The Advocate

Official Publication
of the Idaho State Bar
Volume 57, No. 10
October 2014

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The Advocate

The Official Publication of the Idaho State Bar
57 (10), October 2014

Section Articles

Columns

News and Notices

On the Cover:

This photo by Heather Keen is of the Julyamsh Powow on the Coeur d'Alene Reservation earlier this year. The dancer is Morning Star Andrews from Lapwai.

Section Sponsors:

This issue of *The Advocate* is sponsored by the Indian Law Section.

Editors:

Special thanks to the October editorial team: A. Denise Penton, Angela Schaer Kaufmann, Jennifer M. Schindele, Kristine Marie Moriarty and Brian P. Kane.

November/December issue sponsor:

Idaho Legal History

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

The Advocate

Official Publication of the Idaho State Bar

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www.idaho.gov/isb
(208) 334-4500

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IDAHO STATE BAR

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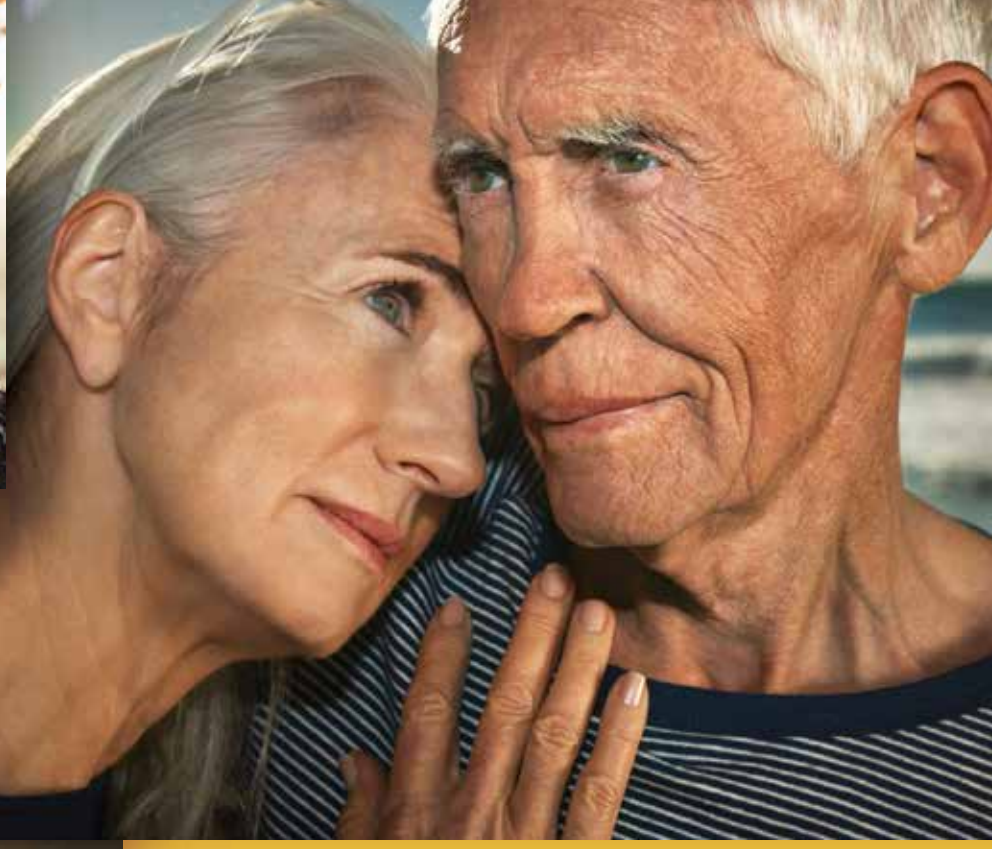

They taught you all the important stuff—eat your vegetables, get good grades, and always be your best self. Now it's your turn.

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Ahrens DeAngeli Law Group is pleased to announce our merger with Sisson & Sisson, The Elder Law Firm, to create the Elder Law Group at Ahrens DeAngeli Law Group. Peter C. Sisson is a national board-certified elder law attorney who advocates for families with long-term care needs. He brings over two decades of Idaho experience helping families protect their assets and make sound health and legal decisions.

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Parsons Behle & Latimer, one of the largest and best-known law firms in the Intermountain Region, is pleased to announce that **Michael W. McGreaham** has joined the firm as a shareholder in its Boise office.

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Mr. McGreaham concentrates his practice on estate planning, business formation and continuation, probate (contested and non-contested), and conservatorship and guardianship.

He graduated from Gonzaga University with a J.D. degree in 1994 and from Brigham Young University with a B.S. degree in 1978. He is admitted to the Idaho and Washington State Bars.

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ISB/ILF Upcoming CLEs

October

October 17
Representing Your Child Client:
Child Protection and Child Custody
Sponsored by the Family Law Section
Hilton Garden Inn, 700 Lindsay Blvd. – Idaho Falls
8:45 a.m. (MDT)
6.0 CLE credits of which 1.5 is Ethics – **NAC**

October 24
Representing Your Child Client:
Child Protection and Child Custody
Sponsored by the Family Law Section
The Riverside Hotel, 2900 W. Chinden Blvd. – Boise
8:45 a.m. (MDT)
6.0 CLE credits of which 1.5 is Ethics – **NAC**

November

November 6
Attorney Ethics When Supervising Over Attorneys/Paralegals
Sponsored by the Idaho Law Foundation in partnership with Peach New Media and WebCredenza Inc.
Audio Stream/Webinar
11:00 a.m. (MST)
1.0 CLE credits of which 1.0 is Ethics

November (Continued)

Mobile Monday CLE Series
November 3 – Session 1 of 4
An In-Depth Look Into Idaho's Civil Rules of Procedure
Sponsored by the Idaho Law Foundation
Teleseminar
12:30 p.m. (MST)
1.0 CLE credits – **NAC**

November 10 – Session 2 of 4
A Perspective from the Chief Justice
Sponsored by the Idaho Law Foundation
Teleseminar
12:30 p.m. (MST)
1.0 CLE credits

November 17 – Session 3 of 4
Legal Aid: Readily Available Resources
for Your Law Practice to Benefit Your Clients
Sponsored by the Idaho Law Foundation
Teleseminar
12:30 p.m. (MST)
1.0 CLE credits – **NAC**

November 24 – Session 4 of 4
A Conversation on Idaho's Juvenile Criminal Justice System
Sponsored by the Idaho Law Foundation
Teleseminar
12:30 p.m. (MST)
1.0 CLE credits – **NAC**

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

**Dates, times, locations and CLE credits are subject to change. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

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

Webcast Seminars

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

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

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IDAHO STATE BAR

President's Message

Militarized Police Don't Fit with Constitutional Protections

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

Local police agencies across the country appear to be more militarized than ever. At the same time, events we see in the media portray the use of police violence and even deadly force in response to what seem to be common events of unrest.

We recently learned about the shooting of a young man in Ferguson, Missouri who was unarmed. The police force there is largely white and the decedent was black. Did that young man receive due process? We have yet to know the results of the investigation.

We were also exposed to a video taken with the phone of a bystander showing a man who appeared to be mentally ill in St. Louis, Missouri, shot multiple times by police officers responding after a report of shoplifting at a convenience store. Could they have found nonlethal means to deal with the man and then afford him his constitutional rights and due process of law?

These events raise troubling questions. What could have been done in these situations to see that the Constitution and our ideals are protected? What happened to communication, contemplation, and compromise? How are our police being trained?

An article in *Mother Jones* magazine got web publicity because it described a program of the federal government which provides local law enforcement, often at no cost, with the weapons of war — bomb resistant HVs (Mine Resistant Ambush Protected (MRAP) vehicle), assault rifles, flash grenades, etc.[1] I never realized there was a Defense Logistics Agency (DLA) that transfers surplus Pentagon property free of charge to federal, state, and local police departments. Overall, the program has shipped off more than $4.3 billion worth of military hardware to state and local cops.

Could they have found nonlethal means to deal with the man and then afford him his constitutional rights and due process of law?

Police in North Little Rock, Arkansas, received 34 automatic and semi-automatic rifles, two robots that can be armed, military helmets, and a Mamba tactical vehicle. Police in Gwinnet County, Georgia, received 57 semi-automatic rifles, mostly M-16s and M-14s. The Utah Highway Patrol, according to a Salt Lake City Tribune investigation, got an MRAP from the 1033 program, and Utah police received 1,230 rifles and four grenade launchers. After South Carolina's Columbia Police Department received its very own MRAP worth $658,000, its SWAT Commander noted that 500 similar vehicles had been distributed to law enforcement organizations across the country. It is no wonder that law enforcement agencies sometimes find themselves alienated from and distrusted by their local publics.

As lawyers, we should promote a different attitude — that we are all in this together, and that our police forces are for service, stability and protection. SWAT teams were invented around 1960, following the University of Texas tower shooting. The War on Drugs ushered in a battle mentality and more emphasis of brute force. Now, even Shelley, Idaho, a community of some 4,500 residents has its own SWAT team, presumably trained like an army squad to resolve crises.

When I was a youth, officers were trained to de-escalate conflict, keep the peace and give residents confidence. Instead, as we have seen in recent months, there are so many situations where the police escalate the situation with heavy-handed military tactics.

As one of my colleagues reminded me, these are probably the more unusual cases and there probably are a great number of everyday occurrences where law enforcement personnel handle things very calmly and evenhandedly. When you see a bad apple in law enforcement, or for that matter in our own profession, do we as lawyers respond by questioning unethical behavior? Do we work to protect the Constitutional rights of everyone in our communities? Or do we look the other way and move on? Let us all be determined to challenge conditions that rob our communities of Constitutional principles upon which our remarkable nation was founded.

There are so many situations where the police escalate the situation with heavy-handed military tactics.

Endnotes

1. http://www.motherjones.com/politics/2014/08/america-police-military-swat-ferguson-westcott-tampa

About the Author

Paul B. Rippel *is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981. He has practiced in Idaho Falls since clerking for the Hon. Arnold T. Beebe for a year. His wife Alexis is also a U of I graduate and they have a son and daughter living in Portland, Oregon.*

Angela R. Marshall

(Public Reprimand/Withheld Suspension/Probation)

On August 15, 2014, the Idaho Supreme Court issued a Disciplinary Order issuing a Public Reprimand to Sandpoint attorney Angela R. Marshall. The Disciplinary Order included a withheld six-month suspension and a nine-month disciplinary probation.

The Idaho Supreme Court found that Ms. Marshall violated I.R.P.C. 1.15(d) [Safekeeping Property]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Ms. Marshall admitted that she violated that Rule.

The formal charge case related to Ms. Marshall's representation of a client in a divorce case. In that case, Ms. Marshall arranged for the sale of the parties' guns and other community property, but thereafter failed to promptly disburse to the opposing party those funds which that party was entitled to receive. A Judgment was entered against Ms. Marshall for $1,937.50, reflecting one-half of the amount of the community property that was to be sold. Ms. Marshall subsequently reimbursed the $1,937.50 to the opposing party as ordered.

The Disciplinary Order provides that the six-month suspension will be withheld and that Ms. Marshall will serve a nine-month period of probation subject to the condition that she will serve the withheld suspension if she admits or is found to have violated any Idaho Rules of Professional Conduct for which a public sanction is imposed for conduct that occurred during the probationary period.

The public reprimand, withheld suspension and probation do not limit Ms. Marshall's eligibility to practice law.

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

Christopher S. Lamont

(Suspension)

On August 19, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Mr. Lamont from the practice of law for nine months.

The Idaho Supreme Court found that Mr. Lamont violated the terms of his disciplinary probation, as set forth in the Court's November 14, 2013 Disciplinary Order, which imposed a nine-month withheld suspension relating to Mr. Lamont's failure to communicate with clients. As part of the stipulated resolution of the disciplinary case, Mr. Lamont admitted that he violated his disciplinary probation by failing to consult with clients about the means by which their cases would be pursued and failing to communicate with those clients as required under I.R.P.C. 1.2(a) and 1.4.

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

Mitchell R. Barker

(Suspension)

On September 10, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Mitchell R. Barker for one year. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding.

Mr. Barker was admitted to practice law in Oregon and Idaho. On May 29, 2014, the Oregon Supreme Court entered an Order Accepting Stipulation for Discipline that suspended Mr. Barker from the practice of law in the State of Oregon for one year, effective May 29, 2014. In the Oregon disciplinary case, while suspended from the practice of law in Oregon, Mr. Barker sent a letter on behalf of his client to the district attorney handling his client's case and requested discovery, when Mr. Barker was not an active member of the Oregon State Bar. Mr. Barker did not notify his client or the district attorney that he was not authorized to practice law in Oregon at that time.

In a separate matter in Oregon, involving the same client, Mr. Barker allowed multiple judgments to be taken against his client in a contested probate matter, largely due to Mr. Barker's inaction. His client was led to believe that Mr. Barker would be responsible for paying one or more of the judgments, but he never did so. Mr. Barker did, however, continue to represent his client in the probate case without obtaining her informed consent, confirmed in writing. In the Oregon case, Mr. Barker admitted violating Oregon Rules of Professional Conduct 1.3 [Diligence], 1.4(a) and 1.4(b) [Communication], 1.7(a)(2) [Conflict of Interest] and 5.5(a) [Unauthorized Practice of Law]. Those rules correspond to the same Idaho Rules of Professional Conduct.

The Idaho Supreme Court's Disciplinary Order also specified a condition of reinstatement that Mr. Barker make a showing that he paid back the remaining balance of legal fees paid to him by his client or that such remaining balance was discharged in bankruptcy.

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

LETTER TO THE EDITOR

Lawyer Referral Service changes considered during Resolution Process

Dear Editor,

The Lawyer Referral Service, (LRS), Committee suggests a few changes in the way the Idaho State Bar administers its LRS program to simplify fee collection and decrease appointment no-shows. These changes are based on the program's original goal — to provide a means for referring a qualified lawyer to any person who has a need for and can pay for legal services.

Each voting member of the Idaho State Bar, (ISB), will see these changes in a resolution proposed for the 2014 Resolution Process, (Roadshow), and if the resolution passes, LRS attorneys would see changes reflected in their 2016 LRS registration forms.

The committee polled attorneys from across Idaho and researched best ways to address their concerns. We compared Idaho's current system to the American Bar Association's Model Rules for LRS and examined the various ways other bar organizations operate their LRS programs. On September 4, the committee presented its recommendations to the Board of Commissioners, who approved them for the resolution process this fall.

The first change would require an LRS attorney who selects any of three specific areas of law to attest they possess minimum experience in that area. Bankruptcy, high-conflict family law, and felony defense criminal law would each require a minimum experience level. ISB Sections helped us determine the areas of law and those minimum qualifications. An attorney who lacks the minimum experience may still enroll in one of those three areas of law, provided that attorney is willing to accept a mentor. These standards would protect the public from an LRS attorney who is not quite ready to tackle their case but still allow that attorney to obtain a referral. This is an essential quality control measure that the ABA asks of any "ABA-Certified" LRS program. Of course, in addition to this enhanced requirement for three areas, each attorney must always certify that they are competent in the areas of law selected for their referrals.

The second change would address what Idaho LRS attorneys told us are a high number of missed appointments, and the onerous collection efforts to receive a $35 half-hour consultation fee. Under the proposal, the $35 fee would be collected by the ISB at the time of the referral. This means a person looking for a lawyer must invest in that first consultation — making it less likely they would forfeit the fee with a no-show. The ISB would use that revenue to help run the program which currently relies in part on the ISB general fund. Added revenue would fund software that would enhance the speed and quality of the referral process. Of course, the attorneys would no longer collect a consultation fee — a loss that LRS attorneys told us they wouldn't mind in exchange for getting more serious-minded referrals.

Taken together, the changes move us toward modernizing the referral program and making it more self-sufficient. We think lawyers will like having fewer no-shows, less bookkeeping and clients will appreciate their case will be handled by an attorney with appropriate experience.

If you have any questions or concerns about this proposal, please feel free to contact any one of us, or LRS supervisor Dan Black at (208) 334-4500.

Sincerely,

ISB Lawyer Referral Committee
Jay Q. Sturgell, *Coeur d'Alene*
Ralph Blount, *Boise*
Joseph Meier, *Boise*
Brooke B. Redmond, *Twin Falls*
Douglas Fleenor, *Boise*

NEWS BRIEFS

Second District Bar Association gears up for pro bono event

This October 20-26, the Idaho legal community will recognize Idaho Pro Bono Week. The Second District Bar Association, along with the Second District Pro Bono Committee, encourages participation in its first Ask-a-Lawyer event on Friday, October 24 in Moscow.

Recognizing that equal justice under the law cannot be realized unless all are provided access to the courts, this event is a great opportunity to provide legal help to those who cannot afford it. In this effort, Second District members of the bar are asked to donate at least one hour out to help answer legal questions from the community. The event will be held from 9 a.m. until 4 p.m. at the Latah County Courthouse. All questions will come in by telephone on a number to be advertised prior to the event. If interested please e-mail Ashley Rokyta with the hour(s) you would be willing to volunteer (between 9 a.m. and 4 p.m.) at arokyta@latah.id.us.

Sixth District Bar Association publicizes pro bono with articles

The Sixth District Bar Association has organized an effort to publicize the pro bono services that are performed

by members of the local bar and highlight the resources available for those in need of legal assistance. Local attorneys will write articles about pro bono work and/or services and plan to have one article per week in the Idaho State Journal for the month of October.

Proposed amendments published for comment

On August 15, 2014, the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules published proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, Rules Committee reports explaining the proposed changes, and instructions on how to submit comments are posted on the federal Judiciary's website. The public comment period ends February 17, 2015.

Ninth Circuit practice guide gets an update

An updated version of The Appellate Lawyer Representatives' Ninth Circuit Practice Guide, which explains the workings of the U.S. Court of Appeals for the Ninth Circuit, is now available. The electronic document may viewed or downloaded from the court's website: http://www.ca9.uscourts.gov/AppellatePracticeGuide.

Originally released in October 2013, the guide provides a broad overview of the appellate process and detailed information about procedures, including sections on motions practice, emergency proceedings, brief drafting, oral argument, the post-decisional process, habeas corpus matters, and checklists for drafting and filing motions and briefs. The updated version now addresses writs, en banc petitions and procedures, and amicus briefs, and has been revised to reflect changes in rules and practice.

The guide was prepared by the Ninth Circuit's Appellate Lawyer Representatives, a group of experienced practitioners who advise the court on procedural and other matters. Although not an official court document, the publication was developed in close consultation with court staff. While intended for lawyers, the guide may also assist journalists, students and educators, pro se litigants and others interested in the workings of the nation's largest appellate court.

The guide is considered a work in progress and the authors welcome feedback. Comments and suggestions should be emailed to ALRPracticeguide@ca9.uscourts.gov.

IDAHO ACADEMY OF LEADERSHIP FOR LAWYERS CLASS OF 2014-2015


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Idaho Academy Leadership for Lawyers Announces 2014 - 15 Class

The Idaho Academy of Leadership for Lawyers (IALL) proudly announces the 2014-15 class. Now in its fourth year, IALL's mission is to promote diversity and inspire the development of leadership within the legal profession.

Twelve lawyers from different practice areas with a variety of experiences from various parts of Idaho comprise the class. Participants will enjoy an interactive leadership training program designed specifically for lawyers. The Academy will include five sessions from September 12, 2014 – April 24, 2015 with a graduation ceremony following the completion of the program. For more information please contact Mahmood Sheikh, Deputy Executive Director, at (208) 334-4500.

The 2014 - 15 IALL Class

Courtney E. Beebe
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Office of the Attorney General
7th District

2014 District Resolution Meetings

Diane K. Minnich
Executive Director, Idaho State Bar

Resolution Packets, which include the 2014 proposed resolutions and the resolution meetings schedule, will be mailed to members the week of October 13. We hope to see you at the resolution meeting in your district.

At the resolution meetings, the professionalism and pro bono awards will be presented. The recipients that will be honored in each of the district are:

Professionalism Awards

1st District: Stephen McCrea

McCrea Law Offices, Coeur d'Alene

Professional attributes you find the most beneficial in your own practice:

The success of our profession depends on the mutual respect among members of the bar and judges. Attorneys must be strong advocates for clients but the process must be respected above all. The principles most important are honesty, civility and courtesy. If a case is prepared properly by both attorneys the system can work efficiently.

What inspired you to ascribe to these principles or characteristics?

My inspiration has been my family and the many judges and attorneys with whom I have had the privilege to work. In the process I have learned that lack of communication leads to misunderstanding and lawsuits; courtroom battles should be left in the courtroom and that earning the trust of a client is an enormous responsibility. In order to do so attorneys must be not just legal advisors, but educators and counselors whose actions affect the well-being of our clients.

2nd District: Manderson L. Miles, Jr.

Knowlton & Miles, Lewiston

Professional attributes you find most beneficial in your own practice?

Listen, respect, and reflect before speaking. I find oral communication to be crucial in helping to understand the opposing view point and having them understand me.

What inspired you to ascribe to these principles or characteristics?

I have enjoyed working with and against such good lawyers. I have really learned a lot by becoming an effective listener and adopting good ideas from other good lawyers.

What have you learned through the process?

Through this process, I have learned that not only can I gain from my own education and life experience but also from each and every client, opposing party and other Attorneys along the way.

3rd District: Charles R. Kroll

Burton and Kroll, Weiser

Although Mr. Kroll was traveling and unable to answer questions before the deadline, longtime colleague and former ISB Commissioner William Wellman helped fill in the blanks.

Professional attributes?

2014 District Bar Association Resolution Meetings

District	Date/Time	City	Location
First Judicial District	Thursday, November 6 at Noon	Coeur d'Alene	North Idaho College, Student Union Building, 1000 W. Garden Avenue
Second Judicial District	Thursday, November 6 at 6 p.m.	Moscow	Best Western Plus University Inn, 1516 Pullman Road
Third Judicial District	Thursday, November 20 at 6 p.m.	Nampa	Hampton Inn and Suites, 5750 E. Franklin Road
Fourth Judicial District	Thursday, November 20 at Noon	Boise	The Owyhee, 1109 Main Street
Fifth Judicial District	Wednesday, November 19 at 6 p.m.	Twin Falls	Stonehouse & Co., 330 4th Avenue South – Twin Falls
Sixth Judicial District	Wednesday, November 19 at Noon	Pocatello	Juniper Hills Country Club, 6600 Bannock Highway
Seventh Judicial District	Tuesday, November 18 at Noon	Idaho Falls	Hilton Garden Inn, 700 Lindsay Boulevard

Chuck has a grasp of the larger picture of community relations. Weiser is a small crossroads community on the edge of the Hells Canyon recreation area. Chuck is fair and reasonable in case evaluation and negotiating as any prosecuting attorney could be. He is rarely affected by the common posturing and positioning of the opposing attorney.

Lessons along the way:

Chuck has lived a very healthy life that appears to have little stress and anxiety. While it must be there at some level his approach to the practice of law has not added to the common stressors that attorneys customarily confront.

Inspirations:

Ira Burton - law partner and mentor for more than 25 years before Ira passed in 2003.

4th District: Bradley G. Andrews

Bar Counsel, Idaho State Bar, Boise

Professional attributes you find most beneficial in your own practice:

"Respect. Listen and reflect before speaking."

What inspired you to ascribe to these principles or characteristics?

"I had the privilege of working with and against some of the best lawyers in Idaho and other states. At the outset, every great lawyer treated me and other young lawyers with professionalism, courtesy and respect. That did not change as I practiced longer. When I clerked for Judge Harold Ryan I had the opportunity to work with and observe great lawyers every day. The Judge treated everyone that appeared in his court professionally. Likewise, the good lawyers treated their opponents and the court professionally. All of these traits were easy to model and incorporate into my practice. "

What have you learned in the process?

