

# the **ADVOCATE**

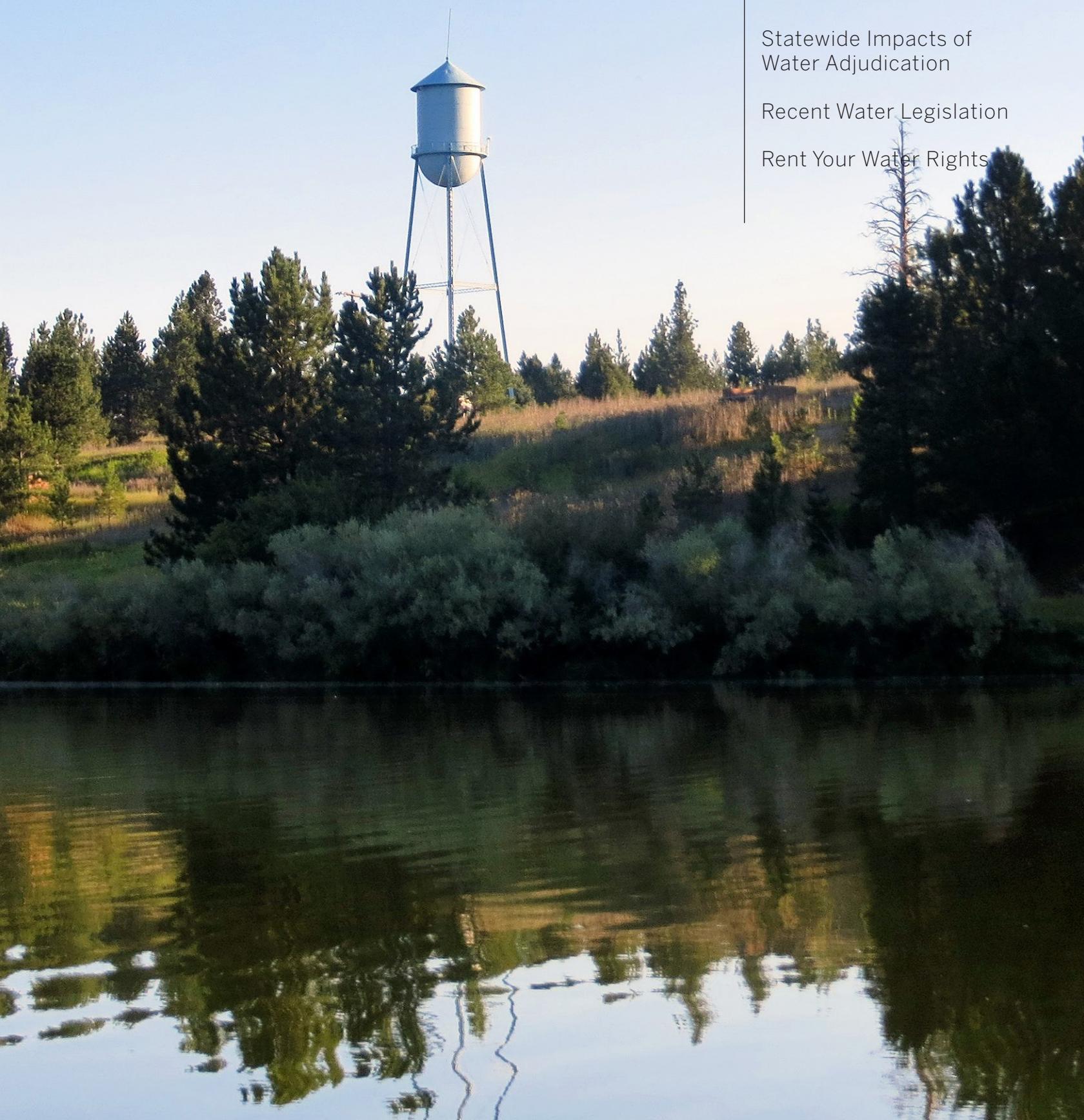
---

Volume 63 | No. 10

Statewide Impacts of  
Water Adjudication

Recent Water Legislation

Rent Your Water Rights





# PROVEN RECORD. RECORD PROVEN.

Successfully assisting law firms with their office space needs since 2000, including:

- Anderson Julian Hull
- Carey Perkins
- Evans Keene
- Cosho Humphrey
- Elam & Burke
- Jones Gledhill
- Stoel Rives
- Spink Butler
- Perkins Coie
- Powers Tolman Farley
- Moffatt Thomas
- MSBT Law



**BILL BECK** | Founding Principal  
(208) 333-7050  
beck@tenantrealtyadvisors.com

**GREG GADDIS, CCIM, SIOR** | Principal  
(208) 333-7052  
greg@tenantrealtyadvisors.com

**TRA**  
Tenant Realty Advisors



THIS IS  
JOHN JANIS

Committed to clients, the law and rights of the injured, John has proven himself with many multi-million-dollar verdicts. He has a focus on winning proven by his black belt in Kenpo karate and numerous professional recognitions like an AV-Rating, Best Lawyers “Lawyer of the Year,” ABOTA membership and induction into the American College of Trial Lawyers.

FEE SHARE • CO-COUNSEL • REFERRALS • ADVICE



WANT HELP WITH A WRONGFUL DEATH OR SERIOUS INJURY CASE?  
CALL JJ. 208 343 7510

## On the Cover



Landscape photo of a local Idaho water tower. Photo taken by the daughter of Candice M. McHugh, Water Law Section Chairperson, Madeline McHugh.

## Featured Article

### 16 **Water Rights Adjudications in Idaho Have Statewide Impacts**

*Meghan M. Carter and Jennifer R. Wendel*

## Sponsored Articles

*Sponsored by the Water Law Section*

### 12 **Musings of a Water Nerd: Recent Water Legislation**

*Paul L. Arrington*

### 20 **Do You Actually Own Those Water Rights?**

*Meghan M. Carter and Jennifer R. Wendel*

### 24 **Don't Transfer Your Water — Rent It!**

*Rebecca E. Moon*

### 28 **Clean Water Act Case Review: Glaser and the Future of the Irrigation Return Flow Exemption**

*Norman M. Semanko*

## Additional Articles

### 32 **The Virtual Annual Meeting of the ABA House of Delegates**

*Larry C. Hunter*

### 34 **Service Animals: A Guide for Handlers and Businesses**

*Hayden Cottle and Quindaro E.C. Frieder*

### 38 **The Idaho Charitable Assets Protection Act: Better Protection of Idaho's Charitable Assets and Donor Intent**

*Stephanie N. Guyon*

### 42 **2020 Richard C. Fields Civility Award: Newal Squyres**

*Professionalism & Ethics Section*

## From the Bar

### 5 **From the Editor**

*Lindsey M. Welfley*

### 6 **President's Message**

*Donald F. Carey*

### 8 **Associate Director's Report**

*Maureen Ryan Braley*

## In Every Issue

10	Bar Actions	48	In Memoriam
44	Court Information	50	Around the Bar
46	Cases Pending	52	Upcoming CLEs

*The Advocate* is the official publication of the Idaho State Bar. Copyright © 2020 The Idaho State Bar. The editorial contents of this publication are the opinions of the authors and do not necessarily represent or reflect the policies or opinions of the Idaho State Bar. *The Advocate* has the authority to edit material submitted for publication. Appearance of an advertisement in *The Advocate* does not constitute a recommendation or endorsement by *The Advocate* or the Idaho State Bar of the goods or services offered therein. The Idaho State Bar Editorial Advisory Board reserves the right to reject advertising determined not to be in keeping with the publication's standards.

*The Advocate* (ISSN 05154987) is published 10 times in the following months: January, February, March, April, May, June, August, September, October, and November by the Idaho State Bar, *The Advocate* P.O. Box 895 Boise, ID 83701. Periodicals postage paid at Boise, ID 83701 and additional mailing offices.

POSTMASTER: Send all address changes to the Idaho State Bar, *The Advocate* P.O. Box 895 Boise, ID 83701.

Subscriptions: Idaho State Bar members receive *The Advocate* as part of their annual dues payment. Nonmember subscriptions are \$45 per year.

## Cooler Weather and Year-End Compliance Await

Lindsey M. Welfley

We've officially made it to autumn, which means two things – first, the weather is getting cooler and we can finally take out those sweaters, and second, it's time to start thinking about what needs to be done to finish out this year strong. Before jumping into content from the October issue sponsor, Associate Director Maureen Ryan Braley has provided a brief update on MCLE Compliance for those reporting their CLE credits this year. You'll want to catch the important information on page 8!

This issue is sponsored by the Water Law Section and begins with an overview of recent water legislation from author Paul Arrington, Director of the Idaho Water Users Association. Next, co-authoring team Meghan Carter and Jennifer Wendel penned two articles with piggy-backing topics – the statewide impacts of water rights adjudications in Idaho and ownership of water rights. Following these two complementary pieces is an article by Rebecca Moon on the option to rent your water right as opposed to transferring it. Finally, Norman Semanko provides a case review of the Ninth Circuit's amended opinion in *PCFFA v. Glaser*.

In addition to the water law content, this issue also contains a handful of articles of interest to the general practitioner. Larry Hunter penned his final report from the ABA House of Delegates as he steps down and hands the reigns to his successor. Following Larry Hunter's report, University of Idaho College of Law students Hayden Cottle and Quindaro Frieder provide a guide for the usage of service animals by handlers and best practices for businesses. Next is attorney Stephanie Guyon's article on the Idaho Charitable Assets Protection Act. And last but certainly not least, the Professionalism & Ethics Section with the former Concordia University School of Law congratulate Newal Squyres on receiving the 2020 Richard C. Fields Civility Award.

We hope you enjoy these articles and are proactive in preparing for the end of the year!

Best,



Lindsey M. Welfley  
Communications Director

Idaho State Bar & Idaho Law Foundation, Inc.

## the ADVOCATE

OCTOBER 2020

### EXECUTIVE DIRECTOR

Diane K. Minnich

### EDITORIAL ADVISORY BOARD

Brian P. Kane, Chairperson

Chynna K. Castoro

Tenielle Fordyce-Ruff

Jessica A. Harrison

Spencer W. Holm

Lea Livingston Kear

J. Andrew Law

Kelsey A. Manweiler

Elizabeth L. Mathieu

Kenneth C. Shumard

Erin E. Tomlin

Michelle Vos

Zachary S. Zollinger

### BOARD OF COMMISSIONERS

Donald F. Carey, President

Kurt D. Holzer, Commissioner

Anne-Marie Fulfer, Commissioner

Laird B. Stone, Commissioner

Kristin Bjorkman Dunn, Commissioner

### ADVOCATE EDITORIAL STAFF

Lindsey M. Welfley

Communications Director

lwelfley@isb.idaho.gov

Bob Strauser

Senior Production Editor/  
Advertising Coordinator

bstrauser@isb.idaho.gov

Kyme Graziano

Member Services Assistant/  
LRS Coordinator

kgraziano@isb.idaho.gov

www.isb.idaho.gov

(208) 334-4500



Texas Sand Castle Contest Winner, 2020.

## The Right to Vote: Is It a Privilege or An Obligation

Donald F. Carey  
Idaho State Bar President  
Sixth and Seventh Districts

Some years ago, I was a sailor on a nuclear submarine. On one long control room watch, while underway, I was engaged in a conversation with a ship mate concerning politics. The discussion concerned the lack of political awareness of our electorate. My friend made a bet. After our watch concluded we would go to the crew's mess for a meal, and while there he would ask other shipmates who the Vice President of the United States was.

He suggested that half of those asked would not know the correct answer. Now mind you, the VP is second in succession as Commander in Chief. You would think people in the military would know the correct answer. I lost the bet! Eight of the 10 asked did not know the correct answer. I was appalled. How is it possible that anyone would not know who the VP is at any

given moment? Good thing we did not ask who was the Speaker of the House, or the majority leader of the Senate.

I have always been a political news junkie. Even as a young child. I have a present sense recollection of President Kennedy's assassination and that of Martin Luther King, Jr., and other major political events that have occurred over the past 50+ years. It amazes me that many who are given this right to vote fail to exercise their franchise. Many embrace a cavalier attitude that it does not matter, that all politicians are corrupt and dishonorable, so why bother? When I hear someone make these types of statements, I think that they have lost hope and have surrendered their opportunity to participate in government by the people.

The voting statistics collected over the years demonstrate that general election turnout is slightly higher nationally than

is the turnout for the midterm elections. Still, the turnout of general elections is rarely over 60% of the electorate. Local and state election voter turnouts are dismal, which is unfortunate. Local elections often affect our lives more immediately than other elections, yet we ignore the opportunity to weigh in on the discussion. City Council elections, County Commissioner elections, and School Board elections affect taxes, street repairs, education of our children – yet those elections are largely ignored.

As lawyers, I believe we have a heightened obligation to participate in government, including an obligation to be informed and to vote. The authority for that position is found in our oath of office. The opening statement of the oath states that we will defend the Constitution of the United States and the Constitution of the State of Idaho. It is unclear to me how we

“We have been gifted the privilege of living in this country. We enjoy the opportunities and freedoms it provides.”

can honor our oath and at the same time disengage from the political discourse.

If this November you find yourself thinking “why bother?”, let me encourage you to reconsider your position, gently of course. I know, without a doubt that votes matter and elections have consequences. We have been gifted the privilege of living

in this country. We enjoy the opportunities and freedoms it provides. We have been educated in the law and we have taken an oath. We should all be willing to engage in our body politic, if for no other reason than to cast a vote.

In many respects, we are the loyal opposition. We must do our job, individu-

ally, collectively, and respectfully. We the people are responsible for our government and for those we elect to do our business. It is our business to hold our leaders accountable for their actions in office. Our vote is but one tool available for that purpose. Let us not shirk our responsibility. Regards.



**Donald F. Carey** is a 1991 graduate of the University of Wyoming College of Law. He is a founding partner in the Idaho Falls-based law firm of Carey Romankiw. He is a certified mediator. His practice includes general litigation and alternative dispute resolution. When he is not in the office you may find him running ridiculous distances in the mountains of eastern Idaho and western Wyoming.

# THANK YOU!

October 25-31 marks Pro-Bono Attorney Appreciation Week! During our last fiscal year **101 attorneys** volunteered with the 4th Judicial District CASA Program/Family Advocates, giving their time (**3,115 hours**), compassion and legal skills. The generosity of these attorneys allowed **183 volunteer Guardians ad Litem** to receive legal representation when advocating for the best interests of **455 children** in active child protection cases.

The 4th Judicial District CASA Program/Family Advocates is incredibly grateful to all of the pro-bono attorneys who worked with us and our Guardians ad Litem this year. In honor of Pro-Bono Attorney Appreciation Week, we want to acknowledge and thank our active pro-bono attorneys who served on a case during our last fiscal year:

Tyler Anderson  
Tom Arkoosh  
Shannon Atwell  
Kevin Beaton  
Sara Berry  
Richard Boardman  
Stephanie Bonney  
Sean M. Breen  
Landon Brown  
Sarah Brown  
Taylor Bruun  
Heidi Burgoyne  
Clinton Casey  
Aaron Chandler  
Lane Chitwood  
Stephanie Christensen  
Shelly Cozakos  
Nick Crawford  
Rochelle (Shelly) Davis  
Jennifer Dempsey  
Bradley Dixon

Amber Dresslar (Goeden)  
Michael Elia  
Joshua Evett  
William Fletcher  
Alyson Foster  
Taylor Fouser  
Grace Witsil  
Alexander Grad  
Alexandra Grande  
Debora Grasham  
Donald (Don) Gray  
Brady Hall  
Lori Hickman  
Darcy Hoellwarth  
Kevin Hogle  
Abby Hoskisson  
Alison Hunter  
Kelsey Jae  
Ryan Janis  
Russell Johnson  
Kersti Kennedy

Steven Kraft  
Scott Learned  
Elaine Lee  
Dominic Lovotti  
Aubrey Lyon  
Julie Manning  
Ashley Marelius  
James (Jim) Martin  
Shannon McCarthy  
Abigail McCleery  
Matthew McColl  
Christopher McCurdy  
Neil McFeeley  
Melodie McQuade  
Craig Meadows  
Loren Messerly  
Tara Miller  
William Miller  
Molly Mitchell  
Jolly Montealeone  
Michael Wallace Moore

Christina Mott Hesse  
Mindy Muller-Willman  
Kirtlan Naylor  
Lisa D. Nordstrom  
Mary (Molly) O'Leary  
Kris Ormseth  
James Page  
Matthew Parks  
David Penny  
Mark D. Perison  
Mark Peterson  
Reid Peterson  
Terri Pickens-Manweiler  
Joseph Pirtle  
Michelle Points  
Chelsea Porter  
Philip (Rich) Rayhill  
Jack Relf  
Michael Rose  
Eric Rossman  
Christine Salmi

Steven Scanlin  
Sheila Schwager  
Benjamin Schwartzman  
Christopher Sherman  
Cathy Silak  
Karen Silva  
Newal Squyres  
Michael Stoddard  
Stephanie Stout  
Meghan Sullivan-Conrad  
Jennifer Swajkoski  
Robert Talboy  
Stanley Tharp  
Logan Elizabeth Weis  
Tyler Williams  
Wade Woodard  
Sean Wynn



Will you make a difference in the life of a child? For more information about how you can get involved contact us at [volunteer@familyadvocates.org](mailto:volunteer@familyadvocates.org)



## MCLE Compliance

The Idaho Mandatory Continuing Legal Education (MCLE) Rules are Section IV, Rules 400-408 of the Idaho State Bar Commission Rules (ICBR). The rules were rescinded and replaced effective May 2, 2014.

Rule 402 states:

Active and House Counsel Members shall complete a minimum of thirty (30) credit hours of Accredited Activity in every three (3) year reporting period.

Beginning with reporting periods ending on December 31, 2017 and thereafter, attorneys must complete least three (3) MCLE credits on legal ethics or professional responsibility, as approved by the Board or its designee. Such courses may include discussion of the Idaho Rules of Professional Conduct, professionalism and civility, client trust account administration and legal malpractice prevention. [Attorneys whose current reporting period ends prior to December 31, 2017 must complete two (2) MCLE ethics credits during their reporting period.]

## 2020 MCLE Compliance

Maureen Ryan Braley  
Associate Director, Idaho State Bar

You have put away your sandals and bathing suits and pulled out your sweaters and jackets. You are grilling less and using the oven more. Pumpkin spice-flavored items are showing up on the counters. Leaves are changing from green to yellow and orange. Fall is in the air! And for the 1,717 Idaho attorneys due to report Mandatory Continuing Legal Education compliance at the end of 2020, this means you have only a few months left to complete your CLE credits!

Idaho lawyers must complete 30.0 CLE credits every three years, including 3.0 Ethics credits. Of the 30.0 CLE credits, at least 15.0 credits must be “live.” Fortunately, live webcasts and live teleconferences qualify for live CLE credit! You do not need to attend an in-person event to complete your live CLE credit requirement. Search for upcoming live courses on our website by looking for notices such as “Online-Live,” “Live

“Fortunately, live webcasts and live teleconferences qualify for live CLE credit!”

Webcast,” or “Live Audio Streaming.”

You must complete your MCLE requirements by December 31, 2020. Or, you can pay the \$100 MCLE extension fee and have until March 1, 2021 to complete your CLEs. Check your CLE attendance records on our website, [isb.idaho.gov](http://isb.idaho.gov), by navigating to Licensing & MCLE -> MCLE Information -> MCLE Attendance. Questions regarding MCLE compliance can be sent to [mcle@isb.idaho.gov](mailto:mcle@isb.idaho.gov).



**Maureen Ryan Braley** is the Associate Director of the Idaho State Bar. She oversees Admissions and Mandatory Continuing Legal Education and assists with the general administration of the Idaho State Bar. She was the Director of Admissions of the Idaho State Bar from 2011 – 2019 and was promoted to Associate Director in February 2019.



**DUKE EVETT**  
ATTORNEYS AT LAW



## TRIAL TESTED

Keely Duke and Josh Evett are excited to announce the formation of their new firm.

Both partners are recognized as highly skilled, tenacious defenders of Idaho's medical, business, and insured community. Keely and Josh have joined forces to create Idaho's premier trial team.

1087 W. RIVER ST.  
SUITE 300  
BOISE, ID 83702  
208 342.3310

[WWW.DUKEEVETT.COM](http://WWW.DUKEEVETT.COM)

### **LEILA L. HALE (Public Reprimand)**

The Professional Conduct Board has issued a Public Reprimand to Nevada lawyer, Leila L. Hale, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding. On January 28, 2020, the State Bar of Nevada, Southern Nevada Disciplinary Board, issued a Public Reprimand to Ms. Hale for violating Nevada Rules of Professional Conduct 1.5 [Fees] and 5.3 [Responsibilities Regarding Non-Lawyer Assistants]. Those Nevada Rules of Professional Conduct correspond to those same Idaho Rules of Professional Conduct. The Public Reprimand relates to the following facts and circumstances.

