

A scenic photograph of a mountain valley. In the foreground, a calm lake reflects the surrounding landscape. The middle ground is dominated by steep, rocky mountain slopes with patches of snow. In the background, more rugged mountain peaks are visible under a clear sky. The overall color palette is dominated by blues, greys, and whites, with some green from trees in the lower left.

The Advocate

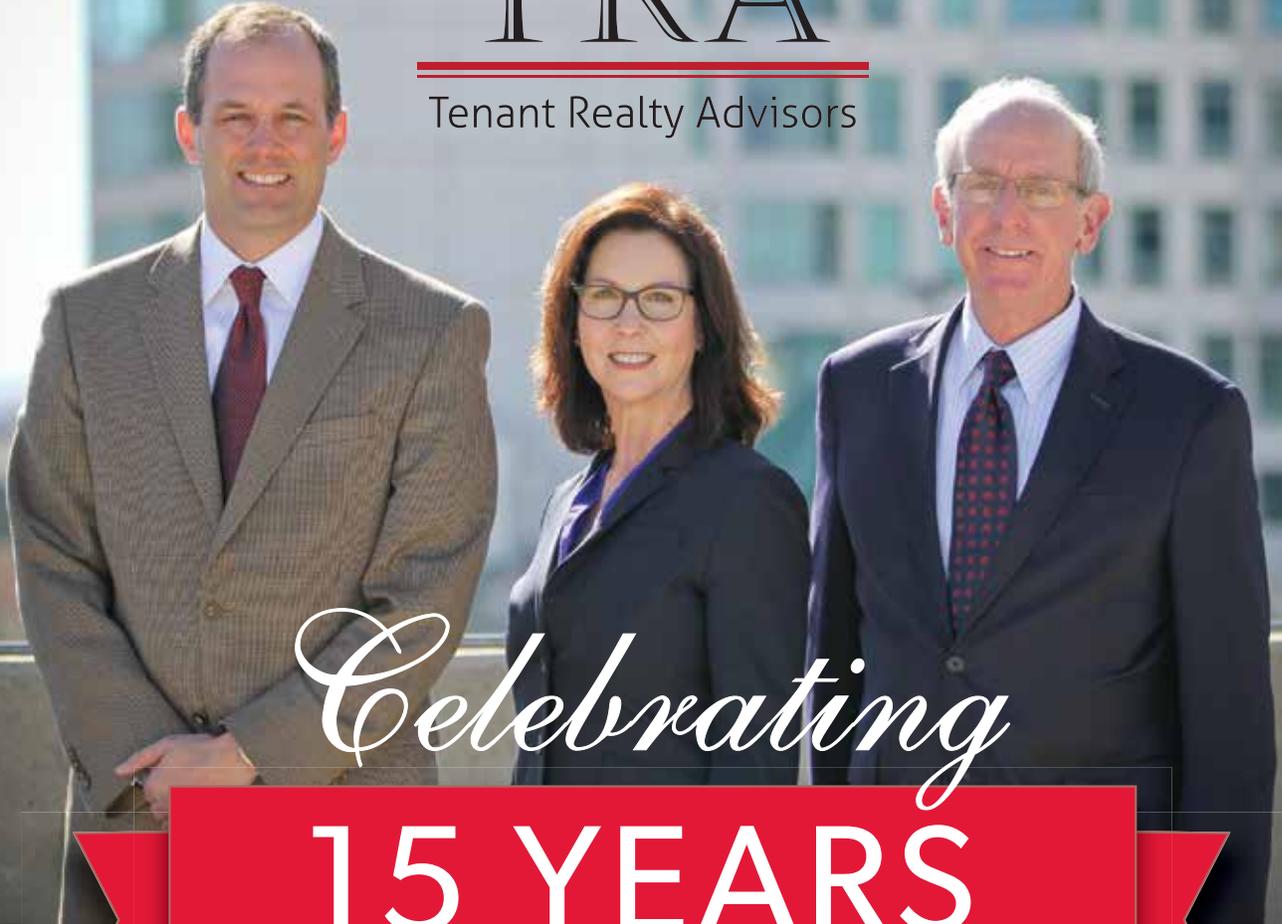
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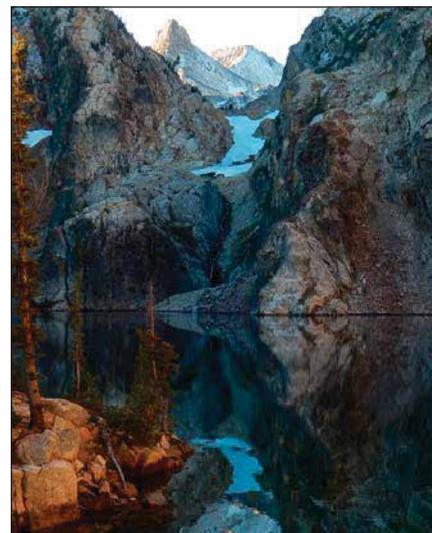
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On the Cover:

Photo by John Marshall, an attorney in Boise. This photo captures an early morning reflection on Goat Lake in the Sawtooth Mountains. John packed into the lake last October and awoke before sunrise in hopes of a calm morning that would provide a good reflection of the cliffs on the opposite side of the lake. "The early rise paid off with a mirror-perfect reflection and the morning sun lighting the distant peaks and the shore of the lake where I was camped," John said.

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The Advocate (ISSN 05154987) is published the following months: January, February, March, April, May, June, August, September, October, and November by the Idaho State Bar, 525 W. Jefferson Street, Boise, Idaho 83702. Subscriptions: Idaho State Bar members receive *The Advocate* as part of their annual dues payment. Nonmember subscriptions are \$45 per year. Periodicals postage paid at Boise, Idaho.

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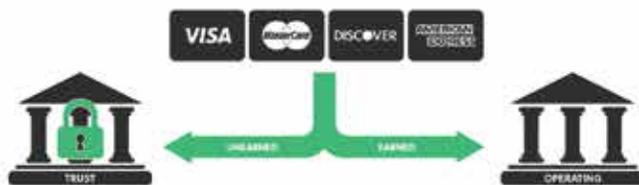


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When: September 17, 2015, 4:00 p.m.

**Where: Law & Justice Learning Center
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September 17

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

9:00 a.m. (MDT)

2.0 CLE credits

September 18 & 19

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Section

The Sun Valley Resort, 1 Sun Valley Road – Sun Valley

10.5 CLE credits of which .5 is Ethics

October

October 1

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 1.5 is Ethics – **NAC**

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

October (continued)

October 2

*Divorce & Business: Experts Appraisals/Evaluations,
Determining Self-Employment Income and Dissecting Tax
Returns*

Sponsored by the Family Law Section

Courtyard by Marriott – 1789 S. Eagle Road – Meridian

8:30 a.m. (MDT)

7.0 CLE credits

October 9

*Divorce & Business: Experts Appraisals/Evaluations,
Determining Self-Employment Income and Dissecting Tax
Returns*

Sponsored by the Family Law Section

Red Lion Pocatello, 1555 Pocatello Road – Pocatello

8:30 a.m. (MDT)

7.0 CLE credits

October 9

Appellate Practice CLE

Sponsored by the Appellate Practice Section

The Idaho Law and Justice Learning Center, 514 W.

Jefferson Street – Boise

8:30 a.m. (MDT)

5.5 CLE Credits

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Are Bullying Lawyers Psychopaths?

Tim Gresback
President, Idaho State Bar
Board of Commissioners

What causes some lawyers to bully? Do bullying lawyers have a psychological disorder that feeds mean behavior?

According to Oxford University's Professor Kevin Dutton, whose work I'll discuss more in a minute, the legal profession has the second largest percentage of psychopaths, trailing only corporate CEOs. Is there something about our profession that attracts psychopaths? This month I will discuss the relationship between bullies, psychopaths, and lawyers. As shocking as it may initially sound to you, a lot of lawyers possess many attributes of a psychopath — and this can actually be a good thing.

Over the last several decades, the definition of psychopath has evolved. In *The Mask of Sanity* (1941), Hervey Cleckly pointed out that among psychiatric patients at the Veterans Administration in Georgia, some appeared confident, friendly, and well-adjusted. Cleckly laid the modern framework for describing, assessing, and thinking about psychopaths.

The Mask of Sanity went through several editions, including the important fifth edition in 1976. Cleckly outlined 16 behavior characteristics of a psychopath. In 1980 the American Psychiatric Association, building on Cleckly's work, revised their diagnostic manual to include this definition of the disorder:

Individuals [with it] are arrogant and self-centered, and feel

They may act aggressively or sadistically toward others in pursuit of their personal agendas and appear to derive pleasure or satisfaction from humiliating, demeaning dominating, or hurting others

privileged and entitled. They have a grandiose, exaggerated sense of self-importance and they are primarily motivated by self-serving goals. They seek power over others and will manipulate, exploit, deceive, con, or otherwise take advantage of others, in order to inflict harm or to achieve their goals. They are callous and have little empathy for others' needs or feelings unless they coincide with their own. They show disregard for the rights, property, or safety of others and experience little or no remorse or guilt if they cause any harm or injury to others. They may act aggressively or sadistically toward others in pursuit of their personal agendas and appear to derive pleasure or satisfaction from humiliating, demeaning dominating, or hurting others. They also have the capacity for superficial charm and ingratiation when it suits their purposes. They profess and demonstrate minimal investment in conventional moral princi-

ples and they tend to disavow responsibility for their actions and to blame others for their own failures and shortcomings.

Does this describe some of the lawyer bullies you've encountered?

Psychopaths lack empathy and an inner police officer. Their brain scans show little or no response to grotesque images, nor are they revulsed by rotten smells. Males outnumber female psychopaths by roughly 20 to 1. As to what causes psychopathy, psychologists are divided on whether psychopaths are born or made. Those who believe psychopaths are products of their environment point to the high percentage of psychopaths who have endured childhood abuse. The nature proponents point to psychopathy running in families.

Psychopaths give clinical psychiatrists fits: no treatment is particularly effective. In this age of medication, no pill has been devised to cause empathy. Psychotherapy is usually not effective because the psychopath will almost never concede anything is wrong. Punishment does not deter psychopaths because they do not rec-

ognize that their behavior requires modification. Although prison may protect the public from the criminal psychopath, it does almost nothing to rehabilitate.

Our profession is not riddled with full-blown, sometimes violent, dangerous psychopaths. Your idea of a psychopath might include Anthony Hopkins's portrayal of Hannibal Lecter in *Silence of the Lambs*. However, there is no simple definitive test to determine whether a person is a psychopath. The diagnosis requires clinical judgment. Like autism, however, psychopathy is now viewed along a spectrum.

Recently a newer category has arisen in discussing this spectrum: the "functional" psychopath. In *The Wisdom of Psychopaths* (2012), Professor Dutton contends that functional psychopaths possess many of the attributes that fuel success for the CEO or lawyer: coolness under pressure, fierce determination, supreme self-confidence, and social charm. Dutton points out that some leaders, like Presidents John F. Kennedy and Bill Clinton, exhibited distinctive psychopathic traits. For Dutton, functional psychopaths are not a social negative but a social positive.

If Dutton is right and many of us — to different degrees — possess the socially beneficial attributes of the psychopath, it may have a profound effect on how we approach the lawyer bully. When facing the machinations of a bully, we might mistakenly use techniques that would only change the behavior of those who are not on the spectrum: a give-and-take discussion; information about consequences; and verbal disapproval. Psychopaths are not embarrassed; they have no shame. A lawyer on the receiving end of psychopathic bullying is wasting time when trying to appeal to the perpetrator's non-existent sense of empathy. You can't reason with a psychopath either. While most of us would

lose sleep if we got a letter from bar counsel, a psychopath dismisses it as an inconvenience caused by those who just don't get it.

Civility seminars don't reform a functional psychopath. It's useless to beg them to be nice. Instead, we must show them how cooperation will be rewarded — and better yet, convince them that it was their idea.

Over the years I've seen wonderful lawyers who are effective problem-solving collaborators. I've also encountered brilliant, hard-charging, uncompromising trial attorneys. The former are often driven from the profession by the latter. Like the rare pitcher who can also hit home runs, effective collaborators who also win landmark verdicts are few and far between. Instinctive collaborators experience professional frustration when they are sent into trial with gladiators. It may make sense, early in our careers, to assess if one style is clearly a good fit for our particular makeup.

Collaborators might not make the best criminal trial defenders. Our system correctly demands that a defender, when appropriate, convincingly look the jury in the eye and explain how the prosecutor failed to prove guilt beyond a reasonable doubt — even when the client has confessed confidentially. A collaborator might be unnerved by graphic autopsy photos which a functional psychopath could take in stride. Similarly, when I'm on the operating

table getting a nasty tumor removed from my frontal cortex, I don't care about my surgeon's bedside manner and welcome the confident steady-handed functional psychopath. I'll go elsewhere for the post-op hug.

Perhaps lawyer bullies fall into two camps. The first type scores high on the psychopathic spectrum. The second is on the other end of the spectrum and is saddled by fear. The fear-based bully, unlike the psychopath, lacks self-confidence and sometimes, in an effort to compensate, comes on too strong. Unlike the psychopath, the fear-based bully feels terrible when called out for inappropriate behavior. Unlike the psychopath, the threat of appropriate consequences for a fear-based bully is extremely persuasive — the remorse is genuine.

I've seen this dichotomy in the attorney disciplinary cases that have come before me in my role as Commissioner over the last two years. Some lawyers apologetically bend over backwards to acknowledge a misdeed and make it right. Others approach the disciplinary process as a misguided assault on their supreme vision for justice.

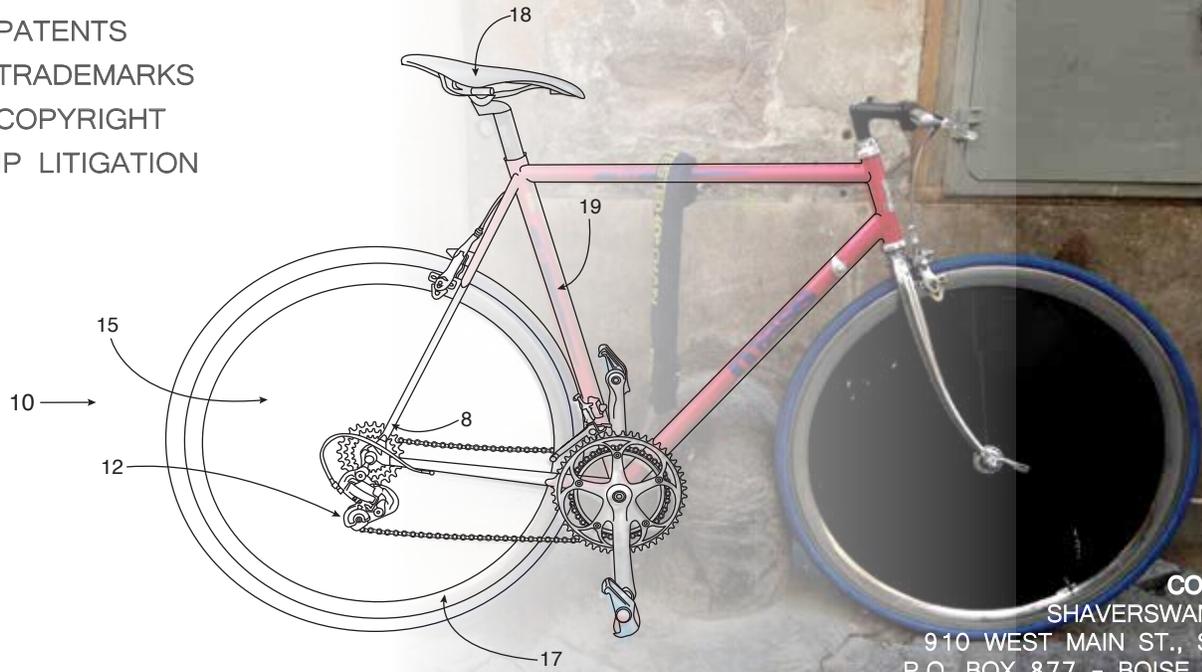
Next month I'll delve deeper into how to deal with bullying lawyers. The good news is that not every lawyer you tussle with is a dangerous psychopath. In the meantime, beware of the super-confident bullying lawyer void of empathy. The stick won't help — use the carrot instead.

