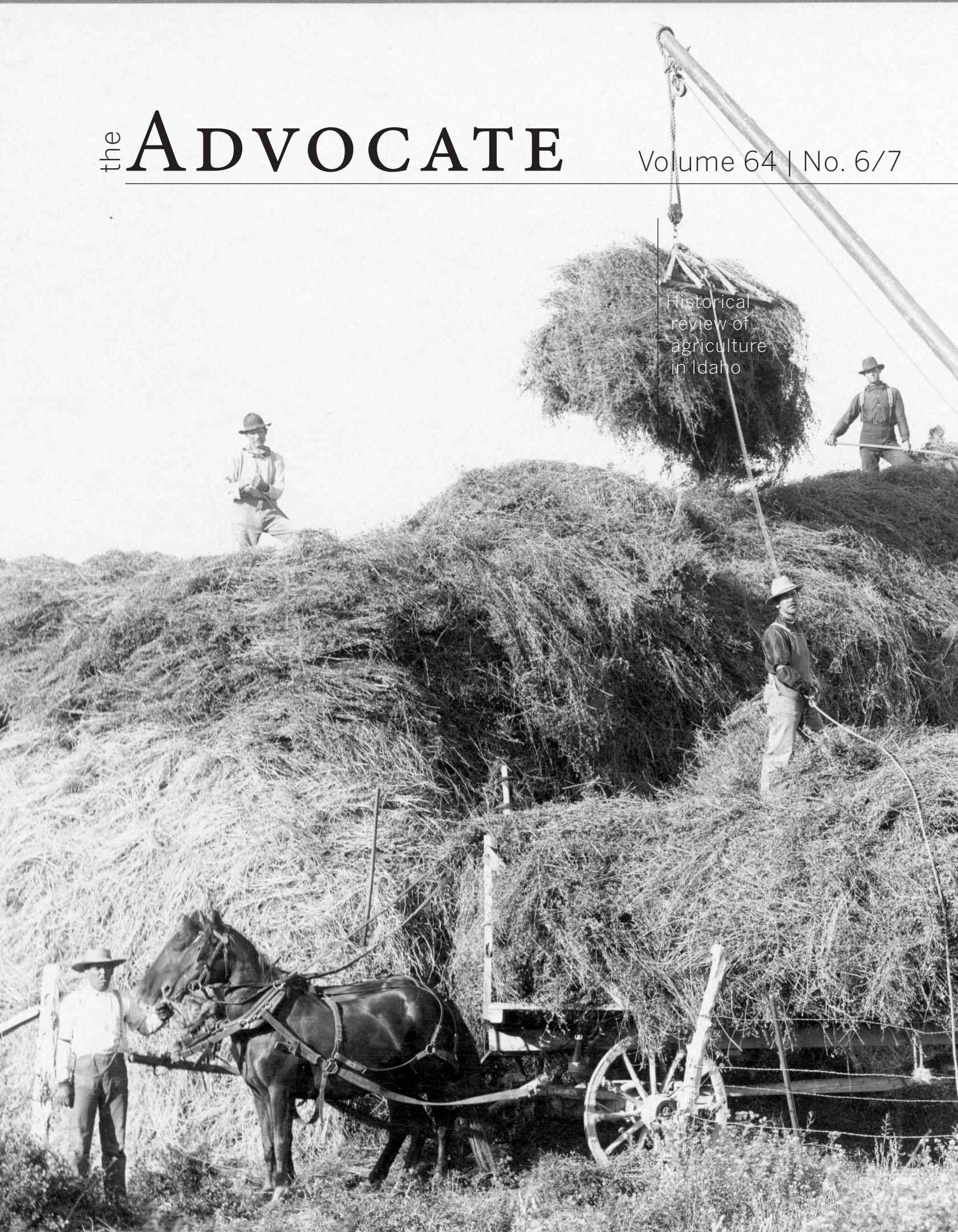
the Advocate

Volume 64 | No. 6/7

Historical review of agriculture in Idaho



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the ADVOCATE

June/July 2021 Volume 64 | No. 6/7

On the Cover

Stacking hay at the State Hospital Farm, Blackfoot, Idaho. 1930. Credit: Idaho State Historical Society.

Featured Article

Sponsored Articles

Sponsored by the Agricultural Law Section

Additional Articles

From the Bar

In Every Issue

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.

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Random Thoughts on Access to Justice in Idaho

Anne-Marie Fulfer
Idaho State Bar Commissioner
First and Second Districts

As I write this column, it is a beautiful spring day on the Palouse in northern Idaho. My husband recently bought me a new bicycle, and it is so lovely to zip through town to the University of Idaho campus, my long "COVID hair" flowing from beneath the helmet I will never get used to wearing. The ride gives me time to reflect on random thoughts such as the life cycle of a mosquito or my upcoming *Advocate* column focusing on Access to Justice or enhancing law students' legal experience or Idaho's legal deserts. It's not a long bike ride, but it is long enough for me to sketch out my random thoughts.

Idaho Access to Justice

I have written about Idaho Access to Justice before and A2J's annual campaigns to raise supplemental funds to support three state-wide organizations that provide pro bono services to low-income, vulnerable Idahoans: Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, and DisAbility Rights Idaho. I recently received a letter from A2J stating that Idaho attorneys and judges contributed to the organization's raising of over $200,000 in 2020! The need for our help continues in 2021, so please give if you are able. For more information on Idaho Access to Justice, or to donate, please go here: www.isb.idaho.gov/AccesstoJustice.

Enhancing Law Students' Legal Experience

The life cycle of the law student is usually three years. In that time, the Career Development Office (CDO) assists law students in their transition from student to lawyer. CDO professionals help our students recognize their pre-lawyer skills and abilities that are directly translatable to their future careers. We provide workshops and opportunities that allow, and encourage, them to enhance those skills and abilities, as well as introduce them to the nearly endless possibilities of what they can do with a law degree, and where they can do it.

The goal of a CDO is for all our graduates to find meaningful employment as they enter the workforce. Students have several avenues to gain legal experience while they are in law school including summer internships, field placement courses, and pro bono cases. I want to thank all the amazing lawyers and judges in Idaho who speak to, work with, and hire law students. I wish I could properly express to you how grateful students are for the time you take to answer their ques-

tions and for the opportunities you give them. Many law schools, including U of I, require students to complete 50 hours of pro bono work, which works as an introduction to rules such as IRPC Rule 6.1, so if you have a pro bono client/case, you can get research help from a law student, while providing them in-the-field experience.

Legal deserts

Kurt Holzer and I are entering our third year as commissioners on the Idaho State Bar Board of Commissioners, splitting the year as President. We are looking at solutions for areas in Idaho that have become "legal deserts" – communities that have few or no lawyers available to residents. What can the Bar do to help increase easy access to lawyers for people who need help with matters such as divorces, custody issues, misdemeanors, and wills? Who else should be or will be part of the discussion? How will Zoom help with access to lawyers?

According to the *ABA Profile of the Legal Profession 2020* (July 2020), which includes the number of lawyers by county throughout the US, 24 of Idaho's 44 counties had 10 or fewer attorneys and three of those counties had no attorneys (See https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf, p. 5).

If you have thoughts on how we begin to address the access to justice issues a legal desert raises, please reach out to me and/or to Kurt, with your ideas and suggestions.

Mosquitoes

I must confess that thinking about mosquitoes has not been that random a thought. My father-in-law was a taxonomist whose area of expertise was mosquitoes. In his career he discovered over 25 new species of mosquitoes. He was a consultant at the British Museum of Natural History, and he collaborated with the Smithsonian for their project on the mosquitoes of Southeast Asia. He was a professor at the University of Malaysia in the Parasitology department, and frequently consulted for the World Health Organization. My favorite story of mosquitoes concerns the species he discovered and named after my mother-in-law, Vijaya. It was one of the first stories I heard from Dr. R.: *Topomyia vijayae*, he assured me, was the perfect mosquito to name after his wife: "it's a beautiful mosquito, AND it's vegetarian!" Shivaji Ramalingam, Ph.D., died peacefully at home on April 29, 2021; I will miss him.

Anne-Marie Fulfer *is the Assistant Dean for Career Development at the University of Idaho College of Law and is a 1999 graduate. Based in Moscow, Anne-Marie has overseen the Career Development Office for Moscow and Boise since 2003. Anne-Marie is a member of Idaho Women Lawyers and the Rotary Club of Moscow (celebrating 100 years in February 2020).*

ERICA M. KALLIN (Reinstatement to Active Status)

On April 23, 2021, Erica M. Kallin was reinstated to practice law in Idaho.

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

NOTICE TO JAMES M. McMILLAN OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule* 614(a), the Idaho State Bar hereby gives notice to James M. McMillan that a Client Assistance Fund claim has been filed against him by former client Marcia Waite, in the amount of $900. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Notice of Public Discipline

To view a complete list of discipline notices visit our website at: https://isb.idaho.gov/bar-counsel/public-discipline.

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From left to right: Gary Cooper, 2020 Distinguished Lawyer, Maureen Laflin, 2020 Distinguished Lawyer, and Justice Jim Jones, 2020 Distinguished Jurist.

2021 Annual Meeting

Diane K. Minnich
Executive Director, Idaho State Bar

This year, the Annual Meeting is scheduled in Boise, July 21-23, at the Boise Centre and the Riverside Hotel. CLE programs and events will be available both live and virtually.

CLE Programs: Every CLE program will be webcast, and available to earn live CLE credit. In person attendance is also available. You can earn more than 11 CLE credits, including 2 ethics credits. CLE programs scheduled this year include:

- *Idaho Law Statutory Construction*
- *Appeals in State Court, the Ninth Circuit, and the US Supreme Court*
- *Lessons with the Masters*
- *Indian Law*
- *Trademark Law and Unfair Competition*
- *Employment Law*
- *Climate of Professionalism and Civility in the Legal Profession*
- *Local Court Rules*
- *Internet Defamation*

The keynote speaker for Thursday's opening session is Walter Echo-Hawk, President of the Pawnee Business Council for the Pawnee Nation of Oklahoma. He is an attorney, author, law professor and tribal judge.

Awards

The 2021 award recipients are listed on the bar's website and will be honored the August edition of *The Advocate*. We will have an outdoor gathering on Wednesday evening, July 23 to honor the distinguished lawyers, distinguished jurist, and outstanding young lawyer. On Thursday evening, the Milestones reception will be held, also outdoors.

Scholarships

A limited number of scholarships are offered for the Annual Meeting, Scholarships include registration and per diem up to $75 per day for travel and lodging. The scholarships are designed to assist attorneys who, due to financial or professional circumstances, would otherwise be unable to attend.

> *"CLE programs and events will be available both live and virtually."*

If you are interested in a scholarship, contact the ISB Commissioner who represents your judicial district or Teresa Baker, Program and Legal Education Director, tbaker@isb.idaho.gov.

Registration for the 2021 Annual Meeting opened on June 1. The program information, attendance fees, and registration are available on the bar's website. https://isb.idaho.gov/member-services/annual-meeting/

We hope you will join us for this year's Annual Meeting!

Idaho State Bar

Annual Meeting

Boise, Idaho | July 21-23, 2021

CLE Topics Include:

Idaho Law Statutory Construction
Appeals in State Court, the Ninth Circuit and Before the US Supreme Court
Lessons with the Masters
Trademark Law and Unfair Competition
Climate of Civility and Professionalism
Cybersecurity and Internet Defamation

And More!

Join Us as we celebrate our Award Winners at the Outdoor In-Person Social Events!

Distinguished Lawyer and Jurist /Outstanding Young Lawyer Awards Reception
Wednesday, July 21st at 6:00 p.m. – The Riverside Hotel – River's Edge Terrace

Milestone Celebration and Awards Reception
Thursday, July 22nd at 6:00 p.m. – The Riverside Hotel – River's Edge Terrace

Please Welcome the Agricultural Law Practice Section!

Kelly Stevenson

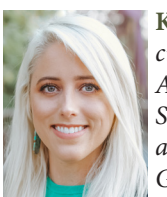
When I started law school, many of my classmates joined clubs in legal areas that interested and inspired them. Me? I eagerly wanted to join a club that focused on agricultural law, but there wasn't one. As a result, I was part of an amazing group of law students who decided to band together and begin the University of Idaho College of Law's first Agricultural Law Society. Then I graduated law school and was faced with the same predicament. There were great practice sections with relevant and interesting law, but where was the practice section that focused on agricultural law? I ultimately came to the conclusion that since the Idaho bar didn't have one, I would start one. With the support and assistance of that same group of classmates from law school (not the least of which is my friend, Samuel Parry, who is an attorney at Givens Pursley LLP and our Section's Vice Chairperson), as well as colleagues and friends, I garnered support and founded Idaho's first Agricultural Law Practice Section. The Section is coming up on its first birthday, and we are all very excited to welcome new members, organize CLEs of varying topics, and continue our growth.

Our Section boasts members with a wide array of experience, backgrounds, and legal practices. Our intent is not to be duplicative of other practice sections, but to provide practicing attorneys an avenue to learn more about the specific, and at times surprising, areas of legal practice impacted by agriculture. Our members are willing volunteers for free lunchtime CLEs and we are hopeful to have in-person meetings in a few more months (due to Covid, we've never actually had an in-person meeting!). If you're interested in what we're up to, we encourage that you join our Section.

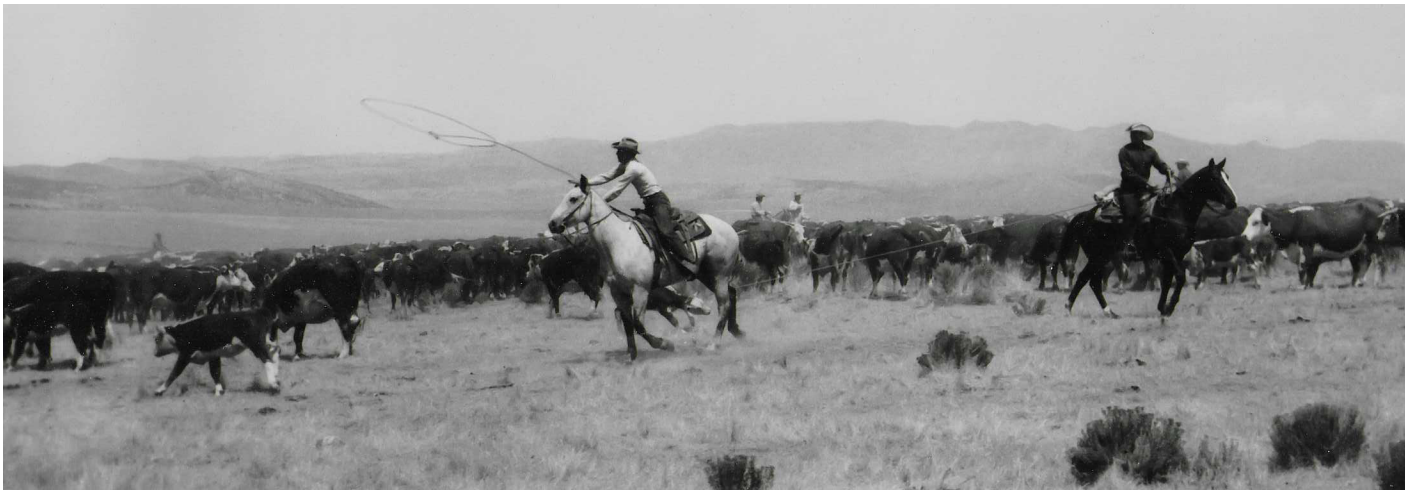
This Issue of the Advocate is sponsored by members of the Agricultural Law Practice Section. The topics selected are intended to emphasize the different areas of law and subjects that nearly every attorney in Idaho will encounter in one way or another. This Issue will look back at the history of agriculture in Idaho and highlight its significant role in our economy. It will also provide an overview of a few of the current changes in the law that our members are faced with in their practices.

The choice of the cover photograph of this Issue was the subject of several months of angst. We finally settled on a photograph chosen from the Idaho State Archives. This image conjures up the realities of a harsher life, when a higher percentage of Idaho's population was involved in agriculture, as well as how far we have come in terms of technology and equipment in farming and ranching. It also brings it into stark focus that agriculture is a part of Idaho, and it always has been.

We hope that you enjoy and learn from this Advocate Issue. I have no doubt that it will be the first of many sponsored issues by the Agricultural Law Practice Section.



Kelly Stevenson *is the current chairperson of the Agricultural Law Practice Section. She is an attorney at Jones Williams Fuhrman Gourley, P.A. in Boise. Her practice focuses on agricultural law, estate planning and administration, real estate, business law, and litigation.*



Cowboys Sherm Swim and Kenneth Pevo bring calves to the branding fire (1950's Arbon Valley). Photo credit: Nelle Swim.

Idaho Agriculture — More than Potatoes

Governor C.L. "Butch" Otter
Sarah A. Hugues

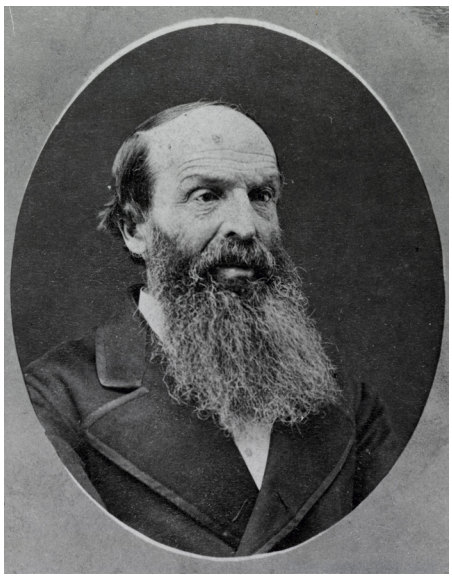
If agriculture isn't an integral part of your life or practice, the topic may only summon visions of potatoes. For those less familiar, rest assured, agriculture encompasses much more than farms, fields, and yes, those glorious potatoes.

Technically speaking, agriculture is the science, art, or practice of cultivating the soil; producing crops; raising livestock; and, in varying degrees, the preparation and marketing of the resulting products.[1] If that still isn't making any progress on the potato image, hear me out.

Legacies of the past

Agriculture in Idaho is older than its statehood.[2] In 1836, Reverend Henry H. Spalding is credited with introducing the very first potato to the area during his missionary work with the Nez Perce tribe. Together, they took on a concerted effort to ensure the crop was sustained.[3] Though not immediately successful, the endeavor prompted the soon-to-be state's first irrigation system and was the beginning of agriculture as we know it today.[4]

In 1850, Reverend Spalding's missionary work in the Lapwai Valley was brought to an end, but it wasn't long before potatoes found a more permanent home in the southern region. Around 1860, one of the earliest pioneers, William Goforth Nelson, found his home in what is now Franklin County. He wrote of his early experiences, detailing the struggles early settlers faced while introducing their crops: "We all camped in our wagons the first summer, but we all got homes built by winter; these houses were built in the present meeting-house lot in a fort. I spent the summer working on ditches, canton roads, and hauling poles and wood from the canyon. I raised thirty-three bushels of potatoes, which is all that was raised in Franklin that summer except for a few onions."[5]



Rev. Henry Harmon Spalding. Circa. 1830-1850. Credit: Idaho State Historical Society.