Pursuant to an office policy, Ms. Hale

sent a non-attorney employee to conduct home visits to two personal injury clients. During those visits, the firm employee presented the potential clients with retainer agreements and various other legal documents. The firm employee read through those documents with the clients and advised one of the clients about potential attorney's liens that may be filed by her already retained counsel if she were to switch counsel. The Nevada Board found those home visits constituted the unauthorized practice of law and that Ms. Hale violated her responsibilities under Nevada Rule of Professional Conduct 5.3 regarding supervising non-lawyer assistants.

In addition, the retainer agreements presented to those clients provided that in the event of withdrawal by Hale Law or early discharge of Hale Law, the client would be responsible for, at minimum, a combined firm rate of \$1,000 per hour

for all attorney and staff time. The Nevada Board found such an agreement was an unreasonable fee and violated Nevada Rule of Professional Conduct 1.5.

The Public Reprimand does not limit Ms. Hale'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.

### **JAMES M. McMILLAN (Interim Suspension)**

On August 24, 2020, the Idaho Supreme Court issued an Order Granting Petition for Interim Suspension of License to Practice Law of Wallace attorney James M. McMillan.

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

## RITTI DISPUTE RESOLUTION PLLC



Gene Ritti has over three decades of commercial litigation experience in private practice and as in-house counsel.

His firm is limited exclusively to ADR services.

[www.rittidisputeresolution.com](http://www.rittidisputeresolution.com)

[ritti@rittidisputeresolution.com](mailto:ritti@rittidisputeresolution.com)

208.484.2851

# Effective, Pragmatic Dispute Resolution

Mediation | Arbitration | Special Masters



**Walt Bithell**  
Bithell Law PLLC  
walter@bithelllaw.com  
(208) 336-4440



**Deborah Ferguson**  
Ferguson Durham, PLLC  
daf@fergusondurham.com  
(208) 345-5183



**David Lombardi**  
Givens Pursley, LLP  
drl@givenspursley.com  
(208) 388-1200



**John Zarian**  
NCCCO  
jnzarian@gmail.com  
(208) 871-6798

**W**ith over 150 years of combined legal experience, our panel of well qualified neutrals brings insight and creativity to the most complex disputes. Offering a choice of credible, respected neutrals—individually or as a team—Idaho Mediation Group brings resolution in a timely, unbiased manner.



idahomediationgroup.com

*IMG, Independent professionals working cooperatively as a panel of highly qualified neutrals*



## Musings of a Water Nerd: Recent Water Legislation

*Paul L. Arrington*

Like many areas of the law, Idaho's water law continues to evolve as issues arise and disputes are settled. In recent years, Idaho's Legislature passed several pieces of legislation affecting Idaho's water code. Many of these amendments are fodder for water cooler conversations amongst water law nerds, like myself!<sup>1</sup> However, there are several bills that warrant some level of understanding regardless of your practice area. The following covers six pieces of legislation enacted during the 2018, 2019, and 2020 legislative sessions.

### **Water delivery and local planning**

There has long been a tension between land development and water delivery rights of way for canals, laterals, drains, etc. Historically, these facilities ran

through farms and along roads delivering water to Idaho's thriving agricultural communities. Yet, as more and more of these farms are developed, these facilities now cross through or near neighborhoods, shopping centers, parks, and schools.

Unfortunately, historically Idaho's irrigation delivery entities have not been involved in the land use planning and approval processes with local communities. At times, this has resulted in development that impedes the ability to deliver water safely and efficiently. Further, disputes regularly arise as landowners and developers work to understand the rights and obligations associated within these rights of way.

Senate Bill 1306a (2018)<sup>2</sup> amended Idaho Code § 67-5919, by adding a new subpart (4) to provide notice of "a proposed subdivision or any other site-specific land development application" to local irrigation water delivery organizations. To

receive notice, the irrigation water delivery organization must notify the city and/or county. By including the irrigation organizations in the planning process, all parties – including developers, communities, and those receiving water – can work to ensure that development does not interfere with safe and efficient water delivery.

### **Investing in Idaho's water future**

In general, Idaho does a great job managing its water resources. Throughout its history, Idaho's water users have worked hard to develop available water supplies for various uses. Although Idaho has seen its share of water shortages, particularly during those hot, dry summer months, it still fares much better than many other western states. And yet, as we look to the future, more water is needed. Studies indicate that in the Treasure Valley

(Ada and Canyon Counties) as much as 188,000 acre-feet of additional water will be needed by 2065.<sup>3</sup> That's over 61 billion additional gallons of water (1 acre-foot = 325,851 gallons)! In other areas of the State, like Mountain Home<sup>4</sup> and Moscow,<sup>5</sup> declining aquifers may require alternate sources of water.

In 2019, Idaho's Legislature passed House Bill 285,<sup>6</sup> which appropriated \$20 million for large water infrastructure projects. This money could be used, for ex-

agreement to restore aquifer levels and river flows. The agreement requires sacrifice. Mitigation plans have been approved to outline recharge efforts and reductions in water use. Over the years, significant money has been spent to ensure success.<sup>7</sup> Modeling shows that, through these sacrifices, aquifer levels can be restored, stream flows can increase, and all will benefit. To be successful, however, all stakeholders must participate.

In 2019, Idaho's legislature amended

tion, fences, etc. Idaho law has long recognized and protected the right of operating entities to remove encroachments on their rights of way. Whether it be fences, buildings, or vegetation, if it encroaches on the right of way it is subject to removal at the landowner's expense.

Although the right to remove trees, bushes, and other vegetation from a right of way has long been recognized by Idaho's courts, it has not been included in the Idaho Code. Senate Bill 1086 (2019)<sup>10</sup> amended several provisions of the Idaho Code to codify the long-standing right of operating entities to remove vegetation from rights of way.

---

“An adjudication benefits all water users, whether they be agricultural, commercial, municipal, or otherwise.”

---

### **Bear River Adjudication**

Idaho is a leader in water right adjudications. Over the last 30+ years, Idaho's Snake River Basin Adjudication (SRBA) has worked to catalogue and decree water rights through Idaho's Snake River Basin (comprising much of the State) as well as the Coeur d'Alene-Spokane River, Palouse River, and Clark Fork-Pend Oreille River Basins in North Idaho. An adjudication benefits all water users, whether they be agricultural, commercial, municipal, or otherwise. Prior to 2020, there were only two basins in Idaho that did not yet have legislative approval for an adjudication – the Kootenai River Basin in Idaho's panhandle and the Bear River Basin in Southeast Idaho.

House Bill 382<sup>11</sup> authorized an adjudication of the Bear River Basin. Expected to commence in the coming years, this adjudication will allow the Basin's water users to obtain decrees and confirm their valuable water rights.

### **Addressing water needs of Idaho's municipalities**

Idaho's water code dates to the infancy of the Gem State. At times, provisions in the code appear to conflict with each other and create confusion among practitioners. Such is the case with the statutes involving a municipality's ability to develop water rights. The general rule for water right development is that an applicant must construct any diversion infrastructure and begin using that water within five years in order to obtain a new water right. This

ample, to offset the cost of raising Anderson Ranch Dam on the South Fork of the Boise River – a project that would provide up to 29,000 additional acre-feet of water. Or, it could be used to construct a pump house and pipeline to deliver water from the Snake River to the Mountain Home Air Force Base to shore up its future water supplies.

There are many ways to spend this money to ensure Idaho's water future is bright. More money (much more) will be needed to continue this process. These appropriated funds are a great start and demonstrate the Legislature's ongoing commitment to ensuring that Idaho's water supplies meet the demands of its citizens.

### **Ensuring the success of a monumental water settlement**

Water users have worked hard over the years to resolve disputes involving the administration of Idaho's water supplies. In 2015, surface and ground water users along Idaho's Eastern Snake River Plain entered into a monumental settlement

several code sections to help ensure that all water users are working together. Senate Bill 1041<sup>8</sup> provides ground water districts with the authority to levy special assessments to ground water users who refuse to comply with approved mitigation plans. Senate Bill 1056a<sup>9</sup> provides the Director of the Idaho Department of Water Resources (IDWR) with the authority to curtail (*i.e.*, shut off) water users that have failed to comply with their mitigation plan obligations. These provisions provide the necessary enforcement authority to ensure that all participate in the success contemplated by the settlement agreement.

### **Removing vegetation from canals, laterals, and drains**

Water delivery facilities, such as canals, laterals, and drains, crisscross the Idaho landscape. To ensure the effective, efficient, and safe delivery of water, the operating entities must have access to the facilities. Access is gained via roadways that run along either side of the facilities. These facilities and their associated roadways must be clear of buildings, vegeta-

“development period” ensures that Idaho’s water resources are developed in a timely manner.

Idaho’s water law has long recognized, however, that municipalities do not plan in five-year increments. Rather, municipal planning horizons regularly extend 10, 15, even 25 years as planners anticipate future growth and infrastructure needs. Municipal water rights, therefore, could seek sufficient water to meet “Reasonably Anticipated Future Needs” (or “RAFN”) based on those planning efforts.

Although the law allows municipalities to look many years into the future when seeking new water rights, it still required that any infrastructure associated with that new water user be constructed within five years. This proved to be an ineffective and inefficient process. Many circumstances can change over a municipality’s planning horizon.

For example, water use habits may change as water efficiencies are increased, resulting in a need for less water or different infrastructure. Likewise, population growth forecasts may prove wrong, again impacting water and infrastructure needs.

Senate Bill 1316<sup>12</sup> amends these statutes to align the code with the realities of the RAFN development process by extending the timeframe for constructing infrastructure and diverting water to align with the municipality’s planning horizon. This will significantly reduce the risk of

overdevelopment of water and infrastructure.

Idaho is fortunate to have a legislature that recognizes the value of water to the state. The Legislature’s focus on water law over the last few sessions has improved the water code and ensured that Idaho’s water resources continue to be protected. These changes to the Idaho Code will help Idaho and Idahoans manage water rights better, both now and into the future.

And there you have it! Six pieces of water legislation. If you made it to the end, then perhaps you too are a water nerd.



**Paul L. Arrington** is Executive Director and General Counsel for the Idaho Water Users Association. Arrington graduated from Boise State University in 2002.

He then graduated in 2005 from Gonzaga University School of Law and joined Barker Rosholt & Simpson LLP later that year, where his law practice focused largely on water and natural resource issues in Idaho and throughout the United States. In May 2017, Arrington took over as the IWUA director.

When not working, Mr. Arrington enjoys spending time with his wife, Michelle, and their four children. He enjoys running and cycling to clear his mind.

## Endnotes

1. For an example of legislation that digs into the minutia of Idaho’s water code, check out Senate Bill 1289 (2020). <https://legislature.idaho.gov/sessioninfo/2020/legislation/S1289/>.
2. <https://legislature.idaho.gov/sessioninfo/2018/legislation/S1306/>.
3. Treasure Valley DCMI Water-Demand Projections (2015 – 2065) – SPF Water Engineering, 2016 (Terry Scanlan & Christian Petrich). <https://idwr.idaho.gov/files/publications/20160808-OFR-Treasure-Valley-Water-Demand-2015-2065.pdf>.
4. See Elmore County Water Supply Alternatives Study – SPF Water Engineering, 2017 (Terry Scanlan). Ground water levels in Elmore County have declined 100–200 feet since the 1960’s. In some areas, the current decline is 5 feet per year, with an annual pumping deficit of 43,000 acre-feet per year.
5. The Palouse Aquifer will see increased demand of nearly 5,000 acre-feet per year by 2065. Over 2,200 acre-feet of additional water is needed per year to stabilize that aquifer.
6. <https://legislature.idaho.gov/sessioninfo/2019/legislation/H0285/>.
7. Importantly, these efforts are working! Since 2015, the volume of water stored in the Eastern Snake Plain Aquifer has increased by 2.2 million acre-feet or 717 billion gallons of water. While this is great news, water users recognize they must remain vigilant to accomplish the ultimate goals of the settlement agreement.
8. S1041 amended Idaho Code §§ 42-5232 & 42-5241. <https://legislature.idaho.gov/sessioninfo/2019/legislation/S1041/>.
9. S1056a added new Idaho Code §§ 42-5244A & 42-5244B. <https://legislature.idaho.gov/sessioninfo/2019/legislation/S1056/>.
10. S1086 amended Idaho Code §§ 42-1102, 42-1204 & 42-1209. <https://legislature.idaho.gov/sessioninfo/2019/legislation/S1086/>.
11. <https://legislature.idaho.gov/sessioninfo/2020/legislation/H0382/>.
12. <https://legislature.idaho.gov/sessioninfo/2020/legislation/S1316/>.

# Have legal issues in Montana?

WE CAN HELP WITH ANCILLARY PROBATE, REAL ESTATE TRANSFERS, REMOTE ONLINE NOTARIZATION, AND SPECIALIZED SERVICES IN TAX, ESTATE PLANNING, AND BUSINESS LAW

**SILVERMAN  
LAW OFFICE**

Helena (406) 449-4829  
Bozeman (406) 582-8822  
[www.mttaxlaw.com](http://www.mttaxlaw.com)

**We'll work with you as part of your TEAM!**



# Sheltered in Wyoming

Why Wyoming? It's one of the most favored states in the U.S.  
– and increasingly, in the world – in which to maintain trusts.



- **Broad Asset Protection**
- **Self-Settled Trusts**
- **1000 Year Legacy Trusts**
- **No State Income or Inheritance Taxes**
- **No Residency Requirement with a Wyoming Trustee**

## Your Trusted Partner in the State of Wyoming

We're Right Next Door. Your Clients Will Love Having Their Money Here!



**Dale Schuman**

SVP – DIRECTOR OF TRUST & WEALTH

10 E. Pearl Ave. Jackson, WY 83002  
(307) 732-3057 (307) 732-3071  
dschuman@bojh.com

[bojhtrust.com/advisors](http://bojhtrust.com/advisors)

Offices in Jackson Hole and Boise

NOT FDIC INSURED	MAY LOSE VALUE NO BANK GUARANTEE
---------------------	-------------------------------------



## Water Rights Adjudications in Idaho Have Statewide Impacts

Meghan M. Carter  
Jennifer R. Wendel

In 528 AD, the Roman Emperor Justinian issued the edict, “By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea.” With these words, Justinian codified the modern-day public trust doctrine, and began an era of public management of natural resources. Though Justinian’s Rome was marred by drought, earthquakes, and a pandemic, it survived where other civilizations did not; Ancient Rome mastered water resource planning.

Idaho is facing all the same challenges and more, including population growth and weather variations caused by climate change. To safeguard its water resources, Idaho has become a leader in western water adjudications, taking stock of its water uses and planning for an uncertain future.

In the 1800’s, western states advanced

the idea of efficient use of water resources through the doctrine of “beneficial use.” The “prior appropriation” doctrine holds that the first person to put water to a beneficial use has the first right to that water. With limited water resources available, water is allocated by priority date, or the date the water right was established, until there is no water left to distribute. States eventually codified the prior appropriation and beneficial use doctrines. Idaho created a mandatory permit structure for groundwater rights in 1963<sup>1</sup> and surface water rights in 1971.<sup>2</sup>

An adjudication is a snapshot of all water rights existing in a particular area on one date and incorporates both the beneficial use rights and the statutory rights. In a general stream adjudication, one type of adjudication, all water rights established under beneficial use or the permit statutes must be claimed and the

federal government is required to waive its sovereign immunity under the McCarran Amendment and claim its water uses through state courts.<sup>3</sup> Without a general stream adjudication, the rights established through beneficial use are not recorded and administration of water rights in priority is impossible. When all water uses are accounted for, the state is better able to manage its water resources.

The Idaho Water Adjudications Court, part of the Fifth Judicial District Court that specializes in water right adjudications, presides over all of the general stream adjudications in Idaho.<sup>4</sup> The Idaho Department of Water Resources (IDWR) acts as a neutral technical advisor to the court. IDWR investigates adjudication claims and issues Director’s Reports, or recommendations with all of the essential elements of a water right, to the court. The court hears objections from claim-

ants, and ultimately issues partial decrees documenting the water right. When an adjudication is closed, the court issues a Final Unified Decree, incorporating all of the partial decrees.

As of the summer of 2020, Idaho has general stream adjudications completed, ongoing, or pending in almost every basin in the state. When Idaho can take full stock of its water use, it will be in the best position to manage and maintain its water resources.

---

“As of the summer of 2020, Idaho has general stream adjudications completed, ongoing, or pending in almost every basin in the state.”

---

## Snake River Basin Adjudication

The Snake River Basin Adjudication (SRBA) commenced on November 19, 1987 and closed on August 25, 2014.<sup>5</sup> With over 158,000 claims, the SRBA was one of the largest legal cases in U.S. history, and its historic closing was marked by a visit from the late Supreme Court Justice Antonin Scalia.<sup>6</sup> The SRBA Court, the term for the Water Adjudications Court when it works through SRBA claims, retains jurisdiction over *de minimis* domestic and stockwater rights<sup>7</sup> and a few unresolved cases.<sup>8</sup> Filing of deferred *de minimis* rights continues in the SRBA and as of July 7, 2020, 36 deferred *de minimis* water rights await decree.

The remaining unresolved cases involved an issue called “refill” which took eight years to fully litigate, finishing in 2020. Many federally owned reservoirs in the SRBA are operated for both flood control and irrigation storage.<sup>9</sup> Operating a reservoir for flood control necessitates the release of water during the spring to make space in the reservoir for spring runoff. It

became a hotly contested issue whether or not flood control releases could be replaced in the reservoirs under priority. Essentially, could the reservoir be “refilled” before junior water rights were satisfied?

After the majority of irrigation storage rights were decreed, the State of Idaho filed a *Motion for Partial Summary Judgment* regarding irrigation storage rights in American Falls and Palisades reservoirs.<sup>10</sup> The motion sought to have the listed water rights decreed with a remark that would

prevent refill from retaining the same senior priority as the main reservoir water rights.

Concerned that such a remark would affect all flood control and irrigation storage reservoirs, several irrigation districts petitioned the Court to designate a Basin-Wide Issue (BWI).<sup>11</sup>

The SRBA Court designated “Does Idaho law require a remark authorizing storage rights to ‘refill,’ under priority, space vacated for flood control?” as BWI-17.<sup>12</sup> The SRBA Court held that “a senior storage water right holder may not refill his storage water right under priority before junior appropriators satisfy their water rights once.”<sup>13</sup> The Idaho Supreme Court, in a decision issued weeks before the SRBA Final Unified Decree was signed, held the SRBA Court abused its discretion in designating BWI-17 and found that issues with IDWR’s accounting method should be addressed by IDWR pursuant to the Administrative Procedures Act.<sup>14</sup>

Meanwhile, Reclamation filed late claims for separate storage rights to protect its ability to refill storage water rights

vacated for flood control.<sup>15</sup> The claims were for reservoirs in the Upper Snake River Basin, Little Wood River Basin, Payette River Basin, and Boise River Basin. Each of the river basins had different outcomes.

Once BWI-17 was resolved, and after settlement discussions, the parties in the Upper Snake River Basin petitioned the SRBA Court to decree water rights pursuant to a stipulated settlement.<sup>16</sup> Later the parties began negotiations to resolve when the annual volume of water authorized under the water rights “resets” to zero for accounting purposes. The Director of IDWR initiated a contested case proceeding on the reset issue,<sup>17</sup> and in April 2019, the parties entered into a stipulation specifying the reset date within the Upper Snake River Basin as September 15.<sup>18</sup>

The parties moved the SRBA Court to modify the relevant partial decrees to add a remark specifying the reset date. The SRBA Court granted the motion and issued amended partial decrees on February 28, 2020.<sup>19</sup> Subsequently, the Director dismissed the contested case proceeding.<sup>20</sup>

The parties to the Little Wood River Basin cases entered into a stipulated settlement in 2015.<sup>21</sup> The stipulation split Reclamation’s late claim in two: the largest right was subordinated to all existing and future water rights within the Little Wood River Basin,<sup>22</sup> and the smaller right requires the Little Wood River Irrigation District to inform the watermaster of the calendar date it intends to store water under the water right.<sup>23</sup>

The Payette River Basin was adjudicated in the Payette Adjudication, so claims in the SRBA that were not made in the Payette were barred by *res judicata*.<sup>24</sup> Reclamation’s refill late claims in the Payette River Basin were not claimed in the Payette Adjudication.<sup>25</sup> Based on this fact, IDWR recommended the claims be disallowed<sup>26</sup> and the State filed a motion for summary judgment asking the court to disallow the claims.<sup>27</sup> The SRBA Court granted the State’s motion<sup>28</sup> and the Idaho Supreme Court affirmed the SRBA Court.<sup>29</sup>

The refill litigation in the Boise River Basin was the subject of “significant, complex litigation.”<sup>30</sup> The path to settlement involved the SRBA Court, IDWR admin-

istrative proceedings, an Idaho Supreme Court appeal, and legislation.<sup>31</sup> Reclamation's original late claims were disallowed<sup>32</sup> and two different water rights were decreed. The larger of the two water rights, with the earlier priority date, was subordinated to all water rights in IDWR Administrative Basin 63<sup>33</sup>, except water rights to store more than 1,000 acre feet, managed groundwater recharge after April 15, 2019, or power.<sup>34</sup> The smaller junior right requires Reclamation to inform the watermaster of the date it intends to store water pursuant to the right.<sup>35</sup>

With the refill issue resolved, irrigators and Reclamation have certainty in how water rights interact with flood control releases.