"Professionalism is an easy two-way street that continually pays rewards. Treat people with respect and courtesy and they will treat you the same way."

4th District: J. Charles Blanton

Solo Practioner, Boise

A man of many talents, interests and considerable charisma, J. Charles Blanton (Chuck) could be called a true Renaissance man. Chuck served in the Navy, was a smokejumper for the U.S. Forest Service, starred in multiple films and, of course, distinguished himself as an attentive attorney.

Chuck graduated from the University of Idaho College of Law in 1951 and has been an active member of the Bar for 62 years. Like many retired or semi-retired attorneys, he keeps his license active. Chuck lives in Boise, McCall and in the winter months, Arizona. Naturally, he is difficult to catch by phone or email.

His practice emphasized probate and trust law, as well as estate planning. With his late wife, Gladyne, he has four children. While he spent his career serving on numerous boards and commissions, Chuck now has time for more leisurely pursuits. When he was honored for his 60 years as an attorney, Chuck said he enjoys his time with family, oil painting, tennis and writing poetry.

5th District: Robyn M. Brody

Brody Law Office, Rupert

Professional attributes you find most beneficial in your own practice:

My goal is to make sure that every client who walks in my door is better off when they walk out and I close my file. To meet this goal I try to be timely, diligent and thorough in the work that I do and maintain clear communication with my client and opposing council. I try to remember that giving people a voice in the legal system is imperative, but lending a listening ear from time to time is key to managing my relationship with the client. When I start feeling stressed by the many demands of litigation I follow Tom High's advice of starting my day with three things I don't want to do.

What inspired you to ascribe to these principles or characteristics?

I grew up practicing law with John Hepworth, John Lezamiz and John Hohnhorst. There are no better teachers.

What have you learned in the process?

Practicing law is difficult because of all of the competing demands on a lawyer's time and energy. I try to always play by the rules and pick battles very carefully and in a way that does not injure personal relationships. I am blessed to practice in the Fifth District where I know plenty of seemingly intractable conflicts are resolved after a long dinner with opposing counsel.

6th District: Thomas Dial

May, Rammelll, & Thompson, Cht'd, Pocatello

Professional attributes you find most beneficial in your own practice:

Ability, Honesty, integrity, courtesy and civility while continuing to advocate for your client.

What inspired you to ascribe to these principles or characteristics?

Role models provided to me as a young man by family, then later as a young lawyer by attorneys I practiced with and against and by the trial judges I litigated before. All inspired me, "to do the right thing," then taught by example what "the right thing" was. This award really belongs to all of them, not me.

What have you learned in the process?

When you give someone your promise, keep it. If you don't know the answer to a client's legal issue,

find it. If you demonstrate bad manners in the guise of "zealous advocacy" for a client, then you are still demonstrating bad manners. It is the obligation of every lawyer to exhibit good professional manners not only in court but also in their communities and office. It is also the lawyer's obligation to give something back to their community and profession, by donating services and time to improve their community, their profession and the disadvantaged. My Grandfather would tell me "remember who you are." I suppose what he said to me sums it up for each of us.

7th District: Stephen Martin

Martin & Eskelson, PLLC, Idaho Falls

Professional attributes you find most beneficial in your own practice:

Diligence-get the work done-get it done thoroughly; communicate with clients often and thoroughly — listen to clients — even when they are inaccurate as to their description of facts or circumstances they are telling you something about themselves which will help you be useful to them; remember you are a servant-first to the law second to your clients; it is more important to protect your reputation for integrity than it is be successful for your client

What inspired you to ascribe to these principles or characteristics?

My mentors: Bill Holden. Terry Crapo, Vern Kidwell, and Fred Hahn.

What have you learned in the process?

It is crucial to be of use to others. Remember that you are a servant: First to God, second to the law, third to your clients

Pro Bono Awards

Note: The clients names used in the descriptions have been changed; they are not the real names of the clients.

1st District

Sean P. Walsh and **Dennis Reuter** teamed up to take a high-conflict divorce that helped a survivor of domestic abuse gain full custody of her two children. The two North Idaho attorneys donated about 100 hours on the case.

The client was abused by her husband for several years until finally she decided to move out. Her husband retaliated with threatening phone calls and harassment. Linda was eventually able to obtain a civil protection order against him and she filed for divorce pro se. That's when the legal battle began. The couple had two teenage boys and the husband sought a temporary order granting him custody. Luckily for Linda, Sean Walsh agreed to step in and represent her in what proved to be a high-conflict divorce, custody and support case. Aided by his colleague, Dennis Reuter, Mr. Walsh took the case through trial was able to secure sole legal and physical custody of the children for Linda as well as alimony support and child support. These volunteers generously donated roughly 100 hours to this case.

2nd District

Jonathan D. Halley donated about 100 hours to help resolve a federal case. Mr. Halley agreed to his appointment as pro bono counsel for a client on two matters as part of the Federal Court's Pro Bono Program "Settlement Week" project, known as "Resolution Roundup." Mr. Halley participated in a two-day settlement conference and then continued negotiations on the client's behalf for the next nine months until a satisfactory conclusion was reached.

3rd District

Deborah Gates took a pro bono case that allowed a domestic violence victim make the journey from denial to empowerment. Deborah helped Angela regain her dignity and get on with her life.

Angela and the man who would become her husband met in grade school and were later reunited through Classmates.com. Angela described things as "good" between them — unless he was drinking too much. A year after they were married, her Angela's husband got drunk and attempted to strangle her. She was able to escape and phone police. Rick was later arrested and after he violated a No Contact Order he was ultimately convicted of felony domestic battery.

As is often the case with domestic violence victims, Angela was still in denial about the violence during part of her husband's prison term. By the time she came to realize that he had put her life in jeopardy and the marriage needed to end, he was released from custody and Angela was afraid and unsure how to proceed.

Fortunately, Deborah Gates agreed to represent Angela. The case was contested but Angela, through Ms. Gates' efforts prevailed at trial.

4th District

Krista Thiry was able to help a young woman break free of a controlling and abusive husband. With more than 100 hours of pro bono work, she helped the woman and her child find physical safety and a legal remedy that provided the long-term stability they need.

The case involved a multi-cultural family. Elias came to the United States from North Africa, and met and married Maia in 2006. Almost from the beginning Elias was controlling and physically abusive. Maia quickly became pregnant. Elias insisted she quit her job and stay home and care for the child. He put her on a very restricted budget and contin-

ued emotionally abusing her. When Maia asked for a divorce, Elias agreed but insisted that she become the sole support for the child. He promptly stopped paying the rent as soon as they agreed to divorce.

After visits with his father, the child would return and call Maia the same derogatory names Elias called her. Maia wanted to pursue the divorce but was very intimidated and worried that Elias would take their child to his home country and never return.

Krista Thiry stepped forward to represent Maia in the divorce and secure protection for the child. After donating nearly 100 hours, Ms. Thiry was able to negotiate a satisfactory resolution of the case that allowed Maia and the child to move on with their lives.

Douglas Leavitt helped with three pro bono cases, one of which was complex and overall, the three amounted to a donation of more than 100 hours.

Mr. Leavitt is a self-described new attorney who completed three separate pro bono cases this year. The first of these was a divorce and custody for Nicki who had three children with Branden. When Branden found out that Nicki was pregnant with their first child, he wanted nothing to do with a baby and encouraged her to terminate the pregnancy. Throughout the rest of their relationship Branden was often absent for long periods of time. When present he was psychically abusive to Nicki and not supportive of the children. After Branden was finally convicted of a domestic abuse-related charge he left for Alaska for several months. He rarely contacted the children during his absenses.

Nicki filed for divorce but Branden hired counsel and told the court he wanted 50/50 custody — even though he had not seen his children in six months. At this point, Mr. Leavitt stepped in and helped Nicki through a contested court proceeding to achieve custody and support for her children. Mr. Leavitt's two additional cases involved representing another domestic violence victim in a divorce and custody (this one, mercifully uncontested) and assisting a low income man with another family law situation.

Douglas Leavitt said he was "extremely grateful" for the recognition and he was "humbled" in his young career to be recognized.

Anthony Pantera IV is the kind of attorney who is especially appreciated by the Idaho Volunteer Lawyer's Program because is he willing to take on difficult family law matters and see them through. He closed two cases this year, putting in volunteer hours well above the "aspirational" goal contained in Rule 6.1.

Mr. Pantera represented a refugee woman in a contested hearing for a civil Protection Order. The woman spoke no English. Mr. Pantera was required to work with an interpreter in the Kirundi language. The client reported a frightening pattern of threats and abuse from the father of her child. However, acting on her own without counsel, she was unable to persuade the court to enter even a temporary ex parte order. Mr. Pantera then stepped in and was able to negotiate an agreement that protected the client and her child without litigation.

Contested custody cases can often present challenges, but the facts that Leanne and presented were unusually complex. Bob had received a favorable custody order for their 7-year-old by default. Leanne, without benefit of counsel, attempted unsuccessfully to have the default set aside. Meanwhile, Bob lived in another county, which made shared custody and appropriate scheduling difficult — the parents and child were spending hours each week in cars sharing transferring the boy from one parent to the other.

Leanne wanted that situation altered and believed Bob was emotionally and physically abusive to the boy — a position supported by Bob's conviction on a misdemeanor injury to a child charge. Mr. Pantera generously agreed to assist her through this difficult process. However, Leanne had her own issues that weighed against her achieving her goal of obtaining primary custody in her modification case. Nevertheless, Mr. Pantera's efforts represent the best of professionalism among pro bono volunteers whose focus is on advocating for those who need legal assistance.

Nicholas Warden had just been sworn in as a new member of the Idaho State Bar when he agreed to represent a homeowner in a foreclosure. The homeowner had obtained a loan from a private lender who had been flexible in dealing with him on the loan. Unfortunately, the lender died and her heirs proved uncooperative. The trustee's sale was scheduled for a little more than a month away when Mr. Warden stepped up.

With the help of an experienced attorney mentor, Mr. Warden was able to prepare a mortgage defense, avoid the trustee's sale and negotiate a result that satisfied the homeowner. Mr. Warden's willingness to step in to help and his dedication in seeing this project through exemplify his professionalism. In addition, this case demonstrates one of the values of pro bono service, which is to gain experience and work with mentors who can help develop the volunteer's skills.

5th District

Tracy Dunlap helped get guardian appointments for three teenagers whose mother was not able to care for them. The story began when Jessie had helped her sister, who struggled with mental health issues, with raising her sisters' three children over several years. In January 2013, Jessie found herself with the three teenage children living in her home and her sister confined to a mental health hospital. The children's father lived in another part of the state, rarely saw the children and had expressed no intention of taking care of them.

Prior to their mother's hospitalization, the situation in the children's home was so unhealthy that the oldest teen had called Child Protection Services herself to report her mother's "erratic behavior." CPS felt the children would be safe with their aunt Jessie and encouraged her to seek guardianship. Ms. Dunlap generously volunteered to represent Jessie and her husband in petitioning for guardianship knowing that the children's mother could choose to contest. That turned out to be the case. However, through Ms. Dunlap's efforts Jessie and her husband were eventually appointed guardians after a series of hearings (including contested evidentiary issues) and months of negotiation.

Jennifer Haemmerle volunteered to represent three children in hearings aimed to provide the best support for the children. Guardianships require that the protected person(s) have their own counsel to assure that their best interests are being served in the legal proceedings. In the case brought by Jessie and her husband, Ms. Haemmerle volunteered to represent the three children. Her professionalism and dedication to this task is evidenced by the substantial number of hours she spent representing the children in the hearings and negotiations that resulted in the establishment of the guardianship. In addition, she has left her file open to act on behalf of the children in reviewing the annual reports that will be prepared by the guardians.

6th District

Tyler Olson closed two pro bono family law cases this year, assisting in Oneida and Franklin Counties. In the first of these cases, Mr. Olson represented a low-income mother in obtaining guardianship of her developmentally-delayed son who was turning 18 so that she could continue to make decisions regarding the young man's care. He had struggled with mental health issues and aggression through the years and had a substantial juvenile record. He was finally getting some of the help he needed in a group home facility (which had the ability to control his anger issues).

However, the mother was concerned her son would not make good choices and would lose the care he was receiving if he did not have a guardian. Mr. Olson's efforts on behalf of the petitioner resulted in the mother obtaining guardianship and securing the safety of the young man.

Mr. Olson's second pro bono case involved advising and counseling a victim of domestic violence whose husband had recently been convicted and sentenced to drug court. His efforts helped the mother secure her safety and stability of her two children in a divorce and custody proceeding.

7th District

Marcia Murdoch came to the aid of a divorced father whose children were in a potentially dangerous living situation with his ex-wife. Ms. Murdoch helped the dad obtain custody.

Jeremy and his ex-wife, Julie had four children. When they divorced several years ago, Julie received primary custody, although Jeremy received regular visitation. After a modification of the decree, Jeremy received primary custody of the two older children who were not doing well with Julie. Jeremy then learned that Julie's new boyfriend was abusing the two younger children. He reported the situation to Child Protection Services and the younger children were placed with Jeremy who was encouraged to file to modify the custody order to secure primary custody for all of the children.

Julie, however, indicated that she would not agree to such a change (she also refused to leave her new boyfriend). Due to a learning disability, Jeremy was not prepared to represent himself in a contested modification. Marcia Murdoch generously volunteered to represent Jeremy in obtaining custody.

Chad Campos was nominated by the 7th District CASA program. Mr. Campos had been taking CASA cases for the past 13 years and has served numerous children within the Judicial District VII area.

"Chad has been a great asset to the program and consistently takes cases when asked," the nomination states.

It says "Chad is compassionate and takes CASA cases because he cares and wants to make a difference in the lives of the abused and neglected children we serve. We commend him and thank him for what he has given to children."

Welcome From the Chair of the Indian Law Section

"Treat all men alike...give them all the same law. Give them all an even chance to live and grow. You might as well expect the rivers to run backward as that any man who is born a free man should be contented when penned up and denied liberty to go where he pleases. We only ask an even chance to live as other men live. We ask to be recognized as men. Let me be a free man...free to travel...free to stop... free to work...free to choose my own teachers...free to follow the religion of my Fathers...free to think and talk and act for myself."

— Chief Joseph of the Nez Perce

Helaman "Helo" Hancock

Early in my career as an Indian law practitioner, I attended an assembly of Tribal leaders from around the country who had gathered to meet with the then newly appointed Assistant Secretary - Indian Affairs for the U.S. Department of Interior (and former Idaho Attorney General) Larry Echo Hawk. Assistant Secretary Echo Hawk mentioned in his address to the leaders of so many distinguished Tribal nations that when the President of the United States called on him to serve in that capacity, he dusted off a book he hadn't read in a number of years for inspiration. That book was called "*Bury My Heart at Wounded Knee*" by Dee Brown.

I bought the book as soon as I could get my hands on it and could not put it down. The text masterfully elucidates the federal government's Indian policies of our nation's first 125 years. The many historical accounts described therein evince a tragic and embarrassing chapter in U.S. history and serve as a constant reminder to many Indian law practitioners of why we do what we do. The present day issues facing Indian Tribes and Tribal members may look much different than a century and a half ago, but most can be inextricably traced to the same misguided federal policies of that era.

Today, Indian law is one of the fastest-growing areas of the law in the Unites States due in large part to the fact that tribes have grown in economic prowess around the nation and in Idaho. In addition to gaming, tribes are involved in industries such as farming, hospitality, construction, environmental remediation, retail, real estate development, manufacturing, federal contracting and healthcare, to name a few. According to a 2009 economic impact study, the five Idaho tribes together have become one of the state's top ten largest employers. All of this means the likelihood of one of your clients requiring legal advice concerning some element of Indian law is rapidly increasing.

So, on behalf of the Indian Law Section, I would like to welcome our fellow Idaho State Bar members to this month's edition of *The Advocate*. While the Indian Law Section is not the largest section of the Bar, we have made significant strides to increase membership and improve participation. We strive to offer free CLEs in conjunction with our monthly business calls. This year we partnered with the Native Law Program at the University of Idaho College of Law to put on the 2014 Native Law Conference entitled "Idaho Indian Law Basics," which covers a healthy ambit of fundamentals for the most common tribal law issues that practitioners in Idaho may encounter (6.0 CLE Credits-available at isb.fastcle.com.

This month's edition of *The Advocate* contains a slate of articles covering a broad array of important topics. To wit, Julie Sobotta Kane provides an excellent overview of federal Indian policy in her analysis of today's need for the Indian Child Welfare Act. Her collaboration with Professor Elizabeth Brandt elaborates on the issue. William Barquin gives us

Indian Law Section

Chairperson

Helaman "Helo" Hancock
Coeur d'Alene Tribe Office of Legislative Affairs
PO Box 408
Plummer, ID 83851
Telephone: (208) 686-0752
Fax: (208) 686-8813
Email: hhancock@cdatribe-nsn.gov

Vice Chairperson

Dylan R. Hedden-Nicely
Howard Funke & Associates, PC
PO Box 969
Coeur d'Alene, ID 83816-0969
Telephone: (208) 667-5486
Fax: (208) 667-4695
Email: dhedden@indian-law.org

Secretary/Treasurer

William F. Bacon
1600 Arlington
Pocatello, ID 83204
Telephone: (208) 478-3822
Fax: (208) 237-9736
Email: bbacon@sbtribes.com

a unique insight in discerning what the future may hold for Tribal sovereignty after the U.S. Supreme Court's decision in *Michigan v. Bay Mills Indian Community*. Dylan Hedden-Nicely offers a brief account of the Coeur d'Alene Tribe's legal history as it relates to the Tribe's longstanding commitment to manage, protect and enhance the water of North Idaho, and in a companion article, also takes us into the world of Federal Reserved Water Rights claims in the Coeur d'Alene-Spokane River Basin Adjudication. Then, Jason Brown explores enigmatic situations involving Tribal court guilty pleas. Finally, we get an update from distinguished Professor Angelique EagleWoman on the outstanding progress of the Native American Law program at the University of Idaho College of Law.

I hope you enjoy this month's edition of *The Advocate* and I personally invite anyone interested in joining our section to do so. Our business calls are scheduled for the first Friday of each month at noon. Have a great October!

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About the Author

Helaman "Helo" Hancock *is the Coeur d'Alene Tribe Legislative Director and has been with the Tribe over nine years. His current responsibilities include managing the Tribe's political affairs and doubling as counsel on large-scale tribal business, government and gaming issues. Mr. Hancock is a 2002 University of Utah graduate and a 2005 graduate of the University of Idaho College of Law.*

Why Applying the Indian Child Welfare Act is Worth the Hassle

Julie Sobotta Kane

After practicing for many years in the area of Indian Law, I often heard complaints about the application of the Indian Child Welfare Act (ICWA) in child protection cases. The Act requires state courts to notify Indian Tribes when members of their tribes are subjects of a proceeding. It also requires higher standards of proof when placing children outside of their home, and generally increases the importance of tribal culture in the court's decision-making. This article provides background and insight into why the Indian Child Welfare Act of 1978[1] is necessary and important. It explores the rationale and public policy for this federal law designed to protect Indian children. The goal of the article is to assist practitioners in understanding that ICWA was a very positive development amidst a sea of misguided federal Indian policies that were designed to improve the lot of Indian citizens, but generally had the opposite effect.

During the assimilation era, federal programs specifically targeted language, religious practices, and cultural knowledge.

Fluctuation in Federal Indian Policy

1. Assimilation

Since first contact through present day, the relationship between the United States and Indian tribes has fluctuated between aggressive attempts at termination and assimilation of tribes to efforts to aid in governmental self-determination. Initially, the "the conquering nation" United States, treated tribal governments as "domestic dependent nations" or "dependent sovereigns." [2] The United States assumed the responsibility to protect Indian tribes. Many characterized this unique relationship as a trust relationship, a relationship deemed by the court to be to the exclusion of state governments. At times, this relationship has been very paternalistic despite the efforts of well-meaning federal officials. For example, in searching for the best way to carry out their Indian policies, the government, in the mid-1800's, began an effort to incorporate Indian people into mainstream non-Indian society. This was called the era of assimilation.

An anthropologist described one of the government's assimilation policies of placing Indian children in boarding schools at a very young age far from their homes:

> The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian — dress, language, religious practices, even outlook on life… was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to the reservation to which they were now foreign.[3]

To make sure parents sent their children to school, the federal government passed laws allowing the denial of rations to Indian families if their children were not sent to boarding schools.[4]

Another assimilation policy during this same time period was the allotment of communal tribal lands. The theory behind the allotment policy was to provide Indian people with individual ownership of a parcel of land in the hopes that they would become self-sufficient and give up the group or communal living. President Roosevelt described the allotment process in his message to Congress in 1906 as "a mighty pulverizing engine to break up the tribal mass."[5]

During the assimilation era, federal programs specifically targeted language, religious practices, and cultural knowledge. The Bureau of Indian Affairs, the governmental agency responsible for these programs, actively sought coercive ways to separate individuals from their communal tribal identity. This blatant paternalism, leading to the boarding school concept, was meant to assimilate Indian children into non-Indian society. The boarding school idea had never been attempted or even conceived for any other political group, but the federal

government felt strongly that this would be the easiest, least expensive and least problematic way of ridding itself of its trust responsibility toward Indian tribes. And while they were busy working toward federal efficiency, Indian children were slowly losing their identity. Metha Bercier, a member of the Turtle Mountain Chippewa Tribe who was subjected to the boarding school experience said:

> And so the days passed by, and the changes slowly came to settle within me…Gone were the vivid pictures of my parents, sisters and brothers. Only a blurred vision of what used to be. Desperately, I tried to cling to the faded past which was slowly being erased from my mind.[6]

As these children were released from their schools they became lost in society. It soon became clear that the assimilation policy was only compounding the "Indian problem." While assimilation was the primary principle for founders of this "melting pot" country, European culture was not something that tribal governments asked for or wanted. Indian people, the natives of the North American continent, did not embrace or prefer the new majority's religious practices, the way they dressed, ate or went about their daily lives. When the government thrust foreign values upon the aboriginal peoples, there was natural resistance. Tradition and history run deep for native peoples and forcing them away from their past by removing their family and tribal identity proved to be one of the worst policies imaginable.

When Congress determined that a particular Indian policy was ineffective, the usual next step was to conduct a study and produce a report, upon which a new policy could be developed. In 1928, the Meriam Report[7] was produced. In the report, the researchers determined that "[t]he Indians have much to contribute to the dominant civilization, and the effort should be made to secure this contribution, in part because of the good it will do the Indians in stimulating a proper race pride and self-respect."[8] Congress was recognizing that emptying Indian hearts and minds of all that they held dear, was a huge mistake, not only for Indian children, but for American society as a whole. The reality, however, was that the long lasting damage was already done.

2. Reorganization

Based on this report, Congress took action to shift the official Indian policy away from assimilation. To address the documented problems associated with assimilation's total removal of culture and traditions from the individual, a new policy was aimed at incorporating a greater respect for Indian culture, "rather than to crush out all that is Indian."[9] Efforts were made at reforming federal policies to encourage economic development on Indian reservations, to stop the rapid disappearance of tribally-owned lands, and to help revive the history, culture and traditions of the diverse tribes. Thus, Congress passed the Indian Reorganization Act (IRA) in 1934.[10]

3. Removal and termination

Within a few short years, however, the IRA, in another wholesale policy shift, was disavowed. Pressures were mounting to reduce the amount of funds dedicated to the federal government's trustee duties toward Indian tribes. Assimilation was re-visited as the preferred method to eventually withdraw federal supervision of Indian tribes altogether. Urban Relocation[11] was seen as a program that would support assimilation policies by assisting individual Indians and their families with moving to cities and finding work or vocational training. Many saw this as a way to disperse Indian people into the general population.

