



# SIDEBAR

A Newsletter of the Idaho Chapter of the Federal Bar

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## A Note from Wendy Olson, President —



I am honored to follow Trudy Fouser as President of Idaho's Chapter of the Federal Bar Association, and I am thrilled to head into my term with an outstanding group of colleagues on the executive committee. While we have made some changes and have brought in new faces, we have a strong core of experienced leaders ready to help our chapter continue its excellence and growth.

Larry Prince of Holland and Hart, treasurer; Larry Westberg of Westberg, McCabe and Collins, national delegate; Brad Williams of Moffatt, Thomas, Barrett, Rock and Fields, secretary; Barry McHugh, Kootenai County Prosecuting Attorney-elect, CLE co-chair, and Ted Creason of Creason, Moore and Dokken, law school liaison, have signed on for another term. Trudy remains on the executive committee as president emeritus and will lead our chapter's pro bono programs. Dean Arnold of Perkins Coie has moved over from young lawyers representa-



Wendy Olson, President  
Idaho Chapter, Federal Bar Assn.

tive to membership chair, succeeding Dick Fields; and Kim Toryanski has moved from program chairperson to vice president/president-elect. Kim is the Executive Director of the Idaho Commission on Aging.

We have two new faces on our Executive Committee. Julie Tetrick of Stoel Rives, a former law clerk for Judge Mikel Williams, is our young lawyers representative; and Robert Schwarz of the Federal Defenders Services of Idaho, joins Barry as CLE co-chair.

### Inside This Issue:

New President	1
Upcoming Events	3
Tri-State Seminar October 9 & 10	4
Complaints	5
9th Cir. Decisions	18
Idaho Jury Trials	26
Visiting Judges	28
Officers	37



(Continued on next page).

# President Wendy Olson

We look forward to serving you, our members, over our two-year term. The Idaho Chapter has quickly established itself as providing quality programming for its members with last year's luncheon honoring our federal judges and our bash to celebrate our two incoming federal magistrate judges, Judge Candy W. Dale and Judge Ronald E. Bush, and their predecessors and colleagues, Judge Williams and Judge Larry M. Boyle.

The coming year will provide even more exciting times for our federal courts and federal practitioners in Idaho with the opening of the new courthouse in Coeur d'Alene on March 16, 2009. Our Chapter will participate by offering a CLE program on Technology in the Courtroom. We will continue to celebrate our outstanding practitioners with our second round of Exemplary Service Awards.

Our chapter will continue to provide opportunities for new lawyers to meet with our federal judges, beginning with the next installment of our Juice with the Judge program on January 8, 2009, in Pocatello with Judge Ron Bush.

We will continue to provide our members with the opportunity to further serve our community. Last year the books for school children project spearheaded by Kate Ball and generously sup-

ported by so many of you, provided more than 600 books to schoolchildren at Fernan Elementary School in Coeur d'Alene.

This year as the executive committee finalizes its community service program, we have great confidence that we will be able to continue to count on our members' support.

***The Idaho Chapter of the FBA will participate in the grand opening of the new courthouse in Coeur d'Alene on March 16, 2009.***

In the coming year, we will host our annual full-day CLE on May 1, 2009, in Boise, the Tri-state FBA conference (with Utah, Wyoming and Idaho), on October 9-10, 2009 in Sun Valley, and several brown bag CLE forums. Our goal is to serve you, our members, so please let us know if there are topics you would like to see covered, or ways that you would like to get involved.

I have been fortunate to work with the executive committee now for three years. Among the things I like best about the Federal Bar Association and about this chapter is the opportunity to be creative in our programming. We are able to reach out to all areas of federal practice and gather so many

smart and talented lawyers for our programs, projects and gatherings. I aspire to do more of the same in my term as president.

One of the differences you may see in the transition from Trudy to me, is that as a federal government attorney, an employee of the United States Attorney's Office, I have some limits on some of the things I can and cannot do in this, an "outside activity." First and foremost, I speak and act only for myself in this position – I do not speak and act for the federal government. I will not be able to lobby or take positions contrary to those of the U.S. Department of Justice. Additionally, as I am unable to solicit money, some of you already have stepped in to take over those activities where our chapter needs them — thank you.

Finally, in this transition from Trudy to me, one thing will stay the same. Susie Headlee will remain as chapter executive director. She is truly the engine that makes our organization run. We are lucky to have her. I look forward to working with Susie – and for all of you – as president.

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# 2009 UPCOMING EVENTS

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## Highlights

**January 8, 2009 - 12:00 p.m. to 1:30 p.m.**

***Juice with the Judge, The Honorable Ronald E. Bush***

Location: Pocatello, Idaho

Contact: Julie Tetrick, Stoel Rives

at (208) 387-4219 / jstetrick@stoel.com

**January 21, 2009 - 12:00 p.m. to 1:30 p.m.**

***Brown Bag CLE: Overview of U.S. Attorney's Office***

including criminal enforcement priorities, investigative tools

James A. McClure Federal Building & U.S. Courthouse, Boise

Contact: Robert Schwarz, Federal Defenders Office

(208) 388-1600 / robert\_schwarz@fd.org

**March 18, 2009 - 12:00 p.m. to 1:30 p.m.**

***Brown Bag CLE:***

***Nuts and Bolts of Federal Drug and Gun Prosecutions  
and Applicable Sentencing Guidelines***

James A. McClure Federal Building & U.S. Courthouse, Boise

Contact: Robert Schwarz, Federal Defenders Office

(208) 388-1600 / robert\_schwarz@fd.org

**May 1, 2009 - Annual CLE Program in Boise**

James A. McClure Federal Building & U.S. Courthouse, Boise

Contact: Barry McHugh, Kootenai County Prosecutor

(208) 661-8922 / mchughbarry@gmail.com

# FIFTH ANNUAL TRI-STATE SEMINAR SUN VALLEY, IDAHO

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## *Save the Date!*

The Idaho Chapter of the Federal Bar Association will be hosting the fifth annual FBA Tri-State Conference this year in Sun Valley, Idaho on **October 9 and 10, 2009**. The Wyoming, Utah and Idaho Chapters are committed to the continued success of this annual event!

