7-29-2011

Fuchs v. Idaho State Police Clerk's Record Dckt. 38714

LAW CLERK IN THE Vol 1 of 2

SUPREME COURT

OF THE

STATE OF IDAHO

Daniel S. Fuchs, Licensee, dba Aubrey's House of Ale,

Petitioner-Respondent,

vs.

Idaho State Police, Alcohol Beverage Control,
Respondent.

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

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38714

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL S. FUCHS, Licensee, dba Aubrey's House of Ale,	)	
Appellant/Petitioner	)	Kootenai County
v	)	CV 2010-5579
Idaho State Police, Alcohol Beverage Control	)	Supreme Court 38714-2011
Defendants-Respondent.	)	

CLERK'S RECORD ON APPEAL

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Daniel S Fuchs vs. Idaho State Police

Date	Code	User		Judge
7/1/2010	NCOC	LEU	New Case Filed - Other Claims	Lansing L. Haynes
		LEU	Filing: L3 - Appeal or petition for judicial review or cross appeal or cross-petition from commission, board, or body to district court Paid by: Brian Donesley Receipt number: 0028781 Dated: 7/1/2010 Amount: $88.00 (Check) For: Fuchs, Daniel S (plaintiff)	Lansing L. Haynes
8/17/2010	FILE	HUFFMAN	New File Created **********2 Expando ********** Exhibits Volume 1 of 1	Lansing L. Haynes
	FILE	HUFFMAN	New File Created**********3 Expando********** Exhibits Volume 1 of 3	Lansing L. Haynes
8/18/2010	MISC	HUFFMAN	Agency Record	Lansing L. Haynes
9/16/2010	NOTC	ROSENBUSCH	Notice of Non-Objection to Appellant's Motion for Order Governing Judicial Review	Lansing L. Haynes
	MOTN	ROSENBUSCH	Motion for Order Governing Judicial Review	Lansing L. Haynes
9/20/2010	HRSC	SVERDSTEN	Hearing Scheduled (Oral Argument on Appeal 01/05/2011 03:30 PM)	Lansing L. Haynes
9/27/2010	ORDR	SVERDSTEN	Order for Hearing and Setting of Briefing Schedule on Administrative Appeal	Lansing L. Haynes
10/15/2010	BRFA	HUFFMAN	Brief Of Appellant In Support Of Petition For Judicial Review	Lansing L. Haynes
11/8/2010	RBRF	ROSENBUSCH	Respondent's Brief in Opposition for Judicial Review	Lansing L. Haynes
11/26/2010	BRIE	LISONBEE	Appellant fuchs' Brief In Support Of Petition For Judicial Review	Lansing L. Haynes
1/5/2011	DCHH	SVERDSTEN	Hearing result for Oral Argument on Appeal held on 01/05/2011 03:30 PM: District Court Hearing Held Taken Under Advisement Court Reporter: BYRL CINNAMON Number of Transcript Pages for this hearing estimated: DA-STEPHANIE ALTIG APPEARING TELEPHONICALLY 208-884-7051	Lansing L. Haynes
1/6/2011	MOTN	LEU	Appllant/Petitioner's Motion To Augment Argument with Supplemental Brief: IAR34(f)(2)	Lansing L. Haynes
/27/2011	MEML	BAXLEY	Respondent's Memorandum Of Law In Support Of Application Of Duncan v State Board Of Accountancy	Lansing L. Haynes
	BRIE	BAXLEY	Supplemental Brief (Appellant)	Lansing L. Haynes
/10/2011	FJDE	SVERDSTEN	Decision on Appeal	Lansing L. Haynes
	STAT	SVERDSTEN	Case status changed: Closed	Lansing L. Haynes
/11/2011		SREED	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Brian Donesley Receipt number: 0010463 Dated: 3/11/2011 Amount: $101.00 (Check) For: Fuchs, Daniel S (plaintiff)	Lansing L. Haynes
	BNDC	SREED	Bond Posted - Cash (Receipt 10465 Dated 3/11/2011 for 100.00)	Lansing L. Haynes

Daniel S Fuchs vs. Idaho State Police

Date	Code	User		Judge
3/11/2011	STAT	SREED	Case status changed: Closed pending clerk action	Lansing L. Haynes
	APDC	SREED	Appeal Filed In District Court	Lansing L. Haynes
	NOTC	SREED	Notice of Appeal - Brian Donesley OBO Petitioner	Lansing L. Haynes
5/4/2011	NOTC	RICKARD	Notice Of Transcript Lodged	Lansing L. Haynes

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STATE OF IDAHO ss
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE,	**Case No.** CV10-5579
Appellant/Petitioner,	**NOTICE OF APPEAL/PETITION FOR JUDICIAL REVIEW**
v.	
IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	
Respondent.	

TO: THE ABOVE NAMED RESPONDENT, ITS ATTORNEYS, AND THE DIRECTOR OF THE IDAHO STATE POLICE.

NOTICE IS HEREBY GIVEN THAT Appellant/Petitioner, DANIEL S. FUCHS, by and through his attorney of record, BRIAN DONESLEY, hereby appeals and petitions the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai for judicial review of the *Director's Final Order* issued by the Director of the Idaho State Police on June 8, 2010 in *Idaho State Police, Alcohol Beverage Control v. Daniel S. Fuchs, Licensee, dba,*

ORIGINAL

Aubrey's House of Ale, Hearing No. 08ABC-COM112, License No. 7323.0, Premise No. K-7323.

This Petition for Judicial Review is commenced pursuant to and in accordance with the Idaho Administrative Procedures Act, I.C. § 67- 5201, *et seq.*

I.
JURISDICTION AND PROCEEDINGS BELOW

1. Judicial review is sought, pursuant to I.C. § 67-5270 and Idaho Rule of Civil Procedure 84, from the *Director's Final Order* of the Director of the Idaho State Police issued on June 8, 2010,

2. This Petition is taken to the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai. The District Court has statutory authority, pursuant to I.C. § 67-5279, to affirm the Director's Final Order or to set aside and remand the matter upon the grounds that the Final Order is:

a) In violation of constitutional and statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure,

(d) Not supported by substantial evidence on the record as a whole; or

(e) Arbitrary, capricious and an abuse of discretion.

3. On October 23, 2008, Idaho State Police, Alcohol Beverage Control ("ISP/ABC"), filed a Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License against Daniel S. Fuchs, Licensee, dba, Aubrey's House of Ale. On November 18, 2009, the Hearing Officer, Michael E. Kelley, presided over a hearing on cross motions for summary judgment. On December 24, 2009, the Hearing Officer entered his *Preliminary Order on Motions for Summary Judgment and Order on Complainant's Renewed Motion for Protective*

Order, finding that there was no genuine material issue of disputed facts and that as a matter of law Fuchs was entitled to summary judgment. On February 2, 2010, ISP/ABC filed its Petition for Review with the Director of the Idaho State Police. The oral argument before the Hearing Officer was taken by stenographic means and has not yet been transcribed. There was no oral argument before the Director. All records of this administrative proceeding are in the possession of the Director of the Idaho State Police, 700 S. Stratford Drive, Meridian Idaho, 83642-6202.

II.

STATEMENT OF ISSUES FOR JUDICIAL REVIEW

Petitioner seeks judicial review of all issues as provided for in I.C. § 67-5279, including, but not limited to each and every of the following:

1. Whether the Director erred as a matter of law, where, having determined that IDAPA 11.05.01.010.03 was ambiguous a matter of law, he determined that the ambiguity be construed in favor of ISP/ABC, the agency that drafted the rule;

   (a) The Director erred because IDAPA 11.05.01.010.03 was unambiguous as a matter of law and should have been interpreted and enforced in a manner consistent with long-time agency practice; or,

   (b) Alternatively, if IDAPA 11.05.01.010.03 is determined to be ambiguous, the rule is void and/or all ambiguities must be construed against the agency that drafted and promulgated the rule;

2. Whether the administrative actions of ISP/ABC violated the Idaho Constitution, Article III, Section 24 and other Idaho and United States constitutional provisions and exceeded the authority granted to it under I.C. § 23-908 (4) and other applicable law;

3. Whether the Director erred, based on the grounds that the administrative actions of ABC were based upon unlawful procedure. ABC's new requirement that licensees make

multiple hourly actual sales within the first six months was a new "Rule" as defined by I.C. § 67-5201 (19). This new rule was implemented, but not properly promulgated, in violation of IDAPA, I.C. §§ 67-5206-5231 and other applicable law;

4. Whether the Director erred based on the grounds that ABC's administrative actions were arbitrary and unreasonable exercises of police power in violation of the United States and Idaho Constitutions;

5. Whether the Director erred based on the grounds that ABC was barred under the doctrine of quasi-estoppel from taking inconsistent positions where Petitioner relied on ABC's previous positions to his detriment;

6. Whether the Director erred by not setting aside the Hearing Officer's exclusion of the testimony of Petitioner's counsel and then making factual findings based upon evidence submitted by counsel;

7. Whether Petitioner is entitled to reasonable attorney's fees and costs pursuant to I.C. § 12-117, incurred in defending the administrative action filed by ISP/ABC, because ISP/ABC's pursuit of forfeiture or revocation of his retail alcohol beverage license had no reasonable basis in law or fact;

8. Whether the administrative actions were otherwise:

(a) In violation of constitutional and/or statutory provisions;

(b) In excess of the statutory authority of the agency;

(c) Made upon unlawful procedure;

(d) Not supported by substantial evidence on the record as a whole; and/or

(e) Arbitrary, capricious or an abuse of discretion.

III.
CONCLUSION

WHEREFORE, it is respectfully requested that this Court set aside and remand the Final Order issued by the Director of the Idaho State Police denying attorneys fees and costs based upon the grounds that:

1) IDAPA 11.05.01.010.03 is unambiguous as a matter of law and does not require that new liquor licensees to make actual sales of liquor by the drink in the first six months; or,

2) Alternatively, that IDAPA 11.05.01.010.03 is ambiguous as a matter of law and therefore is void or must be construed against the agency that drafted and promulgated it;

3) That ABC's new interpretation of IDAPA 11.05.01.010.03 violates the Idaho Constitution, Article III, Section 24 and exceeds the authority granted to it under I.C. § 23-908 (4);

4) That ABC is prohibited under the doctrine of quasi-estoppel from taking inconsistent positions to Petitioner's detriment;

5) That ABC's new interpretation of IDAPA 11.05.01.010.03 was a new rule not promulgated in accordance with and in violation of I.C. § 67-5201 *et seq.*;

6) That ABC's enforcement of IDAPA 11.05.01.010.03 is an arbitrary an unreasonable exercise of police power;

7) That the Director erred by not setting aside the Hearing Officer's exclusion of the testimony of Petitioner's counsel and then making factual findings based upon evidence submitted by counsel;

8) That Petitioner be awarded attorney fees and costs pursuant to the provisions of Idaho law including, but not limited to, Idaho Code §§ 12-117, 121 and Rule 54(e) (1), I.R.C.P, and other applicable law;

9) Appellant requests a reporter's transcript and the full evidentiary record, including all exhibits, of the hearing on the cross motions for summary judgment before the Hearing Officer;

10) Appellant requests that the following documents be included in the agency record: all documents filed with the Hearing Officer associated with the hearing on the cross motions for summary judgment and all documents filed with the Director of the Idaho State Police associated with the Petition for Review filed by Idaho State Police, Alcohol Beverage Control on February 2, 2010;

11) I hereby certify:

(a) That service of this Appeal/Petition for Judicial Review has been made upon the Director of the Idaho State Police;

(b) That the Secretary/Clerk of the Director of the Idaho State Police shall be paid the estimated fee for preparation of the transcript within the time required by rule after notice to Appellant of the amount of the estimated fee;

(c) That the Secretary/Clerk of the Director of the Idaho State Police shall be paid the estimated fee for preparation of the record within the time required by rule after notice to Appellant of the amount of the estimated fee.

DATED this 22 day of June, 2010.

Brian Donesley

Brian Donesley
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of June, 2010, I caused an accurate copy of the foregoing document to be delivered as noted below to:

Lawrence G. Wasden, Attorney General Stephanie A. Altig, Deputy Attorney General Idaho State Police 700 S. Stratford Drive Meridian, Idaho 83642-6202 *Facsimile: 208-884-7228*	U.S. Mail Hand Delivery Facsimile	X X
Lt. Robert Clements, Bureau Manager Alcohol Beverage Control 700 S. Stratford Drive Meridian, Idaho 83642-6202 *Facsimile: 208-884-7096*	U.S. Mail Hand Delivery Facsimile	X X
Colonel G. Jerry Russell Director, Idaho State Police 700 S. Stratford Drive Meridian, Idaho 83642-6202	U.S. Mail Hand Delivery Facsimile	X

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE, **Appellant/Petitioner,** **v.** **IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,** **Respondent.**	**Case No. CV-2010-0005579**

APPELLANT'S BRIEF

IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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I.
INTRODUCTION

This is a Petition for Judicial Review of a Final Order by the Director of the Idaho State Police ("ISP"), wherein the Director denied Petitioner Daniel S. Fuchs' ("Fuchs") motion for attorney fees pursuant to I.C.§12-117. The Director denied Fuchs' fees, even though Fuchs was the prevailing party in the administrative proceeding, and Alcohol Beverage Control Bureau of Idaho State Police ("ISPABC") pursued the action without a reasonable basis in fact or law.[1] In fact, though Fuchs obtained the result he sought in the action, dismissal of the forfeiture and/or revocation proceedings with no sanction, the Director ordered that Fuchs was not the prevailing party. The Director's Final Order was a clear effort to avoid an award of attorney fees. But his decision only compounded the errors of his agency in this matter and further underscores that fees should be awarded to Fuchs.

The administrative proceeding centered on the interpretation of I.C. § 23-908 (4) and IDAPA 11.05.01.010.03 ("Rule 10.03" or the "New Licenses rule"). I.C. § 23-908 (4) requires new liquor licensees, who have been recently issued licenses off of a priority list, to put the license into "actual use" and that the license remain in "actual use" for the first six months after the license was issued. Rule 10.03, an administrative rule promulgated by ABC in 1993, provides that the "actual use" requirement of I.C. § 23-908 (4) is satisfied, if the licensee makes "actual sales" of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week." For fifteen (15) years, and for accepted public policy reasons, ISP interpreted the rule judiciously and liberally, yet in a manner consistent with public policy. However, in 2008, ABC filed the administrative complaint against Fuchs, claiming that he did not make a

[1] ABC, a bureau within the Department of Idaho State Police, has been delegated by the Director, the "authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code." IDAPA 11.05.01.011.02. The Director retains "supervisory authority for alcoholic beverage licensing." *Id.*

sufficient number of "actual sales." During the course of the proceedings, ABC declared that the rule strictly required multiple hourly sales for eight (8) hours a day, six (6) days a week.

The Director, below, ruled that Rule 10.03 was ambiguous, capable of being interpreted three ways. The Director then proceeded to announce his new interpretation of Rule 10.03, disregarding fifteen (15) years of prior agency enforcement of the rule, rejecting ABC's previously unquestioned, historial interpretation, and rejecting the Hearing Officer's interpretation. The Director then declared that Fuchs had violated Rule 10.03. But he did not sanction Fuchs because of the "confusion" regarding the rule's interpretation. He also examined other issues in the case by dicta, stating that ISP is not barred by quasi-estoppel, did not engage in improper rulemaking, and did not engage in an unreasonable exercise of police power. The Director denied fees to either party.

The Director erred by not awarding fees to Fuchs under I.C. § 12-117. Fuchs was the prevailing party, as he obtained the result he sought, the Director holding that Rule 10.03 was ambiguous, and dismissal of the administrative action.

Further, ISP's actions, throughout these proceedings, have been without reasonable basis in fact or law. The interpretation of Rule 10.03 through this case has been a moving target. There have been five separate agency interpretations of the rule presented on the record since this proceeding began.

Fuchs should not bear the financial burden of correcting the State's mistakes that never should have been made. Alternatively, if this Court deems it necessary to reach the merits, Rule 10.03 does not require "actual sales." The rule is ambiguous. All ambiguities must be construed against the agency that drafted it. Further, ISP is barred by quasi-estoppel from taking such inconsistent positions. And it engaged in improper rulemaking. Moreover, it has engaged in an

unreasonable exercise of police power.

This Court should reverse the Director's Final Order and award attorney fees to Fuchs pursuant to I.C. § 12-117.

II.
STATEMENT OF UNDISPUTED FACTS[2]

In 1980, the Idaho Legislature amended the Idaho Code, requiring new liquor licensees put their licenses into "actual use" at the time of issuance and keep them in "use" for at least six (6) months. I.C. § 23-908 (4).

In 1993, ISP/ABC promulgated IDAPA 11.05.01.010.03 ("Rule 10.03" or "New Licenses Rule"), by which a new licensee may satisfy the "actual use" requirements of I.C. § 23-908 (4). This rule states in relevant part:

> The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.
>
> IDAPA 11.05.01.010.03

In 2003, ISP/ABC offered four new licenses to Fuchs in Nampa, Idaho. (Fuchs Aff.; **Exhibit R-DF-1**). Fuchs was told by ISP/ABC that he was not required to make actual sales. But he was required to have liquor available for sale during at least eight (8) hours a day, no fewer than six (6) days a week. (Denise Rogers Aff. at ¶ 4). Subsequently, Fuchs was issued the four new licenses. (Fuchs Aff.; **Exhibits 2, 3, 4, 5**). Fuchs made fewer sales at these premises than is at issue here. (Donesley Aff. **Exhibit R-4**). Although ISP/ABC was aware of how many sales Fuchs made at each of the four licensed premises, ISP/ABC did not issue an administrative notice violation to Fuchs alleging that he failed to make "actual sales." (**Exhibit R-4**; Fuchs

[2] The Statement of Undisputed Facts contained herein is a brief summary. For a complete recitation, Fuchs refers this Court to the Statement of Undisputed Facts set forth in Respondent's Brief on Review by Agency Head, pp. 6-15.

Aff., **Exhibit R-DF-6**).

On May 19, 2008, Fuchs applied for a state liquor license for the City of Coeur d'Alene. (Fuchs Aff.; **Exhibit R-DF-8**). On June 6, 2008, ISP/ABC issued an Idaho Retail Alcohol Beverage License to Fuchs. (Fuchs Aff.; **Exhibit R-DF-16**).

Fuchs leased space at 2065 West Riverstone Drive, # 207 in Coeur d'Alene and obtained all necessary licenses and permits required by other state and local agencies. (Fuchs Aff.; **Exhibits R-DF-7, 10-12**). Fuchs employed staff and obtained unemployment and workers compensation insurance. (Fuchs Aff.; **Exhibits R-DF-13, 14, 15**). Since the license was issued, Fuchs' premise has been named Aubrey's House of Ale ("Aubrey's), and it has remained open each Monday through Saturday, from 10:00 am to 6:00 pm. (Fuchs Aff. at ¶ 13).

On September 16, 2008, Lt. Clements, ABC Bureau Chief, conducted an unannounced inspection of Aubrey's. Lt. Clements met with Ruth Purvis, Fuchs' employee. He observed no customers. Purvis showed Lt. Clements the liquor and beer supply which was available for sale to the public.

Upon request by Lt. Clements, Fuchs produced copies of sales records for Aubrey's for the months of June 2008 through September 2008. Aubrey's had generated sales for each month that it has been open. Fuchs reported sales of $598.11 to the Idaho Tax Commission for the period from July 1, 2008 to September 30, 2008 for Aubrey's. Fuchs Aff.; **Exhibits R-DF-17-18**).

On October 14, 2008, ISP/ABC issued an administrative notice violation alleging the license was not properly being used. (Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License).

III.
PRIOR PROCEEDINGS

1. **Proceedings before the Hearing Officer.**

On October 23, 2008, ABC filed its Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License. Following extensive discovery, the parties filed cross motions for summary judgment on October 9, 2009. Upon oral argument, the Hearing Officer issued his Preliminary Order on December 24, 2009, granting summary judgment to Fuchs.

The Hearing Officer ruled that IDAPA 11.05.01.010.03 unambiguously required a new licensee to make actual sales of liquor by the drink sometime while in operation for eight (8) hours a day/no fewer than six (6) days a week:

> The rule promulgated by the Complainant to satisfy the "actual use" language of Idaho Code § 23-908 (4) unequivocally states that the requirement of Idaho Code § 23-908 (4) that a new license be placed into actual use by a licensee and remain used for six consecutive months is satisfied if the licensee makes actual sale of liquor by the drink during at least eight hours per day and no fewer that six days per week. Contrary to the emphasis placed on other phrases and words within the regulation by the parties, it would appear that applying the plain, obvious and literal meaning to the word "during" would satisfy any inquiry into whether IDAPA 11.05.01.010.03 is ambiguous or unambiguous.
>
> *The definition of "during," inter alia, is "throughout the duration of." The definition of "duration" is "the time during which something exists or lasts." Thus, it would appear a licensee would be required to make actual sales of liquor by the drink sometime while it is in operation for eight hours a day/no fewer than six days a week.* Applying this interpretation to the undisputed facts, the evidence shows that while sales of liquor by the glass by the Respondent at Aubrey's are spotty at best, sales have nevertheless taken place. (underline in original, italics added).

Preliminary Order on Motions for Summary Judgment and Order on Complainant' Renewed Motion for Protective Order at 15-16 ("Preliminary Order").

The Hearing Officer also determined that ABC was barred under the doctrine of quasi-estoppel, since "the Complainant is now taking inconsistent positions of its past practices

regarding requirements of new liquor licensees." Preliminary Order at 18.

Fuchs also had moved for summary judgment on whether ABC's new policy was improper rulemaking and an arbitrary and unreasonable exercise of police power. Notwithstanding, the Hearing Officer held that, because his ruling on the interpretation of the rule was dispositive, the remaining issues "were moot." Preliminary Order at 19. n.6.

The Hearing Officer did not award attorney fees to Fuchs, because, based upon the law at the time, he had no authority to do so:

> Both parties have sought attorney fees in this matter pursuant to Idaho Code § 12-117 and other applicable statutes and rules. Under Idaho Code § 12-117 only the court and not an administrative officer or agency can award attorney fees to a prevailing party. *See, Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415 (2009). As such, no attorney fees are awarded.
>
> Preliminary Order at 19.

In *Rammell*, the Idaho Supreme Court overruled its previous decisions and held, as the Hearing Officer observed, that only courts were authorized to award attorney fees under I.C.§ 12-117 On March 3, 2010, the Idaho Legislature amended I.C. § 12-117 to expressly provide that administrative officers and agencies could award attorney fees. House Bill 421, SIXTIETH LEGISLATURE, SECOND REGULAR SESSION, 2010. It further provided that the legislation would have retroactive effect: "this act shall be in full force and effect on and after its passage and approval, and retroactively to May 31, 2009 and shall apply to all cases filed and pending as of June 1, 2009." Section 2, House Bill 421, SIXTIETH LEGISLATURE, SECOND REGULAR SESSION, 2010.

