8-3-2009

Burton v. State, Dept. of Transp. Clerk's Record Dckt. 36540

LAW CLERK Vol: 1 of 1

IN THE SUPREME COURT OF THE STATE OF IDAHO

VOLUME ONE OF ONE

CASE NO. 36540-2009

BRITT C. BURTON

Petitioner-Appellant

vs.

STATE OF IDAHO DEPARTMENT OF TRANSPORTATION

Respondent-Respondent

Appealed from the District Court of the
First Judicial District of the State of Idaho,
In and for the County of Benewah.

Honorable FRED M. GIBLER,
Judge

JAMES E. SIEBE
Attorney for Petitioner-Appellant
P.O. Box 9045
Moscow, ID 83843

SUSAN K. SERVICK
Special Deputy Attorney General
Attorney for Respondent-Respondent
P.O. Box 2900
Coeur d'Alene, ID 83816

36540

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27/2007	NCOC	CAROL	New Case Filed - Other Claims	Fred M. Gibler
		CAROL	Filing: G3 - All Other Actions Or Petitions, Not Demanding $ Amounts Paid by: James E. Siebe Receipt number: 0003102 Dated: 9/27/2007 Amount: $88.00 (Check) For: Burton, Britt Colleen (plaintiff)	Fred M. Gibler
	APER	CAROL	Plaintiff: Burton, Britt Colleen Appearance James E Siebe	Fred M. Gibler
	PETN	CAROL	Petition For Judicial Review	Fred M. Gibler
	PETN	CAROL	Exparte Petition For Stay Pending Judicial Review	Fred M. Gibler
9/28/2007	ORDR	CAROL	Exparte Order For Stay Pending Judicial Review	Fred M. Gibler
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	NOTC	CAROL	Notice of Petitioner's Request For Preparation Of Transcript	Fred M. Gibler
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	APER	CAROL	Defendant: State of Idaho Transportation Department Appearance Rami Amaro	Fred M. Gibler
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Britt Colleen Burton vs. State of Idaho Transportation Department

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	DCHH	CAROL	Hearing result for Hearing Scheduled held on 03/13/2009 01:00 PM: District Court Hearing Hel Court Reporter: Byrl Cinnamon Number of Transcript Pages for this hearing estimated: less than 100 pages Oral Argument on Appeal (Rami Amaro to notice hearing)	Fred M. Gibler
/13/2009	ORDR	CAROL	Opinion & Order RE: Appeal	Fred M. Gibler
	CDIS	CAROL	Civil Disposition entered for: State of Idaho Transportation Department, Defendant; Burton, Britt Colleen, Plaintiff. Filing date: 4/13/2009	Fred M. Gibler
	STAT	CAROL	STATUS CHANGED: Closed	Fred M. Gibler
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	APER	CAROL	Defendant: State of Idaho Transportation Department Appearance Susan K Servick	Fred M. Gibler
5/26/2009		CAROL	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: James E. Siebe Receipt number: 0004728 Dated: 5/26/2009 Amount: $86.00 (Check)	Fred M. Gibler
	BNDC	CAROL	Bond Posted - Cash (Receipt 4729 Dated 5/26/2009 for 100.00)	Fred M. Gibler
	STAT	CAROL	STATUS CHANGED: Closed pending clerk action	Fred M. Gibler
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	APDC	CAROL	Appeal Filed In District Court	Fred M. Gibler
/27/2009		CAROL	Filing: T - Civil Appeals To The Supreme Court ($86.00 for the Supreme Court to be receipted via Misc. Payments. The $15.00 County District Court fee to be inserted here.) Paid by: Siebe, James E (attorney for Burton, Britt Colleen) Receipt number: 0004741 Dated: 5/27/2009 Amount: $15.00 (Check) For: Burton, Britt Colleen (plaintiff)	Fred M. Gibler

SIEBE LAW OFFICES
JAMES E. SIEBE, ISBN 2362
202 E. Second Street
P.O. Box 9045
Moscow, ID 83843
Telephone: (208) 883-0622
Facsimile: (208) 882-8769

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT COLLEEN BURTON, Petitioner, v. STATE OF IDAHO, TRANSPORTATION DEPARTMENT, Respondent.	Case No. CV07-461 ITD File No. 384000014306 Idaho D.L. No. RA355028A PETITION FOR JUDICIAL REVIEW Fee Category: G3 Fee: $88.00

COMES NOW, Petitioner Britt Colleen Burton, by and through her attorney of record, James E. Siebe, of Moscow, Idaho, and pursuant to I.C. §§ 18-8002A(8) and 67-5270 et seq., hereby respectfully petitions this Court for Judicial Review of the Findings of Fact and Conclusions of Law and Order dated September 20, 2007, by the Idaho Department of Transportation, in File No. 384000014306. A copy of said final order is

attached hereto as Exhibit A. Said proceeding and final order were entered following a hearing held pursuant to I.C. § 18-8002A.

DATED this 26 day of September, 2007.

SIEBE LAW OFFICES

By _____
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of September, 2007, I served a true and correct copy of the foregoing document by the following method, addressed to the following:

Driver Services
Idaho Transportation Dept.
P.O. Box 7129
Boise, ID 83707-1129

_____ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
✓ Facsimile
(208) 334-8739
(208) 332-2002

Hon. Fred M. Gibler
P.O. Box 527
Wallace, ID 83873

_____ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
✓ Facsimile
(208) 753-3581

_____

COPY

IN THE IDAHO TRANSPORTATION DEPARTMENT

STATE OF IDAHO

IN THE MATTER OF THE DRIVING PRIVILEGES OF **BRITT COLLEEN BURTON**	IDAHO D.L. NO.RA355028A FILE NO.384000014306 **FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**

This matter came on for hearing on September 17, 2007, by telephone conference. James Siebe, Attorney at Law, represented Burton.

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A* is **SUSTAINED.**

EXHIBIT LIST†

The hearing examiner received the following exhibits into evidence as part of the record of the proceeding:

1. Notice of suspension and temporary permit
2. Evidentiary test results
3. Sworn statement
4. Incident summary
5. Incident report
6. Copy of citation number 14306
7. Teletype records
8. Copy of petitioner's driver's license
9. Envelope from law enforcement agency

Exhibit A
Page 1 of 10

10. Certificate of receipt of law enforcement documents
11. Petitioner's hearing request
12. Petitioner's driving record
13. Response to discovery

A. Motion to suppress
B. Memorandum in support of motion to suppress

The Hearing Examiner has taken Judicial Notice of the following Items:

1. Records regularly maintained by ITD
2. IDAPA[‡] Rules and manuals
3. ISP[§] standards and procedures[**] for breath testing instruments
4. Idaho Statutes
5. Reported Court Decisions
6. NHTSA[††] driving while impaired and SFSTs[‡‡] testing manual (9/04)

Administrative Proceedings[§§]

Ms. Burton testified:

1. Read Officer Hilton's reason for the stop as noted in Exhibit 3.
2. Officer Hilton stopped her vehicle while she was driving up a hill on a roadway.
3. This section of a two-way roadway has a passing lane (left lane) and a right lane of travel.
4. Her vehicle was being driven within the right lane of travel.
5. While driving up the hill, there was traffic in the oncoming lane of travel.
6. A sign indicated the lanes were going to merge.
7. The sign only showed the lanes merging and did not state which lane would disappear.

8. Not driving beyond the posted speed limit, did not weave the vehicle, and the vehicle's equipment was working before the stop occurred.
9. Informed the reason for the stop was the failure to use the vehicle's turn signals when the two lanes of travel became one lane of travel.
10. The stop occurred after passing the lane merging sign.
11. The vehicle's signals were not used after passing the sign.
12. Did not know she had to use the vehicle's turn signal when merging into another lane of travel while driving up a hill.
13. Not turning the vehicle or turning off the roadway.

Mr. Siebe's comments and arguments:

1. Officer Hilton did not have legal cause for the stop.
2. Officer Hilton did not cite a specific Idaho code.
3. Assumes Officer Hilton was relying on Idaho Code §49-808(1).
4. Idaho Code §49-808(1) was read into the record.
5. Idaho Code §49-808(1) is unconditionally vague.
6. Idaho Code §49-808(1) gives inadequate notice to people of ordinary intelligence concerning the conduct that this statute prescribes.
7. This statute fails to give minimal guidelines for law enforcement or others that enforce this Idaho Code.
8. In this case, people of reasonable intelligence would not know a turn signal would be required.
9. The passing lane disappears when the right lane and passing lane becomes one lane of travel.
10. A turn signal in this case could be misconstrued and indicate that Burton was going to turn off the roadway.
11. A roadway's lanes of travel when merging do not require a turn signal.

FINDINGS OF FACT

I, having heard the testimony; having heard the issues raised by the driver; having considered the exhibits admitted as evidence; having considered the matter herein; and being advised in the premises and the law, make the following Findings of Fact:

PURSUANT TO IDAHO CODE §18-8002A(7) THE PETITIONER HAS THE BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE REGARDING ALL IDAHO CODE §18-8002A STANDARDS AND ALL ISSUES RAISED BY THE PETITIONER.

1.

DID OFFICER HILTON HAVE LEGAL CAUSE TO STOP THE VEHICLE BURTON WAS DRIVING?

1. Officer Hilton observed the vehicle driven by Burton fail to use the vehicle's turn signals when merging from lane of travel to another lane of travel as required by Idaho Code §49-808(1).
2. Idaho Code §18-8002A(b)(ii) does not require a police officer to state a specific Idaho code violation in their sworn statement when setting forth a legal cause to stop a petitioner's vehicle.
3. Exhibit 3 is sufficient pursuant to Idaho Code §18-8002A(5)(b)(ii) in describing Officer Hilton's legal cause for the stopping the vehicle Burton was driving.
4. Legal issues such as those noted in Exhibits A and B are not one of the issues that an administrative license suspension (ALS) hearing officer can rule on as provided in Idaho Code §18-8002A(7) and supported by State vs. Kane (139 Idaho 586).
5. Burton's ALS cannot be vacated based upon what was articulated in both Exhibits A and B.
6. Officer Hilton had legal cause to stop the vehicle driven by Burton.

2.

DID OFFICER HILTON HAVE LEGAL CAUSE TO BELIEVE BURTON VIOLATED IDAHO CODE §18-8004?

1. Officer Hilton observed Hilton driving a motor vehicle.

2. Burton exhibited the following behaviors:
    a. Smelled of an alcoholic beverage
    b. Admitted to consuming alcoholic beverages
    c. Memory was impaired
    d. Eyes were glassy
    e. Eyes were bloodshot
3. Burton met or exceeded the minimum decision points on the following SFSTs:
    a. The horizontal gaze nystagmus
    b. The 9-step walk and turn
    c. The one leg stand
4. Officer Hilton had sufficient legal cause to arrest Burton and request an evidentiary test.

3.

DID THE EVIDENTIARY TEST RESULTS INDICATE A VIOLATION OF IDAHO CODE §§18-8004, 18-8004C, OR 18-8006?

1. The analyses of Burton's breath samples indicated a BrAC··· of .156/.152.
2. Burton was in violation of Idaho Code §18-8004.

4.

