

**ONE OF FIVE: REFLECTIONS ON JIM JONES'  
JURISPRUDENTIAL IMPACT IN HIS TWELVE YEARS  
ON THE IDAHO SUPREME COURT**

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TABLE OF CONTENTS

I. INTRODUCTION .....	622
II. PART II.....	624
A. <i>Idaho Ground Water Association v. Idaho         Department of Water Resources</i> .....	624
B. <i>Wasden v. State Board of Land Commissioners</i> .....	627
C. <i>Suhadolnik v. Pressman and Navo v. Bingham         Memorial Hospital</i> .....	628
III. PART III.....	631
A. <i>Giltner, Inc. v. Idaho Dept. of Commerce and Labor         and Western Home Transport, Inc. v. Idaho Dept. of         Labor</i> .....	631
B. <i>The Proviso Clause, City of Idaho Falls v.         Fuhriman and City of Challis v. Consent of         Governed Caucus</i> .....	634
IV. CONCLUSION.....	637

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## I. INTRODUCTION

The Tuesday following his official retirement from the Idaho Supreme Court, Chief Justice Jim Jones left a message with his former judicial assistant: “Hello Tresha, this is Jim Jones, do you remember me? I used to work there.”<sup>1</sup> As his assistant for nearly forty years, principal planner of his retirement reception, and cataloger of the over 1,600 case files he heard during his tenure, she had not forgotten.<sup>2</sup> But that would not stop Justice Jones from joking about it.

As a person of tremendous personal, political, and judicial reputation in the State of Idaho, one could expect his manner to be distant, proud, and aware of his own importance. But this is not Justice Jones’ way. He is affable, approachable, and kind. During his tenure on the Court, he was also ever willing to mentor. Even during his time as Chief Justice, which carried substantial additional responsibility, he maintained his “open door” policy of being available to his law clerks and staff for questions or discussion any time his office door was open. In his twelve years on the Court, he mentored more than 24 law clerks, helping to prepare them for successful careers in the law. He also had a characteristic way of finding time for fun, from cleverly crafted puns and plays on words to pranks on longtime colleague and friend Justice Burdick, that endeared him to all.

Justice Jones did not follow a traditional path to the Supreme Court. After serving two terms as Idaho Attorney General, he resumed private practice in the Boise area.<sup>3</sup> About fourteen years later, he was sitting in his office with Alan Lance, who mentioned that he supposed Justice Jones would enter the race to replace Wayne Kidwell on the Supreme Court.<sup>4</sup> “You’ve got to be kidding,” was Justice Jones first response, but after thinking it over, he

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1. Audio recording: Voicemail left by Jim Jones, Retired Chief Justice, Idaho Supreme Court, to Tresha Griffiths (Jan. 3, 2017) (on file with author).

2. See Dan Black, *Justice Jim Jones Recalls a Remarkable Career*, THE ADVOCATE, Jan. 2017, at 60, 62; see generally Idaho Supreme Court Voting Pattern Analysis, August 2002 – May 2016 (unpublished internal collection) (on file with Roger S. Burdick, Chief Justice, Idaho Supreme Court) (hereinafter Voting Pattern Analysis).

3. Interview with Jim Jones, Retired Chief Justice, Idaho Supreme Court, in Boise, Idaho (Jan. 30, 2017).

4. *Id.*

decided to run.<sup>5</sup> His practice was getting a little routine, and the pressure from deadlines was getting old.<sup>6</sup> He thought a seat on the high court would be a nice change of pace.<sup>7</sup> Because of his time as Attorney General and his efforts to lower gas prices across the state, Jones ran unopposed.<sup>8</sup> He said that “no one wanted to run against the guy who got gas prices lowered,” and that he received two campaign contributions, which he returned.<sup>9</sup> He retained his seat in an unopposed election in 2010 and served until his term expired at the end of 2016.<sup>10</sup> During his tenure, Justices Schroeder and Trout retired and Justices Warren Jones and Joel Horton were appointed to fill their respective seats.<sup>11</sup> In his twelve years on the Court, Justice Jones authored the majority opinion in over 300 cases, as well as roughly 84 concurrences and 49 dissenting opinions.<sup>12</sup> Aside from the raw data, the impact of Justice Jim Jones on Idaho jurisprudence can be detected, in some small measure, by examination of several key majority opinions he authored as well as a few of his dissents. Accordingly, Part II of this paper will be dedicated to discussing several landmark cases in which Justice Jones authored the majority opinion, Part III will

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; Betsy Z. Russell, *Jim Jones faces no race for court seat*, THE SPOKESMAN-REVIEW (May 22, 2004), <http://www.spokesman.com/stories/2004/may/22/jim-jones-faces-no-race-for-court-seat/>.