This year's conference will offer an opportunity to interact with several districts judges, including a panel discussion with the Chief Judges of each district. The program will include a segment on criminal law, a discussion of the FBA Government Relations, information technology, and many other relevant topics.

Don't miss this unique opportunity to meet and network with colleagues from our neighboring states of Utah and Wyoming. Seminar brochures will be emailed later in the year. Contact Susie Headlee at (208) 334-9373 for more information.

The Seminar will be held at the Lodge in Sun Valley. We are in the process of securing a block of rooms. Details will be emailed later.



# COMPLAINTS FILED IN FEDERAL COURT

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## Pierce v. Valentine & Kebartas, Inc., CV-08-348-S-LMB

### Sexual Harassment, Retaliation

- Grant T. Burgoyne, Mauk & Burgoyne, Boise, Idaho, for Plaintiffs
- Debora Kristensen, Givens Pursley LLP, Boise, Idaho for Defendant

Defendant is a bill collection agency where Plaintiffs either currently work or have worked in the past. Plaintiffs assert that Defendant's management personnel subjected them to unlawful sexual harassment and responded to Plaintiffs' complaints about the harassment by encouraging further harassment and retaliating against Plaintiffs through compensation discrimination, demotions, and/or threats of discharge and other discipline. Plaintiffs filed this action seeking equitable relief and damages arising from Defendant's alleged sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964 and the Idaho Human Rights Act after receiving Notices of Right to Sue from the Idaho Human Rights Commission and the Equal Employment Opportunity Commission. Defendant filed an Answer denying the allegations contained in the Complaint's listed causes of action.

## United States v. J.D. Aldecoa & Son, Inc., CV-08-384-S-MHW

### Negligence, Property Damage, Trespass

- Amy Howe, Assistant United States Attorney, Boise, ID, for the Plaintiff
- Scott Cifrese, Paine, Hamblen, Coffin, Brooke & Miller, Spokane, WA for Defendants

The United States seeks judgment against Defendants jointly and severally for recovery of fire suppression costs incurred by the United States associated with the wildland fire known as the "Hill City Blues 2 Fire," ignited on October 22, 2003. This fire allegedly originated on private lands owned by J.D. Aldecoa & Son, Inc. ("Aldecoa") and eventually moved onto federal lands within the fire protection area of the Sawtooth National Forest, and United States Department of Interior, Bureau of Land Management land. The United States alleges that the fire was negligently caused by Defendant Mendiola, who was at all relevant times an employee of Aldecoa acting within the course and scope of his employment, and the United States brings claims for negligence, trespass, and nuisance. The Defendants have accepted service but have not yet responded to the Complaint.

# COMPLAINTS FILED IN FEDERAL COURT

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PCS Edventures!.com, Inc. v. Deluna, et al., CV-08-379-S-BLW

Trademark

- Steven Schossberger, Hawley, Troxell, Ennis & Hawley, Boise, Idaho for the Plaintiff/Counterdefendant
- John Zarian, Zarian, Midgley & Johnson PLLC, Boise, Idaho, for the Defendants / Counterclaimants

Plaintiff provides goods and services in the area of digital media learning labs for the purpose of training teachers and educators in the proper methodology to use the various digital learning labs Plaintiff sells. Defendant Deluna is an author, lecturer, and educator who has developed classroom methods, books, and curricula to assist teachers in using technology in the classroom. Defendant Infusing Technology is a company wholly owned by Deluna and used by Deluna to commercialize her developments, including those related to providing goods and services in the area of digital media learning labs.

Defendants and Plaintiff entered into two agreements related to licensing and royalties for a digital photography curriculum product and for digital video and audio labs for which content and curricula would be authored by Plaintiff. Plaintiff also entered a training agreement with Defendant Deluna through which, Plaintiff alleges, Deluna was trained in how to deliver, market, and sell Plaintiff's goods and services, and received copyrighted and property materials. The parties also entered a confidentiality agreement.

Plaintiff alleges that digital labs offered for sale by Defendants, and the other content displayed on Defendants' website, infringes Plaintiff's copyrights, and that Defendants' website displays a distinctive mark and logo that is confusingly similar to Plaintiff's mark and logo. Plaintiff's Complaint seeks damages and equitable relief for, among other claims, alleged trademark infringement, unlawful competition, breach of contract, and misappropriation of trade secrets.

Defendants' Answer raises several affirmative defense and asserts counterclaims for unfair competition and false description, misappropriation of trade secrets, copyright infringement, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair or deceptive practices in violation of the Idaho Consumer Protection Act. Defendants also seek an accounting and the imposition of a constructive trust on Plaintiff's profits.

# COMPLAINTS FILED IN FEDERAL COURT

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## Wells Cargo, Inc. v. Transport Insurance Co., CV-08-491-E-REB

Insurance, Breach of Contract, Declaratory Judgment

- G. Lance Salladay, Salladay Law Office, Boise, Idaho, & Helen K. Michael and David H. Anderson, Howrey LLP, Washington D.C. and Chicago, Ill. for Plaintiffs

Defendants have not yet appeared, and have not responded to the allegations.

Plaintiff Wells Cargo, Inc., conducted contract mining operations on United States Forest Service land in Caribou County from 1965 to 1967. That mining site is now the subject of a Forest Service investigation into the release of hazardous substances at the site. The Forest Service initiated the investigation and subsequent administrative proceedings pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act.