Another devastating policy was an effort to buy out tribal status by offering large settlements to terminate official federal recognition of Tribes. Congress began to pass bills to terminate individual Indian tribes, including the Klamaths of Oregon[12] and the Southern Paiutes of Utah.[13]

4. Self-determination

By the 1970's, this second attempt at assimilation, augmented by the termination efforts, was eventually deemed a dismal policy failure and another shift of federal policy was made. Researchers again found that Congress failed to account for the significance of traditional cultur-

A new policy was aimed at incorporating a greater respect for Indian culture, "rather than to crush out all that is Indian."[9]

al values to tribal peoples. Congress then passed The Indian Self-Determination and Education Assistance Act of 1975.[14] This law formed the foundation for tribal control of federal programs intended to assist Indian people. The new (and current) policy of self-determination respected tribal values and traditions.

Destruction of the Indian Family

These severe conflicting shifts in federal Indian policy resulted in critical breaks in the generational teachings of the culture and tradition of Indian tribes. Theorists label this as "cultural discontinuity."[15] Indian children were not only losing their cultural identity, but when growing up in a boarding school, they were losing skills such as nurturing, family problem-solving skills, storytelling, respect for elders, and other values associated with tribal family groups. A boarding school student did not learn how to comfort children when they were hurt or how to talk out and find solutions to family problems, such as hurt feelings about a parental decision or coping with a personal issue. The dynamic of "family" was foreign to them by the time they left school. This was a significant and irreparable loss given the importance of extended families in tribal organization.

1. Assessing the problem

In 1974, the U.S. Senate held oversight hearings to examine the problem of children being lost from the Tribes. The hearings yielded numerous examples, statistical data, and expert testimony documenting what one witness called 'the wholesale removal of Indian children from their homes.'[16] This disintegration of the family structure resulted in numerous cases of young children being homeless or removed from their home. The removed Indian children were almost always placed in non-Indian homes. One witness from the Rosebud Sioux Reservation stated that "state social workers operated under the premise that the reservation was, by definition, an unacceptable environment for children."[17]

One witness from the Rosebud Sioux Reservation stated that "state social workers operated under the premise that the reservation was, by definition, an unacceptable environment for children."[17]

Studies by the Association on American Indian Affairs showed that 25 to 35 percent of all Indian children had been removed from their families and placed in foster, adoptive, or institutionalized care.[18] Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians testified that:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[19]

Strong factual information about how many Indian children were entering state child welfare systems and where they were being placed, along with heart wrenching testimony from parents and children impacted by these placements, moved Congress to action and ICWA was introduced. The primary sponsor of ICWA, Rep. Morris Udall, stated that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people are being placed in jeopardy."[20] The ICWA was intended to recognize this specific cultural loss by giving tribes and Indian parents/guardians federal safeguards from the misconceptions held by the institutions with power over Indian children — state social welfare agencies and state courts.

2. ICWA passed

After much testimony and deliberation, Congress passed the ICWA on November 8, 1978. The purpose of the law is:

- To prevent unwarranted removal of Indian children from their family and Tribes;
- Assure that children who are removed maintain affiliation with their culture and Tribe;
- Provide a voice to Tribes in decision-making regarding their children.

Specifically, ICWA requires state courts to apply a higher standard — clear and convincing efforts, rather than reasonable efforts — when determining whether the state child protection agency is providing adequate services to the Indian child's family. The federal law also requires state courts to provide the Indian child's Tribe notice of the proceedings. A "Qualified Expert Witness" is required to testify as to the parents' abilities to comply with the reunification plan. There

Putting the pieces back together

The Nez Perce Tribal Social Services agency will periodically receive calls from those who were adopted out before the Indian Child Welfare Act, or their adoptive relatives, seeking help from the Nez Perce Tribe, or assistance in finding their biological family. For example, they received one call from an elderly non-Indian woman saying that her adopted Nez Perce daughter was in severe trouble again with the law. The caller indicated her only hope to help save her daughter from self destruction was reconnecting with her Tribe. Clearly, even when raised in a loving non-Indian home, the loss of identity can lead to trouble.

As a result of these types of recurring calls, on September 2012 the Nez Perce Tribe hosted a 'Coming Home Ceremony' in Lapwai, Idaho. The invitation to this event contained the following information:

> 'Coming Home Ceremony. Ni Mii Puu who have been disconnected from their ancestral tribal families and communities, due to relocation policy, adoptions away from the family and other policies intended to remove Native peoples from their homelands throughout this country and Canada, We Welcome You Home.'

An honor dance and prayers were offered for those who returned home for the event. The participants who returned home for the event provided very moving and emotional testimony. Each participant met family members they didn't know, and were warmly welcomed back to the Nez Perce people and their homeland.

Because of the success of the Coming Home event, the Tribe will be hosting other such ceremonies in the future. The Tribe is also focusing on programs to ensure that Indian families receive the help they may need to keep their families together and to ensure that children who are removed from their parents remain with extended family members, or other tribal families, to safeguard that essential tribal connection.

are preferences for the placement of Indian children, which prioritize family members and tribal placements. If a Tribe or parent/guardian desires that the case be transferred to tribal court, the case must be transferred, absent a showing of good cause. Finally, the judge must be involved with decisions by the parents to terminate their rights.

It IS worth the hassle

Even in the wake of *Adoptive Couple v. Baby Girl*,[21] the recent U.S. Supreme Court decision that likely will result in a narrowing of ICWA's application, the underlying reason for its passage — to protect Indian families and tribes from loss of their children and their culture — remains as valid today as it was in the 1970's. Each change in the federal government's approach to Tribes, though usually well intentioned, had dramatic and lingering negative consequences to Indian families. The ICWA was a way to finally help fill the gaps left by these federal policies and it remains an important tool for Indian people to preserve their most valued assets, their children.

The Indian Child Welfare Act of 1978 was the result of good words and good intentions being transformed into written law. This was a situation where the actual federal policy had a positive impact on Indian children. Chief Joseph once said:

> 'Good words do not last long unless they amount to something. Words do not pay for my dead people. They do not pay for my country, now overrun by white men. They do not protect my father's grave. They do not pay for all my horses and cattle. Good words will not give me back my children… It makes my heart sick when I remember all the good words and all the broken promises.'[22]

In 1978, the new federal policy started to officially protect Indian children from being placed in non-Indian homes, and ensured that a cultural connection between the child and his/her tribe was considered by the courts. After years of federal policies that swung back and forth from one extreme to another, this was a targeted, strategic, practical policy that has been protecting Indian children for 36 years. Given recent developments in the *Baby Veronica* case decided by the U.S. Supreme Court last year, some terms of ICWA may be more difficult to apply in every case involving an Indian child. Idaho statutes such as the Safe Haven law[23] also conflict with the application of ICWA. However, while it may sometimes be difficult to apply or enforce, for the reasons set forth in this article, it is indeed worth the hassle.

Endnotes

1. Indian Child Welfare Act of 1978, 92 Stat.3069, (codified at 25 U.S.C. §§ 1901-1962).

2. See "the Marshall Trilogy" *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

3. P.Farb, Man's Rise to Civilization, 257-259 (New York: E.P.Dutton & Co., Inc., 1968). Quote taken from Felix S. Cohen's Handbook of Federal Indian Law, 1982 Ed. p. 140.

4. Appropriations Act of Mar. 3, 1893, ch. 209, § 1, 27 Stat.612, 628 (codified at 25 U.S.C. § 283. Rations were provided by the federal government, as Indian people were placed on reservations with no means of subsistence available to them.)

5. *Ibid*. Cohen at 143.

6. Bercier, Metha Parisien, Tomorrow, My Sister Said, But Tomorrow Never Came, 1993 (unpublished ms., Belcourt, N.D.).

7. Meriam Report, a nongovernmental two-year study of the Indian Bureau undertaken at the request of the Secretary of the Interior Hubert Work, to examine the administration of Indian policy and its impact on Indian life.

8. *Id.*

9. *Id.*

10. Indian Reorganization Act (Wheeler-Howard Act). 48 Stat. 984-988 (1934) (codified as amended at 25 U.S.C. § 461 *et seq*.)

11. Indian Relocation Act of 1956 , Pub. L. No. 959, 70 Stat. 986 (1956).

12. Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (codified at 25 U.S.C. §§ 741-760).

13. Act of Aug. 18, 1954, ch. 732, 68 Stat. 718 (repealed 1987)(codified at 25 U.S.C. § 566).

14. Pub. L. No. 93-638, 88 Stat. 2203 (1975)(codified as amended at 25 U.S.C. § 450 et seq.).

15. Au, Kathryn H., (2001, July/August), *Culturally Responsive Instruction as a Dimension of New Literacies* 5(1)

16. *Mississippi Band of Choctaw Indians v. Holyfield,* 490 US 30, 109 S.Ct 1597 (1989).

17. Fletcher, Mathew L.M., *The Indian Child Welfare Act: A Survey of the Legislative History* (April 10, 2009) MSU Legal Studies Research Paper, No. 07-06.

18. Cohen's Handbook on Federal Indian Law, 2005 Ed., p. 821.

19. *Id*. at 822.

20. *Holyfield* at p. 3. Fn 3.

21. *Adoptive Couple v. Baby Girl,* 133 S.Ct. 2552 (June 2013).

22. Lee Miller, Ed., From the Heart (Ed, 1996) p. 342.

23. Idaho Code §39-8203.

About the Author

Julie Sobotta Kane *grew up in Oregon, graduated from Washington State University with a Bachelor of Arts degree in Communications, and obtained her Juris Doctorate from University of Idaho, College of Law. Her first job out of law school was with the Vancouver office of the Washington Attorney General's Office. After three years there, she moved back to Idaho and took a position as a staff attorney with the in-house legal office for the Nez Perce Tribe. Twenty-two years later, Julie now serves as Managing Attorney for the Office of Legal Counsel for the Nez Perce Tribe. Enrolled in Eastern Band Cherokee Tribe, Julie resides in Lapwai, Idaho, is married and has two adult children and one grandchild.*

It's Worth the Hassle Part II: How Does the *Baby Veronica* Case Impact Cases Involving Indian Children?

Prof. Elizabeth Barker Brandt

In July 2013, the U.S. Supreme Court issued its second-ever decision interpreting the Indian Child Welfare Act[1] – *Adoptive Couple v. Baby Girl*.[2] The majority opinion was authored by Justice Alito, who was joined by Justices Roberts, Kennedy, Thomas and Breyer. Justices Thomas and Breyer also each filed separate concurring opinions. Justice Sotomayor filed a strongly worded dissenting opinion and was joined by Justices Ginsberg and Kagan. Justice Scalia joined in part in the dissent. The decision in this case is enigmatic as one might guess from the unusual alignment of the court with Justice Scalia joining Justice Sotomayor's dissent. The impact of the decision on family law and child welfare practice in cases involving Indian children is not clear.

The Court reasoned that there had never been a custodial relationship of any kind between the father and child, and that, therefore, there was no "continuing relationship" and the "continued custody" provision of ICWA did not make sense.

The *Adoptive Couple* Decision

Adoptive Couple v. Baby Girl involved an Indian child, Veronica, from Oklahoma who was placed by her biological mother through a private adoption agency with a couple in South Carolina. When Veronica's biological father, a member of the Cherokee Tribe, was served notice of the pending adoption, he sought custody of Veronica. The South Carolina Family Court, relying on the Indian Child Welfare Act (ICWA), denied the adoptive couple's adoption petition and awarded custody to the Indian father. The South Carolina Supreme Court affirmed.

The adoptive couple successfully petitioned for certiorari with the U.S. Supreme Court. The Court's majority held that some provisions of ICWA did not apply. Instead, the Court, focusing on three provisions of the statute, concluded that ICWA does not apply to the narrow circumstance where a non-Indian parent with sole custodial rights, voluntarily initiates a private adoption proceeding. The Court remanded the case to South Carolina and ordered the child removed from her father's custody and returned to the adoptive couple.

First, the Court found that section 1912(f)[3] — which bars termination of a parent's rights unless there is a showing of serious damage to the child from the parent's "continued custody" — does not apply when the parent never had physical or legal custody of the child. Although Veronica's parents had been engaged to be married, at the time she was born they were no longer in a relationship. Her father was in the military awaiting immediate deployment to Afghanistan. Although he must have known of the child's birth, he did not contact Veronica's mother, provide any support for medical care for the mother or his child, and he had had no contact with the child during the first months after Veronica was born. Focusing on the term "*continued* custody," the Court reasoned that there had never been a custodial relationship of any kind between the father and child, and that, therefore, there was no "continuing relationship" and the "continued custody" provision of ICWA did not make sense.

Second, the Court found that section 1912(d)[4] — which bars termination of a parent's rights without a showing that active efforts have been made to prevent the "breakup of the Indian family" does not apply when the parent never had a relationship with the child. The Court focused on the term "breakup" in this section. As with section 1912(f), the Court reasoned that the absence of any kind of actual custodial relationship between the father and the child meant that such a relationship could not be "broken up" under the normal understanding of that term.

Finally, the Majority found that section 1915(a)[5] — which establishes placement preferences for the adoption of Indian children — does not bar non-Indians from adopting an Indian child when no other eligible candidates have sought to adopt the child.[6] In *Adoptive Couple*, the birth mother of the child arranged an adoption through a private, out-of-state agency. The Court rejected the notion that in such a situation,

she or the agency should be required to demonstrate that she had invited and explored alternative adoptive placements for the child that complied with the ICWA placement preferences.

Critique of the decision in *Adoptive Couple*

The Court's decision in the *Adoptive Couple* case has been the subject of intense scrutiny and its impact is not yet completely clear. While on its face, the Court's reasoning appears to grapple with the situation in a practical, and common-sense way, the Majority is actually somewhat myopic and fails to grapple with the entirety of the statute or with the larger family law context of the case.

First, the Court majority ignored the statutory interest of the Cherokee Tribe when interpreting the statute. ICWA's jurisdiction provisions are the core provisions of the Act protecting tribes from the continuing outplacement of Indian children.[7] Pursuant to these provisions, a tribe has the right to intervene as a party in a child custody case involving an Indian child who is a member of or eligible to be a member of the tribe in question. Tribes also may try to seek the transfer of such cases to tribal court and, in some situations, may exercise exclusive jurisdiction over Indian child custody cases. A tribe's right of intervention is mandatory and the tribe may exercise the right at any point in the proceeding. This right of intervention was included in ICWA to not only protect the best interests of Indian children by ensuring that state courts consider tribal cultural and social norms, but also to enable tribes to ensure compliance with ICWA to protect their continued existence and integrity.[8] Thus a tribe's right to intervention under ICWA reflects Congress's concern that the Indian child's parents might not be in a position to adequately protect the child's interest in maintaining familial connections with the tribe or the tribe's interest in protecting its children.

In *Adoptive Couple*, the Majority never considers the tribal role in the private adoption proceeding. Rather it focuses exclusively on the father's lack of early custodial and financial involvement with Veronica. The "continued custody" and "active efforts" requirements of ICWA were interpreted as if the fathers' interest was the only interest being protected by the Act, and without regard to the distinct interests of the Cherokee Tribe. As a result, the Court renders the tribe's intervention rights meaningless and nullifies the importance of the intervention provisions of ICWA in many private adoption cases.

Likewise, the Court makes assumptions about state family law that are not consistent with developments in the field. Most importantly, it concludes that the father had "relinquished" his custodial rights and that he had "abandoned his child" because of his failure to make contact with the child or provide financial support during the mother's pregnancy or after Veronica's birth. The Court proceeds based on this purported "relinquishment" as if the father has absolutely no cognizable rights vis-à-vis the child.

Yet the father's rights had not been terminated. Although much controversy exists regarding the due process requirement for terminating the parental rights of an unwed father, it remains clear that some official action is required. The unwed father may or may not be entitled to participate in the process depending on his own conduct. But, without consent, until a parental termination or adoption order is entered based on a constitutional putative father statute, or until grounds for parental termination case are proved, the father has, at minimum, inchoate legal custody rights. In the *Adoptive Couple* case, the father was clearly angry at the breakup of his relationship with Veronica's mother and his attention was pulled away by the demands of his ensuing deployment. His angry, informal communications with the mother simply cannot, by themselves, serve as the basis for the termination of his parental rights. Beyond his informal communications, no official action terminating his parental rights was ever entered except in the case in which he appeared and objected and which was appealed to the Supreme Court.

Finally, the Court ignored the provisions of ICWA that impose substantial procedural requirements on the "voluntary termination of parental rights." In effect, the Court treated the father's inaction as akin

The Court majority ignored the statutory interest of the Cherokee Tribe when interpreting the statute.

to a voluntary termination of his parental rights and did not require compliance with the process requirements of ICWA. One of the primary purposes of ICWA is to make the voluntary placement of Indian children more difficult. The provisions of the Act were a direct response to evidence in the legislative record establishing that Indian parents had often been subjected to threat, pressure and trickery to induce them to "voluntarily" consent to the termination of their parental rights.[9] Thus, ICWA requires that voluntary consents to parental termination must be "executed in writing and recorded before a judge," and that the judge must certify that the "terms and consequences of the consent were fully explained in detail and were fully understood by the parent . . .."[10]

The facts of the father's "relinquishment" of his parental rights in *Adoptive Couple* evoke images of the exact practice ICWA was intended to prevent. In addition to angry personal texts to his former fiancé, the father was approached by a process server in a shopping mall parking lot just days before his deployment to Afghanistan. Believing he was relinquishing his custodial rights to the child's mother, he accepted service and signed a "relinquishment" document of some sort. Although he immediately had second thoughts about signing, the process server refused to allow the father to review the papers or reconsider his signature.

Application of *Adoptive Couple*

1. The existing Indian family doctrine

A number of commentators have speculated that the effect of the *Adoptive Couple* decision is to validate the "existing Indian family" exception to ICWA. This exception, crafted by state courts and not based on the language of the statute, holds that ICWA does not apply at all when a child is not removed from an existing Indian family. While the U.S. Supreme Court has never directly considered this exception to ICWA, it appears to have rejected the exception in dicta in *Mississippi Band of Choctaw Indians v. Holyfield*.[11] The Court did not reference this exception in *Adoptive Couple*.

The Idaho Supreme Court, in strikingly similar circumstances to those of *Adoptive Couple*, rejected the existing Indian family exception in 1993 in *Indian Tribe v. Doe*.[12] In that case, the Idaho Supreme Court addressed a situation in which a non-Indian mother attempted to place her child in an adoptive placement through a private adoption agency without input from the Indian father. The Court stated that requiring an Indian child to first be part of an Indian family before ICWA applies, "would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family." It concluded that such a result would "undermine the tribe's interest in its Indian children, which the Supreme Court recognized in [*Holyfield*]."[13]

While the U.S. Supreme Court has never directly considered this exception to ICWA, it appears to have rejected the exception in dicta in *Mississippi Band of Choctaw Indians v. Holyfield*.[11]

The U.S. Supreme Court's decision in *Adoptive Couple* does not adopt the "existing Indian family" doctrine. While the decision certainly appears to have limited the scope of ICWA in certain private adoption situations, it does not create a wholesale exception to the Act. For example, under the reasoning in *Adoptive Couple*, where the Indian parent has had physical or legal custody of a child, or where the adoption is not voluntarily initiated by a parent, ICWA still applies. Thus, in the vast majority of ICWA cases, which involve situations in which a child is removed from parental custody through the child protection system, ICWA applies and *Adoptive Couple* does limit the statute.

Even though *Adoptive Couple* does not embrace the existing Indian family doctrine, it is still cause for great concern. In a concurring opinion, Justice Breyer expressed concern about the risk of the decision excluding too many "absentee Indian fathers." He cited some examples of situations in which the decision perhaps should not apply, such as a case of a father who has visitation rights or has paid "all of his child support obligations," a case where a father "was deceived about the existence of the child," or a situation involving a "father who was prevented from supporting his child."[14]

2. Child protection cases

The most common cases governed by ICWA are child protection

cases. The language of the statute itself makes clear that Congress was focused on governmental removals of Indian children from their families without regard for tribal family and cultural norms. The *Adoptive Couple* case will not likely change child welfare practice in cases involving Indian children for several reasons.

First, these cases are clearly "removals" — the exact focus of ICWA. Child welfare cases do not involve situations in which a parent is seeking to make a voluntary placement of her or his child.

Second, the Court's concern in *Adoptive Couple* that ICWA would unnecessarily delay safe and loving placements for children is not directly implicated by child welfare cases. The functions and purposes of the child protection system overlap the goals and purposes of ICWA. The function of the child protection agency is to reunite a child with her or his family whenever possible. State law requires child welfare officials to make reasonable efforts to secure reunification and only permits alternative placements upon substantial showings that either reunification cannot occur or that it would pose serious danger for the child. Thus ICWA's requirement of "active efforts" does not raise the danger that Indian children will be disadvantaged in finding a permanent and loving home.

Adoptive Couple's significance for other Idaho Statutes

In recent amendments to the adoption statute in the Idaho Code, recognition of the federal mandate of ICWA was added: "[i]f applicable, nothing in this chapter shall modify the requirements of the Indian Child Welfare Act of 1978, 25 U.S.C. 1902 et seq."[15] However, the adoption statute clearly serves to limit the rights of unmarried fathers in proceedings to determine placement of a child. Thus, while ICWA is specifically addressed in the Idaho Code, the outcome in *Adoptive Couple* will likely serve to limit the application of ICWA for non-custodial Indian fathers, at least in similar circumstances — private adoption, absent father. In a voluntary, private adoption of a child, if the parental rights of an unmarried Indian father who has never had a custodial or familial relationship with his child are properly terminated under the Idaho statute, it is likely that ICWA would not apply.

Adoptive Couple will likely serve to limit the application of ICWA for non-custodial Indian fathers, at least in similar circumstances — private adoption, absent father.

One other Idaho statute, the "Safe Haven" statute,[16] is in direct conflict with ICWA in that it does not require the birth mother to identify herself or the child's father, so there is no required inquiry into whether the child is enrolled or enrollable in a federally recognized tribe.[17] Should a child be delivered by a mother to safe haven, it would be possible that the child would be placed without regard to status as an Indian child. Placements under the Safe Haven statute are not voluntary in the same sense as the private adoption in *Adoptive Couple*. They are, in fact, removals in which the child is in the custody of the state and a modified child protection proceeding is employed to secure the permanent placement of the child. For that reason, these cases are not governed by the exception to ICWA carved out by *Adoptive Couple*. To the extent the Safe Haven statute is inconsistent with ICWA, it is likely pre-empted by federal law. Special care should be taken to avoid placing an Indian child through a safe haven proceeding.

It IS worth the hassle

Even in the wake of *Adoptive Couple*, and the likely narrowing of ICWA, the underlying reason for its passage — to protect Indian families and tribes from loss of their children and their culture — remains as valid today as it was in the 1970's. Each change in the federal government's approach to tribes, though well intentioned, had dramatic and lingering negative consequences to Indian families. The ICWA was a way to finally help fill the gaps left by these federal policies and it remains an important tool for Indian people to preserve their future — their children.

The Indian Child Welfare Act of 1978 was a circumstance where good words and good intentions were transformed into written law and where the actual federal policy had a

positive impact on Indian children. Chief Joseph once said:

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In 1978, the new federal policy of protecting Indian children from being placed in non-Indian homes, and ensuring that a cultural connection between the child and his/her tribe was considered by the courts became just such a law — good words that amounted to something. After years of federal policies that diverged from one extreme to another, ICWA was a targeted, strategic, practical policy; it has been protecting Indian children for 36 years. While it may sometimes be difficult to apply or enforce, it is indeed worth the hassle.