9. Interview with Jim Jones, Retired Chief Justice, Idaho Supreme Court, in Boise, Idaho (Jan 30, 2017).

10. Betsy Z. Russell, *Justice Jones Responds to Justice Burdick's Challenger*, THE SPOKESMAN-REVIEW (Apr. 27, 2010), <http://www.spokesman.com/blogs/boise/2010/apr/27/justice-jones-responds-justice-burdicks-challenger/>.

11. *District Judge Joel Horton named to Idaho Supreme Court*, THE OREGONIAN (Sept. 18, 2007), [http://blog.oregonlive.com/breakingnews/2007/09/horton\\_named\\_to\\_idaho\\_supreme.html](http://blog.oregonlive.com/breakingnews/2007/09/horton_named_to_idaho_supreme.html); Jill Kuraitis, *Warren Jones Appointed To Idaho Supreme Court*, NEWWEST (June 26, 2007), [http://newwest.net/city/article/warren\\_jones\\_appointed\\_to\\_idaho\\_supreme\\_court/C108/L108/](http://newwest.net/city/article/warren_jones_appointed_to_idaho_supreme_court/C108/L108/).

12. *See generally* Voting Pattern Analysis, *supra* note 2.

conduct a review of several cases in which he dissented from the majority, and Part IV will conclude.

## II. PART II

As one of five justices, and given the powerful doctrine of *stare decisis*,<sup>13</sup> even a jurist of tremendous impact would likely only oversee subtle shifts in the law in a decade or more of service. This part will explore majority opinions authored by Justice Jones that signal shifts in the law that have the potential to become more significant changes in the years to come.

### A. *Idaho Ground Water Association v. Idaho Department of Water Resources*<sup>14</sup>

In early 2016, the Court issued a trio of opinions addressing district court decisions related to Rangen, Inc.'s delivery calls for water.<sup>15</sup> The second of these opinions, *Idaho Ground Water Association v. Idaho Dept. of Water Resources*, dealt with the competing doctrines of prior appropriation and beneficial use.<sup>16</sup> Departing from decades of strict adherence to prior appropriation, the Court upheld the Director of the Idaho Department of Water Resources' decision to impose a trim line, or curtailment boundary, which allowed junior users to pump groundwater outside the curtailment area.<sup>17</sup> Rangen held five water rights that it used to operate its fish hatchery near Hagerman, Idaho.<sup>18</sup> Rangen alleged two of these rights, water right no. 36–02551 and water right no. 36–07694, were injured by groundwater pumping in the Eastern

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13. As the Supreme Court has repeatedly recognized, “[w]hen there is controlling precedent on questions of Idaho law ‘the rule of stare decisis dictates that we follow it, unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.’” *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 130 P.3d 1127, 1130, 142 Idaho 589, 592 (2006) (quoting *Houghland Farms, Inc. v. Johnson*, 803 P.2d 978, 983, 119 Idaho 72, 77 (1990)).

14. 369 P.3d 897, 160 Idaho 119 (2016).

15. *Id.*; *Rangen, Inc. v. Idaho Dept. of Water Resources*, 367 P.3d 193, 159 Idaho 798 (2016); *Rangen, Inc. v. Idaho Dept. of Water Resources*, 371 P.3d 305, 160 Idaho 251 (2016).

16. *See Idaho Ground Water Assoc.*, 369 P.3d 897, 160 Idaho 119.

17. *Id.* at 907, 160 Idaho at 129.

18. *Id.* at 900, 160 Idaho at 122.

Snake Plains Aquifer (“ESPA”).<sup>19</sup> Accordingly, Rangen filed petitions for a delivery call, first in 2003 and again in 2011, seeking to have junior priority groundwater pumping limited to increase water flow to its facility.<sup>20</sup> A curtailment order was issued in early 2004 but was withdrawn after the Director of Idaho Department of Water Resources (“Director”) concluded that curtailment of junior ground water rights would not substantially increase flow to Rangen.<sup>21</sup> Subsequent modeling innovation suggested that curtailment of ground water pumping could have a substantial effect on flow to Rangen, and that prior models’ measurements had been inaccurate.<sup>22</sup> Rangen then filed its second delivery call in 2011.<sup>23</sup> The Director issued another curtailment order, limiting junior priority users’ ability to pump groundwater, but implemented a trim line, or curtailment order boundary, which allowed junior users to pump outside the boundary.<sup>24</sup> The district court affirmed the curtailment order but determined that the Director impermissibly applied the trim line.<sup>25</sup>

