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Ewing v. State Appellant's Reply Brief Dckt. 42599

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IN THE COURT OF APPEALS

JEREMY C. EWING,)
)
 Appellant/Petitioner,) Docket Number No. 42599
)
 vs.)
)
 State of Idaho,)
 Department of Transportation,)
)
 Respondent.)

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho,
in and for the County of Nez Perce regarding a judicial review of an ALS hearing officer
decision.

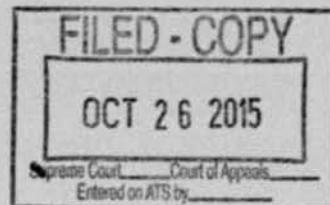
The Honorable Chief Judge and Judges of the Court of Appeals

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I.

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COMES NOW the Appellant, Jeremy C. Ewing, by and through his attorney of record, CHARLES M. STROSCHEIN of the law firm of Clark and Feeney, and responds to the State's brief.

III.
STATEMENT OF THE CASE

Mr. Ewing was driving in Lewiston on March 16, 2014, at which time he was stopped for the DUI. His Administrative License Suspension hearing was held April 10, 2014. *State v. Besaw*, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013) was issued by the Court of Appeals on June 21, 2013. On July 3, 2014, Judge Stegner issued his ruling in *State v. Nauert*, Kootenai County Case No. CR 2013-10176. On August 20, 2015, the Supreme Court issued its opinion in *State v. Haynes*, No. 41924-2014, 2015 WL 4940664, Opinion 80, from a February 23, 2013 DUI stop. On August 24, 2015, the Idaho Supreme Court issued its decision in *State v. Riendeau*, Docket No. 41982-2014, Opinion No. 8 from a March 21, 2013, DUI stop. *Besaw* was issued before Mr. Ewing's ALS hearing but *State v. Nauert*, *State v. Haynes*, and *State v. Riendeau*, are all cases that developed the issue of the Standard Operating Procedures (hereinafter referred to as: "SOPs") and rule-making after Mr. Ewing's ALS hearing. The Supreme Court ultimately determined that the 2013 SOPs were void for lack of rule-making. The State in *Nauert* has filed a motion with the Supreme Court to dismiss the State's appeal of Judge Stegner's findings that the SOPs are invalid and that the ISP had overstepped its authority regarding the foundation require for evidence admitted in courts.

The District Court in *Ewing* did not have the benefit of the *Haynes* or *Riendeau* decisions with regard to its analysis of I.C. §67-5279(3) issues and the use by the ALS hearing officer of the 2013 SOPs as a basis for license a suspension. The 2013 SOPs would have been in effect at the time of Mr. Ewing’s DUI stop and ALS hearing. Rule-making did not take place pursuant to the Idaho Administrative Procedures Act (IAPA) until October 22, 2014. The Court can review IDAPA Rule 11.03.01 for September 2014, a copy of which is attached as Appendix 1.

IV.
ARGUMENT
**THE IDAHO STATE POLICE STANDARD OPERATING
PROCEDURE FOR BREATH TESTING IS VOID,
THEREFORE MR. EWING’S BREATH TEST IS INVALID
FOR THE PURPOSE OF LICENSE SUSPENSION.**

In *Bobbeck v. Idaho Transportation Department*, Docket No. 42682, 2015 Opinion No. 5, the Court of Appeals noted:

This 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. (*Cites omitted*)

Opinion, pp.3-4

The Idaho Transportation Department (hereinafter referred to as: “ITD”) violated the provisions of I.C. §67-5279(3) by sustaining Mr. Ewing’s license suspension based on the SOPS that were in effect at the time of Mr. Ewing’s DUI stop in 2014. There were no adequate administrative

rules regarding breath testing pursuant to I.C. §18-8004(4) and I.C. §18-8002A(3) in effect in 2013, as a result, ITD's statutory authority to suspend licenses was exceeded.

The findings, inferences, conclusions and decisions of the *Ewing* hearing officer were made upon an unlawful procedure in that ITD used void SOPs as a basis to make the finding that the breath test was done pursuant to Idaho Code.

Finally, the ALS decision is arbitrary, capricious, and an abuse of discretion because the ALS hearing officers were required to use valid rules for breath testing while ISPFS was required to produce valid rules for breath testing.

The Idaho Supreme Court in *State v. Riendeau*, No. 41982-2014, Opinion No. 81, notes: in *State v. Haynes*, No. 41924-2014, 2015 WL 4940664 (Idaho Aug. 20, 2015), this Court held that the 2013 SOPs were void because they were not adopted pursuant to the Administrative Procedure Act. Opinion, p. 5.

Ewing is not a case in which an expert testified that the breath testing was accurate. The hearing officer relied on the SOPs. R. at p. 286¹. The SOPs were challenged at the time of the ALS Hearing. Tr. pp. 18-21, R at p. 350-353. The hearing officer specifically noted in his Amended Findings of Facts and Conclusions of Law as follows:

Mr. Stroschein argued the following on behalf of Ewing: . . . 4. The breath testing was not conducted within the requirements of Idaho Code, §18-8004(4), IDAPA Rules 11.03.01, *et seq*, and the recent *Besaw* decision.

¹ "9. Ewing's evidentiary test was performed in compliance with Idaho Law and ISP Standard Operating Procedures.

R at p. 282.

I.C. §18-8002A(7)(d) states specifically:

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. . .

The issue of the SOPs was challenged at the time of the ALS hearing. The SOPs were challenged on judicial review and the SOPs have been challenged in this appeal as a basis for supporting the breath test.

Please also note the emails from ISPFS. R. at pp. 98 - 250. One would have to wonder exactly what expert would be called in the State of Idaho to save breath-testing. Is the Court going to rely on Jeremy Johnston as an expert considering his statements in the emails?

The decisions by the Idaho Supreme Court in *Riendeau* and *Haynes* follow Mr. Ewing's argument regarding the SOPs and the lack of rule-making. Mr. Ewing's case is a 2014 Administrative License Suspension. The Idaho Supreme Court found that the 2013 SOPs used in Mr. Ewing's case are void.

Under Idaho Law, in order to have the force and effect of law, an agency action characterized as a rule must be promulgated according to statutory directives for rule-making. See I.C. §67-5231 (declaring rules invalid unless adopted in substantial compliance with the requirements of IAPA). Therefore, in the absence of evidence of substantial compliance with rule-making procedures, this Court must decide that the SOPs are void and thus, do not have the full force and effect of law. If the SOP for breath-testing does not have the full force and effect of law it cannot be the basis for

ITD's action to suspend driving privileges. Any agency actions resting on the 2013 SOP for breath alcohol testing must be set aside.

Please recollect that Mr. Ewing has a valuable property right in his driver's license. In *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), the Court stated:

“Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses. . . involves State actions that adjudicates important interest of the licensee. In such cases the licenses are not to be taken away without that procedural due process required by the Fourth Amendment.”

At p. 539.

The Idaho Supreme Court did not have the benefit of the emails that are part of this record. The emails show the frivolous nature of ISPFS's attempt at thwarting valid challenges to breath testing. See SOPs changes from January 7, 2015; January 8, 2015; and February 13, 2015. The SOPs have been dumbed-down and continue to be dumbed-down for no scientific purpose. The only purpose for the changes to the SOP is to convict people of DUIs and have their licenses suspended in Administrative License Suspension matters.

ISP Forensic Services and the ITD have been on notice for a number of years that the SOPs were suspect but neither State agency took any action to follow rule-making until Judge Stegner issued his ground-breaking decision in *State v. Nauert*, Kootenai County Case No. CR 2013-10176, Supreme Court Docket No. 0042441-2014. Finally, a District Judge said enough was enough.

The Idaho Supreme Court made the determination that the SOPs are void. As a result, Mr. Ewing's license suspension must be vacated. It is clear the hearing officer made his decision based

on the SOPs and not expert testimony. Mr. Ewing has met his burden of proof, pursuant to I.C. §67-5279(3) and I.C. §18-8002A(7)(d).

One wonders why the State doesn't concede the point by simply doing what the State did in *State v. Victor Smith*, 127 Idaho 77, 813 P.2d 888 (1991). The State, at the time of *Smith*, conceded that the Illegal Drug Stamp Tax Act was unconstitutional and informed Counsel of that decision prior to oral argument. The State then acknowledge the statute was unconstitutional at the time of oral argument. The State in its Briefing should concede that Mr. Ewing's license suspension should be vacated.

The State may argue that the hearing officer's decision in 2014 should not be effected by the decision of the Idaho Supreme Court in 2015. However, this position would be contrary to prior holdings of Idaho appellate courts. The Court can look at *Gay v. County Commissioners of Bonneville County*, 103 Idaho 626, 651 P.2d 560 (Idaho App. 1982) in which the Court of Appeals discussed the issue of standard of review. A copy of the case is attached as Appendix 2 for the Court's ease of reference. The Court noted that the District Court followed what had been a well-established line of Idaho decisions but that the well-established line of decisions was changed during the pendency of the appeal by the Idaho Supreme in its decision in *Cooper v. Board of County Comm'rs of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980). The Court in *Gay* noted that *Cooper* has fundamentally altered our perspective on the proper standard of judicial review. The Court then analyzed how this change should be applied to other cases. The *Gay* Court noted: "There are no constitutional limitations upon a court's choice to give either retroactive or prospective effect to a

decision altering a prior rule of law. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731,14, L.Ed.2d 601 (1965)”. *Gay*, 103 Idaho at 630, 651 P.2d 564. The Court went on to note that the “pipeline approach” was the appropriate approach in applying a new rule on similar cases pending when the new rule was announced.

The Court can look at the language from the *Cooper* decision:

“It is clear there is a pressing need in Idaho for established standards and procedures by which particularized land use regulation is to be administered. To allow the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law.”

Cooper, 101 Idaho at 411, 614 P.2d at 951

The above quote is extremely relevant to issue of ISP Forensic Services and the way it has handled breath testing for alcohol in the State of Idaho. It has been Jeremy Johnston and his cohorts at ISP using “weasel words” rather than government by law in breath testing. Since the *Ewing* matter was in the “pipeline”, the decisions from the Idaho Supreme Court in *Haynes* and *Riendeau*, should be applied to vacate Mr. Ewing’s license suspension. The 2013 SOPs were void, therefore there were no rules for breath-testing. Mr. Ewing’s 2014 breath test was invalid.

The State may argue that the Supreme Court did not grant Ms. Haynes Motion in Limine even though the Court found the ISP breath alcohol testing standards were void. In the DUI case the State had the ability to bring in an expert to testify at the time of the DUI trial. In the ALS hearing was no expert. The State did not bring an expert to Ewing’s ALS hearing; the State just relied on the SOPs. The Court in *Haynes* stated as follows:

The State does not contend that the 2013 SOPs were adopted in substantial compliance with the Act. Therefore, they are void.

However, “[s]howing that the test was administered in conformity with applicable test procedures or expert testimony may suffice to establish an adequate foundation.” *Dachlet v. State*, 136 Idaho 752, 757, 40 P.3d 110, 115 (2002). Therefore, the fact that the 2013 SOPs are void would not have prevented the State from establishing an adequate foundation for the admissibility of the test results. As stated above, the magistrate court ruled that the State would have to establish that the test was accurate. That could be done by expert testimony. Because Ms. Haynes pled guilty prior to trial, the magistrate court never had to determine whether the State could present sufficient evidence to establish that foundation. The district court did not err in holding that the magistrate did not err in denying the motion in limine.

Opinion at p. 11

There is a vast difference between what happened at the DUI Motion in Limine and the request that hearing officer find that the SOPs were invalid for purposes of breath testing. The hearing officer didn’t suspend the hearing for the benefit of bringing in an expert when the challenge was made to the SOPs. The State’s reliance on the fact that Ms. Haynes’ Motion in Limine wasn’t granted is of no effect in this case.

The State may argue that the Supreme Court and the State of Idaho, in both *Haynes* and *Riendeau*, didn’t go far enough regarding the argument of trying to adopt rules for breath testing. There are two Supreme Court decisions that the Court of Appeals can’t overturn. The fact is that the 2013 SOPs, and all SOPs for that matter, are void. The breath testing rules set out in the newly adopted IDAPA rules are the only things that can be applied to support the foundation for breath test results based upon I.C. §18-8004(4) and I.C. §18-8002A(3).

The State may argue that ISP Forensic Services properly adopted breath alcohol testing “rules” pursuant to prior IDAPA Rule 11.03.11.014.03.² The fact that ISP Forensic Services went forward with rule-making in 2014 seems to counter the logic expressed by State.

The State may want the Court to only rely on its interpretation of I.C. §18-8004(4) regarding the use of the SOP . However this is an ALS matter. I.C. §18-8002A(3) states:

Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:

- (a) What testing is required to complete evidentiary testing under this section; and
- (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1)(e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. A test for alcohol concentration in blood or urine as defined in section 18-8004, Idaho Code, that is reported by the Idaho state police or by any laboratory approved by the Idaho state police to perform this test will be valid for the purposes of this section.

The ALS Statute is specific to rule-making. The legislature was specific that the Idaho State Police needed to prescribe by rule the matters noted above. The State can’t get around this legislation despite its attempt to play games with the two decisions of Idaho Supreme Court: *Haynes* and *Riendeau*. ISP Forensic Services “rules” for breath-testing took effect in October of 2014 and

² Breath tests shall be administered in conformity with standards established by the Department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures.

the legislature has made no attempt to change either I.C. §18-8002A or I.C. §18-8004(4) based upon appellate decisions starting with *Besaw*. One would have to assume that if the legislature had a problem with the Court decisions, the legislature would have moved to change the statutory scheme. In *Nauert*, Judge Stegner challenged the ability of ISP to usurp the powers of the court with regard to evidentiary requirements. A copy of the Judge Stegner's decision is attached as Appendix 3 for the Court's convenience.