## Northern Idaho Adjudication

The Northern Idaho Adjudication (NIA) is the current, ongoing adjudication in Idaho. The NIA is made up of three individual adjudications: the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA), the Palouse River Basin Adjudication (PRBA), and the Clark Fork-Pend Oreille River Basin Adjudication (CFPRBA).

The CSRBA commenced on November 12, 2008, and currently encompasses over 12,000 state based claims in basins 91 through 95.<sup>36</sup> Claims in basins 91 through 94 have all been resolved, and IDWR and the Court are currently working through Basin 95 which was split into Part 1 and Part 2. There remain just over 40 contested state based water rights in Part 1 and just over 30 contested cases in Part 2.

Federal reserved water rights, including rights of federally recognized Indian tribes, must be adjudicated in a general stream adjudication. In the CSRBA, the Coeur d'Alene Tribe filed 353 water rights claims. When evaluating Tribal federal reserved claims, a court must first determine what water use a Tribe is entitled to, determined by the purpose of the reservation and the treaty between the Tribe and the United States. Secondly, the court must quantify the amount of water allotted to those uses.

The Idaho Supreme Court determined that the Coeur d'Alene Tribe had reserved water rights for agriculture, fishing and hunting, domestic purposes, and instream

flows on the Reservation.<sup>37</sup> The Court also established the priority dates of these uses: 1) for non-consumptive uses, time immemorial and 2) for consumptive uses, the date-of-Reservation, or the date of reacquisition by the Tribe if the land was previously allotted to a non-Indian owner. Currently the parties are working with IDWR and the CSRBA Court to prepare for the quantification phase of the litigation. This second phase will take a significant amount of time and current quantification phase deadlines with the CSRBA Court extend through 2024.

The PRBA commenced on March 1, 2017 to adjudicate basin 87 covering the Palouse River which flows into Washington north of Moscow. The deadline to file a claim in the PRBA was August 31, 2020. To date, IDWR has received over 1,900 claims. Once IDWR completes claims review, it will issue Director's Reports, or recommendations, for the claims to the PRBA Court.

The CFPRBA will adjudicate basins 96 and 97 around Lake Pend Oreille and Priest Lake. The Idaho Legislature authorized all three NIA adjudications under one bill, but required each adjudication to seek funding at the time of commencement. The Idaho Legislature funded the CFPRBA in July of 2020. IDWR will submit the commencement petition to the court this fall.

## Bear River Basin Adjudication

On March 9, 2020, Governor Little signed House Bill 382 into law, authorizing IDWR to commence the Bear River Basin Adjudication (BRBA). House Bill 382 did not appropriate funding for the adjudication. IDWR will file the commencement petition with the court by the end of 2020 and will subsequently seek funding from the legislature to commence the BRBA.

## Instream stockwater rights on federal grazing allotments

Instream stockwater claims based on federal grazing allotments appear in every adjudication in the state and are undergoing major changes in the wake of an Idaho Supreme Court decision and recent legislation. Federal grazing allotments offer

low cost, subsidized permits for livestock grazing on public, federal land – land that is held in trust for the citizens of the United States. The cattle grazing on the land are owned by private individuals. Which party owns the instream stockwater rights?

In *Joyce Livestock Co. v. U.S.* both Joyce Livestock Company and the United States Bureau of Land Management (BLM) claimed the same instream stockwater rights.<sup>38</sup> The Idaho Supreme Court found that the determining question is: who put the water to beneficial use? The court determined that the predecessors to Joyce Livestock Company established a beneficial use water right by grazing cattle on public land.

Though BLM issued the grazing permit and held the land in trust, BLM did not establish a stockwater water right because it did not own the cattle grazing on the lands.<sup>39</sup> The court stated, “[u]nder Idaho law, a landowner does not own a water right obtained by an appropriator using the land with the landowner's permission unless the appropriator was acting as agent of the owner in obtaining that water right.”<sup>40</sup>

*Joyce Livestock* was decided in 2007, 20 years after the SRBA commenced. By 2007, the SRBA court had already decreed the United States thousands of instream stockwater water rights across Idaho. Because those decrees were final, those decrees remain in effect. In response to *Joyce Livestock*, the Idaho Legislature enacted legislation to spur the forfeiture of *de minimis* stockwater water rights held by the United States and others who do not own livestock.

On March 27, 2018, Governor Little signed House Bill 718 into law, which amended Idaho Code § 42-501, and stated that “...in order to comply with the *Joyce* decision, it is the intent of the Legislature that stockwater rights acquired in a manner contrary to the *Joyce* decision are subject to forfeiture.”<sup>41</sup> On March 24, 2020, Governor Little signed House Bill 592 into law, further amending Idaho Code § 42-501 to provide a process for the Director of IDWR to declare *de minimis* stockwater water rights not put to beneficial use for a term of five years or more as forfeited.

To date, no instream stockwater rights held by the United States on federal graz-

ing allotments have been declared forfeited through the statutory process.

## Conclusion

Idaho is making great strides in cataloging all of its water rights. Once all water rights have been adjudicated, the state will have a full picture of water use throughout Idaho. This picture will be key in planning for future water use, administering water rights, and resolving water related conflicts.



**Meghan M. Carter is a Deputy Attorney General representing the Idaho Dept. of Water Resources. She has been in that position for seven years. The views expressed in this article are**

**that of the author's only and do not reflect those of the Attorney General's Office or the Idaho Dept. of Water Resources.**



**Jennifer R. Wendel is a Deputy Attorney General representing the Idaho Dept. of Water Resources.**

## Endnotes

1. Idaho Code § 42-229 (methods of appropriation).
2. Idaho Code § 42-103 (right acquired by appropriation).
3. Idaho Code § 42-1405 (general adjudication); § 42-1409 (notice of a claim); 43 U.S.C. § 666 (McCarran Amendment).
4. Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin, *In re SRBA Case No. 39576* at 1–2 (Jun. 26, 1987).
5. Final Unified Decree, *In re SRBA Case No. 39576* (Aug. 25, 2014).
6. See [https://www.idahostatejournal.com/news/local/justice-scalia-talks-at-water-rights-event-in-boise-celebration-marks-completion-of-most-snake/article\\_c9d8e024-2dbd-11e4-9244-001a4bcf887a.html](https://www.idahostatejournal.com/news/local/justice-scalia-talks-at-water-rights-event-in-boise-celebration-marks-completion-of-most-snake/article_c9d8e024-2dbd-11e4-9244-001a4bcf887a.html) (last accessed Sept. 2, 2020).
7. Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, *In re SRBA Case No. 39576* (June 28, 2012).
8. Subcase Nos. 01-00219 et al., Order Regarding Subcases Pending Upon Entry of Final Unified Decree, *In re SRBA Case No. 39576* (August 26, 2014).
9. Ann Y. Vonde et al., Understanding the Snake River Basin Adjudication, 52 IDAHO L. REV. 53, 131 (2016).
10. Subcase Nos. 01-02064 et al. (American Falls Subcases), Subcase Nos. 01-02068 et al. (Palisades Subcases), State of Idaho's Motion for Partial Summary Judgment, *In re SRBA Case No. 39576* (January 25, 2012).
11. BWIs are issues that affect a large portion of the SRBA and not just a single administrative basin.
12. Basin-Wide Issue 17, Subcase No.: 00-91017, Order Designating Basin-Wide Issue, *In re SRBA Case No. 39576* (Sept. 21, 2012).
13. Basin-Wide Issue 17, Subcase No.: 00-91017, Memorandum Decision, *In re SRBA Case No. 39576* (March 20, 2013).
14. *In re SRBA*, 157 Idaho 385, 336 P.3d 792 (2014).
15. Subcase Nos.: 01-10620, 01-10621, 01-10622, 01-10623, 21-13161, 37-22806, 63-33732, 63-33733, 63-33734, 65-23531, and 65-23532, The United States Memorandum in Support of Standard Form 4 Motions to File Late Notices of Claim, *In re SRBA Case No. 39576* (January 13, 2013).
16. Subcase Nos. 01-219 et al. (Lake Walcott), Subcase Nos. 01-02064 et al. (American Falls), Subcase Nos. 01-02068 et al. (Palisades), Subcase Nos. 01-4055 et al. (Jackson Lake), Subcase Nos. 21-2156 et al. (Island Park), Subcase Nos. 21-4155 (Grassy Lake), Subcase Nos. 25-7004 (Ririe), Subcase Nos. 01-10614, 01-10615, 01-10616, 01-10617, 01-10618, Motion for Order Decreeing Water Rights, *In re SRBA Case No. 39576* (January 30, 2015).
17. IDWR Docket No. P-WRA-2017-002, Notice of Prehearing Conference; Order Setting Deadline for Petitions to Intervene (Oct. 5, 2017).
18. Order Granting Motion to Alter or Amend Partial Decrees, Order of Amended Partial Decree, *In re SRBA Case No. 39576* (Feb. 28, 2020).
19. *Id.*
20. IDWR Docket No. P-WRA-2017-002, Docket No. P-WRA-2017-003, Docket No. P-WRA-2017-004, Order Dismissing Petitions for Hearing (April 13, 2020).
21. Subcase Nos.: 37-2773, 37-2774, 37-2779, 37-2783, 37-22806 (Little Wood Reservoir), State of Idaho's Motion for Order Decreeing Water Rights, *In re SRBA Case No. 39576* (August 13, 2015).
22. Water Right no. 37-22806A.
23. Water Right no. 37-22806B.
24. Subcase Nos. 65-23531 and 65-23532, State of Idaho's Memorandum in Support of Motion for Summary Judgment, *In re SRBA Case No. 39576* (August 25, 2015). The Payette Adjudication was a general adjudication commenced in 1969 and consolidated into the SRBA in 2001.
25. *In re SRBA Case No. 39576* Subcase Nos. 65-23531 & 65-23532, 163 Idaho 144, 408 P.3d 899 (2018).
26. *Id.*
27. Subcase Nos. 65-23531 and 65-23532, State of Idaho's Memorandum in Support of Motion for Summary Judgment, *In re SRBA Case No. 39576* (August 25, 2015).
28. Subcase Nos. 65-23531 and 65-23532, Memorandum Decision and Order Granting in Part and Dismissing in Part State of Idaho's Motion for Summary Judgment, Order Vacating Trial, Special Master's Recommendation of Disallowance of Claims, *In re SRBA Case No. 39576* (Nov. 19, 2015).
29. *In re SRBA Case No. 39576* Subcase Nos. 65-23531 & 65-23532, 163 Idaho 144, 408 P.3d 899 (2018).
30. Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33734A, 63-33734B, 63-33737 and 63-33738, Order Denying Motions to Participate, *In re SRBA Case No. 39576* (July 8, 2019).
31. *Id.*; HB01, 2019 Legislature.
32. Subcase Nos. 63-33732, 63-33733, 63-33734, 63-33737 and 63-33738, Order Granting Motion to Disallow, Final Order Disallowing Water Right Claims, *In re SRBA Case No. 39576* (July 19, 2019).
33. IDWR has divided the state into over 50 administrative basins that closely track natural water basins.
34. Water Right Nos. 63-33734A
35. Water Right Nos. 63-33734B
36. See Commencement Order for the Coeur d'Alene-Spokane River Basin Adjudication, Case No. 49576 (Nov. 12, 2008).
37. *In re CSRBA Case No. 49576* Subcase No. 91-7755, 165 Idaho 517, 448 P.3d 322 (2019), reh'g denied (Nov. 4, 2019).
38. *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502, 505 (2007).
39. *Joyce Livestock Co.*, 144 Idaho at 17, 156 P.3d at 518 (2007).
40. *Id.*
41. See <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/H0718.pdf>.

**BUTLER SPINK**  
ATTORNEYS AT LAW

**MICHAEL T. SPINK**

208.761.5064

[mospink@butlerspink.com](mailto:mospink@butlerspink.com)

PRACTICE LIMITED TO MEDIATION/ADR

**Real Estate - Construction - Business/Contracts - Employment**

Member, National Academy of Distinguished Neutrals | [www.nadn.org/michael-spink](http://www.nadn.org/michael-spink)

## Idaho Legal Drafting

Brian M. DeFriez, J.D., Ph.D.

Research. Writing.  
Legal Consulting.

208-459-9166

[brian@idaholegaldrafting.com](mailto:brian@idaholegaldrafting.com)

[www.idaholegaldrafting.com](http://www.idaholegaldrafting.com)



## Do You Actually Own Those Water Rights?

Meghan M. Carter  
Jennifer R. Wendel

Last year the Idaho Supreme Court issued two decisions that changed some of the basic assumptions of water right transactions. That change will leave some landowners without title to the water rights associated with their properties. These decisions remind us to be diligent when it comes to water right ownership.

### ***McInturff v. Shippy***

Idaho Code §42-248(1) requires any person who owns a water right to inform the Idaho Department of Water Resources (IDWR) of any change in ownership. Idaho Code §42-1409(6) requires any person with a water right in a general adjudication to notify IDWR of any change in ownership. Until recently, IDWR did not view those statutes as providing IDWR the

authority to determine ownership; IDWR believed it simply maintained records of ownership. That changed with *McInturff v. Shippy*.<sup>1</sup>

The water right at issue in this case has a complicated history. Bruner started St. Maries Wild Rice Growers near St. Maries, Idaho in the 1980s.<sup>2</sup> Bruner did not own the land he was using but instead leased it from Shippy's predecessor in interest. Shortly after forming the company Bruner applied for a water right permit. When the license was issued, St. Maries Wild Rice Growers was listed as owner. Bruner sold his wild rice company to McInturff in 2001, the sales agreement specifically transferred the water right. McInturff submitted a change of ownership to IDWR in 2005 and IDWR updated its records to show McInturff as owner.

McInturff subsequently filed a claim in the Coeur d'Alene-Spokane River Ba-

sin Adjudication (CSRBA)<sup>3</sup> for the water right.<sup>4</sup> Shippy filed a competing claim based on ownership of the land. Due to the complicated back story and limited information, IDWR did not know who the rightful owner was and didn't believe it had the authority to make the decision. Therefore, the Director's Report listed both McInturff and Shippy as owners of the water right. Both parties filed an objection.

The CSRBA Court held that Shippy had failed to timely assert his claim of sole ownership. Shippy did not contest the license being issued to St. Maries Wild Rice Growers, he did not file a change of ownership, and he did not contest McInturff's open use of the water from 2001-2014. Highlighting Shippy's failure to exhaust his administrative remedies, the CSRBA Court held Shippy's claim was a collateral attack on the license.<sup>5</sup>

The CSRBA Court went further, “[w]hen the Director acts to transfer the ownership of a water right he alters one of the defining elements of that right. Such an alteration is of legal consequence.”<sup>6</sup> The CSRBA Court pointed to Idaho Code §42-249(5) and stated that if IDWR does not have sufficient evidence to support a change of water right ownership, it has the authority to refuse to process the change.<sup>7</sup>

Shippy appealed the CSRBA Court’s decision. The Idaho Supreme Court af-

and the Snake River Basin Adjudication (SRBA) Final Unified Decree interact with the principle of *res judicata*. South County acquired the Property in 2003 along with the appurtenant water rights.<sup>10</sup> From 2005 to 2008, South County executed three mortgages with Mountain West Bank (MWB). South County, during the pendency of the SRBA, made seven conveyances of fractional portions of the water rights to multiple parties which we will refer to as First Security.

tive changes to an element of a water right completed after entry of a partial decree but before the entry of the Final Unified Decree.<sup>12</sup>

First Security did not assert its interest in the water right until October 2014, when it submitted an ownership change to IDWR. IDWR processed First Security’s change of ownership splitting the rights between First Security and Belle Ranch. Belle Ranch challenged the change of ownership. IDWR informed the parties they needed to pursue a quiet title action, and this suit commenced.

First Security argued that ownership was not litigated in the SRBA and that being a claimant is not the same as being an owner.<sup>13</sup> The Supreme Court held the partial decrees “were final adjudications of all the claims, except for those properly claimed under a subsequent administrative procedure.”<sup>14</sup> The Supreme Court went on to say that ownership of the water right was litigated in the SRBA because “[w]hen a court issues a decree in the name of a claimant, it is deciding whether that claimant’s assertion of *ownership* is valid.”<sup>15</sup>

First Security was “obligated by Idaho Code section 42-248(1) to notify the Department of the change of ownership,” but it did not. The Supreme Court then held “because the actions could have been brought in the SRBA and were not, First Security’s claims are barred.”<sup>16</sup>

In those areas of the state that have already been adjudicated (such as those parts within the Snake River Basin Adjudication<sup>17</sup>) this decision will have a significant impact for land owners that purchased property with water rights during the pendency of the adjudication and failed to file a change of ownership with IDWR before the water right was decreed. Prior to the *Belle Ranch* decision, IDWR would process post-decree changes of ownership filings in instances where transfer of ownership occurred prior to the issuance of partial decrees. Now, IDWR is no longer able to process an ownership change based on pre-decree transfers.

Where the water right was decreed in the name of the previous owner, the decree is a determination of ownership and IDWR cannot look to pre-decree transfers to change ownership. In those areas of the

---

“The language used by the CSRBA Court and the Supreme Court changed how IDWR’s ownership records are viewed.”

---

firmed the CSRBA Court in a 3-2 decision. The Supreme Court highlighted that Idaho Code §42-1401D deprived the CSRBA Court of “jurisdiction to review an agency decision of the IDWR that was subject to judicial review under the Idaho Administrative Procedures Act” and that “the claim should have been brought in front of the Director during the change in ownership determinations.”<sup>8</sup>

The language used by the CSRBA Court and the Supreme Court changed how IDWR’s ownership records are viewed. The ownership records are not just a recording of information provided to IDWR, they determine legal ownership of water rights. IDWR’s determination of ownership cannot be reviewed for the first time in a water rights adjudication. Any challenges to IDWR’s determination of ownership must proceed through the Idaho Administrative Procedures Act.

### ***First Security v. Belle Ranch***

In *Belle Ranch*,<sup>9</sup> the Idaho Supreme Court explored how a partial decree

In 2010, South County defaulted on its mortgages and MWB executed a deed in lieu of foreclosure on the Property which specifically included the water rights. MWB filed a change of ownership with IDWR in June of 2010. IDWR acknowledged the change and updated its records Sept. 11, 2011. The Property and its appurtenant water rights were then conveyed to Belle Ranch. Belle Ranch filed a change of ownership with IDWR in 2012.

South County’s predecessor in interest filed claims in the SRBA in 1988.<sup>11</sup> South County filed a change of ownership with IDWR after it acquired the Property. IDWR issued recommendations to the water rights in 2007, listing South County as the claimant. On August 31, 2010, partial decrees were issued for the water rights in the name of South County. The partial decrees contained a Rule 54(b) certificate, certifying the partial decrees as final, making them appealable decisions.

The SRBA Final Unified Decree was issued in August of 2014. The Supreme Court noted that the Final Unified Decree does not supersede any administra-

state that are either currently being adjudicated (the Northern Idaho Adjudications) or those areas of the state that will be adjudicated in the future (Bear River Basin Adjudication) this case emphasizes the importance of timely filing a change of ownership with IDWR.

### Conclusion

As a best practice when working with water rights or real estate transactions that have appurtenant water rights, always check who is on record with IDWR as the owner. And, at the same time you record a real estate transaction, also file a change of water rights ownership with IDWR.

