timeline for issuing permits.

Endnotes

1. The other three states are Massachusetts, New Hampshire, and New Mexico. Idaho Dep’t of Env’tl. Quality, *National Pollutant Discharge Elimination System Permits* (Feb. 9, 2015), <http://www.deq.idaho.gov/permitting/water-quality-permitting/npdes.aspx>.
2. 33 U.S.C. § 1342. The term “pollutant” includes “any type of industrial, municipal, and agricultural waste discharged into water.” Office of Wastewater Management-Water Permitting, *Water Per-*

mitting 101 at 4 (Feb. 9, 2015), <http://water.epa.gov/polwaste/npdes/basics/index.cfm>. “Point source” discharges are typically those from publicly owned treatment works, industrial facilities, and related to urban runoff. *Id.* at 5. EPA defines “waters of the United States” to include navigable waters; tributaries of navigable waters; interstate waters; and intrastate lakes, rivers, and streams used for particular purposes. *Id.* at 6.

3. Idaho Dep’t of Env’tl. Quality, *National Pollutant Discharge Elimination System Permits* (Feb. 9, 2015), <http://www.deq.idaho.gov/permitting/water-quality-permitting/npdes.aspx>.

4. Office of Wastewater Management-Water Permitting, *Water Permitting 101* at 7 (Feb. 9, 2015), <http://water.epa.gov/polwaste/npdes/basics/index.cfm>.

5. *Id.*

6. Idaho Dep’t of Env’tl. Quality, *National Pollutant Discharge Elimination System Permits* (Feb. 9, 2015), <http://www.deq.idaho.gov/permitting/water-quality-permitting/npdes.aspx>.

7. See 40 CFR parts 122, 124-125; U.S. EPA-Region 10-Office of Water and Watersheds-NPDES Permits Unit, *DRAFT NPDES Program-State Authorization Guidance* (March 2014), <https://www.deq.idaho.gov/media/1118333/58-0125-1401-npdes-program-state-authorization-guidance-draft-0314.pdf>.

8. *Id.* Section 401 of the CWA requires applicants for federal permits “to conduct any activity which may result in a discharge into navigable waters to provide the . . . permitting agency a certification from the state in which the discharge originates or will originate that the discharge will comply with applicable provisions of the [CWA] and state Water Quality Standards.” Idaho Dep’t Env’tl. Quality, *Idaho Section 401 Certifica-*

Primacy in the NPDES permitting program will allow Idaho state employees to tackle the long backlog of expired permits awaiting action and streamline the timeline for issuing permits.

tion Guidance (Sept. 2012), <https://www.deq.idaho.gov/media/516305-401-certification-guidance-0912.pdf>,

9. *Id.*

10. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Analysis* at 5, Table 2 (Jan. 2015), <https://www.deq.idaho.gov/media/1118571/58-0125-1401-ipdes-program-analysis.pdf>; Michael J. Lidgard, NPDES Permits Unit, EPA Region 10, Comments on Documents Presented at the January 23, 2015 Rulemaking Meeting (Feb. 5, 2015), <https://www.deq.idaho.gov/media/1118752/58-0125-1401-epa-comment-0115.pdf>.

11. Press Release, C.L. "Butch" Otter, Governor (March 7, 2014), http://gov.idaho.gov/mediacenter/press/pr2014/3%20Mar/pr_018.html.

12. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Analysis* at 11 (Jan. 2015), <https://www.deq.idaho.gov/media/1118571/58-0125-1401-ipdes-program-analysis.pdf>.

13. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Development* (Feb. 17, 2015), <https://www.deq.idaho.gov/permitting/water-quality-permitting/npdes/ipdes-program-development.aspx>.

14. Idaho Dep't. Env'tl. Quality, *Proposed Rule Cost/Benefit Analysis* at 1 (Oct. 14, 2014), <https://www.deq.idaho.gov/media/1118270/58-0125-1401-proposed-rule-cost-benefit-analysis.pdf>.

15. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Development* (Feb. 17, 2015), <https://www.deq.idaho.gov/permitting/water-quality-permitting/npdes/ipdes-program-development.aspx>.

16. I.C. § 39-175C.

17. U.S. EPA-Region 10-Office of Water and Watersheds-NPDES Permits Unit, *DRAFT NPDES Program-State Authorization Guidance* at 7 (March 2014), <https://www.deq.idaho.gov/media/1118333/58-0125-1401-npdes-program-state-authorization-guidance-draft-0314.pdf>.

18. Idaho Code § 39-175C(4); Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Development* (Feb. 17, 2015), <https://www.deq.idaho.gov/permitting/water-quality-permitting/npdes/ipdes-program-development.aspx>.

19. *Id.*

20. *Id.* "These rules will establish pro-



cedures for the writing and issuing of IPDES permits, permit application and appeals, fee structures, developing general permits, and other required components of the NPDES program."

21. *Id.* Idaho Dep't. Env'tl. Quality, *Incorporate Pertinent NPDES Rules by Reference of Reprint Pertinent NPDES Rules* at 3 (January 2015), <http://www.deq.idaho.gov/media/1118567/58-0125-1401-ipdes-discussion-paper1.pdf>.

22. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program: Docket No. 58-0125-1401-Negotiated Rulemaking* (Feb. 17, 2015), <https://www.deq.idaho.gov/laws,-rules,-etc/deq-rulemakings/docket-no-58-0125-1401.aspx>.

23. *Id.*

24. Idaho Dep't. Env'tl. Quality, *Idaho's Application for NPDES Delegated Authority* (Dec. 2, 2014), <https://www.deq.idaho.gov/media/1118411/58-0125-1401-npdes-delegated-authority-120214.pdf>. For a list of public comment opportunities and the negotiated rulemaking schedule, visit DEQ's website at <https://www.deq.idaho.gov/laws,-rules,-etc/deq-rulemakings/docket-no-58-0125-1401.aspx>.

25. Idaho Dep't. Env'tl. Quality, *Idaho's Application for NPDES Delegated Authority* (Dec. 2, 2014), <https://www.deq.idaho.gov/media/1118411/58-0125-1401-npdes-delegated-authority-120214.pdf>.

26. Mike Lidgard, EPA, Region 10, NPDES Permits Unit, *Approval of State NPDES Programs: EPA Perspective*, [\[programs-120214.pdf\]\(https://www.deq.idaho.gov/media/1118413/58-0125-1401-approval-of-state-npdes-programs-120214.pdf\).](https://www.deq.idaho.gov/media/1118413/58-0125-1401-approval-of-state-npdes-</p></div><div data-bbox=)

27. *Id.*; 40 CFR 123.21(b)(1).

28. *Id.*

29. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Analysis* at 3 (Jan. 2015), <https://www.deq.idaho.gov/media/1118571/58-0125-1401-ipdes-program-analysis.pdf>.

30. *Id.*

31. Idaho Dep't. Env'tl. Quality, *Proposed Rule Cost/Benefit Analysis* at 1 (Oct. 14, 2014), <https://www.deq.idaho.gov/media/1118270/58-0125-1401-proposed-rule-cost-benefit-analysis.pdf>.

32. Idaho Dep't. Env'tl. Quality, *Idaho Pollutant Discharge Elimination System Program Development* (Feb. 17, 2015), <https://www.deq.idaho.gov/permitting/water-quality-permitting/npdes/ipdes-program-development.aspx>.

33. *Id.*

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Photo courtesy of Jerrold A. Long

Students from Idaho talk about hydrology and the practices that have lowered the level of Laja Lake in the Laguna del Laja National Park in Chile. The lake level has gone down almost 200 feet, and the volume has declined 80%, due to diversions for an out of basin hydroelectric facility.

Traveling to Chile to Learn About Idaho's Water Resource Issues

Jerrold A. Long

For the first two weeks of January, students and faculty from the University of Idaho's Water Resources program visited Concepción, Chile to study water resource issues in the Biobío River Basin. As part of a National Science Foundation funded Integrated Graduate Education and Research Traineeship (IGERT) program,¹ this visit sought to expose the Idaho students to water resource issues in a different legal, cultural, and physical environment. While the students (and their faculty advisors) succeeded in learning a significant amount of information in a short period of time — with invaluable help from Chilean student and faculty colleagues — the most significant lessons learned in Chile were not about the Biobío or Chil-

ean law or culture. Rather, the most significant, and hopefully longest-lasting, lessons were about the water resource issues we face at home in Idaho.

One of our challenges was to avoid viewing Chile only through the lens of our own experiences. When comparing our legal institutions — in this case, water resource institutions — to those of developing nations, it is simplest to assume that our successes are the result of wise choices, careful and strategic institutional design, a free-market economy, or legal stability. Our first response to a problem is often, “well, this is what we do...,” with the implicit assumption that our approach should work in the new context as well. And to some extent, it was an appreciation of a U.S.-style market economy that led Chile's “Chicago

We should be cautious when we assess water resource conflicts in new geographic, ecological, hydrological, legal, and cultural settings.



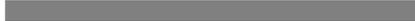
Boys”² to develop a water code that relies almost entirely on privatization and freely tradable water rights, with little to no government regulation over how, where, when, why, or even if water is used.³

But what appear to be benefits of our system, relative to Chile — i.e., situations in which we seem to avoid conflict — might rather be byproducts of our own mistakes, or the luck of historical, geographic, or ecological context. Thus we should be cautious when we assess water resource conflicts in new geographic, ecological, hydrological, legal, and cultural settings. It may be, and perhaps is likely, that what has worked for us will not work in different context. Perhaps less obvious, but more important, is that climate change will ultimately render a new Columbia River Basin that is different ecologically, hydrologically, culturally, and perhaps legally from what we know today — our own home will transition to that different context for which our current institutions might not work.⁴ We therefore must be extremely cautious as we think about how what we do today might or might not work tomorrow.

What can WE learn when nothing is the same?

Given the perhaps obvious point that Chile is a different place, what does the Biobío have to say about water resources in the Pacific Northwest and Idaho? From a cultural and economic perspective, the Biobío River is Chile’s most important river system, and thus plays a cultural and economic role similar to the Columbia River. The Biobío is Chile’s second largest and most developed river, flowing through the country’s second largest metropolitan area. It

Climate change will ultimately render a new Columbia River Basin that is different ecologically, hydrologically, culturally, and perhaps legally from what we know today.



produces almost 50% of Chile’s hydroelectricity, and nearly 20% of its total electricity.⁵

Beyond that very general comparison, finding a U.S. analogue for the Biobío is difficult but useful, because the Biobío teaches more with its differences than with any apparent similarities. Chile is famously narrow, averaging approximately 110 miles in width from the peaks of the Andes to the Pacific Ocean, while running over 2,600 miles north to south — California, in comparison, is over twice as wide at 250 miles, but only 770 miles long north to south. As a result, Chilean rivers are short and steep, dropping quickly from the mountains to the central valley and ocean. Of rivers in the western U.S., the Sacramento is the most similar, descending rapidly from the Sierra Nevada into the Sacramento Valley. But the Sacramento Basin is almost three times the size of the Biobío Basin, and the Sacramento River itself 70% longer. But even with this much greater area, the Sacramento’s average annual flow is only two-thirds that of the Biobío.⁶

Similarly, compared to Idaho river basins, the Biobío produces a very large amount of water in a relatively small area. The mean annual flow at the Biobío’s mouth is about the

same as the Snake River above Lewiston (about 34,000 cfs).⁷ But the total size of the Biobío basin is just 10% of the Snake River Basin upstream of Lewiston. That portion of the Upper Snake River Basin above Howell’s Ferry near Minidoka drains 15,700 square miles, still almost 70% larger than the total Biobío Basin. Yet the Snake River’s average annual flow at Howell’s Ferry is just 6,500 cfs, or less than 20% of the Biobío’s annual average flow.⁸ Put another way, the Biobío Basin produces almost ten times more water per unit area than the Snake River Basin.

Although the Snake and the Biobío seem to share little in common, the Snake River Basin’s reservoir storage capacity above Howell’s Ferry is approximately the same as the Chilean government’s ultimate goal for reservoir storage in the Biobío Basin — about 4 million acre feet — and thus the Snake makes for an interesting comparison. The Biobío’s three large dams currently have a maximum storage capacity of about 1.2 million acre-feet of water, the same as a single reservoir in the Upper Snake: Palisades Reservoir, the second largest reservoir in that part of the Snake River basin. Rivers in the Western United States are far more developed, and have far greater reservoir storage capacity, than the

Biobío, even if their total flows are much less. One reason for this is limited amount of space between the Andes and the Pacific Ocean — there simply is not as much room for dams and reservoirs.

A river without fish?

While the obvious geographic differences are significant, the more significant differences, and the ones that have something to teach us, are more subtle. One of the differences between the Biobío and our rivers is that although the Biobío is the most biodiverse of Chilean rivers,⁹ it lacks the iconic native fishes found in western streams. Most of the native fish are small and largely unknown. The largest native fish is a homely species of catfish, reaching about 18 inches in its largest examples. There are no native fishes valuable from either a commercial or cultural perspective. Although the native Pewenche¹⁰ people of the upper Biobío are considered a “sociedad ribereña” (a riverine society), they rely on the pine nuts of the native Pewen¹¹ tree for both alimentary and spiritual sustenance. They have no connection to rivers or fish similar to that of native peoples in the Pacific Northwest.

This lack of an iconic, culturally-important fish species might initially seem like a benefit to Chilean water managers, because it would seem to simplify integrated watershed management, relative to our experiences in the Columbia River Basin. But in many ways the opposite is true. If the ultimate goal is a river system that works for all of its inhabitants, providing cultural, ecological, hydro-power, flood control, and irrigation benefits, then salmon and steelhead provide a useful focal point around which to engage in conversation and

compromise. Salmon and steelhead have helped ensure continued political power and cultural relevance for native peoples. They provide reason for causal participants to care about river and ecosystem management. Salmon and steelhead complicate management, to be sure, but also provide a reason for that management. While we might disagree about the best route to get there, we all care about the survival of anadromous fish populations. That focal point is missing in the Biobío.

Dams without irrigation

The western United States largely avoids another conflict faced in Chile, but again, not necessarily because of any wise choices or foresight on our part. Perhaps the most significant ongoing water use conflict in the Biobío basin involves disputes between irrigators and hydroelectric facilities.¹² In Chile, the highest power demand occurs during the winter, as the shorter daylight hours require increased use of electric lighting and heating. In the Biobío’s Mediterranean climate, the highest irrigation demand is during the summer months, much like in the western United States. But unlike the western United States, most of the Biobío’s water comes in the form of winter rains. The high-

est river flows are thus in the winter months, with much lower flows in the spring and summer months.¹³

Given the higher electricity demand in the winter, and the subsequent higher price of electricity during the winter, hydropower companies release rather than store winter water. During the summer, with power demand and prices lower, hydropower companies store rather than release water. The end result is that irrigators have water when they do not need it, and do not have it when they need it. In contrast, in the western United States, the period of greatest power demand is in the late summer, when air conditioner use is at its highest. Upstream hydroelectric facilities thus benefit from passing water downstream during the same time that water is most needed by downstream irrigators. As noted above, Chile does not benefit from these fortuitously coincident demands.

Who wins when water is scarce?

In Chile, water rights are characterized as consumptive or non-consumptive. Irrigation is a consumptive right. Water rights for hydroelectric facilities are non-consumptive, given that the water theoretically remains within or returns to the watercourse.¹⁴ According to Chile’s Wa-

During the summer, with power demand and prices lower, hydropower companies store rather than release water. The end result is that irrigators have water when they do not need it, and do not have it when they need it.

ter Code, non-consumptive rights can be granted after consumptive rights, so long as the use of the water does not prejudice the rights of third parties to the same water, either in quantity or opportunity to use (among other things).¹⁵ Because the largest Biobío dams are relatively new,¹⁶ this provision should protect the pre-existing rights of downstream irrigators.