Plaintiff's Complaint in this action seeks a judgment declaring the rights and duties of the parties under insurance policies issued by Defendant Transport Insurance Company as it relates to the costs incurred by Plaintiff in the Forest Service administrative proceeding. Defendant issued insurance policies to Wells Cargo from approximately 1958 through 1984, but neither party has been able to locate a copy of any of the policies in effect prior to 1972. Wells Cargo submitted a demand letter to Defendant seeking defense and indemnification for any activities or costs related to the administrative proceeding. Wells Cargo alleges that, based "upon correspondence, certificates of insurance, endorsements, specimen policies, and other documentation," Defendant is required to defend against any suits against Wells Cargo and pay damages up to an annual policy limit of at least \$5,000,000 for each occurrence.

# COMPLAINTS FILED IN FEDERAL COURT

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Multiquip, Inc. v. Water Management LLC, et al., CV 08-403-S-EJL

Patent Infringement & Validity, Breach of Contract, Conversion, Fraud

Frank Dykas with Dykas, Shaver & Nipper LLP, Boise, Idaho, for Plaintiff.

Defendants have not yet appeared, nor responded to the Complaint.

Plaintiff Multiquip, Inc., manufactures, sells, and distributes a wide range of industrial and construction equipment including power generation units, transportable light towers, concrete finishing equipment, concrete pumps, and waste water pumps. Defendant Water Management Systems is the recorded owner of the patent at issue in this action and, along with co-defendants David and Diann Muhs, the owner of several other, related patents.

In 2002, the Muhs discussed whether Plaintiff would be interested in purchasing their interest in Water Management Systems along with their rights in certain intellectual property. These discussions failed to result in an agreement and, in 2005, the Muhs again approached Plaintiff about a possible licensing arrangement. Plaintiff alleges that factual misrepresentations were made during this second round of negotiations and that an agreed-upon disclosure of confidential information by the Muhs was not what it was represented to be. Plaintiff also alleges that information the Muhs disclosed “was and is readily ascertainable from public domain sources and is of no economic value.” Plaintiff further alleges that it relied on additional representations made by Defendants and continued to operate under an oral agreement. However, the relationship further deteriorated, negotiations failed, and Water Management Systems sent a letter threatening to sue Plaintiff for infringement of Defendants’ intellectual property rights.

Plaintiff filed this action for declaratory relief as to the alleged existence, validity, and infringement of certain trademarks, unregistered Copyrights, proprietary trade secrets, information, drawings, and other written materials. Specifically, Plaintiff seeks a declaratory judgment of patent non-infringement and patent invalidity. Plaintiff also asserts causes of action for breach of contract, fraud, conversion, and intentional misrepresentation to induce entry into a contract.

# COMPLAINTS FILED IN FEDERAL COURT

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Jenott v. St. Alphonsus Reg. Med. Ctr., Inc., et al., CV-08-322-S-EJL

Age Discrimination, Hostile Work Environment, Wrongful Termination

- Paul J. Stark, Idaho Business Law Group, PLLC, Boise, ID, for Plaintiff
- Steven Berenter, Hawley, Troxell, Ennis & Hawley LLP, Boise, ID, for Defendants

Plaintiff alleges that throughout her employment for Defendant Saint Alphonsus Regional Medical Center as a Psychiatric Technician in the Behavioral Health Unit, from 1994 to 2007, she received excellent work performance evaluations. Despite these evaluations however, she alleges that Defendants retaliated against her for her objection to another employee's use of personal leave — because she believed it was a violation of the employer's policy — and because she complained about other preferential treatment employees in her unit had received.

Plaintiff also alleges that a hostile work environment existed in her unit and Defendants were aware of the environment and the prevalence of multiple “sexually charged incidents.” These events culminated in several discussions and allegations stemming from a December 2006 Christmas party.

On January 31, 2007, Plaintiff received a Disciplinary Action, the first in her 12.5 years of employment with Defendant and one she alleges was “an engineered pretext of false allegations . . . with the goal of eventual termination.” Plaintiff, age 56, was terminated on February 14, 2007, and is not ineligible for rehire at Saint Alphonsus. Plaintiff alleges that she was replaced by a younger, male hire and that older employees in her unit were terminated or asked to leave Defendant's employ from December 2005 through February 2007.

Plaintiff brings the following claims: age discrimination, sexual discrimination, unlawful retaliation, hostile work environment, wrongful termination in violation of public policy, tortious interference with contract, intentional infliction of emotional distress, and negligent hiring, supervision, and retention. Defendants have filed an Answer denying the allegations.

# COMPLAINTS FILED IN FEDERAL COURT

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Barnes v. Twin Falls City Police Department, CV-08-231-S-CWD

## Complaint of Civil Rights Violations

- Laird B. Stone for Plaintiffs
- James J. Davis for Defendants

In early 2007, the deceased was being sought by the Defendant Twin Falls City Police Department (the “Department”) for commission of an alleged aggravated battery. The Department later located the deceased at a business address in Twin Falls, Idaho. When the deceased would not leave the business, the Department’s SWAT Team and the Twin Falls County CRT Team were dispatched to the scene and surrounded the building. Allegedly, there were no hostages being held and there was no confirmation that the deceased had a weapon.

At some point, a decision was made for the Department entities to attempt to enter the building. According to the Complaint, the Department entities approached the building in full battle gear with weapons at the ready, throwing several canisters of gas into the building. When they ultimately entered the building, they found the deceased dead of a self-inflicted gun shot wound.

Plaintiffs are the personal representatives of the estate of the deceased and the parents and heirs of the deceased. Plaintiffs claim that the Defendants unlawfully deprived the deceased of his constitutional rights, all in violation of 42 U.S.C. § 1983. Through their Complaint, they seek special, general, and nominal damages while also reserving the right to pursue a claim for punitive damages.

