



The
Advocate

**Official Publication
of the Idaho State Bar
Volume 59, No. 6/7
June/July 2016**



**Sponsored by Environment and
Natural Resources Law Section**

TRA

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Tenant Realty Advisors is pleased to announce the following lease transaction:

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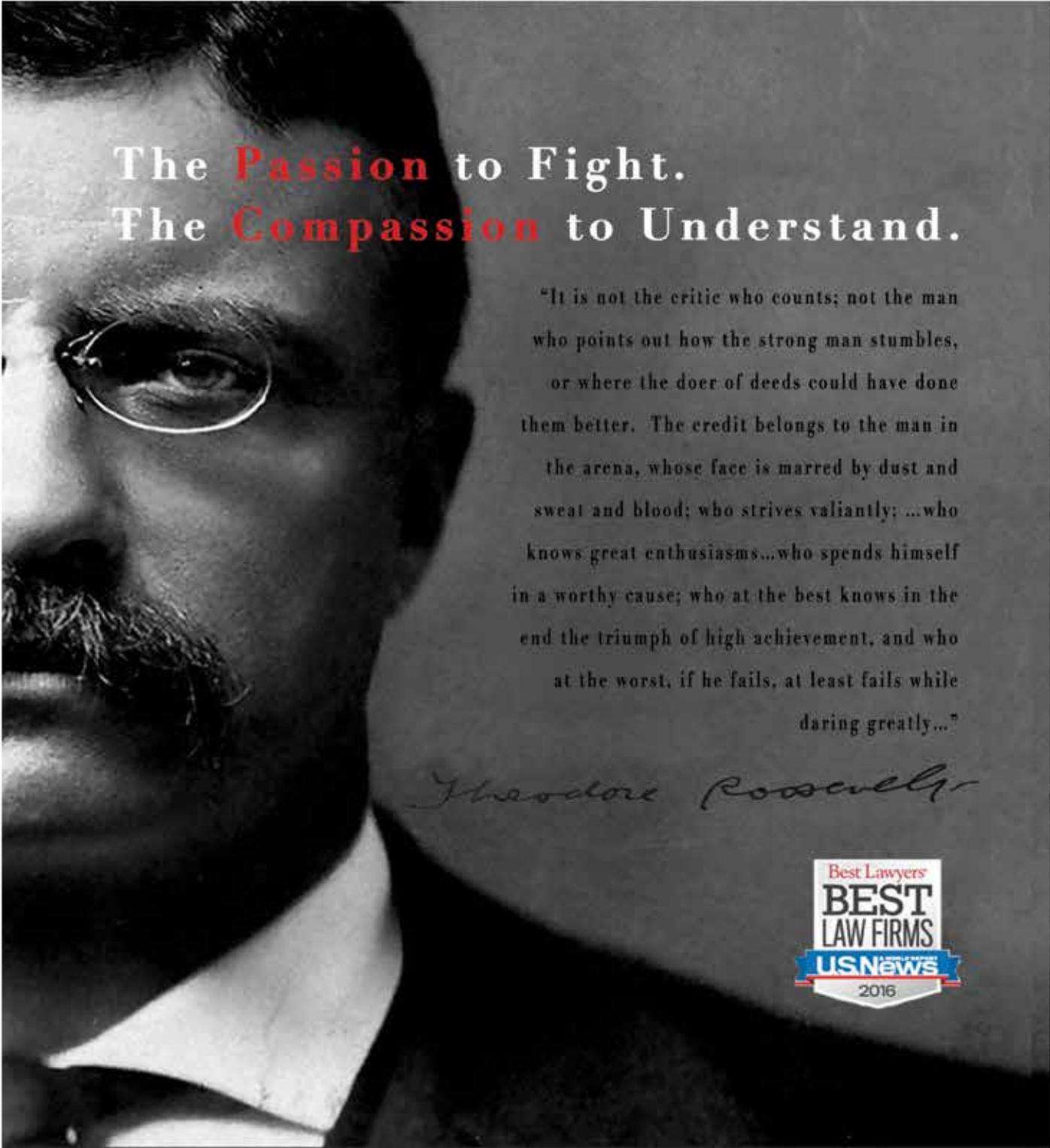
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Theodore Roosevelt



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The Advocate

The Official Publication of the Idaho State Bar
59 (6/7), June/July 2016

Section Articles

- 20** Hello From the Bar's Biggest Small Section
Dylan B. Lawrence
- 22** Sage Grouse Plans Ruffle Feathers
Sam Eaton
- 27** Food Safety Laws Affects Idaho Agriculture
Eric Edmunds
- 30** The Produce Safety Rule (PSR)
Sean Costello
- 33** FSMA Provides Some Relief for
Direct-to-Consumer Business Models
Kelsey Jae Nunez
- 35** Could Idaho Utilize 'Cap n' Trade for its Water Pollution?
Gregory M. George
- 39** Water and Natural Resources Legislation Review: 2016
Norman Semanko and Sarah A. McCormack
- 42** Planning for Wildfire in the Wildland-Urban Interface
*Stephen R. Miller, Eric Lindquist, Jaap Vos,
Thomas Wuerzer, Molly Mowery, Alexander
Grand and Brian Stephens*
- 48** The Clean Water Act's Agriculture Exemptions
Mark Ryan
- 62** Alphabet Soup: More Confusing Word Pairs
Tenielle Fordyce-Ruff
- 76** Jesse Robison Finds Work/Life Balance Through Service
Dan Black
- 79** Fourth District Holds its Law Day Celebration
Dan Black



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The Advocate makes occasional posts and takes comments on a LinkedIn group called "Magazine for the Idaho State Bar."

Columns

- 12 President's Message, *Trudy Hanson Fouser*
18 Executive Director's Report, *Diane K. Minnich*
56 Idaho Courts, *Catherine Derden*

News and Notices

- 11 Continuing Legal Education (CLE) Information
14 ISB Distinguished Lawyer & Jurist Awards Recipients
14 ISB/ILF Service Award Recipients
15 Celebrating 50, 60 and 65 Years of Admission Milestones
16 Discipline
16 Reinstatement
17 News Briefs
52 Idaho Court of Appeals and Idaho Supreme Court
54 Cases Pending
65 Classifieds
66 2015 Idaho Volunteer Lawyers Wall of Fame
70 July 2016 Bar Examination Applicants
72 In Memoriam
75 New Admittees
75 Of Interest
80 Idaho State Bar 2016 Annual Meeting



On the Cover:

Linda Pall, longtime Moscow lawyer, has also been a dedicated photographer for many years, with her favorite subject, the Moscow Farmer's Market. Pall was one of the founders of the market and spent many years as the 'Market Mama' on Saturday mornings. Her favorite vegetables are from Tonnemaker Farms of Royal City, Wash.

Section Sponsor:

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Editors:

Special thanks to the June/July editorial team: Angela Schaar Kaufmann and Karen Preset Overly Sheehan.

August issue sponsor:

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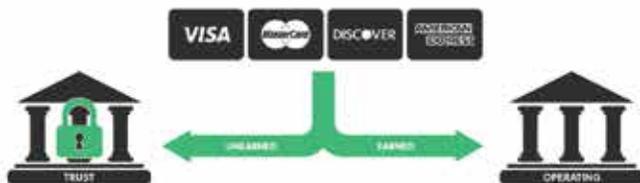


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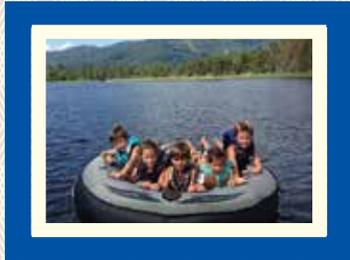
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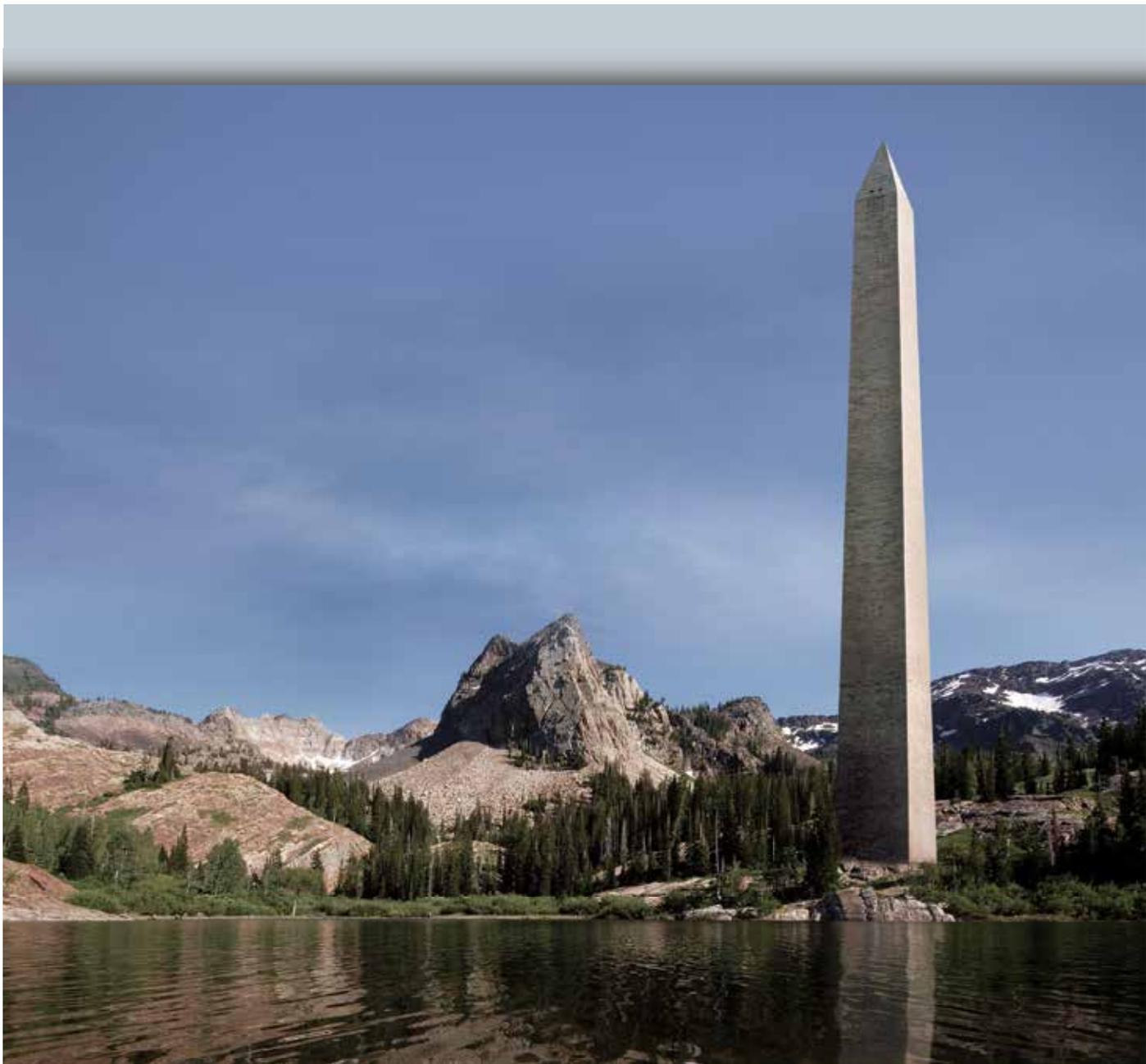
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Upcoming CLEs

June

June 8

2016 Idaho Legislative Review
Sponsored by the Idaho Law Foundation, Inc.
The Law Center, 525 W. Jefferson Street – Boise /
Statewide Webcast
9:00 a.m. (MST)
2.0 CLE credits - **NAC**

June 17

Legal Ethics in Contract Drafting
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partnership with Peach New Media and WebCredenza,
Inc.
Audio Stream
11:00 a.m. (MST)
1.0 Ethics credit

July

July 13 – 15

2016 Idaho State Bar Annual Meeting
Opportunity to earn at least 9.5 CLE credits of which at
least 2.0 Ethics credits



July (continued)

July 22

Ethics of Going Into Business with Clients
Sponsored by the Idaho Law Foundation, Inc. in
partnership with Peach New Media and WebCredenza,
Inc.
Audio Stream
11:00 a.m. (MST)
1.0 Ethics credit

August

August 31

Lawyer Ethics and Disputes with Clients
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partnership with Peach New Media and WebCredenza,
Inc.
Audio Stream
11:00 a.m. (MST)
1.0 Ethics credit

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

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

Live Seminars

Throughout the year, live seminars on a variety of legal topics are sponsored by the Idaho State Bar Practice Sections and by the Continuing Legal Education Committee of the Idaho Law Foundation. The seminars range from one hour to multi-day events. Upcoming seminar information and registration forms are posted on the ISB website at: isb.idaho.gov. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

Online On-Demand Seminars

Pre-recorded seminars are available on demand through our online CLE program. You can view these seminars at your convenience. To check out the catalog or purchase a program go to isb.fastcle.com.

Webcast Seminars

Many of our seminars are also available to view as a live webcast. Pre-registration is required. Watch the ISB website and other announcements for upcoming webcast seminars. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

Recorded Program Rentals

Pre-recorded seminars are also available for rent in DVD and CD formats. To visit a listing of the programs available for rent, go to isb.idaho.gov, or contact Lindsey Egner at (208) 334-4500 or legner@isb.idaho.gov.





Together, We Are Re-Shaping the Perception of Idaho Lawyers

*Trudy Hanson Fouser
President, Idaho State Bar
Board of Commissioners*

When my tenure as President of the Idaho State Bar began in February 2016, the Board of Commissioners set out to re-shape the perception of Idaho lawyers through the Lawyers Serve! campaign. My tenure ends at the Annual Meeting in July, but during my short term as president I have to say that even *my* perception of lawyers has changed. I knew that many Idaho lawyers made time and financial contributions, but I had no idea how many small (and some not so small) meaningful contributions Idaho lawyers are making on a daily basis. We have made great progress in just a short time. The very thing that the Board of Commissioners hoped would happen is – lawyers, firms and companies are commenting on how we *are* improving the perception of lawyers, and they are brainstorming with us about ways we can improve our perception even more.

Idaho lawyers are generous and selfless

The responses we received to the Lawyers Serve! survey were inspiring and truly heartwarming. The Commissioners and ISB staff were astounded by the number of legal and non-legal organizations that Idaho lawyers support with time and money.

We all juggle so much with personal and work obligations,



Kelsey Nunez paints a girl's face at the Idaho Green Fest, which supports sustainable living and conservation.

but I applaud the Idaho lawyers who make time to serve a variety of other very important and meaningful roles throughout the state, including: Scout leaders, volunteers, Deacons, mentors, Big Brothers & Big Sisters, coaches, foster parents (to kids & animals), board members, and missionaries.

As you may recall, one of the survey questions asked respondents to describe their most meaningful philanthropic contribution in 2015. We were blown away by the answers of both small and large contributions. Some of the answers included “reading with second graders at my kid’s school,” “providing dog/cat food and supplies to Idaho fire victim families,” “serving as an Idaho

One Idaho lawyer who responded to the survey adopts families and helps them get back on their feet after natural disasters.

Shakespeare Festival housing host for actors,” “teaching a course on global warming,” “helped a charter high school student complete a 40 hour internship,” “made a donation to Sleep in Heavenly Peace, a nonprofit formed to give kids beds who are sleeping on the floor,” and

“served and baked biscuits for a Veteran’s Day breakfast.”

There are also several lawyers who have donated a significant amount of time and money to various causes. One Idaho lawyer who responded to the survey adopts families and helps them get back on their feet after natural disasters. Another Idaho lawyer organized several fundraisers last year that raised over \$25,000 for the Cystic Fibrosis Foundation in the hopes that a cure will be found that can help their son and others who have CF. Yet another Idaho lawyer chaired a Sister Cities Committee and led a delegation to Iwamizawa, Japan. Another Idaho lawyer serves as a mentor where she provides budget counseling to single women below poverty level. Another Idaho lawyer completed a six-year term as President of the Magic Valley Symphony (and they also performed in the Symphony!) Another Idaho lawyer organized and presented a computer coding class at the Boys & Girls Club.

Success of Lawyers Serve! campaign

The Board of Commissioners’ goal was to highlight the time and talents of Idaho lawyers and judges as individuals in 2015 who enhanced their local communities through their non-profit commitments and then help disseminate that information. Our initial focus has been to use the Idaho State Bar as a platform to share this information with other lawyers because we hope it will improve your own perception of the Bar and build collegiality. Here are a few of the things the Idaho State Bar and Board of Commissioners have accomplished so far in this campaign.

- Distributed a survey to Idaho lawyers seeking information about their philanthropic contributions.



Walt Sinclair sets a nice pace for the runners in the annual “Fund Run” which rallies enthusiasm and publicity for the Access to Justice Idaho campaign. Among many volunteer activities, Walt has served as the group’s chair and chief fundraiser. Money raised goes to Idaho Volunteer Lawyers Program, Idaho Legal Aid, Inc. and DisAbility Idaho.

- Highlighted Idaho lawyers and their philanthropic contributions in the E-Bulletin each week.
- Promoted lawyers’ philanthropic contributions through various social media outlets.
- Featured Jesse Robison, a Pocatello attorney, in this issue of *The Advocate* (see page 72).
- We are in the process of putting together a Lawyers Serve! Report that will be distributed at the Idaho State Bar 2016 Annual Meeting.

Our work continues

We can’t wait to get the word out to the general public about all of

the Idaho lawyers who are making philanthropic contributions to make Idaho an even better place to live and practice law! Even though my term as president is ending soon, I hope this momentum from the Lawyers Serve! campaign continues and we keep working together to improve the perception of Idaho lawyers. I challenge everyone to continue making contributions, celebrate your colleagues of the Idaho State Bar who make contributions, and help us spread the word (and finally put an end to bad lawyer jokes)!

Trudy Hanson Fouser grew up in Malad City, Idaho, and has practiced civil litigation for over 30 years. She is a former recipient of the Idaho State Bar Professionalism Award and is currently serving as President of the Idaho State Bar. Some of her rather irrelevant “accomplishments” include being quite good at parallel parking, having a very loud whistle, running (used rather loosely) Robie Creek 10 times, finishing the NYC Marathon and finding out she had the largest head circumference in her high school graduating class.



Idaho State Bar Distinguished Lawyer & Jurist Awards Dinner

Wednesday, July 13 in the Ponderosa/Tamarack Rooms at The Riverside Hotel
President's Reception begins at 6:00 p.m. with the dinner following at 7:00 p.m.

The Distinguished Lawyer & Jurist Awards are presented each year at the Idaho State Bar Annual Meeting to attorneys and a jurist who have exhibited exemplary conduct, professionalism and many years of dedicated service to the legal profession and the citizens of Idaho. In 2016 the Idaho State Bar honors four renowned Idaho lawyers and a truly respected jurist:



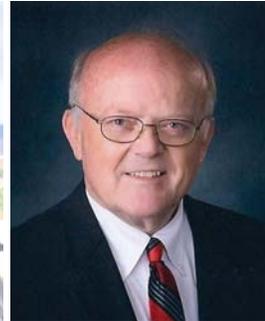
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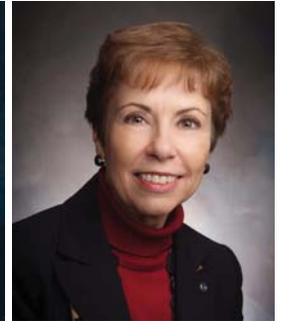
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Boise



S. Richard Rubin
Boise



Robert E. Williams III
Jerome



Hon. Karen L. Lansing
Boise

Idaho State Bar / Idaho Law Foundation Service Awards Luncheon

Thursday, July 14 in the Ponderosa/Tamarack Rooms at The Riverside Hotel
Service Awards Luncheon begins at Noon.

The Service Awards are presented to individuals from around Idaho who have contributed their time and talent to serving the public and improving the legal profession.



Melanie E. Baillie
Coeur d'Alene



Allan R. Bosch
Boise



Peter D. Christofferson
Idaho Falls



Yecora Leaphart Daniels
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2016 Idaho State Bar Annual Meeting • Boise, ID • The Riverside Hotel • July 13-15, 2016

Idaho State Bar Milestone Celebration Honoring 50, 60 and 65 Years of Admission

Thursday, July 14 in the Aspen Room at The Riverside Hotel
The Milestone Celebration Reception begins at 5:00 p.m.

Join friends and colleagues as we honor those members of the Bar who have given decades of service to their clients and the public.

65-Year Attorneys

Admitted to the Idaho State Bar in 1951

J. Charles Blanton - Boise

University of Idaho College of Law

James W. Givens - Lewiston

University of Idaho College of Law

Hon. Richard L. McFadden - St. Maries

University of Idaho College of Law

60-Year Attorneys

Admitted to the Idaho State Bar in 1956

Hon. Robert E. Bakes - Eagle

University of Idaho College of Law

Hon. Charles F. McDevitt - Boise

University of Idaho College of Law

Dwain H. Stufflebeam - Blackfoot

University of Montana School of Law

50-Year Attorneys

Admitted to the Idaho State Bar in 1966

E. Don Copple - Boise

University of Idaho College of Law

Fredrick D. Decker - Twin Falls

University of Idaho College of Law

Max A. Eiden Jr. - Boise

University of Idaho College of Law

Jack S. Gjording - Boise

University of Idaho College of Law

Hon. Gary M. Haman - Coeur d'Alene

University of Idaho College of Law

Carl D. Hamilton - Nampa

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Craig L. Meadows - Boise

University of Idaho College of Law

Hon. Daniel B. Meehl - Twin Falls

Stanford University Law School

Hon. James C. Morfitt - Caldwell

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John S. Simko - Boise

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Robert P. Tunncliff - Pullman, WA

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DISCIPLINE

LISA D. SHULTZ

(Withheld Suspension and Probation)

On May 20, 2016, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Lisa D. Shultz from the practice of law for a period of six (6) months, with all six (6) months withheld, and placing her on a disciplinary probation.

The Idaho Supreme Court found that Ms. Shultz violated Idaho Rule of Professional Conduct 8.4(b) [Commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

On October 17, 2014, Ms. Shultz was charged in Ada County with one misdemeanor count of using a telephone to disturb the peace, re-

lating to her contact with a former legal intern. On March 16, 2015, Ms. Shultz pleaded guilty to an amended charge of disturbing the peace. The Court imposed a five-day jail sentence, entered a Withheld Judgment, and ordered Ms. Shultz to complete a two-year unsupervised probation with conditions requiring her to follow any Idaho State Bar recommendations. Also on March 16, 2015, Ms. Shultz entered guilty pleas in two unrelated cases to misdemeanor charges of possession of marijuana and possession of drug paraphernalia. In those cases, the Court entered a Withheld Judgment and ordered Ms. Shultz to complete a one-month unsupervised probation. The possession and paraphernalia charges were dismissed on April 30, 2015.

The Disciplinary Order provides that Ms. Shultz's six-month suspension is withheld subject to the terms and conditions of her disciplinary probation, which runs through March 15, 2017. The terms and con-

ditions of probation include: avoidance of any alcohol or drug-related traffic violations; a program of random urinalysis, with provision that if Ms. Shultz tests positive for alcohol or other tested substances or misses a random urinalysis test without prior approval, the entire withheld suspension shall be immediately imposed and served; and if Ms. Shultz admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during her probationary period, regardless whether that admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

The withheld suspension does not limit Ms. Shultz's eligibility to practice law.

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

REINSTATEMENT

Karl W. Kime

(Reinstatement to Active Status)

On April 21, 2016, the Idaho Supreme Court entered an Order Granting Petition for Reinstatement, reinstating Karl W. Kime to practice law in Idaho subject to a two-year disciplinary probation.

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

Drake Dee Mesenbrink

(Reinstatement to Active Status)

On May 3, 2016, the Idaho Su-

preme Court entered an Order Granting Request for Readmission to Practice Law in Idaho reinstating Drake Dee Mesenbrink to practice law in Idaho.

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

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New ISB Commissioners elected

David C. Cooper has been elected by members of the Fourth District Bar to serve as a member of the Idaho State Bar Board of Commissioners.

Michael T. Howard has been elected by members of the First and Second District Bar, to serve as a member of the Idaho State Bar Board of Commissioners.

Mr. Cooper is senior vice president of Key Private Bank where he advises clients in trust administration, investment management and banking services. He earned his undergraduate degree in Business Administration and his J.D. from the University of Kansas.



David C. Cooper

In addition to being a licensed attorney in Idaho, Mr. Cooper belongs to the Alaska and Kansas Bar Associations. He is a graduate of the Idaho Academy of Leadership for Lawyers and a member of the ISB Taxation, Probate & Trust Law Section.

Mr. Howard lives in Coeur d'Alene and is a principal at Winston & Cashalt Lawyers, PS. and manages the Coeur d'Alene office. His areas of practice are personal injury, medical malpractice, product liability, and insurance dispute litigation. Mr. Howard is licensed to practice law in Washington and Idaho.