ICWA continues to be a tool used to address the placement of Indian children removed from their families by state child welfare authorities. Compliance with ICWA has given tribes a role in shaping the safe placement of their children. Even so, the problem of the removal of large numbers of Indian children from their tribes may remain a serious problem. In 2013, officials from several tribes in South Dakota, sued the state of South Dakota arguing that it had systematically violated ICWA. A background story by National Public Radio that lead to the litigation indicated that 87% of the Indian children in foster care in South Dakota are placed with white families.[19] As this article is written, the South Dakota litigation is ongoing. To the extent the allegations in the case have even some merit, they illustrate the continuing need for the Act.

Endnotes

1. Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*.

2. 133 S. Ct. 2552 (June 2013). The Court first interpreted ICWA in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

3. 25 U.S.C. § 1912(f)("Parental Rights termination orders; . . . No termination of parental rights may be ordered in such proceeding in the absence of a determination . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.").

4. 25 U.S.C. § 1912(d)("Any person seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.").

5. 25 U.S.C. § 1915(a)("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; (3) other Indian families.").

6. Summary from the Tribal Supreme Court Project, Memorandum Update of Recent Cases, June 25, 2013

7. 25 U.S.C. § 1911. Holyfield, 490 U.S. at 36 (recognizing that the jurisdictional provisions of ICWA are at the heart of the law).

8. Indian Child Welfare Act of 1978: Hearing on S. 1213 Before the Subcomm. on Interior & Insular Affairs, 95th Cong. 191-92 (1978); Holyfield, 490 U.S. at 34-35.

9. B.J. Jones, et al., The Indian Child Welfare Act Handbook 104 (2007), citing H. R. Report 95-1386, at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 7530.

10. 25 U.S.C. § 1913.

11. *Id.* at 9.

12. *Indian Tribe v. Doe*, 123 Idaho 464, 849 P. 2d 925 (1993).

13. *Id*. at 470-71, 849 P. 2d at 921-22.

14. *Ibid*., *Adoptive Couple* at p. 2571.

15. Idaho Code § 16-1501(3).

16. Idaho Code § 39-8203. Interestingly, recent research indicates that Safe Haven laws have not contributed to increased infant safety. Among other things, the research indicates that these laws may encourage women to conceal pregnancies and then abandon infants who otherwise would have been placed for adoption through established legal procedures or raised by relatives. *See* Adoption nation Education Initiative, Unintended Consequences: 'Safe Haven" Laws are Causing Problems not Solving Them (Evan B. Donaldson Institute, March 10. 2003).

17. ICWA, 25 U.S.C. §1903(4)(definition of Indian child).

18. Lee Miller, Ed., From the Heart (Ed., 1996) p. 342.

19.That litigation, Oglala Sioux Tribe v. Van Hunnick, has not yet yielded a reported decision. See reports on the situation leading to this litigation on National Public Radio (http://www.npr.org/2013/02/06/171310945/south-dakota-tribes-accuse-state-of-violating-indian-welfare-act).

About the Author

Elizabeth Barker Brandt *is the James E. Wilson Distinguished Professor at the University of Idaho College of Law. She teaches Community Property, Family Law, Children & the Law, Domestic Violence & the Law, and Wills and Trusts. Brandt is a member of the Idaho Supreme Court's Child Protection Committee and a past member of its Committee on Children and Families in the Courts. She is one of the authors and editors of "Protecting Children of High Conflict Divorce: An Idaho Benchbook," and the "Idaho Child Protection Manual."*

U.S. Supreme Court Upholds Tribal Sovereign Immunity, Again

William Barquin

In May, the United States Supreme Court affirmed the doctrine of tribal sovereign immunity in *State of Michigan v. Bay Mills Indian Community*. The Supreme Court held that a state could not bring a suit against a tribe to shut down a casino located on disputed Indian lands. The Supreme Court upheld tribal sovereign immunity and reaffirmed that only Congress has the power to waive sovereign immunity from suit without the express permission of the Tribe. This article will address the Bay Mills case in detail and discuss the direction the decision takes us in the future.

Michigan asked the Court to consider IGRA as a whole, questioning why Congress would authorize a state to enjoin illegal tribal gaming on Indian lands but not lands subject to state jurisdiction.

In *Bay Mills*, the State of Michigan entered into a compact with the Bay Mills Indian Community to conduct class III gaming on Indian lands. Bay Mills opened a casino on land it had purchased through a congressionally-established land trust funded with compensation from ancestral land takings. Although not held in trust by the federal government, Bay Mills argued that this parcel qualified as Indian lands. Michigan disagreed and sued under a provision in the Indian Gaming Regulatory Act (IGRA) that allows a state to enjoin gaming activities conducted on Indian lands in violation of a state-tribal compact.[2] On the same day that Michigan filed its lawsuit, the Department of the Interior issued an opinion concluding that the lands did not meet the definition of "Indian lands" under IGRA.[3]

The District Court sided with Michigan and issued an injunction closing the casino. The Sixth Circuit, however, overturned the injunction on the grounds that sovereign immunity protected Bay Mills from suit.[4]

Michigan appealed arguing that: (1) IGRA waives Bay Mills' sovereign immunity from suit; and (2) if IGRA did not waive sovereign immunity, the Supreme Court should craft an exception to tribal sovereign immunity for off-reservation, commercial conduct.

The Supreme Court in a 5-4 vote affirmed the Court of Appeals, holding that Michigan's suit against Bay Mills was barred by sovereign immunity.

The majority

In the majority opinion, Justice Kagan summarizes the history of tribal sovereign immunity and points out that "we have time and again treated the 'doctrine of tribal immunity [as] settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver)."[5] Justice Kagan continues, "[e]qually important here, we declined in *Kiowa* to make any exception for suits arising from a tribe's commercial activities, even when they take place off Indian lands."[6] Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor joined in the majority opinion.

IGRA waiver

Michigan argued that Bay Mills "authorized, licensed and operated" the casino from within its reservation, and that such conduct was gaming activity enough to allow the suit to go forward.[7] The majority rejected this argument and found that gaming activity means what goes on in a casino, not the administrative functions of regulating or approving gaming.

Next, Michigan asked the Court to consider IGRA as a whole, questioning why Congress would authorize a state to enjoin illegal tribal gaming on Indian lands but not lands subject to state jurisdiction. After all, Michigan argued, Congress in its wisdom would not have intended this senseless outcome.

The Court answered:

> But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts — addressing one thing without examining all others that might merit comparable treatment.[8]

The majority points out that states have other powers over tribal gaming on state lands that they do not possess, absent consent, in Indi-

an territory.[9] Those powers include the right to deny a license for off-reservation gaming, the enforcement of illegal gaming by bringing suit against tribal officials or employees, and enforcement of the state's criminal laws against illegal gaming.[10]

Finally, the majority observed that Michigan's IGRA arguments could be addressed by negotiating a waiver of immunity in the State-Tribal Compact, including a provision that would address the current circumstances.[11] "So as Michigan forthrightly acknowledges, 'a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe's waiver of sovereign immunity from suit.'"[12]

Kiowa reversal

Michigan also argued that the Court should reverse its decision in *Kiowa Tribe v. Manufacturing Technologies*,[13] a case holding that sovereign immunity applies even for a tribe's commercial activities that occur off reservation. Michigan claimed that tribes increasingly participate in off-reservation commercial activities and, therefore, operate less like governments and more like private businesses.[14] Further, Michigan argued, tribes enjoy broader immunity from suits arising from such conduct than other sovereigns.[15]

The majority rejected Michigan's arguments, concluding *stare decisis* was appropriate "more than usually so in the circumstances here."[16] The Court confirmed that *Kiowa* was not a unique situation but rather "that 'the doctrine of tribal immunity' — without any exceptions for commercial or off-reservation conduct — 'is settled law and controls this case.'"[17]

Michigan's position was that without the ability to sue, it had no other options. The Court pointed out that alternate remedies exist, and declined to address "whether the situation would be different if no alternative remedies were available."[18]

The Court made clear that it is up to Congress to determine whether to limit tribal immunity.[19] Congress has not done so, despite the Court in *Kiowa* "hinting, none too subtly, that 'Congress may wish to exercise' its authority over the question presented."[20]

The dissent

Justice Thomas delivered the dissenting opinion, joined by Justices Scalia, Ginsburg and Alito. Justice Thomas continues the arguments set forth in his concurring opinion in *Adoptive Couple v. Baby Girl*,[21] namely that tribes are not part of the constitutional scheme and are, therefore, not really sovereign.

Justice Thomas argued that *Kiowa* was decided in error and that the resulting expansion of tribal immunity "is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty."[22] Justice Thomas questioned *Cherokee Nation v. Georgia*, an early case that recognized the political status of tribes by stating that "[d]espite the Indian tribes' subjection to the authority and protection of the United States government, this Court has deemed them 'domestic dependent nations' that retain limited attributes of their historic sovereignty."[23]

The dissent explained that a sovereign can claim immunity in its own court, but cannot claim immunity in the court of another sovereign. The exception to this rule is state sovereign immunity, because state sovereign immunity is secured by the Constitution.[24] Based on this premise, the dissent suggested that comity is justification for a sovereign to recognize the immunity of another in its courts. "But whatever its relevance to tribal immunity, comity is an ill-fitting justification for extending immunity to tribes' off-reservation commercial activities."[25]

The dissent is notable for its examples of what it considers tribal wrongdoing, describing tribes in general terms as wealthy gaming entities that hide behind immunity to avoid paying lawfully-owed taxes, avoid punishment for illegal price fixing, deny recovery to tort victims, gouge consumers through payday lending and buy state elections through non-adherence to state campaign finance laws.[26] Ultimately, the dissent concluded that the Court erred when it decided *Kiowa* and should have used this opportunity to correct this error as Congress has declined to act.

Ultimately, the dissent concluded that the Court erred when it decided *Kiowa* and should have used this opportunity to correct this error as Congress has declined to act.

Before some state governments cheer the dissent's challenge to tribal sovereign immunity, note that Justice Ginsburg took aim at state sovereign immunity. Although joining in the dissent, Justice Ginsburg wrote separately with the concern that state immunity is also too broad.[27] Justice Ginsburg forecast that "[n]either brand of immoderate, judicially confirmed immunity, I anticipate, will have staying power."[28]

Justice Scalia also wrote separately to state that although he was in the majority for *Kiowa*, he was now convinced that the decision was in error and should be overruled.

The concurrence

Justice Sotomayor offers a deeper historical basis to support tribal sovereign immunity and to address the principal dissenting opinion. In response to the dissent's suggestion that tribal sovereign immunity was analogous to foreign sovereign immunity, Justice Sotomayor explained that tribes have never been treated as foreign sovereigns. She points out that in *Cherokee Nation*, the Court stated that tribes were not "foreign states."[29]

Next, Justice Sotomayor addressed the comity issue by proposing the view that comity is "proper respect for [a sovereign's] functions." Tribes are not permitted to sue states, including for commercial conduct that chiefly impacts Indian Reservations,[30] and, therefore, comity would be ill-served by unequal treatment of tribes and states.

Justice Sotomayor did a wonderful job of countering the dissent's generalized description of wealthy tribes taking advantage of states through sovereign immunity. Rightfully so, she noted that a majority of tribes do not experience economic success. The Justice also described the federal government's goal of promoting tribal self-sufficiency and determination, pointing out that critical to this goal is the ability for tribes to raise revenue. States have the power to tax certain individuals and companies located on Indian reservations, making it difficult for tribes to raise revenue via taxation. These problems are compounded by federal policies leading to large portions of lands within reservations being owned by non-Indians.

Tribes are not permitted to sue states, including for commercial conduct that chiefly impacts Indian Reservations,[30] and, therefore, comity would be ill-served by unequal treatment of tribes and states.

What is next?

It is (again) settled law that tribes possess immunity from suit for on and off-reservation conduct, whether governmental or commercial, at least where there are alternative remedies to address the issue.

Tribes and states have overlapping jurisdictions, responsibilities and interests. Our governments could choose to retreat to entrenched positions and rely on state and tribal sovereign immunity as we have done in the past. The result of course will be continued expensive fighting over which government is more sovereign and which government should have more control and power over people and resources.

This type of positional flag-waving is a disservice to the citizens and resources our governments are entrusted to protect. It is also a horrible waste of government resources in a time when every government is justifiably concerned about limited budgets, increased responsibility and aging infrastructure.

Alternatively, and preferably, states and tribes could treat each other with respect and begin the dialogue about how our governments can work together for the benefit of our citizens and resources. That dialogue necessarily includes an understanding by the states of the responsibility of tribal governments for their citizens and resources. It also necessarily includes an understanding by the tribes of the responsibility of state governments for their citizens and resources.

So, in the end it comes down to state and tribal governments choosing to be responsible sovereigns. For states, responsible sovereignty includes acknowledging that tribal governments are part of our system of governance in the United States and have rights and interests that tribal, federal *and* state governments must protect.

For tribes, responsible sovereignty means acknowledging that when tribal governments act off-reservation, there may be legitimate impacts to the state government. It also means joining our fellow sovereigns in waiving immunity from suit in a manner that protects tribal treasuries while allowing legitimate griev-

ances against our governments to be heard in an impartial forum such as tribal courts.

So, in the end it comes down to state and tribal governments choosing to be responsible sovereigns.

Endnotes

1. 572 U.S. ___, 134 S. Ct. 2024 (2014).

2. 25 U.S.C. § 2701(d)(7)(A)(ii).

3. Bay Mills Indian Community Vanderbilt parcel decision (December 21, 2010), available at

http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

4. The casino remained closed after the District Court injunction.

5. 572 U.S. ___, 134 S. Ct. at 2030-31 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998)).

6. *Id.* at 2031.

7. "But that argument comes up snake eyes," Kagan writes. She would definitely be fun at the craps table.

8. 572 U.S. ___, 134 S. Ct. at 2033.

9. *Id.* at 2034-35.

10. *Id.* at 2035.

11. *Id.*

12. *Id*. at 2035 (quoting Brief for Michigan 40).

13. 523 U.S. 751 (1998).

14. *Slip Op.* at 2036.

15. *Id.*

16. *Id.* at 2036.

17. *Id.* (quoting *Kiowa*, 523 U.S. at 756).

18. *Id.* at 2036 n 8.

19. *Id.* at 2039.

20. *Id.* (quoting *Kiowa*, 523 U.S. at 758).

21. *Adoptive Couple v. Baby Girl*, 570 U.S. __, 133 S. Ct. 2552 (2013).

22. 572 U.S. ___, 134 S. Ct. at 2045 (Thomas, J., Dissenting).

23. *Id.* at 2046 (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). In *Cherokee*, the Tribe brought an action against the state of Georgia to enjoin state laws depriving them of rights within their own territory. The Court ruled that it had no original jurisdiction in the matter, as the Cherokee nation was a "domestic dependent nation" whose relationship to the U.S. resembled that of a "ward to its guardian."

24. *Id.* at 2046-47 and n.1.

25. *Id.* at 2047.

26. *Id.* at 2051-52.

27. *Id.* at 2055-56 (Ginsburg, J., Dissenting).

28. *Id.* at 2056.

29. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831).

30. Citing *Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).* In *Seminole*, the Tribe was prevented from suing the state for refusing to negotiate a gaming compact under IGRA.

About the Author

William Barquin *is the Attorney General of the Kootenai Tribe of Idaho. He is Eastern Shoshone and Oglala Lakota and was raised on the Wind River Indian Reservation in Wyoming. He earned his B.A. and J.D. degrees from Gonzaga University in Spokane, Washington. He is a member of the Oregon and Idaho bars.*

The opinions expressed herein are solely those of the author and not those of the Kootenai Tribe of Idaho. Pamela Rentz, Paralegal in the Kootenai Tribe Legal Department, assisted with this article.

Guilty Again? The Use of Tribal Court Guilty Pleas in Federal Court

Jason Brown

On May 21, 2014, Ian Sittre was sentenced to serve 27 months in prison on a charge of involuntary manslaughter pursuant to a plea agreement with federal prosecutors. Chief U.S. District Judge B. Lynn Winmill also ordered him to serve three years of supervised probation after he is released. The twist here is that Sittre had entered a guilty plea pro se in Tribal court just a few months previous to his federal court sentencing.

A 10-month-old girl was left in Sittre's care when the child's mother went to work. Sittre is a member of a federally recognized tribe and was residing on the Fort Hall Indian Reservation when the event took place. Less than ten minutes after the child's mother left, Sittre called her and told her something was wrong with the baby. When she returned home, Sittre told the mother that the baby was "breathing funny." She called 911 and attempted CPR. Sittre left the residence before police arrived. The infant died shortly thereafter. An autopsy concluded that the immediate cause of death was abusive head trauma inflicted by a caregiver. While in jail on April 4, 2013, Sittre told his mother during a recorded telephone call that he shook the baby "too hard."[1]

Before his federal guilty plea, Sittre pled guilty in Tribal court. Had he gone to trial in federal court, federal prosecutors would likely have attempted to use his Tribal guilty plea, and possibly the audio recording of the allocution, as a part of its evidence of elements of the crime. This is a dangerous possibility for every Tribal court defendant who is contemplating, or who has already entered, a guilty plea.

Double Jeopardy does not prohibit the federal government from proceeding with a prosecution for a discrete federal offense when a defendant has already been convicted in Tribal court.[2] This is because the U.S. Supreme Court has held that the two are separate sovereigns, thus Tribal prosecution is not a prosecution by federal authorities.

Double Jeopardy does not prohibit the federal government from proceeding with a prosecution for a discrete federal offense when a defendant has already been convicted in Tribal court.[2]

There are five reservations, and six federally recognized Tribes, in the state of Idaho. They are, the Coeur D'Alene, Kootenai, Nez Perce, Duck Valley (Shoshone-Paiute), and Fort Hall (Shoshone-Bannock) Reservations, all of which have their own unique Tribal court systems. None of the five systems is the same, and Tribal courts across the U.S. are similarly varied. In some Tribal courts, the defenders, prosecutors and judges are all attorneys. In others, non-attorney advocates are employed as public defenders, prosecutors and judges. In some Tribal courts, non-attorney defense advocates appear with and represent defendants, where only attorneys are licensed to do so in state and federal court. This is permissible because Tribes are not subject to the U.S. Constitution.

Right to counsel not guaranteed in Tribal courts

Tribal and state courts are two significantly different animals. In *Duro v. Reina*[3], the U.S. Supreme Court recognized this difference.

> "It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not the equivalent to their constitutional counterparts. There is, for example, no right under the Act to appoint counsel for those unable to afford a lawyer."

While defendants in state and federal courts rely on the Sixth and Fourteenth Amendments to the Constitution, and the holding in *Gideon v. Wainright*[4], to guarantee representation by an attorney, this protection is generally not required in Tribal courts. Tribes are exempt from the Constitution, and the longest sentence that most Tribes impose on any charge is one year. Defendants do not lose all rights to representation in criminal Tribal court matters. The Indian Civil Rights Act[5], which applies to all Native American Tribes, and the Tribal Law and Order Act of 2010, which applies to some Tribes, guarantees representation if a Tribe imposes a total term of imprisonment longer than one year.

Why uncounseled pleas are generally admissible in Federal court

Argersinger v. Hamlin[6] and *Scott v. Illinois*[7] are the controlling cases in this area and discuss when uncounseled pleas can be accepted in federal court. In *Argersinger v. Hamlin*, Jon Argersinger was charged in state court with carrying a concealed weapon. This misdemeanor was punishable by 6 months in jail and a $1,000 fine. He could not afford an attorney, and the state court did not provide one. Argersinger represented himself and was convicted and sentenced to 90 days in jail. In the Florida Supreme Court, he asserted that the state court had violated his Sixth Amendment right to counsel, but the court affirmed the conviction. The U.S. Supreme Court eventually reversed the verdict and held that the Sixth Amendment requires an attorney be provided to represent every indigent defendant who is facing loss of liberty for any amount of time and on any charge.

In *Scott v. Illinois*, Scott was convicted of theft for shoplifting merchandise valued at less than $150 and was fined $50 after a bench trial. He was not provided an attorney. He argued that the Sixth and Fourteenth Amendments required that he be provided counsel at no charge. The maximum penalty that could have been imposed was a $500 fine or one year in jail, or both. In *Scott*[8] the Supreme Court held that even though the state statute allowed jail time to be imposed, no jail sentence was imposed therefore the state was not required to provide him with counsel. The significance of this holding is that even though the state was not required to provide counsel, Scott's uncounseled guilty plea could be used against him to enhance the penalty in a later case.

Nichols v. U.S.[9] pushed the *Scott* holding even father. In 1983, Ken Nichols pled nolo contendere to a DUI charge in state court and paid a $250 fine. He was not represented by counsel. In 1990 he pled guilty to a federal drug charge and the guilty plea from 1983 was used to enhance his sentence in federal court. He was imprisoned for more than two years and he appealed to the U.S. Supreme Court. The court held that, "an uncounseled misdemeanor conviction, valid under *Scott*[10] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[11]

Circuit court decisions on admission for prior guilty pleas

Because the U.S. Supreme Court has spoken in this area, the circuit courts are bound by its rulings. Despite this fact, some of the circuit courts have come to different conclusions on the admission of Tribal guilty pleas. It is important to understand these differences, especially for us in the Ninth Circuit, as it can have an effect on how our Tribal court guilty plea cases are resolved.

The Ninth Circuit has held that a guilty plea in the Tribal court was valid because the Tribal court was not required to provide him with counsel.[12]

However, the Ninth Circuit also held that:

> "It is inherently prejudicial to admit a constitutionally infirm plea against a defendant at a subsequent trial on a new offense, it is thus necessary to examine the constitutional validity of Ant's earlier tribal court guilty plea, independent of issues involving tribal law or the ICRA, as if the plea had been made in federal court. Our conclusion is that if Ant's tribal court guilty plea had been made in a federal court, not only would it be constitutionally infirm, but it would also be inadmissible in a subsequent federal prosecution."[13]

Thus, in the Ninth Circuit, a defendant may have a fighting chance to exclude his previous Tribal guilty plea.

The Eighth and Tenth Circuit Courts have held differently. In *U.S. v. Cavanaugh*[14], in the Eighth Circuit, the court held that a federal court may consider a defendant's prior Tribal court convictions, even uncounseled, at least for the purpose of sentence enhancement.

In *United States v. Shavanaux*,[15] the Tenth Circuit held that "tribes are unique political entities that the Bill of Rights may not directly constrain."[16] As a result, a Defendant's Sixth Amendment right to counsel was not violated in Tribal court and

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Practice tips for defense in Tribal court

If you are presented with a client who has a tribal charge and a potential federal charge you may consider taking the following actions:

1. Negotiate the prosecutorial venue: The attorney should attempt to secure a written statement from the federal prosecutor, prior to entering a guilty plea in Tribal court, that he or she will not prosecute the defendant. The Tribal guilty plea is then of no future consequence. Alternatively, some Tribal courts will dismiss Tribal charges in favor of federal prosecution on the same set of facts. This eliminates the possibility of the use of a Tribal guilty plea in federal court.

2. Rehabilitation of the defendant: Consider whether putting your client on the stand to discuss why the client took the plea outweighs the risk.

3. File a motion in limine to suppress or exclude the guilty plea. The guilty plea may contain a compelling reason, such as a due process violation, to exclude or suppress the plea or through Federal Rule of Evidence 403.

If your client has pled guilty in a Tribal court and is now charged federally,

1. Check for due process violations in the Tribal court, especially whether or not he or she was represented by an attorney.

2. Obtain a recording of the Tribal proceeding if possible. (The prosecutor will be required to provide this in discovery but the sooner you have it and can begin planning, the better off you will be.)

3. File a motion in limine to exclude the guilty plea and/or allocution.

4. Make plans to mitigate the impact of the plea/allocution on your case if it is admitted.

If your client is deciding whether or not to plead guilty in Tribal court to a charge with which he or she may be charged federally:

1. Contact the federal prosecutor in your area and find out whether he or she would be willing to sign an agreement not to prosecute on the same charge if your client pleads guilty in Tribal court.

