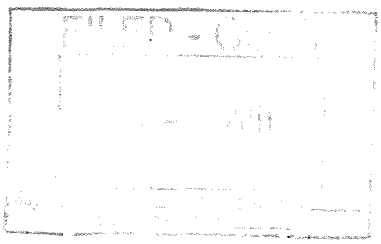
11-3-2011

Fuchs v. Idaho State Police Appellant's Reply Brief Dckt. 38714

IN THE SUPREME COURT OF THE STATE OF IDAHO

DANIEL S. FUCHS, Licensee, dba AUBREY'S HOUSE OF ALE, **Petitioner-Appellant** **v.** **IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,** **Respondent-Respondent.**	**DOCKET No. 38714-2011** **District Court No. CV-2010-0005579**



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I.
INTRODUCTION

This case is about the authority and obligation of the Director of the Idaho State Police, Alcohol Beverage Control ("ISP") to award attorney fees under I.C. 12-117 to a "prevailing party," when the "non-prevailing party" acted without a reasonable basis in fact or law. The Hearing Officer declined to award attorney fees based upon this Court's ruling in *Rammell v. Idaho State Dept. of Agriculture*, 147 Idaho 415 (2009). The Director, in his Final Order, responding to *Rammell,* acknowledged the legislative amendment to I.C. 12-117. But, he declined to award attorney fees to either party, ruling that neither party had prevailed. After Daniel S. Fuchs dba Aubrey's House of Ale ("Fuchs") petitioned for judicial review, without the Parties having raised the issue, the District Court held that Fuchs had no substantial rights to attorney fees as required by I.C. 67-5279(4). It also held that the Director had not abused his discretion in finding that Fuchs was not the "prevailing party."

In December, 2010, this Court issued its opinion in *Smith v. Washington County*, 150 Idaho 388 (2010), which held that I.C. 12-117, as amended, does not provide authority for an award of attorney fees in "administrative judicial proceedings." Accordingly, Fuchs has not sought attorney fees and costs incurred in pursuing his Petition for Judicial Review to the District Court or on appeal to this Court. However, Fuchs is requesting that this Court reverse the District Court's Decision on Appeal, which affirmed the Director's Final Order denying attorney fees to Fuchs. The Director abused his discretion in finding that Fuchs was not the prevailing party, as such a finding was clearly erroneous. I.C. 67-5279(3); *State ex rel. Richardson v. Pierandozzi*, 117 Idaho 1,

4 (1989). Moreover, ISP acted without a reasonable basis in fact or law, pursuing license revocation without articulating any clear standards, without promulgating a new or amended rule regarding "actual sales" and in violation of the Idaho Constitution.

Furthermore, ISP does not dispute that Fuchs was the "prevailing party" in the proceeding before the Director of the Idaho State Police. ISP does not dispute that Fuchs' right to seek attorney fees is a "substantial right" meeting the requirements of I.C. 67-5279(4). Accordingly, ISP has waived these issues on appeal, having offered neither argument nor authority opposing Fuchs' arguments. ISP argues only that this case involves issues of "first impression" and that this Court's decision in *Smith v. Washington County*, 150 Idaho 388 (2010) prohibits an award of attorney fees. Both arguments are wrong.

The issues involved in this case have been well settled. Before the administrative complaint was filed, ISP had maintained a long-standing and unequivocal enforcement policy regarding I.C. 23-908(4) and IDAPA 11.05.01.010.03. It did not require a specified number of "actual sales." ISP's reversal of this policy, enunciating five different standards during the course of the administrative proceedings, was arbitrary, capricious, an abuse of discretion, and in violation of the Idaho Constitution, Article III, § 24, and the rulemaking requirements of the Idaho Administrative Procedures Act, I.C. 67-5201 *et seq.* ("APA").

Smith held that I.C. 12-117, as amended, does not apply to "administrative judicial proceedings." *Smith* does not prevent a party from appealing an adverse decision by an agency head on the issue of attorney fees. Judicial review of an agency decision is required under the APA. As Fuchs is not seeking attorney fees and costs for the Petition

for Judicial Review to the District Court, nor on appeal to this Court, *Smith* does not apply.