2. **ABC's Petition for Review by Agency Head.**

ABC appealed the Hearing Officer's Decision to the Director of the Idaho State Police. On June 8, 2010, the Director issued his Final Order, declaring that Rule 10.03 was ambiguous,

and announcing his own interpretation:

> The Hearing Officer's Interpretation of Rule 10.03 is clearly incorrect. However, this does not automatically dictate that ABC's interpretation is correct. Examining the language of the rule, reasonable minds can reach different conclusions regarding its precise meaning. In other words, it is ambiguous. The rule can reasonably be read one (1) of three (3) ways. A licensee must:
>
> a. sell at least one (1) glass of liquor every hour for at least eight (8) hours, six (6) days or more a week. (This would require at least forty-eight) 48 sales a week and is how ABC is apparently interpreting the rule); or
>
> b. sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at lest eight (8) hours per day, six (6) days or more a week. (This would require at least (6) sales a week); or
>
> c. sell at least one (1) glass of liquor sometime during a period of time during which the establishment is open at least eight hours a day, at least six (6) days a week (this would require only (1) sale a week).
>
> The proper interpretation of IDAPA 11.05.01.010.03 is that a new licensee must sell at least one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, sis (6) days a week.

Director's Final Order at 10-11.

Additionally, the Director held that ABC was not barred from taking inconsistent positions under quasi-estoppel, stating incongruously that "there is no question that Fuchs violated Rule 10.03." Director's Final Order at 12.

Further, the Director ruled that ABC did not engage in improper rulemaking, because "ABC's notifications to Fuchs (including the interpretation adopted by the Director and stated in this Final Decision) qualify as written statements from the agency to the licensee pertaining to how the agency is interpreting Rule 10.03." Director's Final Order at 15. He held that ABC's actions were not arbitrary and unreasonable, because Rule 10.03 requires "actual sales," and "the only thing ambiguous about the rule was whether those actual sales have to be hourly, daily or

weekly." Id. at 16.

Despite such curious pronouncements, the Director did not order revocation or forfeiture of Fuchs' license, though, ostensibly, he had ruled against Fuchs on each issue:

> The record shows that Fuchs violated IDAPA 11.05.01.010.03 by failing to make the necessary sales on numerous days and even several entire weeks during the relevant six (6) month period. However, given the confusion over the proper interpretation of the rule and its misapplication by both parties and the Hearing Officer, Fuchs will not be sanctioned for this violation, and the clarification of the proper interpretation of IDAPA 11.05.01.010.03 set forth in this Final Order shall have prospective effect only.

Id. at 18.

The Director refused to award attorney fees to either party, stating that neither party prevailed and that Fuchs had not acted without a reasonable basis in fact or law.

> Under Idaho Code § 12-117, an administrative agency shall award attorney fees to the prevailing party, but only when the losing party "acted without a reasonable basis in fact or law." In this case, the Director has reversed the Hearing Officer's Preliminary Order and found that Fuchs violated the applicable rule. Therefore, Fuchs is not the prevailing party and is not eligible for attorney fees under Section 12-117. However, neither is ABC. While the Director has concluded that Fuchs violated IDAPA 11.05.01.010.03, it cannot be said that he acted without a reasonable basis in fact or law.
>
> The rule at issue in this case is ambiguous. Prior ISP administrators, the Hearing Officer, and both parties misinterpreted what the rule requires. Although Fuchs was properly put on advanced notice that actual sales were necessary, there was still considerable confusion over the exact details of those sales.

Id. at 17.

On July 1, 2010, Fuchs filed a timely Notice of Appeal/Petition for Judicial Review with this Court seeking costs and attorney fees..

IV.
STANDARD OF REVIEW

An agency's action may be set aside if the agency's findings, conclusions, or decisions (a) violate constitutional or statutory provisions; (b) exceed the agency's statutory authority; (c) are

made upon unlawful procedure; (d) are not supported by substantial evidence on the record as a whole; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). In addition, Idaho courts will affirm an agency action unless a substantial right of the appellant has been prejudiced. I.C. § 67-5279(4).

An award of attorney fees under I.C. § 12-117 has been distilled into a two-part test: fees must be awarded, if (1) the Court finds in favor of the person, and (2) the agency acted without a reasonable basis in fact or law. *Reardon v. City of Burley,* 140 Idaho 115, 118, (2004).

V.
THIS COURT SHOULD OVERRULE THE DIRECTOR'S DENIAL OF COSTS AND ATTORNEY FEES AND ORDER COSTS AND ATTORNEY FEES TO FUCHS UNDER I.C. § 12-117. FUCHS IS THE PREVAILING PARTY. THE RULE WAS FOUND TO BE AMBIGUOUS, HENCE, VOID. THIS RULING CONTROLS AND MAKES OTHER ISSUES MOOT, UNLESS THE COURT CONSIDERS REVIEW OF SUCH ISSUES NECESSARY TO DETERMINE PREVAILING PARTY OR REASONABLENESS OF ISP'S ACTIONS ON THE ISSUE APPEALED, COSTS AND ATTORNEY FEES.

A. Introduction.

Attorney fees are mandatory under I.C. § 12-117, if the non-prevailing party pursued or defended the action without a reasonable basis in law or fact. For fifteen (15) years, Rule 10.03 has been simply a clarification that, if a new licensee made actual sales eight (8) hours a day, no fewer than six (6) days a week, that was one way the new licensee could demonstrate compliance with the "actual use" requirement of I.C. § 23-908 (4). The Director, however, departed from the many years of agency enforcement, in declaring that Rule 10.03 was ambiguous and could be interpreted three different ways. He announced a novel interpretation: one glass of liquor shall be required to be sold during each day the premises is open, eight (8) hours a day, six (6) days a week. This new interpretation is contrary to long-time agency practices, constituted improper rulemaking, and was an unreasonable exercise of police power. This was the agency's own rule.

If ISP knew the rule to be ambiguous, it had an obligation to promulgate a rule amendment properly. This was an agency mistake that never should have been made. As ISP's actions have been without a reasonable basis in law or fact, this Court should award attorney fees pursuant to I.C. § 12-117.

B. Fuchs is the prevailing party.

The Director ruled that the rule was ambiguous, as contended by Fuchs from the beginning. I.C. § 12-117 (1) provides that a prevailing party shall be awarded attorney fees, where the nonprevailing party acted without a reasonable basis in fact or law:

> Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.
>
> I.C. § 12-117

In *Fischer v. City of* Ketchum, 141 Idaho 349, 355-56 (2005), the Idaho Supreme Court stated that the "statute is not discretionary but provides that the court must award attorney fees, where a state agency did not act with a reasonable basis in fact or law in a proceeding involving a person who prevails in the action.

Though the Director dismissed the revocation proceeding, he found that Fuchs was the non-prevailing party:

> Under the totality of the circumstances, it would not be entirely correct to say that ABC is the prevailing party or that Fuchs acted without a reasonable basis in fact or law. Therefore, the Director declines to award attorney fees to either party.
>
> Director's Final Order at 18.

However, Rule 54 (d) (1) (B), I.R.C.P., provides that, when determining the "prevailing party," courts consider the final result of the action or the relief sought:

> In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.
>
> I.R.C.P. 54 (d) (1) (B)

In *Chadderdon v. King*, 104 Idaho 406, 411 (1983), the Court of Appeals explained that there are three factors to be considered when determining which party, if any, prevailed: (1) the final judgment or the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and the extent to which each of the parties prevailed on each of the claims or issues. In *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc*, 134 Idaho 259 (Ct. App. 2000), *abrogated on other grounds*, the Court explained that the defendant was the prevailing party because "the result obtained in this case was a dismissal of Daisy's action with prejudice, the most favorable outcome that could possibly be achieved by Paintball as a defendant." *Id.* at 262. As in that case, Fuchs received the "most favorable outcome that could possibly be achieved," a dismissal of the administrative proceeding. While the Director decided a number of issues before him, ruling that quasi-estoppel did not apply, there was no improper rulemaking, and his department did not engage in an unreasonable exercise of police power, his rulings on these issues are dicta, as he ruled that Rule 10.03 was ambiguous, hence void.

Moreover, the Director ruled against Fuchs on these issues in a clear effort to avoid attorney fees under I.C. § 12-117. By releasing Fuchs' license from the administrative sanction, Fuchs prevailed. Yet, since any award of attorney fees would have been paid out of ISP funds, the Director fashioned a Final Order that suggested that Fuchs did not prevail. One of the

purposes of judicial review mandated by I.C. §§ 67-5270 and 67-5279 is to guard against bias by an administrative officer. This Court is the first adjudicator in a position to rule on attorney fees without bias. The Hearing Officer did not have authority to award attorney fees, because when he issued his Preliminary Order, administrative officers or agencies had no authority to award fees under I.C. § 12-117. While the law had changed by the time the Director reviewed the issue, I.C. § 12-117 expressly providing that authority, the Director's Final Order evidences bias because payment of costs would be out of his department's funds. In *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1 (1989), a liquor licensee challenged the constitutionality of the procedure, whereby the hearing examiners were chosen from a list maintained by the Department of Law Enforcement (predecessor to ISP) and were compensated by the Department on a case by case basis.[3] The Idaho Supreme Court found that the system provided for a check on any potential bias. "The potential for bias is cured by the fact that the parties have the right to judicial appeal of any administrative decision manifesting an abuse of discretion, arbitrary and capricious disposition, or findings which are clearly erroneous in light of the evidence presented at the hearing. *Id.* at 4. This Court's review of the Director's Final Order provides Fuchs that protection from the Director's "arbitrary and capricious disposition" of this matter.

Since Fuchs obtained the result he sought in defending this action, he is the "prevailing party."

[3] Pierandozzi had argued that the system was analogous to the former Justice of the Peace system condemned by the U.S. Supreme Court in *Tumey v. Ohio*, 273 U.S. 510 (1927) where the Court held that due process of law was denied to one tried before a judicial officer whose sole source of income was the fines collected from the accused. *Id.* at 4.

C. ISP has acted "without a reasonable basis in fact or law."

From the date the administrative complaint was filed, ISP's actions have been without a reasonable basis in fact or law. With this case, ABC chose to ignore fifteen (15) years of agency interpretation of Rue 10.03 and required Fuchs to make multiple, hourly sale of alcohol. This new expression of agency policy violated the Idaho Constitution, exceeded statutory authority, was improper rulemaking, and constituted an unreasonable exercise of police power. The Director only compounded ABC's errors. The Director declared that the rule promulgated by his agency was ambiguous and could be interpreted three ways, not including the manner it was previously interpreted by ISP for many years. Fuchs has been put in the position of bearing the financial burden of correcting ISP's mistakes which never should have been made. This Court should award attorney fees under I.C. § 12-117.

In *Bogner v. Dep't of Revenue and Taxation*. 107 Idaho 854, 859 (1984), the Idaho Supreme Court explained that "the purpose of that statute is two-fold: (1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never had made." In *Fischer v. City of Ketchum*, 141 Idaho 349, 356-357 (2005), the Court explained further that "[t]he statute is not discretionary but provides that the court must award attorney fees where a state agency did not act with a reasonable basis in fact or law in a proceeding." The Court has repeatedly held that one of the purposes behind the statute is to remedy situations where persons have borne the financial costs resulting from groundless and arbitrary agency actions:

> The purpose of I.C. § 12-117 is two-fold: First, it serves "as a deterrent to groundless or arbitrary agency action; and [second, it provides] a remedy for persons who have borne unfair and unjustified financial burdens defending

against groundless charges or attempting to correct mistakes agencies never should have made.

Reardon v. City of Burley, 140 Idaho 115, 118 (2004) (*quoting Rincover v. State, Dept. of Fin., Sec. Bureau*, 132 Idaho 547, 548-49 (1999) (quoting *Bogner v. State Dep't of Revenue and Taxation*, 107 Idaho 854, 859 (1984)). Similarly, in *Lane Ranch Partnership, v. City of Sun Valley*, 145 Idaho 87 (2007), the Court held that a government entity's "actions are considered arbitrary and capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles." *Id.* at 90.

Here, for many years, ISP did not require new licensees to make "actual sales" of liquor-by-the drink.[4] ABC ignored this long-time agency interpretation and enforcement of Rule 10.03 in filing against Fuchs its administrative proceeding, requiring multiple hourly sales eight (8) hours a day, six (6) days a week. From the filing of this administrative action, ABC has acted without a reasonable basis in fact or law. The Director compounded this unreasonableness, when he rejected long-time agency interpretation and enforcement and declared that the Rule was ambiguous, capable of being interpreted three ways. ISP's actions have been wholly arbitrary and without "adequate determining principles."

For example, the Director admitted that Rule 10.03 is ambiguous. New interpretations of Rule 10.03 have surfaced at every stage of this proceeding. First, there was the original interpretation; that relied upon by Fuchs, based on direction given by Lt. Clements'

[4] Three past ISP administrators refused to interpret Rule 10.03 to require "actual sales" based upon public policy grounds. "Such a requirement would have been unlawful, in violation of public policy. Rankin Aff. at ¶ 4. "[S]such a requirement would be nonsensical, since, as a matter of common sense, a licensee cannot control how many people come into a licensed premise and buy drinks over any period of time." Gould Aff. at ¶ 5. "A new licensee would also satisfy the requirements of I.C. § 23-908 (4), if he or she secured a qualified premise and made liquor available at that premise, without making sales." Thompson Aff. at ¶ 5.

Administrative Assistant, that Rule 10.03 was not mandatory.[5] Second, there was the interpretation announced at Lt. Clements's deposition: multiple hourly sales, eight (8) hours a day, six (6) days a week. Third, there was the interpretation by the Hearing Officer: "actual sales of liquor sometime while [the licensee] is in operation for eight hours a day/no fewer than six days a week." Preliminary Order at 15. Fourth, there was the interpretation announced by the Director: "sell at least one (1) glass of liquor sometime during every day that the establishment is open." Director's Final Order at 11. Fifth, there was the alternate interpretation announced by the Director, but then rejected: "sell at least one (1) glass of liquor sometime during every day that the establishment is open." *Id.*at 10. Amazingly, the Director did not include the prior administrators' interpretation of Rule 10.03 even as one of his options. The Director has admitted that his agency created "confusion" by not applying Rule 10.03 consistently. Each time ISP announced a new interpretation of Rule 10.03, it demonstrated its lack of "adequate determining principles."

Moreover, this "confusion" was a mistake that never should have been made. For fifteen (15) years, ISP interpreted the rule one way. If ISP or its bureau wished to depart from this policy, it had a legal duty to amend the rule to reflect its new policy: that "actual sales" would now be required. *See, Asarco, Inc. v. State,* 138 Idaho 719 (2003).[6] Since it failed to promulgate a new rule, Fuchs only knew past agency practices and what he was told. He was told by ABC Management Assistant, Denise Rogers, and he knew from his experience with his four Nampa licenses, that alcohol sales were not required in any particular amount over any specified time frame. *See* Rogers Aff. at ¶ 4; Donesley Aff., Exhibit R-4.[7]

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[5] *See* Denise Rogers Affidavit at ¶ 4.

[6] *See, infra,* Section, VI. E., "ISP has Engaged in Improper Rulemaking."

[7] The Director opined that Fuchs knew that "actual sales" were required, because a form letter sent to new

Even though the Director conceded that the rule was ambiguous, he concluded, incredibly, that Fuchs had violated Rule 10.03. "Fuchs has failed to meet his obligation of making at least one (1) sale per day as required by the Director's interpretation of the rule." Final Order at 11. The Director fails to acknowledge that Fuchs complied with the Hearing Officer's interpretation of the rule and with the prior administrators' interpretation and historical enforcement. The Idaho Supreme Court has held that a basic rule of statutory construction is, first, to look at how an agency previously has applied a statute or rule, particularly if it has done so over a long period of time, to ascertain its meaning. The "application of the statute is an aid to construction, especially when the public relies on the application over a long period of time." *Hamilton v. Reeder Flying Services*, 135 Idaho 568, 571 (2001). Contrary to Idaho law, the Director is doing just the opposite. He is ignoring long-time agency application of a rule in favor of a new rule that he announced only in his Final Order against Fuchs.

ABC acted "without a reasonable basis in fact or law," when it ignored longstanding agency interpretation of Rule 10.03 and sought revocation or forfeiture of Fuchs' liquor license, because he did not make multiple, hourly sales of liquor eight (8) hours a day, six (6) days a week. The Director acted "without a reasonable basis in fact or law," when he declared the rule ambiguous and announced a new legal standard in the Director's Final Order. ISP's actions have been arbitrary and capricious and without any identifiable determining principles.

This Court should reverse the Directors Final Order on the issue of attorney fees and award attorney fees and costs to Fuchs pursuant to I.C. § 12-117.

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licensees' states that "actual sales" are required. Director's Final Order at 14. However, this form letter only quotes a portion of Rule 10.03, omitting the most critical word, "during," rendering it meaningless. The pertinent language was identical to that in a letter sent by ABC in 2003, when "actual sales" were not required. Furthermore, the Director, as a matter of law, cannot require compliance with a Rule that he says is ambiguous. *See, infra.*

VI.
AS TO ISSUES OTHER THAN AMBIGUITY, PREVAILING PARTY, AND REASONABLE BASIS IN FACT OR LAW, DISCUSSED ABOVE, THE COURT MAY CHOOSE TO REVIEW SUCH OTHER ISSUES. AND THE DIRECTOR'S RULINGS WERE ERRONEOUS, NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, ARBITRARY AND CAPRICIOUS, AND AN ABUSE OF DISCRETION.

A. This Court need not reach the merits, because Fuchs was the prevailing party, and ISP has acted without a reasonable basis in fact or law.

As discussed above, Fuchs was the "prevailing party," and ISP acted "without a reasonable basis in fact or law." The rule was found to be ambiguous, hence void. Consequently, if this Court reverses the Director on the issue of attorney fees, the merits of this case become moot. I.C. § 67-5279 (4), which governs the District Court's scope of review, provides, in part, that "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." Notwithstanding that the ambiguous rule is void, and every other ground alleged moot, it is respectfully argued that the void, ambiguous rule finding, which has not been appealed by either party, controls. The Court need not go further on the merits.

However, if this Court determines that it must consider the merits of the underlying case, the Director's Final Order was not based upon substantial evidence, was arbitrary and capricious, and an abuse of discretion. The administrative proceeding below should be dismissed and Fuchs awarded attorney fees and costs pursuant to I.C. § 12-117.

B. I.C. § 23-908(4) and Rule 10.03 are unambiguous and do not require that a new licensee off the lists sell liquor drinks.

Idaho Code § 23-908(4) sets forth the requirement for new licensees that each must put the license into "actual use" at the time of an issuance and remain in use for at least six (6) consecutive months or be forfeited:

> Each new *license* issued on or after July 1, 1980, *shall be placed into actual use* by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or be forfeited to the state and be eligible for issue to

> another person by the director after compliance with the provisions of section 23-907, Idaho Code. (Emphasis added.)

The Idaho Code does not define the term "actual use." I.C. § 23-908(4). Although ISP promulgated rules regarding alcohol beverage control, it did not promulgate a rule to define "actual use." Instead, ISP promulgated Rule 10.03, which sets forth one manner in which requirements of I.C. § 23-908(4), pertaining to "actual use," may be satisfied:

> The requirement of section 23-908(3), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months shall be satisfied if the licensee makes *actual sales* of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week. (Emphasis added.)

IDAPA 11.05.01.010.03.[8]

When the language of the statute or regulation is clear and unambiguous, statutory construction is unnecessary. And courts "need only determine the application of the words to the facts of the case at hand." *Porter v. Board of Trustees*, 141 Idaho 11, 14 (2004). Courts read rules the same way. "The language of the rule, like the language of a statute, should be given its plain, obvious and rational meaning. In addition, this language should be construed in a context of the rule and statute as a whole, to give effect to the rule and to the statutory language that the rule is meant to supplement." *Mason v. Donnelly Club*, 135 Idaho 581, 140 (2001).

The literal words of the IDAPA rule are clear and unambiguous. The requirement of Idaho Code § 23-908(4) is satisfied, "if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days a week" for the first six months after issuance off a priority list. There is no requirement of the number of sales per hour, or per day, or per week. There is no mandatory language, such as "must" or "shall," stating that this is

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[8] This is how Rule 10.03 appeared in 1993. In 1994, it was amended to reflect the renumbering of I.C. § 23-908: the "actual use" provision was recodified from I.C. § 23-908 (3) to 23-980 (4). Further, and as discussed, *infra*, Rule 10.03was amended in 2007 whereby "shall be" was deleted in favor of "is."

the *only* means by which the statute may be satisfied Rather, strictly construed, Rule 10.03 provides that making sales of liquor drinks during eight (8) hours a day, no fewer than six (6) days a week is one way, *but not the only way*, that the 'actual use' requirement of I.C. § 23-908(4) may be satisfied. The rule is a "safe haven."

This is how three past ISP administrators interpreted and applied the Rule for fifteen (15) years. John Gould, who was Assistant Deputy Director of ISP and in charge of the ABC, when IDAPA 11.05.01.010.03 was promulgated, stated that the purpose of the rule was to ensure that new licensees would put the licenses into actual use and "not simply file away somewhere without any intention to use it in the manner required. (Gould Aff. at ¶ 3). Captain Rankin stated "[t]o my knowledge, there never was a requirement that a new licensee make actual sales of alcohol," requiring sales of liquor drinks. (Rankin Aff. at ¶ 3). Major Thompson explained that "ISP did not require actual sales of alcohol to meet the actual use requirements of I.C. § 23-908 (4), because public policy required by the Idaho Constitution prohibits promoting alcohol sales and consumption." (Thompson Aff. at ¶ 6.)

The Director ignored the long-time agency application of Rule 10.03, in summarily declaring the rule ambiguous and now requiring new licensees to "sell at least one (1) glass of liquor sometime during every day that the establishment is open." Director's Final Order at 11.[9] As it was the Director's spontaneous interpretation applied against Fuchs that created the ambiguity, this Court should reverse the Director's Final Order as being not supported by substantial evidence, arbitrary and capricious and an abuse of discretion.

[9] The Director's interpretation of Rule 10.03 is a new expression of agency policy because he announced that the "clarification of the proper interpretation of IDAPA 11.05.01.010.03 set forth in this Final Order shall have prospective effect only." Director's Final Order at 18. For this "clarification to have the force of law, the Director must promulgate a new rule amendment. *See, infra.*

C. If Rule 10.03 is ambiguous, its ambiguities must be construed in favor of Fuchs.

For fifteen (15) years, ISP required that new licensees secure a qualified premise and make actual sales of liquor-by the-drink sometime, while in operation during eight (8) hours a day, six (6) days per week for six (6) months, to comply with I.C. § 23-908 (4) and Rule 10.03. This application of Rule 10.03 was consistent with the legislative purpose of I.C. § 23-908 (4), to discourage speculation. Now, after ABC attempted to require multiple hourly sales of alcohol during eight (8) hours a day/six (6) days a week, the Director has ruled in this case that Rule 10.03 was ambiguous as a matter of law. Under Idaho law, ambiguities in a statute or a rule must be construed against the agency that drafted them. If this Court chooses to decide the underlying merits of the case, this Court should reverse the Director's decision in his Final Order.

