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In Re Kimbley Appellant's Reply Brief Dckt. 39829

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**Lawrence G. Wasden
Attorney General**

**Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
PO Box 321
Lewiston, Idaho 83501
Telephone: (208) 746-0344
ISB No. 2297**

Attorney for Respondent-Appellant

**IN THE SUPREME COURT OF THE
STATE OF IDAHO**

**IN THE MATTER OF THE DRIVING)
LICENSE PRIVILEGES OF KAREN)
ANN KIMBLEY)**

Supreme Court No. 39829-2012

KAREN ANN KIMBLEY,)

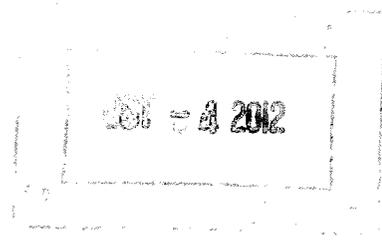
Petitioner-Respondent,)

APPELLANT'S REPLY BRIEF

v.)

**STATE OF IDAHO,)
TRANSPORTATION DEPARTMENT,)**

Respondent-Appellant.)



APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

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

**Deborah L. McCormick
McCormick & Rokyta, PLLC
P.O. Box 10005
Moscow, Idaho 83843**

Attorney for Appellant

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
STATUES.....	iii
I. STATEMENT OF THE CASE.....	1
II. ISSUES ON APPEAL.....	1
III. ARGUMENT.....	1
A. The Breath Test.....	1
1. Background Noise.....	8
2. Deputy Duke's View.....	9
3. The position of Ms. Kimbley and Deputy Duke walking from the interview room to the testing room.....	10
4. Tim of the monitoring period.....	10
B. The District Court erred.....	11
IV. CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Bennett v. State, Dept. of Transp.</i> 147 Idaho 141, 206 P.3d 505 (Ct. App. 2009).....	6, 7, 8
<i>Bradley</i> , 120 Idaho 566 at 569, 817 P.2d at 1093 (Ct.App. 1991).....	8
<i>Kinney v. Tupperware Co.</i> , 117 Idaho 765, 769, 792 P.2d 330, 334 (1990).....	12
<i>Marshall v. Dept. of Transp.</i> 137 Idaho 337, 340, 48 P.3d 666,669 (Ct. App. 2002).....	12
<i>Masterson v. Idaho Dept. of Transp.</i> , 150 Idaho 126, 128, 244 P.3d 625, 627 (Ct. App. 2010).....	7, 12
<i>Peck v. State, Dept. of Transp.</i> , 153 Idaho 37, 278 P.3d 439 (Ct.App. 2012).....	7
<i>People v. Ebert</i> 931 NE 2d 279, 401 Ill. App 3d 958 (2010).....	8
<i>State v. Remsburg</i> , 126 Idaho 338, 341, 882 P.2d 993, 396 (Ct.App. 1994).....	8, 9, 11
<i>State v. Carson</i> , 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999).....	7, 8
<i>State v. DeFranco</i> , 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006).....	7
<i>Urrutia v. Blaine County, ex rel. Bd. of Comm'rs</i> , 134 Idaho 353, 357, 2 P.3d 738, 742 (2000).....	12
<i>Wilkinson v. State, Dept. of Transp.</i> , 151 Idaho 784, 264 P.3d 680 (2011).....	7

STATUES

Idaho Code § 18-8002A(7).....13
Idaho Code § 18-8002A(7)(c).....1
Idaho Code § 18-8002A(7)(d).....7
Idaho Code § 18-8004.....1
Idaho Code § 67-5279.....6, 9, 13

I. STATEMENT OF THE CASE

This is the reply brief of the Idaho Department of Transportation (hereinafter referred to as “the Department”). The Department has appealed District Court Judge John Stegner’s decision setting aside an Administrative License Suspension (ALS) of Karen Ann Kimbley’s driving privileges.

II. ISSUES ON APPEAL

The Respondent Karen Ann Kimbley has accepted the Department’s characterization of the issues on appeal. The issues are:

1. The breath alcohol test was properly performed pursuant to I.C. § 18-8004 as required by I.C. § 18-8002A(7)(c).
2. The District Court erred in setting aside the Department’s Hearing Examiner’s decision.