WAS THE EVIDENTIARY TEST PERFORMED IN COMPLIANCE WITH ALL REQUIREMENTS SET FORTH IN IDAHO CODE, IDAPA RULE, AND ISP FORENSIC SERVICES SOP?

1. Officer Hilton's affidavit states the evidentiary test was performed in compliance with Idaho Code, IDAPA Rule, and ISP Forensic Services SOP.
2. Burton's evidentiary test was performed in compliance with Idaho Code, IDAPA Rule, and ISP Forensic Services SOP.

5.

DID THE EVIDENTIARY TESTING INSTRUMENT FUNCTION PROPERLY WHEN THE TEST WAS ADMINISTERED?

1. The evidentiary testing instrument used to test Burton's breath sample completed a valid simulator solution check at 03:49 hours on August 26, 2007.
2. The valid simulator solution check approved the instrument for evidentiary testing in accordance with ISP Forensic Services SOP.
3. The evidentiary testing instrument functioned properly when the test was administered.

6.

WAS BURTON ADVISED OF THE POSSIBLE SUSPENSION OF HER IDAHO DRIVING PRIVILEGE?

1. Burton was played the audiotape version of the Idaho Code §§18-8002 and 18-8002A advisory form prior to Burton submitting to the evidentiary test.
2. Burton was advised of the consequences of refusing or failing evidentiary testing as required by Idaho Code §§18-8002 and 18-8002A.

CONCLUSION OF LAW

CONFLICTING FACTS, IF ANY, WERE CONSIDERED AND REJECTED IN FAVOR OF THE FOREGOING CITED FACTS. BASED UPON THE FOREGOING FINDINGS OF FACT, I CONCLUDE THAT ALL OF THE REQUIREMENTS FOR SUSPENSION OF THE PETITIONER'S DRIVING PRIVILEGES SET FORTH IN IDAHO CODE §§18-8002 AND 18-8002A WERE COMPLIED WITH IN THIS CASE.

THE FOLLOWING ORDER IS RENDERED:

ORDER

The suspension set out in the Notice of Suspension served pursuant to Idaho Code §18-8002A is SUSTAINED and shall run for a period of ONE YEAR commencing on September 25, 2007, and remain in effect through September 25, 2008.

DATED this 20th day of September 2007.

ERIC G. MOODY
ADMINISTRATIVE HEARING EXAMINER

Endnotes

* Idaho's Implied Consent Statute
† Idaho Transportation Department's (ITD hereafter) exhibits are numeric, Petitioner's exhibits are alpha
‡ Idaho's Administrative Procedure Act
§ Idaho State Police
** Hereafter SOP
†† National Highway Transportation Administration
‡‡ Standardized field sobriety tests
§§ Argument and testimony is summarized from record of hearing
*** Breath Alcohol Concentration

FINAL ORDER

(Hearings pursuant to section 18-8002A, I.C.)

This is a final order of the Department.

A motion for reconsideration may be filed with the Idaho Transportation Department's Administrative License Suspension Hearing Unit, PO Box 7129, Boise, ID 83707-1129 within fourteen (14) days of the issue date of this order. If the hearing officer fails to act upon this motion within twenty-one (21) days of its receipt, the motion will be deemed denied.

Or, pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which:

1. A hearing was held;

2. The final agency actions were taken; or

3. The party seeking review of the order resides.

An appeal must be filed within twenty-eight (28) days of the issue date of this final order. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 21st day of September 2007, I mailed a true and accurate copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER by depositing the same in the United States mail, postage prepaid, addressed to:

James E. Siebe
Attorney at Law
PO Box 9045
Moscow, Idaho 83843

Connie Downum

RAMI AMARO
Special Deputy Attorney General
P.O. Box 796
Hayden, Idaho 83835
Telephone: (208) 665-7551
Facsimile: (208) 667-9992
ISBA #5848
Attorney for Respondent – Idaho Transportation Department

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAHI

BRITT C. BURTON, Appellant, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. CV-07-461 **SUPPLEMENTAL AGENCY RECORD**

COMES NOW, Respondent, State of Idaho, Transportation Department (hereinafter "Respondent"), by and through its attorney, RAMI AMARO of the AMARO LAW OFFICE, Special Deputy Attorney General, and files with this Court a supplemental document recently added to the Agency Record. This document consists of the court reporter's estimate to prepare a transcript of the administrative proceeding. Petitioner has fourteen (14) days from the date of filing this estimate within which to object to or otherwise request additions to the Agency Record. If no objection is made or addition requested, the record shall be deemed complete and settled as of the fourteenth (14^{th}) day after the filing of this estimate. The Petitioner's brief shall then be due thirty-five (35) days later and Respondent's brief shall be due twenty-eight (28) days after

receipt of Petitioner's brief.

I hereby certify that, to the best of my knowledge and belief, the enclosed document is true and correct, and that, together with the original Agency Record filed in this matter, the Agency Record filed with this Court is complete. The Department has retained the original file.

The following is a listing of the documents constituting the supplement to the Agency Record:

1. Transcript costs for hearing on September 17, 2007.

DATED this 16 day of October 2007.

AMARO LAW OFFICE

RAMI AMARO
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of October 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James Siebe
Attorney at Law
P.O. Box 9045
Moscow, Idaho 83843

____ U.S. Mail
____ Overnight Delivery
____ Hand Delivered
__X__ Facsimile (208) 882-8709

Nicole Darnell
Paralegal to Rami Amaro

RAMI AMARO
Special Deputy Attorney General
P.O. Box 796
Hayden, Idaho 83835
Telephone: (208) 665-7551
Facsimile: (208) 667-9992
ISBA #5848
Attorney for Respondent – Idaho Transportation Department

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAHI

BRITT C. BURTON, Appellant, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. CV-07-461 **SECOND SUPPLEMENTAL AGENCY RECORD**

COMES NOW, Respondent, State of Idaho, Transportation Department (hereinafter "Respondent"), by and through its attorney, RAMI AMARO of the AMARO LAW OFFICE, Special Deputy Attorney General, and files with this Court a supplemental document recently added to the Agency Record. This document consists of the transcript of hearing on September 17, 2007. Petitioner has fourteen (14) days from the date of filing this transcript within which to object to or otherwise request additions to the Agency Record. If no objection is made or addition requested, the record shall be deemed complete and settled as of the fourteenth (14th) day after the filing of this estimate. The Petitioner's brief shall then be due thirty-five (35) days later and Respondent's brief shall be due twenty-eight (28) days after receipt of Petitioner's brief.

I hereby certify that, to the best of my knowledge and belief, the enclosed document is true and correct, and that, together with the original Agency Record filed in this matter, the Agency Record filed with this Court is complete. The Department has retained the original file.

Attached as Exhibit A is a copy of the transcript for hearing on September 17, 2007.

DATED this 20 day of November, 2007.

AMARO LAW OFFICE

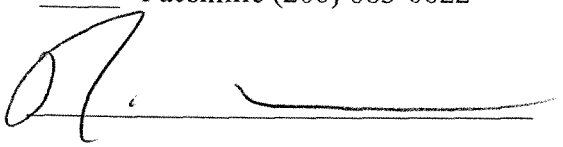
RAMI AMARO
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of November 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

James Siebe
Attorney at Law
P.O. Box 9045
Moscow, Idaho 83843

X U.S. Mail
____ Overnight Delivery
____ Hand Delivered
____ Facsimile (208) 883-0622



COPY

ADMINISTRATIVE LICENSE SUSPENSION HEARING

FOR THE IDAHO DEPARTMENT OF TRANSPORTATION

IN THE MATTER OF BRITT COLLEEN BURTON

FILE NO. 384000014306

SEPTEMBER 17, 2007

BEFORE HEARING OFFICER ERIC MOODY

HEDRICK
COURT REPORTING

POST OFFICE BOX 578
BOISE, IDAHO 83701
208-336-9208

Serving the legal community since 1978

A P P E A R A N C E S

For Ms. Burton:

JAMES E. SIEBE, Esq.
ATTORNEY AT LAW
Post Office Box 9045
Moscow, Idaho 83843

I N D E X

MONDAY, SEPTEMBER 17, 2007

HEARING OFFICER: Okay, it is recording. I'm going to work now. Okay?

MR. SIEBE: Okay.

HEARING OFFICER: Okay, I'll go ahead and transfer her. Excuse me, I'll call her. Okay?

MR. SIEBE: All right.

(Telephone sounds.)

HEARING OFFICER: Are you there, Jim?

MR. SIEBE: Yes.

HEARING OFFICER: Okay.

(Telephone sounds.)

MS. BURTON: Hello?

HEARING OFFICER: Is this Britt Burton?

MS. BURTON: Yes, it is.

HEARING OFFICER: Hi. This is Eric Moody, the hearing officer. Your attorney, Mr. Jim Siebe, is on the other line.

Can you hear her, Mr. Siebe?

MR. SIEBE: Yes, I can.

HEARING OFFICER: And, Ms. Burton, can you hear your attorney?

MS. BURTON: Yes, I can.

HEARING OFFICER: All right. I'm going to go ahead and begin. Is she going to be testifying today, Mr. Siebe?

MR. SIEBE: Yes, she is.

HEARING OFFICER: All right.

The time is 1:08 Mountain time. The date is September 17th, the year 2007. This is the date and time set for the Britt Colleen Burton administrative hearing, ID No. RA355028A, and date of birth is 3/31/72.

My name is Eric Moody, and I've been appointed by the Department to hear this matter.

This hearing will be conducted by telephone conference call as permitted by the Rules and Regulations of the Idaho Transportation Department and the laws of Idaho.

The hearing is being recorded.

The driver is present; also, her attorney, James Siebe.

This hearing is being conducted at the driver's request in accordance with the Idaho Administrative Procedures Act and the Idaho Attorney General's procedure (sic).

Statute sets forth specific issues that can be raised at these hearings, and the burden of proof is upon the driver as to any issue that is raised.

Mr. Siebe, I have received from the State Transportation Department exhibits that were marked 1 through

13. Did you receive these exhibits?

MR. SIEBE: Yes, I did.

HEARING OFFICER: Will you be providing any exhibits into the record?

MR. SIEBE: Yes. I'm going to have my office fax a copy of a Brief and Motion, if I could have them marked -- if I could just mark those and fax them after this hearing as Exhibits 1 and 2. Do you want them without the alphabetical -- letters on them?

HEARING OFFICER: They'll be alphabet --

MR. SIEBE: Okay.

HEARING OFFICER: -- but let our department mark them. Okay?

MR. SIEBE: A and B then?

HEARING OFFICER: Yes.

MR. SIEBE: Okay. And that would be a Motion to Dismiss or Suppress and a Brief in support of that that we filed in the criminal case. Okay?

HEARING OFFICER: Okay.

MR. SIEBE: And I'm in Coeur d'Alene, so I'll have to have people from Moscow send that to you. If you don't mind, give me a fax number to send it to.

HEARING OFFICER: That fax number would be 332-2002.

MR. SIEBE: Okay. Great. I'll do that then.

HEARING OFFICER: Okay. And that could be taken care of after the hearing.

MR. SIEBE: Sure.

HEARING OFFICER: Those will become part of the record.

Also for your information, I do have the original exhibits the law enforcement agency is to provide pursuant to Statute. And again, before I render a Decision, I'll make sure those exhibits were submitted in compliance with Idaho Code and all original exhibits as required by Statute were submitted. Okay?