This Court should reverse the District Court's Decision on Appeal and remand the matter to the Director for a determination of the amount of attorney fees to be awarded to Fuchs under I.C. 12-117.

II.
ISP HAS WAIVED ON APPEAL ANY ARGUMENT THAT FUCHS WAS NOT THE "PREVAILING PARTY." ISP HAS WAIVED ANY ARGUMENT THAT FUCHS DID NOT HAVE A "SUBSTANTIAL RIGHT" TO ATTORNEY FEES.

This Court has held that a party "waives an issue on appeal if either authority or argument is lacking." *Nelson v. Anderson Lumber Co.,* 140 Idaho 702, 713 (2004); *Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare*, 147 Idaho 872, 880 (2009). Here, ISP does not present argument or cite authority suggesting that Fuchs was not the "prevailing party."[1] ISP presents no argument or authority to suggest that Fuchs' right to seek attorney fees is not a "substantial right," as that requirement applies to Fuchs under I.C. 67-5279(4). Consequently, ISP has waived opposition to Fuchs' arguments on these issues.

The District Court's Decision on Appeal was based only upon these two issues: "prevailing party"; and, "substantial right" to fees and costs. The District Court held that Fuchs had not demonstrated that his right to attorney fees was a substantial right, as required by I.C. 67-5279 (4). (Decision on Appeal at 3, R. at 124). [2] The District Court

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[1]As ISP fails to argue that Fuchs was not the prevailing party, Fuchs shall not re-argue that point here. See Appellant's Brief at 17-20. However, the administrative proceeding was dismissed and Fuchs retained his license without sanction.

[2] The District Court made this holding, *sua sponte*, without any such argument having been advanced by ISP. Attorney fees which are awardable under mandatory fee statutes are substantial rights. *Myers v. Vermass*, 114 Idaho 85, 87 (Ct. App. 1987); *Griggs v. Nash*, 116 Idaho 228, 235 (1989);. *See,* Appellant's Brief at 11-17. *See also, Houston v. Whittier*, 147 Idaho 900, 911 (2009).

held that the Director had not abused his discretion in finding that Fuchs was not the prevailing party. (*Id.* at 4, R. at 125). Since the District Court made these rulings, it did not address whether ISP's actions were without a reasonable basis in fact or law. (*Id.*). A minimum, the District Court's Decision on appeal should be reversed, based upon that ISP has failed to submit authority or argument opposing Fuchs' appeal on these grounds, "prevailing party" and "substantial right" to fees and costs. "A party waives an issue on appeal if ***either*** authority or argument is lacking, not just if both are lacking." *State v. Zichko,* 129 Idaho 259, 263 (1996) (emphasis added). This is true, regardless of whether it was the appellant or respondent who waived the issue. *See, Medical Recovery Services, LLC v. Carnes,* 148 Idaho 868, 873 (Ct. App. 2010) (respondent failed to cite authority for argument).

While the District Court did not decide whether ISP acted without a reasonable basis in fact or law, this Court exercises free review over requests for attorney fees. *Reardon and Magic Valley Sand & Gravel, Inc. v. City of* Burley, 140 Idaho 115, 118 (2004). This Court should decide this issue on appeal then remand for determination by the Director of the amount of attorney fees to be awarded.

III.
THE ISSUES BEFORE THIS COURT ARE WELL-SETTLED AND NOT MATTERS OF FIRST IMPRESSION

Since IDAPA 11.05.01.010.03 was promulgated in 1993, ISP 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." (Affidavit of Daniel S. Fuchs, dated October 9, 2009, hereinafter "Fuchs Affidavit"; **Exhibit R-DF-6**).

However, ISP changed its policy with this case. It filed this action in October 2008, without defining, even understanding how many sales it might deem could satisfy the rule. "Probably more than one drink. It's plural." (Affidavit of Brian Donesley, hereinafter "Donesley Affidavit" Deposition of Robert Clements, **Exhibit R-8**, pp. 35-36). Ultimately, the Director disagreed with the ABC Bureau Chief, Lt. Clements. He ruled that IDAPA 11.05.01.010.03 was ambiguous. He ordered that the rule could be interpreted three different ways. (Director's Final Order dated June 8, 2010 at 10). It is clear that ISP 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. ISP did neither. 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.