"It is clear in Idaho law that administrative regulations are subject to the same principles of statutory construction as statutes. Interpretation of such a rule should begin, therefore, with an examination of literal words of the rule." *Mason v. Donnelly Club*, 135 Idaho 581, 586 (2001) (internal citations omitted). Where language of a statute or ordinance is ambiguous, however, the courts look to rules the construction for guidance." *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 197 (2002) (*citing Lawless v. Davis*, 98 Idaho 175 (1977)). The Idaho Supreme Court has held that a basic rule of statutory construction is, first, to look at how an agency previously has applied a statute or rule to ascertain its meaning, particularly if it has done so over a long period of time. The "application of the statute is an aid to construction, especially when the public relies on the application over a long period of time." *Hamilton v. Reeder Flying Services*, 135 Idaho 568, 571 (2001). In *State v. Hagerman Water Right Owners*, 130 Idaho 727, 733 (1997), the Idaho Supreme Court explained that this was a "basic rule of statutory

construction" and that:

> Statutes are documents having practical effects. It is therefore improper to consider them in the abstract, without taking into consideration the historical framework to which they existed . . . where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as very important in arriving at the proper construction of the statute."

Hagerman Water Right Owners, 130 Idaho at 733 (*quoting* Sutherland Stat. Const. (5th Ed. 1992)).

Here, previous ISP policymakers have long realized the "practical effects" of requiring a new licensee to produce sales during every hour during eight (8) hours a day, six (6) days a week was irrational, particularly in the case of a new business:

> Such a technical reading was not made at anytime during my employment, would have been irrational, and would have made it impossible, if enforced strictly, for any new licensee to maintain a retail alcohol beverage license for the six (6) months that such "actual use" would have been required. There certainly are hours when no sales are made, especially in starting a new business.

(Gould Aff. at 4).

In light of these practical and public policy concerns, ISP had long recognized the harsh results that would follow, if a new licensee was expected to produce sales of alcohol during each and every hour during eight hours a day, six days a week, for the first six months. "To enforce the New License Rule to require actual sales per hour, per day, per week or otherwise, would mean that a new licensee would technically be in violation of the rule should time pass without a patron purchasing a drink of alcohol." (Thompson Aff. at ¶ 4). Courts will not interpret statutes and rules that would create hardships or produce oppressive or absurd results. *Higginson v. Westergard*, 100 Idaho 687, 691 (1979).[10]

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[10] The prior agency application of Rule 10.03 was consistent with the Idaho public policy against the promotion of alcohol sales and consumption. "The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality." IDAHO CONSTITUTION, ARTICLE III, § 24. This Constitutional policy was behind past

Finally, Idaho courts construe ambiguous statutes and rules against the agency that drafted them. "Some courts have gone so far as to hold that, in suits involving a public administrative agency, the rules and regulations of such agency should be strictly construed against it. Any ambiguities contained therein shall be resolved in favor of the adversary." *Higginson*, 100 Idaho at 691 (internal citations omitted). If there is an ambiguity in IDAPA 11.05.01.010.03, it is of ISP's making. The Director declared that Rule 10.03 was ambiguous and could be interpreted in three ways. Since it was ISP that wrote and promulgated the rule, all ambiguities must be construed against it. If this Court reaches the merits of the Director's Final Order, it should reverse the Director and hold that, if Rule 10.03 is ambiguous, it must be construed against ISP.

D. ISP is prohibited from taking inconsistent positions under the doctrine of quasi-estoppel.

The Director held that ABC was not barred by quasi-estoppel from taking positions inconsistent with positions previously taken by the agency. First, the Director stated that Fuchs knew that "actual sales" were required, because he was issued a form letter stating sales would be required. Second, the Director stated that Fuchs could show no detrimental reliance. Each reason set forth by the Director is not supported by substantial evidence.

Should this Court reach the issue of quasi-estoppel, it should hold that ISP is barred from taking inconsistent positions to Fuchs' detriment. In *Terrazaz v. Blaine County*, 147 Idaho 193 (2009), the Idaho Supreme Court stated the elements of quasi-estoppel:

> The doctrine of quasi-estoppel applies when (1) the offending party took a different position than his or her original position, (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the

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ISP enforcement of the rule. "ISP did not require actual sales of alcohol to meet the actual use requirements of I.C. § 23-908 (4), because public policy required by the Idaho Constitution prohibits promoting alcohol sales and consumption." (Thompson Aff. at ¶ 6).

> other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in.

Id. at 200, n. 3.

Here, the Hearing Officer held that ABC should be estopped from its current interpretation of IDAPA 11.05.01.010.03 under the doctrine of quasi-estoppel. ABC "is now taking inconsistent positions of its past practices regarding requirements of new liquor licensees." Preliminary Order at 18. The Director disagreed, stating that the Hearing Officer erred, positing that "taking inconsistent positions is not enough to establish the doctrine of quasi-estoppel. The party against whom estoppel is being sought must be 'reaping unconscionable advantage' by changing positions and the other party must be harmed by the changing positions." Director's Final Order at 13.

The Director ignored critical facts and misapplied the law. First, the Director stated "[i]n the present case, ABC has taken inconsistent positions but only in the sense that prior administrators interpreted Rule 10.03 one way, and now Lt. Clements is interpreting the rule in a different manner." Director's Final Order at 13. This statement alone satisfied the first prong of the *Terrazaz* test, the offending party taking a different position. But, it does not state all the facts. The evidence in the record shows that Lt. Clements also took positions inconsistent with positions that he had taken in 2005.

In January 2005, ABC commenced an investigation of Fuchs' four Nampa licenses, Jokin' Jacobs, Brookes Bar, Chelsea Bug's Bar and Rockin' Ryans. **(Exhibit R-4).** ABC determined how many sales were made at each of these licensed premises.[11] On April 15, 2005,

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[11] Jokin' Jacobs Bar reported total sales of $110.03 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Brooke's Bar reported total sales of $68.18 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Chelsea Bug's Bar reported total sales of $63.18 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Rockin' Ryans reported total sales of $30.18

ABC prepared Administrative Violation Notices for each license. ABC determined that "liquor purchases for Chelsea Bug's Bar from October 1- December 31, 2004 was $19.15." **(Exhibit R-DF-6)**. It determined that "Sales tax paid for Chelsea Bug's Bar for October – December 2004 was $3.79." (*Id.*) Nevertheless, ABC did not seek revocation or forfeiture against Fuchs for not making a sufficient number of sales of liquor drinks.[12] Rather, it alleged against Fuchs in that prior administrative case only that Chelsea Bug's Bar was not open for business a sufficient number of hours to meet the "actual sales of liquor by the drink during at least eight (8) hours a day, no fewer than six (6) days a week."[13]

The Director disregarded these facts. He stated that Fuchs "was notified in a February 25, 2008 letter from Nichole Harvey, ABC Management Assistant, that the license at issue in this case (i.e., License No.7323.01 for Aubrey's) would be subject to the actual sales requirement." Director's Final Order at 14. However, this form letter had done nothing more than cite a portion of Rule 10.03, stating, as usual, that: "you will make actual sales of alcohol at least eight (8) hours a day, six (6) days a week [Idaho Code § 23-(08(4)]." **(Exhibit R-DF-1)**. It did not even include the most important qualifying word in the rule, "during." Moreover, it did not inform that multiple drinks per hour, every hour for eight (8) hours a day, six (6) days a week are

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to the Idaho Tax Commission for the period from November 1 to December 31, 2004. (Donesley Aff.; **Exhibit R-4**.)

[12] In the proceedings below, ABC blamed this lack of enforcement on lack of manpower. (Clements Affidavit dated October 23, 2009, at ¶ 24). This is refuted by its own Administrative Violation Notice. ABC knew how many sales Fuchs had made at each of these four bars. **(Exhibit R-4)**. ABC identifies how many sales were in the Incident Report attached to the Administrative Violation Notice. **(Exhibit R-DF-6)**. ABC had obtained all of the necessary evidence it would have needed to pursue a revocation of Fuchs' Nampa licenses. The only logical inference that can be made from ABC's decision not to do so is that "actual sales" was not an issue in 2005.

[13] Chelsea Bug's Bar, like the other three Nampa bars, was permitted by the Nampa City Council to be open for business from 7:00 am to 3:00 pm. I.C. § 23-927 establishes the legal hours for the sale of liquor to be 10:00 am to 1:00 am. The conflict between the city ordinance and I.C. § 23-927 left Chelsea Bug's Bar only five hours a day in which to sell liquor. This conflict was resolved by the Nampa City Council, which allowed Fuchs to modify his hours to conform to the Idaho Code.

required, which is what Lt. Clements was demanding in these proceedings. (Clements' Deposition at P. 36). [14]

Finally, Denise Rogers, former ABC Management Assistant, specifically told Mr. Fuchs that he was only required to make alcohol "available," and that his operation was required to be open eight (8) hours a day, six (6) days a week. (Rogers' Deposition at ¶ 4). Ms. Rogers had previously sent Fuchs a form letter, in 2003, which contained the exact same language that Ms. Harvey stated in 2008, to wit: "you will make actual sales of alcohol at least eight (8) hours a day, six (6) days a week." [Idaho Code § 23-908 (4)] (*Compare* ISP Correspondence to Fuchs dated May 3, 2003 **Exhibit R-DF-1** *with* ISP Correspondence to Fuchs, dated August 27, 2007, **Exhibit R-DF-7**). Consequently, the logic of the Director's ruling that Fuchs should have known that he could disregard that language in 2003, but not in 2008, is arbitrary, capricious and an abuse of discretion.

The second prong of the *Terrazaz* test is that "either (a) the offending party gained an advantage or caused a disadvantage to the other party." *Terrazaz* at 200, n.3. Fuchs was disadvantaged, because, based upon information received from ABC and its past practices, including those of Lt. Clements, Fuchs leased the Coeur d'Alene business for a two year term and has continued to operate the business under the license at 2065 West Riverstone Drive, #207 in Coeur d'Alene, Kootenai County, Idaho. (Fuchs Aff.; **Exhibit R-DF-9**). Fuchs obtained all necessary licenses and permits required by state and local agencies. (Fuchs Aff.; **Exhibits R-**

[14] The Director also ruled that Fuchs was on notice, because of a letter sent by Lt. Clements to Fuchs' present attorney five years earlier. "Indeed, as early as July 20, 2005, Fuchs' attorney, Brian Donesley, was notified in a letter from Lt. Clements that henceforth, Rule 10.03 would be interpreted to require actual sales. *See* Exhibit C5.bb." Director's Final Order at 14. However, Mr. Donesley was not representing Fuchs, but another licensee, when Lt. Clements sent that letter in 2005. The record reflects that Mr. Donesley did not represent Fuchs in any matter until after the filing of the Complaint for Revocation or Forfeiture of Retail Alcohol Beverage License on October 23, 2008. Furthermore, ABC admitted in discovery that it had not initiated any administrative actions against new licensees for failure to make actual sales until 2008. **Exhibit R-4**; (Complainant's Response to Interrogatory No. 19).

DF-10, 11, 12). He employed staff and obtained unemployment and workers compensation insurance. (Fuchs Aff.; **Exhibits R-DF-13, 14, 15).** The Director's statement that "[t]here is simply no evidence in the record of detrimental reliance or change of position by Fuchs" is clear error. Director's Final Order at 14.[15]

In *Young v. Idaho Dept. of Law Enforcement,* 123 Idaho 870 (Ct. App. 1993, the Idaho Court of Appeals explained that the Department of Law Enforcement, predecessor to ISP, could be barred under the doctrine of quasi-estoppel, from taking inconsistent positions to a licensee's detriment. ISP has done that. The Director failed to recognize in his Final Order that Lt. Clements took positions with Fuchs inconsistent with positions he took in 2005. The Director failed to recognize in his Final Order that Fuchs relied to his detriment on ABC's past positions and practices, when he executed a two-year lease and opened and maintained business, obtained all licenses and permits and employed staff to operate Aubrey's House of Ale. Accordingly, the Director's Final Order is not supported by substantial evidence. If this Court reaches the issue of quasi-estoppel, it should reverse the Director's Final Order, dismiss the underlying action and award attorney fees and costs to Fuchs pursuant to I.C. § 12-117.

E. <u>ISP has engaged in improper rulemaking</u>.

The Director announced in his Final Order the new manner in which Rule 10.03 henceforth was to be enforced: a new licensee must "sell one (1) glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8)

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[15] Analytically, the Director erred, in that he misapplied the factors listed in *Terrazaz*. For example, the Director stated that "taking inconsistent positions is not enough ... the party against whom estoppel must be 'reaping an unconscionable advantage' by changing positions and the other party must be harmed by the change in positions. *Terrazaz*, holds, however, that "(1) the offending party took a different position ... ***and*** (2) ***either (a)*** the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions ***or*** (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit from." *Terrazaz*, 147 Idaho at 200.n.3 (emphasis added). Here, Fuchs detrimentally relied on ABC's previous position, satisfying (a) and (b). Thus, there is no inquiry into (c), whether ABC reaped an "unconscionable advantage." The Director misapplied the *Terrazaz* test, requiring that all three be satisfied.

hours per day, six (6) days a week." Director's Final Order at 11. This was yet another new expression of agency policy. Prior administrators had not required "actual sales" of liquor on public policy grounds. To depart from that policy, ISP was required to promulgate a new rule. The Director acknowledges this, when he states that he will be "reviewing the matter for possible rulemaking in the near future." *Id.* at 11. n. 4. Under Idaho law, an agency must follow the rulemaking procedures, when it changes policies that affect the public. ABC did not do this, when it attempted to require multiple hourly sales. The Director did not do this, when he announced the "one (1) glass of liquor" per day rule. Accordingly, both ABC and the Director have engaged in improper, informal rulemaking.

In *Asarco Inc. v. State*, 138 Idaho 719, 723 (2003), the Idaho Supreme Court explained that I.C. § 67-5201 (19) states that agency action is a rule, if it (1) is a statement of general applicability and (2) implements, interprets or prescribes existing law."[16] However, in *Asarco*, this Court observed that this definition is "too broad to be workable." *Id.* Accordingly, the Court provided further guidance, in determining when agency action requires rulemaking, considering that the following characteristics of an agency action are indicative of a rule: (1) has wide coverage; (2) applies generally and uniformly; (3) operates only in future cases; (4) prescribes a legal standard or directive not otherwise provided by the enabling statute; (5) expresses agency policy not previously expressed; and (6) is an interpretation of law or general policy. *Asarco*,

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[16] I.C. § 67-5201(19) defines a "Rule" as "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. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
(i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
(ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
(iii) Intra-agency memoranda; or
(iv) Any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule."

138 Idaho at 723.

Here, the Director held that neither ABC's attempt to require multiple, hourly sales during eight (8) hours a day, no fewer than (6) days a week, nor his "one (1) glass of liquor," were new rules, citing the last paragraph of I.C. § 67-5201 (19), exempting an agency's written interpretations of a rule:

> The term [rule] includes the amendment, repeal, or suspension of an existing rule, but does not include: any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule." Idaho Code § 67-5201 (19 (b) (iv). In this case, ABC's notification to Fuchs (including the interpretation adopted by the Director and state in this Final Decision) qualify as written statements from the agency to the licensee pertaining to how the agency is interpreting Rule 10.03. As such, the interpretations are not rules and, therefore, are not subject to the formal rulemaking process.

Director's Final Order at 15-16.

The Director's reading of "written statements ... pertaining to a rule" is so broad that no agency action could ever be a rule, unless the agency declares it so. Such reading was expressly rejected by the Idaho Supreme Court in *Asarco*. Both ABC's and the Director versions of Rule 10.03 are new expressions of agency policy and, thus, new rules. IDAPA 11.05.01.010.03 was promulgated in 1993. From 1993 to until 2008, the rule was never enforced in a manner as to require multiple hourly actual sales of alcohol. (Thompson Aff. at ¶ 4; Rankin Aff. at ¶ 3; Gould Aff. at ¶ 3; Otto Aff. at ¶ 3; Rogers Aff. at ¶ 3; Donesley Aff. at ¶ 17). With this contested case, ABC took the position that a new licensee must sell multiple drinks of alcohol during every hour during eight (8) hours a day, no fewer than six (6) days a week for the first six (6) months. "Probably more than one drink. It's plural." (Clements Depo at pp. 35-36). Then, the Director, in his Final Order, rejected ABC's interpretation in favor of his own, "one (1) glass of liquor sometime during the day that the establishment is open. Final Order at 11. Each of these new interpretations was an expression of new agency policy. No actual sales had been required by

past administrators or even by Lt. Clements.

In his Final Order, the Director acknowledges that rulemaking is necessary: "[b]ecause of the ambiguity of IDAPA 11.05.01.010.03, it would be appropriate for further clarification of this rule. To that end, the Director will be reviewing this matter for possible rulemaking in the near future." Director's Final Order at 11, n. 4. If ISP's departure from uncontradicted, past practices of prior administrators was not a new expression of agency policy, no rulemaking would be necessary. The "one (1) glass of liquor" per day policy is a new policy and, therefore, a new "rule" under the *Asarco* test.

If this Court reaches the issue, it should rule that ISP has engaged in improper rulemaking, in violation of the APA.

F. ISP's conduct in these proceedings has been arbitrary and an unreasonable exercise of police power.

ISP's various interpretations of is own rules, first requiring multiple hourly sales of liquor, then requiring "one (1) glass of liquor sometime during every day that the establishment is open," is an arbitrary and unreasonable exercise of police power and abuse of process. The Director finally announced in his Final Order his version of the agency's legal standard as to how many actual sales are required. In total, if this Court includes the prior agency interpretation of the Rule such that no "actual sales" were required, ISP has announced five different interpretations of its own Rule. From the moment ABC departed from long-time agency interpretation of Rule 10.03, ISP's actions have been arbitrary and unreasonable and have violated Fuchs' fundamental right of due process: to give notice of the legal standard Fuchs is alleged to have violated.

The Idaho Supreme Court has explained that, "[a]lthough a liquor license is a privilege and not a property right; the licensing procedure cannot be administered arbitrarily." *Crazy*

Horse, Inc. v. Pearce, 98 Idaho 762, 765 (1977) (internal citations omitted). In *O'Connor v. City of Moscow*, 69 Idaho 37 (1949), the Idaho Supreme Court held that the City could not limit in an arbitrary and capricious manner the licensee's ability to operate a beer parlor:

> The provision in question declaring change in ownership to be a new business is an arbitrary and unreasonable exercise of the police power and violates the constitutional protection given by the due process clauses.

O'Connor, 69 Idaho at 43.

In *Weller v. Hopper*, 85 Idaho 386, 392 (1963), the Idaho Supreme Court explained that the statute involved in the case, I.C. § 23-910, was unconstitutional as applied to the licensee, because it created an arbitrary classification system:

> The classification attempted to be set up by such statutory provision, is unreasonable, arbitrary and discriminatory; it attempts discrimination against one who happened to hold a retail liquor license at the time of his conviction of a felony, as against one who did not hold such a license at the time of his felony conviction; no reasonable ground or basis for such a distinction between them, as prospective licensees, exists.

Weller, 85 Idaho at 392.

In *O'Connor* and *Weller,* at least there were defined standards. Here, the legal standard of how many "actual sales" has been a moving target. Nevertheless, the Director rejected Fuchs argument that ISP's actions have been arbitrary and unreasonable. He said the rule required "actual sales," even though he concedes it does not say how many:

> On its face, IDAPA 11.05.01.010.03 requires "actual sales." Fuchs' misreading of the rule to ignore this express term is a clearly wrong interpretation. The only thing ambiguous about the rule was whether those actual required sales have to be hourly, daily or weekly. The Director has now clarified that only one (1) sale per day is necessary to comply with the rule.

Director's Final Order at 16.

ABC sought to revoke or forfeit Fuchs' license, based upon its projection that new licensees must make multiple hourly sales eight (8) hours a day, six (6) days a week. Lt.

Clements testified at deposition that he was not certain how many sales per hour satisfied the rule. "Probably more than one drink. It's plural. 'Actual sales, eight hours per day' so during an eight hour period you have to make sales every hour is the way I understand it." (Clements Deposition at pp. 35-36). ABC had refused in discovery to say what the standard was before that deposition. In fact, it had never required "actual sales." (*See* Donesley, Aff. **Exhibit R-3**). Fuchs did not know of any new legal standard, until after this administrative proceeding had already been filed against him.

The Director states that the only thing ambiguous about the Rule was the amount of sales required, "hourly, daily, or weekly." The difference between what amount is actually required is the difference between avoiding a revocation proceeding or not. Fuchs, as a new licensee, has been unable to do that, because the actual amount was only announced by the Director in his Final Order.[17]

While the Director has finally announced a legal standard, again engaging in improper rulemaking, the fact that it took complex and costly administrative litigation for him to do even this demonstrates that ISP and its ABC bureau have engaged in an arbitrary and unreasonable exercise of police power during these proceedings. If this Court reaches this issue, it should so hold.

VII.
CONCLUSION

ISP's actions have been without a reasonable basis in fact or law. This Court should reverse the Director's decision in his Final Order and award Fuchs attorney fees and costs

[17]Fuchs has actually had more sales of alcohol at Aubrey's House of Ale than he did at four licensed premises he operated in Nampa in 2003 to 2005. For example, Chelsea Bug's Bar reported total sales for a two month period of $63.18. (Donesley Aff.; **Exhibit R-4**). Aubrey's House of Ale reported sales for a three month period of $ 598.11. (Fuchs Aff.; **Exhibit R-DF-17, 18**). ABC considered pursuing an administrative action against Fuchs based upon the sales at each of the four Nampa bars but chose against it. (Donesley Aff.; **Exhibit R-4**).

pursuant to I.C. § 12-117. Fuchs was the "prevailing party" even under the decision rendered by the Director in his Final Order. Fuchs obtained the result he sought, a decision that Rule 10.03 was ambiguous and dismissal of the administrative action. Further, ISP acted without a reasonable basis in fact or law, as it has attempted to enforce a rule for which the agency has, at various times, announced five different ways it should be interpreted. Fuchs was forced to bear the financial burden of mistakes that never should have been made.

If this Court determines that it must reach the merits of the underlying proceeding, it should reverse the Director's Final Order in its entirety. Rule 10.03 is unambiguous and not a mandatory rule. ABC and the Director rendered the rule ambiguous by making it a mandatory requirement. Under Idaho law, ambiguities are construed against the agency that drafted the rule. And, ISP is barred by quasi-estoppel from taking inconsistent positions to Fuchs' detrimental reliance. Further, ISP engaged in improper rulemaking. Finally, ISP's five interpretations of Rule 10.03 have been arbitrary and an unreasonable exercise of police power.