A argument may be raised that somehow the Supreme Court, in *Haynes* and *Riendeau*, missed the distinction between "rules" and "standards". However, this argument doesn't seem to be supported by the Court's language in the *Haynes* case:

A "rule" under the Administrative Procedure Act is "the whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes: (a) Law or policy; or (b) The procedure or practice requirements of an agency." I.C. § 67-5201(19). The approval and certification standards would constitute a rule under the Act. If they are not adopted in compliance with the Act, they are "voidable unless adopted in substantial compliance with the requirements of this chapter," I.C. § 67-5231(1).

At p. 10.

It would be hard to believe that the Idaho Supreme Court would not have been aware of I.C. §67-5201(21).

To finally put to rest this issue that the Supreme Court in *Haynes* got it wrong, the Court can look at the briefing filed by the State in *Haynes*. Pertinent sections of the Respondent's Brief filed by the Paul R. Panther and Lori A. Fleming are attached hereto as Appendix 4. The State devoted

17 pages of argument in an attempt to convince the Court that the SOPs weren't rules, but standards. In *Haynes* the State seems to argue that Ms. Haynes had to file some kind of request for declaratory judgment to overturn the SOPs. Obviously, the Supreme Court did not think much of the State's argument. The Court of Appeals should not think much of the State's argument in Mr. Ewing's case.

The State in its Respondent's Brief states as follows:

Mr. Ewing raises no challenge to the Hearing Examiner's decision that Mr. Ewing has failed to meet his burden pursuant to I.C. §18-8002A(7)(a-c) and (e). Any issue that could have been raised pursuant to I.C. §18-8002A(7) has been waived. *Kugler v. Drowns*, 119 Idaho 687, 809 P.2d 1116(1991), *Wheeler v. ITD*, 148 Idaho 378, 223 P.3d 761 (Ct. App. 2009). However, Mr. Ewing did not raise any I.C. §18-8002A(7) issues before the Hearing Examiner.

Respondent's Brief, p. 3

Clearly, Mr. Ewing raised an I.C. §18-8002A(7)(d) issue as the breath test wasn't administered in accordance with the requirements of I.C. §18-8004(4). The Transcript sets out the argument, the hearing officer notes the argument in his decision. The State tries to mislead the Court.

Mr. Ewing has met his burden of proof regarding the foundation for breath testing - No SOPs, No valid breath test - No license suspension.

The State of Idaho, in *State v. Nauert*, Supreme Court Case No. 42441, has filed a motion to dismiss the appeal. One would have to believe that the Attorney General's Office has determined that the Idaho Supreme Court's decisions in *Haynes* and *Riendeau* were correct and there is no reason to continue a losing argument in *State v. Nauert*. A copy of the motion is attached as

Appendix 5.

Obviously the Supreme Court determined that there is no meaningful distinction between rules and standards in the context of whether something promulgated by an executive agency can be treated as the law. So long as whatever it is claims the ability to affect the lives of citizens, the Idaho Administrative Procedures Act must be followed. It is a simple concept that is clearly expressed in the fact that the State of Idaho has moved to dismiss its appeal in *Nauert*.

At this point in time, the Court may want to consider the frivolous nature of ITD's attempt to continue this appeal process. Although attorney fees weren't requested below or in the initial briefing, one would have to believe because of the case law that has developed, the State should simply do as the Deputy Attorney General is doing in *State v. Nauert*, and agree that the SOPs are void. There was no expert testimony to save the breath test, therefore, the breath tests are invalid and the license suspensions should be vacated. The Court can use I.C. §12-117 in the award of attorney fees to Mr. Ewing. The State is continuing the appeal process despite the overwhelming authority that Mr. Ewing was correct in his position that the SOPs were void and that the State did not pursue rule-making. As a result, the foundation for the breath test is not found on this record and the license suspension is invalid. The Court is aware that this is an administrative proceeding involving a State agency.

**THERE IS NO DUE PROCESS IN ADMINISTRATIVE
LICENSE SUSPENSION HEARINGS.**

The State, in its brief cites the Court to cases that aren't specific to a Driver's license

suspension. Mr Ewing cites the Court to a United States Supreme Court decision that is specific to license suspensions. *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172, (1977). The U.S. Supreme Court in *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L.Ed2d 321, (1979) stated:

Here, as in *Love*, the private interest affected is the granted license to operate a motor vehicle. More particularly, the driver's interest is in continued possession and use of his license pending the outcome of the hearing due him. As we recognized in *Love*, that interest is a substantial one, for the Commonwealth will not be able to make a driver whole for any personal inconvenience and economic hardship suffered by reason of any delay in redressing an erroneous suspension through post-suspension review procedures. 431 U.S. at 113. 97 S. Ct. at 1728. (emphasis added)

Mackey at p. 11

The State cited to *Federal Deposit Ins. Corp v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). The State fails to mention the fact pattern found in the *Mallen* case. Mr. Mallen was indicted by a federal grand jury in the North District of Iowa. He was charged with making false statements to the FDIC in violation of 18 USC §101 and was making false statements to the Farmers State Bank with the purpose of influencing the actions of the FDIC in violation of 18 USC §1014. While Mr. Ewing plead to a \$300.00 inattentive driving charge in *State of Idaho v. Jeremy C. Ewing*, Nez Perce County Case No. CR 2014-2048. In the *Mallen* case there was federal legislation that required a hearing to be held within thirty (30) days of a request for hearing and required that the suspended bank officer have the decision within sixty (60) days of the hearing. Thus, at a maximum, the suspended officer received the decision within ninety days of his or her request for hearing. The Supreme Court in the *Mallen* case focused on whether the federal legislation protected the bank officer's constitutional rights and the right of the State to protect the

interests of depositors and maintain the public confidence in the banking institution. The Court found that the congressional legislation provided the necessary safeguards for the individual who had a protected right.

In Mr. Ewing's case, the statute involved is I.C. §18-8002A. The legislature, obviously being involved in the protection of Idaho roadways, determined due process was satisfied as follows: "If a hearing is requested, the hearing shall be held within 20 days of the date the hearing request was received by the department unless this period is, for good cause shown, extended by the hearing officer for one ten day period." I.C. §18-8002A(7)

Mr. Ewing's opening brief sets out the time-frames involved in what happened in his case. There was no good cause shown for the ALS hearing being held outside the statutory time of 20 days. Obviously, the legislature knew, when it set the statutory time frame, that a hearing officer would have the authority to administer oaths, examine witnesses and take testimony, issue subpoenas and the like. For the State to argue that it was somehow Mr. Ewing's fault for having a hearing officer issue subpoenas is ridiculous. Please recall that without at least some ability to examine what the State did, there wouldn't be any meaningful hearing within an appropriate time frame which is required in post suspension hearings.

Boise Tower Associates, LLC v. Hogland, 147 Idaho 774, 215 P.3d 494 (2009) is a case cited by the State. The Court in *Hogland* specifically notes: BTA's argument that it was entitled to a pre-deprivation hearing before the stop-work order was issued fails under the *Mathews* balancing test. We are not dealing with a request for pre-deprivation hearing in Mr. Ewing's case. Also, the

Court in *Hogland* was not certain that BTA had a constitutionally protected property right in its building permit.

The State cites the Court to cases that aren't relevant to the issues before the Court in Mr. Ewing's case. Due process was noted in the *Dixon v. Love* and *Mackey* decisions regarding the loss of a Driver's license. The State can't make a driver whole for any delay in Mr. Ewing's case.

The State continues to make the odd statement that Mr. Ewing did not raise any I.C. §18-8002(7) issues, but clearly Mr. Ewing did, as noted above and noted by the hearing officer's decision. There was an erroneous deprivation of a property right in Mr. Ewing's administrative license suspension case, his driver's license.

It is interesting that the State argued previously, that attachments to Mr. Ewing's opening brief weren't part of the record. The State, in its Supplemental Brief in *Gary Alexander Hern, vs. State of Idaho, Department of Transportation*, Court of Appeals, Docket No. 42287, attached exhibits that weren't before the hearing officer or the district court. There was no motion to augment the record in *Hern* as permitted by statute.

The State argues: "Finally, Mr. Ewing does not indicate that he suffered any actual harm or that there was a violation of any fundamental right." Respondent's Brief, p. 17. One has to wonder if the State actually read the opening brief of Mr. Ewing and the case law that notes that a right to a driver's license is a fundamental right that due process applies to. The opening brief of Mr. Ewing cites the Court to Federal and State case law that supports the position that the suspension of a motor vehicle operator's license adjudicates important property interest of the licensee.

The State once again points to “invited error” as a reason for the Court to disregard Mr. Ewing’s argument. However, the State doesn’t note what facts apply to the *Invited Error Doctrine* or how Mr. Ewing invited error. Mr. Ewing requested a hearing and requested subpoenas pursuant to I.C. §18-8002A, so how is that invited error? The hearing was set for April 10, 2014. The license suspension began on March 16, 2014, with a temporary license being good for thirty days or until April 15, 2014. A stay of the suspension was not entered until April 16, 2015.

**THE ACTIONS OF THE HEARING OFFICER
VIOLATE MR. EWING’S EQUAL PROTECTION RIGHTS.**

With regard to the equal protection argument and the issue of the lack of performance verification, the initial briefing filed by Mr. Ewing is sufficient as the argument made by the State under its Issue 3 and Issue 4 is just a re-tread of prior arguments and really has no support in the law.

**V.
CONCLUSION**

The SOP is not a “rule” as there was no compliance with the process that is required in making administrative rules. The Court must find that ISP Forensic Services has failed in its statutory duties to set out administrative rules for breath alcohol testing in the State of Idaho. I.C. §18-8002A(7)(c), I.C. §18-8002A(7)(d) and I.C. §18-8004(4) allow for the attack of the breath test result. There is no valid breath test.

The Court can also review I.C. §67-5279(3) in that: for ITD to use the SOP, it would be a violation of a constitutional or statutory provision and would be in excess of the statutory authority of the agency, and therefore, would be an unlawful procedure. The use of the SOP would not be

supported by substantial evidence and would be arbitrary, capricious and an abuse of discretion.

The Court is going to have to decide whether the process used now by ITD for fair post-suspension hearings is actually constitutional. ITD does not support a fair hearing for a driver. ITD makes it as hard as possible for a driver to meet his burden.

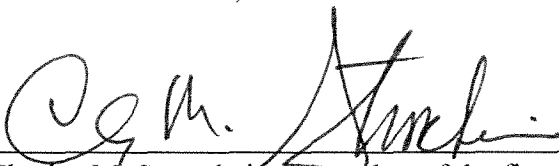
Finally, there is no equal protection in these matters for drivers who request any sort of subpoena or relevant evidence.

Since the hearing officer made no sort of record regarding “good cause” and didn’t have a hearing, the Court can also find that the decision to expand the hearing past the twenty (20) day limit is not supported by substantial evidence on the record as a whole. The Court can apply I.C. §67-5279(3).

The Court should find that the license suspension was improper and enter an order directing ITD to vacate the license suspension for Mr. Ewing.

DATED this 23th day of October, 2015.

CLARK and FEENEY, LLP

By 
Charles M. Stroschem, a member of the firm
Attorneys for Appellant

I hereby certify on the 23th
day of October, 2015, a true copy
of the foregoing instrument
was: Mailed
 Faxed
 Hand delivered to:

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
P.O. Box 321
Lewiston, ID 83501

CLARK and FEENEY, LLP


By 
Attorneys for Appellant

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IDAPA 11
TITLE 03
CHAPTER 01

IDAHO STATE FORENSIC LABORATORY

11.03.01 - RULES GOVERNING ALCOHOL TESTING

000. LEGAL AUTHORITY.

The Director of the Idaho State Police has general rulemaking authority to prescribe rules and regulations for alcohol testing, pursuant to Section 67-2901, Idaho Code. (4-7-11)

001. TITLE AND SCOPE.

01. Title. These rules shall be cited as IDAPA 11.03.01, "Rules Governing Alcohol Testing." (4-7-11)

02. Scope. The rules relate to the governance and operation of the Alcohol Testing Program. (4-7-11)

002. WRITTEN INTERPRETATIONS.

There are no written interpretations of this rule. (4-7-11)

003. ADMINISTRATIVE APPEALS.

There is no provision for administrative appeals before the Idaho State Police under this chapter. (4-7-11)

004. INCORPORATION BY REFERENCE.

The following are incorporated by reference in this chapter of rules: (4-7-11)

01. Conforming Products List of Evidential Breath Measurement Devices (revised 3/11/2010). This document is available on the internet at <http://edocket.access.gpo.gov/2010/pdf/2010-5242.pdf>. (4-7-11)

005. MAILING ADDRESS AND OFFICE HOURS.

The mailing address is Idaho State Police, Forensic Services, 700 S. Stratford Drive Suite 125, Meridian, ID 83642-6206. Lobby hours are Monday through Friday, 8 a.m. to 5:00 p.m. except holidays designated by the state of Idaho. (4-7-11)

006. PUBLIC RECORDS AVAILABILITY.

This rule is subject to and in compliance with the Public Records Act. (4-7-11)

007. WEBSITE.

Alcohol Testing information is available on the internet at <http://www.isp.idaho.gov/forensics/index.html>. (4-7-11)

008. -- 009. (RESERVED)

010. DEFINITIONS AND ABBREVIATIONS.

01. Alcohol. "Alcohol" shall mean the chemical compounds of ethyl alcohol, methyl alcohol, or isopropyl alcohol. (9-2-14)T

