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Hern v. Idaho Transp. Dept. Respondent's Brief 1 Dckt. 42287

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IN THE SUPREME COURT
OF THE
STATE OF IDAHO

GARY ALEXANDER HERN,)	SUPREME COURT NO. 42287
)	
Petitioner-Appellant,)	
)	
v.)	
)	
STATE OF IDAHO,)	
TRANSPORTATION DEPARTMENT,)	
)	
Respondent.)	
_____)	

RESPONDENT'S SUPPLEMENTAL BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JEFF M. BRUDIE, PRESIDING

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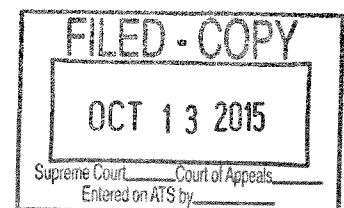


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I. STATEMENT OF THE CASE

This is the Supplemental Brief requested by the Court to address two recent decisions by the Idaho Supreme Court. This brief is limited to that request and supplements the prior arguments made on behalf of the Idaho Transportation Department, the “Department” based on the Idaho Court’s recent decisions.

II. ISSUES ON APPEAL

The Court has invited Mr. Hern and the Department to supply supplemental briefing considering whether the Idaho Supreme Court’s decisions *State v. Haynes*, No. 41924-2014, 2015 WL 4940664 and *State v. Riendeau*, No. 41982-2014, 2015 WL 4999120, (Idaho Aug. 24, 2015), affect the Administrative License Suspension process and the disposition of this appeal.

There would appear to be two issues raised by the Idaho Supreme Court’s decisions. The first is the determination in *Haynes* that the Idaho State Police’s Breath Alcohol Testing Standard Operating Procedures are void because they were not adopted as rules pursuant to the Idaho Administrative Procedures Act. The second issue more predominately addressed by the Court in *Riendeau* is the application of the United States Supreme Court’s decision in *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696, 185 L.Ed2d 696, 81 USLW 4250 (2013).

The Department limits its Supplemental briefing to those issues and does not reiterate the argument and analysis set out in the Department’s Response Brief.

III. ARGUMENT

ISSUE 1

Effect of voidness of the Idaho State Police Breath Alcohol Testing Standards.

The Idaho Supreme Court in *Haynes* determined that the Idaho State Police's Breath Alcohol Testing Standards were void. In *Haynes*, the State argued that ISP is not required to adopt the Breath Alcohol Testing Standards as rules pursuant to I.C. § 67-5231(1). Ms. Haynes argued that the 2013 Breath Alcohol Testing Standards were not adopted pursuant to the Idaho Administrative Procedures Act rule making requirements and were therefore not adequate standards requiring the Court to grant Ms. Haynes motion in limine. The Court in spite of determining that the ISPs Breath Alcohol Testing Standards were void, did not grant Ms. Haynes' motion in limine.

The State's argument in *Haynes* that the State is not required to adopt rules pursuant to I.C. § 67-5213(1) simply did not go far enough. In the judicial review of the Department's Administrative Hearing Examiner's Decision, Hern has the burden to show that:

the tests for alcohol concentration drugs or other intoxicating substances administered at the direction of the police officer were not conducted in accordance with *the requirements of I.C. § 18-8004 (4)* or the testing equipment was not functioning properly when the test was administered I.C. § 18-8002A(7)(d). (Emphasis added).

In pertinent part I.C. §18-8004(4) provides:

analysis of blood, urine or breath for the purpose of determining the alcohol concentration shall be performed by a laboratory operated by the Idaho state police or a laboratory *approved by the Idaho state police under the provisions of approval and certification standards* to be set by the Department or by any other method approved by the Idaho state police. (Emphasis added).

As previously submitted in the Department's Responsive Brief (Issue I p. 5-11), ISP properly adopted Breath Alcohol Testing Standards complying with IDAPA 11.03.11.014.03.¹

Consistent with that direction, ISP adopted and implemented Breath Alcohol Testing Standards for the administration of breath alcohol testing.