The Supreme Court, in an opinion authored by Justice Jones, held that the Director was within his discretion to impose the trim line because of the policy of beneficial use.<sup>26</sup> The Court stated that “the policy of securing the maximum use and benefit, and least wasteful use of Idaho’s water resources, has long been the policy in Idaho” and that “[t]his policy limits the prior appropriation doctrine by excluding from its purview water that is not being put to beneficial use.”<sup>27</sup> These policy statements were followed by citations to the Court’s recent decisions in *Clear Springs Foods*,

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19. *Id.*

20. *Id.*

21. *Id.* at 900–01, 160 Idaho at 122–23.

22. *Idaho Ground Water Assoc.*, 369 P.3d at 901, 160 Idaho at 123.

23. *Id.*

24. *Id.* at 902–903, 160 Idaho at 125–26.

25. *Id.* at 903, 160 Idaho at 126.

26. *Id.* at 907, 160 Idaho at 129.

27. *Id.* at 909, 160 Idaho at 131.

*Inc. v. Spackman*<sup>28</sup> and *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resource*;<sup>29</sup> two cases from 1909; and an Idaho Department of Water Resources (“IDWR”) internal management rule, CMR 20.03.<sup>30</sup> Essentially, the Court reasoned that recognizing Rangen’s rights to the exclusion of all others, which is what prior appropriation would dictate, would not be the most beneficial use because it would “curtail irrigation to hundreds of thousands of acres so that Rangen might get another 1.5 cfs of water.”<sup>31</sup> The majority viewed the Director’s decision imposing a trim line as a reasonable balance of the senior rights of Rangen and the junior users, and a proper application of Idaho water law, because there was some support for beneficial use in recent decisions of the Court.<sup>32</sup> Although not stated in terms indicating jurisprudential departure, the Court’s decision effectively recognized a beneficial use limitation on the most powerful water rights doctrine of the West—prior appropriation.<sup>33</sup> To be sure, the Court’s decision was focused on the specific case before it, and it was careful to continue to assert the priority rights of Rangen,<sup>34</sup> but the Court also nimbly suggested that absolute rights for the senior holder may not be the most efficient or beneficial use of the water. Because it declared that beneficial use may be a limitation on prior appropriation—a water rights doctrine steeped in history and widely adopted in the West—this decision stepped outside precedent and suggested a new way forward in water rights law. Right or wrong, the impact of this decision and its power to affect

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28. 252 P.3d 71, 78, 150 Idaho 790, 797 (2011).

29. 154 P.3d 433, 440, 143 Idaho 862, 869 (2007).

30. *Idaho Ground Water Assoc.*, 369 P.3d at 909, 160 Idaho at 131.

31. *Id.* at 910, 160 Idaho at 132.

32. *Id.* at 910–911, 160 Idaho at 132–33.

33. As indicated by Justice Eismann’s dissent, prior appropriation is provided for in Article XV section 3 the Idaho Constitution. *Idaho Ground Water Assoc.*, 369 P.3d at 915–16, 160 Idaho at 138–39 (Eismann, J., dissenting). Additionally, a variation of the doctrine has been adopted by seventeen western states. See Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 229 (2015).

34. In fact, the majority declared that “the trim line here does not reduce the decreed quantities of Rangen’s water rights. Rangen remains entitled to the full measure of its rights, subject to availability of water and beneficial use limitations.” *Idaho Ground Water Assoc.*, 369 P.3d 897, 910, 160 Idaho 119, 132 (2015).

the decisions to come is stronger than its language suggested and signals great potential for a future shift in the law.

B. *Wasden v. State Board of Land Commissioners*<sup>35</sup>

Some cases signal shifts in the law, such as *Idaho Ground Water Association* above, and others restore bedrock principles and established legal doctrines. A case of the latter type, authored by Justice Jones in 2012, was *Wasden v. State Board of Land Commissioners*.<sup>36</sup> In *Wasden*, the Attorney General challenged a state statute, Idaho Code Section 58–310A, that exempted state endowment cottage site leases from the requirement that the sites be leased to the highest bidder at an auction.<sup>37</sup> The Attorney General argued that the statute conflicted with the State Board of Land Commissioners’ constitutional duty, under Article IX, Section 8 of the Idaho Constitution, to achieve the highest price for disposal of endowment land through use of an auction.<sup>38</sup> The district court did not agree, ultimately concluding that Idaho Code Section 58–310A did not conflict with Article IX, Section 8 of the Idaho Constitution.<sup>39</sup>