Michael T. Howard

He obtained his bachelor of science in Zoology and Chemistry from University of Idaho and his J.D.

from the University of Idaho College of Law. After graduation, he served as a law clerk to Idaho Supreme Court Justice Cathy Silak. He is a regional director for the Idaho Trial Lawyers Association, a board member of the John P. Gray American Inn of Court and is President of the First District Bar Association.

Apply to IALL until July 15

This September, the Idaho Academy of Leadership for Lawyers (IALL) begins its sixth year with a new class. The mission of IALL is to promote diversity and inspire the development of leadership within the legal profession. IALL brings together lawyers from different practice areas with a variety of backgrounds from all across Idaho. IALL builds upon the participant's leadership skills and promotes leadership experiences by:

- Teaching accepted and recognized leadership skills and philosophies;
- Fostering professional relationships within the Idaho legal community and the greater community;
- Promoting professional obligations and community service; and
- Raising awareness among lawyers of the broad range of issues and challenges facing leaders today.

IALL is a two-year commitment comprising a class of 12-16 individuals who have been admitted to practice law for at least five years, or be licensed to practice law and have five years of professional experience. In the first year, there are five daylong sessions, over eight months, which focus on developing leadership skills. In the second year, participants each select a legacy project to benefit the Bar or their community.

Appellate Practice Section Chairperson and IALL graduate Christine Salmi said:

The curriculum that the IALL steering committee put together for our class were phenomenal, including presentations by Idaho state and federal judges, local political and government leaders and numerous inspirational coaches. All the members of my class and the steering committee now have a unique and beneficial bond with each other that we could never have obtained otherwise. The important thing is that IALL requires its members to give back to the community in our unique way by creating legacy projects. I am certain we will have learned not only how to be effective leaders in our profession, but also how to be contributing members of our local communities.

Applications for the 2016-2017 class will be made available June 13. Deadline for submission is July 15. If you are interested in applying to the program please check out the IALL webpage: http://isb.idaho.gov/member_services/iall.html.

Access to Justice FUND Run/Walk

The 3rd annual Access to Justice FUND Run/Walk will be held on Saturday, June 18, at Fort Boise Park at 10 a.m. This is a non-competitive family and dog-friendly 5k run/walk that raises funds and awareness for the Access to Justice Idaho Campaign. It raises funds to provide support for the three principal providers of free civil legal services for poor and vulnerable Idahoans: DisAbility Rights Idaho, Idaho Legal Aid Services, and the Idaho Volunteer Lawyers Program. All registration dues will go to the Access to Justice Idaho Campaign. Please contact Whitney Fouser at wfouser@gidaholaw.com if you are interested in being a race sponsor or volunteer.



Executive Director's Report

Join Us For The 2016 Annual Meeting

Diane K. Minnich
Executive Director, Idaho State Bar

July 13-15, Boise, the time and place for this year's annual meeting. We hope you will join us at the Riverside Hotel for one of the many programs and events that are planned. You can earn at least 9.5 CLE credits (including over 2 ethics credits). Join us in honoring your colleagues, reconnecting with friends and meeting new colleagues.

The CLE lineup this year is:

- Buyer Beware - Your Homeowner's Association May Be More Powerful Than You Think
- Civility Matters
- Delivery of Veterans Legal Aid and the Idaho Military Legal Alliance
- Hot Topics in Environmental & Natural Resources Law
- Idaho Courts: Transitioning to the Electronic Record Part II
- Know Thyself: Unconscious Bias in the Legal Profession
- Legislating and Lobbying
- Lessons from the Masters
- Not Small Potatoes: The Lanham Act
- Settler's Remorse: Challenges in Rescinding a Mediated Settlement Agreement
- The Status and Threats to International Law on Freedom of Religion or Belief
- Transitioning From the Practice of Law: Tools & Resources Await



Paulette Brown

- What Happened in the SRBA? Water Rights Basics and Post Adjudication Considerations
 - Workplace Investigations - Who, What, Where, When & Why
- The keynote speaker is American Bar Association President Paulette Brown. As ABA President, one of Ms. Brown's goals is to visit every state. We are pleased she is able to be in Idaho for the Annual Meeting. She also is committed to the Boys and Girls Clubs so this year's service project will benefit the Boys and Girls Clubs of Ada County.
- The Annual Meeting also includes the Distinguished Lawyer and Jurist Awards dinner, the Idaho Law Foundation Annual Meeting



Boise attorney Earnest Hoidal talks to visitors at the Idaho Legal Aid Society table in the exhibitors' corridor at last year's Annual Meeting in Sun Valley.

This year's service project will benefit the Boys and Girls Clubs of Ada County.

and Service Awards lunch and a reception honoring those attorneys that have reached 25, 40, 50, 60 and 65 year milestones in their legal careers. The list of award recipients is on pages 14 and 15.

We are able offer the Annual Meeting at a reasonable cost in large part due to the generous commitment of our corporate sponsors. A special thanks to following entities for their support of the Annual Meeting.

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Please be sure to visit our corporate sponsors inside the Exhibition Hall.

The Annual Meeting program brochure is posted on the ISB website and was mailed to attorneys in early June. For more information about the conference, visit the ISB website, www.isb.idaho.gov or call 208-334-4500.

We hope to see you in Boise this summer.

More than 1,000 students, their coaches, friends and family are arriving in Idaho, from as far away as South Korea, to participate in this year's competition.

National Mock Trial competition

As I write this, the 2016 National Mock Trial Competition is beginning in Boise. More than 1,000 students, their coaches, friends and family are arriving in Idaho, from as far away as South Korea, to participate in this year's competition.

The number of volunteers and volunteer hours that were contributed to hosting this event are staggering. In addition, Law Related Education Director Carey Shoufler and her assistant Amy Nordby have focused almost exclusively on planning this event

for several months. In a future issue, we will include the results of the competition, more thanks and photos of the event. For now, I want to thank the Host Committee, whose members spent the last three years planning the competition.

- George W. Breitsameter
- Gregory C. Dickison
- Michael J. Fica
- Craig L. Meadows
- Celeste K. Miller
- Tracy Oneale
- Carey Shoufler
- Jena Vasconcellos



Basque Dancers entertain hundreds of high school students from around the country gathered in Boise for the National Championship Mock Trial Competition in May. The students explored downtown Boise and spent one evening at the Discovery Center, a public hands-on museum of technology and science.

Hello From the Bar's Biggest Small Section

Dylan B. Lawrence

The Environmental & Natural Resources (ENR) Section is pleased to sponsor this issue of *The Advocate*. The ENR Section is certainly not one of the bigger bar sections but environmental and natural resource issues affect all Idahoans. Many people may go an entire lifetime without facing, for example, a bankruptcy or intellectual property issue. But we all breathe air, drink water, and eat food. Many of us hunt, fish, recreate, and operate on public lands. All of these issues fall squarely within the purview of “environmental and natural resources” law. For this reason, I believe the ENR Section is the bar’s biggest “small” section.

The status of sage grouse under the federal Endangered Species Act (ESA) is perhaps the biggest natural resource issue currently facing Idaho and its neighboring western states. Sam Eaton has provided an objective — and sometimes humorous — overview of the history of sage grouse under the ESA, some of the current efforts to protect the bird, and the status of multiple related legal proceedings.

We all eat food, and therefore have a vested personal interest

As attorneys in an agricultural state, many of us represent and advise farmers, ranchers, dairies, and other food producers.

in food safety. As attorneys in an agricultural state, many of us represent and advise farmers, ranchers, dairies, and other food producers. Sean Costello, Eric Edmunds, and Kelsey Nunez have teamed up to provide a helpful and timely summary of a recent overhaul of our food safety laws.

Facilities that discharge wastewater to nearby waterbodies are required to obtain a permit under the federal Clean Water Act. These permits can be difficult to obtain and expensive to implement. Greg George has provided an article discussing recent efforts to implement water pollutant trading systems that would allow regulated facilities to implement creative ways to reduce water pollutants, but at lower cost — a potential “win-win.”

This being an election year, the conventional wisdom is that 2016 was a relatively quiet legislative session. While perhaps true generally, there was significant legislation regarding the Eastern Snake Plain Aquifer and Idaho’s efforts to replace the EPA as the Clean Water Act permitting authority in the state. Sarah McCormack and Norm Semanko have provided a helpful and timely summary of these and other natural resources legislation in 2016.

Wildfires affect all Idahoans in a variety of ways. For some, wildfire can devastate grazing land. Others may be in harm’s way and need to evacuate their homes. We all pay to fight these fires with our tax dollars. And, the cost to fight those fires is driven primarily by the proximity

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of the fire to inhabited areas, not the size of the fire itself. Professor Stephen Miller and graduate students Brian Stephens and Alexander Grad take a fascinating look at this phenomenon and potential land use approaches for minimizing wildfire effects on the “wildland-urban interface.”

As previously mentioned, the discharge of wastewater streams to local water bodies requires a permit under the Clean Water Act. However, there are exceptions for agricultural operations. Mark Ryan has authored a helpful explanation of those exceptions, which are important in a highly agricultural state like Idaho.

Collectively, these articles illustrate how diverse and far-reaching environmental and natural resource issues can be. I hope you enjoy them.



The Charlotte Fire burned dozens of homes in a Pocatello subdivision. The urban-wildfire interface has become a hot topic.

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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Sage Grouse Plans Ruffle Feathers

Sam Eaton

It is early spring on the high desert in Idaho. All across the west, male sage grouse are convening at mating areas (leks) for their annual mating ritual. In the waning hours of dawn, the male birds strut their stuff (literally) and puff their chests (also literally) for the females hunkered down in the sagebrush nearby. A few lucky males will out-strut their competition and ensure that a new generation of sage grouse will be around the following year. This iconic, sage-steppe species has participated in this annual display for thousands of years and is blissfully unaware of the ever-increasing interest in its future.

That interest reached an all-time high in the months leading up to September 2015, when the U.S. Fish and Wildlife Service (Service) was to decide whether to list sage grouse as a threatened species under the Endangered Species Act (ESA).¹ The Service ultimately concluded that the species did not warrant federal protections across its range, in large part because of the newly-minted sage-grouse conservation measures adopted by the Bureau of Land Management (BLM) and U.S. Forest Service.² The decision not to list sage grouse was hailed by many as a conservation victory, but an equally large contingent has been left wondering if these new measures go too far, or, in some cases, not far enough.

Like the spotted owl or the battle over Roadless Areas, the sage grouse saga is complex, contentious, and continuous. And although sage grouse were not listed, concerns surrounding the enforceability, long-term commitment to fully implement, and restrictiveness of the conservation plans has led to an ever-increasing swath of legal challenges. If not for the Clean Power Plan or



the Waters of the United States, sage grouse would be the most controversial environmental issue currently embroiled in the legal system. This article will discuss, at a broad level, the varying legal challenges to the newly enacted sage grouse conservation plans. This discussion is only meant to provide a broad overview of the current legal state and is not meant to proffer an opinion one way or another.

Here's some context

Greater sage grouse in North America currently occupy 11 western states and 2 Canadian provinces, with 98 percent of the population located in the United States.³ Sage grouse abundance is difficult to estimate but since the 1960's there has been a long-term rate of decline, although the trend is slowing and populations are even increasing in some areas.⁴ In Idaho, sage grouse can be found across 15 million acres of state and federal lands.⁵

In 2010, the Service determined that the sage grouse was warranted

for a listing (but precluded by higher priority species) range-wide and identified habitat loss and the lack of regulatory mechanisms (or conservation plans) as the greatest threats facing sage grouse.⁶ In Idaho, and the surrounding Great Basin states, the biggest threat to the species is habitat loss from wildfire and invasive species.⁷ The Service also pointed to a host of secondary threats, primarily related to human disturbance.⁸

In response to the Service's finding that sage grouse was warranted for listing, Idaho and several other Western states, at the invitation of the Department of the Interior, began developing state-based conservation plans for inclusion into the federal agencies' "National Sage Grouse Planning Strategy." In 2011, the BLM and Forest Service began the National Environmental Planning Act (NEPA) planning process to amend 98 land use plans across the West to include enforceable sage grouse conservation actions (sage grouse amendments or plan amendments) that would serve as adequate regu-

latory mechanisms. However, like most federal planning efforts, the development of these sage-grouse amendments was fraught with controversy and delay.⁹

After four years of planning, in May 2015, the BLM and Forest Service released their Proposed Plan and final environmental impact statement (FEIS) for public review.¹⁰ After receiving protests and exhausting the administrative appeals process, the federal agencies issued their Records of Decision (ROD), implementing the final sage grouse amendments.¹¹ Many of the Western states felt spurned by the federal agencies' failure to adopt large portions of the state-based plans in the final plan amendments for sage grouse.¹² Several states and industry groups also felt the sage grouse amendments were unnecessarily restrictive. Contrarily, many conservation groups were critical of the plan amendments, asserting that there was too much political pandering and that the plans lacked substantive conservation measures necessary to move the needle on sage-grouse conservation.¹³

In mid-September 2015, two weeks after the BLM and Forest Service issued their RODs, the Service published its decision not to list sage-grouse as a threatened species under the ESA.¹⁴ The Service noted the recently-enacted sage grouse amendments as crucial in their decision to not list the bird.¹⁵ Since September 2015, at least six lawsuits have been filed in five different federal jurisdictions challenging the BLM's and Forest Service's adoption of the sage-grouse amendments. Plaintiffs in these lawsuits include states and local governments, affected industry groups, and environmental organizations.

Okay, so sage grouse wasn't listed.

Why is everyone upset?

Simple answer: access to, and use of, public lands. An issue that has not garnered much public interest lately (note: sarcasm). And, of course, myriad other reasons. But, much of the contention centers on the fact that sage grouse occupies 68 million acres of federally managed land in the West (almost 60 percent of the bird's habitat) – mostly BLM and Forest Service managed land.

The Service noted the recently-enacted sage grouse amendments as crucial in their decision to not list the bird.¹⁵



And, as most of you know by now, a large portion of these Western states are federally managed – Idaho (62%), Nevada (85%), Utah (65%), Wyoming (48%), etc. – you get the point.¹⁶ Similar to the concerns the logging industry had with the impact of the spotted owl listing, many Western economies depend on public lands and the states are concerned these sage grouse amendments will have spillover effects onto state and private lands and unnecessarily inhibit access and development of natural resources. This includes energy development, mineral extraction,

and cattle grazing. Of course, protection of our public lands is also why a contingent of environmental groups believe the sage grouse plans need to contain more restrictive conservation measures.

There is also consternation surrounding the level of commitment and oversight required by the federal agencies within the plan amendments. For example, the federal agencies must commit additional resources to address prioritization and review of livestock grazing permits, monitor population and habitat triggers, analyze a recommendation to withdraw lands from mineral entry, develop a mitigation strategy,¹⁷ and a whole host of other obligations.¹⁸

If the federal agencies are unable to fulfil their obligations under the ROD, either because of limited resources or lack of feasibility, there is concern these plan amendments will only delay a listing. Furthermore, the Service's decision to not list sage grouse does not end their involvement. There is a subtle but, key caveat to the Service's decision: the Service will review the status of sage grouse in five years, which they typically only do when a species is a candidate (*i.e.*, awaiting a listing decision) or recently delisted.¹⁹ In other words, the Service is keeping a very close eye. Also, as the political climate changes, it will be interesting to see if the federal agencies honor the many commitments within the plan amendments.

Legal challenges

The parties involved in the sage grouse litigation can be classified into two groups:

- 1) those who oppose the plan amendments because they ignore locally-developed conservation plans, failed to follow the proper federal process, and are overly restrictive (*i.e.*, the states, counties, and industry groups); and

2) those who oppose the plan amendments because they do not contain enough enforceable measures to immediately protect sage grouse. Of course some conservation groups have joined the BLM and Forest Service to defend the plans as an appropriate balance between conservation and multiple-use of public lands (*i.e.*, less angry conservation groups).

Challenges by states, counties, and industry groups

Since the plans were finalized in September 2015, the states of Nevada, Utah, and Idaho have filed individual challenges to the sage grouse land use plan amendments in federal court.²⁰ In addition, the Wyoming Stock Growers Association and several Wyoming counties challenged the plan amendments in two separate lawsuits.²¹ Although the lawsuits are in different stages and the breadth of claims vary, there are a few common assertions made among this group of plaintiffs.

First, the states argue that the federal agencies did not give proper credence to the state-developed sage grouse conservation plans and did not attempt to reconcile the inconsistencies between the state plans and the federal plans.²² This claim stems from the Federal Land Management Policy Act's (FLMPA) requirement that federal plans be consistent with state and local plans to the "maximum extent [the Secretary] finds consistent with Federal law."²³ Broadly stated, the state plaintiffs argue that their sage grouse plans were consistent with federal law and provided enforceable conservations actions necessary to stave off a listing; but nevertheless, were largely disregarded by the federal agencies without proper explanation.

Second, several plaintiffs argue that the federal agencies included

Wyoming counties challenged the plan amendments in two separate lawsuits.²¹

substantive, eleventh-hour changes to the sage grouse amendments that require additional analysis and public input under NEPA.²⁴ These additional measures included:

1) uniform buffer distances around sage grouse leks (mating areas),

2) a new "net conservation gain" mitigation standard that applies to all new development in sage grouse habitat, and 3) a new habitat classification called sagebrush focal areas (SFAs). The SFAs implement new regulatory measures within existing habitat areas deemed "highly important" by the Service.²⁵ Within habitat classified as SFAs, the federal agencies are imposing never-before-seen management prescriptions that include no surface occupancy for oil and gas development, a recommendation to withdraw these lands from mineral entry, and greater scrutiny for renewing livestock grazing permits. Across the BLM and Forest Service, SFAs account for over 10 million acres.²⁶ In Idaho alone, there are 3.8 million acres of SFAs.

Plaintiffs' arguments are all fairly similar: between the Draft Environmental Impact Statement (DEIS) and the FEIS, the federal agencies violated NEPA by introducing new, significant provisions that should have been made available to the public for review and analysis.²⁷

Plaintiffs contend that the agencies should have prepared a supplement to the DEIS because the changes were dramatically different from the actions previously analyzed.²⁸ Instead, according to plaintiffs, the BLM and Forest Service cognitively chose not to issue a supplement because "they ran out of time as they rushed to publish the RODs to influence [the Service's] decision whether to list [sage grouse]."²⁹

The *third* general argument made by this group of plaintiffs involves another claimed NEPA violation, namely that the BLM and Forest Service failed to properly analyze the cumulative impacts of the sage grouse amendments.³⁰ NEPA requires the federal agencies to analyze the impacts from the proposed action in addition to "other past, present, and reasonably foreseeable future actions."³¹ All 98 land use plan amendments for sage grouse were analyzed within 15 separate FEISs (based on region). For example, Idaho is covered by a single FEIS; whereas, Wyoming sage grouse habitat is analyzed in four separate FEISs.³² Plaintiffs' general contention is that each FEIS myopically analyzed the cumulative impacts within that particular region, as opposed to the entire range of sage grouse.³³ As a result, the aggregate cumulative impact from all 15 FEISs across the species' range was not adequately analyzed according to plaintiffs.

Several other arguments were raised by plaintiffs, but these represent the most prevalent claims among the different plaintiffs. Only Idaho and Nevada are in the merits stages of litigation with oral arguments and judicial determinations not likely until mid-to-late summer 2016. The federal agencies, and others, are criticizing these legal challenges and warn that the sage grouse amendments are the linchpin that keeps the bird off of the endangered species list.³⁴ On the other hand, the state plaintiffs contend that their state-based plans provided the necessary regulatory certainty to prevent a listing and should have been adopted.³⁵

Legal challenge filed by a coalition of environmental groups

Not to be outdone by the states and industry, a quartet of conservation groups challenged the land use plan amendments in the District Court of Idaho.³⁶ Generally, this group believes the sage grouse amendments lack stringent conservation measures and are the product of political influence.³⁷ Interestingly, the environmental plaintiffs raise many of the same arguments as the states and industry groups—although they seek a different outcome. Like the state and industry plaintiffs, the environmental plaintiffs claim, among other things, that the federal agencies failed to conduct a proper cumulative impacts analysis.³⁸ They, too, contend that the agencies did not properly conduct an analysis at the range-wide scale. However, contrary to the state and industry plaintiffs, the environmental plaintiffs argue that the BLM and Forest Service failed to analyze the cumulative impacts from climate change, livestock grazing, infrastructure, and resource extraction.³⁹

Another key distinction between the environmental plaintiffs and the other plaintiffs deals with the remedies sought by the parties. Here, the environmental groups do not seek to vacate the sage grouse plan amendments.⁴⁰ Instead, they state that the plan amendments are currently benefiting sage grouse on federal land, and therefore, they request that the Court issue a remand requiring the federal agencies to undertake “supplemental NEPA analysis and adoption of further amended or revised RODs ... in order to cure the legal violations.”⁴¹ Unlike the other

Environmental plaintiffs argue that the BLM and Forest Service failed to analyze the cumulative impacts from climate change, livestock grazing, infrastructure, and resource extraction.³⁹

Prayers for Relief, the environmental plaintiffs desire to see the plans stay remain in effect until the agencies incorporate more stringent conservation measures.

To be continued...

As stated, all these lawsuits are in various stages of litigation and no judicial opinions are expected until late summer. Like all multi-jurisdictional challenges, the future is murky. Some, or all, of these cases could become consolidated in a single district, or we could just as likely see conflicting opinions issued from

different jurisdictions. However, one thing is for certain, the sage grouse issue will provide a lot of attorneys with job security for the foreseeable future.

Endnotes

1. See *In Re Endangered Species Act Section 4 Deadline Litigation*, 10-mc-00377-EGS, MDL Dkt No. 2165 (D.D.C. Sept. 9, 2011) (requiring the Service to make a listing determination for sage grouse by September 2015).
2. 80 Fed. Reg. 59,858 (Oct. 2, 2015).
3. Western Association of Fish and Wildlife Agencies, “Greater Sage Grouse Population Trends: An Analysis of Lek Count Databases 1965-2015” (Aug. 2015) (“Lek Data”).
4. 75 Fed. Reg. 13,910, 13,920 (Mar. 23, 2010);
5. Idaho Executive Order 2015-04, App. 1 at 2.
6. 75 Fed. Reg. 13,910, 13,986-88.
7. BUREAU OF LAND MGMT., DEPT. INTERIOR, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE GREAT BASIN REGION at 1-7 (2015) (“BLM ROD”).
8. BLM ROD at 7.
9. See 76 Fed. Reg. 77,008, 77,009 (contemplating adoption of the sage grouse amendments by Sept. 2014).
10. 80 Fed. Reg. 30,711 (May 29, 2015).
11. See BLM ROD; U.S. FOREST SERV. DEPT. OF AGRIC., GREATER SAGE-GROUSE RECORD OF DECISION (2015) (“Forest Service ROD”).
12. See Governor’s Consistency Reviews, available at http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents_and_resources.html
13. See Complaint, *W. Watersheds Project v. Schneider*, No. 16-083 (D. Idaho filed Feb. 25, 2016).
14. 80 Fed. Reg. 59,858 (Oct. 2, 2015).
15. *Id.* at 59,874.
16. Congressional Research Services, “Federal Land Ownership: Overview and Data” at 4-5 (Dec. 2014).
17. The RODs require a new “net conservation gain” mitigation requirement for any new development in sage grouse habitat. This term is defined as a “gain above baseline conditions.” BLM ROD at 1-25. There is concern as to how much mitigation above the baseline the federal agencies will require and if there will be any consistency.

18. See BLM ROD 1-17.
 19. 80 Fed. Reg. at 59,941.
 20. *W. Exploration v. U.S. Dept. Interior*, No. 15-491 (D. Nev. filed Sept. 2015); *Herbert v. Jewell*, No. 16-101 (D. Utah filed Feb. 2016); *Otter v. Salazar*, No. 15-1566 (D.D.C. filed Sept. 2015).
 21. *Wyo. Stock Growers Assoc. v. Jewell*, No. 15-181 (D. Wyo. filed Oct. 2015); *Wyo. Coal. of Local Gov'ts*, No. 16-41 (D. Wyo. filed Mar. 2016).
 22. See Complaint at 54, *Herbert v. Jewell*, No. 16-101 (D. Utah filed Feb. 4, 2016); Plaintiffs' Motion for Summary Judgment at 35, *W. Exploration v. U.S. Dept. Interior*, No. 15-491 (D. Nev. filed Apr. 1, 2016).
 23. 43 U.S.C. § 1712(c)(9).
 24. See *W. Exploration* at 12; *Herbert* at 54
 25. Forest Service ROD at 40; BLM ROD at 1-16.
 26. BLM ROD at 1-15; Forest Service ROD at 22.
 27. See, e.g., *Otter* at 15
 28. See, e.g., *W. Exploration* at 12.
 29. *Id.* at 14.
 30. *Herbert* at 33; *Otter* at 26.