Early farmers in Idaho used horse-drawn equipment. Unknown date. Credit: Idaho State Historical Society.

Nelson's account, taken only three years before the Idaho Territory was organized, is the earliest recorded planting of potatoes in Idaho where the settlers remained, and the crop is still grown to some extent today.[6] Having been successfully established in the southern region, it wasn't long before the eastern region took note. Potatoes were introduced to what is now known as the City of Blackfoot through a freighter hauling a load of potatoes for a man named Judge Stephens, who was encouraged by the freighter to plant the potatoes.[7] This is believed to be the first potato planting in the area.

Though not a judge in the sense most of us are familiar, Judge Stevens's "decision" and the decisions of every early settler were pivotal in building the Idaho we know today. As proudly and articulately touted by Blackfoot's (somewhat) famous Idaho Potato Museum: "Those first Idaho settlers were pioneers mentally as well as geographically because they had the initiative and willingness to better their conditions regardless of physical hardships and uncertain futures."[8]

The initiative to take on early agribusiness wasn't unique to those establishing crops. In 1864, Matthew Joyce and his family arrived in Ruby City, known today as Owyhee County.[9] His ranch is believed to be the first established in Idaho. Seeing little opportunity in the oversaturated mining ventures that brought him to the area, he set out to provide the surrounding community with meat, milk, and horses. This morphed into a traditional cattle ranch, which has seen over 150 years of operation.

The Joyce family is not alone in terms of longevity. Over 450 farms and ranches statewide have been designated as Idaho Century Farms or Ranches, an honor bestowed by the Department of Agriculture and the Idaho Historical Society recognizing those families who have maintained their roots on the same land as their ancestors for 100 years or more. As the Historical Society notes: "Every Idaho farm and ranch has a history and family story. Through the stories of families and communities people discover their place in time. These stories of achievement (setting up homesteads), courage (enduring forces of mother nature) and passion (perusing the love of the land) have shaped people's personal values, identities, and their sense of place that guides them through life."[10]

This recognition of the earliest settlers, homesteaders, pioneers, and Centurion families is a justified and worthy endeavor if only to honor each individual triumph. But we needn't stop there, when the shared victories of the earliest Idahoans paved the way for the single largest contributor to the Idaho economy.[11]

Modern agribusiness

In Idaho, agriculture is an economic powerhouse, making up 28% of the total economic output in sales and 13% of the GDP.[12] With more than 25,000 farms and ranches producing more than 185 commodities, Idaho ranks first in five of those commodities and secures a spot in the top ten in thirty commodities.[13] It is the third largest agricultural state in the West and second in net farm income.[14]

Idaho ranchers and farmers bring in a total of $8.2 billion in farm cash receipts, which is the revenue that producers are paid for selling their agricultural commodities.[15] According to federal data collected by the United States Department of Agriculture, dairy reigns supreme as Idaho's top farm commodity in terms of farm cash receipts, bringing in an impressive $2.85 billion. Idaho's dairies give us an annual milk yield that exceeds 13 billion pounds while producing over 800 million pounds of cheese.[16]

Idaho ranches that produce cattle and calves come in second at $1.74 billion.[17] We rank 13th in the nation for inventory, with 2.1 million animals raised by 7,500 operations, most of which are family-owned. It's not surprising that one of these operations happens to be the second largest cow/calf operation in the United States, home to more than 30,000 cows.[18]

Back to those potatoes we know and love, the root vegetable ranks third at $1.02 billion.[19] Though they take bronze in cash receipts, they still secure a gold in production, giving Idaho national bragging rights. Every year our growers produce more than 134 million hundredweight[20] of potatoes on only 300,000 acres.[21] If you think the initial promise of agriculture being more than just potatoes in any way demeans the glory of the famous tuber, think again. One can only be proud that the commercial frozen French fry was developed by our very own J.R. Simplot.[22]

Impressive potato production is followed by wheat, which is lauded as one of our top exports and brings in $500 million annually.[23] Notably, Idaho is one of the few climates in the world which allows the production of all five classes of wheat.

Hay, ranked first in the nation as certified organic, follows closely with $468 million.[24] Last but certainly not least, sugar beets ($285 million), barley ($251 million), corn ($119 million), hops ($89

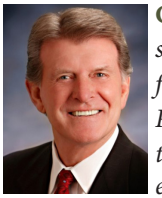
Farm workers loading sheaves of grain on to a wagon being pulled by a tractor. August 5, 1955. Photographer, Bob Lorimer. Credit: Idaho State Historical Society.

million), onions ($66 million), and dry beans ($55 million) round out the impressive group.[25]

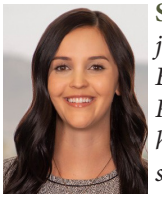
Technology and the future

From William Goforth Nelson's 33 bushels of potatoes to 134 million hundredweight of potatoes produced yearly, Idaho has transformed from the wild frontier to an agricultural giant. The increase in agricultural technology and efficiency accounts for a 280% increase in potato yield per acre and a 400% increase in milk production in the last 70 years.[26] The Idaho Department of Commerce believes that no one industry is to blame for the leap in technology: "Increased agricultural productivity is a direct result of public and private effort. Many groups play a vital role in developing and implementing improved practices, and we all reap the benefits of the work done by universities, private producers, and companies. Farmers understand better than most that staying on the cutting-edge of new technology is critical for operating in a changing world."[27]

This perspective sums up the crucial point: We all benefit from the success of the ag industry and play a vital role in its continued success. We hope that our section is able to provide interesting and critical insight on the role we play as attorneys and how those efforts can continue to bridge the traditions of the past with the technologies of the present while addressing the essential questions of sustainability for the future.



C.L. "Butch" Otter *has served the people of Idaho for more than four decades. Prior to his time as a three-term Governor, he was elected to notable leadership positions including Lieutenant Governor, United States Congressman, and State Legislator. His career also includes 30 years of private sector experience as an international agribusiness executive with Idaho's iconic J.R. Simplot Company.*



Sarah A. Hugues *recently joined Perkins Coie as an Environment, Energy, and Resources associate. Prior to her transition to the private sector, she was appointed Associate Counsel to Governor C.L. "Butch" Otter, where she remained until the end of his term. Raised on a ranch in southeast Idaho, she is a fourth-generation rancher and a sixth-generation Idahoan.*

> *"We all benefit from the success of the ag industry and play a vital role in its continued success."*

Endnotes

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3. *Id.*
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14. *Id.*
15. *Id.*
16. *Id.*
17 *Id.*
18. *Id.*
19. *Id.*
20. A hundredweight (abbreviated as cwt) is a standard unit of weight or mass used in certain commodities trading contracts. In North America, a hundredweight is equal to 100 pounds.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Census of Agric.*, united states dept. of agric., https://www.nass.usda.gov/AgCensus/FAQ/2017/#3 (last modified Dec. 4, 2019).
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Greater Sage-grouse, The Odyssey Continues

John Richards

Alright, maybe Odyssey is a bit of a misnomer for the Greater Sage-grouse issue. Even Odysseus's fabled journey home from the Trojan war only lasted 10 years whereas the Sage-grouses' story is already decades in the making with no definitive end in sight. While it may seem amazing that a chicken sized bird has been able to cause such a West-wide kerfuffle over the years, the Greater Sage-grouse, with their puffed-up chests and signature mating dance moves, has arguably been one of the most highly contentious and large-scale natural resource issues in the western United States. Despite the Sage-grouses' already extensive story, it is one that is continuing to develop even today. This article will explore aspects of the past chapters of that story in order to provide context leading up to more recent developments.

The crux of the Sage-grouse issue essentially boils down to conservation of the sagebrush ecosystem, land use restrictions on federal lands from typical federal agency land use planning, and potential restrictions that accompany a listing under the Endangered Species Act (ESA). Since the mid-1960s, long term population trend estimates have shown a steady decline in Sage-grouse abundance range-wide.[1] Based on some estimations, populations of Sage-grouse in the 1960s were approximately two or three times greater than current numbers.[2] While exact population numbers are hard to measure, recent estimates range from 200,000–500,000 individual birds.[3] Over the past 25 years, this decline has led to several petitions for listing under the ESA, and several major Sage-grouse conservation planning efforts on state and federal lands in an attempt to make an ESA listing unnecessary.

This article is not meant to be comprehensive of all aspects of past or current Sage-grouse planning efforts. The elements of this topic are so complex and nuanced it can, and has, filled books. The purpose of this article is to provide a broad, general overview of Sage-grouse conservation planning efforts involving Idaho over the past 25 years, highlight some recent developments, and provide the unfamiliar reader a high-level glimpse of the Sage-grouses' story. This article is also not intended to provide any opinion on current or past Sage-grouse management plans, efforts, or litigation.

First, why are Sage-grouse so important to so many?

A key to comprehending the Sage-grouse issue is to first understand why it is so important to such wide and diverse range of groups and people across the West. This can largely be broken down to two interrelated reasons: 1) the birds' per-

vasiveness across the western landscape and 2) the effects federal land management policies and plans can have on parties that depend on or benefit from federal land use.

First, pervasiveness. Sage-grouse habitat consists of approximately 165 million acres of sagebrush ecosystem across the western United States and Canada.[4] That is approximately 258,000 square miles, which is about the equivalent of the entire state of Texas. The importance of this pervasiveness is accentuated by the fact Sage-grouse are a sagebrush obligate, meaning they are almost totally dependent on intact sagebrush ecosystems to survive. As such, they are regularly considered an umbrella species for other sagebrush obligates or semi-obligates.[5] As an umbrella species, the condition of Sage-grouse and their habitat is often used as an indicator of the overall health of the Western sagebrush ecosystem, and it is expected that conservation efforts that benefit Sage-grouse will also benefit species under their "umbrella." This makes management of the Sage-grouse a priority focus for people and groups who believe as goes the Sage-grouse, so goes vast swaths of the Western landscape.

Next, to fully grasp the importance of Sage-grouse, one must understand the effects of federal land use management policies and plans. As mentioned above, this reason is closely interrelated with pervasiveness because any restrictions imposed by the federal government in the name of Sage-grouse are, by necessity, going to affect vast areas of land across many western states. About 64% of Sage-grouse habitat in the United States. exists on federally managed lands, the majority of which are managed by the Bureau of Land Management (BLM) and Forest Service. This is critical to the issue because the federal government is the largest single owner of land in many western states.

Percentage of Federal Land Ownership by State	
Idaho	62%
Utah	65%
Nevada	85%
Oregon	53%
Wyoming	48%

> *"The importance of this pervasiveness is accentuated by the fact Sage-grouse are a sagebrush obligate, meaning they are almost totally dependent on intact sagebrush ecosystems to survive."*

Additionally, while the percentage of federal ownership may be significant at the state level, this percentage can be even higher at a local county scale**.** This makes federal land management policy incredibly important to many groups in those areas because they can be particularly dependent on federal land utilization.

The main takeaway here is federal land ownership is so prevalent across western states, that any federal management actions restricting economically beneficial uses on federal lands (recreation, grazing, timber harvest, oil and mineral exploration, etc.) can have significant cascading impacts to areas off of federal lands dependent on those activities. Accordingly, this makes land use restrictions associated with Sage-grouse management a particularly meaningful issue for any party relying on such uses.

Planning efforts: Background and Context

For anyone who may be unfamiliar with the Sage-grouses' tumultuous past, this section provides background and context from the last 25 years of planning efforts. To preface these planning efforts, it's important to understand that one of the five factors considered when analyzing a petition to list a species under the ESA is the inadequacy of existing regulatory mechanisms.[6] The various Sage-grouse conservation planning efforts were an attempt to develop adequate regulatory mechanisms to avoid the need for an ESA listing and its accompanying strict limitations on land uses that may affect a listed species.

In Idaho, organized conservation planning efforts for Sage-grouse can be traced back to the 1997 Idaho Sage Grouse Management Plan developed by Idaho's first Sage-grouse Task Force under the direction of the Idaho Fish and Game Commission.[7] This 1997 plan divided Idaho into Sage-grouse management areas and called for the creation of Local Working Groups to develop Sage-grouse management plans for each area.[8] Some of these Local Working Groups are still active today.

Between 1999 and 2003, United States Fish and Wildlife Service (USFWS) received eight petitions to list Sage-grouse as threatened or endangered under the ESA. In 2004, USFWS determined three of the petitions provided substantial information that listing may be warranted, which kickstarted a comprehensive range-wide status review.[9] In response to the status review and the significant potential for an ESA listing, Idaho undertook another planning effort to update the 1997 Plan.

In 2005, the USFWS issued a decision that Sage-grouse was not warranted for listing under the ESA.[10] This decision was the subject of litigation and in 2007 it was found to be arbitrary and capricious and was remanded back to the USFWS for further consideration.[11] Meanwhile in 2006, Idaho finished its most recent planning effort and published the new *Conservation Plan for the Greater Sage-grouse in Idaho*, replacing the 1997 plan and incorporating significant new information and data as

well as an overarching scientific and management framework to guide implementation of the plans developed by the Local Working Groups.[12]

Moving forward to 2010, the USFWS issued a new determination that Sage-grouse was warranted for listing under the ESA but was precluded by higher priority species.[13] This warranted-but-precluded finding initiated an unprecedentedly large-scale collaborative National Sage Grouse Planning Strategy involving state and federal entities. This public planning effort culminated in 2015 when the BLM and Forest Service issued Records of Decision (ROD)s, finalizing Sage-grouse conservation amendments to 98 BLM and Forest Service land use plans across the West.

For a more detailed discussion of the 2015 planning effort and resulting litigation, I recommend reading previous Advocate article *Sage Grouse Plans Ruffle Feathers*.[14] As that article describes, the 2015 planning effort left groups on both sides of the issue unhappy with the resulting plans. Some parties felt certain elements of the plans were unnecessarily restrictive, ignored local and state developed plans, and that the collaborative planning process had been usurped by unilateral changes by the federal agencies in the eleventh hour. Other parties believed the 2015 plans were insufficient to conserve the sagebrush ecosystem or to provide Sage-grouse with adequate protections from further habitat loss and population decline.

In the end, the finalized 2015 plans accomplished their goal by playing an essential role in the USFWS's 2015 determination that Sage-grouse no longer warranted listing under the ESA.[15] The USFWS found the Federal and state plans that incorporated Sage-grouse conservation principles substantially reduced the primary threats to Sage-grouse in approximately 90% of the breeding habitat.[16] Despite their success on that front, the 2015 plans were met with multiple lawsuits from states, industry groups, counties, and conservation groups. Yet, as of the date this article was written, the 2015 plans have not been overturned or enjoined and are still being implemented by the BLM and Forest Service today.

Fast forward to 2017. A new administration under President Trump decides to initiate another Herculean planning effort in an attempt to collaborate with states to bring the plans more in line with state developed plans across the West and to revise elements of the 2015 plans seen by some as overly restrictive. These efforts resulted in the BLM issuing new RODs amending the 2015 Sage-grouse management plans in Idaho, Wyoming, Colorado, Utah, Oregon, Nevada, and northeastern California. (The Forest Service also conducted a concurrent planning process, but as of the date of this article, they have not issued any RODs to finalize their proposed amendments.)

Much like the original 2015 plans, the 2019 amendments were met with mixed reactions. Groups that found the 2015 overly restrictive praised the 2019 amendments as bringing a better balance in allowing beneficial uses while still providing effective conservation measures for Sage-grouse. Groups that believed the 2015 plans weren't restrictive enough, decried the new amendments as weakening already insufficient protections for Sage-grouse, and some considered it a thinly veiled attempt to promote the Trump administrations' Energy Dominance Agenda. Unsurprisingly, the newly minted 2019 amendments were soon the subject of new litigation.[17]

Current litigation and recent developments

In March 2019, Plaintiffs who had filed suit against the 2015 plans filed a supplemental complaint challenging the 2019 amendments, claiming the planning process and resulting plans violated the Federal Land Policy and Management Act, the National Environmental Protection Act, and the Administrative Procedures Act.[18] In October 2019, the District Court of Idaho issued a preliminary injunction enjoining BLM from implementing the 2019 Sage-grouse plan amendments.[19] Currently, the injunction is still in place and the BLM and Forest Service are both operating under the 2015 plans.

Now the story comes full circle to the year 2021 in which the new Biden administration wasted no time in taking on environmental issues. While it may have been difficult to keep track of every Executive Order (EO) issued by President Biden at the start of his term, one of particular relevance here is EO 13990, "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." In part, this EO lays out the administration's environmental policy and directs federal agencies to review agency actions taken over the previous four years that may be inconsistent with the stated policy.[20] If an action is found to be inconsistent, agencies are encouraged to consider suspending, revising, or rescinding the action.

Concurrently with this EO, the administration put out an accompanying Fact Sheet listing about 100 specific actions to be reviewed by agencies under the provisions of the EO.[21] Under the Department of Interior section of the Fact Sheet, all of the 2019 Sage-grouse amendments are listed for review. EO 13990 also authorizes the U.S. Attorney General to request stays of any litigation pending agency review of actions that are currently being litigated and fall under the EO's purview. On March 10, 2021, the litigation involving the 2019 Sage-grouse plan amendments was paused until May 10, 2021, to allow the federal defendants time for re-evaluation of their Sage-grouse policy and to then propose next steps in the litigation.[22] As of the date this article was written, litigation is still on hold and there has been no indication as to how the federal agencies are planning to approach Sage-grouse policy or the litigation going forward.

The *Odyssey* Goes On

Like Odysseus, the Sage-grouses' story is one that is long and full of trials and challenges. However, unlike his story, it seems the Sage-grouses' journey is destined to continue on with no proverbial homecoming in sight. It seems unlikely the 2019 plan amendments will survive the new Biden administration, which leaves questions to be answered such as whether the administration will simply attempt to revert back to the 2015 plans or attempt another colossal planning effort to promulgate their own amendments to the 2015 plans. Additionally, if the admin-

istration reverts back to the 2015 plans, it seems likely the various dormant lawsuits against those plans will be revived, keeping the Sage-grouses' future uncertain. Regardless of the path this administration decides to take, it seems we are very likely on the cusp of the next great chapter in the ongoing Sage-grouse Odyssey.