**Meghan M. Carter** is a Deputy Attorney



*General representing the Idaho Dept. of Water Resources. She has been in that position for seven years. The views expressed in this article are that of the author's only and do not reflect those of the Attorney General's Office or the Idaho Dept. of Water Resources.*



**Jennifer R. Wendel** is a Deputy Attorney General representing the Idaho Dept. of Water Resources.

### Endnotes

1. In re CSRBA Case No. 49576, Subcase No. 91-7094, 165 Idaho 489, 447 P.3d 937 (2019) (McInturff).

2. Water Right 91-7094, Special Master's Report and Recommendation: Findings of Fact and Conclusions of Law, In re CSRBA Case No. 49576 (October 6, 2016).
3. See Water Rights Adjudication in Idaho Have State-wide Impacts in this edition for further information on Idaho water rights adjudications.
4. *Id.*
5. Subcase No. 91-7094, Memorandum Decision and Order, In re CSRBA Case No. 49576 at 6 (Aug. 17, 2017).
6. *Id.* at 8.
7. *Id.* at 9.
8. McInturff, 165 Idaho at 498, 447 P.3d at 946.
9. *First Sec. Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 451 P.3d 446 (2019) (*Belle Ranch*).
10. *Id.* at 733,449.
11. *Id.* at 738, 451.
12. *Id.* at 739, 452.
13. *Id.* at 742, 451.
14. *Id.*
15. *Id.* at 743, 456.
16. *Id.* at 744, 457.
17. A map of the IDWR administrative basins showing the SRBA is available here: <http://srba.idaho.gov/Images/SRBAMap.pdf> (last visited Sept. 2, 2020).

**River's Edge**  
MEDIATION

Peter C. Erbland      Fonda L. Jovick      Erik P. Smith

Mediation | Arbitration | Special Master

**Continuing the Legacy in Coeur d'Alene**

Resolving conflicts - Same serene surroundings - Still making peace

208-765-6000

**RiversEdgeMediation.com**

2020  
MEMBERS



# THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

America's Most Experienced Civil-Trial Mediators & Arbitrators

## IDAHO CHAPTER

[www.IdahoMediators.org](http://www.IdahoMediators.org)

*The Academy Recognizes The Following Charter Members For  
Excellence In The Practice of Alternative Dispute Resolution*



Walt Bithell  
(208) 336-4440



Peter Erbland  
(208) 664-8115



Deborah Ferguson  
(208) 345-5183



David Lombardi  
(208) 388-1200



Hon. Duff McKee  
(208) 381-0060



Marvin Smith  
(208) 529-3005



Michael Spink  
(208) 761-5064

APRIL 2020						
Su	Mo	Tu	We	Th	Fr	Sa
	1	2 AM	3	4	5 PM	6
7	8 PM	9	10	11	12	13
14	15	16	17 AM	18 AM	19 AM	20
21	22	23 AM	24 AM	25	26	27
28	29	30				

Check your preferred available dates or  
schedule appointments online, directly  
with our Academy Members - for free.

[www.IdahoMediators.org](http://www.IdahoMediators.org) funded by members

The National Academy of Distinguished Neutrals is an invite-only association of over 1000 litigator-rated mediators & arbitrators throughout the US, and a proud sponsor of the national trial (AAJ) and defense (DRI) bar associations. For more info, visit [www.NADN.org/about](http://www.NADN.org/about)



## Don't Transfer Your Water — Rent It!

*Rebecca E. Moon*

**R**ather than secure your right to water with a permanent transfer, why not rent it for the short-term to maintain an inexpensive and flexible use? Better yet, why not rent it from yourself? The Water Supply Bank and local rental pools effectively operate as an open exchange market to match water right holders with surplus water to water users needing additional water. Idaho Code section 42-1764(1) specifically allows water right holders to use the Water Supply Bank as a substitute for transfer proceedings.

This allows a water right holder to rent its own appropriated water through the Water Supply Bank with the flexibility to change the point of diversion, place of use, or nature of use.<sup>1</sup> This opportunity provides water right holders with short-term flexibility for changing the use of their existing appropriated water without risking forfeiture that may otherwise accumulate through non-use.

Water right transfers are a permanent, but often time-consuming, process that allows the otherwise fixed elements of a water right to be changed. The Water Supply Bank allows for leases and rentals of water rights to and from the bank by any water user. A water right holder is allowed to lease water to the Water Supply Bank and then rent that same water from itself (referred to here as a “Directed Rental”) to temporarily change certain elements of the water right. This article will address some of the benefits of renting water from yourself, rather than permanently transferring a water right.

### Simplot case study

Earlier this year, two of Simplot’s locations each had their water rights curtailed due to a delivery call by a senior water right holder. To make-up for the lost water, Simplot submitted applications to the Water Supply Bank to rent a total of 74.8

acre-feet of water to substitute for the curtailed rights at the two locations. Simplot requested a Directed Rental of water from a different Simplot water right which had previously been leased to the Water Supply Bank. Approximately two months later, the Water Supply Bank approved both rental applications.

When renting private water from the Water Supply Bank, lessors and renters are allowed to negotiate the rental price for the water. Since this was a Directed Rental of private water, the rental fee Simplot owed to itself was \$0 and Simplot paid an administrative fee to the Water Supply Bank of \$149.60. The administrative fee is 10% of the cost of the rental or the current published rate for renting water, which for 2020 is \$20 per acre-foot.

Simplot could have applied for a transfer of the existing leased water to make up the lost supply, however, the process would have been more costly, would likely

not have been completed in time to continue operations at the sites, and would have then become permanently affixed to the two new locations. Instead, a Directed Rental allowed Simplot to gain the rights to substitute for the curtailed water rights for operations to continue, at very little cost, and at the end of the rental, the water will revert to the Water Supply Bank and remain with Simplot under the original elements of the water right. If supplemental water is needed at those two locations

the watershed, and (5) is a beneficial use.<sup>2</sup> The Director cannot approve a transfer unless the watermaster<sup>3</sup> for the appropriate district has also recommended approval of the transfer.

With limited exceptions for specific types of transfers, the application undergoes advertisement for public notice and comment. Anyone who believes the change in water rights may result in their aggrievement may protest the application. If the applicant for the transfer cannot resolve the protest informally, the Director

right holder can lease its surplus of water for others to use and a water user can rent additional water for its use.<sup>8</sup>

Although the Water Supply Bank was formalized in 1979, there were informal rental pools in the state as early as 1932. At that time, water could be rented for \$0.17 per acre-foot.<sup>9</sup> Today, the current published rate set by the Water Supply Bank is \$20 per acre-foot.<sup>10</sup>

To lease water to the Water Supply Bank, a water right holder applies with the Water Supply Bank and pays an application fee of \$250 per water right.<sup>11</sup> The water right holder can attach conditions to the Lease, such as duration or rental price, by specifying such conditions in the application.<sup>12</sup> While not subject to public notice or advertisement, the applications are considered at public meetings of the Board.<sup>13</sup> The Director and the Board review an application and either approve or deny it based on factors, including rental price, likelihood to be rented, and whether it is in the local public interest.<sup>14</sup> If approved, the water right holder's leased water is placed into the Water Supply Bank for a rental by other water users and the water right holder must cease use of that portion so leased.<sup>15</sup>

Although it is within the Board's discretion, the owner of the leased water generally does not receive any money unless and until the leased water is rented from the Water Supply Bank.<sup>16</sup> Once the leased water is in the Water Supply Bank's control, any forfeiture proceedings under Idaho Code section 42-222(2) are stayed, regardless of whether the water is ever rented or not.<sup>17</sup> In the case of leasing stored water, the largest risk to the water right holder is that if there is a dry winter, the storage may not completely refill by the end of the term of the lease, in which case the water right holder may not have use of its water until such storage refilled.

To rent water from the Water Supply Bank, a water user applies to the Water Supply Bank. There is no fee to apply to rent water.<sup>18</sup> The Director then reviews the application, including place and type of use, and approves or denies based on whether (1) injury to other rights would occur, (2) it would constitute an enlargement, (3) the rented water will be put to beneficial use, (4) there is sufficient supply within the Water Supply Bank for the intended use, and (5) it will conflict with the local public interest.<sup>19</sup>

---

“A transfer proceeding is a process that allows a water right holder to permanently change one or more elements of its water right.”

---

in the years that follow, Simplot can again apply for another Directed Rental each year, up to five years.

### **What is a water right transfer?**

Established water rights have elements that are fixed with permissible uses and cannot be changed without a formal transfer proceeding. A transfer proceeding is a process that allows a water right holder to permanently change one or more elements of its water right. This could include a change to the point of diversion, place of use, period of use, or nature of use.

A water right holder can initiate a transfer proceeding through a written application and the payment of a fee to the Idaho Department of Water Resources. The Director of the Department can approve a transfer in whole, in part, or with conditions. When deciding whether to approve a transfer, the Director considers whether the modified right (1) will injure other water rights, (2) will constitute an enlargement of the original right, (3) is consistent with the conservation of water resources and in the public interest, (4) will adversely affect the local economy of

then investigates the protest and holds a hearing to determine whether the transfer meets the factors above.<sup>4</sup>

Generally, a transfer proceeding can take anywhere from six months to a year to complete. Once the transfer is complete, the elements of the water right become permanently fixed again, unless another transfer is completed.

### **What is the water supply bank?**

The Water Supply Bank and local rental pools facilitate the exchange of previously appropriated natural flow water rights and privately held storage water rights.<sup>5</sup> Local rental pools each have their own rules which may vary slightly from one another or the Water Supply Bank. This article will focus on the Water Supply Bank, which is statutorily created and operated by the Idaho Water Resource Board through the Director of the Idaho Department of Water Resources.<sup>6</sup>

The Water Supply Bank may lease, purchase, or otherwise obtain, any decreed, permitted, or licensed water rights.<sup>7</sup> Through the Water Supply Bank, a water

Unlike a transfer application, unless the rental application is for a period greater than five years, the Director has discretion whether to require public notice through advertisement.<sup>20</sup> The Director can approve rental applications with terms of up to five years. A term beyond five years requires review by the Board.<sup>21</sup> Once approved, the water user pays the rental fee to the Water Supply Bank, which then pays the water right holder, less a 10% administrative charge held by the Water Supply Bank.<sup>22</sup>

## Benefits of directed rentals

Idaho Code section 42-1764(1) specifically allows a water right holder to use a Directed Rental in lieu of the transfer proceedings prescribed by Idaho Code section 42-222. In doing so, the water right holder can temporarily change the elements of its water right. Here are some of the benefits that may be achieved through the use of Directed Rentals:

**Flexible and Temporary.** A Directed Rental allows a water right holder to change the place or type of use of its water for a *limited duration* (1–5 years), which provides temporary and flexible uses for the previously appropriated water. At the end of the Directed Rental, the water reverts to the Water Supply Bank and ultimately back to the original elements of the water right (and owner) at the end of the lease term. This can be especially useful for water users leasing property for the short term where no water right exists or pursuing experimental crops where a permanent need for water is unknown.

**Inexpensive.** Although there is generally a flat fee per acre-foot of water rented when renting water from the Water Supply Bank, the water user can negotiate the rental fee with the water right holder.<sup>23</sup> If the water right holder of the leased water is also the user of the rented water, the rental amount can be waived so that the amount owed is \$0. In such circumstances, the water right holder/user is still required to pay the administrative fees to the Water Supply Bank, which is 10% of the rental fee or published rental rate.<sup>24</sup>

**Approval Occurs Quickly.** For water leased or rented through the Water Supply Bank, any public notice of the use or change requested is within the discretion of the Board but is not statutorily required as with transfer proceedings. Generally, the Board does not advertise the leases or rentals and approves or denies on its own based on the criteria discussed previously.

Because there is no advertisement, there is also no objection period or protests. Although an individual could file an objection or protest with the Board, the discretion to approve or deny rests wholly with the Board. Generally, once a rental application for a Directed Rental is submitted, it is completed and approved within a few weeks.

If the elements of that same water right were changed using transfer proceedings, it could potentially take a few months to even years. If a water right holder has water available for a Directed Rental, it is a much faster process to change the elements of the water and begin using the changed water right more quickly.

**No Dedication to Land.** Generally, once transferred water is put to beneficial use on land, it becomes dedicated for use on that land only. However, when water is rented from the Water Supply Bank it does not become affixed to the property where it is used.<sup>25</sup> This means if a Directed Rental (or any rental) occurs, the owner of the right does not risk permanent loss of the water and the water right will revert to its original elements (including place of use) once the rental is complete.

This is especially important when water users are leasing land that does not have appurtenant water rights. If a transfer was used, the water right would become permanently affixed to the leased land and the owner of the land could become the owner of the water right. However, if a water user or lessee of land was able to use a Directed Rental, they maintain all benefits of using the water on the leased land, but also ensure continued ownership of the water right.

**No Forfeiture.** Since forfeiture is stayed while water is leased to the Water Supply Bank—even if the water is not rented by anyone—if a water right holder does not have use for its water for the next few seasons at one location, it can temporarily transfer the water to a different location through the Water Supply Bank without risking forfeiture of the otherwise unused water.

**Interim Rentals.** A Directed Rental can also be utilized *while* a water right holder is in the process of permanently transferring the water right. When using the two in tandem, a water right holder can realize the benefits of a Directed Rental while pursuing a formal transfer proceeding.

Although a transfer of a water right is useful and necessary when the elements

of the water right need to be permanently changed, through the use of Directed Rentals, a water user can achieve the same means temporarily. Whether using a Directed Rental alone or in tandem with a formal transfer proceeding, a Directed Rental gives the water user an inexpensive and flexible alternative, without the risk of forfeiting their unused water.



**Rebecca E. Moon is Real Estate Counsel at J. R. Simplot Company where she oversees real estate and water transactions and negotiates various commercial contracts for the company.**

*Prior to working at Simplot, she worked in private practice. She is also the vice chairperson of the Water Law Section.*

## Endnotes

1. Idaho Code §§ 42-1764(1), -222(1).
2. Although “beneficial use” has never been statutorily defined, water rights must be put to some useful purpose, which includes domestic use, irrigation stock-watering, manufacturing, mining, hydropower, municipal, aquaculture, recreation, and fish and wildlife.
3. Under Idaho Code section 42-605(3) each water district has a watermaster appointed by the Director of the Department to oversee water distribution.
4. Idaho Code § 42-222(1).
5. IDAPA 37.02.03.001.02.
6. Idaho Code § 42-1761; IDAPA 37.02.03.001.02.
7. Idaho Code § 42-1762(2); IDAPA 37.02.03.025.02.a.
8. IDAPA 37.02.03.010.05, .08.
9. *Water Supply Bank: Local Rental Pools*, Idaho Department of Water Resources, <https://idwr.idaho.gov/water-supply-bank/local-rental-pools.html> (last visited August 11, 2020).
10. *Water Supply Bank: Pricing*, Idaho Department of Water Resources, <https://idwr.idaho.gov/water-supply-bank/pricing.html> (last visited August 11, 2020).
11. IDAPA 37.02.03.025.02.
12. IDAPA 37.02.03.025.01.
13. IDAPA 37.02.03.025.05.
14. IDAPA 37.03.02.025.06.
15. Idaho Code § 42-1762(2); IDAPA 37.02.03.025.08.b.
16. IDAPA 37.02.03.025.06.h.
17. Idaho Code §§ 42-223(5), -1764(2); IDAPA 37.02.03.025.08.e.
18. IDAPA 37.02.03.030.01; *Water Supply Bank: Pricing*, Idaho Department of Water Resources, <https://idwr.idaho.gov/water-supply-bank/pricing.html> (last visited August 11, 2020).
19. Idaho Code § 42-1763; IDAPA 37.02.03.030.01.
20. IDAPA 37.02.03.030.02.
21. IDAPA 37.02.03.030.05.
22. IDAPA 37.02.03.035.
23. *Id.*; *Water Supply Bank: Pricing*, Idaho Department of Water Resources, <https://idwr.idaho.gov/water-supply-bank/pricing.html> (last visited August 11, 2020).
24. IDAPA 37.02.03.035.
25. Idaho Code § 42-1764(3).

**PROTECT YOUR FIRM. HELP MORE PEOPLE.  
BE THE LAWYER YOU WANT TO BE.**

Find out more about your ISB-endorsed carrier at  
[www.alpsnet.com/advocate](http://www.alpsnet.com/advocate)

**MALPRACTICE INSURANCE FOR THE**

**LAW FIRM**

**WORTH PROTECTING**

Endorsed by more state bars  
(including yours) than any other carrier.



**THE NATION'S LARGEST DIRECT WRITER  
OF LAWYERS' MALPRACTICE INSURANCE.**

(800) 367-2577 • [www.alpsnet.com](http://www.alpsnet.com) • [learnmore@alpsnet.com](mailto:learnmore@alpsnet.com)

# Clean Water Act



## Clean Water Act Case Review: *Glaser* and the Future of the Irrigation Return Flow Exemption

Norman M. Semanko

Last year, the Ninth Circuit Court of Appeals issued an amended opinion in *PCFFA v. Glaser*<sup>1</sup>, providing clarification – and raising some questions – regarding the irrigation return flow exemption contained in the Clean Water Act<sup>2</sup>. The case itself is currently on remand to the U.S. District Court for the Eastern District of California. In the meantime, the Ninth Circuit Court’s decision has western irrigation interests, legal practitioners, and regulators all weighing the future of the exemption.

This article will provide an overview of the exemption for irrigation return flows, an examination of the *Glaser* case, and offer some guidance as to how these issues may be addressed in the future.

### History of the irrigation return flow exemption

Under the Clean Water Act, a National Pollutant Discharge Elimination System

(NPDES) permit is required to discharge a pollutant into navigable waters from a point source.<sup>3</sup> This requirement applies to government agencies.<sup>4</sup> However, the Act contains a permit exemption “for discharges composed entirely of return flows from irrigated agriculture.”<sup>5</sup> In addition, while a “point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch [or] channel. . .” it does not include “return flows from irrigated agriculture.”<sup>6</sup> It hasn’t always been so.

The Clean Water Act, as originally enacted in 1972, did not contain any exceptions to its NPDES permitting requirement.<sup>7</sup> It wasn’t until five years later, during 1977, that Congress added an exception for discharges composed entirely of return flows from irrigated agriculture.<sup>8</sup> In doing so, Congress limited the irrigation return flow exemption “to only those flows which did not contain additional

discharges from activities unrelated to crop production.”<sup>9</sup>

The legislative history for the 1977 amendments to the Clean Water Act includes a Congressman’s statement that an NPDES permit would not be required for “a vast irrigation basin that collects all of the waste resident of irrigation water in the Central Valley and places it in [the San Luis Drain] and transport[s] it. . .[to] the San Joaquin River.”<sup>10</sup> Ironically, this is the very irrigation and drainage project that would become the subject of the *Glaser* case some 40 years later.

### The *Glaser* Case: Addressing the meaning and application of the exemption

In *Glaser*, selenium and other pollutants were discharged to the San Joaquin River and the Bay-Delta Estuary from the San Luis Drain, which was built by the

federal government as part of the Grassland Bypass Project in the Central Valley of California.<sup>11</sup> At issue was whether the discharges required an NPDES permit, or whether they were excused from the permitting requirement by the Act's irrigation return flow exemption.<sup>12</sup> It was alleged that at least some amount of the Project's discharges may be unrelated to crop production, including discharges from lands underlying a solar project.<sup>13</sup>

The Ninth Circuit Court of Appeals

Appeals nonetheless concluded that the district court's reliance on legislative history to construe the statutory exemption was not erroneous.<sup>15</sup>

In construing the plain language of the statute, the Ninth Circuit concluded that the dictionary definition of "agriculture" confirms that it has a broad meaning that encompasses crop production.<sup>16</sup> The Court reviewed the legislative history and confirmed that Congress intended for "irrigated agriculture" as used in the

to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges.<sup>18</sup> On remand, the district court was therefore ordered to consider the Plaintiffs' claims regarding alleged runoff entering the San Luis Drain from "non-irrigated land," including the solar project and "highways, residences, seepage. . .and sediment" from other locations.<sup>19</sup>

### **The future of the exemption: More litigation and potential guidance**

Significant questions face the district court on remand in *Glaser*. Perhaps most consequential will be the court's determination of what broad set of activities are "related to crop production" within the Project. One of the Plaintiffs' main claims – drainage from retired and fallow lands – seems to clearly fall within the irrigation return flow exemption. Other allegations in the complaint are not so easy to characterize as "related to crop production." Whatever the result, the district court's decision will be subject to appeal and perhaps additional clarification. Lawsuits in other jurisdictions are certainly possible, as well.