Tim Gresback, current ISB president, is a past president of the Idaho Trial Lawyers Association as well as the Idaho Association of Criminal Defense Lawyers. He is certified as a civil trial specialist. He serves on the Idaho Supreme Court Evidence Committee and taught trial advocacy at the University of Idaho College of Law for 10 years. He lives with his wife, Dr. Sarah Nelson, and son, Luke, in Moscow.



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Defense lawyers help foodbank

August 10 was Idaho Food Bank Volunteer Night in Pocatello. The event was sponsored by Idaho Association of Criminal Defense Lawyers with support of the Sixth District Bar Association. The Idaho Foodbank helps address the serious problem of hungry Idahoans across the state. Volunteers are always needed to sort and package food boxes.

Justice Jim Jones to serve as Chief Justice of Idaho Supreme Court

Justice Jim Jones has been elected by his colleagues to serve as Chief Justice of the Idaho Supreme Court. Justice Jones begins his four year term as Chief Justice on August 1. He succeeds Justice Roger S. Burdick, who will continue to serve on the state’s highest court. The new Chief Justice was formally sworn in at a ceremony on August 3.

“I feel honored to be able to continue to serve Idahoans as the next Chief Justice of the Idaho Supreme Court,” said Justice Jones. “A lot of responsibility comes with this position and I thank my colleagues for believing I am up for the challenge. Justice Burdick has done a tremendous job over the last four years and I look forward to building upon his success so we can continue to pro-

vide timely justice to all Idahoans.”

During Justice Burdick’s tenure as Chief Justice, he worked with the Idaho Legislature to pass the Justice Reinvestment Initiative, helped launch a new technology platform to help modernize court operations throughout the state and chaired 15 interview sessions with 131 applicants for district judge and appellate positions.

The new Chief Justice says he plans to continue the implementation of initiatives instituted by the Supreme Court in recent years to improve the administration of justice. “The Supreme Court is a five-person team and we are working together to make the court system operate more fairly and efficiently,” said Justice Jones. “My expectation is that we will continue with those on-going efforts.”

Justice Jones, an Idaho native, was elected to the high court in 2004 and re-elected in 2010. After receiving a political science degree from the University of Oregon and a law degree from Northwestern University School of Law in Chicago, he served in the U. S. Army for two years. He worked for former U.S. Senator Len

Jordan for three years, then practiced law in Jerome and went on to serve two-terms as Idaho’s Attorney General in the 1980’s. Justice Jones is a decorated Vietnam combat veteran and is an active member of his community, serving on various boards and volunteering with numerous non-profit organizations over the years.

Idaho Law and Justice Learning Center

The University of Idaho College of Law faculty and staff in Boise moved into the Idaho Law and Justice Learning Center (ILJLC) during the summer, and classes for the College of Law in Boise began in the facility on Monday, August 24. A celebration for the opening of the ILJLC is slated for Thursday, September 24. The event will be open to the public and will include food, beverages, tours and welcoming remarks from Lieutenant Governor Brad Little, University of Idaho President Chuck Staben, College of Law Dean Mark Adams, former Idaho Supreme Court Chief Justice Roger Burdick, and former UI Interim President and College of Law Dean Don Burnett. The festivities will begin at 5 p.m., and the main program at 5:45.



Hon. Jim Jones

2015 District Bar Association Resolution Meetings

District	Date/Time	City
First Judicial District	Thursday, November 5 at Noon	Coeur d’Alene
Second Judicial District	Thursday, November 5 at 6 p.m.	Clarkston, WA
Third Judicial District	Thursday, November 19 at 6 p.m.	Nampa
Fourth Judicial District	Thursday, November 19 at Noon	Boise
Fifth Judicial District	Wednesday, November 18 at 6 p.m.	Twin Falls
Sixth Judicial District	Wednesday, November 18 at Noon	Pocatello
Seventh Judicial District	Tuesday, November 17 at Noon	Idaho Falls

IDAHO ACADEMY OF LEADERSHIP FOR LAWYERS CLASS OF 2015-2016



Brenda M. Bauges



Andrea L. Courtney



Amber C. Ellis



William K. Fletcher



Patrick J. Geile



Jamila D. Holmes



Teri Jones



Matthew J. McGee



April L. Pope



Michael K. Porter



Julie Stomper



Robert J. Taylor

Idaho Academy Leadership for Lawyers Announces 2015 - 16 Class

The Idaho Academy of Leadership for Lawyers (IALL) proudly announces the 2015-16 class. Now in its fifth year, IALL's mission is to promote diversity and inspire the development of leadership within the legal profession.

Twelve lawyers from different practice areas with a variety of experiences from various parts of Idaho comprise the class. Participants will enjoy an interactive leadership training program designed specifically for lawyers. The Academy will include five sessions from September 25, 2015 – May 6, 2016 with a graduation ceremony following the completion of the program. For more information please contact Mahmood Sheikh, Deputy Executive Director, at (208) 334-4500.

The 2015 - 16 IALL Class

Brenda M. Bauges

*Office of the Attorney General
4th District District*

Andrea L. Courtney

*Office of the Attorney General
4th District District*

Amber C. Ellis

*St. Luke's Health System
4th District*

William K. Fletcher

*Hawley Troxell
4th District*

Patrick J. Geile

*Foley Freeman, PLLC
4th District*

Jamila D. Holmes

*Kootenai County Prosecutor's Office
1st District*

Teri Jones

*Ada County Public Defender
4th District*

Matthew J. McGee

*Moffatt Thomas
4th District*

April L. Pope

*Battelle Energy Alliance, LLC
7th District*

Michael K. Porter

*Canyon County Prosecuting Attorney
3rd District*

Julie Stomper

*Beard St. Clair Gaffney PA
7th District*

Robert J. Taylor

*Taylor Law & Mediation PLLC
4th District*



Executive Director's Report

Thank you for Your Service

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

At the 2015 Idaho State Bar Annual Meeting in Sun Valley, eight lawyers and one non lawyer were honored for their service to the bar, the foundation and their communities. We are fortunate and thankful for the commitment of these nine volunteers. The time, energy and resources donated make a difference to the Idaho legal profession and the Idaho public.



Courtney Beebe

Office of Administrative Hearings,
Spokane Valley

Courtney is truly an engaged contributor to the profession, having given her time to the ISB Character & Fitness Committee, bar exam grading and the Idaho Academy of Leadership for Lawyers. She is also involved in ABA committees. She was inspired by her mother, grandmother and aunt who dedicated their careers to serving the greater good. She said her contributions have taught her a great deal, which motivates her to continue to serve.



Courtney Beebe

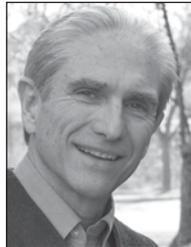
The time, energy and resources donated make a difference to the Idaho legal profession and the Idaho public. We are proud of these recipients of the Service Award.



Bruce S. Bistline

Bistline Law, Boise

For 18 years, Bruce has served as a mediator on the ISB Fee Arbitration Program. He patiently and methodically goes about finding an agreeable outcome for both the attorneys and clients. In so doing, he draws on his extensive training and experience as a mediator and peace-maker. We are fortunate for his long term committee to the fee arbitration program.



Bruce S. Bistline

Debhra J. Carnahan

Carnahan Law Offices, Boise

Debhra took on a difficult and time consuming task, closing another attorney's practice. Debhra is a solo practitioner who regularly does pro bono work. She earned

the ISB Pro Bono award in 1998. For this years' Service Award, she was nominated in recognition for her work closing the practice of a lawyer who had abandoned his practice. Her priorities are clear — take care of clients.

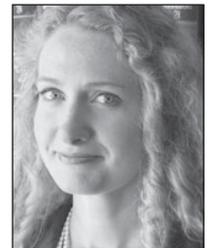


Debhra J. Carnahan

Amber C. Ellis

Ada County Prosecutor's Office,
Boise

An eager and effective volunteer, Amber works on no less than four ISB committees, and, remarkably, has time for other legal groups and for arts organizations as well. Her dedication and efforts take her from the Humane



Amber C. Ellis

Society to the Boise Little Theater. We are especially thankful for her help grading bar exams, working on *The Advocate* Editorial Advisory Board, Law Day planning and participation with the ISB Professionalism and Ethics Section.

Kimbell D. Gourley

Jones Gledhill Fuhrman Gourley, PA, Eagle

The ISB Commercial Law & Bankruptcy Section has benefited a great deal from the contributions made over the years by Kim. He served on the board's governing council for seven years, including time editing the Section's semi-annual newsletter, monitoring the list serve program and planning the annual seminar as well as serving as section chair. His leadership and enthusiasm for service helped the Section serve as a vibrant partner to many practitioners.



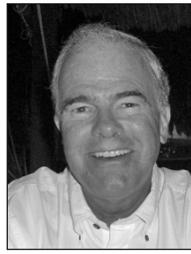
Kimbell D. Gourley

G. Lance Salladay

Salladay Law Office, Boise

Lance has been a leader on the ISB Dispute Resolution Section and the Litigation Section — including time as chair of Litigation Section when it was awarded Section of the Year

in 2013. He enjoys meeting people, finding common cause and working with other talented volunteers. He finds time to assist the boards of Hays Shelter Home and Ballet Idaho, and serves as an Ambassador for the Bogus Basin Ski Area.



G. Lance Salladay

Cpt. Stephen A. Stokes

Idaho National Guard, Boise

Steve really stepped up to meet the needs of Idaho's veterans, service members and families with his work with the Idaho Military Legal Alliance. He also serves on the Pro Bono Commission, and as a board member helped the Family Law Section with the Family Law Formbook revisions. He regularly helps with the CASA program and numerous other ventures. For all of his efforts, he retains his original motivation – simply to help.



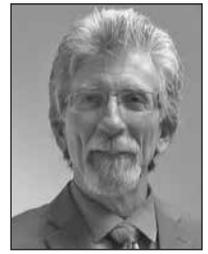
Cpt. Stephen A. Stokes

Laird B. Stone

Stephan, Kvanvig, Stone & Trainor, Twin Falls

Laird extends his realm of ser-

vice into a wide variety of places. He has served in various District Bar Association positions since 1983. Politically, he has helped various campaigns, and also served as a State Legislator, and on the State Board of Education. He's very involved with American Legion Baseball, his church and various arts organizations. He recently established CSI legal clinics for students, which have been well received by the college and students.



Laird B. Stone

Mark Young

Raymond James Financial Services, Inc., Idaho Falls (Non-lawyer)

As non-attorney recipient, Mark has offered distinguished service to the ISB Professional Conduct Board, is a member of Rotary, serves on the Idaho Department of Commerce Economic Advisory Council, and is a passionate supporter of the City Club of Idaho Falls. He was inspired by his father, who was an attorney and judge, to give back to the community in a variety of ways.



Mark Young

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Welcome From the Water Law Section

Candice M. McHugh

“Isn't the water on my property mine to use?”
“Can I sell my surface water rights and just drill a well instead?”

“If water is a public resource, how can someone own a water right?” These are some of the questions that I have recently been asked by water users and I am sure that many water attorneys have been asked similar questions over the years.

One of the reasons I enjoy being a water rights attorney is the diversity of my clients. From individual farmers, irrigation entities, to municipalities, understanding each clients' interest in water and its utility is always a fun and interesting challenge. We water rights attorneys also get to work with geologists, engineers, and hydrologists, to name a few, which enriches the experience in solving problems for water users. As one of my colleagues often remarks, “most water right issues can ultimately be solved by engineering ... if money's no object!”

In the past two years, the Water Law Section has reinvigorated our role to better serve the legal community and its members. Last year, prior to the signing of the Final Unified Decree in the Snake River Basin Adjudication (SRBA), the Water Law Section and many of its members, interviewed key individuals and published a book, *Through the*

This issue of *The Advocate* provides an update on what is happening in adjudications around the state.

Waters: An Oral History of Snake River Basin Adjudication. The hope is that this effort will solidify this landmark water rights' adjudication case in history and prove to be a useful tool in 20 years when water attorneys are wondering exactly what happened in the SRBA and why.

This past spring, the Water Law Section sponsored a legislative intern to learn about how the legislative process impacts water rights and interests and to provide a summary of what legislation was introduced

or passed that may impact water use in Idaho. The section intends to continue providing this experience. This issue of *The Advocate* provides an update on what is happening in adjudications around the state as well as articles that provide practical information about how water rights impact individual, conservation and municipal interests. I hope you find the information from this issue thoughtful and informative.

Candice M. McHugh is a founding owner of McHugh Bromley, PLLC, a law firm focusing on water and administrative law. Candice served as co-counsel representing groundwater users on Idaho's Eastern Snake Plain in four of Idaho's significant conjunctive management delivery call cases. She is currently representing clients in the delivery call pending in the Big Wood delivery call case.



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How a State Known for its Rivers Ends Up With Dry Riverbeds Every Year: A Look Into Idaho's Minimum Stream Flow Law

Marie Callaway Kellner

Several years ago I had the privilege of travelling on a small ship to Antarctica with 70 people from all over the world. When my fellow passengers learned I was from Idaho, almost without fail they said two things: potatoes and the Salmon River.

Idaho is known round the world for its irrigated agriculture industry as well as for trout fishing on the Henrys Fork and the unique experience of floating the Middle Fork of the Salmon River through the Frank Church River of No Return Wilderness. Yet increasing tensions surround these dichotomous uses of water. One of those tensions, explored in this article, arises from the historic viewpoint that water left in-stream is wasted.

Rivers in Idaho are often viewed as conduits, whose primary purpose is moving water from one point of diversion to the next until there is literally no water left and the riverbed is dry. Water left in-stream is considered a wasted opportunity. However, one need look no further than the endangered salmon, steelhead, and bull trout that once thrived in Idaho to realize that more than a century of Idaho water practices under this historic mentality has proven detrimental to Idaho's rivers and the aquatic life dependent on them. And with the warmer temperatures and more frequent drought that Idaho is already experiencing due to climate change, ensuring in-stream flows for Idaho's iconic rivers and fisheries has never been more important.³

This article explores the difference between in and out-of-stream

It became apparent that the riparian water use principles that developed in wetter parts of the world would not work well in the arid American West.

water uses and rights, and submits that Idaho's rivers, and the people and industries that value them, deserve greater use of and flexibility in establishing in-stream flow water rights.

Origins of in-stream and out-of-stream water uses

Virtually all of the original uses of western rivers took place in-stream.⁴ Like many human populations around the world, western Native Americans set up their lives along river courses to ensure a means of drinking water, bathing, navigation and food supply.⁵ In particular, rivers of the Pacific Northwest historically teemed with salmon in a way that is difficult for we modern day residents to imagine, making them the true lifeblood of early Pacific Northwest communities.

As more people moved West, it became apparent that the riparian water use principles that developed in wetter parts of the world would not work well in the arid American West. And as populations grew and technology advanced, particularly as related to mining, common western water use practices began to re-

quire increasingly more water out of stream, and the Prior Appropriation Doctrine was born.⁶

Idaho is a traditional prior appropriation state, and the recently completed Snake River Basin Adjudication helps to strengthen Idaho's application of this "first in time is first in right, so long as it is put to a

In-stream and out-of-stream water rights

Out-of-stream water rights have the following required elements: a) source b) priority date, c) amount of water (either in annual volume or rate of flow), d) period of year of use, e) purpose of use, f) point of diversion, and g) place of use.¹

In-stream flow water rights have the following required elements: a) name of the stream and legal description of the point on the stream where the in-stream flow is proposed to be appropriated and determined; b) minimum stream flow proposed; c) purpose for which the appropriation is proposed to be made; d) period of time or season of the year during which the appropriation is proposed, and e) other information as shall be required by the Idaho Department of Water Resources Director.²

beneficial use” doctrine. As discussed in the next section, water rights intended to leave water instream as opposed to divert it out-of-stream are also administered via prior appropriation; however, their establishment and marketability are treated differently.

Evolution of instream flow law in Idaho

Instream flow water rights establish a flow amount that is the minimum amount of water deemed necessary to meet designated *instream* beneficial uses. Idaho has dozens of instream flow water rights dating back to the 1800s and through the early twentieth century. Those water rights were issued either under the federally reserved water rights doctrine established in *Winters v. U.S.*⁷, or by the legislature in order to ensure lake levels and stream flows for recreation and scenic purposes.