But as is often the case, both politics and economics can influence legal reasoning. In 1993, the Chilean Supreme Court finally decided a multi-year long dispute over the relative priorities of consumptive and non-consumptive rights. Previously, in the Maule River Basin, a new dam (the Pehuenche Hydroelectric Plant) had disrupted the water supply to downstream, pre-existing consumptive rights holders. Notwithstanding the statutory provision apparently guaranteeing that non-consumptive uses could not interfere with consumptive rights, the hydropower facility claimed that inherent in the non-consumptive right is the right to fill an associated reservoir allowing use of the non-consumptive right, whatever the impact on downstream users. The lower courts found for the downstream users on several occasions, but the Chilean Supreme Court repeatedly overturned the lower courts while avoiding the substantive issue.¹⁷

But with the Pangué Hydroelectric Facility on the Biobío, the Chilean Supreme Court finally had to confront the substantive issue.¹⁸ Pangué was much more controversial than the Pehuenche facility in the Maule Basin, in part because it would displace and have significant effects on native Pehuenche communities.¹⁹ The dam would also have significant, and arguably not con-

sidered, environmental effects on an undeveloped river canyon offering world-class white water rafting. But opponents seized on the water rights issue in an effort to stop completion of the dam. Like the Pehuenche facility, Pangué would be a run-of-the-river dam with a small reservoir, lacking the capacity to store large quantities of water. It would therefore have potentially significant effects on downstream water users at sporadic and unpredictable times, as it altered river flows on a day-to-day or week-to-week basis to take advantage of favorable market conditions. Opponents argued that a non-con-

These higher storage capacities in the United States reflect systems designed for irrigation as much as hydropower, particularly on the Snake River.

sumptive right did not include the right to alter water flows in this fashion without concern for the effects on downstream consumptive rights holders. The Chilean Supreme Court, ignoring its previous support for the property rights of irrigators, and the apparently clear language of the statute, determined that the dam operator could fill its reservoir, and potentially harm downstream water users, without negotiating with those users in advance.²⁰

Given this interpretation, it would seem that it is Chilean law that is to blame for the conflict. In a prior appropriation system like that used in Idaho, the question of whose rights must be satisfied first is relatively straight forward — first in time, first in right. So arguably, if Chile would adopt a priority system more similar to that of western States, it might avoid this or similar problems in the future. But it is not our law that makes the U.S. system work somewhat better in allocating water between irrigators and hydroelectric facilities. Chile's law would probably work well if Chile were like the western U.S. in other, non-legal ways.

Despite recent international controversy about the Biobío, it remains a relatively undeveloped basin by U.S. standards. The main stem of the Biobío has only three major dams, the newest of which has been operating less than two years. While the total storage capacity of the system is apparently unknown, the two largest dams — Pangué and Ralco — can only capture about 5% of the Biobío's total runoff. In contrast, almost 100% of the annual runoff can be captured in the Sacramento River system. And in the Upper Snake River, the reservoirs capture over 80% of historical average flows. These higher storage capacities in the United States reflect systems designed for irrigation as much as hydropower, particularly on the Snake River. The major dams on the Upper Snake were built by the Bureau of Reclamation, with the purpose of constructing "irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands" in the western United States.²¹ In Chile, the dams are primarily (and exclusively in some cases) hydropow-

er facilities. Thus part of the reason we avoid conflicts between irrigators and hydroelectric facilities as severe as those in Chile is that we have already built a lot of dams, specifically for irrigation, and thus have already endured conflict and caused the ecological and cultural harms that Chile might still be able to — and might want to — avoid.

How it is that we avoid conflict

There are thus three reasons, at least, that might explain why there is less conflict between irrigators and hydroelectric facilities in the western United States than in Chile: First, we have built far more dams, have much greater storage capacity, and capture far more of the annual runoff than can water managers in the Biobío Basin. While this does not avoid all water use conflicts, it does provide “more” water to work with, but at significant costs to riparian ecosystems, migratory fish species, and native cultures that Chileans are only beginning to experience.

Second, due to U.S. power use habits, demand for water for irrigation and hydropower are highest at the same time: during the summer. It is primarily this demand for more power in the summer, rather than any inherent benefit in how we manage water, that helps avoid the conflict seen in Chile. Unlike Chile, hydroelectric facilities in the western U.S. can fill their reservoirs when the water is not needed by irrigators, and pass water when it is.

Finally, as noted above, the Biobío Basin currently provides 19% of the electricity for Chile’s entire Sistema Interconectado Central.²² In the U.S., *all* hydropower from all river systems only accounts for 5% of our total power supply. Consequently, the importance of hydropower in

While this does not avoid all water use conflicts, it does provide “more” water to work with, but at significant costs to riparian ecosystems, migratory fish species, and native cultures that Chileans are only beginning to experience.

the Biobío is much greater, relative to irrigation. It is also important in a national, rather than a regional, sense. Chilean irrigators do not have the same political power, compared to private hydroelectric companies,²³ and U.S. irrigators.

Idaho’s most significant historic conflict between irrigators and a hydroelectric facility helps demonstrate these points. On the surface, Idaho Power’s 1983 lawsuit against 7,500 upstream irrigators threatened to restrict irrigation on thousands of acres.²⁴ While some of the conflict’s effects were significant,²⁵ the Swan Falls Agreement ultimately allowed continued irrigation upstream of Swan Falls. Again, rather than some element inherent in our institutional regimes, it was the overall system’s physical flexibility, due both to its natural and constructed elements (including sufficient available water at the time),²⁶ as well as the political power of the irrigators, that provided a path toward an agreement that continues working today. That flexibility, and even the political conditions benefitting irrigators, might not exist to help resolve conflicts in the future.

Conclusion

Compared to Chile, the western United States avoids certain catego-

ries of significant water resource conflicts not necessarily because of anything inherent in our institutions or governance regimes, but because of fortuitous ecological and cultural circumstances, and some previous significant government-funded or assisted development that has caused its own ecological and social problems. As climate change alters hydrological and socioecological systems, those same fortuitous aspects of our overall water regime may no longer exist. Just as climate and cultural change might alter Chile’s power demands and the balance of its hydropower production and irrigation needs, similar changes might unbalance our own currently precariously balanced hydropower and irrigation needs. More troubling, climate change might also further threaten salmon and steelhead populations. In the Pacific Northwest, these fish provide a continuing cultural connection to our rivers. As those fish are threatened, so too is our connection with and concern for natural rivers.

Ultimately, Chile’s lesson for the western United States is perhaps both simple and obvious, but crucial nonetheless: our water resource institutions must take into account the changing cultural, hydrological, ecological, and climatic context of our

region. In the past, we have avoided or successfully managed conflict, in part, because the specific conditions that existed at that particular time, potentially independent of the actual legal structures governing those conditions. If avoiding conflict was due to a historical accident as much as our intentional actions, we must be aware that those same historical accidents might not happen again in the future. The Columbia River Basin will be a different place — culturally, ecologically, hydrologically, and climatically — and our water resource institutions must prepare for that.

Endnotes

1. Information about the University of Idaho's Water Resources IGERT Program is available here: <http://www.uidaho.edu/cogs/envs-wr/academics/water-resources/igert-program> (last visited March 3, 2015). **IGERT Grant #:** 1249400. **Title:** IGERT: Adaptation to change in water resources: science to inform decision-making across disciplines, cultures and scales

2. The "Chicago Boys" were group of U.S.-trained (many at the University of Chicago) economists who helped implement neoliberal economic policies in Chile after the 1973 military coup.

3. There have been gradual, incremental changes in Chile's Water Code since it was first enacted in 1980. But these have been both minor and limited to rights obtained in the future. Given that the Chilean system incentivized, and protects, speculation, these non-retroactive reforms are of limited effect. See Silvia Borzutzky and Elisabeth F. Madden, *Markets Awash: The Privatization of Chilean Water Markets*, 25 J. INT. DEV. 251 (2013).

4. Many studies over the past couple of decades demonstrate the potential effects of climate change on the Columbia River Basin. Generally speaking, in addition to higher temperatures, we should expect to see more precipitation fall as rain, reduced winter snowpacks, earlier

spring runoff, and lower summer stream flows. The associated social and cultural effects are more difficult to predict. See Alan F. Hamlet and Dennis P. Lettenmaier, *Effects of Climate Change on Hydrology and Water Resources in the Columbia River Basin*, 35 J. AMER. W. RES. ASS'N 1597 (1999); Jason C. Leppi, et al., *Impacts of Climate Change on Stream Discharge in the Central-Rocky Mountains*, 112 CLIMATIC CHANGE 997 (2012); Huan Wu, et al., *Projected Climate Change Impacts on the Hydrology and Temperature of Pacific Northwest Rivers*, 48 WATER RES. RES. W11530 (2012); Julie A. Vano, et al., *Seasonal Hydrologic Responses to Climate Change in the Pacific Northwest*, WATER RES. RES. Accepted article, DOI: 10.1002/2014WR015909.

5. Chile has several power distribution systems. By far the largest is the Sistema Interconectado Central (SIC), which provides power for over 90% of Chile's citizens. The SIC's installed capacity, including the capacity of each individual power facility, is available here: <http://www.cne.cl/estadisticas/energia/electricidad> (last visited March 2, 2015).

6. See Theodore E. Grantham, et al., *Water Management in Mediterranean River Basins: A Comparison of Management Frameworks, Physical Impacts, and Ecological Responses*, 719 HYDROBIOLOGIA 451 (2013).

7. Stream flow data for the USGS gauge near Anatone, Washington (upstream from Lewiston) dating back to July 1958 is available at: http://waterdata.usgs.gov/id/nwis/uv/?site_no=13334300 (last visited March 3, 2015).

8. Stream flow data at Howell's Ferry near Minidoka dates to April 1910. <http://wa->

terdata.usgs.gov/nwis/inventory/?site_no=13081500 (last visited March 3, 2015).

9. While the Biobío is biodiverse by Chilean standards, it is much less biodiverse than the Columbia River Basin. The Columbia River Basin is home to thirty one native fishes and twenty six introduced fishes, many of which provide sport fishing opportunities. In contrast, the Biobío is home to seventeen native fishes and four introduced species. See Evelyn Habit, et al., *Response of the Fish Community to Human-Induced Changes in the Biobío River in Chile*, 51 FRESHWATER BIOLOGY 1 (2006).

10. Although this is the spelling used by the Pewenche themselves, their name is often spelled "Pehuenche" (with the same pronunciation) given that in Spanish the letter w is generally only used for words adopted from other languages.

11. Also called the Araucaria or monkey puzzle tree.

12. Of course, there are conflicts between irrigators and hydroelectric facilities in the western United States. Perhaps the most significant of these involved the Swan Falls Project hydroelectric facility on the Snake River in southwestern Idaho. That conflict and the subsequent Swan Falls Agreement ultimately led to the Snake River Basin Adjudication. But as will be noted later in this article, hydrologic and political conditions in the Snake River system allowed an outcome that likely would not be possible in Chile.

13. See Carlos Bertrán, et al., *Macrofauna del Curso Inferior y Estuario del Río Biobío (Chile): Cambios Asociados a Variabilidad Estacional del Caudal Hídrico*, 74(2) REV.

Chilean irrigators do not have the same political power, compared to private hydroelectric companies,²³ and U.S. irrigators.

CHIL. HIST. NAT. 331 (2001).

14. *Codigo de Aguas, Libro Primero, Titulo II, Articulo 14º*, available at <http://www.leychile.cl/Consulta/homebasico> (last visited March 3, 2015).

15. Chile's Water Code provides for non-consumptive rights so long as they do not harm existing consumptive rights: "La extracción o restitución de las aguas se hará siempre en forma que no perjudique los derechos de terceros constituidos sobre las mismas aguas, y demás particularidades." *Codigo de Aguas, Libro Primero, Titulo II, Articulo 14º*, available at <http://www.leychile.cl/Consulta/homebasico> (last visited March 3, 2015). Translated by the author: The extraction or restitution of water will always be in a form that does not prejudice the rights of third parties to the same water in terms of quantity, quality, substance, opportunity of use, or other characteristics.

16. The oldest of the three large dams on the Biobío was completed in 1996.

17. For a more detailed discussion of this case, see CARL J. BAUER, *SIREN SONG: CHILEAN WATER LAW AS A MODEL FOR INTERNATIONAL REFORM*, 106-109 (2004).

18. See *Orrego v. Empresa Eléctrica Pangué* (Corte Suprema, May 8, 1993) (Recurso de Protección (Chile)).

19. The Ralco hydroelectric project, which was constructed a few years after and upstream from Pangué, was even more controversial. Unlike Pangué's run-of-the-river operation, Ralco created a large reservoir which flooded an ancient Pewenche cemetery. There were numer-

ous violent clashes between the government and Pewenche protesters during construction. A 2014 Spanish-language documentary of the conflict—*tilted Quintremán - Crecer con Sabiduría* (Grow with Wisdom)—is available on YouTube at <http://youtu.be/Mueva9ztV8A>.

20. See BAUER, *SIREN SONG* at 109-111.

21. The dams on the Upper Snake River are part of the Minidoka Project, first authorized in 1904 under authority granted the Secretary of the Interior in the Newlands Act. Of the five original dams in the Minidoka Project, three were intended exclusively for irrigation purposes. The other two provided for both irrigation and power production. A history of the Minidoka Project is available at the Bureau of Reclamation's website: http://www.usbr.gov/projects/Project.jsp?proj_Name=Minidoka+Project (last visited March 3, 2015).

22. The SIC is the central power grid, serving over 90% of Chilean citizens.

23. This is another significant difference that might warrant its own independent treatment, but will only get a brief mention here. While many of the dams and hydroelectric facilities in the Columbia River Basin are owned and operated by the federal government, and thus have additional obligations to act in the public interest, all of the Chilean facilities are privately owned. They thus have none of the obligations inherent in a publicly-owned and managed system.

24. For a detailed discussion of the Swan Falls controversy, see Jeffrey C. Fereday & Michael C. Creamer, *Swan Falls in 3-D: A*

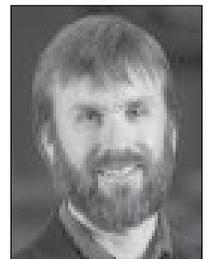
New Look at the Historical, Legal and Practical Dimensions of Idaho's Biggest Water Rights Controversy, 28 IDAHO L. REV. 573 (1992).

25. The most obvious effect was the initiation of the Snake River Basin Adjudication.

26. One indication of that structural flexibility is the fact that the mean monthly flows at the Murphy gauge on the Snake River, in August, apparently have never dropped to the required minimum flows established by the Swan Falls Agreement. Data for the Murphy gauge is available at: http://waterdata.usgs.gov/usa/nwis/inventory/?site_no=13172500 (last visited March 4, 2015). These flows have remained even as development has continued upstream.

About the Author

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In the Weeds: Idaho's Invasive Species Laws and Biofuels Research and Development

April Lea Pope

Federal laws, policies, and programs that incentivize and mandate the development of biofuels have local effects on both Idaho's environment and on research supporting biofuels. The passage of a new energy crop rule in Idaho, effective as of March 20, 2014, follows an increased interest in growing, possessing, and transporting energy crops comprised of invasive plant species that are regulated under Idaho's Invasive Species Act. Idaho's new energy crop rule is an example of how a state can take measures to protect against unintended consequences of federal laws, policies, and programs while also taking advantage of the benefits of such policies and programs.

The Idaho State Department of Agriculture (ISDA) adopted and the Idaho legislature approved the rule that, for the first time, explicitly defines and regulates "energy crop invasive species" under Idaho's 2008 Invasive Species Act.¹ So long as the requisite permit is obtained, the final rule allows for the possession, importation, cultivation, and shipment of identified invasive species that are grown for energy, like for use in biofuels.² The permitting scheme within the new rule allows the state to balance the risk of invasive species with the benefits of supporting biofuel research in Idaho by providing a list of factors that the Director of the ISDA takes into account when deciding whether to issue a permit.