III. ARGUMENT

A. The Breath Test.

Karen Kimbley challenges the Hearing Examiner's conclusion that the circumstances of the 15 minute pretest monitoring prior to the administration of an evidentiary test for breath alcohol was sufficient. Kimbley argues that the testimony of Ms. Kimbley and Latah County Deputy Duke, the police officer administering the evidentiary test for breath alcohol, demonstrates there is not sufficient evidence to support the Hearing Examiner’s decision. In particular, Ms. Kimbley argues that Deputy Duke left the observation room during the applicable pretest monitoring period.¹

¹ALS Exhibit C demonstrates the layout and proximity of the interview room where the pretest monitoring occurs, the adjacent hallway and the Intoxilyzer room where the evidentiary test for breath alcohol test is administered.

Here Deputy Duke conducted an initial 15 minutes pretest monitoring period which was recorded on Deputy Duke's "video mic" recorder (ALS Ex. C). Ms. Kimbley was not able to supply the necessary volume of air for the Intoxilyzer breath testing equipment and a "deficit sample" result was reported (p. 031).

Deputy Duke then after contacting his supervisor and after a second pretest monitoring period administered a second breath alcohol test (R. p. 032). The second monitoring period was not recorded by Deputy Duke. The results of the second test were .126 and .127.

Ms. Kimbley contends that Deputy Duke left Ms. Kimbley unattended during the first 13 minutes of the second pretest observation. However there is no testimony that supports such a conclusion. Ms. Kimbley only testifies generally about the circumstances of Deputy Duke's second pretest monitoring of her.²

2

19 A. But I – but after these tests were done, I - -
20 the first set of tests were done, I was taken into a little
21 room with a table and chairs.

22 Q. Is that the same room you were in earlier?

23 A. Yeah. And I was told to wait there and they were
24 going to give me 15 minutes until the next tests were done,
25 and - -

1 Q. Okay. So this was a different room from the
2 breath testing machine; this was the other room - -

3 A. Yes.

4 Q. - - where you had earlier listened to the
5 audiotape?

6 A. Yes, it was.

7 Q. Okay. And was just Deputy Duke in there with you
8 at that time?

9 A. He was, for the part of the time.

10 Q. He was for part of the time. Well, what
11 happened.

12 A. Yeah.

13 Q. Why was he - - did he leave the room?

14 A. Yeah, he did.

15 Q. Where did he go? Did you see where he went?

16 A. He sat with me for - - he sat with me for a few
17 minutes, and then he got up and went to another office where
18 the other officers were at and where they sit and - - where the
19 other officers sit down there and hang out. He was walking
20 back and forth.

ALS Tr. p. 16, LL. 19-25, p. 17, LL.1-20.

The Hearing Examiner appropriately accepted Ms. Kimbley's testimony at face value. Ms. Kimbley's testimony is consistent with Deputy Duke's reporting of the second pretest monitoring. Deputy Duke testified that he may well have been out of the room on several occasions while he confirmed if it was appropriate to administer a second breath alcohol test to Ms. Kimbley.³

It was reasonable for the Hearing Examiner to conclude that such absences from the interview room did not occur 15 minutes prior to the administration of the second breath alcohol test since Ms. Kimbley "assumes" the number of times Deputy Duke left her presence and she had no idea when or if he had restarted the monitoring period.⁴

3

19 Q. Okay. And then since you were in a separate
20 room, then who prepped the machine for you - -

21 A. Well, I just - -

22 Q. - - for taking the second breath sample?

23 A. I waited approximately 13 minutes. I told the
24 jail deputies what my new time was and what time I would like
25 to take the samples. They kind of prompted me a couple of

1 minutes before it was ready, and I escorted Ms. Kimbley back
2 into the room and programmed the machine.

3 Q. Okay. Got it. Okay. Are you aware that the
4 Second observation period is not included in the video that you
5 Provided to the prosecutor in this case?