2. If the federal prosecutor will not agree not to prosecute, find out if you can obtain an agreement from the Tribal prosecutor that if the defendant is charged federally the Tribal charge will be dismissed.

3. Consider a jury trial on the Tribal charges. If he or she is found not guilty in Tribal court, it is far less likely that the federal prosecution will happen.

Duty to inform: As a final note, it is the attorney's duty to inform the client prior to his plea that he or she may she may be prosecuted federally and, if he or she is, the plea and allocution will likely be admissible and used in federal court.

so could not be violated again by use of the Tribal convictions in federal courts.

These cases give practitioners three main points to keep in mind:

1. If there were due process violations in Tribal court, use them to exclude the guilty plea from the federal proceeding.

2. If a defendant pled guilty in Tribal court, even without counsel, and did not receive jail time, his guilty plea will most likely be admissible in federal court if there was no due process violation.

3. If the plea was made with attorney representation and if there was no due process violation, there is little question that the plea will be admissible.

What does it mean to me?

Given the above cases, how would you have counseled Mr. Sittre if he came to you after pleading guilty in Tribal court and was thinking of going to trial in federal court?

The answer depends on several factors. These factors are:

1. Was he represented by an attorney when he entered his plea? He entered the plea without counsel.

2. If not, did he receive jail time as a result of his plea? Yes, one year.

3. Was the judge a licensed attorney in any jurisdiction in the United States? Yes.

4. Was the prosecutor an attorney in any jurisdiction in the United States? Yes.

Were any of the defendant's due process rights violated by the Tribal court process that would have been preserved had the plea taken place in federal court? Mr. Sittre's Sixth Amendment rights would have provided counsel in federal court so it is unlikely that the plea would have been admitted in federal court had he elected to go to trial.

In Mr. Sittre's case, he represented himself at the time of the Tribal guilty plea. He had previously been represented by a non-attorney advocate, but had indicated he desired other representation and did not obtain other counsel by the time of sentencing. He stated at the time of sentencing that he was aware of the significance of the proceedings and wanted to proceed pro se.

Because Mr. Sittre was not represented by an attorney and pled guilty in a case in which incarceration time was imposed, his guilty plea would probably be deemed uncounseled, and would probably not have been admissible in his federal court case on the same set of facts. The guilty plea would probably have been admissible pursuant to *Nichols v. U.S.*[17]

if no jail time had been imposed by the Tribal court. The guilty plea would probably have been admissible in federal court pursuant to *Burgett v. Texas.*[18] If Mr. Sittre had been represented by an attorney and pled guilty in Tribal court. Federal courts have at times considered whether or not the judge and prosecutor were attorneys for the sake of due process, however, the most important factor is whether or not the defendant was represented by counsel. If so, the Tribal court guilty plea will most likely be admissible in federal court.

Conclusion

In case it isn't clear yet, the point is this; be extremely careful with Tribal guilty pleas no matter what stage your client is in. The use of a Tribal guilty plea, and possibly the use of the allocution, can destroy a defense case in a trial. The best way to deal with it is to prevent federal use of the Tribal guilty plea if at all possible, and do your best to keep it out if the federal prosecutor is planning on using it.

Fortunately federal public defenders, who are familiar with both the Tribal and federal systems, are present in the federal courts and can be depended on to guide defendants through the process. For private attorneys who have this rare type of case come through the door, take time to research the issues, review the circumstances of the guilty plea with intense scrutiny, prepare the case with your best effort, and hope for the best.

Endnotes

1. *See* Press Release, United States Attorney's Office for the District of Idaho, *Fort Hall Man Sentenced to 27 Months for Involuntary Manslaughter* (May 21, 2014).
2. *United States v. Lara*, 541 US 193 (2004)
3. *Duro v. Reina*, 495 U.S. 676, 693 (1990)
4. *Gideon v. Wainright,* 372 US 335 (1963)
5. Indian Civil Rights Act, 25 U.S.C.§§ 1301-1304
6. *Argersinger v. Hamlin*, 407 US 25 (1972)
7. *Scott v. Illinois,* 440 US 367 (1979)
8. *Scott v. Illinois*, 440 US 367 (1979)
9. *Nichols v. U.S.*, 511 U.S. 738 (1994)
10. *Scott v. Illinois*, 440 US 367 (1979)
11. *Nichols v. U.S.*, 511 U.S. 738 (1994)
12. *US v. Ant*, 882 F. 2d 1389 9th Cir. (1989)
13. *See* Christiana M. Martenson, *Uncounseled Tribal Court Guilty Pleas in State and Federal Courts: Individual Rights Versus Tribal Self-Governance*, 111 Mich. L. Rev. 617 (2013)
14. 643 F.3d 592, 596 (8th Cir. 2011)
15. *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012)
16. Christiana M. Martenson, *Uncounseled Tribal Court Guilty Pleas in State and Federal Courts: Individual Rights Versus Tribal Self-Governance*, 111 Mich. L. Rev. 617 (2013)
17. *Nichols v. U.S* , 511 U.S. 738 (1994)
18. *Burgett v. Texas*, 389 U.S. 109 (1967)

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About the Author

Jason Brown *is a staff attorney with Idaho Legal Aid Services, Inc. in Pocatello. He is a graduate of the University Of Idaho College Of Law with a Native American Law emphasis and, in addition to being a member of the Idaho Bar, is a member of the Shoshone-Bannock Tribal Bar in Fort Hall, Idaho and the Shoshone Arapaho Tribal Bar in Fort Washakie, Wyoming.*

Idaho Tribal State Court Forum Finds Common Ground Among State and Tribal Courts

Hon. Gaylen L. Box

In 1963, pursuant to Public Law 280, Idaho enacted Idaho Code Section 67-5101. This code section created concurrent jurisdiction of tribal and state courts in seven areas: compulsory school attendance, juvenile delinquency and youth rehabilitation, dependent, neglected and abused children, insanities and mental illness, public assistance, domestic relations, and the operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.

This concurrent jurisdiction occasionally created situations where there were conflicting tribal and state court orders and competition for jurisdiction. Procedures for recognizing, respecting and enforcing state and tribal court orders, on and off of reservations, could prove to be complicated, problematic and costly.

As noted by Justice Vernon R. Pearson, (Ret.) Supreme Court of Washington, Chair of the Coordinating Council of the Prevention and Resolution of Jurisdiction Disputes Project:

> Jurisdictional conflicts are costly to court systems and particularly costly to the parties, and these conflicts delay the resolution of other pending matters. Many of these problems can be resolved through informed agreements, informal inter-system working relationships, education, new or revised statutes or court rules, and other methods that a forum arranges or coordinates.

Idaho's Tribal State Court Forum was established in 1993 with a goal of implementing strategies to reduce jurisdictional conflicts between state and tribal courts by facilitating communication among judges of both systems, thus making each court system more effective. By bringing the players together at forum meetings, judges can learn the differences between the respective court systems and discuss ways to bridge those differences. These meetings also allow tribal and state judges to gain knowledge of each other's procedures and practices and foster mutual cooperation and respect.

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The Idaho Supreme Court appoints the Forum's members and the Chief Justice convenes the Forum on an annual basis. Forum meetings have been hosted by the Idaho Supreme Court, University of Idaho College of Law, the Shoshone Bannock, Kootenai, Nez Perce and Coeur d' Alene Tribes. Tribal government officials and the public are welcome to attend Forum meetings.

Idaho has six federally recognized Indian tribes. The Kootenai, Coeur d' Alene, Nez Perce, Shoshone-Bannock, and Shoshone Paiute Tribes have tribal court systems in Idaho. The Northwestern Band of Shoshone occasionally uses the court facilities of the Shoshone-Bannock Tribes at Fort Hall, Idaho. Tribal court judges from these Tribes are invited to participate in the Forum along with state court judges from areas adjacent to the Indian reservations. The United States District Court for Idaho also has a representative on the Forum. The members serve at the pleasure of the Chief Justice of the Idaho Supreme Court. Currently, Professor Angelique EagleWoman of the University of Idaho College of Law serves as a consultant to the Forum, and Judge Fred Gabourie and I serve as co-chairs.

The Forum discusses current issues of importance to tribal and state courts and its agenda includes educational topics such as the Indian Child Welfare Act, relations between governmental agencies, criminal jurisdiction, extradition, juvenile justice issues, Public Law 280 jurisdiction, reciprocity, full faith and credit and comity. The Forum can pass resolutions, comment on legislation and rules, and propose action on relevant topics. As a Supreme Court committee, any such action is forwarded to the Supreme Court's Administrative Conference for consideration.

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The Coeur d'Alene Tribe's Claims in the Coeur d'Alene-Spokane River Basin Adjudication

Dylan R. Hedden-Nicely

In 2008, the State of Idaho commenced the Coeur d'Alene-Spokane River Basin Adjudication (CSRBA).[1] The Coeur d'Alene-Spokane River basin lies within the historic homeland of the Coeur d'Alene Tribe and includes the current Coeur d'Alene Indian Reservation. As trustee for the Tribe, the United States entered the CSRBA and made claims on the Tribe's behalf, which were submitted to Idaho Department of Water Resources on January 30, 2014.[2] IDWR's Director's Report of federal claims was published in March, 2014. The publishing of the Director's Report triggered the objection period for federal claims, which ran until September 29, 2014.[3] The purpose of this article is three-fold. First, it will describe the fundamentals of Indian reserved water rights and how reserved water rights differ from state-based water rights. Second, it will describe the Tribe's claims in the CSRBA. It will close with a discussion on negotiation of tribal claims.

> The legal basis for Indian reserved water rights is derived from the treaties, executive orders, and/or congressionally ratified agreements (operative documents) between each Tribe and the United States.[4]

The fundamentals of Indian water rights

In most cases, the right to use water is acquired pursuant to state law. Indian reserved water rights are an important exception to this general principle as they are vested pursuant to federal law. Specifically, the legal basis for Indian reserved water rights is derived from the treaties, executive orders, and/or congressionally ratified agreements (operative documents) between each Tribe and the United States.[4] Most of these operative documents are silent regarding water rights. That silence was first addressed in *U.S. v. Winters*,[5] when non-Indian irrigators began damming and diverting water from the Milk River, a water source for the Fort Belknap Reservation in Montana.[6]

The basis of the case was a congressionally ratified agreement between the Tribes and the United States, which made no mention of water rights.[7] Nonetheless, the Supreme Court found the agreement implied a water right sufficient to make the reservation "valuable or adequate."[8] The Court reaffirmed that a "treaty is not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted[:]"[9]

> [t]he Indians had command of the lands and waters, - command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . . Neither view is possible."[10]

Since *Winters* the Supreme Court has repeatedly reaffirmed that "when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."[11]

State water rights vs. Indian reserved water rights

Decreed state and federal water rights are administered together in Idaho, making the distinctions between the two important for Idaho water users and managers. Idaho is a prior appropriation state;[12] the older the water right, the more "senior" the water right. During times of shortage, water is administered according to priority with the most senior water rights being serviced first.[13] When purely applied, prior appropriation is a harsh system; junior water right holders receive *no* water until all more senior holders receive their full allocation.

In order to acquire a state-issued water right, users must divert water and put it to a beneficial use.[14] The quantity appropriated is the amount actually put to a beneficial use.[15] In contrast, Indian water rights are reserved; actual use is not necessary to

perfect them.[16] Further, unlike state water rights, Indian water rights are not subject to forfeiture for non-use.[17] Finally, the quantity reserved is the amount necessary to fulfill the purpose of the reservation rather than the amount necessary for a particular beneficial use.[18]

Though administered together in order of priority, the means for determining the priority date of state versus federal reserved water rights are different. The priority date of a state-issued right is the date application for a permit was made, or for water rights that predate Idaho's mandatory permitting and licensing system, the date the water was first put to beneficial use.[19] In contrast, the priority date for Indian water rights is the creation of the reservation[20] or, if the water right is necessary for a traditional use of water, time immemorial.[21]

The McCarran Amendment and state court general stream adjudications

Because Indian water rights are implied they typically must be quantified by a court or through settlement precipitated from litigation. Of late, this is usually done via a general stream adjudication, which is a "comprehensive determination of the nature, extent and priority of the rights of [all] users of surface and ground water . . . ."[22] General stream adjudications are the only way that federal and tribal water rights can be quantified in state court. As sovereigns, both the United States[23] and Indian tribes are generally immune from suit.[24] In 1952 Congress passed the McCarran Amendment, which gave consent for the United States to be joined "as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source . . . where it appears the United States is the owner of . . . water rights by appropriation under State law, by purchase, by exchange, or otherwise . . . ."[25]

The Supreme Court held that the McCarran Amendment granted state court jurisdiction over Indian water rights because "viewing the governments' trusteeship of Indian rights as ownership," the United States is "otherwise" the owner of Indian water rights.[26] The McCarran Amendment did not waive tribal sovereign immunity but tribal water rights can be quantified without their participation.[27] The Coeur d'Alene Tribe has not entered the CSRBA. Instead, the United States, as the Tribe's trustee, has filed claims on the Tribe's behalf.

Important for interstate hydrologic basins such as the Coeur d'Alene-Spokane Basin, Congress expressly disclaimed any waiver of the sovereign immunity of the United States "in any suit or controversy in the Supreme Court of the United States involving the right of states to the use of the water of any interstate stream."[28] The Supreme Court has yet to address how it would treat a federal reserved water right that had previously been decreed in a general stream adjudication by one of the states involved in an interstate water rights adjudication.

The claims filed by the United States on behalf of the Coeur d'Alene Tribe

A companion piece in this edition of *The Advocate* entitled "The Coeur d'Alene Tribe's Enduring Relation to Water - A Legal History" details the Coeur d'Alene Tribe's longstanding connection to the water within its territory and the steps the Tribe has taken to protect and manage water and other natural resources within the Basin. That history informed the Tribe as it worked with the United States to develop its claims in the CSRBA. Table 1 shows the 353 claims that have been filed to reserve sufficient water to fulfill the "overall purpose of establishing the [Coeur d'Alene] Reservation as a permanent homeland for the Coeur d'Alene people."[29]

The Tribe's claims may be categorized as either consumptive (61 claims) or non-consumptive (the remaining 292 claims). As applied here, a consumptive water right is the right to remove water from a source and use it such that it is not returned whereas a non-consumptive water right is the right to ensure water remains in its natural place.

Type of Claim	Number of Claim Forms	Total Water Claimed
Domestic, Commercial, Municipal, Industrial (DCMI)	17	7,453 acre-feet per year (AFY) plus 979 wells with use up to 13,000 gallons per day
Instream Flows	72	Monthly cubic feet per second
Irrigation	44	17,815 AFY
Coeur d'Alene Lake	1	Natural Lake Elevation
Springs	24	21.6 AFY
Wetlands	195	7,102 AFY

Table 1: Summary of the claims filed by the United States on behalf of the Coeur d'Alene Tribe.

Consumptive use claims

The first consumptive water right claims are for irrigation water. The Tribe is entitled to a water right to irrigate all "practicably irrigable acreage" (PIA).[30] PIA acres consist of all lands currently irrigated, as well as those lands not currently irrigated if they are (1) arable - the soil is capable of growing a crop; (2) irrigable - water can reach the land; and (3) economically viable - the economic benefit of irrigating the land is greater than the cost.[31] This is a complex and exacting criteria; the analysis is done on an acre-by-acre basis by a team of technical and economic experts. A water duty is applied to each PIA acre to arrive at the final water right claim. The claimed priority date for these water rights is November 8, 1873 - the creation of the Reservation.

The United States also made claims for current and future tribal Domestic, Commercial, Municipal, and Industrial (DCMI) water uses. Water for DCMI uses are from both groundwater and surface water and are necessary to maintain the Coeur d'Alene homeland into perpetuity. Current DCMI needs include, but are not limited to, water for the Tribe's casino, hotel, and golf course,[32] as well as water for current domestic use. The United States also claimed water for future DCMI needs, including planned commercial and industrial projects as well as 979 future domestic wells necessary to provide water for future tribal members. To make this claim, the United States did extensive statistical analysis to estimate future tribal population. In determining quantity, the United States mirrored Idaho law and claimed 13,000 gallons per well per day.[33]

The Tribe claimed a total of 25,268 acre feet per year for consumptive water rights. In comparison, the Shoshone-Bannock Tribes of the Fort Hall Reservation agreed to a water right to "divert up to 581,031 [acre-feet per year] . . . for present and future irrigation, DCMI, instream flow, hydropower, and stockwater . . . ."[34] The Nez Perce Tribe agreed to a total consumptive water right of 50,000 acre-feet per year.[35]

Also consider the total volume of *surface* water available in the basin. According to tribal hydrological analysis, the total volume of surface water originating on the Reservation is approximately 300,000 acre-feet per year while the volume originating in the St. Joe and Coeur d'Alene River Basins is approximately 4.5 million acre-feet per year.[36] The tribal consumptive claim is for approximately 7.7% of the surface water originating on the reservation and 0.6% of the water available from the St. Joe and Coeur d'Alene Rivers.[37]

The tribal consumptive claim is for approximately 7.7% of the surface water originating on the reservation.

Non-consumptive claims

The United States claimed non-consumptive water rights for a variety of purposes including cultural uses and the preservation of reservation plants, fish, and wildlife. The claims are for water to maintain seeps, springs and wetlands, as well as instream flows and a lake elevation claim for Lake Coeur d'Alene. Because these water right claims are necessary to fulfill uses that predate the creation of the Coeur d'Alene Reservation, each has a claimed priority date of time immemorial.[38]

The United States filed 219 claims on behalf of the Coeur d'Alene Tribe for water rights to protect seeps, springs, and wetlands distributed throughout the reservation and located exclusively on tribal lands. These claims are necessary to "provide for Tribally-harvested game and waterfowl habitat, Tribal plant gathering, and other Tribal traditional, cultural, spiritual ceremonial, and/or religious uses."[39] These uses continue to be critical to the identity of the Coeur d'Alene People. Despite the number of claims, the total volume claimed is for 7,123.6 acre-feet of water per year, which averages to 32.5 acre-feet per year per claim.

The United States filed 72 claims for instream flows necessary to maintain a healthy habitat for on-Reservation adfluvial trout that live in the Lake but spawn in tributary streams.[40] The "resident fishery was a main staple of the Tribe's diet" at the time the Coeur d'Alene Reservation was created[41] and tribal members continue to rely on this resource today. In developing this claim, federal and tribal experts coordinated to conduct extensive hydrological and biological analysis to estimate monthly minimum flows for each of the 72 claim reaches. A majority of these claims are for stream reaches located in rural portions of the Basin where

little water use is currently taking place. However, because fish from the Lake must travel on the larger rivers in order to reach the headwater spawning grounds, claims were also made for flows in the mainstem reaches of the Coeur d'Alene and St. Joe Rivers.

Finally, the United States claimed a sufficient flow into Lake Coeur d'Alene to maintain the Lake's natural monthly elevation and outflow. The term "natural elevation" is used to represent the elevation that would occur but for control by the Post Falls Dam. However, this claim does not seek to alter present licensed management of the Lake's elevation. The water right would take effect only if the Lake's elevation were to fall *below* the elevation claimed. Any water above that minimum elevation would be available for other uses. As Figure 1 shows, the claim ranges between five and eight feet below the average summertime elevation when water demand is highest. The volume available between 2120 and 2128 feet is estimated to be approximately 275,000 acre-feet,[42] which would be available for other uses.

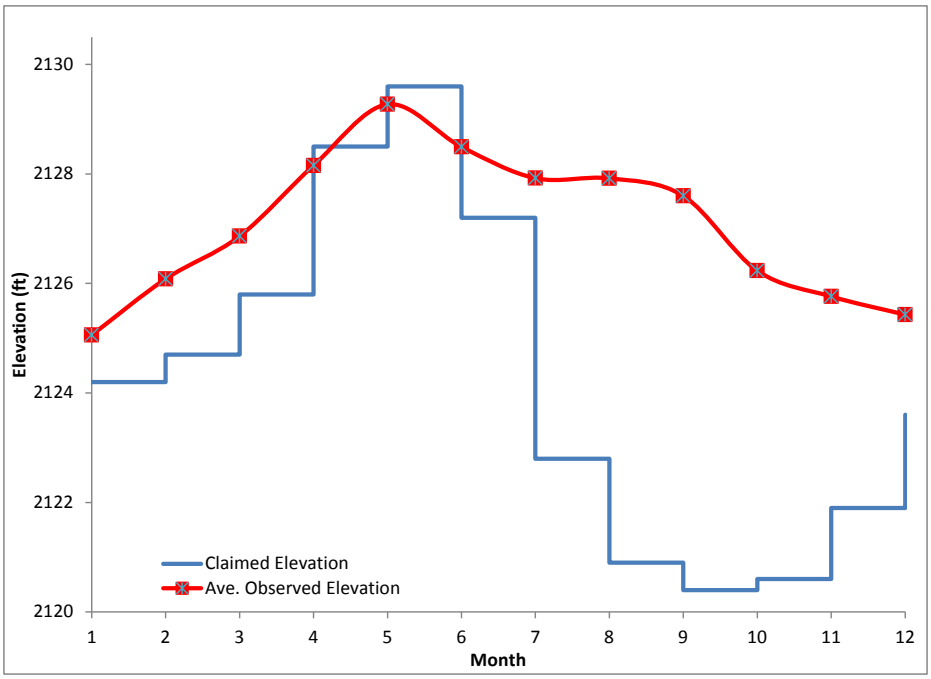

Figure 1: Claimed vs. observed elevation, Lake Coeur d'Alene, ID.

Why negotiate tribal claims?

The 2014 Idaho Legislature unanimously passed House Concurrent Resolution 62 (HCR 62) directing "the Governor and the Attorney General, to attempt to negotiate. . . a resolution of the nature and extent of the reserved water rights claims of the Coeur d'Alene Tribe."[43] With the passage of HCR 62 all three sovereigns have signaled their willingness to engage in negotiations. Local municipalities, businesses, utilities, and other stakeholders have indicated support as well. However, for negotiations to be successful, *all* interested CSRBA claimants must buy into the process. HCR 62 directed "the Governor [and the AG to] develop a process . . . for equal and open participation in the negotiations by claimants [in the CSRBA.]"[44] This opens the door for any claimant to attempt to derail the settlement process.

Conflict is inevitable in a case as large and complex as a water rights adjudication. Every user is making claim to a unitary and finite resource. However, these realities underscore why negotiation is the preferred approach. The cost for water rights litigation has been estimated to average three times as much as negotiation *per year*.[45] Further, while most negotiations involving Indian Tribes are typically resolved within five to ten years,[46] water rights litigation has been known to commonly last up to fifty years.[47] As the United States Supreme Court has cautioned, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law,"[48] making it very difficult to be flexible in the outcome. Litigation poses significant risk to all parties. There is no "sensitivity" to junior water users in litigation.[49]

In contrast, settlement is less time consuming and less expensive. At a recent conference to celebrate the end of the Snake River Basin Adjudication (SRBA), speakers credited successful tribal settlements for the relatively quick and inexpensive conclusion of that case. Many believed that but for those settlements, the SRBA would still be in its infancy today.[50]

Further, settlements can be flexible enough to account for the unique characteristics of the region. Both the United States and the Tribe have sovereign immunity from any future interstate adjudication. Settlement in this case has the potential to forge a partnership capable of keeping water in Idaho. Additionally, negotiated agreements provide procedural safeguards since they must be ratified by the Tribal Council, the Idaho Legislature, and the U.S. Congress,

as well as be approved by the Court before going into effect. A negotiated settlement provides the opportunity to forge a lasting relationship amongst all basin stakeholders and allow for effective and cooperative water management into the future.