31. 40 C.F.R. § 1508.7.
 32. See Governor's Consistency Reviews, available at http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents_and_resources.html.
 33. *W. Exploration* at 22; *Herbert* at 33; *Otter* at 26.
 34. See Scott Streater, *Wyo. Counties Join Growing Legal Battle Against Federal Plans*, E&E PUBLISHING, Mar. 7, 2016, www.eenews.net/greenwire/stories/1060033561.
 35. See Scott Streater, *Utah Sues Interior*,

- USDA to Stop Federal Sage Grouse Plans*, E&E PUBLISHING, Feb. 5, 2016, www.eenews.net/greenwire/stories/1060031909.
 36. *W. Watersheds Project v. Schneider*, No. 16-083 (D. Idaho filed Feb. 2016).
 37. *Id.*
 38. Complaint at 95, *W. Watersheds Project v. Schneider*, No. 16-083 (D. Idaho filed Feb. 25, 2016).
 39. *Id.* at 95-96.
 40. *Id.* at 106.
 41. *Id.*

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Food Safety Laws Affects Idaho Agriculture

Eric Edmunds

In late 2008, a deadly outbreak involving peanut products from the Peanut Corporation of America (PCA) production facility in Georgia sickened at least 714 people in 47 states, and caused at least nine deaths.¹ More recently, a family cantaloupe farm in Colorado was connected to an outbreak with fresh cantaloupe that sickened 147 people in 28 states, and caused 33 deaths.² The Colorado farmers were sentenced to home detention and paid some restitution fees; however, the executives from PCA may spend the rest of their lives in prison.

After these incidents, and several others, consumer confidence was shaken. Consumers, the food industry, and Congress recognized that our food safety laws needed to become pro-active, rather than reactive. To that end, President Obama signed the Food Safety Modernization Act (FSMA) into law on January 4, 2011.³ While previous American food safety laws were designed to respond to food safety outbreaks, FSMA focuses on preventing outbreaks before they occur.

FSMA represents a massive overhaul of the American food safety regulatory regime, but focuses on seven pillar regulations promulgated by FDA. This article will focus on two of the rules that are likely most pressing for Idaho's agricultural industry: the Preventive Controls Rule for Human Food (PCHF) and the Produce Safety Rule (PSR).

Specifically, this article will: (1) Introduce how to determine whether either rule applies to your clients; (2) Briefly explain the preventive controls rule for human food and the produce safety rule; and (3) Discuss why Idaho producers, manufacturers, and their advisors should be

Preventive Controls for Human Food	August 30, 2015 ⁴
Preventive Controls for Animal Food	August 30, 2015 ⁵
Foreign Supplier Verification Program	October 31, 2015 ⁶
Produce Safety Rule	October 31, 2015 ⁷
Sanitary Transportation of Human and Animal Food	March 31, 2016 ⁸
Intentional Adulteration Rule (Food Defense)	May 31, 2016 ⁹

familiar with FSMA and its implementing rules. While this section of the article focuses on the PCHF rule, it begins with a discussion of food facility registration requirements, because determining whether a business is covered by the PCHF rule begins with asking whether the facility is required to register.

Food facility registration: The initial inquiry

The first step in determining whether any of the FSMA rules apply to your client is to examine whether or not the business must register as a food facility with FDA. All domestic and foreign facilities that are engaged in the manufacturing/processing, packing, or holding of food for consumption in the United States, regardless of whether or not the food from the facility enters interstate commerce, must register. Certain facilities are exempt from registration:

- Private residences of individuals
- Non-bottled water drinking water collection and distribution establishments and structures
- Transport vehicles that hold food only in the usual course of their business as carriers
- Farms
- Restaurants
- Retail food establishments
- Nonprofit food facilities

Consumers, the food industry, and Congress recognized that our food safety laws needed to become pro-active, rather than reactive.

-
- Fishing vessels that harvest and transport fish
 - Facilities regulated exclusively and through the entire facility by the U.S. Department of Agriculture (USDA).¹⁰

If a business is not exempt from food facility registration, the business will likely be regulated under the PCHF rules or their animal food corollary.

Farms can use the new federal definition of farm to determine if they need to register with FDA as a food facility, or a mixed-type facility. The new definition subdivides farming activities into two categories: (1) Primary production farms; and (2)

Secondary activities farms. A primary production farm is an operation under one management in one general (but not necessarily contiguous) physical location devoted to the growing of crops, the harvesting of crops, the raising of animals (including seafood), or any combination of these activities.¹¹ A secondary activities farm is an operation, not located on a primary production farm, devoted to the harvesting (such as hulling or shelling), packing, and/or holding of raw agricultural commodities, provided that the primary production farm(s) that grows, harvests, and/or raises the majority of the raw agricultural commodities harvested, packed, and/or held by the secondary activities farm owns, or jointly owns, a majority interest in the secondary activities farm.¹²

Preventive controls for human food (PCHF)¹³

Under FSMA, existing current good manufacturing processes (CGMPs) for food facilities remain relatively unchanged. However, some businesses will be required to develop and implement a written hazard analysis plan in addition.

These additional requirements and compliance timelines depend on the business. (See Chart 2 for a table containing information on business size and compliance timelines.)

Changes to CGMPs¹⁵

The changes to CGMPs are as follows: (1) The final rule does not have any nonbinding provisions, training and education are now binding requirements; (2) Management must ensure that all employees have adequate training and education for their duties; and (3) Allergen cross-contact contamination is explicitly addressed in the text of the CGMPs.¹⁶ For establishments subject solely to the CGMPs, training will be an im-

Chart 2: Preventive Controls for Human Food Compliance Dates ¹⁴		
Preventive Controls for Human Food		
Category	Definition	Compliance Date
Very small business	Averaging less the \$1 million/year in both sales of human food and the market value of human food manufactured, processed, packed, or held without sale over per year over 3 previous years (Financial records should begin January 1, 2016)	September 17, 2018
Small business	Employs less the 500 FTEs	September 17, 2017
All other businesses	If not found in another category	September 17, 2016
Business subject to the Pasteurized Milk Ordinance (PMO)	Must be in compliance with PMO and exemption only applies to Grade "A" milk and milk products covered by the PMO	September 17, 2018

portant issue to address, but may be easy to add to an existing food safety program. For example, an employee that handles unpackaged ingredients should have training in personal hygiene, proper hand washing, and potential allergen cross-contamination, but may not need much more than that basic training. In the end, it will depend on the exact requirements of their job duties, and records of the training will be essential.

Qualified facility exemption

Under the PCHF, a “qualified facility” is a very small business, or a business that averages less than \$500,000 in annual sales, and over 50 percent of sales are to consumers in the same state or Indian reservation as the business, or within 275 miles.¹⁷ Qualified facilities are exempt from the new hazard analysis and risk-based preventive controls, and the supply-chain program, although they must still need to comply with the CGMPs and relevant record keeping requirements. FDA retains authority to withdraw qualified facility status.¹⁸

Modified requirements may also apply to a qualified facility, if the facility submits two attestations to FDA. In the first, the facility must at-

Qualified facilities are exempt from the new hazard analysis and risk-based preventive controls, and the supply-chain program, although they must still need to comply with the CGMPs and relevant record keeping requirements.

test that it is a qualified facility. The second attestation has two options: (1) that the facility has identified potential hazards, is implementing preventive controls to address the hazards, is monitoring the preventive controls, and ensuring that they are effective; or (2) that the facility is in compliance with a state, local, county, tribal, or other applicable non federal food safety regulatory regime.¹⁹

Food safety plan

Idaho food operations subject to the PCHF rule are to create a written, facility and product-specific

food safety plan, which will consist mostly of the facility's hazard analysis and preventive controls. The hazard analysis must consider all reasonably foreseeable biological, chemical (including radiological hazards), and physical hazards, and identify possible hazards for which preventive controls should be implemented in order to minimize or prevent adulteration.²⁰ While PCHF rule provides some flexibility for the management of preventive controls, there are three essential components, which must be in writing and kept pursuant to the PCHF's record keeping requirements.

1. Monitoring activities to ensure the preventive control is being implemented.
2. A plan to correct the situation where a preventive control is not properly implemented, which may include the recall of product.
3. Verification that the facility's preventive controls are still valid. This includes conducting record reviews to see if preventive controls are consistently performed and machinery and equipment is working properly, and continually reanalyze its food safety plan.²¹

The food safety plan will also include a supply-chain program, focusing on the entity that is controlling a known hazard, as indicated from the food safety plan.²² If a supplier is controlling a hazard, verification that the supplier is controlling the hazard will need to be obtained. However, importantly, if a food facility redistributes a product that has an uncontrolled hazard it will need to disclose that the hazard has not been controlled, and obtain written assurance from the end recipient related to how the hazard will be addressed.²³

In addition to the new regulatory requirements that must be implemented by food operations, there are specific requirements for record retention throughout the rules. The re-

In addition to the new regulatory requirements that must be implemented by food operations, there are specific requirements for record retention throughout the rules.

cords must demonstrate that a food operation is in compliance with the rules that apply to it. While each of the rules has specific record requirements, it is important to remember the FDA mantra, "If you didn't document it, it didn't happen."

Endnotes

1. Gretchen Goetz, Peanut Corporation of America from Inception to Indictment: A Timeline, Food Safety News, <http://www.foodsafetynews.com/2013/02/peanut-corporation-of-america-from-inception-to-indictment-a-timeline/#.Vw-lvWOWNq0> (last visited April 9, 2016).
2. <http://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html> (last visited April 9, 2016)
3. <http://www.fda.gov/Food/Guidance-Regulation/FSMA/> (last visited April 13, 2016)
4. http://www.centerforfoodsafety.org/files/2014-2-20-dkt-82-1--joint--consent-decree_26503.pdf
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. Although this article will not directly address Preventive Controls for Animal Food (PCAF), the PCHF rule can provide some general parallel guidance.
14. Compliance timeframes and information for the Supplier Verification rule can be found at: <http://www.fda.gov/downloads/Food/GuidanceRegulation/FSMA/UCM461834.pdf>
15. The CGMPs and the new subparts related to hazard analysis and preventive controls, record requirements, and supply-chain programs will be moved to 21 C.F.R. 117.
16. 80 Fed. Reg. 180, 56151.
17. *Id.*, 56147.
18. See generally 80 Fed. Reg. 180, 56145.
19. *Id.*, 56147 and 56159
20. *Id.*
21. *Id.*
22. *Id.*, 56163.
23. *Id.*

Eric Edmunds recently returned home to Idaho to pursue his career. He earned a B.S. in Biology from Westminster College and a J.D. from Willamette University College of Law. He worked as a food safety and policy specialist for the last five years in Oregon, and was admitted to the Idaho State Bar in 2013.



The Produce Safety Rule (PSR)

Sean Costello

The Growing, Harvesting, Packing, and Holding of Produce for Human Consumption Rule, otherwise known as the Produce Safety Rule (PSR) (effective January 26, 2016) implements Section 105 of the FDA Food Safety Modernization Act¹ (FSMA). Section 105 and the PSR require that covered farms implement preventative practices to decrease food safety risks related to the growing, harvesting, packing and holding of fresh produce. The rule’s purpose is to foster public health by minimizing risks of food adulterated by microbial contamination and promoting the traceability of associated outbreaks.

See Chart 1 for the PSR’s tiered implementation timeframes.

What produce is covered?

Under the PSR, “covered produce” is any fruit or vegetable, nut or herb, in its unprocessed state, that is usually consumed raw,² in other words, produce that remains substantially unaltered from ground to mouth. On the other hand, the PSR exempts fruits and vegetables that are “rarely consumed raw” (e.g., potatoes), produce for personal or on-farm consumption,³ and raw agricultural commodities (RACs) bound for commercial processing (e.g., canning, or another sufficient microbial “kill step”).⁴ FDA has provided a non-exhaustive list of covered produce (raw agricultural commodities)⁵ and an exhaustive list of produce fitting the definition of “rarely consumed raw.”⁶ Of critical importance for advising Idaho produce growers is the fact that a single covered farm or facility may be growing both covered and exempt produce, and each set of commodities may be governed by different standards.

		Covered activities involving all other covered produce (ie. Subject to part 112, except subpart M)		Farms eligible for a qualified exemption (if applicable)		
Size of covered farm	Covered activities involving sprouts covered under subpart M (i.e., subject to all requirements of part 112)	Compliance date for certain specified agricultural water requirements	Compliance date for all other requirements	Compliance date for retention of records supporting eligibility in § 112.7(b)	Compliance date for modified requirement in § 112.7(b)(1)	Compliance date for all other requirements in §§ 112.6 and 112.7
	Time periods starting from the effective date of this rule					
Very small business	3 years	6 years	4 years	Effective date of rule	January 1, 2020	4 years
	2 years	5 years	3 years			3 years
Small business All other businesses	1 year	4 years	2 years			N/A

What is a covered activity?

A covered activity is growing, harvesting, packing, or holding covered produce on a farm.⁷ This includes the manufacturing and/or processing of covered produce on a farm, but only to the extent that the activities are performed on RACs. Covered produce may be exempt if it is intended for commercial processing that adequately reduces pathogens. Growers must make certain statements on documents accompanying the produce and keep records and customer assurances from those who will be further processing the covered produce to maintain the exemption.⁸

The rule’s purpose is to foster public health by minimizing risks of food adulterated by microbial contamination and promoting the traceability of associated outbreaks.

Who is covered?

“Farms” and/or “mixed-type facilities”⁹ which gross more than \$25,000 in sales of produce annually during the previous three year period are potentially subject to the Produce Safety Rule.¹⁰ The rule would not apply to farms grossing less than the \$25,000 in annual sales of produce.

If a farm averages less than \$500,000 annually in all food¹¹ sales and sells the majority of products to a qualified end-user¹² in the same state within 275 miles, the grower is partially exempt from the rule.¹³ As with the PCHF, qualified exempt farms must follow modified requirements¹⁴ and FDA can revoke exemptions.¹⁵

As discussed above, mixed-type facilities are those required to register as FDA food facilities but also conduct PSR covered farm activities.¹⁶ These are farms that grow produce, and, for example, also process food not grown, raised or consumed on the farm. So, where a farm may be exempt from food facility registration under the PCHF, farmers must evaluate whether they will be subject to the PSR. There will be situations in which a farm conducts farm activities, but also conducts activities that would be covered by one of the preventive controls rules. In these situations the farm will have to comply with both regulations as a mixed-type facility.¹⁷

What does the rule require a grower to do?

The final PSR establishes “science-based minimum standards for the safe growing, harvesting, packing and holding of produce . . .”¹⁸ FDA has issued final standards within the PSR for each of the following categories:

- *Personnel Qualifications and Training* standards for those who handle produce or food contact surfaces;¹⁹

- *Health and Hygiene* standards for those that may present a health risk to produce and food contact surfaces;²⁰

- *Agricultural Water* standards showing adequate level of safety and sanitary quality.²¹ This standard will likely be the most onerous and complicated for Idaho growers. As a result, a longer period of compliance is included in the final rule;²²

- *Biological Soil Amendments of Animal Origin (BSA)* standards, including treatment and processing to reduce microorganisms of public health concern;²³

The final PSR establishes “science-based minimum standards for the safe growing, harvesting, packing and holding of produce . . .”¹⁸

- *Domesticated and Wild Animals* standards, where a reasonable probability exists that animals will contaminate covered produce;²⁴

- *Growing, Harvesting, Packing, and Holding Activities* standards, in order to adequately separate covered produce from excluded produce and adequately clean and sanitize food contact surfaces;²⁵ and

- *Sprouts* standards specifically, because growing conditions for hazardous microorganisms are ideal for growing sprouts.²⁶

Recordkeeping

As with the PCHF rule, recordkeeping requirements will become an essential aspect of a covered entity’s satisfaction of each of the above standards, as well as to demonstrate the initial or continued applicability of pertinent exemptions, exclusions or modified requirements.²⁷ The January 26, 2016, effective date means that certain Idaho growers may already have recordkeeping responsibilities and may need legal guidance in order to comply.

Alternatives and variances

Individuals or entities can establish alternatives to some requirements of the proposed rule “if the alternative is scientifically established to provide the same amount of protection as the requirement in the proposed rule without increasing the risk of adulteration.”²⁸ This fact illustrates an important aspect of the PSR, namely, that the PSR proscribes standards, not methods of achievement. How covered entities ultimately achieve and comply with the standards, in many ways, will be left up to them.

Variances can also be granted, on a state or foreign country level, by “demonstrate[ing] that the variance is necessary in light of local growing conditions and that the procedures, processes, and practices to be followed under the variance are reasonably likely to ensure that the produce is not adulterated under section 402 [of the FD&C Act] and to provide the same level of public health protections as the [PSR rule].”²⁹ As an example, the originally proposed agricultural water standards drew much comment, including vociferous dissatisfaction from Idaho’s agricultural industry, and were altered in the final rule. The water standards, therefore, may be an aspect of the rule from which Idaho seeks a variance as implementation proceeds.

FSMA implementation, education and outreach

FDA is currently in a period of regulatory repose, in order to focus on implementation, education and outreach. Key to this process is determining the extent and scope of cooperation between FDA and state and local governments. The Idaho State Department of Agriculture, to which the 2016 Idaho legislature delegated nonretail FSMA authority,³⁰ is currently in the process of applying for FSMA implementation monies provided under the 2016 Farm Bill.³¹

Covered entities and their attorneys may and should now begin taking advantage of the educational and outreach opportunities increasingly coming on line. FDA is in the process of implementing the “On-Farm Readiness Review Program,” which offers an on-farm pre-inspectional review for FSMA applicability and compliance. Further, growers may take advantage of and submit inquiries to FDA’s Technical Assistance Network (TAN), which was implemented to aid with coverage and jurisdictional inquiries.³²

FDA has also partnered with USDA-AMS and Cornell University to fund the Produce Safety Alliance (PSA), which provides training, updates to interested parties and methods of preparation for those entities subject to FSMA regulation.³³ FDA and the National Association of State Departments of Agriculture (NASDA) are also in the process of putting together uniform regulatory models.

Conclusion

The final FSMA rules will have a significant impact on Idaho agriculture and both covered and exempt entities will need to carefully scrutinize the rules and guidance to either implement new or altered preventive practices, or simply to keep records to prove an ongoing exemp-

FDA is in the process of implementing the “On-Farm Readiness Review Program,” which offers an on-farm pre-inspectional review for FSMA applicability and compliance.

tion. All potentially affected entities should be analyzing their operation and consulting with counsel to determine the best route toward compliance during FDA’s period of regulatory repose.

Endnotes

1. Pub. L. 111-353.
2. 80 Federal Register 228 (November 27, 2015), pp. 74527.
3. 21 C.F.R. §§ 112.1 and 112.2. Food grains are exempt if primarily grown for processing. 21 CFR 112.3(c).
4. *Id.* at 112.2(2).
5. 21 C.F.R. §§ 112.2(a)(1)-(3) & 112.2(b).
6. 21 C.F.R. § 112.1(a)(1).
7. *Id.* at 112.2(a)(1).
8. *Id.* at 112.3(c).
9. *Id.* at 112.2.
10. *Id.*
11. *Id.* at 112.4(a).
12. *Id.* at 112.3(c).
13. *Id.* at 112.3(c).
14. *Id.* at 112.5.
15. *Id.* at 112.6.
16. *Id.* at 112.201-213.
17. *Id.* at 112.3(c).
18. 80 Fed. Reg. 180, 55907, 56147 (Sept. 17, 2015) (to be codified at 7 C.F.R. pt. 117)
19. *Id.* at 74355.
20. See 21 CFR § 112.21-30.
21. *Id.* at 112.31-33.
22. *Id.* at 112.41-50 and Analytical Methods under 21 C.F.R. § 112.151.
23. See Produce Safety Rule Compliance Dates Table, 80 Federal Register 228 (November 27, 2015), p. 74357.
24. See 21 CFR § 112.50-60.
25. *Id.* at 112.81-84.
26. *Id.* at 112.111-140.
27. *Id.* at 112.141-150.
28. *Id.* at 112.161-167.
29. *Id.* at 112.12.
30. *Id.* at 112.171-182.
31. HO499, 63rd Reg. Session (ID 2016).
32. See Public Law 113-79.
33. See generally <http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm459719.htm>.
33. See generally <http://producesafety-alliance.cornell.edu/>.

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FSMA Provides Some Relief for Direct-to-Consumer Business Models

Kelsey Jae Nunez

Farmers markets and community supported agriculture (where one buys a “share” in a local farm and receives seasonal food as it is harvested) are types of direct-sale models which allow producers and buyers to connect personally. Such direct-to-consumer models are popular among advocates of a bio-regional food economy that values workers’ rights, animal welfare, and environmental sustainability. With FSMA’s scope and complexity causing consternation across the country, it behooves attorneys in this sector to understand the significant but nuanced carve-outs for direct-sale models and for small farms focusing on local needs.

Expanding the definition of exempt “retail food establishments”

A retail food establishment that sells “directly to consumers as its primary function” is not a “facility” under the PCHF.¹ FSMA instructed FDA to amend the current definition of retail food establishments, which includes grocery stores and vending machines², to include sales made directly to consumers (A) at an off-site roadside stand or farmers’ market; (B) through a community supported agriculture program; or (C) at other direct sales platforms as determined by the FDA.³ FDA published the Preventative Controls Rule without this additional language and instead opened a separate rulemaking docket to amend the registration requirements.⁴ The proposed rules also add door-to-door sales; mail, catalog and internet orders, including online farmers markets and online grocery delivery; religious or other organization bazaars; and state and local fairs.⁵



Modified, less stringent requirements for “Qualified Facilities”, “Qualified Exempt Farms” and sales to “Qualified End-Users”

Farms catering to local food aficionados are also given some relief in the form of modified and less stringent requirements available under both rules. These generally apply if a farm is a “Qualified Facility” or a “Qualified Exempt Farm” that sells to “Qualified End-Users.” Essentially, this means the farm: (1) has less than \$500,000 in gross sales over the previous three year period and (2) sells a majority of their food directly to a “qualified end user”, which is: (a) the consumer of the food; or (b) a restaurant or retail food establishment in the same state or within 275 miles from the farm.⁶

Other business models acknowledged but not accommodated

Many states (including Idaho) allow non-potentially hazardous foods prepared in homes or farm kitchens (cottage foods) to be sold directly

It behooves attorneys in this sector to understand the significant but nuanced carve-outs for direct-sale models and for small farms focusing on local needs.

to consumers without a license or guarantee of food safety. The FDA declined to exempt cottage foods from the PCHF per se, but addressed them in the context of low-risk activity food combinations and the modifications applicable to small and very small businesses.⁷ FDA also declined to issue general exemptions for business models such as kitchen incubators, food hubs, grower market cooperatives, and produce auctions, essentially stating that there is too much variety in how these models operate to create a workable exemption.⁸

What next?

With regulations this complex, the likelihood of misinterpretation is high and small farmers need help understanding their options. The University of Idaho Extension Center has faculty and staff dedicated to food systems and small farms and is working with the Idaho State Department of Agriculture and other partners on outreach and education to assist with preparation for FSMA compliance. Attorneys for this sector will be increasingly called on to help our clients navigate the regulations and make structural adjustments to the business models to stay within available exemptions or modifications.

Endnotes

1. 21 CFR § 1.226(c); 80 Fed. Reg. 55908, 55917 (September 17, 2015).
2. 21 CFR § 1.227.
3. FSMA § 102(c)(1); 124 Stat. 3889. Note that a farm that has a CSA or sells directly

to consumers may be exempt from registration under this definition but may still need to comply with the Produce Rule.

4. See 80 Fed. Reg. at 55921. The open docket is 80 Fed. Reg. 19160 (April 9, 2015).
5. 80 Fed. Reg. at 19183.
6. See 21 C.F.R. §§ 112.3(c), 112.5, 117.3, and 117.5(a).
7. See 80 Fed. Reg. at 55590 (Comment and Response 222); 21 C.F.R. § 117.5(g) (3).
8. See *id.* at 55592 (Comment and Response 227).

FDA also declined to issue general exemptions for business models such as kitchen incubators.

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Could Idaho Utilize 'Cap n'Trade' for its Water Pollution?

Gregory M. George

Recent years have seen a raft of new ideas on how to reduce pollution of air and water. Most people have heard of the “cap-and-trade” policy proposed to reduce emissions of greenhouse gases.¹ Similar ideas to reduce water pollution, however, have received less attention. Still, such ideas have been formed and developed into guidance at both the federal and state levels. Idaho, along with other states all over the country, has developed frameworks and guidance for water quality pollutant trading over the past several years. However, with the advance of such policies have come legal challenges from opponents arguing that pollutant trading fails to comply with the text and structure of the underlying laws — namely, the federal Clean Water Act.

This article will examine the fundamentals of water quality pollutant trading: why the idea was hatched, what it entails, how the state structures the process of water quality trading, and potential legal challenges ahead.