6 A. The prosecutor's assistant informed me of that
7 Earlier this week.

8 Q. Do you know why that is?

9 A. I am assuming it was accidental. After the first
10 Test I turned off my recording in order to advise my sergeant
11 Of what happened and see what he wanted me to do, so I was
12 Unsure if he wanted me to take a - - go get a breath sample
13 Because Ms. Kimbley was complaining of asthma and - -

14 Q. Gotcha.

15 A. - - that we may need to go get a blood test
16 Instead of a breath test.

ALS Tr. p. 11 LL. 19-25, p. 12 LL. 1-16.

4

4.9 Kimbley's testimony noted she assumed the number of times Deputy Duke left her Presence and she had no idea when or if he had restarted the monitoring period.

Findings of Fact and Conclusions of Law and Order, R. p. 089.

Kimbley and the District Court inappropriately emphasize Deputy Duke's 'statement' in response to the Hearing Examiner's invitation to make a comment (ALS Tr. p. 18 LL. 21-24). Deputy Duke "comments" consistently with his testimony and not in response to any questions, describing the circumstances of the beginning of the second pretest monitoring period (ALS Tr. p. 19 LL.10-18).

It is just as reasonable to conclude as the Hearing Examiner did here, that Deputy Duke did not argue with Ms. Kimbley's testimony because he was told that he could only make a comment and could not and did not respond to any specific questions. Deputy Duke also did not hear something in Ms. Kimbley's testimony that was contrary to his testimony, he was only offering a comment based on the Hearing Examiner's request.

Deputy Duke specifically indicates that he said what he did and that he really does not recall anything different because he did not review the video recording (ALS Tr. p. 19 LL.10-18).

Deputy Duke reports on the circumstances of his observation during the second pretest monitoring period. Duke reports that he did not observe Kimbley to belch, burp or vomit during the second pretest monitoring. There is no suggestion that Ms. Kimbley burped or regurgitated into her mouth. Deputy Duke also indicates that Latah County Deputy Sheriff Scott Storr's observed Kimbley during the second pretest monitoring period (R. p. 035).

Ms. Kimbley may argue that Deputy Duke's testimony is inconsistent with his report, however the generalized questions of Deputy Duke are not time specific and do not distinguish the circumstances of the first monitoring period from the second monitoring period.

Additionally, the Hearing Examiner considered the specific inconsistency of Ms. Kimbley's testimony that she was not advised of the circumstances of the pretest monitoring.

The video recording of the circumstances of the first pre test monitoring period clearly indicates that Deputy Duke told Ms. Kimbley of the pretest monitoring (time stamped at 22:21 ALS Exhibit C).⁵

Ms. Kimbley testifies that Deputy Duke did not tell her about the pretest monitoring period (ALS Tr. p. 15 LL. 20-25, p. 16 LL. 1-2). In fact Ms. Kimbley indicates she did not know there was a fifteen minute monitoring period.

The Hearing Examiner's finding that Ms. Kimbley testified inconsistently with the video goes to her credibility.

The Hearing Examiner concluded that based on the inconsistency with the video recording that he could not appropriately rely on Ms. Kimbley's testimony, *Bennett v. State, Dept. of Transp., 147 Idaho 141, 206 P.3d 505 (Ct.App. 2009)*, I.C. § 67-5279.

Ms. Kimbley also testifies that she had no idea how long Deputy Duke may have been gone from the interview room or how many times Deputy Duke might have left the room (ALS Tr. p. 18 LL.10-14).

Ms Kimbley can point to no inconsistencies between Deputy Duke's testimony and the video recording, instead she can only argue contrary to I.C. § 67-5279 that the facts mean something different than what the Hearing Examiner concluded. Ms. Kimbley's argument that the pretest monitoring was insufficient because she was left

⁵

4.3 Unlike Kimbley's ALS testimony, the DVD (Exhibit C) at 22:21:33 provides Deputy Duke informing Kimbley about the fifteen-minute monitoring period and the reasons for the monitoring period.