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10. 70 Fed Reg 2,243 (Jan. 12, 2005).
11. *Western Watersheds Project v. United States Forest Service*, 535 F. Supp. 2d 1173 (D. Idaho 2007)
12. *Id.*
13. 75 Fed Reg 13,910 (Mar. 23, 2010).
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15. 80 Fed Reg. 59,858, at 58,858 (Oct. 2, 2015).
16. *Id.*
17. The 2019 Amendments changed the 2015 plans and essentially paused all litigation against the 2015 versions pending the resolution of claims against the 2019 amendments. If the 2019 amendments are upheld, at least some claims against the 2015 plans will likely be found moot. If the 2019 amendments are vacated, it is possible that litigation against the 2015 plans will resume.
18. *See* First Supplemental Complaint, *Western Watersheds Project v. Bernhardt*, 2019 WL 2219153, No. 1:16-cv-00083-BLW (D. Idaho May 3, 2019) (trial pleading).
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20. Exec. Order No. 13990, 86 Fed Reg 7,037, at 7037 (Jan. 25, 2021).
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Will There Be a Second Century for Section 1031 Property Exchanges?

Max A. Hansen

After 2020, the whole world is waiting to see what 2021 has in store. The hope for everyone, I'm sure, is that we can return to a "new normal" with people back to work, businesses in full swing and a rebounding economy. Since the focus of this issue is the agriculture sector, that hope extends to farmers, ranchers and businesses everywhere based on agriculture. Those businesses include attorneys, accountants and other advisors who represent clients in the agriculture sector.

One aspect of the law that impacts people in the ag sector is the use of tax deferred real property exchanges pursuant to Section 1031 of the Internal Revenue Code. Some of you who are acquainted with 1031 property exchanges may know that this year is the 100th anniversary of Section 1031 becoming part of the Tax Code.[1] The past century has witnessed the positive impact property exchanges have had not only on the agricultural economy but on businesses and property investors throughout our country.

Unfortunately, as we observe this milestone, Section 1031 is in grave danger of severe limitation or repeal. For the past 20+ years, Section 1031 has been challenged by some administrations and Congress looking to raise revenue for other initiatives, but the threat building over the past couple years and finally presented in the past few weeks is the most serious in history.[2]

The evolution of 1031

Section 1031 allows taxpayers to exchange "like-kind" property for other "like-kind" property and defer the taxable gain on the transaction. "Like-kind" property is defined as any real property held for productive use in a business or trade, or for investment purposes.[3] That broad definition generally refers to any real property interest which will not be used right away for personal residential use or quickly re-sold as part of a development.[4]

Though most exchanges in the early days involved simple exchanges of what was loosely referred to as simply "land," the qualifying assets being exchanged today include agricultural real estate, water rights, commercial buildings, residential rentals, oil, gas and mineral interests, beneficial interests in Delaware Statutory Trusts (DST), tenancy in common interests in large properties, timber rights and

future development rights, just to name a few.

Initially, property exchanges were structured as simple simultaneous swaps of either real or personal property. Prior to 1979, if taxpayers could not complete a simultaneous swap with another party, complex multi-party transactions involving "straw men" were the order of the day. The landmark *Starker* decision in 1979 established the basis for delayed exchanges.[5]

In *Starker*, the taxpayer, T.J. Starker, exchanged title to his property for a contractual promise by the buyer, Crown-Zellerbach, to acquire like-kind property to be selected and designated by Starker at a later date. No cash changed hands on Starker's conveyance to Crown-Zellerbach. Starker's net sale proceeds were held by the buyer as a "net exchange value" credit on its books. Months later, Starker selected properties using his exchange credit toward the acquisition price. Crown-Zellerbach acquired the properties and transferred the title to Starker. This delayed exchange transaction was disallowed by the IRS, but Starker prevailed on appeal and set the precedent for 1031 delayed exchanges.

Uncertainties persisted after the *Starker* decision regarding the exact delayed exchange process to be followed but in 1991, the IRS promulgated exchange regulations, which resolved those uncertainties and clarified many issues including the length of the exchange period, identification and receipt of replacement property, "safe harbors" for avoiding actual and constructive receipt of cash or other non-qualifying property.[6]

Of those safe harbors called qualified trusts, qualified escrows and qualified intermediaries, the qualified intermediary or QI has become the prevailing safe harbor of choice. QI companies provide the exchange agreement and other exchange documentation, oversee the closings for the sale of the relinquished property and acquisition of the replacement property and generally assist taxpayers and their advisors in the process. In my experience, the bulk of exchanges completed now are delayed exchanges.

> *"The repeal of personal property exchanges adversely impacted the ability of folks in the agriculture sector to exchange livestock and equipment."*

In 2000, the IRS further clarified how transactions can be structured to accomplish what are referred loosely as "reverse exchanges" or perhaps more correctly as "parking transactions."[7] Revenue Procedure 2000-37 outlined the structure wherein as part of a Qualified Exchange Accommodation Agreement, an Exchange Accommodation Titleholder or "EAT" can acquire a potential exchange replacement property on behalf of a taxpayer and park it until the taxpayer can complete the sale of their relinquished property and acquire the parked property to complete their exchange. That process has been refined in the past 20 years but has become a mainstay in the service provided by many QI companies.

In late 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), which eliminated Section 1031 exchanges of personal property.[8] The repeal of personal property exchanges adversely impacted the ability of folks in the agriculture sector to exchange livestock and equipment. Those personal property exchanges had been central to sales of farms and ranches with multiple asset classes but fell victim to the perceived need of a pay-for to lower the corporate tax rate.[9] Fortunately, real property exchanges survived the passage of the TCJA.

Recent clarification for real property exchanges

There have been many interesting developments in recent years regarding the property interests which may be exchanged. And, with the limitation now to just real property, there has been continuing discussion about what constitutes real property and the opportunities available to those effecting an exchange. On December 2, 2020, the U.S. Treasury issued its final regulations to further define what constitutes real property, due largely to the limitation of Section 1031 to real property in the TCJA.[10]

The final regs reinforce the idea that, for Section 1031 purposes, what was real property pre-TCJA is still real property today and looks to the law of the state or local jurisdiction in which the property is located to classify it as such. The old "purpose or use test" is eliminated, which allows for a facts and circumstances analysis coupled with the state law test to determine if items such as built-in appliances, wiring, carpeting, fencing, center pivot irrigation systems, grain storage bins, etc. are part of a typical 1031 exchange. There is a long list of examples in the final regs worthy of further study.[11]

The final regs also make clear that the sale of development rights integral to conservation easements and green belt conveyances can be part of 1031 exchanges. Licenses and permits can also be part of a 1031 exchange if they are integral to the use and enjoyment of accompanying real property and they are in the nature of an easement or leasehold interest. This clarification is critical to the transfer of state and Federal grazing and farming permits and leases as part of the sale and exchange out of a farming and ranching operation.[12]

The portion of the final regs that probably drew the most attention was the clarification of what many refer to as the "15% rule" or "incidental personal property rule" for purposes of the treatment of personal property that may be part of a real property exchange. Prior to the passage

of the TCJA, personal property exchanges were allowed but the allocation of values in farm, ranch or other exchanges was important to assure that exchange value for the land was not being used to acquire equipment or livestock or *vice versa.* The 15% rule was simply an identification rule.

The final regs now allow the taxpayer to use funds allocated to the value of real property to acquire personal property as part of an exchange if the personal property is "incidental" to the land purchase. Personal property is incidental if it is typically transferred with the real estate in a standard commercial transaction and the value of the personal property does not exceed 15% of the real property being acquired in the exchange.[13] **Beware**: this new regulation does **not** allow deferral of gain on the personal property portion of the exchange. The rule simply eliminates the danger that the taxpayer has invalidated the entire exchange because they constructively received that portion of the land exchange funds for the purchase of non-qualifying property. It will still be taxable boot.

Section 1031 continues to benefit ag sector taxpayers

In my 40+ years' experience in the real estate and 1031 exchange areas, I have witnessed ag sector taxpayers increasing use of 1031 exchanges for a variety of reasons. The typical example is the sale of unproductive property or property not suited to an existing ag operation and use of the exchange funds to acquire another more productive property or property that otherwise improves operational efficiencies.

Another expansion of opportunities afforded by a 1031 exchange is the sale of water rights, timber rights and oil and gas and mineral rights not necessary for farm or ranch operations and exchanges into other real property interests. Sometimes this type of transaction affords a farmer or rancher the opportunity to develop an income stream not dependent on commodity prices.

Many agricultural landowners have sold perpetual easements or long-term leasehold interests (30+ years in duration) for the installation of wind power and solar power generation facilities on portions of their farms or ranches that are not integral to crop or livestock production. There are also increasing opportunities for farmers and ranchers to sell conservation easements to private conservation organizations or government entities such as the U.S. Department of Agriculture and use the cash proceeds to exchange with other real property.[14]

Sadly, I have also witnessed many situations in which the current generation of owners who have succeeded to multi-generational farms and ranches are faced with the reality that there is no next generation to work the land and livestock 24/7/365 days a year while facing fluctuations in the economy, disease, predators, drought, fires and other natural disasters. Fortunately for those folks, there are always buyers interested in agricultural land and the ageing sellers can exchange out of a sale into other types of income-producing property. For the first time in their lives, those diverse income streams support the retirees independently of the agriculture markets.

On the other side of the equation, there are many investors who have begun to realize the benefits of investing in agricultural property. Though the return on investment is not as high as certain types of commercial, office or residential rental property, pastureland, which is in short supply for livestock producers, provides a steady cash return and an upside in appreciation in value.[15]

Many agricultural investors are also investing in farmland which has heretofore been in dry land crop production or pastureland but has the capacity for increased production and profitability. Those producers can marshal under-utilized water resources and, with enhanced irrigation systems, convert dry land farms into other production such as row crops, vineyards, etc. The profitability of the land can also be changed with the introduction of organic crops which bring higher prices at the marketplace. With each of these modifications there is a corresponding appreciation in value of the land.

How 1031 exchanges drive the economy

In the last century, like-kind exchanges have proven to be a powerful driver of economic growth, not just in the agriculture sector but throughout the country. The provision has survived despite major tax reform measures in the past 30 years, because of a number of attributes which are tied to the reasons for implementation of the Code section in the first place.

First, it is a tax deferral mechanism and taxpayers do not avoid ultimately paying capital gains tax if they cash out of their property. Second, like-kind exchanges are used by a broad range of taxpayers from the wealthy to individuals of modest means and small businesses, including ranches and farms. Third, farmers, ranchers and Main Street businesses, which are the foundation of our national economy, use like-kind exchanges, resulting in a ripple effect in the manufacturing sector and service industries.[16]

The importance of 1031 property exchanges in the agriculture sector is further evidenced by the fact that for years the National Farm Bureau Federation, National Cattlemen's Beef Association and other like-minded state agricultural organizations have teamed up with the National Association of Realtors, REALTORS Land Institute, CCIM Institute, Land Trust Alliance, Federation of Exchange Accommodators and others to rebut the myth that 1031 exchanges are just a loophole for the wealthy.[17]

1031 exchanges encourage investors to upgrade their holdings, which is good for the economy. Typically, a taxpayer replacing low basis agricultural or other real property, will recognize substantial capital gains which are not otherwise fully offset. Without the ability to use an exchange in a land sale, farmers, ranchers and others require additional cash to cover both the tax liability and make a new investment. Without access to that additional cash, there would be a corresponding shrinkage of agricultural and commercial real estate investments, retarding ability for growth as well as diminishing the net worth of farmers, ranchers, and other real estate investors.[18]

The loss of Section 1031 may also create a "lock-in effect." The lock-in effect comes into play when property owners are faced with capital gains tax upon sale and reinvestment in other real estate. Even with lower tax rates promised from time to time, the value of property owners' investments and life savings in property is

reduced by the tax bill and they are more likely to hold onto their properties longer. The deferral of gain in an exchange removes the lock-in effect, takes the government out of the decision-making process, and permits taxpayers to engage in opportunistic transactions that make good business and investment sense without fear of negative tax ramifications.[19]

Based upon my experience, I fear that repeal of like-kind exchanges will adversely impact conservation easements, green belt preservation, and other conservation-focused transactions referenced above. Like-kind exchanges make the economics work for conservation easement grants of environmentally sensitive lands that benefit our environment by slowing development, improving water quality, mitigating erosion, preserving wildlife habitats, and creating recreational green spaces for all Americans. The continuation of these socially beneficial conveyances is dependent upon the absence of negative tax consequences.

Keep 1031 for the next century!

For all these reasons and others, proponents for the retention of property exchanges have recently and repeatedly encouraged Congress and the Administration to leave Section 1031 alone in any efforts to revamp the Tax Code. Currently, Congress and the Administration, faced with the economic fallout from the Covid pandemic and the massive relief and other spending bills, continue to look for revenue raisers. Thus, it was no surprise that on April 28, 2021, President Biden announced he would "end the special real estate tax break—that allows real estate investors to defer taxation when they exchange property—for gains greater than $500,000. . . ."[20]

As you can see, the adage that no bad idea in Washington, DC is ever forgotten rings true. Hopefully, you can see from this article that Section 1031 continues to carry out the two primary purposes for it becoming law in 1921 and should not be jettisoned based on the idea that it will raise revenue. Taxpayers should be encouraged to maintain investments in property without being taxed on theoretical (i.e "paper") gains and losses during a series of a continuous investments. Section 1031 should remain in its current form to continue to promote transactional activity dictated by prudent business decisions and changing circumstances.

If you are interested in the benefits of Section 1031 exchanges for your agriculture-based clients or others, contact a QI company near you or engage another member of the legal or accounting profession who has expertise in these types of transactions. If you or your clients have personally witnessed the benefits of Section 1031 and are interested in preserving Section 1031 in its current form, please do your part to keep property exchanges out of the crosshairs by contacting members of your Congressional delegation. You can also obtain more info on this subject by going to www.1031taxreform.com.

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The United States-Mexico-Canada Agreement: New International Law with Implications for Idaho

Randy Reed

Since 1994, the North American Free Trade Agreement (NAFTA) has fostered the economic well-being of the U.S. and its neighbors. Notably, NAFTA has become fundamental to Idaho's agricultural economy, which exports 46% of its agricultural products to either Canada or Mexico. All three member nations now share, thanks to NAFTA, a largely integrated North American agricultural market.[1] The newly minted United States–Mexico–Canada Agreement (USMCA) updates NAFTA in ways that are likely to benefit Idaho agriculture further. As a source of international law, moreover, the USMCA should be of interest to Idaho lawyers.

In 2016, candidate Trump vowed to renegotiate NAFTA and rebalance the trade deficit between the U.S., Mexico, and Canada. Also, NAFTA began to show its age; many prevalent and essential elements of a modern economy simply did not exist in 1994. For example, E-commerce, cross-border data storage, and intellectual property issues all needed to be addressed. Eventually, in July 2020, the newly renegotiated agreement went into effect. Generally speaking, the USMCA is a "ratification of 90% of NAFTA," and there have been no "large structural changes" in USMCA from its predecessor.[2] Agriculture was no exception; all of the former tariff reductions from NAFTA found their way into USMCA.

Additionally, the U.S. Trade Representative (USTR) was able to gain a few concessions from Canada that are reflected in the USMCA. Notably, Canada increased market access to dairy and poultry, and parts of the wheat grading system have been reformed. Although these concessions might seem modest, the USTR estimates that Canada's modest concessions could lead to a two-billion-dollar global increase for the U.S. Agriculture industry.[3] Additionally, states such as Idaho that are leaders in dairy, wheat, and vegetable production and share a border with Canada find themselves in a unique position to capitalize on the new agreement.

Trade with Mexico

As a whole, NAFTA is a complex, comprehensive trade agreement credited with liberalizing and integrating North American markets, perhaps no market more so than the agricultural markets between the U.S. and Mexico. As indicated by a Congressional Research Service Report, "The United States and Mexico agreement

under NAFTA did not exclude any agricultural products from trade liberalization."[4] Over the first 14 years of NAFTA, those tariffs that were not immediately removed upon NAFTA's implementation were gradually eliminated. By 2008, 14 years after NAFTA went into effect, there were virtually no tariffs on any agricultural product or food product between the U.S. and Mexico.

This remarkable liberalization of the agricultural market is realized by the sharp increase in trade since NAFTA's implementation. In 1990, total agricultural exports to Mexico from the U.S. were valued at $2.6 billion. In 1995, shortly after NAFTA's approval, agricultural exports rose to $3.7 billion. In 2018, ten years after removing all tariffs, they topped out at $18.8 billion. [5] Further, two-way agricultural trade between the U.S. and Mexico totaled $44.7 billion in 2018.[6] Indeed, the U.S. and Mexico have grown dependent upon one another, with the U.S. buying 78% of all Mexican agricultural exports. At the same time, Mexico consumes a full 13% of all U.S. agriculture production, which equates to 69% of all of Mexico's agricultural goods imported originating in the U.S.[7]

In terms of agricultural trade, Canada is the U.S.'s top trade partner, and Mexico is third, having only recently been passed by China.[8] A fact that brings into sharp focus what is perhaps the USMCA's most notable achievement concerning its renegotiation with Mexico: it secured existing agricultural markets.

Trade with Canada

Trading with Canada predated NAFTA and started with the Canada–United States Trade Agreement (CUSTA) in 1990. Much of CUSTA's market liberalization found its way into NAFTA, which, although not as sweeping as Mexico's agreement, is still quite expansive, providing "full market access to most agricultural products," exempting only a few markets from the agreement.[9] Under NAFTA, Canada maintained trade restrictions on importing U.S. dairy, poultry, and eggs. Canada also employed non-tariff trade barriers on wheat and dairy. Under the USMCA, however, Canada has eased some of these trade restrictions and agreed to reforms that will reduce non-tariff trade barriers for milk and wheat.

"In terms of agricultural trade, Canada is the U.S.'s top trade partner, and Mexico is third, having only recently been passed by China.[8]"

Dairy

Canada protects its dairy producers in two ways: first, Canada imposes tariff rate quotas (T.R.Q.s) for dairy imports into the country; second, Canada operates a dairy supply management system, which critics claim keeps Canadian dairy prices artificially low.

T.R.Q.s establish a maximum amount, a quota, of a given product that may enter a country duty-free. "Over-quota" amounts are those amounts that exceed the quantity and are subject to substantial import duties (tariffs).

Under NAFTA, T.R.Q.s for dairy were restricted to Canada's W.T.O. obligations, and tariffs were "capped" Most Favored Nations (M.F.N.) rates; often, M.F.N. are more than 200 %.[10] Under the new USMCA, T.R.Q.s will start at Canada's current W.T.O. obligations and increase to specified amounts over an established timetable. Practical application of this means that U.S. dairy producers will be able to import dairy, duty-free, into Canada over and above Canada's W.T.O. obligations.

Generally speaking, the rate of increase is 1% per year for 13 years after year six of the agreement, with years one through six seeing a boost to the specified quantity. An example is fluid milk: under the USMCA, the T.R.Q. is set at 8,333 metric tons (M.T.) for year one. The 8,333 M.T. will increase to 50,000 M.T. by year six; after year six, it will increase 1% per year for a further 13 years to its maximum of 56,905 M.T. in year 19 of the agreement.[11] Similar T.R.Q.s have been established across the spectrum of dairy products, and it is predicted that these T.R.Q. increases will lead to a $280 million increase in U.S. dairy exports to Canada.