The first permit for the possession and transportation of energy crop invasive species was issued to

The Idaho State Department of Agriculture (ISDA) adopted and the Idaho legislature approved the rule that, for the first time, explicitly defines and regulates "energy crop invasive species" under Idaho's 2008 Invasive Species Act.¹

Battelle Energy Alliance, LLC (BEA), the management and operating contractor for Idaho National Laboratory (INL). The permit allows BEA to perform important research on feedstocks for biofuels in southeast Idaho at the Biomass Feedstock National User Facility (BFNUF).³ The research at the BFNUF is not geared toward refining conversion technologies; rather it is geared toward the preprocessing of biomass feedstock before it reaches the biorefinery where it is then converted into biofuel. The BFNUF program's ultimate goal is to establish consistent biomass feedstock specifications and commodity grades for each feedstock resource for varying conversion pathways. BFNUF services are offered to bioenergy industry, academia, and other government agencies worldwide, which results in useful collaborations that meet the needs of the ever-changing biofuel landscape.

Biofuel background

Biofuel is a solid, liquid, or gaseous fuel used primarily for transportation and derived from plant or animal biomass (organic matter). This article focuses on plant-derived

biofuel. Biofuel production is reliant on biomass feedstock materials. Biomass feedstocks are the raw materials used as the resource for conversion to a fuel. Biofuels are currently mixed into blends with petroleum, but are also meant to directly compete with petroleum products derived from fossil fuel.

Fossil fuels are finite and some consider them to be economically, ecologically, and environmentally questionable.⁴ Biofuels, on the other hand, are renewable, considered to be sustainable and to significantly reduce greenhouse gas emissions. The renewability of biofuels increases the security of the supply. And the use of energy crops to make biofuel may promote regional development by providing new income and employment opportunities in rural areas.

There are two generations of biofuels: first-generation and second-generation. There is no set scientific definition for either generation. The term *first-generation biofuels* refers generally to biofuels already being produced at commercial scale and include ethanol, corn ethanol, and sugarcane ethanol. First-generation biofuels are problematic because

they are produced from biomass feedstocks that are also food, like corn, sugar cane, and soy. Using food crops for biofuel instead of for food has ethical and economic implications. Additionally, first-generation biofuels tend to have lower energy content than petroleum.

The term *second-generation biofuels* generally refers to biofuels that are in demonstration or pilot scale production, but are close to commercial scale production. One of the most promising types of second-generation biofuels is cellulosic biofuel, so named because it is produced from cellulose, the main constituent of a plant's cell wall. Cellulosic biofuels can therefore be produced from grass clippings, forest and crop residues (biomass leftover after cultivation), and designated energy crops such as switchgrass, Chinese silver grass (*Miscanthus*), and giant reed (*Arundo donax*). There are, however, technical and logistical barriers to producing cellulosic second-generation biofuels at commercial scale including the risk associated with the cost, volume, and variability of the biomass feedstock.⁵

Congress has passed legislation to mandate and promote the production and use of biofuels and federal agencies have established programs to incentivize biofuel production, research, and development. There are some incentives for biofuel production at the state level, but the main driving force behind an increased interest in growing energy crops comes from the federal level. Several federal agencies administer programs incentivizing biofuels, but this article will focus on the U.S. Environmental Protection Agency (EPA), U.S. Department of Agriculture (USDA), and U.S. Department of Energy (DOE).

Federal policies and programs promote biofuel production and the growth of energy crops

The most notable renewable fuel policy is the Renewable Fuels Standard (RFS). The EPA, as directed by Congress, implements the Renewable Fuel Standard (RFS) program.⁶ The RFS is a federal law that amends the Clean Air Act and requires regulated entities in the petroleum industry to use renewable fuels, like biofuel and biodiesel, in transportation fuel. It is considered to be the primary pillar of U.S. renewable fuel energy policy because it mandates the commercialization of biofuel. The first RFS was passed under the Energy Policy Act of 2005.⁷ In 2007, the Energy Independence Security Act (EISA) expanded the RFS, in part because the original RFS was not sufficient to incentivize cellulosic biofuels.⁸ In December of 2014, Congress expanded the RFS and increased use targets for biofuel from nine billion gallons in 2008 to thirty-six billion gallons by 2022, and specifically includes cellulosic biofuels in the RFS.⁹ As a result, nearly every gas pump in the state of Idaho has a decal denoting that up to 10% of the fuel may be comprised of ethanol, a first generation biofuel. Unless repealed, the RFS will continue to dramatically shape the way in which

biofuel is researched, produced, and commercially deployed.

The USDA, under the Agricultural Act of 2014, provides subsidies to qualifying growers of energy crops, including those crops used to make cellulosic biofuels, through the Biomass Crop Assistance Program.¹⁰ The subsidies' purpose is to offset some of the costs associated with the production and supply of qualifying feedstocks (including energy crops) for bioenergy production.

The DOE, under the EISA, is mandated to award grants for the production of advanced biofuels, which includes biofuels made from cellulose.¹¹ Appropriations from Congress for the production of advanced biofuels are authorized until the end of fiscal year 2015.¹²

The promotion of biofuels by the federal government has had intended effects, as well as some unintended effects.

Federal law, policies, and programs increase the growth of energy crops

As intended, federal laws, policies, and programs promoting biofuel production have resulted in a significant increase in the growth and production of energy crops for cellulosic biofuel. An unintended consequence is an increased threat of the spread of invasive plant spe-

The DOE, under the EISA, is mandated to award grants for the production of advanced biofuels, which includes biofuels made from cellulose.¹¹

cies. The characteristics that make an energy crop species desirable for use as a feedstock to produce cellulosic biofuels are, unfortunately, the same characteristics that make them potential invasive species because they: (1) grow rapidly, (2) are able to grow on marginal land with minimal input, and (3) are resistant to disease and pests. Switchgrass, Chinese silver grass, and giant reed are examples of three desirable energy crops considered by Idaho to be invasive plant species.¹³

While there is no recorded invasion from energy crops in Idaho, the threat posed by invasive plants, like those identified as energy crops, is real. In the United States, It is estimated that 90% of ecologically and economically damaging invasive plant species were intentionally introduced.¹⁴ Efforts to control invasive plants and to repair damage caused by them is estimated to cost the United States \$34 billion each year.¹⁵ Because of the increased threat of invasion from energy crops, states have adopted a precautionary approach by passing laws that regulate how the invasive energy crops are handled.¹⁶ Idaho is no exception.

Idaho's energy crop rules and biomass feedstock research

The new energy crop rules under the 2008 Invasive Species Act are an example of how a state can take protective measures to prevent unintended consequences of federal laws, policies, and programs.

Under the ISDA's new rule, "crops and other beneficial nonnative organisms" are specifically excluded from the definition of "invasive species." ISDA added "Invasive Energy Crop Species" to the definitions and defined it as "... a non-native plant

grown to harvest for use in making biofuels... plants that are cultivated for the purpose of producing (non-food) energy."¹⁷ The energy crop rules implement a permitting scheme for the shipment, transportation, cultivation, and importation of invasive energy crops.¹⁸ The Director of ISDA considers several factors in determining whether to issue a permit, including the facility's proximity to agriculture operations and environmentally sensitive lands and waters, adverse weather, potential for the invasive species to be released, etc.

While there is no recorded invasion from energy crops in Idaho, the threat posed by invasive plants, like those identified as energy crops, is real.

The permitting scheme of the energy crop rules allows the state to determine, *ad hoc*, whether the particular species and listed activities on a permit application carry an unacceptable risk of invasion. The ISDA has an interest in balancing harm to the environment with the added potential of employment and economic growth from energy crops. The permitting scheme is a way for the state to minimize risk and to reap the benefits of invasive energy crops.

The permitting scheme also allows the applicant the opportunity

to apply for a permit rather than being barred wholesale from possessing or transporting energy crop invasive species. This is important because had Idaho placed species of plants used as energy crops on the noxious weeds list, there would be no permitting process. Under Idaho law, noxious weeds have no benefit and are to be controlled, not purposefully grown.¹⁹ Had the ISDA classified energy crops as noxious weeds, innovative research in Idaho that supports biofuel would be compromised. The work at the BFNUF is an excellent example.

INL is the first recipient of a permit to transport and possess invasive energy crop species of Chinese silver grass (*miscanthus*), giant reed (*Arundo donax*), and switchgrass. BEA manages and operates the BFNUF at INL in southeastern Idaho. DOE's Bioenergy Technology Office (BETO) sponsors a designated feedstock logistics program at INL, in which BEA is also a participant. Researchers at INL use energy crops in a variety of research and development projects to understand how these crops should be harvested, stored, and preprocessed for biofuel production. Growing, breeding, or producing the invasive energy crop species on the permit are not part of INL research. Most research projects at BFNUF involve sourcing biomass, preprocessing, characterizing, and shipping the preprocessed feedstocks to project participants and customers.

The BFNUF is comprised of the Process Demonstration Unit (PDU), the Biomass Characterization Laboratory, and the Bioenergy Feedstock Library (Library). The PDU is used to analyze various methods of feedstock operations and preprocessing before conversion to biofuel. PDU

capabilities include size reduction, separation/fractionation, thermal treatment, chemical treatment, and densification.

Feedstock testing and analysis are also integral elements of the feedstock development at INL. Researchers use the Biomass Characterization Laboratory to determine chemical, physical, and conversion feedstock attributes, which are then incorporated into the Library.

The Library has three goals: (1) to collect and manage biomass feedstock samples; (2) supply data gathered from the samples (pedigree, history, operations, chemical, physical, and conversion performance); and (3) develop advanced tools that use the data to derive answers to questions about biomass feedstock (i.e. least cost formulation blending models and meeting particular conversion specifications). The Library already has a reference database of nearly 70,000 samples.

The BFNUF is a unique facility that fulfills a national need. Without a permitting scheme, INL would be unable to conduct research on several promising feedstocks for cellulosic biofuels. The permitting scheme helps facilitate collaborations with industry and academia to conduct specialized research in Idaho.

Conclusion

The federal laws, policies, and programs incentivizing biofuel research and production have local effects on the environment and on biofuel research in Idaho. The ISDA responded to those effects with a new energy crop invasive species rule that allows for innovative and important biofuel research in Idaho at the INL to continue so long as a permit is obtained. Federal laws, policies, and programs

will continue to incentivize biofuels, and Idaho has legislative tools to protect against the unintended consequences of federal biofuel incentives while still promoting cutting edge research in the Gem State.

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The opinions in this article are those of the author and do not reflect the opinions or position of Battelle Energy Alliance, LLC.





Photo by Harold Ipolyi

Kelley Dagley and his wife Lori build the largest net-metered residential solar system in Idaho. At 25kW, it supplies all the power for the couple's 100% electric house on top of the mountain at Wilderness Ranch, near Idaho City.

Solar Incentives and Development: Potential Impact of Federal Legislation

Alison M. Nelson



Solar energy is used to provide electricity to homes and businesses in remote locations, but has not been widely adopted as a viable source of affordable electricity across Idaho.

Despite its high potential for solar energy, Idaho has relatively few solar energy projects compared to other states. Idaho's negligible policies incentivizing solar energy development may be why. However, the Environmental Protection Agency (EPA) has proposed rules that could force Idaho to adopt a plan to reduce carbon dioxide emissions. Whether Idaho's plan will reduce emissions by requiring increased generation from renewable energy sources, including solar facilities, remains to be seen. This article explores Idaho's few incentives for solar energy development, outlines common incentives used in other states, and concludes by summarizing the EPA's proposed rules and discussing how that may impact Idaho's solar incentives going forward.

Idaho's potential for solar energy use

According to the U.S. Department of Energy, southern Idaho has a solar potential of more than 450 watt hours/ft²/day.¹ This is higher than every state in the eastern United States, including Florida. However, The Solar Foundation ranks Idaho only 41st in terms of the number of homes that are powered by solar energy.² Solar energy is used to provide electricity to homes and businesses in remote locations, but has not been widely adopted as a viable source of affordable electricity across Idaho.

Existing state incentives

The meager number of solar energy projects in Idaho is likely explained by the absence of robust incentives and policies encouraging solar development.

Existing incentives include tax deductions and credits at the state and federal levels. Under Idaho Code section 63-3022C(1), an individual taxpayer who installs an “alternative energy device,” including “any system or mechanism or series of mechanisms using solar radiation,” may deduct 40% of the cost of constructing or installing the device in the first year it is placed in service, and 20% per year in the following three years, up to \$5,000 per taxable year.³ At most, this amounts to approximately \$1,500 in returns over a four year period.⁴ Also, under the federal tax code, a tax credit is available through 2016 for 30% of the qualified solar electric property expenditures for residential projects made in a taxable year,⁵ and for 30% of the basis of each “energy property” including equipment using solar energy to generate electricity placed in service during a taxable year.⁶

In addition, loans carrying an interest rate of 4% with a 5-year repayment term are available through Idaho’s State Energy Loan Program, which offers residential loans of up to \$15,000 and commercial loans of up to \$100,000 for solar energy projects.⁷

Other types of policies and incentives

However, Idaho has not adopted other types of policies and incentives seen in other states that further encourage development of solar energy resources.

Renewable portfolio standard

One example is a renewable portfolio standard, which specifies the percentage of energy generated in the state that must be from renewable sources. Twenty-nine states have such a standard in place.⁸ For instance, Nevada requires each provider to generate, acquire, or save electricity from portfolio energy sys-

Without a renewable portfolio standard in place, Idaho utilities have no reason to offer customers financial incentives for installing solar energy systems, such as rebates for purchases of solar energy systems or performance-based incentive rates.

tems (including renewable energy systems like solar energy projects) or energy efficiency measures, increasing by 2025 to not less than 25% of the total amount of electricity sold each calendar year.⁹ Nine other states do not have enforceable standards but do have renewable portfolio goals in place.¹⁰ For example, Utah law provides that at least 20% of annual retail electric sales shall consist of “qualifying electricity” such as solar, “to the extent that it is cost effective to do so.”¹¹ Notably, in the western United States, only Idaho and Wyoming lack such standards or goals.¹²

Many renewable portfolio standards further encourage solar development by requiring that a certain percentage of energy come from solar energy rather than other renewable sources. Nevada law requires that by 2016, 6% of the total amount of electricity generated by portfolio energy systems must be generated or acquired from solar renewable energy systems.¹³

Renewable portfolio standards generally provide for a penalty to be assessed against any utility that fails to meet its standards; in Nevada, the Public Utilities Commission may impose a fine “in an amount necessary and reasonable to ensure that the provider complies with its portfolio standard, as determined by the Commission.”¹⁴ Without a renewable portfolio standard in place,

Idaho utilities have no reason to offer customers financial incentives for installing solar energy systems, such as rebates for purchases of solar energy systems or performance-based incentive rates.

Interconnection and net metering policies

In addition, Idaho also lacks other statewide policies that encourage access to solar power, including interconnection policies and net metering policies. While Idaho utilities have each adopted interconnection standards and provide for net metering, the requirements and eligibility for each vary from utility to utility.¹⁵ Moreover, those standards are not codified as state law. Only five other states (North Dakota, Oklahoma, Tennessee, Alabama, and Mississippi) lack a statewide interconnection policy,¹⁶ and only six other states (South Dakota, Tennessee, Alabama, Mississippi, Texas, and South Carolina) lack a statewide net metering policy.¹⁷

Tax incentives

Finally, Idaho lacks certain tax incentives seen in many other states. Property owners pay tax on any increase in value that results from the installation of a solar energy project, while a tax exemption or tax abatement is available in more than 30 states.¹⁸ Idaho offers a property tax

exemption for wind and geothermal energy producers,¹⁹ but that exemption is not available to solar producers. In addition, purchasers of solar equipment pay sales tax on that equipment, while such equipment is exempt from tax liability in more than 20 states.²⁰ Idaho used to offer a sales tax refund on the cost of certain machinery, equipment, and support facilities used to generate electricity from solar resources, but that tax refund expired without renewal on July 1, 2011.²¹

Potential for federal regulations to encourage solar development

Proposed federal regulations could, if adopted as proposed, change this framework significantly. In June 2014, EPA proposed a rule titled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” in which EPA proposes to establish state-specific goals for carbon dioxide emissions from existing fossil fuel-fired electric generating units (EGUs) and to require states to develop plans to meet those goals.