In 1978, Idaho officially took instream flow protections up a notch with enactment of the Minimum Stream Flow statute.⁸ Pursuant to the statute, common reasons to dedicate an instream flow water right in Idaho are fish & wildlife habitat, aquatic life, aesthetics, recreation, navigation & transportation values, and water quality.⁹

An instream right differs from an out-of-stream right in a very notable way: it does not require a point of diversion. Rather, a minimum flow amount is proposed for a section—of reach—of river by providing a beginning and ending point.¹⁰ Just like out-of-stream water rights, instream flow rights are administered in priority, meaning they are subject to curtailment at the behest of senior water right holders. At the same time, administration in priority also protects them from injury by junior water rights.

As is the case in many western states, Idaho Code takes a paternal approach to instream flow water rights, only allowing the State to hold them. Since 1978 when the Minimum Stream Flow statute was adopted, the Idaho Water Resource Board (IWRB)¹¹ is the state entity that holds them.¹² Unlike an out-of-stream water right where the applicant applies directly to the Idaho Department of Water Resources (IDWR) (with one layer of review, absent a protest and potential judicial review), an instream flow appli-

Common reasons to dedicate an instream flow water right in Idaho are fish & wildlife habitat, aquatic life, aesthetics, recreation, navigation & transportation values, and water quality.⁹

cation requires multiple tiers of approval, beginning with the IWRB.¹³

There are two ways that an instream flow application might originate: 1) from the IWRB itself in efforts to secure instream values for the specific purposes enumerated above, or 2) from an individual or entity that must petition the IWRB to seek a water right on its behalf.¹⁴ If the IWRB is not supportive of the individual or entity’s petition and therefore does not agree to apply for the water right, its decision is final and there is no judicial review.¹⁵ No

matter who initiates the effort, the IWRB applies to the IDWR Director for the water right. Should the Director approve it, the approved application is then submitted to the legislature for approval during the next legislative session.¹⁶ This multiple tier approval ending with full legislative approval is a considerable burden.

The SRBA adjudicated more than 150,000 water rights, with tens of thousands more water right claims currently pending in the North Idaho Adjudications. Of all these water rights, IDWR’s database registers just 482 minimum stream flow water rights in Idaho.¹⁷ To be sure, many of the 482 water rights are for significant amounts of water, even thousands of cubic feet per second¹⁸ on some rivers. But the necessary amount of water left instream to sustain any given river is relative, and many Idaho rivers are still diverted to the point of being greatly diminished ecologically, if not completely dry, on an annual basis.

How other arid states differ from Idaho

Some of Idaho’s similarly arid sister states engender more flexible instream flow practices. For example, the primary entity to hold instream flow water rights in Utah is the Utah Division of Wildlife Resources,¹⁹ not the Utah Division of Water Resources or the Division of Water Rights. By endowing a wildlife agency as the holder of instream flow water rights, as opposed to a water rights agency, Utah has placed the responsibility and stewardship of instream flows with the state agency that has most relevant in-house expertise regarding aquatic habitat needs. Similarly, Montana allows the Montana Department of Fish, Wildlife and Parks

to change an existing out-of-stream right to an instream flow water right to benefit fisheries.²⁰

While IWRB members and staff certainly have water expertise, Idaho Department of Fish & Game (IDFG) staff may be better suited to understand and prioritize aquatic habitat needs. It's no coincidence that IDFG is the entity that traditionally most often petitions the IWRB for instream flows. But, at the end of the day, it is the water planning agency, not the fish and wildlife agency that decides whether a new instream flow water right is needed in Idaho. And if the IWRB does not agree to move a requested instream flow water right application forward, the IDFG has no legal recourse.

Another interesting practice in Utah is that "fishing groups" may hold temporary instream flow rights for the benefit of certain fish species.²¹ A fishing group is defined as: 1) exempt from taxation (non-profit), and 2) promotes fishing opportunities in the state.²² In this context, "temporary" means the water right lasts anywhere from one to ten years.²³ By allowing non-profit fishing groups to hold instream flow water rights, Utah formally acknowledges and relies on the expertise and stewardship abilities of organizations like Trout Unlimited.²⁴

In Oregon, individuals may hold instream flow water rights based on water conserved from an existing water right.²⁵ There, an individual takes conservation measures that decrease the amount of water used under an existing water right.²⁶ The Oregon Water Resources Commission determines the actual amount of water conserved, and then allocates 25% back to the State and 75% to the water right holder.²⁷ The water right holder may then convert the 75% to

At the end of the day, it is the water planning agency, not the fish and wildlife agency that decides whether a new instream flow water right is needed in Idaho.

an instream right, and may reserve the ability to turn it back into an out-of-stream right in the future.²⁸ In contrast, in Idaho the threat of forfeiture looms over Idaho water right holders who conserve water under their existing water rights, and there is no legal mechanism for individuals to dedicate a percentage of conserved water back instream even if it would be their preference to do so.

Prior appropriation's amoral application

The prior appropriation doctrine is often described as amoral. It has no basis in right or wrong. Instead, it is applied objectively by priority with no preference for one beneficial use over another.²⁹ As a professional advocate for healthy rivers and all that they endow, I often find myself up against the reality that fish didn't have advocates to speak for them in the 1800s as water rights were established in the driest parts of Idaho. And especially because of increasing water scarcity, there is very little leeway in the modern application of the prior appropriation doctrine to compensate for the lack of consideration fish were given then.

The prior appropriation doctrine's black and white application means that, theoretically, financial markets are where the values in water are borne out: the state issues wa-

ter rights for free,³⁰ and their worth is hashed out when the decision is made to sell or attempt to transfer them. But Idaho's paternal approach to instream water rights means they aren't privy to this market. An Idahoan may acquire and later sell an individual water right to divert water in furtherance of a business practice or to irrigate property, but Idahoans cannot acquire individual water rights to ensure a healthy fishery or flowing river out their back door, even if they are willing to pay for it.

This is in great part because at the time the oldest — and now most powerful — water rights were issued, our predecessors could not have fathomed that Idaho's water resources would be so scarce or taxed as they are today. Settling much of what is now central and southern Idaho required diverting water from rivers in order to make the arid desert lands habitable. Not to mention, water and fish were abundant in much of Idaho. Instream flows have had to find a place within the prior appropriation doctrine as an afterthought because they simply weren't seen as necessary.

But when a rapidly changing climate is paired with one of the fastest growing populations in the nation, and then added to the realities of water over-allocation that many parts of Idaho are being forced to address,³¹ Idaho is left with a water

management system that leaves little to no room for new instream flows and virtually no flexibility for water right holders to dedicate their out-of-stream rights, or even just a portion of them, instream.

Conclusion

Idaho's fish and wild rivers are its oldest heritage, but an outdated water allocation and management structure continually threatens their healthy existence. Should Idaho want to provide greater protection for instream values of water via a more flexible minimum stream flow statute, it can do so. We are a society of laws, and in the same way Idaho's current water management legal structure was developed, it can be adapted to modern needs and values, looking to some of our arid sister states for examples. And if Idaho's rivers and fish are to be as world renown to future generations as they are to us and were to those who came before us, this great state will need to instill more flexibility into its instream flow law and policy.

Endnotes

1. Water right elements are identified in numerous sections of Idaho Code. See IDAHO CODE §§ 42-203A, 42-217, 42-222, 42-1411.
2. IDAHO CODE § 42-1503.
3. Dan Isaak, *New Studies Describe Historic & Future Warming Rates in Northwest U.S. Streams*, CLIMATE-AQUATICS BLOG (March 3, 2012), <https://groups.google.com/forum/?hl=en#!forum/climateaquaticsblog>. For more information about the U.S. Department of Agriculture Climate-Aquatics Blog, see http://www.fs.fed.us/rm/boise/AWAE/projects/stream_temp/stream_temperature_climate_aquatics_blog.html.
4. DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 20 (ISLAND PRESS 1997). [hereinafter *INSTREAM FLOW PROTECTION*].
5. *Id.*

6. *INSTREAM FLOW PROTECTION* at 20.
7. 207 U.S. 564 (1908).
8. IDAHO CODE § 42-1501 *et seq.*
9. IDAHO CODE § 42-1501.
10. *Id.*
11. Established in 1965, the Idaho Water Resource Board is comprised of eight governor appointees who oversee water planning in Idaho. They are volunteers and serve an unlimited number of four-year terms. See <http://www.idwr.idaho.gov/waterboard/About.htm>.

In the same way Idaho's current water management legal structure was developed, it can be adapted to modern needs and values.

12. IDAHO CODE § 42-1503.
13. *Id.*
14. IDAHO CODE § 42-1504.
15. *Id.*
16. IDAHO CODE § 42-1503.
17. Additionally, seventy-three water rights also exist for lake level storage and Wild & Scenic River flows, reflecting instream values similar to the values pro-

tected by the 482 minimum stream flow water rights.

18. Water flows are commonly measured in cubic feet/second or cfs. One cfs is the same as 448 gallons/minute or 646,315 gallons/day.
19. UTAH CODE § 73-3-30(2) (2015).
20. MONT. CODE ANN. § 85-2-436(e) (2015).
21. UTAH CODE § 73-3-30(3)(a) (2015).
22. UTAH CODE § 73-3-30(1)(b) (2015).
23. UTAH CODE § 73-3-30(1)(c) (2015).
24. Trout Unlimited is a national cold-water fishery non-profit dedicated to ensuring that wild and native trout populations are allowed to thrive. See <http://www.tu.org/about-tu/history>.
25. OR. REV. STAT. § 537.455-500 (2015).
26. OR. REV. STAT. § 537.465 (2015).
27. OR. REV. STAT. § 537.470 (2015).
28. *Id.*
29. The amoral application of the prior appropriation doctrine occurs under routine prior appropriation water management. However, the Idaho Constitution does provide beneficial use preferences in times of shortage: domestic, then agriculture, then manufacturing, unless it is in an "organized mining district" in which case mining trumps agriculture and manufacturing. IDAHO CONST. art. XV.
30. The term 'free' here is relative: applicants pay \$25 to file water right applications, and certainly IDWR staff do more than \$25 worth of work processing each application.
31. See February 23, 2015, Big and Little Wood River Basin Delivery Calls, http://www.idwr.idaho.gov/News/WaterCalls/Big_Wood_River_Delivery_Call/.

Marie Callaway Kellner is the Idaho Conservation League's Water Associate. Previously, she clerked in the U.S. District Court of Idaho and in Idaho's Fourth District Court. Prior to that, she was a professional river guide for 18 years. She doesn't hold water rights, but she does hold a J.D. from the University of Idaho, and a B.A. and M.Ed. from the University of Tennessee.



Curtailment of Municipal Water Rights for “In-House” Use

Chris M. Bromley

The issuance of a writ of mandate signals the occurrence of an issue of legal importance, one that cannot be resolved “in the ordinary course of law.”¹ In *Musser v. Higginson*,² the Idaho Supreme Court affirmed the issuance of a writ of mandate against the Idaho Department of Water Resources, (IDWR), requiring its Director to act in response to a call for delivery of water made by a spring user whose water right was hydrologically connected to ground water in the Eastern Snake Plain Aquifer (ESPA). Important to the Court’s decision in *Musser* was legal recognition of the hydrologic interconnection between ground water and surface water sources within the ESPA. This article will identify the historical backdrop of this decision, its current effect, and how it should be approached within the future as rural agricultural and municipal domestic uses intersect.

Musser v. Higginson

A few years after the 1987 commencement of the Snake River Basin Adjudication (SRBA), IDWR began issuing recommendations for water rights claimed in the adjudication. One particular claim, made by Alvin and Tim Musser, (Mussers), was pivotal in setting in motion an administrative scheme known as conjunctive administration.³ In the SRBA, Mussers claimed a water right to “4.8 cubic feet per second (cfs) of water from the Martin-Curran Tunnel (the tunnel) with a priority date of April 1, 1892.”⁴ Water from the “springs which supply the Mussers’ water are tributary to the Snake River and are hydrologically interconnected to the Snake plain aquifer In the spring of 1993, the Mussers found

Important to the Court’s decision in *Musser* was legal recognition of the hydrologic interconnection between ground water and surface water sources within the ESPA.

that the tunnel did not supply them with sufficient water”⁵ In a writ of mandate proceeding initiated by Mussers, the Director moved to dismiss the action, citing, among other reasons, that IDWR “issued a notice of intent to promulgate rules” to govern conjunctive administration.⁶ Despite the Director’s well-meaning intention, the Idaho Supreme Court affirmed the district court’s issuance of the writ of mandate.⁷

Arriving at the hydrologic interconnection

In 1994, as alluded to by IDWR in *Musser*, the *Rules for Conjunctive Management of Surface Water and Ground Water* (hereinafter “CM Rules”) were enacted.⁸ The CM Rules prescribe the procedures for holders of senior-priority surface water rights or senior-priority ground water rights to seek curtailment of junior-priority ground water rights that are causing “material injury” in an “area having a common ground water supply.”¹⁰ The only area in the state determined to have a “common ground water supply” is the Eastern Snake Plain Aquifer.¹¹

Since 2005, numerous holders of senior-priority water rights overlying the ESPA have used the CM Rules to file delivery calls with IDWR, asking

for curtailment of junior-priority ground water rights. In four of these delivery calls – Blue Lakes Trout Farm, Inc., Clear Springs Foods, Inc., Rangen, Inc., and Surface Water Coalition – the Director found material injury to the calling senior, and ordered curtailment.¹²

On May 2, 2005, the Director issued a curtailment order in the Surface Water Coalition delivery call, which applied to owners of “consumptive ground water rights for agricultural, commercial, industrial, and municipal uses, *excluding in-house culinary uses*.”¹³ (Emphasis added). Around the same time, the Director issued curtailment orders in response to the Blue Lakes and Clear Springs delivery calls. In his Blue Lakes and Clear Springs orders, the Director further clarified that owners of *de minimis* ground water rights for domestic purposes “within the limits of the definition set forth in Idaho Code § 42-111” would not be curtailed.¹⁴

Idaho Code § 42-111 provides for the establishment of two types of water rights. Subpart (a) allows the creation of a water right for: “The use of water for homes, organizational camps, public campgrounds, livestock and for any other purpose in connection therewith, including

irrigation of up to one-half (1/2) acre of land if the total use is not in excess of thirteen thousand (13,000) gallons per day”¹⁵ If the well is used for purposes not defined in subpart (a) – such as for commercial or industrial – subpart (b) allows the owner to divert up to “twenty-five hundred (2,500) gallons per day.”¹⁶

The Rangen Order

With this background in mind, on January 29, 2014, the Director issued a curtailment order in response to the Rangen delivery call, (Rangen Order). According to the Rangen Order, curtailment applied as follows:

This order shall apply to all consumptive ground water rights, including agricultural, commercial, industrial, and municipal uses, but excluding ground water rights used for de minimis domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for de minimis stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(1), pursuant to IDAPA 37.03.11.020.11.¹⁷

Unlike in the Surface Water Coalition delivery call, the Rangen Order appears to have omitted language regarding an “in-house” exemption. While subtle, and perhaps unintentional,¹⁸ the change could be construed as having broad implications for residents of cities who rely solely on municipal water for domestic use.

Potential implications of the Rangen Order’s omission

One rationale for the Director’s decision to exclude the term “in-house” from the Rangen Order

could be reliance on the plain language of Idaho Code § 42-111(1). While Idaho Code § 42-111(1) does use the word “home,” it does not use the term “in-house.” But is that result consistent with other sections in Title 42, Idaho Code?

Title 42, Idaho Code states that a municipal water right is made up of “water for residential, commercial, industrial, irrigation of parks and open space, and related purposes”¹⁹ (Emphasis added.) Residential is defined by Merriam-Webster as “used as a residence or by residents.” Residence is defined as “the act or

If a domestic well is not recorded as a water right, it is difficult to imagine how such a well could be administered by IDWR in a curtailment order.



fact of dwelling in a place for some time.” Arguably, the word “residential” is synonymous with the word “home,” used in Idaho Code § 42-111(1). If that is the case, it would be consistent with Idaho law to allow residents of cities to keep diverting municipal water rights for domestic use.

Another basis for possible omission of the term “in-house” from the Rangen Order could be reliance on the fact that Idaho is a prior appropriation state, where water rights that are first in time are first in right.²⁰ While the prior appropri-

ation doctrine has been explained as “harsh,”²¹ it is not a doctrine “without exception.”²² Indeed, Idaho law promotes a policy of “the optimum development of water resources in the public interest.”²³

An example of the flexibility in the prior appropriation doctrine is found in Idaho Code § 42-227, which specifically exempts owners of domestic ground water wells from the requirement that they obtain a water right from IDWR: “The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code”²⁴ If a domestic well is not recorded as a water right, it is difficult to imagine how such a well could be administered by IDWR in a curtailment order. Nevertheless, many owners of domestic wells obtained a water right for their use, so those wells are identifiable and could be curtailed. Presumably, in order to treat all domestic wells equally, IDWR does not draw a distinction between wells for which there is a recorded water right, or wells for which there is not. This is sound public policy, as allowing water to be used in and around homes is in the public interest, and should be encouraged.