# COMPLAINTS FILED IN FEDERAL COURT

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## Prism Pointe Technologies, LLC v. MPC Computers, LLC, CV-08-349-S-CWD

### Contract Dispute

- Christopher C. Burke, Greener Burke Shoemaker, P.A. and Paul C. Munger, Taylor Busch Slipakoff & Duma, LLP, for Plaintiff / Counterdefendant
- B. Newal Squyres and Scott E. Randolph, Holland & Hart for Defendant / Counterclaimant

In September 2006, Defendant entered into an agreement with Plaintiff. The agreement allegedly stipulated that Plaintiff would provide computer maintenance services to customers with warranties on Defendant's computer equipment. The agreement allegedly further stipulated the geographic area in which Plaintiff would provide said services, the pricing of said services, and the parts that would be supplied for said services.

Plaintiff provided invoices to Defendant for services rendered under the agreement, allegedly evidencing Plaintiff's completed work. Plaintiff claims that Defendant is in default for failure to timely pay Plaintiff's invoices, asserting breach of contract claims.

Defendant denies Plaintiff's substantive allegations, simultaneously asserting a counterclaim for breach of contract. Specifically, Defendant alleges that it and Plaintiff entered into a non-disclosure agreement whereby both parties agreed not to disclose any confidential information and/or trade secrets to any third party. Defendant claims that the above-referenced September 2006 agreement contains trade secrets and other confidential information; yet, by virtue of Plaintiff's unsealed filings, it allegedly disclosed the parties' confidential and proprietary information. Additionally, Defendant alleges that Plaintiff failed to fulfill its contractual service obligations under the September 2006 agreement.

# COMPLAINTS FILED IN FEDERAL COURT

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## Unitech Composites, Inc. v. FFE Transportation Services, Inc., CV-08-361-N-CWD

### Interstate Commerce Act

- Michael James Hines and Michael G. Schmidt for Plaintiff
- John Winton Greene and Christopher P. Graham for Defendant

Plaintiff engineers and manufactures structural and nonstructural composite laminate products for aerospace, transportation, military, commercial, and industrial applications. Plaintiff allegedly purchased highly temperature-sensitive, perishable composite product from Cytac Engineered Materials (“Cytac”) and contracted with Defendant to transport the product from California to Plaintiff’s facilities in Hayden Lake, Idaho. Defendant then proceeded to transport said product to Plaintiff in Hayden Lake, Idaho.

Allegedly, Defendant was aware that the shipments had to be temperature controlled throughout the duration of the shipments. The bills of lading allegedly specify that the refrigerated trucks had to maintain a 0 degree Fahrenheit temperature at all times during transit. However, after the shipment arrived, the trip data files allegedly revealed that the temperature of the product during the two shipments exceeded 0 degrees Fahrenheit.

According to Plaintiff, the failure to maintain the appropriate temperature caused irreparable damage to the two shipments, rendering the composite product worthless.

# COMPLAINTS FILED IN FEDERAL COURT

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United States of America v. Shoshone Silver Mining Co. et al, CV-08-495-N-CWD

Environmental Matters - CERCLA

- Paul Gormley, U.S. Department of Justice, Washington, D.C. for Plaintiff
- William F. Boyd for Defendant Shoshone Silver Mining Co.
- Counsel for Defendant Lakeview Consolidated Silver Mines, Inc. has not yet appeared

From approximately 1980 through 1988, Defendant Shoshone Silver Mining Co. (“Shoshone”) conducted mining activities at the Idaho Lakeview Mine and Mill Site (the “Site”). Portions of the Site are allegedly owned by Shoshone and have allegedly been owned by Shoshone at the time of the disposal of hazardous substances. Additionally, from approximately 1976 through today, Defendant Lakeview Consolidated Silver Mines, Inc. (“Lakeview”) also owned portions of the Site.

According to the Complaint, while Shoshone conducted operations at the Site, hazardous substances were disposed of into the environment at the Site. In 2005, the EPA conducted a removal action at the Site in response to releases or threats of releases of hazardous substances into the environment. The EPA has allegedly incurred approximately \$2 million in unreimbursed costs in response to releases and threats of releases of hazardous substances at the Site.

Plaintiff seeks the reimbursement of all costs incurred by the United States in response to releases or threats of releases of hazardous substances at the Site.

# COMPLAINTS FILED IN FEDERAL COURT

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## Booth v. Pocatello Radiology Associates et al, CV-08-401-N-CWD

### Job Discrimination - Hostile Work Environment

- DeAnne Casperson for Plaintiff
- Katelyn Rae McKinney and Ted Murdock for Defendants

In December 2006, Defendant hired Plaintiff to perform scheduling and marketing services. During the course of said employment, she allegedly properly and satisfactorily performed all obligations and responsibilities required of her under the terms of her applicable employment agreement.

On a number of occasions, a Defendant employee made sexually-related comments to Plaintiff about her body and appearance. Plaintiff was allegedly offended by these comments and tried to ignore them. Later, Defendant employee allegedly made inappropriate advances at Plaintiff. Plaintiff was again allegedly offended and attempted to deter Defendant employee's alleged advances.

According to the Complaint, Plaintiff was never provided any employment policies or guidelines regarding sexual harassment or discrimination. Likewise, Plaintiff was allegedly unaware of any employment policies and procedures until shortly before she was constructively discharged. Still, Plaintiff allegedly reported the harassing behavior to Defendant's office manager who directed Plaintiff to tell Defendant employee that his behavior was inappropriate. However, Plaintiff reported back to the office manager that she could not confront Defendant employee because of her fear of him and alleged shock over the alleged sexual assault. The office manager allegedly told Plaintiff again that she needed to confront Defendant employee.