EPA listed EGUs as a category of stationary source that “causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.”²² As a result, EPA must publish standards of performance for new sources within the category and adopt regulations that establish a procedure for states to submit plans that establish standards of performance for existing sources in that category.²³

For existing EGUs, EPA has proposed that states reduce carbon dioxide emissions through a combination of the following four “building blocks”:

1. Reducing the carbon intensity of generation at individual affected EGUs through heat rate improvements.

2. Reducing emissions from the most carbon-intensive affected EGUs in the amount that results from substituting generation at those EGUs with generation from less carbon-intensive affected EGUs.

3. Reducing emissions from affected EGUs in the amount that results from substituting generation at those EGUs with expanded low- or zero-carbon generation.

4. Reducing emissions from affected EGUs in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.²⁴

For purposes of the proposed rules, an “affected EGU” is an EGU that meets certain conditions specified in the proposed rules, including base load rating.²⁵ While the first of these building blocks involves technological changes to the operating source, the remaining blocks would require a state to reduce its use of fossil-fuel fired EGUs, either by substituting generation from other types of sources or by reducing demand for generation overall.

EPA’s proposed regulations also suggest state-specific goals that reflect EPA’s calculation of the emissions reductions each state can achieve.²⁶ States would be required to meet interim goals between 2020 and 2029 and meet final goals beginning in 2030.²⁷ Those goals vary widely from state to state. For exam-

ple, Idaho has the lowest proposed interim rate-based carbon dioxide emission performance goal of 244 pounds of carbon dioxide per MWh of net energy output and the next-to-lowest proposed final goal of 228 pounds. In contrast, Utah would be required to meet an interim goal of 1,378 pounds and a final goal of 1,322 pounds.²⁸

Additionally, the rules would require states to develop plans to meet the proposed goals pursuant to certain guidelines.²⁹ Each state plan would be required to identify the EGUs affected by the rule.³⁰ The state plan would also need to describe the plan approach and identify which of the four building blocks will be used to achieve the required emission reduction, *i.e.*, either forcing technological changes to operating sources (under the first building block), reducing utilization of fossil-fuel fired electric generating units by either substituting generation from other types of sources (under the second and third building blocks) or by reducing demand for generation overall (under the fourth), or some combination of these approaches.³¹

To accomplish this, Idaho might consider increasing utilization of renewable energy sources, including solar facilities, by implementing a renewable portfolio standard. However, efforts to adopt a renewable portfolio standard in Idaho in 2008 were unsuccessful. And other

EPA’s proposed regulations also suggest state-specific goals that reflect EPA’s calculation of the emissions reductions each state can achieve.²⁶

options are available to achieve the required emissions reductions. Idaho could choose not to incorporate the third building block of EPA's proposed regulations, or to submit a multi-state plan that allows for averaging of performance standards.³²

Given the low level of reductions required of Idaho and a political climate that has not been supportive of a renewable portfolio standard to date, the federal regulation could have less of an impact on the market for renewables than proponents of solar might hope to see.

What to watch

President Obama's Presidential Memorandum directed EPA to adopt final standards for existing power plants by June 1, 2015,³³ and EPA presently expects to finalize its rulemaking by that date.³⁴ If adopted, each state would be required to submit its plan to EPA by June 30, 2016, although EPA has proposed that states requiring additional time to submit a complete plan may submit an initial plan by June 30, 2016 and commit to submission of the complete plan by June 30, 2017 (for single state plans) or June 30, 2018 (for multi-state plans).³⁵

As a result, the coming year could see some significant changes in Idaho's energy policies. If Idaho responds by requiring utilities to increase utilization of renewable energy sources, the state might see a corresponding increase in the availability of incentives for residential and commercial solar development within the state. But if Idaho responds by requiring installation of more stringent control technologies or focusing on energy efficiency measures, the effect on renewables will be slight. One thing, however, is certain — adoption of the proposed regulations at the federal level will force a discussion regarding the value and desirability of renewable energy

sources in Idaho that will require the input of utilities, environmental organizations, industry, developers of renewable energy projects, and the general public.

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If Idaho responds by requiring utilities to increase utilization of renewable energy sources, the state might see a corresponding increase in the availability of incentives for residential and commercial solar development within the state.

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4. This assumes that the maximum \$5,000 deduction is taken each year by a taxpayer with a 7.4% income tax rate.

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6. See 26 U.S.C. § 48; see also 26 U.S.C. § 48(a)(2)(A)(i) (providing for an energy credit equal to an "energy percentage" of 30 percent of energy property "but only with respect to periods ending before January 1, 2017").

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Resources, State Energy Loan Program, available online at <http://www.energy.idaho.gov/financialassistance/energy-loans.htm>.

8. See Database of State Incentives for Renewables & Efficiency (DSIRE), Renewable Portfolio Standard Policies (Sept. 2014), available online at http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2015/01/RPS_map.pdf ("DSIRE RPS Map").

9. See Nev. Rev. Stat. § 704.7821.1; see also Nev. Rev. Stat. §§ 704.7805, 704.7811 & 704.7815 (defining "portfolio energy system or efficiency measure," "renewable energy," and "renewable energy system," respectively).

10. See DSIRE RPS Map.

11. See Utah Code § 54-17-602(1)(a) (establishing a target for electrical corporations); Utah Code § 10-19-201(1)(a) (establishing a target for municipal electric utilities). Renewable energy certificates may also be used to meet these goals. *Id.*

12. See DSIRE RPS Map.

13. See Nev. Rev. Stat. § 704.7821.2(a).

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19. See Idaho Code §§ 63-602JJ & 63-3502B.

20. See DSIRE, Summary Maps, available

online at <http://programs.dsireusa.org/system/program/maps> (Program Type: Sales Tax Incentive; Technology: Solar Photovoltaics & Thermal Electric) (last visited March 11, 2015).

- 21. See Idaho Code § 63-3622QQ.
- 22. See 42 U.S.C. § 7411(b)(1)(A).
- 23. See 42 U.S.C. § 7411(b)(1)(B) (requiring standards of performance for new sources); 42 U.S.C. § 7411(d) (requiring standards of performance for existing sources).
- 24. See Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,838 (June 18, 2014) (proposed rule). These building blocks are required to reflect the degree of emission limitation achievable through the application of the "best system of emission reduction" ("BSER") that EPA determines has been adequately demonstrated, taking into account the cost of achieving the reduction, any non-air quality health and environmental impacts, and energy requirements. See 42 U.S.C. § 7411(a) (defining "standard of performance").

- 25. See *id.* at 34,954 (proposing at 40 C.F.R. 60.5795 the EGUs that must be addressed by the state plan).
- 26. See *id.* at 34,953 (proposing at 40 C.F.R. 60.5765 state rate-based carbon dioxide emissions performance goals, and proposing at 40 C.F.R. 60.5770 a procedure for converting the rate-based goal to a mass-based goal).
- 27. See *id.* at 34,953 (proposing at 40 C.F.R. 60.5765 compliance dates).
- 28. See *id.* at 34,957 (proposing at Table 1 to 40 C.F.R. Part 60 Subpart UUUU specific goals by state).
- 29. See *id.* at 34,951 (proposing at 40 C.F.R. 60.5710 a requirement to submit a plan).
- 30. See *id.* at 34,950 (proposing at 40 C.F.R. 60.5740 requirements for the contents of a state's plan).
- 31. *Id.*
- 32. See *id.* at 34,952 (proposing at 40 C.F.R. 60.5745 to allow multi-state plans).
- 33. See Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013), available online at [http://www.whitehouse.gov/the-press-](http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards)

[office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards](http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards).

- 34. See 79 Fed. Reg. at 34,838.
- 35. See *id.* at 34,952 (proposing timing requirements at 40 C.F.R. 60.5755).

About the Author

Alison M. Nelson is senior counsel at Husch Blackwell LLP, a full-service litigation and business law firm with 600 attorneys in locations across the United States and in London. Ali is a member of the firm's Energy and Natural Resources Strategic Business Unit, with a focus on environmental law. She is also the Chair of the Environmental & Natural Resources Law Section of the Idaho State Bar.



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Environmental Due Diligence Beyond the Phase I

Dylan B. Lawrence
Mark A. Torf

Many attorneys advise clients to have a Phase I Environmental Site Assessment (ESA) done when purchasing real property. However, Phase I ESAs are limited in scope and only identify indications of contamination within the property. For transactions involving existing businesses and facilities, a Phase I ESA does not tell the buyer anything about whether the facility is operating in compliance with the various environmental laws and regulations that may apply to its activities. In addition, when planning a new development or expanding existing facilities, the buyer must understand any applicable environmental regulations that may restrict such plans. Again, this issue lands well outside the scope of a Phase I ESA.

This article identifies some of the regulations that may govern an existing business's operations, discusses how to identify such compliance issues in a business transaction, and provides some examples of factors that can limit a new or expanded facility's location.

Getting an ESA before you buy

Buyers should consider getting a Phase I ESA before purchasing real property for a couple of reasons. On a practical level, the ESA provides information to the buyer regarding indications of contamination within the property. And, as a legal matter, conducting a Phase I ESA or "all appropriate inquiry"¹ satisfies one of the requirements for the "bona fide prospective purchaser" defense and other liability defenses.² Without

What properties need an ESA?

Generally speaking, this article applies to transactions involving non-residential (agricultural, industrial, commercial, etc.) properties, as well as multi-unit residential properties. As EPA has recognized, typical activities on small residential properties do not generate contamination. Therefore, conducting a Phase I ESA in the context of a single unit residential property transaction is usually unnecessary, and

is relatively rare. However, the statutes governing liability for contamination (which will be discussed in more detail later in this article) do not categorically exclude residential properties (and the owners thereof) from liability. Instead, EPA and many state agencies have policies of not enforcing against owners of contaminated residential properties who did not otherwise contribute to the contamination.

such defenses, the owner of a contaminated property could be one of the parties liable for such contamination.³

A Phase I ESA must be conducted by a qualified environmental professional and includes a site visit, review of environmental databases and historical records, interviews with past and present owners and occupants, interviews with state or local government representatives, and, finally a written report about the investigation and whether there are any "recognized environmental conditions" on the property that warrant further investigation.⁴ The Phase I ESA includes potential contamination by a wide variety of "hazardous substances" and petroleum products. Interestingly, even though one of the primary reasons to conduct the assessment is to qualify for liability defenses as previously described, petroleum product contamination is not subject to all of the same rules and defenses as other pollution. However, the standard Phase I ESA includes petroleum contamination because, historically, it has been a concern at many properties.⁵

Even though Phase I ESAs deal with a wide variety of "hazardous substances" and petroleum products,

many other issues and concerns may warrant assessment that are not commonly included in a Phase I ESA. These "non-scope" issues include asbestos, biologic agents, cultural and historic resources, lead-based paint, radon, threatened or endangered species, and wetlands.⁶ If any of these issues are of concern, they must be separately assessed or specifically added to the scope of the Phase I.

Conducting a Phase I ESA or "all appropriate inquiry"¹ satisfies one of the requirements for the "bona fide prospective purchaser" defense and other liability defenses.²

Recent updates clarify the ESA scope

Before discussing some of the compliance and other “non-scope” issues, it may be helpful to briefly note some recent revisions to the standards governing Phase I ESAs. In November 2013, the Phase I ESA standard protocol was revised by its sponsoring organization, ASTM⁷ International. Some of the changes should help property owners avoid stigma from past problems that have already been resolved. The changes include:

- The definition of a “recognized environmental condition,” which could trigger the need for additional investigation with a Phase II ESA.⁸ While the prior definition was cumbersome and potentially confusing, the revision looks squarely at “releases” that could lead to cleanup liability under federal law.
- Differentiating between past releases that have been remedied, past releases that are being controlled by treatment or site restrictions, and current contamination.⁹
- Clarification that de minimis conditions that do not pose threats to human health or the environment are neither “recognized environmental conditions” nor “controlled recognized environmental conditions” that require further investigation.¹⁰ (An example might be a small spill on pavement that has been cleaned up.)
- Making the potential presence of vapors from contaminated soil migrating into living and work areas, or onto other properties, a standard component in Phase I ESAs.¹¹

In addition to these revised standards governing Phase I ESAs, new database research products are constantly evolving. Depending on the level of sophistication needed,

In the case of an existing facility, the Phase I ESA does not examine compliance with the myriad environmental laws and regulations.¹²

these tools can reduce the costs of researching regulatory files and historical records. However, they are not a replacement for the professional interpretation required by the ASTM Phase I standard.

Compliance issues

While the information generated in a Phase I ESA is very important, it is also quite narrow in scope. In the case of an existing facility, the Phase I ESA does not examine compliance with the myriad environmental laws and regulations.¹² And, in situations where a purchaser may want to construct a new facility or expand an existing one, the Phase I ESA does not identify potential environmental regulatory hurdles or limitations that could restrict those plans.

Environmental audits generally

Because environmental compliance issues may arise, the buyer should consider an environmental audit in addition to the Phase I ESA. Increasingly, large companies demand their vendors and suppliers implement environmental auditing programs as a threshold requirement. Therefore, environmental audits have utility even outside the transactional context.

Some of the most common areas of environmental regulation include

the emission of air pollutants under the Clean Air Act,¹³ the discharge of wastewaters to surface waters under the Clean Water Act,¹⁴ and the management of hazardous waste under the Resource Conservation and Recovery Act.¹⁵ Some programs also apply to drinking water quality; managing used oil; storing and managing petroleum products, fertilizers, pesticides and other chemicals; construction activities on structures with asbestos and lead paint; managing refrigerants containing chlorofluorocarbons (CFCs); and others.

With an environmental audit, an environmental consultant evaluates whether the facility is in compliance with these various programs. In addition, the environmental audit can evaluate the regulatory climate and, in particular, whether there are any known issues that may limit construction of a new facility or expanding an existing facility. The remainder of this article explores examples of additional environmental considerations for a commercial or industrial property buyer.

Ambient air quality standards can affect new and expanding facilities

Under the federal Clean Air Act, the Environmental Protection Agency (EPA) establishes ambient air quality standards for six pollutants

referred to as “criteria” pollutants: carbon monoxide, lead, nitrogen oxides, ozone, particulate matter, and sulfur dioxide.¹⁶

To measure these, each state, including Idaho, is divided into several airsheds. The state tests the ambient air at various monitoring stations, and EPA criteria for the frequency of exceedances within a two or three-year period determine whether each airshed is in compliance with the ambient standards. Areas that remain in compliance with the ambient standards earn designation as “attainment” areas, and areas with criteria pollutants consistently exceeding the ambient standards are designated as “non-attainment” areas.¹⁷ The distinction between “attainment” and “non-attainment” areas is important because different permitting standards and requirements apply to each.

A facility that will emit any of these criteria pollutants above EPA thresholds must obtain an air permit from the Idaho Department of Environmental Quality (DEQ) before construction or modification of the facility begins.¹⁸ To receive the permit, a facility located in an “attainment” area must demonstrate to DEQ that it will not cause or significantly contribute to violations of the federal ambient standards or state toxic emission standards, and that its air emissions will comply with the technology-based “best available control technology” emissions limitations.¹⁹

By contrast, a facility located in an area that has already been designated as non-attainment must utilize even stricter technology-based emissions standards that achieve the “lowest achievable emission rate.” The facility must demonstrate that it will not significantly contribute to

ambient concentrations of the non-attainment pollutant which, in some cases, requires the facility to “offset” its emissions of the non-attainment pollutants by securing reductions in emissions by other sources within the airshed.²⁰ Therefore, when deciding whether to construct or expand a facility, it is important to consider the airshed’s compliance with ambient air quality standards.

