

~ SIDEBAR ~

a Newsletter of the Idaho Chapter of the Federal Bar Association



President's Message by Wendy J. Olson



Happy December! Please join us on Tuesday, December 22, from 5:30 - 8:00 p.m. at the home of Jack Gjording and Trudy Hanson Fouser to enjoy each other's company, and celebrate the holidays. This year, we want our Idaho Chapter members and other federal practitioners to have a chance for some fun. We know that everyone has a busy holiday schedule but hope that you can stop by for a few minutes just to say hello. And please feel free bring along a non-member who might be interested in our Chapter.

The Federal Bar Association's mission is to serve the federal practitioner. In 2010, much as we did in 2009, the Idaho Chapter plans to do that through low-cost, high quality CLEs, entertaining programs, this award winning newsletter, increased commitment to pro bono work, more "Juice with the Judge" programs to introduce young lawyers to our federal judges, and presentation of our third annual exemplary service awards to outstanding federal practitioners. We hope you will continue to join us in these events, and we encourage you to give us your ideas for additional programs.

Our executive committee is making a few changes in 2010. Barry McHugh, who has served three terms as one of the CLE program directors, is stepping down to devote more time to his new job as Kootenai County Prosecuting Attorney. Unfortunately, Barry's new duties don't allow much time in federal court. We will miss not only his contributions to our CLE programs, but also his company on our committee.

Our bylaws require executive committee vacancies to be filled by vote of the membership. We have a couple of openings on the executive committee – spots that simply weren't filled at the last election in 2008 – so we will be sending you a ballot for election for Barry's replacement and other executive committee members. Also, the entire executive committee's terms are up in October 2010.

Kim Toryanski, as president-elect, will succeed me, and I am confident that many of our current members will want to continue to serve, but please be thinking about whether you would be interested in an executive committee spot. Some of you have already indicated to me that you are.

(Continued on page 2).



Executive Board

Wendy Olson, President

Kim Toryanski
Vice President

Susie Headlee
Executive Director

Larry Prince, Treasurer

Brad Williams, Secretary

Dean Arnold, Membership

Barry McHugh and
Robert Schwarz, CLE

Julie Tetric
Young Lawyers

Ted Creason
Law School Liaison

Trudy Hanson Fouser
Pro Bono/Events

Larry Westberg
National Chair
Government Relations





President's Message cont'd.

Additionally, our full-day CLE this year will be on April 9, 2010, in Boise. We have an exciting opportunity to present "Clarence Darrow's Judicial Perspective." This legal education program is the brainchild of Gary Anderson, who has traveled the country presenting legal programs to various state judiciary audiences and other law-related venues. Most recently, he presented the program in Illinois at the National Conference of State Trial Judges.

We will apply for a half-hour ethics credit with the Idaho State Bar for this program.

Mr. Anderson has tapped into Idaho's local legal/acting community by securing Tony Park, former Idaho Supreme Court Justice Bob Huntley, State Court Judge Ronald Wilper, and retired Court of Appeals Justice Alan Schwartzman. Please mark your calendars and save the date!

We also are putting together smaller CLE programs for other parts of the state, and we will rotate our full-day CLE to Coeur d'Alene in 2011.

Finally, please let us know what more we can do to serve you. Although the national FBA membership is down a little bit – likely due to the economy – our membership numbers are holding steady. I hope it is because we provide programs of value, an important service, and that we provide an opportunity to improve the quality of your interaction in your federal practice.

Of course, I know that much of our success is due to the hard work of Executive Director Susie Headlee, and Dean Arnold, our membership director.

I am looking forward to 2010 — until then, see you on December 22 at Trudy and Jack's!





A Recap of the Tri-State Federal Bar Program

by Tom Arkoosh . Capitol Law Group, Idaho
and Craig Adamson . Dart, Adamson and Donovan, Utah



Tom Arkoosh
Capitol Law Group

The Idaho Chapter of the Federal Bar Association hosted the 5th annual Tri-State Federal Bar Association Conference on October 8 - 10, 2009, in beautiful Sun Valley, Idaho. Idaho, Wyoming, and Utah FBA members (from the Ninth and Tenth Circuits), meet once a year to confer and integrate learning, and learn about national trends and developments in the Federal Judiciary.

Larry Westberg, Chair of the Governmental Affairs Committee, and National Executive Director Jack Lockridge opened the Conference providing a substantive review of the economic effects of Judges' salary levels on the Federal Courts and the current status of federal judicial vacancies nationwide. Photo below.



Craig Adamson
Dart, Adamson & Donovan

Quite often CLE programs go downhill from the initial reception. That was not the case at the Tri-State Conference for the states of Idaho, Utah and Wyoming. Attendees gathered on Thursday evening for an informal reception complete with music, light fare and drinks. Beginning early Friday morning through Saturday at noon, lawyers, eleven federal judges and court personnel interacted on a close personal basis to discuss problems with real application to the FBA chapter members.





Recap of Tri-State Program cont'd.

This year the educational focus was a mix of technology and trial skills training. Conference attendees heard from Judges on topics like Jury Trial Innovations and Courtroom Technology, and Legal Ethics. Judges Mark W. Bennett and Judge B. Lynn Winmill illustrated their uses of courtroom technology.

Judge David O. Carter of California explained the pitfalls for lawyers, judges and litigants of conducting complex violent crime prosecutions, which most attendees visibly hoped would be esoteric so far as they were personally concerned. Judge Carter's session dealt with real problems faced by the judges, court staff, the U.S. Marshal's Service, and prison officials when dealing with violent offenders, and during criminal jury trials.

A mix of lawyers and judges conducted a series of panels on useful, current, and innovative trial and advocacy skills. These included effective legal writing with Judge Clark Waddoups, Utah, Dave Metcalf and Syrena Hargrove, Idaho.

From the intensely practical session on Effective Legal writing: Don't use a page when a clear sentence will do to the session on Voir Dire, and how it is conducted by different judges, even in the same District.



Judge Mark W. Bennett, Iowa, (Left)
and Chief Judge B. Lynn Winmill, Idaho
provide an overview of Technology in the Courtroom



Chief Judge B. Lynn Winmill, Idaho (Left)
and Judge David O. Carter, * California

*Judge Carter is a frequent visiting judge to the District of Idaho, who sits by special designation.



Recap of Tri-State Program cont'd.