MR. SIEBE: Okay.

HEARING OFFICER: Okay. At this time, I'll go ahead and place Britt under oath.

BRITT COLLEEN BURTON,

produced as a witness at the instance of the Petitioner, being first duly sworn, was examined and testified as follows:

HEARING OFFICER: All right. And you're going to have to speak up just a little bit louder, make sure I can hear you and record you, and also your attorney can hear you. Okay?

THE WITNESS: Okay.

HEARING OFFICER: All right.

BY MR. SIEBE:

Q. Yeah, this is a bad connection anyway Britt, so anyway, help us out if you don't mind, by speaking up. Okay?

A. Okay. Sorry.

Q. Would you tell us your full name, please?

A. Britt Colleen Burton.

Q. Will you spell your last name?

A. B-U-R-T-O-N.

Q. And where do you live?

A. In Fernwood, Idaho.

Q. Okay. Are you the Petitioner seeking to challenge the proposed suspension of your driving privileges in this case?

A. Yes.

Q. Okay. Now, have you had a chance to review the materials that we were sent by the Department of Transportation?

A. Yes.

Q. Okay. So you had a chance to read the police officer's Affidavit of Probable Cause and the attached police reports?

A. Yes.

Q. Okay.

MR. SIEBE: For the record, I don't know that she has those available, but for the record, we've -- as we've acknowledged, those are Exhibit No. 3 which was attached to the packet we got from the Department of Transportation, and I furnished those to the -- to the Petitioner in this particular case.

Q. BY MR. SIEBE: Did you have a chance to read what the officer said relative to why he stopped you on the evening in question?

Ms. Burton? Did you --

A. I'm here.

Q. Did you -- did you have a -- can you hear me?

A. Yeah, I can. (Inaudible.)

Q. Did you have a chance to read what the officer said was his reason for stopping you on the Probable Cause Affidavit?

A. Oh, because I did not signal while merging from a double to a single lane.

Q. Okay. So the answer is, "Yes."

A. Yes.

Q. Sorry. You don't need to tell us what he said. I'm just trying to clarify some things preliminarily here, Britt. Okay?

A. (Inaudible.)

Q. So, you read the Probable Cause Affidavit.

Right?

A. Right.

Q. Okay. And at 2:36 in the morning, were you headed out of St. Maries on Highway 3?

A. Yes.

Q. Okay. This was on the 26th of August?

A. Yes.

Q. So you agree with the date the officer put on the Probable Cause document?

A. Yes.

Q. Okay. And then why don't you describe for me where -- where it was that he pulled you over. He references milepost 81. Is that going up a hill?

A. That's just before. I'm not exactly sure where milepost 81 is, but --

Q. Well, let's -- let's take a step back. Forget that I mentioned 81. The officer mentioned milepost 81, but if you don't know, that's fine.

A. Okay.

Q. You were pulled over as you were climbing a hill, coming away from St. Maries. Is that fair?

A. Yes.

Q. Okay. And was there a passing lane going the same direction you were going, as well as a lane on the right of the passing lane?

A. Yes.

Q. Which lane were you in?

A. In the right.

Q. Okay. And were you speeding?

A. No.

Q. Was your car weaving in any way?

A. No.

Q. Was your -- were all the -- was all the equipment on your car operating properly?

A. Yes.

Q. Okay. So -- and the officer told you the reason he pulled you over was because you failed to signal when the two lanes became one?

A. Yes.

Q. Okay. Now, this means that the left lane disappeared. Is that it?

A. Yes.

Q. Okay. Now, going up the hill -- I don't want to be leading you with these questions, so let me ask some questions where you give me the answers -- was there a sign indicating that the lanes were going -- that the lanes were merging?

A. Yes.

Q. Had you passed the sign before you actually were stopped?

A. Had I passed the sign?

Q. Yeah, the sign that says the lanes were going to be merging, had you passed that before you were stopped?

A. Yes, I did. Yes.

Q. Okay. And did you signal before you were -- before you -- or, did you signal as you passed that sign?

A. No.

Q. Okay. And you understand the officer told you that he pulled you over because you didn't signal?

A. Correct.

Q. Okay. Now, did you understand before this that you were required to signal at all before or when a passing lane disappears and when you're in the right-hand lane going up a hill?

A. No.

Q. Okay. And this is two-way traffic, was it not, except for the passing lane and the right-hand lane going up the hill? There was oncoming traffic in the other lane?

A. Correct.

Q. Whether there was traffic that night or not, the road's set up for oncoming traffic. Is that correct?

A. Yes.

Q. Okay. Now, did you at any time turn?

A. No.

Q. Okay. Did you merge or exit from the highway?

A. No.

Q. You were already on the highway from the time you left St. Maries, I take it?

A. Yes.

Q. Okay. And then did the sign tell you which lane disappeared or did it just show that the line -- that the -- the lanes merged?

A. It just showed that the lanes merged.

Q. Okay.

MR. SIEBE: No further questions.

(The witness was excused.)

HEARING OFFICER: Your arguments.

MR. SIEBE: Yes. I -- I think there was insufficient cause to pull her over.

The -- our position is he didn't cite a specific statute, but I'm assuming he was relying on Idaho Code 49-808(1), which states that no person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.

And it's our position that if that is the Statute, in fact, that was applied in this particular case, that the Statute is unconstitutionally vague. It fails to give any adequate notice to people of ordinary intelligence

concerning the conduct it prescribes, and fails to establish minimal guidelines to govern law enforcement or others who must enforce the Statute.

From our perspective, drivers of reasonably or presumably ordinary intelligence would not understand the need to give a signal when all they're doing, as she did, is continuing straight when the, actually, the passing lane disappears even though both lanes become one. And, certainly, signaling could actually give the wrong impression that you were actually getting ready to leave the roadway when you're not. And there should be no need to signal when the highway leaves no choice whatsoever, no more than you would have to signal if a highway took a -- an angle off to the right or went around one of those, I don't know what -- how to describe them other than a roundy-round, but one of those go-arounds like they have in Europe and in New Zealand where you go around and then take one of the spikes or one of the streets that come off of a circular drive as you're going down the road.

And from this perspective, given the totality of the circumstances, if that is why the officer pulled her over -- and he doesn't say in his -- in his report here, which I think is also fatal, you know, what he's relying on other than the fact that she didn't signal when the highway merged from two lanes to one -- that Statute's unconstitutional. But I think you could find this defective in terms of cause for

pulling her over by not articulating more specifically why it was he pulled her over.

He observed no driving pattern other than this supposed failure to signal, and she's testified that there was nothing in her driving pattern independently that would warrant being pulled over.

So, for that reason, we ask that you not sustain the suspension.

HEARING OFFICER: Anything else?

MR. SIEBE: No.

HEARING OFFICER: With that, I'll review the record and I'll get a written Order of my Decision out to you in the mail.

MR. SIEBE: Okay. Thank you.

HEARING OFFICER: And could you hold on while the --

(The hearing concluded.)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
County of Ada)

I, WENDY J. MURRAY, a Notary Public in and for the State of Idaho, do hereby certify:

That the foregoing hearing was manually transcribed by me from compact disc recording, and that the transcript contains a full, true, and verbatim record of the said hearing, to the best of my ability.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 2nd day of November, 2007.

WENDY J. MURRAY, Notary Public
in and for the State of Idaho,
residing at Herriman, Utah.
My commission expires 2-5-2008.
Idaho CSR No. 475.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT COLLEEN BURTON, Petitioner, v. STATE OF IDAHO, TRANSPORTATION DEPARTMENT, Respondent.	Case No. CV-07-461 PETITIONER'S BRIEF

COMES NOW the above-named Petitioner, Britt Colleen Burton (hereafter "Burton") by and through her attorney of record, and presents to the Court the following brief.

I. ISSUES TO BE APPEALED

A. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to provide fair notice that signaling is appropriate when roadway design necessitates merging from two lanes into one.

B. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to establish minimal guidelines as to what is an "appropriate signal" to govern enforcement of the statute.

II. STATEMENT OF FACTS

On August 26, 2007, at approximately 2:36 a.m., Burton was traveling out of St. Maries, Idaho, on Highway 3. A.L.S. Hrg. Transcr. 9:3-10 (Sept. 17, 2007). The highway was a two-way highway. *Id.* at 16-19. As the highway climbed a hill, it had a left-hand passing lane and the regular right-hand lane in which Burton was traveling. *Id.* at 9:20-10:3. As Burton climbed the hill, she passed a sign indicating that the lanes were going to merge. *Id.* at 10:18-23. The sign did not indicate which lane ended but only that the lanes were merging. *Id.* at 12:5-8. Burton did not signal when she passed that sign because she did not understand that she was required to signal when a passing lane disappears and she is traveling in the regular, right-hand lane going up a hill. *Id.* at 11:5-7; 11:11-15.

Shortly after the left passing lane ended, Burton was pulled over by Deputy Sidney E. Hilton (hereafter "Hilton") of the Benewah County Sheriff's office. *Id.* at 10:15-17; R. 003. Hilton told Burton that he pulled her over because she failed to signal when the two lanes became one. ALS Hrg. Transcr. 10:11-14, 11:8-10; R. 003. At no time did Burton turn or exit the highway. ALS Hrg. Transcr. 11:23-12:4.

A subsequent investigation by Hilton led to a charge of DUI, and Burton was served with a Notice of Suspension for Failure of Evidentiary Testing. R. 001-003. In

accordance with statutory provisions, Burton requested an administrative hearing on August 29, 2007. R. 018-021.

The administrative hearing was conducted on September 17, 2007. R. 027, 045. Burton testified at the hearing as described above. ALS Hrg. Transcr. 6:16-12:10. Burton offered as exhibits the Motion to Suppress and Memorandum in Support, which she had filed in Benewah County District Court relative to her DUI charge. ALS Hrg. Transcr. 5:3-6:5; R. 031-044. Said motion and memorandum in support argued that I.C. § 49-808(1) is unconstitutionally void as applied to Burton because it fails to provide fair notice that her conducted is proscribed by the statute and it fails to establish minimal guidelines to govern enforcement of the statute. R. 031-044. Burton's argument relied on the Memorandum Decision and Order of Fifth District Magistrate Judge Israel, which was attached to the memorandum in support as Exhibit A. R. 042-044.

In paragraph 1 of his Findings of Fact, Administrative Hearing Examiner Eric G. Moody (hereafter "Moody") stated that Burton's void for vagueness argument was not one on which an ALS hearing officer could rule and that he could not vacate Burton's license suspension based on that argument. R. 048. Therefore, he held that Hilton had legal cause to stop Burton and sustained the suspension of her driver's license. R. 048, 051.

III. STANDARD OF REVIEW

On judicial review, the District Court may set aside the administrative hearing officer's decision if the Court determines that the agency's findings, inferences, conclusions, or decisions were, among other things, in violation of constitutional or

statutory provisions. I.C. § 67-5279(3). This includes arguments that a statute or ordinance on which the agency's decision relied is void for vagueness. *See Cowan v. Bd. of Commissioners of Fremont County*, Docket No. 30061 (2006); *Dupont v. Idaho State Board of Commissioners*, 134 Idaho 618 (2000).