Here in Idaho, non-attainment areas include the Cache Valley in the southeastern corner of the state for fine particulate matter (PM_{2.5}, which is commonly attributable to emissions from motor vehicles, combustion, heating appliances, etc.), and the Pinehurst area of the Silver Valley, both for fine particulate matter (PM_{2.5}) and for coarse particulate matter (PM₁₀, commonly generated by road dust and agriculture).²¹

In addition to existing non-attainment areas, some airsheds are considered areas of concern and are therefore potential candidates for future non-attainment designations because there have been a significant number of measurements exceeding the ambient standards. One such area is the Ada and Canyon County Area for both fine particulate matter (PM_{2.5}) and ozone (O₃).²² The key source of ozone in the Ada and Canyon County Area are nitrogen oxides (NO_x) from motor vehicles combin-

ing with volatile organic compounds (VOCs)²³ typically derived from fuels, paints and coatings, and some process chemicals. Air emissions modeling has shown that reducing VOC emissions will be key to reducing ozone in the Treasure Valley — a potential indicator of future regulatory attention.²⁴

To summarize, a new or expanded facility in a non-attainment area will face much more stringent permitting requirements than one located in an attainment area. Put another way, locating or expanding a facility in a non-attainment area can be significantly more expensive due to the additional pollution controls that would be required. Businesses currently located, or that wish to locate, in these areas should consider these issues early in the planning process. A traditional Phase I ESA would not alert a buyer to such issues.

Locating a facility near impaired surface waters

Many operations and facilities generate waste waters that must be discarded, such as food processing facilities, power plants, and municipal treatment plants. In addition, construction sites and certain industrial facilities discharge storm water runoff to nearby creeks, streams, and rivers. Under the federal Clean Wa-

A new or expanded facility in a non-attainment area will face much more stringent permitting requirements than one located in an attainment area.

ter Act (CWA), in order to discharge those waste waters to a nearby surface water body, the facility must first obtain a discharge permit from EPA.²⁵

The CWA also requires all states, including Idaho, to designate the types of uses that each surface water body should be able to support.²⁶ An “impaired” water body is one that does not meet the water quality criteria necessary to support the designated uses. When this occurs, a “total maximum daily load” (TMDL) is then developed for that pollutant within the impaired water body.²⁷ Essentially, a TMDL is the maximum amount of the pollutant that the water body can contain and still meet the applicable water quality standards.²⁸ These TMDLs are then used to set the effluent limitations, monitoring requirements, and other conditions in the individual permits that authorize discharges into that water body.²⁹

Water body assessments and, in some cases, TMDLs, have been completed for 67 water quality sub-basins in Idaho. As of 2012, 36% of streams and 56% of lakes are not fully supporting state water quality standards, with 34% of streams and 38% of lakes having not yet been assessed at that time.³⁰ In Idaho, TMDLs have been developed and approved by EPA that cover nearly 24,000 miles of rivers and streams and over 210,000 acres of lakes and reservoirs.³¹ This is important information to know for facilities located or proposed in these areas, because it can be expensive to achieve the pollution reductions in a wastewater stream necessary to comply with the TMDL-based effluent limits. Again, this type of information is well outside the scope of a typical Phase I ESA.

Locating a facility in problem areas for groundwater

The federal Safe Drinking Water Act (SDWA) regulates the quality of drinking water provided by municipalities, subdivisions, and commercial establishments whose drinking water is not provided by a municipality or other utility supplier.³² In Idaho, DEQ administers the SDWA. Its regulations apply to any business or establishment that regularly provides drinking water to an average of at least 25 people daily for at least

Of 34 nitrate priority areas in Idaho, many already exceed or are close to exceeding the SDWA standards.



60 days out of the year, and to any system with at least 15 service connections.³³ Among other responsibilities under the SDWA, regulated facilities must sample and treat their water to ensure pollutants fall below certain thresholds.³⁴

Nitrate is one of the most widespread ground water contaminants in Idaho, a state where ground water supplies 95% of the drinking and industrial supply. Of 34 nitrate priority areas in Idaho, many already exceed or are close to exceeding the SDWA standards. Because mu-

nicipalities and businesses cannot provide water exceeding the SDWA drinking water standards, contaminants in local groundwater can limit operations or expansion, or require a facility to implement expensive water treatment techniques. Again, this important information falls outside the scope of a typical Phase I ESA.

Conclusion

Phase I ESAs provide real property buyers with key information regarding potential contamination. They are also essential for certain liability defenses. However, ESAs are fairly limited in scope. Depending on the transaction, it may be prudent to expand the due diligence to include assessing compliance with environmental permits and requirements, and whether such requirements may hinder plans for future development or expansion. This article has identified some of the issues that warrant a complete environmental picture of a particular property or facility.

Endnotes

1. The contents of a Phase I ESA are governed by industry standards promulgated by ASTM International, while the contents of an “all appropriate inquiry” are governed by EPA regulations. *Compare* STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS E1527-13 (ASTM International 2013) (hereinafter, “ASTM Standard”), with 40 C.F.R. Part 312 (EPA “all appropriate inquiries” rules). Unless otherwise noted, references in this article to Phase I ESAs should be read to also include an “all appropriate inquiry” investigation pursuant to EPA standards, and vice versa. By way of background, ASTM’s revision of the Phase I ESA standard preceded EPA’s revision of its “all appropriate inquiries” standard, but the federal agency caught up a month later. EPA’s revised “all appropriate inquiries” standard clarifies that the ASTM E1527-

13 standard is compliant with the EPA rule, and that parties conducting all appropriate inquiries may use the procedures in the ASTM E1527-13 standard. 40 C.F.R. § 312.11(c).

2. 42 U.S.C. § 9601(40).

3. 42 U.S.C. § 9607(a)(1).

4. See ASTM Standard, note 1, §§ 1.1.1, 7.1, 7.3.1; 40 C.F.R. § 312.20(e).

5. *Id.*, note 1, § 1.1.2.

6. See *id.*, note 1, § 13.

7. Until 2001, this organization was known as the American Society for Testing and Materials.

8. See *id.*, note 1, § 3.2.78.

9. See *id.*, note 1, §§ 3.2.18, 3.2.42.

10. See *id.*, note 1, §§ 3.2.18, 3.2.22, 3.2.78.

11.

12. See *id.*, note 1, § 3.2.30.

13. 42 U.S.C. §§ 7401-7671q.

14. 33 U.S.C. §§ 1251-1387.

15. 42 U.S.C. §§ 6901-6992k.

16. See 40 C.F.R. Part 50.

17. See generally 42 U.S.C. § 7410.

18. IDAPA 58.01.01.201.

19. 42 U.S.C. § 7475(a); 40 C.F.R. § 52.21(j); IDAPA 58.01.01.205.

20. See 42 U.S.C. § 7503(a); IDAPA 58.01.01.204.

21. See generally IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, ATTAINMENT VERSUS NONATTAINMENT, at <http://www.deq.idaho.gov/air-quality/monitoring/attainment-versus-nonattainment.aspx> (last visited March 9, 2015).

22. *Id.*

23. DIVISION OF ATMOSPHERIC SCIENCES, DESERT RESEARCH INSTITUTE, OZONE AND ITS PRECURSORS IN THE TREASURE VALLEY, IDAHO 20, 22 (2008).

24. See generally *id.* at 136.

25. 33 U.S.C. §§ 1311, 1342; 40 C.F.R. § 122.21. As a result of legislation passed in 2014, Idaho is currently putting together an application package to obtain authority from EPA to administer this permitting program. See IDAHO CODE § 39-175C.

26. 40 C.F.R. § 131.10.

27. 33 U.S.C. § 1313(d); IDAPA 58.01.02.055.02.

28. IDAPA 58.01.02.010.100; 40 C.F.R. § 130.2(i).

29. 33 U.S.C. §§ 1311(b)(1)(C), (m)(2), 1342(a)(1)(A); 40 C.F.R. § 130.7(a).

30. IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, IDAHO'S 2012 INTEGRATED REPORT xii (2014).

31. *Id.* at xi.

32. See generally 42 U.S.C. §§ 300f – 300j-26.

33. See IDAPA 58.01.08.003.107.

34. See generally IDAPA 58.01.08.

About the Authors

Dylan Lawrence is a partner with Varin Wardwell, specializing in water rights, environmental, and natural resources law. He has handled multiple contested environmental permitting matters, and regularly advises clients on contamination issues in the transac-



It may be prudent to expand the due diligence to include assessing compliance with environmental permits and requirements.

tional and enforcement contexts. Dylan achieved his B.B.A. and J.D. from the University of Texas. You can reach him at dylanlawrence@varinwardwell.com.

Mark Torf has been the Owner and Senior Professional of TORF Environmental Management for over 25 years, where he specializes in identifying and resolving environmental compliance and safety issues. He has a B.S. in Natural Resources from the University of Michigan, and has achieved numerous industry and agency accreditations. You can reach him at mtorf@torf.us.





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Regular Spring Term for 2015 3rd Amendment – 03/13/15

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

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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 Court of Appeals Oral Argument for May 2015

Dated 04/07/15

Friday, May 1, 2015 – BOISE (Capital High School)

9:30 a.m. *State v. Davis* #41790

Tuesday, May 12, 2015 – BOISE

9:00 a.m. *State v. Smith* #41661
10:30 a.m. *Johnson v. State* #41414
1:30 p.m. Vacated

Thursday, May 14, 2015 – BOISE

9:00 a.m. Open
10:30 a.m. *State v. Westlake* #42169
1:30 p.m. Vacated

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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Judges
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Regular Spring Term for 2015 6th Amendment – 03/30/15

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 May 2015

Dated 03/17/15

Monday, May 4, 2015 – BOISE

8:50 a.m. *Tracfone Wireless v. State* #41868
10:00 a.m. *Hamilton v. Alpha Services* #42521
11:10 a.m. *Federal National Mortgage v. Hafer* #41825

Wednesday, May 6, 2015 – BOISE

8:50 a.m. *St. Alphonsus v. Elmore County* #42175
10:00 a.m. *State v. Orellana-Castro* (Petition for Review) #42671
11:10 a.m. *Hilliard v. Murphy Land* #42093

Friday, May 8, 2015 – BOISE

8:50 a.m. *Chavez v. Stokes* (Industrial Commission) #42589
10:00 a.m. *Pines v. Idaho Board of Medicine* #41972
11:10 a.m. *John & Jane Doe v. John* (2014-05) *Doe* #41817

Tuesday, May 12, 2015 – IDAHO FALLS

8:50 a.m. Open
10:00 a.m. *La Bella Vita v. Shuler* #42092
11:10 a.m. *Wickel v. Chamberlain* #41514

Wednesday, May 13, 2015 – POCATELLO

8:50 a.m. *Campbell v. Parkway Surgery* #42173
10:00 a.m. *Kawamura v. Kawamura* #42112
11:10 a.m. *Alexander v. Stibal* #41604

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**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 4/1/15)**

CIVIL APPEALS

Attorney fees and costs

1. Did the court err in finding that Stanley and Marilyn Favini did not intend to guarantee payment for professional services for their son, Ronald Favini?

Watson Law Office v. Favini
S.Ct. No. 42021
Supreme Court

Instructions

1. Whether the trial court erred in failing to instruct the jury on recklessness until after the jury had found Dr. Shappard liable and awarded non-economic damages in an amount that exceeded the statutory cap.

Hoffer v. Shappard
S.Ct. No. 42087
Supreme Court

Post-conviction relief

1. Did the court err when it summarily dismissed Russell's claim of ineffective assistance of counsel for failing to adequately prepare mitigation evidence for sentencing?

Russell v. State
S.Ct. No. 41783
Court of Appeals

2. Did the district court err in denying Jackson's petition after an evidentiary hearing on two of his claims of ineffective assistance of counsel?

Jackson v. State
S.Ct. No. 42116
Court of Appeals

3. Was Clapp put on notice as to the basis for summary dismissal of his petition for post-conviction relief?

Clapp v. State
S.Ct. No. 42258
Court of Appeals

Summary judgment

1. Whether the district court erred in ruling that no reasonable juror could draw inferences from the facts of this case that Walco's bid constituted a trade secret and that Walco took reasonable steps to protect that trade secret under the Idaho Trade Services Act.

Walco, Inc. v. County of Idaho
S.Ct. No. 42296
Supreme Court

2. Whether the district court erred when it concluded that res ipsa loquitur could not be applied in this case.

Krinit v. Dept. of Fish & Game
S.Ct. No. 42417
Supreme Court

CRIMINAL APPEALS

Due process

1. Did the court violate Wilson's right to due process when it denied his motion for a continuance on the first day of trial so that he could have additional time to interview a late disclosed witness?

State v. Wilson
S.Ct. No. 40759
Court of Appeals

Motions to sever

1. Did the court abuse its discretion when it denied Diaz's motion to sever because the facts of his trial demonstrate that unfair prejudice resulted from the joint trial?

State v. Diaz
S.C. No. 42103
Court of Appeals

2. Did the joinder of charges for trial prejudice Wilske such that the court abused its discretion when it denied Wilske's motion to sever?

State v. Wilske
S.Ct. No. 41821
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the court err when it denied Easterday's motion to suppress, finding a drug dog's alert on a vehicle establishes probable cause to search a container in the vehicle?

State v. Easterday
S.Ct. No. 41831
Court of Appeals

Substantive law

1. Does the requirement in I.C. § 19-2604(3) that the prosecutor stipulate to relief violate the separation of powers provision of the Idaho Constitution?

State v. Moore
S.C. No. 42405
Court of Appeals

**Summarized by:
Cathy Derden**

**Supreme Court Staff Attorney
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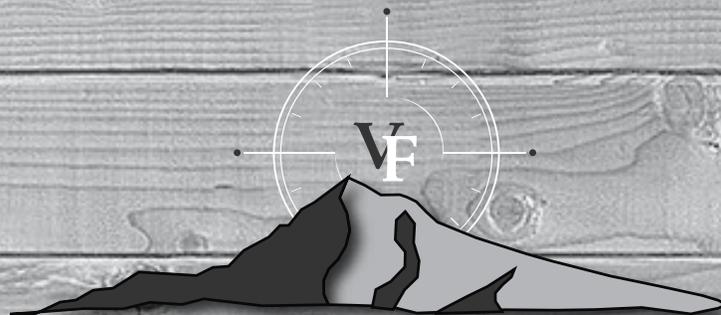


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Idaho Could Get Second ABA Seat

Deborah A. Ferguson
Idaho Delegate
to ABA House of Delegates

As your Idaho ABA State Bar Delegate, I attended the 76th Midyear Meeting of the ABA and the meeting of the National Caucus of State Bar Associations in early February in Houston, Texas.

There is an important potential ABA development which, if implemented, will positively impact our Bar. The ABA Commission on Governance convenes every 10 years, and reported on its recently released proposals. The Commission has proposed that some of the underrepresented states be given additional delegates, based on their state Bar's population of active lawyers. This could result into the creation of a second Idaho State Bar Delegate position. In addition, Young Lawyer delegates will be added to 22 more states, and Idaho is among those who would receive a Young Lawyer delegate. If this proposal is passed at the annual meeting, Idaho's presence in the ABA House of Delegates will be increased for the first time in its history.

In his remarks to the House of Delegates, ABA President William C. Hubbard stressed the importance of looking back 800 years to the sealing of Magna Carta, citing Magna Carta as a forward-looking document that endures as the seminal, foundational document that defines and shapes the American concept of the rule of

law. President Hubbard described the ongoing, yearlong celebration of the 800th anniversary of the Magna Carta that will culminate on June 15, 2015, with the rededication of the ABA's Magna Carta Memorial at Runnymede.

Several noteworthy resolutions were discussed and voted upon. On behalf of the Working Group on Unaccompanied Minor Immigrants, Resolution 113 supporting government appointed counsel for unaccompanied children in immigration proceedings and urging that immigration courts should not conduct any hearings, including final hearings, involving the taking of pleadings or presentation of evidence before an unaccompanied child has had a meaningful opportunity to consult with counsel about his or her specific legal options. The resolution was approved.