Fluid milk, in particular, offers a unique opportunity for Idaho's dairy exporters, as the new agreements state that 85% of the new T.R.Q. "shall be for the importation of milk in bulk (not for retail sale) to be processed into dairy products that will be used as ingredients for further food processing (secondary manufacturing)."[12] This differs from NAFTA, in which a majority of the fluid milk T.R.Q. was available only to cross-border retail shoppers.[13]

Additionally, bulk fluid milk is eligible for Canada's Imports for Re-Export Program (IREP) and its Duty Relief Program (D.R.P.).[14] Under these programs, bulk U.S. dairy that is not destined for Canadian retail markets can be exported to Canada at zero or reduced tariff rates as long as the final products are not destined for Canadian retail markets. It is unclear whether the bulk dairy exported under IREP or D.R.P. will count against the T.R.Q. for fluid milk. At a minimum, the IREP and D.R.P. programs will create an opportunity to integrate further U.S.-Canadian dairy markets, which could lead to a substantial increase in bulk exportation of fluid milk to Canada.

Canada also operates a dairy supply management system that creates trade

barriers for U.S. dairy producers. The system is intended to provide stability to Canada's dairy producers by maintaining production quotas for its producers, maintaining minimum pricing levels for commercial products, and implementing its T.R.Q. as a means of import control.[15] However, while T.R.Q.s increased under USMCA, there remained other barriers for U.S. dairy in Canadian markets: Canada's so-called "class 7" price restrictions.

In recent years, increased demand for butter has led the Canadian Dairy Commission (C.D.C.) to increase the production quotas for milk by Canadian dairy producers. Thus, increased milk production for use in producing butter created a surplus of skim milk (a byproduct of butter production), which led the dairy management system to create the so-called "class 7 pricing" by the C.D.C.[16] The result was Canadian prices for skim milk were held below international market prices, harming U.S. (including Idaho) dairy producers.[17] The USMCA's elimination of the "class 7 pricing" will restore the U.S.'s comparative advantage in global markets. The elimination of the "class 7" prices is expected to lead to a $2 billion increase in U.S. dairy exports.

Wheat

Canada maintains non-tariff barriers that place U.S. wheat at a disadvantage in Canada. The U.S. negotiators attempted to remove or reduce these barriers, but it is unclear how much of a positive impact those efforts will have in the future. The Canadian Grain Act (C.G.A.), which establishes the Canadian Grain Commission (C.G.C.), states that "in the interest of the grain producers, [the C.G.C.] shall establish and maintain standards of quality for *Canadian grain* and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets."[18] It achieves this by maintaining grain grades and standards and implementing a grading system that prevents any foreign grain from being graded.[19]

In addition to the grading system, Canada also maintains a varietal registration system that requires wheat and barley varieties to be on Canada's registration before they can be graded and in Canada.

These two barriers operate independently under the C.G.A. to prevent U.S. wheat from receiving a fair grade in Canada. The result is that the U.S., including Idaho, imports almost no wheat into Canada, even though a plentiful portion of Idaho's wheat producers operate within a stone's throw of Canadian grain silos.

The USMCA was able to address wheat grading issues under the Canadian Grain Act. However, the varietal registration is still a significant barrier to U.S. wheat in Canada, which will likely require domestic reform of the C.G.A. and its varietal registration system before the U.S. grains will make any real gains in Canadian markets.

The C.G.A. creates a condition causing grain entering Canada to be segregated from domestically produced grain. C.G.A. provides a grain inspector with an inspection certification stating where the grain was grown in *Canada*. Simply put, if the grain is not grown in Canada, it cannot receive an inspection certificate. This creates a situation where grain elevators will segregate U.S. wheat from Canadian wheat to prevent the co-mingling of certified inspected Canadian wheat and U.S. wheat, which, before USMCA, would have been ineligible to receive an inspection certificate. In the absence of a grade certificate, wheat can only be sold at "feed-grade," the lowest grade, despite being high-quality wheat.

The scale of the impact this has had on U.S., including Idaho, wheat exports to Canada is evident based on the near-complete lack of wheat exports to Canada.[20] The three-year average from 2012-2015 for wheat exports to Canada was 53 thousand metric tons (T.M.T.).[21] Wheat accounts for 0% of total U.S. exports to Canada. In contrast, wheat exports to Mexico make up 12% of total U.S. exports to Mexico or $619 million for 2018.

United States negotiators gained some concessions from Canada. The USMCA states: "Each party shall accord to originating wheat imported from the territory of the other Party treatment no less favorable than it accords to like the wheat of domestic origin with respects to the assignments of quality grades. . . ."[22] This eliminated the de facto segregation system that Canadian grain elevators have had to operate and allows for the theoretical fair grading of imported grain. However, it fails to address Canada's variety registration system, which is the second hurdle that U.S. producers must jump to sell grain in Canada.

Canada's variety registration (V.R.) system requires wheat varieties to be registered in Canada before being sold in Canada.[23] In general, the crop variety registration system is a profoundly bureaucratic institution that requires years of testing to have a wheat variety officially registered and commercially available. In contrast to the U.S. system, which provides almost instant access to commercially available wheat varieties for U.S. producers, Canadian wheat varieties are three to four years behind what is being used in the U.S. The result is that almost no U.S. producers use a variety of wheat available for sale in Canada.

The Canadian V.R. system is federally managed and establishes a recommendation committee (R.C.) that consists of voting and non-voting members from various parts of the grain industry. The R.C. assesses some "33 to 49 specific characteristics" for "merit" and evaluates a further 32 quality parameters statutorily established by the C.G.A. for each grain variety.[24] To warrant "merit" for a recommendation, the new grain must-have qualities that meet or exceed existing grain qualities for the 33-49 characteristics and the 32 quality parameters. The R.C. further requires one to two years of field testing, though, realistically, these field tests last two to three years and must be completed before being eligible for assessment by the R.C. If a wheat variety makes it past the R.C., the recommendation is passed to the Canadian Food Inspection Agency (CFIA), which then subjects the recommended wheat variety to a myriad of tests and further requires the wheat to be grown for one growing season under its supervision to ensure it meets the various standards, and on it goes ad nauseum. As it is, the V.R. system in Canada remains an obstacle that stands in the way of Idaho's wheat producers.

The U.S. system, by contrast, is significantly quicker in bringing wheat varieties to the market. Wheat is inspected and graded by state inspectors who grade wheat on behalf of the USDA.[25] Land-

grant universities and private breeders develop wheat varieties based on what end users desire as their grain traits. Farmers select what verities to plant based on market demands from end-users. The federal government has no role in determining the variety of wheat and a moderated role in grading grain. As a result, U.S. producers have ready access to the latest type of wheat, which leads to the U.S. outpacing the Canadian V.R. system. The result is that hardly any U.S. wheat farmers grow wheat found on the Canadian V.R. and authorized for sale in Canada. As the *USDA's Report to Congress on Policy Barriers to U.S. Grain Producers* [in Canada] states, "[t]here are thousands of wheat varieties available in the United States." As of 2012, only "340 wheat varieties were registered in Canada, with 56 of these of U.S. origin." The report continues, "of those 56 varieties, only 20 varieties are currently planted by U.S. farmers."

Moreover, of the 20 planted in the U.S., only two varieties are grown in northern states interested in exporting their wheat to Canada.[26] While the USMCA makes inroads into improving treatment of U.S. wheat in Canada by ensuring fair grading, Canada's V.R. system remains a complication that needs to be addressed. Fortunately, in recent years there has been considerable pressure for Canada to reform its V.R. system.

Impact for Idaho

Most agree that the USMCA will positively impact Idaho's agriculture economy, which is of vital importance to the overall health of the economy as a whole. Idaho's farmers and ranchers enjoyed a total agricultural output of $7.2 billion in 2017 with $2 billion in exports to foreign markets.[27] Auspiciously, Idaho is a top-tier producer of many ag products that saw an improvement under the new agreement or will continue to receive favorable treatment. For example, Idaho recently passed New York and now ranks third in the U.S. for dairy production trailing only California and Wisconsin.[28] Likewise, Idaho ranks fourth in vegetable exports and sixth in wheat exports.[29] Under NAFTA, Mexico and Canada became vital trading partners for Idaho's agricultural economy, with Canada consuming some 26% of Idaho's agricultural exports, followed closely by Mexico at 20%, thereby accounting for a full 46% of Idaho's total agricultural exports.[30]

> *"Most agree that the USMCA will positively impact Idaho's agriculture economy, which is of vital importance to the overall health of the economy as a whole."*

Idaho will continue to enjoy robust trading with Mexico under the new agreement. While it remains to be seen just how the new deal will impact trade between Idaho and Canada, Idaho dairy producers should be optimistic about the new agreement. The elimination of Canada's "class 7" price restrictions will make Idaho's dairy more competitive internationally. Additionally, the increased quotas and the set aside for bulk dairy imports combined with Idaho's close geographic proximity to Canada puts Idaho in a unique position to capitalize on the improved market access provided for under the new agreement.

The fair grading of U.S. wheat in Canada required under the USMCA is undoubtedly a cause for celebration among Idaho's wheat producers. However, Canada's V.R. system is still a substantial obstacle to U.S. wheat imports into Canada. Nevertheless, progress was made under the USMCA. If the much-needed reform ever comes to Canada's V.R. system, the Palouse, along with the rest of Idaho's wheat producers, will be in a prime position to export their high-quality wheat to a mostly untapped Canadian market.

Finally, as population growth in the U.S. levels off, the exportation of U.S. agricultural products assumes greater importance. Trade agreements create alternate markets and supply chain redundancy that plays an increasingly important role in the health of Idaho's economy. The new agreement allows for continued access to important markets and further deepening integration in the U.S. agricultural market, increases market access for Idaho's dairy producers in Canada, and, perhaps most importantly, provides a template for future bi-lateral free trade agreements. The U.S. has made agriculture an essential part of the agreement; the USMCA's attitude toward open agricultural markets could be significant as the U.S. seeks trade agreements with the U.K., Japan, China, the E.U., and beyond.

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Worker Cooperatives in Agricultural Communities

Kelsey Jae

Humans have always cooperated in order to thrive, and over the generations innumerable models of cooperation have developed. Most of these models are informal, applying to family or community units. More complex models are regulated by the government through statutory schemes with entity formation, governance, and taxation rules. This article highlights various types of cooperatives, and ultimately homes in on the worker cooperative structure. This entity form is increasingly applicable to farming communities and shows that cooperation, collaboration, and reciprocity have a solid place in our modern economy.

Defining "Cooperatives"

Most people have a general understanding of what it means "to cooperate" with others, but the nuances of the term vary depending on the context and individuals involved. Cooperative businesses or projects can be legally organized in a variety of ways, many of which are discussed below. At a basic level, nearly all cooperative organizations will adhere to the seven core principles that are commonly understood to distinguish cooperative organizations: (1) voluntary and open membership; (2) democratic member control; (3) member economic participation; (4) autonomy and independence; (5) education, training, and information; (6) cooperation among cooperatives; and (7) concern for community.[1] Another general concept is that cooperative organizations are owned/governed by the same people who produce, use, and/or benefit from the products and services offered by the organization.

Cooperatives can also be formally defined by the statutes that govern them. Federal tax statutes create tax benefits for entities "operating on a cooperative basis" as those terms are defined under IRS precedent under Subchapter T. Statutory schemes that govern the formation and operation of cooperative entities exist in all states. At this time, there is no "uniform" law of cooperatives, so practitioners use the available forms in their respective jurisdictions. Some states have enacted specific laws for specific types of cooperative entities while others apply general for-profit or non-profit corporation laws with modifications (as is the case in Idaho). Cooperative lawyers will work with their clients to determine the best available entity structure in their jurisdiction and determine how to incorporate the desired cooperative principles into their operations.

This practice area is certain to keep expanding because cooperative models can

be applied in any industry. Consider the many types of cooperative entity forms seen around the country. These include:

Agricultural/Horticultural Marketing Cooperatives. These cooperatives are common in states with agriculture-based economies and are used to support farmers and get their products to market. Idaho's statute dates back to 1921 and allows these entities "to promote, foster, and encourage the intelligent and orderly marketing of agricultural products through cooperation"; "to eliminate speculation and waste"; "to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer"; and "to stabilize the marketing problems of agricultural products."[2] Agricultural marketing cooperatives can be formed as for-profit or non-profit entities and can often qualify for state and federal tax benefits and securities exemptions. These organizations can be powerful influencers of state politics if the commodities they represent are integral to the economy. Like many forms of cooperatives, agricultural cooperatives can be subject to federal cooperative-regulation in addition to state statutes.

Consumer & Producer Cooperatives. Consumer and producer cooperatives are broad terms for entities that are cooperatively managed to produce and/or provide consumable goods and services to the members and sometimes the general public. Consumer cooperatives tend to help the consumers consolidate their buying power, and producer cooperatives tend to help the producers maximize efficiency and reach. These concepts can be combined. For instance, cooperatives can be created for health care services like body work and acupuncture, for childcare and schools, and for food production and grocery stores. The key elements of consumer and producer cooperatives are adhering to the seven general principles described above, membership/patronage requirements, and membership/patronage benefits. They can range from small and private (like a neighborhood preschool co-op) to large and public (like a grocery store co-op that welcomes all shoppers). Great variety exists from state-to-state in the regulation of consumer and producer cooperatives. Depending on the state, these cooperatives can be formed under specific cooperative statutes or under general corporation laws with cooperative concepts incorporated into the bylaws. My survey of Idaho cooperatives showed that most consumer/producer cooperatives here are formed as nonprofit corporations.

"They can range from small and private (like a neighborhood preschool co-op) to large and public (like a grocery store co-op that welcomes all shoppers)."

Credit unions. Financial cooperative corporations can take the form of credit unions. The statutory purposes of these cooperatives typically concern providing an opportunity for the members to use and control their own money, to promote thrift at a reasonable rate of return, and to provide a source of credit at fair and reasonable rates. In addition to whatever cooperative corporation statutes might apply, credit unions are also highly regulated by state and federal commercial, securities, and consumer protection statutes.

Housing Cooperatives. Housing cooperatives can also take many forms but are generally multi-family or group living situations where a cooperatively managed entity owns and maintains the building(s) and the entity is owned by cooperative members who are also residents. Residents do not own their units separate from the cooperative. Thus, depending on the structure, the cooperative may restrict the rights of members to sell their interests, and therefore access to their units, on the open market. Housing cooperatives can serve to protect communities against real estate speculation and gentrification while also building community and long-term financial stability for resident owners. Housing cooperatives are also subject to fair housing laws and planning and zoning ordinances.

Utility Cooperatives. Communities have long had to band together to provide water for drinking and irrigation, electricity or gas for power and heat, telephone service, and waste management. States with rural populations far away from urban centers and centralized power supplies (like Idaho) tend to have more utility cooperatives. They are generally structured as nonprofit corporations with members that are geographically related and collectively responsible to pay for the costs associated with managing and benefiting from these services. Even urban areas can benefit from utility cooperatives - for example, neighbors can collectively purchase solar power generating and distribution systems to power their subdivisions. Utility cooperatives will also be regulated under complex utility and safety regulations and other statutory frameworks that govern the consumption of natural resources and generation of pollution.

Worker Cooperatives. Generally, a worker cooperative is a business owned and managed by the workers. They provide an opportunity to eliminate the conventional "master-servant" relationship dynamic that characterizes many employment opportunities. Worker cooperatives

can empower workers and communities by connecting the financial risks and rewards of business ownership with the labor that is needed to succeed. While some states have formal worker cooperative statutes, many others do not and their "worker cooperative" models can be found in corporations or LLCs that have formalized cooperative management and profit-sharing principles into their processes.

Inspiring movement towards agricultural worker cooperatives

The above review of various cooperative models shows the potential for businesses of all sorts to operate on a cooperative basis. One of the most interesting movements is towards agricultural *worker* cooperatives. These entities are distinguished from the more common agricultural *producer* cooperative: "In a producer-owned cooperative, a group of independently owned and operated farm businesses come together as a cooperative to distribute their combined agricultural goods. The decision-makers in producer-owned cooperatives are typically a group of farm owners (or producers of other goods) who may employ many workers who have little say in the management of the cooperative. In contrast, the decision-makers in a worker-owned cooperative . . . are the worker-owner farmers who work the land, and share in the risks and profits of the farm business."[3]

Conventionally, the humans doing the bulk of the physical labor at the farm or ranch are not necessarily the owners of the business. As more workers unite to manage their own small farms/ranches, there is a gap in knowledge and resources that must be filled. For any business to succeed, the team needs access to land ownership and capital, long term strategy planning, conflict skills, institutional knowledge, and a plethora of other business management expertise.

These new businesses can find support in organizations like Kitchen Table Advisors and the Agriculture and Land Based Training Association, which provide education, training, and capacity building services for worker-owned farming cooperatives.[4] A lot of this activity is occurring in the Bay Area region with the help of Prospera and The Sustainable Economies Law Center. Using resources in various languages and culturally appropriate outreach and leadership development tools, these organizations are working with immigrant communities to create business structure and management skills while creating replicable resources (such as model legal documents that non-lawyers can understand) to share with other communities. The mission is to help the most marginalized members of our economy build self-sufficiency and community prosperity through cooperative business ownership.[5]

Worker cooperatives in Idaho

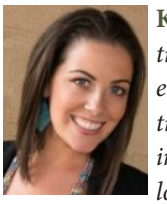
Idaho does not have a specific "worker cooperative" statute that provides a mandatory structure for this type of entity.[6] We also do not have rules that prevent worker ownership from being implemented in other business forms. This lack of regulation can be beneficial because, for example, it allows for creativity in client relationships and legal drafting.

To create a worker cooperative in this state, the simplest way is to use an LLC, corporation, or benefit corporation and implement cooperative management structures into the operating agreement or bylaws. Workers that want to be owners would be members or shareholders and would be involved in the management and risks of the business. The entity could be taxed as a regular corporation or partnership, or if desired, the entity could elect to be taxed under the cooperative taxation rules of Subchapter T.

This taxation structure is based upon "patronage," *i.e.*, allocation of profits based on business done with the cooperative. Subchapter T taxation is more complicated *and* requires different allocation structures than a conventional LLC, corporation, or benefit corporation. Bringing in an attorney and accountant who are familiar with cooperative concepts is advisable.

It is also advisable to have relationship consulting and capacity building among the ownership team. Clients must know that "clocking in and doing a defined job in exchange for a steady paycheck" is worlds away from owning the business, which means never being done working and managing the risk that comes from countless responsibilities. In conversations I've been a part of, the small business owners were interested in sharing ownership with their employees (*e.g.*, through a "cooperative conversion") but after the conversations about the difference between wages and allocation of profits/loss (with risk of loss being emphasized), the employees did not want to become owners.

Worker cooperative practice is very fact-specific and involves a hard look at the emotions and intentions of the people involved. It thus requires a high level of honesty, connection, and creativity. Those are some of the most rewarding projects and should be encouraged in Idaho.