The Supreme Court, however, invalidated Section 58–310A on the basis that the operative word in the Idaho Constitution, “disposal,” was held to include the sale *or* lease of the property.<sup>40</sup> The Court’s decision was based on the word’s usage in Article IX, Section 8 of the Idaho Constitution and in prior Supreme Court decisions interpreting that section.<sup>41</sup> This decision rebuked the notion that certain uses of endowment lands were exempt from the constitutional decree that endowment lands be managed “in such

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35. *Wasden v. State Bd. of Land Comm’r.*, 280 P.3d 693, 153 Idaho 190 (2012).

36. 280 P.3d 693, 153 Idaho 190 (2012).

37. *Id.* at 696, 153 Idaho at 192.

38. *Id.* at 695–96, 153 Idaho at 192–93.

39. *Id.* at 696, 153 Idaho at 193.

40. *Id.* at 699–700, 153 Idaho at 196–97.

41. *Id.*

manner as will secure the maximum long-term financial return.”<sup>42</sup> This unanimous decision was a clear reminder from the Court of endowment land managers’ constitutional duty to seek the highest possible return from endowments lands, regardless of whether they are leased or sold.<sup>43</sup>

As a former Idaho Attorney General, Justice Jones was in a unique position to rule on the merits of the case, but also on the threshold question of whether the Attorney General had standing to pursue the suit. Before ruling on the merits, the Court held that the Attorney General had standing to challenge the statute as the lawyer representing the endowment beneficiaries, who were necessarily injured when less revenue was generated in the leasing of endowment property.<sup>44</sup> As a whole, the Court’s decision signaled a return to the principles outlined in the Idaho Constitution. By refusing to allow a statutory exception that would erode the state’s goal of maximizing return in the management of endowment lands, the Court, in a decision authored by Justice Jones, strengthened the Idaho Constitution by emphasizing the purpose of its provision above the statute in question. Idaho Code Section 58-310A reflected a shift in the law away from the foundational principles in the Idaho Constitution, and the decision by the Court returned the inquiry to the province of the language in Article IX, Section 8.

*C. Suhadolnik v. Pressman and Navo v. Bingham Memorial Hospital*

Justice Jones also influenced Idaho medical malpractice law in two decisions issued during his tenure, *Suhadolnik v. Pressman*<sup>45</sup> and *Navo v. Bingham Memorial Hospital*<sup>46</sup>, that dealt with how the standard of care is established and what means can be used to establish it, particularly when employing out-of-area

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42. IDAHO CONST. art. IX, § 8.

43. Chief Justice Burdick and Justices Eismann, Horton, and Justice Pro Tem Trout concurred in the opinion. *Wasden*, 280 P.3d at 703, 153 Idaho at 200.

44. *Id.* at 699, 153 Idaho at 196.

45. *Suhadolnik v. Pressman*, 254 P.3d 11, 151 Idaho 110 (2011).

46. *Navo v. Bingham Mem’l Hosp.*, 373 P.3d 681, 160 Idaho 363 (2016).

experts.<sup>47</sup> Justice Jim Jones did not author the majority opinion in *Navo*, but participated fully and joined it.<sup>48</sup>

*Suhadolnik* concerned the extent to which out-of-area experts may rely on deposition testimony to familiarize themselves with the local standard of care.<sup>49</sup> The Court, in an opinion authored by Justice Jones, declared that one way out-of-area experts may familiarize themselves with the local standard of care is “by speaking to a local specialist and by reviewing deposition testimony that establishes that the local standard is governed by a national standard.”<sup>50</sup> Accordingly, the Court determined that the expert proffered by the plaintiffs needed to do more than review the medical records of the plaintiff and read the deposition testimony of the defendant to familiarize himself with the local standard of care.<sup>51</sup> The Court took considerable time to outline several possible methods of familiarizing out-of-area experts with the local standard of care because it recognized the difficulty of finding appropriate local experts to consult with in small, insular communities.<sup>52</sup> For example, the Court mentioned that it considered review of deposition testimony sufficient to familiarize an out-of-area expert with the local standard of care in cases where the out-of-area expert also consulted with local specialists about the local standard of care.<sup>53</sup> Consultation with local specialists, it was noted, was not required by Idaho law, but was offered as the potential reason why out-of-area experts familiarization methods in some cases were more satisfactory.<sup>54</sup> The Court also noted that out-of-area experts who had reviewed deposition testimony from

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47. *Suhadolnik*, 254 P.3d at 11, 151 Idaho at 110; *Navo*, 373 P.3d at 681, 160 Idaho at 363.