Outside of the district court, irrigators west-wide – particularly in the Ninth Circuit – are also asking the question: What activities are related to crop production? Given that the answer is not set forth in the Clean Water Act itself, the irrigation community may look to the regulators to provide answers, either through guidance or rulemaking. Whether that comes from the U.S. Environmental Protection Agency (EPA) or the State agencies that have been delegated authority to administer the NPDES program, the pressure will grow as additional citizen suits are pursued.

Previous EPA guidance provides that the irrigation return flow exemption includes maintenance of irrigation conveyances through the use of aquatic herbicides.<sup>20</sup> The Bureau of Reclamation has also issued guidance regarding discharges to its irrigation and drainage facilities.<sup>21</sup> The need to expand on this guidance or to issue additional guidance interpreting the irrigation return flow exemption seems apparent in the wake of *Glaser*. Whether that will eventually lead to agency rulemaking, or even additional action by Con-

---

“ *Outside of the district court, irrigators west-wide – particularly in the Ninth Circuit – are also asking the question: What activities are related to crop production?* ”

---

addressed three alleged errors committed by the district court in its interpretation of the irrigation return flow exemption.

First, the Ninth Circuit Court concluded that the burden of proving that the exemption applies falls on the Defendants. The district court had found that the burden rests with the Plaintiffs. In reversing the lower court, the Ninth Circuit observed that once the plaintiffs in a case prove the existence of a discharge of a pollutant to navigable waters from a point source, the defendant carries the burden of demonstrating that an applicable statutory exemption applies. With the Plaintiffs having made their initial showing, the burden shifts and the Defendants in *Glaser* must now establish that the Project's discharges were "composed entirely of return flows from irrigated agriculture."<sup>14</sup>

The Ninth Circuit Court of Appeals next upheld the district court's determination that the irrigation return flow exemption applies to discharges that are related to crop production. While noting that the district court should have begun its analysis with the statutory text, the Court of

Act's exemption to be defined broadly and to include discharges from "all activities related to crop production," including drainage from retired and fallow lands.<sup>17</sup>

Finally, the Ninth Circuit Court held that the discharges must be composed "entirely" of return flows from irrigated agriculture to qualify for the exemption. The district court had construed the irrigation return flow exemption as applying unless a "majority of the total commingled discharge" is unrelated to crop production. The Ninth Circuit found that the dictionary definition of "entirely" is "wholly, completely, fully." That definition differs significantly from the "majority" standard used by the district court.

In confirming a literal interpretation of "entirely," the Ninth Circuit observed: "Given the many activities related to crop production that fall under the definition of 'irrigated agriculture,' Congress's use of 'entirely' to limit the scope of the statutory exception makes perfect sense. The text demonstrates that Congress intended for discharges that include return flows from activities unrelated to crop production

gress to clarify the meaning and scope of the current exemption within the Clean Water Act, is something that only time will tell.

**Norman M. Semanko** is a shareholder with Parsons Behle & Latimer in Boise. Semanko previously served as Executive Director & General Counsel for the Idaho Water Users Association. He spent time as a Legislative Assistant in the U.S. Senate and U.S. House of Representatives while obtaining his law degree from Georgetown University. These days, Semanko splits his professional time representing clients in southern Idaho and North Idaho.



## Endnotes

1. *Pacific Coast Federation of Fishermen's Associations v. Glaser*, 945 F.3d 1076 (9th Cir. 2019).
2. 33 U.S.C. Secs. 1251-1387.
3. 33 U.S.C. Sec. 1311(a).
4. 33 U.S.C. Sec. 1323(a).
5. 33 U.S.C. Sec. 1342(l)(1); see also IDAPA 58.01.25, Rules Regulating the Idaho Pollutant Discharge Elimination System Program, Subsection 102.05.f (exempting "[a]ny return flow from irrigated agriculture" from permitting).
6. 33 U.S.C. Sec. 1362(14); see also IDAPA 58.01.25, Rules Regulating the Idaho Pollutant Discharge Elimination System Program, Subsection 10.65 ("point source" definition "does not include return flows from irrigated agriculture").
7. *Nw. Env'tl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1072 (9th Cir. 2011), *rev'd and remanded sub nom. Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013).
8. *Brown*, 640 F.3d at 1073.
9. S. Rep. No. 95-370, 35 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4360.
10. *Brown*, 640 F.3d at 1072.
11. *Glaser*, 945 F.3d at 1080-82.
12. *Id.* at 1082.
13. *Id.* at 1081-82.
14. *Id.* at 1083.
15. *Id.*
16. *Id.* at 1084.
17. *Id.* at 1084-85.
18. *Id.* at 1085.
19. *Id.* at 1087.
20. EPA Interpretive Statement and Regional Guidance on the Clean Water Act's Exemption for Return Flows from Irrigated Agriculture, available at <https://www3.epa.gov/hpdes/pubs/talentfinal.pdf>.
21. Reclamation Manual, Directives and Standards (ENV 06-01): Non-Agricultural Discharges into Bureau of Reclamation Facilities – Requirements and Procedures for Obtaining Authorization from Reclamation, available at <https://www.usbr.gov/recman/env/env06-01.pdf>.

THE HAWLEY TROXELL WAY

# MEDIATION AND ARBITRATION



**Merlyn W. Clark**



**Craig L. Meadows**



**Cathy R. Silak**



**David W. Knotts**



**Marvin M. Smith**

BOISE / COEUR D'ALENE / IDAHO FALLS / POCATELLO / RENO  
Call 208.344.6000 or visit [HawleyTroxell.com](http://HawleyTroxell.com)

Our Mediation & Arbitration attorneys are skilled in all forms of alternative dispute resolution, including mediation, arbitration, and hearing officer services. Additionally, we provide case administration as well as conference areas, hearing rooms, and video conferencing at no additional costs to our clients.

And, best of all, our nationally renowned legal services come with a local address.

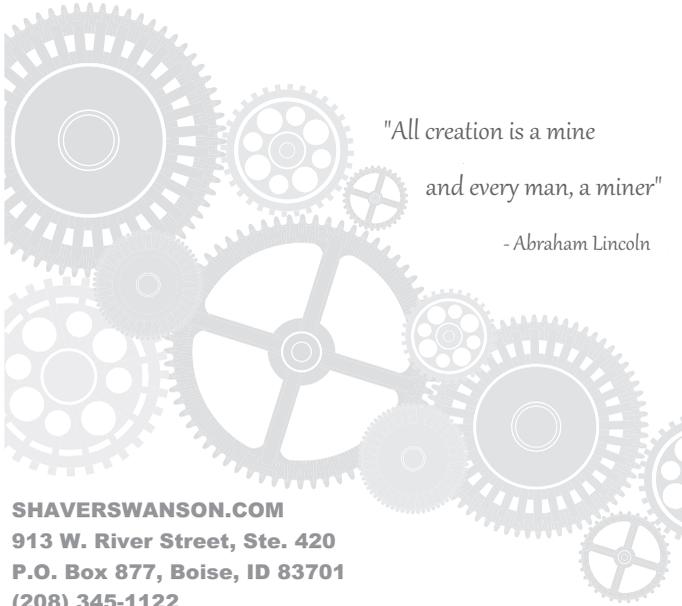


# SHAVER & SWANSON

IDAHO'S PREMIER INTELLECTUAL PROPERTY FIRM

+Patents  
+Trademarks  
+Trade Secrets

+Copyrights  
+Licensing  
+Litigation



"All creation is a mine  
and every man, a miner"  
- Abraham Lincoln

SHAVERSWANSON.COM  
913 W. River Street, Ste. 420  
P.O. Box 877, Boise, ID 83701  
(208) 345-1122



# Pickens Law, P.A.

## Terri Pickens Manweiler, Mediator

- Terri is a graduate of the Northwest Institute for Dispute Resolution.
- With over 20 years of commercial, real estate, and civil litigation experience, Terri is well qualified to mediate all types of civil disputes.

208-954-5090  
terri@pickenslawboise.com  
www.pickenslawboise.com



*Results  
you can  
Trust*

 **CUSTER  
AGENCY**  
INVESTIGATIONS . DIGITAL FORENSICS . INFORMATION SECURITY

208.562.0200 Toll Free: 800.250.4907  
www.custeragency.com



## The Virtual Annual Meeting of the ABA House of Delegates

Larry C. Hunter

The August 2020 meeting of the House of Delegates of the American Bar Association (ABA) was unique, as, of course, much of our lives is unique during the pandemic. The meeting was a virtual meeting in which members of the House and others listened and watched via a Zoom webinar. The voting on the various resolutions was done on a separate platform called SYNC. To their credit, the ABA technical staff handled the logistics almost without flaw (I almost wrote “virtually without flaw”, but that would have been too cheesy). While I missed seeing my colleagues in the Idaho delegation, as well as friends from other states, the business of the House was carried on in an orderly fashion.

In all, approximately 60 resolutions were adopted and another four failed or were withdrawn. Many of the resolutions were revised before passage. The results

of the voting and the subject matter of the resolutions, as well as the content of the speeches given by incoming and outgoing officers of the association are available on the ABA website, but I will give a summary of some of the highlights for me.

Because of the societal environment in which the meeting was held, there were a number of resolutions that touched on the COVID-19 pandemic, civil rights, and racism. It was only fitting, and in fact quite moving, that for the invocation, with which the House always begins its proceedings, a video was played of the invocation which recently deceased civil rights icon, Representative John Lewis, offered at the 2015 Annual Meeting of the House of Delegates. He called upon God to bless all of us to work in harmony, stating “we are all one house”.

He alluded not just to the House of Delegates, but to the nation as being “one

house”, a timely reminder for all of us. Consistent with the feelings expressed by Representative Lewis and the tenor of the times, one of the last resolutions that the House passed called for state and federal governments to recognize June 19<sup>th</sup> (Juneteenth) as a paid federal holiday to mark the end of slavery.

Two of the resolutions dealt with police reform. Both are resolutions which urge state and local governments to take action. The first is to include instruction of implicit bias as a part of law enforcement training. The second is to legislate the abrogation of the substantial curtailment of qualified immunity in civil actions against law enforcement officials.

A hotly contested resolution, albeit one that is seemingly arcane to non-House members, dealt with the procedure of bringing resolutions before the House. It was proposed by a select committee head-

---

“ *I have enjoyed the opportunity to serve the bar in the capacity of State Delegate and State Bar Delegate for the past 16 years and thank all of those who have given me their support, counsel, and encouragement.* ”

---

ed by former ABA President Bob Carlson of Montana. Its purpose was to clarify that a resolution dealt with one of the four purposes of the ABA. It was felt that it would make it easier for states with integrated bars, like Idaho, to deal with resolutions without appearing to take up controversial, politically-tinged issues. The measure was defeated principally because it was felt that the added obligation of including the purpose would restrict the introduction of important measures that arose at the last moment.

The Resolution that was the longest-debated and most divisive dealt with bar exams. The proponents of the Resolution argued that while the timing of the Resolution was problematic (it was submitted after 24 states had already given an in-person bar exam in late July), it was also unavoidable due to the rapid rise of the pandemic since the mid-year meeting in February and the immediacy of the various states' bar exams.

The point of the Resolution was to encourage, really to force, States not to administer a traditional bar exam this year in order to avoid possibly exposing recent law school graduates to the COVID-19 virus. The Resolution included a number of suggestions for alternatives to bar admis-

sion during the pandemic. Those alternatives included: (1) administering the exam online; (2) offering limited admission to recent graduates until they could take the bar exam later, possibly in the Spring; and (3) allowing admission to the Bar by diploma privilege (*i.e.*, by merely graduating from law school).

The position of the supporters of the Resolution was that it was impossible to guarantee isolation from the virus in a traditional bar exam setting, even if social distancing, wearing masks, and antiseptic measures were practiced. The opponents argued that the Resolution was flawed because among other things, it did not specify that the graduates for a diploma admission had to graduate from a licensed and accredited law school. The Resolution passed after a lengthy debate.

A number of States, including Idaho, had already administered the bar exam, while others had cancelled or postponed theirs, assuring a patchwork of admission policies this year. Just a word about how Idaho administered the bar exam this year.

The format of the bar exam, while administered by the Idaho State Bar, is approved by the Idaho Supreme Court. This year in particular there was cooperation to assure as safe a proceeding as possible

while maintaining the integrity of bar admissions. The Court authorized the Idaho State Bar to also administer an online bar exam in October 2020. Applicants for the July in-person bar exam were given a choice of taking the exam in-person or online. The vast majority took the exam in-person. The test was administered to small groups at various locales and social distancing, masks, and proper sanitization were practiced. No positive COVID-19 cases were traced to the Idaho bar exam.

In addition to the Resolution process, the House heard from present and incoming leaders. Judy Perry Martinez (LA), the then current President of the ABA, Patricia Refoe, (AZ), the incoming and now current President, Reginald Turner (MI), the President-Elect, and William Neukom, this year's recipient of the ABA Medal and a former President of the Association all spoke eloquently of the role of the ABA. Two topics that were common for the speakers were preserving the right to vote (especially timely because of this being the 100 year anniversary of the adoption of the 19<sup>th</sup> Amendment) and upholding the independence of the Judiciary. For the full remarks, one can check the Annual Meeting notes on the ABA website.

Finally, on a note of personal privilege, this was my last meeting as the Idaho State Bar Delegate and my last as a member of the House of Delegates. I am sure that my successor, Judge Oths, will do a great job. I have enjoyed the opportunity to serve the bar in the capacity of State Delegate and State Bar Delegate for the past 16 years and thank all of those who have given me their support, counsel, and encouragement.

I am particularly mindful of the support of the Idaho State Bar commissioners and staff, especially Diane Minnich. I have enjoyed working with the various other Idaho Delegates over the years, including Deborah Ferguson, Jennifer Jensen, Michelle Points, Tim Hopkins, and the late Allyn Dingel. It's been a great experience.



**Larry C. Hunter** is a former Idaho State Bar Commissioner and President. Hunter served as the American Bar Association (ABA) State Bar Delegate and is an appointed delegate to the ABA's Commission on Lawyer Assistance Programs.



## Service Animals: A Guide for Handlers and Businesses

Hayden Cottle  
Quindaro E.C. Frieder

**S**ervice animals have become a common part of our surroundings.

Though pets have long been an enrichment to our families, service animals occupy a different and specific role to many of our citizens. Citizens with disabilities often employ the skills of service animals to assist them through the world. Veterans have the ability to have an animal prescribed to them as a part of their treatment and rehabilitation.

This article will explain the following topics for clear, concise guidance to navigate the world of service animals: definition of a service animal, rights of handlers, rights of businesses, and available resources for issues regarding service animals.

### What is a service animal?

According to the Americans with Disabilities Act (ADA)<sup>1</sup> and Idaho Statute<sup>2</sup> a “Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purpose of this definition.

The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to: assisting individuals who are blind or have low vision with navigation and other tasks; alerting individuals who are deaf or

hard of hearing to the presence of people or sounds; providing non-violent protection or rescue work; pulling a wheelchair; assisting an individual during a seizure; alerting individuals to the presence of allergens; retrieving items such as medicine or the telephone; providing physical support and assistance with balance and stability to individuals with mobility disabilities; and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

Animals that can be designated as service animals are dogs and miniature horses. Under the Veterans Affairs (VA)

benefit however, only dogs may be designated as a service animal.

### Do I qualify?

Veterans may qualify through the VA for the benefit of a service animal. To qualify, a veteran must meet with their VA health provider. Veterans who have been diagnosed as having: a visual, hearing, or substantial mobility impairment, spinal cord injury, traumatic brain injury (TBI), or seizure disorders; or certain mental

Dogs with preexisting conditions will not be excluded. Hardware or replacements for use with the dog can be obtained through the Prosthetic and Sensory Aids Service at the veteran's local VA medical facility. Travel expenses associated with obtaining a dog or replacement dog are covered.

Items associated with the service dog that are not covered by the federal regulation include: "license tags, non-prescription food, grooming, insurance for a

vices or they interfere with the service animal's safe, effective performance of tasks. In that case, the individual must maintain control of the animal through voice, signal, or other effective controls.

A person with a disability cannot be asked to remove their service animal from any governmental, commercial, or public premises unless: (1) the animal is acting poorly (barking, growling, or invading the space of others) and the handler does not take effective action to control or correct the animal or (2) the animal is not housebroken. When there is a legitimate reason to ask that a service animal be removed, staff must offer the person with the disability the opportunity to obtain goods or services without the animal's presence.

---

“Under the ADA, service animals must be harnessed, leashed, or tethered, unless the individual's disability prevents the use of these devices or they interfere with the service animal's safe, effective performance of tasks.”

---

### Service animals and housing rights

Under the Fair Housing Act (FHA), handlers of service animals are to be allowed reasonable accommodations by housing providers. The FHA makes it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need in order to "have equal opportunity to enjoy and use a dwelling."<sup>4</sup>

While some disabilities are readily visible or apparent, others are not. Housing providers are permitted to request information regarding the task the service animal provides and related need for a service animal. However, housing providers are not entitled to ask, or demand answers related to the individual's diagnosis.

Housing providers are entitled to request documentation of a disability in order to make a determination regarding a reasonable accommodation such as exceptions to no-animal policies, deposits, or fees that are typically charged for animals. However, the handler does not have to comply with requests that are related to their personal health. Some types of short-term temporary shelters are not covered by the FHA.

### Inquiries, exclusions, charges, and other specific rules related to service animals

Individuals can ask the handlers two questions: (1) Is the animal a service ani-

health issues may qualify for a service dog.

Veterans must have successfully completed a training program by Assistance Dog International (ADI) or the International Guide Dog Federation (IGDF) and provide a certificate. Veterans seeking to use a service dog as a VA health benefit must have their dog certified by ADI or IGDF. Applying for the VA benefit of a service dog is normally a two-stage process. The first stage will be to qualify through Veterans Affairs and the second stage through a coordinating organization to assist in training and financial assistance.

If the veteran qualifies for the VA benefit, the VA will provide financial coverage for several of the associated expenses. Coverage will be provided for one service dog at any given time. The VA, not the veteran, will be billed for a commercially available insurance policy. The VA will also be billed for any premiums, copayments, and deductibles associated with the policy.

The VA will cover all treatment associated with the service dog, including prescription medications and veterinary care.

personal injury policy, non-sedated dental cleanings, nail trimming, boarding, pet sitting or dog walking services, over the counter medications, or other routine expenses associated with owning a dog."<sup>3</sup>

Veterans can also obtain a service animal without applying for or using VA benefits or services. They can do so by obtaining and training an animal themselves or through a non-ADI or non-IGDF approved organization. However, it is important to note that Idaho does not have any ADI or IGDF approved organizations for service animals.

Additional assistance may be available through non-profit organizations. Always use legitimate organizations and avoid those that require payment for the organization's services. Do your research to find the best fit for your needs.

### Rights of handlers

A service animal must be under the control of its handler. Under the ADA, service animals must be harnessed, leashed, or tethered, unless the individual's disability prevents the use of these de-

mal? and (2) What work or task has the animal been trained to perform?

Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.

People with disabilities who use service animals cannot be isolated from other patrons, treated less favorably than other patrons, or charged fees that are not charged to other patrons without animals. In addition, if a business requires a deposit or fee to be paid by patrons with pets, it must waive the charge for service animals. Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.

Under the ADA, state and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is allowed to go. For example, in a hospital it usually would be inappropriate to exclude a service animal from areas such as patient rooms, clinics, cafeterias, or examination rooms. However, it may be appropriate to exclude a service animal from rooms where their presence may compromise a sterile environment.

## Rights of businesses

Under the ADA, places of public accommodation must allow people with disabilities to bring their service animals into all areas of the facility where customers are normally allowed to go. This federal law applies to all businesses open to the public, including restaurants, hotels, taxis and shuttles, grocery and department stores, hospitals and medical offices, theatres, health clubs, parks, and zoos.

Service animals are not required to wear a vest or identification when they are out in public. Businesses that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises. Businesses are not, however, required to provide care or food for a service animal or provide a special location for it to re-

lieve itself. Violators of the provisions of the ADA can be required to pay money damages and penalties.

## Removing a service animal

In these cases, the business should give the person with the disability the option to obtain goods or services without having the animal on the premises.

People with disabilities who use service animals cannot be charged extra fees, isolated from other patrons, or treated less favorably than other patrons. However, if a business such as a hotel normally charges guests for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

## Conclusion

Service animals are a growing trend in Idaho and can be found in the form of service dogs or miniature horses. It is important that handlers and businesses are both aware of their rights when dealing with or handling service animals. Handlers have the right to be accompanied by their service animal in any place of public accommodation. Businesses have the right to ask the two-questions stated previously.

Finally, the removal of a service animal can only happen if the animal is acting poorly and the handler does not take effective actions to correct the animal or the animal is not housebroken. If all parties are aware of their rights and responsibilities when interacting with service animals, these interactions can be smooth and positive for all.