IV. DISCUSSION

The due process clause of the Fourteenth Amendment to the U.S. Constitution requires that a statute defining criminal conduct be "worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited" and that it be "worded in a manner that does not allow arbitrary and discriminatory enforcement." *State v. Korsen*, 138 Idaho 706, 711 (2003).

Therefore, a statute is void for vagueness if it "fail[s] to provide fair notice that the defendant's conduct was proscribed or fail[s] to provide sufficient guidelines such that the police had unbridled discretion" in enforcing the statute. *Id.* at 712. The statute involved in this matter, I.C. § 49-808(1) is unconstitutionally void for both of these reasons.

A statute is facially vague if it is "impermissibly vague in all of its applications," i.e. invalid *in toto*. *Id.* However, even if a statute is not facially vague it may still be vague "as applied" to a particular defendant's conduct. *Id.* Burton is not arguing that I.C. § 49-808(1) is facially void but, rather, that it is void as applied to her conduct.

A. I.C. § 49-808(1) is Unconstitutionally Vague as Applied to This Case Because It Fails to Provide Fair Notice that Signaling is Appropriate When Roadway Design Necessitates Merging from Two Lanes into One.

I.C. § 49-808(1) states:

> No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.

In *State v. Dewbre*, 133 Idaho 663, 666 (Ct. App. 1999), the court held that failing to signal at the end of a passing lane constituted "movement" and violated this statute. However, as pointed out by Fifth District Magistrate Judge Israel, the court was divided and its opinion sent mixed signals. *See Memorandum Decision and Order, State v. Dale, Blaine County Case No. CR-2007-0783* dated June 6, 2007, R.042-043.

As Judge Israel's decision points out, the Dewbre court refused to consider whether the statute was unconstitutionally vague because that issue was not raised below. *See Dewbre*, 133 Idaho at 667. Although Chief Judge Perry's opinion states that I.C. § 49-808 is plain and unambiguous, as Judge Israel states, this does not rule out an as applied vagueness argument or there would have been no reason for the court to specifically leave that argument open. *See Memorandum Decision and Order*, R. 043, n. 1.

> Despite Chief Judge Perry's statement, I.C. § 49-808 is hardly plain and unambiguous, or, if it is plain and unambiguous, it can be palpably absurd as applied to many situations. Is weaving within a lane without a turn signal a violation of the statute? Is swerving to avoid a deer without a turn signal a violation of the statute? Is going around a bend in the road without a turn signal a violation of the statute? Consistent with Judge

> Perry's reasoning, the answer is yes, yet almost no one would apply the statute to these situations.

Id. at 43.

The divided nature of the *Dewbre* opinion, itself, supports Defendant's argument that the statute is unconstitutionally vague as applied to the present case. In the main opinion, Chief Judge Perry states that he is "constrained" to find that the defendant's action violated the statute "until further clarification is provided by the Idaho legislature." *Id.* at 666.

In addition, in his concurring opinion, Judge Schwartzman points out that "many an Idaho driver would, in custom and practice, see no need to operate a turn signal in this hyper-technical situation." *Id.* at 667. Therefore, even Judge Schwartzman would agree that the statute does not give adequate notice to Idaho drivers of "presumably ordinary intelligence" that a signal is required under the circumstances of this case. *See Memorandum Decision and Order*, R.043-044.

This is reiterated in the dissenting opinion of Judge Pro Tem McDermott in which he states that common sense dictates that the word "move" in the statute "does not require a driver to signal where the driver, obeying the posted traffic signs, remains in the right-hand lane until the highway's structure forces the driver to merge" into the remaining lane and that such a requirement "may confuse, rather than alert, other drivers." *Id.* at 667-668.

Further, because the term "appropriate signal" is not defined in the Idaho Code, a person of ordinary intelligence is left to wonder when a signal is appropriate and,

therefore, required. The vagueness doctrine does not require every word in a criminal statute to be statutorily defined. *State v. Casano*, 140 Idaho 461, 464 (Ct. App. 2004). However, "a statute must be construed so that effect is given to every word and clause of the statute" and "words and phrases are construed according to the context and the approved usage of the language." *Dewbre*, 133 Idaho at 656. Therefore, effect must be given to the word "appropriate" as it is used in this statute.

"Appropriate" is defined as "suitable or fitting for a particular purpose, person, occasion" (http://www.dictionary.com, accessed Sept. 5, 2007) or "suitable for the occasion or circumstances" (http://www.encarta.msn.com, accessed Sept. 5, 2007). Therefore, inclusion of the word "appropriate" in the statute implies that there are situations in which the use of a signal is not appropriate. The situations quoted above from Judge Israel's Memorandum and Decision make clear that there are many situations in which a signal is not necessary or appropriate. However, because the statute provides no definition of the term "appropriate signal," (e.g. when other traffic is present and your "movement" could impede or interfere with their "movement"), people of ordinary intelligence are left to wonder when a signal is appropriate. In fact, there are many situations, including the one presently before the court, in which "the appropriate signal under the circumstances was just as likely no signal at all." *See Memorandum Decision and Order*, R. 044.

Burton was traveling in the right-hand lane of a highway that narrowed from two lanes to one. Therefore, the design of the highway forced Burton to merge into the remaining lane. There was no other traffic in the vicinity at the time whose travel was

potentially impeded or interfered with by Burton's action. Therefore, it is likely that the "appropriate signal" in this situation was no signal at all. However, because the statute fails to provide notice to people of ordinary intelligence whether the terms "movement" and "appropriate signal" include such situations, it is unconstitutionally vague as applied to this situation and, therefore, void.

B. I.C. § 49-808(1) is Unconstitutionally Vague as Applied to This Case Because it Fails to Provide Sufficient Guidelines as to When a Signal is Appropriate Thereby Giving Police Unbridled Discretion in Enforcing the Statute.

A law that does not provide minimal guidelines for enforcement "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *State v. Bitt*, 118 Idaho 584, 586 (1990). This failure to provide minimal guidelines for enforcement is often "what tolls the death knell" for a statute. *Id.* at n. 4. This is "perhaps the most meaningful aspect of the vagueness doctrine." *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

In *Bitt*, a city loitering and prowling ordinance was struck down as failing to provide sufficient enforcement guidelines. 118 Idaho at 590. Under the ordinance, a person could not be arrested or convicted unless he failed to identify himself and offer an explanation for his presence and conduct. *Id.* However, the ordinance did not provide any guidelines for what constituted credible and reliable identification and, therefore, gave police officers complete discretion to make that determination. *Id.* at 589-590. Although that ordinance was found to be facially void, the reasoning is equally applicable in this "as applied" vagueness challenge.

Similar to *Bitt*, I.C. § 49-808(1)'s use of the phrase "appropriate signal" without providing further enforcement guidelines impermissibly gives officers complete discretion to decide who is and who is not violating the statute. Although a facial challenge of I.C. § 49-808(1) might not prevail because there are obvious situations in which a person of ordinary intelligence would understand a signal to be appropriate, the statute is vague as applied to Burton's conduct.

As discussed above, the situations quoted from Judge Israel's Memorandum and Decision demonstrate that there are many situations in which a signal is not necessary. Not only does the statute's failure in defining the phrase "appropriate signal" leave a person of ordinary intelligence wondering when a signal is "appropriate," this failure to provide minimal guidelines provides police with unbridled discretion in determining whether the statute has been violated. As noted by Judge Israel, "the minimal guidelines meant to establish the enforcement of the law are at best in flux." *See Memorandum Decision and Order*, R. 044.

Therefore, I.C. § 49-808(1) is unconstitutionally vague as applied to Burton because it fails to provide minimal guidelines as to when a signal is appropriate thereby giving police officers unbridled discretion in enforcing the statute.

V. CONCLUSION

Because I.C. § 49-808(1) is void for vagueness and because Moody relied on that statute in making his decision that the officer had legal cause to stop Burton, his order sustaining the administrative suspension of Burton's driver's license should be vacated.

DATED this 26th day of December, 2007.

SIEBE LAW OFFICES

By _____
Attorney for Britt Colleen Burton

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of December, 2007, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

Rami Amaro
Attorney at Law
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✓ U.S. Mail
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___ Overnight Mail
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAHI

BRITT C. BURTON, Appellant, v. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	Case No. CV-07-461 **RESPONDENT'S BRIEF**

COMES NOW, Respondent, State of Idaho Department of Transportation, by and through its attorney of record, RAMI AMARO, Special Deputy Attorney General, of the AMARO LAW OFFICE, and hereby respectfully submits Respondent's Brief.

I. INTRODUCTION

This case arises from the Idaho Transportation Department's (hereinafter "the Department") suspension of Petitioner Britt C. Burton's (hereinafter "Appellant" or "Burton") driving privileges. Burton requests the reversal of the Department's order suspending her driving privileges. The Department requests that this Court uphold the suspension.

II. FACTUAL AND PROCEDURAL BACKGROUND

On or about 2:36 in the morning, on August 26, 2007, Deputy Sidney E. Hilton (hereinafter "Deputy Hilton"), while patrolling Highway 3, observed Appellant fail to signal when merging lanes. At that point, Deputy Hilton proceeded to stop Appellant's vehicle, due to the manner in which she was driving, at milepost 81. Pages 1-5 of the administrative record.

Deputy Hilton approached the vehicle, identified Appellant via her driver's license, and informed her as to the reason for the stop. Appellant then informed Deputy Hilton that she never signals when merging. During this exchange, Deputy Hilton noticed a strong odor of alcohol emanating from the vehicle and thus asked Appellant if she had been drinking, in response to which Appellant admitted that she had consumed two beers. Id.

Deputy Hilton then requested that Appellant submit to a series of field sobriety tests, to which she consented. Deputy Hilton proceeded said several field sobriety tests, including the Horizontal Gaze Nystagmus (hereinafter "HGN"), the "walk-and-turn" evaluation, and the "one-leg stand" evaluation. Appellant failed all three tests, and was then placed under arrest for Driving Under the Influence of Alcohol (hereinafter "DUI"). During said arrest Appellant insisted that she would be okay if simply allowed to return to her home. Id.

Deputy Hilton transported Appellant to the Benewah County Sheriff's Department, where he proceeded to check her mouth for any foreign objects or substances. He then played the advisory tape while waiting the required fifteen minutes. After the required wait period, Appellant submitted to two tests, with results of .156 and

.152 respectively. Appellant was thereafter cited for a DUI, notified of her license suspension and released. Id.

Appellant later requested an administrative review, which review was completed with the Hearing Officer upholding the suspension on September 21, 2007. Appellant then requested this judicial review on September 26, 2007. Pages 18-21; 60-62 of the administrative record.

III. HEARING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the submitted evidence, as listed on pages 45-47 of the administrative record, the Hearing Examiner made the following pertinent findings of fact and conclusions of law on page 48 of the administrative record.

1. Deputy Hilton observed the vehicle driven by Burton fail to use the vehicle's turn signals when merging from lane of travel to another lane of travel as required by Idaho Code 49-808(1).
2. Idaho Code does not require law enforcement to state a specific code violation in their sworn statement when setting forth a legal cause to stop a petitioner's vehicle.
3. Exhibit 3 is sufficient pursuant to Idaho Code 18-8002A(5)(b)(ii) in describing Deputy Hilton's legal cause for stopping the vehicle Burton was driving.
4. Legal issues such as those noted in Exhibits A and B are not one of the issues that an administrative license suspension (ALS) hearing officer can rule on as provided in Idaho Code 18-8002A(7) and supported by State v.