Judge Candy Wagahoff Dale, Idaho
and Judge Mark W. Bennett, Iowa

The voir dire portion of the program included Judge B. Lynn Winmill, Judge Dale Kimball, lawyers Richard Rubin and Lauren Scholnick, where a lively discussion ensued outlining the difference in how Voir Dire is conducted where some Judges allow very broad attorney conducted Voir Dire, while others preferring to handle it themselves with limited suggestions from counsel.

Judge Trott's keynote address on the topic of when we became "one nation" was fascinating – it was actually much later than you might think.

Judge Candy Wagahoff Dale (District of Idaho), Louise York (Chief Deputy, District of Utah), Jason Prince (Stoel Rives, Idaho), and Erik Christiansen (President, Utah Chapter) emphasized the importance of Chapter members being involved in *pro bono* work.

A portion of the program was also devoted to legal ethics (Utah Judges Tena Campbell, Dale A. Kimball and Clark Wadouds, moderated by lawyer Jonathan O. Hafen), and juror perspectives involving Judge Larry M. Boyle, District of Idaho.

Each described the proactive approach their district was using with regard to pro se litigants and the work pro bono attorneys are providing in assisting the litigants.

Judge Stephen S. Trott, Ninth Circuit Court of Appeals, regaled the group at lunch with an enthralling history of the struggle for equality that simultaneously gave rise to the growth of the nation and its near destruction in the civil war.

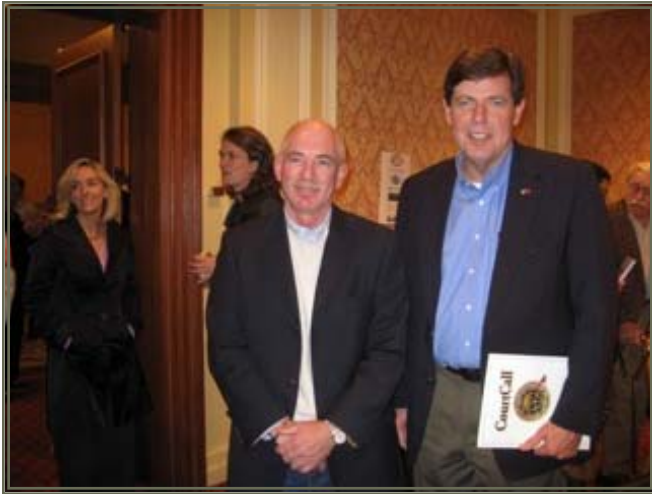
Idaho has significantly expanded its list of attorneys accepting pro bono appointments through the efforts of Trudy Fouser of the Idaho Chapter, and Judge Dale and Susie Headlee's participation in outreach to the attorneys through the Idaho Pro Bono Commission. Utah's increasing participation of pro bono attorneys was attributed to their outreach to law firms as opposed to individual lawyers.



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



Recap of Tri-State Program cont'd.



Kate Ball and Syrena Case Hargrove (background)
Tom Arkoosh, Idaho
and Judge William F. Downes*, Wyoming
*Judge Downes is also a frequent visiting judge to the
District of Idaho, who sits by special designation



Lauren Scholnick, Strindberg & Scholnick
law firms in Utah and Idaho
with Executive Director Jack Lockridge

Both Jason Prince and Erik Christiansen shared their insights about the professional growth they achieved through their participation in representing pro se litigants.

Finally, the three Chief Judges: Lynn Winmill, Tena Campbell, Utah, and Bill Downes, Wyoming, allowed an unfettered hour of “ask the Judges,” which resulted in developing or refining a process to review just how much discovery a particular case really mandates.

An interesting facet of all of these presentations was the contrast in the differing impressions and solutions different Judges and lawyers had on similar issues. It was apparent that different Judges approach and solve these problems very differently. All present went away with a little different view on differing solutions to these problems. It is very clear that practitioners would be well advised to consult the local rules frequently.

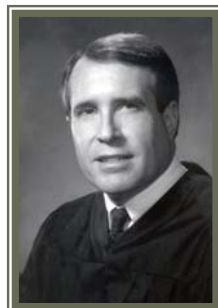
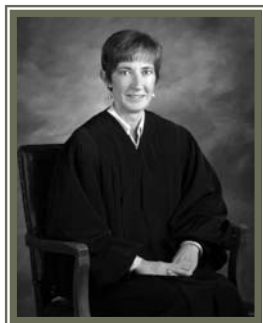
The multi-District make up of the annual Idaho, Utah, Wyoming Tri-State Federal Bar Association Conference is staffed by the jurists and lawyers that work at the front of today’s federal litigation, which provides an unbeatable gathering for federal lawyers.

The Federal Bar is indeed alive and well in Idaho, Utah and Wyoming. Participants stated that this was a conference was high level, meaningful, and practical.

Hopefully, at some point in the future, these programs will be recorded for use by other Federal Bar members.

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Jury Trials in the District of Idaho



Ringel v. Heritage
CV-08-438-S-BLW
September 28, 2009
Boise, Idaho

Burling v. Real Stone
CV-08-43-E-EJL
October 13, 2009
Pocatello, Idaho

US v. Hamilton/Cattanea
CR-09-02-E-BLW
November 16, 2009
Pocatello, Idaho

Millenkamp v. Davisco
CV-03-439-E-EJL
November 17, 2009
Pocatello, Idaho

Attorney for Plaintiff:
Charles L. Honsinger
Ringert Law
Boise

Attorney for Plaintiff:
James D. Holman
Thomsen & Stephens
Idaho Falls

For the Government:
Wendy Olson
Assistant U.S. Attorney
Boise, Idaho

Attorney for Plaintiff:
C. Thomas Arkhoosh
Capitol Law Group
Boise, Idaho

Attorney for Defendant:
Thomas B. High
Benoit Alexander
Harwood & High

Attorney for Defendant:
Rick D. Roskelley
Littler Mendelson
Las Vegas, Nevada

Attorney for Defendant
Hamilton:
Kelly Kumm
Pocatello, Idaho

Attorneys for Defendant:
Kenneth White
Mankato, Minnesota

Verdict:
In Favor of Plaintiffs,
\$118,000
(Finding Plaintiffs 10%
at Fault)

Verdict:
In Favor of Defendants,
and were awarded Costs.

Attorney for Defendant
Cattanea:
Steven V. Richert
Federal Defender's
Office, Pocatello, Idaho

Thomas H. Lopez
Lopez & Kelly,
Boise, Idaho

Verdict:
In Favor of Defendants.