This Court should reverse the Director's Final Order and award costs and attorney fees to Fuchs pursuant to I.C. § 12-117.

DATED this 15 day of October 2010.

Brian Donesley

Brian Donesley
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of October, 2010, I caused an accurate copy of the foregoing document to be delivered as noted below to:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE, Appellant/Petitioner, vs. IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL, Respondent,	Case No. CV-2010-0005579

RESPONDENT'S BRIEF IN OPPOSITION

FOR JUDICIAL REVIEW

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I. INTRODUCTION.

Respondent is the Bureau of Alcohol Beverage Control ("ABC"), a bureau of the Idaho State Police.

Under IDAHO CODE § 23-902(3), "Director" [for purposes of alcohol beverage control law] means the Director of the Idaho State Police. Under IDAHO CODE § 67-2901 (4), "The director shall exercise all of the powers and duties necessary to carry out the proper administration of the state police, and may delegate duties to employees and officers of the state police."

The Director has specific rule making authority for alcohol beverage control purposes. IDAHO CODE § 23-932. By promulgation of IDAPA 11.05.01.011.02, the Director delegated "his authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code, to the, Alcohol Beverage Control Bureau, Idaho State Police."

The Director has the authority to promulgate rules and regulations necessary to carry out the provisions of IDAHO CODE Title 23, Chapters 6-14, pursuant to IDAHO CODE §§ 67-2901, 23-932, 23-946(b), 23-1330 and 23-1408.

ABC is the state entity charged under IDAHO CODE Title 23, Chapters 8, 9, 10 and 13 with the authority to enforce and police Idaho's liquor laws pursuant to IDAHO CODE § 23-804.

IDAHO CODE §§ 23-933, 23-1038 and 23-1331 provided the basis and authority for the administrative Complaint for Forfeiture of Retail Alcohol Beverage License, which began this administrative case.

Appellant Daniel S. Fuchs ("Fuchs"), dba, Aubrey's House of Ale ("Aubrey's") currently holds liquor license number 7323.0, which affords him the privilege of selling beer pursuant to

IDAHO CODE § 23-1010, wine by the glass and bottle pursuant to IDAHO CODE § 23-1306, and liquor by the drink at retail pursuant to IDAHO CODE § 23-903. Ex. C1.

The administrative Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License was served on Fuchs on October 23, 2008, by certified mail, return receipt. Fuchs received it on October 28, 2008. Fuch's Answer was filed on November 12, 2008.

The statute and administrative rule at issue in this case are:

> IDAHO CODE § 23-908(4) – Each new license issued on or after July 1, 1980, shall be placed into actual use by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or be forfeited to the state and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferable for a period of two (2) years from the date of original issuance, except as provided by subsection (5)(a), (b), (c), (d) or (e) of this section.
>
> and
>
> IDAPA 11.05.01.010.03. New Licenses. For purposes of Section 23-908(4), IDAHO CODE, a "new license" is one that has become available as an additional license within a city's limits under the quota system after July 1, 1980. The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.

The issue in this case has been the interpretation of the term "actual use" as that term is used in IDAHO CODE § 23-908(4) and the interpretation of the language in IDAPA 1.05.01.010.03 that such "actual use" of a newly issued city priority list liquor license is "satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week."

II. STANDARD OF REVIEW.

The standard of judicial review of agency actions is found in IDAHO CODE § 67-5215(g). It allows a court to reverse or modify an agency decision only under limited circumstances, including, *inter alia,* a constitutional violation, action in excess of statutory authority, clearly erroneous findings of fact, an arbitrary and capricious decision or one characterized by an abuse of discretion. *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1, 3, 784 P.2d 331, 333 (1989).

A court reviewing agency actions in an appellate capacity under the APA must determine whether the agency perceived the issue in question as discretionary, acted within the outer limits of its discretion and consistently with the legal standards applicable to the available choices, and reached its own decision through an exercise of reason. *Haw v. Idaho State Bd. of Medicine*, 143 Idaho 51, 137 P.3d 438 (2006) *citing Rockefeller v. Grabow*, 136 Idaho 637, 643, 39 P.3d 577, 583 (2001).

III. ATTORNEY FEES.

It is evident from Appellant's Brief in Support of Petition for Judicial Review that his primary goal is to secure an award of attorney fees. He accuses the Director of Idaho State Police of bias and argues repeatedly that "Rule 10.03 was ambiguous, hence void" (with no citation to authority), that he is the prevailing party and that Respondent acted without a reasonable basis in fact or law. Appellant, however, whether out of convenience, oversight or purposeful avoidance, ignores the one rule of law that controls the issue of whether he is entitled to an award of attorney fees in this case under IDAHO CODE § 12-117.

Until this dispute arose, there had been no interpretation of either IDAHO CODE § 23-908(4) or IDAPA 11.05.01.010.03, which are the code section and administrative rule at issue.

In *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 266-67, 207 P.3d 988, 997-98 (2009), the crux of that case was the interpretation of the term "property interest" as that term is used in IDAHO CODE § 7-1402(5)(d). The issue had never been addressed by an Idaho appellate court and was therefore a matter of first impression. In *Purco Fleet Services, Inc. v. Idaho State Department of Finance*, 140 Idaho 121, 90 P.3d 346 (2004), the Idaho Supreme Court denied the Idaho Department of Finance's request for attorney fees on appeal under IDAHO CODE § 12-121 because one of the central issues on appeal was the interpretation of the word "claim" as that term is used in IDAHO CODE § 26-2223(2) was an issue of first impression. *Purco Fleet Services*, 140 Idaho at 126-27, 90 P.3d at 351-52. The Court stated: "A case of first impression does not constitute an area of settled law; therefore, the request for attorney fees should be denied." *Id.*

The same reasoning and rule of law controls the present question of an award of attorney fees. It cannot be said that Respondent acted without a reasonable basis in fact or law when a matter of first impression regarding the interpretation of the statute and administrative rule was involved. As the Idaho Supreme Court recently held in *Saint Alphonsus Regional Medical Center v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009), where issues of first impression are raised, attorney fees will not be awarded under IDAHO CODE § 12-117(1). *Wheeler,* 147 Idaho at 267, 207 P.3d at 998; *Employers Resource Management Co. v. Department of Ins.*, 143 Idaho 179, 185, 141 P.3d 1048, 1054 (2006).

Because the interpretation of IDAHO CODE § 23-908(4) and IDAPA 11.05.01.010.03 are issues of first impression in Idaho, it cannot be said that Respondent brought the present case frivolously, unreasonably, and without foundation. Therefore, this Court should deny Appellant's request for attorney fees.

IV. MERITS OF CASE.

Appellant asserts that the Court need not reach the merits of this case because he characterizes Fuchs as the prevailing party and argues that Respondent acted without a reasonable basis in fact or law. Respondent does not concede either of these assertions, of course, as the record before the Court demonstrates. Nevertheless, secondary to his attempt to secure an award of attorney fees is Appellant's alternative desire that this Court reverse the Director's Final Order and, in effect, force the Director to adopt the Hearing Officer's Preliminary Order. Appellant argues, in various ways, that the Director's Final Order was not based upon substantial evidence, was arbitrary and capricious, and was an abuse of discretion.

Appellant argues that IDAPA 11.05.01.010.03 is a "safe haven" or "one manner in which the requirements of IDAHO CODE § 23-908(4), pertaining to 'actual use' may be satisfied." Having repeatedly argued that the rule is "ambiguous, hence void" in his argument for attorney fees, *citing* to *Porter v. Board of Trustees*, 141 Idaho 11, 14 (2004) and *Mason v. Donnelly Club*, 135 Idaho 581, 140 [sic] (2001), Appellant now argues that the language of the rule is "clear and unambiguous" and that "[t]he language of the rule, like the language of a state, should be given its plain, obvious and rational meaning." Appellant points to the way previous Idaho State Police, Alcohol Beverage Control administrators and employees interpreted and applied the "actual use" requirement, which was essentially that "actual sales" were not required as long as liquor by the drink was merely available for purchase "during eight (8) hours a day, no fewer than [sic] (6) days a week." The word "available" is found nowhere in the text of the statute or administrative rule at issue. Yet, it is that very interpretation – adding the word "available" – applied by past ABC administrators and employees and the interpretation made by the Hearing Officer in his Preliminary Order that Appellant promotes, and has from the inception of this case.

In his Final Order, the Director disagreed with the Hearing Officer and declined to add a word to IDAPA 11.05.01.010.03 that does not exist. Instead, he recognized the rule's ambiguity and carefully considered three ways that the rule, by its language, could rationally be interpreted. Appellant complains that the Director did not include the prior interpretation, with the addition of the word "available" as one of the options, but it really should be no surprise that the Director declined to amend the rule outside of the rulemaking process.

The Director accurately recognized the purpose of the "actual use" statute and "actual sales" rule as the Legislature's intent that requiring "actual use" was to "discourage speculation in liquor licensing where a person would secure a license and then essentially do little or nothing with the license and then later sell the license at a greatly increased or inflated price." *See*, Director's Final Order, pp. 6-7. In this context, the Director then identified three ways that the "actual sales" rule could be read, based on its text, and noting that "[t]o conclude as did Fuchs, the Hearing Officer and prior ISP administrators that no sales are actually required and that the rule only requires the establishment to hold liquor by the drink available for sale eight (8) hours a day, six (6) days a week totally ignores the language of the rule, which requires one (1) or more actual sales."

The Director then outlined three reasonable ways the rule could be interpreted:

> a. sell at least one (1) glass of liquor every hour for at least eight (8) hours, six (6) days or more a week. (This would require at least forty-eight (48) sales a week and is how ABC is apparently interpreting the rule); or
>
> b. sell at least one glass of liquor sometime during every day that the establishment is open. The establishment must be open for at least eight (8) hours per day, six (6) days or more a week. (This would require at least six (6) sales a week); or
>
> c. sell at least one (1) glass of liquor sometime during a period of time during which the establishment is open at least eight (8) hours a days, at least six (6) days a week (this would require only one sale a week).

Having considered these three options, the Director concluded that the "proper interpretation of IDAPA 11.05.01.010.03 is that a new licensee must sell at least one (1) glass of liquor sometime during every day that the establishment is open." The Director found this interpretation was consistent with the public policy behind the "actual use" requirement, and yet "did not impose a particularly onerous burden on the licensee." He concluded that "requiring at least one (1) sale is a reasonable, obtainable and objective standard for determining whether a licensee is serious about exercising the use of his license or has some other ulterior motive, such as speculating in the purchase and sale of licenses." *See*, Director's Final Order, pp. 10-11. This careful reasoning and rational approach can hardly be considered, as Appellant argues, "not supported by substantial evidence, arbitrary and capricious and an abuse of discretion." *See*, Appellant's Brief, p. 20.

The Director's approach is consistent with tried and true rules of statutory construction.

> In construing statutes, the plain, obvious and rational meaning is always to be preferred to any curious, narrow, hidden sense. *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965); *John Hancock Mutual Life Ins. Co. v. Haworth*, 68 Idaho 185, 191 P.2d 359 (1948). When choosing between alternative constructions of a statute, courts should presume that the statute was not enacted to work a hardship or to effect an oppressive result. *Lawless v. Davis*, 98 Idaho 175, 560 P.2d 497 (1977). Consequences of a proposed interpretation can be considered when the statute is capable of more than one construction. *Id.* Constructions that would render a statute productive of unnecessarily harsh consequences are to be avoided and any ambiguity in a statute should be resolved in favor of a reasonable operation of the law. *Id.* It therefore would follow that construction of the undefined terms of an administrative permit should be such so as to avoid unduly harsh results and the terms of the permit should be construed in a plain, obvious and reasonable manner.

Higginson v. Westergard, 100 Idaho 687, 691, 604 P.2d 51, 55 (1979).

Appellant's argument that IDAPA 11.05.01.010.03 should be "strictly construed" against ABC and "resolved in favor of the adversary," assuming but not conceding that that is the rule in

Idaho rather than dicta by the Court in *Higginson, supra*, is exactly what the Director did nevertheless. He adopted one of three possible interpretations, without adding language that is not in the rule's text yet still promoting the Legislature's public policy to discourage speculation in liquor licenses.

Respondent argues that the doctrine of quasi-estoppel should prohibit the Director from interpreting the rule differently than did previous administrators. This argument cannot succeed for several reasons. First, it is well established that estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity. *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (2003). Precisely on point is *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000). In that case, Kelso argued that because the State Insurance Fund ("SIF") had consistently represented to its policyholders that the SIF's surplus and reserves belong to the policyholders, the SIF be estopped from denying the policyholders' interest. The SIF responded that even if the statements rose to the level of estoppel, the doctrine of estoppel does not apply to the SIF. The Court recited controlling law:

> The general rule is "[e]quitable estoppel may not ordinarily be invoked against a governmental or public agency functioning in a sovereign or governmental capacity." *State ex rel. Williams v. Adams*, 90 Idaho 195, 201, 409 P.2d 415, 419 (1965). Therefore, because the SIF is undisputedly a public agency acting in a proprietary capacity, the doctrine of equitable estoppel would normally be applicable to the SIF. However, as a statutorily created agency, the SIF has only that authority granted to it by its statutory framework. Therefore, "[i]t may not exercise its sub-legislative powers to modify, alter, enlarge or diminish the provisions of the legislative act which is being administered." *Roberts v. Transportation Dept.*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct.App.1991). If equitable estoppel were applied to the statements made by the SIF's agents, then those agents would have effectively altered the SIF's statutory framework by granting the policyholders an ownership interest which the legislature did not intend them to have. *Cf. Pitner v. Federal Crop Ins. Corp.*, 94 Idaho 496, 501, 491 P.2d 1268, 1273 (1971 (holding the agency could be estopped because the rule violated by the agent was an administrative rule and the actions taken by the

> agent were within the statutory authority granted by Congress). Because nothing in the SIF's statutory framework granted the SIF the authority to give its policyholders an ownership interest in the SIF's assets, equitable estoppel does not apply to the SIF under the facts of this case. To hold otherwise would allow an administrative agency to expand its own powers and effectively amend statutes without legislative action.

Likewise, any statements made by previous ABC administrators and employees that merely having liquor by the drink available for sale satisfied the "actual sales" requirement is mistaken statement of law, not fact, and Appellant cannot estop the state through those mistaken statements of law. *Kelso*, 134 Idaho at 138, 997 P.2d 599. Therefore, the mistaken statements of law made by previous ABC administrators and employees cannot estop, in any way, current ABC officers from enforcing the actual sales rule as written and interpreted by the Director. For the Court to hold otherwise would be to condone blatant improper rulemaking.

Appellant argues that the Director's interpretation of the "actual sales" requirement is improper rulemaking. That could not be further from the truth. The Director engaged in lawful, thoughtful, rational and reasoned statutory/rule construction. Could IDAPA 11.05.01.010.03 be clearer? Certainly it could, and if it had been, there would be no need for the Director to construe and interpret it as he did. Notably, if Appellant had his way and the Director inserted the word "available" into the rule as ABC predecessors did, Appellant would not likely complain, even though if anything in the history of the application of the rule amounted to improper rulemaking, it was that very insertion. The Director's comment that the rule's ambiguity makes further clarification through formal rulemaking appropriate may result in a forthcoming clarification more onerous than his very generous "one (1) glass of liquor per day" interpretation of IDAPA 11.05.01.010.03.

Appellant accuses the Director of changing agency policy when he announced his interpretation of the "actual sales" rule. The Director was not changing policy. As he carefully

explained, he interpreted the rule in a way that is consistent with the public policy behind the "actual use" requirement without imposing "a particularly onerous burden on the licensee," and that "requiring at least one (1) sale is a reasonable, obtainable and objective standard for determining whether a licensee is serious about exercising the use of his license or has some other ulterior motive, such as speculating in the purchase and sale of licenses." *See*, Director's Final Order, pp. 10-11. Contrary to Appellant's assertion, there is nothing arbitrary or capricious about such a thoughtful and fair analysis and conclusion, and it is consistent with the "actual sales" (plural) language.

V. CONCLUSION.

Based on the foregoing, the Court should affirm the Director's reasoned and rational decision as set forth in his Final Order in all respects and dismiss Appellant's Petition for Judicial Review accordingly.

DATED this 4th day of November 2010.

Stephanie A. Altig

STEPHANIE A. ALTIG
Deputy Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR JUDICIAL REVIEW was served on the following on this 4th day of November 2010 by the following method:

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Stephanie A. Altig

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE, **Appellant/Petitioner,** **v.** **IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,** **Respondent.**	**Case No. CV-2010-0005579**

APPELLANT FUCHS' BRIEF

IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

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I.
INTRODUCTION

Appellant Daniel S. Fuchs dba Aubrey's House of Ale ("Fuchs") has been forced to bear the financial burden of correcting mistakes made by Respondent Idaho State Police, Alcohol Beverage Control ("ISP/ABC") that never should have been made. For fifteen years the law was settled regarding what was required by new licensees to satisfy the "actual use" requirement of I.C. § 23-908 (4). IDAPA 11.05.01.010.03 provides that the "actual use" requirement was satisfied if a new licensee "makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week." Past ISP administrators, without exception, based upon the literal reading of the rule and public policy had made this IDAPA rule not mandatory. Rather, the rule provided one way, but not the only way, that the "actual use" requirement of I.C. § 23-908 (4) could be satisfied. Actual sales were not actually required. "Actual sales," without any particular number of sales over any period of time was the "safe harbor" to ensure compliance without question. Fuchs did make actual sales "during" the first six months.[1]

In 2008, ISP/ABC changed policy. It decided to require new licensees make "actual sales." While it did not promulgate a new or amended rule, it filed this action against Fuchs seeking revocation or forfeiture of Fuchs' retail alcohol beverage license. This was an impulsive and arbitrary action. ISP/ABC did not have a standard as to how many "actual sales" satisfied its new policy. Since this proceeding was filed, ISP/ABC, the hearing officer, and the Director each have required different standards. And, the

[1] *See,* Fuchs Affidavit, **Exhibit R-DF-17.**

Director determined that that IDAPA 11.05.01.010.03 was ambiguous as a matter of law. Ultimately, the Director decided that the rule would be satisfied if a licensee sold one (1) glass of liquor per day while the licensed premises is open eight (8) hours a day, six (6) days a week. The Director's ruling that IDAPA 11.05.01.010.03 was ambiguous, and his failure to promulgate a new rule, assured that ISP/ABC's filing of this action was error, as a matter of law.

Fuchs should not be required to bear the burden of correcting internal management mistakes. ISP/ABC's actions were without a reasonable basis in fact or law. This Court should award Fuchs attorney fees pursuant to I.C. § 12-117.[2]

II.
FUCHS SHOULD NOT BE REQUIRED TO CORRECT ISP/ABC MISTAKES THAT "NEVER SHOULD HAVE BEEN MADE"

Since IDAPA 11.05.01.010.03 was promulgated in 1993, ISP/ABC had enforced the rule consistently and uniformly. It never required any number of "actual sales" to satisfy the "actual use" requirement of I.C. § 23-908 (4) "during" the first six months. Even Lt. Clements, the most recent ABC Bureau Chief, did not require "actual sales." (Donesley Aff. **Exhibit R-4**). However, ISP/ABC changed policy with this case. It filed this action in October 2008 without knowing how many sales it would deem might satisfy the rule. "Probably more than one drink. It's plural." (Deposition of Robert Clements, **Exhibit R-8**, pp. 35-36). Ultimately, the Director disagreed with the ABC Bureau Chief, Lt. Clements, and ruled that IDAPA 11.05.01.010.03 was ambiguous. He ordered that the

[2] ISP/ABC notes that that "[i]t is evident from Appellant's Brief in Support of Petition for Judicial Review that his primary goal is to secure an award of attorney fees." (Respondent's Brief in Opposition to Petition for Judicial Review "Respondent's Brief" at 3). This is true. The only harm to Fuchs remaining, since the Director allowed him to keep the license, is the cost incurred in this litigation, *i.e.*, the "financial burdens" caused by correcting agency mistakes that never should have been made." *Reardon v. City of* Burley, 140 Idaho 115, 118 (2004). *See* Appellant's Brief in Support of Petition for Judicial Review at p. 18.

rule was subject to being interpreted three ways. Director's Final Order at 10. Accordingly, ISP/ABC should not have filed this action without having first promulgating a new or amended rule, announcing to the public, including Mr. Fuchs, that it had changed its policy regarding "actual sales." Nor should it have filed this action without first establishing how many "actual sales" of liquor drinks would be required to satisfy this new policy. As ISP/ABC did neither of these things, it acted without a reasonable basis in fact or law. This Court should award attorney fees and costs to Fuchs pursuant to I.C. § 12-117.

The Idaho Supreme Court has held that one of the purposes behind I.C. § 12-117 is to provide a remedy where persons have borne the financial costs resulting from groundless and arbitrary agency actions:

> The purpose of I.C. § 12-117 is two-fold: First, it serves "as a deterrent to groundless or arbitrary agency action; and [second, it provides] a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made.

Reardon v. City of Burley, 140 Idaho 115, 118 (2004) (*quoting Rincover v. State, Dept. of Fin., Sec. Bureau,* 132 Idaho 547, 548-49 (1999) (quoting *Bogner v. State Dep't of Revenue and Taxation,* 107 Idaho 854, 859 (1984)).

ISP/ABC argues that it is insulated from an award of attorney fees, regardless of the arbitrariness and unreasonableness of its actions, because it believes this is a "case of first impression":

> Because the interpretation of IDAHO CODE § 23-908 (4) and IDAPA 11.05.01.010.03 are issues of first impression in Idaho, it cannot be said that Respondent brought the present case frivolously, unreasonably, and without foundation."

(Respondent's Brief at 4).

This is ISP/ABC's sole argument in opposition to attorney fees. It is wrong for two reasons. First, ISP/ABC should not be entitled to act arbitrarily and capriciously, departing from longstanding enforcement posture of its own rules, and then to hide behind the claim that the "case is one of first impression." Such an administrative "one-free bite" concept would undermine and subsume the I.C. § 12-117 purpose of preventing state agencies from taking groundless actions "made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles." *Lane Ranch Partnership, v. City of Sun Valley*, 145 Idaho 87, 90 (2007).

Second, this is not a case of first impression. "A case of first impression does not constitute an area of settled law." *Purco Fleet Services, Inc. v Idaho State Dept. of Finance*, 140 Idaho 121 (2004). For many years, past ISP/ABC administrators interpreted and enforced I.C. § 23-908 (4) and IDAPA 11.05.01.010.03 so as not to require any number of "actual sales" or any sales at all. That interpretation was based upon public policy grounds. "Such a requirement would have been unlawful, in violation of public policy." (Affidavit of Edgar Rankin at ¶ 4).[3] Then, ISP/ABC changed policy, without notice to Fuchs or the general public. Suddenly "actual sales," in some unpronounced number, were required.