Idaho Code §18-8004(4) references use of ISPs Breath Alcohol Testing Standards. A standard is defined separately and differently from a rule. A standard is:

a manual, guideline, curriculum, specification, requirement, measurement or other administrative principle providing a model or pattern in comparison with which the correctness or appropriateness of specified actions, practices or procedures may be determined. I.C. § 67-5201 (21).²

In *Haynes* the Court considers the applicability of its prior decision in *Asarco Inc., v. State*, 138 Idaho 719, 69 P.3d 139 (2003) but fails to consider the statutory language permitting ISP's use of Breath Alcohol Testing Standards. Further the Court in

¹ IDAPA 11.03.11.014.03 provides:

Administration. Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of Idaho administrative rules, ISPFs analytical methods, and ISPFs standard operating procedures. (In effect prior to April 11, 2015).

² Compare the definition of a Rule, I.C. § 67-5201(19).

"Rule" means the whole or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes:

- (a) Law or policy; or
- (b) The procedure or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule, but does not include:
 - (i) Statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or
 - (ii) Declaratory rulings issued pursuant to section 67-5232, Idaho Code; or
 - (iii) Intra-agency memoranda; or
 - (iv) Any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

Haynes does not analyze the statutory distinction between a *rule* and a *standard*. Clearly I.C. § 18-8004(4) as referenced by I.C. § 18-8002A(7)(d) authorizes ISP to use a standard against which a driver could demonstrate whether the test for breath alcohol conformed to the standards adopted by ISP.

The Court neither in *Asarco* or in *Haynes* considers the relationship between the statutory authority of an agency (here ISP) to adopt a standard (I.C. § 18-8004(4)) and IDAPA provisions defining a standard, I.C. § 67-5201(21). The Court in *Haynes* and *Riendeau* did not consider that ISP pursuant to I.C. § 18-8004(4)'s statutory direction to utilize a standard, appropriately adopted rules indicating that ISP would adopt Standards for Breath Alcohol Testing.

In *Asarco* the Idaho Court confronted a direct challenge to DEQ's adoption of Total Daily Maximum Load (TDML) requirements. DEQ was required by federal and state law to adopt TDMLs

for each water quality segment. 33 USC § 1313 (D)(1)(c), I.C. § 39-3611. Once the TDMLs are established for each of the segments, they are incorporated into the state's water quality management plan. 33 USC § 1313 (E); I.C. § 39-3612. The purpose of this process is to identify segments of water bodies in Idaho that do not meet the state's water quality standards and, through the TDML, establish the maximum amount of pollution that can go into the segments from both point and nonpoint sources in an effort to reduce pollutants and ultimately improve the quality of the water receiving the pollution *Asarco at p. 720*.

In *Asarco*, DEQ inexplicably argued that the TDML is an unenforceable planning tool analogous to a comprehensive plan and did not have the force and effect of law, arguing that the TDML was not adopted by rulemaking purposely to render the TMDL unenforceable. Clearly DEQ's analysis invited the Court will to find that the TDML were rules since the TDML were to be incorporated into the State's Water Quality

Management Plan which would then result in a determination by DEQ that a certain water body did not meet State water quality standards and establish the maximum pollution dischargeable into those water bodies.

The *Asarco* analysis employed by the Court in *Haynes* is simply not appropriate to the Breath Alcohol Testing Standards adopted by ISP. The *Asarco* decision does not compel a finding that ISP has not appropriately adopted Breath Alcohol Testing Standards.

ISP's Breath Alcohol Testing Standard does not have wide coverage. The Breath Alcohol Testing Standard does not apply to a large segment of the general public. Instead in the Administrative License Suspension setting, the Breath Alcohol Testing Standards apply to drunk drivers and a resulting narrow and select group, *Asarco at 723*.