Verdict:
Criminal case: Health
Care Fraud; Aiding and
Abetting.
Guilty on most counts
for both defendants.
Sentencings scheduled
February 22, 2010
in Pocatello, Idaho.





A note of thanks –

Dear Chapter Members,

Thank you for your donations to the Idaho Chapter's 2009 Community Service Project. Because of your generosity we were able to donate \$275 and four boxes of school supplies to Whittier Elementary School in Boise, Idaho. Many of the students at Whittier come from low-income areas and the school has an unlimited need for supplies.

This year we were the only organization who contacted the school to help provide supplies, so the need was more critical than ever.

A special note of thanks to the law firms who helped collect supplies — Stoel Rives and Manweiler, Breen, Ball & Hancock. Also, special appreciation to Jim Martin of Moffatt Thomas, and Moore & Elia, for their generosity in contributing cash donations.

Thank you for your continued support of our community service projects. You really do make a difference in the lives of the children in Idaho! And finally, a hearty thank you to Kate Ball for organizing this worthwhile project for our Chapter. Your hard work in getting this project off the ground, organizing the drop-off locations, and delivering all of the supplies to Whittier is greatly appreciated.

~ Wendy Olson ~





COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable
Mikel H. Williams
U.S. Magistrate Judge
District of Idaho

YMC, Inc. v. Insurance Company of the West, CV-09-543-S-MHW Federal Question Jurisdiction - Miller Act

- Geoffrey J. McConnell, Meuleman Miller, Boise, Idaho, for Plaintiff
- John A. Bailey, Jr., and Frederick J. Hahn, III,
Racine Olson Nye Budge & Bailey, Idaho Falls, Idaho for Defendant

Plaintiff YMC, Inc. (“YMC”) filed this Complaint against Defendant Insurance Company of the West (“IMC”), the surety for Eagle Rock Timber, Inc. (“Eagle Rock”). Plaintiff alleges that, on or before March 1, 2008, the Department of Energy, through Battelle Energy Alliance Eagle Rock, entered into a written contract (the “Prime Contract”) whereby Eagle Rock agreed to furnish certain labor and materials and perform certain work on improvements made at the MFC Radiochemistry Lab at the Idaho National Laboratory, Scoville, Idaho (the “MFC Radiochemistry Project”). Pursuant to the Miller Act, 40 U.S.C. §§ 3131, *et seq.*, Eagle Rock as principal, and ICW as surety, duly executed and delivered a Labor and Material/Payment Bond to assure payment of the claims of all persons supplying labor and materials in the prosecution of the work on the Prime Contract.

Eagle Rock and YMC then entered into a written agreement (the “Subcontract”) whereby YMC agreed to provide certain labor, materials and services to Eagle Rock for the MFC Radiochemistry Project in return for payment of \$1,768,561.00. Between approximately March 2008 and October 2009, YMC did furnish, deliver, and provide certain labor, material and services in connection with the performance of the Subcontract. YMC alleges that all of the labor, material and services were furnished by YMC to be used and were actually used in connection with the MFC Radiochemistry Project. YMC further alleges that it has performed all of the work required under the Subcontract and has performed all conditions, covenants and promises required on its part to be performed in accordance with the terms of the Subcontract, except as the same have been excused, waived and/or prevented by Eagle Rock.

YMC claims that Eagle Rock has breached the Subcontract by refusing to pay YMC in full for the labor, materials and services provided by YMC. Defendant responded by Answer, stating that YMC has not performed all of its conditions, covenants and promises required in the Subcontract and that the Subcontract contains an arbitration clause, which should be enforced and is a condition precedent to Defendant’s liability.



The Honorable Ronald E. Bush
U.S. Magistrate Judge
District of Idaho

COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Schilder Dairy v. DeLaval, Inc., CV-09-531-S-REB Product Liability

- Steven D. Peterson and John Christopher Peterson
Peterson Law Office for the Plaintiff
- John F. Kurtz, Hawley Troxell Ennis and Hawley for the Defendant

Plaintiff filed the underlying Complaint in Twin Falls County on September 10, 2009, claiming it entered into an agreement with Defendant to design, build, equip, monitor, inspect, and maintain a dairy barn and milking system. Plaintiff alleges that Defendant's milking system failed to sustain stable vacuum level, contributing to mastitis in Plaintiff's dairy cows.

Given these alleged deficiencies in the milking system, Plaintiff asserts the following claims against Defendant: (1) Breach of Express Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Breach of the Implied Warranty of Workmanlike Performance; (4) Breach of the Implied Warranty of Merchantability; (5) Breach of the Implied Warranty of Fitness for a Particular Purpose; and (6) Negligence. Plaintiff alleges damages in the approximate amount of \$1,380,000.00.

On October 16, 2009, Defendant removed the action to this Court pursuant to 28 U.S.C. §§ 1332 & 1441(b), in that it is a civil action between residents of different states and the matter in controversy exceeds the sum of \$75,000.00.



The Honorable
Edward J. Lodge
U.S. District Court
District of Idaho

COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Lundy v. KBR, Inc., et al., CV-09-570-E-EJL

Diversity Jurisdiction - Personal Injury, Negligence

- Curtis D. McKenzie, Augustine & McKenzie Boise, Idaho
for the Plaintiff
- Defendants have not yet appeared

Plaintiff George Lundy brought this action on behalf of himself and all others similarly situated. He alleges that the United States paid Defendants to dispose of waste on bases and camps in Iraq and Afghanistan and that Defendants burned vast quantities of unsorted waste in enormous open air burn pits with no safety controls. He alleges that the waste burned includes trucks, tires, lithium batteries, styrofoam, paper, wood, rubber, petroleum-oil-lubricating products, metals, hydraulic fluids, munitions boxes, medical waste, biohazard materials (including human corpses), medical supplies (including those used during smallpox inoculations), paints, solvents, asbestos insulation, items containing pesticides, polyvinyl chloride pipes, animal carcasses, dangerous chemicals, and hundreds of thousands of plastic water bottles.