48. *Navo*, 373 P.3d at 683, 160 Idaho at 364.

49. *Suhadolnik*, 254 P.3d at 14, 151 Idaho at 113.

50. *Id.* at 18, 151 Idaho at 117.

51. *Id.* at 18–23, 151 Idaho at 117–22.

52. *Id.* at 22, 151 Idaho at 121.

53. *Id.*

54. *Id.*

multiple people acquainted with the local standard of care were more likely to be sufficiently acquainted with the local standard of care than the expert employed in *Suhadolnik*, who had reviewed just one.<sup>55</sup> This decision, while frowning on the methods employed by the plaintiff's expert in the case, provided guidance to the bar about proper methods of familiarizing out-of-area experts with local standards of care. It also potentially enabled greater numbers of injured plaintiffs to overcome the difficulties associated with establishing the local standard of care in medical malpractice cases.

In *Navo*, the Court outlined two ways an out-of-area expert may familiarize themselves with the local standard of care: 1) by consulting with a local specialist or 2) by demonstrating that a statewide or national standard of care has replaced the local standard of care, usually by reference to the applicable codes.<sup>56</sup> After spelling out the different methods, however, the Court affirmed the district court's ruling that the out-of-area expert used by the plaintiffs in the case had failed to adequately familiarize himself.<sup>57</sup> The expert had consulted with a registered nurse who was Associate Director of the State Board of Nursing, but there was not sufficient evidence to convince the district court that the nurse was familiar with the standard of care in Blackfoot, Idaho.<sup>58</sup> The expert claimed that the local standard of care was superseded by a statewide or national standard of care, with which he was familiar.<sup>59</sup> However, the district court concluded that the standards alluded to by the expert did not provide a coherent standard of care sufficient to replace the local standard of care, and the Supreme Court agreed.<sup>60</sup>

Interestingly, *Navo*, when read in conjunction with *Suhadolnik*, reveals a concerted effort by the Court to educate about possible ways plaintiffs may establish the local standard of care required in medical malpractice cases with out-of-area experts. If heeded, these cases have the potential to assist medical malpractice plaintiffs in the delicate work of building the strong,

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55. *Id.*

56. 373 P.3d at 689–90, 160 Idaho at 371–72.

57. *Id.* at 692, 160 Idaho at 374.

58. *Id.* at 690–91, 160 Idaho at 371–72.

59. *Id.*

60. *Id.* at 691–92, 160 Idaho at 372–73.

persuasive case essential to ultimate success. Justice Jones contributed to this evolution in the law by outlining a method himself in *Suhadolnik*, and by concurring in *Navo*, which mentioned several other methods that could be utilized by plaintiffs.

### III. PART III

In addition to his contributions to the law through authorship of majority opinions, Justice Jones also advanced the law through his infrequent, but always well-stated concurrences and dissents. In his twelve years, he authored roughly 84 concurrences and 49 dissenting opinions.<sup>61</sup> Of those, three dissenting opinions which had the quickest and clearest impact will be discussed below.

A. *Giltner, Inc. v. Idaho Dept. of Commerce and Labor* and  
*Western Home Transport, Inc. v. Idaho Dept. of Labor*

In *Giltner, Inc., v. Idaho Department of Commerce and Labor*<sup>62</sup>, Giltner trucking company faced a hefty unemployment tax bill for “owner/operator” drivers it considered to be independent contractors, but that the Idaho Department of Commerce and Labor (“the Department”) considered to be employees of the company.<sup>63</sup> The drivers operated under the federal highway authority of Giltner, but were responsible for fuel, maintenance, and incidental expenses and were paid a set percentage of each load delivered.<sup>64</sup> The Supreme Court determined that the Department and the Idaho Industrial Commission correctly concluded that the drivers were employees of Giltner and that Giltner was responsible for unemployment taxes for those individuals.<sup>65</sup> The Court’s analysis delineated the two-prong test an employer must satisfy to be exempted from paying unemployment taxes for certain workers, such as independent

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61. See generally Voting Pattern Analysis, *supra* note 2.

62. *Giltner, Inc. v. Idaho Dept. of Commerce and Labor*, 179 P.3d 1071, 145 Idaho 415 (2008).

63. 179 P.3d at 1074, 145 Idaho at 418.

64. *Id.* at 1074, 1076, 1081, 145 Idaho at 418, 420, 425.