How reliable is domestic water use?

Prior to issuance of the Rangen Order, residents of cities may have been prevented from using water outside, but could rest assured that water for indoor use would not be curtailed. Important indoor uses of water include, but are not limited to: bathing, dish washing, drinking water, flushing toilets, and laundry. Allowing use of municipal water rights for indoor domestic purposes makes practical sense, as uninterrupted indoor use is vitally important to maintain a healthy community.

However, under the Rangen Order, residents of cities who use water in their homes could be shut off completely; conversely, owners of individual domestic wells – recorded and unrecorded – maintain the ability to use water in their homes, including the ability to irrigate up to one-half acre of land. Thus, residents of cities who rely on municipal water for their homes are treated differently than their neighbors just outside city limits who use domestic wells for the same reason.

Balancing domestic water use

If Title 42, Idaho Code does not provide clear guidance on resolving the disparate treatment between residents of cities and their neighbors just outside city limits, is there additional legal rationale that reaches a result of equal treatment of all users of domestic water? Idaho’s Constitution provides any “incorporated city or town may make and enforce, within its limits, all such local police, *sanitary* and other regulations as are *not in conflict* with its charter or with the general laws.”²⁵ (Emphasis added). This provision “has been viewed as a grant of local police powers to Idaho cities.”²⁶ The Idaho Supreme Court has held: “Preserving and promoting general health and welfare includes providing necessary services such as *water* and sewage, schools, and police and fire protection.”²⁷ (Emphasis added.) “Public health and sanitation are broad objects of the police power of the state and its political subdivisions.”²⁸

Allowing municipal water to be used for domestic purposes in homes within city limits protects public health, and naturally flows from the same policy of promoting “the optimum development of water resources in the public interest.”²⁹ Given the harmony in policy, there should be no conflict in Idaho

law if residents of cities who rely on municipal water for their domestic needs were treated the same as owners of domestic wells outside city limits.

Endnotes

1. *Ackerman v. Bonneville County*, 140 Idaho 307, 311, 92 P.3d 557, 561 (Ct. App. 2004).
2. *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994) (rehearing denied April 22, 1994).
3. *Id.*
4. *Id.* at 394, 871 P.2d at 811.
5. *Id.*
6. *Id.*
7. *Id.* at 396, 871 P.2d at 813.
8. IDAPA 37.03.11 *et seq.*
9. IDAPA 37.01.11.042.
10. IDAPA 37.01.01.
11. IDAPA 37.01.050.
12. The Director’s orders may be found on IDWR’s website: <http://www.idwr.idaho.gov>.
13. <http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/archive/PDFfiles/Edited%20Amended%20Order%205-2-05.pdf>; <http://www.idwr.idaho.gov/Browse/News/WaterCalls/1000/archive/PDFfiles/Clear%20Springs%20Order%2007-08-05.pdf>.
14. <http://www.idwr.idaho.gov/Browse/News/WaterCalls/1000/archive/PDFfiles/Blue%20Lakes%20Order%2005-19-05.pdf>.
15. Idaho Code § 42-111(1)(a).
16. Idaho Code § 42-111(1)(b).
17. <http://www.idwr.idaho.gov/news/>

[curtailment/2014/01Jan/20140129_Final%20Order%20re%20Rangen’s%20Petition%20for%20Delivery%20Call;%20Curtailing%20GW%20rights%20junior%20to%207-13-1962.pdf](http://www.idwr.idaho.gov/News/WaterCalls/Surface%20Coalition%20Call/archive/PDFfiles/Edited%20Amended%20Order%205-2-05.pdf).

18. After the Rangen Order was issued, IDWR sent letters to owners of water rights who were subject to curtailment in the Rangen delivery call, warning of curtailment. According to those letters, “[n]on-consumptive uses and culinary *in-house* uses of water are *not* subject to curtailment.” (Emphasis added.) Similarly, letters sent by IDWR in 2014 to owners of water rights who were subject to curtailment in the Surface Water Coalition delivery call used identical language; thus, purporting to exempt “*in-house* uses of water” from curtailment.
19. Idaho Code § 42-202B(6).
20. Idaho Const. Art. XV, § 3.
21. *American Falls Res. Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007).
22. *Id.* at 880, 154 P.3d at 451.
23. *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 809, 252 P.3d 71, 90 (2011). See also Idaho Const. Art. XV, § 7 and *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).
24. Idaho Code § 42-227.
25. Idaho Const. Art. XII, § 2.
26. *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980).
27. *City of Lewiston v. Knieriem*, 107 Idaho 80, 84, 685 P.2d 821, 825 (1984).
28. *Lindstrom v. Dist. Bd. of Health Panhandle Dist. I*, 109 Idaho 956, 961, 712 P.2d 657, 662 (Ct. App. 1985).
29. *Clear Springs* at 809, 252 P.3d at 90.

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Adjudication Can Provide Clarity in Water Rights Disputes: A Turn to North Idaho

Meghan Carter

Water has become a frequent topic of conversation, especially with increasing awareness of water shortages in California and the rest of the West. In Idaho, more than 90 percent of counties have either been declared natural disaster areas or are bordering disaster areas due to drought conditions.¹ Knowing that I work in water law, many people ask what Idaho is doing to prevent conflict and severe curtailment of water uses. When they do, I always tell them about Idaho's water rights adjudications.

How adjudications serve Idaho

A water rights adjudication (adjudication) essentially catalogs the nature, extent, and priority of all water rights within a designated area. In Idaho, prior to 1963 for ground water² and 1971 for surface water³, a person could establish a water right by simply diverting and applying the water to beneficial use. Water rights appropriated in this manner are referred to as beneficial use rights. Because a person did not need to go through the written application, permitting and licensing process, many beneficial use rights did not have a written record of their elements. The adjudications in Idaho provide that record.

With a record of all water rights in an area, the Idaho Department of Water Resources (IDWR) can administer water rights and evaluate new water right applications. Water rights administration settles disputes between senior water users and junior water users. An example of administration aided by adjudication

Administering existing water rights and managing new water right appropriations provides a framework for maintaining Idaho's water resources.

is the Rangen, Inc. (Rangen) delivery call.⁴ In the Rangen delivery call, the Director of IDWR found two senior surface water rights were injured by junior ground water uses and ordered curtailment of the junior ground water users.⁵ The ordered curtailment would have affected approximately 157,000 irrigated acres.⁶ Without an adjudication of water rights, it would have been more difficult for IDWR to evaluate the nature and extent of the senior surface water rights, and to administer junior ground water rights affecting the senior rights.

Knowing the amount of water already appropriated in an area also allows IDWR to evaluate proposed new uses and determine their impact on existing water rights. The Director of IDWR must look to several criteria when evaluating applications for permit to appropriate water. A catalog of water rights assists the Director when determining if the proposed water use "will reduce the quantity of water under existing water rights. . ." or whether "the water supply itself is insufficient for the purpose for which it is sought to be appropriated . . ."⁸

Administering existing water

rights and managing new water right appropriations provides a framework for maintaining Idaho's water resources. Idaho adjudications provide that framework. Maintaining Idaho's water resources will head off, as much as possible, a catastrophic water shortage.

Status of Idaho adjudications

Idaho currently has two adjudications, soon to be three, in various stages of completion. The adjudications are all general adjudications which determine the rights of an entire water system, in contrast to a private adjudication, in which only certain rights are determined.⁹ The first and largest adjudication, the Snake River Basin Adjudication (SRBA) commenced November 19, 1987. The SRBA covers 87% of the state of Idaho including many prominent hydrologic features such as the Snake River and the Eastern Snake Plain Aquifer. On August 25, 2014, 27 years after the SRBA commenced, Judge Wildman signed the Final Unified Decree in the SRBA. The SRBA Court decreed over 158,000 water rights,¹⁰ which was a monumental achievement for Idaho.

Essential completion of the SRBA¹¹ allowed IDWR to shift focus to the North Idaho Adjudication. The North Idaho Adjudication is comprised of three different adjudications: the Coeur d’Alene-Spokane River Basin Adjudication (CSRBA), the Palouse River Basin Adjudication (PRBA), and the Clark Fork-Pend Oreille River Basin Adjudication (CFPRBA). The Idaho Legislature authorized each adjudication in the same legislation, but required IDWR seek legislative funding prior to initiation of each adjudication.

As a non-party technical advisor to the adjudication court, IDWR investigates each claim based on state law filed by water users and submits a report to the court. The report, referred to as a Director’s Report, contains IDWR’s determination of all the elements of the water right claims in a specific basin. Once a Director’s Report is submitted, objections can be filed to the recommendations. Objections proceed through a court process and are usually settled. All rights recommended in a Director’s Report eventually have a partial decree issued detailing the final determination of all elements of the water right.

The CSRBA was commenced November 12, 2008,¹⁴ and is significantly smaller than the SRBA with approximately 11,000 water right claims. The Basin 93 Director’s Report, filed in March 2014, was the first Director’s Report filed in the CSRBA. The report contained 358 claimed rights. There were two objections filed to the Basin 93 Director’s Report. With those objections resolved, the Basin is fully decreed with the exception of claims initiated late and federal reserved water rights claimed by the United States on behalf of the Coeur d’Alene Tribe. As to the remaining basins in the Coeur d’Alene Adjudication:

Adjudication	Basin ¹² Nos.	Prominent Hydrologic Features
CSRBA	91-95	Coeur d’Alene River, St. Joe River, St. Maries River, Spokane River, Lake Coeur d’Alene, and the Spokane Valley-Rathdrum Prairie Aquifer
PRBA	87	Palouse River and the Palouse Basin Aquifer ¹³
CFPRBA	96,97	Lake Pend Oreille and Priest Lake

- IDWR filed the Basin 92 Director’s Report in December 2014, it contained 457 claimed rights.¹⁵
- The Director’s Report in Basin 91 was filed in February 2015 and contained 638 claimed rights.¹⁶
- IDWR plans to file the Basin 94 Director’s Report by the end of 2015 and the Basin 95 Director’s Report Fall 2016. Basin 94 and 95 are the largest basins in the CSRBA containing approximately 1,931 and 7,574 claims respectively.

Federal reserved water right claims arising under federal law, such as the claims made by the United States on behalf of the Coeur d’Alene Tribe mentioned above, are controversial with CSRBA claimants.¹⁷ The United States submitted a total of 364 federal reserved water right claims to the court, and various parties filed approximately 85,000 objections. The majority of objections filed were against the claims made by United States on behalf of the Coeur d’Alene Tribe. All of the objections to the federal reserved water right claims are currently being discussed in settlement negotiations.

IDWR received funding approval from the Idaho Legislature for the PRBA in the IDWR 2016 budget.¹⁸ IDWR plans to file a motion to commence the PRBA in 2016. IDWR has not determined when it will seek funding to commence the CFPRBA.

Landscape of future administration

The primary water uses differ between Northern and Southern Idaho.

Northern Idaho receives more precipitation annually than Southern Idaho,¹⁹ leading to more irrigation in Southern Idaho and dryland farming in Northern Idaho. While the largest number of rights decreed in the SRBA were domestic and stockwater rights, the largest quantity of water decreed in the SRBA was for irrigation. In contrast, the largest quantity of water claimed in the CSRBA is for domestic and stockwater uses. Consequently, the issues that will arise in the CSRBA regarding state based claims are likely to be different than the issues that arose in the SRBA.

The aquifers in both Northern and Southern Idaho present different issues as well. The Eastern Snake Plain Aquifer is located in Southern Idaho and has a prominent connection with surface water. Currently, that connection drives the majority of water rights administration issues confronting IDWR. In Northern Idaho, the two large aquifers are shared with the State of Washington, which has led to many conversations about how to jointly manage the shared resources. Knowing the extent of water use in Northern Idaho will aid in any discussions about the shared aquifers.

Conclusion

IDWR’s ability to manage Idaho’s water resources is enhanced through the framework created by Idaho’s adjudications. This management ensures water sources will not be over appropriated, and will be managed

consistently with the prior appropriation doctrine. Reliable administration of water minimizes the possibility of severe water use curtailment, protects a valuable resource, and ensures more efficient resolution of conflicts between water users in and out of Idaho.

Endnotes

1. USDA: Nearly all of Idaho affected by natural disaster areas, <http://www.ktvb.com/story/news/local/idaho/2015/07/16/idaho-natural-disaster-areas/30242577/> (accessed July 31, 2015).
2. 1963 Idaho Sess. Laws 623.
3. 1971 Idaho Sess. Laws 843.
4. See http://www.idwr.idaho.gov/News/WaterCalls/1000Spring%20Users%20Calls/Rangen_2011_archive.html
5. *Final Order Regarding Rangen, Inc.'s Petition for Delivery Call Curtailing Ground Water Rights Junior to July 13, 1962*, IDWR Docket No. 2011-004 (Jan. 29, 2014).
6. *Id.* at 28. The junior ground water users were able to provide mitigation and continue their water use. See *Memorandum Decision and Order on Petition for Judicial Review*, Case No. CV 2014-4633, Fifth Judicial District of Idaho (May 13, 2015) (appealed June 24, 2015).
7. Idaho Code §42-203A(5).
8. *Id.*
9. Idaho Code § 42-1401A(5).
10. *Final Unified Decree*, In Re SRBA, Case No. 39576 (Aug. 25, 2014).
11. At the time of signing the Final Unified Decree, there were seventy-two water right claims remaining for adjudication. These claims included water right subcases awaiting a decision from the

Idaho Supreme Court, other subcases in the middle of negotiations, as well as subcases initiated late. In addition to the pending issues, deferrable *de minimis* claims, while part of the SRBA, were not required to be claimed or adjudicated during the adjudication. Rather, adjudication is required only when the holder of the right desires administration of the deferred claim.

12. IDWR split the state up into administrative basins that roughly follow hydrologic basins.
13. The Palouse Basin Aquifer is composed of two separate aquifers of different basalt composition. The aquifers are the Grande Ronde and the Wanapum. See <http://columbia-institute.org/wsu/WSUhome/Aquifer.html>
14. *Commencement Order for the Coeur d'Alene-Spokane River Basin General Adjudication*, Case No. 49576 (October 12, 2008).
15. There were ninety-eight objections to sixty-four subcases and the deadline to respond to objections ran July 9, 2015.
16. There were sixty objections filed to the Basin 91 Director's Report, and the response deadline runs August 25, 2015.
17. IDWR assigns a number to the federal

This management ensures water sources will not be over appropriated, and will be managed consistently with the prior appropriation doctrine.

- reserved water right claims but does not investigate them. The federal reserved water right claims were reported to the adjudication Court the same time the Director's Report was filed in Basin 93
18. H.B. No. 273 (2014 Session).
 19. Average Annual Precipitation: State of Idaho, <https://www.idwr.idaho.gov/images/water-supply/idaho-annual-average-precipitation.gif> (accessed July 31, 2015).

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The Critical Role of Ground Water Districts in Water Disputes

Dylan B. Lawrence

When the news broke in February 2015 that irrigators in the lower Big Wood and Little Wood River Valleys were demanding that the Idaho Department of Water Resources (IDWR) shut off up-gradient ground water withdrawals, efforts had already been underway to form two separate ground water districts in the area in order to respond to just this type of “delivery call” proceeding.¹ A ground water district is a district formed by ground water users in a particular area in order to pool resources and act in a unified manner in addressing ground water challenges and issues. The general situation in the Big Wood and Little Wood River Valleys provides a good opportunity to explore the topic of ground water districts, how they are formed, and their potential uses and advantages.

Formation of ground water districts in Idaho

The process for forming a ground water district is similar to the process for forming other grass roots, special purpose districts. The first step in the process is for the requisite number of ground water users (either 50 total, or a majority of the ground water users in a particular area, whichever is less) to present a petition to the county commission and IDWR.² Generally speaking, the petition should include detailed information regarding the proposed boundaries of the district and the existing ground water uses within the proposed district, among other things.³ IDWR then analyzes the petition and the supporting materials and prepares and submits a report to the county commission.⁴

A ground water district provides a formal, enforceable mechanism for ground water users within a particular geographical area to pool resources.