Findings of Fact and Conclusions of Law and Order, R. p. 089.

alone in the interview room calls for a conclusion not supported by the record. General factual statements which are not specific as to time or place are not sufficient for Ms. Kimbley to meet her burden to demonstrate that the test was not administered consistent with I.C. 18-8002A(7)(d), *Bennett id.*

Ms. Kimbley argues that it is appropriate to review the Idaho Breath Alcohol Standard Operating Procedures to determine whether there is any ambiguity which requires the Court to engage in statutory construction to determine whether Ms. Kimbley has met her burden (Respondent's Brief, p. 11-17). This is not an inquiry into the meaning of the words used by the Idaho State Police to describe the standard to determine whether the evidentiary test for breath alcohol or a reference to documents not considered by the Hearing Examiner, *Masterson v. Idaho Dept. of Transp.*, 150 Idaho 126, 244 P.3d 625 (Ct.App. 2010).

There is no argument by the Department that a pretest monitoring period is not necessary. Specifically the Department's Hearing Examiner concludes that the monitoring is necessary and was sufficiently conducted by Deputy Duke (Hearing Examiner's Finding 4.2 R. p. 089). The Department's argument is not minimizing the requirement of pretest monitoring instead the department is minimizing the application of *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999) and *State v. DeFranco*, 143 Idaho 335, 144 P.3d 40 (Ct. App. 2006) to the breath tests administered here.

Consistent with the court's decisions in *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Ct.App. 2009), *Wilkinson v. State, Dept. of Transp.*, 151 Idaho 784, 264 P.3d 680 (Ct.App. 2011) and *Peck v. State, Dept. of Transp.*, 153 Idaho 37, 278 P.3d 439 (Ct.App. 2012), Deputy Duke did what was necessary to 'detect belching or

regurgitation into the mouth or the like', *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct. App. 1999).

Ms. Kimbley really argues that the officer's conduct to meet the standard of a sufficient pretest monitoring requires Deputy Duke to stare fixedly at Ms. Kimbley.⁶

The question for the court must be whether the alleged non-compliance with the procedures of the Idaho State Police. The alleged non-compliance is at most de minimis. There is no evidence that an event occurred affecting the breath test results.⁷

Ms. Kimbley does not testify that she does anything which would affect the validity of the test results or would introduce mouth alcohol into the breath sample, *Bennett*, see for example, *People v. Ebert*, 931 NE 2d 279, 401 Ill. App 3d 958 (2010).

In an effort to show that the Hearing Examiner's conclusion that 'Deputy Duke followed the proper procedures when he started the second pretest monitoring period' (Finding 4.11) is not supported by sufficient evidence in the record Ms. Kimbley argues that the first pretest monitoring period was insufficient. Following that argument, if the circumstances of the first pretest monitoring period are sufficient than the Hearing Examiner's findings that the second pretest monitoring period was sufficient are

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The Idaho Operator's Manual for the use of the Intoximeter 3000 does not require that the observer never take his eyes off the subject, only that the subject be observed closely. Such an interpretation comports with the purpose of the Manual, which is to "reduce the risk of invalid test results from various conditions which might occur after the time of the arrest." *Bradley*, 120 Idaho at 569, 817 P.2d at 1093. In this case, Officer Campbell was in the same room with *Remsburg* at all times and closely observed her for at least fifteen minutes directly preceding administration of the breath test. The fact that Campbell's attention was briefly diverted from staring at *Remsburg* while he read the advisory form to her and programmed the Intoximeter did not preclude his compliance with the mandatory fifteen-minute observation period.

State v. Remsburg, 126 Idaho 338, 341, 882 P.2d 993, 396 (Ct.App. 1994).

⁷ The breath tests of .127 and .126, are within .02, Idaho Breath Alcohol Standard Operating Procedures 6.2.2.2. The difference between the test samples is de minimis (.001).

supported by substantial evidence in the record, I.C. § 67-5279.⁸

Ms. Kimbley puts substantial emphasis on what she contends are the distractions in the environment in which the pretest monitoring was administered.