The framework of water quality pollutant trading in Idaho

The basic purpose of water quality trading is to allow parties with high pollution-reduction costs to pay another party to reduce pollution by the same amount for less cost.¹⁷ In this way, it works similarly to “cap and trade” systems designed to reduce carbon emissions.¹⁸

The Idaho Department of Environmental Quality (DEQ) and EPA Region 10 (which includes Idaho) have used water quality pollutant trading to meet water quality goals. Specifically, a water quality trading framework has been developed for the lower Boise River in order to reduce phosphorus pollution.¹⁹

A water quality trading framework has been developed for the lower Boise River in order to reduce phosphorus pollution.¹⁹

Overview of the Clean Water Act

Water quality pollutant trading is a market-based approach to reducing pollution in public waters. To understand the concept, it is important first to understand the legal problem it seeks to solve. The federal Clean Water Act (CWA)² provides that, except as specifically permitted, “the discharge of any pollutant by any person shall be unlawful.”³ Most relevantly here, the CWA defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.”⁴ “Navigable waters” are defined as “the waters of the United States, including the territorial seas.”⁵

The term “pollutant” includes, among other things, solid waste, agricultural waste, garbage, chemical materials, and biological materials discharged into water.⁶ To count as “discharge of a pollutant,” the pollutant must come from a “point source.” A “point source” is “any discernible, confined, and discrete conveyance . . .”⁷ This definition expressly includes pipes, ditches, channels, tunnels, conduits, wells, concentrated animal feeding operations (CAFOs), discrete fissures, containers, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.⁸

As part of the CWA, Congress created the National Pollutant Discharge Elimination System (NPDES). Under

this program, the Environmental Protection Agency (EPA) “may . . . issue a permit for the discharge of any pollutant, or combination of pollutants” on the condition that the discharge either complies with specifically listed sections of the CWA or with “conditions as the [EPA] Administrator determines are necessary to carry out the provisions of this chapter.”⁹

The CWA requires each state to set water quality standards for all waters within its boundaries.¹⁰ The standards set water quality goals for specific water bodies.¹¹ Every two years, each state must create a list of the water bodies for which the current pollution limitations are insufficient to meet the applicable water quality standards.¹² The state must submit its list of such “impaired” water bodies to the EPA for approval.¹³

When a water body is placed on this list, the state has to establish a Total Maximum Daily Load (TMDL) of each pollutant that the water body can absorb and still meet the water quality standards.¹⁴ Each state must include TMDLs as part of its required water quality management plan.¹⁵ However, the CWA leaves to each state the responsibility to develop plans for meeting water quality standards and limiting pollution from point and non-point sources.¹⁶

Water quality pollutant trading is recognized in Idaho's water quality standards at Idaho Administrative Procedure Act (IDAPA) Section 58.01.02.055.06. This section of IDAPA states simply that "[d]evelopment of TMDLs or equivalent processes or interim changes under these rules may include pollutant trading with the goal of restoring water quality limited water bodies to compliance with water quality standards."

In July 2010, the Idaho DEQ published guidance on water quality pollutant trading as an update to its November 2003 Draft Guidance.²⁰ The 2010 guidance "sets forth recommendations DEQ believes should be considered when pollutant trading is conducted."²¹

This guidance provides that pollutant trading allows point source dischargers like wastewater treatment plants and factories to "purchase controls of a particular pollutant elsewhere in the watershed instead of installing tighter controls for that pollutant at the discharger's plant."²² The point source discharger's NPDES permit must include the conditions of pollutant trading.²³

The Idaho DEQ requires certain information and a trading framework to authorize trading.²⁴ The published guidance provides six pieces of information that should be developed before trading begins. First, a TMDL should be in place or under development for the pollutant(s) at issue.²⁵ Second, a market for trading should be identified (i.e., there should be a meeting of trading partners, a determination of whether the pollutant is viable for trading, and a determination of whether there are opportunities to make sufficient reductions of the pollutant in the watershed.²⁶ Third, a trading framework must be developed identifying the sectors that would trade, determining trading ratios for the pollutant, examining water quality conditions to identify

localized impacts, and developing a trading framework document.²⁷

Fourth, the trading framework document should go public for comment for at least 30 days. Based on the comments received, appropriate changes are made to the document. Afterward, a final trading framework for the specific watershed is incorporated into Idaho's Water Quality Pollutant Trading Guidance as an appendix.²⁸ Fifth, if trading is not authorized by the TMDL, the TMDL is administratively updated to authorize trading for the watershed.²⁹ Sixth, any additional conditions the NPDES permit writer determines

Credits are stated in terms of an amount of a pollutant per unit of time.³⁶

are necessary under the approved trading framework are applied. At this point, trading can commence between the point source discharger under the trading framework for the watershed and consistent with the NPDES permit.³⁰

The TMDL provides the framework for water quality pollutant trading in two ways: (a) it sets the overall cap on a specific pollutant; and (b) it divides the reductions amongst various pollution sources.³¹ To participate in water quality pollutant trading, dischargers need to have a good record of compliance with their NPDES permits; this in-

cludes having EPA-compliant Quality Assurance Program plans and monitoring.³²

The mechanics of water quality pollutant trading in Idaho

Water quality pollutant trading has two major components: the trading parties (i.e., buyers and seller) and credits (which the trading parties buy and sell).³³ Point sources and nonpoint sources create "credits" by reducing pollutants beyond the level set by their TMDL and NPDES permit.³⁴ More specifically, point sources generate credits by reducing pollutant discharges below the NPDES limits initially set by the waste load allocation.³⁵ Credits are stated in terms of an amount of a pollutant per unit of time.³⁶ Nonpoint sources generate credits by using "best management practices" (BMPs) to reduce pollutant runoff.³⁷ BMPs for nonpoint sources have specific design, maintenance, and monitoring requirements.³⁸ A list of approved BMPs for each Idaho watershed is included in the appendices to the July 2010 DEQ guidance.³⁹

Although the process is subject at every stage to governmental oversight, the trading parties effectuate their trades with private contracts. These contracts identify the parties, the pollutant reduction measures that will be undertaken, the trade amount, the effective date, the time period for which the trade is valid, the responsibilities of each party, the price, the payment provisions, and the remedies if a party fails to deliver credits.⁴⁰ The contracts themselves are not submitted to any agency.⁴¹

When a point source discharger trades to another point source discharger, it can reduce its pollutant discharge below its effluent limit by a certain amount for a given month. The reduction creates the "credit" that can be sold to another point source. Selling a credit increases the

seller's "effective discharge" by the amount of the credit, and buying a credit decreases the seller's reported discharge by the same amount.⁴² Each point source is ultimately responsible for ensuring that its discharge, adjusted by credits bought or sold, meets its effluent limit.⁴³ The EPA has authority to enforce applicable effluent limits against any point source that exceeds them.⁴⁴

Nonpoint sources can reduce the amount of pollutant runoff by first selecting a BMP from the applicable BMP list.⁴⁵ The pollution reduction is calculated according to the requirements of the chosen BMP.⁴⁶ Such reduction can be turned into a credit, which the nonpoint source can then sell to a point source.⁴⁷ Point sources can buy credits for a given month generated by a nonpoint source in the same month and thereby increase its allowed discharge for that month.⁴⁸ The nonpoint source credits must be located on the same water bodies covered by the TMDL.⁴⁹

If the EPA or the DEQ later determine by inspection that the BMP's underlying pollutant reduction is invalid (i.e., it does not actually reduce pollution by the amount of the credit), then the credit is nullified, with the result that the point source's effective discharge for the month covered by the credit is increased.⁵⁰ The EPA and/or DEQ may verify pollution reductions by monitoring, trade information tracking (which includes a trade database), recordkeeping, and reporting.⁵¹ The verification processes are discussed further in the next section.

How pollution reductions are verified

Trading parties have to keep records showing the validity of the reductions in pollution underlying their credits, and must additionally document all trades.⁵²

The EPA and DEQ review point source trades as part of the NPDES

Holders of NPDES permits are responsible for ensuring that BMPs are properly implemented and that the correct number of credits is produced.⁵⁸

permit process.⁵³ This review includes the point source's Discharge Monitoring Report (DMR), which point source dischargers prepare for the EPA and/or state agencies. The DMR is reviewed and compared with the information submitted in the monthly Trade Summary Report the point source discharger submits to the EPA.⁵⁴ The EPA and DEQ investigate any discrepancies between the documents.⁵⁵

The Idaho Soil and Water Conservation Commission reviews the BMPs of nonpoint sources.⁵⁶ EPA or DEQ agents may visit BMP sites to examine the BMP's design, maintenance, and monitoring.⁵⁷ Holders of NPDES permits are responsible for ensuring that BMPs are properly implemented and that the correct number of credits is produced.⁵⁸

Potential challenges to trading

Like most environmental policies, water quality pollutant trading is not without controversy. Some opponents of the idea have mounted legal challenges, arguing that pollutant trading runs counter to the CWA. In 2013, environmental advocacy group Food and Water Watch (FWW) sued the EPA in federal district court in Washington, D.C. seeking to halt water quality pollution trading in the Chesapeake Bay watershed.⁵⁹

In its complaint, FWW alleged that the CWA does not authorize

pollution trading between point sources and nonpoint sources, or between a point source and another point source.⁶⁰ FWW's complaint stated that "[t]he CWA does not allow sources of any kind to exceed their TMDL allocations or waste-load allocations in exchange for pollution reductions in another location."⁶¹ In other words, FWW argued that the CWA requires each source to stay within its own pollutant discharge limits, and bars sources from buying their way out through pollutant trading.

FWW contended that water quality pollutant trading "allows point sources to avoid or outright violate their NPDES permit by discharging greater amounts of pollutants than their waste load allocations permit."⁶²

In FWW's view, this violates the CWA, which "[does] not allow for [point sources] to avoid any permit limitations — including technology-based, water quality-based or waste-load limitations — through a pollution trading program."⁶³ Moreover, FWW cited the "anti-backsliding provision" of the CWA, which states that NPDES permits "may not be renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit."⁶⁴

FWW also asserted that pollutant trading effectively amended the

Chesapeake Bay TMDL without the required notice and comment period. The complaint stated that allowing one source to expand its discharge by purchasing credits “creates new load allocations that were not included in the final Chesapeake Bay TMDLs.”⁶⁵ Doing so, FWW alleged, amounted to an amendment to the TMDL requiring the EPA to provide a formal notice and comment procedure.⁶⁶ Because the EPA did not do so, FWW argued that the EPA violated the notice and comment procedures required under the federal Administrative Procedure Act at 5 U.S.C. § 553(b) and (c).⁶⁷

The district court, however, did not rule on any of these arguments. Rather, it decided the case on other grounds (e.g., standing, ripeness, lack of a final agency action being challenged).⁶⁸ So, water quality pollutant trading was unscathed. However, FWW continues its legal criticism of pollutant trading.⁶⁹ It is reasonable to assume that it and/or other groups will litigate the issue in the future.

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23. *Id.*

24. *Id.* at 11.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 5.

32. *Id.*

33. *Id.* at 13.

34. *Id.*

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37. *Id.*

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39. *Id.* at 32-46.

40. *Id.*

41. *Id.*

42. *Id.* at 13-14.

43. *Id.* at 14.

44. *Id.*

45. *Id.*

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49. *Id.*

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53. *Id.* at 22.

54. *Id.*

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56. *Id.*

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59. *Food and Water Watch v. United States Environmental Protection Agency*, 5 F.Supp.3d 62 (D.D.C. 2013).

60. Complaint at 10, *Food and Water Watch v. United States Environmental Protection Agency*, 5 F.Supp.3d 62 (D.D.C. 2013) (No. 12-1639).

61. *Id.*

62. *Id.* at 9.

63. *Id.* at 10.

64. *Id.* at 9; 33 U.S.C. 1342(o).

65. Complaint at 14, *Food and Water Watch v. United States Environmental Protection Agency*, 5 F.Supp.3d 62 (D.D.C. 2013) (No. 12-1639).

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67. *Id.*

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Water and Natural Resources Legislation Review: 2016

Norman Semanko
Sarah A. McCormack

By the time the Idaho Legislature adjourned sine die at 12:09 p.m. on March 25, 2016, it had adopted several pieces of legislation in the environmental and natural resources arena. The most significant of these are discussed below, along with several of the administrative rules reviewed by the Legislature. Complete copies of the legislation reviewed here, as well as other bills that were considered, but not approved during the 2016 Legislative Session, are accessible on the Idaho State Legislature's website at <http://www.legislature.idaho.gov>.

Water quality legislation

The Legislature adopted three pieces of legislation and a rule designed to facilitate delegation of the National Pollutant Discharge Elimination System (NPDES) permit program from the U.S. Environmental Protection Agency (EPA) to the State of Idaho. With these important pieces of legislation and the rule in place, DEQ expects to be able to meet the Legislature's September 1, 2016 deadline for submission of the State's NPDES delegation application to EPA.

First, S1238 authorizes the inspection and copying of certain water quality records, to make Idaho Code Sec. 74-114 consistent with the requirements of the Clean Water Act and existing federal regulations. This piece of legislation ensures access to local water quality records and protects trade secrets of the federal and state systems. S1238 was enacted into law and amended Idaho Code Section 74-114.

Second, S1239 provides a mechanism for public notice and an opportunity to comment on proposed decisions by the Idaho Department of Environmental Quality (DEQ), as

This rule is of key importance to the package of items required for EPA to consider Idaho's request for delegation of the NPDES program.

well as a process to appeal final decisions to an independent hearing officer appointed by the Board of Environmental Quality. The legislation also provides for judicial review. This is necessary for Idaho to submit an application to the Environmental Protection Agency (EPA) requesting authorization to implement a state National Pollutant Discharge Elimination System (NPDES) program. This piece of legislation was enacted into law as a new section in Chapter 1, Title 39, Idaho Code, designated as Section 39-175D, Idaho Code.

Third, S1260 clarifies the authorities and duties of the Idaho Department of Agriculture regarding dairy farms and beef cattle feeding operations. These duties are to be carried out in a cooperative manner with DEQ, as part of an overall NPDES permit program at the state level. This piece of legislation was enacted into law and amended Idaho Code Section 22-4902.

Finally, the Legislature adopted the Idaho Pollutant Discharge Elimination System (IPDES) rule that was proposed by DEQ and the Board of Environmental Quality. This rule is of key importance to the package of items required for EPA to consider Idaho's request for delegation of the NPDES program. The rule includes a proposed fee structure to be implemented once the IPDES program is approved by EPA and implemented

by DEQ and ensures DEQ has the authorities required by EPA for IPDES regulation of dairy and beef cattle operations.

Also of note, DEQ-sponsored legislation (S1237) was approved to revise Idaho Code Section 39-3609 by updating the process for prioritizing water bodies that are designated as water quality limited. The adoption of this legislation requires development and implementation of a Total Maximum Daily Load (TMDL) under the Clean Water Act. DEQ requested that the prioritization process take into account "the availability and quality of data, department resources, and whether the severity of pollution" poses a "significant risk" (high priority), "risk" (medium priority), or "minimal risk" (low priority) "to designated or existing beneficial uses." The purpose of this legislation is to make Idaho Code consistent with federal law.

Finally, the Legislature favorably considered the "Fish Consumption Rule." This rule updated Idaho's human health water quality criteria. DEQ proposed the rule after evaluating local and regional fish consumption information and conducting lengthy negotiated rulemaking.¹ The rule observes: "EPA guidance allows states to choose from a range of 10-4 to 10-6 for the incremental increase in cancer risk used in human

health criteria calculation. Idaho has chosen to base this criterion on carcinogenicity of 10-5 risk.” The Fish Consumption Rule is subject to review and approval, or disapproval, by EPA, as well as potential litigation.

Water management and regulation

The Legislature approved three concurrent resolutions dealing with water management in Idaho. Concurrent resolutions require approval by both the house and senate, but do not enact or amend statutes and therefore do not require the governor’s signature. They are typically adopted to regulate the internal affairs of the legislature that adopted them, or for other purposes where authority of law is not necessary. In large part, these three resolution stem from the historic settlement agreement reached between certain senior surface water right holders and ground water management districts regarding delivery calls on the Eastern Snake Plain Aquifer (ESPA).

First, SCR 136 revised the state’s target for managed recharge from 100,000 acre-feet per year to 250,000 acre-feet per year. The managed recharge program is managed by the Idaho Water Resource Board. The higher level of recharge is a key component of the settlement agreement between the surface and ground water users.

Second, SCR 137 calls for enhanced ground water management efforts across the state, through what are referred to as “statewide aquifer stabilization and sustainability projects,” to include managed recharge. The goal of the resolution is to provide adequate water supplies for current and future uses, and to help resolve or avoid water delivery calls.

Third, SCR 138 provides the state’s support for the settlement agreement.

Toward statewide aquifer stabilization

The settlement agreement requires ground water users on the ESPA to reduce their total consumptive use by 240,000 acre-feet per year. The ground water users are also required to deliver 50,000 acre-feet per year of storage water to the senior surface water right holders. The agreement also calls for the state to conduct an average of 250,000 acre-feet per year of managed recharge. The agreement

calls for periodic check-ins on the condition of the ESPA, along with adaptive management as necessary to help the aquifer and spring flows meet the desired levels. In exchange for these efforts, the participating ground water users are granted safe harbor from future delivery calls and any curtailment orders by the Idaho Department of Water Resources (IDWR).

As a companion to these three resolutions, the Legislature approved a plan for adequately funding the aquifer stabilization and recharge activities. These appropriations were contained in S1402, the funding bill for IDWR and the Idaho Water Resource Board.

The Legislature approved H595 to update the law regarding Ground Water Management Areas(I.C. § 42-233b), which contained an antiquated and unrealistic deadline for IDWR to issue curtailment orders. The legislation further clarified that ground water users operating under an approved mitigation plan are not subject to curtailment orders. Because the Ground Water Management Area statute may become an administrative tool for implementing the settlement agreement discussed above, an update was necessary.

Also of note is H351, in which the Legislation modified the definition of a “dam” for purposes of requiring safety inspections and submitting design plans to IDWR. Under the new definition, IDWR will regulate any artificial barrier that is 10 feet in height and impounds at least 50 acre-feet of water. H351 also provided for the regulation of any facility that is deemed to “pose a threat of direct loss of life or significant property damage,” regardless of its size.

Oil and gas permits

S1339 streamlined the permitting process to address concerns that the process was taking over a year in Idaho, while permits were being considered in 60 days or less in other states. The legislation shifted the initial responsibility for application process and approval from the Oil and Gas Commission (OGC) to the Idaho Department of Lands (IDL), and provided very specific timelines for agency action on permit applications. Appeals of IDL decisions now go to the Oil and Gas Commission, followed by an opportunity for judicial review. Any attorney practicing in the oil and gas area will want to become familiar with these lengthy and detailed statutory changes. This piece of legislation was enacted into law and amended Idaho Code Section 47-317.

Agricultural activities

H499 designated the Idaho State Department of Agriculture as the state authority for food regulation and inspections, including those required by the federal Food and Drug Administration, under the authority of the Food Safety Modernization Act.²

H531 enacted a new statute (Idaho Code Sec. 18-7043) to address breaches of biosecurity on agricultural facilities or operations, includ-

ing the actual or attempted “release or spread of any type of contagious, communicable or infectious disease or poison.” The legislation designates any violation as a misdemeanor and includes fines and penalties.

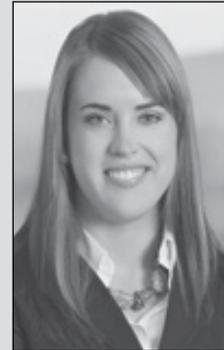
Endnotes

1. IDAPA 58.0102.1201, Subsection 210.01.c, table footnote I. “When using toxicity thresholds to derive water quality criteria to protect human health, a fish consumption rate representative of the population to be protected, a mean adult body weight, and adult 90th percentile water ingestion rate, a trophic level weighted BAF or BCF, and a hazard quotient of one (1) for non-carcinogens or a cancer risk level of 10⁻⁵ for carcinogens shall be utilized.” *Id.*, Subsection 210.05.b.ii.
2. For more about FMSA, see the article on page 27.

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Planning for Wildfire in the Wildland-Urban Interface

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The federal government is spending unprecedented funds to fight wildfires. In 1995, fire made up 16 percent of the U.S. Forest Service's annual appropriated budget. In 2015, wildfire consumed more than 50 percent of the agency's budget, a benchmark reflective of steadily rising costs.¹ At the same time, while 91 percent of federal appropriations for wildfire management are allocated to protect federal lands, it is increasingly evident that federal funds are being used to protect private homes and other structures "adjacent to federal lands [that] can significantly alter fire control strategies and raise costs."²

In a survey of Forest Service land managers, estimates were that "[50] to [95] percent of firefighting costs were attributable to protection of private property."³ Moreover, a study conducted for the Montana legislature found that firefighting costs are "highly correlated with the number of homes threatened."⁴ A recent study of wildfires in Wyoming found that protecting just one isolated home added as much as \$225,000 to the overall cost of fighting a fire.⁵

The rising cost of fighting fires and, in particular, those that threaten private property, has many factors including terrain, fuels, and weather.⁶ Increasingly, though, attention is being directed to the rapid growth of remote developments — especially those not designed or maintained with wildfire in mind — at the ur-

If current development patterns continue, development in the WUI will almost certainly grow substantially, resulting in even further increases in wildfire protection costs.

ban periphery often referred to as the "wildland-urban interface," or WUI (pronounced "Woo-E").⁷ A good example of WUI development patterns in the Idaho region would include those residential developments in the Boise foothills, an area which Ada County includes in its definition of the county's WUI.⁸ There is good reason why attention is turning to these types of developments: six of the 10 most expensive fires in the past 100 years were WUI fires despite the fact that WUI fires account for just a small fraction of overall fires fought in any given year.⁹

There are different approaches to defining the WUI, which include prioritizing either a designated area on a map or a set of conditions which contribute to wildfire risk.¹⁰ According to one widely used WUI definition, only 14 percent of the WUI is developed.¹¹ If current development patterns continue, development in the WUI will almost certainly grow substantially, resulting in even further increases in wildfire protection costs.

Here's the dilemma: local governments retain authority to approve WUI development through applications of local zoning, building, fire, and subdivision codes even though

it is the federal government that bears the greatest burden in protecting those developments from wildfire. Indeed, only a few local governments in the West generally, much less in Idaho, are integrating a deep knowledge of federal wildfire protection policy into their planning and development processes. That disconnect between federal wildfire planning and local land use planning decisions has a potential to "lock in" long-term, expensive development patterns.

This article will first describe a new collaboration between the University of Idaho, Boise State University, the U.S. Forest Service, and the Idaho Department of Lands to address these issues. The article will then briefly review several regulatory and non-regulatory approaches to addressing wildfire in the WUI currently in use throughout Idaho and the West.

Starting a conversation about wildfires in the WUI

Across the West, a number of approaches are being pioneered to bridge the jurisdictional divide in wildfire that also respond to local conditions. In 2015, the U.S. Forest

Service and the Idaho Department of Lands provided a \$240,000 grant to scholars at the University of Idaho and Boise State University to address this disconnect throughout Idaho's varied terrains and political sensibilities. The project is currently in its first phase, in which students in Stephen R. Miller's Economic Development Clinic at the University of Idaho College of Law are contacting all 200 Idaho cities and 44 Idaho counties to establish a "legal baseline" of existing local approaches to wildfire.

At the same time, Eric Lindquist, director of Boise State University's Public Policy Research Center, and Thomas Wuerzer, faculty of Real Estate Development at Nova Southeastern University, Davie, Florida, surveyed thousands of Idahoans on their perception of wildfire risk. These studies will provide a collective baseline of existing Idaho legal strategies used to address wildfire, as well as an understanding of how Idahoans perceive the risk of wildfire.

In Fall 2016, the College of Law will release a working draft of a wildfire risk planning guide for Idaho. This first draft will include online access to existing legal approaches in the state, as well as foundational best practices just now emerging to address wildfire in the WUI. In the second and third years of the grant, Jaap Vos, program head of the University of Idaho's Bio-regional Planning and Community Design program will coordinate workshops around the state to assist local communities to find locally appropriate approaches to planning for wildfire in the WUI. As these conversations evolve, so, too, will the wildfire risk planning guide, which will remain a working document throughout the process. The vision is that the final guide will be completed in the third and final year of the grant, and will reflect the best

solutions arising from the needs and conditions of local communities.

A brief introduction to tools for planning for wildfire in the WUI

This section reviews several general tools being used around the country to plan for wildfire in the WUI and refers to several Idaho examples of those strategies currently in use.

As these conversations evolve, so, too, will the wildfire risk planning guide, which will remain a working document throughout the process.