After publication of notice, the commission holds a hearing on the petition, primarily to determine whether the petition contains the required number of signatures, and to either confirm or adjust the proposed boundaries of the district.⁵ The commission then issues a written order describing the boundaries of the district, and providing that the district will be formed if it is approved through an election.⁶ When it renders its decision, the county commission also divides the ground water district into three to seven divisions, each of which elects a director.⁷

An election is then held regarding whether to organize the district and, if so, to elect the initial directors.⁸ The electors are those who would be members of the district based upon their ownership of ground water rights, and voting is weighted based upon the size of the ground water rights owned by each elector.⁹ Creation of the district requires approval of at least two-thirds of the votes cast.¹⁰ If approved, the county commission then enters an order in its minutes declaring the organization of the district, which triggers a two-year statute of limitation on actions challenging the creation of the district.¹¹

Once a ground water district is formed, it may engage in the activities that it is authorized by statute to do, but may lack the necessary funds until the completion of its first assessment cycle. In this regard, ground water districts have always had authority to issue warrants to help finance their initial activities.¹² However, by way of update, the Idaho Legislature recently enacted legislation substantially increasing the amount of money that can be raised through such warrants.¹³

Uses and advantages of ground water districts in Idaho

A ground water district provides a formal, enforceable mechanism for ground water users within a particular geographical area to pool resources. Ground water districts can levy assessments against ground water users within the boundaries of the district.¹⁴ As long as the ground water district follows the required formalities, its unpaid assessments can result in a lien on the landowner’s property, and such lien “shall be superior to the lien of any mortgage or deed of trust, whether prior in time or not...”¹⁵

The assessments collected by the district can be used to fund a variety

of activities and projects that further illustrate the usefulness of ground water districts and their role in delivery calls. Of course, as is the case with most special purpose districts, ground water districts possess many of the general authorities that are necessary for the district to function, such as the authority to enter into contracts,¹⁶ acquire real and personal property,¹⁷ retain agents, contractors, and employees,¹⁸ incur indebtedness,¹⁹ adopt bylaws,²⁰ exercise eminent domain,²¹ *etc.* Ground water districts also possess authorities more specifically related to ground water issues, such as the authority to acquire and dispose of water rights and related works and facilities,²² develop and operate aquifer storage and recharge projects,²³ and measure and monitor ground water levels and diversions.²⁴

Moreover, ground water districts have authority to appear in legal and administrative proceedings, and, interestingly, to represent their members in such proceedings, even with respect to the members' own "individual water rights."²⁵ Of course, water rights in Idaho are real property rights,²⁶ making this somewhat of a notable grant of authority. Similarly, ground water districts may develop and implement mitigation plans to offset injury to senior water uses that are caused by ground water use within the district.²⁷

Without these grants of authority to districts, junior ground water users would potentially need to hire their own consultants and attorneys to appear in legal and administrative proceedings, develop mitigation plans, and deal with IDWR and senior water users regarding such plans — an inefficient and potentially chaotic situation. Indeed, while ground water districts are "grass roots" districts formed by ground water users themselves, rather than by IDWR, IDWR

Ground Water-Related Designations

Critical ground water area: An administrative designation for a particular area where ground water supplies are not sufficient to satisfy existing ground water rights. This designation provides IDWR with authority to adopt a ground water management plan, and results in additional, very restrictive standards for obtaining new ground water rights in the area.¹

Ground water district: A district formed by ground water users in order to pool resources and act in a unified manner in addressing ground water challenges and issues.

Ground water management area: An area that IDWR believes may be approaching the status of a critical ground water area.²

Ground water management district: A district that can be formed by water users within a critical ground water area or ground water management area, primarily for the purpose of financing the repair or abandonment of ground water wells within the district.³

Ground water measurement district: A district formed by IDWR for the purpose of measuring ground water with-

drawals within a particular area. These are instrumentalities of the state government and are often a precursor to the formation of a water district.⁴

Irrigation district: A quasi-municipal district that provides landowners within the district with irrigation water, typically through the ownership and operation of a surface water canal system, though many irrigation districts own ground water rights, as well.⁵

Water district: A district formed by IDWR for the purpose of regulating water diversions according to the prior appropriation doctrine. A water district is an instrumentality of the state government, and can regulate diversions of surface water, ground water, or both.⁶

Endnotes

1. See generally IDAHO CODE § 42-233a.
2. See generally *id.* at § 42-233b.
3. See generally *id.* at § 42-5101.
4. See generally *id.* at § 42-706.
5. See generally *id.* at §§ 43-101 – 43-2554; see also *Lewiston Orchards Irr. Dist. v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).
6. See generally IDAHO CODE § 42-604.

has promoted and encouraged the formation of ground water districts in some areas for these very reasons.²⁸

Until recently, nine ground water districts had been formed, all in south-central and eastern Idaho.²⁹ All of these ground water districts are either within or adjacent to the Eastern Snake Plain Aquifer, where there have been delivery call actions involving junior ground water diversions for the past several years.³⁰ In addition, as previously mentioned, the two ground water districts being formed in the Big Wood River Valley were proposed in large part in anticipation of expected water delivery calls.

Conclusion

As our collective understanding of how ground water use can affect surface water flows continues to develop, future disputes between surface water users and ground water users seem likely, even in areas of the state other than the Eastern Snake Plain Aquifer. Ground water users in such areas, like those in the lower Big Wood and Little Wood River Valleys, may wish to understand the advantages and disadvantages of, and procedures for, forming ground water districts, and attorneys in such areas should therefore become familiar with them. Hopefully, this article is helpful in that regard.

Endnotes

1. Greg Moore, *Petition Aims to Divide Valley into 2 Groundwater Districts*, IDAHO MOUNTAIN EXPRESS, Feb. 25, 2015, available at <http://tinyurl.com/mphd6r8> (last visited July 7, 2015). As of the date of submission of this article, that water delivery call proceeding is ongoing, and this article in no way discusses or comments on the merits of that proceeding.

2. IDAHO CODE §§ 42-5202, 42-5203(1), 42-5206(1). If the area spans more than one county, then the petition is filed in the county where the highest proportion of ground water rights within the proposed district are located. *Id.* at § 42-5203(1).

3. *Id.* at § 42-5203.

4. *Id.* at § 42-5206.

5. *Id.* at § 42-5207(1), (2).

6. *Id.* at § 42-5207(2)(b).

7. IDAHO CODE § 42-5208.

8. *Id.* at § 42-5209.

9. *Id.* at § 42-5210.

10. *Id.* at § 42-5213.

11. *Id.* at § 42-5213(1), 42-5215.

12. See generally *id.* at § 42-5233.

13. S.L. 2015, ch. 309, sec. 1, p. 1214.

14. IDAHO CODE §§ 42-5214(1), 42-5224(5), 42-5232.

15. *Id.* at § 42-5240.

16. *Id.* at § 42-5224(3).

17. *Id.* at § 42-5224(2).

18. *Id.* at § 42-5224(4).

19. *Id.* at § 42-5224(2).

20. IDAHO CODE § 42-5224(18).

21. *Id.* at § 42-5224(13).

22. *Id.* at §§ 42-5224(1), (2), 42-5224(9).

23. *Id.* at §§ 42-5224(16), 42-5225.

24. *Id.* at § 42-5224(17), (20).

25. *Id.* at § 42-5224(6).

26. IDAHO CODE § 55-101(1).

27. *Id.* at §§ 42-5224(11); 42-5201(13).

28. See generally Moore, *supra* note 1.

29. See IDAHO DEPT. OF WATER RESOURCES, IDAHO GROUND WATER DISTRICTS, available at <http://tinyurl.com/o36yu9l> (last visited June 15, 2015).

30. See generally *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862 (2007); *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790 (2011); *A & B Irr. Dist. v. Idaho Dept. of Water Resources*, 153 Idaho 500 (2012); *A & B Irr. Dist. v. Spackman*, 155 Idaho 640 (2013).

Dylan B. Lawrence is a partner with Varin Wardwell, specializing in water rights, environmental, and natural resources law. He regularly handles water right matters for clients in both the administrative and transactional settings. Dylan achieved his B.B.A. and J.D. from the University of Texas. You can reach him at dylanlawrence@varinwardwell.com.



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Joel D. Horton

Regular Fall Term for 2015

4th Amended – 07/29/15

Boise August 11
Coeur d'Alene August ~~25~~, 26, and 27
Moscow August 28
Boise (Boise State University) September 2
Boise September 3
Boise September 18
Boise November 2, ~~4~~, 9 and 10
Twin Falls November 4, 5 and 6
Boise December 2, 4, 7, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

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

**Idaho Supreme Court
Oral Argument for September 2 - 3, 2015**

Wednesday, September 2, 2015 – BOISE STATE UNIVERSITY

8:50 a.m. OPEN
10:00 a.m. ITD v. Ascorp #42018
11:10 a.m. Hoffer v. Shappard #42087

Thursday, September 3, 2015 – BOISE

8:50 a.m. Greater Boise Auditorium District v. Frazier #43074
10:00 a.m. Jane Doe 2015-03 #43152
11:10 a.m. Icanovic v. State #38477

Oral Argument for September 18, 2015

Friday, September 18, 2015 – BOISE

8:50 a.m. OPEN
10:00 a.m. John Doe v. Shoshone-Bannock Tribe #43165
11:10 a.m. OPEN

**OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO**

Chief Judge
John M. Melanson
Judges
Karen L. Lansing
Sergio A. Gutierrez
David W. Gratton

Regular Fall Term for 2015

4th Amended 07/13/15

Boise August 11, ~~13~~, 18, 20
Boise September ~~10~~, 15, 17, 24
Boise October 15, 20, 22, 27
Boise November 12, 17, 19, 24
Boise December 15, 17

By Order of the Court
Stephen W. Kenyon, Clerk

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

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

There are no oral arguments scheduled at this time
in September for the Court of Appeals.

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 7/1/15)**

CIVIL APPEALS

Attorney fees and costs

1. Did the court abuse its discretion in finding, on remand, that appellants were not entitled to attorney's fees under Idaho Code Section 9-344(2)?

Hymas v. Meridian Police Dept.
S.Ct. No. 42626
Court of Appeals

Post-conviction relief

1. Did the court err when it denied Fletcher's motion for appointment of counsel?

Fletcher v. State
S.Ct. No. 42658
Court of Appeals

Procedure

1. Whether the court on remand erred by failing or refusing to allow and to take into consideration new evidence, new witnesses and new arguments beyond those previously identified in the course of the summary judgment proceedings.

Morgan v. New Sweden Irrigation District
S.Ct. No. 42575
Supreme Court

Trusts

1. May the Estate pursue John Cornell's claim that property wrongfully was withheld from Cornell during his life or did Cornell's claims against the trust abate upon his death?

In the Matter of the Revocable Family Trust of Michael Cornell and Arlie Cornell
S.Ct. No. 42822
Supreme Court

Water rights

1. Whether the district court erred in invalidating the Great Rift trim line set by the IDWR to exclude from curtailment junior ground water pumping east of the Great Rift.

City of Pocatello v. Rangen
S.Ct. No. 42836
Supreme Court

2. Did the Director of IDWR err as a matter of law by concluding he has limited discretion to prevent hoarding of Idaho's water resources?

IGWA, Inc. v. Idaho Dept. of Water Resources
S.Ct. No. 42775
Supreme Court

CRIMINAL APPEALS

Due process

1. Was Ostler's right to due process violated by the prosecutor charging him with an additional crime after the district court granted Ostler a new trial?

State v. Ostler
S.Ct. No. 42335
Court of Appeals

Evidence

1. Was there sufficient evidence to support the jury verdict finding Singer guilty of burglary?

State v. Singer
S.Ct. No. 42251
Court of Appeals

2. Did the court err in its I.R.E. 404(b) ruling that statements by Rawlings that he shoplifted in the past were admissible in Rawlings' burglary trial?

State v. Rawlings
S.Ct. No. 42697
Supreme Court

Fifth amendment

1. Whether the officer's testimony commenting on Dent's decision to remain silent constituted fundamental error.

State v. Dent
S.Ct. No. 42383
Court of Appeals

Right to counsel

1. Did the district court err in finding the magistrate judge denied Rockstahl's right to counsel of his choice by refusing to continue the trial to a date available for that counsel?

State v. Rockstahl
S.Ct. No. 42525
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the district court err in concluding police do not have reasonable suspicion to temporarily detain a person who provides a name and date of birth that do not appear in police records?

State v. Pachosa
S.Ct. No. 42950
Supreme Court

2. Did the district court err in finding the warrantless entry into Harris' hotel room was justified by exigent circumstances?

State v. Harris
S.Ct. No. 42461
Court of Appeals

3. Did the district court err when it denied Tranmer's motion to suppress evidence found in her purse and vehicle, which she argued was the fruit of an unlawful search?

State v. Tranmer
S.Ct. No. 42263
Court of Appeals

4. Did the district court err when it denied Hunter's motion to suppress in which he asserted the officer lacked reasonable suspicion that Hunter had committed a traffic infraction?

State v. Hunter
S.Ct. No. 42233
Court of Appeals

5. Did the district court err when it denied Kinch's motion to suppress in which he asserted his traffic stop was not supported by reasonable suspicion?

State v. Kinch
S.Ct. No. 42787
Court of Appeals

6. Did the district court err when it found the officer had probable cause to search the trunk of Kelley's vehicle?

State v. Kelley
S.Ct. No. 42680
Court of Appeals

7. Did the court err in denying Naranjo's motion to suppress and in finding the drug dog's act of putting his head in the open window of Naranjo's vehicle was not a search?

State v. Naranjo
S.Ct. No. 42097
Court of Appeals

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



Federal Court Corner

Two Bench-Bar Conferences Planned for this Fall

Two federal court Bench-Bar conferences are planned in the District of Idaho for 2015. The first conference (which alternates from year to year between North Idaho and Eastern Idaho) is set for Friday, September 18, 2015 at the Spokane Convention Center in Spokane, Washington. This will be the first collaborative Bench-Bar conference presented jointly by the Idaho federal courts and the Federal Bar Association for the U.S. District Court for Eastern Washington. The second conference, held each year in Boise, is set for Friday, October 30, 2015 at the Boise Centre.

The morning program at the Spokane conference includes Chief District Judges B. Lynn Winmill (of the District of Idaho) and Rosanna Malouf Peterson (of the Eastern District of Washington), and Ninth Circuit Judge N. Randy Smith who will give the State of the Judiciary remarks concerning their respective courts.

The morning plenary session features a live-video feed presentation by Judge Richard A. Posner, a Seventh Circuit judge who has a prodigious library of legal scholarship in his judicial opinions and in his academic writing about economics, the law, and the work of judges. Judge Posner's remarks draw upon the intersection of law and economics — a frequent theme of his thinking and writing — and are titled “An Economic Analysis of the Law.”

Following a lunch break, the conference will continue with comprehensive breakout sessions taught by experts in their fields from private



Photo courtesy of the U.S. Courts, District of Idaho

Attentive jurists listen to a presentation as part of the 2014 Bench-Bar Conference in Fort Hall. This year one conference will be in Spokane and another is in Boise.

practice and academia addressing topics important to practitioners of many specialties, including programs on “Environmental & Water Law,” “What Happens After Federal Criminal Sentencing,” “Advocacy and Initiatives to Combat Human Trafficking,” “Discharge of Student Loans in Bankruptcy,” and “Information You Should Know about the Bar Complaint Process in Washington and Idaho.” The afternoon ends with a first for the Spokane locals, but a long-standing and popular component of the Idaho conferences — the lively “Judges’ Panel” program, in which judges from the federal bench answer questions of substance and procedure regarding the practice of law in the federal courts of Idaho and Eastern Washington.

In Boise, Chief District Judge B. Lynn Winmill and Chief Bankruptcy Judge Terry Myers, along with Circuit Judge N. Randy Smith, will begin the conference with a conver-

sation about the state of the judiciary in the District of Idaho and the Ninth Circuit. Next will be the plenary session of the conference, high-

Judge Posner's remarks draw upon the intersection of law and economics — a frequent theme of his thinking and writing — and are titled “An Economic Analysis of the Law.”

lighted by keynote speaker, Philip Howard.

Mr. Howard is senior counsel with the New York City office of Covington & Burling, and is the head of "Common Good," an advocacy organization which believes that "individual responsibility, not mindless bureaucracy must be the organizing principle of government" and which advocates that government should be "radically simplified" to "restore the ability of officials and citizens alike to use common sense when advancing public goals."