65. *Id.* at 1074, 145 Idaho at 418.

contractors.<sup>66</sup> In essence, the test requires that (1) the worker be “free from control or direction in the performance of his work” and that (2) the worker be “engaged in an independently established trade, occupation, profession, or business.”<sup>67</sup> The Court concluded that the owner/operator drivers were free from direction and control in their work as required by the first prong, but that the drivers did not conduct an independent business sufficient to fulfill the second prong.<sup>68</sup> The second prong was unfulfilled chiefly on the basis of one fact: that the drivers operated under Giltner’s Department of Transportation (DOT) motor carrier authority to transport freight between states.<sup>69</sup> Thus, the Court determined that the drivers were Giltner employees and Giltner was liable for unpaid unemployment insurance taxes for them.<sup>70</sup>

In a lengthy dissent, Justice Jones outlined the legal history of exemption analysis, in common law as well as legislative enactments, and concluded that the long-standing policy of the Court had been to apply a three-factor test to determine whether exemption was proper under the second prong.<sup>71</sup> Accordingly, he disagreed with the majority’s use of a “single factor test,” which determined that the drivers were employees primarily on the basis of their use of Giltner’s DOT authority.<sup>72</sup> Although his analysis of precedent emphasized the use of multiple factors in determining whether the worker was conducting an independent trade or business, Justice Jones also declined to apply the Department’s fifteen-factor test.<sup>73</sup> Instead, Justice Jones would have applied the historical three-factor test, which he viewed as “not . . . onerous . . . or a high hurdle,” to conclude that the owner/operator drivers in question were not employees of Giltner.<sup>74</sup> This dissent might have

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66. *Id.* at 1075, 145 Idaho at 419.

67. *Id.*

68. *Id.* at 1076, 145 Idaho at 420.

69. *Giltner*, 179 P.3d at 1076, 145 Idaho at 420.

70. *Id.*

71. *Id.* at 1077–83, 145 Idaho at 421–27 (Jones, J., dissenting).

72. *Id.* at 1083, 145 Idaho at 427.

73. *Id.*

74. *Id.*

been like so many others, recorded but affecting little change, if not for *Western Home Transport, Inc. v. Idaho Department of Labor*,<sup>75</sup> a case decided six years later which addressed identical issues and came to the opposite conclusion.

*Western Home* concerned a trucking company (Western Home) that provided for the transportation of oversized mobile homes.<sup>76</sup> The company, much like the company in *Giltner*, contracted with owner/operator drivers to transport the homes and these drivers operated under Western Home's DOT motor carrier authority.<sup>77</sup> These drivers were treated by the company as independent contractors, but the Idaho Department of Labor concluded that they were not exempt from unemployment insurance tax requirements and that Western Home was liable for \$13,277.93 in unpaid unemployment insurance taxes.<sup>78</sup>

In a unanimous opinion, the Supreme Court concluded that the one-factor test elucidated in *Giltner* for analysis of the second exemption prong had proven "unjust, unwise, and incorrect" and overruled *Giltner* on that point.<sup>79</sup> The Court concluded that focusing on DOT authority to the exclusion of other appropriate factors, as *Giltner* directed, ignored the nature of the trucking industry and focused on one factor that was often "completely inconsequential."<sup>80</sup> To bolster its reasoning, the Court also emphasized that federal regulations precluded owner operators from operating under their own DOT authority when they were working for a motor carrier with DOT authority.<sup>81</sup> *Western Home*

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75. 318 P.3d 940, 155 Idaho 950 (2014).

76. *Id.* at 941, 155 Idaho at 951.

77. *Id.*

78. *Id.* at 942, 155 Idaho at 952.

79. *Id.* at 942–44, 155 Idaho at 952–54.

80. *Id.* at 943, 155 Idaho at 953.

81. *Western Home Transport, Inc.*, 318 P.3d at 943, 155 Idaho at 953. This conclusion was particularly ironic, because, as mentioned above, the Court determined in *Giltner* that the drivers at issue were not engaged in an independent business precisely because they were not operating under their own DOT authority. *Giltner*, 179 P.3d at 1076, 145 Idaho at 420.

reflected the Court's recognition that Justice Jones had taken a correct view of the law in *Giltner*, especially in regard to the trucking industry. Of course, the Court did not adopt Justice Jones' reasoning outright in their revised holding, but based their holding on a "new," or at least previously undiscovered, federal trucking regulation that required contractors to operate under the motor carrier's DOT authority.<sup>82</sup> Regardless of how they arrived at the correct conclusion, Justice Jones said that he was glad that they finally "saw the light."<sup>83</sup> Justice Jones' contribution here was to subtly guide the Court to the correct conclusion—which he had reached six years earlier—that provided clarity in the law for trucking and other industries that relied on independent contractors to conduct significant portions of their business.