At some point, the office manger told Plaintiff that he spoke with Defendant employee and directed him to stay away. However, the sexual advances allegedly continued. When Plaintiff complained, her employer allegedly began criticizing her work. Up until that time, Plaintiff received no oral or written warnings regarding her job performance.

As a result of Defendant employer's alleged failure to remedy the situation, working conditions grew intolerable and Plaintiff was compelled to leave.

# COMPLAINTS FILED IN FEDERAL COURT

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Sun Valley Bronze, Inc. v. Nobilus, LLC, CV-08-345-S-EJL

## Declaratory Judgment

- John N. Zarian and Peter M. Midgley for Plaintiff
- Jennifer Marie Reinhardt, Paul J. Stockhausen and William A. Rinehart for Defendant

In correspondence sent to Plaintiff in July and August 2008, Defendant allegedly asserted ownership of all right, title, and interest in a patent, labeled “Door Handle System.”

In a July 9, 2008 letter, Defendant allegedly claimed that Plaintiff was making, selling, and offering for sale door handle assemblies which infringe on said patent. Defendant further demanded that Plaintiff cease and desist the manufacture, use, sale, and offering for sale of Defendant’s products and that Defendant immediately take steps to provide a full and complete accounting of all sales of such products to date.

In response, on August 8, 2008, Plaintiff indicated that it needed additional information to fully evaluate Defendant’s allegations of patent infringement and to respond accordingly. On August 12, 2008, Defendant responded, enclosing digital photographs of an exemplar that allegedly infringes on the patent at issue and reiterating its earlier demands.

Plaintiff seeks a judgment declaring that Plaintiff does not manufacture, use, sell, or offer for sale any product that infringes any valid claim of said patent.

# COMPLAINTS FILED IN FEDERAL COURT

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Beach v. J.D. Lumber, Inc., CV-08-416-N-EJL

Labor Dispute

- Mel L. Crawford, David J. Whedbee, and Robert C. Huntley for Plaintiffs
- Brian K. Julian for Defendants

On August 2, 2008, Defendant issued a document entitled “60-Day Notice to All JD Lumber Employees of a Mass Layoff” (the “Notice”), stating that Plaintiffs would be terminated on October 3, 2008 due to an asset purchase sale with a competitor company. Plaintiffs worked the swing shift at Defendant’s business.

When the Notice was being distributed to the affected employees, Defendant employer allegedly represented to the Plaintiffs that he (Defendant employee) would be employed with the competitor purchaser identified in the Notice, and that his main priority was to develop the competitor’s log yard. Allegedly, Defendant employee also represented that he would retain his forest lands, other property, and his foresters. Finally, Defendant employee allegedly stated that log contracts that Defendant had with Potlatch Corporation would be transferred to the competitor purchaser the next day.

On August 22, 2008, Defendant issued to Plaintiffs a second notification stating that they were being laid off, effective end of shift on August 22, 2008. This second notification further stated that “due to unforeseen business circumstances caused by a sudden, dramatic, and unexpected weather and market conditions affecting the entire lumber industry in this area, [Defendant] is, at this point, running only one shift because of a lack of logs.” On August 22, 2008, Plaintiffs were terminated.

Plaintiffs alleged that, since before the date of the August 22, 2008 notification, Defendants have been diverting logs that were originally intended to go to Defendant to the competitor purchaser and, in doing so, created themselves the “lack of logs” they claim justifies Plaintiffs’ termination.

Plaintiffs now claim that Defendant failed to give at least 60 days notice to all affected employees of their termination as is required by 29 U.S.C. § 2102(A)(1). Additionally, Plaintiffs assert wage claims and breach of contract claims under Idaho law.

# COMPLAINTS FILED IN FEDERAL COURT

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## The Wilderness Society et al v. United States Forest Service et al CV-08-363-E-EJL

### Environmental Matters - Administrative Procedure Act

- Erik Schlenker-Goodrich, Western Environmental Law Center, Taos, NM and David A. Bahr, Western Environmental Law Center, Eugene, Oregon, Scott W. Reed, Coeur d'Alene, Idaho and David A. Bahr for Plaintiffs
- Beverly F. Li for U.S. Forest Service, and Robert H. Foster, U.S. Department of Justice for Defendants

Plaintiffs bring this civil action for declaratory and injunctive relief against the Defendants in accord with the Administrative Procedure Act (“APA”) for violations of: (1) the National Environmental Policy Act (“NEPA”); (2) the Clean Water Act (“CWA”); (3) the National Forest Management Act (“NFMA”); (4) Executive Order 11644, as amended by Executive Order 11989; and (5) implementing regulations established pursuant to these federal statutes and executive orders.

This action arises out of an Appeal Decision issued by the Forest Service on May 28, 2008. The Appeal Decision rejected an administrative appeal filed by Plaintiffs and, in so doing, affirmed a February 22, 2008 Decision Notice (“DN”) and Finding of No Significant Impact (“FONSI”) designating 1,196 miles of roads and trails for motorized recreation use on the Minidoka Ranger District of the Sawtooth National Forest in Idaho. The DN/FONSI was signed on the basis of a February 2008 Environmental Assessment (“EA”) prepared for the District Rangers’ Travel Plan Map Revision – Elimination of Motorized Cross-Country Travel and Motorized Route Designation. Subsequent to the Appeal Decision, the Forest Service published the requisite Motor Vehicle Use Maps (“MVUMs”), thus completing the travel planning process on the Minidoka Ranger District.