Kane (139 Idaho 586).

5. Burton's ALS cannot be vacated based upon what was articulated in both Exhibits A and B.

6. Deputy Hilton had legal cause to stop the vehicle driven by Burton.

IV. STANDARD OF REVIEW

A party aggrieved by the decision of a hearing officer may seek judicial review of the decision in the manner provided for in judicial review of final agency action as provided in Chapter 52, Title 67, Idaho Code. I.C. § 18-8002A(8). "[J]udicial review of disputed issues of fact must be confined to the agency record for judicial review ... supplemented by additional evidence take pursuant to section 67-5276, Idaho Code." I.C. § 67-5277.

The scope of review is such that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5279. The standard for review of an administrative decision is further elaborated:

> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) not supported by substantial evidence on the record as a whole; or
>
> (e) arbitrary, capricious, or an abuse of discretion.
>
> **If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.**

> (4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency actions shall be affirmed unless substantial rights of the appellant have been prejudiced.

I.C. § 67-5279.

If the hearing examiner's findings are clear, concise, dispositive, supported by the evidence, and not affected by errors of law, the findings should be upheld by the Court. *See Van Orden v. State Dep't of Health & Welfare*, 102 Idaho 663, 667, 637 P.2d 1159, 1163 (1981).

V. ISSUES ON APPEAL

The issues raised by Appellant in her brief are limited to the following:

1. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to provide fair notice that signaling is appropriate when roadway design necessitates merging from two lanes into one.

2. Whether I.C. § 49-808(1) is unconstitutionally void as applied to this case because it fails to establish minimal guidelines as to what is an "appropriate signal" to govern enforcement of the statute.

Appellant argues that Appellant's suspension may be set aside by this Court based on Appellant's argument that the Department relied on a statute or ordinance that is void for vagueness.

VI. ARGUMENT

A. Standard of Review

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. I.C. 49-201, 49-330, 67-5201 and 67-5270. A court reviewing an agency

decision cannot substitute its judgment for that of the agency as to the weight of the evidence presented. Rather, the court must defer to the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. In Re Suspension of Driver's License, 143 Idaho 937 (App. 2006) 155 P.3d 1176.

A reviewing court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. In Re, supra. If the agency's decision is not affirmed on appeal, "it shall be set aside … and remanded for further proceedings as necessary." I.C. § 67-5279(3).

B. **ANALYSIS**

The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that the Idaho Transportation Department (ITD) suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has

been notified of such an administrative license suspension may request a hearing before a hearing officer designated by the ITD to contest the suspension. I.C. § 18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18-8002A(7); In Re, supra. The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

(a) The peace officer did not have legal cause to stop the person; or

(b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-3004C or 18-8006, Idaho Code; or

(c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

(d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered. . . .

The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); In Re, supra. Presumably, Appellant is arguing that due to the alleged unconstitutionality of I.C. 49-808(1), that Deputy Hilton did not have

legal cause to stop Appellant, thereby constituting a basis on which the Hearing Officer allegedly should have set aside the suspension of Appellant's driver's license.

C. Legal Cause

Appellant presumably argues that Deputy Hilton lacked legal cause to stop Appellant. Pursuant to I.C. 18-8002A(7), it was Appellant's burden to present evidence affirmatively showing that the Deputy Hilton lacked legal cause to stop Appellant's vehicle.

A traffic stop by a member of law enforcement constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. In Re, supra. Under the Fourth Amendment, a member of law enforcement officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. A member of law enforcement may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the member's experience and law enforcement training. Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior. Id.

The hearing officer properly concluded that Appellant failed to prove that the Deputy Hilton lacked legal cause to stop Appellant. Deputy Hilton observed Appellant fail to signal while changing lanes via merging on Highway 3, despite the fact that there

was obviously a member of law enforcement in traffic behind Appellant. The result was that Deputy Hilton was proper in stopping Appellant's vehicle to investigate possible criminal behavior. Deputy Hilton's action was proper as at that point there was a reasonable and articulable suspicion that the vehicle was being driven contrary to traffic laws. It was Deputy Hilton's understanding that it was a violation of traffic law to change lanes and/or merge without signaling, which understanding was based upon his training and experience. Basing Deputy Hilton's action in stopping Appellant on the totality of the circumstances at the time of the stop, Deputy Hilton's suspicion was reasonable, and consisted of more than mere speculation or instinct.

Appellant appears to argue that Deputy Hilton did not have probable cause or reasonable suspicion necessary to make a legal traffic stop. However, in situations such as these, probable cause to believe the law has been broken outbalances private interest in avoiding police contact. Whren v. United States, 517 U.S. 806, 817-18 (1996). An member of law enforcement may also stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. United States v. Cortez, 449 U.S. 411, 417(1981). Probable cause and reasonable suspicion are objective tests. Neither test depends on the individual officer's subjective thoughts nor upon the bases offered by the state to justify the stop. *Deen v.State*, 131 Idaho 435, 436, 958 P.2d 592, 593 (1998) (reasonable suspicion); *State v. Murphy*, 129 Idaho 861, 863-64, 934 P.2d 34, 36-37 (Ct.App. 1997) (probable cause). Thus, in determining whether a traffic stop constituted a lawful seizure, courts freely apply relevant law to the objective facts presented, unconstrained by law enforcement's enumerated reasoning. This prevents costly resort to the exclusionary rule

where a police officer or prosecutor merely fails to articulate the appropriate justification for an otherwise legal search or seizure. *State v. Bower*, 135 Idaho 554, 558, 21 P.3d 491, 495 (Ct.App. 2001).

D. Validity of I.C. 49-808(1)

Appellant, in this case, argues that I.C. 49-808 is sufficiently vague to be unconstitutional and therefore invalid, presumably resulting in a lack of probable cause for stop, and a basis on which the Hearing Officer could vacate Appellant's suspension. Appellant attempts to reach this same point via an argument that as the statute is unconstitutional, that the Hearing Officer committed reversible error by relying on it, thereby warranting this Court's reversal of the Hearing officer's decision.

Of the two Idaho cases which interpret I.C. 49-808, neither explicitly examines whether the statute is unconstitutional. In the first, which is most similar factually to the case at hand, Appellant contended that the officer lacked the requisite suspicion to stop his vehicle because I.C. §49-808 did not require the use of signals when entering or exiting a passing area. The Court in that case examined the issue, finding as follows:

"The relevant portion of I.C. § 49-808 provides that no person "shall turn a vehicle or move right or left upon a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal." Dewbre contends that I.C. § 49-808 requires the use of turn signals only when a vehicle turns or makes a lane change. Dewbre contends that he did not turn or change lanes, that he continued in the same lane while entering and exiting the passing area, and that he, therefore, was not required to use his signal. Dewbre also argues that I.C. § 49-808 requires the use of signals only when appropriate and that no turn signal is the "appropriate signal" when the vehicle movement can be made with reasonably safety.

This Court exercises free review over the application and construction of statutes. State v. Schumacher, 131 Idaho 484, 485, 959 P.2d 465, 466 (Ct.App. 1998). Generally, "[w]ords and phrases are construed according to the context and the approved usage of the language." I.C. § 73-113. A statute must be construed so that effect is given to every word and clause of a statute. State v. Baer, 132 Idaho 416, 417-18, 973 P.2d 768,

769-70 (Ct.App. 1999). The task of the court "in interpreting the meaning of language contained in a statute is to give effect to the legislature's intent and purpose." State v. Coleman, 128 Idaho 466, 469, 915 P.2d 28, 31 (Ct.App. 1996). There is no occasion for construction where the language Page 666 of a statute is plain and unambiguous. State v. McCoy, 128 Idaho 362, 365, 913 P.2d 578, 781 (1996). "The plain, obvious and rational meaning is always preferred to any hidden, narrow or irrational meaning." State v. Arrasmith, 132 Idaho 33, 40, 966 P.2d 33, 40 (Ct.App. 1998).

The language of I.C. § 49-808 is plain and unambiguous and must be given effect. The following holding from the district court's order affirming the magistrate's denial of Dewbre's suppression motion correctly analyzes the statute's application: When Dewbre approached the portion of the highway containing a passing lane, the sign required him to "keep right accept to pass." As such, Dewbre moved his vehicle to the right to comply with this requirement. When Dewbre reached the end of the portion of the highway that contained a passing lane, the record clearly establishes that there was a sign requiring Dewbre to merge back into the left lane. This required a turning movement to the left. It is undisputed the [sic] Dewbre made these movements, and it is also undisputed that he did not signal when he made either turn. By failing to signal when he made these turns, Dewbre violated I.C. § 49-808.

It is true that at the point Dewbre made these turning maneuvers, the dashed line did not separate the left and right northbound lanes. However, the statute does not strictly limit its application to the lane changes. Instead, the statute requires a signal whenever an individual makes a "move right or left upon a highway." Had the legislature intended only to regulate turns and lane changes, it could have stated so specifically. By moving first right, and then left, Dewbre came within the ambit of the statute, and was required to make to [sic] signal.

I am constrained to agree. Upon entering the passing area Dewbre moved his vehicle to the right in order to comply with the highway signage. Upon exiting the passing area, Dewbre moved his vehicle to the left, complying once again with the highway signage. There are no exceptions in I.C. § 49-808 to the signal requirement. State v. Pressley, 131 Idaho 277, 279, 954 P.2d 1073, 1075 (Ct.App. 1998). Whenever a movement is made to the left or right on a highway, regardless of whether the movement is made necessary to comply with highway signage, an appropriate signal is required pursuant to I.C. § 49-808.

I do not attempt by this holding to define the boundaries of what constitutes a "movement to the right or left upon a highway." I conclude only that Dewbre's movements placed him within the ambit of the statute. Until further clarification is provided by the Idaho legislature, I am constrained to hold that whenever a vehicle moves to the right or to the left because one lane splits into two lanes, or two lanes merge into one lane, an appropriate signal is required pursuant to I.C. § 49-808. Therefore, I.C. § 49-808 required Dewbre to use an appropriate signal when he moved to the right while entering the passing area and then to the left while exiting the passing area.

Dewbre further argues that no signal is the appropriate signal when the vehicle movement can be made with reasonably safety. The plain language of I.C. § 49-808 provides that an individual may "move right or left upon a highway" if two requirements are met: (1) if "the movement can be made with reasonable safety" and (2) if "an appropriate signal" is given. Even if a vehicle can be moved with reasonable safety, I.C. § 49-808 still requires the use of turn signals when making the movement to the right or left. Furthermore, the Idaho legislature specifically amended the turn signal law deleting the exception Dewbre argues. Prior to the amendment, the statute provided that an appropriate signal was only required "in the event any other traffic may be affected by such movement." 1953 Idaho Sess. Law 507. This exception was removed in 1977 by the Idaho legislature. 1977 Idaho Sess. Law 370. Consequently, the legislature intended that turn signals be used when moving right or left on a highway regardless of whether other traffic may be affected or a vehicle is moving with reasonable safety. I agree with the district court that an appropriate signal requires "such a signal as would put others Page 667 on notice of the driver's intention to make a turning movement, and that it was not the intent of the legislature to negate the requirement of signaling when making a turning movement."