He claims Defendants exposed, and continue to expose, soldiers and others to toxic smoke, ash, and fumes, causing serious diseases, increased risk of serious diseases in the future, death, and increased risk of death. Plaintiff's causes of action include negligence, battery, nuisance, negligent infliction of emotional distress, intentional infliction of emotional distress, willful and wanton conduct, breach of duty to warn, and breach of contract to third party beneficiaries. Defendants have not yet answered the Complaint.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Anderson v. Molenda, et al., CV-09-513-C-CWD

Personal Injury

- Michael A. Maurer, Lukins & Annis, Spokane, Washington
for the Plaintiff
- Donald F. Carey, Carey Perkins, Idaho Falls, Idaho, for Defendants



The Honorable
Candy Wagahoff Dale
Chief U.S. Magistrate Judge
District of Idaho

Plaintiff Christopher Anderson was traveling on a motorcycle on U.S. Highway 12 when Defendant Molenda, an employee of Defendant Western Bee Supply, Inc., allegedly crossed over the highway's double yellow dividing line in a pickup truck with a utility trailer attached.

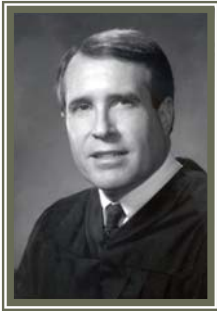
Plaintiff alleges that Molenda's trailer veered into Plaintiff's lane and struck him, causing his motorcycle to crash. Plaintiff claims he has suffered severe and permanent injuries as a direct and proximate result of Molenda's allegedly negligent actions. Defendants admit that the parties were traveling in opposite directions on the highway, but deny that Molenda crossed the line with his truck or trailer causing the accident at issue. Defendants assert that Plaintiff was negligent.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Intermountain Fair Housing Council v. Alder Point, CV-09-554-S-BLW Federal Question Jurisdiction - Fair Housing Act

- Ken Nagy, Lewiston, Idaho, for Plaintiff
- Defendant has not yet appeared



The Honorable B. Lynn Winmill
Chief Judge, U.S. District Court
District of Idaho

Plaintiff Intermountain Fair Housing Council is a nonprofit organization with a stated mission to advance equal access to housing for all persons without regard to race, color, sex, religion, national origin, familial status, or disability. Defendant Alder Point Homeowner's Association is the homeowner's association for Alder Point, a subdivision with 161 residences. The Alder Point residence at issue in this case is owned by Leila Eddins ("Owner"). In or around June 2007, a married couple ("Tenants") entered into a lease agreement with Management Pro, LLC ("Management Pro"), the property management company for the Defendant at that time. Tenants have a minor daughter who is handicapped, as that term is defined at 42 U.S.C. § 3602(h) and 24 C.F.R. § 100.201.

Tenants use a trailer to transport their minor daughter's wheelchair and asked Management Pro for permission to park their daughter's wheelchair trailer in the driveway. Plaintiff alleges that Tenants were told by Management Pro that they would be permitted to do so, but later were told that Defendant would hold a meeting about the trailer. Tenants sent a letter to Defendant, dated August 28, 2007, describing the wheelchair trailer and their need for the wheelchair trailer, and enclosed a photograph of the trailer with the wheelchair on it.

Defendant sent a letter to Owner on October 23, 2007 informing her that she had been fined \$200.00 for Tenants' storage of the wheelchair trailer in public view. Management Pro then sent a letter to Tenants stating that the Defendant had ordered that Tenants' wheelchair trailer not be parked in the driveway or on the street, and that the Owner had been fined \$294.84, charged to Tenants' "tenant ledger." The letter also allegedly stated that an additional fine would be imposed unless the trailer was removed, and directed Tenants to place a shed in the backyard and begin parking the trailer in the shed. The letter stated the tenancy would be terminated on November 30, 2007 unless Tenants fully complied with the listed demands. In response, Tenants sent a letter to Management Pro requesting accommodation and providing a letter from their daughter's treating physician describing the daughter's need for the wheelchair trailer and the need for "ready and convenient means of transporting her chair."

(Continued on next page).



COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Intermountain Fair Housing Council cont'd.

Plaintiff alleges that Defendant failed or refused to enter mediation regarding this matter, failed or refused to grant to Tenants their reasonable accommodation requests, failed or refused to rescind the imposition of the fine for storing the trailer on the Subject Property, and failed or refused to rescind the termination of Tenants' lease. Plaintiff seeks a declaratory judgment and permanent injunctive relief under the Fair Housing Act for alleged disability/handicap discrimination in the rental of a dwelling.

Defendant has not yet responded to these allegations.



The Honorable
Edward J. Lodge
District Judge
U.S. District Court

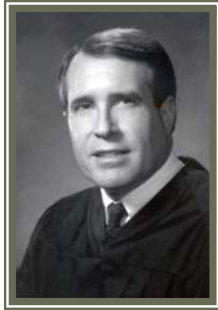
COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Gonzales v. Idaho Foodbank Warehouse, Inc., CV-09-520-S-EJL
Civil Rights - Title VII & Idaho Human Rights Act

- Robert C. Huntley, The Huntley Law Firm, Boise, Idaho,
for the Plaintiff
- Robert White, Givens Pursley, Boise, Idaho, for the Defendant

Plaintiff Carmen Gonzales filed a Complaint alleging that Defendant Idaho Foodbank Warehouse, Inc., wrongfully discharged her from employment. Defendant does business as a food bank, providing food, information, and supportive services to people through partnerships with several agencies, corporations, and government entities.

Defendant employed Plaintiff from October 27, 2006 through March 13, 2008. Plaintiff alleges that she substantially increased the number and success of Defendant's food drives and received excellent reviews. Plaintiff alleges she was retaliated against after speaking with an attorney investigating sexual harassment allegations. According to the Complaint, Plaintiff was forced to resign or constructively terminated because "she could not longer tolerate the hostile work environment." Defendant counters that Plaintiff was terminated for legitimate, non-discriminatory, and non-retaliatory reasons, and that her separation from employment was entirely voluntary.