Regulatory approaches

One of the best guides to mitigating the impacts of fire through the development process, *Community Wildfire Safety through Regulation: A Best Practices Guide for Planners and Regulators*, was published in 2013 by the National Fire Protection Association (NFPA).¹² The guide describes five primary regulatory tools for local governments to manage wildfire in the WUI: comprehensive plans, land use and zoning codes, subdivision codes, building codes, and fire codes.¹³

Comprehensive plans

Comprehensive plans can play an important role in signaling the long-term development goals of a community and, in particular, its intention to address the risk of wildfire in the planning process.¹⁴ For instance, Bonner County, Idaho has used its comprehensive plan as an opportunity to describe its fire history, identify characteristics of the WUI, and outline techniques for reducing the risk of wildfire to development in the WUI.¹⁵ Bonner County's comprehensive plan recognizes that clear road signage and fire resistant building materials reduce WUI fire hazards by respectively decreasing firefighter response time and improving home and neighborhood fire resistance.¹⁶ As an out-of-state example, Boulder, Colorado's recent comprehensive plan includes an entire chapter dedicated to natural hazards including eight policies expressly addressing wildfire.¹⁷

Land use regulations and zoning ordinances

Land use development regulations and zoning ordinances can also be powerful in addressing wildfire in the WUI. Since wildfire issues in the WUI often apply across different land use districts, an overlay zone can apply WUI regulations to specific fire hazard areas that do not correspond directly to uses.¹⁸ For example, Coeur d'Alene, Idaho defines hillside overlay zones in certain areas with average slopes of at least 15 percent.¹⁹ Before developing in a hillside overlay zone, the city must determine wildfire mitigation goals for the area according to the Kootenai County WUI Fire Mitigation Plan and NFPA standards as guidelines.²⁰

An alternative zoning approach is to adopt, in whole or in part, the International Code Council's International Wildland-Urban Interface

Code, which provides model language for defining WUI areas based on climate, geography, topography, and fire insurance rates as provided by an appropriate insurance services office.²¹ In adopting its own Urban-Wildland Interface Code, Bannock County tailored the International WUI Code to its needs by amending the fire insurance rate consideration in the standard code and adding factors related to fuels, water supply, and access that were unique to its location.²² As written, the Bannock County Urban-Wildland Interface Code imposes wildfire specific requirements on WUI areas, such as water supply and access requirements, fire resistant construction standards, and defensible space.²³

Subdivision codes

Most WUI development involves subdivision of land, which provides an opportunity to consider how that process can be altered to reduce wildfire threat. For instance, Flagstaff, Arizona reduced subdivision ignitability by respectively requiring firebreaks and clustering lots away from fire hazards.²⁴ Clustering can be balanced to preserve the desired density in a subdivision while avoiding high risk fire areas, which results in the developed area being denser than would otherwise be possible.²⁵ Communities seeking to improve fire response in subdivisions often require additional access roads and water supply.²⁶

Building codes

At the lot and building scale, communities often focus on building ignitability reduction by requiring 30 feet of defensible space (e.g., modifications to vegetation, such as tree removal, thinning and pruning).

In addition to regulatory options for addressing wildfire in the WUI, local governments also have a number of non-regulatory options and incentives to offer.

This may sometimes be enacted regardless of property boundaries, so neighbors may be required to cooperate to mitigate their shared fire hazard.²⁷ In addition to defensible space, Boise addresses structure ignitability by requiring fire resistant roofing, siding, exterior glazing, and doors in its WUI zones.²⁸ Eagle County, Colorado, uses site-specific hazard assessments to specify mitigation requirements that the developer must satisfy as a condition before obtaining a building permit.²⁹

Fire codes

Finally, the broad public safety goals of fire codes are flexible enough to encompass many WUI wildfire management objectives;³⁰ as a result, they are a popular location for these types of regulations.³¹ Communities should give consideration to their base fire code, which can offer a wider array of options for addressing wildfire.

Non-regulatory approaches

In addition to regulatory options for addressing wildfire in the WUI, local governments also have a number of non-regulatory options and incentives to offer. Non-regulatory approaches can be especially valu-

able in incentivizing ongoing maintenance of properties in a state of fire readiness.

Firewise communities

One commonly used — and often misunderstood — tool is the Firewise Communities program, which is administered by the non-governmental National Fire Protection Association. Firewise Communities is a voluntary program that encourages homeowners and neighbors to work together to minimize their wildfire risk. To become a recognized Firewise Community, a community goes through a five-step process.³² First, the project applicant must obtain a wildfire risk assessment from the state forestry agency or a fire department.³³ Second, the developer must convene a working group and create an action plan based on the assessment.³⁴ Third, the developer or subsequently created fire board must conduct community outreach events promoting wildfire education or the action plan on an ongoing basis.³⁵ Fourth, the community must invest two dollars per member annually in Firewise activities.³⁶ Fifth, the development must submit an application for approval to the state Firewise liaison.³⁷ Local governments should be aware, however, that there is no measurable standard for what constitutes

a Firewise Community and should not rely upon that designation as ensuring a standard of fire readiness. The details of each Firewise program must be investigated and compared to local risk factors to determine if the program will assist a local government's wildfire objectives.

Insurance

Some local governments are also looking at ways to provide additional incentives to property owners who perform mitigation. Boulder County, Colorado's Wildfire Partners program, which is administered by the county and run on state and federal grants, offers in-depth property assessments by mitigation specialists to help residents understand their structural and property vulnerabilities.³⁸ Property owners who successfully perform all required mitigation receive a certificate. The program has two unusual benefits: a financial rebate to cover mitigation costs (e.g., tree removal), the certificate's acceptance by several insurance companies as proof of adequate fire mitigation sufficient to reduce rates or retain coverage.³⁹

Hazard mitigation plans and community wildfire protection plans

In a third non-regulatory approach, local governments can participate in one of several planning processes that offer the opportunity to participate in broader funding schemes. For instance, the U.S. Federal Emergency Management Agency (FEMA) provides funding to communities that assess their natural hazards and propose solutions to manage and reduce those hazards through a Hazard Mitigation Plan (HMP).⁴⁰ For example, Canyon County, Idaho, and its cities—

Nampa, Caldwell, Middleton, Notus, Parma, Wilder, and Greenleaf—have created an HMP that describes the WUI within the county, identifies fire hazards, and recommends fire mitigation activities.⁴¹ Similarly, the Healthy Forest Restoration Act directs federal funds for fuel reduction and reducing structural ignitability into communities that have adopted a Community Wildfire Protection Plan (CWPP).⁴² One such CWPP is Idaho County, Idaho's *Revised Wildland-Urban Interface Wildfire Mitigation Plan*. The CWPP

These issues will be addressed in greater depth in the upcoming working draft of the wildfire planning guide tailored to Idaho's communities, which will be available in Fall, 2016.

contains a comprehensive description of its wildfire characteristics, impacted community interests, and treatment recommendations rated by effectiveness and sustainability.⁴³ Furthermore, it is the product of an extensive collaboration between the County, 25 of its cities and towns, the Nez Perce Tribe, State and Federal agencies, fire districts and departments, and private stakeholders.

Homeowner's associations CC&Rs

Finally, some homeowner associations have forged a path between

regulation and voluntary efforts through covenants, conditions and restrictions (CC&Rs) crafted to reflect the local wildfire conditions with a special emphasis on maintenance of properties.

Concluding remarks

This brief article serves as a survey of just a few of the tools that local governments in Idaho, and around the West, are using to address the complicated issues that arise when planning for wildfire in the WUI. These issues will be addressed in greater depth in the upcoming working draft of the wildfire planning guide tailored to Idaho's communities, which will be available in Fall, 2016. Those looking for immediate resources would likely find substantial assistance in reviewing the Colorado Department of Local Affairs' recently published *Planning for Hazards: Land Use Solutions for Colorado*.⁴⁴ *Planning for Hazards* provides a comprehensive method for addressing eleven different hazards, including wildfire, that affect western communities and discusses how communities of all sizes are finding solutions tailored to local community needs, as well as their proclivities toward both regulatory and non-regulatory options.

While addressing the threat of wildfire in the WUI can be daunting, there are a number of regulatory and non-regulatory solutions that can bring this potentially outsized problem of the West's future under control without prohibiting development and growth. This joint project of the University of Idaho and Boise State University, along with the U.S. Forest Service and the Idaho Department of Lands, will seek to offer ways forward that fit with the character of Idaho's communities.

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While addressing the threat of wildfire in the WUI can be daunting, there are a number of regulatory and non-regulatory solutions that can bring this potentially outsized problem of the West's future under control without prohibiting development and growth.

Rising Costs of Fighting Fires in the WUI].

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9. See HEADWATERS ECONS., *The Rising Cost of Wildfire Protection 1* (2013), <http://headwaterseconomics.org/wphw/wp-content/uploads/fire-costs-background-report.pdf>.
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14. While deemed only advisory documents in Idaho, many cities also require discretionary permits, such as condi-

tional use permits, to include a finding of compliance with a local government's comprehensive plan. As a result, comprehensive plans can prove especially powerful with regard to those permits. *Evans v. Teton Cty.*, 139 Idaho 71, 76, 73 P.3d 84, 89 (2003) ("A comprehensive plan is not a legally controlling zoning law, it serves as a guide to local government agencies charged with making zoning decisions."); but see, e.g., Boise City Zoning Code § 11-03-04(6)(C)(7)(a) (v) (2016) (requiring conditional use permit decisions to include a finding that "the proposed use is in compliance the Comprehensive Plan").

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19. CITY OF COEUR D'ALENE, IDAHO, CITY CODE § 17.08.905 (2016).
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22. COUNTY OF BANNOCK, IDAHO, Code of Ordinances, Title 15, Chapter 15.24, section 302.1 (adopted by Ordinance No. 2005-7, recording no. 20521189 (Oct. 3, 2005)).

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24. NAT'L FIRE PROTECTION ASS'N, *Community Wildfire Safety Through Regulation: A Best Practices Guide for Planners and Regulators* 8 (2013), <http://catalog.nfpa.org/Community-Wildfire-Safety-Through-Regulation-A-Best-Practices-Guide-for-Planners-and-Regulators-P552.aspx>.

25. PLANNING FOR HAZARDS at 113.

26. CLARION ASSOCIATES, *Addressing Community Wildfire Risk: A Review and Assessment of Regulatory and Planning Tools*, Fire Protection Research Foundation 14 (2011), <http://www.nfpa.org/~media/files/research/research%20foundation/rfwuiregulatoryassessment.pdf>.

27. *Id.* at 16.

28. BOISE CITY, IDAHO, CITY CODE §§ 7-01-69 (2016).

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30. See INTERNATIONAL CODE COUNCIL, INTERNATIONAL FIRE CODE § 101.2 (2012), http://publicecodes.cyberregs.com/icod/ifc/2012/icod_ifc_2012_1_sec002.htm.

31. See *supra* note 25 at 20.

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38. Wildfire Partners, <http://www.wildfirepartners.org/>; Ryan Maye Handy, *Boulder wildfire mitigation program could become template for state*, THE GAZETTE (Sept. 24, 2015), <http://gazette.com/boulder-wildfire-mitigation-program-could-become-template-for-state/article/1559989>.

39. *Id.*

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The Clean Water Act's Agriculture Exemptions

Mark Ryan

It is axiomatic that water is part and parcel of agriculture, both on the front and back ends. Farmers and ranchers in Idaho depend on water to grow their crops and water their animals, and the wastewater from those operations often ends up in the nearby creek or lateral. Because water is such a critical part of our agricultural economy, Congress wrote the Clean Water Act (CWA) to deal with discharges from agricultural operations differently than any other class of dischargers. Agriculture is the only category that is largely and specifically exempt from most regulation under the Act.

This article summarizes the principle provisions of the CWA and its implementing regulations dealing with the regulation of agriculture, with a special emphasis on the agricultural exemptions. Because the exemptions are so important to the agriculture industry in Idaho, all farmers, feedlot operators and irrigators in the state should understand both the breadth of the exemptions and their limitations.

To understand the importance of the agriculture exemptions, one needs to understand the *prima facie* elements of CWA jurisdiction. For a CWA permit requirements to kick in, there has to be (1) a discharge, (2) of a pollutant, (3) from a point source, (4) by a person to (5) a water of the United States. Unless all five elements are present, none of the CWA permitting requirements apply.¹

The agriculture exemption

With the *prima facie* elements in mind, let's look at number (3), point sources. The agriculture exemptions are found largely in the point source definition in the CWA. Section 502(14) of the Act states:

Agriculture is the only category that is largely and specifically exempt from most regulation under the Act.

The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural storm water discharges and return flows from irrigated agriculture.* (emphasis added).

Congress reemphasized the point source agriculture exemption in section 402, the National Pollutant Discharge Elimination System (NPDES) permitting provision of the CWA. Subsection (1) states: "The Administrator shall not require a permit under this section for discharges composed *entirely* of return flows from irrigated agriculture, nor shall the administrator directly or indirectly, require any state to require such a permit." (emphasis added).

This means is that stormwater and snow melt running off of a farm field is exempt from regulation under the CWA. The same thing applies to return flow from irrigated agriculture. If a farmer irrigates his fields, and that irrigation runoff containing sediment, pesticide or fertilizer residues enters a water of the

United States (WOTUS), it is not a point source discharge. If no point source is involved, a CWA permit is not required.

Because agricultural return flow is exempt, and because the exemption applies only to flows that are comprised *entirely* of return ag flow, it is important for farmers to keep their return flows from being contaminated by third parties. For example, any runoff from parking areas or adjacent streets or housing developments that co-mingles with the return agricultural return flow could jeopardize the exemption under section 402(1).

The agriculture exemption is embedded in the CWA. The EPA regulations on point sources, found at 40 C.F.R. § 122.2, mirror the language in the CWA. Since the exemption is in the statute, the implementing federal agencies cannot remove or amend it by regulation. (States are allowed to cover more than the CWA, but Idaho environmental law seldom, if ever, exceeds minimum federal standards.) And of recent interest, the controversial new rule defining waters of the United States (aka The Clean Water Rule) does not amend or remove the point source agriculture exemption.

It is important to recognize that the agriculture exemption is unique.

Congress wrote the point source definition to apply to a broad class of dischargers. Over the last 44 years, the courts have considered almost every type of “discrete conveyance” to be a point source subject to regulation. Except for agriculture. Stormwater and agricultural return flow from farm fields have always been exempt, and always will be unless Congress decides to change the law, which is very unlikely.

The Agriculture exemption is also of significance for canal operators. The new WOTUS Rule aside, irrigation canals and ditches that discharge back into natural water bodies such as the Snake or Boise Rivers have long been considered to be WOTUS.² As a result, discharges into canals and laterals are considered point source discharges which must be regulated under the NPDES permitting program.) Non-agricultural point source discharges of a pollutant into ditches that are WOTUS require a permit. But runoff from farm fields into those ditches is exempt as nonpoint source pollution.

The exceptions to the exemption

Congress specifically included concentrated animal feeding operations (CAFOs) in the definition of point source, thereby creating a statutory exception to the general agriculture exemption. Feedlot and large poultry operations have been regulated for many years, depending on their size and the types of animals being confined.³ Runoff from CAFOs has always been considered a point source discharge subject to NPDES permit requirements. The extent to which CAFO runoff can be regulated was litigated in *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W.Va. 2013), where the court held that litter and manure washed from the farmyard surrounding a poultry operation into navigable waters due to a precipitation event is an agricul-

tural stormwater discharge and not a point source discharge, rendering the CAFO’s discharges exempt from the CWA’s NPDES permit requirement. That case appears to be the at odds with some of the CAFO cases cited below, but it will likely be litigated again when EPA, a state or citizen group attempts to enforce against a CAFO for discharges that are not directly coming from the pens or lagoons.

The discharge from a CAFO need not be on the surface to result in liability. There is at least one case holding that CAFO discharges via shal-

Congress specifically included concentrated animal feeding operations (CAFOs) in the definition of point source, thereby creating a statutory exception to the general agriculture exemption.

low, subsurface aquifers can result in a finding of a point source discharge.⁴

The careful practitioner should be aware of the few exceptions to the general agriculture exemption. For example, many CAFOs apply their manure on farm fields. CAFOs are point sources and the application of CAFO’s wastes to farm fields be done pursuant to a nutrient management plan and not exceed agronomic rates.⁵ There are a few cases outside of Idaho holding that CAFO waste runoff from farm fields is a point source discharge that falls outside of the normal agriculture exemption.⁶ It is im-

portant to recognize that these cases represent relatively rare circumstances of successful enforcement actions against farmers related to manure runoff from farm fields.

There are been a few other isolated cases of farmers being held liable for discharges from their farming operations.⁷ These cases are, however, outliers, and most are very old. In the 44 years since the CWA was passed, only a small handful of cases have chipped away at the generally broad agriculture exemption.

TMDLs

The only CWA hook into agriculture is through the total maximum daily load (TMDL) program in section 303 of the Act. TMDLs can assign pollution reduction targets for nonpoint source pollution such as runoff from agricultural areas.⁸ But the CWA does not provide any enforcement mechanisms for regulating nonpoint source pollution. Any regulation of agriculture under a TMDL would have to occur under state law, and Idaho does not provide for any enforcement mechanisms against farmers for dischargers off of their fields that do not comply with a TMDL load allocation.

City of Des Moines litigation

Board of Water Works Trustees of the City of Des Moines, Iowa v. Sac County Board of Supervisors, No. 5:15-cv-04020, is a case to watch. The City of Des Moines filed a complaint in federal court on March 16, 2015, alleging that farm field runoff through tile drains is causing the nitrate pollution in the city’s drinking water source. The city alleges that the tile drain discharges to the Raccoon River are point source discharges because they emanate from pipes, which are classic point sources. The city will argue that the agriculture exemptions do not apply because the

discharges come from contaminated groundwater, not surface runoff.

A procedural motion to dismiss on state-law grounds currently is pending before the court, and trial is set for this fall. On the substantive CWA law, the court will have to decide an interesting issue: do agricultural return flows and agricultural storm water lose their point source exemptions once they soak into the ground and reach a pipe that puts the water in the same place it would have ended up without the pipe? Put another way, how will the court address the internal tension in section 502(14) between the reference to a pipe as a point source and the exemption of agricultural return flow and agricultural storm water.

Most agricultural runoff travels over the surface or seeps into nearby water bodies via diffuse shallow, subsurface aquifers, which is nonpoint source pollution. Tile drains add a new dimension to the problem that Congress did not squarely address when it passed the CWA. Given how pervasive tile drains are, especially in the Midwest, it is surprising how little case law there is on this issue.⁹

While tile drains are less common in Idaho than in Iowa, a ruling in favor of the City of Des Moines would, for the first time, expose farmers to CWA liability for nutrient contamination coming off of their fields. EPA has not yet taken a position in this litigation, but will likely side with the agriculture industry.

The Waters of the United States Rule

The newly proposed WOTUS definition is currently stayed, pending review on the merits by the Sixth Circuit Court of Appeals.¹⁰ There is a very high likelihood that the Sixth Circuit will remand the rule to EPA and the Corps. It is nevertheless worth noting several of the important agriculture-specific provisions of the new rule, should it become

While tile drains are less common in Idaho than in Iowa, a ruling in favor of the City of Des Moines would, for the first time, expose farmers to CWA liability for nutrient contamination coming off of their fields.

law. [In the interest of full disclosure, I was one of the authors of the draft WOTUS rule. I left EPA before the final rule was promulgated.]

Section 230.3(o)(2) sets out which waters are not WOTUS. That list includes: prior converted croplands; ditches with ephemeral flow not located in tributary; ditches with intermittent flow that are not located in a tributary; ditches that do not flow back into traditional navigable waters; artificially-constructed lakes and ponds created in dry land such as farm and stock water ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; and groundwater, including groundwater drained through subsurface drainage systems.

It is interesting to note that the intermediate-flow ditch exemption in the new WOTUS rule may put those ditches at risk of being regulated. The new rule classifies ditches with intermittent flow (*e.g.*, those that flow April to October) that are constructed in uplands (*e.g.*, the New York Canal near Boise) as non-WOTUS. Such ditches are common in Idaho. If a ditch is a WOTUS, when it flows back into a natural water body such as the Snake River, it's simply one WOTUS flowing into another, and no liability attaches.

If those ditches are not WOTUS, then arguably they are point sources

at the point where they reenter the Snake River, especially if they are carrying *any* non-ag return flow. That could make the ditch owner liable for anything being discharged from the ditch into a downstream water. Let's hope EPA clarifies that ambiguity if the Sixth Circuit Court remands the rule. If the rule is not remanded, expect that issue to be litigated.

Conclusion

It would be easy to take away from this article that liability traps abound for farmers under the CWA. While it is true that a few courts have found liability in a limited number of cases, those findings are relatively few and far between. By and large, farmers continue to enjoy a special exemption under the CWA that no other dischargers have, and few plaintiffs have successfully brought cases against farmers under the CWA. If a farmer is careful to avoid the few pitfalls outlined above, he or she can stay clear of the enforcement provisions of the Act.

Endnotes

1. See, *e.g.*, *Committee to Save Mokolunne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 309 (9th Cir. 1993), cert. denied, 513 U.S. 873 (1994).
2. See, *e.g.*, *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001);

Community Assoc. for Restoration of the Environment v. Bosma Dairy, 305 F.3d 943 (9th Cir. 2002); *United States v. Vierstra*, 803 F. Supp. 2d 1166 (D. Idaho 2011); 62 Fed. Reg. 20,177, 20,180 (1997) (EPA Region 10, Idaho CAFO General Permit, Response to Comments: "Canals and laterals which empty into (or connect with) waters of the United States such as rivers, streams, lakes, etc. are themselves waters of the United States in accordance with the definition of waters of the United States in 40 CFR 122.2(e).

3. See 40 C.F.R. § 122.23(b)(2).

4. Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Id. 2001) (in denying defendant's motion for summary judgment, held that plaintiffs may attempt at trial to prove that leakage from dairy's waste storage pond entered creek via groundwater; "[W]hether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation or our nation's rivers and streams.")

5. 40 C.F.R. § 123.23(e).

6. See *Community Assoc. for Restoration of the Environment v. Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002) (farm fields where dairy disposes of manure waste is part of the CAFO and therefore a point source); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (runoff from the fields to which manure from 700 cattle was applied was not nonpoint source runoff).

7. See *United States v. Frezzo Brothers, Inc.*, 642 F.2d 59 (3d Cir. 1981) (discharge from mushroom composting operation a point source discharge, and not agri-

cultural return flow); *Reynolds v. Rick's Mushroom Service, Inc.*, 246 F. Supp. 2d 449 (E.D. Pa. 2003) (mushroom farm that discharged "brownish" runoff via gravity flow to nearby creek held to be a point source); *United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (E.D. Pa. 1980) (waste water sprayed onto the surface of an irrigation field, which then entered a nearby stream through a break in the berm of a canal was a discharge from a point source).

8. See 40 C.F.R. § 130.2(i).

9. See *Fishermen Against the Destruction of the Environment v. Closter Farms, Inc.*, 300 F.3d 1294, 1297-1298 (11th Cir. 2002) (discharge of storm water and return irrigation water from sugar cane field and adjoining properties held to be exempt from definition of point source and therefore not subject to NPDES permit requirement; discharged groundwater and seepage used to irrigate crops can be characterized as agricultural return flow); *Pacific Coast Federation of Fisherman's Associations v. Glaser*, 2013 WL 5230266 (E.D. Cal. Sept. 16, 2013) (in case involving allegations of unpermitted discharges of polluted groundwater from

By and large, farmers continue to enjoy a special exemption under the CWA.

tile drains in California, on motion to dismiss, held that the exemption "return flows from irrigated agriculture" in subsection 1342(1)(l) and section 1362(14) covers discharges from irrigated agriculture that do not contain additional discharges unrelated to crop production"; rejected argument that exemption applies only to surface flows; dicta at end of case hints that tile drain discharges during the non-irrigation season might not qualify for the exemption).

10. *In re Clean Water Rule*, 803 F.3d 804 (6th Cir. 2015).

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Jim Jones
Justices
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Joel D. Horton

**Regular Spring Term for 2016
1st Amended**

Boise August 16, 17, ~~24, 26, 29~~
Coeur d'Alene August 30, 31
Moscow September 1
Boise September 19, 29, 30
Idaho Falls September 22
Pocatello September 23
Boise November 2, 4, 7, 9, 10, 30
Boise December 2, 5, 7, 9

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2016 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.

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John M. Melanson
Judges
Sergio A. Gutierrez
David W. Gratton
Molly J. Huskey

**Regular Fall Term for 2016
5/4/16**

Boise August 9, 18, 23, 25
Boise September 6, 15, 20, 22
Boise October 4, 11, 18, 20
Boise November 3, 8, 29
Boise December 6, 8

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2016 Fall Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Supreme Court
Oral Arguments for June 2016**

4/14/16

Wednesday, June 1, 2016 – BOISE

8:50 a.m. *Ballard v. Kerr, M.D.* #42611
10:00 a.m. *State v. Van Komen* #43939
11:10 a.m. *Morrison v. St. Luke's RMC* #42625

Friday, June 3, 2016 – BOISE

8:50 a.m. *Stiles v. Amundson* #43289
10:00 a.m. *City of Sandpoint v. Independent Hwy Dist.* #42517
11:10 a.m. *State v. Ostler* #43915

Monday, June 6, 2016 – BOISE

8:50 a.m. *Capstar v. Lawrence* #42326
10:00 a.m. *State v. Jimenez* #43938
11:10 a.m. *Spectra Site Communications v. Lawrence* #43082

Wednesday, June 8, 2016 – BOISE

8:50 a.m. *Tiller White v. Canyon Outdoor Media* #43482
10:00 a.m. *State v. Sepulveda* #42758
11:10 a.m. *Cummings v. Northern Title* #43081

Thursday, June 9, 2016 – TWIN FALLS

8:50 a.m. *State v. Baeza* #42988
10:00 a.m. *Warner v. ITD* #43484
11:10 a.m. *Bryan Trucking v. Gier* #43461

Thursday, June 23, 2016 – BOISE

8:50 a.m. *OPEN*
10:00 a.m. *Doe v. Doe (2016-07)* #43920
11:10 a.m. *IDHW v. Doe (2016-09)* #44010

**Idaho Court of Appeals
Oral Arguments for June 2016**

1st Amended
4/26/16

Thursday, June 16, 2016 – BOISE

9:00 a.m. *State v. Ross* #42968
State v. Daly #43549
10:30 a.m. *State v. Daly* #43549
State v. Ross #42968

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**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 5/1/16)**

Civil Appeals

Attorney fees and costs

1. Did the district court err in denying Gilbride's motion for attorney fees and in concluding the real estate purchase and sale agreement between the parties did not support an award of fees?