B. The Proviso Clause, *City of Idaho Falls v. Fuhriman* and *City of Challis v. Consent of Governed Caucus*

In two cases decided over the course of his tenure, *City of Idaho Falls v. Fuhriman*<sup>84</sup> and *City of Challis v. Consent of Governed Caucus*<sup>85</sup>, Justice Jones consistently disagreed with the Court's strict interpretation of Article VIII, Section 3 of the Idaho Constitution and its exception, the proviso clause.<sup>86</sup> Article VIII, Section 3 requires that cities obtain electoral approval for incurring indebtedness in excess of their annual budgets.<sup>87</sup> The proviso clause is a clause in Section 3 that allows expenditures larger than cities' annual income for "ordinary and necessary" expenses incidental to governing.<sup>88</sup> Justice Jones' dissents concerned the type of expenditures considered "ordinary and

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82. *Id.*

83. Interview with Jim Jones, Retired Chief Justice, Idaho Supreme Court, in Boise, Idaho (Jan. 30, 2017).

84. *City of Idaho Falls v. Fuhriman*, 237 P.3d 1200, 149 Idaho 574 (2010).

85. *City of Challis v. Consent of the Governed Caucus*, 361 P.3d 485, 159 Idaho 398 (2015).

86. See *Fuhriman*, 237 P.3d at 1206, 149 Idaho at 580; *City of Challis*, 361 P.3d at 492, 159 Idaho at 405.

87. ID. CONST. art. VIII, § 3.

88. *Id.*

necessary” sufficient to be legally incurred without electoral approval.<sup>89</sup>

In *Fuhriman*, the City of Idaho Falls contracted with Bonneville Power Administration (BPA) to purchase power for provision to residents of the city.<sup>90</sup> Prior to expiration of the contract, the parties sought to renew the contract for an additional 17 years.<sup>91</sup> The question presented was whether the city’s decision to renew their 17-year power purchase agreement with BPA was an acquisition that required electoral approval per Article VIII, Section 3 of the Idaho Constitution, or whether it was an “ordinary and necessary” expense under the proviso clause.<sup>92</sup> The Court concluded that its precedent required interpretation of the necessary prong of “ordinary and necessary” to include an immediate need for the project to be completed within a year for the proviso clause to apply.<sup>93</sup> Accordingly, the Court held that there was no immediate need for the contract to be entered into “as ample time existed during which Idaho Falls could have submitted this proposed contract to its taxpayers for a confirmatory vote” and thus the contract did not fit within the proviso clause.<sup>94</sup>

In a lengthy dissent, Justice Jones disagreed with the necessity-requires-urgency framework utilized by the Court, opining that precedent dictated a dichotomy between “new programs or construction” and “support of existing governmental functions” in proviso clause analysis.<sup>95</sup> Using an analogy of a family’s decision to acquire a pet, he argued that common sense also supported this interpretation.<sup>96</sup> To Justice Jones, continued

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89. See *Fuhriman*, 237 P.3d at 1206, 149 Idaho at 580; *City of Challis*, 361 P.3d at 492, 159 Idaho at 405.

90. *Fuhriman*, 237 P.3d at 1202, 149 Idaho at 576.

91. *Id.* at 1202, 1205, 149 Idaho at 576, 579.

92. *Id.* at 1202, 149 Idaho at 576.

93. *Id.* at 1204, 149 Idaho at 578.

94. *Id.*

95. *Id.* at 1206, 149 Idaho at 580.

96. *Fuhriman*, 237 P.3d at 1206, 149 Idaho at 580.

maintenance of an acquisition, whether it be an obligation to provide power to city residents, a new piece of equipment, or a family's new pet, is an "incidental part of the initial decision" to acquire and thus should not be subject to the electoral approval requirement of Article VIII, Section 3.<sup>97</sup> Because the City of Idaho Falls long ago decided to provide power to residents in its service area, the continued provision of that decision—power at reasonable rates secured by a long-term contract—had already been decided and did not need to be submitted to voters for approval.<sup>98</sup>