The Honorable
B. Lynn Winmill
Chief Judge, U.S. District Court
District of Idaho

COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Western Watersheds Project, et al. v. BLM, et al., CV-09-507-E-BLW Environmental - Review of Agency Action

- Lauren M. Rule, Advocates for the West, Boise, Idaho for Plaintiff Western Watersheds Project
- Jennifer Schemm, La Grande, Oregon, and Lauren M. Rule for Plaintiff Hells Canyon Preservation Council and the Wilderness Society
- Deborah Ferguson, Assistant U.S. Attorney, Boise, Idaho for the Defendants
- Murray D. Feldman and William G. Myers, Holland & Hart, Boise, Idaho, Intervenor Defendant The Carlson Company
- David J. Cummings, Julie S. Cane, Michael A. Lopez, Ryan W. Sudbury, Lapwai, Idaho, for Amicus Nez Perce Tribe

Plaintiffs Western Watersheds Project (“WWP”), Hells Canyon Preservation Council (“HCPC”), and The Wilderness Society (“TWS”) challenge Defendant Bureau of Land Management’s (“BLM”) ongoing authorization of domestic sheep grazing on the Partridge Creek allotment in the Salmon River canyon and the Secretary of Interior’s denial of Plaintiffs’ petition to close that allotment. Plaintiffs allege that the grazing threatens excessive harm and significant damage to the Main Salmon River bighorn sheep population, the only remaining native bighorn sheep in Idaho, because of the substantial risk of disease transmission to bighorn sheep. Plaintiffs claim the BLM’s actions violate the National Environmental Policy Act (“NEPA”) and the Federal Land Policy and Management Act (“FLPMA”), and their implementing regulations. Shortly after Plaintiffs filed their Complaint, the Court granted Plaintiffs motion to enjoin grazing on the Partridge Creek allotment pending an evidentiary hearing. An evidentiary hearing is set for January 21, 2010.

The Carlson Company, which had received authorization by the BLM to graze up to 833 domestic sheep on the allotment beginning October 15th, has appeared as an intervenor defendant. The Nez Perce Tribe has conducted the most extensive scientific review of bighorns in this area and has filed a brief *Amicus Curiae* in support of Plaintiff’s argument that an evidentiary hearing is no longer warranted in light of the BLM’s decision not to oppose closing the Partridge Creek allotment until BLM conducts an environmental analysis and final agency action is taken.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable
Candy Wagahoff Dale
Chief U.S. Magistrate Judge
District of Idaho

Wood v. Kinetics Systems, Inc., CV-09-579-S-CWD

Fair Labor Standards Act, Breach of Contract, Defamation

- Eric B. Swartz and Darwin LaVor Overson, Jones & Swartz
Boise, Idaho, for Plaintiff
- Fredric V. Shoemaker and Thomas John Lloyd
Greener Burke & Shoemaker, Boise, Idaho for Defendant

Defendant Kinetics Systems, Inc., provides engineering and construction services. Plaintiff Ronald Wood alleges that he entered an employment contact with Defendant on November 30, 2003 whereby Defendant agreed to pay him a base wage of \$62.50 per hour, four weeks of paid vacation annually, and paid holiday and sick time.

Plaintiff alleges that he regularly worked over forty hours per week, accruing 1988 hours of time and one-half and 1039.5 hours of double time during five years of employment. Plaintiff submitted overtime cards, but claims that Defendant rejected his requests for overtime, informing Plaintiff that he is not entitled to overtime because he is exempt from the overtime wage requirements of the Fair Labor Standards Act. Defendant terminated Plaintiff's employment, allegedly for safety violations. Plaintiff contends the allegation of safety violations is false and has damaged his reputation.

Plaintiff filed his complaint in the Third Judicial District of the State of Idaho stating a wage claim and claims for violations of the FLSA, breach of contract, defamation, and emotional distress. Defendant removed the case to federal court and then filed a motion to dismiss for lack of personal jurisdiction and improper venue, alternately requesting transfer to another jurisdiction.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable Ronald E. Bush
U.S. Magistrate Judge
District of Idaho

Harris Publishing, Inc. v. Metro Marketing, Inc., CV-09-426-E-REB Copyright Infringement

- Bradley J. Williams, Moffatt Thomas Barrett Rock & Fields
for the Plaintiff
- Bradlee R. Frazer and Ryan Thomas McFarland,
Hawley Troxell Ennis & Hawley for the Defendant

In 1984, Plaintiff created a 2-D map of the Idaho Falls, Idaho area, later publishing the map on a bi-annual basis. According to the Complaint, each edition of the map provides notice that it is a copyrighted work at the bottom of the map, plus the year of publication. To support the production and publication of the map, Plaintiff sells advertising space to local businesses; moreover, Plaintiff asserts that its map has been endorsed by the Greater Idaho Falls Chamber of Commerce and the City of Idaho Falls, having been referred to as the “Official Idaho Falls Map.”

In 2008, Plaintiff found a publication, entitled 2008 Edition Metro Map of Idaho Falls which, upon Plaintiff’s information and belief, was produced and published by Defendant and copies from, and a reproduction of, Plaintiff’s copyrighted map. Further, Plaintiff alleges that Defendant sold advertising space in its map to various Idaho Falls area businesses and touted its map as being endorsed by the Idaho Falls Chamber of Commerce and the city of Idaho Falls, causing confusion and misleading the public. Plaintiff asserts the following claims against Defendant: (1) Copyright Infringement; (2) Federal Unfair Competition; and (3) Common Law Unjust Enrichment and Unfair Competition.



The Honorable
Candy Wagahoff Dale
Chief U.S. Magistrate Judge
District of Idaho

COMPLAINTS FILED IN THE DISTRICT OF IDAHO

Albertson, et al. v. Fremont County, Idaho, et al., CV-09-598-E-CWD Diversity Jurisdiction - Negligence, Wrongful Death

- William Mauk, Mauk & Burgoyne, for the Plaintiffs
- Defendants have not yet appeared

This is action for negligence and wrongful death arising from the death of James L. Albertson (“Albertson”) in or near Island Park, Idaho, brought by Mr. Albertson’s spouse, minor child, and estate (“Plaintiffs”). On the morning of Sunday, February 1, 2009, Mr. Albertson was part of a group of recreational snowmobilers traveling on snow machines from West Yellowstone, Montana to Ponds Lodge in the City of Island Park, Idaho. Around 11:00 a.m., Mr. Albertson was driving his snowmobile, traveling on what is known as Chick Creek Trail, heading west on that section of the trail between Chick Creek Flat and U.S. Highway 20.