02. Approved Vendor. "Approved vendor" shall mean a source/provider/manufacture of an approved standard. (9-2-14)T

03. Blood Alcohol Analysis. "Blood alcohol analysis" shall mean an analysis of blood to determine the concentration of alcohol present. (7-1-93)

04. Breath Alcohol Analysis. "Breath alcohol analysis" shall mean an analysis of breath to determine the concentration of alcohol present. (7-1-93)

05. **Breath Alcohol Test.** "Breath alcohol test" shall mean a breath sample or series of separate breath samples provided during a breath testing sequence. (9-2-14)T

06. **Breath Alcohol Testing Sequence.** "Breath alcohol testing sequence" shall mean a sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by the instrument, the Operator, or both, and may consist of air blanks, performance verification, internal standard checks, and breath samples. (9-2-14)T

07. **Breath Testing Certification Class.** "Breath testing certification class" shall mean a department approved training class for prospective or uncertified breath alcohol Operators/Breath Testing Specialists. (9-2-14)T

08. **Breath Testing Specialist (BTS).** "Breath Testing Specialist" shall mean an operator who has completed advanced training approved by the department and are certified to perform routine instrument maintenance, teach instrument operation skills, proctor proficiency tests for instrument Operators, and testifying as an expert on alcohol physiology and instrument function in court. (9-2-14)T

09. **Calibration.** "Calibration" shall mean a set of laboratory operations which establish under specified conditions, the relationship between values indicated by a measuring instrument or measuring system, or values represented by a material, and the corresponding known values of a measurement. (9-2-14)T

10. **Certificate of Analysis.** "Certificate of analysis" shall mean a certificate stating the standards used for performance verification have been tested and approved for use by the ISPFs or are manufactured by an ISO 17025:2005 vendor and are traceable to N.I.S.T. standards. (9-2-14)T

11. **Certificate of Instrument Calibration.** "Certificate of instrument calibration" shall mean a certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFs and found to be suitable for forensic alcohol testing. The certificate bears the signature of the calibration analyst at Idaho State Police Forensic Services, and the effective date of the instrument approval. (9-2-14)T

12. **Changeover Class.** "Changeover class" shall mean a training class for currently certified Operators during which the Operator is taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists complete BTS training that qualifies them to perform BTS duties related to the new make or model instrument. (9-2-14)T

13. **Department.** "Department" shall mean the Idaho State Police. (7-1-93)

14. **Evidentiary Test.** "Evidentiary test" shall mean a blood, breath, or urine test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and non-quantitative screening/monitoring. (9-2-14)T

15. **Idaho State Police Forensic Services (ISPFs).** "Idaho State Police Forensic Services" shall mean a division of the Idaho State Police. ISPFs is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFs is the administrative body for the blood and breath alcohol testing programs in Idaho. (9-2-14)T

16. **Laboratory.** "Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, vitreous humor, urine, or beverages for law enforcement purposes. (9-2-14)T

17. **MIP/MIC.** "MIP/MIC" shall mean an abbreviation used to designate minor in possession or minor in consumption of alcohol. (9-2-14)T

18. **Operator Certification.** "Operator certification" shall mean the condition of having satisfied the training requirements for administering breath alcohol tests as established by the department. (9-2-14)T

19. **Operator.** "Operator" shall mean an individual certified by the department as qualified by training

to administer breath alcohol tests. (9-2-14)T

20. **Performance Verification.** "Performance verification" shall mean a verification of the accuracy of the breath testing instrument utilizing a performance verification standard. Performance verification should be reported to three decimal places. While ISPFs uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check." (9-2-14)T

21. **Performance Verification Standard.** "Performance verification standard" shall mean an ethyl alcohol standard used for field performance verifications. The standard is provided or approved, or both, by the department. (9-2-14)T

22. **Proficiency Testing.** "Proficiency testing" shall mean a periodic analysis of blood, urine, or other liquid specimen(s) whose alcohol content is unknown to the testing laboratory, to evaluate the capability of that laboratory to perform accurate analysis for alcohol concentration. (9-2-14)T

23. **Quality Control.** "Quality control" shall mean an analysis of referenced samples whose alcohol content is known, which is performed with each batch of blood, vitreous humor, urine or beverage analysis to ensure that the laboratory's determination of alcohol concentration is reproducible and accurate. (9-2-14)T

24. **Recertification Class.** "Recertification class" shall mean a training class offered by the department for currently certified personnel, completion of which results in uninterrupted continuation of their BTO or BTS status for an additional 2 years. (9-2-14)T

25. **Urine Alcohol Analysis.** "Urine alcohol analysis" shall mean an analysis of urine to determine the concentration of alcohol present. (7-1-93)

26. **Waiting Period/Monitoring Period/Deprivation Period/Observation Period.** "Waiting Period/Monitoring Period/Deprivation Period/Observation Period" shall mean individual titles used for the time period prior to administering a breath alcohol test, in which an officer monitors the test subject/individual. (9-2-14)T

011. (RESERVED)

012. **GENERAL PROVISIONS.**

01. **Repeal of Prior Rules.** All rules governing the Idaho State Forensic Laboratory are repealed, specifically Idaho State Police Emergency Rules 11.03.1, 11.03.2, 11.03.3, 11.03.4, 11.03.5 and 11.03.6. (7-1-93)

02. **Continuation of Policies.** All policies, training manuals, approvals of instruments, and/or certifications of officers in effect when the alcohol program was managed by the Department of Health and Welfare shall continue to be in effect in the Idaho State Police until the policy, training manual, approval and/or certification is changed or deleted by the Idaho State Police. (7-1-93)

013. **REQUIREMENTS FOR LABORATORY ALCOHOL ANALYSIS.**

01. **Laboratory.** Any laboratory desiring to perform urine alcohol, vitreous humor, blood alcohol, or beverage analysis shall meet the following standards: (9-2-14)T

a. The laboratory shall prepare and maintain a written procedure governing its method of analysis, including guidelines for quality control and proficiency testing. A copy of the procedure shall be provided to ISPFs for initial approval. Whenever procedure, protocol, or method changes (however named) are adopted by a laboratory, a copy of the update with the changes clearly indicated shall be approved by ISPFs before implementation; (9-2-14)T

b. The laboratory shall provide adequate facilities and space for the procedure used. The laboratory alcohol related functions shall be subject to an assessment by either an accrediting body or the department each calendar year, and the results from the annual audit shall be submitted to the department. The assessment shall be at the expense of the laboratory; (9-2-14)T

e. Specimens shall be maintained in a limited access and secure storage area prior to analysis. A chain of custody shall be maintained while the evidence is in the laboratory; (9-2-14)T

d. All instrumentation, equipment, reagents and glassware necessary for the performance of the chosen procedure shall be on hand or readily available on the laboratory premises. Instrument maintenance documentation shall be available for review by the department; (9-2-14)T

e. The laboratory shall participate in approved proficiency testing and pass this proficiency testing according to standards set by the department. Laboratories must participate in proficiency testing from a department approved provider at least once a calendar year. Approved providers include National Highway Transportation Safety Administration (NHTSA) and Collaborative Testing Services (CTS). Each test consists of at least four (4) blood samples spiked with an unknown concentration of ethyl alcohol, and possibly other volatiles, for qualitative determination. Participating laboratories must obtain proficiency tests from approved providers and are responsible for all costs associated with obtaining and analyzing such tests. Results from proficiency tests must be submitted by the due date to the test provider and ISPFS. Results not submitted to a test provider within the allowed time do not qualify as a proficiency test. An alcohol concentration range is determined from the target value and ± 3.0 standard deviations as provided by the proficiency test provider. Reported values must fall within this range. If a laboratory determines more than one (1) alcohol value for a given sample, the mean value of results will be submitted and evaluated. Upon satisfactory completion of an approved proficiency test, a certificate of approval will be issued by the department to the participating laboratory. Approval to perform legal blood alcohol determinations is continued until the results of the next proficiency test are reviewed and notification is sent to the respective laboratory by ISPFS. Failure to pass a proficiency test shall result in immediate suspension of testing by an analyst or laboratory in the form of a written inquiry from the department. The test is graded as a unsuccessful when the mean results are outside the tolerance range established from the accepted mean values. The laboratory shall have thirty (30) calendar days to respond to the department inquiry. The department shall notify the laboratory within fourteen (14) calendar days regarding corrective action steps necessary to lift the testing suspension, or the department may issue a written revocation. The department shall not lift a proficiency testing related suspension or revocation until a successful proficiency test has been completed by the individual analyst or laboratory. (9-2-14)T

f. For a laboratory performing blood, urine, vitreous humor, or beverage analysis for alcohol, approval shall be awarded to the laboratory director or primary analyst responsible for that laboratory. The responsibility for the correct performance of tests in that laboratory rests with that person; however, the duty of performing such tests may be delegated to any person designated by such director or primary analyst. The department may temporarily suspend or permanently revoke the approval of a laboratory or analyst if the listed requirements are not met. The department will issue the suspension or revocation in writing to the laboratory director or primary analyst responsible; (9-2-14)T

g. Reinstatement after revocation requires completed corrective action of any items listed on the revocation documentation issued by the department. Documentation of corrective actions taken to address the nonconformities shall be submitted to the department for review. Once the department is satisfied that the laboratory is in compliance with all requirements, the department will issue written approval for the resumption of testing by that laboratory or analyst. A laboratory may appeal a suspension or revocation to the Director of the department. (9-2-14)T

02. Blood Collection. Blood collection shall be accomplished according to the following requirements: (7-1-93)

a. Blood samples shall be collected using sterile, dry syringes and hypodermic needles, or other equipment of equivalent sterility; (7-1-93)

b. The skin at the area of puncture shall be cleansed thoroughly and disinfected with an aqueous solution of a nonvolatile antiseptic. Alcohol or phenolic solutions shall not be used as a skin antiseptic; (7-1-93)

c. Blood specimens shall contain at least ten (10) milligrams of sodium fluoride per cubic centimeter of blood plus an appropriate anticoagulant. (4-4-13)

03. **Blood Reported.** The results of analysis on blood for alcohol concentration shall be reported in units of grams of alcohol per one hundred (100) cubic centimeters of whole blood. (9-2-14)T

04. **Urine Collection.** Urine samples shall be collected in clean, dry containers. (9-2-14)T

05. **Urine Reported.** The results of analysis on urine for alcohol concentration shall be reported in units of grams of alcohol per sixty-seven (67) milliliters of urine. Results of alcohol analysis of urine specimens shall be accompanied by a warning statement about the questionable value of urine alcohol results. (9-2-14)T

06. **Records.** All records regarding proficiency tests, quality control and results shall be retained for three (3) years. (7-1-93)

014. REQUIREMENTS FOR PERFORMING BREATH ALCOHOL TESTING.

01. **Instruments.** Each breath testing instrument model shall be approved by the department and shall be listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United States Department of Transportation as incorporated by reference in Section 004 of this rule. The department will maintain a list of benchtop and portable instruments approved for evidentiary testing use in Idaho. Each individual breath testing instrument must be certified by the department. The department may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof. (9-2-14)T

02. **Report.** Each direct breath testing instrument shall report alcohol concentration as grams of alcohol per two hundred ten (210) liters of breath. (7-1-93)

03. **Administration.** Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of Idaho administrative rules, ISPFS analytical methods, and ISPFS standard operating procedures. (9-2-14)T

a. The breath alcohol test must be administered by an operator (BTO or BTS) currently certified in the use of the instrument. (9-2-14)T

b. Prior to administering the observation period, any foreign objects/materials which have the potential to enter the instrument/breath tube or may present a choking hazard should be removed. If a foreign object/material (e.g. dental work, gum, chewing tobacco, food, piercing) is left in the mouth during the entirety of the fifteen (15) minute monitoring period, any potential external alcohol contamination should not interfere with the results of the subsequent breath alcohol tests. (9-2-14)T

c. Prior to evidentiary breath alcohol testing, the subject/individual should be observed for fifteen (15) minutes. The operator should be alert for any event that might influence the accuracy of the breath alcohol test. During the observation period the subject/individual should not be allowed to smoke, drink, eat, or belch/burp/vomit/regurgitate. (9-2-14)T

d. If mouth alcohol is suspected or indicated by the testing instrument, the operator should begin another fifteen (15) minute observation period before repeating the testing sequence. If during the observation period the subject/individual vomits or regurgitates material from the stomach into the breath pathway, the observation period should start over. If there is doubt as to the events occurring during the observation period (e.g. silent burp, belch, vomit, regurgitation), the officer should evaluate the instrument results for any indication of mouth alcohol. (9-2-14)T

e. A complete breath alcohol test includes two (2) valid breath samples taken during the testing procedure and preceded by air blanks. The subsequent breath samples performed with a portable breath testing instrument should be approximately two (2) minutes apart or more. If the subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the single test result shall be considered valid. If only a single test result is used, then a fifteen (15) minute observation period must be observed. For hygienic reasons, the operator should use a new mouthpiece for each series of tests. (9-2-14)T

f. The operator has the discretion to end breath testing, repeat breath testing, or request a blood draw at any point during the testing process as the circumstances require (including but not limited to lack of sample correlation, lack of subject participation or cooperation, subject is incoherent or incapable of following instructions, subject incapacitation). If a subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the results obtained are still considered valid, provided the failure to supply the requested samples was the fault of the subject/individual and not the operator. (9-2-14)T

g. A third breath sample should be collected if the first two (2) results differ by more than 0.02 g/210L alcohol. Unless mouth alcohol is indicated or suspected, it is not necessary to repeat the observation period prior to obtaining a third breath sample. (9-2-14)T

h. The results for subsequent breath samples should correlate within 0.02 g/210L alcohol to show consistent sample delivery, indicate the absence of RFI, and to indicate the absence of alcohol contamination in the subject/individual's breath pathway as a contributing factor to the breath results. (9-2-14)T

i. In the event of an instrument failure, the operator should attempt to utilize another instrument or have blood drawn. (9-2-14)T