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1. These seven core principles are elaborated upon in numerous resources.

2. I.C. § 22-2601.

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4. *See* https://www.kitchentableadvisors.org/, https://www.albafarmers.org/. These programs are in their early stages.

5. Learn more about this work in California at https://www.theselc.org/immigrant_coops.

6. Several states do, including but not limited to California, Colorado, Illinois, Maine, New York, Ohio, Oregon, and Texas. See https://www.co-oplaw.org/knowledge-base-category/state-by-state-law/ for a list of state profiles produced by SELC fellows (Idaho chapter forthcoming, authored by me). *See also* National Cooperative Business Association, *State Cooperative Statute Library*, https://ncbaclusa.coop/resources/state-cooperative-statute-library/. For those interested in accessing biographies of some worker cooperatives, this entertaining and inspiring article shares plenty of references. *See* Annelise Jolley, *Can Cooperatives Save America's Small Farms?*, https://www.greenbiz.com/article/can-cooperatives-save-americas-small-farms (April 11, 2018).

Agriculture Exemption from Overtime Pay in Idaho: Here to Stay, Or on Its Way Out?

Katie Vandenberg-Van Vliet

In November 2020, the Washington Supreme Court shocked farmers across the state when it held that Washington's statutory agricultural exemption from overtime pay was unconstitutional. As the Washington legislature and its farmers have scrambled to find a solution to prevent farms from becoming unprofitable and going out of business due to rising costs of labor and other expenses, farmers in neighboring states, including Idaho, have been left wondering what implications this case may have on them. Therefore, it is timely to have a discussion of the federal exemption that applies in Idaho, and explain why the case out of Washington does not jeopardize the federal exemption, at least for the time being. This article explains the federal exemption, including its background and scope, and provides a brief summary and discussion of the decision that invalidated Washington state's agricultural exemption from overtime pay.

Background

Idaho does not have a law on the books that specifically requires overtime pay. Therefore, overtime pay in Idaho is governed by the federal Fair Labor Standards Act ("FLSA"). The FLSA was passed by Congress in 1938 and sets forth standards for minimum wage, overtime pay, recordkeeping for employers, and youth employment.[1] An employee will generally be protected in one of two ways under the FLSA: (1) through enterprise coverage; or (2) through individual coverage. An employee will be protected under enterprise coverage if its employer has more than two employees and has an annual dollar volume of sales or business of at least $500,000.[2] Even when enterprise coverage does not apply, an employee will nonetheless be covered individually if the employee is "engaged in commerce or in the production of goods for commerce."[3]

When there is a question of whether an employee is covered under the FLSA, courts have generally been known to construe individual coverage liberally in favor of the employee. However, there are a number of statutory exemptions to this coverage, such as for agricultural workers, executive positions, administrative positions, professional positions (such as lawyers), outside salesmen, and highly compensated employees performing office or non-manual work.[4] This article will focus on the agricultural exemption from overtime pay.

FLSA agricultural exemption from overtime pay

The FLSA specifically exempts "any employee in agriculture" from overtime pay.[5] However, the definition of "agriculture" does not include all jobs that are related to agriculture. The FLSA only exempts those employees who are engaged in "primary" and "secondary" agriculture.[6] While the definition of agriculture under the FLSA may seem quite broad to some, those farms who have vertically integrated, perform services for other farms, or have created an additional business tied to their farm may be at risk of losing their overtime exemption for some employees if those employees engage in activities that are considered a separate and distinct business activity.

> *"When there is a question of whether an employee is covered under the FLSA, courts have generally been known to construe individual coverage liberally in favor of the employee."*

Primary agriculture includes those activities that most traditionally envision farmers doing, such as cultivating and tilling the soil, planting crops, raising livestock, and caring for and milking a dairy herd.[7] Secondary agriculture includes activities "whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as incident to or in conjunction with 'such' farming operations."[8] This secondary agriculture category is where the overtime exemption becomes less black and white and enters shades of grey. The key to whether the activity qualifies as secondary agriculture is whether it is (1) performed by a farmer or on a farm; (2) in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed; and (3) incident to or in conjunction with the farming operation.[9]

The federal regulations provide some specific examples to illustrate the fine line between what is considered agricultural work exempt from overtime pay and what is not. For example, employees who gather fruit at the groves are considered agricultural workers because they are engaged in harvesting and are exempt from overtime pay. However, those employees who work for an intermediary that buys fruit unsuitable for fresh sales, packages it, and transports it to canneries are not considered agricultural workers, and must be paid overtime.[10] Additionally, an employee who is employed by a farmer to repair and service agricultural equipment only on that farm is employed in agriculture and is exempt from overtime pay.[11] However, an employee who works for an employer that is in the business of servicing agricultural equipment and machinery for numerous farmers is not an agricultural worker and must be paid overtime.[12]

To put this in the context of one operation, let's consider a dairy farm that also grows feed for its herd; recycles its used bedding and manure from corrals into compost as fertilizer for its fields; and hauls its own milk to the processor. Dairies such as these are dynamic operations that involve many different kinds of positions, some of which are considered primary agriculture, and some secondary.

For example, employees that cultivate the fields, plant the fields, irrigate the fields, and assist in harvesting the fields to produce feed for the herd are all clearly involved in primary agriculture and are exempt from overtime pay. The employees that feed and care for the calves, heifers, and milk cows are also involved in primary agriculture and are exempt from overtime pay, as well as the employees that milk them.[13] The employees that help clean corrals, free stalls, and alleys are also exempt because these activities are required to properly care for the herd and maintain good animal husbandry. Other positions that qualify as exempt include employees that repair equipment used on the dairy or in the fields for that farmer only, night watchmen, artificial insemination technicians, and employees hired to grind high moisture corn or assist with preparing and packing silage pits at the dairy.[14]

The employees who haul manure and bedding into windrows and operate the machinery to turn the manure and bedding into compost are also exempt, so long as the compost operation does not become a "separate and distinct" business activity. If the dairy takes neighboring dairies' manure and bedding as well, turns it into compost, and then sells that compost to third parties instead of applying it to fields farmed by the dairy, then this situation would likely be considered a separate and distinct business activity, and any employees involved in turning the compost and preparing it for sale would lose their exemption and need to be paid overtime.

Similarly, if the dairy hauls its own milk to the processor, the truck driver that loads the milk and delivers it to the processor is exempt from overtime pay. However, if the truck driver stops at other dairies and also delivers their milk to the processor along with its employer's milk, then that employee would likely lose its exemption because the milk transport has likely become a separate and distinct business activity from the farm. Accordingly, it is easy to see where bigger and more vertically integrated farms are at risk of losing this exemption for certain employees if they become engaged in ancillary businesses or activities that compliment their own operation.

Martinez-Cuevas v. DeRuyter Bros. Dairy

In late 2020, the Washington Supreme Court issued an opinion that required

overtime pay for Washington dairy workers. The decision has no immediate import to Idaho inasmuch as Washington's ruling pertained to specific provisions of the Washington Constitution and a Washington statute that are not identical to federal or Idaho law. However, awareness and caution is in order as Washington's case may be argued as persuasive in cases applying to the FLSA. While a successful challenge is not anticipated in the immediate future for the reasons discussed below, a discussion of this case is timely and appropriate to help agricultural employers and practitioners become aware of the types of challenges they may face in the future as the agricultural industry and labor laws continue to evolve.

Martinez-Cuevas v. DeRuyter Bros. Dairy is the Washington case where 300 workers brought suit against a dairy in Washington, alleging claims for failure to pay minimum wage, failure to provide adequate rest and meal breaks, failure to compensate pre and post shift duties, and failure to pay overtime. The plaintiffs also sought a ruling declaring Washington's statutory agricultural exemption from overtime pay unconstitutional.[15] A class settlement was reached on all claims other than the overtime pay claim. Cross motions for summary judgment were filed on the overtime pay issue. The trial court denied the plaintiffs' motion for summary judgment in part, holding that the workers were entitled to overtime pay based on the fundamental right to work and earn a wage, but declined to rule on the constitutionality of the state overtime exemption and reserved that issue for trial. The plaintiffs moved for discretionary review of the trial court's decision by the Washington Supreme Court, which was granted.

A divided Washington Supreme Court also held in favor of the plaintiffs on a 5-4 decision, but not on the same grounds as the trial court. Instead of affirming the reasoning of the trial court, the Washington Supreme Court explicitly held that the statutory exemption from overtime pay violated the privileges or immunities clause of the Washington Constitution. The Court expressly recognized that the text and aims of Washington's privileges and immunities clause differs from the federal privileges or immunities clause and admits that they "diverge" from the federal antidiscrimination principle in their holding.[16] The Court applied a two-step analysis, finding that the Washington statute exempting agricultural workers from overtime pay was unconstitutional because it (1) granted agricultural employers an impermissible "privilege" or "immunity" from paying otherwise mandatory minimum pay, which workers had a fundamental right to under the health and safety protections contained in Washington's constitution; and (2) that the Washington legislature lacked reasonable grounds for granting the overtime exemption to agricultural employers specifically.[17] Accordingly, the Court remanded the case to the trial court for entry of summary judgment in favor of the plaintiffs on the constitutional claim, and also awarded plaintiffs their attorney fees.

Agricultural exemption here to stay in Idaho, for now

While this decision may have caused angst amongst agricultural employers in Idaho and the attorneys who represent them, the good news is that this decision does not jeopardize how overtime pay applies in Idaho at this time, since the FLSA agricultural exemption from overtime pay was not overturned in that case. As mentioned above, Idaho does not have a law that requires overtime pay in Idaho for private employers like Washington does, nor does Idaho specifically exempt agricultural employers from overtime pay like Washington did. Instead, overtime pay in Idaho is governed by the FLSA, which is here to stay for the foreseeable future. Like the majority in *Martinez-Cuevas* acknowledged, and the dissent expanded upon, the Washington Supreme Court's decision in that case is a divergence from federal antidiscrimination principles and case law. This was magnified in the dissent, where the slim majority was criticized for treating a "law review article and *Slaughter-House Cases* dissents as precedent, while rejecting the authority of the United States Supreme Court."[18]

Accordingly, because the decision in *Martinez-Cuevas* was based on law specific to Washington state which is not mirrored in Idaho or federal law, and because it did not strike down the federal FLSA agricultural exemption from overtime pay, it is probably safe to say that the exemption in Idaho is here to stay, at least for now. However, only time will tell if the arguments in *Martinez-Cuevas* will serve as an outline for a broader attack on the federal exemption.

"A divided Washington Supreme Court also held in favor of the plaintiffs on a 5-4 decision, but not on the same grounds as the trial court."

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Endnotes

1. *See generally* 29 U.S.C. §§ 201–219.
2. 29 U.S.C. § 203.
3. 29 U.S.C. §§ 203, 206-07, 212.
4. *See generally* 29 U.S.C. § 213.
5. 29 U.S.C. § 213(b)(13).
6. 29 C.F.R. § 780.105.
7. *Id.*
8. *Id.*
9. 29 C.F.R. § 780.129.
10. 29 C.F.R. § 780.109.
11. 29 C.F.R. § 780.158.
12. 29 C.F.R. § 780.129.
13. 29 C.F.R. § 780.111.
14. 29 C.F.R. § 780.158.
15. *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 475 P.3d 164, 167 (Wash. 2020).
16. *Id.* at 169.
17. *See generally id.* at 171–75.
18. *Id.* at 181 (5-4 decision) (Stephens, J., dissenting).

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Idaho Supreme Court building in Boise. Photo courtesy of the Idaho Architecture Project.

Highlights of Rule Amendments for 2021

Lori Fleming

The following is a list of rule amendments approved by the Idaho Supreme Court in the past year. The orders amending these rules can be found on the Idaho Supreme Court website at http://www.isc.idaho.gov/recent-amendments. Be sure to check the Idaho State Bar E-bulletin for your chance to comment on proposed amendments before adoption. Unless otherwise indicated, all amendments and new rules are effective July 1, 2021.

Idaho Appellate Rules

The Idaho Appellate Rules Advisory Committee is chaired by Chief Justice G. Richard Bevan.

Rule 5. Special Writs and Proceedings. Because copies of petitions for special writs are no longer required, the word "Number" has been removed from the heading of subsection (c). No other amendments have been made to this rule.

Rule 13. Stay of Proceedings Upon Appeal or Certification. Idaho Appellate Rule 13(a) currently provides for an automatic 14-day stay of all district court judgments or orders in a civil action upon the filing of a notice of appeal. The rule has been amended to provide that civil protection orders issued pursuant to I.C. § 39-6306 (domestic violence) and I.C. § 18-7907 (malicious harassment/stalking) are not automatically stayed when a notice of appeal is filed. A similar amendment is being made to I.R.C.P. 83(e), which governs stays during appeals to the district court from the magistrate division.

Subsection (b) of Rule 13 currently states that, when an appeal is taken from a partial judgment that is certified as final under I.R.C.P. 54(b), the entirety of the district court case is stayed and the district court has no power to take action unless approved by the Supreme Court. The rule has been amended to provide that, during an appeal from a partial judgment certified as final under Rule 54(b), I.R.C.P., the district court shall have the power and authority to take any actions and rule upon any matters unaffected by the Rule 54(b) judgment, including conducting a trial of the issues remaining in the case, unless a stay is entered by either the district court or the Supreme Court pursuant Rule 13.4(b), I.A.R.

Rule 13.4. Delegation of Jurisdiction to District Court During an Appeal. Consistent with the amendment to Rule 13(b), this rule has been amended to provide that, during an appeal from a partial judgment certified as final under I.R.C.P. 54(b), the district court retains jurisdiction to take actions and rule upon maters unaffected by the Rule 54(b) judgment.

The district court may enter an order staying the balance of the district court case, either on its own motion or on the motion of any party at any time during the pendency of the appeal. A motion for stay must be made and processed in the manner provided by subsection (b)(1) of the rule. If the district court denies the motion or fails to rule on it within 21 days, subsection (b)(2) permits the moving party to apply to the Supreme Court for a stay. Likewise, if the district court grants the motion for a stay, subsection (b)(2) permits any party aggrieved by the ruling to apply to the Supreme Court to modify or vacate the stay.

Rule 24. Reporter's Transcript. The word "Number," as it appears both in the main heading and in the heading of subsection (a), has been replaced with the word "Format" to more accurately reflect the substance of the rule. No other amendments have been made to this rule.

Rule 26. Preparation and Arrangement of Reporter's Transcripts. This rule has been amended to conform to the language of I.A.R. 24, which requires the court reporter to prepare one copy of the reporter's transcript in electronic format and to only prepare a hard copy of the transcript if requested by the parties. In an effort to eliminate discrepancies between the way electronic copies of transcripts are labeled and the way they are cited by the parties on appeal, the rule has also been amended to impose new formatting and pagination requirements for transcripts submitted in electronic form. Under new subsection (m)(1) of the rule, the electronic copy must be prepared in standard format, with no more than one page of regular transcript on one 8 ½ x 11 inch page of the electronic file. If a hard copy of the transcript is requested, subsection (m)(2) provides that it may be prepared in a compressed format, with no more than 12 pages of regular transcript on one page of compressed transcript, using both the front and back of each page.

Rule 27. Clerk's or Agency's Record. Subsection (b)(1) of this rule has been amended to clarify that the $1.25 per page fee for preparation of a paper copy of the record applies only if a hard copy of the record has been requested by the parties.

Rule 29. Settlement and Filing of Reporter's Transcript and Clerk's or Agency's Record. Idaho Appellate Rule 29(a) states that any objection to the clerk's or agency's record must be noticed for hearing and must be heard and determined by the district court or administrative agency from which the appeal is taken. The rule has been amended to clarify that no hearing is required if the opposing party stipulates to, or otherwise indicates in writing that it does not oppose, the relief requested in the objection.

Rule 34. Briefs on Appeal. Idaho Appellate Rule 34(b) states that no appellate brief in excess of 50 pages shall be filed without consent of the Supreme Court. The rule has been amended to exclude from this page limit the covers, the caption page, the table of contents, the table of authorities, the certificate of service, and any addendums or exhibits. The heading of Rule 34 has also been amended to more accurately reflect the substance of the rule.

Idaho Juvenile Rules

The Juvenile Justice Advisory Committee is chaired by Judge Mark Ingram. The following amendments to the Idaho Juvenile Rules took effect January 1, 2021.

Rule 6. Admit/Deny Hearing (J.C.A.). A new subsection of this rule provides that, once a case is assigned to a magistrate at the admit/deny hearing on a petition filed under the Juvenile Corrections Act, the magistrate retains responsibility for the case until it is closed and all subsequent cases involving the same juvenile will be assigned to the same magistrate. A different magistrate will only be assigned when (1) the judge who presided over the case no longer holds the same judicial office that the judge held at the initiation of the case, or (2) other extraordinary circumstances exist, such as the judge's disqualification, death, illness, or other disability.

Rule 39. Shelter Care Hearing (C.P.A.). Subsection (b) of this rule has been amended to provide that, once a C.P.A. case is assigned to a magistrate, the magistrate retains responsibility for the case until its conclusion. Again, a different magistrate will only be assigned when (1) the judge who presided over the case no longer holds the same judicial office that the judge held at the initiation of the case, or (2) other extraordinary circumstances exist, such as the judge's disqualification, death, illness, or other disability.

Rule 48. Termination of Parent Child Relationship (C.P.A.). A new subsection of this rule provides that a petition to terminate parental rights shall be assigned to the same magistrate who presided over the C.P.A. action and, with the same exceptions set forth in Rules 39 and 48, such magistrate shall retain responsibility for the case until its conclusion.

Idaho Misdemeanor Criminal Rules

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

Rule 5. Uniform Citation. Ordinarily, a defendant who is issued a Uniform Citation for a citable offense must appear in court on the citation not less than five nor more than 21 days after the date of the citation. Idaho Misdemeanor Criminal Rule 5(b) sets forth an exception to these time limits, requiring that, for certain offenses, the defendant must personally appear before a magistrate for arraignment within 48 hours following citation or arrest. Until recently, the expedited arraignment requirement only applied to second offense or enhanced driving under the influence charges. Effective March 1, 2021, Rule 5(b) was amended to include the following additional offenses to which the 48-hour arraignment requirement applies: Stalking in the Second Degree (I.C. § 18-7906); Domestic Assault or Battery (I.C. § 18-918); Violation of a Domestic Violence Protection Order (I.C. § 39-6312); Violation of No Contact Order (I.C. § 18-920); Sexual Battery (I.C. § 18-924); and Violation of a Protection Order for Malicious Harassment (I.C. § 18-7907).

Rule 14. Disposition of Citations by Written Plea of Guilty – Limitations – Deferred Payment Agreements. Subsection (b)(2) of this rule was amended to add I.C. § 63-2450 (fuels tax violations) to the list of misdemeanor offenses for which a written plea of guilty may be accepted when the required bail bond under Rule 13 does not exceed $582.00. The amendment took effect January 13, 2021.