On behalf of the Criminal Justice Section, Revised Resolution 107A urging governments to adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others. This resolution was also approved.

The ABA 2015 annual meeting will take place in Chicago, July 30-August 4. I look forward to attending as your State Bar Delegate and reporting back to the Bar on the events of that meeting. As your ABA

Young Lawyer delegates will be added to 22 more states, and Idaho is among those who would receive a Young Lawyer delegate.



State Bar delegate, don't hesitate to contact me if you have any questions concerning the ABA.

About the Author

Deborah A. Ferguson is a partner at Ferguson Durham, PLLC, which specializes in civil and criminal litigation, as detailed at www.fergusondurham.com. With 29 years of complex civil litigation experience, she had litigated hundreds of federal civil cases. She also has an active mediation practice. Ms. Ferguson was President of the Idaho State Bar in 2011. She can be contacted at (208) 345-5183 or at daf@fergusondurham.com.



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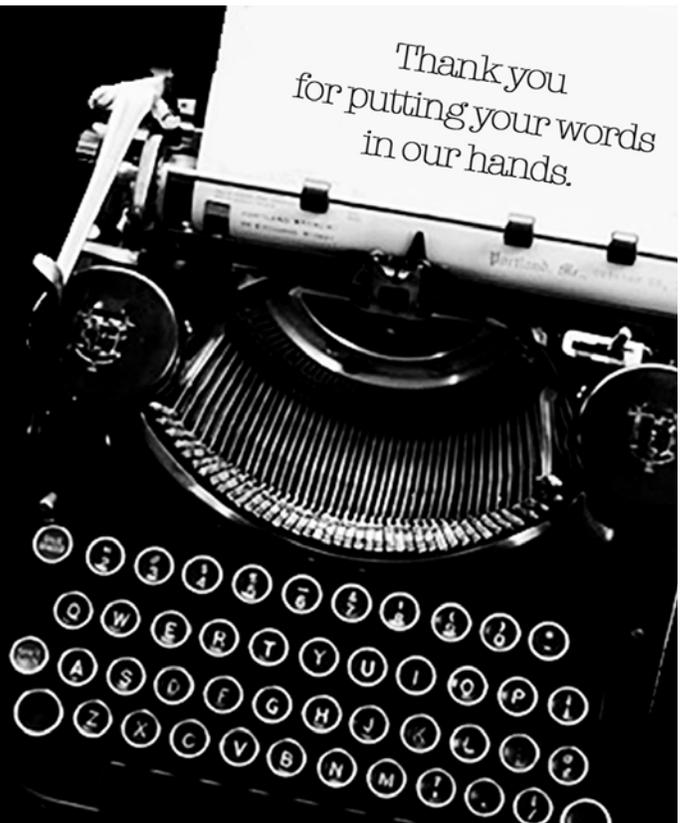


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The spoken word perishes; the written word remains.



The Need for Better Language Access in Idaho Courts

Erik Johnson

Spanish speakers are now found routinely in most, if not all, Idaho courtrooms. Many attorneys are now familiar with several other languages commonly encountered in the courts: Arabic, Bosnian, Mandarin, Farsi, Nepali, Russian, or Swahili, to name a few. But how about Cebuano, Gio, Karen, Krio, Kumano or Oromo? These were among 45 languages for which interpreters were appointed in Idaho courts in 2010. In that same year Canyon County required interpreters in 4,000 court proceedings and Ada County required them in 3,300. Twin Falls County needed interpreters in 1,000 proceedings.¹

The 2010 Idaho Trial Court Financing Report showed court interpreter expenses totaling \$752,850 statewide, a number which did not include salaries of bilingual court personnel that interpret as an additional job responsibility. The Supreme Court spent an additional \$70,000 to pay for interpreters in the 3rd, 4th, 5th, 6th and 7th Judicial Districts.²

In addition to interpretation of spoken languages, the courts must also provide interpreters for American Sign Language (ASL), which is a visual-spatial language created by deaf people. It is not English. ASL has all the elements of any spoken language. Its grammar and conversational rules are very different from spoken English, but, like all languages, it comprises a set of abstract symbols agreed upon by those who “speak” it. ASL is the preferred language of the deaf community in the U.S., even among those who use spoken English.

Language Access Committee Raises Awareness

The Idaho Supreme Court Language Access Committee seeks to improve language access in the Idaho court system.

The committee is made up of judges, interpreters, court administrators, attorneys and advocates for limited English proficient (LEP) persons and the deaf and hard of hearing. The purpose of this article is to promote the mission of the Language Access Committee. I will talk briefly about the need for language access in the courts and the laws that require language ac-

cess. The main thrust of the article is provide advice to attorneys and judges on how to work with interpreters.

An excellent resource for questions about providing interpretation services to LEP persons is the federal government interagency website on the issue: www.lep.gov. The U.S. Department of Justice Civil Rights Division's website on the Americans With Disabilities Act provides helpful information on providing services to the deaf and hard of hearing. Go to www.ada.gov and type “deaf” in the search box.

Language access is required by law

There are many laws that govern the provision of language services in our state courts. I will touch briefly on three of the main ones.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. (Details on Title VI compliance can be found at www.lep.gov). Idaho courts receive federal money from the U.S. Department of Justice (DOJ) and therefore must comply with Title VI. The DOJ has established specific guidelines on providing adequate language access in the courts.

Title II of the Americans with Disabilities Act (ADA) requires state courts to provide qualified sign language interpreters or other auxiliary aids such as transcription or assistive listening systems to ensure effective communication with deaf and hard of hearing persons. Title II of the ADA further requires that when selecting the appropriate reasonable accommodation, deference be given to the deaf or hard of hearing indi-

vidual's choice of what auxiliary aid he or she needs. For more information on the requirements of the ADA go to www.ada.gov.

Idaho Code § 9-205 states: “In any civil or criminal action in which any witness or party does not understand or speak the English language, or who has a physical handicap which prevents him from fully hearing or speaking the English lan-

Idaho courts receive federal money from the U.S. Department of Justice (DOJ) and therefore must comply with Title VI.

guage, then the court shall appoint a qualified interpreter to interpret the proceedings to and the testimony of such witness or party.”

How to work with interpreters³

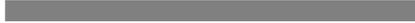
The Court interpreter’s job is only to interpret. Court interpreters are not allowed to explain legal matters to the person they are interpreting for. They cannot explain cultural differences for the limited English proficient (LEP) or deaf or hard of hearing person. They can’t tell the court that there is a cultural difference creating a misunderstanding. In many instances it is obvious to the interpreter that there is a miscommunication or misunderstanding, but it is not the interpreter’s job to fix that. Either the attorney or the judge need to dig into what is going on and clarify the miscommunication.

Interpreters interpret exactly what is spoken. If you speak in formal or eloquent language, the interpreter will use the linguistic equivalent. If your client uses expletives or answers in a nonsensical way, the interpreter is bound by interpreter ethics to interpret using expletives or nonsensical words. The interpreter cannot clean up your client’s remarks.

Direct your words directly to the LEP, deaf or hard of hearing person, not the interpreter. Don’t say to the interpreter, “Ask him how old he is.” Instead, simply say, “How old are you?” The interpreter will interpret your words literally. If you ask the question indirectly, confusion will ensue.

Explain legal terms, acronyms and complicated concepts. Many legal terms, acronyms and complicated concepts could be difficult for the

Provide copies of important documents to the interpreter prior to the hearing if possible.



interpreter to interpret. You should communicate in plain English so that the interpreter can easily interpret what you are trying to communicate. This is especially important if you are dealing with an LEP, deaf, or hard of hearing person with little or no formal education.

Provide copies of important documents to the interpreter prior to the hearing if possible. Interpreters can interpret more accurately and quickly when they have appropriate background information and context. If you will be asking the interpreter to interpret passages from a written document for the LEP, deaf or hard of hearing person, the process will go much more smoothly if the interpreter has the opportunity to review the document prior to the hearing.

Discuss complex or uncommon terms or concepts with the interpreter prior to the hearing if possible. If you have the opportunity to talk with the interpreter prior to the hearing, take advantage of that opportunity by explaining to the interpreter some of the complicated or uncommon terms or concepts you might use at the hearing. This will give the interpreter a chance to think about how they would interpret the term or concept, or look something up if necessary.

Give interpreters a break. The interpreter is the only person who is speaking nonstop during court hearings. Interpretation requires intense focus. Ensure that the interpreter gets occasional breaks if the proceeding is an extended one. Remember that if you have the interpreter interpret for you and your client during a recess, that is not a break for the interpreter. Consider asking for two interpreters if you anticipate that your hearing may last several hours.

Consecutive interpretation. With consecutive interpretation, a statement is made and then the interpreter interprets. After the interpretation, another statement is made, followed by interpretation. It may be necessary for the interpreter to signal a speaker to pause to permit interpretation when the length of a statement approaches the outer limits of the interpreter’s capacity for recall. The interpreter should take notes to assist him or her in rendering the interpretation. In preparing witnesses or parties who will need an interpreter, the attorney is wise to train the person to break up his or her answers in brief parts. Without this training, the witness or party may continually lose their train of thought and get confused while giving testimony when the interpreter interrupts them in order to interpret.

Simultaneous interpretation. With simultaneous interpretation, the interpreter interprets for the person needing interpretation at the same time someone is speaking. Simultaneous interpretation is intended to be heard only by the person receiving the interpretation and is usually accomplished by speaking in whispered tones or using equipment specially designed for the purpose in order to be as unobtrusive as possible. Unlike consecutive interpretation, it is not necessary to speak in brief parts, although it is still advisable to not speak so quickly that it is difficult for the interpreter to keep up.

Don't talk over each other. Slow things down. Problems arise with interpretation in a courtroom setting when the participants talk over each other or interrupt each other frequently. When this happens, it is impossible for the interpreter to keep up and let the person receiving the interpretation know who is saying what. In these instances, the attorney or the judge needs to slow the proceedings down so the interpreter can do his or her job.

How to deal with inaccurate interpretation. If the interpreter acknowledges an error, the judge should accept the correction by the interpreter. In a jury trial, this should be done during a sidebar conference. If the interpreter disputes that an error was made, the burden rests with the attorney alleging the error.

The judge will need to determine whether the issue surrounding the alleged inaccurate interpretation is substantial enough to warrant further attention. If the issue is substantial, the judge should ask the person whose speech was allegedly misinterpreted to clarify the term or statement. If that does not resolve

the dispute, the judge should then hear evidence as to the correct interpretation from experts submitted by attorneys for the parties, from the interpreter who made the alleged error, or from any other linguistic expert the judge may select or allow. In some situations, it may be advisable or necessary to play back the recording of what a witness has said since many perceived interpreting errors are a function of what was actually said in the foreign language, as opposed to the interpretation.

Familiarize yourself on local rules on the appointment and use of interpreters.

The judge then should make a final determination as to the correct interpretation in view of the evidence. If the determination is different from the original interpretation, then the judge should amend the record accordingly, and if applicable, so advise the jury.

Use certified or qualified interpreters. Counties will vary on the availability of certified and qualified interpreters. Certified interpreters have passed a state exam that certifies their competence. Qualified interpreters are not certified, but may be used by the courts when a

certified interpreter is not available. When using qualified interpreters the court should ask a series of questions to determine the interpreter's qualifications to interpret. In some judicial districts, a roster of certified and qualified interpreters for various languages is maintained, which greatly facilitates the judge's inquiry into the interpreter's qualifications.

Familiarize yourself on local rules on the appointment and use of interpreters. Local rules and procedures may vary on how an attorney notifies the court that an interpreter is needed. Attorneys should familiarize themselves with those rules and follow them to ensure that an interpreter is assigned to the proceeding requiring an interpreter.

Endnotes

1. Idaho Judiciary 2012 Report to the Governor.
2. Idaho Judiciary 2012 Report to the Governor.
3. Parts of this section on working with interpreters were adapted from the Washington Court Interpreter Commission, February 2011.

About the Author

Erik Johnson is the Migrant Law Unit Director of Idaho Legal Aid Services and the Managing Attorney of the Caldwell Idaho Legal Aid office. He has worked for Idaho Legal Aid since 1993. He is a graduate of Bowdoin College and Columbia University School of Law. Erik would like to acknowledge the assistance of Delia Gonzalez in writing this article. Delia is a court certified interpreter and an Idaho Legal Aid outreach worker.



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Robust Writing: Crafting Better Sentences

Tenielle Fordyce-Ruff

I love teaching legal writing in the spring! (Okay, I love teaching all the time, but the Spring Semester is especially rewarding.) My students have grasped organizational principles and learned to edit for grammar and punctuation. My students have also learned that legal writing can be difficult to read.

Sometimes the difficulty comes from hard concepts or ideas. Sometimes, however, the difficulty comes from difficult sentence structure. The writer has tried to pack too many ideas into one unit. I get to spend part of my time in the spring helping my students work on creating easily readable briefs and developing their own writing style. Part of that help includes editing their writing for more robust sentences.

This issue, we'll focus on crafting better sentences by creating shorter, less cluttered sentences.

Avoiding too-long sentences

Readers prefer shorter sentences and will struggle to absorb sentences longer than about 25 words. Readers need the quick mental break provided by the period at the end of a sentence to pause and process the information they just read. Don't believe me — read these two examples and determine which one was easier to absorb.

Spotting too-long sentences is easy, scan your writing and look for sentences longer than two lines, then highlight those sentences and have your word processing program do a quick word count; if the sentence is pushing too far beyond the 25-word "limit," edit the sentences.¹



Spotting too-long sentences is easy — scan your writing and look for sentences longer than two lines. Next, highlight those sentences and have your word processing program do a quick word count. If the sentence is pushing too far beyond the 25-word "limit," edit the sentences.

The first example is 45 words. The second example is broken into three sentences, 16 words, 14 words, and 15 words. (I counted the words in each sentence by following the advice in these examples; it took me about 23 seconds total.)

Okay, so what do you do once you've located some pesky, too-long sentences? First, try turning the sentences into multiple shorter sentences.

If that won't work, try numbering the ideas contained within the sentence to give the reader a mental break. Compare how easy to read the following examples are.

When editing for robust writing, you should check for abstract nouns that begin sentences, check for "it is" and "there are" at the beginning of sentences, check for vague verbs, check for passive voice, check for

What do you do once you've located some pesky, too-long sentences? First, try turning the sentences into multiple shorter sentences.

nominalizations, avoid too many independent clauses, avoid too many dependent clauses, avoid too many prepositional phrases, avoid too-long sentences, and create variety in sentences.² (60 words)

When editing for robust writing, you should (1) check for abstract nouns that begin sentences, (2) check for "it is" and "there are" at the beginning of sentences, (3) check for vague verbs, (4) check for passive voice, (5) check for nominalizations, (6) avoid too many independent clauses, (7) avoid too many dependent clauses, (8) avoid too many

prepositional phrases, (9) avoid too-long sentences, and (10) create variety in sentences. (Easier, right?)

Avoiding too many independent clauses in a sentence

After shortening sentences, however, your writing still might not be as robust as you would like. Even short sentences can present difficulty for the reader.

Check your writing for sentences that have too many ideas nested within them. Chances are that even if the sentence is grammatically correct, it will feel cluttered to a reader.

Whether a reasonable person would feel free to leave is determined by examining the totality of circumstances, and this test asks whether a reasonable person under similar conditions would feel free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

This sentence has multiple ideas nested between “Under” and the period. Each of the ideas in this sentence is an independent thought. Unbundling the ideas into different sentences helps clear the clutter from this sentence.

Whether a reasonable person would feel free to leave is determined by examining the totality of circumstances. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). This test asks whether a reasonable person under similar conditions would feel free to leave. *Id.*

An easy trick to help you find multiple independent clauses in a single sentence is to look for coordinating conjunctions and a period. (Remember that to join two independent clauses into a single sentence you can use either a semicolon

or a comma followed by coordinating conjunction.)³

Caveat: Adding variety to sentences

Please don’t take this advice to an extreme. Readers also like variety in sentences. I’ll show you an example my cousin uses in her English Composition classes.