Considering what may be characterized as the environmental factors of testing:

1. Background Noise.

The circumstances of Deputy Duke programming the breath testing equipment is captured in its entirety on the video recording (ALS Exhibit A beginning at time stamp 22:26). The video recording clearly captures the sounds and noises of the entire Latah County Sheriff's office not just the space where the breath test is conducted. Conversations are heard, radio transmissions are heard and Ms. Kimbley (who is observed to be only several feet away from Deputy Duke) is not heard to 'belch or regurgitate into her mouth'. It is clear that Deputy Duke's hearing is not affected in such a way as to conclude that he could not employ his hearing to listen to an event which would introduce mouth alcohol to Ms. Kimbley's breath sample. His senses of sight or smell are not implicated by the programming noises of the Intoxilyzer. This kind of background noise does not distract Deputy Duke, *Remsburg at 996, 341*.

2. Deputy Duke's View

Deputy Duke continues to be able to view Ms. Kimbley who is immediately adjacent to his right shoulder and several feet away while he was programming the Intoxilyzer. Deputy Duke was in a position to use his vision, hearing and smell should

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Ms Kimbley argues to the Hearing Examiner that the video recording contradicted Deputy Duke's report as well as his testimony (ALS Tr. p. 25), arguing that if the video recording is different than the testimony of the police officer that is evidence of an insufficient pretest monitoring. Rhetorically then if Ms. Kimbley's testimony is inconsistent with the video recording then there is a sufficient 15 minute monitoring period and the Hearing Examiner's decision is supported by substantial evidence in the Record.

there be any suggestion of an event which would have affected mouth alcohol. Here there is no evidence in the record that an event affecting mouth alcohol occurred. Only argument is offered as the basis for a different conclusion than what is visible on the video recording.

3. The position of Ms. Kimbley and Deputy Duke walking from the interview to the Intoxilyzer room.

Ms. Kimbley argues that the circumstances of walking from the interview room to the testing room are indicative of an insufficient monitoring (ALS Ex. at 22:25). It is clear in the couple of seconds that it takes for Deputy Duke to walk Ms. Kimbley to the testing room that he can hear, see and smell whether a 'belch or regurgitation into the mouth' occurred. At no time is Deputy Duke's back to Ms. Kimbley and the circumstances of walking to the interview room are clearly visible on the videotape demonstrating the sufficiency of the initial pretest monitoring.⁹

4. Time of the monitoring period.

It is clear that not only did the initial pre-monitoring last more than 15 minutes, Deputy Duke was able to observe Ms. Kimbley employing his senses to determine whether an event affecting mouth alcohol occurred.

The duration of the second pretest monitoring period is also sufficient.

Contrary to Kimbley's factual assertions there is no evidence that Deputy Duke did not keep his eyes, ears and nose attuned to Ms. Kimbley any time during the 15

⁹

Ms. Kimbley is constantly under the view of the Latah County Deputy Sheriff staff. Further, it is not necessary for Deputy Duke to tell the Deputy conducting the pat down then she needs to be observant for a burp, belch or regurgitation into the mouth. If such an event occurred the Latah County Sheriff's Deputy would he have reported it. Furthermore there is no evidence observing the videotape of the circumstances of the pat down that Ms. Kimbley 'belched or regurgitated into her mouth'.

minutes immediately prior to the administration of the second evidentiary test for breath alcohol. The second breath test was administered to Ms. Kimbley at 22:57. Deputy Duke reports beginning the second observation at 22:38. 15 minutes from 22:57 would place the 15 minute monitoring immediately prior to the breath test commencing at 22:42 (R. p. 032.).