Revised DUI Evaluation Reporting Form. Section 10 of the standardized DUI Evaluation Reporting Form embedded in Rule 9.4, I.M.C.R., was amended to mirror the language of Rule 9.4(b)(10), which requires the evaluation report to contain the following information: "Evaluator's impressions and recommendations for further assessment and/or appropriate ASAM level of care for treatment, including specific reasons for recommendations and the factors considered." The amendment took effect January 13, 2021.

Idaho Rules of Civil Procedure

The Civil Rules Advisory Committee is chaired by Justice Robyn Brody.

Rule 54. Judgments. Idaho Rule of Civil Procedure 54(b)(2) currently states that, when an appeal is taken from a partial judgment that is certified as final under I.R.C.P. 54(b)(1), the trial court loses all jurisdiction over the entire action, except as provided in Rule 13 of the Idaho Appellate Rules. The rule has been amended to provide that, during an appeal from a partial judgment that is certified as final under I.R.C.P. 54(b)(1), the district court retains jurisdiction to take any actions and rule upon any matters unaffected by the Rule 54(b) judgment, including conducting a trial of the issues remaining in the case, unless a stay is entered by either the district court or the Supreme Court pursuant Rules 13 and 13.4 of the Idaho Appellate Rules.

Rule 83. Appeals from Decisions of Magistrates. Idaho Rule of Civil Procedure 83(e)(1) currently provides for an automatic 14-day stay of magistrate judgments or orders upon the filing of a notice of appeal to the district court. The rule has been amended to provide that civil protection orders issued pursuant to I.C. § 39-6306 (domestic violence) and I.C. § 18-7907 (malicious harassment/stalking) are not automatically stayed when a notice of appeal is filed. A similar amendment is being made to I.A.R. 13(a), which governs stays during appeals to the Supreme Court from the district court.

Idaho Rules of Evidence

The Evidence Rules Advisory Committee is chaired by Judge Molly Huskey. The following technical amendments to Rules 201 and 410, I.R.E., took effect January 13, 2021.

Rule 201. Judicial Notice. A period was inserted immediately following the word "information" in subsection (c)(2).

Rule 410. Pleas, Plea Discussions, and Related Statements. With the adoption of the most recent version of the Idaho Rules of Evidence in 2018, a paragraph discussing the admissibility of evidence relating to liability insurance was inadvertently included at the end of Rule 410, which sets forth the circumstances in which evidence of guilty pleas and plea discussions are admissible in a civil or criminal case. That paragraph has been deleted from Rule 410, but it is still included in Rule 411, which governs the admissibility of evidence that a person was or was not insured against liability.

Idaho Rules of Family Law Procedure

The Children and Families in the Courts Committee is chaired by Judge Diane Walker. The Committee was tasked with updating and restyling the Idaho Rules of Family Law Procedure to simplify, clarify and modernize the language, eliminate redundancies, and create a consistent structure and format. The newly formatted rules were adopted by the Supreme Court and are effective July 1, 2021. The rules are still divided by topic, but some of them have been renumbered. This is because a few of the former rules have been deleted, others have been consolidated by subject, and new rules have been added. A cross-reference table of the new and former rules is available on the Idaho Supreme Court website. In addition to being renumbered, the rules have also been revised, generally, to make case processing times consistent with those required in cases governed by the Idaho Rules of Civil Procedure. A number of other procedural and substantive changes have been made. Some of the more significant amendments are summarized below.

Rule 102. Applicability of Other Rules. This rule differs from former Rule 102 in that it requires a party desiring strict compliance with the Idaho Rules of Evidence to file a motion requesting such strict compliance. In a family law action, the motion must be filed within 30 days after an answer or other responsive pleading is filed, or, if there is no responsive pleading, within 42 days from the filing of the motion or petition in the family law case. In a civil protection order action, the motion must be filed no later than two days before the 14-day civil protection order hearing. The court may deny the motion for strict compliance for good cause shown, including but not limited to a power imbalance in representation between the parties or the best interest of the child. If no motion for strict compliance is filed or if the motion is denied, all relevant evidence is admissible unless its probative value is outweighed by the danger of unfair prejudice.

Rule 103. Definitions. This rule now includes definitions of the following terms that were not specifically defined in former Rule 103: "Answer," "Civil Protection Order Action," "Confer," "Family Law Action," "Good Cause," "Relevant Evidence," and "Responding Party."

Rule 106. Coordination of Related Family Cases. This new rule creates a preference that one judge be assigned to one family. Specifically, it states that all related family cases and civil protection order actions must be handled before one judge, unless impractical. A "related family case" is one that involves the same parties, child, or issues as any pending family law action, one that affects the court's jurisdiction to proceed, or one in which an order may conflict with an order in another case. If it is not practical for on judge to handle all related family cases and civil protection order actions, the judges assigned to hear the related cases involving the same family or child may confer for the purpose of case management and coordination of the cases. Notwithstanding the provisions of I.C.A.R. 32, both a judge hearing a family law action and authorized court personnel may access and review the files of any related family case, but neither the judge nor authorized court personnel may disclose confidential information contained in the related family case files except in accordance with applicable state and federal confidentiality laws and rules.

Rules 108. Joint Hearings and Consolidation. This rule was formerly Rule

106. It has been revised to require that, in cases in which the court orders a joint hearing or trial of any matters at issue in related family cases or civil protection order actions, notice must be provided to all parties and to all attorneys of record in each related case, regardless of whether the party providing notice is a party in every case number that will be called for hearing.

Rule 109. Disqualification. All of the former rules relating to disqualification of judges are now combined in a single rule. The provisions of the rule governing the parties' right to disqualify a judge without cause now state that such right does not apply to a judge who heard, joined, or consolidated a prior related family case.

Rule 115. Conduct of Proceedings. This rule was formerly Rule 117. Substantively, it has been amended to provide that, unless a different time is allowed by the presiding judge or fixed by another controlling rule, each party will have no more than 30 minutes to present evidence at evidentiary hearings conducted in family law actions and civil protection order actions. The limitation does not apply to trials in family law cases.

Rule 120. Idaho Child Support Guidelines. The Idaho Child Support Guidelines, formerly Rule 126, now appear in Rule 120 of the newly formatted Rules of Family Law Procedure. The Child Support Guidelines Committee is chaired by Judge R. Todd Garbett. As a result of the work of that Committee, the Guidelines have been updated and restyled to simplify, modernize, and clarify the language, and to create a consistent structure and format. No significant substantive changes were made, but the amended Guidelines are easier to read and understand.

Rule 201. Commencement of Actions. This rule governs the commencement of family law actions, civil protection order actions, family law modification actions, and actions to obtain a money judgment. The rule now states that, if a child is involved in an action commenced under Rule 102, the child's full name and date of birth must be included in the petition and in any subsequent order, decree, or judgment. In addition, both the petitioner and the respondent must complete and submit a family law case information sheet each time a case is commenced or reopened. Ordinarily, any petition that opens or reopens a case must be served on all parties. However, in cases in which the parties have filed a stipulation for entry of a decree or judgment, service is not required.

Rule 204. Summons. Former Rule 204 provided that service could be made on a minor child at least 14 years of age. The rule has been revised to require that the person being served be 18 years or older. If the person is less than 18 years old or has been judicially declared to be incompetent, service must be made on the person's guardian. Unless the court orders otherwise, service must also be made on the minor or incompetent person. Other revisions to the rule include the incorporation of statutory requirements for service by publication, and the removal of a provision allowing proof of service by mailing other than by evidence that such service was accomplished by certified or registered mail. Finally, the Summons forms that were previously included in Rule 204 are now contained in the Appendix to the I.R.F.L.P.

Rules 208 and 213. Form of Pleadings/Signing Pleadings, Motions, and Other Papers. Formerly Rules 207 and 212, respectively, these new rules have both been amended to permit a petitioner in a civil protection order action to omit his or her contact information from the petition or application as long as that contact information has been included on the family law case information sheet.

Rule 219. Contact Information. This new rule states that unrepresented parties must keep the court apprised of their current contact information. It also imposes a requirement upon attorneys and unrepresented parties to notify the court within 14 days of any changes in the attorney's or party's mailing address, phone number, or previously provided email address.

Rule 220. Attorney Appearance in Civil Protection Order Actions. This new rule governs the appearance and withdrawal of attorneys in civil protection order actions. Attorneys who intend to represent a party in such action must file a notice of appearance before the hearing on the case or as soon as practicable after the first hearing at which they appear. Attorneys who appear in civil protection order actions will be served with copies of any filings in the case. An attorney who has appeared in the action may file a notice of withdrawal after the case has been dismissed, but the withdrawal will not be effective until the time for appeal has expired and no proceedings are pending.

Rule 401. Mandatory Disclosure in Contested Proceedings. This rule has been amended to require the disclosure of all personal and business tax returns in any action in which child support is an issue. In addition, if parenting time is an issue in the case, each party must state with particularity his or her requested parenting plan. The requirements for expert witness disclosures also now appear in this rule.

Rule 402. Additional Discovery. A number of former rules relating to discovery in actions governed by the I.R.F.L.P. are now combined in new Rule 402. Significantly, the rule includes new requirements regarding the sequence and timing of discovery. Specifically, the rule states that, unless the court orders otherwise, a party may proceed with discovery only after that party has completed its mandatory disclosures required under Rule 401. Once mandatory disclosures are complete, methods of discovery may proceed in any sequence, but no party may request information or documents that were previously disclosed pursuant to the mandatory disclosure provisions of Rule 401. The new Rule 402 also imposes limits on discovery in civil protection order actions. The general rule is that discovery is not allowed. However, for good cause shown, a party may move the court to engage in discovery. The motion may be heard at the 14-day hearing. After hearing the motion, the court will determine the scope of discovery, if any is allowed. In the event the motion causes the 14-day hearing to be continued, such continuance may be for no more than 14 days, and the temporary protection order may remain in effect pending the continued hearing.

Rule 505. Temporary Order Issued Without Notice. This new rule provides that a court may issue a temporary order without notice to the responding party if (1) the facts in an affidavit or verified motion clearly show that immediate and irreparable injury, loss, or damage will result

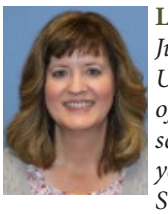
to the moving party or minor child of the party before the responding party can be heard in opposition, (2) the moving party or his or her attorney certifies in writing any efforts made to give notice and the reasons why it should not be required, and (3) the moving party submits a proposed temporary order that complies with the requirements of the rule. Pursuant to the rule, the temporary order must describe the injury and state why it is irreparable, state why the order was issued without notice, and state the date and time for the hearing. Unless a party receives an extension, the temporary order issued without notice is only effective for a fixed period not to exceed 14 days. The moving party must serve a copy of the motion, affidavits, and order on the responding party within the timeframes set forth in the rule, and an expedited hearing must be set. The responding party may seek a continuance of up to 14 days to respond, during which time the order issued without notice will remain in effect. On two days' notice to the moving party or on shorter notice set by the court, the responding party may appear and move to dissolve or modify the order.

Rule 602. Mediation of Child Custody and Visitation Disputes. Under former Rule 602, any person who possessed a bachelor's degree qualified for placement on the list of registered child custody mediators complied by the Supreme Court. The rule has been revised so that only those applicants who hold at least one of the following professional credentials will qualify for placement on the approved mediator roster: (A) the applicant is recognized by the Idaho Mediation Association as a Certified Professional Mediator, or holds a membership in the Association for Conflict Resolution—or other national organization with equivalent membership standards—at an advanced practitioner level; or (B) the applicant is a member of the Idaho judiciary, a licensed member of the Idaho State Bar, or a licensed psychologist, counselor, social worker, or therapist. The purpose of the amendment is to ensure that new mediators meet the ethical standards required by their professional licenses or by their memberships in professional mediation and conflict resolution organizations.

"The purpose of the amendment is to ensure that new mediators meet the ethical standards required by their professional licenses or by their memberships in professional mediation and conflict resolution organizations."

Rule 802. Judgments. The rules on judgments and partial judgments contained in former Rules 803 and 804 have been combined into a single rule. Consistent with amendments to the Rules of Civil Procedure, subsection (b)(2) of new Rule 802, I.R.F.L.P., states that, if a certificate of final judgment is issued on a partial judgment and an appeal is filed, the court retains jurisdiction to take any actions and rule upon any matters unaffected by the partial judgment, including conducting a trial of the issues remaining in the case, except as provided in Idaho Appellate Rules 13 and 13.4.

Rule 1007. Receiver. This new rule clarifies that the I.R.F.L.P. govern actions in which the appointment of a receiver is sought or in which a receiver sues or is sued. The rule states that the appointment and administration of estates by receivers must be in accordance with Idaho Code. An action in which a receiver has been appointed may be dismissed only by court order.



Lori Fleming *received her Juris Doctorate from the University of Idaho College of Law in 1998. After law school, she completed a two-year clerkship for United States Magistrate Judge Mikel H. Williams. Following her clerkship, she worked for almost 20 years as a Deputy Attorney General in the Appellate Unit of the Criminal Law Division of the Idaho Attorney General's Office. She has been the Staff Attorney for the Idaho Supreme Court since September 2019.*

What We Learned from the Idaho Academy of Leadership for Lawyers, And Why You Should Apply

Michael Porter
Taylor Mossman-Fletcher
William K. Fletcher

As lawyers, we're well familiar with the old saying that law school is an excellent place to learn the law, but does little to prepare you for the actual practice of law. If you think about it, though, this same criticism applies equally to the actual practice of law. Decades of practice may allow us to master legal analysis, intricacies, and procedures. The problem, however, is that legal practice requires equal, if not more, parts human acuity. Unfortunately, the legal profession, rooted in the intellectual process, so often falls short in developing this critical human element.

Enter the Idaho Academy of Leadership for Lawyers. Now in its tenth year, IALL was founded with the mission of promoting diversity and inspiring leadership within the legal profession. But it does much more than that. IALL provides an opportunity to develop emotional intelligence, and in turn, form a better understanding of ourselves, our clients, and our peers. IALL concentrates on individualized leadership styles and growing relationships in and outside of the bar. And most central to IALL's mission, it inspires confidence in both new and seasoned lawyers to achieve their leadership ambitions.

As three graduates of the program, we're not kidding when we say IALL has been an impactful experience that has made us better lawyers. In addition to providing much-needed tools to develop the people side of lawyering, IALL has helped us grow as citizens, partners, friends, coaches, thinkers, counselors, volunteers, social workers, and mentors. Here are just a handful of the many lessons we learned in IALL:

Community

Let's be honest, lawyers are competitive people. Not only do we compete against opposing counsel every day, but we also compete against our colleagues, friends, and even routinely, ourselves. All this competition can have a destructive effect over time. IALL shows that there is a different way to practice law—you can win and win better by developing a sense of community and comradery. The thinking of organizational psychologist Adam Grant is a big part of the IALL curriculum. As Grant puts it, we often gain more when

we collaborate and foster community with our competitors. IALL participants meet and form lasting friendships with other lawyers, judges, business leaders, municipal leaders, and members of the state legislature, to name a few. It is a good reminder that our community is far more expansive than just the legal community, and we can often accomplish more as legal warriors if we put down our weapons and armor and work together.

Vulnerability

Expressions of vulnerability are discouraged for lawyers, as they often are associated with weakness. However, as IALL teaches, vulnerability is all but necessary for effective leadership. Sound leaders are self-aware and they accept that they're not always the expert in the room. When a leader learns to lean on, rather than simply directing, other members of their team, it's an act of vulnerability that strengthens the entire team. This, of course, is because it allows collaboration towards a common goal.

Additionally, IALL's teachings are imparted in intimate, smaller groups. There, we learn to recognize how our authenticities are effective, but also how they may not be. Through this, IALL establishes a space for lawyers to not just be vulnerable, but to fuse vulnerability with leadership.

Challenge yourself and learn to enjoy the journey

Talk to an IALL class member and they'll likely share with you that the decision to apply can come with great apprehension of the unknown and being forced outside of your comfort zone. Talk to an IALL graduate and they'll likely tell you that they are so glad they took the risk. They'll also tell you that IALL exposed them to ideas and opportunities they never would have come to on their own. This not only enriched their lives, but allowed them to better enrich the lives of those around them.

Mentorship

Class members are invited to abandon pretense, decorum, and defense through laughter and the modeled vulnerability of presenters and committee members. Listening to judges, justices, partners, and professors as they laugh at themselves, share their fears and their goals in a safe environment forces you to confront the issues holding you back from a better connection with the profession and yourself. This process results in greater authenticity and thereby an increased ability to identify potential mentor-mentee opportunities. Bonding over deeply held and shared beliefs builds lasting relationships filled with meaningful interactions.

And leadership, of course

Leadership can be hard to define, a fact that IALL celebrates. It is an idea rather than something that can be concretely summarized. But to borrow from the thinking of Supreme Court Justice Potter Stewart, you know it when you see it. Distilled to its most basic element, it is the ability to influence others to act, but it takes on many, many forms. IALL embraces that there are numerous types of good leadership. More importantly, it helps you on the journey to discovering what leadership qualities you may already possess, as well as what qualities are ripe for cultivation.

IALL also makes you realize that good leadership is within everyone's grasp—And it has a feedback effect, both in yourself and in others. Daring to lead begets more opportunities to lead. Leading also inspires others to do the same. You just have to take the plunge.

Are you convinced yet?

Perhaps the most cherished part of IALL is the lasting relationships. Our classes were a mix of new friends with whom we may not otherwise have crossed paths, and some old friends whom we got to know more deeply. We met some amazing people, such as Justice Roger Burdick, who knows you should never take yourself too seriously despite having a long and distinguished career; Mahmood Sheikh, who taught us that you can be loved by everyone, and yet have time for anyone; Judges Andrea Courtney and Gene Petty, who consistently see challenges as simply opportunities; Yecora Daniels, whose quiet confidence inspires; Diane Minnich, who personifies grace and warmth; IALL's founder, Deborah Ferguson, who has provided a great example of what a vision can turn in to with a little momentum; and finally, all of our IALL classmates, who continue to inspire us and with whom we'll always have a connection.

Conclusion

The Application for the 2021—2022 IALL class will become available on the Idaho State Bar website in June 2021 and will be accepted through the first week of August. If any part of this article has resonated with you; If you want to be reminded (or need a reason to believe) Idaho lawyers are amazing and wonderful people; If you're in need of introspection and a chance to be authentic; or if you just want to meet some amazing people and have the excuse to get to know them a little better—you've every reason to apply. We promise you'll be glad you did.