Conclusion

The Coeur d'Alene Tribe's history is one of water. The CSRBA represents the latest episode in the Tribe's continuing effort to protect its rights and natural resources and is the Tribe's one opportunity to make claims for all current and future water needs for the Coeur d'Alene People. Accordingly, the Tribe has coordinated closely with the United States to make water rights claims for a sufficient quantity of water to fulfill the homeland purpose of the Coeur d'Alene Reservation. We now approach a crossroads where the scope of the Tribe's claims can be litigated or negotiated. The Tribe has demonstrated success in litigating these issues of great importance but maintains its policy of seeking negotiation first. Litigation is a risky and inflexible zero-sum game that is time consuming and extremely costly to all involved. In contrast, negotiated agreements provide an opportunity to structure a stable, cooperative solution that attempts to minimize impacts, maximize benefits, and coordinate outcomes and implementation.

Endnotes

1. *In Re: The General Adjudication of Rights to the Use of Water From the Coeur d'Alene-Spokane River Basin Water System*, No. 49576 (Nov. 12, 2008).

2. Letter from Vanessa Villard, Department of Justice, to Gary Spackman, Director of the Idaho Department of Water Resources re The United States' Claims on Behalf of the Coeur d'Alene Indian Tribe (January 30, 2014).

3. *Notice of Filing Federal Reserved Water Right Claims in the Coeur d'Alene-Spokane River Basin Adjudication*, No. 49576 (Mar. 27, 2014).

4. *Winters v. United States*, 207 U.S. 564 (1908).

5. *Id.*

6. *Id.* at 565.

7. *Id.* (citing Acts of the Fiftieth Congress, first session, Ch. 213. 1888).

8. *Id*. at 576.

9. *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

10. *Winters*, 207 U.S. at 576.

11. *Cappaert v. U.S.*, 426 U.S. 128, 139 (1976).

12. Idaho Const Art. XV § 3.

13. *Id*.; I.C. § 42-106 (1900).

14. I.C. § 42-101 (1900).

15. *Id.*

16. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

17. *Id.* at 51.

18. *Cappaert*, 426 U.S. at 138.

19. I.C. § 42-219 (1903).

20. *Cappaert*, 426 U.S. at 138. *See also*, *United States v. Idaho*, 131 Idaho 468, 472 (1998).

21. *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

22. I.C. § 42-1406B (2006).

23. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

24. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2013).

25. 43 U.S.C. § 666 (1952).

26. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 810 (1976).

27. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n. 17 (1983).

28. 43 U.S.C. § 666 (1952).

29. V. Willard, note 2.

30. *Arizona v. California*, 373 U.S. 546 (1963).

31. *Id*. at 155-56.

32. Combined, the Coeur d'Alene Hotel and Casino, along with Circling Raven Golf Course are one of the largest employers in North Idaho.

33. I.C. § 42-111 (1899).

34. The 1990 Fort Hall Indian Water Rights Agreement By and Between The Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, the State of Idaho, the United States, and Certain Idaho Water Users 17 (1990). While the water right contemplated includes non-consumptive uses such as instream flow and hydropower, the Agreement makes clear that the consumptive right is for 581,031 acre-feet per year but the Tribe may elect to forego diverting some of that water in favor of instream purposes, if it so chooses. *See id.* at 46-55.

35. Mediation between the Nez Perce Tribe, the State of Idaho, the United States, and Other Water Users Mediator's Term Sheet at § 1(A). *Available at*: http://www.srba.state.id.us/FORMS/Mediator%20term%20sheet.pdf. This term sheet was ultimately incorporated into the final decree of the Snake River Basin Adjudication.

36. Stetson Engineers, General Natural Flow Study for the Coeur d'Alene Tribe, Idaho (2010).

37. These figures do not include groundwater or water available in Kootenai County outside the Reservation, St. Joe, and/or the Coeur d'Alene Rivers.

38. *Adair*, 723 F.2d at 1414.

We now approach a crossroads where the scope of the Tribe's claims can be litigated or negotiated.

39. *Id*.

40. A table showing the monthly flow claimed for each stream reach is on file with the author. The claims may also be obtained from the SRBA Court.

41. *United States and Coeur d'Alene Tribe v. Idaho*, 95 F. Supp.2d 1094, 1100 (D. Idaho 1998).

42. *Order Issuing New License and Approving Annual Charges for Use of Reservation Lands*, 127 FERC ¶ 61,265 (2009).

43. H.C.R. 62, 67th Leg., 2d Reg. Sess. (Idaho 2014).

44. *Id.*

45. *See e.g.*, https://docs.google.com/viewer?url=http://www.cskt.org/tr/docs/negotiation-vs-litigate-printable.pdf?time=0

46. For example, the negotiations leading to the Fort Hall Agreement took approximately five years while a final resolution to the Nez Perce claims, which involved both litigation and negotiation, lasted fourteen years.

47. *See e.g. Arizona v. California*, 373 U.S. 546 (1963) (litigation began in 1952 and is ongoing); *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (1988) (adjudication began in 1977 and is ongoing); *U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1984) (litigation began in 1975; the most recent settlement was reached in early 2014 but is subject to ratification); *Washington v. Acquavella*.100 Wash.2d 651 (1983) (adjudication began in 1977).

48. *San Carlos Apache*, 463 U.S. at 571.

49. *Cappaert*, 426 U.S. at 139.

50. Understanding the SRBA Resolution - A Foundation for Idaho & National Water Policy. A Celebration of the Conclusion of the Snake River Basin Adjudication, Boise, ID (August 25, 2014).

The Tribe has demonstrated success in litigating these issues of great importance but maintains its policy of seeking negotiation first.

About the Author

Dylan R. Hedden-Nicely *is an attorney with Howard Funke & Associates, P.C. He practices in the areas of Native American natural resources and water law. He is admitted to practice in Idaho and in the United States District Court, District of Idaho. He received his J.D., magna cum laude, from the University of Idaho with Emphases in Native American Law and Environmental and Natural Resources Law in November 2011. He also received an M.S. from the University of Idaho in Water Resources - Science and Engineering in November 2012.*

The Coeur d'Alene Tribe's Enduring Relation to Water — A Legal History

Dylan R. Hedden-Nicely

"Water is the life of all of us."[1]

The Coeur d'Alene Tribe is inextricably linked to the water flowing through the Coeur d'Alene Indian Reservation. Documented and oral history demonstrate a deep connection between the Tribe and the water in the Coeur d'Alene-Spokane River Basin. Much of that history, in particular the history leading up to and during the Reservation Era, has been recounted by the Idaho Federal District Court[2] as well as the United States Supreme Court in *Idaho v. United States*.[3] The purpose of this article is to briefly highlight relevant history to provide context to the claims made on behalf of the Tribe in the Coeur d'Alene-Spokane River Basin Adjudication.[4]

The Coeur d'Alene Tribe originally inhabited an area of more than 3.5 million acres, which included the entire Coeur d'Alene-Spokane River Basin within Idaho.[5] "[T]he Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival."[6] More specifically, "[t]ribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities."[7] Just as important, "[t]he Tribe's spiritual, religious and social life centered around the Lake and rivers."[8] Tribal members "depended on watercourses in their manner of self-identification, language and religious practices."[9] Accordingly, "[a] right to control the lakebed and adjacent waters was traditionally important to the Tribe …."[10]

> "A purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource."[16]
>
> — *United States and Coeur d'Alene Tribe v. Idaho*

The Tribe's efforts during the reservation era

The Reservation Era began in Coeur d'Alene Country in 1867 when President Johnson set aside a reservation for the Tribe without its knowledge. The Tribe rejected that reservation because of its "failure to make adequate provision for fishing and other uses of important waterways."[11] The Tribe sent a petition to the U.S. government in which it "insisted" on a different reservation that included key river valleys.[12]

In 1873, the United States and the Tribe agreed on a reservation that included the Hangman Valley, portions of the Coeur d'Alene and St. Joe Rivers, and all but a small sliver of Lake Coeur d'Alene.[13] Article One of the 1873 Agreement guaranteed that "the water running into said reservation shall not be turned from their natural channel where they enter said reservation."[14] One U.S. negotiator noted that "[w]e found that the Indians *demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River."[15] In other words, "a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource."[16]

The 1873 Agreement was not ratified by Congress. However, President Grant issued an Executive Order, with "[a]n object of the 1873 Executive Order [being], in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement."[17]

As of 1885, "Congress had neither ratified the 1873 agreement nor compensated the Tribe" for ceding its aboriginal territory.[18] The Tribe once again petitioned for an agreement, and renewed negotiations commenced in 1887. The parties reached an agreement, which reaffirmed the 1873 reservation boundaries and the cession of territory outside that reservation. Article five of the 1887 Agreement states:

> [i]n consideration of the foregoing cession … the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians … no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."[19]

Rather than immediately ratify the 1887 Agreement, the Senate directed the Secretary of Interior "to inform the Senate as to the present area and boundaries of the Coeur d'Alene Indian Reservation … [and] whether such area includes any portion . . . of the *navigable waters* of

Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers . . . ."[20] The Commissioner of Indian Affairs, responding for the Secretary, stated that "the [1873] reservation appears to embrace [almost] all the navigable waters of Lake Coeur d'Alene," and that "[t]he St. Joseph River also flows through the reservation."[21] In response, Congress directed the Secretary of the Interior to negotiate "for the purchase and release . . . of such portions of its reservation . . . as such tribe shall consent to sell."[22]

In 1889, the Tribe and the United States negotiated for the reduction of the 1873 Reservation. While most terms were reached, including the cession of the northern third of the Reservation's uplands, there was never agreement regarding price or the acreage to be sold. Nonetheless, the 1887 Agreement and 1889 Agreement (as drafted by the U.S. negotiators) were ratified together by Congress in 1890.[23]

Allotment comes to the Coeur d'Alene Reservation

Notwithstanding non-Indian encroachment and federal pressure for land, the Tribe flourished during this era. In 1887, U.S. negotiating agents told the Tribe they "did not expect to see [tribal children] ahead of the whites as I see them here" and that the Tribe had "the finest schools, the best community that I have seen among Indians."[24] The agents concluded that "[y]ou will soon need nothing from the government . . . [y]ou will have no use for Government farmers, smiths, doctors, or agents; you can get things without aid."[25] In 1889, U.S. agents observed "[tribal farms] surrounded by better fences than their neighbors, the whites, burdened with golden grain that gave promise of a rich harvest; horses and cattle in large numbers peacefully grazing upon hills covered with bunch-grass, made a picture truly pleasant to contemplate."[26]

Things came to an abrupt change in 1906 when Congress unilaterally allotted the Reservation despite unanimous and vehement objection by the Tribe.[27] Through allotment, the collective ownership of the reservation was dissolved and each tribal member was allotted 160 acres.[28] Of the roughly 345,000 acres within the 1889 Reservation, 104,000 acres were allotted to tribal members. The remaining 241,000 acres were declared "surplus" and made available to non-Indians under the Homestead Act.[29] Despite the promise by the United States that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation,"[30] the Tribe lost almost two-thirds of its reservation land by 1909.

The Tribe was devastated by the disruption and poverty caused by allotment.[31] It took many years to reassert its sovereignty, particularly over water within the reservation.[32] In 1907 Washington Water Power Company (now Avista) flooded Lake Coeur d'Alene, the Spokane River, the Coeur d'Alene River, and the St. Joe River with six and a half feet of water without notice to the Tribe.[33] Flooding was increased to eight feet in 1941.[34] During this era the State of Idaho also began issuing water rights in the Basin pursuant to state law, including within the Reservation.

The tribe reasserts its right to control and protect water within the reservation

Despite allotment and its subsequent effects, the Tribe continued to assert its reserved rights. A major milestone in that effort occurred in 1991 when, after overtures for negotiation were rejected, the Tribe filed suit against the State of Idaho in U.S. District Court claiming ownership of the submerged lands of Coeur d'Alene Lake and its tributaries within the original 1873 Reservation boundary.[35] The District Court held that 11th Amendment immunity barred suit and the U.S. Supreme Court affirmed.[36] However, the Supreme Court made clear "[o]ur recitation of the ties between the submerged lands and the State's own sovereignty . . . is not in derogation of the Tribe's own claim. As the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right."[37]

Through allotment, the collective ownership of the reservation was dissolved and each tribal member was allotted 160 acres.[28]

The United States, as trustee for the Tribe, brought its own case against Idaho in 1998 seeking to quiet title to the southern third of Lake Coeur d'Alene and the portion of the St. Joe River within the 1889 Reservation boundary.[38] The Tribe intervened and the Federal District Court quieted title in favor of the United States as trustee for the benefit of the Tribe, "to the beds and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation."[39] Additionally, the Court found that the U.S. and Tribe are "entitled to the exclusive use, [and] occupancy" of those submerged lands and that "the State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to [those] bed and banks . . . ."[40] The United States Supreme Court affirmed, recognizing that "the submerged lands and related water rights had been continuously important to the Tribe . . . ."[41]

Simultaneous to its initial lake case in 1991, the Tribe opened a second front to address contamination flowing into the Lake from the Silver Valley.[42] After requests for negotiations were rejected, the Tribe filed a Natural Resources Damages (NRD) suit against the 10 largest polluters in the Valley.[43] The United States filed its own suit in 1996, which was consolidated with the Tribe's.[44] In 2003, the Federal District Court apportioned liability among the polluters based upon their respective contribution to the hazardous waste stream.[45] The court subsequently determined the Tribe is a trustee "for the purposes of CERCLA over the federal and tribal land as well as the migratory natural resources of: fish, wildlife, birds, biota, water and groundwater based on their involvement in the management and control of such natural resources."[46] The eventual consent decree settlements resulted in approximately $1 billion to restore natural resources and protect human health in the region

In 2005 the Tribe was granted Treatment in the Same Manner as a State (TAS) status by the EPA,[47] which allows the Tribe to "administer the water quality standards for those waters of Coeur d'Alene Lake and the St. Joe River within the Coeur d'Alene Reservation . . . ."[48] The EPA approved the Tribe's water quality standards on June 12, 2014.[49] The Tribe also jointly developed a Lake Management Plan in 2009 with the Idaho Department of Environmental Quality. The purpose of the LMP is to limit nutrients introduced to the Lake in an effort to manage *in situ* metals contamination from the Silver Valley.[50]

After requests for negotiations were rejected, the Tribe filed a Natural Resources Damages (NRD) suit against the 10 largest polluters in the Valley.[43]

In 2009, as part of its relicensing process for the Spokane River Project, Avista entered into a comprehensive agreement with the Tribe to resolve a range of issues related to Avista's storage of water on Lake Coeur d'Alene. Those issues included Avista's historic trespass by flooding tribal submerged lands without permission from the Tribe, as well as its current and future use of tribal waters, submerged lands, and other lands within the Reservation.[51] Among other things, that agreement provides funding to protect and restore trust resources, including lands, river bank erosion, cultural resources, aquatic weed control, wetland/riparian habitat, and water quality.[52] Avista also applied for a Water Storage/Use Permit from the Tribe, issued pursuant to Tribal Code, to store and use water for hydropower generation and other purposes on the Lake and St. Joe River within the Reservation.[53]

This history demonstrates the Tribe's commitment, from before first contact with non-Indians to present, to the continued management, protection, and enhancement of the water within the Coeur d'Alene Reservation, particularly the Lake and St. Joe River. Now the Tribe must address the issues in the CSRBA: the latest chapter of this long history.

Endnotes

1. Felix Aripa, Coeur d'Alene Tribal Elder.

2. *United States and Coeur d'Alene Tribe v. Idaho, 95* F.Supp.2d 1094, 1101 (D. Idaho 1998) [hereinafter *D. Idaho Opinion*].

3. *Idaho v. United States*, 533 U.S. 262 (2001) [hereinafter *Idaho II*].

4. Those claims, as well as a discussion on the fundamentals of Indian water rights in general, is the subject of a companion piece found in this edition of *The Advocate* entitled "The Coeur d'Alene Tribe's Claims in the Coeur d'Alene-Spokane River Basin Adjudication."

5. *Idaho II*, 533 U.S. at 265.

6. *D. Idaho Opinion*, 95 F.Supp.2d at 1101.

7. *Idaho II* at 265.

8. *D. Idaho Opinion* at 1101.

9. *Id.* at 1102.

10. *Idaho II* at 274.

11. *Id.* at 266.

12. *Id.*

13. *D. Idaho Opinion* at 1095-96.

14. *Id.* at 1105.

15. T.W. Bennett, *Letter to the Editor of the Idaho Signal* (September 18th, 1873) (emphasis in original) (on file with author).

16. *D. Idaho Opinion* at 1109.

17. *Id.*

18. *Idaho II* at 267.

19. *Id.* at 267-68 (quoting the 1887 Agreement).

20. *Id.* at 268; *D. Idaho Opinion* at 1111-12.

21. *Idaho II* at 268.

22. Act of Mar. 2, 1889, ch. 412 § 4, 25. Stat. 1002.

23. *Idaho II* at 270.

24. United States. Congress. House. *Reduction of Indian Reservations*. House Executive Document No. 63. 50th Congress, 1st Session. Washington D.C.: Government Printing Office, 1888.

25. *Id.*

26. Report of the Coeur d'Alene Indian Commission (1889) (on file with the author).

27. 34 Stat. 325, 334 (1906).

28. *Id.*

29. *Id.*

30. *Idaho II* at 267-68 (quoting the 1887 Agreement).

31. For an in-depth account of the effects of the Allotment Policy on Indian tribes throughout the United States, *see* Judith Royster, *The Legacy of Allotment* 27 Ariz. St. L. J. 1, 10-14 (1995).

32. *See e.g.*, Petition to Intervene by Coeur d'Alene Tribe Before the Federal Power Commission 9 (1973) (available with the author), Federal Energy Regulatory Commission, *Order on Remand, Determining Lack of Authority, and Vacating Prior Orders* (1988) (available with the author).

33. *See* Idaho Department of Water Resources, Claim to a Water Right No. 95-9115 (2002).

34. *See id.*

35. *See Coeur d'Alene Tribe v. Idaho*, 798 F.Supp. 1443 (D. Idaho 1992).

36. *U.S. v. Idaho*, 521 U.S. 261 (1997).

37. *Id.* at 287.

38. *D. Idaho Opinion* at 1094. That case did not place the northern two-thirds of the Lake or the submerged lands within Heyburn State Park at issue.

39. *Id.* at 1117.

40. *Id.*

41. *Idaho II* at 275.

42. Dept. of Envtl. Quality and Coeur d'Alene Tribe, Coeur d'Alene Lake Management Plan 5 (2009).

43. *Coeur d'Alene Tribe v. Gulf Resources*, No. 3:1991cv00342 (1991).

44. *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F.Supp.2d 1094 (D. Idaho 2003).

45. *Id.*

46. *United States v. Asarco Inc.*, 471 F.Supp.2d 1063 (D. Idaho 2005).

47. Letter from Ronald A. Kreizenbeck, Acting Regional Administrator for EPA Region 10, to Chief J. Allan, Chairman of the Coeur d'Alene Tribe (August 5, 2005) (on file with author).

48. *Id.*

49. Letter from Daniel D Opalski, Director, EPA Office of Water and Watersheds, to Chief J. Allan, Chairman of the Coeur d'Alene Tribe (June 12, 2014) (on file with author).

50. DEPT. OF ENVTL. QUALITY AND COEUR D'ALENE TRIBE, COEUR D'ALENE LAKE MANAGEMENT PLAN (2009). *See also*, Dylan R. Hedden-Nicely, *Gauging the Success of the Coeur d'Alene Lake Management Plan: an Example of Tribal-State Cooperation*, The Advocate, Vol. 56, No. 8 (August 2013) at 23.

51. *Order Issuing New License and Approving Annual Charges for Use of Reservation Lands*, 127 FERC ¶ 61,265 (2009).

52. *Id.* at Appendix D.

53. Coeur d'Alene Tribe, Department of Lake Management, Water Storage/Use Permit No. 2008-01 (2008) (on file with author).

About the Author

Dylan R. Hedden-Nicely *is an attorney with Howard Funke & Associates, P.C. He practices in the areas of Native American natural resources and water law. He is admitted to practice in Idaho and in the United States District Court, District of Idaho. He received his J.D., magna cum laude, from the University of Idaho with Emphases in Native American Law and Environmental and Natural Resources Law in November 2011. He also received an M.S. from the University of Idaho in Water Resources - Science and Engineering in November 2012.*

A Tradition of Excellence in Native American Law at the University of Idaho College of Law

Prof. Angelique EagleWoman
(Wambdi A. WasteWin)[1]

Over the years, the University of Idaho College of Law has offered courses on Native American law topics to prepare law students for legal practice in the state, region, and on the national level. Prior to 2008, courses were offered by such distinguished professors of law such as Emeritus Professor Dennis Colson; Former Interim President, Former Dean and Professor Donald Burnett, Jr.; current Judge of the Nez Perce Tribal Appellate Court Douglas Nash; and water law expert Professor Barbara Cosens.

This tradition expanded with the addition of Professor Angelique EagleWoman to the law faculty in the fall of 2008. Building on the foundations of the on-going commitment to prepare practice-ready law students, the Native American Law program has developed into an academic emphasis area with an active cohort of law students involved in the UI chapter of the Native American Law Student Association (NALSA).[2]

The Native American Law emphasis

With the official launch of the Native American Law (NAL) Emphasis in the fall of 2009, UI law students have had the option of applying for the Emphasis and selecting a track of concentration for their studies. The four tracks available are: Economic Development, Governance, Family Law, and Natural Resources Management.

NAL Emphasis students are required to complete a minimum of six credits in Native American Law specific courses and a minimum of six credits in courses related to the Emphasis track.

Within the three-year J.D. program, students accepted into the Emphasis must successfully complete the academic requirements to receive the Emphasis designation on the law school transcript. NAL Emphasis students are required to complete a minimum of six credits in Native American Law specific courses and a minimum of six credits in courses related to the Emphasis track.

As part of the intellectual engagement with the field, NAL Emphasis students must also complete a legal research paper. A final requirement is to complete an experiential component with a minimum of 20 hours under the supervision of an attorney working on a Native American law issue. In the summer of 2012, the Tribal Summer Externship program was introduced to allow academic credit for Emphasis students in summer externship placements with Tribal governments, Tribal courts, and Tribal natural resource departments under the authority of a supervising attorney.[3] The externship program is an option for NAL Emphasis students to complete the experiential component requirement.

As of the 2014 May graduation, there have been 27 NAL Emphasis graduates. The total number of Emphasis graduates per year is as follows: 2010 - two graduates; 2011 - eight graduates; 2012 - six graduates; 2013 - five graduates; and 2014 - six graduates.

These law students engaged in legal research in the field of Native American law and produced substantial research papers spanning the field. Paper topics have involved criminal law issues on the following topics: sexual assault and domestic violence responses in Indian Country; jury selection issues for Native American defendants in state courts; the economic impacts of multiple law enforcement authorities on tribal lands; and consideration of the retrocession of Public Law 280[4] criminal jurisdiction in Idaho.[5]

Other students have focused on land issues, such as: the consequences of condemnation of tribal trust property; the overlap of mining activities and tribal sacred sites on federal public lands; and the legal issues involved with easements through tribal trust lands.

Several students have chosen paper topics involving tribal water

stewardship issues, such as: in-stream tribal water rights based on treaty provisions, legal issues involving the Lower Snake River dams; tribal input in the renewal of the Columbia River Treaty; and surveying tribal water law settlements across regions.