This sentence has five words. Here are five more words. Five-word sentences are fine. But several strung together become monotonous. Listen to what is happening. The writing is getting boring. The sound of it drones. It’s like a stuck record. The ear demands some variety.

Now listen. I vary the sentence length, and I create music. Music. The writing sings. It has a pleasant rhythm, a lilt, a harmony. I use short sentences. And I use sentences of medium length.

And sometimes, when I am certain the reader is rested, I will engage her with a sentence of considerable length, a sentence that burns with energy and builds with all the impetus of a crescendo, the roll of the drums, the crash of the cymbals — sounds that say “listen to this, it is important.”⁴

This advice holds true for legal writing. Don’t be afraid to use sentences of various lengths. Your reader will appreciate it!

Sources

- Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, 48-58 (Carolina Academic Press 2014).
- Suzanne Rowe, *Keep It Simple: ‘Short and Sweet’ Brings Clarity to Legal Writing*, available at <https://www.osbar.org/publications/bulletin/08jun/legalwriter.html>.

Each of the ideas in this sentence is an independent thought.

Unbundling the ideas into different sentences helps clear the clutter from this sentence.

Endnotes

1. Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, 48 (Carolina Academic Press 2014).
2. This editing checklist comes from Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, 34-35 (Carolina Academic Press 2014). I highly recommend this text to every legal writer who has every struggled with editing.
3. For a refresher on coordinating conjunctions, see Tienielle Fordyce-Ruff, *Conjunction Junction: Making Conjunctions Function for You, The Advocate* 51-52 (May 2012).
4. Gary Provost, available at <http://themetapicture.com/reading-this-is-so-satisfying/> (last visited Mar. 16, 2015).

About the Author

Tienielle 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 or <http://cu-portland>.



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Glen Richard "Dick" Rosenberry 1921 - 2014

Glen Richard "Dick" Rosenberry, 92 of Caldwell, died Friday, May 2, 2014 at home. Dick was born and raised in Uhrichsville, Ohio. He enlisted in the U.S. Army Air Corps in 1939 and on Dec. 7, 1941, he was wounded during the bombing of Pearl Harbor. Despite his injuries, he picked up nearby wounded soldiers in a damaged weapons carrier and drove them to the hospital before being admitted for his own wounds. In 1943 he was assigned to the 492nd Bombardment Group of the 8th Air Force, and headed for England. In May 1944, while flying his third mission, he was shot down in Germany and taken to a prison camp, the site of the "Great Escape," where he remained in the until the end of the war.

He returned home in May 1945 and married his high school sweetheart Virginia (Ginny) Servison. Dick and Ginny headed to Laramie, Wyoming where he attended law school, graduating in 1950. Dick practiced law for over 50 years. He served as



Glen Richard "Dick"
Rosenberry

Prosecuting Attorney of Washington County from 1950-1952 and Assistant Attorney General of Guam from 1952-1956 before practicing law in Caldwell. His law career in Canyon County included Caldwell City Police Judge, attorney for the local school district and private practice. He was a 70-year member of the Elks Club, Pearl Harbor Survivors

Association, Caldwell Lions Club and the Shriners. He is survived by his first son, Hans R. of Caldwell, his second son, Mark L.; and his foreign exchange son Zoran Yankovich; all who reside in the Nampa-Caldwell area. He was preceded in death by his wife of 50 years, Ginny, and his granddaughter Shelly.

W.W. "Bill" Nixon 1932 - 2014

W.W. "Bill" Nixon died on Thanksgiving Day, 2014 at the age of 82. He was born to William James and Evan Jane (Wilson) Nixon on Feb. 12, 1932 in Payette, Idaho. He was proud to call himself a third-generation Idahoan.

The family moved to Bonners Ferry where his family raised and showed Shorthorn cattle and his father practiced law.

Bill was appointed to West Point, but decided to go to the University of Idaho, where he pledged Sigma Chi. He graduated from law school in 1956 and joined his father in practice in Bonners Ferry, where Bill was elected as Boundary County Prosecutor. He moved to Coeur d'Alene in 1972 where he practiced law until shortly before his death.

He served on numerous clubs and service groups and also served on the Kootenai Medical Center Foundation, North Idaho College Foundation, North Idaho College Board of Trustees, University of Idaho School of Law Advisory Board, Vandal Booster Board, and Bank of



W.W. "Bill" Nixon

Idaho (now Wells Fargo) Board of Directors.

He practiced in many areas of law and particularly enjoyed cases arguing before the Ninth Circuit Court in San Francisco. He assisted the Brown family of Sandpoint in starting Schweitzer Ski area and served as legal counsel for Pack River Lumber Company of Sandpoint. He was a recipient of the Idaho State Bar Professionalism Award.

He was preceded in death by his parents, his brother-in-law Rod Keller of Wenatchee, Wash. He is survived by his wife of 40 years, Judy; children Grant (Marla) Nixon of Hayden Lake, Janna (Rik) Willmering of Spokane, Wash., and Jed (Meagan) Nixon of Coeur d'Alene four grandchildren, two brothers and numerous nieces and nephews.

Brett Ira Johnson 1969 - 2015

Brett Ira Johnson was the master of doing the impossible. As a young adult, he played football for Black Hills State and tried out at the NFL combine. He did bodybuilding, earned his PRCA card in bareback bronc riding, and enjoyed boxing and MMA fighting, sometimes in the ring, sometimes in less civilized environments.

He was at different times in his life a huge muscled jock that taught nieces and nephews alike the proper way to win any arm-wrestling match, but also taught them to achieve their academic goals and strive for the kind of excellence that his high



Brett Ira Johnson

IN MEMORIAM

school teachers never would have seen coming.

His incredible diligence and hard work earned him a Bachelor's Degree in Biology from Black Hills State, a Secondary Education degree from Utah State University, a Juris Doctor degree and Editor-in-Chief of law review while graduating 2nd in his class at the University of Idaho College of Law, and an advanced L.L.M. law degree from NYU College of Law.

He clerked at the Idaho Supreme Court, practiced complex litigation and intellectual property law for many years, was licensed in numerous jurisdictions, and was published in multiple law journals. Brett died suddenly and unexpectedly from a heart attack.

He will be sorely missed by those who knew him and loved him best, his Mom and Dad, Jerry and Ann, his brother and sister-in law Russ and Rhonda, brother Dave, sister and brother-in-law Natalie and Roger, and his treasured nieces and nephews.

Theodore Osman Creason Jr. **1948 - 2015**

Theodore Osman Creason Jr., 66, of Lewiston, passed away Wednesday, April 8, 2015, at the University of Washington Medical Center, Seattle, after battling leukemia (AML) for almost nine months. Ted was a generous, compassionate, fun, loyal, adventurous and eloquent gentleman. Highly regarded in every aspect of his life, Ted's personal and professional accomplishments are too numerous to list. He was a wonderful and dedicated husband, son, father and grandfather.

Family was Ted's world, and if you were in his world then he considered you family. Ted was pro-

foundly proud of his grandchildren and closely followed their accomplishments. His easy laugh could be heard frequently when playing with them or when recounting their antics. As the eldest of his siblings, Ted maintained strong bonds with his mom and all his brothers and sisters; these bonds now transcend generations. Family holidays hosted at Ted and Marsha's were boisterous occasions where large masses celebrated with copious amounts of food and drink and filled their house to capacity; yet room was always made for additional guests.

Ted and Marsha's love of adventure took them on exciting travels around the world, where they served as ambassadors for the great state of Idaho and their beloved Lewiston. Quick to tell anyone and everyone about the values and virtues of "God's country," they were just as eager to bring back stories of their exciting culinary and cultural discoveries abroad. Ted's quests ranged from kissing the Blarney Stone in Ireland, to Castilian cuisine in Barcelona, to bullet-proof vests in Afghanistan, to discussing religion with the president of Liberia. Even in his battle with cancer, his last journey, Ted's love of travel was clear: his posts on the CaringBridge website related his experience to a guided camel ride through the desert. Through it all, Ted's enthusiastic love of life, learning and understanding enriched the lives of all who knew him.



Theodore Osman
Creason Jr.

At home, Ted always believed in being involved and supporting the community. He was a lifelong Episcopalian and was active in all areas of the church. Among other roles, Ted served on the Republican Central Committee as chairman, was part of the Idaho Commission of Pardons and Parole, served on the board of directors for a local bank, served on the board of directors for the Northwest Children's Home, including a term as president, was a member of the Downtown Lewiston Rotary Club, including time as president. Most recently, he enjoyed serving on the board of directors for the Lewiston Library Foundation.

Ted was born on May 28, 1948, in American Falls, Idaho, to Theodore Osman Creason and Helen Patricia Ritchey. He graduated from Aberdeen High School and received his bachelor of arts in history from the University of Idaho in 1970 and his juris doctorate from the University of Idaho College of Law in 1973. He immediately went to work with his grandfather and uncle at the firm of Creason and Creason in Rupert, Idaho. This is when he met Marsha Kidder, the love of his life, whom he married on June 20, 1975, in Fruitland, Idaho. That autumn, he and Marsha moved to Lewiston, where their four beautiful and beloved children were born and raised. Upon arriving in Lewiston, Ted worked as a part-time deputy prosecutor and also maintained a general practice. In 1985, he joined the firm of Ware, O'Connell and Creason. In 1988, he became the senior partner of the firm, which today is known as Creason, Moore, Dokken and Geidl, PLLC. He enjoyed being part of many organizations associated with the practice of law, some of which he

IN MEMORIAM

served as president. He was especially proud of being given the exceptional professional and ethical "AV" rating by his legal peers for more than 15 years, and always strived to live up to that high standard.

He leaves behind his wife, Marsha; and four children, Robert Creason (with wife Beth and son Alex) of Alexandria, Va., Kayla Robinson (with husband Tim, daughter Olivia

and twins on the way) of Houston, Texas, Jana McGilvery (with husband Chris, and children Harley, Tyler, Kaison and Kalon) of Eagle, Idaho, and Samuel Creason (with wife Christine, and children Maggie, Evie, Lizzie and Paul) of Lewiston. Ted is also survived by his mother, Patricia Toevs of Aberdeen, Idaho; and five siblings: sister Helen "Penny" Nelsen (with husband Mike) of

Redmond, Wash.; brother Gordon Toevs (with wife Brenda) of Woodbridge, Va.; brother Ritchey Toevs (with wife Joanne) of Aberdeen, Idaho; sister Sarah Hoagland (with husband Kevin) of Boise; and sister Anne Beck (with husband Phil) of Cottonwood, Utah. Ted was preceded in death by his father, Theodore Creason, and his stepfather, Gordon Toevs.

OF INTEREST

Cheyenne House joins Seiniger Law

BOISE - Cheyenne House recently joined Seiniger Law as an associate attorney. Her areas of practice include employment law, personal injury, and workers' compensation.

Prior to joining Seiniger Law, Ms. House clerked for the Judge Jason Scott in Ada County and the Judge Robert Elgee in Blaine County. A native of Boise, Ms. House received her undergraduate degree from the University of Oregon and her law degree from the University of Idaho College of Law.



Cheyenne House

Seiniger Law is an experienced plaintiff's litigation firm, specializing in cases involving major trauma and complex medical issues as well as patients' civil rights.

Moffat Thomas members elected to Human Resources Association

BOISE - Three members of the law firm, Moffat Thomas, were elected to serve on the 2015 Board of Directors of the Treasure Valley's largest

employers association, the Human Resources Association of Treasure Valley.

C. Clayton "Clay" Gill, a Shareholder and member of the Moffatt Thomas Board of Directors, serves as the HRATV Legislative Affairs Director. Kay Walter, Human Resource Director, and Vivian Otero-Epley, Marketing Director serve as co-chairs of the association's Programs Committee.

Human Resources Association of Treasure Valley is a local non-profit organization established in 1954 for Human Resource Management professionals in the Treasure Valley. Currently, there are currently over 400 members of



C. Clayton "Clay" Gill



Kay Walter



Vivian Otero-Epley

HRATV representing many of the area's employers.

Anthony Shallot appointed to Historic Preservation Committee

BOISE - On March 31, the Boise City Council confirmed Anthony Shallot's appointment to the City's Historic Preservation Commission. Shallot, an Associate Attorney at Angstman Johnson, will fill a vacancy on the commission and complete a three-year term ending in October of 2016. Shallot is also a member of Boise State Public Radio's Community Advisory Board and Boise Young Professionals.



Anthony Shallot

Christopher Meyer joins "Dividing Waters" board

BOISE - Givens Pursley is pleased to announce that Christopher Meyer has been selected to join the Board of Advisors to the "Dividing the Waters" program of the National Judicial College. Chris will serve as the sole Idaho representative on the board composed

of 14 noted water lawyers from across the West.

The Dividing the Waters program provides judges, special masters, and referees who preside over complex water litigation with the information and training they need to resolve some of the most difficult disputes about how to allocate and share this most precious and communal resource.



Christopher Meyer

Andrade Law Offices opens a satellite office in Ontario, OR

ONTARIO - Andrade Legal is pleased to announce the opening of a satellite office in Ontario, Oregon to provide immigration legal services to smaller, often underserved communities. The office, managed by returning attorney Chris Christensen, will be a full service immigration law office - providing clients with convenient access.

Prior to rejoining Andrade Legal, Chris was the director of the Migrant Farmworker Law Center at Indiana Legal Services and conducted outreach across the state of Indiana, informing migrant and seasonal farmworkers about their legal rights and remedies, and representing them in FLSA and AWPAs cases. From 2009 through 2013,

Chris worked as an associate at Andrade Legal handling all types of immigration cases and developing specialization in consular process-



Chris Christensen

ing and waivers. Prior to that, Chris clerked for the Honorable Darrel Perry on the Idaho Court of Appeals and reviewed almost exclusively criminal and post-conviction appeals.

Kennedy Luvai elected shareholder at Parsons Behle & Latimer

BOISE – Raymond J. Etcheverry, chairman and CEO of Parsons Behle & Latimer, announced that Kennedy K. Luvai has been named a shareholder in the firm’s Boise office.

“The entire firm congratulates Kennedy Luvai on being elected shareholder,” said John N. Zarian, managing partner of Parsons Behle & Latimer’s Boise office. “Kennedy’s shareholder election speaks to his legal acumen and growing contributions to the legal profession, particularly in the area of intellectual property law.”



Kennedy Luvai

Wytychak Elder Law sold to Katherine Coyle

COURD’ALENE - Michael Wytychak III, who has practiced Elder Law in Coeur d’ Alene, Idaho since 1987, has sold his practice, Wytychak Elder Law, PLLC to attorney Katherine Monroe Coyle. Coyle has been with the office since 2007. Wytychak Elder Law, PLLC specializes in issues facing seniors and the disabled population, including estate planning, trusts, wills, powers of attor-



Katherine Coyle

ney, probate, avoidance of probate, guardianships, conservatorships, and planning for long term care expenses. Wytychak will remain with the firm as “Of Counsel.”

Coyle attended the University of Montana, graduating with honors. She attended Gonzaga University School of Law where she was an articles editor for the Gonzaga Journal of International Law and a member of the Phi Alpha Delta legal fraternity. While in law school, she interned for the Spokane County prosecutor’s office and Wytychak Elder Law, PLLC. Coyle is a member of the Kootenai Health Clinical Ethics Committee, the National Academy of Elder Law Attorneys, Idaho Women Lawyers, and the local CareNet chapter. In 2014, Coyle was honored as a North Idaho Business Journal “30 under 40” recipient.

Brian Marshall appointed to association

MERIDIAN - Brian Marshall, an attorney with Borton-Lakey Law offices in Meridian, Idaho was appointed to the Board of Directors of the Human Resources Association of the Treasure Valley (HRATV), beginning January 2015. At the same time, Brian was appointed to be a Professional Certifications Co-Chair and will work in that capacity to assist members with the resources, tools and information necessary to achieve certification and recertification through HRCI and SHRM (national certification bodies).