It has been clearly established law that a state agency must promulgate a new or amended rule when it decides to change policies that affect the public. In 1991, Deputy Attorney General Michael Gilmore explained to the special legislative council committee

[3] *See also*, Affidavit of John Gould: "such a requirement would be nonsensical, since, as a matter of common sense, a licensee cannot control how many people come into a licensed premise and buy drinks over any period of time." (Gould Aff. at ¶ 3); Affidavit of Major Thomas Thompson: "A new licensee would also satisfy the requirements of I.C. § 23-908 (4), if he or she secured a qualified premise and made liquor available at that premise, without making sales." (Thompson Aff. at ¶ 5).

formed to modernize the Idaho Administrative Procedures Act ("APA") that a purpose behind the rulemaking provisions was to stop agencies from engaging in informal rulemaking:

> Mr. Michael Gilmore, Attorney General's Task Force, stated the purpose of this Act is to stop agencies from using informal internal guidance documents and to give supervising attorneys a clear statement from the legislature that this has to stop. He said the requirement in this Act is that

ADMINISTRATIVE PROCEDURES ACT OF 1992, 51st Legislative Committee Minutes, p. 392, (October 29, 1991) (Attached as an Appendix to this Memorandum).

The Idaho Supreme has since rejected attempts by state agencies to avoid rulemaking. In *Asarco v. State*, 138 Idaho 719, 725 (2003), the Idaho Supreme Court rejected the State Division of Environmental Quality's attempt to change its policies without following formal rulemaking requirements:

> It is undisputed that DEQ did not comply with formal rulemaking requirements. Rather than arguing that it substantially complied with the rulemaking requirements, DEQ argued it did not have to do so. Thus, the district court correctly held the TMDL is void for failure to comply with state administrative law.

Asarco, 138 Idaho at 725.

Consequently, it is settled law. ISP/ABC must promulgate a new or amended rule to change policies affecting the public.[4]

And, it is important that this case involves the interpretation of a rule, not a statute. In *Rincover v. State Dept of Finance*, 132 Idaho 547 (1999), the Idaho Supreme Court declined to award fees against the State under I.C. § 12-117, because no court had interpreted the statute at issue. "At the time, the specific provisions of I.C. § 30-1413 which were relied upon by the Department had not been construed by the courts." *Rincover*, 132 Idaho at 550.[5] This is not a case about a statute, a law written by the legislature, but by a rule written by the agency itself. ISP/ABC knew when it filed this action, that previous and current administrators had never enforced the rule in a manner that required any number of "actual sales." (Respondent's Brief at 5). Nevertheless, it filed this action without promulgating a new or amended rule or pronouncing, even knowing, how many "actual sales" would satisfy its new policy. (Deposition of Robert Clements, **Exhibit R-8**). Consequently, what matters here is not whether I.C. § 23-908 (4) or IDAPA 11.05.01.010.03 have been interpreted by the courts, but whether the ISP/ABC's rulemaking obligations under the APA have been settled. *See, Asarco v. State*, 138 Idaho 719, 725 (2003).

[4] Similarly, and as discussed, *infra*, the other issues in this case have been settled by the courts as well. Ambiguities in administrative rules are construed against the agency that drafted them. *Higginson v. Westergard*, 100 Idaho 687 (1979). Parties, including state agencies, are prohibited from taking inconsistent positions to the other party's detriment. *Young. v. Department of Law Enforcement*, 123 Idaho 870 (Ct. App. 1993). Idaho State Police (or its predecessors) may not engage in arbitrary and capricious conduct as that is an unreasonable exercise of police power. *Weller v. Hopper*, 85 Idaho 386, 392 (1963); *O'Connor v. City of Moscow*, 69 Idaho 37 (1949).

ISP/ABC admi[redacted]it changed policy when it began rec[redacted] "actual sales." (Respondent's Brief at 5). It should not have filed this action without first promulgating a new or amended rule legally changing its policy. It did not do so. Fuchs should not bear the financial burden of correcting ISP/ABC mistakes that never should have been made. As ISP/ABC's failure to follow settled administrative law has been without a reasonable basis in fact or law, this Court should award attorney fees to Fuchs pursuant to I.C. § 12-117.

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[5] *See also, State Dept. of Finance v. Resource Service Corp., Inc.,* 134 Idaho 282 (2000) (interpretation of I.C. § 30-1413.); *Purco Fleet Services, Inc v. Idaho State Dept. of Finance,* 140 Idaho 121 (2004) (interpretation of I.C. § 26-2223(2)). Appellant Fuchs' attorneys have found no cases where the appellate court denied fees to a petitioner on the basis that it was a case of first impression where the agency was enforcing its own rule that it determined to be ambiguous.

III.
THE MERITS OF THIS CASE PROVE THAT ISP/ABC HAS ACTED WITHOUT A REASONABLE BASIS IN FACT OR LAW

A. ISP/ABC disregarded longtime interpretation and enforcement of IDAPA 11.05.01.010.03.

For many years, ISP/ABC did not require any number of "actual sales" by new licensees in the first six months. There are practical, public policy, and state constitutional reasons for this previously uncontradicted interpretation and enforcement of IDAPA 11.05.01.010.03. In bringing this administrative case for revocation of Fuchs' liquor license, ISP/ABC changed its policy. It began requiring some unknown and unexplained number of "actual sales" during the first six months. It did this arbitrarily and capriciously. How many sales would satisfy its new, capricious interpretation was not announced. The Director finally ruled in his Final Order that the rule was ambiguous. He then announced how he would thereafter apply the rule: a new licensee must sell "one (1) glass of liquor per day during each day the establishment is open, eight (8) hours a day, six (6) days a week." Director's Final Order at 11.

ISP/ABC now argues, though its argument is irrelevant to this case, that the Director's new interpretation of IDAPA 11.05.01.010.03 is somehow now the "proper" one, despite the ambiguity the Director acknowledges, criticizing previous administrators for their prior interpretation of the rule:

> Appellant points to the way previous Idaho State Police, Alcohol Beverage Control administrators and employees interpreted and applied the "actual use" requirement, which was essentially that "actual sales" were not required so long as liquor by the drink was merely available for purchase during "eight (8) hours a day, no fewer than (6) days a week." The word available is found nowhere in the test of the statute or the administrative rule.

(Respondent's Brief at 5).

Curiously, the Director found in his Final Order the rule having been ambiguous, capable of interpretation three different ways, notwithstanding that the hearing officer found the rule unambiguous. We have come full circle. The Director then, in his "new rule," construed the ambiguity. The Director criticizes his predecessors for applying the rule as unambiguous, as the hearing officer concluded prior to the Director's cogitation on review.[6]

For many years ISP/ABC predecessors to Lt. Clements and the Director interpreted IDAPA 11.05.01.010.03 as non-mandatory. Major Thompson stated by affidavit that the rule has been interpreted that new licensees needed only make liquor "available" during eight (8) hours a day, (6) days a week, not actually sell drinks, because a new licensee could not control how many customers patronize a licensed premises:

> To enforce the New License Rule to require actual sales per hour, per day, per week or otherwise, would mean that a new licensee would technically be in violation of the rule should time pass without a patron purchasing a drink of alcohol. This was determined by ISP policymakers, including by me, to be an unreasonable, arbitrary, irrational and impracticable interpretation of the New Licenses Rule.

(Affidavit of Major Thomas Thompson, ¶ 4).

Also, Major Thompson explained that a requirement of "actual sales" would violate the state constitutional mandate to promote "temperance and morality," by promoting alcohol consumption:

> ISP did not require actual sales of alcohol to meet the actual use requirements of I.C. § 23-908 (4) because public policy required by the

[6] Previous ISP administrators found the rule to be unambiguous as non-mandatory. Thompson Affidavit at ¶¶ 4-6). The Hearing Officer found the rule to be unambiguous, holding that a new licensee must make "actual sales" sometime while the establishment is open, "eight (8)hours a day, six (6)days a week." Preliminary Order at 15. The Director ruled that his own agency rule was *ambiguous*, in an obvious and strained attempt to award of attorney fees under I.C. § 12-117. ISP/ABC contends that this entire appeal is about attorney fees. (ISP/ABC's Response Brief at 3). This is correct.

> Idaho Constitution prohibits promoting alcohol sales and consumption. Article III, Section 24 and 26 of the Idaho Constitution states that that "temperance and morality" should be promoted by government, not alcohol consumption. An interpretation of a statute or a rule that requires sales of alcohol as a condition of licensure would violate this provision of Idaho Constitution.
>
> (Affidavit of Major Thomas Thompson, ¶ 6).

This interpretation of IDAPA 11.05.01.010.03 stood for fifteen (15) years. Current ISP/ABC administrators may be free to change this policy, but they are required to promulgate a new or amended rule to do so. *Asarco v. State*, 138 Idaho 719 (2003).

Moreover, while ISP/ABC challenges Major Thompson, because the word "available" does not appear in the rule, neither do the mandatory words "must" or "shall." Nor in IDAPA 11.05.01.101.03 does appear the phrase "one (1) glass of liquor sometime during the day that the establishment is open." Director's Final Order at 11. The Director ruled that IDAPA was ambiguous. Hence, it must be construed against the agency that drafted it. "Some courts have gone so far as to hold that, in suits involving a public administrative agency, the rules and regulations of such agency should be strictly construed against it. Any ambiguities contained therein shall be resolved in favor of the adversary." *Higginson v. Westergard*, 100 Idaho 687, 691 (1979) (citations omitted). The only manner, in which the rule could lawfully have been enforced, absent a new or amended rule, is as it had been enforced for many years. *See, State v. Hagerman Water Right Owners*, 130 Idaho 727, 733 (1997) ("where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as very important in arriving at the proper construction of the statute").[7]

[7] ISP/ABC argues it was improper for Fuchs to state that IDAPA 11.05.01.010.03 is "ambiguous, hence void." (Respondent's Brief at 5). Respondent is correct that there is no bright line rule that once a rule is declared ambiguous, it is automatically void. However, it is impossible to enforce a rule that has had no

ISP/ABC admits in its briefing before the Court, the agency, and the Director, that it changed policy. Rather than promulgate a new or amended rule, it fell to criticizing prior administrators. (Respondent's Brief at 5). The Director ruled that IDAPA 11.05.01.010.03 was ambiguous. The attempt to revoke Fuchs' retail alcohol beverage license based upon a rule that had never before been applied as a mandatory rule and which has now been declared by the Director on review as ambiguous, was without a reasonable basis in fact or law. This Court should award Fuchs attorney fees pursuant to I.C. § 12-117.

B. ISP/ABC is barred from revoking Fuchs' license based upon quasi-estoppel.

The Idaho Court of Appeals has held that quasi-estoppel may be invoked against the Department of Law Enforcement (predecessor to ISP), if that government agency takes inconsistent positions to a licensee's detriment. *Young v. Idaho Dept. of Law Enforcement,* 123 Idaho 870 (Ct. App. 1993).[8] Previous and current ISP/ABC administrators did not require any number of "actual sales."

ISP/ABC argues, in its persistence and confusion, as it did before the Hearing Officer and the Director on review, that the separate and distinct doctrine of "equitable estoppel" may not be invoked against a government or public agency functioning in a sovereign or governmental capacity. (Respondent's Brief at 8). But Fuchs has not argued "equitable estoppel." He argues "quasi-estoppel." The Hearing Officer and the Director

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clear standard but has become a moving target. If a statute or rule is ambiguous, the rules of statutory construction require that courts will look to long-time agency application of the rule. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 733 (1997). Courts construe ambiguities against the drafter. *Higginson v Westergard*, 100 Idaho 687, 691 (1979). Courts construe ambiguous statutes and rules to avoid "unnecessarily harsh consequences." *Id.*

[8] *See also, Terrazas v. Blaine County*, 147 Idaho 193 (2009); Appellant's Brief in Support of Petition for Judicial Review at pp. 23-27 for full discussion of the doctrine of quasi-estoppel and its application to this case.

each acknowledged the distinction. "Fuchs argues the doctrine of quasi-estoppel, not equitable estoppel. While very similar, there is a difference between these two principles." Director's Final Order at 13. ISP/ABC's entire response to Fuchs' assertion of quasi-estoppel is based upon a wrong theory not before the Court.

Further, ISP/ABC argues that it cannot be estopped by misstatements of law made by ISP administrators and employees. "Appellant cannot estop the state through those mistaken statements of law." (Respondent's Brief at 9) (*citing Kelso & Irwin, P.A. v. State Ins. Fund,* 134 Idaho 130, 138 (2000)). *Kelso* was an equitable estoppel case, not one based upon quasi-estoppel. It has no application here. Nevertheless, previous administrators made no mistakes of law. Mr. Gould, Captain Rankin and Major Thompson, the state administrators responsible for enforcement of IDAPA 11.05.01.010.03,[9] were the final arbiters of agency policy during their tenure. *See,* I.C. § 23-903. They read the rule and applied it to require any number of "actual sales." ISP/ABC did not promulgate a new or amended rule to change it.[10]

ISP/ABC concedes that it has taken inconsistent positions. It now claims previous and current administrators were inept and wrong. Since ISP/ABC knew it was changing policy, and should have known it was doing so illegally, it acted without a reasonable basis in fact or law. This Court should award Fuchs attorney fees and costs pursuant to I.C. § 12-117.

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[9] *See,* Gould Affidavit at ¶ 2; Rankin Affidavit at ¶2; Thompson Affidavit at ¶ 2.

[10] Ironically, ISP/ABC has made misstatements of law in these proceedings. It argued to the Hearing Officer and to the Director that Fuchs was required to make multiple, hourly sales of liquor by the drink to satisfy the rule. (**Exhibit R-8**). The Director only announced in his new interpretation in his Final Order, that one (1) glass of liquor must be sold per day to satisfy the rule. Director's Final Order at 11.

C. ISP/ABC engaged in improper rulemaking.

While ISP/ABC argues that it did not engage in improper rulemaking, "[t]he Director engaged in lawful, thoughtful, rational and reasoned statutory rule construction." (Respondent's Brief at 9), this is not the rulemaking which Fuchs challenged. He defended against the illegal rulemaking alleged in the administrative complaint for revocation or forfeiture brought against him. The Director's new rulemaking, again likely unlawful, is not at issue here. In any case, the Director should not have engaged in "statutory rule construction" with regard to the rule against Fuchs in the complaint. The rule applied in the complaint was unambiguous. It was incumbent upon the Director to amend or repeal the rule. If he chose to depart from prior enforcement of agency policy, he was required to promulgate a new rule or rule amendment. Since he did not do so, ISP/ABC's actions were without a reasonable basis in fact or law. This Court should award Fuchs attorney fees pursuant to I.C. § 12-117.

ISP/ABC admits that it has changed policy. It disparages past ISP/ABC administrators and the manner in which they enforced IDAPA 11.05.01.010.03. In a memorandum before the Hearing Officer, ISP/ABC claimed that Mr. Gould, Captain Rankin, Major Thompson and ISP Officer Donald Otto were in "dereliction of their duty to enforce the law." (Complainant's Response to Respondent's Motion for Summary Judgment and Continued Objection to and Motion to Strike Evidence of ABC's Past Practices filed October 23, 2009).

ISP/ABC admits, further, that the current bureau chief, Lt. Clements, did not require "actual sales," when he investigated Fuchs' Nampa licensed premises in 2005, relating to issues which did not result in administrative action. ISP/ABC attempts to

blame its decision to not require actual sales in 2005 on lack of manpower:

> In hindsight, if Lt. Clements had sufficient staff and resources, Fuchs should have been asked to forfeit those licenses back to the state for failure of actual use as the law requires, and if he refused to do so as in the present case, Lt Clements would have sought revocation.

(Complainant's Response to Respondent's Motion for Summary Judgment and Continued Objection to and Motion to Strike Evidence of ABC's Past Practices filed October 23, 2009 at 16, *citing* Affidavit of Robert Clements in Response to Respondent's Motion for Summary Judgment at ¶ 18).[11]

A state agency must promulgate a new or amended rule if it seeks to change policies that affect the public. *Asarco v. State*, 138 Idaho 719 (2003). Since ISP/ABC failed to do so prior to filing this action, its continued attempts to revoke Fuchs' license, based upon an ambiguous rule, the application of which was changed retroactively, was without a reasonable basis in fact or law. This Court should award attorney fees to Fuchs pursuant to I.C. § 12-117.

D. ISP/ABC's actions are an unreasonable exercise of police power.

ISP/ABC does not respond to Fuchs' argument that its conduct has been an unreasonable exercise of police power. Yet, ISP/ABC admits that it never required "actual sales" prior to this action. (Donesley Aff.; **Exhibit R-3**).[12] ISP/ABC admits that

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[11] ISP/ABC's attempt at blaming lack of manpower is refuted by its own Administrative Violation Notice. ISP knew how many sales Fuchs had made at each of these four bars. (**Exhibit R-4**). ISP identifies how many sales were in the Incident Report attached to the Administrative Violation Notice. (**Exhibit R-DF-6**). ISP had obtained all of the necessary evidence it would have needed to pursue a revocation of Fuchs's Nampa licenses. The only logical inference that can be made from ISP's decision not to do so is that "actual sales" was not an issue in 2005.

[12] Fuchs requested in discovery that ABC identify other cases where it had sought to forfeit or revoke a license for failure to make actual sales in the first six (6) months. ABC only identified one other, currently pending action against Bill and Lynn's Backroom. (Complainant's Response to Interrogatory No. 19) (Donesley Aff.; **Exhibit R-3**). This interrogatory response was subject to a motion to compel. In response to the Motion, in the telephone conference with the Hearing Officer, ABC affirmatively stated that this was

it filed this administrative proceeding without knowing what number of "actual sales" it would require of any licensee, specifically Fuchs. "Probably more than one drink. It's plural." (Deposition of Robert Clements, **Exhibit R-8**, at pp. 35-36). It does not dispute that five different standards have been enunciated since this action has been filed.[13] ISP/ABC's actions have been an unreasonable exercise of police power.

The Idaho Supreme Court has explained that, "[a]lthough a liquor license is a privilege and not a property right; the licensing procedure cannot be administered arbitrarily." *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 765 (1977) (citations omitted). The Idaho Supreme Court has held that arbitrary administration of liquor licensing is an unreasonable exercise of police power. *O'Connor v. City of Moscow*, 69 Idaho 37, 43 (1949); *Weller v. Hopper*, 85 Idaho 386, 392 (1963).

The most concrete example of ISP/ABC's arbitrary and capricious enforcement of IDAPA 11.05.01.010.03 is its inconsistent treatment of Daniel Fuchs. In 2005, Fuchs had less sales of alcohol at his four Nampa bars than he did at Aubrey's House of Ale alleged in this case. For example, Chelsea Bug's Bar (Nampa) reported total sales for a two month period of $63.18. (Donesley Aff.; **Exhibit R-4**). Aubrey's House of Ale (Coeur d' Alene) reported sales for a three month period of $ 598.11. (Fuchs Aff.;

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the only other case involving a premise in which ABC had alleged a licensee failed to fulfill the actual sales requirement. (Complainant's Objection to Respondent's Motion to Compel Discovery and for Enlargement of Time and for Telephonic Hearing on Oral Argument at 8).

[13] The five interpretations are as follows: (1) the original interpretation that the rule was non-mandatory. (Major Thomas Thompson Affidavit at ¶ ¶ 4-6) (Denise Rogers Affidavit at ¶ 4); (2) Lt. Clements' interpretation: multiple hourly sales, eight (8) hours a day, six (6) days a week. (Robert Clements Deposition, **Exhibit R-8**); (3) the Hearing Officer's interpretation: "actual sales of liquor sometime while [the licensee] is in operation for eight hours a day/no fewer than six days a week." Preliminary Order at 15; (4) the Director's interpretation: "six (6) sales a week." Director's Final Order at 11; (5) the Director's alternate interpretation which he then rejected, "one (1) sale a week." *Id.* at 10.

Exhibit R-DF-17, 18).[14] ABC did not seek forfeiture or revocation of any of Fuchs' Nampa licenses or allege in any administrative action or otherwise that he did not make sufficient "actual sales." (Donesley Aff.; **Exhibit R-4**).

Because ISP/ABC's conduct was an unreasonable exercise of police power, it was without a reasonable basis in fact or law. Fuchs should be awarded attorney fees and costs pursuant to I.C. § 12-117.

IV.
CONCLUSION

ISP/ABC has acted without a reasonable basis in fact or law. It changed policy without following formal rulemaking procedures. It filed this action not knowing the number of "actual sales" it sought to enforce. The Director ruled that IDAPA 11.05.01.010.03 was ambiguous. Consequently, without a reasonable basis in fact or law for ISP/ABC attempted to require "actual sales" when it filed this administrative proceeding. This Court should award attorney fees to Fuchs pursuant to I.C. § 12-117.

DATED this 26 day of November 2010.

Brian Donesley
Attorney for Appellant/Petitioner

[14] Jokin' Jacobs Bar reported total sales of $110.03 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Brooke's Bar reported total sales of $68.18 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Chelsea Bug's Bar reported total sales of $63.18 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. Rockin' Ryans reported total sales of $30.18 to the Idaho Tax Commission for the period from November 1 to December 31, 2004. (Donesley Aff.; **Exhibit R-4**).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26 day of November, 2010, I caused an accurate copy of the foregoing document to be delivered as noted below to:

Lawrence G. Wasden, Attorney General Stephanie A. Altig, Deputy Attorney General Idaho State Police 700 S. Stratford Drive Meridian, Idaho 83642-6202	U.S. Mail : _____ Hand Delivery: _____ Facsimile: X *(208) 884-7228*

Thomas Humphrey

APPENDIX

LEGISLATURE OF THE STATE OF IDAHO

Fifty-first Legislature First Regular Session — 1991

IN THE HOUSE OF REPRESENTATIVES

HOUSE CONCURRENT RESOLUTION NO. 15

BY JUDICIARY, RULES AND ADMINISTRATION COMMITTEE

A CONCURRENT RESOLUTION

AUTHORIZING AND DIRECTING THE LEGISLATIVE COUNCIL TO APPOINT A COMMITTEE TO UNDERTAKE AND COMPLETE A STUDY OF THE ADMINISTRATIVE PROCEDURES ACT.

Be It Resolved by the Legislature of the State of Idaho:

WHEREAS, the Administrative Procedures Act contained in Chapter 52, Title 67, Idaho Code, was first enacted in 1965; and

WHEREAS, the Administrative Procedures Act was amended by the passage of House Bill No. 529 in 1990 which related to legislative oversight of administrative rules and was interpreted in 1990 by the Idaho Supreme Court in the case of Mead v. Arnell; and

WHEREAS, the Mead v. Arnell case upheld the Legislature's authority to reject rules and regulations promulgated by the executive branch of government; and

WHEREAS, the problem of notice for proposed rules under the Administrative Procedures Act is one that both state agencies and persons or entities regulated by rules and regulations seem to struggle with; and

WHEREAS, the world, Idaho and state government have changed greatly since 1965 and an examination of the Administrative Procedures Act is in order to modernize it, make it more efficient and have it better serve the needs of the people of the state as well as agencies of state government.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Fifty-first Idaho Legislature, the House of Representatives and the Senate concurring therein, that the Legislative Council is authorized and directed to appoint a twelve person committee, with six members from the Senate and six members from the House of Representatives, to undertake and complete a study of the Administrative Procedures Act with emphasis given to legislative oversight of administrative rules and the general procedure of how rules get promulgated and notice is given to and received by the public. In conducting this study, the Committee shall consult with the directors or administrative heads of state agencies and institutions, and the private, public entities and persons who are impacted by or regulated by administrative rules and the general provisions of the Administrative Procedures Act.