Mr. Howard has written several books espousing his views on those subjects, which have generated considerable conversation around the country, including *The Death of Common Sense*, *The Collapse of the Common Good*, *Life Without Lawyers*, and his most recent book, *The Rule of Nobody*. Following his remarks, there will be a panel discussion of policy-makers, lawyers, and business people to talk about real-life examples of regulatory form versus substance, and the potential for reform. More information about Mr. Howard and his organization can be found at www.commongood.org.

After the morning sessions, there will be a hosted luncheon. The afternoon session then begins with breakout sessions dealing with the significant developments in the past

Mr. Howard is senior counsel with the New York City office of Covington & Burling, and is the head of "Common Good," an advocacy organization which believes that "individual responsibility, not mindless bureaucracy must be the organizing principle of government."

year in the employment law arena, the use of expert and fact witness testimony in environmental litigation and trials, and a discussion of "Life After Sentencing in Federal Criminal Cases" with information from experts on the business of the Federal Bureau of Prisons and on the world of supervised release in the District of Idaho.

Following those sessions, there will be an important presentation about federal rule changes to take effect in 2015, some of which will significantly alter the nature of discovery in federal court. This will be an important opportunity for lawyers to learn about changes to Federal Rule of Evidence 801, Federal Rules of Procedure 26 and 45, and Local Rules 15.1, 27.1, and 47.2.

The Boise conference concludes with the always enlightening and sometimes even entertaining Judges'

Panel discussion, consisting of questions, answers, and occasional commentary regarding the practice of law before the District of Idaho and the Ninth Circuit Court of Appeals.

Always a grand bargain for the enlightening and interesting content of the conference program, the conference cost is \$75 for attorneys, \$35 for U.S. Attorneys, Federal Defenders, Young Lawyers (ISB), law clerks, law school faculty, and paralegals. (Late registrations will have higher registration costs.) There is no charge for current law students. The cost includes the CLE credits, a continental breakfast, and a full lunch (breakfast and lunch provided at the Boise conference only). CLE credit approvals are pending. A registration form is available on the Courts' website at www.id.uscourts.gov.

Source: U.S. Court, District of Idaho.



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Idaho Chapter of American Immigration Lawyers Association Celebrates Its First Year With Training and a Naturalization Clinic

Nicole Derden

In June of this year the Idaho Chapter of the American Immigration Lawyers Association (AILA) celebrated its first anniversary and continues to grow in numbers and strength; now with 36 members in Idaho.

In May 2015, a new Idaho Chapter Chair was elected: Attorney Chris Christensen of Andrade Legal. Having practiced immigration law since 2009, Mr. Christensen brings extensive experience and a passion for immigrant justice to his position. Goals of the Chapter outlined during its May 2015 annual meeting include continued liaison with local government agencies, including the U.S. Citizenship and Immigration Service, U.S. Immigration and Customs Enforcement, the U.S. Department of Homeland Security Office of Chief Counsel, and the Portland Oregon Immigration Court sitting in Boise, Idaho.



Chris Christensen

Goals of the Chapter also include providing information and updates to the Idaho public about recent changes in immigration law and developing a stronger pro bono presence within Idaho's immigrant community. The Idaho AILA Chapter has also absorbed the work of Idaho's former Pro Bono Immigration Law Network (PILN) which provides no-fee legal representation to qualifying Idaho immigrants facing Deportation.

For the month of September, the Chapter is sponsoring AILA's National Citizenship Day, Saturday,



AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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September 19, 2015, at the Hispanic Cultural Center in Nampa, from 10 a.m. to 4 p.m. The event invites the pro bono services of any interested attorney to assist in the preparation and review of eligible immigrants' Applications for Naturalization to U.S. Citizenship.

In preparation for the event, Concordia University Immigration Law Professor Nicole Derden will offer training, "The Attorneys' Roll in Preparing Form N-400, Application for Naturalization to U.S. Citizenship," on Tuesday, Sept. 8, 10 a.m.- noon at the Idaho Law Center and again at 8 a.m. on the day of the event (MCLE credits pending).

If you have any questions or are interested in learning more about AILA please contact Chair Chris Christensen cchristensen@andradelegal.com, Vice-Chair Angela

Levesque angela@levesquelaw.us, or Secretary/Treasurer Nicole Derden nicole@idahoimmigrationlawyer.net.

The event invites the pro bono services of any interested attorney to assist in the preparation and review of eligible immigrants' Applications for Naturalization to U.S. Citizenship.

Nicole Derden was admitted to the Idaho State Bar in 2005; she opened her own immigration law practice in 2009, which is currently located in Eagle, Idaho. She has been a member of the American Immigration Lawyers Association since 2007 and holds the position of Secretary/Treasurer for the Idaho Chapter. Nicole resides in Eagle, Idaho, with her husband Terry and their four boys.



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It's All About Documenting Scope

Mark Bassingthwaight

I know lawyers get tired of hearing it and risk folk like me get tired of always having to say it; but there is real value in documenting scope of representation on every new matter. Please note that I did not say with every new client, I said with every new matter. Now, I don't mean to suggest that every time a call comes in from some longstanding client that you, as their lawyer, should shoot off a new contract or engagement letter. By no means do I wish to suggest that. I am suggesting, however, that anytime a new file is opened for a client, new or longstanding, one would be well served by taking a few moments to document the scope of representation on that new matter.

Many attorneys respond to this advice by sharing that they object to sending engagement letters to their longstanding and, or well-known clients. They argue that doing so would be too formal and would detract from the attorney/client relationship. I could buy into this rationale if such clients never sued their attorneys. Unfortunately, longstanding clients, life-long friends, and even family members do sue their attorneys. In fact, some of our largest losses have come from claims that were brought by such clients. Here's the spin. There is no rule that requires an engagement letter to be a lengthy three page contract full of legalese. A simple thank-you note or confirming email indicating that the usual fees will be charged along with a reference to the nature and scope of the work to be done can suffice.

Then this next argument is made. With flat fee work, such as transactional work, more time

would be spent drafting and sending an engagement letter than is warranted. After all, the work itself is usually completed within a month and often sooner. In response, it is uncanny to note the number of times that a planned one-month transaction ended up taking far longer. Unforeseen complications abound, particularly in repetitive transactions such as real estate closings in an area where many transfers are taking place.

Of course, we also need to recognize that memories can be short, including our own. Who wants to be in a dispute with a client over what you were or weren't asked to do? When this type of dispute does arise, few clients remember that they said they only wanted to pay their attorney to do certain tasks and not every possible action that might have been indicated. Again, a short letter or confirming email can do wonders. This documentation not only confirms your understanding of what the client's needs are, thus avoiding the running with assumptions misstep, but can even be an opportunity to ask if there is anything else you might be able to assist the client with. What harm is there in asking for additional work?

Given what we're seeing in claims coupled with more and more attorneys moving into limited scope representation, I would also encourage you to consider documenting what you are not going to do. If there happens to be a workman's comp component



Unfortunately, longstanding clients, life-long friends, and even family members do sue their attorneys.

to a personal injury claim and you have no intention of handling that piece, put it in writing! The same could be said for those of you who handle divorces or obtain large settlements of any type but also have no intention of advising those clients as to any tax ramifications that might arise. If you are only being retained to provide a second opinion, document that you have no obligation to file suit on the client's behalf. It's all about documenting that the client was made aware of what you will and will not be doing. Further, where called for, you might also consider documenting that you advised them to seek the services of someone who can assist them on those issues that you won't be.

Finally, it is always a good idea to document that the representation has ended and inform the client that the file is about to be closed, or that the file relative to a particular matter for an on-going client will

be closed. A letter of closure sent at the conclusion of representation can meet this need quite effectively. At its most basic level this letter simply confirms for the client that everything you said you would do has now been completed. It is one more way to make certain that no assumptions are in play on either side.

Of course, the letter of closure is also a way to inform the client of your file retention policy, can serve as a cover letter for the return of original documents to the client, assists in marketing by giving you a chance to say thanks for the business, and is one more opportunity to ask for additional work with a statement as simple as “please don’t hesitate to contact me if there is anything else I might be able to assist you with.”

All of this speaks to the need to play it safe when it comes to docu-

menting scope of representation. Clients are far less able to allege that their understanding of scope of representation was far broader than what yours was; and here’s the rub. Should scope ever be an issue in a malpractice claim and you find yourself in a word against word dispute with the client as to just what your scope was, you’ve got a serious problem. We all know that attor-

neys don’t fare well in word against word disputes in the malpractice arena. For this reason alone, the time spent documenting scope at the beginning and at the end of representation is well worth it. Try to get into a regular and consistent practice of doing so because claims attorneys will look for these types of documents in every claim file that comes in. They are that important.

ALPS Risk Manager Mark Bassingthwaight, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Mark can be contacted at: mbass@alpsnet.com.



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Back to the Basics, Part V: Adjectives

Tenielle Fordyce-Ruff

As I write this, school is about to start again. Each August, I walk back into a classroom filled with eager new students. We cover a lot of ground in a few short months, but we also have to start with some basics. Repeating each year the same basics with new students reminds me how everyone comes to writing with different knowledge and how, even if the writer understands the concept, a refresher is always nice.

As it has been over a year since I wrote about the basics, I thought I would provide my readers with a primer on adjectives to go along with the early ones I wrote about various parts of speech and punctuation.

Adjectives: What are those?

In grammar terms, an adjective is a word that modifies a noun or pronoun. You might have learned that it's a "describing word" back in elementary school.

Adjectives tell the reader what sort, how many, what size or whose. Adjectives can also be used to add more detail to a noun.

The child was hit by a red car.

The Court issued a long opinion.

Or to limit a noun.

This time, I decided to go back to the basics.

Three defendants agreed to settle.

Most adjectives derive from a noun. For instance, *hammered* comes from *hammer* and *perilous* comes from *peril*. And most adjectives are formed by the addition of a suffix: -able, -al, -ary, -ed, -en, -esque, -ful, -ible, -ic, -ish, -ive, -less, -like, -ly, -ous, -some, and -y.

A proper adjective comes from a proper noun.



Some businesses accept Canadian dollars.

She will arrive in a New York minute.

Proper adjectives are always capitalized, but the word that the adjective modifies is capitalized only if it is a proper noun.

Articles: Are they adjectives, too?

In short, yes. Articles — *the*, *a*, and *an* — are limiting adjectives. *The* can be used to indicate something definite: something well understood, something that is about to be described, or something important.

The plaintiff moved for summary judgment.

The deponent who refused to attend his deposition was found in contempt.

The grand prize for finishing this article is a better understanding of adjectives!

A and *an* are used to indicate something indefinite: a non-specific person, thing, or object that is indistinguishable from other members of the class.¹

A plaintiff must serve the defendant within six months of filing an action.

Of course, there are a few exceptions to these general rules. Sometimes *the* can be used to refer to a generic class.

Adjectives tell the reader what sort, how many, what size or whose. Adjectives can also be used to add more detail to a noun.

The courts are interested in limiting the word limit in briefs.

And sometimes *a* or *an* can be used to refer to something definite.

The students watched a fascinating trial yesterday.

Where do I put them?

Generally, adjectives go before the noun they modify. If however, you want to add emphasis, the ad-

jective is following a linking verb, or it is standard usage, the adjective should follow the noun.

For reasons innumerable, the law should change.

The sky was clear that day.

She signed her will in front of a notary public.

Likewise, if the adjective modifies a pronoun, it usually follows the pronoun.

He was insensitive.

Finally, if the adjective is modifying a noun phrase, and the noun phrase includes a possessive, the adjective should follow the possessive noun.

The firm's former managing partner left to open a boutique practice.

What about dates as adjectives?

Legal writers use dates as adjectives all the time, so we know dates can function as adjectives. The difficulty for us comes from knowing when to use (or not use) a comma when a date functions as an adjective.

Quick rule: If the date has only two parts, (month and day, or month and year) don't use a comma. If it has all three parts, use two commas — one before and one after the year.

The November 13 contract included a liquidated damages clause.

The November 2009 contract included a liquidated damages clause.

The November 13, 2009, contract included a liquidated damages clause.

Of course, using the full date as an adjective is awkward, so use it infrequently. Another option, if you must use the full date is to use an "of" construction.

The contract of November 13, 2009, included a liquidated damages clause.

Beyond the Basics

Now that you have a handle on the basics of adjectives, let's move

on to a few bonus points: The use or omission of articles and predicate adjectives.

How can the use or omission of articles change the meaning of my sentence?

The absence of an article can change a sentence's meaning. Take these two sentences.

The discovery responses provided little clarity.

The discovery responses provided a little clarity.

In the first example, the discovery responses did nothing to clarify the situation. In the second, the situation was somewhat clarified by the discovery responses.

What are predicate adjectives?

This one is for the grammar nerds out there. A predicate adjective follows a linking verb, but modifies the subject of the sentence. Linking verbs are either *to be* verbs or intransitive verbs. They are called linking verbs because they link the subject to the predicate — the rest of the sentence.²

I was thrilled to write about adjectives.

I felt bad that I couldn't include more.

These adjectives, although they follow a verb, both tell you about my excitement.

The difficulty for us comes from knowing when to use (or not use) a comma when a date functions as an adjective.

Sources

- *The Chicago Manual of Style*, 222-229 (16th ed.)
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 172 (2d ed.)

Endnotes

1. The choice between *a* and *an* depends on the sound of the word following the article. When the word begins with a vowel sound, no matter the spelling, use *an*. When the word begins with a consonant sound, including y, h, and w, use *a*. Thus, you would write about a historic occasion but an hour.
2. For more on intransitive verbs, see my article *Beyond the Basics: Transitive, Intransitive, Ditransitive, and Ambitransitive Verbs*, *The Advocate* (February 2015).

Tenielle Fordyce-Ruff is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Fisher Rainey Hudson. You can reach her at tfordyce@cu-portland.edu or <http://cu-portland.fice.com>.



'The Widow Wave, A True Courtroom Drama of Tragedy at Sea'

A. Denise Penton

My casual reading preferences run to action adventures, sci-fi and fantasy adventures. My preferences usually exclude legal thrillers and non-fiction books. I had just picked up eight or so books from the library to put myself to sleep at night when I received a copy of the *Widow Wave*. I felt it was likely I would only read a few pages before becoming disinterested and moving on to one of the other action adventure fictional books I had checked out.

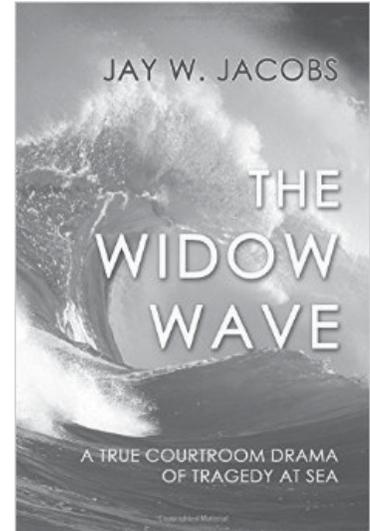
I was pleasantly surprised to find myself completely engrossed. I have a tendency to read three or four books at a time. This book was so well written and the story and issues presented in such a spellbinding way that I read it all the way through, without my usual detours into other stories. I stopped myself several times from jumping to the end to sneak a peek at the "whodunit" final moments.

The *Widow Wave* is a nonfiction thriller written by Jay Jacobs, an attorney who handled the legal consequences of a real life maritime tragedy. Billed as the worst recreational fishing boat accident, the tragedy occurred when a group of friends, family and business acquaintances went out into the Pacific Ocean, never to be seen alive again.

The book tells the story of how the clients, opposing parties, lay and expert witnesses all affected the ultimate outcome of the case. The legal issues created the compellingly legal thriller component and the author did a great job of weaving in the real life interactions, tensions and in-fighting that occurs in real life legal dramas.

I was pleasantly surprised to find many of the observations the author made on a personal and professional level were ones that I could identify in many of my own cases. You do not have to be an attorney to appreciate this book. However, if you are an attorney, I think you will appreciate some of the twists of this case and observations made by the author. You may even recognize, as I did, some of them in your own legal dramas. I would highly recommend reading this book.

BOOK REVIEW



The Widow Wave, A True Courtroom Drama of Tragedy at Sea, by Jay Jacobs 276 pages, published by Quid Pro, LLC, also available in Kindle.

A. Denise Penton is the Principal of Penton Law Office Pllc and has been an attorney for over 19 years. Penton Law Office Pllc is a general practice law firm with an emphasis in Immigration Law, Business Law and Family Law. She has served three terms on the Editorial Advisory Board and belongs to four Sections.