The Complaint alleges that the Forest Service, in designating 1,196 miles of roads and trails for motorized recreation use, violated procedural and substantive duties critical to the protection of the environment. In particular, the Forest Service allegedly unlawfully circumvented public participation rights essential to a fair and fully informed decision-making process, failed to address the extensive legacy of environmental damage caused by motorized recreation use, and failed to consider common-sense solutions which would have remedied this legacy of environmental damage and prevented it from reoccurring.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Sandra Ikuta  
U.S. Court of Appeals  
for the Ninth Circuit

Renteria-Morales v. Mukasey, 04-74742

Rivera De Alvarado v. Mukasey, 06-73283

Petition for Review from: BIA

Panel: Thomas, Tallman

(concurring in part and dissenting in part), Ikuta (author)

Subject Matter: Immigration

The panel ordered the opinion filed July 10, 2008, and appearing at 532 F.3d 949, withdrawn and a superseding opinion filed simultaneously. As in the original opinion, the panel consolidated petitions for review regarding whether petitioners' convictions for failure to appear in court (bail jumping), in violation of 18 U.S.C. § 3146, qualified as aggravated felonies as defined by 8 U.S.C. § 1101(a)(43)(S) (offenses relating to obstruction of justice) or 8 U.S.C. § 1101(a)(43)(T) (offenses relating to failure to appear pursuant to a court order).

In the superseding opinion, the panel concluded that a violation of § 3146 qualified as the generic crime of "obstruction of justice" under § 1101(a)(43)(S), but did not qualify as the generic crime of "failure to appear" under § 1101(a)(43)(T). The panel also concluded that a petitioner's prior conviction qualified as an aggravated felony under § 1101(a)(43)(S) only if the petitioner had been sentenced to a term of imprisonment of "at least one year."

Regarding Irma Renteria Morales' (Renteria) conviction, the panel held that although § 3146 includes all of the elements of the generic crime, the elements of § 3146 are broader than the elements of § 1101(a)(43)(T). Under the modified categorical approach, the panel held that on the present record, it could not say with certainty that Renteria was convicted of all of the elements of the generic crime described in § 1101(a)(46)(T), and thus granted Renteria's petition for review.

# RECENT NINTH CIRCUIT DECISIONS

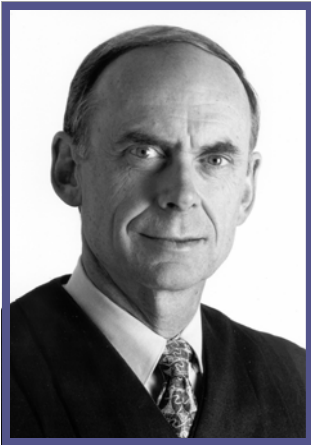
Judge Ikuta's  
decision continued from  
previous page

Regarding Maria Jesus Rivera de Alvarado's (Rivera) conviction, the panel afforded *Chevron* deference to the BIA's definition of "obstruction of justice" and concluded that a conviction under § 3146 is categorically "an offense relating to obstruction of justice" under § 1101(a)(43)(S). The panel held that the component of § 1101(a)(43)(S) requiring that the offense be one "for which the term of imprisonment is at least one year," is a statutory requirement rather than an element of the generic federal offense, and thus the panel used tools of statutory construction rather than the categorical and modified categorical approach to evaluate the crime. The panel concluded that because Rivera was sentenced to a term of twelve months and a day, the statutory sentencing requirement in § 1101(a)(43)(S) was met. The panel thus denied Rivera's petition for review.

As in the original opinion, Judge Tallman concurred in part and dissented in part. Judge Tallman would deny Renteria's petition for review, and dissented from the majority's conclusion that, under the modified categorical approach, Renteria's conviction did not meet the elements of an aggravated felony under § 1101(a)(43)(T). Judge Tallman concurred in all other parts of the majority's opinion.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Raymond C. Fisher  
U.S. Court of Appeals  
for the Ninth Circuit

Seattle Affiliate v. City of Seattle, 06-35597

Appeal from: W.D. Wash [Lasnik, J.]

Panel: Fisher (author), Gould, Ikuta (dissenting)

Subject Matter: Civil Rights

The panel reversed the district court's summary judgment in a 42 U.S.C. § 1983 action challenging the City of Seattle's parade ordinance, which gave its police chief the discretion, when issuing a parade permit, to require marchers to use the sidewalks instead of city streets.

The panel held that the ordinance by its terms gave the Chief of Police unbridled discretion to force marchers off the streets and onto the sidewalks, unchecked by any requirement to explain the reasons for doing so or to provide some forum for appealing the chief's decision. The panel therefore held that the parade ordinance was facially unconstitutional.

Dissenting, Judge Ikuta stated that Seattle's parade-friendly ordinance was an ordinary content-neutral time, place, and manner restriction that did not vest unbridled discretion in the Chief of Police.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Cynthia Holcomb Hall  
U.S. Court of Appeals  
for the Ninth Circuit

Transwestern Pipeline Co. v. 17.19 Acres of Property  
Located in Maricopa County, 08-15991

Appeal from: D. Ariz. [Sedwick, J.]

Panel: Pregerson, Hall (author), N. Randy Smith

Subject Matter: Natural Gas Act/Preliminary Injunction

The panel affirmed the district court's denial of a natural gas pipeline owner's motion for a preliminary injunction seeking immediate possession of parcels of land for a new pipeline approved by the Federal Energy Regulatory Commission.

Following the Fourth and Seventh Circuits, the panel held that the pipeline owner had no substantive right of possession until completion of condemnation proceedings under the Natural Gas Act, and, therefore, the district court lacked authority to grant preliminary equitable relief.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Stephen S. Trott  
U.S. Court of Appeals  
for the Ninth Circuit

United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CL v. Shell Oil Co., 08-56672 & 08-56673

Appeal from: C.D. Cal. [Klausner, J.]