BE IT FURTHER RESOLVED that the Committee shall report its findings, recommendations and proposed legislation, if any, to the Second Regular Session of the Fifty-first Idaho Legislature.

Legislative Council
Committee on Administrative Procedures
Senate Caucus Room
Statehouse, Boise, Idaho
October 29, 1991

MINUTES

The meeting was called to order at 9 a.m. by Cochairman Senator Vance. Other members in attendance were Cochairman Representative Simpson, Senators Donesley, Hawkins, Kerrick, McLaughlin, and Wetherell, and Representatives Pete Black, Duncan, and Loveland. Representative Adams was absent and excused. Representative Infanger was absent. Staff in attendance were Schlechte and Wood.

Others in attendance were Representative Loertscher; Carl Olsson and Bob Fry, State Tax Commission; Dale Goble, Mike Gilmore, Jack McMahon, Korey Lowder, and Michael DeAngelo, Attorney General's Task Force; Paul Pusey, Boise; Jon Carter, Governor's Office; Woody Richards, Moffatt, Thomas, Barrett, Rock, and Fields; Reagan Davis and Dick Rush, Idaho Association of Commerce and Industry; and Bob C. Hall, Idaho Newspaper Association.

Mr. Jack McMahon, Deputy Attorney General, Attorney General's Office, stated that Attorney General Larry EchoHawk made it a priority of his office to review the Administrative Procedures Act (APA) for state agencies. He said through the courtesy of the cochairmen of this committee, the decision was made to allow the Attorney General's Task Force to go forward and draft a document covering all the APA excepting the legislative oversight provisions.

Mr. McMahon stated the Task Force started meeting in April and includes members representing the state agencies, the private sector, and local government, and five legislators representing both parties in the House and Senate. He said the Task Force was divided into three groups: rulemaking, contested cases, and publication of rules. He said these committees met periodically throughout the summer, and by late summer had put together a first draft which has been mailed to attorneys and other interested parties throughout the state for their review and comment.

Mr. McMahon said the comments received have been integrated into the attorney general's draft document. The committee has also met with the Idaho Association of Commerce and Industry's legal advisory team, private sector attorneys, 20 deputy attorneys general, and key contacts in the media inasmuch as one of the provisions in the draft is of serious concern to the media. He said the draft is now in two different forms, one of which is in legislative format drafted by Legislative Council. The other, drafted by Professor Dale Goble, University of Idaho College of Law, varies slightly and contains comments after each section.

Professor Goble stated that there is a perception that agencies act on the basis of secret law. He said the draft attempts to make agency actions and proceedings more open to the public. The creation of the Idaho Administrative Bulletin and the Idaho Administrative Code in the draft are steps in that direction. He continued that the public notice requirements in rulemaking have been expanded and the time limits for interim legislative review have been extended to increase the public participation.

Professor Goble said the second thing they tried to do is "regularize" what agencies are doing. They tried to look at the kinds of things that agencies currently are doing, figure out how many different kinds of things there were, and then specify the procedures for those kinds of things. He said this is particularly true in contested cases.

Professor Goble said the third thing they tried to do is to keep it simple and informal. He said a number of people commenting on the initial draft said, "Don't make it very complicated." He said people indicated they want it so that individuals can go to an agency to try and solve their problems without having to involve an attorney. Professor Goble said all the way through they have attempted to do that. For example, he said they have encouraged agencies to engage in negotiated rulemaking. They have attempted to give flexibility so that agencies can formally negotiate contested case problems.

Professor Goble said the APA is divided into five general sections, four of which were a part of the model APA, and the fifth, Legislative Review, from current law.

1. General Provisions

Professor Goble said the first section deals with a number of general provisions that are applicable throughout the Act. He said in reviewing definitions, three of those definitions tie into one another and are of particular importance. The first is the definition of agency action. Most of the judicial review provisions in the Act are tied into the idea that agency action is subject to judicial review; therefore, the definition of agency action tends to be a trigger for judicial review.

Professor Goble said the second and third definitions are "order" and "rule." He said the two primary things that agencies do are to either issue orders following a contested case, or adopt a rule following a rulemaking.

Professor Goble said the second major thing contained in general provisions is the creation of the office of Administrative Rules Coordinator. The Rules Coordinator will be responsible for the publication of two documents: the Idaho Administrative Bulletin to be published biweekly and contain notices of proposed

rulemaking; and the Idaho Administrative Code to be published annually and contain all final rules promulgated by an agency. The bulletin will be widely distributed throughout the state and will be available in libraries around the state. It will also be available in subscription form.

2. Rulemaking

Professor Goble said there are relatively few changes in the rulemaking provisions from the current statute. He said one of the changes is found is Section 67-5220 where an additional step is added at the beginning of the process to have agencies notify the public of their intent to promulgate a rule, the idea being that the earlier the public is given notice, the better. Professor Goble said the notice of intent is the voluntary step designed to get notice out to the public and to encourage agency decision making to be as open as possible.

Professor Goble said Sections 67-5221 through 67-5224 set out four mandatory procedures that an agency is required to go through to promulgate rules. The agency has to publish a notice in the bulletin that contains a wide range of information including the text of the proposed rule. Concurrent with the publication in the bulletin, notification goes to the legislature. The legislative subcommittees have an opportunity to hold a hearing on the rule if they choose to do so. In the third step, the public also has an opportunity to make comment on the proposed rule, including the opportunity to require some kind of an oral presentation. The final step in the process is that the agency is required to publish a statement including the reasons for and an explanation of the rule in conjunction with publishing the final rule in the bulletin.

Professor Goble said in order to facilitate judicial review of the process, Section 67-5225 requires the agency to put together a record in conjunction with the rulemaking process. He said the current statute provides for emergency rules. Section 67-5226 of this proposal somewhat expands the kinds of rules that can be promulgated by authorizing the agencies to promulgate temporary rules in certain circumstances. If an agency proposes to change a rule to comply with changes in federal law, then it can do so through a temporary rule while it promulgates a final rule. If the agency is conferring a benefit, then it can do so through an emergency rule followed by a final rule. He said it was felt that in both of those situations we wouldn't run the risk of cutting off people's rights. Professor Goble said one safeguard with a temporary rule is that it only lasts for a maximum of 27 weeks.

Professor Goble stated that in order to determine when government actions are going to happen, all the way through the APA they attempted to change time frames over to multiples of seven days. He said longer numbers are specified in terms of weeks; the shorter numbers are specified in multiples of seven days.

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3. Contested Cases

Professor Goble stated that contested cases are those situations in which the agency action affects an individual's rights or responsibilities. As a result, these provisions are the most intricate, interrelated, and complex provisions of the Act. He said they attempted to find common problems that confront agencies in contested cases, and essentially found that there are five different models in things that agencies did. He said they then attempted to draft law that captured those five things. One of the major distinctions between the five things is whether or not the agency head makes the initial decision. He said in a couple of situations the agency head will make the initial decision. In the other three situations, somebody other than the agency head, generally a hearing officer, will make the first decision in the agency. He said there is then the possibility in the latter three of some kind of internal appeals process and that tends to be what separates out the five different groups.

Representative Duncan stated that he was somewhat concerned with the wording in 67-5240 as far as making the transition from the "rulemaking" process to the "contested cases" process; i.e., "a contested case is governed by the provisions of this chapter." The chapter will be Chapter 52 -- so would that mean that contested cases would be governed by some of the things in prior sections dealing with rulemaking? He asked how we would stop that conclusion from happening?

Professor Goble responded that it is covered by this chapter in the sense that the definition provisions in the first part of the Act apply here, and the judicial review provisions in the last part of the Act apply here as well. He said he thought it would be possible to go through and specify the various sections.

Representative Duncan said he wondered if there would be a conflict with "one of those guys with a black robe," who would somehow use one of the rulemaking proceedings that doesn't specifically start out by saying "this only applies to rulemaking," and come up here with some sort of ambiguity or contradiction between contested cases.

Mr. McMahon said the document should be worded so carefully that that will never happen. He said it's a challenge we should accept. He said agency actions are either rules or orders, rulemakings or contested cases, and the vocabulary has been done so carefully that rulemaking provisions, even though they are part of this chapter too, should never be capable of confusion in a contested case arena. Mr. McMahon said we should make perfectly sure of that.

Professor Goble said if an agency tries to do something to a particular person or a small, particularly identified group of

individuals, by definition that's an order, and by definition you can only do an order through a contested case. He said we've tried to draw the line between general legislative rulemaking and individual contested case order.

Senator Donesley questioned when does the specificity break down and an order become a rule? Professor Goble responded that any time you try to draw a line there's a gray area where the two meet. He said orders tend to be directed toward events that occurred in the past, whereas a rule tends to look to the future. In response to a question by Senator Donesley, Professor Goble said under both the rulemaking and the contested case provisions, there's the opportunity to seek declaratory judgment.

Mr. McMahon said that sometimes agencies get in the middle of a case and they say, "Gee, this is a good policy for this person; we want this policy to start governing everything we do for all the other people that we're going to deal with." He said that in Section 67-5250, Indexing of Precedential Agency Orders, we've said, "You can't do that unless you either make it into a rule, or index that opinion and keep it available." Everyone would then know that from then on that policy was established and the agency was going to rely on it from now on.

Senator Donesley said from a practical matter in some agencies there are informal memos, guidelines, opinions, and enforcement guidelines -- will these be permissible under these rules? Are they prohibited, such that they have no effect unless promulgated lawfully, or have we addressed that issue at all?

Professor Goble said we didn't address that issue specifically and it is probably impossible to get away from having such documents. But, if we try to say that we have to publish them all, maybe it will require a phone call to determine the agency policy. He said when they were at IACI they heard similar concerns that agencies have such internal guidance documents. Nobody could find out what they were, and they would really like to see something in there about having internal guidance documents, much like the precedential orders.

Mr. Michael DeAngelo, Attorney General's Task Force, stated that according to 67-5249, these things are required to be placed in the record, so they must be available as part of the contested case record. When balancing that with 67-5250, the intent is that we can't use anything as precedent or binding unless it's indexed and available for public inspection.

Professor Goble said the other difference is that if an agency goes through the process of promulgating a policy as a regulation, then the regulation itself has the force and effect of law. The agency then doesn't have to prove that it's valid in subsequent contested cases. He said that's where one starts from, just as

though it were statute. But, if there is an internal guidance document that's never promulgated, then every time the agency wants to use that, it has to establish that the policy itself corresponds to the statute. He said if the agency promulgates a rule, it gains vis-a-vis judicial review. If it chooses not to, then the internal guidance document does not have the force and effect of law.

Mr. Mike Gilmore, Attorney General's Task Force, stated the purpose of this Act is to stop agencies from using informal internal guidance documents and to give supervising attorneys a clear statement from the legislature that this has to stop. He said the requirement in this Act is that if it's not written and promulgated as a rule, it can't be used.

Professor Goble said there are five models of contested cases. He said the first kind of thing that agencies do is issue a notice of violation or a complaint. The most common occurrence when a notice of violation is issued is that the person who receives it will say, "Yeah, you caught me, here's the penalty," and that will be the end of it. Notices of violation are treated as one form of informal disposition of a contested case. He said if the person who receives the notice of violation objects to the notice, they can trigger a contested case. They have the authority to go in and request a full hearing before the agency on the matter. Professor Goble said there doesn't have to be a contested case to issue a notice of violation. The inspector can go out and issue the notice of violation. If the person does not contest the notice of violation, he can pay the penalty and there is no need to go through a full procedure, but we give the option to the person who receives the notice of violation to initiate the process. That's the first model.

Professor Goble said the second and third models are situations in which the hearing is held by a hearing officer. The difference between the two is whether or not the order becomes final without the head of the agency having done anything. He said one recurrent factual pattern is that the hearing officer hears the case and prepares a recommended decision. That recommended decision does not become final until it goes to the board and a decision is made.

Professor Goble said the other similar model is where a hearing officer hears the case and renders a preliminary order. That preliminary order then becomes final unless one of the two parties to the hearing requests a hearing before the agency head. Therefore, when you have a recommended order, the order doesn't become final until the agency head acts. With a preliminary order, it becomes final unless there is a request for administrative review of the matter. Professor Goble said then there are final orders, situations where the agency head will actually do the hearing and will make the decision.

Professor Goble said these four types of orders follow the same procedures as set out in Section 67-5242. There are no real significant changes in this section; it is essentially the way it is done now. Professor Goble said the fifth type of order, the emergency order, has a separate procedure and is designed for a small number of situations in which there is a pressing threat to public health or safety. He said in such situations an expedited procedure is available for issuing an emergency order.

Professor Goble said the remaining provisions in the contested case materials are essentially housekeeping and there are no significant changes in there. One change that goes along with the idea of reducing the range of secret law has to do with agencies taking official notice, which is found at 67-5251. If an agency proposes to take official notice, all parties must be notified to allow them a reasonable opportunity to contest and rebut the facts. The agency will not be allowed to "shove documents" at the opposing side; they'll have to have a staff person bring the document with them and be available to testify as to the document.

4. Judicial Review of Agency Action

Professor Goble said the only significant change in the judicial review provisions was to make them applicable to rulemaking as well as to contested cases. In the current statute, the judicial review provisions apply only to contested cases. He said reviewing courts, as a result, have scrambled around "pulling bits and pieces from here and there" trying to come up with a way of reviewing rulemakings.

Professor Goble said the other thing they did was to take one very, very long section and divide it up into separate steps, and give each of the separate steps a title. He said it now appears that there's a whole bunch of sections where there was only one section before; but essentially, the one big section was just divided into smaller sections.

Senator Donesley stated that internal personnel policies are required by statute and by rule of the Personnel Commission. He said they do affect private rights. Following discussion regarding whether or not internal personnel policies of agencies should be made part of the APA, Senator Donesley agreed that they should not be because they would only clutter up the Administrative Code. However, Senator Donesley said that he was concerned about the wording contained in the definition of "rule" in Section 67-5201(16)(i) where it states "... not affecting private rights or procedures available to the public." In order to make the language very clear, Senator Donesley requested that it be changed to "... not affecting private rights <u>of the public</u> or procedures available to the public."

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In response to a request by Representative Simpson, Professor Goble reviewed the proposed establishment of an office of administrative rules coordinator. He said the coordinator will be responsible for publishing the Administrative Bulletin biweekly and the Administrative Code annually. These publications are to be widely distributed throughout the state. The following documents shall be published in the Administrative Bulletin:

1. All proclamations and executive orders of the governor, except those that have no general applicability or are effective only against state agencies or persons in their capacity as officers, agents, or employees thereof.

2. Agency notices of intent to promulgate rules, notices of proposed rules, and the text of all proposed and final rules together with any explanatory material supplied by the agency.

3. All documents required by law to be published in the bulletin.

4. Any legislative documents affecting a final agency rule.

Professor Goble said the focus is primarily on the publication of documents related to the promulgation process itself. He said there are essentially three steps in that publication process. The first one is a voluntary one (Section 67-5220). If the agency chooses it may publish a notice of an intent to promulgate a rule. Professor Goble said the first mandatory step in the process is set out in 67-5221, Public Notice of Proposed Rulemaking. The agency is required to publish a notice in the bulletin which sets out eight items that are required to be published:

1. The specific statutory authority for the rulemaking.

2. A statement in nontechnical language of the substance of the proposed rule.

3. A concise nontechnical explanation of the purpose of the proposed rule.

4. The text of the proposed rule prepared in legislative format.

5. The location, date, and time of any public hearings the agency intends to hold on the proposed rule.

6. The manner in which persons shall make written comments on the proposed rule, including the name and address of a person in the agency to whom comments on the proposal shall be sent.

7. The manner in which persons may request an opportunity for an oral presentation as provided in Section 67-5222, Idaho Code.

8. The deadline for public comments on the proposed rule.

Professor Goble said the initial publication contains two types of information: one, information about the rule itself; and two, information about how to become involved in commenting on the rule. The rule then goes out for public comment. The agency is required to give at least 21 days for public comment. Professor Goble said then there is the public participation period which is concurrent with the interim legislative review period.

Mr. McMahon said under the current law oftentimes the legislative review committees end their review proceedings long before the comment period has expired and the agency is still receiving comment. The new proposal makes sure the legislature can always hold a hearing after all the public comment has been received rather than when it's still coming in.

Professor Goble said the final step is publication of the final rule (67-5224). Basically what is required here is a statement of the reasons and justifications for adopting the rule, plus a statement of any change that was made between the proposed text and the final text.

Professor Goble said on an annual basis all the rules that have been published in final form in the bulletin will be compiled into a codification called the Administrative Code. In response to a question by Representative Simpson, Professor Goble said it will also be available through electronic means and will be available to those who want to subscribe to it.

Mr. McMahon stated that when the office of administrative rules coordinator is created, it will be effective July 1992. The Act itself would not take effect until July 1993, so for a year there will be start up costs necessary for this office before it can start billing the agencies for doing the work inasmuch as it won't be doing the work; it will be creating a data base and getting all the existing agency regulations onto the computer. After July 1993, this office will be self-supporting.

Mr. McMahon said this position was put in the office of the Governor. He said there is nothing sacred in this decision and that it was a "flip of the coin" sort of thing because it could just as well be placed in the Secretary of State's office, the State Law Library, or in the Auditor's office. He said some states place it in the Attorney General's office.

Senator Hawkins stated that he would like to pursue the public notice aspect in the proposed draft. He said many of his

constituents ask him, "Why didn't I have notice of this rule?" He said by publishing proposed rules in only one place, the Administrative Bulletin, we are actually going to constrict the public notice rather than expand it. He said he doesn't think that the average citizen of the state is going to be aware or be involved in receiving, reviewing, and understanding the bulletin all the time. He said even though public notice in the newspapers seems to be inadequate, it does seem to be better, broader, and more effective than the bulletin.

Professor Goble said there has been absolute unanimity among everyone that he has talked to that the goal is the best notice possible at a reasonable cost. He said everyone he has talked to feels that the best way to hide something is to put it in the legal section in the back of a newspaper. He said if there is a place where they are regularly available, and if they are available in every public library in the state, he feels this is a step ahead.

Mr. Korey Lowder, Department of Health and Welfare, said he is responsible for all the notices of rulemaking in that department, and in his five years of experience, he has found that the majority of people that take notice of a rulemaking get that notice from a direct mailing from the department; they don't get it from the newspaper. He said the department uses a direct mailing because it realizes that the newspaper publication doesn't work inasmuch as no one reads them.

In response to a question by Senator McLaughlin, Mr. Lowder said under the current system, the state is probably spending 25% more than it should be spending on publications and mailings. He said now they are sending out rules, they are sending out legal notices, and it is "shooting hit and miss." He said the office of rules coordinator will allow the agencies to channel their funds into one constructive means and people will have one place to go for information on rules and regulations.

Senator McLaughlin asked if there was going to be a charge to the private people that wish to have access to the bulletin? Mr. Lowder said if they read the bulletin in the public library it will be free; if not, there will be a charge. Senator McLaughlin said that causes her concern because not every town in Idaho has a public library. She said some people might need to have access to this information, but they might not have the resources by which to obtain it.

In response to a question by Senator McLaughlin, Mr. Lowder said he feels the bulletin will allow more access to the rules and will inform more people than the current process. He also responded that sometimes they notify clients of a possible rule change and sometimes they don't. Mr. DeAngelo said if there is a change in level of benefits to Health and Welfare clients, there is a notification process, but this is not a part of rulemaking

changes. Mr. DeAngelo stated that he doesn't feel there is any kind of system that is going to guarantee that everyone that needs and wants to know about a particular issue is going to get that notice.

Senator Hawkins stated that he feels the notice provision in the draft proposal is inadequate. He said he does not perceive a large percentage of his constituency being aware and informed of a bulletin and being able to follow it, as compared to what there is now. He said he has had a lot of constituents read a legal notice in a newspaper and they didn't know if it affected them or not, but at least they knew something was happening and took the initiative then to make a phone call and find out what was happening.

Representative Simpson said in Section 67-5205 he would like to add a provision that one copy of the bulletin be distributed to each city hall in addition to one copy being distributed to each county clerk. He would also like to add a provision for an 800 number in the office of the administrative rules coordinator. He said he feels that once people realize that there is a biweekly publication that tells them everything they want to know about any proposed rule or regulation, there will be a much bigger benefit to the public than there is in a legal notice in a newspaper.

Representative Simpson suggested that a notice be placed in the newspaper that (a) states that a rule is coming out; and (b) contains a glossary which indicates which rules are being proposed. He said this way someone could see that there were rule changes affecting a particular area. Senator Donesley said this is a good idea and he would support this idea as it would provide an added "safety net" for the public.

Senator Hawkins said be believes public notice of a rule change, even though it presently isn't adequate, needs to be a part of the promulgation process. He said he really believes that if we are going to have public involvement in developing rules, we are going to have to provide better notice than what we're providing now. He said individual people won't have a clue as to what's happening to them with regard to regulations until it's too late.

The committee recessed for lunch at 12:10 p.m. and reconvened at 1:30 p.m.

Senator Donesley expressed concern about the language in Section 67-5242(1)(c) and said he would like to see it changed so that it's clear that there must be notice as to facts and generally as to applicable law, rather than the existing language alone which requires that a notice must include "a statement of the matters asserted or the issues involved" inasmuch as he is not clear what that language means. He said the reason for this suggestion is that it's quite simple to give people notice of what it is that's being alleged in a contested case.

Mr. McMahon said the policy choice was made to try to strip this document down and leave in just the bare essentials with the intention of following it up with a set of model rules for all of the agencies to follow. The model rules support this document and fill in all the details. He said every agency will have to adopt model rules unless they adopt something that's better, something that is more thorough and more protective. (Section 67-5206(5).

Representative Duncan asked about the wording in 67-5240 where it seems like the Public Utilities Commission is exempted out of providing rules dealing with contested cases. Professor Goble said the PUC is taken out of 67-5240 for a couple of reasons: He said what they do formally fits within the definition of a contested case, but at the same time it's forward looking which makes it sort of like a rulemaking; therefore, the normal contested case proceeding doesn't fit a lot of their processes and procedures very well. Mr. McMahon said the PUC has a very thorough and elaborate set of rules that are even thicker than this draft and they are broken down by type of proceeding.

Mr. McMahon said it was the intent of the Task Force that the Industrial Commission be included in Section 67-5240, along with the Public Utilities Commission, and requested that it be added to that section. He said the point was made that the Industrial Commission has a specific exemption in their statute for their judicial rulemaking which really is its contested case process, so they have an entire set of rules that govern how they do contested cases. Mr. Schlechte said both the PUC and the Industrial Commission have direct appeal to the Supreme Court, so they need to be treated somewhat differently.