04. Training. Each individual operator (BTO or BTS) shall demonstrate sufficient training to operate the instrument correctly. This shall be accomplished by successfully completing a training course approved by the department on each instrument model utilized by the operator. Operator certifications issued after July 1, 2013 are valid for two (2) calendar years from the course completion date. The department may revoke individual operator (BTO/BTS) certification for cause. (9-2-14)T

05. Performance Verification Checks. Each breath testing instrument shall be checked for accuracy with a performance verification standard approved by the department. Performance verification checks shall be performed according to a procedure established by the department and shall be documented. The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log. (9-2-14)T

a. A performance verification check shall occur within twenty-four (24) hours before or after an evidentiary test. The benchtop instrument requires a performance verification check as part of the testing sequence. On the portable instrument, multiple breath alcohol tests may be covered by a single performance verification. (9-2-14)T

b. A performance verification on a portable instrument consists of two (2) samples at either the 0.08 or 0.20 level. Both samples must be run with the same performance verification standard. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument shall be taken out of service. The instrument shall not be returned to service until it has been calibrated and certified by ISPFS. (9-2-14)T

c. A performance verification acquired during a breath testing sequence on an approved benchtop instrument consists of one (1) sample at either the 0.08 or 0.20 level. A performance verification acquired outside the breath testing sequence on an approved benchtop instrument consists of two (2) samples at either the 0.08 or 0.20 level. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument must be taken out of service. The instrument must not be returned to service until it has been calibrated and certified by ISPFS. (9-2-14)T

d. Performance verification checks must be within +/- 10% of the performance verification standard target value. (9-2-14)T

e. A wet bath 0.08 performance verification standard should be replaced with fresh standard approximately every twenty-five (25) verifications or every calendar month, whichever comes first. For a closed loop, recirculating system (e.g. the Intox 5000 series), the 0.08 performance verification standard should be replaced with fresh standard approximately every one hundred (100) verifications or every calendar month, whichever comes

- first. (9-2-14)T
- f. A wet bath 0.20 performance verification standard should be replaced with fresh standard approximately every twenty-five (25) verifications. (9-2-14)T
- g. Dry gas performance verification standards may be used continuously without replacement until the canister is spent or the expiration date is reached. (9-2-14)T
- h. Performance verification standards should not be used beyond the expiration date. (9-2-14)T
- i. If Section 18-8004C, Idaho Code, (excessive alcohol concentration) is applicable, then a 0.20 performance verification must be run and results documented once per calendar month. Failure to perform a 0.20 performance verification will not invalidate any tests where Section 18-8004C, Idaho Code, is not applicable. A performance verification with a 0.20 standard does not need to be performed within twenty-four (24) hours of an evidentiary breath test in excess of 0.20 g/210L alcohol. (9-2-14)T
- j. Temperature of the wet bath simulator shall be between thirty-three point five degrees Celsius (33.5°C) and thirty-four point five degrees Celsius (34.5°C) in order for the performance verification results to be valid. (9-2-14)T
- k. An agency may run additional performance verification standard levels at their discretion. (9-2-14)T
06. **Records.** Operators must document and retain test results (i.e. written log, printout, or electronic database). All records regarding maintenance and results shall be retained for three (3) years. ISPFS is not responsible for storage of documentation not generated by ISPFS. (9-2-14)T
07. **Deficiencies.** Failure to meet any of the conditions listed in Sections 013 and 014. Any laboratory or breath testing instrument may be disapproved for failure to meet one (1) or more of the requirements listed in Sections 013 and 014, and approval may be withheld until the deficiency is corrected. (4-7-11)
08. **Standards.** Premixed alcohol simulator solutions shall be from an approved vendor and explicitly approved in writing by the department before distribution within Idaho. Dry gas standards from ISO 17025:2005 certified providers are explicitly approved by the department for use in Idaho without evaluation by the department. (9-2-14)T
09. **MIP/MIC.** The presence or absence of alcohol is the determining factor in the evidence in an MIP/MIC case. The instrumentation used in obtaining the breath sample is often the same instrumentation utilized for acquiring DUI evidence. The different standard of evidence requires different standards for the procedure. (9-2-14)T
- a. Fifteen (15) minute observation period: The monitoring/observation period is not required for the MIP/MIC procedure. (9-2-14)T
- b. The breath alcohol test must be administered by an operator currently certified in the use of that instrument. (9-2-14)T
- c. The instrument used must be certified by ISPFS. The instrument only needs to be initially certified by ISPFS. Initial certification shows that the instrument responds to alcohols and not to acetone. The instrument does not need to be checked regularly or periodically with any of the 0.08 or 0.20 standard. (9-2-14)T
- d. The officer should have the individual being tested remove all loose foreign material from their mouth before testing. False teeth, partial plates, or bridges installed or prescribed by a dentist or physician do not need to be removed to obtain a valid test. The officer may allow the individual to briefly rinse their mouth out with water prior to the breath testing. Any alcohol containing material left in the mouth during the entirety of the breath test sampling could contribute to the results in the breath testing sequence. (9-2-14)T
- e. A complete breath alcohol test includes two (2) valid breath samples taken from the subject and

preceded by an air blank. The subsequent breath samples do not need to be consecutive samples from the same subject. The individual breath samples should be approximately two (2) minutes apart or more. A deficient or insufficient sample does not automatically invalidate a test sample. The operator should use a new mouthpiece for each individual. (9-2-14)T

f. A third breath sample is required if the first two (2) results differ by more than 0.02 g/210L alcohol. In the event that all three (3) samples fall outside the 0.02 g/210L alcohol correlation, and testing indicates or the officer suspects mouth alcohol, they must administer a fifteen (15) minute observation period and then retest the subject. If mouth alcohol is not suspected or indicated by the test results, then the officer may retest the subject without administering an observation period. (9-2-14)T

g. The operator should manually log test results and/or retain printouts for possible use in court. (9-2-14)T

h. The instrument must not be in passive mode for the testing of subjects for evidential purposes. (9-2-14)T

i. The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol. (9-2-14)T

015. -- 999. (RESERVED)

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103 Idaho 626 (Idaho App. 1982)

651 P.2d 560

John GAY and Janice Gay, his wife, Plaintiffs and Appellants,

v.

COUNTY COMMISSIONERS OF BONNEVILLE COUNTY, and Simplot Soilbuilders, Inc., Defendants and Respondents.

No. 13647.

Court of Appeals of Idaho.

September 21, 1982

Petition for Review Denied Nov. 15, 1982.

[651 P.2d 561]

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John M. Ohman, Cox, Ohman & Weinpel, Idaho Falls, for plaintiffs and appellants.

John D. Hansen and Michael R. Orme of Hansen, Boyle, Beard & Martin, Idaho Falls, for defendant and respondent, Simplot Soilbuilders, Inc.

BURNETT, Judge.

The issue presented is whether procedural due process was afforded in proceedings before zoning authorities, on a request to change the authorized use of a particular parcel of land. Simplot Soilbuilders, Inc., sought and obtained from Bonneville County a variance to construct a fertilizer storage and blending facility in an area zoned A-1 agricultural. The owners of adjoining property, John and Janice Gay, brought this action to vacate the variance. They alleged that numerous procedural errors had infected the variance granting process, and that certain findings made by the zoning authorities were unsupported by a sketchy record. The district court upheld the variance and dismissed the Gays' complaint. We reverse.

I

The threshold question is whether the district court applied the correct standard of judicial review. The district court--following what had been a well-established line of Idaho decisions--held that all actions of zoning authorities

were presumptively

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[651 P.2d 562] valid, and that the scope of judicial review was limited to looking for capriciousness, arbitrariness or discrimination. See, e.g., *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977); *Ready-to-Pour, Inc. v. McCoy*, 95 Idaho 510, 511 P.2d 792 (1973). However, during the pendency of this appeal, our Supreme Court issued its decision in *Cooper v. Board of County Comm'rs of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980). Cooper has fundamentally altered our perspective on the proper standard of judicial review.

Cooper draws a distinction between determination of general zoning policies and the application of such policies to specific situations. The former function is deemed legislative, and the latter quasi-judicial. The Cooper opinion treats the restricted standard of judicial review, employed by the district court and illustrated by Dawson and Ready-to-Pour, as a form of judicial deference to legislative action. This restrained standard of review is appropriate to such legislative determinations as the adoption of comprehensive plans or the enactment of general zoning ordinances. In contrast, a decision whether to rezone a particular parcel of property is regarded by Cooper as quasi-judicial, subject to due process protections. See also, e.g., *Fasano v. Board of County Comm'rs of Washington County*, 264 Or. 574, 507 P.2d 23 (1973), overruled on other grounds, *Neuberger v. City of Portland*, 288 Or. 585, 607 P.2d 722 (1980).

Although the county's action here has been characterized as the granting of a "variance," it was in reality a change of authorized land use for a particular parcel of property. The concept of a variance is narrowly treated by I.C. § 67-6516, part of the Local Planning Act of 1975, which had been enacted before Simplot filed its application with the county. The statute defines a variance as follows:

a modification of the requirements of the [zoning] ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots.

A variance, as so defined, does not include a change of authorized land use. Rather, it is limited to adjustment of certain regulations concerning the physical characteristics of the subject property.

It is not disputed in this case that a fertilizer storage and blending facility fell outside the scope of permitted land uses in an A-1 agricultural zone. The "variance" procured by Simplot made permissible a land use previously not authorized by the zoning ordinance. We cannot view a request for such a "variance" differently from the request for rezoning addressed in Cooper. We hold that the Cooper requirement of procedural due process is applicable to proceedings on a request to change the land use authorized for a particular parcel of property, regardless of whether the subject of such proceedings carries the label "variance" or "rezoning."

The right to procedural due process is secured by Article I, Section 13, of the Idaho Constitution and by the Fourteenth Amendment to the United States Constitution. That adjoining land owners, who are "affected persons" under I.C. § 67-6521, have property interests entitled to due process protection has not been contested in this case. Hence, we presume such interests to exist, "and the question then is what process is due." *Van Orden v. State*, 102 Idaho 663, 665, 637 P.2d 1159, 1161 (1981).

The United States Supreme Court has imparted an elastic quality to the concept of procedural due process.

'[D]ue process' ... is not a technical conception with a fixed content unrelated to time, place and circumstances.... [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally,

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[651 P.2d 563] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976); accord, *Van Orden v. State*, supra. The full dimensions of procedural due process, as contemplated by the Cooper decision, have yet to be developed. However, on the facts presented in Cooper, our Supreme Court held that a deprivation of due process resulted from (a) failure to give notice of a second meeting of zoning authorities (after a public hearing), when a rezoning request was considered and staff views were expressed; (b) failure to keep a transcribable verbatim record of the proceedings before the zoning authorities; and (c) failure to make specific written findings of fact and conclusions of law, upon which the decision on the rezoning request was based. Cooper, 101 Idaho at 411, 614

P.2d at 951.

In the present case, Bonneville County and Simplot have argued that the failures identified in Cooper merely illustrate factors relevant to a due process determination, and that none of them represents a deprivation of due process per se. However, specific findings and notice of meetings--from which we infer the right to a reasonable opportunity to present and to rebut evidence--have been recognized as fundamental elements of procedural due process in a variety of contexts. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Moreover, we view a transcribable record as indispensable to meaningful judicial review of rezoning proceedings where the sufficiency of notice, adequacy of opportunity to present or to rebut evidence, or the existence of evidence supporting the agency's findings may be put at issue. [1] Under Idaho law, a rezoning decision might be reviewed on any of these points. I.C. §§ 67-6521(d), 67-5215(g).

We believe that all the factors mentioned in Cooper, together with the opportunity to present and to rebut evidence, meet the standards for due process requirements under *Mathews v. Eldridge*, infra. First, each requirement is germane to the property interests of parties seeking, or adversely affected by, a change of zoning. Secondly, the requirements afford minimum safeguards against erroneous deprivation of such interests. Finally, none of the requirements appears to be unduly burdensome. Even the requirement of a transcribable record--which has excited some controversy in this appeal--compels zoning authorities to do no more than conduct the public's business "on the record," preserve documents received and produced, and operate a tape recorder during hearings or meetings when information on a requested zoning change is received or official action is taken. Accordingly, we hold that notice, opportunity to present and to rebut evidence, preparation of specific findings of fact and conclusions of law, and the keeping of a transcribable record comprise a common core of procedural due process requirements, constitutionally mandated in all cases where zoning authorities are requested to change the land use authorized for a particular parcel of property.

II

We turn now to the questions of whether, and how, these due process requirements should be applied to the instant case. As noted previously, Cooper was decided while this appeal was pending. Bonneville County and Simplot, in a well-crafted brief and argument, urge that requirements based on Cooper not be applied "retroactively" here.

There are no constitutional limitations upon a court's choice to give either retroactive or prospective effect to a decision altering a prior rule of law. *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14

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[651 P.2d 564] L.Ed.2d 601 (1965); *Great Northern Railway Co. v. Simburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The choice is discretionary. The range of available choices includes applying a new rule of law to all cases ("retroactivity"); applying the rule only to future cases ("prospectivity"); applying the rule to future cases and to the case decided (a form of "modified prospectivity"); or applying the rule to future cases, to the case decided, and to similar cases pending on appeal when the new rule was announced (a broader form of "modified prospectivity"). See, e.g., *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974); *Dawson v. Olson*, 94 Idaho 636, 496 P.2d 97 (1972). For ease of reference, we will call the broader form of modified prospectivity the "pipeline approach," because it includes similar cases in the appellate system "pipeline" when the new rule of law was announced.

