

Tri-State Conference Covers Common Issues Facing Intermountain States

by Susie Headlee



Susie Headlee is the office administrator for Parsons Behle & Latimer's Boise and Idaho Falls, Idaho, offices. She is the executive director of the Idaho Chapter of the FBA, having served in that capacity since 2004. In 2015, she retired from a 25-year career at the U.S. federal courts in court administration.

The Wyoming Chapter of the Federal Bar Association hosted this year's 13th annual Tri-State Conference on Oct. 5-7, 2017, at Spring Creek Ranch in Jackson, Wyo. The Tri-State Conference consists of federal judges and practitioners from Utah, Wyoming, and Idaho, who gather to discuss issues of common interest affecting the West. The Tri-State provides extensive opportunities to mingle in an informal setting with members of the judiciary and other practitioners from intermountain states during the Thursday evening reception and throughout the day and a half conference. We were delighted that for the first time a practitioner joined us from the Colorado FBA Chapter.

This year's conference began with a stellar program, "The Fate of Public Lands," with presentations by former Wyoming Gov. Dave Freudenthal, who is a former U.S. attorney for Wyoming, and John Leshy, Harry D. Sunderland Distinguished Professor of Law Emeritus, University of California, Hastings College of Law, who also served as solicitor, U.S. Department of the Interior.

Gov. Freudenthal and Leshy were the first speakers on Friday morning and discussed the prospects for transfer of federal lands to the states. They agreed that transfer is not going anywhere right now. However, there was a lot of discussion about giving states more control over the management of some amount of federal land. Considerations like cost and whether the states would serve the interests of the federal government were mentioned; and they indicated exchanges of land will continue to play a role. The duo also discussed the sage grouse and the likelihood of an Endangered Species Act listing, indicating that the current process to once again revise the western resource management plans is likely to take years and noting that there hasn't been much change recommended. To date, there has been no response to the recommendations from the White House.

The conference continued with a program simply titled "Cybersecurity," which was all-encompassing and led by Ovie Carroll, director of the Department of Justice Cybercrime Lab, Carroll specializes in computer and intellectual property crimes and pre-

sented on digital forensics, which is all about the hunt for evidence in digital places that are hiding critical clues. While social media, the web, iPhones, Alexa, and other types of smart technology provide convenience, they can also be used to track people in ways never initially intended. The Department of Justice is only beginning to utilize this digital investigative analysis. The magnitude of information found in our digital data and the potential uses of this data is both exciting and unnerving.

The lunch-time presentation by Brad Nielson, formerly head of Shell's global litigation team, addressed how legal risk factors into decisions by major corporations regarding where to invest in new projects. The risk of delayed and increased project cost resulting from U.S. litigation may discourage international investment. Mr. Nielson advocated for lowering litigation costs in part by moving away from charging by the billable hour to value-based billing that better matches lawyer and client incentives.

Immediately following the luncheon, the group attended a program of interest titled, "Immigration Law Reform and Trends," which was led by Suzan Pritchett, associate professor and director, Family and Immigration Justice Clinic, University of Wyoming College of Law; and Timothy Wheelwright, Durham Jones & Pinegar. The panelists discussed the current family- and employment-based immigration systems and highlighted challenges within the current immigration regime, including long-outdated immigration caps. They concluded by noting trends in immigration enforcement, changing executive policies, and federal litigation that will characterize immigration practice and adjudication in the year to come.

The criminal practitioners thoroughly enjoyed U.S. Sentencing Commission Deputy Director Alan Dorhoffer's presentation. Mr. Dorhoffer sorted through a variety of statistical data collected by the Sentencing Commission. With precision, he was able to compare the offense types for each of the districts and discuss how often the court was sentencing within the guideline ranges. Dorhoffer also pointed to and summarized a number of new Sentencing Commission publications



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and highlighted those concerning recidivism. All of the publications may be found on the Commission’s website.¹ He wrapped up with a helpful summary of the Supreme Court’s decision in *Johnson v. United States*,² and its profound effect on sentencing.

Senior District Judge Dee Benson, District of Utah, presented about his experiences as a member of the Foreign Intelligence Surveillance Court (FISA). His presentation included information about the history that brought about the formulation of the court, what the FISA court does, and he provided an overview on the classified situation regarding Al Qaeda and other areas of current interest.

The last program of the day on Friday included Judges Dale Kimball (Utah), B. Lynn Winnill (Idaho), and Scott Skavdahl (Wyoming), and was led by moderator Adam Wright, Parsons Behle & Latimer (Utah). The panel began by addressing qualified immunity in § 1983 litigation. Specifically, they discussed the challenges of deciding qualified immunity issues early in litigation without the need for significant discovery; whether the flexible approach to qualified immunity articulated by the Supreme Court in *Pearson v. Callahan* impedes the development of constitutional law; the increase of video evidence in § 1983 litigation and how that evidence has altered their approach to qualified immunity issues; and qualified immunity for non-law enforcement state actors.

The first presentation on Saturday morning was with professor Sam Kalen, University of Wyoming College of Law, who presented about the future of Chevron deference, highlighting recent Supreme Court decisions. He also discussed upcoming decisions in the next term and how the appointment of Justice Neil Gorsuch may influence the demise of Chevron.

Bruce Moyer, FBA counsel for government relations, provided an update on FBA advocacy efforts in Washington and recent legislative developments in Congress. He devoted particular attention to the historically high numbers of vacancies on the federal bench, their impact and the current state of the judicial nomination and confirmation processes.



Above: Chief U.S. Magistrate Judge Kelly Rankin, District of Wyoming; and former Wyoming Gov. Dave Freudenthal.



Above left: Teague Donahey, Holland & Hart; District Judge David C. Nye, District of Idaho; and Lauren Scholnick, Strindberg & Scholnick, Utah. Above right: JoAnn Bowman (Moyer); Susie Headlee, executive director, Idaho Chapter, FBA; Norm Semanko, Parsons Behle & Latimer; and Bruce Moyer, FBA counsel for government relations, Washington, D.C.

The conference concluded with the Chief Judge’s Panel, moderated by Judge Mark Carman (Wyoming). Serving on the panel were Chief Judge B. Lynn Winmill (Idaho), Chief Judge Nancy Freudenthal (Wyoming), Judge Dale Kimball (Utah), Chief U.S. Magistrate Judge Ronald Bush (Idaho), Chief U.S. Magistrate Judge Paul Warner (Utah), and Chief U.S. Magistrate Judge Kelly Rankin (Wyoming). The panel engaged in a lively discussion of the wide-ranging administrative responsibilities of chief judges, practice tips for arguing dispositive motions, and judges’ procedures for handling discovery disputes, among other topics.

We hope you will “save the date” for next year’s Tri-State, which will be held on Sept. 20-22, in Park City, Utah, with the Utah Chapter serving as our host. We look forward to more practitioners joining us from neighboring states, including Colorado. If you have questions about the Tri-State Conference, please contact Susie Headlee, executive director, Idaho, Chapter, FBA at sheadlee@parsonsbehle.com.

Endnotes:

¹www.usssc.gov

²135 S. Ct. 2551 (2015)

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