Plaintiffs allege that, as Mr. Albertson came around a turn in the trail within approximately 300 feet of, and heading toward, U.S. Highway 20, there were no traffic signs, control devices, or warnings to inform Mr. Albertson of any risks, dangers or cautionary concerns in his direction of travel, including in particular the approaching intersection with a public highway. Plaintiffs also allege that the snow plows clearing snow from U.S. Highway 20 had caused an accumulation of snow and ice on the sides of the highway and intersecting trail, obstructing Mr. Albertson’s ability to observe and appreciate the approaching intersection with U.S. Highway 20. Although there was a stop sign posted near the highway, Plaintiffs allege it was not positioned in a location where it was clearly noticeable to approaching snowmobile traffic and that it was obscured from Mr. Albertson’s view by a bushy pine tree, approximately six to seven feet in height. Mr. Albertson’s snowmobile entered upon the public highway where it collided with a 2003 Chrysler van driven by Defendant Michael T. Benson. Mr. Albertson was killed instantly and his snowmobile was damaged beyond repair.

Plaintiffs bring claims for negligence against Defendant Benson and the governmental entities – Fremont County and City of Island Park – that Plaintiffs allege have jurisdiction and responsibilities over some, if not all, of the roadways, trails and signage at issue in this case. Summonses have been issued, but Defendants have not yet appeared.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable Ronald E. Bush
U.S. Magistrate Judge
District of Idaho

State Farm Mutual Automobile Ins. Co. v. Tower, CV 09-444-S-REB Diversity Jurisdiction, Complaint for Declaratory Relief

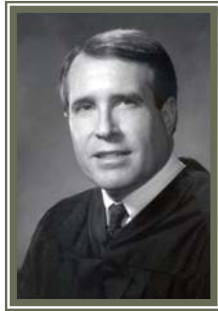
- James D. LaRue; Elam & Burke; Boise, Idaho
Robert R. Pohls; Pohls & Associates; San Ramon, California
for the Plaintiff
- Jacob Deaton; Law Office of Jacob Deaton, Eagle, Idaho
for the Defendant

Defendant, the insured, submitted a claim for Total Disability benefits under the policy claiming he has been disabled since September 21, 2004 due to low back pain. Plaintiff, the insurer, originally approved the claim on January 26, 2005 and paid Defendant the disability benefits due plus a premium waiver for several years.

Plaintiff now seeks a declaratory judgment that the Defendant, the insured, is not “Totally Disabled” within the meaning of a disability income insurance policy and has not been entitled to benefits, including the premium waiver, at any time since May 2008.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable
B. Lynn Winmill
Chief Judge, U.S. District Court
District of Idaho

Melaleuca, Inc. v. Max International, LLC, et al., CV-09-572-E-BLW
Diversity Jurisdiction - Tortious Interference & Unfair Competition

- Brent V. Manning and Chad R. Derum
Manning Curtis Bradshaw & Bednar, Salt Lake City
- Joshua K. Chandler and Michael L. LaClare, Idaho Falls, Idaho,
(both for Plaintiff)
- John N Zarian and Brook B. Bond, Zarian Midgley & Johnson
Boise, Idaho for Defendants

Plaintiff Melaleuca, Inc. (“Melaleuca”) is an Idaho that formulates, manufactures, and/or markets nutritional, personal care, and household products. These products are largely based on formulas developed by Melaleuca’s Research and Development department. Their independent sales representatives (called “Marketing Executives”) refer customers to Melaleuca and earn commissions on purchases made by those customers.

Melaleuca alleges that Defendants Max International (“Max”) and Ken Dunn (“Dunn”), a distributor and top earner for Max, have acted in concert to tortiously interfere with contracts between Melaleuca and its Marketing Executives, and have misappropriated Melaleuca’s trade secrets. Melaleuca alleges that Defendants have accomplished this by, among other things, offering exorbitant payments to Melaleuca’s Marketing Executives to induce them to leave Melaleuca for Max, and conspiring with former Melaleuca Marketing Executives to recruit other Marketing Executives in violation of non-solicitation covenants with Melaleuca. Melaleuca claims that these acts have harmed Melaleuca, potentially luring away hundreds of Marketing Executives in at least four separate Melaleuca business organizations. Melaleuca has obtained injunctions against four former Melaleuca Marketing Executives who are currently enrolled with Max, but allege that Defendants continue to encourage these former Marketing Executives to recruit in violation of their non-solicitation agreements.

Melaleuca’s Complaint states causes of actions for Tortious Interference with Contractual Relations, Tortious Interference with Prospective Economic Advantage, Unfair Competition, Misappropriation of Trade Secrets, Civil Conspiracy. Melaleuca also seeks a Temporary Restraining Order (TRO), Preliminary Injunction, and Permanent Injunctive Relief. Defendants have appeared and oppose Plaintiff’s motions, but have not yet filed an answer to the Complaint. The Court held a hearing on Plaintiff’s motions for TRO and to expedite discovery and those motions are presently under advisement.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable Ronald E. Bush
U.S. Magistrate Judge
District of Idaho

Walters v. Saint Alphonsus Regional Medical Center et al.,
CV-09-524-S-REB Family Medical Leave Act (“FMLA”)

- Erika Birch and Lauren I. Scholnick, Strinberg & Scholnick
for the Plaintiff
- D. John Ashby and Steven W. Berenter
Hawley Troxell Ennis & Hawley for all Defendants

Plaintiff is a former employee of Saint Alphonsus Regional Medical Center. In 2008, after recovering from a planned surgery, Plaintiff was injured in an A.T.V. accident. As a result of the two medical events and the severity of the A.T.V. accident, Plaintiff missed a considerable amount of work.

Plaintiff alleges that she took this medical leave pursuant to the FMLA and, as her FMLA leave was drawing to an end, was promised a 30-day extension consistent with written policy. However, before Plaintiff could apply for the extension, she was told that she had exhausted her medical leave under the FMLA and her position had been offered to someone else. Plaintiff’s claims include: interference with FMLA rights, retaliation with FMLA rights, breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel.



COMPLAINTS FILED IN THE DISTRICT OF IDAHO



The Honorable Edward J. Lodge
United States District Judge
District of Idaho

Klein v. No Limit, Inc., CV 09-589-E-EJL

Diversity Jurisdiction - Securities and Exchange Commission Act

- John F. Kurtz & Michelle Points, Hawley Troxell Ennis & Hawley
Boise, Idaho, for the Plaintiff
- Defendant has not yet appeared

On February 26, 2009, the Securities and Exchange Commission (the “SEC”) filed a Complaint against Trigon Group, Inc. (“Trigon”) and Daren L. Palmer (“Palmer”) in the United States District Court for the District of Idaho (“District Court”), Case No. CV-09-75-S-EJL (“SEC Action”) and the Commodity Futures Trading Commission (the “CFTC”) filed a Complaint against Trigon and Palmer, Case No. CV-09-075-S-EJL (“CFTC Action”). These suits allege, among other things, that Trigon and Palmer operated an investment program in violation of the registration, licensing and anti-fraud requirements of federal securities and commodities laws. The district court appointed a receiver in connection with the SEC and CFTC actions.