State v. Dewbre, 133 Idaho 663 (App. 1999).

Appellant argues that the statute is so ambiguous as to be unconstitutionally vague. However, the Idaho Appellate Court, in the above opinion, specifically held that "*the language of I.C. § 49-808 is plain and unambiguous and must be given effect*". The Idaho Appellate Court further found that, pursuant to I.C. 49-808, a driver must signal when changing lanes or when merging. Id. If that statute were so vague that such determination could not be made, such a holding would be unlikely.[1]

The statute is neither void for vagueness nor facially vague - either pursuant to the standards set forth in the State v. Korsen case, or standards set forth in the State v. Bitt case. It does not fail to set forth minimal guidelines for enforcement. Nor does it fail to provide fair notice that a particular conduct is proscribed.

Further, the Hearing Officer in this matter had no authority to determine whether the statute was unconstitutional or void. The Hearing Officer's duty was to

[1] Note that the Appellant in this case did not introduce evidence similar to that introduced by Dewbre in terms of signage and vehicle movement.

uphold the suspension absent certain proofs, which burden Appellant failed to meet. Appellant presumably argues one of two issues: First, that the Hearing Officer made his decision based on invalid or unconstitutional law; Next, that the Hearing Officer presumably should have held the stop to be without cause based on an identical argument regarding the statute at issue. The error is said argument is that the Hearing Officer based his opinion on current, valid law which had been upheld in a near identical scenario. The Hearing Officer had no authority to deem said law invalid.

VII. CONCLUSION

This Court's review is now confined to the agency record. Idaho Code § 67-5277. This Court cannot substitute its judgment for that of the agency as to the weight of the evidence or questions of fact. Idaho Code § 67-5279. This Court shall affirm the hearing decision, unless it finds that the hearing examiner's findings: (1) violate constitutional or statutory provisions; (2) exceed statutory authority or are made upon unlawful procedure; (3) are not supported by the substantial evidence on the whole; or (4) are arbitrary, capricious or an abuse of discretion. *Id.* Notwithstanding the existence of any of the aforementioned grounds for reversal, this Court shall also affirm the agency action if the substantial rights of the appellant were not prejudiced.

Appellant has not shown to this court that the hearing examiner's findings are in violation of statutory or constitutional provisions, that they exceed statutory authority, that they are made upon unlawful procedure, that they are not supported by substantial evidence on the whole, or that they are arbitrary, capricious, or an abuse of discretion. Nor has the Appellant shown that any of her substantial rights were prejudiced. Therefore, the Department respectfully requests that this Court uphold the decision of the

hearing examiner in this matter, and leave the suspension of Appellant's license undisturbed.

DATED this 8th day of February, 2008.

AMARO LAW OFFICE

BY _____
RAMI AMARO
Special Deputy Attorney General
Idaho Transportation Department

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of February, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT COLLEEN BURTON, Petitioner, v. STATE OF IDAHO, TRANSPORTATION DEPARTMENT, Respondent.	Case No. CV-07-461 PETITIONER'S REPLY BRIEF

COMES NOW the above-named Petitioner, Britt Colleen Burton (hereafter "Burton") by and through her attorney of record, and presents to the Court the following reply brief.

Respondent's Brief can be broken down into three arguments: 1) that the statutory vagueness argument is not properly before the court; 2) that I.C. § 49-808 is not unconstitutionally vague; 3) a substantial right of Burton was not prejudiced. All three of these arguments are erroneous, and this reply brief will address each of them in turn.

A. **The Issue of the Constitutionality of the Statute on Which the Stop of Burton's Vehicle Was Based Is Properly Before the Court.**

Under I.C. § 18-8002A(7), insufficient legal cause to stop the driver is one of the grounds on which a hearing officer may vacate an administrative license suspension. A determination of whether the stop of a vehicle is lawful includes an analysis of whether the statute on which the stop was based was unconstitutional. Therefore, such an analysis is a necessary part of the hearing examiner's inquiry and the hearing examiner does have statutory authority to make such an analysis subject, of course, to judicial review.

In addition, administrative proceedings that apply general rules to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints. *Cooper v. Bd. of County Commissioners of Ada County*, 101 Idaho 407, 409-411 (1980); *Cowan v. Bd. of Commissioners of Fremont County*, 143 Idaho 501, 148 P.3d 1247, 1256 (2006). *See also American Falls Reservoir Dis. No. 2 v. The Idaho Dept. of Water Resources*, Docket Nos. 33249/33311/33399 (2007) (referring to the "quasi-judicial functions" of administrative bodies).

At an administrative license suspension hearing, the hearing examiner applies general rules to the individual and situation before it. Therefore, the hearing is quasi-judicial and is subject to due process constraints. These due process constraints include whether the statute on which the administrative action is based is unconstitutionally vague. *See Cowan* at 1259-60; *Dupont v. Idaho State Board of Commissioners*, 134 Idaho 618, 623 (2000); *American Falls Reservoir Dis. No. 2.*

Further, in Idaho, due process is not satisfied unless judicial review is provided from the decision of an administrative agency. *Northern Frontier Inc. v. State*, 129 Idaho 437, 439 (Ct. App. 1996) (citing *Graves v. Cogswell*, 97 Idaho 716 (1976)). If the statutory scheme for ITD administrative hearings (which scheme includes, in combination, I.C. § 18-8002A(7) and IDAPA) does not provide for constitutional challenges at either the administrative hearing level or on judicial review, the scheme itself violates the procedural due process rights of drivers. Therefore, the hearing officers' findings, inferences, conclusions, or decisions could be overturned as being made upon unlawful procedure. I.C. § 67-5279(3)(c).

While I.C. § 65-5279 does require that the reviewing court defer to the agency's findings of fact unless they are clearly erroneous, a determination of whether a statute is void for vagueness is not a question of fact. Rather, the constitutionality of a statue is a question of law over which appellate courts exercise free review. *See American Falls Reservoir Dis. No. 2*; *MDS Investments, LLC v. State*, 138 Idaho 456, 461 (2003). The District Court is acting in an appellate capacity for judicial review of this administrative decision and, therefore, the question of whether I.C. § 19-808(1) is unconstitutionally vague is properly before the court and the court exercises free review over the issue.

B. <u>I.C. § 49-808(1) is Unconstitutionally Vague as Applied to This Case</u>.

This argument was fully addressed in Petitioner's Brief filed on December 26, 2007. Therefore, Petitioner directs the Court to that brief and will not repeat that argument in its entirety here. However, Petitioner would like to make the following points:

Respondent states in its brief that "Appellant argues that the statute is so ambiguous as to be unconstitutionally vague." *See* Respondent's Brief, p. 12 (Feb. 8, 2008). This statement implies that Burton is arguing that the statue is facially vague. However, Petitioner's Brief sets forth the differences between a "facially vague" argument and a "vague as applied" argument and clearly states that "Burton is not arguing that I.C. § 49-808(1) is facially void but, rather, that it is void as applied to her conduct."

The *Dewbre* court's statement that the statute is "plain and unambiguous" is not contrary to an "as applied" vagueness argument. In order to be facially vague, a statute must be "impermissibly vague in all of its applications." *State v. Korsen*, 138 Idaho 706, 712 (2003). There are situations to which I.C. § 49-808(1) clearly applies (such as entering or exiting a highway) and, therefore, the statute is not facially vague.

However, even if not facially vague, a statute may still be unconstitutionally vague when applied to a specific situation. *Id.* In *Dewbre*, the traffic stop based on the defendant's failure to signal when the highway's structure forced him to merge from two lanes to one was "a barely plausible traffic stop." *Dewbre* at 668, J. Schwartzman, concurring opinion, n. 2. Yet, the court specifically stated that it was declining to address the issue of whether the statute was unconstitutionally vague because the defendant had not raised the argument below. *Id.* at 667.

Further, in J. Schwartzman's concurring opinion, he agreed in the result (that, again, was not based on a vagueness argument) "despite the fact that many an Idaho driver would, in custom and practice, see no need to operate a turn signal" in such a

hyper-technical situation. *Id.* at 668. He also pointed out his own observations that individuals rarely signal in such a situation. *Id.*, n. 2. These comments by him indicate that, had a vagueness challenge properly been before the court, J. Schwartzman would have at least considered the possibility that the statute did not give adequate notice to people of ordinary intelligence concerning the conduct it proscribes and may have been void for vagueness as applied to that situation.

Again, vagueness was not properly before the *Dewbre* court and, therefore, was not addressed by the court. *Id.* at 667. However, it was addressed by Fifth District Magistrate Judge Israel in *State v. Harrison Matthew Dale,* Blaine County Case No. CR-2007-0783. *See Memorandum Decision and Order*, R. 042-044. There, in a situation very similar to the one presently before the court, Judge Israel's reasoned holding was that I.C. § 49-808 is "palpably absurd as applied to many situations" including a situation such as when highway structure forces a driver to merge from two lanes to one. *Id.* at 43. Judge Isreal's holding that the statute was vague as applied is supported by the divided nature of the *Dewbre* opinion, the particular comments referenced above made by J. Schwartzman in his concurring opinion, as well as the dissenting opinion of J. McDermott.

I.C. § 49-808(1) requires an "appropriate" signal, and rules of statutory interpretation require that the word "appropriate" be given effect. *Dewbre* at 665. As set forth in Petitioner's Brief, "appropriate" is defined as "suitable or fitting for a particular purpose, person, occasion" (http://www.dictionary.com, accessed Sept. 5, 2007) or "suitable for the occasion or circumstances" (http://www.encarta.msn.com, accessed

Sept. 5, 2007). Therefore, inclusion of the word "appropriate" in the statute implies that there are situations in which the use of a signal is not appropriate.

As explained in Judge Israel's opinion, there are many situations in which a signal is not necessary or appropriate even though the driver is engaged in "movement" on the highway. However, because the statute provides no definition of the term "appropriate signal," (e.g. when your "movement" could impede or interfere with the "movement" of another vehicle), people of ordinary intelligence are left to wonder when a signal is appropriate. In fact, there are many situations, including the one presently before the court, in which "the appropriate signal under the circumstances was just as likely no signal at all." *See Memorandum Decision and Order*, R. 044.

Further, the failure to define when a signal is appropriate "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *State v. Bitt*, 118 Idaho 584, 586 (1990). The failure to provide minimal guidelines as to when a signal is appropriate "tolls the death knell" for this statute because providing guidelines is "perhaps the most meaningful aspect of the vagueness doctrine." *Id.* at n. 4.

In *Bitt*, the Court found statute before it vague because it did not define what constituted credible and reliable identification and, therefore, gave law enforcement complete discretion in that determination. *Id.* at 589-90. Although *Bitt* dealt with a facially vague challenge, whether the statute supplies sufficient guidelines is also part of an "as applied" vagueness inquiry. *Korsen* at 712. Therefore, *Bitt* is applicable to the present case.

As pointed out by Judge Israel, there are many situations in which the "appropriate" signal may be no signal. However, because the statute fails to provide any guidelines, law enforcement had unbridled discretion to determine whether a signal was appropriate in this situation. Therefore, I.C. § 49-808(1) is unconstitutionally vague as applied to Burton because it fails to provide notice to people of ordinary intelligence whether a signal is appropriate in situations such as the one before the court. Further, the statute is unconstitutionally vague as applied to Burton because it failed to provide law enforcement with minimal guidelines for determining whether a signal was appropriate in this situation.