Senator Vance stated that at this time the committee will accept public testimony pertaining to the proposed document.

Senator Michael D. Crapo, Idaho Falls, said that he has some very strong reservations about the proposed bill that has been presented to the committee. He said his main concern evolves from a concern that he has that the citizens of this state, and most other states, feel removed from the political process. A part of this is caused by the fact that some of the agencies are, to a certain extent, becoming those kinds of nameless, faceless bureaucracies that we associate with Washington, D.C.

Senator Crapo said there is a problem in Idaho. He said the political system has grown beyond the control of the average citizen in a number of areas, and one of those areas is the Administrative Procedures Act and the interplay of citizens with state agencies. He said nine out of ten of the constituent contacts he has concern a problem that a citizen is having with an executive agency. He said this makes sense because that is where government really meets the people -- in the administration of laws through the agencies. He said we need a system where the people

can interplay with the government in a way that is effective and where the people have some power.

Senator Crapo said in the 1991 legislature he introduced Senate Bill 1006 which would have judicial oversight over agency decision making. He said there were other bills also introduced that dealt with the same issue. The Attorney General requested that we hold off on those bills inasmuch as he proposed the appointment of a task force to review the entire administrative procedures process. Senator Crapo said they agreed with this and encouraged them to take into consideration some of the feelings that we were expressing in our proposed legislation, and to some extent they have done so. He said the areas he was most concerned with have been ignored completely and that is one of the main reasons he is concerned about this proposed legislation.

Senator Crapo said one problem we have is that there is not a tight enough connection between the statutory authority for rulemaking and the exercise of rulemaking. He said he has seen a lot of rules promulgated where the statutory authority for the rule is just a very general statement in the statute. He said somewhere in the statute there should be something that essentially says: "Rules may be promulgated by an agency only when specifically authorized by statute. No rule shall be valid or enforceable unless it is specifically authorized by and falls within the intent and scope of statutory law." He said the legislature has to quit giving agencies the blanket authority to make rules and regulations for some very broad statement of policy. He said we can start this process in the Administrative Procedures Act.

Senator Crapo said he realizes that the legislature cannot write every detail of every law, and there has to be some authority for rulemaking, but presently it is way out of balance in terms of what we've allowed in this state. He said there should be a nexus, but it should be a rather carefully and tightly controlled nexus.

Senator Crapo said the publication of the Administrative Code is a fantastic idea. He said he has sometimes spent weeks trying to find an agency's regulatory authority, and sometimes he never finds it. He said the people in many of the agencies don't know where it is.

Senator Crapo said the proposed legislation and the system we are now working under basically have the concept of limited judicial review, meaning that the agency gets to decide what enforcement action to take. They then bring the enforcement action and the enforcement action is handled by an employee of the agency or a hearing officer who is paid by the agency. After his decision is rendered then a court can review it, but the court cannot review any fact issues beyond determining whether there's been a reasonable basis in the record determined for those factual decisions. The court has full review of legal issues.

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Senator Crapo said the outcome of that is, frankly, that the agency is the prosecutor, the judge, the jury, and the executioner. He said that is why the people are cynical about not getting a fair shake in front of the agencies. One solution in other states has been to create some kind of an independent administrative law judge or a system of administrative law judges who are independent. They are paid by the state, but they are not paid by the agency. He said he does not think this works, and quite frankly he thinks it's just another new bureaucracy.

Senator Crapo said the concept that he has proposed in Senate Bill 1006 is to simply takes our old approach but allows the judge to take additional evidence if he doesn't feel there's enough evidence from the record before him. The judge is then allowed to have a de novo review of the facts and the law. He said some people feel this will have a monumental impact on more litigation in the courts. He said he doesn't agree, but if it takes this in order to protect the citizens of the state of Idaho in terms of giving them empowerment in their dealings with the agencies, so be it.

In response to a question by Representative Loveland, Senator Crapo said he would be in favor of putting a sunset clause in some statutes in order that the legislature would be forced into reviewing the statute as well as the rules and regulations.

Senator Crapo said the very maximum amount of legislative oversight that is allowed by constitutional law should be written into statute. He said this committee should be very certain that the legislature does not give away one iota of its authority to review rules and regulations. He said it should not be limited timewise or any other way. The legislature should have the most convenient procedures available to it to review the rules and regulations of the agencies because in one sense the legislature is the last resort for citizens who have not been able to get some kind of satisfaction in front of an agency.

Senator Crapo said he was concerned about the definition of "provision of law" in the proposed draft which reads, "'Provision of law' means ... an executive order or rule of an administrative agency." He said never in his mind has he thought that an executive order is a provision of law, nor that a rule or regulation has the full status of law. He said he was alarmed that this is being placed in the statute, because in effect it will be elevating those things to the level of law. He said to him a law is a statute, not a rule or regulation, although essentially the rules and regulations have the effect of law.

Senator Crapo said with reference to the creation of the office of administrative rules coordinator, he is not convinced that we need to remove this from the state law librarian's office. He said he doesn't feel we need to create a new agency. He said

if the legislature has oversight of the rules and regulations, and if we do create a new position, then it should be the legislature that appoints the position. He said it should not be the governor and it should not be the code commission. He said if the committee does not agree with this, and the governor does appoint the person to that position, then the legislature should at least have advice and consent in the Senate.

Senator Crapo addressed Section 67-5221, Public Notice of Proposed Rulemaking. He said this might be a good place to state that we need a specific statutory nexus because it talks about identifying specific statutory authority for the rulemaking.

In Section 67-5222(2), Senator Crapo expressed his concern about the language "An opportunity for oral presentation need not be provided when the agency has no discretion as to the substantive content of a proposed rule...." He said he is not sure we should restrict public participation even in those circumstances.

Senator Crapo said that Section 67-5224 allows for a rule to become final when published, or such other day that's specified. He said in some cases where they're conferring a benefit, there's no good reason for delay. He said he also feels that an agency could make it effective immediately by simply saying that they were conferring a benefit. He said that maybe in the final analysis that concern is not big enough to override the concern that the agency does need, on occasion, to be able to act immediately, but he said that this should be looked at very carefully, because the way it's worded there is no limitation on the agency.

Senator Crapo said that in Section 67-5226, Temporary Rules, if an agency finds that it is reasonably necessary to protect the public health, safety, or welfare, or reasonably necessary to confer a benefit, then they can adopt a temporary rule. He said this provision is so broad, that we might as well allow an agency to enact a temporary rule whenever they want, because that's exactly what that provision says. He said either put no limits on it, or figure out what we're trying to let happen and define it.

Senator Crapo said that in Section 67-5231, Time Limitation, it places a statute of limitations on procedural requirements. He said if there is a limitation, it should be put at 5 or 10 years, because frequently a rule has to be in effect and operate for a period of years before the public really understands what's happening.

In response to a question by Senator Hawkins relating to public notice of rulemaking in a newspaper, Senator Crapo said he feels that most people are not going to be aware of the biweekly Administrative Bulletin, and the public is used to looking in the legal notice section of the newspaper. He said he realizes there is a cost involved if you're publishing in both places, but again,

in terms of fairness of giving true public notice, there should probably be some kind of public notice in the newspapers. He said he doesn't feel the entire rule has to be published in the newspaper; that some type of shortened notice in the newspaper would probably be adequate.

Mr. Bob Hall, Idaho Newspaper Association, stated he primarily represents community newspapers and does not represent two or three of the largest newspapers in the state. Mr. Hall stated that the Idaho Newspaper Association is in support of the major thrust of the proposed legislation; i.e., the gathering and publication process of administrative rules and regulations into both an administrative bulletin and an administrative code. He said the publishing of legal notices in the newspapers accounts for about $500,000 of legal advertising; nevertheless, he feels that publishers are wise enough citizens to know when a job can be done better, at least in terms of codifying the rules and collecting them in a central place.

Mr. Hall said the current system of publication of notices in the newspapers has failed in notifying the citizens because it's a spotty process. He said agencies publish according to a law that says only that they have to publish in a newspaper or newspapers. It does not say in every county, in every city. He said there is no pattern required. Mr. Hall said the goal of this committee should be to achieve the maximum penetration to the highest number of people possible at the most effective cost. He said there should be at least some ad or a mass message that will penetrate at least 70% of the homeowners in a county.

Mr. Hall said the law should provide for a notice that contains an index of which rules and regulations are being changed, informs the public of the existence of and what is contained in the Administrative Bulletin, and where it can find a copy. He said the notice should be published in a newspaper which is the largest or most effective in a given county and make sure that it is in every county in the state. He said this will break the spotty pattern and will not unreasonably increase the cost.

Mr. Hall said the Idaho Newspaper Association would oppose any law that does not substitute some reasonable public notification of the promulgation of rules. Mr. Hall presented the committee with a sample of a public notice that would be published in newspapers prior to the biweekly publication of the Administrative Bulletin. See Appendix A.

Mr. Hall said he is concerned about the language contained in Section 67-5205 which states, "One each to any public library in this state which requests a copy from the coordinator." He said it should be mandatory that every public library receive a copy of the bulletin. He said it should be mandatory that every city in the state receive a copy also.

The committee discussed future meetings of the committee. Representative Simpson said at the next meeting the committee should address those areas of concern which individuals have discussed today. He requested that members send any proposed changes to the draft legislation to the Legislative Council in order that they may be made available to the committee.

The next meeting of the committee was scheduled for November 12, 1991, in Boise.

There being no further business, the meeting adjourned at 3:05 p.m.

APPENDIX A

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This is a sample of the public notice advertisement to be required to be run in at least one newspaper of dominant circulation in each county in Idaho to alert the public to the each new issue of the Idaho Administrative Bulletin and where they can go to study those Bulletins.

Ad Size: 2 columns x 5 inches
Estimated Annual Cost to cover all counties with notice of each new Bulletin issue in 40 in-county newspapers: $50,000.00

Estimated 1991 cost for all Rules & Reg "intent to change" and hearing notices published under current law in 6 daily newspapers used: $200,000.00

Source: Idaho Newspaper Association, Inc.

Public Notice

Of New Or Changed State Agency Rules

The following public agencies of the State of Idaho have filed their intent to propose or promulgate Rules or Regulations that would change that agency's operations affecting citizens of this State.

Dept. or Agency	General Subject	Reg. #
Fish & Game	Salmon Fishing	33-42
Health & Welfare	Toxic Waste, Restaurants	432-15
Revenue & Taxation	Sales Tax, Truckers	12-34
Highways	Road signs, Intersections	57-32
Industrial Commission	Workmen's Comp Records	21-76
Education	School Texts, Primary	43-56

Citizens can read the fulle text of, and related agency procedures on, any of the above proposed rules in the Idaho Adminstrative Bulletin, at the following locations:

Clerk's Office, Clearwater County Courthouse ,112 First St., Orofino
Orofino City Library,43 East Rhodes St., Orofino
Pierce City Library, Main Street, Pierce

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Attorney for the Respondent

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE, Appellant/Petitioner, vs. IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL, Respondent.	)	Case No. CV-2010-0005579 Respondent's Memorandum of Law in Support of Application of *Duncan v. State Board of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010)

RESPONDENT'S MEMORANDUM OF LAW

IN SUPPORT OF APPLICATION OF *Duncan v. State Board of Accountancy*,

149 Idaho 1, 232 P.3d 322 (2010)

I. INTRODUCTION.

On January 6, 2011, this Court convened oral argument on the Petition for Judicial Review and Respondent's opposition thereto. Appellant/Petitioner was represented by Brian Donesley, Attorney at Law. Respondent was represented by Stephanie A. Altig, Lead Deputy Attorney General for Idaho State Police and its Alcohol Beverage Control Bureau.

During Respondent's oral argument, Ms. Altig cited to and discussed *Duncan v. State Board of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010). By letter dated January 6, 2011, this Court directed the parties to file a memorandum of law no later than January 27, 2011 discussing the application of *Duncan*, after which the Court will take the matter under advisement.

II. DEFERENCE TO AGENCY INTERPRETATION.

The Idaho Supreme Court has consistently instructed that an agency's interpretation of its rules is entitled to deference from the judiciary on appellate review: "The actions of an agency like the Board [of Accountancy] are afforded a strong presumption of validity. [*Cooper v. Bd. Of Prof'l Discipline*, 1134 Idaho 449, 454, 4 P32d 561, 566 (2000)]. We will defer to the Board's findings of fact unless they are clearly erroneous and unsupported by evidence in the record. *Id.*" *Duncan*, 232 P.3d at 324.

The Idaho Supreme Court has consistently set forth the standards and elements that support agency deference:

> This Court may not substitute its judgment for that of the Board. *Id.* The Board's decision may be overturned if it: "(a) violate[s] constitutional or statutory provisions; (b) exceed[s] the agency's statutory authority; (c) [is] made upon unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is] arbitrary, capricious, or an abuse of discretion." *Id.* (citing I.C. § 67-5279(3)). Further, the Board's decision will be upheld unless the appellant

> demonstrates that one of his substantial rights has been prejudiced. *Id.* (citing I.C. § 67-5279(4)).

Duncan, 232 P.3d at 324.

Where an agency interprets a statute or rule, the Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. The Court must determine whether:

> (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998).

Duncan, 232 P.3d at 324.

> There are five rationales that underlie the rule of deference:
>
> (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation. *Id.* at 505, 960 P.2d at 188.

Duncan, 232 P.3d at 324. "When some of the rationales underlying the rule exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. Therefore, the absence of one rationale in the presence of others could, in an appropriate case, still present a 'cogent reason' for departing from the agency's statutory construction...If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some deference, the court should afford 'considerable weight' to the agency's statutory interpretation." *Preston*, 131 Idaho at 5055, 960 P.2d at 188, citing *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206 1219 (1991).

An agency's interpretation of its rule or statute is considered unreasonable only when:

> [it]is so obscure or doubtful that it is entitled to no weight or consideration." *Preston*, 131 Idaho at 505, 960 P.2d at 188 (quoting *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)). Generally, we have found agency interpretations reasonable unless the agency relied on erroneous facts or law in its determination. (citations omitted). Normally, this Court defers to the agency interpretation of statutes and rules. *See, e.g., Canty v. Idaho State Tax Comm'n*, 138 Idaho 178, 183, 59 P.3d 983, 989 (2002); *Simplot*, 120 Idaho at 863, 820 P.2d at 1220.

Duncan, 232 P.3d at 325.

III. THE FOUR-PRONGED TEST.

(1) Whether the agency is responsible for administration of the rule at issue.

There can be no debate that the Director of the Idaho State Police is responsible for administration of the "actual sales" rule at issue.

Under IDAHO CODE § 67-2901 (4), "The director [of Idaho State Police] shall exercise all of the powers and duties necessary to carry out the proper administration of the state police, and may delegate duties to employees and officers of the state police." Under IDAHO CODE § 23-902(3), "Director" [for purposes of alcohol beverage control law] means the Director of the Idaho State Police.

The Director has the authority to promulgate rules and regulations for alcohol beverage control purposes necessary to carry out the provision of Idaho Code, Title 23, Chapters 6-14. IDAHO CODE §§ 67-2901, 23-932, 23-946(b), 23-1330 and 23-1408.

For interpretation in the present case are a statute and an administrative rule that apply to newly issued city priority list liquor licenses:

> IDAHO CODE § 23-908(4) – Each new license issued on or after July 1, 1980, shall *be placed into actual use* by the original licensee at the time of issuance *and remain in use for at least six (6) consecutive months* or be forfeited to the state and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferable for a period of two (2) years from the date of original issuance, except as provided by subsection (5)(a), (b), (c), (d) or (e) of this section.

(emphasis added). The term "actual use" is not defined in statute, but is in rule:

> IDAPA 11.05.01.010.03. New Licenses. For purposes of Section 23-908(4), IDAHO CODE, a "new license" is one that has become available as an additional license within a city's limits under the quota system after July 1, 1980. The *requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week.*

(emphasis added).

The Director's authority to promulgate rules is clear. He has interpreted, via administrative rule, that the term "actual use" as used in IDAHO CODE § 23-908(4) and the interpretation of the language in IDAPA 1.05.01.010.03 that such "actual use" of a newly issued city priority list liquor license is "satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week." In his Final Order, the Director further interpreted that this means at least one glass of liquor by the drink must be sold on each of the six eight-hour per week days that the establishment is open during the first six months.

The first prong is therefore met and supports deference to the Director's interpretation of the "actual use" statute and "actual sales" rule.

(2) Whether the agency's construction is reasonable.

The Director found that IDAPA 11.05.01.010.03 is ambiguous and recognized that it needed a proper interpretation. He noted, correctly, that the Legislature's purpose in requiring "actual use" was to discourage speculation in liquor licensing, typified by a person being issued a liquor license and then doing essentially little or nothing with it until the six-month period had expired and the license could be sold at a greatly increased or inflated price. *Director's Final Order*, pp 6-7.

Next, recognizing that IDAHO CODE § 23-908(4) did not define "actual use," the Director looked to IDAPA 11.05.01.010.03, which explicitly, albeit ambiguously, requires "actual sales" to be made. Although Respondent relied on affidavits of former ABC administrators and employees, none of these people's interpretation of the "actual sales" rule is entitled to any deference whatsoever, for two reasons. First, they interpreted the rule by improperly adding the word "available," as in having liquor available for sale, to the language of the rule (certainly without rulemaking of any kind) as satisfying the rule's actual sales requirement. Secondly, and most importantly, none of them ever served as the Director of the Idaho State Police. None were ever the ISP/ABC agency head whose interpretation is entitled to deference. They were simply employees of the agency who chose enforce the actual sales requirement as being satisfied of liquor by the drink was merely available for sale during the requisite times.

The Director's Final Order describes his reasoning for interpreting the "actual sales" requirement to require at least one liquor by the drink must be sold each day that the establishment is open during at least eight (8) hours per day, no fewer than six (6) days per week, throughout the first consecutive six month period after the new license issued.

First, the Director noted that the rule requires "actual sales" of liquor by the drink, initially recognized by the Hearing Officer but subsequently rejected by him in favor of Fuchs' argument that merely having liquor by the drink available for sale was sufficient. The Director found that the Hearing Officer's construction of the rule not to require any sales ignored the plain "actual sales" language of the rule. *Director's Final Order*, pp. 9-10.

Second, the Director recognized that reasonable minds could differ in construing the language of the rule. He set forth three reasonable ways it could be interpreted and concluded that a "new licensee must sell at least one (1) glass of liquor sometime during the day that the

establishment is open." *Director's Final Order*, p. 11. He reasoned that this interpretation was consistent with the public policy behind IDAHO CODE § 23-908(4), i.e., that a new license must remain in actual use for the first six months after issuance, without imposing a particularly onerous burden on the licensee. He concluded that "requiring at least one (1) sale per day is a reasonable, obtainable, and objective standard for determining whether a licensee is serious about exercising the use of the license or has some other ulterior motive, such as speculating in the purchase and sale of licenses." *Id.*

(3) Whether the language of the rule does not expressly treat the matter at issue.

Clearly the language of the "actual sales" rule does not expressly treat the matter at issue, which is the frequency that actual sales of liquor must be made "during at least eight (8) hours per day, no fewer than six (6) days per week." IDPA 11.05.01.010.03.

The Director identified three reasonable ways that the rule could be interpreted. Petitioner argued for a fourth way, i.e., that having liquor by the drink available for sale during the relevant time period was sufficient. That four different possible interpretations were identified, even though the Director soundly rejected Petitioner's, is irrefutable evidence that the rule does not expressly treat the matter at issue – the frequency of sales.

(4) Whether any of the rationales underlying the rule of agency deference are present.

First Rationale: A practical interpretation of the rule exists.

The question here is whether rule at issue has a practical interpretation. A practical reading of the rule, as the Director found, is to require new a city priority liquor licensee to sell at least one (1) sale per day, as that requirement "is a reasonable, obtainable, and objective standard for determining whether a licensee is serious about exercising the use of the license or has some other ulterior motive, such as speculating in the purchase and sale of licenses" because "[w]ith

extremely minimal advertising and effort, Fuchs, or any other licensee, can promote his business and achieve at least one (1) sale every day that he is open." *Director's Final Order*, p. 11. The first rationale is therefore met. *Preston*, 131 Idaho at 505, 960 P.2d at 188.

Second Rationale: The presumption of legislative acquiescence.

The genesis of the current conflict derives from IDAHO CODE § 23-908(4), which requires newly issued city priority list licensees to put those licenses into "actual use" for the first consecutive six months after issuance. The rule at issue demonstrates that the legislature acted beyond "something more than mere silence" as to the construction of that statute. *Preston*, 131 Idaho at 505, 960 P.2d at 188. In this case, the "something more" to determine legislative intent went beyond mere silence or reenacting IDAHO CODE § 23-908(4)'s "actual use" requirement. *Preston*, 131 Idaho at 506, 960 P.2d at 189. The Legislature instead approved IDAPA 11.05.01.010.03, with its "actual sales" requirement, with the intent to clarify the meaning of "actual use," IDAHO CODE § 67-5291, which has now been subject to the Director's agency construction. Because the Legislature empowered the Director to adopt administrative rules, and specifically approved the "actual sales" rule, the Legislature has presumably acquiesced in his interpretation of the "actual sales" rule. *Duncan*, 232 P.3d at 326 (Because the Legislature empowered the Board of Accountancy to adopt professional standards, the Legislature presumably acquiesced in the Board's interpretation of its conflicts rule).

Third Rationale: Reliance on the agency's expertise in interpretation of the rule.

It is beyond debate that the Director, and through him ISP's Bureau of Alcohol Beverage Control are relied upon by alcohol beverage licensees state-wide to help guide them through the often times confusing world of alcohol beverage control statutes and rules. This reliance has been in place since 1947 when the Legislature first enacted alcohol beverage control laws that

have tasked the Director of ISP with enforcement, licensing and administrative authority in this area. 1947 IDAHO SESS. LAWS CH. 274.[1] Alcohol beverage control enforcement, licensing and administration are technical areas, and the Director, via his Bureau of Alcohol Beverage Control, is the expert in this area. Accordingly, his decision should be given "considerable weight." *See, e.g., Preston*, 131 Idaho at 506, 960 P.2d at 189 (The area of tax is a technical area, the [Tax] Commission is an expert in the area, so its decision should be given considerable weight.)

Fourth Rationale: The rationale of repose.

As pointed out in *Duncan*, "requiring affirmative disclosure by the accountant and assent by the client serves the rationale of repose, preventing a potential conflict from hanging over the parties' heads while the accountant makes an attempt to ascertain whether the conflict was discovered and impliedly acquiesced in by the clients." *Duncan*, 232 P.3d. at 326. Similarly, and as illustrated by the conflict in the present case, the Director's interpretation of the "actual sales" rule prevents further misunderstanding. And even though the Director expressly found Petitioner in violation of the rule, his decision further serves the rationale of repose insofar as he declined to apply his interpretation to Petitioner, thus leaving Petitioner in possession of the liquor license and its corresponding privilege to engage in the business of selling liquor, a temporary permit to do that which would otherwise be unlawful. (citations omitted)." *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951).