In *Cooper* our Supreme Court did not explicitly pass on the retroactivity question. However, the court applied its holding on procedural due process to the facts of that case. Similarly, in *Walker-Schmidt Ranch v. Blaine County*, 101 Idaho 420, 614 P.2d 960 (1980)--a rezoning case pending when *Cooper* was decided--the Supreme Court reversed a determination by zoning authorities, and remanded the case with an instruction to the district court that the zoning authorities be directed to comply with *Cooper*. Thus, it plainly appears that the Supreme Court has not explicitly rejected retroactivity, and has, at least, adopted the "pipeline approach"--applying *Cooper* to the case decided and to similar cases pending when the rule of *Cooper* was announced, as well as to future cases. We need not address the possibility of "retroactivity" in this case. The "pipeline approach" is sufficient to determine the impact of *Cooper* upon this appeal.

Simplot and Bonneville County contend that this case is outside the "pipeline" because it is not a "similar" pending case. They point to the fact that *Cooper* and *Walker-Schmidt* were appeals from judgments upholding denials of rezoning requests. In contrast, this appeal has been taken from a judgment upholding the grant of a change in authorized land use. The significance of this distinction, we are told, is that during the course of this litigation Simplot actually constructed the facility for which the change in authorized land use had been sought. Simplot does not contend that the appeal has been rendered moot. However, we are now asked to exempt this case from due process scrutiny on the ground that Simplot had a right to

expect that the decision of the county zoning authorities ultimately would be upheld under the pre-*Cooper* standard of judicial review.

Reliance upon an existing rule of law is one of the criteria to be considered in choosing among the various retroactivity and prospectivity alternatives. It must be weighed against two other criteria--the purpose of the new rule of law announced, and the effect of retroactivity or prospectivity upon the administration of justice. See, e.g., *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977); *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 25, 539 P.2d 566, 577 (1974) (on rehearing); *Thompson v. Hagan*, supra. Ordinarily, these criteria are considered in the decision announcing a new rule of law. However, because no such analysis has yet been articulated in connection with *Cooper*, and because the instant case is asserted to be dissimilar, we will analyze the criteria here.

The reliance claimed by Simplot is not upon the pre-*Cooper* rule itself, but upon an expectation that applying the pre-*Cooper* standard necessarily would have resulted in upholding the county's zoning decision. We need not indulge in an "opinion within an opinion," actually applying the pre-*Cooper* standard. It is sufficient to note that judicial review in this case was sought to determine whether the proper zoning ordinance had been used by the county authorities; whether findings of fact, which were entered specifically in response to this litigation and which consisted partly of a recitation of language from the zoning ordinance, were valid; and whether the findings of fact were adequately supported by a record

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[651 P.2d 565] which consisted partially of disputed recollections by zoning officials of the proceedings before them. We cannot say that the final disposition of such issues, on appeal, would have been free from doubt under the pre-*Cooper* standard. Moreover, when the district judge was informed that Simplot had started construction while a petition for judicial review was pending, he pointedly stated on the record, that "you are building at your peril, as it were." Simplot's counsel acknowledged that "[t]here are certain risks from this point on, I suppose." The weight that might otherwise have been ascribed to the reliance criterion is diminished in this case.

Against this diminished claim of reliance we must weigh the effect of the "pipeline approach" upon the purpose of the *Cooper* decision, and upon the administration of justice. The following language from the *Cooper* opinion is relevant to both of these criteria:

It is clear that there is a pressing need in Idaho for established standards and procedures by which

particularized land use regulation is to be administered. To allow the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law. [101 Idaho at 411, 614 P.2d at 951.]

We believe this clear expression of purpose would be thwarted if we refused to apply the requirements of procedural due process to this case. It appears that the county zoning authorities made no specific findings to support their decision until faced with a lawsuit testing the validity of the decision. It further appears that the findings were based largely upon one zoning board member's familiarity with the property in question. The county kept no transcribable record from which a reviewing court could determine the extent to which the information known to this board member was presented at a public meeting of which notice had been given, or the extent to which the interested parties were afforded an opportunity to rebut such evidence.

We also believe that the proper administration of justice will best be served by applying due process requirements here. Due to the lack of an adequate record of what had transpired at the county level, the district judge was forced to take conflicting evidence, and to make findings, on how the zoning proceedings were conducted and on what basis the county reached its decision. The court then was required to review the propriety of the county's decision upon a record which the court itself had participated in creating. Developing the record of proceedings before an administrative agency, from conflicting evidence, falls outside the purposes for which a reviewing court should take evidence under applicable portions of I.C. § 67-5215. *Cf. Hill v. Board of County Comm'rs*, 101 Idaho 850, 623 P.2d 462 (1981) (holding trial de novo inappropriate upon petition for judicial review of denial of a rezoning application). More fundamentally, we view this process as a distortion of the judicial review function.

Weighing all of the criteria--reliance on the prior rule of law, the purpose of the new rule, and the effect upon the administration of justice--we conclude that the "pipeline approach" to Cooper is appropriate and that it embraces this case. We hold that the procedural due process requirements we have drawn from Cooper govern disposition of this appeal. Because no transcribable record was kept and because, without such a record, a reviewing court in this case could not determine that the interested parties received notice of all meetings at which information concerning the zoning request was received, or that an opportunity to rebut such information was afforded, we conclude that the county's decision must be set aside.

The other issues raised by the petition for judicial review likely would be mooted, or resolved, if the county

conducted proceedings in conformity with the requirements we have drawn from Cooper. Therefore, the judgment of the district court is reversed, and the cause is remanded with direction that the district court require

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[651 P.2d 566] Bonneville County to reconsider Simplot's request in conformity with this opinion.

WALTERS, C. J., and SWANSTROM, J., concur.

Notes:

[1] Since the filing of this appeal, the Idaho Legislature has imposed a statutory requirement of a transcribable record upon all land use proceedings where judicial review is available. See I.C. § 67-6536 (added in 1982).

Citing References :

651 P.2d 558 (Idaho App. 1982), 14121, State v. Angel

Court of Appeals of Idaho 09/14/1982 651 P.2d 558 103 Idaho 624

654 P.2d 1389 (Idaho App. 1982), 13797, State v. Tisdale

Court of Appeals of Idaho 12/07/1982 654 P.2d 1389 103 Idaho 836

658 P.2d 992 (Idaho App. 1983), 13594, Avondale On Hayden, Inc. v. Hall

Court of Appeals of Idaho 02/02/1983 658 P.2d 992 104 Idaho 321

693 P.2d 1108 (Idaho App. 1984), 14461, City of Burley v. McCaslin Lumber Co.

Court of Appeals of Idaho 12/31/1984 693 P.2d 1108 107 Idaho 906

702 P.2d 795 (Idaho 1985), 15416, Intermountain Health Care, Inc. v. Board of County Com'rs of Caribou County

Supreme Court of Idaho 06/17/1985 702 P.2d 795 108 Idaho 757

712 P.2d 1180 (Idaho 1986), 15323, Matter of Approval of Zoning of Idaho Frozen Foods

Supreme Court of Idaho 01/06/1986 712 P.2d 1180 109 Idaho 1072

792 P.2d 882 (Idaho 1990), 17792, South Fork Coalition v. Board of Com'rs of Bonneville County

Supreme Court of Idaho 01/29/1990 792 P.2d 882 117 Idaho 857

796 P.2d 162 (Idaho App. 1990), 17879, Johnson v. City of Homedale

Court of Appeals of Idaho07/25/1990 796 P.2d 162 118 Idaho 285

867 P.2d 989 (Idaho 1994), 20095, Chambers v. Kootenai County Bd. of Com'rs

Supreme Court of Idaho, Coeur D'Alene01/21/1994 867 P.2d 989 125 Idaho 115

917 P.2d 409 (Idaho App. 1996), 21978, Angstman v. City of Boise

Court of Appeals of Idaho05/20/1996 917 P.2d 409 128 Idaho 575

993 P.2d 596 (Idaho 1999), 22271, Rural Kootenai Organization, Inc. v. Board of Com'rs

Supreme Court of Idaho, Lewiston12/09/1999 993 P.2d 596 133 Idaho 833

180 P.3d 487 (Idaho 2008), 33060, Spencer v. Kootenai County

Supreme Court of Idaho, Boise03/06/2008 180 P.3d 487 145 Idaho 448

254 P.3d 24 (Idaho 2011), 37562, Cizek v. Kootenai County Bd. of Com'rs

Supreme Court of Idaho, Boise05/26/2011 254 P.3d 24 151 Idaho 123

8 P.3d 646 (Idaho 2000), 25049, Idaho Historic Preservation Council, Inc. v. City Council of City of Boise

Supreme Court of Idaho, Boise06/30/2000 8 P.3d 646 134 Idaho 651

No negative treatment in subsequent cases

BACKGROUND

The State and Nauert stipulated to a brief statement of facts: Nauert consented to an evidentiary breath test for the presence of alcohol in his body after being provided with an administrative license suspension (ALS) warning. Nauert challenged the constitutional validity of his consent via a Motion to Suppress. He also filed a Motion in Limine challenging the validity of the standard operating procedures (SOPs) and manuals created by the Idaho State Police (ISP) to govern evidentiary testing for alcohol and the foundations for the admissibility of those test results.

The Magistrate Judge denied Nauert's motions. As a result of his challenges being rejected, Nauert entered a conditional guilty plea and appealed the Magistrate Judge's decisions to this Court.

LAW

A trial court's ruling on a motion to suppress is reviewed on a bifurcated standard. *State v. Wheeler*, 149 Idaho 364, 233 P.3d 1286 (Ct. App. 2010). Findings of fact supported by substantial evidence are accepted, but the reviewing court considers the application of constitutional principles *de novo*. *Id.*, 149 Idaho at 370, 233 P.3d at 1292.

The Fourth Amendment of the U.S. Constitution provides that citizens shall be secure from unreasonable searches and seizures, and that no warrants shall be issued except upon a showing of probable cause. U.S. CONST. AMEND. IV. Article I,

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

STATE OF IDAHO,)	Case No. CV-2013-10176
)	
Plaintiff/Respondent,)	
)	MEMORANDUM OPINION
vs.)	
)	
MARTIN EUGENE NAUERT,)	
)	
Defendant/Appellant.)	
)	
)	

In this case, the defendant, Martin Eugene Nauert, entered a conditional guilty plea to Driving Under the Influence of Alcohol, a misdemeanor, in violation of I.C. § 18-8004. Nauert now appeals to this Court, challenging the Magistrate Judge's denials of his Motion to Suppress and his Motion in Limine. The case was submitted on the brief of Nauert without oral argument as authorized by I.A.R. 37(e). For reasons that have never been explained, the State did not respond to Nauert's brief.

§ 17 of the Idaho Constitution provides similar, although some would argue greater, protection against unreasonable searches.

Consent is a well-recognized exception to the Fourth Amendment requirement for a search warrant. *Wheeler*, 149 Idaho at 370, 233 P.3d at 1292. Under Idaho Code § 18-8002(1), every operator of a motor vehicle in the state of Idaho is deemed to have given consent to evidentiary testing for alcohol concentration.¹ This is commonly referred to as implied consent. Among other provisions, the implied consent statute authorizes the imposition of a \$250 penalty and the suspension of one's driving privileges for one year for refusal to submit to testing. I.C. § 18-8002. Both the financial penalty and the loss of driving privileges are characterized as *civil* penalties. A driver may also be shown to freely and voluntarily consent to an evidentiary test, such as a breath test, in light of all the circumstances. *State v. Varie*, 135 Idaho 848, 852, 26 P.3d 31, 35 (2001).

¹ I.C. § 18-8002(1) states:

Any person who drives or is in physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

ANALYSIS

The Magistrate Judge Did Not Err in Denying Nauert's Motion to Suppress, Because Nauert's Consent to Breath Testing Was Not Coerced

Nauert argues that his consent was unconstitutional because he was coerced into agreeing to have his breath tested for alcohol. He contends he was forced to agree to the testing because of the onerous penalties he faced if he were to refuse testing. The ALS advisory informs the driver, among other things: "You are required by law to take one or more evidentiary test(s) to determine the concentration of alcohol or presence of drugs or other intoxicating substances in your body." Following this admonition is a list of *civil* penalties that may be imposed against a driver for his refusal to undergo testing. (As noted, these include a fine of up to \$250 and loss of one's driving privileges for one year. The ALS advisory does not advise the driver that the test results, if they show an alcohol concentration of .08 or above, may be introduced in a *criminal* trial and that such a showing would result in the driver being found to have been operating the vehicle while under the influence of alcohol. I.C. § 18-8004(1)(a).)

Nauert argues that *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) requires a different analysis of what warning is required regarding his *criminal* case. Nauert seems to argue that because the implied consent advisory does not advise the driver of the *criminal* implications of taking the test and failing it, that it cannot be considered a knowing, intelligent, and voluntary waiver for criminal purposes.

In *McNeely*, the U.S. Supreme Court noted that:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense.

Id. at 1566.

The *McNeely* Court also cited *South Dakota v. Neville*, 459 U.S. 553 (1983).

In *Neville*, the U.S. Supreme Court reviewed certain aspects of South Dakota's implied consent law. *Id.* The Supreme Court found that the law allowed a one-year *civil* revocation of a driver's license for refusal to allow testing after the driver was given an opportunity for a hearing. *Id.*, 459 U.S. at 560. The Supreme Court then stated succinctly: "Such penalty for refusing to take blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *Id.*

However, the U.S. Supreme Court further stated in a footnote:

Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that his failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. . . .