An essential purpose behind I.C. 12-117 is to provide a remedy when a person has borne 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 argues that it is insulated from an award of attorney fees, regardless of the arbitrariness and unreasonableness of its actions, because, as it contends, this is a "case of

first impression":

> [U]ntil 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.
>
> (Respondent's Brief at 5).

This is ISP's primary argument in opposition to attorney fees.[3] It is wrong for two reasons. First, ISP should not be entitled to act arbitrarily and capriciously, departing from longstanding enforcement standards pertaining to its own rules, and then to hide behind the claim that this "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). During the course of the administrative proceedings, ISP enunciated five different standards of what constituted the specified number of "actual sales."[4] Failure to offer "clearly articulated

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[3] ISP argues that Fuchs "argues *repeatedly* that "Rule 10.03 was ambiguous, hence void." Respondent's Brief at 5 (emphasis added). Fuchs made this statement twice in his opening brief before the District Court. (R. at 26, 32). However, in his reply brief, Fuchs clarified this statement: "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 clear standard but has become a moving target. If a statute or rule is ambiguous, the rules of statutory construction require that courts 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.*" Appellant Fuchs' Reply Brief in Support of Petition for Judicial Review at 9, n. 7. (R. at 75-76).

[4] The five interpretations are as follows: (1) the original interpretation that the rule was non-mandatory. (Thompson Affidavit at ¶ ¶ 4-6) (Affidavit of Denise Rogers dated October 9, 2009 at ¶ 4); (2) Lt. Clements' interpretation: multiple hourly sales, eight (8) hours a day, six (6) days a week. (Robert Clements Deposition, Donesley Affidavit, **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 on Motions for Summary Judgment and Order on Complainant's Renewed Motion for Protective Order dated December 24, 2009 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.

standards" prior to the commencement of the action was arbitrary, capricious and abuse of discretion. *See, Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 285 (2007).

Further, ISP's reliance solely on the "case of first impression" focuses its failure to bring argument or authority opposing the underlying bases upon which Fuchs has demonstrated that ISP acted without a reasonable basis in fact or law. ISP does not argue that it articulated clear legal standards. It does not argue that it abided by the APA's rulemaking procedures. It does not argue that its requirement of "actual sales complies with Idaho Constitution Article III, § 24. ISP waives opposition to those issues raised by Fuchs. See, *supra*, pp. 3-4).

And, 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 administrators interpreted and enforced I.C. 23-908(4) and IDAPA 11.05.01.010.03 to not require any number of "actual sales," or any sales at all, basing such enforcement policy upon public policy grounds. "Such a requirement would have been unlawful, in violation of public policy." (Affidavit of Edgar Rankin dated October 9, 2009 at ¶ 4).[5] Then, in Fuchs', ISP changed policy, without notice to Fuchs or the public. Suddenly, "actual sales," in some undefined number, were required, contrary to longstanding agency interpretation and

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[5] *See also,* Affidavit of John Gould dated October 9, 2009: "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." (*Id.* at ¶ 5); 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." (Affidavit of Thomas Thompson dated October 9, 2009 at ¶ 5).

enforcement of the statute and the rule. Rather, the Director declared in his Final Order a new interpretation of Rule 11.05.01.010.03, stating that new licensees must make "one (1) sale per hour sometime during every day that the establishment is open." Director's Final Order at 11. This was simply another new rule. The Director acknowledged that he was making new policy when he stated that prior administrators and current ABC officials had gotten it wrong before. *Id.* at 17.

It is because the Director's current administrators misapplied the rule that Fuchs has been required to bear the financial burden of correcting government mistakes that "never should have been made." *Reardon and Magic Valley Sand & Gravel, Inc. v. City of Burley*, 140 Idaho 115, 118 (2004) (citations omitted). The Director attempts to correct errors by announcing, yet again, a new rule. Then he applied that new rule to Fuchs retroactively. The Director states in his order that Fuchs' arguments, that his current administrators' interpretation is "misdirected," fail , because the Director retroactively had cured their misinterpretation by coming up with a new, "rational" interpretation in his Final Order. Director's Final Order at 16-17.