C. Burton's Substantial Due Process Rights Were Prejudiced.

ITD's findings, inferences, conclusions, or decisions can be overturned on judicial review if they violate I.C. § 67-5279(3) and if they prejudiced a substantial right of Burton.

Because a statute that is void for vagueness fails to give adequate notice of the behavior proscribed and/or fails to provide minimal guidelines to those enforcing the statute, the void for vagueness doctrine is a procedural due process concept. *U.S. v. Professional Air Traffic Controllers Organization*, 188 F.3d 531 (1st Cir. 1982); *Hutchins v. D.C.*, 188 F.3d 531 (D.C. Cir. 1999).

There is no question that an individual has a substantial right not to be deprived of life, liberty, or property without due process of law. The violation of a procedural due process right constitutes prejudice of a substantial rights under I.C. § 67-5279. Although few Idaho cases contain specific discussions on whether a substantial right was

prejudiced by an agency action or decision, many cases cite this standard and then find for the petitioner based on various violations of the statute. Therefore, these cases can be interpreted as holding that those violations of the statute constituted prejudice of a substantial right of the petitioner.

In *Fischer v. City of Ketchum*, the Court held that the planning and zoning commission had violated Fischer's procedural due process rights. 141 Idaho 349, 355 (2005) (stating that actions such as those by the commission weakened or possibly nullified interested parties' rights to a public hearing). Although it did not specifically state that a substantial right of Fischer had been prejudiced, the Court did cite the "prejudice of a substantial right" standard contained in I.C. § 67-5279(4) and held that Fischer was the prevailing party in the dispute. *Id.* at 352-353, 356. Therefore, this case can be interpreted as holding that a procedural due process violation prejudices a substantial right of the party.

In *Eacret v. Bonner County*, the County appealed a district court ruling in favor of Eacret and other petitioner's. 139 Idaho 780 (2003). The Court found that the petitioners' procedural due process rights were violated because one of the planning and zoning commissioners had made statements indicating bias and the inability to judge the matter fairly and had engaged in ex parte communications resulting in evidence that was not available to the entire Board or equally to the parties. *Id.* at 786-787. Therefore, the Court affirmed the district court ruling in favor of petitioners. *Id.* at 787. Again, the Court did not specifically state that a substantial right of the petitioners was prejudiced. However, it cited the "prejudice of a substantial right" standard contained in I.C. § 67-

5279(4) and upheld the district court's ruling. *Id.* at 784, 787. Therefore, this case also can be interpreted as holding that a procedural due process violation prejudices a substantial right of the party.

In *Cooper v. Board of Professional Discipline of Idaho State Board of Medicine*, the Court held that the Board violated Cooper's due process rights by disciplining him for behavior of which he did not have specific notice. 134 Idaho 449, 454-455 (2000) (holding that Cooper's due process rights were violated because he was not given specific notice in the complaint of all charges brought against him and for which he was disciplined). Although the Court's ruling in Cooper's favor was also based on another violation by the Board, because it cited the "prejudice of a substantial right" standard contained in I.C. § 67-5279(4) and ruled in Cooper's favor, this case also can be interpreted as holding that a procedural due process violation for failure of notice prejudices a substantial right of the party.

Burton has a substantial due process right that has been prejudiced by her being disciplined based on a statute that is vague as applied to her situation and, therefore, did not provide notice that it was applicable to her behavior.

DATED this 27th day of February, 2008.

SIEBE LAW OFFICES

By _____
Attorney for Britt Colleen Burton

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2008, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

Rami Amaro
Attorney at Law
P.O. Box 796
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STATE OF IDAHO | ss
County of Benewah |
FILED 4-13-09
At 11:00 O'clock A.M.
DISTRICT COURT CLERK

CJR
Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT C. BURTON, Appellant. vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent,	CASE NO. CV-2007-461 OPINION & ORDER RE: APPEAL

Appellant Britt Burton seeks judicial review of respondent Idaho Transportation Department's order suspending her driver's license.

STANDARD OF REVIEW

In re Suspension of Driver's License of Gibbar, 143 Idaho 937, 941-42, 155 P.3d 1176, 1180-81 (Ct.App.2006) sets out the applicable standard of review as follows:

> The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. . . . This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. This Court instead defers to

> the agency's findings of fact unless they are clearly erroneous. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record.
>
> A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. If the agency's decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary." I.C. § 67-5279(3).

(Citations omitted.)

ANALYSIS

Burton's challenge to the suspension is centered upon a contention that ITD erroneously found that the stop of her vehicle by Benewah County Deputy Sheriff Sidney Hilton, just after 2:30 a.m. on August 26, 2007, was based upon legal cause. *In re Suspension of Driver's License of Gibbar, supra,* states:

> The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that the Idaho Transportation Department (ITD) suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. A person who has been notified of such an administrative license suspension may request a hearing before a hearing officer designated by the ITD to contest the suspension. At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of

several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

> (a) The peace officer did not have legal cause to stop the person
> . . . .
>
> The hearing officer's decision is subject to challenge through a petition for judicial review.
>
> . . . .
>
> A traffic stop by an officer constitutes a seizure of the vehicle's occupants and implicates the Fourth Amendment's prohibition against unreasonable searches and seizures. Under the Fourth Amendment, an officer may stop a vehicle to investigate possible criminal behavior if there is a reasonable and articulable suspicion that the vehicle is being driven contrary to traffic laws. The reasonableness of the suspicion must be evaluated upon the totality of the circumstances at the time of the stop. The reasonable suspicion standard requires less than probable cause but more than mere speculation or instinct on the part of the officer. An officer may draw reasonable inferences from the facts in his or her possession, and those inferences may be drawn from the officer's experience and law enforcement training. Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior.

Id. 143 Idaho at 942-43, 155 P.3d at 1181-82 (citations omitted).

ITD found that Officer Hilton stopped defendant for moving left on the roadway without signaling, in violation of I.C. § 49-808. Subsections one and two of that provision state:

> (1) No person shall turn a vehicle onto a highway or move a vehicle right or left upon a highway or merge onto or exit from a highway unless and until the movement can be made with reasonable safety nor without giving an appropriate signal.
>
> (2) A signal of intention to turn or move right or left when required shall be given continuously to warn other traffic. On controlled-access highways and before turning from a parked position, the signal shall be given continuously for not less than five (5) seconds and, in all other instances, for not less than the last one hundred (100) feet traveled by the vehicle before turning.

Burton argues that I.C. § 49-808 is void-for-vagueness as applied to her. She does not contend that I.C. § 49-808 is void-for-vagueness in all of its applications. *State v. Korsen,* 138 Idaho 706, 69 P.3d 126 (Idaho 2003) states:

> The void-for-vagueness doctrine is premised upon the due process clause of the Fourteenth Amendment to the U.S. Constitution. This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement. It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Furthermore, as a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes. This Court has held that due process requires that all "be informed as to what the State commands or forbids" and that "men of common intelligence" not be forced to guess at the meaning of the criminal law. A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute.
>
> A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. For a "facial vagueness" challenge to be successful, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." In other words, the challenger must show that the enactment is invalid in toto. To succeed on an "as applied" vagueness challenge, a complainant must show that the statute, as applied to the defendant's conduct, failed to provide fair notice that the defendant's conduct was proscribed or failed to provide sufficient guidelines such that the police had unbridled discretion in determining whether to arrest him. A "facial vagueness" analysis is mutually exclusive from an "as applied" analysis.

Id. 138 Idaho at 711-12, 69 P.3d at 131-33 (emphasis added) (citations omitted). *State v. Schumacher,* 136 Idaho 509, 37 P.3d 6 (Ct.App.2001) states:

> An appellate court is obligated to seek an interpretation of a statute that will uphold its constitutionality. A statute's possible infirmity for vagueness may be avoided by a judicial construction of the statute

> that is consistent with legislative intent and comports with constitutional limitations. When interpreting a statute, we begin with the supposition that the legislature intended the ordinary meaning of the words it used unless a contrary intent is clearly expressed.

Id. 136 Idaho at 519, 37 P.3d at 16 (emphasis added).

Burton contends that I.C. § 49-808 is unconstitutionally vague as applied to her because it was impossible for her to know whether I.C. § 49-808 required her to signal under the circumstances then present. First, Burton focuses on the statutory requirement of a signal when a vehicle "move[s] . . . right or left upon a highway." Burton contends that the traffic sign present, "indicating the lanes were going to merge," "did not indicate which lane ended." Petitioner's Brief, at 2. ITD did not make a specific finding agreeing with Burton that the sign did not indicate which lane ended. Instead, ITD focused on Burton's responsibility to merge, stating:

> Officer Hilton observed the vehicle driven by Burton fail to use the vehicle's turn signals when merging from [her] lane of travel to another lane of travel as required by Idaho Code § 49-808(1).

Decision at 4; Record at 48. ITD's finding is supported by Deputy Hilton's affidavit, which states:

> I observed a vehicle (license # 3B34991) fail to signal when it merged lanes.
>
> When I made contact with the driver, I advised her why I had stopped her. She stated . . . "I never signal when I merge lanes."

Affidavit, at 1-2; Record at 3-4. ITD's finding is also supported by Burton's testimony at hearing, where Burton admitted the sign "showed the lanes

This result is consistent with *State v. Dewbre,* 133 Idaho 663, 991 P.2d 388 (Ct.App.1999)[2] which held:

> The language of I.C. § 49-808 is plain and unambiguous and must be given effect.
>
> . . . .
>
> [W]henever a vehicle moves to the right or to the left because one lane splits into two lanes, or two lanes merge into one lane, an appropriate signal is required pursuant to I.C. § 49-808.

Id. 133 Idaho at 666, 991 P.2d at 391.

Finally, Burton contends, "Inclusion of the word 'appropriate' in the statute implies that there are situations in which the use of a signal is not appropriate." Reply at 6. Burton's interpretation might be valid if the statute required a signal "if" or "when" appropriate. Instead, the statue requires an "appropriate signal." The word "appropriate" is an adjective describing the type of signal required. In other words, the statute requires a signal, but not just any kind of signal. It requires the type of signal given be appropriate. For example, an appropriate signal for a leftward movement on a highway would be the activation of the left blinker, and an inappropriate signal for the same movement leftward would be the activation of the right blinker. Here, Burton gave no signal, appropriate or otherwise. Accordingly, it is clear that Burton failed to give an appropriate signal as contemplated by the statute, and this language is not unconstitutionally vague

[2] It is noted that the result herein is consistent with *Dewbre* because, as that court stated, it did not consider the issue of whether the statue was unconstitutionally vague, as Dewbre had not raised it below. *Id.* 133 Idaho at 667, 991 P.2d at 392.

as applied to Burton. Again, this result is consistent with *State v. Dewbre, supra,* which held:

> Dewbre further argues that no signal is the appropriate signal when the vehicle movement can be made with reasonably safety. The plain language of I.C. § 49-808 provides that an individual may "move right or left upon a highway" if two requirements are met: (1) if "the movement can be made with reasonable safety" and (2) if "an appropriate signal" is given. Even if a vehicle can be moved with reasonable safety, I.C. § 49-808 still requires the use of turn signals when making the movement to the right or left. Furthermore, the Idaho legislature specifically amended the turn signal law deleting the exception Dewbre argues. Prior to the amendment, the statute provided that an appropriate signal was only required "in the event any other traffic may be affected by such movement." 1953 Idaho Sess. Law 507. This exception was removed in 1977 by the Idaho legislature. 1977 Idaho Sess. Law 370. Consequently, the legislature intended that turn signals be used when moving right or left on a highway regardless of whether other traffic may be affected or a vehicle is moving with reasonable safety. I agree with the district court that an appropriate signal requires "such a signal as would put others on notice of the driver's intention to make a turning movement, and that it was not the intent of the legislature to negate the requirement of signaling when making a turning movement."