Panel: Eighth Circuit Judge Bright, Trott (author), and Hawkins

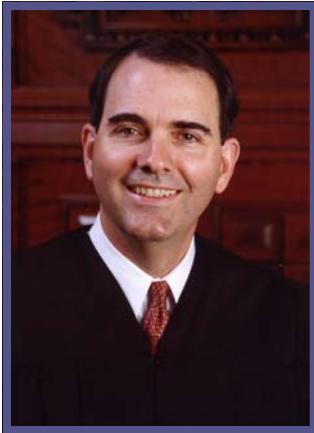
Subject Matter: Class Action Fairness Act

The panel reversed the district court's orders remanding a case to state court. The panel held that § 1453(b) of the Class Action Fairness Act, in a case with multiple defendants, entitles one defendant to remove the entire action; and, therefore, Shell Oil's timely notice of removal effected removal of the entire action, including the claims against Tesoro Refining and Marketing Company.

The panel also denied a plaintiff's motion for sanctions where the defendants did not intentionally delay or disrupt the litigation, and the plaintiff did not file a separate sanction motion or even cite Federal Rule of Appellate Procedure 38.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Jay S. Bybee  
U.S. Court of Appeals  
for the Ninth Circuit

Diaz v. Davis (In re: Digimarc Corp. Derivative Litigation),  
06-35838

Appeal from: D. Or. [Haggerty, J.]

Argued & Submitted: 8/26/08

Panel: T. G. Nelson, Hawkins, Bybee (author)

Subject Matter: Sarbanes-Oxley Act

The panel affirmed in part and reversed in part the district court's dismissal of a shareholder's derivative action for breach of fiduciary duties by corporate officers and directors.

In an issue of first impression in any Circuit, the panel affirmed the district court's holding that there is no private right of action under § 304 of the Sarbanes-Oxley Act, which provides for the forfeiture of certain bonuses and profits when corporate officers fail to comply with securities law reporting requirements.

The panel reversed the district court's subsequent realignment of the corporation as a plaintiff, which destroyed diversity jurisdiction over state law claims, because there was antagonism between the derivative plaintiffs and the corporate officers and directors at the time the suit was filed.

# RECENT NINTH CIRCUIT DECISIONS

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Judge D.W. Nelson  
U.S. Court of Appeals  
for the Ninth Circuit

Société Civil Succession Richard Guino v. Renior,  
07-15582, 07-15583, 07-17209

Appeal from: D. Ariz. [Murguia, J.]

Panel: Schroeder, D. W. Nelson (author), Reinhardt

Subject Matter: Copyright

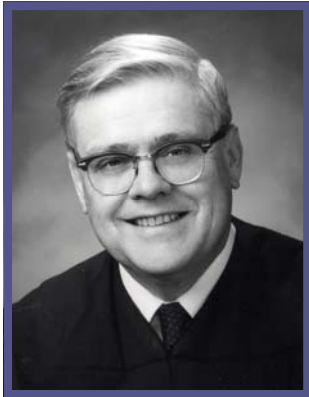
Affirming the district court's summary judgment, the panel held that sculptures created between 1913 and 1917 were protected by copyright. The panel held that, under the 1909 Copyright Act, publications of the sculptures in a foreign country in 1917 and 1974, without notice of United States copyright, did not put the sculptures in the public domain in the United States.

In addition, between 1917 and 1978, the sculptures were not protected by copyright under the 1909 Act because they were never published with copyright notice. The panel held that, under § 104A of the 1976 Copyright Act, restoration of copyright protection for foreign works was not available because the sculptures had not passed into the public domain. Nonetheless, under § 303(a) of the 1976 Act and *Twin Books v. Walt Disney Co.*, 83 F.3d 1162 (9th Cir. 1996), the sculptures were entitled to protection for 70 years after the death of the last surviving author in 1973 because they were created before 1978 but were not therefore in the public domain or copyrighted.

The panel rejected the argument that *Twin Books* should be distinguished on the basis that works published before 1923 are generally in the public domain under the 1976 Act and the 1998 Copyright Extension Act. The panel also rejected the argument that application of *Twin Books* violated the Constitution and *Eldred v. Ashcroft*, 537 U.S. 186 (2003), by creating a limitless term of United States copyright for works published abroad.

# RECENT NINTH CIRCUIT DECISIONS

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Judge Robert J. Timlin  
Senior, U.S. District Judge  
Central District of California  
Sitting by Special Designation

## Chambers v. McDaniel, 07-15773

Appeal from: D. Nev. [Jones, J.]

Panel: Wallace (dissent), Graber, District Judge Timlin (author)

Subject Matter: Habeas Corpus

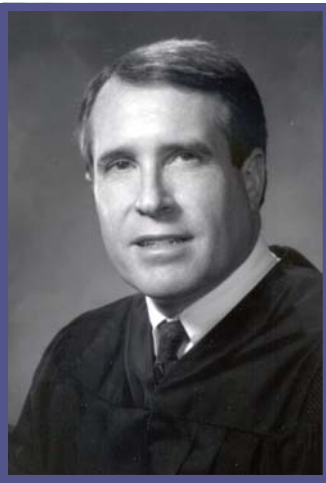
The panel affirmed in part and reversed in part the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition challenging a Nevada state conviction for murder and two consecutive sentences of life without possibility of parole.

The panel first held petitioner's claim was exhausted, because the highest court had considered and addressed the claim on the merits. The panel then held that the jury instructions violated petitioner's right to due process because they allowed the jury to convict him of first degree murder without finding the essential element of deliberation. Because the error was not harmless given weak evidence of deliberation, the panel reversed and remanded with instructions to grant the writ unless the State elects to re-try petitioner.

Judge Wallace dissented because he did not agree that petitioner had fairly presented his habeas claim to the state supreme court, or that the court had addressed the claim on the merits. He would remand with instructions that petitioner file his claims in the Nevada state courts.