Fifth Rationale: The requirement of contemporaneous agency interpretation.

As in *Duncan*, the fifth rationale is inapplicable in this matter because this case deals with an administrative rule promulgated by the Director rather than a statute adopted by the Legislature that needed to be interpreted by the Director. *Duncan*, 232 P.3d at 326 n.1.

[1] In 1947, the Director of the Idaho State Police was called the Commissioner of Law Enforcement of the State of Idaho.

Because four of the rationales supporting the rule of deference are present in this case, there is no compelling reason for the Court to depart from the Director's interpretation.

IV. CONCLUSION.

Based on the foregoing, and because the Director's interpretation is reasonable, employing a rationale used by the Idaho Supreme Court, and no compelling reason is presented to depart from it, this Court should afford the Director the deference he is due and deny Petitioner's Petition for Judicial Review.

DATED this 27 day of January 2011.

Stephanie A. Altig

STEPHANIE A. ALTIG
Lead Deputy Attorney General
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION OF *Duncan v. State Board of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010) was served on the following on this 27 day of January 2011 by the following method:

Brian Donesley
Attorney at Law
P.O. Box 419
Boise ID 83701-0419
Counsel for Appellant/Petitioner

[ ] U.S. First Class Mail, Postage Prepaid
[ ] U.S. Certified Mail, Postage Prepaid
[ ] Federal Express
[ ] Hand Delivery
[x] Facsimile
[ ] Electronic Mail

Stephanie A. Altig
Stephanie A. Altig

Idaho State Police
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Phone -
Fax – 208-884-7228

To:	Judge Lansing Haynes c/o Suzi Sverdsten	**From:**	Stephanie Altig c/o Susan Saint or Lynn Reese
Fax:	208-446-1188	**Pages:**	12 including cover sheet.
Phone:	208-446-1105	**Date:**	January 27, 2010
Re:	CV 2010-0005579	**CC:**	

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RE: Daniel S. Fuchs v ISP CV-2010-0005579

Attached please FILE: Respondent's Memorandum of Law in Support of Application of Duncan v State Board of Accountancy

Could you please CONFIRM receipt by faxing back page 1 of document w/the file stamp for our records. FAX: 208-884-7228.

If any questions, please call our office immediately: 208-884-7050.

Thank You...

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE,	**Case No. CV-2010-0005579**
Appellant/Petitioner,	**SUPPLEMENTAL BRIEF**
v.	
IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	
Respondent.	

Comes Now, Appellant/Petitioner Daniel S. Fuchs, by and through his attorney of record, Brian Donesley, and hereby submits the following Supplemental Brief in support of his Pctition for Judicial Review.

I.
INTRODUCTION

This Supplemental Brief is submitted by leave of Court granted, so the parties could discuss the application, if any, of *Duncan v State Board of Accountancy*, 149 Idaho 1 (2010). *Duncan*, which analyzes whether courts should give deference to an agency's

interpretation of its rules, is irrelevant to this case. Here, as described in Appellant Fuchs' Brief in Support of Petition for Judicial Review ("Appellant's Brief") and Appellant Fuchs' Reply Brief in Support of Petition for Judicial Review, Idaho State Police ("ISP") violated Idaho constitutional and statutory provisions and exceeded its statutory authority. Further, the Director's Final Order, was based upon unlawful procedure, was not supported by substantial evidence, and was arbitrary, capricious and abuse of discretion. The Director's Final Order should be overturned, on the statutory set forth in I.C. 67-5279 (3). This Court need not address the issue of deference of the agency's interpretation of IDAPA 11.05.01.010.03.

If *Duncan* were found by this Court to apply, however, no deference should be given to the Director's Final Order, insofar as the Director construes the rule. The Director's construction of IDAPA 11.05.01.010.03 was not reasonable. It departed from long-standing agency interpretation of the rule. And, it was reached only after ISP had pursued license revocation with no articulated legal standard to enforce. Further, no interpretation was necessary in the Final Order. The rule had treated the issue precisely. Actual sales was one way, but not the only way, that a new licensee could satisfy the "actual use" requirement of I.C. 23-908 (4). Hence, as the rule treated the issue "precisely," as discussed in *Duncan*, no deference shall be given the Director's construction.

This Court should disregard *Duncan*. It should award attorney fees to Fuchs pursuant to I.C. 12-117.

II.
DUNCAN IS IRRELEVANT. IF *DUNCAN* WERE APPLICABLE, THE DIRECTOR'S FINAL ORDER WOULD NOT BE ENTITLED TO DEFERENCE.

In *Duncan*, the Idaho Supreme Court affirmed a district court's decision affirming the ruling of the Idaho State Board of Accountancy. The Board had sanctioned Duncan for violating American Institute of Certified Public Accounts (AICPA) Rule 102.3 and Idaho Administrative Rule 01.01.01.004.001. Duncan, an accountant, had failed to disclose a conflict of interest. The district court affirmed the agency's decision. It held that the Board's findings were supported by substantial evidence. The Idaho Supreme Court held that the agency interpretation of its own rules was entitled to deference.

Duncan's deference to agency interpretation of a rule is irrelevant here. In Fuchs' case, the Director's decision was not based upon substantial evidence, as the district court had found in *Duncan*. Furthermore, ISP, here, departed from its long-time interpretation of the rule, without notice to the public and the legislature, and without amending its rules lawfully. Accordingly, ISP's actions violated constitutional and statutory provisions. It exceeded statutory authority, was based upon unlawful procedure, was arbitrary, capricious and constituted abuse of discretion. I.C. 67-5279 (3).

Again, a "practical" interpretation of IDAPA 11.05.01.010.03, as such term is used in *Duncan*, previously existed. ISP had interpreted its rule for fifteen years not to require any number of actual sales of liquor. (Major Thomas Thompson Affidavit at ¶ ¶ 4-6) The Director acknowledged this in his Final Order, but he determined that this prior agency interpretation was wrong. "Prior administrators, the Hearing Officer, and both parties misinterpreted what the rule requires." (Director's Final Order at 17). Yet, when ISP departed from prior agency interpretation and enforcement of the rule, it was required

by law to promulgate a new or amended rule, thereby announcing its new rule. *Asarco, Inv. v. State*, 138 Idaho 719 (2003). ISP did not lawfully change its rule. Rather, ISP filed its administrative complaint and sought revocation without a legal standard to enforce.[1] It was only after the Director declared the rule ambiguous in his Final Order, saying it could be interpreted three different ways, that he settled on his view that one (1) glass of liquor must be sold during each day a premises is open, eight (8) hours a day, six (6) days a week. Director's Final Order at 10-11. This ruling was without precedent before the agency and the public. Because the Director made a rule without following requirements of law, his rulemaking by *fiat* is not entitled to deference.

As the *Duncan* court explained, Idaho courts shall overturn an agency decision that "(a) violate[s] constitutional or statutory provisions; (b) exceed[s] the agency's statutory authority; (c) [is] made upon unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is] arbitrary, capricious, or an abuse of discretion." *Duncan*, 149 Idaho at 3 (*quoting Cooper v. Bd. Of Prof'l Discipline*, 134 Idaho 449, 454, (2000) (*citing* I.C. 67-5279 (3))). Each ground applies to this case:

1. ISP's filing of its complaint and prolonged attempt to revoke Fuchs' license, without a legal standard to enforce, was an unreasonable exercise of police power, which violated Fuchs' fundamental rights of due process. This violated constitutional and statutory provisions and exceeded the agency's statutory authority. See Appellant's Brief at 30-32.

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[1] *Duncan* states that the "actions of an agency *like the Board* are afforded a strong presumption of validity." *Duncan*, 149 Idaho at 3 (emphasis added). ISP's pursuit of revocation without any clear legal standard is "agency action." *See*, I.C. 67-5201 (3). There should be no presumption of validity of the actions of a bureau within an agency that is acting in violation of law and contrary to lawful procedure. The actions of the bureau, despite the delegation of discretionary police power authority by the Director, itself suspect, much diminishes the deference due, if at all, under the *Duncan* analysis.

2. ISP's departure from prior agency rules, without promulgating a new or amended rule, was informal rulemaking, contrary to the Idaho Administrative Procedures Act, I.C. 67-5201 *et seq.*, and, thus, was based upon unlawful procedure. *See* Appellant's Brief at 27-30.

3. The Director's Final Order was not based upon substantial evidence. Fuchs made actual sales of alcohol. No construction of the rule is required to which to grant deference. As the evidence showed, contrary to statements in the Director's Final Order,[2] Fuchs complied with the only legal standard for which he or the public had ever been given notice: no number of actual sales was required. ISP's new interpretation was inconsistent with the position upon which Fuchs had detrimentally relied. *See* Appellant's Brief at 23-27.

4. The Director's Final Order was arbitrary, capricious and abuse of discretion. Without notice, the Director departed from long-time agency interpretation. After declaring the rule ambiguous, he stated a new standard of how many actual sales were required over how many hours, days, weeks, and months for newly issued licenses. This was a new rule. No interpretation was to be done, hence no discretion involved. As to the old rule, there was no factual or legal basis for his departure from longstanding agency interpretation. As there were no "adequate determining principles" behind his new rule, any interpretation should be afforded no deference anyway. *See Lane Ranch*

[2] The Director incorporated the Hearing Officer's recitation of these undisputed facts into his Final Order. (Director's Final Order at 2). Even so, the Director made incorrect factual statements regarding the inconsistent statements made by ISP and Fuchs' reliance upon them. The Director stated that Fuchs had been informed of a change in policy when the contrary was true. In ISP's practice with respect to Fuchs' Nampa license, no number of actual sales was required. **(Exhibit R-DF-6)**. ISP Management Assistant, Denise Rogers, told him no number of actual sales were required. (Rogers Affidavit at ¶ 4). Further, Fuchs relied on ISP's previous positions to his detriment, leasing a premise, hiring an employee, obtaining permits and more. **(Exhibits R-DF 9-15)**.

Partnership v. City of Ketchum, 145 Idaho 87, 91 (2007). *See also,* Appellant's Brief at 14-20.

Even if this Court were to apply *Duncan's* analysis, the Director's interpretation is not entitled to deference. In *Duncan*, the Court identified a four-prong test to determine the appropriate level of deference:

> This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present.
>
> *Duncan*, 149 Idaho at 3.

While an agency is responsible for administration of the rule, the Director's Final Order does not pass the second and third prongs of the test. The Director's construction was unreasonable. It was reached only after ISP sought to enforce an entirely different and patently unreasonable standard: multiple drinks per hour during eight (8) hours a day, six (6) days a week. (Deposition of Robert Clements at 35-36). Only after a full hearing and administrative appeal, at great cost to Fuchs, and the Director's admission that the rule was ambiguous, did the Director finally settle on one (1) glass per day each day the establishment was open as his rule. Director's Final Order at 11. Yet, even that construction would not be reasonable. Contrary to past ISP practice, the rule would require a new licensee to get patrons to buy drinks, something beyond a licensee's control. (*See* Gould Affidavit at 4).

ISP's actions also fail the third prong of the test. The language of the rule expressly treated the matter at issue. IDAPA Rule 11.05.01.010.03 addresses the issue of

actual sales. It did not make such sales mandatory. (See Affidavits of Thompson, Gould, and Rankin).

As ISP's actions do not meet the second and third prongs of the *Duncan* test, the Director's Final Order is entitled to no deference. Even if construction of the Director's post-agency action, his new rule, was proper, and not rulemaking, which it clearly was, *Duncan* does not apply.

III.
CONCLUSION

Duncan does not apply to this case. If it were applicable, ISP did not satisfy *Duncan's* four-prong test. This Court should award attorney fees to Fuchs pursuant to I.C. 12-117.

DATED this 27 day of January, 2011.

Brian Donesley
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of January, 2011, I caused an accurate copy of the foregoing document to be delivered as noted below to:

Lawrence G. Wasden, Attorney General
Stephanie A. Altig, Deputy Attorney General
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Barbi McCary Crowell
Barbi McCary Crowell

STATE OF IDAHO)
County of Kootenai)ss
FILED 2-10-11
AT 1:35 O'clock P M
CLERK OF THE DISTRICT COURT
Deputy Clerk

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

DANIEL S. FUCHS, LICENSEE, dba, AUBREY'S HOUSE OF ALE,	**CASE NO. CV2010-5579**
Appellant/Petitioner,	**DECISION ON APPEAL**
vs.	
IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	
Respondent.	

Brian Donesley, Attorney for Appellant.
Stephanie A. Altig, Attorney for Respondent.

The agency decision below, denying attorney fees to both parties, is AFFIRMED.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter is before the District Court on a Petition for Judicial Review pursuant to I.C. § 67-5201, et. seq., and I.R.C.P. 84. The appeal is from the June 8, 2010, Final Order by the Director of the Idaho State Police (ISP), denying Appellant's (Fuchs) Motion for Attorney Fees pursuant to I.C. § 12-117.

Fuchs was issued an Idaho Retail Alcohol Beverage License on June 6, 2008, and Fuchs leased space at 2065 West Riverstone Drive, #207, in Coeur d'Alene, Kootenai County, Idaho. This premise was named Aubrey's House of Ale (Aubrey's), and was open for business Monday thru Saturday, from 10:00 a.m. to 6:00 p.m.

On September 16, 2008, Lt. Clements, Alcohol Beverage Control (ABC) Bureau Chief, conducted an unannounced inspection of Aubrey's. Lt. Clements met with Ruth Purvis, Fuchs' employee, but observed no customers. Ms. Purvis showed Lt. Clements the liquor and beer supply which was available.

Fuchs produced for Lt. Clements copies of Aubrey's sales records from June, 2008 thru September, 2008. Those records indicated sales for each month Aubrey's had been open. ABC filed a Complaint for Forfeiture or Revocation of Retail Alcohol Beverage License. The parties filed cross motions for summary judgment on October 9, 2009. Upon oral argument, the Hearing Officer issued a Preliminary Order on December 24, 2009, granting summary judgment to Fuchs. The Hearing Officer found that IDAPA Rule 11.05.01.010.03, the controlling rule at issue, unambiguously required a new licensee to make actual sales of liquor by the drink sometime while in operation for eight (8) hours per day and no fewer than six (6) days per week. The further finding was that Fuchs and Aubrey's had met that requirement.

ABC appealed the Hearing Officer's decision to the Director of the Idaho State Police. On June 8, 2010, the Director issued his Final Order, declaring that Rule 10.03 was ambiguous, and that the actual requirement for Rule 10.03 was for the new licensee to sell at least one (1) glass of liquor sometime during every day that the establishment is open as required by law. The Final Order found that Fuchs had not met that requirement, but did not order revocation for forfeiture of the license because of the confusion over the proper interpretation of the rule. The Director denied

attorney fees to both parties, stating that neither party was prevailing and that Fuchs had not acted without a reasonable basis in law.

Fuchs filed his Notice of Appeal/Petition for Judicial Review with this Court on July 1, 2010, seeking costs and attorney fees. Memoranda in support of and in opposition to Fuchs' appeal were filed with this Court, and oral argument was heard on January 5, 2011. At oral argument, counsel for Respondent cited the case of *Duncan v. State Board of Accountancy*, 149 Idaho 1, 232 P.3d 322 (2010), a case not previously cited by either party in their briefing. This Court allowed both sides to submit additional legal analysis of that case.

II. DISCUSSION

Fuchs argues that the Court should overrule the Director's denial of costs and attorney fees, and order costs and attorney fees to Fuchs under I.C. § 12-117, on the basis that Fuchs was the prevailing party and ABC unreasonably brought the forfeiture/revocation action.

Fuchs exhaustively analyzes and argues I.C. 67-5279(3), the five findings upon which a reviewing court can set aside an agency action. This Court determines that it need not make findings or conclusions on the five criteria of I.C. § 67-5279(3); this determination is based on I.C. § 67-5279(4), which provides that an agency action shall be affirmed unless the substantial rights of the appellant have been prejudiced. *See Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 175 P.3d 776 (2007). Fuchs has failed to persuade this Court that costs and attorney fees are a substantial right contemplated by the statute. Fuchs was not, in fact, sanctioned by the Director in his Final Order, and no substantial right of his has been denied.

The real analysis for this Court is found in the plain language of I.C. § 12-117, the statutory basis under which Fuchs seek costs and fees below.

I.C. § 12-117 provides for the award of reasonable attorney fees and costs to the prevailing

party, if it is also found that the non-prevailing party acted without a reasonable basis in fact or law.

The Director below, as previously stated, denied attorney fees to both parties on the basis that neither party was prevailing. This was a reasonable view of the proceedings by the Director given that Fuchs was found to have violated the requirements of a new licensee, but no sanctions were levied against Fuchs. This was also a discretionary call by the Director, and there is nothing in the record to support an argument that the Director abused his discretion. The record supports the conclusion that the Director viewed this decision as discretionary, acted within the perimeters of that discretion and acted in a reasonable manner.

In the absence of a finding of a prevailing party, the Director did not need to determine whether the non-prevailing party acted without a reasonable basis in law or fact.

III. CONCLUSION

The Director below properly exercised his discretion in finding that neither party prevailed for purposes of an attorney fees request pursuant to I.C. § 12-117. It was, therefore, proper for the Director to not award fees and costs to either party. The decision of the Director below is AFFIRMED.

DATED this 10th day of February, 2011.

Lansing L. Haynes

Lansing L. Haynes, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of February, 2011 a true and correct copy of the foregoing was faxed to:

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Clifford T. Hayes
Clerk of the District Court

By: _____
Deputy Clerk

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Attorney for Appellant/Petitioner

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE,	**Case No. CV-2010-0005579**
Appellant/Petitioner,	**NOTICE OF APPEAL**
v.	
IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	
Respondent.	

TO: THE ABOVE NAMED RESPONDENT, ITS ATTORNEYS, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Daniel S. Fuchs, Licensee, dba Aubrey's House of Ale, appeals against the above-named Respondent, Idaho State Police, Bureau of Alcohol Beverage Control, to the Idaho Supreme Court from the Decision on Appeal entered in the above entitled action on the 10th day of February, 2011, the Honorable Lansing L. Haynes, District Judge, presiding.

2. Appellant has the right to appeal to the Idaho Supreme Court, and the decision described in paragraph 1 above is appealable under and pursuant to Rule 11 (a) (2) and (f) I.A.R.

3. This appeal is based upon the June 8, 2010 Director's Final Order issued by the Director of the Idaho State Police, dismissing the Petition for Review filed by Complainant Idaho State Police, Alcohol Beverage Control Bureau, from the Preliminary Order issued by the Hearing Officer granting summary judgment to Appellant. The Director ruled that Appellant would not be sanctioned, despite finding that Appellant had violated a rule, finding, incongruously, that the agency rule involved in the action was ambiguous, as had been contended by Appellant from the beginning of the administrative license revocation action. The Director denied Appellant's Motion for Attorney Fees pursuant to I.C. § 12-117, stating that (1) neither party had prevailed and (2) that Appellant Fuchs had not acted without a reasonable basis in fact or law.

The Director's Final Order was affirmed by the District Court, holding that costs and attorney fees are not a "substantial right" contemplated by I.C. § 67-5279 (4) and that the Director properly had exercised his discretion when he held that neither party prevailed.

The following issues arise from the Decision on Appeal:

A. Whether Appellant's "substantial rights," as contemplated by I.C. § 67-5279 (4), were prejudiced;

B. Whether Appellant was a "prevailing party," entitling him to seek attorney fees pursuant to I.C. § 12-117;

C. Whether Respondent's actions were without a reasonable basis in fact or law, based on the following grounds:

i. Respondent departed from longstanding agency practice and filed the administrative action for revocation without first promulgating a new or amended rule notifying new licensees as to how many "actual sales" would be required;

ii. Respondent was barred from enforcing inconsistent positions under the doctrine of quasi-estoppel;

iii. Respondent's attempt to revoke Appellant's license, based upon a legal standard only announced by the Director in his Final Order, without first promulgating a new or amended rule stating how many "actual sales" were required, was an unreasonable exercise of police power.

D. The District Court erred in applying an overbroad, discretionary standard to the Director's quasi-judicial function in finding the Director's discretion excused the denial of Appellant's "substantial rights" to costs and attorney's fees, due process of law, and freedom from the unreasonable exercise of police power.

4. No order has been entered sealing all or any portion of the record.

5. (a) Appellant requests the reporter's transcript to be prepared in hard copy and electronic format for the following proceedings:

January 5, 2011: Hearing of Oral Argument on Appeal.

6. Appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under Rule 28, I.A.R:

A. Brief of Appellant in Support of Petition for Review, filed on October 15, 2010;

B. Respondent's Brief in Opposition for Judicial Review, filed on November 8, 2010;

C. Appellant Fuchs' Reply Brief in Support of Petition for Review, filed on November 26, 2010;

D. Respondent's Memorandum of Law in Support of Application of Duncan v. State Board of Accountancy, filed on January 27, 2011; and,

.E. Supplemental Brief (Appellant), filed on January 27, 2011.

7. Appellant requests the following additional documents, charts or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court Agency Record, filed in the District Court on August 18, 2010.

8. I certify:

(a) That a copy of this notice of appeal has been served on the reporter of whom a transcript has been requested, as named below, at each address set out below;

(b) (1) That the clerk of the district court has been paid the estimated fee for the preparation of the reporter's transcript.

(c) (1) That the estimated fee for the preparation of the clerk's record has been paid.

(d) (1) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required served pursuant to Rule 20 (and the Attorney General of Idaho pursuant to Section 67-1401(1), Idaho Code).

DATED this 8 day of March 2011.

Brian Donesley

Brian Donesley
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8 day of March, 2011, I caused an accurate copy of the foregoing document to be delivered as noted below to:

Lawrence G. Wasden, Attorney General Stephanie A. Altig, Deputy Attorney General Idaho State Police 700 S. Stratford Drive Meridian, Idaho 83642-6202	U.S. Mail: _____ Hand Delivery: _____ Facsimile: X *(208) 884-7228*
Byrl Cinnamon Official Court Reporter P.O. Box 2821 Hayden, ID 83835	U.S. Mail: X Hand Delivery: _____ Facsimile: _____

Barbi McCary Crowell

Barbi McCary Crowell

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL S. FUCHS, Licensee, dba Aubrey's House of Ale,	)	
Appellant/Petitioner	)	Kootenai County
v	)	CV 2010-5579
Idaho State Police, Alcohol Beverage Control	)	Supreme Court 38714-2011
Defendants-Respondent.	)	

I, Clifford T. Hayes, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that there are exhibits, which are part of the clerk's record.

I certify that the Attorneys for the Appellant/Petitioner and Defendant's Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid on the _____ day of _____, 2011.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County Idaho this _____ day _____, 2011.

CLIFFORD T. HAYES
Clerk of the District Court

By:_____
Deputy Clerk