A particular research paper worth mentioning was written by Ashley Ray (Class of 2014) regarding a conflict between two Tribal Nations asserting authority over an ancestral burial ground and whether a federal court would provide an adequate dispute resolution process. Her paper was accepted for publication in the American Indian Law Journal of Seattle University School of Law and published in final form as, "Preservation Over Profits: The Conflicting Interests Of Hickory Ground and Exploring Options For Preserving the Sacred Parcel."[6]

As varied as the paper topics have been, law students have also sought out an array of experiences for the Emphasis experiential component. Students have assisted tribal attorneys in various tribal government's in-house legal counsel departments; worked alongside tribal prosecutors, civil attorneys, and judges in Tribal Courts; helped in state public defender and prosecutorial offices on Native American law issues; served as Tribal Court Appointed Child Advocates in family law cases; and contributed to the work of tribal gaming and legislative attorneys.

A few notable experiences include Sally Butts (Class of 2011), who served as an intern in Washington, D.C. for the National Native American Graves Protection & Repatriation Program (NAGPRA),[7] and Samantha Hammond (Class of 2015) interning at the National Indian Gaming Commission (NIGC)[8] during the summer of 2014.

Native American Law programming

Whether law students pursue the NAL Emphasis or simply have an interest in taking a course or two, there have been many opportunities to learn about this field at the UI College of Law. The Native American law courses offered at the law school are enhanced by guest speakers, NALSA-sponsored legal events, and the annual Native American Law conference.[9]

Every fall as part of the overview Native American Law course, a panel of Tribal Judges is invited to discuss legal practice in area Tribal Courts with law students. In November as part of the campus Native American Heritage month events, the NALSA sponsors a guest lecture. In November of 2013, NALSA and the Environmental Law Society co-sponsored a film viewing of *March Point* based on the story of three Swinomish teenager's efforts to raise awareness of the impact of oil refineries in their tribal homeland. Following the film, a guest lecture was provided by the Swinomish Tribe's Historical Preservation Officer, Larry Campbell, Sr., who further elaborated on tribal cultural preservation practices.

One of the most anticipated events of the year for those interested in this field of law is the annual UI College of Law's Native American Law conference. Conference topics have centered on Tribal Nation economics, Indigenous kinship commerce, and best practices in Tribal Courts. In the spring of 2014 the conference topic was "Idaho Indian Law Basics" and was a co-sponsored event with the Idaho State Bar Indian Law Section.[10]

The Indian Law Section has these conference sessions available as CLE rental programs on the Idaho State Bar CLE web site.[11] In the spring of 2013, a special event bringing the Navajo Nation Supreme Court[12] to the College of Law provided an opportunity for law students to hear firsthand a presentation on the blending of traditional and contemporary legal concepts by the Navajo Nation Justices in their judicial decision-making.

Highlights from Professor EagleWoman

In addition to these events, Professor Angelique EagleWoman has continued to promote greater understanding of the field of Native American law in the state and region. One recent effort was publication of a co-authored text, "Mastering American Indian Law,"[13] in the fall of 2013. A purpose of the recent

As varied as the paper topics have been,
law students have also sought out an array of experiences
for the Emphasis experiential component.

publication was to provide a readable, accessible text for undergraduates, law students, judges, and legal practitioners on the basics of the Tribal law, federal Indian law, and Tribal-State relations.

Professor EagleWoman also recently published a personal narrative on her journey in legal academia in the hopes of inspiring others to pursue careers in law and legal teaching.[14] She has also been actively speaking to federal and state agencies and organizations interested in learning about the policies and history underpinning government-to-government consultation with tribal governments.

On the national level, she currently serves on the Executive Board of the Indian Law Section of the Federal Bar Association[15] and as lead chair of the 40th annual FBA Indian Law Conference to be held at the Arizona Talking Stick Resort[16] in April 2015. On the state level, Angelique serves as a consultant to the Idaho Tribal-State Court Forum and likes the communication and collaboration that the Forum provides.[17]

"It is tremendously gratifying to see Native American Law Emphasis graduates practicing in the state, joining the Indian Law Section, and serving the needs of tribal and state citizens in Idaho," according to Professor EagleWoman.

Endnotes

1. This is the author's name in the Dakota language.

2. For more information on the UI Native Law Program, see NATIVE LAW PROGRAM, http://www.uidaho.edu/law/academics/areasofstudy/nativelaw (last visited July 16, 2014).

3. In the summer of 2014, Natural Resources and Environmental Law (NREL) Emphasis students were allowed to also apply for the Tribal Summer Externship Program to gain experience in the intersection between U.S. and Tribal law in the field of natural resources and environmental law.

4. 18 U.S.C. § 1151

5. *See* Idaho Code § 67-5101 for the enactment of partial Public Law 280 criminal jurisdiction delegated from the federal government to the State of Idaho for the seven listed categories: "A. Compulsory school attendance, B. Juvenile delinquency and youth rehabilitation, C. Dependent, neglected and abused children, D. Insanities and mental illness, E. Public assistance, F. Domestic relations, G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof." *Id*.

6. American Indian Law Journal, Vol. II Issue II Spring 2014, http://www.law.seattleu.edu/academics/journals/ailj (last visited July 16, 2014).

7. *See* 25 U.S.C. § 3001 et seq.

8. *See* 25 U.S.C. § 2704.

9. The annual Native American Law conference is held every March on the Friday following spring break.

10. For more information on the Indian Law Section, see IDAHO STATE BAR INDIAN LAW SECTION, https://isb.idaho.gov/member_services/sections/ind/ind.html (last visited July 17, 2014).

11. The ISB approved recorded course is titled, "Idaho Indian Law Basics" and sponsored by the Indian Law Section. The course may be accessed by searching on the ISB approved recorded courses website at: https://isb.idaho.gov/licensing/mcle/mcle_approved_rec.cfm.

12. For more information on the Navajo Nation Supreme Court, see THE SUPREME COURT OF THE NAVAJO NATION , http://www.navajocourts.org/indexsuct.htm (last visited July 16, 2014).

13. See Angelique EagleWoman & Stacy Leeds, MASTERING AMERICAN INDIAN LAW (Carolina Academic Press 2013). My co-author is currently the only Native American law dean in the United States and considered an expert on American Indian property law.

14. *See* Angelique T. EagleWoman, *Balancing Between Two Worlds: A Dakota Woman's Reflections on Being a Law Professor*, 29 BERKELEY J. GENDER & JUST. 250 (2014).

15. *See* Federal Bar Association Indian Law Section, http://www.fedbar.org/Sections/Indian-Law-Section/Officers.aspx (last visited July 17, 2014).

16. The Talking Stick Resort is owned and operated by the Salt River Pima Maricopa Indian Community. For more information on the Talking Stick Resort, see SALT RIVER PIMA MARICOPA INDIAN COMMUNITY, http://www.talkingstickresort.com/the-salt-river-indian-community.aspx (last visited July 17, 2014).

17. For more information on the Idaho Tribal-State Court Forum, see STATE OF IDAHO JUDICIAL BRANCH TRIBAL STATE COURT FORUM, http://www.isc.idaho.gov/tribal-state/tribalcourt (last visited on July 17, 2014).

One of the most anticipated events of the year for those interested in this field of law is the annual UI College of Law's Native American Law conference.

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

Chief Justice
Roger S. Burdick
Justices
Daniel T. Eismann
Jim Jones
Warren E. Jones
Joel D. Horton

1st AMENDED - Regular Fall Term for 2014

Boise ..... July 29
Boise ..... August 20, 22, ~~25~~, 27, 28 **and 29**
Boise ..... September 26
Coeur d'Alene ..... September 29 and 30
Moscow ..... October 1
Boise ..... October 3
Boise ..... November 3
Twin Falls ..... November 6 and 7
Boise ..... November 10 and 12
Boise ..... December 1, 3, 5, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2014 Fall Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

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

2nd AMENDED - Regular Fall Term for 2014

Boise ..... July 22 and 24
Boise ..... August 12, 19 and 29
Boise ..... September 9, 11, 16 and 18
Boise ..... October 14, 16, and 21 ~~23~~
Boise ..... November 13, 14, 24 and 25

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2014 Fall Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court
Scheduled for November 2014

Monday, November 3, 2014 – BOISE
8:50 a.m. *BRN Development v. Taylor Engineering* ..... #40625-2013
10:00 a.m. *State v. Sanchez-Castro* ..... #40603-2012
11:10 a.m. *Deon v. H&J* (Industrial Commission) #41593-2013

Thursday, November 6, 2014 – BURLEY (Cassia County Courthouse)
8:50 a.m. *Franklin Building Supply v. Hymas* ..... #41041-2013
10:00 a.m. *Flying "A" Ranch v. Fremont County* ..... #41584-2013
11:10 a.m. *Big Wood Ranch v. Water Users' Association* ..... #41265-2013

Friday, November 7, 2014 – TWIN FALLS (Twin Falls County Courthouse)
8:50 a.m. *State v. Wolfe* (Petition for Review) ..... #41750-2014
10:00 a.m. *Plane Family Trust v. Skinner* ..... #41448-2013

Monday, November 10, 2014 – BOISE
8:50 a.m. *Gailey v. Whiting* ..... #41605-2013
10:00 a.m. *Bond v. Round* ..... #41485-2013
11:10 a.m. *State v. Arrotta* ..... #41632-2013

Wednesday, November 12, 2014 – BOISE
8:50 a.m. *Turner v. City of Lapwai* ..... #41560-2013
10:00 a.m. *Dept. of Transportation v. HJ Grathol* ... #40168-2012
11:10 a.m. *State v. Abdullah* ..... #31659-2005/39417-2011

The Idaho Supreme Court will have NO oral arguments during the month of October.

Idaho Court of Appeals
Oral Argument for October 2014

Tuesday, October 14, 2014 – BOISE
10:30 a.m. *State v. Hughes* ..... #41365-2013
1:30 p.m. *State v. Roach* ..... #41221-2013

Thursday, October 16, 2014 – BOISE
9:00 a.m. *State v. Bias* ..... #40930-2013
10:30 a.m. *Crawford v. State* ..... #41669-2013
1:30 p.m. *State v. Hillbroom* ..... #41533-2013

Tuesday, October 21, 2014 – BOISE
9:00 a.m. *State v. Hays* ..... #40999-2013
10:30 a.m. *State v. Barber* ..... #41015-2013

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 9/1/14)

CIVIL APPEALS

Arbitration

1. Does Idaho have standing to challenge parts of a Partial Award that prohibits release of post-2003 Non-Participating Manufacturers Adjustment funds to Idaho on the basis that the Partial Award contravenes the Master Settlement Agreement and exceeds the arbitrators' powers?

State v. Philip Morris, Inc.
S.Ct. No. 41679
Supreme Court

Employment

1. Did an agreement regarding employment terms, including the right to a due process pre-termination hearing, exist regardless of whether Nix was an employee at will?

Nix v. Elmore County
S.Ct. No. 41524
Supreme Court

Post-conviction relief

1. Did the court err in denying post-conviction relief and in finding counsel was not ineffective by not filing a motion to suppress evidence found as the result of a *Terry* stop?

Padilla v. State
S.Ct. No. 41772/41773
Court of Appeals

Summary judgment

1. Did the court err in granting Idaho Property Management's motion for summary judgment and in awarding rent and other costs incurred from November 2011 through July 2013?

Idaho Property Management v. MacDonald
S.Ct. No. 41733
Court of Appeals

Trespass

1. Did the district court err in finding a statutory trespass occurred in 2011 pursuant to I.C. § 6-202?

Mueller v. Hill
S.Ct. No. 41452
Supreme Court

Water law cases

1. Whether the district court erred in holding Mullinix has a right to use the diversion and/or pipeline of Kilgore, and whether that holding is supported by substantial and competent evidence.

Mullinix v. Kilgore's Salmon River Fruit Co.
S.Ct. No. 41583
Supreme Court

CRIMINAL APPEALS

Evidence

1. Did the court err in admitting, pursuant to I.R.E. 404(b), evidence of Hileman's statements regarding his general attraction to young females, as relevant on the issue of intent?

State v. Hileman
S.Ct. No. 40834
Court of Appeals

2. Was there sufficient evidence from which the jury could conclude beyond a reasonable doubt that Eauclaire had knowledge of the presence of drug paraphernalia and physical control over it?

State v. Eauclaire
S.Ct. No. 41766
Court of Appeals

3. Was there substantial, competent evidence admitted at trial from which the jury could conclude beyond a reasonable doubt that Southwick was guilty of possession of methamphetamine?

State v. Southwick
S.Ct. No. 40855
Court of Appeals

4. Did the court abuse its discretion by allowing the State to present, pursuant to I.R.E. 404(b), evidence of Passons' actions the day after the charged crime, including his attempt to return the stolen item to a different store for credit, his flight from police and his arrest?

State v. Passons
S.Ct. No. 41288
Court of Appeals

5. Did the State present sufficient evidence from which the jury could conclude, beyond a reasonable doubt, that Hendren was guilty of aggravated battery?

State v. Hendren
S.Ct. No. 41345
Court of Appeals

Probation revocation

1. Did the court abuse its discretion by denying Ellis's request for a continuance of the disposition phase so that he could have more time to prepare a defense?

State v. Ellis
S.Ct. No. 40898/40901
Court of Appeals

Procedure

1. Did the district court err by dismissing the State's appeals from the dismissal of its complaints at the preliminary hearing, where the statute of limitations had facially run, likely preventing any re-filing of the complaint?

State v. Daniels
S.Ct. No. 41997/41998
Court of Appeals

Search and seizure – suppression of evidence

1. Did the court err in denying Pedersen's motion to suppress evidence discovered in his jacket and in finding the search was proper as incident to his arrest on a warrant?

State v. Pedersen
S.Ct. No. 41431
Court of Appeals

2. Did the district court err when it reversed and remanded the magistrate court's order denying Colvin's motion to suppress, and in finding the officer properly stopped Colvin's vehicle for violating I.C. § 49-808(1)?

State v. Colvin
S.Ct. No. 41762
Court of Appeals

Sixth amendment

1. Were Franks' Sixth Amendment rights to compulsory process and to present a defense violated when the court refused to order a recalcitrant witness to testify under threat of contempt and when it denied Franks' request that the witness state his refusal before the jury?

State v. Franks
S.Ct. No. 41607
Court of Appeals

Statutory construction

1. Did the district court err in reversing the magistrate court's order denying Thiel's release from jail and in holding that when a sheriff recommends an inmate's release pursuant to I.C. § 20-621, acceptance of the recommendation is mandatory?

State v. Thiel
S.Ct. No. 41811
Supreme Court

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

A Pro's Woe: Overcoming Writer's Block in a Hurry

Tenielle Fordyce-Ruff

Picture this: It's late on a Friday afternoon, the sun is shining in your office window, and you're sitting in front of your computer staring at a blank screen. You also know full well that the response to a motion is due Monday, yet you cannot seem to even get a single word onto the page. In fact, you can't even get your fingers to the keyboard.

Sound familiar? Even though attorneys spend much of their lives writing, we are not immune to writer's block. Some of us have tried-and-true methods for overcoming these slumps, but even then there might be times when the go-to trick that has worked in the past fails to put words on the page.

So for this month we are going to look at some tips for overcoming even the worst episodes of writer's block.

Brain dump

The brain dump is a great tip for the ultra-organized. I'm sure you know someone (me) like this. Everything has a place and everything is in its place. This goes for writing, too. There are writers who write everything in the perfect order. But sometimes these writers get stuck. Because they have to start with the first word on the first page, nothing else can flow if those first few lines can't flow.

Or maybe instead of being ultra-organized, you simply have too many thoughts bumping around in your head. Every time your fingers hit the keyboard you see two new counter-arguments and a new approach to the main argument. You simply can't get all these thoughts onto the page in any sort of coherent order.

For these times, a brain dump can be a good trick to get over the bump in the road.

The goal of a brain dump is to get over the need for order. To dump your brain, set a timer for a short period of time, and then just start typing and don't stop until the timer sounds. Get over the need to put anything in order — instead focus on getting everything you know about the problem into a document. Go for quantity, not quality.

Once your ideas are on paper, you can start to see the order and move into a more polished and organized draft.

Talk to yourself

Of course, for some people even the jumble of a brain dump floating on the screen is too much to take. For those times, close your door and talk.

Get over the need to put anything in order — instead focus on getting everything you know about the problem into a document.

Now, I'm not suggesting a full-blown conversation. Instead, grab your smartphone, open a dictation app, and start telling the phone everything you know about the problem. Then you can have a very patient assistant start transcribing your oral ramblings.

Even better would be to turn on the voice-activated software that

came with your computer and that you never use. You can cover the screen to avoid the distraction of the words going onto the page and just start telling your computer everything you know about the problem.

After you're done, you can take the jumbled transcription from your assistant or uncover your screen and start to impose some order on what you've been talking about. Many a great writer is made in the second draft!

Take a break

Other times, a change of scenery can help. Walk down the hall or street for a quick cup of coffee or take your pen and a pad of paper into an empty conference room. The point of the break is not necessarily to stop: it's to change the landscape.

As Anne Lamott said, "Your unconscious can't work when you are breathing down its neck. You'll sit there going, 'Are you done in there yet, are you done in there yet?' But it is trying to tell you nicely, 'Shut up and go away.'"[1]

By changing what you're looking at, you give your mind a break. And sometimes just that little break is enough to get over the block!

Outlines, bubble charts, and mind-maps

Occasionally, we start with an end-goal in mind, but no real idea of how to get there. (I find myself doing this when I'm really busy!) For those times, take a step back from drafting and make yourself a map to the end goal.

For some writers, going back to the outlining phase works: Open a new document on your computer and start by writing all the issues you will need to cover, then move into more detail from there.

Once you have all the ideas on the paper, look for big groupings of ideas. These big groupings are likely major topics you will need to cover.

Of course, for those writers who have bad memories of forced outlines from high school or massive outlines from law school, this technique can actually increase anxiety. Not great for overcoming writer's block!

If that's you, try bubble charts or mind-maps instead. These are more free form than outlining, but they will get you to the same end. Put a big idea in a circle in the center of a blank piece of paper (yes, use actual pen and paper for this!). Then branch out with ideas from there. Each big idea gets more bubbles with smaller, related ideas. Connect every related idea with lines between the bubbles.

Once you have all the ideas on the paper, look for big groupings of ideas. These big groupings are likely major topics you will need to cover. The lonely circles with no related bubbles might be useless ideas.

You can then move from the bubbles to a first draft and beyond.

Start in the middle

The final tip for this month is a great one for perfectionists: Avoid the first few pages all together.

Chances are, there is some part of what you're working on that will be easier to write than other pieces. Pick that part and get to work. Once the juices are flowing, you can go back and fill in the more difficult parts.

Conclusion

Don't beat yourself up if you get writer's block. We all struggle with it from time to time. This month I couldn't finish because I couldn't decide what to write about. I started three other pieces before beginning this one. I finally got out of the office, and I'm finishing this at home with my dogs asleep at my feet.

Sources

• Suzanne E. Rowe, *Unblocking Writer's Block: Moving Ideas from Head to* Page, available at https://www.osbar.org/publications/bulletin/06oct/writer.html.

Endnotes

1.http://flavorwire.com/343207/13-famous-writers-on-overcoming-writers-block/3, quoting Anne Lamott, *Bird by Bird*

About the Author

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

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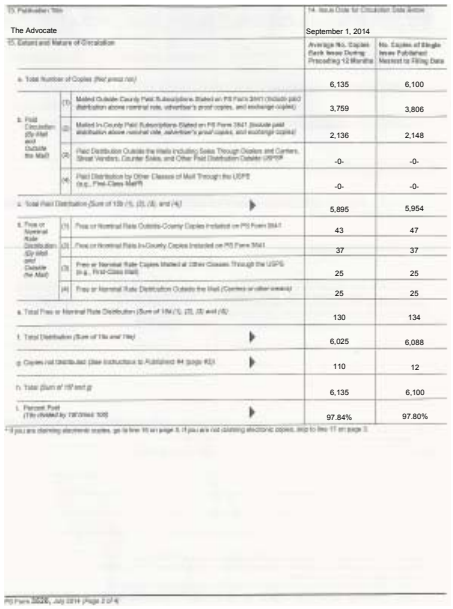

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i. Percent Paid (15c divided by 15f times 100)			97.84%	97.80%

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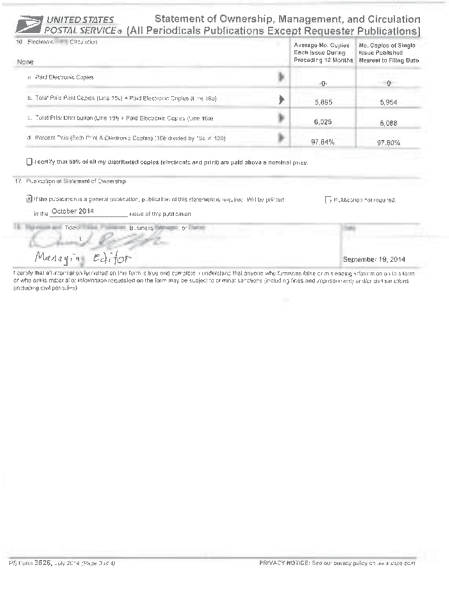

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Merle Jay Meyers
1949 - 2014

Merle Jay Meyers of Pocatello, unexpectedly passed away on Aug. 29, 2014 while enjoying one of his most treasured pastimes — showing reined cow horses at the Magic Valley Futurity of the Idaho Reined Cow Horse Association. He was 65. Jay was the second child born to Merle and Dorothy Meyers who lived on the family ranch on Midnight Creek in Arbon Valley.

Jay often said that "every post hole, every strand of barbed wire fence, and every piece of junk farm equipment on the place" was a result of their efforts to carve their dream to have their own ranch out of the dry sagebrush flats. Jay inherited his love for cows and the cowboy lifestyle from his father Merle.

Jay attended school in American Falls and participated in wrestling and rodeo. After high school he attended Ricks College and Idaho State University before law school at the University of Idaho. His dream of becoming an attorney stemmed from an experience he had as a young man goose hunting with his father and Lou Racine, a prominent Pocatello attorney.

Jay married Paula Liese in 1971 shortly before moving to Moscow for law school. While there he continued to rodeo as much as possible and braided bull ropes for gas money to go to rodeos. He failed his torts class because he had been too busy going to rodeos, and the professor told him he would never make it as a lawyer.

Jay went on to have an incredibly successful career that he loved, arguing over 20 Idaho Supreme Court cases and serving on the Idaho State Bar Character and Fitness and Professional Responsibility Committees. He was also a past president of the Idaho Trial Lawyers Association and was recently awarded the Distinguished Lawyer Award by the Idaho State Bar. He was especially thankful for his partners and legal assistants whom he worked with over the years.

Merle Jay Meyers

Jay married Ranae Pumphrey in 1992 and together they worked to build a successful horse and cow operation and raise their family. After daughter Jamie's passing in 2003 and with son John at college, Jay and Ranae became heavily involved with training and showing their horses in regional reined cow horse competitions. In 2010 Jay was inducted into the Eastern Idaho Horseman's Hall of Fame for his tireless efforts to promote equine pursuits in Idaho.

He is survived by his wife Ranae, mother Dorothy, son John, daughter in law Courtney, grandson Porter, brother Jerry and sister Judy, and a multitude of loving nieces and nephews.

Robert Wesley "Bob" Speck
1924 - 2014

Robert Wesley "Bob" Speck, born May 1, 1924 in Spokane, Washington to Harold and Leila Speck, died peacefully after a long and arduous battle with Alzheimer disease, at Hospice House of Spokane. Robert grew up in Spokane with his brothers Donald, Jack and Richard, and Sister Shirley. He graduated from North Central High School in 1942 and immediately joined the Army Air Corps, serving as tail gunner in a B26 Marauder for the following four years across Europe.

Robert Wesley "Bob" Speck

When he returned home he attended Eastern Washington University where he met his future wife Betty Minnie Monk.