# JURY TRIALS IN THE DISTRICT OF IDAHO

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Chief Judge B. Lynn Winmill  
United States District Court  
for the District of Idaho

United States v. Swisher  
CR-07-182-S-BLW  
April 3, 2008  
Boise, Idaho

For the Government:  
Jessica T. Fehr  
Assistant U.S. Attorney  
District of Montana

For the Defendant:  
Christopher Alden Bugbee  
Bugbee Law Office, PS  
Spokane, Washington

Verdict - Guilty, without  
authority authorized by  
Congress, wore decorations and  
medals; that he was involved in  
combat (four guilty counts)

Sentencing set January 5, 2009  
at 9:00 a.m. in Boise

United States v. Arrendondo-  
Mesa, CR-07-187-E-BLW  
April 21, 2008  
Pocatello, Idaho

For the Government:  
Michael J. Fica, Pocatello  
and Anthony G. Hall, Boise  
Assistant U.S. Attorneys  
District of Idaho

For the Defendant:  
R. James Archibald  
Swafford Law Office  
Idaho Falls, Idaho

Verdict - Guilty, Count I,  
conspiracy to distribute 500  
grams of methamphetamine;  
and Count II continuing  
criminal enterprise (CCE)

Sentencing held October 10,  
2008 — Four hundred-eighty  
months imprisonment; \$500  
fine; \$100 special assessment.

# JURY TRIALS IN THE DISTRICT OF IDAHO

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Judge Edward J. Lodge  
United States District Court  
for the District of Idaho

United States v. Joseph Duncan  
CR-07-23-N-BLW  
April 14, 2008  
Boise, Idaho - Death Sentence

For the Government:  
Thomas E. Moss  
U.S. Attorney, District of Idaho

Traci Jo Whelan  
Assistant U.S. Attorney  
Coeur d'Alene, Idaho

Wendy Olson  
Assistant U.S. Attorney  
Boise, Idaho

For the Defendant:  
Judy Clarke, Federal Defenders  
San Diego, California

Mark A. Larranaga  
WALSH & LARRANAGA  
Seattle, Washington

Roger Peven  
Federal Defender's Office  
Spokane, Washington

Thomas Monaghan  
Federal Defender's Office  
Boise, Idaho

US v. Graciano Marquez-Huazo  
Eduardo Cobos and  
Tomas Roldan  
CR-07-271-S-BLW  
May 27, 2008 - Boise, Idaho

For the Government:  
Aaron N. Lucoff  
Assistant U.S. Attorney  
Boise, Idaho

For the Defendants:  
James K. Ball  
for Marquez-Huazo  
Manweiler, Manweiler,  
Breen & Ball  
Boise, Idaho

Paul E. Riggins, Riggins Law  
for Eduardo Cobos  
Boise, Idaho

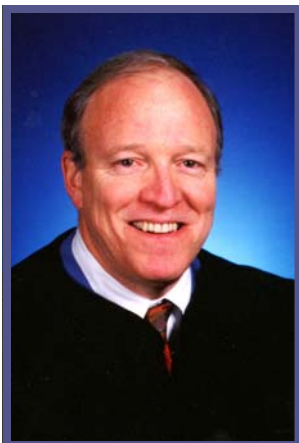
Leo N. Griffard, Jr.  
for Tomas Roldan  
Boise, Idaho

Verdict: Guilty of Distributing  
Methamphetamine; and  
Possession of a Firearm

Sentencings to be held in Boise  
in December 2008

# VISITING JUDGES IN THE DISTRICT OF IDAHO

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Chief Judge Robert H. Whaley  
United States District Judge  
for the Eastern District  
of Washington  
Sitting by Special Designation

Tomlinson Black v. Kirk  
CV-06-118-N-BLW  
June 6, 2008  
Coeur d'Alene, Idaho

For the Plaintiff  
Douglas S. Marfice  
and Terrance R. Harris  
Ramsden & Lyons  
Coeur d'Alene, Idaho

For the Defendant  
Jeffrey J. Aultman  
and Patrick E. Miller  
Paine Hamblen Coffin Brooke  
& Miller  
Coeur d'Alene, Idaho

R. Bruce Owens  
Owens James Vernon & Weeks  
Coeur d'Alene, Idaho

Regina Michele McCrea  
Owens & Crandall, PLLC  
Coeur d'Alene, Idaho

For Respondent  
Edwin Bowman Holmes  
HOLMES LAW OFFICE  
Hayden, Idaho

Verdict: \$235,000 for Plaintiff;  
partial verdict for defendant

Judge Wm. Frem Nielsen  
United States District Court  
for the District of Washington  
Sitting by Special Designation

United States v. Jerome Loew  
CR-07-85-N-BLW  
June 2, 2008  
Moscow, Idaho

For the Plaintiff  
James Peters  
Assistant U.S. Attorney  
Moscow, Idaho

For the Defendant  
Mark Moorner  
Moscow, Idaho

Verdict: Guilty (11 Counts)  
of Harrassing/Obscene Phone  
Calls; Not Guilty (2 Counts)  
of Transportation of Obscene  
Matter, and Interstate  
Telephone Threat

Sentencing Scheduled January  
15, 2009 at 1:30 p.m. in  
Coeur d'Alene, Idaho

# VISITING JUDGES IN THE DISTRICT OF IDAHO

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On a recent assignment as a Visiting Judge to the District of Idaho, Chief Judge William F. Downes of the District of Wyoming, had the opportunity to visit with Idaho former Governor Cecil Andrus.

Shown left to right: Chief Judge Downes, Governor Andrus, and Stephen Oertle, law clerk for Judge Downes, District of Wyoming.





# SPECIAL THANKS!

Thanks and Appreciation to

**Daniel Gordon, Kate Ball  
and Kira Pfisterer**

**Career Staff Attorneys  
for Judge Ronald E. Bush**

**for providing the synopsis  
of this edition's Complaints**

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Wendy Olson, President  
Assistant United States Attorney  
United States Department of Justice

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Wendy.Olson@usdoj.gov

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