Michael Porter *is the current co-chair of the IALL steering committee and a deputy civil prosecutor in the Canyon County Prosecuting Attorney's Office.*

Taylor Mossman-Fletcher *practices in Boise handling workers compensation and social security disability cases at Mossman Law, LLP. She is a 2014 IALL graduate and currently is serving as the President of the Idaho Trial Lawyers Association.*

William K. Fletcher *is a 2015 IALL graduate and house counsel at Zasio Enterprises, a records management software and consulting company.*

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

Chief Justice
G. Richard Bevan

Justices
Robyn M. Brody
Roger S. Burdick
John R. Stegner
Gregory W. Moeller

Regular Spring Term for 2021
2nd Amended December 10, 2020

Boise via Zoom ..... January 11, 13, 15, 19 and 21
Boise via Zoom ..... February 17, 19, 22, 24 and 26
Boise ..... April 12, 14 and 16
Moscow U of I ..... April 20
Lewiston ..... April 21
Boise ..... May 3, 5, 7, 10 and 12
Boise ..... June 7, 9, 11, 14 and 16

By Order of the Court
Melanie Gagnepain, Clerk

NOTE: The above is the official notice of the 2021 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

Chief Judge
Molly J. Huskey

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

Regular Spring Term for 2021
10/28/2020

Boise ..... April 13, 15, 20, and 22
Boise ..... May 11, 13, 18, and 20
Boise ..... June 8, 10, 15, and 17

By Order of the Court
Melanie Gagnepain, Clerk

NOTE: The above is the official notice of the 2021 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court
Oral Arguments for June 2021
05/04/2021

June, 2021 via Zoom

Monday, June 7, 2021 – BOISE
8:50 a.m. *Allen v. Campbell* ..... #48075
10:00 a.m. *Frost v. Gilbert* ..... #48156
11:10 a.m. *Florer v. Walizada* ..... #48290

Wednesday, June 9, 2021 – BOISE
8:50 a.m. *Pena v. Viking Insurance* ..... #48379
10:00 a.m. *State v. Wilson* ..... #48693
11:10 a.m. *Easterling v. HAL Pacific* ..... #47919

Friday, June 11, 2021 – BOISE
8:50 a.m. *Farms, LLC v. Isom* ..... #48012
10:00 a.m. *State v. Guerra* ..... #48193
11:10 a.m. *State v. Dacey* ..... #47497

Monday, June 14, 2021 – BOISE
8:50 a.m. *Summerfield v. St. Luke's* ..... #47946
10:00 a.m. *State v. Paulson* ..... #46803

Thursday, June 17, 2021 – BOISE
11:10 a.m. *State v. Randall* ..... #48692

Idaho Appeals Court
Oral Arguments for June 2021
05/04/2021

June, 2021 via Zoom

Tuesday, June 15, 2021 – BOISE via Zoom
9:00 a.m. *State v. Cruse* ..... #47801
10:30 a.m. *Doe (2021-09) v. Doe* ..... #48663
1:30 p.m. *Lujan v. Hillbroom* ..... #48168

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/.

UNITED STATES DISTRICT AND BANKRUPTCY COURTS
DISTRICT OF IDAHO
NOTICE

May 2021

TO: INTERESTED MEMBERS OF THE IDAHO STATE BAR

The Judges of the United States District and Bankruptcy Courts for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Courts for a three-year term to replace DeAnne Casperson. In addition to Ms. Casperson, the District of Idaho's current Lawyer Representatives are Alexandra Caval, Katie Ball, Robert Faucher (emeritus), and April Linscott (emeritus).

Effective November 1999, the Board of Judges adopted a Lawyer Representative Selection Plan, based upon current bar membership, which ensures state-wide representation. This plan calls for selection of lawyer representatives as follows: 2022 – 1st or 2nd Districts; 2023 – 4th District; 2024 – 6th or 7th Districts; 2025 – 3rd or 5th Districts; 2026 – repeat above.

Based upon the Plan, this year's lawyer representative must come from the 1st or 2nd Districts.

Applicants are required to:

1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system;

2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and be willing and able to actively contribute to that end;

3. Be willing to assist in implementing Conference programs with the local Bar; and

4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

Typical duties include: serving on court committees, reviewing recommendations on the use of the Court's non-appropriated fund, developing curriculum, assisting with the planning for the District conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Any persons interested in such an appointment should submit a letter setting forth their experience and qualifications, **no later than August 31, 2021,** to the following:

Stephen W. Kenyon
Clerk of Court
clerk@id.uscourts.gov

Cases Pending (April 2021)

CIVIL APPEALS

Attorney fees and costs

1. Whether the district court abused its discretion by failing to award attorney fees in the full amount requested by the prevailing party.

Action Collection Svc. v. Black
Docket No. 47864
Court of Appeals

2. Whether the district court abused its discretion by determining that Defendants were not prevailing parties for the purpose of awarding costs and fees where Defendants successfully defended against Plaintiffs' claims but failed to recover on any of their counterclaims.

Tullett v. Pearce
Docket No. 48455
Court of Appeals

Contract

1. Whether the district court erred by granting summary judgment in the Lessor's favor and ruling as a matter of law that Tenant's breach of the farm lease did not have to be material to support the lease's termination.

Stanger v. Walker Land & Cattle, LLC
Docket No. 48092
Supreme Court

2. Whether the district court erred by dismissing Plaintiff's Idaho Wage Claim Act suit and concluding that Plaintiff was not owed compensation for any earned commissions under the unambiguous terms of the employee compensation contract.

Smith v. Kount, Inc.
Docket No. 48228
Supreme Court

Divorce, custody, and support

1. Whether the district court incorrectly interpreted the Idaho Child Support Guidelines when it held that Petitioner's potential income from student loans may be added to her actual income and public assistance benefits to calculate her gross income.

Valentine v. Valentine
Docket No. 48254
Supreme Court

2. Whether the district court erred by affirming the magistrate's decision to reopen the property settlement agreement, set aside the judgment, and re-characterize all of Husband's employer-sponsored retirement accounts as community property.

Robirds v. Robirds
Docket No. 48414
Supreme Court

3. Whether the district court erred by affirming the magistrate's spousal and child support awards because the magistrate's finding that Husband was voluntarily underemployed was not supported by substantial and competent evidence.

Voss v. Voss
Docket No. 48313
Court of Appeals

Governmental immunity

1. Whether the district court erred by finding that Defendants' installation of unsafe bunk beds in a county jail is a discretionary function immune from liability pursuant to I.C. § 6-904(1).

Williamson v. Ada County
Docket No. 48289
Supreme Court

Jurisdiction

1. Whether the district court erred by dismissing the Complaint for lack of subject matter jurisdiction and concluding that, under Idaho law, a Trust's principal place of administration is the location of the office or residence of the trustee who keeps the records pertaining to the Trust.

Allen v. Campbell
Docket No. 48452
Supreme Court

Post-conviction

1. Whether the district court erred by denying post-conviction relief and finding that Petitioner failed to carry his burden of proving his claims that the state suppressed exculpatory evidence and presented false evidence at the petitioner's trial for capital murder.

Dunlap v. State
Docket No. 47179
Supreme Court

Procedure

1. Whether the district court had statutory authority to grant Plaintiff's motion to renew a money judgment, despite the fact that the operative judgment had never been recorded.

Alpha Mortgage Fund v. Drinkard
Docket No. 48424
Supreme Court

Summary judgment

1. Whether the district court erred by granting summary judgment in Defendants' favor and ruling as a matter of law that a credit union owed no fiduciary duty to its member.

Christiansen v. Potlatch #1 FCU
Docket No. 48256
Supreme Court

Tax cases

1. Whether the district court erred by granting summary judgment and ruling as a matter of law that a net operating loss incurred by Taxpayers in the year 2014 could not be carried back to offset Taxpayers' 2012 tax liability.

Idaho State Tax Commission v. James
Docket No. 47835
Supreme Court

CRIMINAL APPEALS

Bad acts

1. Whether evidence that Defendant had forced the victim to have sex on prior occasions was relevant and admissible in Defendant's trial for rape to show Defendant's motive and intent to prevent the victim from resisting.

State v. Fulton
Docket No. 47764
Court of Appeals

Due process

1. Whether the district court committed reversible error when it declined to declare a mistrial after a witness testified at Defendant's trial for murder and robbery that Defendant had previously stolen money from the victim.

State v. Olvera
Docket No. 47546
Court of Appeals

Evidence

1. Whether the district court erred by denying Defendant's motion for judgment of acquittal and finding that the state presented sufficient evidence to prove that the lobby of a work release center is a "room" as that term is used in Idaho's burglary statute.

State v. Damiani
Docket No. 47610
Court of Appeals

2. Whether the district court committed reversible error by admitting evidence of the fact of Defendant's prior felony conviction to show untruthfulness when the nature of the conviction, a DUI, had no bearing on that character trait.

State v. Rodriguez
Docket No. 48067
Court of Appeals

3. Whether the state's evidence was insufficient to support Defendant's convictions for possession of a controlled substance and possession of drug paraphernalia.

State v. Kahoiwai
Docket No. 48249
Court of Appeals

4. Whether the district court abused its discretion by admitting a list of the victim's past medical diagnoses over Defendant's hearsay objection.

State v. Neaderhiser
Docket No. 48015
Court of Appeals

5. Whether the district court abused its discretion by excluding the testimony of two late-disclosed defense witnesses without first explicitly considering whether the state was prejudiced by the late disclosures or whether there were any adequate alternative sanctions.

State v. Tubbs
Docket No. 47773
Court of Appeals

6. Whether allowing the state to lay the foundation for the admissibility of Defendant's blood test results by permitting the phlebotomist who drew the blood to testify telephonically violated Defendant's confrontation rights?

State v. Clapp
Docket No. 47698
Supreme Court

Instructions

1. Whether the district court erred by instructing the jury that an "initial aggressor" is "the one who provoked the altercation in which another person is killed," without regard to whether the aggressor's actions raised the threat or fear of deadly force to the victim.

State v. McDermott
Docket No. 47642
Supreme Court

Search and seizure – suppression of evidence

1. Whether the district court erred by denying the motion to suppress and finding under the totality of the circumstances that the force officers used to detain Defendant was reasonable and did not transform the investigative detention into de facto arrest.

State v. Maahs
Docket No. 47690
Court of Appeals

2. Whether officers were lawfully exercising their community caretaking function when they opened the car door to contact Defendant, who was unconscious in the vehicle.

State v. Porter
Docket No. 47858
Court of Appeals

3. Whether the district court erred by granting the motion to suppress and concluding that the informant's tip lacked adequate indicia of reliability to provide officers with the reasonable suspicion necessary to justify Defendant's detention.

State v. Huntley
Docket No. 47981
Supreme Court

Sentence review

1. Whether the district court erred by denying Defendant's motion for credit for time served and ruling that Defendant was not entitled to credit for time he claimed to have spent incarcerated on an agent's warrant, before he was served with the arrest warrant in this case.

State v. Hernandez
Docket No. 48031
Court of Appeals

2. Whether Defendant's written motion for reduction of sentence, filed after Defendant had previously made two oral requests for leniency, was a successive motion prohibited by I.C.R. 35.

State v. Brown
Docket No 48305
Supreme Court

3. Whether the district court abused its discretion by revoking Defendant's probation after Defendant admitted to having violated his probation by committing a misdemeanor battery and failing to make himself available for supervision.

State v. Baca
Docket No. 48083
Court of Appeals

4. Whether the district court erred by failing to make redline notations when it corrected the presentence investigation report.

State v. Hanchey
Docket No. 47979
Court of Appeals

5. Whether the district court erred by denying Defendant's motion for credit for time served and holding that Defendant was not entitled to credit for time he spent in custody before he was served with a the bench warrant.

State v. Frakes
Docket No. 48287
Court of Appeals

ADMINISTRATIVE APPEALS

Other

1. Whether the district court should have reversed the administrative driver's license suspension because the hearing officer failed to make any findings of fact that would support the conclusion that law enforcement had reasonable suspicion to detain Petitioner to conduct a DUI investigation.

Blalack v. Idaho Transportation Department
Docket No. 48293
Court of Appeals

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

Tim Hopkins
1936 - 2021

Charles Timothy "Tim" Hopkins of Idaho Falls passed away on April 23rd, 2021 of heart complications. Tim was born March 30th, 1936 in Idaho Falls, the son of Zoe and Talcott Hopkins and the younger brother of Tad and Henry. He grew up on South Boulevard where he rode horses, engaged in debate, and participated in sport. He loved riding in the annual War Bonnet Roundup's grand entries, tearing up the streets in the rumble seat of his brother Tad's Model A, cruising with Henry in the giant black Buick Roadmaster and working for his father at Rogers Brothers Seed Company during the summers. Tim was Student Body President when he graduated from Idaho Falls High School in 1954. After graduation Tim enlisted in the U.S. Army and was stationed in Newfoundland, Canada. In 1956, following his service, Tim attended Stanford University in Palo Alto CA, and graduated in 1960 earning a degree in Political Science. It was during this time that he met Anne Hardy, a bright and beautiful United Airlines Stewardess from North Carolina. They were wed June 27, 1959.

Tim was interested in public service and public life. He received a Ford Foundation political internship after graduating from Stanford and went to work for the California GOP. This led him to Washington DC and shortly after, with help from the G.I Bill, to George Washington Law School. This was the Kennedy era and an exciting time to be in DC. While Tim was pursuing his law degree, Anne worked at the Smithsonian, and later at the White House assisting the curator who was helping Jackie Kennedy reassemble America's treasures for public display. Through an associate's job with the firm Covington & Burling, Tim was surrounded and influenced by some of the top legal and political figures of the day. In 1962 Tim and Anne had their first child, Kate. Following GW Law, Tim wanted to return to the west which was made possible when he accepted a position with a prominent San Francisco firm. During their two years in the Bay Area, they experienced the magic and the upheaval of the times, but it was not Idaho, which was made clear when Tim asked where to do some duck hunting, and the answer was that he'd "have to rent a blind in the Sacramento delta." In 1964 Tim and Anne had their second child, Elizabeth, who passed shortly after birth. This was a turning point in their lives, and Tim was feeling the pull of home. Tim and Anne concluded they could either live in San Francisco and spend time off in Idaho, or live in Idaho and spend time off traveling the globe.

In Idaho Falls Tim joined one of Idaho's iconic law firms, Holden, Holden & Kidwell, then went on to start his own firm. In 1973, he joined forces with Skip French to create the law firm that is presently Hopkins, Roden, Crockett, Hansen, and Hoopes with offices in Idaho Falls and Boise. In 1966 Tim and Anne gave birth to their daughter Hilary, and in 1968 to their son Talcott "Ted".

Tim's law career in Idaho was outstanding and was marked by the lifelong personal and professional relationships he cultivated with his peers. Tim argued approximately 35 cases before the Idaho Supreme Court, including key cases in land-use, water rights and redistricting. Tim also served as President of the Idaho Bar in the State's Centennial year, 1991. Following that service, Tim served in the House of Delegates of the American Bar Association, and soon after became a member of the ABA Board of Governors. One of Tim's great ABA honors was to serve on the Standing Committee on the Federal Judiciary, and to Chair that Committee in 2007-2008. Tim loved the law, every part of it. Tim believed in service and loved serving Idaho. He was a founding board member of City Club of Idaho Falls, served on the Idaho Humanities Council board, and held leadership roles in the local Chamber of Commerce, Rotary Club, the United Way, and so many more important organizations. But Tim's true passion was for the planet and its landscapes, especially Idaho landscapes. He served as chairman of the board for both the Nature Conservancy's Idaho chapter, and the Teton Regional Land Trust.

In the 1980s Tim supported the South fork Coalition in their effort to stop the construction of a large residential Planned Unit Development and golf course at the Hays Ranch adjacent to Lufkin Bottom in the South Fork of the Snake River's stunning canyon section. This effort eventually led to protection of this magical place for perpetuity. It's an American treasure, and Tim's efforts in keeping it wild, along with numerous other properties along this river corridor, are one of his many enduring gifts to us all. Though Tim was a lawyer who looked the part, acted the part, and was "the part", he was also a family man and an avid outdoorsman who relished catching a cutthroat on a dry fly, chasing upland birds and ducks, and both riding and bettin' on them horses. Tim spent many hours on his favorite horse Rex, riding and wrangling at "round ups" in the Bone area. The trove of family memories is abundant and varied, but many were around tables sharing coffee and newspapers in the morning, long wonderful dinners with great conversations, and once all were of age, spirited cocktail hours in front of the fireplace or gin and tonics outside on the patio. Family drives while "eating dust" with the windows down, Teton Valley ranch walks and floating in tubes on tributary creeks to the Teton River were regular occurrences. Skiing as a family at Grand Targhee and Kelly Canyon was a favorite family activity, as were winters and summers in Sun Valley with Tim's mother Zoe. He loved tending his rose garden and closely followed the progress of the daffodils, tulips, iris, apricot and fruit trees around the family home. Tim shared his love of nature and his love of Idaho in ways that will always be imprinted on our hearts. Tim is survived by his loving wife, Anne Hardy Hopkins; his daughter Kate Hopkins Salomon and son-in- law Hopi Salomon, daughter Hilary Anne Hopkins, son Talcott Edward "Ted" Hopkins; and his adored granddaughters, Emma Anne Salomon and Lauryn Elizabeth Hopkins. He was preceded in death by daughter Elizabeth Anne, his parents Talcott and Zoe, and his brothers Tad and Henry.

"Spring is here in eastern Idaho, and in our part of the Greater Yellowstone, native cutthroats will soon be finding their way up streams bordered with long lush grasses and stands of bushy willows for their

annual spawning ritual. Shaggy moose and whitetails are nibbling tender green shoots on the floor of the cottonwood forests. And birds, everywhere, all kinds, are calling out to each other with invitations for spring romance. This is our place . . ."

–Tim Hopkins

John J. "Jack" Rose Jr.
1952 - 2020

John J. "Jack" Rose Jr., 68, died September 21, 2020 at the Schneidmiller House in Coeur d'Alene after a battle with cancer.

He worked in the Shoshone County Prosecuting Attorney Office for several years and later maintained a private practice in Kellogg.

Stanley J. Cieslewicz
1956 - 2020

It is with deep sadness that I inform you of the passing of Mr. Stanley J. Cieslewicz. Stan, as he was known to family and friends, retired after 37 years of federal service from the Office of the Judge Advocate, US Army Europe, in June, 2019. During his years of service, Stan served as an active duty officer, an Army and Air Force reserve officer, and as a civilian attorney in several different assignments around the world. He was renowned throughout Europe and across the Services for his keen understanding in contract and fiscal law matters.

Born in Milwaukee, Wisconsin on December 8, 1956, Stan was the second of five brothers. In 1975, after high school, Stan attended Ripon College in Ripon, Wisconsin, and later, in 1979, graduated with Bachelor of Science degree in Foreign Service from Georgetown University, Washington, DC. In 1982, Stan received his Doctor of Jurisprudence from the University of Idaho, Moscow, Idaho.

Stan first commissioned as an officer in the US Army Adjutant General's Corps in 1982. Subsequently, he transferred to the Judge Advocate General's Corps, graduating from the Judge Advocate Officer Basic Course in 1983. For the next four years, Stan served in a variety of positions at the US Army Armament, Munitions and Chemical Command at Rock Island, Illinois, in Korea, and at Fort Lewis.