Id. 133 Idaho at 666-67, 991 P.2d at 391-92.[3]

Burton has not shown that I.C. § 49-808, as applied to her conduct, failed to provide fair notice that her failure to signal was proscribed or failed to provide sufficient guidelines such that Officer Hilton had unbridled discretion in determining whether to stop her. Accordingly, I.C. § 49-808 is not

[3] Although Judge Schwartzman, in his concurring opinion in *Dewbre,* questioned whether any driver would be able to fully comply with traffic laws, he concluded: "[S]ince the officer had some objective measure of probable cause to believe that Dewbre violated the traffic code, the stop would now be constitutionally reasonable and justified." *Id.* 133 Idaho at 667, 991 P.2d at 392. Although, as advanced by Burton, Fifth District Magistrate Judge Ted Israel in State v. Dale, Blaine Co. case # CR-2007-783, disagreed with the Idaho Court of Appeals decision *Dewbre*, this court is bound to follow it to the extent that its rationale is applicable. *See* Record at 42-44.

unconstitutionally vague as applied to Burton, and ITD's finding that Officer Hilton had legal cause to stop defendant for violating that statute is not in error.

ORDER

IT IS THEREFORE ORDERED: ITD's decision is affirmed.

DATED this 10th day of April, 2009.

Fred M Gibler

FRED M. GIBLER, District Judge

I hereby certify a true and correct copy of the foregoing was mailed, postage prepaid, this 13th day of April, 2009, to the following:

James E. Siebe
Siebe Law Offices
202 E. Second St.
P.O. Box 9045
Moscow, ID 83843

Rami Amaro
Special Deputy Attorney General
P.O. Box 796
Hayden, ID 83835

MICHELE REYNOLDS, Clerk of Court

By: Connie Johnson
Deputy Clerk / Secretary to Judge Gibler

SUSAN K. SERVICK
Special Deputy Attorney General
618 North 4th Street
PO Box 2900
Coeur d'Alene, Idaho 83816
Phone: (208) 667-1486
Fax: (208) 667-1825
ISBN 3443

Attorney for Respondent –
Idaho Department of Transportation

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT C. BURTON, Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	CASE NO. CV 07-461 NOTICE OF SUBSTITUTION OF COUNSEL

NOTICE IS HEREBY GIVEN that Susan K. Servick, Special Deputy Attorney General, does hereby appear and substitute as attorney for the Respondent, State of Idaho, Department of Transportation, in the above-entitled matter. See Special Deputy Attorney General Appointment letter attached as Exhibit A. You are hereby notified that all papers to be served on the Respondent shall be served on:

Susan K. Servick
Special Deputy Attorney General
618 North 4th Street
PO Box 2900
Coeur d'Alene, Idaho 83816
Phone: 208-667-1486
Fax: 208-667-1825

Dated April 10, 2009.

Susan K. Servick
Susan K. Servick

ORIGINAL

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the NOTICE OF SUBSTITUTION were transmitted, April 10, 2009 by the following method, to:

James E. Siebe
Attorney at Law
PO Box 9045
Moscow, ID 83842

Fax: 208 882-8769

✓ Fax
___ US Mail

Susan K. Servick
Susan K. Servick

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 20, 2009

SPECIAL DEPUTY ATTORNEY GENERAL APPOINTMENT

TO WHOM IT MAY CONCERN:

Susan K. Servick, Attorney at Law, P. O. Box 2900, Coeur d'Alene, Idaho 83816-2900, is hereby appointed Special Deputy Attorney General for the purpose of representing the State of Idaho in any appeal from a hearing officer's decision in Idaho Transportation Department District 1 filed pursuant to the authority of Idaho Code § 18-8002A, Automatic License Suspension Program.

This letter of appointment will be included in the files of any court case, hearing, or other matter in which she represents the State of Idaho in these appeals. This appointment is effective through December 31, 2009.

Any courtesies you can extend to Ms. Servick in her conduct of business for the State of Idaho, as my delegate, will be appreciated.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

LGW:blm

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. State Street
Joe R. Williams Building, 2nd Floor

EXHIBIT A

SIEBE LAW OFFICES
JAMES E. SIEBE, ISBN 2362
202 E. Second Street
P.O. Box 9045
Moscow, ID 83843
Telephone: (208) 883-0622
Facsimile: (208) 882-8769

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT COLLEEN BURTON,

Petitioner,

vs.

STATE OF IDAHO, TRANSPORTATION DEPARTMENT,

Respondent.

Case No. CV-2007-461

NOTICE OF APPEAL

BRITT COLLEEN BURTON,

Appellant,

vs.

STATE OF IDAHO, TRANSPORTATION DEPARTMENT,

Respondent.

TO: THE ABOVE-NAMED RESPONDENT (SPECIAL DEPUTY ATTORNEY GENERAL) AND THE CLERK OF THE ABOVE-ENTITLED COURT

1. The above-named Appellant, BRITT COLLEEN BURTON, appeals against the Idaho Transportation Department, to the Supreme Court of the State of Idaho, from the final agency decision dated September 20, 2007, upholding

Ms. Burton's license suspension, and the District Court's Opinion and Order Re: Appeal, affirming the decision, entered by the Honorable Fred M. Gibler on April 10, 2009 and served on appellant's counsel on April 13, 2009.

2. The party has a right to appeal to the Supreme Court, and the Order described in paragraph 1 above is an appealable order under and pursuant to I.A.R. 11(f).

3. The preliminary statement of the issue on appeal which the appellant then intends to assert in the appeal is as follows: there was no lawful basis for the stop preceding the evidentiary test giving rise to the Administrative License Suspension imposed upon Appellant.

However, pursuant to I.A.R. 17(f), this preliminary statement of the issue to be appealed does not prevent appellant from asserting other issues on appeal.

4. Appellant requests preparation of the Court Clerk's Record. Appellant will pay the balance of the fees for preparation upon receipt of said estimate. The necessary transcripts and record for the appeal to District Court have been prepared and Appellant has paid the fees for preparation thereof, and this matter was submitted without argument, so Appellant anticipates the record will be *de minimis* in size.

5. Appellant requests that no additional documents be included in the clerk's record other than those automatically included under I.A.R. 28.

6. Counsel certifies by his signature hereunder that service of this Notice of Appeal has been made upon the reporter of the Honorable Fred M. Gibler, District Judge, that the $100 estimated fee for preparation of the clerk's record has been paid concurrently with the filing of this Notice, that counsel will mail the fee for

preparation of any transcript if any such estimate is received, and that service has been made upon all other parties required to be served pursuant to I.A.R. 20.

DATED this 22nd day of May, 2009.

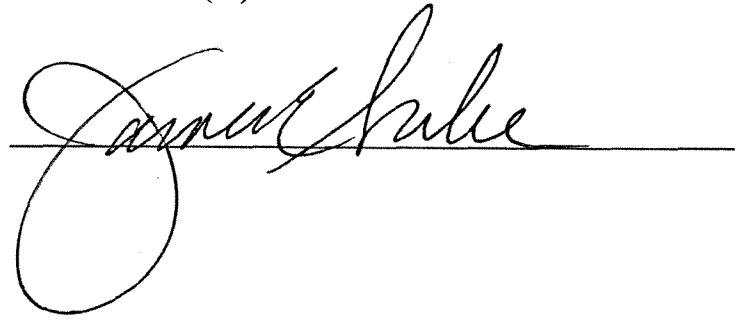
SIEBE LAW OFFICES

By: _____
Attorney for Petitioner/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2009, I served a true and correct copy of the foregoing document by the method indicated and addressed to the following:

Susan K. Servick Special Deputy Attorney General P.O. Box 2900 Coeur d'Alene, ID 83816	( ) U.S. Mail ( ) Hand Delivered ( ) Overnight Mail (✓) Facsimile (208) 667-1825
Driver Services Idaho Transportation Department P.O. Box 7129 Boise, ID 83707-1129	( ) U.S. Mail ( ) Hand Delivered ( ) Overnight Mail (✓) Facsimile (208) 332-4124
Honorable Fred M. Gibler P.O. Box 527 Wallace, ID 83873	( ) U.S. Mail ( ) Hand Delivered (✓) Overnight Mail ( ) Facsimile (208) 753-3581
Byrl Cinnamon P.O. Box 2821 Hayden, ID 83835	(✓) U.S. Mail ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT C. BURTON, Petitioner/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent/Respondent.	)	SUPREME COURT NO.36540-2009 CLERK'S CERTIFICATE

I, CAROLN RYAN, Deputy Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Benewah, do hereby certify that the foregoing Clerk's Record in the above entitled cause was compiled and bound under my direction as, and contains true and correct copies of all pleadings, documents and papers designated to be included under Rule 28, IAR, the Notice of Appeal, any Notice of Cross-Appeal, and any additional documents requested to be included.

I further certify that all documents, x-rays, charts and pictures offered or admitted as exhibits in the above entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record (except for the exhibits which are retained in the possession of the undersigned), as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at St. Maries, Idaho this 25th day of June, 2009.

J. MICHELE REYNOLDS
Clerk of the District Court

By: Carol Ryan
Deputy

CLERK'S CERTIFICATE

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BENEWAH

BRITT C. BURTON, Petitioner/Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent/Respondent.	)	SUPREME COURT NO.36540-2009 CLERK'S CERTIFICATE OF EXHIBITS

I, CAROL RYAN, Deputy Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Benewah, do hereby certify:

That the following is a list of exhibits to the Record that have been used as evidence in this cause:

COURT'S EXHIBITS	DESCRIPTION
1	ADMINISTRATIVE RECORD FOR JUDICIAL REVIEW

THERE ARE NO REPORTER'S TRANSCRIPTS LODGED IN THIS CASE.

I do further certify that all exhibits in the above entitled cause will be duly lodged with the Clerk of the Supreme Court along with the Clerk's Record as required by Rule 31 of the Idaho Appellate Rules.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at St. Maries, Idaho this 25th day of June, 2009

J. MICHELE REYNOLDS
Clerk of the District Court

By: Carol Ryan
Deputy

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were mailed postage pre-paid or by inter-office mail this 25th day of June, 2009 to:

JAMES E. SIEBE
Attorney at Law
P.O. Box 9045
Moscow, ID 83843

SUSAN K. SERVICK
Attorney at Law
P.O. Box 2900
Coeur d'Alene, ID 83816

J. MICHELE REYNOLDS
Clerk of the District Court

By: Carol Ryan
Deputy