Kosmann v. Gilbride
S.Ct. No. 43296
Supreme Court

2. After awarding attorney fees to the Department of Health and Welfare as the prevailing party, did the court abuse its discretion in limiting recovery to no more than the amount the party spent for its attorneys to litigate the case?

Inclusion v. Dept. of Health and Welfare
S.Ct. No. 42245
Supreme Court

Judicial estoppel

1. Did the district court err in dismissing this action pursuant to I.R.C.P. 12(b)(8), finding that another action was pending between the same parties for the same cause, when the other action had already been dismissed as moot?

Frantz v. Hawley Troxell Ennis & Hawley
S.Ct. No. 43576
Supreme Court

Summary judgment

1. Did the district court err by entering summary judgment against Hammer and in finding she released all claims against the City in exchange for her contractually agreed upon severance payment for a termination without cause?

Hammer v. City of Sun Valley
S.Ct. No. 43079
Supreme Court

2. Did the court err in entering summary judgment in favor of the trust and in concluding the quitclaim deed did not convey good title to McCarty when executed and delivered?

The David and Marvel Benton Trust v. McCarty
S.Ct. No. 43326
Supreme Court

3. Whether the district court erred in holding that Idaho's worker's compensation exclusivity provision, I.C. § 72-209, barred the Mareks' claims against Hecla and in granting summary judgment in favor of Hecla.

Marek v. Hecla, Limited
S.Ct. No. 43269
Supreme Court

4. Did the court err in finding the Homeowner Associations' assessments against appellants' property was legal and within its authority?

Pend Oreille View Estates v. T.T. LLC
S.Ct. No. 42538
Supreme Court

5. Whether CNW's notice letter sent to NSID through its counsel was "presented to" NSID's secretary when she received the notice from NSID's attorney.

CNW, LLC v. New Sweden Irrigation
S.Ct. No. 43005
Supreme Court

6. Did the court err in granting summary judgment and in finding that, as a matter of law, James, Alexa and Tanner Slavens are rightful owners of 33% each of Twin G. Holdings, LLC?

Slavens v. Slavens
S.Ct. No. 43743
Supreme Court

7. Did the district court err in ruling the doctrine of prevention of performance does not suspend or discharge Burns' obligation under the Agreement to construct the permanent facility?

Burns Concrete, Inc. v. Teton County
S.Ct. No. 43527
Supreme Court

Termination of parental rights

1. Was finding of neglect supported by sufficient evidence and did the court abuse its discretion in finding termination was in the best interests of the children?

Idaho Dept. of Health and Welfare v. Jane Doe
(2016-10)
S.Ct. No. 44063
Court of Appeals

Criminal Appeals

Due process

1. Did the State deprive Elizondo of his right to due process when the State breached the plea agreement by impliedly disavowing its promised sentencing recommendation?

State v. Elizondo
S.Ct. No. 43333
Court of Appeals

Evidence

1. Did the district court abuse its discretion by excluding a video of the victim participating in a mixed martial arts match that Malec asserted was relevant to his self-defense claim and by finding any probative value of the video was substantially outweighed by the danger of unfair prejudice?

State v. Malec
S.Ct. No. 42508
Court of Appeals

Restitution

1. Did the district court err by awarding restitution to the Sheriff's Office for the costs of extraditing Sandoval to Idaho?

State v. Sandoval
S.Ct. No. 43088
Court of Appeals

2. Did the district court exceed its jurisdiction and/or commit fundamental error in ordering Wisdom to pay restitution to Idaho Medicaid State Operations in the absence of evidence that Medicaid is a "victim" under I.C. § 19-5304?

State v. Wisdom
S.Ct. No. 43009
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the district court err when it denied Williams' motion to suppress because the officers detained Williams for longer than necessary and then arrested him without probable cause?

State v. Williams
S.Ct. No. 43129
Court of Appeals

2. Did the district court err in determining the initial encounter between the officer and the occupants of the motorhome was consensual?

State v. Wolfe
S.Ct. No. 43171
Court of Appeals

3. Did the court err in denying Kelley's motion to suppress and in determining there was reasonable articulable suspicion to support Kelley's detention?

State v. Kelley
S.Ct. No. 43392
Court of Appeals

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

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Idaho Courts

Highlights of Rule Amendments for 2016

Catherine Derden

The following is a list of rule amendments for 2016, with the effective dates designated. The orders amending these rules can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/recent-amendments>. Be sure to check the Idaho State Bar e-bulletin for your chance to comment on proposed amendments before adoption.

Idaho Appellate Rules

The Idaho Appellate Rules Advisory Committee is chaired by Justice Roger Burdick.

The following amendments were effective January 1, 2016.

Rule 11, 11.1 and 17. These rules on filing the notice of appeal were all amended to require that a copy of the judgment or order being appealed be attached to the notice of appeal.

Rule 28. Preparation of the Clerk's or Agency's Record. The standard record in an appeal from an administrative proceeding now includes the findings of fact and conclusions of law made by a referee or a hearing officer.

Rule 34.1. Electronic Briefs (optional). A new subsection was added to this rule to provide that, in criminal cases, the parties may file an electronic brief without the necessity of filing any paper copies of the brief.



The filing must still comply with the other requirements in the rule for filing an electronic brief.

Rule 30. Augmentation of the Record. The parties are required to paginate documents attached to the motion to make it easy to identify the augmented pages if the motion to augment is granted entirely or in part.

Rule 118. Petitions for Review. The rule now clarifies that the brief in support of the petition for review must address the criteria for review set out in I.A.R. 118(b). There is still no response to a petition for review unless the Supreme Court requests a party to respond to the petition for review before granting or denying the petition. If a petition for review is granted, the Supreme Court will rely on the original briefs filed by the parties and considered by the Court

of Appeals. There will be no additional briefing unless it is ordered by the Supreme Court.

The following amendment was effective January 21, 2016.

Rule 5. Special Writs and Proceedings. Several new subsections have been added to this rule on original writs filed with the Supreme Court. The rule now states that if the court denies the petition or issues a peremptory writ it shall be a separate document that only states the relief ordered. There is also a new subsection addressing the filing of a memorandum of costs and what costs are allowed. The memorandum must be filed within 14 days of the order denying the petition or granting the peremptory writ and failure to timely file is a waiver of the right to costs. An objection to the memorandum of costs must be filed no later than

14 days after service of the memorandum of costs. If mailed, both the memorandum and the objection are deemed filed upon mailing.

Idaho Rules of Civil Procedure

The Idaho Rules of Civil Procedure Advisory Committee is chaired by Chief Justice Jim Jones. A special ad hoc committee tasked with updating and reformatting the rules was chaired by Senior Judge David Day.

The following amendment was effective January 1, 2016.

Rule 54. Judgments. A new subsection was added to Rule 54(a) providing that, if the court orders an amendment to a judgment, the amendment will be effective only after the court enters an amended judgment setting forth all of the terms of the new judgment, including those terms of the prior judgment that remain in effect. Subsection (b) was amended to reflect that the judgment in this subsection is only a partial judgment since it is not final as to all parties and all claims.

The following amendments are effective July 1, 2016.

The Idaho Rules of Civil Procedure have been reformatted with a new table of contents, and the language has been simplified, clarified and modernized. Each rule addresses a single topic, and a consistent format for the rules has been adopted. In addition, there is a separate set of Rules for Small Claims Actions. Some rules that were obsolete were deleted and some rules were moved to the Idaho Court Administrative Rules. As part of this review, there were also a number of substantive changes that were recommended by the Idaho Rules of Civil Procedure Advisory Committee and adopted

by the Supreme Court as part of the newly formatted rules.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions. Language found in the federal rule on the procedure for a motion for sanctions, the nature of a sanction imposed under this rule, and limitations on monetary sanctions was added. The rule also clarifies that a law firm may be held jointly responsible for a violation committed by a partner, associate, or employee.

Rule 16. Pretrial Conferences; Scheduling; Management. A new subsection was added entitled “request for trial setting by a party”, that allows a party to request the court to set the matter for trial and to set any other deadlines and conferences should the court fail to do so after all defendants have appeared.

Rule 26. General Provisions Governing Discovery. New subsections similar to those found in the federal rule were added regarding limits on electronically stored information and limits on frequency and extent of discovery where discovery sought is unreasonably cumulative or duplicative or can be obtained from a source less burdensome or less expensive. In addition, language was added to clarify the obligation on a party who has been notified that privileged information was sent by mistake until the claim of privilege is resolved, including that the party must not use or disclose the information until the claim is resolved, must take reasonable steps to retrieve the information if the party disclosed it before being notified, and may promptly present the information to the court under seal for a determination of the claim. Subsection (c) on

protective orders was amended to add the requirement that the motion include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. A statement on the effect of a signature with respect to a statement of fact in a discovery response was added to the subsection on signing discovery requests.

Rule 29. Stipulations about Discovery Procedure. This rule was amended to add a statement that a stipulation to extend time must have court approval if it would interfere with the time set for trial, or if approval is required by other order of the court.

Rule 30. Depositions by Oral Examination. The officer taking the deposition must identify all persons present in the opening statement on the record. Similar to the federal rule, a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(4).

Rule 31. Depositions by Written Questions. Language found in the federal rule on deposition by written question with leave was added to include where the parties have not stipulated to the deposition and the deponent has already been deposed in the case.

Rule 37. Failure to Cooperate in Discovery; Sanctions. In subsection (a)(5) on “payment of expenses; protective orders”, a reference was added similar to that found in the federal rule about providing discovery after a motion to compel is filed. There is also a new subsection on the conse-

quences of a failure to supplement an earlier response when required or to comply with a disclosure requirement ordered by the court that includes not allowing the party to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. A new subsection on failure to provide electronically stored information states that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Rule 43. Taking Testimony. The rule now provides that for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Rule 55. Default; Default Judgment. References to the clerk entering default judgment were removed.

Rule 66. Sureties on Bond. Language that formerly applied only to temporary restraining orders and preliminary injunctions was added to this rule to make it applicable to any instance where a surety gives security under the civil rules. The provision is that the surety's liability may be enforced on motion without an independent action. The motion, and any notice that the court orders, may be served on the court clerk, who must promptly mail a copy of each to every surety whose address is known.

Rule 77. Class Actions. This rule was formerly Rule 23. The amendments add language found in the federal rule, including a sub-

section on what the court must consider in appointing class counsel and a subsection on attorney's fees and nontaxable costs that includes the procedure for claiming the award.

Appendix A. Filing Fee Schedule. The amendment reflects that a request for a modification for support or custody that requires a filing fee will still require that fee even if initiated by a stipulation.

Idaho Court Administrative Rules

As part of the effort to update the Idaho Civil Rules of Procedure, a number of rules were moved to the Idaho Court Administrative Rules, including rules on jurisdiction and assignment of magistrates, transfer of a case from magistrate to district court, reporting of proceedings in the magistrate division, withdrawal of files, the clerk's office and orders by the clerk, selection of master jury list and master jury wheel, selection of jury panel, qualifications of a civil mediator, and registration of private civil litigation evaluators. These, as well as the following amendments, are effective July 1, 2016.

Rule 32. Records of the Judicial Department – Examination and Copying- Exemption from and Limitations on Disclosure. There were several amendments to this rule. The Public Records Act was recodified by the Legislature in 2015 as chapter 1 of title 74 so references to the Public Records Act have been updated. Subsection (g) of this rule provides that certain records are confidential and exempt from disclosure and that willful or intentional disclosure of a confidential court record may be treated as contempt. However, in certain instances the disclosure of the record may be

either explicitly or implicitly authorized by provisions in Rule 32 itself, for instance with regard to those persons who have access to confidential records under subsection (c) of the rule. Therefore, the amendment to subsection (g) clarifies this by providing that the disclosures that may be treated as contempts of court are those "not otherwise authorized under this rule." Subsection (g)(5) provides that arrest warrants are exempt from disclosure, while bench warrants are not. The terms "arrest warrant" and "bench warrant" have been defined to clarify this provision. An arrest warrant is a warrant issued for the arrest and detention of a defendant at the initiation of a criminal case. A bench warrant is a warrant issued for the arrest of a defendant who has already appeared in a criminal action and includes a warrant issued for a failure to appear, for violation of the conditions of release or bail, or for a probation violation.

Subsection (j) of the rule, dealing with sealing, redaction, and opening of records, has been revised in two respects. First, this subsection has been divided into sub-parts for clarity and ease of reading. Second, since Idaho is moving into a period when some courts will have fully electronic case files and others will still have paper case files, the rule has been revised to provide clearer procedures for the sealing and redaction of records in both of these settings. As Idaho moves to electronic case files, clarity is needed as to who are the custodian and custodian judges of the electronic case records within each county, and who are the custodian and custodian judge of the statewide case records management system. Subsections (j)(2)(G) and (j)(3)(A) have been amended to provide that

the Administrative Director of the Courts and the Chief Justice are the custodian and custodian judge of only the statewide case management system.

Rule 56. Coordinated Family Court Services Cost Recovery Fees. The amendment allows partial waivers of fees charged by Family Court Services in order to be consistent with the companion statute, I.C. § 32-1406, which authorizes partial fee waivers.

Idaho Criminal Rules

The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann.

The following amendments were effective February 25, 2016.

Rules 4. Arrest Warrant – Summons - Determination of Probable Cause. The word “arrest” was added to describe this warrant as part of an effort to clarify in the rules the difference between a bench warrant and an arrest warrant. According to I.C.A.R. 32, an arrest warrant is exempt from disclosure but a bench warrant is not. The wrong designation can result in the entire case being sealed if the warrant is outstanding.

Rule 5.3 Initial Appearance on Probation Violations. The amendment clarifies that the warrant issued for a probation violation is a bench warrant.

Rule 16. Discovery and Inspection. The section on the disclosure of evidence by the prosecution was amended with a new subsection designed to address the delay caused by the need to redact information and the use of body worn cameras by law enforcement. The amendment al-

lows prosecutors to disclose the unredacted media to defense counsel without delay, even if there is information that needs to be protected, so that defense counsel can make decisions necessary to expedite resolution of the case. However, defense counsel cannot share the unredacted version with the defendant without prior consent of the State or a court order and, when shared, the defendant is not able to retain a copy. If the State determines there is protected information that needs to be redacted before it is disclosed, then the State must prepare a redacted version and indicate what was redacted. If defense counsel disagrees with the redactions, a motion to compel may be filed.

Rule 44.1 Withdrawal and Substitution of Counsel. The amendment allows the court, in the order of appointment, to state at what time or upon what event the appointment terminates. It also adds a section on substitution of counsel that allows for notice to the court instead of leave of the court and specifies that if a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for that party, unless the court finds good cause for delay of the proceedings.

Rule 46. Bail or Release on Own Recognizance. This rule was amended to reflect that the warrant referred to in this rule is a bench warrant.

Rule 46.2. No contact orders. The reference to “victims” in this rule was changed to “protected persons” as a no contact order is not limited to the protection of victims and may be issued to protect others,

such as a witness, a co-defendant, or a reporting party. The change also more accurately reflects I.C. § 18-920, which states “an order forbidding contact with another person may be entered.”

Rule 54.17. Appellate Review. If a district court on appeal remands less than all of the issues back to the magistrate court, a problem can arise if an appeal is filed and the magistrate court is also attempting to proceed on remand. A provision similar to that found in the Civil Rules of Procedure was added, requiring a remittitur to be issued to the magistrate court after the time for an appeal has expired and is issued only if no appeal is filed to the Supreme Court.

Idaho Rules of Evidence

The Evidence Rules Advisory Committee was chaired by Judge Karen Lansing when these amendments were considered. It is now chaired by Judge Molly Huskey.

The following amendments were effective January 1, 2016.

Rule 609. Impeachment by evidence of conviction of crime. The term “character for truthfulness” has been substituted for the term “credibility” in the first sentence of this rule. The amendment and the comment clarify that the restrictions in Rule 609 apply only where the conviction is offered to attack a witness’s general character for truthfulness and not for some other purpose, such as contradicting the witness’s specific testimony.

Rule 801(d)(1)(B). Definitions - Statements which are not hearsay - prior statement of witness. Before the amendment, the definition in this section was that a statement is

not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive. The amendment added "or, to rehabilitate the declarant's credibility as a witness when attacked on another ground."

Rule 803. Hearsay exceptions; availability of declarant immaterial. The amendments to subsections (6) through (8) clarify the burden of proving circumstances indicating the evidence is not trustworthy. If the proponent has established the stated requirements of the exception, regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification, then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The amendment to subsection (10), absence of public record or entry, creates a procedure by which a defendant may waive the Sixth Amendment right to confront a witness and permit the admission of the certification to prove absence of the public record. The certification is admissible only if the prosecutor who intends to offer the certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice, unless the court sets a different time for the notice or the objection.

Rule 804. Hearsay exceptions; declarant unavailable. Subsection (b)(3), statement against interest, was

amended. Under the rule, statements tending to expose the declarant to criminal liability and to exculpate a criminal defendant must meet an additional requirement before the statement may be admitted, as there must be corroborating circumstances indicating that the evidence is trustworthy. The amendment broadens the rule to apply whether the evidence exculpates or inculpates the defendant.

Idaho Rules of Family Law Procedure

The Children and Families in the Courts Committee is chaired by Judge Russell Comstock.

The following amendments are effective July 1, 2016.

Rule 112. Appearance and Withdrawal of Counsel. The reference to "local" rules is deleted and the reference to Rule 115.D is corrected and now refers to new Rule 819.

Rule 201. Commencement of Action. Subsection C, Proceedings to modify child custody, child support and spousal maintenance, was amended to expressly permit a proceeding to modify custody or support to be initiated by stipulation. The current rule requires that a petition be filed first; however, the courts often see modifications filed by stipulation without an accompanying petition. The amendment ratifies existing practice.

Rule 207. Documents; Caption; Name of Parties; Language; Abbreviation; and Numbers. This rule as amended reflects the changes made to I.R.C.P. 2, formerly I.R.C.P. 10.

Rule 720. Brief Focused Assessments. This new rule authorizes the court to order a "brief focused assessment" in child custody cases

where less than a comprehensive parenting time evaluation is needed or warranted. The rule distinguishes between a brief focused assessment and a parenting time evaluation and further defines (i) the scope of the assessment to a limited number of issues, (ii) the qualifications of assessors by making them consistent with those who can perform parenting time evaluations, and (iii) the procedure for appointment.

Rule 803. Judgments. A new subsection D was added on entry of judgment as this was inadvertently omitted from the I.R.F.L.P.

Rule 819. Notice of orders or judgments. This new rule is the equivalent of Rule 77 found in the Idaho Rules of Civil Procedure.

Idaho Infraction Rules

The Misdemeanor/Infraction Rules Advisory Committee is chaired by Judge Michael Oths.

The following amendments are effective July 1, 2016.

Rule 1. Application and Designation of Rules. A reference to "bicycles" has been added. The amendment allows bicycle friendly communities in the state to deal with bicycle violations in an educational fashion rather than through uniform citation and financial penalty.

Rule 8. Failure to appear - Default judgment - Notice of judgment. The form found in subsection (d) on default judgment and notice of noncompliance has been updated.

Rule 10. Failure to pay penalty - Suspension of driver's license - Notice of nonpayment - Late payment - Receipt and notice of payment - Other sanctions. References

to mailing the receipt for payments to the defendant have been deleted as some payments are now made online. The amendment also recognizes that receipt of payment is automatically sent to the Department of Transportation electronically. The form for notice of non-payment was updated and the form for receipt and notice of payment was deleted.

Idaho Juvenile Rules

The Juvenile Rules Advisory Committee is chaired by Judge Mark Ingram.

The following amendments are effective July 1, 2016.

Rule 19. Standards and Procedures for Commitment to the Department of Juvenile Corrections (J.C.A.). In 2014, the Office of Performance Evaluation's report on Confinement of Juvenile Offenders recommended that the court or the legislature revisit the criteria for commitment to state custody. Specifically, the report stated that some stakeholders had said the criteria lacked definition and judges had too much discretion in applying the existing criteria. The proposed revision is a draft proposal which seeks to address some of those concerns and to base commitment decisions on a more evidence based risk/needs analysis. The proposal eliminates the distinction between misdemeanor and felony criteria and reduces the number of criteria to four.

Rule 40. Notice of Further Proceedings Including Parents, Foster Parents and Other (C.P.A.). The Preventing Sex Trafficking and Strengthening Families Act of 2014 requires that courts ask foster children about their desires for permanency. The amendments require fos-

ter children 12 and older to attend review and permanency hearings unless the youth declines in writing prior to the hearing, declines through counsel, or is excused by the court.

Idaho Misdemeanor Rules

The Misdemeanor/Infraction Rules Advisory Committee is chaired by Judge Michael Oths.

The following amendments are effective July 1, 2016.

Rule 8. Deferred Payment Agreement - Form. The amendment adds a reference to any other court ordered payment in case restitution was ordered. The form for the deferred payment agreement has been updated as to notifications for the defendant.

Rule 9.1. Suspension of Driver's License Upon Conviction of Offense Authorizing or Requiring Suspension of License - Suspension Upon Plea or Finding of Guilty of Offense - Notice of Increased Penalty on Subsequent Violations - Temporary Restricted License. The amendment recognizes that the order of suspension is transmitted electronically to the Department of Transportation. The forms for the order of suspension and temporary restricted license have been updated. The forms can now be used

in felony cases as well as misdemeanors.

Rule 9.2. Suspension of Driver's License for Failure to Take Evidentiary Test. References to seizing a driver's license have been deleted since that is no longer the practice of law enforcement, and the rule has been changed to refer to refusal to submit to evidentiary testing rather than alcohol testing since the rule also applies to drugs. The affidavit of refusal has been updated and the alternative form for probable cause eliminated since each law enforcement agency has its own probable cause affidavit. The suspension order for a refusal has also been updated.

Rule 9.3. Suspension of Driver's License for Failure to Take Evidentiary Test. The title of the rule as well as the rule have been amended to delete references to seizing a driver's license since that is no longer the practice.

Rule 13(b). Bail Bond Schedule. Currently the bail bond schedule sets bail for a violation of 63-2441 Special Fuel Permit Violation at 382.00. In 2015, I.C. § 63-2441 was repealed and renumbered so the schedule now reflects the new code citation to 63-2455. In addition, a violation of I.C. § 63-2450 on fuels tax was added at the same bond amount.

Catherine Derden is a graduate of the University of Arkansas at Little Rock, where she received her Juris Doctorate Degree in 1979. In 1992, she became an Assistant Attorney General for the State of Arkansas. She moved from Arkansas to Idaho in 1994 and continued to handle criminal appeals as a Deputy Attorney General for Idaho. She has been the Staff Attorney for the Idaho Supreme Court since September 1998.



Alphabet Soup: More Confusing Word Pairs

Tenielle Fordyce-Ruff

I'm writing this over my Spring Break. By the time you read this, the weather will be lovely, but today it's classically blustery. I decided to make soup before sitting down at my computer. Filled with a lovely, warm homemade concoction, I realized that I didn't have a topic ready to pour out of my head.

So as sometimes happens when I have a bit of writer's block, my mind began to wander. I remembered lunches of alphabet soup on blustery spring days long before I hit law school (or high school for that matter). And then it hit me—I should write about all the odd ball confusing word pairs that didn't fit with my letter-themed past columns!

Accord/Accordance

Accord is a verb that means agreement. *Accordance* is a noun that conveys conformity.¹

The parties were in accord after their successful mediation.

The complaint was drafted in accordance with I.R.C.P. 9(b).

Beneficence/Benevolence

Beneficence denotes the quality of being disposed or capable of doing good. *Benevolence* denotes the act of doing a good deed.

The beneficence of the students involved with the Street Law clinic spoke to their character.

The clients thanked them for their benevolence.

Can/Could

In many circumstances, the verb *could* conveys the past tense of the verb *can*. But these two verbs can



also vary in sense: *Can* expresses a certainty, while *could* expresses uncertainty or a conditional statement.

The clinic students can appear in court under certain conditions.

The clinic students could only represent low-income clients.

Discreet/Discrete

Discreet means careful or circumspect in speech, especially to avoid offending or to gain an advantage.