## Resources

- Idaho Military Legal Alliance (IMLA)  
Matt Wolfe, President  
208.401.9300
- Idaho Service Dog Advocates  
Cheryl Bloom, ADA Coordinator  
[advocacyidaho@gmail.com](mailto:advocacyidaho@gmail.com)
- Boise Regional VA  
208.422.1000
- Assistance Dogs International (ADI)  
[www.assistancedogsinternational.com](http://www.assistancedogsinternational.com)
- International Guide Dog Federation  
[www.igdf.org.uk](http://www.igdf.org.uk)

*Created with the assistance of IMLA, Idaho Service Dog Associates, Mike Masterson, retired Boise Police Chief and University of Idaho College of Law students through the college's Pro Bono program.*



**Hayden Cottle** was born and raised in Las Vegas and attended Brigham Young University for a bachelor's degree in social science.

Hayden attended the University of Cambridge for additional schooling before attending law school. Hayden is an advocate for individuals with disabilities and is a board member of a non-profit that seeks to better inform and educate individuals and families on Type One Diabetes and Service Animals. Hayden and his wife, Kyleigh, work with service dogs on a regular basis and have two of their own. Their family of four enjoys the outdoors, traveling, and exploring the world. They moved to Meridian in August 2019 for Hayden to pursue further education in the form of law school at the University of Idaho.



**Quindaro E.C. Frieder** is a native Hoosier with a background that started in national and state politics, first as a Washington, D.C. lobbyist followed by positions in

the Indiana House of Representatives and Indiana Department of Labor. Her policy stint wrapped up as a public affairs officer for the Veteran Affairs Medical Center in Lebanon, PA. Quin's husband, Ryan, an Idaho native, is a physician whose career brought the Frieder family out West, with stops in Santa Fe, NM and Tucson, AZ. But it was her legal ambition which brought the family to the Gem State in June 2019 for Quin to pursue a Juris Doctor at the University of Idaho. Quin and her family love the outdoors, skiing and biking, and traveling and exploring the world through music and cooking. They currently reside in Boise.

## Endnotes

1. (28 C.F.R. §36.104)
2. (§56-701A)
3. (38 CFR§17.148)
4. (42 USC §3604(f)(3)(B); 24 CFR §100.24).

### EXPERT WEATHER TESTIMONY



Weather/climate data research & analysis 30+ yrs meteorological expertise – AMS certified – extensive weather database – a variety of case experience specializing in ice, snow, wind & atmospheric lighting.

Meteorologist Scott Dorval  
208-690-9464, sdorval88@gmail.com



Your legal staffing resource for part-time and full-time attorneys and professional employees.

*We are accepting applications and resumes from candidates for all positions.*

Contact Merrily Munther  
at (208) 853-2300 or 724-3838  
info@idaholegalstaffing.com

### Legal Research Services



IDAHO LEGAL RESEARCH  
Consulting & Services LLC



**Teresa Zywicki, J.D.**

Legal Research Specialist ♦ 30+ years experience  
Powered by Westlaw® ♦ Sample work on request  
(208)724-8817    teressazywicki@gmail.com

### MOONLIGHTING SOFTWARE

Innovative Custom Software  
Home of the Best Child Support Program

(208) 376-7728

P.O. Box 4753  
Boise, ID 83711

online.idchildsupport.com



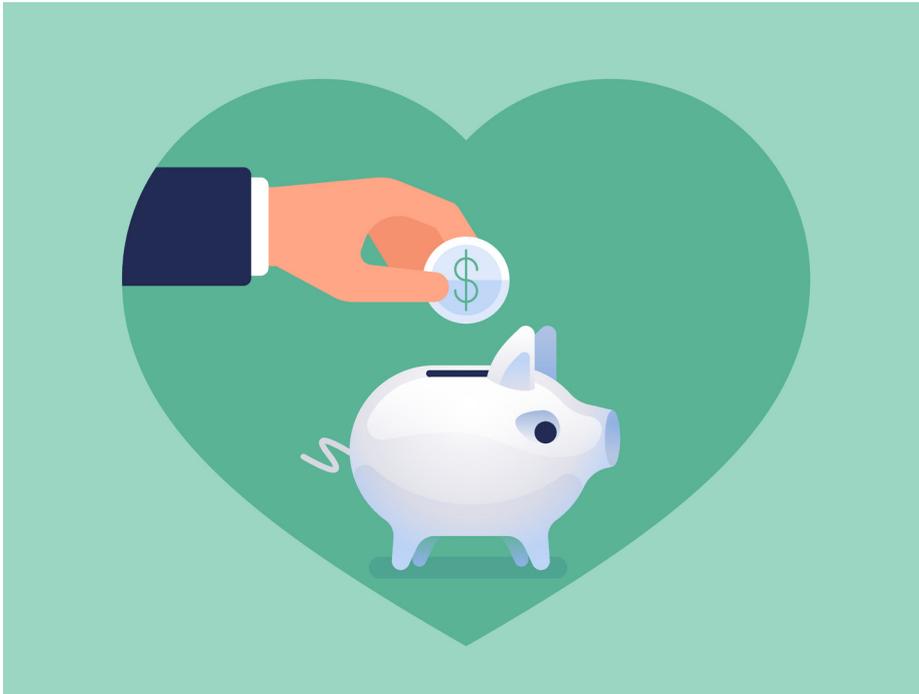
### MEDIATION IS PROCESS, PATIENCE AND PERSEVERANCE.

30+ years of litigation experience  
AAA Certified Arbitrator and Mediator

DAN WILLIAMS  
208 331-1170  
dwilliams@idalaw.com



JONES WILLIAMS  
FUHRMAN GOURLEY, P.A.  
ATTORNEYS AT LAW



## The Idaho Charitable Assets Protection Act: Better Protection of Idaho’s Charitable Assets and Donor Intent

Stephanie N. Guyon

Idaho is home to over 4,500 charitable organizations that hold over \$9 billion in charitable assets. Each year, Idahoans donate over \$900 million in charitable contributions. Yet, Idaho had no comprehensive charitable assets law until July 1, 2020 when the Idaho Charitable Assets Protection Act (ICAPA), the state’s first comprehensive charitable assets law, became effective.<sup>1</sup>

ICAPA articulates and confirms the Attorney General’s role in protecting Idaho’s charitable assets and preserving donor intent. Importantly, ICAPA includes two significant provisions that will help better protect charitable assets in Idaho.

The first provision prohibits the misuse of charitable assets.<sup>2</sup> The second provision requires charitable organizations to notify the Attorney General in writing before

they dissolve, convert to a noncharitable entity, or terminate and dispose of all or substantially all of the organization’s assets.<sup>3</sup>

This article discusses the history of regulating charitable assets and those two provisions, including the Attorney General’s related enforcement duties and authorities.

### A brief history of charitable asset regulation

The history of the state attorney general’s authority to supervise charitable trusts dates back to the development of English common law in Fifteenth Century England.<sup>4</sup> The king’s chancellor, on behalf of the Crown, began enforcing trusts that benefitted the people and the community.<sup>5</sup> The English Parliament enacted the Statute of Elizabeth in 1601 to further control

abuses of charitable donations, but the law was unsuccessful and gradually fell into disuse.<sup>6</sup> Other charity supervision laws followed, but the task of enforcing charitable trusts always fell back on attorneys general.

In 1938, the Idaho Attorney General’s common law authority over charitable trusts was called into question. In *Hedin v. Westdala Lutheran Church*,<sup>7</sup> the Idaho Supreme Court invalidated a provision in a will that left the residue of the testator’s estate to his trustee to use for charitable and religious purposes.<sup>8</sup> The Idaho Supreme Court expressed concern that if the provision was upheld no one would have standing to ensure the trustee properly distributed the funds.<sup>9</sup> The court rejected the attorney general’s common law authority to enforce charitable trusts, writing:

Apparently, in some states, the attorney general has power to commence

and maintain suits to protect public charities where property intended for their use is not being properly applied. In this state, such is not one of the duties of that official.<sup>10</sup>

In 1963, the Idaho Legislature restored the Attorney General's authority over charitable trusts. The Legislature documented the purpose of adding subparagraph (4) to the Attorney General's general duties in Idaho Code § 67-1401, writing, (4) [now (5)] gives the Attorney General authority over charitable trust assets "in conformity with the common law."<sup>11</sup>

### Attorney General's limited authority under Idaho Code § 67-1401(5)

Before ICAPA, Idaho Code § 67-1401(5) constituted the primary source<sup>12</sup> of the Attorney General's authority over charitable trust assets. Broadly phrased, paragraph 5 imposed a duty on the Attorney General to "supervise" entities and persons holding property subject to a charitable trust.<sup>13</sup>

The law authorized the Attorney General to examine charitable trusts, but failed to provide the tools (e.g., subpoenas or investigative demands) to conduct such examinations. Also, while the Attorney General could file suit to enforce compliance with a charitable trust's purpose, he could not recover lost assets or hold persons accountable for misusing charitable assets.

Court decisions implicating Idaho Code § 67-1401(5) are scarce. Since 1963, the Idaho Supreme Court has issued only four opinions addressing the statute.<sup>14</sup> Unfortunately, none of the opinions helped to interpret or clarify the statute's language.

### Idaho Charitable Asset Protection Act

The Attorney General began drafting a comprehensive charitable asset law in 2015. With input from Idaho's nonprofit community and experienced charitable trust attorneys, ICAPA emerged five years later. The law covers "charitable organizations" and their "accountable persons" holding "charitable assets," for a "charitable purpose"—each being a defined term.

*Misuse of Charitable Assets.* ICAPA prohibits a charitable organization or an accountable person from knowingly misusing charitable assets.<sup>15</sup>

A charitable organization or an accountable person misuses charitable assets by knowingly<sup>16</sup> using charitable assets or allowing charitable assets to be used in a manner that is inconsistent with the law applicable to the charitable asset, the restrictions contained in a gift instrument regarding the charitable assets,<sup>17</sup> or the charitable purpose of the charitable organization that holds the charitable asset.

An accountable person is not liable under ICAPA, however, if the accountable person does not knowingly misuse charitable assets. They also are not liable in four other situations. First, if his or her duties are discharged in compliance with the standards found in Idaho's Nonprofit Corporations Act;<sup>18</sup> second, if he or she acts in compliance with the applicable trust instrument and the instrument complies with Idaho law; third, if he or she qualifies for immunity under Idaho Code § 6-1605; and fourth, if he or she acts in compliance with a court order of which the Attorney General received timely notice, such that the Attorney General had an opportunity to object.<sup>19</sup>

ICAPA's enforcement provisions parallel those granted to the Attorney General in the Idaho Consumer Protection Act.<sup>20</sup> When the Attorney General has a reason to believe that a charitable organization or an accountable person has knowingly misused charitable assets or is knowingly misusing charitable assets, the Attorney General has authority under ICAPA to initiate an investigation of the charitable organization or the accountable person.<sup>21</sup>

Before filing a lawsuit against a charitable organization or an accountable person, the Attorney General must offer the charitable organization or accountable person an opportunity to sign an assurance of voluntary compliance or a consent judgment.<sup>22</sup> If settlement is not possible, the Attorney General may proceed with a lawsuit to obtain injunctive and financial relief.<sup>23</sup>

*Notice to Attorney General.* If a charitable organization intends to dissolve, convert to a noncharitable entity, or terminate and sell or transfer all or

---

### Defined Terms

- Charitable Organizations: persons who hold charitable assets. I.C. 48-1903(4).
- Accountable Persons: The directors, officers, executives, managers, trustees, agents, and employees of Charitable Organizations. I.C. 48-1903(1).
- Charitable Asset: Any interest in real or personal property and any other article, commodity, or thing of value that is impressed with a charitable purpose. I.C. 48-1903(3).
- Charitable Purpose: the relief of poverty, the advancement of knowledge, education, or religion, or the promotion of health, the environment, civic or patriotic matters, or any other purpose, the achievement of which is beneficial to the community. I.C. 48-1903(5).

---

substantially all of its charitable assets, the charitable organization, at least 30 days before dissolution, conversion, or termination, must provide written notice to the Attorney General.<sup>24</sup>

The charitable organization's written notice must include the following: (1) the legal names and mailing addresses of the charitable organization's directors and officers; (2) a description of the charitable organization's charitable assets and the charitable purpose of the charitable organization's charitable assets; and (3) a copy or summary of the charitable organization's plan of dissolution, conversion to a noncharitable organization, or termination and disposal of all or substantially all of the charitable organization's charitable assets.<sup>25</sup>

The Attorney General has 30 days after receiving the charitable organization's notice to inform the charitable organization in writing that the Attorney General consents to or opposes the organization's proposed plan to dissolve, convert, or terminate.<sup>26</sup> If a charitable organization receives a letter of opposition from the Attorney General, the charitable organization must refrain from implementing its proposed plan for 14 days receiving the notice.<sup>27</sup>

During that 14-day period, the Attorney General will work with the charitable organization to resolve the Attorney General's opposition to the charitable organization's proposed plan. If a resolution is not possible during the 14-day period, the Attorney General has discretion to file a lawsuit seeking to block the charitable organization's proposed plan.<sup>28</sup>

The Attorney General may investigate instances where a charitable organization fails to give proper notice.<sup>29</sup> ICAPA also gives the Attorney General authority to enter into assurances of voluntary compliance or consent judgments, and, if necessary, to file civil lawsuits against charitable organizations and their accountable persons.<sup>30</sup>

In addition to the 30-day notice requirement, a charitable organization must provide certain information to the Attorney General within 90 days of dissolving, converting to a noncharitable organization, or terminating and disposing of all or substantially all of its charitable assets.<sup>31</sup> The Attorney General must receive a list from the charitable organization that includes, at a minimum, (1) the name and address of each person who received the charitable organization's charitable assets, and (2) a description of which charitable assets the person received.<sup>32</sup>

*For More Information.* The Attorney General's FAQs regarding ICAPA are available on the Attorney General's website. The FAQs cover all of ICAPA's requirements and provide information about how the Attorney General intends to interpret and apply the law.

Attorneys who represent charitable organizations should advise their clients about ICAPA and refer them to the Attorney General's FAQs. Attorneys and charitable organization leaders may direct their questions about ICAPA to the deputy attorneys general with the Attorney General's Consumer Protection Division.

## Conclusion

Idaho has a large number of charitable organizations holding a significant amount of charitable assets. ICAPA is Idaho's first comprehensive act regulating the use of charitable assets, and it articulates and confirms the Attorney General's role in protecting Idaho's charitable assets and preserving donor intent.



**Stephanie N. Guyon** is a deputy attorney general in the Attorney General's Consumer Protection Division. She handles a variety of consumer matters, including charitable assets and solicitations, auto advertising, Internet sales, and telemarketing. The opinions expressed in this article are those of the author and do not reflect the opinions or position of the Attorney General's Office or the State of Idaho.

## Endnotes

1. Title 48, chapter 19, Idaho Code.
2. See IDAHO CODE § 48-1906.
3. See IDAHO CODE § 48-1907. The notice requirement applies to charitable organizations with charitable assets of more than \$10,000.
4. See David Villar Patton, *The Queen, the Attorney General, and the Modern Charitable Fiduciary: A Historical Perspective on Charitable Enforcement Reform*, 11 U. FLA. J.L. & PUB. POL'Y 131 (2000). For a detailed discussion of the evolution of the attorney general's common law authorities concerning charitable trust assets, along with a history of charities since the First Century A.D., see MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS (Harvard University Press 2008).
5. Patton, *supra* note 4, at 136-37.
6. *Id.* at 138-39.
7. 59 Idaho 241, 81 P.2d 741 (1938).
8. *Id.* at 243-44, 81 P.2d at 742.
9. *Id.* at 250-51, 81 P.2d at 745-46. The court found the charitable trust invalid because the will's provision failed to (1) identify a reasonably ascertainable class or group of beneficiaries; (2) limit the trustee's ability to choose the beneficiaries; or (3) identify a person who could enforce the trust. *Id.*
10. See *id.* at 250-51, 81 P.2d at 745.
11. See 1963 IDAHO SESSION LAWS 475.
12. The Attorney General also has enforcement authority over charitable trusts and private foundations pursuant to Idaho Code §§ 68-1204 and 33-1505 and Idaho's Probate Code, title 15, Idaho Code.
13. IDAHO CODE § 67-1401(5).
14. See *In re Egan's Estate*, 86 Idaho 328, 386 P.2d 563 (1963); *Yribar v. Fitzpatrick*, 91 Idaho 105, 416 P.2d 164 (1966); *Dolan v. Johnson*, 95 Idaho 385, 509 P.2d 1306 (1973); *Kleiner v. Kleiner*, 130 Idaho 930, 950 P.2d 1269 (1998). The *Dolan* court also recognized the beneficiaries' right to enforce the charitable trust pursuant to Rules 23(a) [now 73(a)] of the Idaho Rules of Civil Procedure. *Dolan* at 390, 509 P.2d at 311.
15. See Idaho Code § 48-1906.
16. Under Idaho law, "the word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of [the law]. It does not require any knowledge of the unlawfulness of such act or omission." IDAHO CODE § 18-101(5).
17. ICAPA does not prevent a person from seeking a release or modifying the charitable purposes or restrictions within a gift instrument as Idaho law allows. See Idaho Code § 48-1906(1)(b).
18. See Idaho Code §§ 30-30-618 and 30-30-623.
19. See Idaho Code § 48-1906(2).
20. The Idaho Consumer Protection Act is codified at title 48, chapter 6, Idaho Code.
21. See IDAHO CODE § 48-1908.
22. Assurances of voluntary compliance and consent judgments serve as settlement agreements between the Attorney General, on behalf of the State of Idaho, and charitable organizations or accountable persons. The district court must approve the terms within an assurance or consent judgment. See Idaho Code § 48-1909.
23. The Attorney General may request and a court has authority to (a) issue a temporary restraining order or preliminary or permanent injunction to enjoin the alleged violator's unlawful activities; (b) appoint a master, receiver, or escrow agent to gather, account for, and oversee the charitable assets of the alleged violator and prevent further dissipation of any charitable assets; (c) remove the alleged violator from his or her position as an accountable person of the charitable organization; (d) terminate a charitable organization and liquidate its charitable assets in accordance with the charitable organization's governing instrument(s) or applicable law; (e) require the alleged violator to pay damages or restitution of any charitable assets misappropriated, lost, or diverted; (f) require the alleged violator to pay civil penalties of up to \$50,000; (g) order the alleged violator to perform a specific action; and (h) require the alleged violator to pay the attorney general's fees, reasonable expenses, and investigative costs. See IDAHO CODE § 48-1910(1).
24. See IDAHO CODE § 48-1907. ICAPA does not require charitable organizations to notify the Attorney General every time they sell or transfer a charitable asset. The notice requirement only applies when charitable organizations terminate operations or convert to a noncharitable entity and intend to distribute all or substantially all of their charitable assets.
25. See IDAHO CODE § 48-1907(3). A form notice that charitable organizations may use to notify the Attorney General is posted on the Attorney General's website at [www.ag.idaho.gov](http://www.ag.idaho.gov).
26. See IDAHO CODE § 48-1907(4). The Attorney General may consent in writing to charitable organization's plan. If the charitable organization does not receive a notice of consent or opposition from the Attorney General opposing its proposed plan, the charitable organization may proceed with its plan. See IDAHO CODE § 48-1907(6).
27. See IDAHO CODE § 48-1907(8).
28. See IDAHO CODE § 48-1907(8). If 14 days pass from when the charitable organization received the Attorney General's written opposition and the Attorney General does not file suit seeking to block the charitable organization's proposed plan, the charitable organization may proceed with its plan. See IDAHO CODE § 48-1907(8).
29. See IDAHO CODE § 48-1908.
30. See IDAHO CODE § 48-1910(2). The Attorney General may request the court enter an order that: (a) prevents the charitable organization from proceeding with its proposed plan to dissolve, convert to a non-charitable organization, or terminate and dispose of all or substantially all of its charitable assets; (b) appoints a master, receiver, or escrow agent to gather, account for, and oversee charitable assets if it appears the charitable organization's charitable assets may be dissolved, converted, terminated, or disposed of during the Attorney General's lawsuit; (c) terminates a charitable organization and liquidates its charitable assets in accordance with its governing instrument(s) or applicable law; and (d) requires the charitable organization's accountable person(s) to pay civil penalties of up to \$5,000 if the charitable organization's accountable person(s) knew of and intended to violate the notice provisions of Idaho Code § 48-1907.
31. See IDAHO CODE § 48-1907(7).
32. See IDAHO CODE § 48-1907(7).