The purpose of the monitoring period is to reduce the effect of various conditions which might occur at the time of the arrest on the breath alcohol evidentiary test results. No such conditions were present here, *Remsburg at 996, 341.*

There are no discrepancies of the nature that Ms. Kimbley argues to indicate that the Hearing Examiner's findings are not based on the record. It is clear that if the circumstances of the second monitoring are consistent with the monitoring as evidenced on the videotape, then there is sufficient evidence in the record supporting the Hearing Examiner's conclusion that the circumstances of the second monitoring was sufficient.¹⁰

B. The District Court erred.

Ms. Kimbley simply argues that if you weigh the facts as she suggests, the Hearing Examiner's conclusions are not supported by sufficient evidence in the record. However if you look at the record considering the conclusions made by the Hearing

¹⁰

- 4.9 Kimbley's testimony noted she assumed the number of times Deputy Duke left her presence and she had no idea when or if he had restarted the monitoring period.
- 4.10 Kimbley's recollection of what occurred between the first and second evidentiary breath testing sequence is based upon a time when her memory was impaired (see Exhibit 4's DUI NOTES) and having an alcohol content that was in excess of the legal limit to drive a vehicle (see Exhibit 3).
- 4.11 It is reasonable to deduce if Deputy Duke conducted Kimbley's first evidentiary breath testing sequence in accordance with ISPFs SOPs, by natural habit, Deputy Duke would follow proper procedures again when he restarted the monitored period for Kimbley's second evidentiary breath testing sequence.
- 4.12 Kimbley's evidentiary test was performed in compliance with Idaho Code and SOPs.

Findings of Fact and Conclusions of Law and Order, R. pp. 089-090.

Examiner, it is clear those conclusions are supported by substantial evidence in the record.¹¹

The Hearing Examiner correctly describes and sets out the testimony submitted to him by Ms. Kimbley (R. pp. 057-058). The Hearing Examiner sets out Counsel's comments and arguments (R. pp. 058-059). Clearly the Hearing Examiner considered the testimony of Ms. Kimbley and Deputy Duke and the arguments of counsel. The Hearing Examiner's observations are a correct rendition of what he heard.

Ms. Kimbley argues that the Hearing Examiner was not entitled to rely on the testimony of Deputy Duke. The District Court does not consider the testimony of Deputy Duke and Ms. Kimbley in light of the Hearing Examiner's factual findings.

Instead of determining whether the Hearing Examiner's conclusion was supported by substantial evidence in the Record, the Court concludes it cannot accept the testimony of Deputy Duke because the District Court finds that Deputy Duke is not credible and therefore the Court could not rely on the testimony of Deputy Duke.

The Court simply makes its own credibility findings, simply weighing the same evidence in the Record differently than the Hearing Examiner. That is not the District Court's role on Judicial Review, *Marshall v. Department of Transp.*, 137 Idaho 337, 48 P.3d 666 (Ct.App. 2002). The Court must give deference to the Hearing Examiner's

¹¹

In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial and competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion. *Kinney v. Tupperware Co.*, 117 Idaho 765, 769, 792 P.2d 330, 334 (1990). Substantial evidence is more than a scintilla, but less than a preponderance. *Id.*

Masterson v. Idaho Dept. of Transp., 150 Idaho 126, 128, 244 P.3d 625, 627 (Ct. App. 2010).

findings even if the Court would not have made the same factual findings, if there is a reasonable basis for the Hearing Examiner's conclusion, *Masterson id.*, I.C. § 67-5279. The Hearing Examiner sets out what he considered, what weight he gave what he considered and how he analyzed those facts.

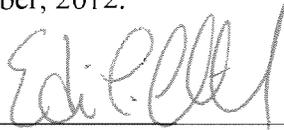
The Hearing Examiner's decision is based on sufficient competent evidence in the Record.

IV. CONCLUSION

Ms. Kimbley did not meet her burden pursuant to Idaho Code § 18-8002A(7) to demonstrate that the Hearing Examiner's Decision was not supported by substantial evidence on the Record as a whole.

The Hearing Examiner's decision to suspend Ms. Kimbley's driving privileges should be sustained and Ms. Kimbley's driving privileges should be suspended for ninety days.

Respectfully Submitted this 7 day of October, 2012.



Edwin L. Littenecker
Special Deputy Attorney General

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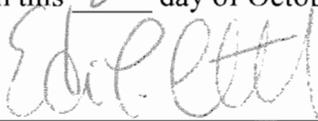
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Deborah L. McCormick
McCormick & Rokyta, PLLC
P.O. Box 10005
Moscow, Idaho 83843

On this 2 day of October, 2012.



Edwin L. Litteneker