After Stan left active duty in 1988, he worked as a civilian attorney for the US Army Corps of Engineers in the Seattle District. He moved to Germany for the first time in 1990, when the US Army Contracting Command-Europe hired him as Regional Counsel in Fuerth, Germany. In 1993, Stan left Germany to take a job as Regional Counsel, Defense Commissary Agency, Northwest/Pacific Division, Fort Lewis, Washington. However, after three years, Stan returned to Germany as the Regional Counsel, US Army Contract Command Europe, Grafenwoehr, Germany. In 1998, the US Army Europe Office of the Judge Advocate, then in Heidelberg, Germany, hired Stan as an Attorney-Advisor in the Contract and Fiscal Law Division (KFLD). Stan moved with the Headquarters from Heidelberg to Wiesbaden in 2014 and remained with KFLD until his retirement in June 2019.

Concurrently with his assignments as a civilian attorney, Stan served as an Army Reserve Officer first in the Army and then in the Air Force Reserves, working in a variety of positions in both organizations. Stan retired from the Air Force Reserves as a Lt. Colonel in 2010, with over 28 years of both active and reserve service.

Over the course of his 37 years of Government service, Stan provided legal support on thousands of procurement actions worth billions of dollars. In fact, Stan's career in Europe spanned several key events to which Stan contributed valuable legal advice to US Army Europe, such as responding to Saddam Hussein's invasion of Kuwait, operations in the Balkans, and Vladimir Putin's invasion of Ukraine.

Stan was an acknowledged expert on many facets of contract and fiscal law. Of note, Stan was the US Army Europe expert on Acquisition and Cross Servicing Agreements (ACSA), and for many years, provided invaluable insight to US Army Europe command and staff in the execution of its expansive ACSA program.

Importantly, over the course of his career, Stan also trained and mentored dozens of attorneys and junior officers. Stan was always willing to use his nearly four decades of acquisition experience to train and develop the next generation of attorneys. But beyond being an iconic attorney within the contract and fiscal community, Stan was also a great colleague and friend. Whether it was sharing stories about his travels to Spain, discussing the requirements for an ACSA order, filling in the legal history behind why things are the way they are in US Army Europe, or playing the "Cieslewicz song" for every new attorney, Stan was a fixture in the office and is sorely missed.

Stan passed away less than a month before his 64th birthday, on November 11, 2020, at his home in Vancouver, Washington. He was preceded in death by his parents and his brother, Paul. He is survived by brothers Mark, Bill, and Greg, along with a legion of Uncles, Aunts, cousins, and friends in the U.S. and around the world.

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. This will allow us to honor the individual with details "In Memoriam".

July 2021 Bar Exam Applicants

Fernando R Aceves
Boise, ID
Wayne State University Law School

John William Adams III
Ammon, ID
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Terrun Edgar Zolman
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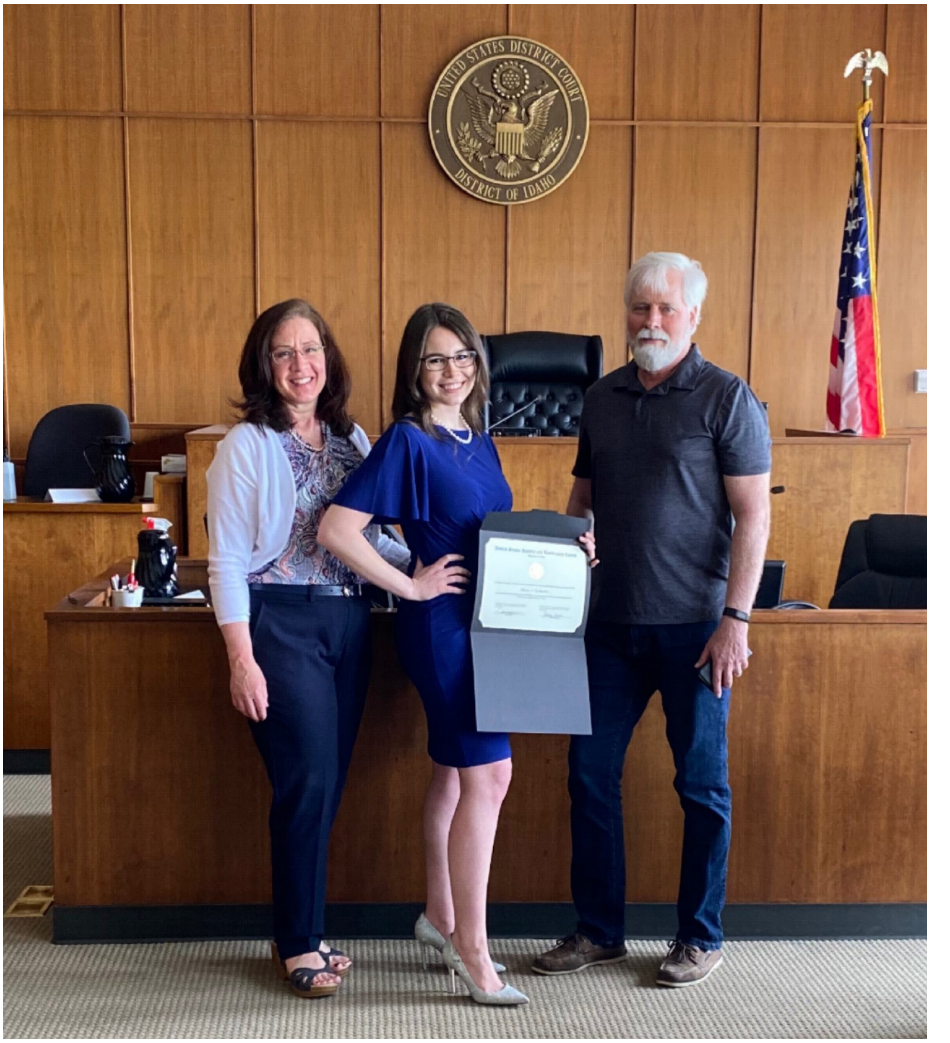
University of Idaho College of Law

Welcome new members, Spring Admissions Ceremony

The Idaho Supreme Court held four swearing-in ceremonies on April 30, 2021. 39 attorneys were admitted to the Idaho Bar. The Justices from the Supreme Court took turns presiding over the ceremonies. Precautions were taken to comply with federal and state COVID-19 health and safety guidelines. The Court worked with Idaho Public Television to live stream and post videos of the ceremonies on the Court's website.

The United States District Court for the District of Idaho has not held formal admissions ceremonies during the pandemic. Instead, attorneys are sworn into the Idaho federal court during individual appointments.



Ally Kjellander celebrates her admission to the United States District Court for the District of Idaho with her parents, Paul and Radelle Kjellander.

Idaho Law Foundation Program receives National Award

STATEWIDE – The Idaho Law Foundation's Law Related Education Program received a 2020 Law Day Outstanding Activity Award from the American Bar Association for its Annual Law Day Podcast Contest. The Award highlights the best Law Day programs from around the country that promote public understanding of law and integrate the Law Day theme into activities that serve the community.

The Annual Law Day Podcast Contest offers students an opportunity to win cash prizes while exploring the importance of the rule of law in the United States. Working individually or in groups, students submit a 5 to 10-minute podcast that ties to the annual American Bar Association's Law Day theme.

Will Gunn, ABA Law Day Chair said of the award-winning Law Day Podcast Contest: "You were selected from a competitive national pool of applicants by a committee of leaders assembled from the legal community. The Law Day Podcast Contest demonstrated broad outreach to your community, with a substantive understanding of the Law Day theme. You engaged your audience in meaningful conversations to help foster understanding about voting rights and the role of access to the ballot in our American democracy. And, in 2020, you managed to do all

From left to right, Shelbi Eller, Grace Maldonado, and Gurpreet Dhatt enjoying the sun after being sworn in on April 30, 2021.

of this in the face of a national pandemic that forced everyone to rethink their programs under extraordinarily uncertain conditions. The ABA truly commends your work."

For more information about the Annual Podcast Contest, visit idaholawfoundation.org and click the Law Day link from the main page. For questions, contact Carey Shoufler, Idaho Law Foundation Law Related Education Director, at cshoufler@isb.idaho.gov.

Givens Pursley is proud to announce two new associates

BOISE – Givens Pursley is proud to announce that it has hired two new associates.

James Mahan is joining the transactional team working on real estate, land use and business formation matters. James joins the firm after spending the previous 7 years working for his family's law firm, Mahan & Mahan, Attorneys at Law, focusing on Assisted Reproductive Technology (ART) law, more commonly known as surrogacy and sperm/egg/embryo donation arrangements. James received his J.D. from Stanford Law School and his B.S. with Honors from the United States Naval Academy in Annapolis, Maryland.

Lars Lundberg has also joined the firm as an associate. Lars is a 2015 Gonzaga University School of Law graduate, and he comes to us with diverse experience in commercial litigation and appellate law, including a two-year clerkship for the Honorable Warren E. Jones of the Idaho Supreme Court. Lars will join the Litigation Practice Group. He is licensed to practice in Idaho and Washington.

Idaho State Bar Annouces New Section

The Idaho State Bar Board of Commissioners has approved the formation of an Idaho Legal History Section.

The organizational meeting will take place at 2:30 P.M. (MT) on June 8, 2021 via Zoom video conference.

Zoom Meeting ID: 988 2971 8670

Passcode: 008624

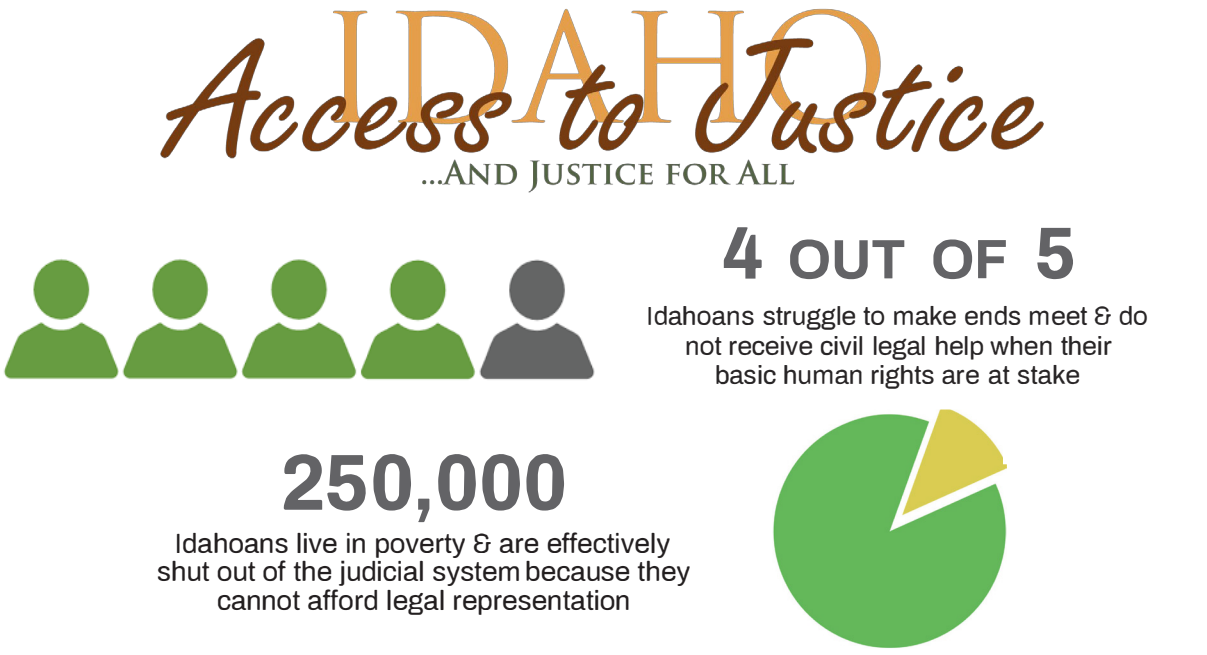
For telephone audio, dial (253) 215-8782.

Agenda items include selection of Officers, adoption of By-Laws, and discussion for design and development of Section activities. All Bar members are invited to participate.

New Idaho State Bar Commissioner

The voting members in the Eastern Districts of the Idaho State Bar elected one new member of the Board of Commissioners. Pocatello attorney Gary Cooper will represent the Sixth and Seventh Districts, replacing President Donald Carey. Mr. Cooper will serve a three-year term, beginning in July 2021.

Gary has practiced law in Pocatello since 1975. He grew up in Caldwell, Idaho, graduated from the University of Idaho Law School in 1975 and has been admitted to practice before all State and Federal Courts in Idaho (1975), in Utah and Wyoming (2011), the 9th Circuit Court of Appeals (1991) and the United States Supreme Court (1995).



The IALL Class of 2020-2021 - Pictured (l-r) in the front: ISB Staff Liasion Teresa A. Baker, Lisa M. Carlson, Steering Committee Co-Chair Julie Stomper, Steering Committee Member Jana B. Gomez, Jill S. Holinka, Sarah M. Brekke, Elizabeth D. Sonnichsen, Steering Committee Member Hon. Gregory M. Culet, (back left), Tyler J. Rands, Jennifer R. Chadband, Tawnya Rawlings, Erik W. Ellis, Steering Committee Co-Chair Michael K. Porter, Cheyenne M. House, Matthew Wolfe, Brittany A. Kreimeyer and Steering Committee Member Stephen Robertson. Not pictured: Lindsey M. Welfley, Mark D. Perison and Steering Committee Member Amber C. Ellis.

Congratulations to the graduating 2020-2021 Class of the Idaho Academy of Leadership for Lawyers

STATEWIDE – The 2020-2021 class of IALL started their leadership journey during the COVID-19 pandemic and they are graduating with it still continuing. The class members have remained steadfast in their commitment to move forward despite the obstacles and the Zoom fatigue. The class was able to hold their held their last class session in-person on June 4th in Boise. During this session the class presented their legacy projects which includes assisting Attorney for Civic Education with sustainable fundraising, helping address the needs of those facing eviction and the housing crisis with forms through the Court Assistance Offices, increasing the access to assistive hearing devices for those in need, compiling narratives of Idaho's elderly and veteran populations during the pandemic and beyond and increasing the recognition of the myriad of attorneys providing pro bono services in the 5th District.

The Idaho Academy of Leadership for Lawyers will begin its tenth year in the Fall. The application for 21-22 class is available on the Idaho State Bar website. In anticipation of this year's program the IALL steering committee contacted graduates and former committee members to share their thoughts and experience. It is the committee's hope the thoughts shared here will inspire others to consider joining the distinguished list of IALL graduates.

Continuing Legal Education

June

16 *Employment Law CLE*
1.0 Ethics credit
Live Webcast Only

18 *Lawyer Ethics and the Internet*
1.0 Ethics credit
Live Audio Stream

24 *Agricultural Law Issues in Idaho*
3.0 Ethics credits
Live Webcast Only

25 *The Ethics of Representing Two Parties in a Transaction*
1.0 Ethics credit
Live Audio Stream

30 *Ethics in Negotiations – Boasts, Shading, and Impropriety*
1.0 Ethics credit
Live Audio Stream

= In Person

= Live Webcast

= Live Audio Stream

July

16 *Lawyer Ethics and Credit Cards*

22 & 23 Idaho State Bar Annual Meeting

August

13 *Corporate Law Grab Bag*

For more information and to register, visit www.isb.idaho.gov/CLE.

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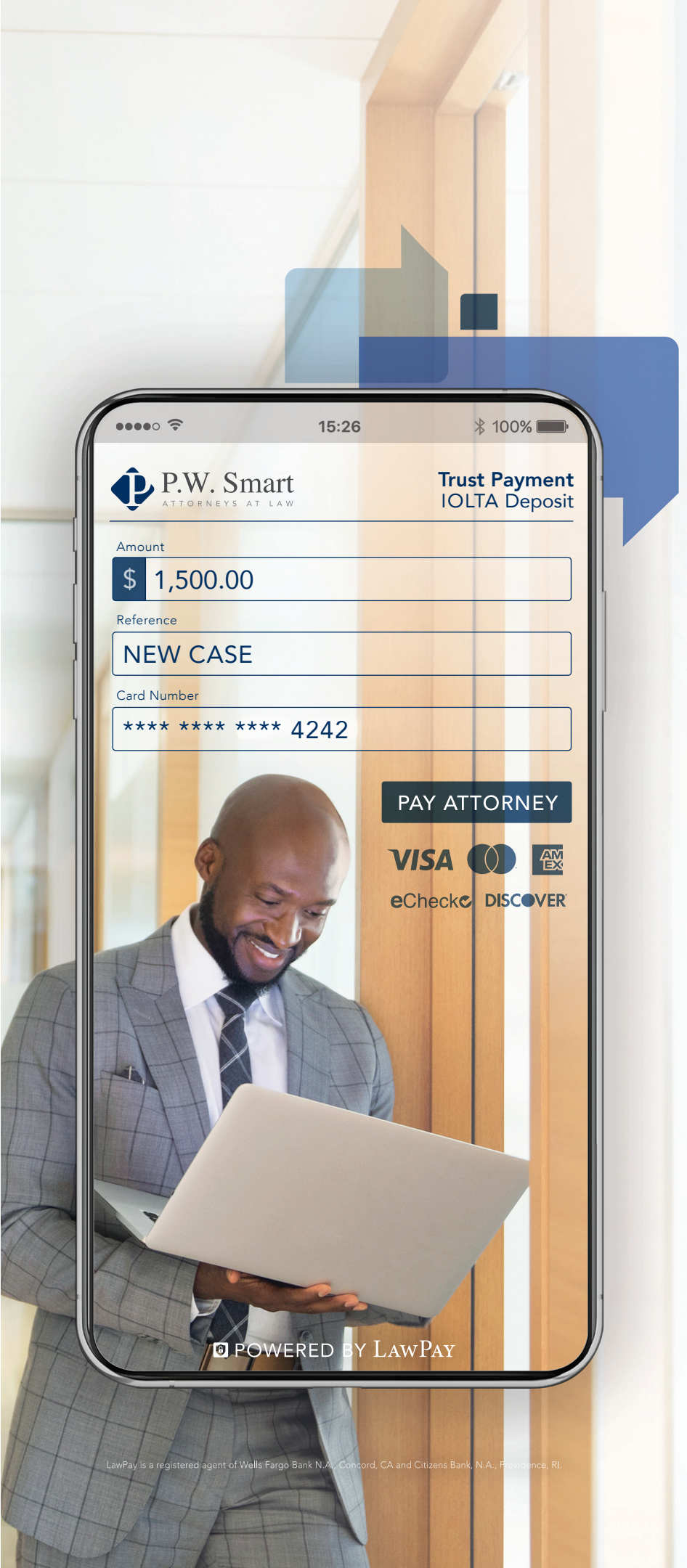

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