Mediation & Arbitration Services

Senior District Judge

**DUFF MCKEE**

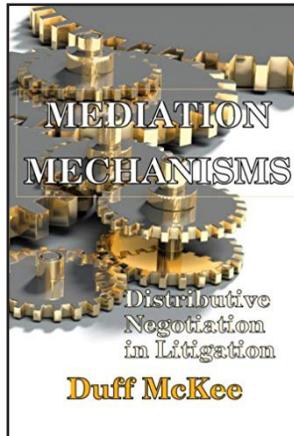
Over 30 years - Over 2,000 cases

(208) 381-0060  
ddmckee@ddmckee.com  
[WWW.DDMCKEE.COM](http://WWW.DDMCKEE.COM)

**JUDGE MCKEE'S BOOK**

*A valuable resource in preparing for mediation*

**AVAILABLE ON AMAZON**  
or from the publisher at  
[WWW.RIDENBAUGHPRESS.COM](http://WWW.RIDENBAUGHPRESS.COM)



**For Those Who Take Criminal Defense Seriously.**  
**Benefits Include:**

- Top-notch CLEs
- List Serve
- Strike Force Assistance
- *Idaho's Best Criminal Cases* (13<sup>th</sup> Ed. 2020)
- Amicus Assistance
- Members-only Website

**More Information:**  
**Contact IACDL**  
Executive Director Debi Presher  
[dpresher@nbmlaw.com](mailto:dpresher@nbmlaw.com)

**2021 LAWYERS OF THE YEAR – BEST LAWYERS®**



**Tyler J. Anderson**  
**LAWYER OF THE YEAR**  
Litigation – Construction



**John Ashby**  
**LAWYER OF THE YEAR**  
Litigation – Labor & Employment Law



**John A. Bailey**  
**LAWYER OF THE YEAR**  
Personal Injury  
Litigation – Defendants



**Richard F. Goodson**  
**LAWYER OF THE YEAR**  
Real Estate Law



**John McGown, Jr.**  
**LAWYER OF THE YEAR**  
Tax Law



**Sheila R. Schwager**  
**LAWYER OF THE YEAR**  
Bankruptcy and Creditor  
Debtor Rights / Insolvency and  
Reorganization Law

**2021 Best Lawyers®**

Mike Baldner  
Brian L. Ballard  
Howard D. Burnett  
Merlyn W. Clark  
Lynnette M. Davis  
Julian E. Gabiola  
David P. Gardner

Kenneth C. Howell  
Paula L. Kluksdal  
David W. Knotts  
John F. Kurtz  
James L. Martin  
Craig L. Meadows  
Brad P. Miller

Nicholas G. Miller  
Thomas J. Mortell  
Carsten A. Peterson  
Rita L. Ricks  
Andrea Rosholt  
Cathy R. Silak  
Marvin M. Smith

Richard G. Smith  
Michael M. Stoddard  
Stephen R. Thomas  
Tracy L. Wright

**2021 Best Lawyers® Ones to Watch**

Lars E. Lundberg  
William K. Smith  
Brent Wilson





## 2020 Richard C. Fields Civility Award: Newal Squyres

*Idaho State Bar  
Professionalism & Ethics Section*

The *Richard C. Fields Civility Award* recognizes an attorney who demonstrates a strong commitment to professionalism and civility in the practice of law. The award was created in 2014 to honor the memory of the late Richard Fields. Mr. Fields received the Idaho State Bar's Distinguished Lawyer Award in 2000 and chaired the Dean's Advisory Council at Concordia University School of Law from 2009 to 2014. Additionally, Mr. Fields demonstrated a commitment to professionalism and civility in his practice of law.

In honor of Mr. Fields' memory and legacy, this year's award is presented by the Idaho State Bar Professionalism & Ethics Section and the former Concordia University School of Law. We are pleased to announce the 2020 recipient of the *Richard C. Fields Civility Award*

is Newal Squyres, practicing at Holland & Hart, in Boise, Idaho.

Mr. Squyres' passion for the law was ignited during his clerkship for Judge Joe Ingraham on the U.S. Court of Appeals for the Fifth Circuit. The principles of civility and professionalism have guided Mr. Squyres' approach to practicing law throughout his career, which spans more than 45 years. Mr. Squyres also served in the Office of Legal Counsel (OLC) on the personal staff of U.S. Attorney General Griffin Bell from 1977-1979. During his tenure in the OLC, he focused on national security and counterintelligence issues, including passage and implementation of the Foreign Intelligence Surveillance Act (FISA).

Mr. Squyres is a Fellow in the American College of Trial Lawyers, a preeminent organization of trial lawyers in North America, for which fellowship is extended

only by invitation to those experienced trial lawyers whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility, and collegiality.

In 2015, Mr. Squyres was honored with the Idaho State Bar's Distinguished Lawyer Award. He has served as an Idaho State Bar Commissioner, including one term as president. While Idaho State Bar president, he wrote about civility and professionalism. Mr. Squyres insightfully wrote:

Definitions of "kindness" include compassion, generosity, a helping act, and service. Each of these is an attribute to which good lawyers should aspire. Synonyms that seem particularly appropriate to what we do are courtesy, humanity, indulgence, patience, thoughtfulness, tolerance, and understanding. Each

of these qualities are associated with professionalism, and the common watchword today, civility. But until I heard former U.S. Attorney General and, now Judge Griffin Bell described as a kind man, I had not really thought about that characteristic as summing up the essence of professionalism and civility.

According to his colleague, Murray Feldman, Newal really “walks the walk” of civility and professionalism. Mr. Feldman continued, “Newal always stresses solving the client’s problem, and listening—to your client, your colleagues, your adversary, the court, and perhaps most importantly, your family. He preaches patience, never trying to force an outcome, argument, or resolution that may not be ready to be had yet. And he models civility—kindness as he puts it—in his everyday professional and personal interactions.”

He has served on the Idaho Pro Bono Commission, Idaho Partners Against Domestic Violence, Idaho Law Foundation, Citizens’ Law Academy, and other profes-

sional organizations. He has spent time giving back to future lawyers, teaching at the Trial Advocacy Clinic at the University of Idaho Law School for over two decades. Additionally, he is dedicated to mentoring younger generations of lawyers, readily sharing his expertise, practical guidance, and “war” stories to help encourage civility and professionalism in their own careers. One attorney remarked that Mr. Squyres, who at the time was serving as co-defense counsel, was more of a mentor to her than the partner from her own firm. In recent years, Mr. Squyres has added the role of mediator to his distinguished career.

Outside of his law practice, he has devoted hundreds of hours to youth soccer, working for decades as a coach and member of the Boise Nationals Soccer Club Board.

According to one of his partners at Holland & Hart, Mary York, “Newal epitomizes civility and professionalism and is well-deserving to receive this award. Newal has been a tremendous mentor, colleague and friend, and I am proud to call him my partner.” Brian Hansen also

---

“In recent years, Mr. Squyres has added the role of mediator to his distinguished career.”

---

commented, in nominating Mr. Squyres for this award, that he recalled a specific case where an opposing counsel’s out of state counsel was being very difficult to deal with, yet “Newal handled the matter with grace and professionalism.”

Please join us in giving a big congratulations and thanks to Mr. Squyres, who demonstrates a strong commitment to professionalism and civility, is a genuine example to his peers, and truly embodies the qualities of the *Richard C. Fields Civility Award*.

# ALAN R. GARDNER

*Conducts independent mediations in IDAHO Workers’ Compensation cases.*

- 50 years experienced as Worker’s Compensation attorney.
- Martindale-Hubbell AV Preeminent rating.
- Member Board of Governors of the College of Workers’ Compensation Lawyers (CWCL).
- Experienced in negotiating Workers’ Compensation settlements.



PLEASE CONTACT MR. GARDNER’S OFFICE AT:  
1410 W. WASHINGTON STREET • BOISE, IDAHO 83702  
(208) 387-0881 • [agardner@gardnerlaw.net](mailto:agardner@gardnerlaw.net)

# Court Information

## OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice  
Roger S. Burdick

Justices  
Robyn M. Brody  
G. Richard Bevan  
John R. Stegner  
Gregory W. Moeller

### Regular Fall Term for 2020

*1<sup>st</sup> Amended May 20, 2020*

Boise & Coeur d'Alene via Zoom ..... August 17, 19, and 21  
Pocatello ..... September 9 and 10  
Twin Falls ..... September 11  
Boise ..... September 14 and 16  
Boise ..... November 2, 4, 6, 9, and 12  
Boise ..... December 7, 9 and 11

By Order of the Court  
Karel A. Lehrman, Clerk

**NOTE:** The above is the official notice of the 2020 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.

## OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge  
Molly J. Huskey

Judges  
David W. Gratton  
Jessica M. Lorello  
Amanda K. Brailsford

### Regular Fall Term for 2020

*5/19/20*

Boise ..... August 11, 13, 18, and 20  
Boise ..... September 1, 3, 15, and 17  
Boise ..... October 13, 15, 20, and 22  
Boise ..... November 5, 10, 17, and 19  
Boise ..... December 8

By Order of the Court  
Karel A. Lehrman, Clerk

**NOTE:** The above is the official notice of the 2020 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 November 2020

*9/17/20*

### November, 2020 via Zoom

#### **Monday, November 2, 2020 – BOISE**

8:50 a.m. *State v. Rebo* ..... #46451  
10:00 a.m. *Rouwenhorst v. Gem County* ..... #47668  
11:10 a.m. *Asher v. McMillian* ..... #47684

#### **Wednesday, November 4, 2020 – BOISE**

8:50 a.m. *State v. Orozco* ..... #47263  
10:00 a.m. *Chernobieff v. Smith* ..... #47337  
11:10 a.m. *Frizzell v. DeYoung* ..... #47543

#### **Friday, November 6, 2020 – BOISE**

8:50 a.m. *State v. Gorringer* ..... #46554  
10:00 a.m. *Weitz v. Weitz* ..... #47483  
11:10 a.m. *Tucker v. State* ..... #46882

#### **Monday, November 9, 2020 – BOISE**

8:50 a.m. *Choice Feed v. Montierth* ..... #46544  
10:00 a.m. *State v. Huckabay* ..... #48109  
11:10 a.m. *Hilton v. Hilton* ..... #47487

#### **Thursday, November 12, 2020 – BOISE**

8:50 a.m. *State v. Howard* ..... #47367  
10:00 a.m. *Bromund v. Bromund* ..... #47602  
11:10 a.m. *Abdullah v. State* ..... #46497

## Idaho Appeals Court Oral Arguments for October 2020

*9/17/20*

### October, 2020 via Zoom

#### **Thursday, October 22, 2020 – BOISE**

9:00 a.m. *State v. Frakes* ..... #46887/46928  
10:30 a.m. *State v. Ochoa* ..... #47796

### Idaho Supreme Court Calendar

Oral arguments held in Boise are now available to watch live streaming via Idaho Public Television's Idaho Live at: <http://idahoptv.org/insession/courts.cfm>

Please note, playback quality will depend on your Internet connection speed.

Press releases and schedules are posted as they are made available at <https://isc.idaho.gov/>.

## Brian Donesley LIQUOR LAW

- Former Idaho Liquor Chief
- Former Idaho State Senator
- 30+ years experience in liquor law
  - Retail/Wholesale
  - Revocations/Suspensions/Criminal
  - Hearings/Appeals/Trials
  - Lobbying/Governmental Affairs
  - State, Local, Federal, Multi-State
  - National Association of Alcohol Beverage Attorneys (NAABLA)
  - Licensed in Idaho and Washington

Brian Donesley, Attorney at Law  
ISB No. 2313

P.O. Box 419, – Boise, ID 83701  
Telephone: (208) 343-3851  
bdonesley@bdidlaw.com  
www.idaholiquorlaw.com



## GRANT T. BURGOYNE MEDIATOR AND ARBITRATOR



Certified Professional Mediator

On State and Federal Court  
Mediator Rosters

Arbitrator

Hearing Officer

AV Rated Attorney

*Serving Idaho Attorneys and their Clients*

- Employment • Contracts • Torts • Commercial
- Personal Injury • Civil Rights

(208) 859-8828 | Grant@ADRIDaho.com  
www.ADRIdaho.com



**SAGE**  
SETTLEMENT CONSULTING



**Audrey Kenney, CSSC**  
Sage Settlement Consulting  
Senior Settlement Consultant  
Phone: (208) 631-7298  
akenney@sagesettlements.com

## INNOVATIVE SOLUTIONS FOR ATTORNEYS AND THEIR CLIENTS

### Sage's Comprehensive Services:

- Structured Settlement Annuities
- Market-Based Structured Settlements
- Non-Qualified Structured Settlements
- Attorney Fee Deferral Strategies
- Trust Services
- Qualified Settlement Funds (468B Trusts)
- Government Benefit Preservation
- Mass Tort Settlement Resolution
- Lien Resolution
- Medicare Set-Asides
- Probate Coordination
- Law Firm Financing

www.sagesettlements.com

## Civil Appeals

### Damages

1. Whether the trial court erred by concluding plaintiff failed to prove it was damaged by defendant's breach of the parties' trademark settlement agreement.

*Gem State Roofing v. United Components*  
Docket No. 47484  
Supreme Court

### Post-conviction relief

1. Whether the district court erred by granting the state's motion for summary dismissal and ruling that petitioner's amended post-conviction petition took the place of, and did not incorporate, his original post-conviction petition and supporting declaration.

*Davis v. State*  
Docket No. 47638  
Court of Appeals

### Standing

1. Whether plaintiffs had standing to bring a suit for property damage when plaintiffs did not own the property at the time the damage occurred and pursued their claim based on an assignment from the previous property owner.

*Radford v. Van Orden*  
Docket No. 47364  
Supreme Court

### Statute of limitations

1. Whether the district court erred by ruling defendants reinitiated the statute of limitations on plaintiffs' breach of contract claim by acknowledging the existence of the debt in writing.

*Fuentes v. Williams*  
Docket No. 47021  
Court of Appeals

## Criminal Appeals

### Denial of counsel

1. Whether the district court erred by ruling the state could not use the defendant's prior misdemeanor DUI conviction to enhance his current DUI charge to a felony because the record was silent as to whether the defendant waived his right to counsel in the prior DUI case.

*State v. Price*  
Docket No. 47608  
Court of Appeals

### Double jeopardy

1. Whether the district court erred by denying defendant's motion to dismiss and finding defendant's retrial was not barred by double jeopardy where his original trial prematurely ended in a mistrial due to circumstances beyond the parties' control, and pursuant to the stipulation of the state and defense counsel.

*State v. Bowman*  
Docket No. 47333  
Court of Appeals

### Due process

1. Whether the mid-trial amendment of the charging document to add an alternative means by which the defendant was alleged to have committed the crime violated the defendant's rights to due process and to prepare and present a defense.

*State v. Larsen*  
Docket No. 47148  
Court of Appeals

2. Whether the state breached the plea agreement by supporting its sentencing recommendation on a reduced charge of felony injury to a child by referencing the conduct that formed the basis of the original lewd conduct charges.

*State v. Harris*  
Docket No. 47635  
Court of Appeals

3. Whether the district court erred by denying defendant's motion for a mistrial after a state's witness testified that defendant had an outstanding warrant for his arrest.

*State v. Richardson*  
Docket No. 47371  
Court of Appeals

4. Whether the district court erred by denying defendant's motion for a mistrial after a state's witness testified that defendant was on parole, in violation of the district court's pretrial order that such information was inadmissible.

*State v. Maki*  
Docket No. 47426  
Court of Appeals

5. Whether the district court abused its discretion by denying defendant's motion to withdraw her guilty plea and finding that defendant's guilty plea and the accompanying waiver of her right to file a motion to withdraw the plea, were knowingly, voluntarily and intelligently entered.

*Smith v. Smith*  
Docket No. 47441  
Court of Appeals

### Evidence

1. Whether the district court erred by excluding the breath testing instrument verification logs and testimony regarding the standard operating procedures governing the certification and measure of uncertainty for breathalyzer devices from evidence at the defendant's trial for felony driving under the influence of alcohol.

*State v. Keys*  
Docket No. 47587  
Court of Appeals

2. Whether the district court abused its discretion by denying defendant's pre-trial motion for the admission of alternate perpetrator evidence on the basis that the evidence was hearsay and did not meet the trustworthiness requirement of I.R.E. 804(b)(3).

*State v. Blake*  
Docket No. 47157  
Court of Appeals

### Probation revocation

1. Whether the district court erred by finding defendant waived his right to confront adverse witnesses and allowing the state to introduce hearsay evidence to prove its allegations that defendant violated the conditions of his probation.

*State v. Gray*  
Docket No. 47203  
Court of Appeals

### Procedure

2. Whether the district court erred by failing to conduct the analysis required by I.C.R. 14 when addressing the state's motion for joinder of the drug possession charge with other charges.

*State v. Chacon*  
Docket No. 47009  
Court of Appeals

3. Whether the district court erred by ruling on defendant's motion to seal the criminal case record without first conducting the hearing required by I.C.A.R. 32(i)(1).

*State v. Clapp*  
Docket No. 47446  
Court of Appeals

### Search and seizure – suppression of evidence

1. Whether the district court erred by denying the motion to suppress and finding that the warrantless search of defendant's vehicle was a valid inventory search conducted pursuant to established police procedures.

*State v. Weliever*  
Docket No. 47332  
Court of Appeals

2. Whether the officer's actions of taking defendant into protective custody to transport him to a hospital for mental health treatment and searching him before placing him in the police car were constitutionally reasonable under the community caretaking function.

*State v. Towner*  
Docket No. 47396  
Court of Appeals

3. Whether the district court erred by granting the motion to suppress and finding that the officer unlawfully extended the traffic stop by deviating from writing the citation to engage in a conversation with other officers who arrived on scene.

*State v. Riley*  
Docket No. 47372  
Court of Appeals

#### **Sentence review**

1. Whether the district court erred by affirming the magistrate's judgment ordering the defendant to serve consecutive periods of probation for two counts of driving without privileges.

*State v. Magsamen*  
Docket No. 47716  
Court of Appeals

2. Whether the district court abused its discretion by suggesting that a 10-year fixed term of confinement could never be appropriate in a homicide case, even though such sentence is permitted under the law.

*State v. Ruff*  
Docket No. 47028  
Court of Appeals

**Summarized by:**  
**Lori Fleming**  
**Supreme Court Staff Attorney**  
**(208) 334-2246**

# Martelle, Gordon & Associates, p.a.

5995 W. State St., Suite A – Boise, ID 83703  
(208) 938-8500 | [www.martellelaw.com](http://www.martellelaw.com)

**WE CAN HELP WITH DEBT PROBLEMS  
FROM STUDENT LOANS, IRS OR STATE TAXES,  
CREDIT CARDS, AND OTHER DEBTS.**

#### **TAX PROBLEMS**

Offer in Compromise  
Installment Plans  
Innocent Spouse Relief  
Penalty Abatement  
Bankruptcy Discharge  
Tax Court Representation  
Lawsuits in Federal Court

#### **STUDENT LOAN NEGOTIATIONS**

Payment Plans  
Forgiveness  
Deferment/Forbearance



#### **BANKRUPTCY**

Chapter 7  
Chapter 11  
Chapter 13  
Business & Personal

# In Memoriam

## Anthony P. De Giulio 1939 – 2020

Anthony Paul De Giulio, 80, of Pingree, passed away, Monday, August 24, 2020 at Bingham Memorial Hospital.



Tony was born December 25, 1939 in Pingree, Idaho to Suzio L. and Mary Busico De Giulio.

Tony attended Idaho State University where he joined ROTC. Following ISU, he received his legal degree from Willamette University in Salem, OR. Tony served his country in the United States Army during the Vietnam War and received many medals and awards. He was awarded the Legion of Merit, Bronze Star Medal, Meritorious Service Medal, Army Commendation Medal, National Defense Service Medal with Bronze Star, Vietnam Service Medal, Army Service Ribbon, Overseas Service Ribbon, and Republic of Vietnam Campaign Medal. He put together and monitored the first US Army trial defense service.

Tony married Barbara Marie Whiting, together they had four children. They later divorced. On February 4, 1983 he married Nadine Eileen Semler in Colorado Springs, CO.

Upon his honorable discharge in September of 1993 he continued to live in Virginia for a couple of years before moving home to Pingree. Tony then opened up the De Giulio Law Office in Blackfoot in March of 1996. He fully retired in 2005.

Tony is survived by his wife, Nadine of Pingree; children, Nicolas Anthony De Giulio, Leslie Ann De Giulio, Toni Jeanne Andrews, and Gionina Piccolina De Giulio; sister, Anna Kesterson; eight grandchildren; and 11 great grandchildren. He was preceded in death by his parents; daughter, Lynn Marie; and brothers, Eugene and Ernie De Giulio.