While the State did not actually warn respondent that the test results could be used against him [in a criminal trial], we hold that such a failure to warn was not the sort of implicit promise to forego use of evidence that would unfairly "trick" respondent if the evidence were later offered against him at trial. . . .

Id., 459 U.S. at 565 n. 16, 566.

Given that *McNeely* specifically references *Neville*, it does not require the invalidation of the consent to breath test in a criminal case. This Court is troubled by the advisory warning's failure to mention that the breath test administered may

be used in a *criminal* prosecution. Were it not for the controlling precedent of *South Dakota v. Neville*, and the U.S. Supreme Court's tacit recognition of the continuing viability of *Neville*, this Court would find that Nauert's consent was invalidated by a failure to warn him of the *criminal* consequences of taking and failing the breath test.² It is not possible to conclude that Nauert's consent was knowing, intelligent, or voluntary absent the footnote in *Neville*. However, this Court is constrained by the decision of the United States Supreme Court in *Neville*, where the justices determined that officers need not specifically warn a driver that alcohol test results may be used against him in a *criminal* trial. *Neville*, 459 U.S. at 565 n. 16. As a result, this Court must conclude that Nauert's consent was valid for the purposes of criminal prosecution, and the Magistrate Judge did not err in denying the motion to suppress.

The Magistrate Judge Erred In Denying Nauert's Motion in Limine, Because the State Did Not Offer the Breath Testing Evidence Through a Valid Alternative to Expert Testimony Under the Rules of Evidence

The gravamen of Nauert's motion in limine is that the SOPs and manuals, formulated by the ISP to implement the statutes authorizing breath-testing and its admissibility in court, have never been adopted as rules. Because of the ISP's failure to promulgate rules, the procedures required to establish the reliability of the breath testing were not fulfilled and the magistrate judge should have rejected

² It should be pointed out that a driver in Nauert's situation is not entitled to the advice of counsel under the circumstances. *Matter of McNeely*, 119 Idaho 182, 189, 804 P.2d 911, 918 (Ct. App. 1990); I.C. § 18-8002(2). As a result, Nauert was never informed of the legal consequences he faced in a *criminal* prosecution and he was deprived of the ability to be apprised of the consequences by his lawyer. Consequently, it is hard to understand how Nauert's consent was knowing, intelligent, or voluntary.

the results of Nauert's breath testing when challenged through the motion in limine. This Court agrees that whatever else can be said of the SOPs and manuals they are not "rules" and therefore do not have the effect of rules. Consequently, the magistrate judge erred when he denied Nauert's motion in limine.

Idaho Code §§ 18-8002A(3) and 18-8004(4) purportedly exercise the state legislature's power to regulate the admission of alcohol testing evidence in DUI cases.³ These statutes confer upon the ISP, an executive branch agency, the "responsibility for authorizing alcohol content testing procedures . . ." *State v.*

³ I.C. § 18-8002A(3) states:

Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:

- (a) What testing is required to complete evidentiary testing under this section; and
- (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1)(e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. A test for alcohol concentration in blood or urine as defined in section 18-8004, Idaho Code, that is reported by the Idaho state police or by any laboratory approved by the Idaho state police to perform this test will be valid for the purposes of this section.

I.C. § 18-8004(4) states:

For purposes of this chapter, an evidentiary test for alcohol concentration shall be based upon a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath or sixty-seven (67) milliliters of urine. Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

Besaw, 155 Idaho 134, ___-___, 306 P.3d 219, 227–29 (Ct. App. 2013) (discussing *State v. Bell*, 115 Idaho 36, 764 P.2d 113 (Ct. App. 1988)).

Under this statutory duty and authority, the ISP has generated administrative rules, the SOPs, and the breath testing manuals. The ISP has promulgated IDAPA 11.03.01.014.03, which reads as follows:

Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures. [Effective] (4-7-11)

The SOPs and manuals are not contained in IDAPA 11.03.01. Neither are they formally incorporated by reference in that chapter.⁴ No court has ever determined that the SOPs and manuals constitute “rules” for purposes of the APA. *Besaw*, 155 Idaho at ___, ___ n. 2, 306 P.3d at 225, 225 n. 2 (“[T]he Idaho State Police agency is charged with prescribing by rule approved equipment for testing breath alcohol content and standards for administration of such tests. We have treated [the SOPs and manuals] as ‘rules’ for the purpose of judicial review because the parties have done so and because they constitute the only materials by which the ISP has purported to authorize testing instruments and methods. . . . We have not, however, held that these SOPs and manuals actually constitute ‘rules’ or that

⁴ On the other hand, under IDAPA 11.03.01.004 the ISP has formally incorporated a list of conforming breath testing devices which have been approved by the ISP. This action superseded the decision of the Court of Appeals in *Alford*, which said that approval of breath testing devices was not an agency action subject to the requirements of the APA. *State v. Alford*, 139 Idaho 595, 597–98, 83 P.3d 139, 141–42 (Ct. App. 2004).

the ISP has 'prescribed by rule' testing instruments and methods as contemplated by [statute]; that issue has never been presented to this Court.”).

In *Besaw*, the Court of Appeals recognized that there was “troubling information about the manner in which the SOPs for breath testing have been developed or amended . . .” *Besaw*, 306 P.3d at 229. The Court of Appeals found that certain “emails and memos to and from ISP [were] disturbing [because they] lacked any apparent regard for the way proposed changes could affect the validity of the tests.” *Id.* The *Besaw* court disapproved of the apparent objective of certain ISP personnel to “thwart all possible defense challenges to the admission of breath tests rather than to adopt standards that will maximize the accuracy of tests upon which individuals may be convicted of serious crimes and deprived of their liberty.” *Id.* The court also noted that there seemed to be “a conscious avoidance of any opportunity for suggestions or critiques from persons outside the law enforcement community.” *Id.* In a footnote, the Court of Appeals explained that avoidance of scrutiny for the SOPs would be impossible if they had been promulgated according to the APA. *Id.* at 229 n. 5.

Under the APA, an administrative rule implementing a statute must undergo a specific process to become final, and given the force and effect of law. The SOPs and manuals have not been promulgated to comport with APA rulemaking requirements. The ISP provides no notice in the administrative bulletin before the SOPs and manuals are adopted (as required by I.C. §§ 67-5220 and 67-5221); the ISP accepts no public comments and holds no public hearing on the SOPs (as

required by I.C. § 67-5222); the ISP does not submit the SOPs to any legislative review (as required by I.C. §§ 67-5223 and 67-5291). Certainly, from a procedural and legal standpoint, the SOPs and manuals are not administrative rules.

Given that the SOPs and manuals have never been established as “rules,” the question facing this Court is a matter of first impression: Are the SOPs and manuals valid authority which enable the admission of Nauert’s breath testing without expert testimony? To answer that inquiry, this Court must ask the unavoidable question of what the SOPs and manuals are: Since they are not rules, what legal effect do they have?

Because the SOPs and manuals are not rules, they cannot be given the force and effect of law generally ascribed to administrative rules. *Mead*, 117 Idaho at 664, 791 P.2d at 414. The SOPs are, at most, internal guidelines or standards. *See Service Employees Int’l Union, Local 6 v. Idaho Dept. of Health & Welfare*, 106 Idaho 756, 759, 683 P.2d 404, 407 (1984) (reaffirmed in *Nation v. State, Dept. of Correction*, 144 Idaho 177, 158 P.3d 953 (2007)). As internal guidelines, the SOPs and manuals may be changed with impunity by the agency head whenever he chooses, and are not vetted by anyone other than the ISP. Internal guidelines do not have the force and effect of law. *Id.* They can only govern the internal management of an agency and cannot affect private rights or procedures available to the public. *Id.* As a result, internal guidelines are also *incapable* of affecting the Rules of Evidence.

The APA provides no saving support for the authority of the SOPs and manuals. As defined by I.C. § 67-5201(21), a "standard" is:

[A] manual, guideline, criterion, specification, requirement measurement or other authoritative principle providing a model or pattern in comparison with which the correctness or appropriateness of specified actions, practices or procedures may be determined.

Without incorporation by reference and in compliance with the APA, the SOPs and manuals have no legal effect beyond the management of the ISP. At most, the SOPs and manuals are unincorporated standards, manuals, and internal guidelines, nothing more. As a result they have no power to give effect to I.C. §§ 18-8002A(3) and 18-8004(4). It is inexplicable that such an insubstantial basis could divert the course of the judiciary in the manner it has. Nevertheless, that is where we now are.

What the ISP has done is, in effect, construct an end run around the APA and ultimately the Rules of Evidence. If the ISP were required to follow rule making procedures, the SOPs and manuals would at least be subject to outside scrutiny. To the extent they are arbitrary or capricious, they could be struck down. I.C. § 67-5279. While the state legislature is not required to prescribe standards to control an agency's rulemaking discretion, the legislation itself or the agency's internal guidelines should provide "meaningful safeguards against arbitrary decision making" such as a right to a hearing or judicial review. *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985) (abrogated on other grounds). As noted by the Idaho Court of Appeals, in *Besaw*, there is "troubling information about the manner in which the SOPs for breath testing have been

developed or amended . . .” *Besaw*, 155 Idaho at ___, 306 P.3d at 229. This conclusion is especially disconcerting when it is remembered that the results of the breath test effectively create strict liability for a driver whose breath test shows an alcohol concentration of 0.08 or more. The result of where we are today is that there is no scientific support for the processes to be employed in administering a test that holds a driver strictly liable for driving under the influence. Not only is this result prohibited by our Rules of Evidence, it also fails to meet the requirement of fundamental fairness.

As the process currently stands, there are no “meaningful safeguards” to ensure that the SOPs are neither arbitrary nor capricious. (In fact, the Court of Appeals has cast serious doubt on the SOPs and manuals because they seem to be promulgated in a way to avoid scrutiny. *Besaw*, 155 Idaho at ___, 306 P.3d at 229.) There is no indication whatsoever that the legislature itself exercises *any* oversight of the development of the SOPs and manuals. Without oversight, there is no assurance that the SOPs and manuals are anything other than self-serving.

Given that the SOPs and manuals are not rules, they cannot supplant the Rules of Evidence. (They also cannot abrogate the separation of powers doctrine or the requirement of due process, but those are other issues.) I.R.E. 1102 makes it clear that statutes and rules cannot affect the Rules of Evidence: “Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect.” With that as a starting point, it is a

fortiori that the SOPs and manuals, which are neither statutes nor rules, could somehow effect a change of the rules of evidence in the way sought. If statutes and rules cannot alter the Rules of Evidence, something that has never been promulgated as a rule surely cannot affect the Rules of Evidence.

The admissibility of evidence is a matter within the inherent judicial power of the Idaho Supreme Court to establish rules and procedures. Idaho Const., Art. V, §§ 2, 13; I.C. § 1-212 (recognizing the judiciary's inherent powers); and I.R.E. 1102 (which reflects the judiciary's primacy when it comes to matters of evidence: "Statutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with applicable rules of Idaho Rules of Evidence, are of no force or effect."). The legislature has no power to deprive the judiciary of its powers, but may regulate by law, when necessary, the methods of proceeding in the exercise of those powers of all the courts inferior to the Supreme Court, so long as it does not conflict with the state constitution. Idaho Const., Art. V, § 13. The Rules of Evidence may only be amended by the Supreme Court. Art. V, § 13 does not give the legislature the ability to modify those Rules of Evidence. Indeed, "to the extent that the rule [of evidence] places greater strictures upon the use of such evidence than does the statute, the rule must govern." *State v. Ricks*, 122 Idaho 856, 860, 840 P.2d 400, 404 (Ct. App. 1992).

The Court of Appeals has, somewhat inexplicably, concluded that I.C. § 18-8002A(3) simply provides an alternative method to satisfy the foundational

requirements for scientific testimony in the Rules of Evidence. *State v. Nickerson*, 132 Idaho 406, 410–11, 973 P.2d 758, 762–63 (Ct. App. 1999). However, the case law upon which *Nickerson* relies makes it clear that the statutes have not done away with foundational requirements. See *State v. Bell*, 115 Idaho 36, 39, 764 P.2d 113, 117 (Ct. App. 1988):

The acceptance by the Legislature of test procedures as designated by the Idaho Department of Health and Welfare does not wholly eliminate the need of establishing foundational requirements for a test result. This is required even in light of the legislative directive to utilize an expedient means to admit such evidence. The adoption of the particular test procedure merely recognizes the validity and reliability of that particular accepted test. It must still be established at trial that those procedures which ensure the reliability and in turn the accuracy of the test have been met.

What has been happening with the SOPs and manuals as of late is more than just a legislative substitute for scientific reliability. The fact of the matter is that the ISP is now vested with the unilateral power to prescribe the admission of breath testing evidence in Idaho's courts. As a result, this statute violates the separations of powers doctrine. *State v. Moore*, 150 Idaho 17, 20, 244 P.3d 161, 164 (2010) "The separation of powers doctrine embodies the concept that the three branches of government, legislative, executive and judicial, should remain separate and distinct so that each is able to operate independently." (quoting *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990)); *Estep v. Comm'rs of Boundary County*, 122 Idaho 345, 347, 834 P.2d 862, 864 (1992) "The only exception to the separation of powers doctrine occurs where the exercise of another branch's power is expressly directed or permitted by the constitution."