The Director's contrivance to correct the errors made by the ABC Bureau was a new rule. It is 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 formed to modernize the Idaho 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

if it's not written and promulgated as a rule, it can't be used.

ADMINISTRATIVE PROCEDURES ACT OF 1992, 51st Legislature, Committee Minutes, p. 392 (October 29, 1991) (Attached Appendix) (emphasis added).

This Court has since reviewed attempts by state agencies to avoid rulemaking. In *Asarco v. State,* 138 Idaho 719, 725 (2003), this 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.

This is settled law. ISP must promulgate a new or amended rule to change policies affecting the public.

And, it is important that this case involves the interpretation of a rule, rather than a statute. In *Rincover v. State Dept of Finance*, 132 Idaho 547 (1999), this 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.[6] Ours is not a case about a statute, a law written by the legislature, but by a rule written by the agency itself. A rule is not a statute. *See, Meade v. Arnell*, 117 Idaho 660,

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[6] *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.

664 (1990) ("while these rules and regulations may be given the 'force and effect of law,' they do not rise to the level of statutory law").

The Director acknowledged this distinction, explaining in his Final Order that he would consider future rulemaking to clarify the rule:

> *Because 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 the matter for possible rulemaking in the near future.

Director's Final Order at 11, n. 4. (Emphasis added.)

As the Director had the authority and obligation to administer his agency's rules, this case is distinguishable from *Rincover* and *Purco Fleet Services, Inc., v. Idaho State Dept. of Finance*, 140 Idaho 121 (2004) (*cited* in Respondent's Brief at 5).[7]

ISP's prior administrators long ago had established the manner in which ISP would enforce I.C. 23-908 (4) and IDAPA 11.05.01.010.03. ISP admits that it had changed policy when it began requiring some conjectural number of "actual sales." (Respondent's Brief in Opposition to Petition for Judicial Review filed before the District Court at 5, R. at 58). The Director acknowledged he was changing policy, stating that prior administrators had applied it incorrectly. Director's Final Order at 17.

ISP was required, under I.C. 67-5220 through I.C. 67-5231, to promulgate a new or amended rule legally changing its long-established policy, before it filed this administrative action. *See, Asarco v. State*, 138 Idaho 719, 725 (2003) (state's failure to comply with state administrative law rendered informal action void as it should have

[7] The Director's rulemaking authority is provided in I.C. 23-932, which provides in relevant part: "[f]or the purpose of the administration of this act the director shall make, promulgate and publish such rules and regulations as the said director may deem necessary for carrying out the provisions of this act and for the orderly and efficient administration hereof, and except as may be limited or prohibited by law and the provisions of this act, such rules and regulations so made and promulgated shall have the force of statute."

been done by rulemaking).[8] It did not do so. Fuchs should not bear the financial burden of correcting ISP mistakes that never should have been made by the agency.

As ISP's failure to follow settled administrative law was without a reasonable basis in fact or law, this Court should reverse the District Court and award attorney fees to Fuchs pursuant to I.C. 12-117.

IV.
PARTIES MAY SEEK ATTORNEY FEES IN ADMINISTRATIVE PROCEEDINGS WHERE THE NON-PREVAILING PARTY ACTED WITHOUT A REASONABLE BASIS IN FACT OR LAW. PARTIES ARE ENTITLED TO APPEAL AGENCY DECISIONS ON ATTORNEY FEES

ISP argues that Fuchs may not seek costs and attorney fees under I.C. 12-117, based upon this Court's ruling in *Smith v. Washington County*, 150 Idaho 388 (2010). In *Smith,* this Court ruled that parties may only seek attorney fees in "administrative proceedings," but not in "administrative judicial proceedings." *Smith*, 150 Idaho at 392. ISP argues that *Smith* means that parties cannot appeal adverse agency decisions on requests for attorney fees. Such an argument would render meaningless I.C. 12-117. Neither parties to "administrative proceedings" nor "administrative judicial proceedings" would be entitled to attorney fees. This is contrary to what this Court held in *Smith*. 150 Idaho at 392.[9]

Further, such a result would be contrary to the Idaho APA, which provides aggrieved parties the right to judicial review of agency decisions. I.C. 67-5270, 5279. In

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[8] See, Appellant's Brief at 27-28.