Brian Marshall

Robert Berlin named to AECOM legal positions

BOISE - AECOM has announced that Robert Berlin, Vice President and Associate General Counsel, will be responsible for overseeing employment and labor law, as well as compliance and ethics, for the company's global construction business. His office will be in Boise.

Berlin previously held similar positions for URS, which recently merged with AECOM. Prior to joining AECOM and URS legacy company Morrison Knudsen in 1999, Berlin was a partner at the Boise law firm of Eberle Berlin.



Robert Berlin

AECOM, a Fortune 500 company, is one of the world's largest engineering and construction firms, providing services to the infrastructure, energy, industrial, governments, buildings and sports markets, with nearly 100,000 employees in over 150 countries and annual revenue of \$20 billion.

Eberharter-Maki & Tappen, PA merges with Moore, Smith, Buxton and Turcke

BOISE - The law firm of Eberharter-Maki & Tappen (EMT) recently merged with the law firm of Moore, Smith, Buxton & Turcke (MSBT) of Boise. An overview of MSBT, its attorneys and the services it provides can be found at <http://www.msbtlaw.com/>.

MSBT will allow the new firm to provide a greater depth and breadth of legal services to Idaho school districts and charter schools.

Holland & Hart's Corporate and Commercial Litigation Groups expand in Boise

BOISE – Holland & Hart's Boise office has expanded with the addition of Gabriel Hamilton and Matthew Bradshaw in the Corporate group and Sara Berry in the Commercial Litigation group. All three attorneys are joining as associates and bring both practical skills and substantive legal knowledge to their practice areas.

Gabriel Hamilton advises companies on general corporate, transactional, and regulatory matters. He assists clients in regulated industries including insurance, health care, and banking. Hamilton practiced at Hawley Troxell in Boise before joining Holland & Hart.



Gabriel Hamilton

Matthew Bradshaw provides strategic counsel to companies of all sizes, from family-owned businesses and start-up companies to large privately and publicly held corporations, on a broad range of commercial transactions, such as entity formation, financing, governance, mergers and acquisitions, and business succession planning. Bradshaw practiced at Hawley Troxell in Boise prior to joining Holland & Hart.



Matthew Bradshaw

Sara Berry is a litigation associate, counseling clients on a wide range of commercial litigation matters relating to contracts, products liability,

property use, and appellate practice. Berry previously practiced at Stoel Rives, and was a clerk for the U.S. Court of Appeals for the Ninth Circuit and the Idaho Court of Appeals.



Sara Berry

"We are pleased to welcome these talented new associates to Holland & Hart," said Brian Hansen, administrative partner for the Boise office.

Attorney joins Andrade in Boise

BOISE - Andrade Legal, a Boise based Immigration law firm recently welcomed attorney Christine Meeuwsen to its team. Ms. Meeuwsen has joined the Law Firm of Andrade Law, specializing in Immigration law in Boise. Ms. Meeuwsen graduated from the University of California – Davis School of Law in 2014 and has joined Andrade as a Public Interest Law Fellow. She has experience in both immigration and employment law. Previously she interned at Tahirih Justice assisting immigrant women and girls fleeing gender based violence and the California Department of Fair



Christine Meeuwsen

Employment and Housing investigating claims of employment discrimination. Ms. Meeuwsen also served for two years as a small enterprise development Peace Corps Volunteer in Benin, West Africa where she established micro savings and loan associations for women's groups in several small villages.



I would like to thank my many clients, colleagues, mentors, family and friends who have helped make this award possible.

Thank you for your help in making my selection as one of the IBR 2015 Women of the Year possible!

I am honored.

Wendy Shoemaker



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Mary Hobson: From the Boardroom to Indigent Front Lines

Dan Black

Idaho Volunteer Lawyers Program Director Mary Hobson retired last month after serving nine years in that high-profile position with the Idaho Law Foundation. She now plans to spend her days gardening, traveling and volunteering as a fundraiser for the Access to Justice Campaign.

Mary's connection to IVLP began when she volunteered on the IVLP policy council and was intrigued by its central challenge – how to bring non-family law attorneys on as regular volunteers. Once she joined IVLP, Mary and the IVLP staff increasingly put their focus on making pro bono accessible to all Idaho attorneys.

“It has been a real honor to have the opportunity to work with the public and the Idaho bar,” she said, “and to see the tremendous generosity and professionalism of our Bar members. I got a lot more out of it than I gave,” she said.



Mary Hobson

The IVLP director matches hundreds of lawyers with up to 1,000 low-income clients each year, keeping in mind the attorneys' skill sets, the nature of the legal issue and how much time a case will likely take. Quite often, IVLP's highest priority clients are low-income mothers who need the safety and protection of the legal system.

“It gives you perspective to experience what people are going through,” Mary said. But she never felt burnout after dealing up close to people's tragedies. Mary said she's “not one to fret about what we're not

doing. Every day something is positive enough that you want to come back and do it again.”

An Idaho lawyer for 38 years, Mary started out as a litigator then moved to the corporate track. After a few years as an Assistant United States Attorney she went into private practice. One of her major clients, Mountain Bell, asked her to join its legal department and her career niche solidified. Mary had a full time telecommunications practice with US West and its successors as the telephone monopoly broke apart and competition created a huge demand for legal services.

She reflected on how her interest in IVLP became a passion. “There are a lot of good lawyers that know their way around a courtroom,” she said, and that more attorneys could do pro bono if they were properly encouraged. “The challenge was to get them engaged. A volunteer doesn't want to slip up by taking a case in an area of law that is unfamiliar,” she said. So IVLP set up special training for taking family law cases, arranged for mentors and even organized legal clinics based on areas where pro bono attorneys are needed such as immigration, military veterans, and the homeless.

“It was a real boon when University of Idaho required students to do pro bono work,” she said. New lawyers understand the Rule 6.1 commitment. And when Concordia University came on the scene, they were very focused on community service.

She understood that many attorneys don't have enough time to take a case. Legal clinics provide them a way of helping people sitting across the table without an extensive commitment.

The path has not always been easy. There have been clients who expected too much from their attorney, and vice versa. The staff attempts

Mary said she's “not one to fret about what we're not doing. Every day something is positive enough that you want to come back and do it again.”



to screen clients, prepare some basic case materials and counsels the clients about making their appointments and having documents ready. For attorneys, she said, “there are client control issues with every client, even in pro bono cases.”

One of her co-workers, Gloria Munoz, said “Mary cares very much for people and the disadvantaged, especially women, and goes the extra mile whenever possible, in order to find resources for IVLP callers. She truly cares and walks the walk.”

ILF Executive Director Diane Minnich echoed those sentiments. “We appreciate Mary's commitment to providing legal services to those in need,” she said. “Mary has worked tirelessly to improve the pro bono legal services provided throughout the state.”

About the Author

Dan Black is the Communications Director for the Idaho State Bar and Managing Editor of *The Advocate*. He is a former newspaper reporter, copy editor and managing editor.



25 YEARS OF EXPERIENCE. AND WE'RE JUST GETTING STARTED.



After 25 years as a leading Idaho real estate, development, and land use law firm, we are adding more ways to help your business succeed. In order to better serve your business, we are growing ours by welcoming Chad Lamer, a certified land planner who focuses on real estate, land use, and development, and Tara Martens Miller, who specializes in business and real estate transactions and employment and commercial litigation.

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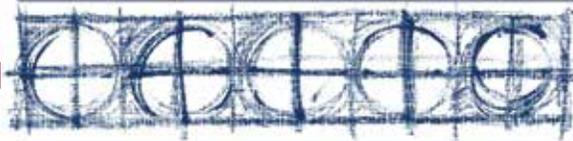


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2014 Idaho Volunteer Lawyers Program Wall of Fame

Please join us in saying a special thanks to the 750 Idaho attorneys who accepted or completed pro bono assignments in family law, immigration, consumer protection, wills, benefits, foreclosure matters, and other special needs for IVLP applicants in 2014. Some of the volunteers helped represent individuals facing foreclosure, stepped in to represent Court Appointed Special Advocates in a child protection cases, or helped a grandparent rescue an innocent grandchild from a dysfunctional home by establishing guardianship. The *IVLP Wall of Fame* also includes the names of attorneys or judges who participated in other IVLP activities including: Legal Clinics held for Veterans, Seniors, and the larger community or on the Bankruptcy Helpline. Volunteers also participated in *Soundstart* (proactive education and motivation sessions for low-income parents) and Volunteer Lawyers for Emerging Businesses (assisting small business owners with their legal needs). Attorney members of the Idaho Pro Bono Commission and the IVLP Policy Council are also listed.

Gregory Marshall Adams, Boise
 Andrew A. Adams, Idaho Falls
 Darrel William, Lewiston
 David E. Alexander, Pocatello
 Cheryl A. Allaire, Hailey
 Jared W. Allen, Idaho Falls
 Debra J. Alsaker-Burke, Boise
 Mackenzie Anne Amen, Boise
 Todd Christopher Amick, Boise
 Kenneth L. Anderson, Lewiston
 John A. Anderson Jr., Caldwell
 Maria E. Andrade, Boise
 Anthony C. Anegon, Lewiston
 Sam L. Angell, Idaho Falls
 Thomas J. Angstman, Boise
 John C. Arkoosh, Boise
 Charles Thomas Arkoosh, Boise
 Paul L. Arrington, Twin Falls
 Larry C. Ashcraft, Mountain Home
 John M. Avondet, Idaho Falls
 Sunrise A. Ayers, Boise
 Durward (Dave) K. Bagley II, Pocatello
 Kent W. Bailey, Meridian
 Melanie E. Baillie, Coeur d'Alene
 Eric F. Baldwin, Meridian
 Robert R. Ball, Boise
 James K. Ball, Boise
 Ryan A. Ballard, Rexburg
 Lisa A. Barini-Garcia, Twin Falls
 Donald R. Barker, Moscow
 Randall S. Barnum, Boise
 John C. Barrera, Nampa
 Alfred E. Barrus, Burley
 Nancy A. Baskin, Boise
 Charles B. Bauer, Boise
 Richard L. Baughman, Coeur d'Alene
 Jeanne C. Baughman, Boise
 Aaron J. Bazzoli, Caldwell
 Gregory S. Bean, Henderson
 Kevin J. Beaton, Boise

Joel A. Beck, Pocatello
 Kenton Abrams Beckstead, Twin Falls
 Barbara A. Beehner-Kane, Boise
 Christopher James Beeson, Boise
 Matthew J. Beeter, Boise
 William Lyman Belnap, Boise
 Howard A. Belodoff, Boise
 Frederick F. Belzer, Pocatello
 Shane O. Bengoechea, Boise
 Dennis A. Benjamin, Boise
 Emil R. Berg, Boise
 Chad E. Bernards, Boise
 G. Philip Bernstein, Boise
 Sara M. Berry, Boise
 Brian D. Bethke, Boise
 James A. Bevis, Boise
 Philip M. Bevis, Boise
 Loren D. Bingham, Twin Falls
 Bruce H. Birch, Payette
 Barton J. Birch, Driggs
 Erika Birch, Boise
 Bruce S. Bistline, Boise
 Eric R. Bjorkman Jr., Boise
 Brian R. Blender, Boise
 Scott T. Blotter, Sandy
 Ralph R. Blount, Boise
 Richard C. Boardman, Boise
 Tamara L. Boeck, Boise
 Erik J. Bolinder, Boise
 Lisa B. Boman, Nampa
 Stephanie J. Bonney, Boise
 Allan Ray Bosch, Boise
 Brian L. Boyle, Boise
 Alison E. Brace, Boise
 Kevin C. Braley, Boise
 Maureen R. Braley, Boise
 Dean C. Brandstetter, Idaho Falls
 M. Sean Breen, Boise
 Amanda A. Breen, Ketchum
 George William Breitsameter, Nampa

Carol Brennan, Eagle
 Rebecca A. Broadbent, Boise
 John J. Browder, Boise
 Philip A. Brown, Gooding
 Christian D. Brown, Meridian
 Hon. Mitchell W. Brown, Soda Springs
 Jeremy D. Brown, Blackfoot
 Jason Michael Brown, Pocatello
 Bart D. Browning, Twin Falls
 Jeffrey D. Brunson, Rexburg
 Thomas J. Budge, Pocatello
 John J. Bulger, Pocatello
 Muriel M. Burke-Love, Coeur d'Alene
 Laura E. Burri, Nampa
 A. Elizabeth Burr-Jones, Burley
 John A. Bush, Boise
 Thomas A. Bushnell, Bonners Ferry
 Paul G. Butikofer, Rigby
 D. Kirk Bybee, Pocatello
 Vicki L. Cade, Caldwell
 Jessica Cafferty, Caldwell
 Justin Scott Cafferty, Boise
 Brett R. Cahoon, Pocatello
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 Kimmer W. Callahan, Coeur d'Alene
 Chad A. Campos, Idaho Falls
 Kari M. Campos, Idaho Falls
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 Hon. Rick Carnaroli
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 Andrew M. Chasan, Boise
 Kirk Sterling Cheney, Boise
 Glenna M. Christensen, Boise

Susan K. Christensen, Boise
 Matthew T. Christensen, Boise
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 David P. Claiborne, Boise
 Sandra L. Clapp, Eagle
 Alan J. Coffel, Nampa
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 Meghan S. Conrad, Boise
 Beth L. Coonts, Boise
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 Anna Elizabeth Courtney, Boise
 Tracy J. Crane, Anderson, Boise
 Justin T. Cranney, Boise
 Aaron Crary, Idaho Falls
 John N. Crawford, Boise
 Michael J. Crawford, Mountain Home
 Gregory L. Crockett, Idaho Falls
 Christopher J. Cuneo, Boise
 Amy Cunningham, Pocatello
 Nathan J. Cuoio, Pocatello
 Paul T. Curtis, Idaho Falls
 Hon. Candy W. Dale
 William R. Dalling, Eagle
 John B. "Rocky" Dallum, Portland
 Nathaniel J. Damren, Boise
 Daniel C. Dansie, Salt Lake City
 Layne Davis, Boise
 Lynnette Michele Davis, Boise
 Weston S. Davis, Idaho Falls
 Karl R. Decker, Idaho Falls
 R. George DeFord Jr., Nampa
 Julie A. DeFord, Nampa
 Mark A. DeMeester, Boise
 Jennifer S. Dempsey, Boise

Wiley R. Dennert, Idaho Falls
Stacey DePew, Jerome
Nicole R. Derden, Eagle
Richard Allen Diehl Jr., Pocatello
Kevin E. Dinius, Nampa
Seth H. Diviney, Boise
David E. Dokken, Lewiston
Thomas B. Dominick, Boise
Brian N. Donesley, Boise
M. Adelle Franklin Doty, Boise
Kimberly Ann Doyle, Morristown
William G. Dryden, Boise
Merritt L. Dublin, Boise
Michael E. Duggan, Caldwell
Yvonne A. Dunbar, Boise
Mariah R. Dunham, St. Maries
M. Lynn Dunlap, Twin Falls
Tracy Dunlap, Hailey
Kristin B. Dunn, Boise
Marty Durand, Boise
Craig H. Durham, Boise
Kirstin K. Dutcher, Ketchum
Thomas E. Dvorak, Boise
Douglas K. Dykman, Pocatello
Malcolm S. Dymkoski, Coeur d'Alene
W. Brent Eames, Logan
Ryan Thomas Earl, Nampa
Matthew S. EchoHawk, Boise
Richard B. Eismann, Nampa
Michael J. Elia, Boise
Joseph L. Ellsworth, Boise
Summer A. Emmert, Cottonwood
Richard A. Eppink, Boise
Lane V. Erickson, Pocatello
Hyrum Dean Erickson, Rexburg
John Matthew Eustermann, Eagle
Joshua S. Evett, Boise
Megan J. Fernandez, Idaho Falls
Barbra Ferre, Nampa
Michelle R. W. Finch, Boise
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