In *City of Challis*, the city wished to update its water distribution system by replacing meters, aging pipes, and fire hydrants; installing a new telemetry system; and constructing a new pipeline to the airport.<sup>99</sup> Again, the Court applied its "necessity-requires-urgency" bright-line rule for analyzing whether the expenditure was necessary under the "ordinary and necessary" language of the proviso clause.<sup>100</sup> Perhaps unsurprisingly, the Court determined that the updates to the water system were not so urgent that they needed to be undertaken within that year, and as such were subject to Article VIII, Section 3 electoral approval.<sup>101</sup> The Court emphasized that the "necessity-requires-urgency" inquiry was the proper approach in determining whether proposed city expenditures fit within the proviso clause, and acted to expand the application of the inquiry while upbraiding the district court for failing to apply it.<sup>102</sup>

Again, Justice Jones crafted a lengthy dissent criticizing the Court's emphasis on the "necessity-requires-urgency" bright line rule and questioning the legal foundation of the language.<sup>103</sup> According to Justice Jones, *Dunbar*<sup>104</sup>, the first case to intimate

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97. *Id.*

98. *Id.*

99. *City of Challis*, 361 P.3d at 486–87, 159 Idaho at 399–400.

100. *Id.* at 489, 159 Idaho at 402.

101. *Id.* at 490, 159 Idaho at 403.

102. *Id.* at 489–90, 159 Idaho at 402–03.

103. *See generally id.* at 492–98, 159 Idaho at 405–11.

104. *Dunbar v. Bd. of Comm'rs. of Canyon Cty.*, 49 P. 409, 5 Idaho 407 (1897).

that urgency was contemplated by the proviso clause, did so in language unnecessary to the decision in the case, which was subsequently cited to and “given legs” in the more recent cases of *City of Boise v. Frazier*<sup>105</sup> and *Fuhriman*.<sup>106</sup> Justice Jones decried the continued use of the doctrine on such a “shaky foundation” and continued to emphasize the real dichotomy that he saw in the Article VIII, section 3 cases—the split between a city’s proposal to acquire something *new* and a proposal to update or maintain *existing* fixtures or systems.<sup>107</sup> In both *Fuhriman* and *City of Challis*, he also emphasized that the framers of the Idaho Constitution were practical people, who wanted voter approval and extended consideration of large new projects before they were begun. But, once approval was given, they did not want counties and cities to be burdened with constantly seeking approval for maintenance and upgrades of an existing system.<sup>108</sup>

As Justice Jones noted in his dissent, the Court’s interpretation of the proviso clause “zigged and zagged over the years” between a broader and narrower reading of the proviso clause.<sup>109</sup> By consistently opposing the narrower reading and continuing to emphasize the historical roots and common-sensical reasoning behind the new/existing dichotomy, Justice Jones hoped to lay the legal foundation for a shift in the law in future years. His ten total pages of dissent on the issue, which outline the legislative history surrounding the adoption of Article VIII, Section 3 and the evolution of the case law related to the matter will serve a solid foundation should a shift occur.

#### IV. CONCLUSION

How is impact measured? Is it in raw numbers of cases heard, opinions authored, and law clerks mentored? Or is it more properly

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105. *City of Boise v. Frazier*, 137 P.3d 388, 143 Idaho 1 (2006).

106. *City of Challis*, 361 P.3d at 495, 159 Idaho at 408.

107. *Id.*

108. *See generally id.* at 492–98, 159 Idaho at 405–11; *Fuhriman*, 237 P.3d at 1206–10, 149 Idaho at 580–84.

109. *Id.*

measured in years of service? Over the course of his legal career, Justice Jones served the people of the State of Idaho for twenty years, eight as Attorney General and twelve as a Justice on Idaho's highest court.<sup>110</sup> Although the fame of his years as Attorney General may be difficult to surpass, his impact on Idaho law is amply noted in the volumes of cases he heard as a member of the Court. As indicated above, he oversaw shifts in the law as a member of the majority in *Idaho Water Association*, *Wasden*, *Suhadolnik* and *Navo*. In his dissents in *Giltner*, *Fuhriman*, and *City of Challis* he spoke out where he thought more shifting was needed. Given the nature of the law, and the way courts' opinions build upon one another, this handful of decisions represents just a sampling of the impact of Justice Jones on Idaho jurisprudence. As author of over 300 majority opinions,<sup>111</sup> he will be cited and recited for years to come.

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110. Robert Ehlert, *No longer chief justice of the Idaho's high court, Jim Jones has a few things to say*, IDAHO STATESMAN (Jan. 13, 2017), <http://www.idahostatesman.com/opinion/opn-columns-blogs/robert-ehlert/article126541659.html>.

111. See generally Voting Pattern Analysis, *supra* note 2.