[9] In four cases since *Smith* was issued, this Court declined to award attorney fees based upon *Smith*'s holding that I.C. 12-117, as amended, did not provide authority for fees incurred in district court on appeal from an agency decision. *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417 (2011); *Vickers v. Lowe*, 150 Idaho 439 (2011); *St. Luke's Magic Valley Regional Medical Center, Ltd. v. Board of County Com'rs of Gooding County,* 150 Idaho 484 (2011); *In re City of Shelley*, 151 Idaho 289 (2011). None of these cases involved requests for fees incurred before the agency.

State ex rel. Richardson v. Pierandozzi 117 Idaho 1 (1989), a liquor license revocation case, this Court held that it is the right to judicial review that cures any unconstitutional bias of an administrative decision-maker. "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. *See also, Staff of the Idaho Real Estate Commission v. Nordling*, 135 Idaho 630, 636 (2001). This is a due process requirement. Review is essential.

Consistent with *Smith*, Fuchs is not seeking an award of costs and attorney fees incurred on his Petition for Judicial Review to the District Court.[10] Fuchs is not requesting attorney fees on his appeal to this Court under I.C. 12-117 and I.A.R. 41. However, Fuchs is appealing the District Court's decision affirming the Director's Final Order denying to Appellant Fuchs costs and attorney fees in the administrative proceeding filed before the agency by ISP on October 23, 2008. Fuchs is entitled to request attorney fees. He was a prevailing party.[11] The agency acted without a reasonable basis in fact or law.[12] Fuchs' appeal is properly before this Court. This Court

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[10] Fuchs did request such fees in his initial Notice of Appeal/Petition for Judicial Review filed in the District Court on June 22, 2010. (R. at 11). That petition was filed before *Smith* was issued by this Court on December 15, 2010.

[11] Fuchs prevailed below. The Director dismissed the action, refusing to revoke Fuchs' license or to sanction him. Further, the Director rejected the ABC's interpretation of the rule that multiple drinks per hour were required. The Director declared IDAPA 11.05.01.010.03 ambiguous and then announced a new rule. Director's Final Order at 10-11. Because Fuchs obtained all relief he requested, he prevailed. *Daisy Manufacturing Co. v. Paintball Sports, Inc.* 134 Idaho 259 (Ct. App. 2000). *See*, Appellant's Brief at 17-20.

[12] ISP acted without a reasonable basis in fact or law. It acted arbitrarily and capriciously, failing to articulate clear standards. *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281 (2007). It acted arbitrarily and capriciously, failing to follow its own laws and rules. *County Residents Against Pollution From Septic Sludge (CRAPSS) v. Bonner County*, 138 Idaho 585). It failed to follow required rulemaking procedures. *Asarco v. State*, 138 Idaho 719 (2003). It violated the Idaho Constitution. *Reardon and Magic Valley Sand & Gravel v. City of Burley,* 140 Idaho 115 (2004). *See*, Appellant's Brief at 20-29.

should reject ISP's suggestion that parties cannot appeal a decision by an administrative officer denying an award of attorney fees and costs.

V.
CONCLUSION

Fuchs has met the requirements of I.C. 12-117. Fuchs prevailed. ISP acted without a reasonable basis in fact or law. This case has not presented issues of first impression to this Court. And, the APA requires that parties be permitted judicial review of agency decision, and, thus, *Smith v. Washington County*, 150 Idaho 388 (2010) does not apply.

This Court should reverse the District Court's Decision on Appeal and remand the matter to the Director for a determination of the attorney fees and costs to be awarded to Fuchs. Fuchs requests costs on appeal.

DATED this 3 day of November, 2011.

Respectfully submitted

Brian Donesley

Brian Donesley
Attorney for Petitioner-Appellant,
Daniel S. Fuchs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of November, 2011, I caused an accurate copy of the foregoing document to be delivered as noted below to:

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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.

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."

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.

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

October - 404

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