Discrete means individually separate and distinct.

We made discreet inquiries.

The interrogatories covered several discrete areas.

To remember the difference in spelling, remember that the letters E in discrete are separate, like its meaning.

Forego/Forgo

Forego means to go before; *forgo* means to do without.

The foregoing word pair has caused many spelling mishaps.

Use the tips in this article to forgo errors.

To remember the difference, remember that *forgo* does without the E.

Gibe/Jibe

As a noun *gibe* means a taunt or insulting remark. As a verb it means to jeer or to make insulting remarks. A nautical term, currently *jibe* also means to fit or agree, but it has the sense of negation.

Some critics launch gibes at attorneys. The gibes don't, however, jibe with reality.

Illegible/Unreadable

Sometimes used interchangeably, the adjectives *illegible* and *unreadable* reference writings that cannot be read. But the conventional use of this two terms can convey two distinct meanings: *Illegible* text might be rendered unreadable due to poor handwriting or deterioration. In contrast, an *unreadable* writing might be legible, but so poorly composed as to be dull or incomprehensible.

Most of the notes my husband scribbles to me are *illegible*.

Some of the writing my students turn in the first few weeks of 1L is *unreadable*.

Notable/Noteworthy

Notable means readily noticed or worthy of attention. *Noteworthy* means interesting, significant, or unusual.

She had many notable clients, but none of their cases were noteworthy.

On/Upon

Both prepositions literally mean supported by a surface. *Upon* is more formal and abstract, however. *Upon* should be avoided unless you're expressing a condition.

He served process on his client's former employer.

Upon completion of the job, the employee was entitled to compensation, but the employer refused to pay him.

Peak/Peek/Pique

Ahh, homophones. *Peak* means an apex (and you can remember this one because the A looks like a mountain peak). *Peek* means to sneak a look at something (think of the "ee" as two eyes glancing). *Pique* means to annoy or arouse (a feeling many people experience when having to spell words with a French origin).

Principle/Principal

Principle is a natural, moral, or legal rule. *Principal* is a person of high authority or a loan amount requiring repayment.

The principle of free speech permeates our society.

She diligently paid extra principal each month.

(*Mea culpa*—this is a set I've mixed up before! In fact, this is one set of homophones that almost always gets me.)

Purposely/Purposefully

To do something with intention is to do it *purposely* (think on purpose). To do something *purposefully* is to have a certain outcome or goal in mind. So when my two-year old nephew hits me, it's *purposely*. But because he doesn't mean to injure me, it's not *purposefully*.

Tortious/Tortuous/Torturous

This is for my 1L students who bemoan that spell check won't catch their usage mistakes with this set.

Tortious relates to torts. *Tortuous* is something full of twists and turns or excessively lengthy and complex. *Torturous* involves torture or at least severe discomfort.

She filed a complaint for tortious interference with a contract.

Her tortuous brief was so full of jargon it was torturous.

To remember the difference, liken the "uou" in tortuous to twists and turns — the "u" is more curvy than the "i" in tortious! And of course, torturous has the same root as torture in it.

Toward/Towards

These directional words have the same meaning: in the direction of. The shorter *toward* is preferred in American English. This preference also holds true for other directional pairs (upward, downward, forward, backward, and afterward).

She was moving toward finishing the article.

Wrong/Wrongful

Wrong means immoral, unlawful, or incorrect. *Wrongful* means unsanctioned, unjust, or unfair.

It is wrong to use wrong and wrongful interchangeably.

Conclusion

Now that this is done, I'm going to bundle up and head out for a walk before making dinner. I've looked a few recipes that have piqued my interest and I *could* use something a little more filling than soup. (And yes, I used those words *purposely*!)

Source

- *The Chicago Manual of Style* § 5.220 (16th ed.).

Endnotes

1. Technically, accordance is a nominalization. For more on nominalizations, see my article, *Cutting the Clutter: Spring Cleaning for Writing* in the April 2013 edition of *The Advocate*.

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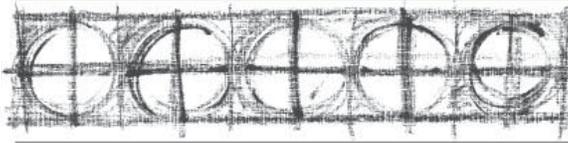
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Theresa A. Martin	Alan L. Morton	Brittany Lee Pfister	Jason Joe Rudd
Ryan Lee Martinat	Alycia Truax Moss	Kira Dale Pfisterer	Kristin F. Ruether
Reese Bradley Masingill	Taylor Lynn Mossman-Fletcher	Cameron Lee Phillips	Margalit Z. Ryan
Pamela Beth Massey	Tobi J. Mott	Derek Anthony Pica	Monica Evangelina Salazar
Albert Matsuura	Mindy Marie Muller	Joseph N. Pirtle	Christine M. Salmi
Jason R. Mau	George Leo Mullin	Noel James Pitner	Angela Celyn Sasser

M. Anthony Sasser
 Steven F. Scanlin
 Danielle C. Scarlett
 Edwin Guy Schiller
 Jennifer May Schindele
 Lisa M. Schoettger
 Lance J. Schuster
 Steven John Schuster
 Kurt Herzog Schwab
 Sheila Rae Schwager
 Sarah Elizabeth Scott
 Wesley Landon Scrivner
 Aaron Lloyd Seable
 William Breck Seiniger, Jr.
 Karin Rosalind Seubert
 Karen Preset Overly Sheehan
 Amelia Anne Sheets
 Ann K. Shepard
 Sara Shepard
 Christopher D. Sherman
 Bret William Shoufler
 Jennifer Lynn Shrum
 Lisa Doreen Shultz
 Cathy Roxanne Silak
 Karen L. Silva
 Sarah Quinn Simmons
 Edward Simon
 Craig Winger Simpson
 J. Walter Sinclair
 Peter Charles Sisson
 Milton Chace Slavin
 David Joseph Smethers
 Bruce Michael Smith
 Ellen Nichole Smith
 James Bryant Smith
 John Jacob Smith
 Margery Weir Smith
 Nicholas A. Smith
 Scott Joseph Smith
 Stephen Christopher Smith
 Stephen F. Smith
 Thomas Daniel Smith

William Keith Smith
 Andrew John Snook
 Nicole C. Snyder
 Elizabeth DeLayne Sonnichsen
 Dean C. Sorensen
 Nolan R. Sorensen
 James Alphonse Spinner
 B. Newal Squyres
 Craig D. Stacey
 Kim C. Stanger
 David Isaacs Stanish
 Melissa M. Starry
 Jared A. Steadman
 Benjamin Edward Stein
 Frances Ruth Stern
 Shelli Dawn Stewart
 Erik F. Stidham
 Robin Jeffrey Stoker
 Stephen Andrew Stokes
 Laird Bruce Stone
 Richard William Stover
 Charles Michael Stroschein
 Richard L. Stubbs
 Matthew Paul Stucki
 Weldon Blair Stutzman
 David Michael Swartley
 Paul R. Taber, III
 Joel Dee Tague
 Robert Walter Talboy
 Glenda Marie Talbutt
 Brian Marc Tanner
 Pamela Jane Tarlow
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 Joshua Blake Taylor
 Matthew Kent Taylor
 Nicholas L. Taylor
 Robert James Taylor
 Stanley Joseph Tharp
 Krista D. Thiry
 Carmen Michelle Thomas Morse
 Aaron Neal Thompson
 Cheryl Wight Thompson

Jason Stevan Thompson
 Dale Packer Thomson
 Tayler Wayne Tibbitts
 Robert P. Tilley
 Hon. Joel Evan Tingey
 Gregory Clayton Tollefson
 Aaron John Tolson
 Margaret Boggs Trollan
 Christ Theodore Troupis
 Brian Thomas Tucker
 Steven Ashby Tuft
 Amanda Elizabeth Ulrich
 Jean Rynd Uranga
 Robert W. Vail
 Anthony Michael Valdez
 Jack Van Valkenburgh
 Tracy V. Vance
 Bradley Drake Vandendries
 Joshua Paul vanSwearingen
 Julie Varin
 Eric Hawkins Vehlow
 Nicolas Vernon Vieth
 Jonathan Michael Volyn
 Dennis S. Voorhees
 Matthew Lee Wade
 Jacqueline Susan Wakefield
 Robert E. Wakefield
 Francis Patrick Walker
 Richard P. Wallace
 Robert A. Wallace
 Sean Patrick Walsh
 Matthew Lloyd Walters
 Nicholas Alexander Warden
 Shane Kody Warner
 Elijah Martin Watkins
 Roland D. Watson
 Andrew Marshall Wayment
 Dennis C. Weigt
 Bernard Joseph Welch, Jr.
 William Harold Wellman
 Carole Denise Wells
 Peter Max Wells

Stanley Wesley Welsh
 Carole I. Wesenberg
 Zachary J. Wesley
 Jacob Scott Wessel
 Jefferson Hunt West
 Joshua Douglas Wetzel
 Jesse Michael Wheeler
 Teri A. Whilden
 Scott Alan Whipple
 Erica Jeannine White
 Jeffrey Scott White
 Robert Blaine White
 Jarom Anthony Whitehead
 Michael Joseph Whyte
 Jaren Nichole Wieland
 Steven Paul Wieland
 April Michelle Wielang
 Wesley Gene Wilhite
 Dennis Paul Wilkinson
 Brian James Williams
 Daniel Everett Williams
 Kimberly Lynette Williams
 Tyler David Williams
 Ned Cody Williamson
 R. Bradley Willis
 Brent Thomas Wilson
 David Evans Wishney
 Paul Bruce Withers
 Carl Jeffrey Withroe
 Nolan Ernest Wittrock
 Brian Clayton Wonderlich
 Robert H. Wood
 Theodore Jason Wood
 Aaron J. Woolf
 Stephen T. Woychick
 Roger B. Wright
 Erin Jean Wynne
 Cynthia Lin Yee-Wallace
 Mary Virginia York
 William (Bud) Frederick Yost, III
 John Naya Zarian
 Zachary S. Zollinger
 Clayne S. Zollinger, Jr.

And thanks to the following attorneys who have donated over **1,200** pro bono hours through Idaho Legal Aid Services, Inc.:

- Scott Bauer, *Coeur d'Alene*
- Stephen Bywater, *Boise*
- David Commisa, *Boise*
- Cassandra Cooper, *Caldwell*
- Mark Ellison, *Boise*
- Wayne Fuller, *Caldwell*
- Brett Harris, *Idaho Falls*
- Jeff Howe, *Caldwell*
- Nancy Hurd, *Nampa*
- Rebecca Kulaga, *Boise*
- Anne Magnelli, *Boise*

- Jillian Roderick, *Coeur d'Alene*
- Chuck Sheroke, *Coeur d'Alene*

Bankruptcy Clinic:

- Matt Shriver
- Jake Peterson

Participants in the 4th District Bar Association's 6.1 Challenge reported donating almost **6,890** hours in pro bono services in the friendly challenge among corporate legal departments, law firms (large and small) and public sec-

tor legal departments. The competition entrants include:

- Idaho Power
- Office Depot, Inc.
- Stoel Rives LLP
- Perkins Coie LLP
- Hawley Troxell
- Holland& Hart, LLP
- Moore & Elia, LLP
- Fisher Rainey Hudson
- The Huntley Law Firm
- Andrade Legal
- Richardson Adams, PLLC
- Merris & Naugle, PLLC
- Finch O'Neil Law Office,

- Brady Law Chartered
- Boise City Attorney
- Office of the Idaho State Appellate Public Defenders
- Robert Aldridge, Chartered

A special thanks to Hon. Russell Comstock for creating a Family Law Tool Kit and Hon. Howard Smyser for updating the Family Law Deskbook and Custody Combo – all for use by attorneys who volunteer to take cases in family law area.

**July 2016 Idaho Bar Examination Applicants
(as of May 1, 2016)**

Mitchell Reyes Aguilar

Coeur d'Alene, ID
University of Arizona

Andrew R. Alder

Fairfax, VA
George Mason University School of Law

Austin Orme Allen

Idaho Falls, ID
University of Idaho College of Law

Jack E. Ambrose

Moscow, ID
University of Idaho College of Law

Mary Susan Amschel

aka Mary Amschel Ruppert
Meridian, ID
Concordia University School of Law

Megan C. Anderson

aka Megan C. Wyatt
Boise, ID
University of Idaho College of Law

Kirk David Andre

San Jose, CA
Gonzaga University School of Law

Marisa Eileen Askew

aka Marisa Eileen Askew Welch
Seattle, WA
Seattle University School of Law

Steven Atwell Atkinson

Moscow, ID
University of Idaho College of Law

Johnathan Richard Baldauf

Boise, ID
University of California-Davis School of Law (King Hall)

Jeffrey Rankin Ball

Missoula, MT
University of Montana School of Law

Kyle Eric Bastian

Boise, ID
University of Idaho College of Law

Ingrid Christina Batey

aka Ingrid Panther
aka Ingrid Christina Hauge-Panther
aka Ingrid Kristina Panther
Nampa, ID
University of Idaho College of Law

Robert Ignacio Beltran

Boise, ID
University of Idaho College of Law

Andrew Warlick Betson

Moscow, ID
University of Idaho College of Law

Ryan Michael Black

Moscow, ID
University of Idaho College of Law

Jeb W. Bond

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University of Nevada, Las Vegas, Wm S. Boyd School of Law

Alexandra Anne Breshears

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Bryan H. Buck

Sandpoint, ID
University of Idaho College of Law

Maria C. Caballero

aka Maria C. Briseno
aka Maria C. Cruz
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Sheena M. Christman

Salt Lake City, UT
University of Utah S.J. Quinney College of Law

David Christopher Commisa

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Max M. Corley

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Concordia University School of Law

Drax Delfico

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Boise, ID
University of Idaho College of Law

Samuel Nephi Dickinson

Nampa, ID
University of Idaho College of Law

Edward William Dindinger

Boise, ID
University of Idaho College of Law

Benedict George Donahue

Boise, ID
University of Idaho College of Law

Michael Francis Donovan

Hailey, ID
University of Utah S.J. Quinney College of Law

F M Cody Duane Earl

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Monica R. Fabbi
aka Monica R. Coburn
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Patrick James Fackrell

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University of Idaho College of Law

Cory Bert Fielding

Meridian, ID
University of Nevada, Las Vegas, Wm S. Boyd School of Law

Amanda Elaine Findlay

Hayden, ID
Mississippi College School of Law

Jared S. Fluckiger

Burley, ID
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Elisabeth Anne Fontugne

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Brittany Kay Ford

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Tulane University Law School

Nathan Andrew Fowler

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Austin Jeffrey Frates

Payette, ID
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Claire Marie Freund-Marceau

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Stephanie Suzanne Griffey

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Melba, ID
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Jason Clay Gustaves

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Katherine L. Haas

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Barbara F. Harper

aka Barbara F. Iffland
aka Barbara F. Frischkorn
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aka Mikel Jane Chapman
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Christopher W. Herzinger

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Ashly Meredith Hoffman

Oregon City, OR
Creighton University School of Law

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Coeur d'Alene, ID
University of Idaho College of Law

Joseph Francis Hurley

Pocatello, ID
University of Idaho College of Law

Charles Alan Johnson

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University of Idaho College of Law

Ammon Clark Judy

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Kevin Gene Kohtz

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**July 2016 Idaho Bar Examination Applicants
(as of May 1, 2016)**

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Pocatello, ID
Arizona Summit Law School

Courtney LaFranchi
Davis, CA
University of California-Davis School of Law (King Hall)

Jamie Paul Laliberte
Boise, ID
University of Idaho College of Law

Lauren Teresa Lavigne
Wallace, ID
University of Idaho College of Law

Sandra Dawn Lockett
aka Sandra Dawn Richards
Moscow, ID
University of Idaho College of Law

Seamus Neil Lovelace
San Jose, CA
Whittier Law School

Dominic Giulio Lovotti
Boise, ID
University of Idaho College of Law

Kylie Lopez Madsen
Lancaster, PA
William & Mary Law School

Whitney Anne Magnuson
Pocatello, ID
Lewis & Clark Law School

Scott Lovell Maisey
Layton, UT
University of Idaho College of Law

Ashley Rachelle Marelius
aka Ashley Rachelle Marelius-White
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Janice Marie Martin Beller
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Jaime Lynn Matier
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Danielle Jean Mayberry
Moscow, ID
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John Andrew McCrostie
Garden City, ID
Concordia University School of Law

Brandon E. McDade
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University of Idaho College of Law

Molly Elizabeth Mitchell
Boise, ID
University of Idaho College of Law

Andrew Wayne Montgomery
Boise, ID
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Natalia Morozova
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David James Morse
aka Ahmed David Nassar Ismail
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Jacob K. Munk
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Florida Coastal School of Law

Brianna L. Murphy
aka Brianna Lee Crisp
Pullman, WA
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Mark Douglas Nicolarsen
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Lisa M. O'Brien
aka Lisa Marie Proffitt
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Empire College School of Law

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University of Idaho College of Law

Jason Laurance Oliver
Moscow, ID
University of Idaho College of Law

Jack Keith Ormond
Boise, ID
University of Idaho College of Law

Shelby Kate Owens
Boise, ID
University of Idaho College of Law

Bobby Eugene Pangburn
Eagle, ID
Lewis & Clark Law School

Shannon N. Pearson
Boise, ID
Concordia University School of Law

Angela Dawn Perkins
aka Angela Dawn Sarich
Boise, ID
Concordia University School of Law

Larry Scott Peterson
Boise, ID
Concordia University School of Law

Reid Kermit Peterson
Moscow, ID
University of Idaho College of Law

Andrew Graham Pluskal
Boise, ID
Georgetown University Law Center

Olivia V. Polyakov
aka Olga Polyakov
Meridian, ID
University of Idaho College of Law

Lance Marlow Pounds
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Tyler Andrew Powers
Framingham, MA
Boston College Law School

Lauren Ann Prew
Boise, ID
Michigan State University College of Law

Kara M. Przybos
aka Kara Maxine Myers
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Concordia University School of Law

Eric Christian Puype
Boise, ID
University of Idaho College of Law

Thalia Jean Radey
aka Thalia Jean Gulke-McAlister
aka Thalia Jean McAlister
aka Thalia Jean Gulke
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Nicholas Mark Rammell
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Brigham Young University

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Arnold Reyes-Mendiola
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Ave Maria School of Law

Beck Charles Roan
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Anja Renae Rodriguez
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University of Idaho College of Law

Daniel Luis Rodriguez
Carlsbad, CA
University of San Diego

John Michael Rousseau Malek
Deer Park, WA
Gonzaga University School of Law

Stephanie A. Russell
Boise, ID
University of Idaho College of Law

Joseph James Schaffer
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University of Buffalo Law School, SUNY

Samantha Gene Schmitt
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aka Shannon Vos
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Keith P. Scholl
Moscow, ID
University of Idaho College of Law

Teva F. Sempel
New Orleans, LA
Loyola University New Orleans College of Law

Katelyn Michelle Skaggs
Boise, ID
University of Idaho College of Law

Amy Marie Smith
aka Amy Marie Sage
Rescue, CA
University of the Pacific, McGeorge School of Law

Colleen Rosannah Smith
Alexandria, VA
William & Mary Law School

Dori Lyn Smith
aka Dori Lynn Henderson
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University of Idaho College of Law

Hillary Smith
Boise, ID
University of North Carolina School of Law

**July 2016 Idaho Bar Examination Applicants
(as of May 1, 2016)**

Jesse Hundley Smith

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University of Idaho College of Law

Kemp Cedric Smith

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University of Idaho College of Law

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Boise, ID
Concordia University School of Law

Talitha C. Solorzano

aka Talitha Cumi Tyler
Boise, ID
California Western School of Law

Joseph Alexander Spayd

Meridian, ID
Seton Hall University School of Law

Leeann Ming Yee St. Clair

aka Leeann M. Greenough
Moscow, ID
University of Idaho College of Law

Michael Bryan Steele

Brookfield, WI
Marquette University Law School

Cory Roy Stegelmeier

Moscow, ID
University of Idaho College of Law

Brian Lee Stephens

Boise, ID
University of Idaho College of Law

Rori Leigh Stokes

Boise, ID
University of Idaho College of Law

Scott Steven Streed

Hayden, ID
Western State University-College of Law

Jennifer Lynn Swajkoski

Boise, ID
University of Idaho College of Law

David Garrett Swenson

Meridian, ID
Brigham Young University

Jeremy K. Tamsen

Boise, ID
University of Idaho College of Law

Mitchell Scott Thackeray

Moscow, ID
University of Idaho College of Law

Shenandoah Anthony Titus

aka Anthony Ray Titus
Warrenton, VA
Western New England College

Nicholas Dean Tranmer

Pocatello, ID
University of Idaho College of Law

Martha Wharry Turner

aka Martha Gregg Wharry
Boise, ID
University of Denver Sturm College of Law

Ruth Helena Twede

aka Ruth Helena Dittli
Provo, UT
Brigham Young University

Brennan Shipley Ward

Canton, MS
The University of Mississippi School of Law

Linda Elizabeth Wells

Kimberly, ID
University of Idaho College of Law

Allison Kathleen Whipps

aka Allison Kathleen Fuller
Boise, ID
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Mark Raymond Wietstock

Santa Barbara, CA
Santa Barbara College of Law

T. Matthew Wolfe II

Boise, ID
Concordia University School of Law

Timothy James Woodson

Kuna, ID
Concordia University School of Law

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David Lombardi

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

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

IN MEMORIAM

Denton P. Andrews 1942 - 2016

Denny Andrews, 74, passed away Friday, April 29, 2016, at his home in Clarkston surrounded by loved ones.



Denton P. Andrews

He was born March 15, 1942, in Boise, to Denver and Oleta Clark Andrews. When Denny was 5 years old and living with his family at Faragut Naval Training Station, his father Denver moved to Kodiak Island, Territory of Alaska, to assist with the construction of the Kodiak Naval Station. Denny, his mother, Oleta, and his sister, Lois, took the month-long journey by steamship to Kodiak to join him shortly thereafter.

As a young man, Denny worked in various trades, such as deck hand for several commercial fishing boats, a pea processor for Twin City Foods

and eventually as a law clerk. His law clerk experience is what drove his passion for the law. He clerked for a judge in the Tacoma area while going to law school. He obtained a bachelor of science in industrial engineering in 1967 and passed the Washington State Bar exam in 1973.

An attorney by trade, he spent his life helping those around him. A hobbyist scholar, he shared his wisdom freely. Denny was also a competition bench rest shooter who won the World Championship in Finland in 1996. His passion for shooting was contagious and he worked diligently to share his experience and knowledge with others.

Denny met the love of his life, Charmain Black, in 1987, in Washington, D.C., and they were married May 6, 1988. At the time, Denny was serving as associate counsel to the Secretary of the Navy at the Pentagon, and, in 1991, moved to the Justice Department as senior Navy trial attorney - Criminal Division.

In 1996, Denny and Charmain

moved from Springfield, Va., to Asotin County. He served as the deputy prosecuting attorney for Asotin County until 2002, then moved into private practice as a bankruptcy attorney.

Denny and Charmain spent their lives serving friends of Bill W. and family members alike. Denny is survived by his wife, Charmain; and his daughters and grandchildren, Oleta and Constantine Vassilopoulos of Falls Church, Va., and their daughter, Ana; Alexandria and Ken Abadie of Lafayette, La., and their children Gwendolyn, Mason and Colin; Jean Marie Thomas of Washington, D.C.; and foster daughter Missy Black of Spring, Texas. Surviving siblings are Lois Andrews of Puyallup, Wash., Bruce (Robin) Andrews, David (Marina) Andrews and Dale (Karen) Andrews. He was preceded in death by his youngest sister, Carol Andrews LaFramboise; and parents Denver and Oleta Andrews.

INTRODUCING OUR NEW PARTNER GEOFFREY M. WARDLE

Spink Butler is pleased to announce that Mr. Wardle has joined their team of professionals. Drawing on his 20 years of experience in both the public and private arenas, Mr. Wardle will focus his practice at Spink Butler on commercial development, real estate, land use, entitlements, and transportation issues.

SPINK BUTLER
ATTORNEYS AT LAW



GEOFFREY M. WARDLE

MICHAEL T. SPINK JOANN C. BUTLER T. HETHE CLARK TARA MARTENS MILLER GEOFFREY M. WARDLE

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A photograph of a man and a young boy fishing on a beach at sunset. The man is kneeling on the left, holding a small, colorful lure. The boy is standing on the right, leaning forward. A fishing rod is visible on the right side of the frame. The background shows the ocean and a sunset sky.

TODAY. TOMORROW. FOR LIFE.