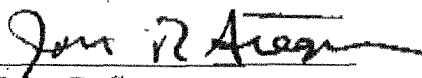
It is unsettling to think that the ISP is allowed to draft SOPs and manuals given the force and effect of law without any oversight. This is tantamount to a wholesale assignment of power to an executive branch agency, when the Supreme Court has said this is an area solely governed by the Court. It is axiomatic that the legislature is vested with the authority to make laws, not the executive. Idaho Const., Art. III, § 1, Art. II, §1. It is even more unsettling to think that the ISP would be granted the power to dictate the procedural operations of the judicial branch. This is a prerogative the judiciary, at least in the past, has been unwilling to relinquish. *R.E.W. Const. Co. v. Dist. Ct. of the Third Judicial Dist.*, 88 Idaho 426, 437–38, 400 P.2d 390, 397 (1965); *see also, In re SRBA Case No. 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995).

This Court is unwilling to endorse the ISP's unchecked exercise of power over the judicial process. The judiciary of this state "has consistently acted to protect against encroachment of one department of government on another." *Mead*, 117 Idaho at 669, 791 P.2d at 419. In deciding cases and controversies the judiciary must be mindful of the "enduring consequences upon the balanced power structure" of our democratic system. *Id.* (quoting the U.S. Supreme Court's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The ISP cannot unilaterally direct what foundation, if any, is required for the admission of breath test evidence in Idaho's courts. Yet the current system amounts to the functional equivalent of a transfer of that authority.

CONCLUSION

For the reasons stated above, this Court concludes that the Magistrate Judge erred in overruling Nauert's challenge to the admissibility of Nauert's breath test results without an adequate foundation being laid. Accordingly, the Order Denying the Motion Limine is reversed and the case remanded for further proceedings consistent with this opinion.

Dated this 3rd day of July 2014.


John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete, and correct copies of the foregoing order were delivered to:

Jay Logsdon [] U.S. Mail
Deputy Public Defender [] Overnight Mail
208-446-1701 [] Fax
[] Hand Delivery

Joel Ryan [] U.S. Mail
Post Falls Prosecuting Attorney [] Overnight Mail
208-773-0214 [] Fax
[] Hand Delivery

On this ____ day of July 2014.

Deputy Clerk

III.

Haynes Has Failed To Show Error In The District Court's Determination That The Magistrate Correctly Applied The Law To The Facts In Denying Haynes' Motion In Limine To Exclude The Breath Test Results

A. Introduction

Haynes challenges the denial of her motion *in limine* to exclude the results of her breath test, arguing as she did to the magistrate and district courts below that the accuracy of those results is inherently unreliable for two reasons.

First, she argues that the breath test results were inadmissible because ISP has failed to comply with its statutory duty to establish methods to ensure the reliability of breath test results in general. (Appellant's brief, pp.18-24.) The Idaho Court of Appeals recently considered and rejected this precise argument in State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), *review denied*. Haynes has presented no cogent reason why Besaw should be overruled, nor has she demonstrated from the record that the testing procedures utilized in her case actually produced an unreliable result. Having failed to do so, Haynes has failed to show error in the denial of her motion to exclude the test results on this basis.

Second, Haynes argues that the failure of ISP to comply with the rulemaking requirements of the IAPA in creating SOPs and manuals for breath alcohol testing renders those SOPs and manuals void and all BAC testing based on those standards too unreliable for use at a criminal trial. (Appellant's brief, pp.24-31.) This argument fails for several alternative reasons. First, nothing in I.C. § 18-8004(4) requires formal rulemaking as a prerequisite to the admissibility of results of breath tests performed pursuant to methods approved by ISP.

Second, if ISP's creation of the SOPs is agency action governed by the requirements of the IAPA, Haynes' exclusive means for challenging such action was through the judicial review provisions of the IAPA; she has no standing to raise, and neither the lower courts nor this Court have jurisdiction to consider, a challenge to the validity of the SOPs as a basis for excluding breath test results in a criminal case. Finally, even if this Court reaches the merits of Haynes' argument, correct application of the law shows the SOPs are not rules and, as such, no compliance with the formal rulemaking requirements of the IAPA was required.

B. Standard Of Review

The standard of review applicable to a decision rendered by a district court in its intermediate appellate capacity is set forth in Section I.B., *supra*, and is incorporated herein by reference.

"When a decision on a motion addressing the admissibility of evidence is challenged, [the appellate court] defer[s] to the trial court's findings of fact supported by substantial and competent evidence." State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), *review denied*. Questions of law, including whether the state has satisfied the foundational requirements for the admission of breath test results in a DUI prosecution, are subject to free review. State v. Carson, 133 Idaho 451, 452, 988 P.2d 225, 226 (Ct. App. 1999); State v. Remsburg, 126 Idaho 338, 339, 882 P.2d 993, 994 (Ct. App. 1994).

C. Haynes Has Failed To Show Any Basis For Reversal Based On Her Claim, Already Rejected In State v. Besaw, That ISP Has Failed To Establish Methods To Ensure The Reliability Of BAC Test Results

In order to have the results of a breath test admitted as evidence at trial, the state must make a foundational showing that the administrative procedures which ensure the reliability of the test have been met. State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011); State v. Mazzuca, 132 Idaho 868, 979 P.2d 1226 (Ct. App. 1999) (citing State v. Utz, 125 Idaho 127, 129, 867 P.2d 1001, 1003 (Ct. App. 1993)). To satisfy this foundational requirement, "the state may rely on I.C. § 18-8004(4), which provides an expedient method for admitting BAC test results into evidence when the analysis is conducted pursuant to [Idaho State Police ("ISP")] standards." State v. Uhly, 121 Idaho 1020, 1022, 829 P.2d 1369, 1371 (Ct. App. 1992) (citations omitted); accord Healy, 151 Idaho at 737, 264 P.3d at 78; State v. Nickerson, 132 Idaho 406, 411, 973 P.2d 758, 763 (Ct. App. 1999). Specifically, that statute provides:

Analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by that department, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in a proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4). "If the State elects to proceed under § 18-8004(4), it must not only show that the test equipment was approved by [ISP] but also that the

equipment was operated and the test administered in conformity with [ISP] standards.” Nickerson, 132 Idaho at 411, 973 P.2d at 763 (citing State v. Bell, 115 Idaho 36, 39-40, 764 P.2d 113, 116-17 (Ct. App. 1988)).

Haynes acknowledges that, pursuant to I.C. § 18-8004(4), breath test results are admissible if they were obtained in conformity with ISP methods meant to ensure the reliability of the results. She argues, however, that no such methods actually exists because ISP has, in several instances, modified its SOPs for breath alcohol testing by replacing what were once mandatory testing procedures with testing recommendations that need not be uniformly complied with, thereby “render[ing] the SOPs incapable of ensuring accuracy” of breath test results, generally. (Appellant’s brief, pp.18-24.) Haynes’ argument fails because it is merely a rehashing of the argument already considered and rejected by the Idaho Court of Appeals in State v. Besaw, 155 Idaho 134, 142-44, 306 P.3d 219, 227-29 (Ct. App. 2013), *review denied*.

Like Haynes, Besaw argued “that although ISP is charged by statute with adopting alcohol concentration *standards* meant to ensure the reliability of test results, the agency has abdicated this responsibility by replacing standards with testing *recommendations* that are not meant to ensure the accuracy of test results but, rather, to facilitate the admissibility of test results.” Besaw, 155 Idaho at 143, 306 P.3d at 228 (emphases original). Specifically, he argued that because ISP had “changed a number of former ‘must’ testing requirements to ‘should’ recommendations within the SOPs,” the SOPs effectively fail to set forth *any standards* for breath testing. Id. at 143-44, 306 P.3d at 228-29.

The Idaho Court of Appeals disagreed and, in so doing, rejected Besaw's argument, which was based on the dissenting opinion in Wheeler v. Idaho Transp. Dept., 148 Idaho 378, 223 P.3d 761 (Ct. App. 2010), *review denied*, that "nonmandatory standards [are] tantamount to no standards at all." Besaw, 155 Idaho at 144, 306 P.3d at 229. Although the Court was troubled by some of the information Besaw presented "about the manner in which the SOPs for breath testing have been developed or amended," the Court was not persuaded by any evidence before it "that the SOP procedures are incapable of yielding accurate tests." Id. Because Besaw failed to present any evidence "establish[ing] that the test procedures actually authorized by the SOPs and applied in Besaw's case [were] incapable of producing reliable tests," the Court found "no error in the magistrate court's denial of Besaw's motion to exclude the test results from evidence." Id.

The reasoning and result of Besaw are controlling in this case. Like Besaw, Haynes argues that ISP has replaced the word "must" with the word "should" in several provisions of the SOPs.⁵ (Appellant's brief, p.23.) And, like Besaw, Haynes contends that the replacement of what were once mandatory breath testing methods with nonmandatory methods has resulted in there being no "method" at all to ensure the accuracy of breath test results. (Appellant's brief, pp.20-24.) Like Besaw, however, Haynes has failed to present any

⁵ Although failure to follow a procedure that "should" have been followed would not have prevented the admission of the test result, Haynes would have been free to argue that any such failure affected the weight the jury should give the evidence.

evidence to demonstrate the SOPs, as amended, are incapable of yielding accurate results. Nor has she even argued, much less demonstrated, that Trooper Keys failed to comply with any of the "recommended" procedures in administering the breath test in this case or that any such failure actually affected the accuracy of her test results.⁶ Because she has failed to do so, Haynes, like Besaw, has failed to show any basis for exclusion of the breath test results in her case.

Haynes acknowledges the holding of Besaw but asks this Court to overrule it. (Appellant's brief, pp.22-24.) As support for her request, Haynes merely repeats the arguments that were presented to and rejected by the Court in Besaw. (Compare Appellant's brief, pp.20-24 with Besaw, 155 Idaho at 142-44, 306 P.3d at 227-29.) That Haynes believes Besaw was wrongly decided does make it so. Haynes has not presented any new argument and has not otherwise pointed to anything in the record to demonstrate that Besaw has proven over time to be unjust or unwise. Having failed to do so, Haynes has

⁶ Haynes identifies only two "instances" in which "the SOPs have been modified so that the word 'must' has been replaced by the word 'should': "1. The necessity to have the correct acceptable range limits and performance verification standard lot number set in the instrument prior to evidentiary testing"; and "2. The need to monitor the subject for fifteen minutes prior to the test to ensure there is no alcohol being regurgitated or in the mouth." (Appellant's brief, p.23 (citations omitted).) Haynes does not contend Trooper Keys failed to perform either of these procedures, nor could she based on the record in this case. Haynes presented no evidence below that Trooper Keys failed to properly calibrate the breath testing instrument, and the video of the traffic stop, introduced below as Defendant's Exhibit B, affirmatively shows that Trooper Keys monitored Haynes for two consecutive 15-minute periods (the officer was unaware Haynes had gum in her mouth during the first 15-minute observation period and, so, conducted a second 15-minute observation period after ensuring Haynes no longer had anything in her mouth) before administering the test.

failed to demonstrate any basis why Besaw should be overruled. See State v. Koivu, 152 Idaho 511, 518, 272 P.3d 483, 490 (2012) (controlling precedent will not be overruled “unless it is shown to have been manifestly wrong, or the holding in the case has proven over time to be unwise or unjust” (citations omitted)). The district court’s decision affirming the magistrate’s denial of Haynes’ motion to exclude the breath test results (on the claimed basis that there exist no methods to ensure the reliability of the results) must therefore be affirmed.

D. Haynes Has Failed To Show Any Basis For Excluding Her Breath Test Results Based On Her Claim That ISP Did Not Comply With The Formal Rulemaking Requirements Of The IAPA In Adopting The SOPs For Breath Alcohol Testing

1. Nothing In I.C. § 18-8004(4) Requires Compliance With The Rulemaking Requirements Of The IAPA As A Prerequisite To The Admissibility Of Results Of BAC Testing Performed Pursuant To Methods Approved By ISP

Idaho’s DUI statute states it is unlawful for a person with “an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle” on a road or place open to the public. I.C. § 18-8004(1)(a). Subsection (4), in turn, sets forth a formula of grams of alcohol per 210 liters of breath upon which upon which “an evidentiary test for alcohol concentration shall be based” and states that such breath tests shall be performed by an approved laboratory or “by any other method approved by the Idaho state police.” I.C. § 18-8004(4). That subsection continues:

Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4).

As contemplated by I.C. § 18-8004(4), ISP has approved certain methods for breath alcohol testing and standards for the administration of such tests, and those approved methods have been set out by ISP in the form of "Standard Operating Procedures" and training manuals (hereinafter collectively "SOPs"). (See R., pp.34-123, 138-236); State v. Besaw, 155 Idaho 134, 140, 306 P.3d 219, 225 (Ct. App. 2013), *review denied*. Haynes does not contend that, in administering her breath test, Trooper Keys failed to comply with any of the methods or procedures set forth in the SOPs. Rather, she argues the methods themselves are invalid because there is nothing in the record indicating that ISP complied with the rulemaking procedures of the IAPA, I.C. § 67-5201 *et seq.*, in adopting the SOPs. (Appellant's brief, pp.24-31.) Haynes' challenge to the *manner* in which ISP approved the methods for breath alcohol testing does not show any basis for exclusion of her breath test results because nothing in the governing law requires compliance with the rulemaking requirements of the IAPA as a prerequisite to the admissibility of results of BAC testing performed pursuant to methods approved by ISP.