## Edward J. Anson 1951 – 2020

Beloved husband, father, grandfather, and friend, Edward "Ed" Joseph Anson, 69, of Pinehurst, Idaho, passed away Aug. 11, 2020, at St. Patrick's Hospital in Missoula, MT. He was born Jan. 9, 1951, in Philadelphia, PA; Ed was the son of Edward and Theresa (Whelan) Anson.



Ed attended Washington College of Maryland, where he studied English and political science. During his undergrad time, Ed took a year off to travel and work across Europe. He then moved west, where he attended and graduated from Gonzaga University with a law degree. After graduation, Ed moved to Wallace, Idaho, where he began practicing law. He practiced at Anson & Sweney for a few years before opening up the Coeur d'Alene branch of Witherspoon Kelly in the late 1980s, where he worked until he retired in April 2017.

On Oct. 13, 1990, Ed was united in marriage to Marla, in Paris, France.

Ed had many passions in life. He enjoyed golf, skiing, old movies, photography, and listening to music, especially the Rolling Stones. Ed was a world traveler, with a particular affinity for France, Italy, and Mexico. He was also known as a "foodie," enjoying all types of cuisines and cooking for the family. At the end of the day, Ed loved nothing more than putting his nose in a good book.

Ed is survived by his beloved wife of 30 years, Marla Anson; four children, Ryan (Ashley) Bailey, James (Eryka) Anson, Stephen Anson, and Rachelle Evans; and six grandchildren, Kyncie, Mason, Lexi, Brooklyn, Olivia, and Violet. Ed was preceded in death by his parents.

## John A. Doerr 1933 – 2020

John Doerr of Twin Falls, Idaho, 87, died of complications from acute aging on August 22, 2020. He was born in Bismarck, North Dakota to Mary Heisler Doerr and August Doerr, on May 24, 1933.



John was a loving husband, father, son, brother, and friend. He had many passions in his life, among them the practice of law, hunting and fishing, gathering the bounty of the wild, gardening, travel and adventure, visiting with family and friends, the study of philosophy and classic literature, music and dance, and lifting a glass of good drink. He celebrated life and lived it



### McClaran Legal Research & Writing, LLC *Amie McClaran, J.D.*

- 13 years of experience as a staff attorney to Idaho district court judges
- Member of the Idaho State Bar
- Reasonable hourly rates, with reduced rates for Public Defender Conflict cases
- No charge for consultations

(208) 994-2020 | [mcclaranlrw@gmail.com](mailto:mcclaranlrw@gmail.com)  
[www.mcclaranlrw.com](http://www.mcclaranlrw.com)



KEY BUSINESS CENTER

DOWNTOWN BOISE

### NORTHEACING CONTIGUOUS OFFICES NOW AVAILABLE!

Key Business Center – choose your lease option at the prestigious Key Financial Plaza! Parking included! Full Service! – all inclusive! Secure bike parking, on site health club and showers also available. Join us in the heart of Downtown Boise! [karen@keybusinesscenter.com](mailto:karen@keybusinesscenter.com); [www.keybusinesscenter.com](http://www.keybusinesscenter.com), 208-947-5895.

to the fullest, knowing it was a blessed gift, not to be taken for granted.

John finished his education at the University of North Dakota, Grand Forks, ND, in 1958 when he received his J.D. During his time in school, in the summers he traveled to northern Idaho, where he worked for the forest service and developed his love of the mountains, adventure, and the State of Idaho.

John started his practice of law with his father, August, in Napoleon, ND, for the first five years, then made the decision to pursue an opportunity to work for a law firm in Twin Falls, Idaho, where he practiced law until a week before his death. John had a long honorable career as a lawyer.

John married Rosemarie Hansen shortly after they met in 1954 and spent the next 60 years together, until Rosemarie's death in 2016. John's second love, Joan Davies, blossomed late in his life.

John is survived by his second love, Joan Davies; sisters, Lori and Trish; chil-

dren, Kathleen Willard, Thomas Doerr, Michele Harris, and Mark Doerr; 12 grandchildren; and 11 great-grandchildren.

### Thomas R. Cushman 1946 – 2020

Thomas Rhea Cushman who passed away quietly Sept. 2, 2020. Son of attorney A. Richard Cushman and Joann Ganey Cushman (Finlay), born March 12, 1946, in New London.



Thomas loved his wife Gail; his children, Elizabeth Hume (Chris) and Cole Cushman (Pam). His love of his grandchildren was endless. Nathaniel and Tommy Cushman, and Roe and Maggie Hume are his proudest legacy.

His work life always centered around the law with time spent as a judge in Gooding, Idaho. He served in the Idaho Legislature, and was a special master for the Snake River Basin Adjudication. He

was a Boise County Prosecuting Attorney and Public Defender in Orofino, Idaho.

His interests spanned a wide spectrum. He loved to cook, read, dance, sing, ski, golf, and travel. The love of travel was shared with his lifelong companion and adventurer, Gail, and together they visited all 50 states, 30ish countries, and all seven continents.

He was particularly proud of his service to his country in the United States Marine Corps. Tom and Gail were married for 53 years and never looked back.

### Keeping track

Despite our best efforts, there are times when a member's death remains undocumented. Upon learning of a fellow attorney's death, please feel free to contact Lindsey Welfley with the information at [lwelfley@isb.idaho.gov](mailto:lwelfley@isb.idaho.gov). This will allow us to honor the individual with details "In Memoriam."

# WE ARE COMMERCIAL LITIGATION EXPERTS

It's who we are. It's all we do.  
We've handled some of the toughest, most complex business cases in the Northwest. And because we represent both defendants and plaintiffs, we understand your opponents' motivations and strategies — *and what it takes to win.*

Andersen Schwartzman Woodard Dempsey PLLC • 208.342.4411  
101 S Capitol Blvd, Suite 1600, Boise • [aswdpllc.com](http://aswdpllc.com)



## Ninth Circuit Court of Appeals Appoints New Bankruptcy Judge for District of Idaho

SAN FRANCISCO, CA — Judges of the United States Court of Appeals for the Ninth Circuit have appointed Noah G. Hillen as the next bankruptcy judge on the U.S. Bankruptcy Court for the District of Idaho. His 14-year term began on August 31, 2020, when he took his oath of office administered by Chief Bankruptcy Judge Joseph Meier of the District of Idaho. Mr. Hillen will maintain chambers in Boise.



Mr. Hillen, 38, engaged in private practice as a Chapter 7 trustee and attorney in Boise since 2014, primarily in bankruptcy and commercial law. Previously, he worked as an associate attorney from 2010 to 2013 at Moffatt, Thomas, Barrett, Rock & Fields Chtd. in Boise. From 2009 to 2010, Mr. Hillen was an associate attorney at Hall, Farley, Oberrecht,

and Blanton P.A., in Boise.

Mr. Hillen received his Bachelor of Arts from the College of Idaho and his juris doctorate from the University of Idaho College of Law. Following law school, Mr. Hillen clerked at Idaho's Fourth Judicial District Court for Judge Joel D. Horton, who was then elevated to the Idaho Supreme Court, where Mr. Hillen continued his clerkship with Justice Horton until 2009.

The U.S. Bankruptcy Court for the District of Idaho received 3,665 bankruptcy filings in 2019. The court is authorized two permanent judgeships.

Judges of the U.S. Court of Appeals for the Ninth Circuit have statutory responsibility for selecting and appointing bankruptcy judges in the nine western states that comprise the Ninth Circuit. The court uses a comprehensive merit selection process for the initial appointment and for reappointments. Bankruptcy judges serve a 14-year renewable term and handle all bankruptcy-related matters under the U.S. Bankruptcy Code.

## Promotion of Captain Anil Kimball, Idaho Army National Guard

FORT IRWIN, CA – On August 14, 2020, Anil Kimball was promoted to the rank of Captain. Captain Kimball is a Judge Advocate in the Idaho Army National Guard. He is currently serving a one-year mobilization in the Office of the Staff Judge Advocate, Fort Irwin, California, where he is focusing in the Army legal functional area of administrative law. Upon his return to Idaho, Captain Kimball will resume his duties as the National Security Law advisor in the Brigade Legal Section, 116th Cavalry Brigade Combat Team, Idaho Army National Guard, where he will continue to advise commanders on the Law of Armed Conflict. Captain Kimball has served in the Idaho Army National Guard since October 2018 and has been a member of the Idaho State Bar since January 2018.



## Thank you, Tom

After over three years of working with Tom Walker at Generations Law Group, I am joining the law firm of Ludwig Shoufler Miller Johnson, LLP. Tom gave me my first job out of law school, and I wanted to take this time to express my appreciation for his mentorship and friendship for these past three years.

Despite our 40-year age and nearly 10,000 Bar number difference, when Tom started his new firm, he hired me as his associate. Through his encouragement and guidance, I have been able to be extremely active in the Bar, getting elected as an officer of the 4<sup>th</sup> District Bar Association, providing pro bono service to veterans, and being elected Chair of the Idaho Military Legal Alliance.



I will forever be grateful to Tom. Tom is an expert in complex litigation, especially in the areas of Business Law and Trusts and Estates. I would recommend him to any attorney or client that has questions in these areas. My family and I look forward to our continued friendship. Thank you again, Tom.

~ T. Matthew Wolfe II

## Idaho Academy of Leadership for Lawyers Class of 2020-2021



Idaho Academy of Leadership for Lawyers Class of 2020-2021. Top row from left to right: Sarah M. Brekke, Lisa M. Carlson, Jennifer R. Chadband, and Erik W. Ellis. Middle row from left to right: Jill S. Holinka, Cheyenne M. House, Brit A. Kreimeyer, and Mark D. Perison. Bottom row from left to right: Tyler J. Rands, Tawnya Rawlings, Elizabeth D. Sonnichsen, and T. Matthew Wolfe, II.

### Idaho Academy of Leadership for Lawyers Class of 2020-2021 Announced

STATEWIDE – The Idaho Academy of Leadership for Lawyers proudly announces their 2020-2021 class. The participants will be the Academy’s ninth class. The diverse makeup of the class features attorneys from four judicial districts who

encompass an array of practice areas.

Participants have pursued legal careers in the fields of criminal law, health care, real estate, local government, business, family law and estate planning as in-house counsel, in solo, small and large firms and for local government. Participants will meet in Boise over five sessions for this interactive leadership training program designed specifically for lawyers. The first

session will take place September 25th and 26th with Graduation set for May 7, 2021.

Special thanks to the Fourth District Bar Association and the Fifth District Bar Association for their generous financial support of the Academy. For more information please contact Teresa Baker, Idaho State Bar Program and Legal Education Director at (208) 334-4500.

Idaho Academy of Leadership for Lawyers Class of 2020-2021	
<b>Sarah M. Brekke</b> <i>St. Luke's Health System</i>	<b>Lisa M. Carlson</b> <i>Holland &amp; Hart LLP</i>
<b>Jennifer R. Chadband</b> <i>Zasio Enterprises, Inc.</i>	<b>Erik W. Ellis</b> <i>Canyon County Public Defender's Office</i>
<b>Jill S. Holinka</b> <i>Holinka Law, PC</i>	<b>Cheyenne M. House</b> <i>Elam &amp; Burke</i>
<b>Brit A. Kreimeyer</b> <i>McConnel, Wagner, Sykes + Stacey, PLLC</i>	<b>Mark D. Perison</b> <i>Mark D. Perison, PA</i>
<b>Tyler J. Rands</b> <i>RandsLaw, PLLC</i>	<b>Tawnya Rawlings</b> <i>Bannock County Public Defender's Office</i>
<b>Elizabeth D. Sonnichsen</b> <i>Duke Evett, PLLC</i>	<b>T. Matthew Wolfe, II</b> <i>Ludwig Schoufler Miller Johnson, LLP</i>



## October

**9** *Ethics in Trust and Estate Planning*  
1.0 Ethics credit  
Live Audio Stream



 = In Person

 = Live Webcast

**16** *COVID-19's Impact on Idaho's Healthcare Providers*  
1.5 CLE credits  
Live Webcast



 = Live Audio Stream

**23** *Family Law Fall Conference*  
6.0 CLE credits  
Live Webcast



**30** *Idaho Pro Bono Week CLE*  
Live Webcast



## November

**2** *Mobile Monday CLE Series*

**3** *Professionalism and Ethics Section Annual CLE*

**5** *The Division of Government Responsibilities in the COVID-19 Era*

**6** *Ethics and Changing Law Firm Affiliation*

**9** *Mobile Monday CLE Series*

**16** *Mobile Monday CLE Series*

**17** *Ethics of Beginning and Ending Client Relationships*

**23** *Mobile Monday CLE Series*

**30** *Mobile Monday CLE Series*

For more information and to register, visit [www.isb.idaho.gov/CLE](http://www.isb.idaho.gov/CLE).

# Statement of Ownership

## UNITED STATES POSTAL SERVICE® Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title: **The Advocate**  
 2. Publication Number: **0 5 1 5 - 4 9 8 7**  
 3. Filing Date: **10/01/2020**

4. Issue Frequency: **Monthly excluding July and December**  
 5. Number of Issues Published Annually: **10**  
 6. Annual Subscription Price: **\$45.00**

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®)  
**525 W Jefferson St. Boise, Ada County, ID 83702**  
 Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)  
**P.O. Box 895 Boise, ID 83701-0895**

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)  
**P.O. Box 895 Boise, ID 83701-0895**

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)  
 Publisher (Name and complete mailing address)  
**Idaho State Bar P.O. Box 895 Boise, ID 83701-0895**

Editor (Name and complete mailing address)  
**Kyrre Graziano, Idaho State Bar P.O. Box 895 Boise, ID 83701-0895**

Managing Editor (Name and complete mailing address)  
**Lindsay Weffley, Idaho State Bar P.O. Box 895 Boise, ID 83701-0895**

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name: **Idaho State Bar** Complete Mailing Address: **P.O. Box 895 Boise, ID 83701-0895**

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box  None

Full Name: **N/A** Complete Mailing Address:

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)  
 Has Not Changed During Preceding 12 Months  
 Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

PS Form 3526, July 2014 (Page 1 of 4) (see Instructions page 4) PSN: 7530-01-000-9031 PRIVACY NOTICE: See our privacy policy on www.usps.com

13. Publication Title: **The Advocate**  
 14. Issue Date for Circulation Data Below: **09/01/2020**

15. Extent and Nature of Circulation

		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		6668	6800
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions (Included on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	5706	6644
	(2) Mailed In-County Paid Subscriptions (Included on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	740	0
	(3) Paid Distribution Outside the Mail (Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®)	0	0
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution (Sum of 15b(1), (2), (3), and (4))		6446	6644
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Duplicate-County Copies (Included on PS Form 3541)	43	52
	(2) Free or Nominal Rate In-County Copies (Included on PS Form 3541)	10	0
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail®)	0	0
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	50	56
e. Total Free or Nominal Rate Distribution (Sum of 15d(1), (2), (3), and (4))		103	108
f. Total Distribution (Sum of 15c and 15e)		6549	6752
g. Copies not Distributed (See Instructions to Publishers #4 (page 83))		119	48
h. Total (Sum of 15f and 15g)		6668	6800
i. Percent Paid (15c divided by 15h times 100)		98%	98%

\* If you are claiming electronic copies, go to line 15i on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

PS Form 3526, July 2014 (Page 2 of 4)

## UNITED STATES POSTAL SERVICE® Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

16. Electronic Copy Circulation  
 N/A

	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies		
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)		
c. Total Print Circulation (Line 15f) + Paid Electronic Copies (Line 16a)		
d. Percent Paid (16b divided by 16c x 100)		

I certify that 50% of all my distributed copies (electronic and print) are paid above a stated price.

17. Publication of Statement of Ownership  
 If the publication is a general publication, publication of this statement is required. Will be printed in the **October 2020** issue of this publication.  Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner  
**Kyrre Graziano, Editor** Date: **09/21/2020**

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil penalties.

PS Form 3526, July 2014 (Page 3 of 4) PRIVACY NOTICE: See our privacy policy on www.usps.com

# IDAHO APPELLATE HANDBOOK

## October 2019, Sixth Edition

\$100 for IAPS members  
\$150 for non-members

Available at [isb.idaho.gov/member-services/practice-sections/apl/](http://isb.idaho.gov/member-services/practice-sections/apl/)

Appellate Practice Section of the Idaho State Bar  
© All rights reserved

**32%**

of all lawyers under 31 and  
21% of all lawyers have a  
**DRINKING PROBLEM**

**28%**

of lawyers struggle with  
**DEPRESSION**

**19%**

of lawyers have symptoms of  
**ANXIETY DISORDER**

**11%**

of lawyers have  
experienced  
**SUICIDAL THOUGHTS**

- These statistics mean there's a chance it will be you and certainly it will be someone you know. Care for your colleagues and yourself.
- When you see something, do something. These issues can destroy lives and damage lawyers' reputations.
- Getting help for a friend or asking for help ourselves saves lives, futures, families, and practices. Ignoring or doing nothing can be consequential.

**SAVE A LIFE!  
CALL US!**

**Idaho Lawyer Assistance Program Saves Lives  
Absolutely 100% Confidential**

**24 Hour Hotline**

**866.460.9014 | 208.891.4726**

**[www.SouthworthAssociates.net](http://www.SouthworthAssociates.net)**



## UBS provides a powerful integration of *structured settlements* and *wealth planning* for you and your clients.

By integrating structured settlements with one of the world's leading wealth management firms, your clients can now receive unbiased advice and long-term planning to help secure their financial needs now and in the future. With over 7,000 Financial Advisors in 350 offices across the country, we stand ready to serve you.

### Extensive capabilities for a range of settlement solutions

- Structured settlements
- Structured attorney fees
- Traditional wealth planning
- Special needs trusts
- Medicare set-aside trusts
- Qualified settlement funds (468b trusts)
- Revocable and irrevocable trusts
- Guardian and conservatorship accounts
- Court controlled accounts
- Fiduciary bonding
- Trust and estate planning
- Life insurance and long-term care
- Banking services

For more information on the capabilities of Vasconcellos Investment Consulting at UBS, or for a second opinion on your current wealth management strategy, please contact:



#### **Vasconcellos Investment Consulting**

William L. Vasconcellos, CIMA<sup>®</sup>, CRPC<sup>®</sup>

Senior Vice President–Wealth Management

1161 West River Street, Suite 340, Boise, ID 83702

208-947-2006 888-844-7452 [william.vasconcellos@ubs.com](mailto:william.vasconcellos@ubs.com)

[www.ubs.com/fa/williamvasconcellos](http://www.ubs.com/fa/williamvasconcellos)

*We will not rest*



Neither UBS Financial Services Inc., nor any of its employees provide tax or legal advice. You must consult with your tax and legal advisors regarding your personal circumstances. Insurance products are issued by unaffiliated third-party insurance companies and made available through insurance agency subsidiaries of UBS Financial Services Inc. As a firm providing wealth management services to clients, UBS is registered with the U.S. Securities and Exchange Commission (SEC) as an investment adviser and a broker-dealer, offering both investment advisory and brokerage services. Advisory services and brokerage services are separate and distinct, differ in material ways and are governed by different laws and separate contracts. It is important that you carefully read the agreements and disclosures UBS provides to you about the products or services offered. For more information, please visit our website at [ubs.com/workingwithus](http://ubs.com/workingwithus). CIMA<sup>®</sup> is a registered certification mark of the Investment Management Consultants Association, Inc. in the United States of America and worldwide. Chartered Retirement Planning Counselor<sup>SM</sup> and CRPC<sup>®</sup> are registered service marks of the College for Financial Planning<sup>®</sup>. ©UBS 2014. All rights reserved. UBS Financial Services Inc. is a subsidiary of UBS AG. Member FINRA/SIPC. 7.00\_Ad\_7.25x9.25-cmyk\_8B0314\_VasW

# LAWPAY<sup>®</sup>

AN AFFINIPAY SOLUTION

## POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit,  
debit, and eCheck payments

The ability to accept payments online has become vital for all firms. When you need to get it right, trust LawPay's proven solution.

As the industry standard in legal payments, LawPay is the only payment solution vetted and approved by all 50 state bar associations, 60+ local and specialty bars, the ABA, and the ALA.

Developed specifically for the legal industry to ensure trust account compliance and deliver the most secure, PCI-compliant technology, LawPay is proud to be the preferred, long-term payment partner for more than 50,000 law firms.



ACCEPT MORE PAYMENTS WITH LAWPAY  
877-217-6239 | [lawpay.com/isb](http://lawpay.com/isb)