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

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IN MEMORIAM

Michael Keith Naethe 1975-2015

Michael (Mike) Keith Naethe, 39, died unexpectedly in his sleep on August 3, 2015. He was born on September 6, 1975 to Gordon and Sandra Naethe. As a child, Mike was very active in



Michael Keith Naethe

sports and was an Eagle Scout. After high school, he attended BSU and received two degrees, one in international business and one in economics.

After graduating from BSU, he attended Manchester College in England and received his master's degree in Economics. After England, he went to University of Idaho to receive a law degree. After passing the Idaho State Bar, he worked for the Attorney General's office in Boise.

Later, he moved to Las Vegas and was working for Hafter Law Office.

At the time of his death, he worked for O'Reilly Law Group. He is survived by his mother, Sandra; brother and sister-in-law, Kevin and Jaymel Naethe; aunt and uncle, Connie and Bud Alloway; and many cousins.

He was preceded in death by his father, Gordon, and both sets of grandparents.

OF INTEREST



Pictured left to right are Boise-based attorneys with Office Depot, Inc. legal department, which earned national honors recently. From left are Dennis Radocha, Tracy Oneale, Gene Ritti, Kindra Hansen, and Jeff Neumeyer.

Office Depot, Inc. attorneys recognized after merger

BOISE - The Office Depot, Inc. legal department was recognized by ALM's Corporate Counsel, the leading national publication for general counsel and in-house attorneys, as one of the "Best Legal Departments" in corporate America for 2015. According to the magazine, the legal department earned its spot largely for the way its lawyers managed the

2014 merger integration of Office Depot and OfficeMax. The company was also recognized for other reasons including its hands-on approach to litigation and its active involvement in pro bono projects and helping people in need.

Office Depot's corporate headquarters is based in Boca Raton, Florida, and the legal department also maintains a satellite legal office in Boise, Idaho. The Boise legal team is responsible for companywide cor-

porate litigation as well as legacy matters involving OfficeMax and Boise Cascade Corporation (now known as OfficeMax Incorporated).

Hawley Troxell expands litigation practice with five new hires

BOISE - Hawley Troxell is pleased to announce that Boise attorneys David W. Knotts, Carsten A. Peterson, Tracy L. Wright, William K. Fletcher and Jessica E. Pollack have joined the firm in its main office in Boise.

"We are pleased to welcome this strong team of trial and litigation attorneys to our existing litigation practice group. These talented individuals enable us to expand our client base and serve our existing clients in a broader range of cases," said Managing Partner Nick Miller. "In addition to the strong individual resumes, we are delighted that the group includes attorneys at different experience levels, thus positioning the firm to continue to serve clients for years to come," Miller said.

The group's senior attorney, Dave Knotts, who will join Hawley Trox-

OF INTEREST

ell as a partner, said: "Hawley Troxell is such a known quantity in the legal community, I felt the opportunity to integrate my practice into the firm just could not be missed."

Mr. Knotts has over 25 years of trial and litigation experience and is also listed on the mediator panels for the Idaho Supreme Court and the United States District Court for Idaho. Knotts received his J.D. from the University of Oregon Law School in Eugene, his masters degree from the University of North Carolina in Chapel Hill, and his undergraduate degree from Indiana University in Bloomington. Mr. Knotts is a member of the Idaho Mediation Association.



David W. Knotts

Carsten Peterson has significant experience in litigation involving medical liability, employment practices, catastrophic personal injury cases, wrongful death and transportation liability. He is also experienced in administrative complaints filed with the Idaho Human Rights Commission and Equal Employment Opportunity Commission with respect to discrimination claims under the Fair Housing Act (FHA), Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Title VII of the 1964 Civil Rights Act and state laws prohibiting discrimination.



Carsten A. Peterson

Mr. Peterson received his J.D. from the University of Idaho College of Law and a B.S. in Biology with a minor in Chemistry from Utah State University in Salt Lake City. He is licensed to practice in Idaho and Utah.

Tracy Wright has a general litigation practice, with an emphasis on commercial and business litigation, construction litigation, professional liability, personal injury, worker's compensation and product liability. He has successfully defended clients in state and federal courts and has extensive experience in alternative dispute resolution. Mr. Wright also has strong ties to the restaurant and hospitality industry, having defended and advised numerous restaurant and hospitality industry clients. Mr. Wright graduated from the University of Idaho College of Law and earned his B.A. in Philosophy and Anthropology from Auburn University in Alabama.



Tracy L. Wright

Jessica Pollack has a general litigation practice which includes insurance defense, personal injury and employment liability. She graduated from the University of Idaho College of Law and earned her B.S. in Public Relations and Communications from the University of Idaho. Pollack was in-



Jessica E Pollack

ducted into the Phi Beta Kappa honor society and received the University of Idaho Alumni Association's Award of Excellence. Following law school, Ms. Pollack served for one year as a judicial law clerk for Justice Daniel T. Eismann of the Idaho Supreme Court.

William Fletcher has a litigation practice with an emphasis on insurance defense, personal injury defense, environmental law and government liability. He graduated from the University of Idaho College of Law and earned his B.S. from Northern Arizona University. Following law school, Mr. Fletcher served for one year as law clerk to the Honorable Robert Elgee in the Fifth District.



William K. Fletcher

Sarah Q. Simmons joins Strindberg & Scholnick

BOISE - Strindberg & Scholnick, LLC is pleased to announce that Sarah Q. Simmons has joined the firm as an attorney in its Boise office. Sarah is a 2010 graduate from University of Idaho College of Law and former law clerk to Justice Joel D. Horton of the Idaho Supreme Court. She joins the firm after practicing ERISA law and prosecuting cases for Ada County. Sarah, along with the rest of the attorneys at the firm, will focus



Sarah Q. Simmons

OF INTEREST

on employment and labor law issues throughout Idaho and Utah.

Owens, McCrea & Linscott, PLLC welcomes new attorney

HAYDEN - The law firm of Owens, McCrea & Linscott, PLLC, is pleased to announce the addition of Jillian H. Caires as an associate attorney.

Jillian Caires is a native of Coeur d'Alene and graduated from Lake City High School in 2004. Ms. Caires attended Washington State University, graduating in 2006 with a bachelor's degree in political science. She earned her law degree from Gonzaga in 2012.

In law school she was a member of the Mugel National Tax Moot Court Team and the worked on the Gonzaga Journal of International Law, which was awarded the top grade in Legal Research and Writing, Estate Planning, Community Property, Criminal Procedure, and Animal Law.

Following law school, she served two years as law clerk to the Hon-



Jillian Caires

orable Benjamin Simpson, District Judge, First Judicial District. During her clerkship, Ms. Caires had the opportunity to work on numerous complex civil and criminal matters.

In addition to the firm's areas of focus, medical malpractice, personal injury, and employment, she will practice in the areas of environmental, real estate, property, probate and estate litigation, as well as appellate work.

Cox, Ohman & Brandstetter Chtd. adds two attorneys

IDAHO FALLS - The Idaho Falls law firm of Cox, Ohman & Brandstetter, Chartered, welcomes its two new associates, April Wielang and James Herring.

Ms. Wielang graduated with a Bachelor of Science degree in Biology from Idaho State University in 2010. She graduated from the University of Idaho College of Law in 2014, where she interned in the Legal Aid Clinic providing legal assistance to low-



April Wielang

income community members. As a student providing pro bono services, she focused her efforts on assisting the Moscow domestic violence crisis center known as Alternatives to Violence of the Palouse. She is currently a member of the Family Law Section of the Idaho State Bar. Now that she has returned to her hometown of Idaho Falls, her main focus is on cases involving domestic relations, family law, divorce, custody, and child support.

Mr. Herring is a United States Navy veteran, and a 2014 graduate of the University of Idaho College of Law, where he was the Technical Editor of the Idaho Law Review. He also interned with the University of Idaho Small Business Legal Clinic, where he helped many people successfully start their new businesses. His practice primarily focuses on business litigation, personal injury, estate planning and litigation, and criminal defense.



James Herring



The Idaho Law Foundation has received generous gifts in memory of:

Mack Redford

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Mack Redford



Annual Meeting Keynote Speaker former Colorado State Supreme Court Justice Rebecca Love Kourlis talks about the “Redesigning the Courts to Meet the Needs of Litigants.”

Attorneys Relax in Picturesque Sun Valley at Annual Meeting

Mahmood U. Sheikh

The 2015 ISB Annual Meeting kicked off Wednesday evening, July 22, with the President’s Reception and the Distinguished Lawyer Award Dinner. The recipients of the 2015 Distinguished Lawyer Award were Kenneth L. Pedersen of Twin Falls, John E. Rumel of Boise and B. Newal Squyres of Boise. For the first time, the Idaho State Bar presented the Distinguished Jurist Award to Judge Stephen S. Trott, Senior Circuit Judge for the United States Court of Appeals, Ninth Circuit. The evening was capped with an Annual Meeting Hospitality HQ featuring drinks and music.

Thursday morning, July 23, officially began with a Plenary Session. ISB President Paul B. Rippel welcomed the attendees and Chief Justice Roger S. Burdick gave the “State of the Courts.” The keynote presen-

The 50/60/65 Years of Admission Reception was held Thursday evening and recognized 20 attorneys.

tation was given by Justice Rebecca Love Kourlis, Executive Director and founder of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver.

At noon, the annual Idaho State Bar and Idaho Law Foundation Service Awards were presented. Eight lawyers and one non-lawyer from

around the state who have provided volunteer time to support the work of the Bar and the Law Foundation were honored. The Outstanding Young Lawyer of the Year Award was presented to Joe Pirtle of Boise. The Family Law Section also recognized the Hon. Russell Comstock with its Annual Family Law Award of Distinction. When the Awards program

concluded the Idaho Law Foundation held their Annual Meeting.

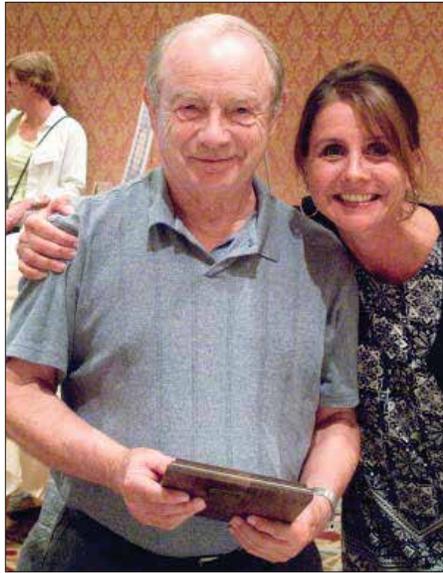
During the afternoon break, representatives from The Advocates, a non-profit in Hailey, Idaho, whose mission is to teach people of all ages how to build and maintain healthy relationships were on hand to thank attendees for their generosity of donated new school supplies for grades K-12 in the Wood River Valley. A dryer box load was donated. The 50/60/65 Years of Admission Reception was held Thursday evening and recognized 20 attorneys.

On Thursday numerous lectures and workshops were worth 5.0 CLE credits, 2.0 CLE credits in the morning session (0.5 during Plenary Session) and 3.0 CLE credits in the afternoon session.

An additional 5.5 CLE credits were offered to conference participants on Friday. The late morning session featured the annual “Lessons from the Masters” CLE. The presenters for the 2015 installment were Gary L. Cooper of Pocatello, Hon. Juneal C. Kerrick of Caldwell and William V. McCann Jr. of Lewiston.

Attendees enjoyed the Networking BBQ Luncheon on the Limelight Terrace of the Sun Valley Inn. The Professionalism & Ethics Section received the Section of the Year Award. The *Advocate* Awards were also presented. The flagship CLE “Drones: Idaho, the West and Abroad” was presented Friday afternoon and featured officials from the United States Department of Interior, the Federal Aviation Administration and the United States Department of Homeland Security.

The Annual Meeting officially adjourned a little after 3:30 p.m. on Friday afternoon.



Former Idaho Supreme Court Justice Gerald Schroeder accepts his 50-Years of Practice Award from Idaho State Bar Commissioner Michelle Points.

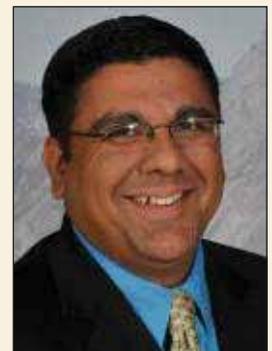


Michael H. Felton of Buhl, talks about the Idaho Law Foundation’s activities in 2015. He serves as president of the ILF, which is hosting the 2016 National Championship Mock Trial Competition in Boise.



Enjoying each other’s company before the Distinguished Lawyer Dinner are, from left, Rachel Vanderpool, Idaho Supreme Court Justice Roger Burdick, Ernest Hoidal and Carol Hoidal.

Since July 2010, **Mahmood U. Sheikh** has served as Deputy Executive Director for the Idaho State Bar/Idaho Law Foundation. He oversees the Member Services Department and plays an integral role with Continuing Legal Education programming, Practice Sections, District Bar Associations, Lawyers Assistance Program, Idaho Academy of Leadership for Lawyers, member benefits and the Bar’s Annual Meeting.



Fast Facts - Annual Meeting

- 395 individuals attended the 2015 ISB Annual Meeting. This ranks as the 15th most attended since 1986. The turnout was a 4.5% increase from the previous Annual Meeting held in Sun Valley in 2011.
- 254 attorneys/judges attended the 2015 ISB Annual Meeting. This represents the eighth largest attorney/judges turnout at the Annual Meeting since 1986. The attorneys/judge turnout was a 7.2% increase from the previous Annual Meeting held in Sun Valley in 2011.
- The Annual Meeting has been held 14 times in Sun Valley since 1986.
- 15 programs produced; total of 23.5 hours of CLE programming)
- CLE fees were waived for attorneys practicing three years or less or those attorneys unemployed and residing outside of the 5th Judicial Districts. Those in the 5th District falling into this category received reduced registration.
- CLE fees were waived for law students.

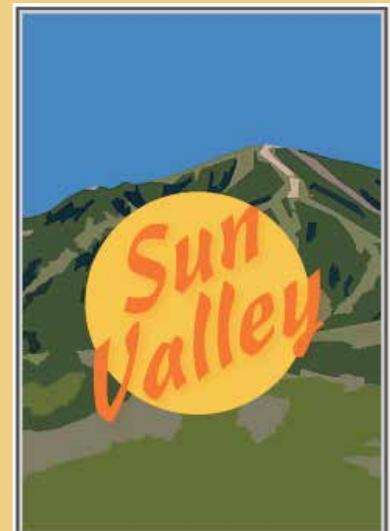
**Readily available Annual Meeting Statistics date back to 1986*

2015 Idaho State Bar Annual Meeting CLE Programs Attendance

Program	Attendance
<i>Lessons from the Masters</i>	126
<i>Plenary - Redesigning the Courts</i>	118
<i>Drones: Idaho, the West</i>	72
<i>Social Media Potential Jury</i>	59
<i>Diversity Issues in Ninth Circuit</i>	56
<i>Idaho Courts - Electronic Record</i>	52
<i>Legal Ethics & DR</i>	51
<i>Second Amendment</i>	49
<i>Ethics & Brady v. Maryland</i>	45
<i>Employment & Labor Law Update</i>	45
<i>Protecting Law Firm's Data</i>	42
<i>SCOTUS on Marriage Equality</i>	39
<i>Alienation & Reunification in High Conflict</i>	37
<i>Idaho Legal History Part II</i>	32
<i>Trustee Selection in Idaho</i>	26

ISB Thanks its Annual Meeting Corporate sponsors

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 Thursday Continental Breakfast: **BizPrint**
 Plenary Session: **LawPay Credit Card Processing**
 Service Awards Luncheon: **Moreton & Company and Family Law Section**
 Community Service Project: **Concordia University School of Law**
 Celebrating 50/60/65 Years of Admission Reception: **Fifth District Bar Association**
 Friday Continental Breakfast: **Eide Bailly LLP**
 Social Networking BBQ: **University of Idaho College of Law**
 Course Materials: **Casemaker**



Distinguished Jurist of the Year – Hon. Stephen S. Trott

Dan Black

In this new category of award, the Idaho State Bar Board of Commissioners honored the Hon. Stephen S. Trott, Senior Circuit Judge for the U.S. Court of Appeals, Ninth Circuit, “in recognition of distinguished judicial service and exemplary integrity and independence. Recipients are recognized for their contribution to enhancing attorneys’ satisfaction of practicing law.” At the Annual Meeting in Sun Valley David Leroy introduced Judge Trott during the awards ceremony.