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Audrey Kenney

Millennium Settlements
Settlement Consultant
(208) 631-7298
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NEW ADMITTEES
Admitted 5/5/16

Michaela Kai Adams
 Michelle Lynn Agee
 Lara Elizabeth Anderson
 Jeffrey Thomas Armstrong
 Krista Marie Bartels
 Tanya Lee Barton
 Brenda S. Barton-LeMay
 Teresa Marie Bode
 Bradley Ray Bond
 Matthew Tyler Brickey
 Bennett Hafen Briggs
 Samantha Jean Brown
 Sean Christopher Brown
 Craig Michael Cannon
 Lisa Michelle Carlson

Donna McIntyre Case
 Jason Ronald Chandler
 Rachael Renae Collins
 E. Malcolm Copple
 James Paul Corpstein
 Robert Thomas Curl
 Eric Richard DeBord
 Teague Ian Donahey
 Matthew E. Draper
 Casey Elizabeth Drews
 Rafael John Droz
 Amanda L. Dumont
 Brian A. Ertz
 W. Forrest Fischer
 James Michael Francel

Gregory Michael George
 Cary Edward Goldstein
 Esperanza Granados
 Enrique Gutierrez
 Paul Corbett Hanes
 Jennifer Jaylene Hanway
 Richard Kevin Henry
 Jared John Hight
 Nicole Joanne Huddleston
 Eileen R. Johnson
 Justin Don Jones
 Spencer Thomas Lay
 P. Alexandria Lewis
 Allison Marie Limb
 Eben Tollie Masingill
 Lourdes Annette Matsumoto

Chad Robert Moody
 Tyler Robert Naftz
 Bryan V. Norton
 Jeffrey Lind Phillips
 Aubrey Rae Richardson
 Brett Curran Ruff
 Christopher Don Schmidt
 Kenneth Charles Shumard
 Adam M. Strong
 Stacey Songstad Strong
 Jacob Ray Thomas
 Chynna Charlene Tipton
 Elizabeth Denise Warner
 Brennan Allan Wright
 Paul Andrew Zumberge

OF INTEREST

Tom Banducci steps back from firm

BOISE — After six months into his year-long sabbatical, Tom Banducci has withdrawn from his firm, Andersen Banducci Schwartzman Woodard and Brailsford, to pursue interests in law, teaching, and giving back to the community. Mr. Banducci intends to return to Boise in October, 2016. Tom can be reached at tom@tbanduccilaw.com. The firm, which specializing in civil trial practice and commercial dispute litigation, has changed its name to Andersen Schwartzman Woodard Brailsford (ASWB).



Tom Banducci

Michael W. Lojek appointed to bench

BOISE — The Ada County Fourth District Court announced that Michael W. Lojek has been appointed

to serve as a District Court Magistrate Judge in the Fourth District. Originally from Boise, he has served in the Ada County Public Defender's Office since 2006. He holds a BA of Arts from Whitman College in Walla Walla and his J.D. from the University of Idaho College of Law.

He worked as Assistant General Counsel to the National Rifle Association of America in Fairfax, VA. In 2000 he moved back to Idaho where he mostly worked as a public defender. He begins work on June 13.

Palmer joins Racine, Olson

POCATELLO — Nathan Palmer, LL.M., has joined the Pocatello office of Racine, Olson, Nye, Budge & Bailey, Chartered. He is a member of Racine Olson's business and estate planning groups and practices in the



Hon. Michael W. Lojek

areas of business, litigation, taxation, trusts, wills, and probate. Nathan is excited to be part of Racine Olson's tradition.

Nathan is a client-oriented problem solver. He has successfully litigated several cases in both federal and state courts. Nathan earned a bachelor's degree in economics from University of Utah. He obtained his law degree from the University of Nevada, Las Vegas, William S. Boyd School of Law. Nathan then earned an LL.M. in Taxation from the University of Florida Levin College of Law.

Nathan's wife, Lindsey, was born and raised in Malad, Idaho, where her family has farmed and ranched for five generations. Nathan and Lindsey are the proud parents of two boys. Nathan can be reached at (208) 232-6101 or nrp@racinelaw.net.



Nathan Palmer

Lawyers Serve!

Jesse Robison Finds Work/Life Balance Through Service

Dan Black

After enduring 20 years of the stress and anxiety that accompanies a litigation practice, Pocatello lawyer Jesse Robison put his career on a different track. To create more time for charitable and community-oriented activities, he began almost exclusively doing mediation and consulting. That allowed him to work seven or eight months each year, and left 4-5 months each year to pursue other interests, namely public service.

“In my mind it gave me freedom to travel and write. I love what I do, but litigation is hard work. I think I’m going to live longer” because of the part-time schedule he sets as a solo practitioner.

That was 15 years ago and since then Jesse reflects on his service in the community with the satisfaction he made the right choice. Originally, he was urged to get involved with local service clubs, and Chamber of Commerce, knowing that by being seen in the community would help bring new clients. But those volunteer opportunities failed to spark Jesse’s imagination. Instead, he looked for volunteer work that had a more personal connection.

His interests drew him to the Big Brother organization, where he was



Jesse Robison



Pocatello attorney Jesse Robison stands with his summer school students in a classroom in northern Peru. He wanted a service project that took him out of his familiar element and he had a longtime affinity for Latin America. Robison said he especially likes making a difference for individual students.

able to be a positive influence to a young man who came from a difficult background. Jesse said he also grew up with a difficult home life, and he enjoyed providing support in very simple everyday activities.

He also agreed to help select scholarship winners at Idaho State University, where he earned his undergraduate degree. That experience opened new doors and Jesse served on the alumni board of directors, including a time as president.

While helping community groups apply for grant money, Jesse developed a passion for public art projects. “My father was an artist,” he said, I have always had an interest in the arts, especially public art.”

His interests drew him to the Big Brother organization, where he was able to be a positive influence to a young man who came from a difficult background.

Jesse joined the Pocatello Arts Council and was asked to look for locations where they could put public art. He immediately recognized that a large wall at the federal courthouse would do nicely. And he proceeded to raise money for a mural. "Every dollar I raised came from Idaho attorneys," he said. "It was a personal campaign and I got very few 'no's'."

After that campaign, he replicated that success for more public art projects. The largest project he has spearheaded is the Japanese Garden at the Pocatello airport. The project was meticulously researched, planned and executed with an enormous amount of help from donors and volunteers.

Other art projects include the abstract pieces at the public library, a sun dial sculpture downtown, and a giant set of whimsical chimes activated by the wind, inviting people to interact with it and make some noise.

Jesse's latest project began with his introduction to the cultures of Latin America. He spent six months in Mexico City as a teenager and since then he has travelled to several places in South and Central America. At one point he looked into a job for the Peace Corps, but the organization required a two-year commitment. "I just couldn't do it," Jesse said.

He eventually found a way to contribute with a smaller block of time. Through a web site he found a small-scale education agency in Trujillo, Peru. There, two brothers worked to support visitors who can tutor local children with English and other subjects. This assistance help give those students some hope that they will be able to have some options in their future. Jesse decided to go for it. This winter he spent two months in Peru.

This righted my ship. And reminded me of who I am.
It makes me feel healthy. They taught me more
than I taught them."

The place where he stayed were primitive accommodations. And it was hot. "There was no A.C.," Robison said. The electricity and water service was spotty.

The classrooms were similarly Spartan. But the students made his trip a success. "They were respectful and listened. That struck me."

Jesse developed a love for Latin culture. The children were coming to summer school to get a jump start on their English studies. He said "despite living in abject poverty these children were so happy. They took their education very seriously."

And he developed friendships with the kids, especially a group of little girls he called "little monkeys." When he was getting ready to leave, the kids surprised him again, telling him that after he was gone and when they have another teacher,

they "would remember him in their hearts forever."

"I was struggling with some personal difficulties," Jesse said. "But this righted my ship. And reminded me of who I am. It makes me feel healthy. They taught me more than I taught them."

"You do things that call to you and you find it rewarding," he said.

So, will he go back to Peru? "Definitely," he said, "probably next winter." And in the meantime, Jesse is continuing to write a book with the working title, *Little Grey House on Fire*. "It's a story of spiritual journey," Jesse said.

And at home in Pocatello he serves on the Bistline Foundation, and keeps busy selecting art and fundraising whenever the need arises.

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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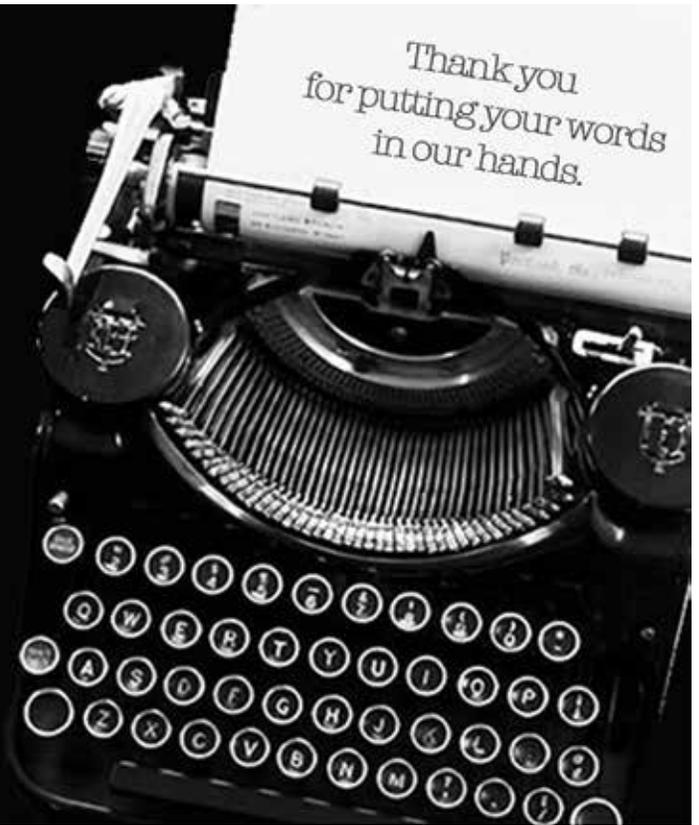


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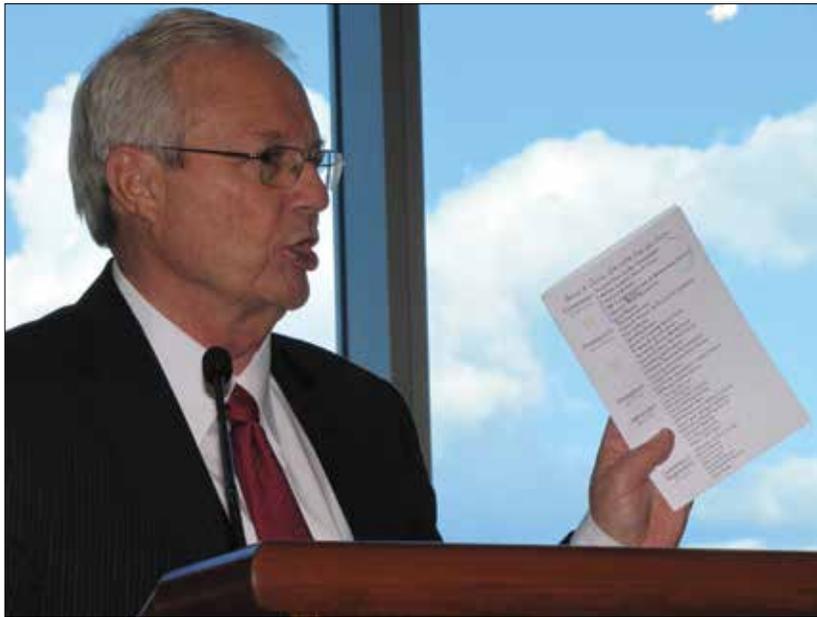
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Photos by Dan Black

Charles "Chuck" Homer, Chair of the Access to Justice Idaho Leadership Committee, reports on the donations made to Access to Justice Idaho fundraising campaign. This year's goal is \$250,000.

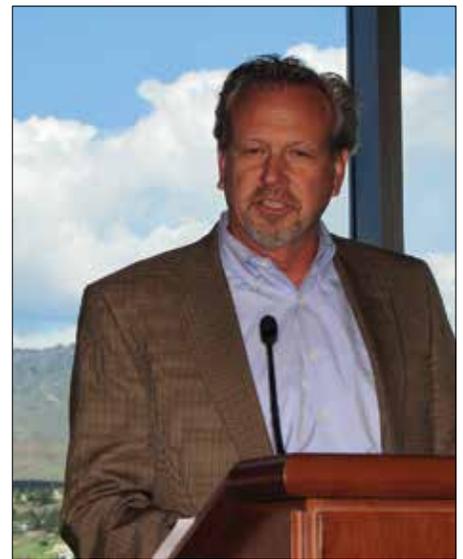
Fourth District Holds its Law Day Celebration



Timothy Murphy of Micron Technology offers a few words of appreciation to his colleagues after accepting the 6.1 Challenge award in the corporate division.



Sara Thomas accepts the award for Idaho State Appellate Public Defenders from Hon. Chief Justice Jim Jones, who emceed the ceremony at the Zions Bank Building.



Michael J. Elia, of Moore and Elia, LLP, accepts the 6.1 Challenge Award in the small firm category.

Once again the Fourth District Bar Association hosted a Pro Bono Celebration for Law Day, which was celebrated on April 28 and included dozens of volunteers who took phone calls in an Ask-A-Lawyer program.

The event also marked the start of the Access to Justice Idaho campaign. Contributions to the campaign support Idaho Volunteer Lawyers Program, Idaho Legal Aid, Inc., and DisAbility Idaho.

The following were honored for their remarkable pro bono contributions.

- Corporate - Micron Technology, Inc.
- Large Firm - Holland & Hart, LLP
- Small Firm - Moore & Elia, LLP

- and Andrade Legal
- Solo Practitioner - Greaves Legal, PLLC
- Government – State Appellate Public Defenders

— Dan Black

2016 Idaho State Bar Annual Meeting Schedule of Events

Boise, Idaho • The Riverside Hotel • July 13-15, 2016

Wednesday, July 13

8:30 a.m. - 3:00 p.m.	Idaho State Bar Board of Commissioners Meeting
4:00 p.m. - 6:00 p.m.	Registration/Exhibition Hall
6:00 p.m. - 7:00 p.m.	President's Reception
7:00 p.m. - 9:00 p.m.	Distinguished Lawyer & Jurist Awards Dinner
9:00 p.m. - 11:00 p.m.	Idaho Law Foundation Hospitality HQ

Thursday, July 14

7:30 a.m. - 5:00 p.m.	Registration/Exhibition Hall
7:30 a.m. - 8:30 a.m.	Continental Breakfast
7:30 a.m. - 8:30 a.m.	Litigation Section Annual Meeting
7:30 a.m. - 8:30 a.m.	Taxation, Probate & Trust Law Section Meeting
7:30 a.m. - 8:30 a.m.	Diversity Section "Justice for All" Breakfast
8:30 a.m. - 10:00 a.m.	Plenary Session <ul style="list-style-type: none">• Welcome from Idaho State Bar President Trudy Fouser• State of the Courts by Idaho Supreme Court Chief Justice Jim Jones• Keynote Presenter: American Bar Association President Paulette Brown
10:15 a.m.	Idaho Law Foundation Board of Directors Meeting
10:15 a.m. - 11:45 a.m.	CLE Session #1 <ul style="list-style-type: none">• Hot Topics in Environment & Natural Resources Law <i>Sponsored by the Environment & Natural Resources Law Section, 1.5 CLE credits (NAC)</i>• Idaho Courts: Transitioning to the Electronic Record Part II <i>Sponsored by the Idaho Law Foundation, Inc., 1.5 CLE credits (NAC)</i>• Not Small Potatoes: Branding and The Lanham Act <i>Sponsored by the Intellectual Property Law Section, 1.5 CLE credits</i>
12:00 p.m. - 1:15 p.m.	Idaho State Bar/Idaho Law Foundation Service Awards Luncheon and Idaho Law Foundation Annual Meeting
1:30 p.m. - 3:00 p.m.	CLE Session #2 <ul style="list-style-type: none">• Buyer Beware - Your Homeowner's Association May Be More Powerful Than You Think <i>Sponsored by the Real Property Law Section, 1.5 CLE credits (NAC)</i>• Legislating and Lobbying <i>Sponsored by the Idaho Law Foundation, Inc., 1.5 CLE credits of which 0.25 is Ethics (NAC)</i>• Settler's Remorse: Challenges in Rescinding a Mediated Settlement Agreement <i>Co-Sponsored by the Dispute Resolution Section and the University of Idaho College of Law, 1.5 CLE credits of which 0.25 is Ethics</i>
3:00 p.m. - 3:15 p.m.	Community Service Project/Ice Cream Sundae Break
3:15 p.m. - 4:45 p.m.	CLE Session #3 <ul style="list-style-type: none">• Civility Matters <i>Co-Sponsored by the Litigation Section and the Professionalism & Ethics Section, 1.5 CLE credits of which 1.5 is Ethics</i>• The Status and Threats to International Law on Freedom of Religion or Belief <i>Co-Sponsored by the International Law Section and the J. Reuben Clark Society - Boise Chapter, 1.5 CLE credits</i>• Workplace Investigations - Who, What, Where, When & Why <i>Sponsored by the Employment & Labor Law Section, 1.5 CLE credits</i>
5:00 p.m. - 6:30 p.m.	Milestone Celebration Reception: Celebrating 25, 40, 50, 60 & 65 Years of Admission

Friday, July 15

7:00 a.m. - 8:00 a.m.	Appellate Practice Section Breakfast Reception
7:30 a.m. - 1:30 p.m.	Registration/Exhibition Hall
7:30 a.m. - 8:30 a.m.	Continental Breakfast
7:45 a.m. - 8:45 a.m.	District Bar Association Officers Breakfast
8:00 a.m. - 10:00 a.m.	CLE Session #4 <ul style="list-style-type: none">• Delivery of Veterans Legal Aid and the Idaho Military Alliance <i>Sponsored by the Idaho Military Legal Alliance, 2.0 CLE credits (NAC)</i>• Know Thyself: Unconscious Bias in the Legal Profession <i>Sponsored by Concordia University School of Law, 2.0 CLE credits of which 0.25 is Ethics</i>• What Happened in the SRBA? Water Rights Basics and Post Adjudication Considerations <i>Sponsored by the Water Law Section, 2.0 CLE credits (NAC)</i>
10:15 a.m. - 11:45 a.m.	CLE Session #5 <ul style="list-style-type: none">• Lessons from the Masters <i>Sponsored by the Idaho Law Foundation, Inc., 1.5 CLE credits of which 0.5 is Ethics (NAC)</i>
12:00 p.m. - 1:15 p.m.	Social Networking Luncheon
1:30 p.m. - 3:30 p.m.	CLE Session #6 <ul style="list-style-type: none">• Transitioning from the Practice of Law: Tools & Resources Await <i>Sponsored by the Idaho State Bar Senior Lawyer Transition Task Force, 2.0 CLE credits of which 0.5 is Ethics (NAC)</i>
3:30 p.m.	Conclusion of the 2016 Idaho State Bar Annual Meeting

IDAHO STATE BAR ANNUAL MEETING

2016 Registration Form

Name: _____
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FILL OUT THIS COLUMN FIRST ↓

FULL REGISTRATION PARTICIPANT

Includes all meals, CLEs & Plenary Session

→ Only Guests Require *Additional* Payment for Meal Events →

Early Bird (by June 17) <input type="checkbox"/> \$275	Standard (after June 17) <input type="checkbox"/> \$325	First Time Attendee <input type="checkbox"/> \$245
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SPECIAL REGISTRATION PARTICIPANT

Includes CLEs & Plenary Session ONLY

→ Meal Events & Guests Require *Additional* Payment →

Attorneys who have been practicing three years or less and/ or unemployed (self employed ineligible) residing inside the 3rd or 4th Districts <input type="checkbox"/> \$140	Attorneys who have been practicing three years or less and/ or unemployed (self employed ineligible) residing outside the 3rd or 4th Districts <input type="checkbox"/> FREE	Law Students <input type="checkbox"/> \$40
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DAY PASS REGISTRATION PARTICIPANT

Includes CLEs & Plenary Session ONLY

→ Meal Events & Guests Require *Additional* Payment →

Thursday Full Day <input type="checkbox"/> \$135	Thursday Morning Session <input type="checkbox"/> \$70	Thursday Afternoon Session <input type="checkbox"/> \$100
Friday Full Day <input type="checkbox"/> \$160	Friday Morning Session <input type="checkbox"/> \$115	Friday Afternoon Session <input type="checkbox"/> \$80

FILL OUT THIS COLUMN LAST ↓

MEAL EVENTS

(Included with Full Registration)

Distinguished Lawyer & Jurist Awards Dinner <input type="checkbox"/> Registrant <input type="checkbox"/> Guest (\$50 each) = \$_____
Service Award Luncheon <input type="checkbox"/> Registrant <input type="checkbox"/> Guest (\$35 each) = \$_____
Milestone Celebration Reception <input type="checkbox"/> Registrant <input type="checkbox"/> Guest (\$20 each) = \$_____
Social Networking Luncheon <input type="checkbox"/> Registrant <input type="checkbox"/> Guest (\$30 each) = \$_____
Total Meal Event Fees = \$ _____ Guest Name(s): 1. _____ 2. _____ 3. _____ 4. _____

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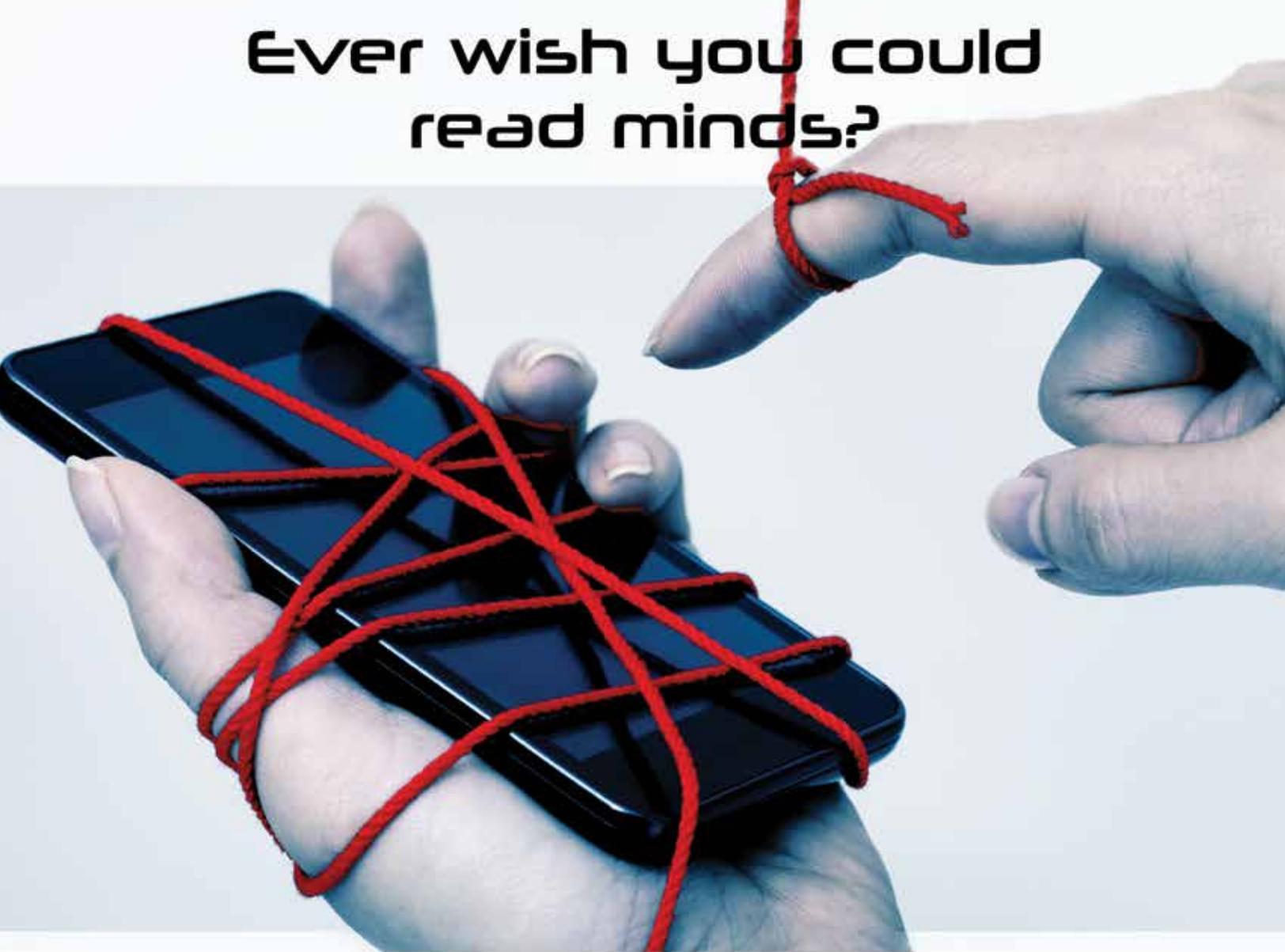
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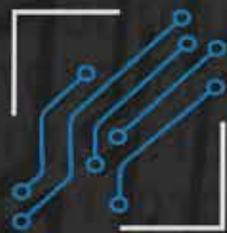
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