This case was filed by Plaintiff R. Wayne Klein, the Court-Appointed Receiver of Trigon Group, Inc. and for the assets of Daren L. Palmera in the SEC and CFTC actions. Plaintiff seeks to recapture and return funds invested in Trigon that were allegedly diverted by Trigon and Palmer. Specifically, Plaintiff alleges that from 1997 through at least October 2008, Trigon and Palmer, using a Ponzi scheme, sold securities in the form of promissory notes and investment contracts to over 55 investors in unregistered, non-exempt transactions amounting to over \$60 million. Plaintiff seeks to set aside fraudulent transfers and fraudulent conveyances, impose a constructive trust, and obtain an accounting.

Plaintiff alleges that Trigon made a fraudulent transfer to Defendant No Limit, Inc., (operating under the assumed business name of Piano Gallery) in the amount of \$33,750. Plaintiff seeks to recover this amount, plus pre-judgment interest from the date of transfer, December 21, 2007, at a rate of 12% per annum. Plaintiff alleges: (1) on December 21, 2007, Piano Gallery received a check made payable to “Piano Gallery” in the amount of \$33,750.00 drawn on the bank account of Trigon; (2) this payment was purportedly for the purchase of a piano by Daren and Michelle Palmer; but (3) the piano was never delivered to Daren or Michelle Palmer. Based on information and belief, Plaintiff alleges that Piano Gallery remains in possession and/or control of the piano.

A summons has been issued, but Defendant has not yet responded.



Ninth Circuit Case Law



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

United States v. Curtin, 08-10394

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

Panel: Wallace, Trott (author), Rymer

Subject Matter: Criminal Law

The panel affirmed a jury conviction (after a new trial on remand) and sentence for travel with intent to engage in a sexual act with a juvenile, in violation of 18 U.S.C. § 2423(b), and coercion and enticement, in violation of 18 U.S.C. §§ 2422(b) and 3583(k), resulting from a government sting operation designed to identify adults trolling sexually for juveniles using the Internet.

Holding that the district court appropriately exercised its discretion in permitting an FBI agent on redirect examination to testify that the total number of child/sex stories on the defendant's electronic personal digital assistant (PDA) was in excess of 140, the panel wrote that the number was more relevant than prejudicial to counter the inference that the defendant attempted to create – *i.e.*, that the one redacted child/sex story admitted by the district court from the defendant's PDA was a small, insignificant part of the PDA's total content. The panel held that all of the evidence admitted against the defendant on retrial – including the redacted story – safely passes the Federal Rule of Evidence 403 probative value/unfair prejudice test.

The panel held that the district court appropriately exercised its discretion in excluding proffered testimony, by a licensed marriage and family therapist, about a survey that had not been published, subjected to peer review, or presented for analysis of methodology.

The panel rejected the defendant's contention that the imposition of a lifetime term of supervised release after the second trial, after he received a five-year term following the first trial, was vindictive.



Ninth Circuit Case Law



The Honorable
Johnnie Rawlinson
U.S. Court of Appeals
for the Ninth Circuit

Lin v. Holder, 08-71227

Petition for Review from: Board of Immigration Appeals

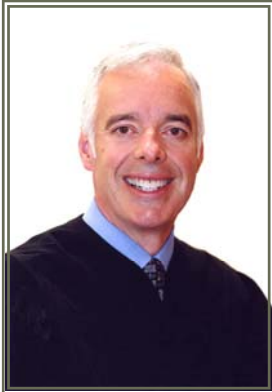
Panel: Gould, Rawlinson (author), and District Judge Beistline

Subject Matter: Immigration

The panel denied a petition for review of a decision of the Board of Immigration Appeals denying Lin's motion to reopen seeking to file a successive asylum application on the theory that China's family planning policies have become more stringent since the time of the original removal proceedings. Specifically, Lin argued that since the time of her hearing in 2000, government officials in the Fujian province, her birthplace, have mandated forcible sterilization for all Chinese citizens who have had more than one child abroad. The panel held that the Board did not abuse its discretion in concluding that the evidence Lin submitted regarding sterilization laws or the enforcement of those laws failed to establish a material change in country conditions.



Ninth Circuit Case Law



The Honorable
Richard Tallman
U.S. Court of Appeals
for the Ninth Circuit

United States v. Monghur, 08-10351
Appeal from: D. Nev. [Pro, J.]
Panel: Hug, Hawkins, and Tallman (author)

Subject Matter: Criminal Law

The panel amended an opinion filed August 29, 2009. In the amended opinion, the panel vacated a conviction and an order denying a motion to suppress a handgun found in a closed container on a closet shelf during a warrantless search.

The panel held that the defendant did not waive his expectation of privacy in the closed container through statements in jail telephone conversations that he knew were monitored by law enforcement. Distinguishing a Seventh Circuit case, the panel reasoned that the defendant's efforts to conceal the subject matter of his conversations demonstrated both an objective and a subjective intention to preserve privacy. The panel remanded to the district court for further proceedings.



Ninth Circuit Case Law



The Honorable Susan Graber
U.S. Court of Appeals
for the Ninth Circuit

United States v. Kuo, 08-10314+
Appeal from: D. Haw. [Ezra, J.]
Panel: Beezer, Graber (author), Fisher

Subject Matter: Criminal Law

The panel affirmed in part and vacated in part a restitution order in the case of two defendants who pleaded guilty to violating 18 U.S.C. § 241, Conspiracy to Violate Civil Rights, in connection with inducing Chinese women to travel to American Samoa to engage in prostitution for the defendants' financial benefit. The panel affirmed the portion of the district court's order, not challenged by the defendants, holding that \$4,226 seized from the defendants during the execution of a search warrant may be used to pay restitution to the two victims in equal parts.

The panel rejected the defendants' argument that the district court did not order restitution at sentencing (and therefore lacked authority to enter post-judgment orders of restitution.) The panel held that the district court's imposition of restitution beyond the 90-day window described by 18 U.S.C. § 3664(d)(5) was harmless error, where the defendants made no showing of prejudice occasioned by the minimal delay.