The Judge keeps his chambers in Boise, where he is regularly involved in numerous programs involving legal and civics education, and the advancement of the profession. He has made himself available for numerous CLE programs. Judge Trott earned an Idaho State Bar Service Award in 2003.

As a freshman at Wesleyan University, Trott was an early member of the folk music group, “The Highwaymen,” known for their gold record #1 hit *Michael Row the Boat Ashore*. He later graduated from Harvard Law School. He served as U.S. Attorney for the Central District of California from 1981–83 and the Assistant Attorney General for the USDOJ Criminal Division from 1983–86. He served as Associate Attorney General from 1986–88.

Trott was nominated to the U.S. Court of Appeals by President Ronald Reagan in 1987. Since 2004 he has continued to serve in Senior Status.

Charitable work

In his charitable endeavors, Judge Trott served as a board member of the Children’s Home Society for 15 years, including time as president



From left are former Idaho Attorney General and Lt. Governor David Leroy, Judge Richard Tallman, U.S. Court of Appeals of the Ninth Circuit, Carol Trott, and Senior Circuit Judge Stephen S. Trott, U.S. Court of Appeals, Ninth Circuit. Judge Trott was honored with the “Distinguished Jurist Award” for his unique contribution to the profession and to the community.

during its \$1.8 million Capital Campaign. He also held two joint benefit concerts by “The Highwaymen” to raise money for the Warm Springs Counseling Center and the Boise Philharmonic Association, and numerous concerts around the country for various non-profit organizations.

He also served on the board of the Boise Philharmonic Association, including four years as president. He initiated the organization’s foundation and a permanent endowment fund. He also provides a pre-concert lecture before performances by the Philharmonic. He has done a similar service before concerts at the Seattle Symphony.

He serves on the board of the Esther Simplot Performing Arts Academy and volunteers with the Boise State University Wrestling team, the YMCA Strategic Planning Committee, Boys and Girls Club of Nampa,

The Judge keeps his chambers in Boise, where he is regularly involved in numerous programs involving legal and civics education, and the advancement of the profession.

University of Idaho College of Law Advisory Council. He has also contributed to the BSU Renaissance Institute as a lecturer on the United States Constitution and classical music.

He also travels the state to lecture at the Citizen’s Law Academy in Boise, Caldwell, Moscow, Pocatello and Idaho Falls.

Joseph Pirtle Earns Recognition at ISB Annual Meeting

Dan Black

Joseph N. Pirtle, 36, was chosen as this year's Outstanding Young Lawyer for his "service to the profession, the Idaho State Bar, Idaho Law Foundation, and to the community and who exhibits professional excellence," according to the nomination.

He is the past chair of the Litigation Section and participated in the Idaho Academy of Leadership for Lawyers as an inaugural class member. He has served on the Lawyer Assistance Program Committee since 2010 and is a program committee member of the Boise Adjusters Association. He's a member of the Idaho Association of Defense Counsel and participates as a member of the Oregon State Bar.

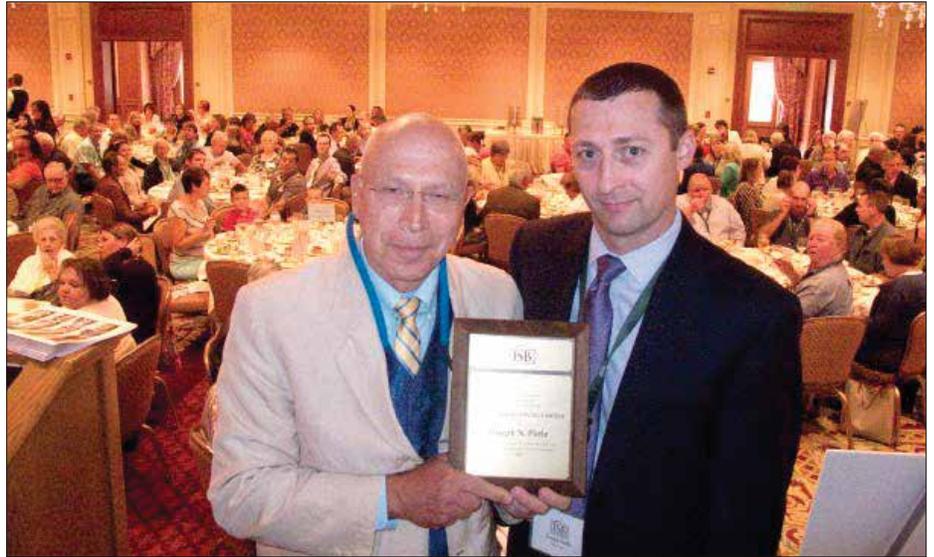
Joe works at Elam & Burke, PA, and practices civil litigation with a focus on commercial and business litigation, and insurance defense. Notably, Joseph regularly performs pro bono work for court appointed guardians ad litem through the Court Appointed Special Advocate Program.

He is a graduate of the University of Idaho College of Law and clerked for Hon. John C. Hohnhorst, District Judge, Fifth Judicial District of Idaho.

He and his wife Melisa have two sons and live in Boise.

Advocate Awards – 2015

Contributors to *The Advocate* receive no financial compensation. The only reward to writers is knowing they have helped improve the professionalism, knowledge and understanding for those practicing law. In recognition of the best work



Outstanding Young Lawyer Award winner Joseph N. Pirtle, receives congratulations from Idaho State Bar President Tim Gresback.

during the previous year, *The Advocate* Editorial Advisory Board choose three recipients for *The Advocate* Awards.

Best Article – Stephen Adams takes this year's prize for best article printed in *The Advocate* for his piece *Following the Recipe: A Rules Reminder for Motion Practice*, which ran in the February, 2015 issue. The Editorial Advisory Board noted that the article



Stephen Adams

deserves the award because of the article's clarity, usefulness to practitioners and the overall benefit to the practice of law. The article takes the reader logically through the sequence of procedures for filing motions in civil cases. Stephen created a graphic summarizing the relevant deadlines, fees, and rules for different types of filings. He also made the article applicable to attorneys in a wide range of practice areas.

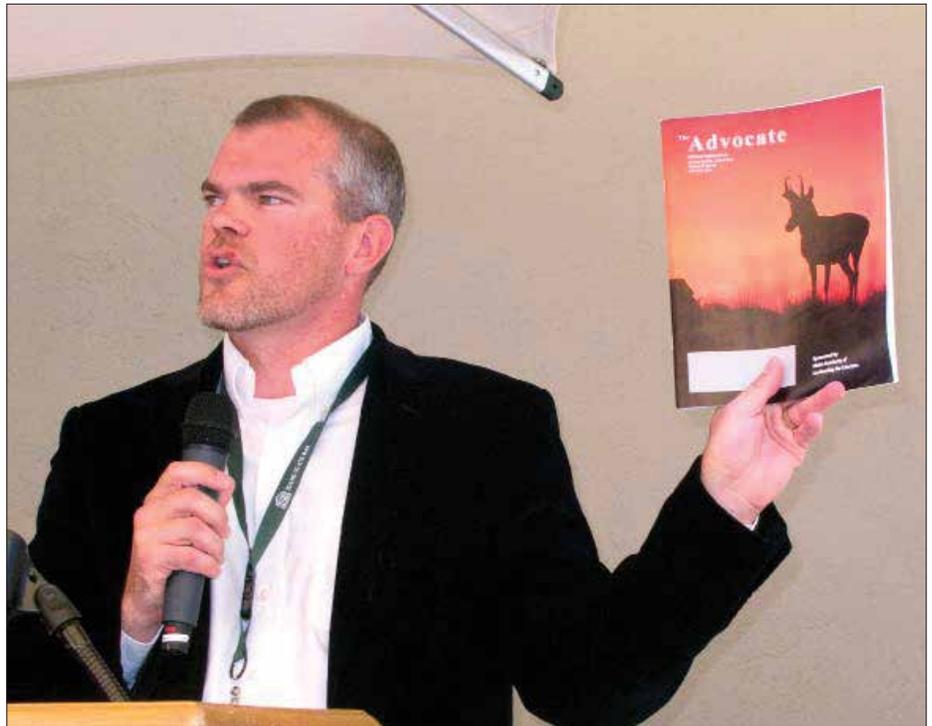
Joe regularly performs pro bono work for court appointed guardians ad litem through the Court Appointed Special Advocate Program.

Best Cover Picture – Patrick George stunned readers with his dramatic silhouette of an antelope surrounded with deep red hues. It ran in the 2015 June/July issue. The picture was taken from about 90 yards away from the animal near Pinedale, Wyo. Mr. George works at Racine, Olson, Nye & Bailey, Chtd. in Pocatello.

The Advocate Editorial Advisory Board noted the picture was a bit of an optical illusion because it could appear the male antelope is facing both away, or directly toward, the photographer. Pat previously earned recognition in 2005 with the Idaho State Bar Pro Bono Award. He and his wife, Stacey, live in Pocatello.

Best Issue Sponsor – The 2015 March/April issue sponsored by the Real Property Section earned the highest praise for any sponsor last year, with Editorial Advisory Board members noting that the topics were of interest to all members of the bar and explored dynamic issues such as oil & gas leases, easement law, real property in a living trust, claims against a title insurer, and privacy issues with drones and trespass law. Special notice was given to Andrew Hawes’ fictional “Uncle Sal” who “is famous for two things: (1) His ham hock sandwiches; and (2) Calling you for free legal advice.” The Section brought forward major contemporary issues facing Idaho lawyers making the issue jam-packed with interesting, relevant and timely articles.

The Advocate staff would like to thank all of the magazine’s contributors for their generous contributions adding to the intellectual landscape for Idaho’s legal community.



A. Dean Bennett, a representative from The Advocate Editorial Advisory Board, introduces The Advocate Awards for best article, best issue, and best cover photo, which he holds up as an example.

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. Dan oversees the Lawyer Referral Service and general announcements from the ISB. He has been Managing Editor of The Advocate since 2009.



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2015 ANNUAL MEETING - SUN VALLEY



Annual Meeting participants donated school items for The Advocates, a non-profit organization in Hailey that serves families and children who have been displaced or disrupted by domestic violence. From left are ISB Commissioner Trudy Fouser, Commissioner Michelle Points, Commissioner Tim Gresback, Advocates staff Emily Watts, staff member Tricia Swartling, Commissioner Paul Rippel and attorney Amanda Breen.



Donald Burnett, left, and Tim Hopkins, right, listen to a speaker during the Awards Luncheon.



Trudy and Kenneth Pedersen of Boise relax before the Distinguished Lawyer Award presentation.

2015 ANNUAL MEETING - SUN VALLEY



Having a great time at the Annual Meeting in Sun Valley are, from left, Sarah Nelson, Erika Birch, Sarah Simmons, Cassandra Cooper, Michelle Points, Anne Marie Fulfer.



Linda Squyres stands with her daughter Ruby and granddaughter Elise at the Distinguished Lawyers Award Dinner. Linda's husband, Newal, received the Distinguished Lawyer Award.

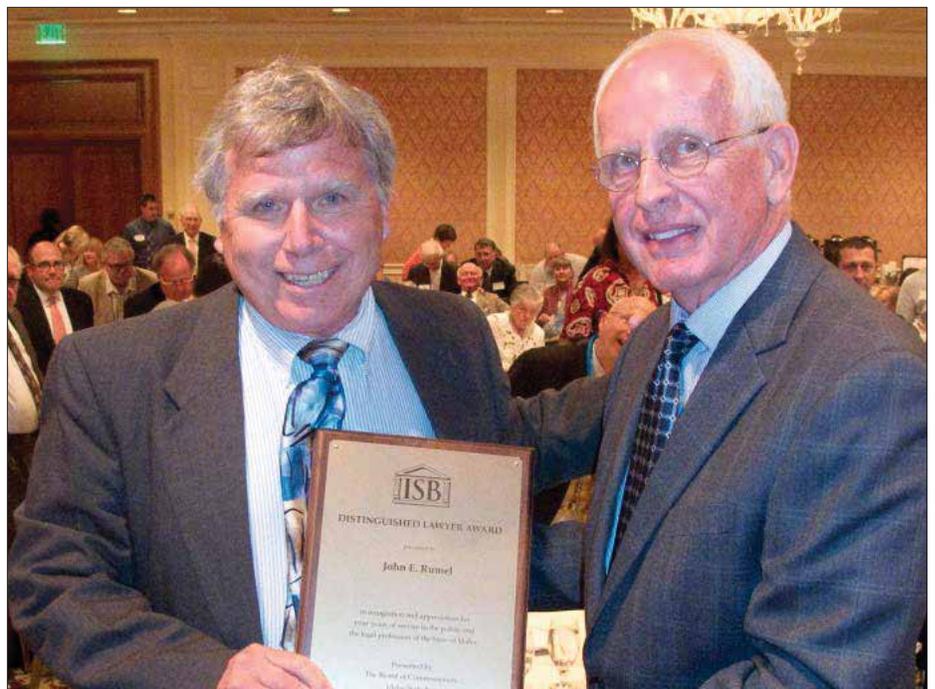


Walt Bithell, right, holds the Distinguished Lawyer Award, which he presented moments earlier to B. Newal Squyres of Boise.



Members of the Idaho Law Foundation Board of Directors visit during the Idaho State Bar Annual Meeting in Sun Valley. From the left are: Kimberlee Bratcher, ISB/ILF Executive Director Diane Minnich, Hon. Joel Horton, Susan Eastlake, Michael Felton, Kari Campos, Craig Meadows, and Dave Maguire.

**Annual Meeting photos by
John Glen Hall**



John Rumel, left, stands with former Idaho Education Association Executive Director James Shackelford. Rumel spent many years as IEA counsel before he began his own teaching career.

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IDAHO *Access to Justice* ...AND JUSTICE FOR ALL

Calling All Associates: Access to Justice Idaho Associate Campaign

Aaron J. Kraft

When I graduated from law school, I wanted to advocate for others and help people navigate the legal system. I found my niche helping organizations protect their intellectual property. I love my work, but I practice law as a business. So I devote the significant majority of my time to paying clients. My practice area is also not relevant to most of the legal issues that affect low income or disabled Idahoans. Most of Idaho's private practice lawyers are in the same boat.

Idaho Legal Aid Services, Disability Rights Idaho, and the Idaho Volunteer Lawyers Program are the main providers of free civil legal services to low-income and disabled Idahoans. As the population of Idaho increases so does the demand for free legal services for Idaho's most vulnerable populations, yet funding for such services has consistently diminished over the years.

Access to Justice Idaho, an annual campaign, was launched in 2013 by Idaho Legal Aid Services, Disability Rights Idaho, and Idaho Volunteer Lawyers Program. The goal of the campaign is to provide civil legal services to low-income Idahoans by raising funds from Idaho's legal community, businesses, and others who understand the essential role of the judicial system in the lives of so many.

The campaign has been successful. In its inaugural year, *Access to Justice Idaho* raised over \$180,000. This funding is being

This year, the campaign is making a concerted effort to reach associates in hopes that every associate will contribute to this important cause.

used to help family members secure guardianship of children and vulnerable adults, assist victims of domestic violence with divorce and custody proceedings, and provide representation for people with chronic mental illness and developmental disabilities. However, participation by law firm associates has been low. So this year, the campaign is making a concerted effort to reach associates in hopes that every associate will contribute to this important cause. The recommended donation is the equivalent of one-half of an associate's hourly rate. But the most important thing is not the amount

of the donation, it is to raise awareness about *Access to Justice Idaho* among associates. Associates can show support for the campaign by contributing something — just \$10 or \$20 from all of the private practice associates in Idaho would make a huge impact.

Like me, most associates have student loans, family obligations, and lots of other requests for donations. But I support this effort, and I'll be contributing. It's easy to give online here: <http://idahogives.razoo.com/story/Access-To-Justice-Idaho>. Please join me to support access to justice for all Idahoans.

Aaron J. Kraft is a member of the *Access to Justice Idaho* Leadership Committee. Mr. Kraft is an associate with Holland & Hart LLP. His practice focuses on patent prosecution and strategic patent counseling. One of his role models is Chief Justice Jim Jones, who works tirelessly to promote pro bono efforts in Idaho. Aaron had the great privilege of serving as a law clerk to Justice Jones before entering private practice.





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