Promulgation of rules is required under the IAPA only where "specifically authorized by statute." I.C. § 67-5231(1). The plain language of I.C. § 18-

8004(4) states that, "[n]otwithstanding any other provision of law or rule of court," results of BAC testing "shall be admissible," without the necessity of producing expert testimony, if the test was "performed by a laboratory operated or approved by the Idaho state police *or by any other method approved by the Idaho state police.*" (Emphasis added). Nothing in this statute authorizes or requires ISP to comply with the rulemaking requirements of the IAPA in approving the methods for determining an individual's breath alcohol concentration, nor does the statute make compliance with the IAPA a condition precedent to the admissibility of BAC test results in a criminal proceeding. To the contrary, the statute provides that such results are admissible if the test was performed by "any ... method approved by" ISP. I.C. § 18-8004(4). Because Haynes has never argued, much less demonstrated, that Trooper Keys failed to comply with any of the methods set out in the SOPs in administering her breath test, she has failed to show any basis for exclusion of her test results in the criminal case.

The state recognizes the legislature *has*, in a related statute, conferred rulemaking authority upon ISP for purposes of administrative license suspension proceedings. Specifically, I.C. § 18-8002A provides:

(3) Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:

(a) What testing is required to complete evidentiary testing under this section; and

(b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the

following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1) (e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. ...

I.C. § 18-8002A(3). By its plain language, however, the rulemaking authority granted by I.C. § 18-8002A does not extend to the approval of methods for breath alcohol testing contemplated by I.C. § 18-8004(4). To the contrary, the statute *limits* what ISP may prescribe by rule to the determinations of “[w]hat testing is required to complete evidentiary testing *under this section* [18-8002A]” and “[w]hat calibration or checking of testing equipment must be performed to comply with the department’s requirements.” The statute also mandates that any rule so prescribed recognize that, for purposes of the license suspension provisions of I.C. § 18-8002A, a test for breath alcohol concentration is valid “if the breath alcohol testing instrument was approved for testing by the Idaho state police *in accordance with section 18-8004.*” In so doing, the legislature clearly indicated that the approval of breath testing equipment and methods required under I.C. § 18-8004 is not itself subject to the rulemaking requirements of the IAPA.

Idaho Code § 18-8004 does not require that ISP approve BAC testing methods by formal rulemaking. Therefore, Haynes’ argument that the SOPs were not adopted pursuant to the formal rulemaking requirements of the IAPA is irrelevant to the admissibility of her breath test results under this section.

2. If ISP's Creation Of The SOPs Is Agency Action Governed By The Requirements Of The IAPA, Haynes' Exclusive Means For Challenging Such Action Was Through The Judicial Review Provisions Of The IAPA

Haynes argues that, because administrative license suspension hearings “held per I.C. § 18-8002A are agency action controlled by [the IAPA],” ISP’s approval of methods for BAC testing for purposes of admissibility of test results under I.C. § 18-8004(4) must also be “agency action falling under the requirements of [the IAPA].” (Appellant’s brief, p.29.) For the reasons set forth in Section III.D.1, *supra*, Haynes has failed to show that ISP’s compliance or lack thereof with the formal rulemaking requirements of the IAPA is at all relevant to the determination of the admissibility of her breath test results under I.C. § 18-8004(4). If Haynes is correct, however – and ISP’s approval of BAC testing methods for purposes of I.C. § 18-8004(4) is agency action governed by the IAPA – Haynes had no standing to bring, and neither the lower courts nor this Court have no jurisdiction to consider, a challenge to the manner in which ISP approved BAC testing methods as a basis for excluding the breath test result in the criminal case.

“Actions by state agencies are not subject to judicial review unless expressly authorized by statute.” Laughy v. Idaho Dept. of Transp., 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (citing I.R.C.P. 84(a)(1)); Johnson v. State, 153 Idaho 246, 250, 280 P.3d 749, 753 (2012) (same). Idaho Code § 67-5270 permits judicial review of final agency actions, including the failure of an agency to “issue a rule” or “to perform, any duty placed on it by law.” See I.C. § 67-5201(3) (definition of “Agency action”); Laughy, 149 Idaho at 871, 243 P.3d at

1059 (summarizing "types of agency actions that could be reviewed by a court"). However, in order to be entitled to such review, the "person aggrieved by final agency action" must comply with the procedural requirements of I.C. §§ 67-5271 through 67-5279. I.C. § 67-5270(2); BV Beverage Co., LLC v. State, 155 Idaho 624, 627, 315 P.3d 812, 815 (2013); Laughy, 149 Idaho at 870, 243 P.3d at 1058. Where, as here, the aggrieved person is challenging the validity of a "rule," compliance with the procedural requirements necessary to obtain judicial review requires the person to, among other things: exhaust all available administrative remedies (I.C. § 67-5271), institute proceedings for review or declaratory judgment by filing a petition in the district court of the county in which the final agency action was taken or where the aggrieved person resides (I.C. § 67-5272(1)), file the petition within two years of the adoption of the rule being challenged (I.C. §§ 67-5231 and 67-5273), and make the agency a party to the action (I.C. § 67-5278). Haynes did not comply with any of these procedural requirements, nor could she ever have done so in the criminal case.

From the beginning of this case, Haynes has sought a judicial ruling invalidating the SOPs for BAC testing based on ISP's failure to have complied with the formal rulemaking requirements of the IAPA in approving the testing methods contained in the SOPs. But Haynes herself did not comply with the

judicial review provisions of the IAPA. To the state's knowledge, she did not attempt to pursue any available administrative remedies.⁷ I.C. § 67-5271. Nor did she "institute" any "proceedings for review or declaratory judgment" by filing a timely petition in the district court of the appropriate county and naming ISP as a party to the action. I.C. §§ 67-5272, 67-5273, 67-5278. Instead, Haynes has attempted to have the SOPs invalidated as a basis for excluding her breath test result in the criminal case. Nothing in the IAPA or in any other statute, including I.C. § 18-8004, enables Haynes to challenge the validity of ISP's action in this forum and in this manner. Haynes' attempt to do so is, in her own words, nothing more than an attempt to make "an end-run around the requirements" of the IAPA. (Appellant's brief, p.25.)

Because there is no statute that authorizes Haynes to raise ISP's alleged noncompliance with the rulemaking requirements of the IAPA as a defense in the criminal case, Haynes lacked standing to bring the challenge and both the lower courts and this Court are without jurisdiction to consider it. See Laughy, 149

⁷ The state confesses is not aware of any specific administrative remedy by which Haynes could challenge the validity of ISP's adoption of the SOPs and methods for BAC testing contained therein. Although I.C. § 18-8002A(7) allows for an administrative hearing when a person's driver's license has been suspended as a result of failing a BAC test, failure of ISP to comply with the rulemaking requirements of the IAPA in approving the methods for BAC testing is not one of the grounds upon which the license suspension may be vacated. In addition, I.C. § 67-5278 appears to contemplate that the validity of an agency rule may be challenged in an action for declaratory judgment, without the necessity of exhausting administrative remedies. See also Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 (2003) (mining companies did not have to exhaust administrative remedies before seeking judicial review of validity of state agency's action in issuing a total maximum daily load limit without complying with rulemaking requirements of the IAPA).

Idaho at 870, 243 P.3d at 1058 ("Without an enabling statute, the district court lacks subject-matter jurisdiction" to review agency action.). If the IAPA applies to ISP's actions in approving methods for breath testing, it also applies to bar Haynes' attempt to challenge those actions in the criminal case.

3. Even If This Court Entertains The Merits Of Haynes' Challenge To ISP's Approval Of BAC Testing Methods, Correct Application Of The Law Shows The SOPs Are Not Rules And, As Such, No Formal Rulemaking Was Required

The legislature has given ISP authority to prescribe by rule "[w]hat testing is required to complete evidentiary testing" for alcohol concentration under I.C. § 18-8002A and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." I.C. § 18-8002(3)(a), (b). Pursuant to this authority, ISP has promulgated administrative "Rules Governing Alcohol Testing." See Idaho Administrative Code (IDAPA) 11.03.01, *et seq.* Relevant to this appeal is IDAPA 11.03.01.14.03, which governs the administration of breath alcohol testing. Specifically, the rule provides:

03. Administration. Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures.

IDAPA 11.03.01.14.03. Pursuant to its plain language – and consistent with the requirements of I.C. §§ 18-8002A and 18-8004(4) – this rule leaves to ISP the task of developing standards for the administration of breath tests and of issuing such standards "in the form of analytical methods and standard operating procedures." Nowhere in this rule or in the legislative mandate of I.C. §§ 18-

8002A and 18-8004(4) is there any requirement that the SOPs themselves be established as rules in compliance with the IAPA.

On appeal, Haynes does not challenge the validity of IDAPA 11.03.01.14.03 or contend that that rule, which expressly authorizes ISP to establish methods for breath testing and issue them in the form of SOPs, was improperly promulgated. Instead, she argues that the SOPs themselves meet the legal definition of an agency "rule" and, therefore, compliance with the formal rulemaking requirements of the IAPA was required. (Appellant's brief, pp.25-31.) For the reasons set forth in Sections III.D.1 and III.D.2, *supra*, this Court should decline to entertain the merits of Haynes' argument. Even if this Court does consider Haynes' challenge to the validity of ISP's action in adopting the SOPs without engaging in formal rulemaking beyond that which occurred in adopting IDAPA 11.03.01.14.03, the challenge fails because the SOPs are not agency "rules" under the applicable law.

An agency action is a rule only where the action in question meets all of six characteristics. Asarco, Inc. v. State, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). Those characteristics include that the action in question "prescribes a legal standard or directive not otherwise provided by the enabling statute," "expresses agency policy not previously expressed," and "is an interpretation of law or general policy." Id.; see also I.C. § 67-5201(19) (definition of "Rule"). Where an agency merely carries forth its assigned task without creating additional legal requirements or interpreting law or general policy it does not create rules subject to the procedures of the IAPA. See Sons and Daughters of

Idaho, Inc. v. Idaho Lottery Comm'n., 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 (2006) (Gaming Update not a rule where it did not prescribe a legal standard but merely explained existing rules); Idaho State Tax Comm'n v. Beacom, 131 Idaho 569, 570-72, 961 P.2d 660, 661-63 (1998) (adoption of tax form to carry out required function of self-reporting taxes not rulemaking function).

Applying the above principles, the Idaho Court of Appeals has already concluded that the rulemaking requirements of the IAPA do "*not* apply when the Idaho state police approves the methods for determining an individual's alcohol concentration." State v. Alford, 139 Idaho 595, 597, 83 P.3d 139, 141 (Ct. App. 2004) (emphasis added). In Alford, the defendant sought to exclude his BAC test result on the basis that ISP did not comply with the rulemaking requirements of the IAPA when it approved the use of the Alco-Sensor III, the breath-testing device used in Alford's case. Id. at 597-98, 83 P.3d at 141-42. Citing the characteristics of agency rules identified by the Idaho Supreme Court in Asarco, *supra*, the Court of Appeals determined "the Idaho state police action approving the use of the Alco-Sensor III was not rulemaking" because it neither prescribed any new legal standard or agency policy nor interpreted any law. Id. The court reasoned:

The DUI statute already prescribes the legal standard limiting an individual's alcohol concentration. Alford has failed to demonstrate that any Idaho state police policy was expressed, or that any law or policy was interpreted, by the approval of the Alco-Sensor III. Instead, the Idaho state police properly carried out a statutory duty to authorize the use of certain breath-testing equipment by law enforcement agencies. In doing so, it identified equipment that it found to be suitable for such purpose. It did not create additional legal requirements. Thus, the state was not required to provide

evidence of Idaho state police compliance with IAPA in approving the use of the Alco-Sensor III.

Id. at 598, 83 P.3d at 142.

Haynes has not even cited Alford, much less attempted to distinguish it. Nor can she. Just as the approval of breath-testing equipment is not rulemaking, neither is the approval of methods to conduct such testing according to the standards of I.C. § 18-8004(4). As correctly observed by the Court of Appeals in Alford, I.C. § 18-8004 "already prescribes the legal standard limiting an individual's alcohol concentration." Alford, 139 Idaho at 598, 83 P.3d at 142. The methods for BAC testing set forth in the SOPs do not prescribe any new legal standard for DUI, nor do they interpret any existing law or policy. To the contrary, the state police action in adopting the SOPs was merely the carrying out of the legislative directive to approve methods for BAC testing pursuant to the statute. While compliance with the methods so approved is a prerequisite to the admissibility of breath test results in the absence of expert testimony, this legal requirement exists by virtue of the enabling statute itself, see I.C. § 18-8004(4), not because of any action on the part of ISP.

The methods for BAC testing set forth in the SOPs do not create any binding law or policy; they are merely procedural standards that, if followed by law enforcement, permit a BAC test result to be introduced in a criminal proceeding with the necessity of expert testimony pursuant to I.C. § 18-8004(4). Because the SOPs do not themselves prescribe or interpret any law, they are not "rules" to which the formal rulemaking requirements of the IAPA apply. Haynes' arguments to the contrary are without merit and do not establish any basis for

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	Supreme Court No. 42441
)	
Plaintiff-Appellant,)	Kootenai Co. Case No.
v.)	CR-2013-10176
)	
MARTIN EUGENE NAUERT,)	MOTION TO DISMISS
)	APPEAL
Defendant-Respondent.)	
)	
)	

COMES NOW, the State of Idaho, Plaintiff-Appellant, by and through its authorized representative, the Attorney General of the State of Idaho, and pursuant to Rule 32(b), I.A.R., hereby moves this Court for an order dismissing, with prejudice, the State's appeal in this case.

DATED this 16th day of October, 2015.


LORI A. FLEMING
Deputy Attorney General

FILED - ORIGINAL
OCT 16 2015
Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 16th day of October, 2015, served a true and correct copy of the attached MOTION TO DISMISS APPEAL by placing the copy in the United States mail, postage prepaid, addressed to:

JAY LOGSDON
Kootenai County Public Defender's Office
P.O. Box 9000
Coeur d'Alene, ID 83816


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