The panel held that the district court plainly erred by calculating restitution based on the market value of the prostitution services that the victims performed, a method derived from the restitution provision in the Trafficking Victims Protection Act of 2000, where the defendants were convicted of an offense not under the Trafficking Act, but under § 241, for which Congress specified that restitution is limited to the victim's actual losses. Unable to tell whether the amount of restitution imposed exceeded the victims' actual losses, the panel held that the error affected the defendants' substantial rights and affected the fairness, integrity, or public reputation of the judicial proceedings. The panel vacated and remanded for the district court on an open record to allow recalculation under 18 U.S.C. § 3663.

Because the district court employed an improper calculation method, the panel did not decide whether sufficient evidence supported the calculation, but wrote that victim affidavits will generally provide sufficient, reliable evidence to support a restitution order. The panel also wrote that it is inappropriate for the defendants to contest the sufficiency of the government's evidence to the extent that other documentary evidence that defendants' associates deliberately destroyed may have contained



Ninth Circuit Case Law

Per Curiam Opinion

South Fork Band Council of Western Shoshone of Nev. v. DOI, 09-15230

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

Panel: Schroeder, Tashima, Berzon [Per Curiam]

Subject Matter: Environmental Law

The panel affirmed in part and reversed in part the district court's order denying preliminary injunctive relief in an action, brought by Indian Tribes who attribute religious significance to Mt. Tenabo, challenging a major gold mining project on the side of Mt. Tenabo in Nevada.

The panel held that the Tribes have not satisfied their burden of showing a likelihood of success on the merits of their Federal Land Policy Management Act claims. Specifically, the panel held that there was no basis to disturb the district court's conclusion that the Tribes failed to demonstrate a likelihood of success in establishing any arbitrary or capricious agency action in relation to the Bureau of Land Management's obligation under Executive Order 13007 to accommodate the Tribes' need for access to and use for religious sites.

The panel also rejected the Tribes claim that BLM acted arbitrarily and capriciously by failing to find an unnecessary or undue degradation of scenic resources as a result of the mining operation. In addition, the panel reversed the denial of injunctive relief on the Tribes' National Environmental Policy Act claims, and remanded for the entry of an injunction in favor of the Tribes' pending preparation of an environmental impact statement that adequately considers the environmental impact of the extraction of millions of tons of refractory ore, mitigation of the adverse impact on local springs and streams, and the extent of fine particulate emissions.



Ninth Circuit Case Law



The Honorable
Milan Smith
U.S. Court of Appeals
for the Ninth Circuit

United States v. Thompson, 07-50351

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

Panel: T.G. Nelson, Bybee, and M. Smith (author)

Subject Matter: Criminal Law

The panel affirmed the district court's orders permitting a criminal defendant to represent himself at trial and denying his request for a continuance.

The panel saw no reason to remand to the district court in light of *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (holding that states are free to assess the defendant's competency for purposes of self-representation under a different than assessing competency to stand trial), which was decided after the defendant's trial, where there is no indication that the district court conflated the standards for competency to stand trial and competency for self-representation.

The panel wrote that the district court did exactly what *Edwards* and *United States v. Ferguson*, 560 F.3d 1060 (9th Cir. 2009), instruct – that is, it determined whether the defendant lacked the mental capacity to conduct trial proceedings – and held that the district court's conclusion that the defendant had such a capacity was not an abuse of discretion.

The panel held that the district court did not abuse its discretion in denying the defendant's request at the final pretrial conference for a continuance based on the fact that the defendant was not prepared to represent himself, where the defendant's conduct up that point was clearly dilatory, the district court had already granted at least twelve continuances at the defendant's request, the district court had appointed standby counsel for the trial, and the defendant knowingly and intelligently waived his right to counsel after being fully advised of the dangers of proceeding pro se.



Ninth Circuit Case Law

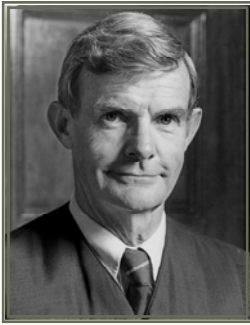
Bradway v. Cate, 08-55296

Appeal from: S.D. Cal. [Gonzalez, C.J.]

Panel: Canby (author), Rawlinson, N. Randy Smith

Subject Matter: Habeas Corpus

The panel affirmed the district court's denial of a 28 U.S.C. § 2254 habeas corpus petition challenging a conviction for first degree murder by means of lying in wait, with the special circumstance of lying in wait. The panel held it was neither contrary to nor an unreasonable application of clearly established federal law for the state court to hold that the special circumstance of lying in wait was distinguishable from the crime of first degree murder by lying in wait, because the former requires a specific intent to kill while the latter does not, and that the distinction sufficiently narrows the class of persons eligible for the increased sentence imposed when the special circumstance is found to be true.



The Honorable
William Canby
U.S. Court of Appeals
for the Ninth Circuit

The Honorable
Richard Tallman
U.S. Court of Appeals
for the Ninth Circuit
Dissenting

Wendy J. Olson, President
Assistant U.S. Attorney
U.S. Department of Justice
(208) 334-1211

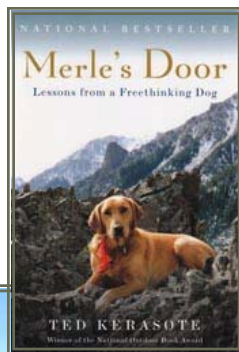


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SUSIE'S BOOKSHELF

Merle's Door: Lessons from a Freethinking Dog



Merle and Ted found each other in the Utah desert. Merle was about ten months old, surviving on his own, and looking for a human to hang his heart on. Ted was forty-one, liked to write about animals, and had been searching for a pup whom he could shape into a companion. The training went both ways. Ted showed Merle how to live around wildlife, and Merle reshaped Ted's ideas about the complexity of a dog's mind, showing him how a dog's intelligence could be expanded by allowing it to make more of its own decisions.

Acting as Merle's translator, and using Merle's life and lessons as a door into the world of dogs, Ted takes us on the journey they shared. He explores why the dog-human bond is so intense and how people and dogs communicate so readily with each other. He also uses the latest wolf research—showing that wolves treat maturing pups as partners rather than as subordinates—to explain how sharing leadership with your dog, rather than being its alpha, can help to create a healthier, more self-reliant, and better-socialized companion.

It's funny, fascinating, and tender — a moving love story that reveals how the partnership between dogs and humans can become far more than we have imagined.