Married and working two jobs, he attended and graduated from Gonzaga Law School. He was then recruited by the FBI. As a Special Agent he, Betty and family traveled the country, making friends wherever they went.

He had two sons, Thomas, Paul, and a daughter, Amy. When he retired from the FBI he spent a summer managing Arrow Point Resort. He then joined the Kootenai County Prosecutor›s Office as Deputy Prosecutor.

After six years there he won a seat as a State Representative. He declined a second run. He then returned to the prosecutor's office. Throughout the years he was involved in the Catholic Church, Kiwanis Club, Toastmasters, teaching and playing duplicate bridge, and Habitat for Humanity. He enjoyed gold mining, fishing and huckleberry picking.

Bob was an avid joke teller with a quick wit and a dry sense of humor. He loved to sing. He is most famous for his poetry recitation, especially Robert Service's Cremation of Sam McGee.

Robert is survived by his brother Richard; sister Shirley; sons Thomas (Michele), and Paul (Jody); daughter Amy (Laurie); grandchildren Teresa, Victoria, Bethany, Carl and Scott; three great-grandchildren and numerous nieces, nephews, cousins, in-laws and friends.

Hawley Troxell welcomes three attorneys

BOISE – Hawley Troxell is pleased to announce attorneys Allison Parker, Chelsea Porter and Tayler Tibbitts have joined the firm as Associate Attorneys. "We are pleased to have such a high degree of talent added to our already strong team of litigators and transactional attorneys," says Steve Berenter, Managing Partner of Hawley Troxell.

Allison Parker joins the firm's patent, intellectual property, internet and corporate practice groups. Prior to joining Hawley Troxell, Ms. Parker clerked for the Hon. Jim Jones of the Idaho Supreme Court and externed for the Hon. Candy Wagahoff Dale, Chief Magistrate Judge of the United States District Court for the District of Idaho. She worked as a summer associate for Hawley Troxell in 2012.


Allison Parker

Ms. Parker received her J.D. from the University of Idaho College of Law, (magna cum laude), in 2013 and her B.S. in Molecular Biology and a B.A. in Studio Arts from Evergreen College in Olympia, WA in 2005.

Chelsea Porter is a member of the firm's public finance, corporate, banking and mergers and acquisitions practice groups. She will be working on entity formations and various contractual issues, as well as municipalities and compliance issues in public finance transactions. Ms. Porter worked as a summer associate for Hawley Troxell in 2013. Ms. Porter received her J.D. from Gonzaga University School of Law (magna cum laude) in 2014 and her B.A. in Communications (cum laude) from Regis University in 2011.


Chelsea Porter

Tayler Tibbitts is a member of the firm's litigation group. Prior to joining Hawley Troxell, Mr. Tibbitts clerked for the Hon. N. Randy Smith of the United States Court of Appeals for the 9th Circuit, externed with the Hon. B. Lynn Winmill, Chief Judge of the United States District Court for Idaho and worked as a summer associate at Williams & Connolly, a storied litigation firm in Washington D.C.


Tayler Tibbitts

Mr. Tibbitts received his J.D. from University of Virginia School of Law in 2013 and his B.S. in Accounting and Minors in Economics and Mandarin Chinese (summa cum laude) from Brigham Young University-Idaho in Rexburg, ID in 2010.

Givens Pursley LLP welcomes Brian J. Holleran

BOISE – Givens Pursley LLP is pleased to announce that Brian J. Holleran has joined the firm as an associate attorney. His practice focuses on real estate finance and transactions, entity formation, corporate governance, banking and loan transactions, and estate planning. He received his Juris Doctorate degree Cum Laude from Gonzaga University School of Law in 2010.


Brian J. Holleran

Three attorneys join Parsons Behle & Latimer's Boise office

BOISE – John N. Zarian, managing partner of Parsons Behle & Latimer's Boise office, announced that Maria O. Hart, James E. Lake and James D. Meaders have joined the firm.

Maria O. Hart is an associate in the firm's Litigation, Trials & Appeals department and focuses on commercial litigation and business law. Her practice involves litigation in both federal and state court, including real estate transactions, non-compete clauses in employment contracts, applying for and enforcing trademark protection, defending adversary proceedings in bankruptcy, and defending employers against claims of discrimination. She is admitted to practice in Idaho and Montana. Ms. Hart received her law degree in 2012 from Brigham Young University and a Bachelor of Science degree in 2001 from Eastern Michigan University.


Maria O. Hart

James E. Lake is of counsel and focuses his practice on client counseling and procurement of intellectual property rights in the United States and abroad for technology clients. His technical areas of emphasis in intellectual property include materials science, nanotechnology, semicon-


James E. Lake

ductor processing, aerospace, energy production, metallurgy, chemical manufacturing, medical devices, printing ink and toner, and other areas associated with advanced research. Mr. Lake is admitted to practice in Washington and Arizona, and before the United States Patent and Trademark Office. He graduated from Brigham Young University with a Bachelor of Science degree in chemical engineering in 1991 and a Juris Doctorate degree in 1997.


James D. Meaders

James D. Meaders joins the firm as an associate and focuses his practice on patent procurement and proceedings before the United States Patent and Trademark Office. He also provides support for patent litigation matters such as the preparation of claim charts and technical analysis. Meaders is admitted to practice in Utah, and before the United States Patent and Trademark Office. He received a J.D. degree from the University of Akron School of Law in 2012. He graduated with a Bachelor of Science degree in electrical engineering from Brigham Young University in 2009.

Kira Pfisterer a partner at Hepworth Janis & Kluksdal


Kira Pfisterer

BOISE – Hepworth Janis & Kluksdal is pleased to announce that Kira Dale Pfisterer has been made a partner with the firm. Kira is active in the Idaho Trial Lawyers Association, the Idaho Women Lawyers and she was recently appointed to the American Association for Justice Board of Governors. Before Mrs. Pfisterer joined Hepworth, Janis & Kluksdal, she worked as an associate attorney with a large regional law firm and later with a commercial litigation boutique. She also served as a law clerk for then Chief Justice Linda Copple Trout of the Idaho Supreme Court, the Hon. United States Magistrate Judge Larry M. Boyle, and the Hon. United States Magistrate Judge Ronald E. Bush.

Mrs. Pfisterer attended Duke University and graduated with degrees in political science and economics. A native of Phoenix, she returned to the Rocky Mountain West for law school and graduated from the University of Utah College of Law. Kira and her husband, Adrian, stay busy exploring the Idaho wilderness and raising two school-age boys.

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The Idaho Law Foundation
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National Pro Bono Celebration
October 19 - 25, 2014

Pro Bono Week Encourages Civic Duty for Idaho Lawyers

Hon. Jim Jones
Chairman Idaho Pro Bono Commission

Idaho's legal community will be celebrating Idaho Pro Bono Week during October 19–25, 2014. The Idaho Pro Bono Commission is urging Idaho lawyers to commit more legal help to those who cannot afford it, while recognizing the many lawyers who have provided cost-free services in the past.

Free legal services to low-income Idahoans are made available through a variety of sources. The Idaho Volunteer Lawyers Program, operated out of the offices of the Idaho State Bar, accepts requests for legal services, screens the applicants for income eligibility, and makes referrals to lawyers willing to provide free representation. In 2013, more than 750 attorneys, working in association with the program, provided more than 15,000 hours of volunteer attorney assistance to more than 1,600 low-income individuals and families, including legal representation in more than 600 state court cases, while volunteer lawyers provided 635 hours of pro bono service in federal court cases.

Idaho Legal Aid Services is a statewide non-profit law firm dedicated to serving the civil legal needs of low-income Idahoans through its seven regional offices. In 2013 its staff attorneys and attorney volunteers provided 17,502.8 hours of free legal services to thousands of Idahoans with legal problems such as domestic violence, wrongful evictions, illegal foreclosure, guardianships for abused or neglected children, Medicaid and Social Security problems of seniors, and unlawful discrimination.

The Idaho Law Foundation is sponsoring a statewide campaign to fund legal services for low-income residents and persons with disabilities, with the funding to be shared among the Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, and Disability Rights Idaho. The fund-raising goal is $300,000 and, through the support of lawyers and other public-minded citizens, the campaign has reached the halfway mark.

The graduating class of 2014 at the University of Idaho College of Law compiled approximately 9,330 hours of pro bono services, under the supervision of Idaho lawyers and judges, as part of the college's distinctive pro bono program in which every student participates.

The Idaho Pro Bono Commission is urging Idaho lawyers to commit more legal help to those who cannot afford it, while recognizing the many lawyers who have provided cost-free services in the past.

Pro bono events around the Gem State

The 2nd District Bar local pro bono committee will be conducting an Ask A Lawyer call-in event on Friday, October 24 at the Courthouse. Attorneys interested in volunteering should contact Ashley Rokyta at arokyta@latah.id.us

The 6th District Bar' local committee is also conducting an Ask A Lawyer event for Pro Bono Week. Anyone interested in volunteering for that project should call Kent Higgins at (208) 232-2286.

The 5th, 6th and 7th District Bars' local committees are joining together with the Idaho Volunteer Lawyers Program (IVLP) to celebrate Pro Bono Week by sponsoring a CLE program on Friday, October 24. The topic of program is representing persons who are the subject of guardianship proceedings. Attorneys pledging to volunteer with IVLP may attend without charge and receive 2 hours CLE credit. Details and registration information is available from Anna Almerico at aalmerico@isb.idaho.gov

Students and faculty at Concordia University School of Law contributed 1,003 hours of pro bono service in 2013 and are committed to expanding access to justice through their pro bono service requirement, their on-site legal clinic, and providing pro bono training for Idaho lawyers

In addition, many Idaho lawyers, acting on their own volition, generously provide many untallied hours of pro bono service to citizens of Idaho without asking or receiving any recognition for their unpaid services.

The Idaho Pro Bono Commission was established in 2008 with the charge of encouraging lawyers to provide more pro bono service. Its constituent members consist of Idaho's state courts, the United States Courts in Idaho, the Idaho State Bar, the Idaho Law Foundation, the University of Idaho College of Law, and Concordia University College of Idaho.

The Commission and its members recognize that our country's dedication to equal justice under the law cannot be realized if people with limited financial resources are not able to have access to the courts.

The Commission and its members recognize that our country's dedication to equal justice under the law cannot be realized if people with limited financial resources are not able to have access to the courts. The need for free legal services has substantially increased because of current economic conditions. The Commission and its members are consequently intensifying their efforts to get more attorney participation in pro bono work. Recognition and celebration of Pro Bono Week in Idaho is part of that effort.

National Pro Bono Celebration
October 19 - 25, 2014

Idaho Attorneys Volunteer to Help Detained Refugees

Pro bono work by immigration attorneys tries to restore rule of law

Dan Black

In late July Maria Andrade put her Boise immigration practice on hold and set out for a remote detention facility in Artesia, N.M., hoping to aid some of the several hundred women and children detained there.

What she found was shocking. Andrade was among the first attorneys to gain access to the facility — a federal law enforcement training center surrounded by barbed wire, where several hundred women and children are being held. These refugees, she said, were being denied their rights to request asylum as guaranteed by law. "People as a class are being denied the ability to apply," she said.


Maria Andrade


Nathaniel Damren

There were several obstacles to justice at the facility, she said:

1. Access for pro bono attorneys is extremely difficult: the facility is located more than three hours away from a major metropolitan area (approximately 195 miles from El Paso, 237 miles from Albuquerque). Once attorneys arrive at the facility's gates, they have to wait for immigration officers to pick them up in a van to escort them the short distance to the "law library," the only place where the women and children were permitted to meet with them.


Yadira Jurez


Benjamin Stein

2. Refugees often speak little or no English and they lack knowledge of the American legal system. Before they could speak with an attorney they were being asked technical legal questions ("Are you a member of a particular social group?" or "Have you ever been harmed or threatened in your home country because you belong to a group that is seen as different or special by society?") that will have grave consequences for their asylum application: if they answer with a simple yes or no, then they may unknowingly exclude themselves from asylum.

3. Refugees had illusory access to interpreters, family or the courts. Some, like indigenous Mayans from Guatemala, do not speak Spanish, and there were no interpreters for local indigenous dialects. Refugees were allowed only one time-limited (generally 3-5 minute) phone call a day, which practically means they must decide between calling their attorney or their family as their cases advance along a rapid court calendar. If a caller is unable to reach someone during the time permitted by the immigration officers, the individual must wait until the next day.

4. Refugees have no privacy to explain the traumatic events that led to their flight — the "law library" (a trailer containing neither books, nor access to legal databases, nor reports of country conditions) lacks

These refugees, she said, were being denied their rights to request asylum as guaranteed by law.

cubicle walls, let alone visitation rooms that would ensure confidentiality. As a result, refugees must tell their stories in front of guards and their children, who might be traumatized to hear about rape and other horrors, often including the children's own threatened murder.

The ACLU, National Immigration Project of the National Lawyers Guild, and the American Immigration Council, along with other nonprofits and law firms, filed suit on August 22, asking a federal district court to order the Department of Homeland Security to remedy these conditions and allow due process.

Andrade saw the crisis coming

Ms. Andrade and her colleagues had been hearing horror stories of criminal organizations, such as drug traffickers and the notorious street gangs known as maras, overpowering civic institutions in broad swathes of El Salvador, Honduras and Guatemala. Across Central America, stories abound of businesses subject to extortion, women forced to marry gang members and children forcibly removed from schools as new gang recruits. There were numerous accounts of infants taken and sold on the international organ transplant market, rampant rape and indiscriminant violence against women.

At the same time, the U.S. border patrol observed a spike in the number of families at the southern border looking for safety. U.S. politicians decried the influx at the border claiming they were economic immigrants who would take American jobs. In fact, reports from all neighboring countries showed that an influx of Central Americans were fleeing systemic violence caused by the maras, drug traffickers and other criminal organizations.

What are they fleeing from?

Highly sophisticated criminal elements have taken over the social structures in Central American countries of Guatemala, El Salvador and Honduras. Those who stand up against injustice alone, challenging police who look the other way or criticizing gang violence are raped, beaten or have their children taken away.

- Women bear the worst of it.
- Single women living alone are at particular risk of being told to marry gang members. Sexual violence is rampant.
- Boys of a certain recruitment age are at risk of being taken directly out of school. gang leaders say, "You're old enough. Time to join the organization." School teachers, parents, police and military are powerless against these gangs.
- If the husband gets in trouble with the Maras, then the whole family is in danger of extortion and impunity.
- Women in Guatemala are not allowed to leave their husbands under the fear of violence.

The Obama Administration promised to quickly deport the women and children back to their home countries. A new expedited removal policy at Artesia was outlined by President Obama in a June 30 letter to Congress, which stated that the government had adopted "an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers."

The June 30 letter further stated that the Administration would establish new facilities specifically "to expedite the processing of cases involving those who crossed the border in recent weeks."

"They want to ram as many people through as possible, without taking time to go through the process of determining whether they qualify under the legal criteria as refugees, Ms. Andrade said.

Politics trumps rule of law

Those statements were seen as permission to skirt the law, Andrade said, and Homeland Security set up the Artesia facility as a shortcut in the process for quick deportation.

"They are substantively being pre-judged," Andrade said, before they have a chance to even learn what their rights are under U.S. law.

"A lot of these are textbook cases" for successful asylum, Andrade said, adding that 90 percent of the cases she saw during her two-week stay likelywould be successful in their bid for asylum.

"But I can tell you that 99 percent of these people will lose without access to an attorney."

The June 30 letter further stated that the Administration would establish new facilities specifically "to expedite the processing of cases involving those who crossed the border in recent weeks."

Since mid-July, there has been a dozen or so pro bono attorneys working from 7 a.m. to 1 a.m., making the most of their short visits in Artesia. When the facility closed each evening, the attorneys met for a strategy session at a local church, before going to a motel to work on individual cases.

"This is like a fire. There's an emergency — we know this area of law — so we are the ones to respond," Ms. Andrade said.

An emotional toll

The fate of an estimated 50,000 refugees hangs in the balance. Immigration attorneys from all over the country have gathered in Artesia, creating a bond that they are doing the right thing. But the schedule and working conditions are incredibly difficult.

"It's emotionally exhausting," Andrade said. "I feel fortunate I have the ability to leave my practice. I have a great staff who have been supportive, picked up cases, and also travelled to Artesia to help. The whole reason this firm exists is to provide just consideration before the courts," she said.

"It's good to feel like your skills are having an effect and helping people," she said. "But we're participating in a system that is not providing justice. That doesn't feel good. There's not enough of us."

So, is this sort of work fun?

"No. It is not fun. It is really not fun," Andrade said. "You are constantly meeting with people who are traumatized, carrying a lot of emotion and it can be overwhelming."

She worries about the families inside the facility. "They are locked up in this crowded facility with nothing to do. Mental health counselors can't get in. The press can't get in. Yesterday I heard a report a girl was sexually assaulted. Sick kids are everywhere. The children are not eating, and more are getting sick," she said.

So what keeps Andrade going?

"Outrage," she answers without hesitation. "Nobody is going to compromise my clients' rights. I know that I would win, I know these are good claims. You want people to know that they are putting aside the process. It makes a farce of what you do."

Refugees are given confusing information about their fate. If they agree to a quick deportation, they are told things will go well. Otherwise, they have to stay in detention indefinitely. "Detention is being used to wear people down and give up their right to apply," Andrade said.

The volunteers take their work very seriously, she said. "Every moment you are not working, another person is being deported."

Petition for relief, literally

Andrade currently serves on the board for the National Immigration Project of the National Lawyers Guild, which has asked the federal courts for practical tools to let pro bono lawyers do their jobs in Artesia. For instance, there are no phones allowed in the library, the only place where lawyers can meet with clients. It is a chaotic place where women and children are crying, telling their stories through interpreters, or through broken English.

Attorneys initially had no way to get notice of hearings, and the only food allowed inside the facility are snack bars. Hearings with judges are all done long-distance over video conference, which further dehumanizes the refugees' plight, Andrade said. Overall, the officials have placed numerous roadblocks in the way of pro bono lawyers trying to do their jobs.

Andrade reported to the National Immigration Project in Chicago at the beginning of September, and said that eventually more cases out of Artesia will win, which will open the door for more successful cases.

"We just have to keep insisting on procedure," she said. The lawsuit also claims refugees at Artesia are being given an unfair bond amount. A $5,000 bond is considered pretty high in traditional immigration proceedings; in Artesia, the majority of detainees are held on bond ranging from $17,000 to $30,000.

Mental health counselors can't get in.
The press can't get in.
Yesterday I heard a report a girl was sexually assaulted.

The lawsuit points out that during detainees' initial screening of an individual's credible fear of harm in their home country, typically 77 percent of detainees are passed on to the next level. In Artesia, that number is 38 percent.

The U.S. government similarly violated its own laws in the 1970s and 80s, Ms. Andrade said, when it systematically turned away refugees from Haiti , El Salvador and Guatemala. Eventually, the courts reasserted the rule of law, but as of the writing of this article, that has not yet happened for this wave of refugees. Ms. Andrade plans to return to Artesia this fall as her schedule permits. And from her firm, attorneys Benjamin Stein and Nathaniel Damren, along with legal assistant Yadira Juarez, have also made the trip.

The lawsuit, *M.S.P.C. v. Johnson*, was filed in the U.S. District Court for the District of Colombia. Since its filing, immigration officers have relaxed the procedures for attorney entry into the facility and begun constructing a separate entrance solely for them. A room with cubicles has also been set aside to ensure client confidentiality.

As of September 5, 2014, two women have received grants of asylum by the immigration court.

The scene in Artesia

- Artesia is one of several processing facilities meant to quickly process and deport a backlog of 30,000 to 50,000 detainees captured on the U.S. border. It holds 672 people and is located about 200 miles north of El Paso, Texas.
- Pro bono attorneys visiting Artesia need experience in asylum and litigation. Some have one but not the other and get some quick training onsite.
- Of the 12 or 13 attorneys in Artesia, most stay only a few days.
- Maria said the pro bono attorneys must "educate the judges" because they are not familiar with border issues in the 5th Circuit.
- Maria said an important reason for pro bono attorneys is simply to witness what is happening.

Overall, the officials have placed numerous roadblocks in the way of pro bono lawyers trying to do their jobs.

About the Author

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

National Pro Bono Celebration
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Pro Bono Case Grew in Complexity and Rewards — (Almost) Everybody Won

Kahle Becker

In early 2009 I had just opened the doors to my own practice.[1] I had plenty of free time as I slowly developed my clientele. A senior attorney suggested that I take on a pro bono case to gain some experience and put my idle time to use. He assured me that the case he proposed would be a quick and easy one.

I represented the Idaho Military Historical Society in their quest to seek the return of a historic World War II PT-23 airplane that was being wrongfully held by a board member of another aviation historical society, the Idaho Aviation Hall of Fame. The late Steve Appleton had donated the plane to the Idaho Aviation Hall of Fame for eventual display to the public in a museum. In the interim, a board member of the Hall of Fame offered to store the plane in his hangar. When the Hall of Fame board of directors voted to donate the plane to the Military Historical Society, the board member who had been storing the plane began ignoring requests for its transfer. Eventually, the disgruntled board member claimed that he was owed over $10,000 for what was to have been gratuitous storage.

I put dozens of hours into the case in the first year with no thought of being compensated. I was urged by members of the Bar to account for my time and submit it, along with work I had done on other pro bono cases, for consideration of the 6.1 Challenge. Ultimately, I was awarded the 2009-2010 4th District 6.1 Challenge Award.

The case then slogged on for several additional years, during which I put in hundreds of additional hours. Counterclaims for lien foreclosure and storage charges were asserted by the Defendant. All the while, my clients asked for the return of the airplane and even made token offers to pay the opposing party. Ultimately, a trial became necessary and Jon Steele signed on the same pro bono basis to assist me as trial counsel. Following a four-day bench trial, the Court ordered the immediate return of the airplane to my client. An award of $73,820 attorney's fees and costs under I.C. 12-121 followed thereafter. The airplane is now on display at the Idaho Military Museum near the airport in Boise.

The Defendants appealed. I briefed and argued the case before Idaho's Supreme Court. The Supreme Court issued its decision in the summer of 2014 upholding the award of my fees.[2] With post-judgment interest and costs on appeal, the total judgment amount was $84,311. I executed on a supersedeas bond the Defendants posted and ultimately collected the full amount in August of 2014.

I spoke with the Bar regarding my fee award and offered to return the 6.1 Challenge Award. Instead the Bar applauded my efforts and we discussed sharing my story to other attorneys. I made a sizeable donation to the Idaho Volunteer Lawyer's Program, Veteran's Legal *Clinic* which provides legal services to Idaho veterans free of charge on a monthly basis.

Pro bono service has not always turned out as well as it did for me in this case. I have taken other matters in which my clients did not prevail but were grateful nonetheless that someone took the time to plead their case. I have learned many lessons in my pro bono service; I was able to take a civil case from inception through trial and on to appeal, have been introduced to some really great people, and I was able to do what I imagine most attorneys envision the practice to be like on their first day of law school, fighting the good fight for those who are unable to do so on their own. In the end I will continue to take on pro bono cases when my schedule allows and I encourage other attorneys to do the same. You just never know where good deeds will lead you.

Endnotes

1. See March/April 2010 Advocate "From the Concrete Canyons to the Granite Peaks, A Young Sole Practitioner's Perspective."

2. Idaho Military Historical Soc'y, Inc. v. Maslen, 156 Idaho 624, 329 P.3d 1072 (2014), reh'g denied (Aug. 6, 2014)

About the Author

Kahle Becker *is a graduate of the Pennsylvania State University, and the University of Pittsburgh School of Law. He has a solo practice in Boise, Idaho focusing on commercial and personal injury litigation as well as natural resource law.*

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