The Breath Alcohol Testing Standards are intended to be generally and uniformly applicable. However the significant difference here is that ISP adopted the Breath Alcohol Testing Standards as standards consistent with I.C. §18-8004(4) and ISP rulemaking at IDAPA 11.03.01.014.

The Breath Alcohol Testing Standards only applies in future cases, clearly consistent with the purpose of a standard pursuant to I.C. § 52-6701(21).

The Breath Alcohol Testing Standards do not provide a legal standard or directive not authorized by law. I.C. §18-8004(4) references the use of Breath Alcohol Testing Standards by the adoption of a *standard* as permitted by I.C. § 52-6701(21). Idaho Code §18-8004(4) does not require the adoption of rules, instead I.C. §18-8004(4) identifies the formula authorizing an evidentiary test for alcohol concentration that is “based upon a formula of grams of alcohol per 100 cubic cm of blood, per 210 Liters of breath or 67

milliliters of urine.”

The adoption of the Breath Alcohol Testing Standards simply implements that statutory formula consistent with the ISP's ability to adopt a standard pursuant to I.C. § 18-8004(4).

The Breath Alcohol Testing Standards as the Court in *Haynes* correctly notes, do not express ISP's policy which was not previously expressed since ISP had authorized Breath Alcohol Testing Standards pursuant to rule and had utilized the Breath Alcohol Testing Standards. The expression of the agency policy in the Breath Alcohol Testing Standard based on the statutory formula for the testing for the presence of alcohol found in I.C. § 18-8004(4) is consistent with ISP statutory authority.

Finally as the Court in *Haynes* found, the Breath Alcohol Testing Standards are not an implementation of law or general policy. However the Court fails to consider that ISP's adoption by standard is specifically authorized by I.C. §18-8004(4). ISP by adopting the standard by a rule reference was not statutorily required either by I.C. §18-8004(4) or the Idaho Administrative Procedures Act to adopt Breath Alcohol Testing Standard by rule.

Had the Court in *Haynes* appropriately considered ISP's adoption of Breath Alcohol Testing Standards in light of the statutory authority provided ISP and correctly distinguished between *rules and standards*, ISP's Breath Alcohol Testing Standards would not have been voided.

Importantly, the Court in *Haynes* held that the Breath Alcohol Testing Standards set adequate standards to ensure the general reliability of breath alcohol testing results. The Court in *Haynes* just as this Court has previously concluded, finds that there is no

reason to believe that when a Breath Alcohol Test is performed consistent with the ISP Breath Alcohol Testing Standards that the test will be unreliable, *State v. Besaw*, 155 Idaho 134 at 144, P.3d 219 (2013).

The Breath Alcohol Test administered pursuant to the Breath Alcohol Testing Standards in existence at the time to Mr. Hern submitted to evidentiary testing is reliable. There is no showing that the test administered pursuant to ISP Breath Alcohol Testing Standards for Mr. Hern were unreliable.

The Court's determination in *Haynes* that the failure to adopt Breath Alcohol Testing Standards by rule simply does not affect Administrative License Suspensions prior to the Court's decision in *Haynes*. This Court has consistently contrasted the State's burden in a criminal prosecution to that of the driver's burden in the Administrative License Suspension setting, *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2006).

This argument does not create an inconsistency with the Court's decision in *Haynes*. Instead this analysis is consistent with the distinction between the role of the Court on judicial review of Administrative License Suspensions where the driver has the burden and the role of the Court in hearing an appeal in a criminal prosecution where the State has the burden.

ISP, prior to the date of the Supreme Court's decision in *Haynes*, adopted its Breath Alcohol Testing Standards by rule. Attached as Exhibit A to this briefing is a true and accurate copy of the notice in the Idaho Administrative Bulletin setting out ISP's intention to adopt Proposed and Final Rules for Breath Alcohol Testing.

The Legislature approved ISP's Breath Alcohol Testing Rules. Attached as

Exhibit B is the Breath Alcohol Testing Rules of ISP. In particular the Court's attention is drawn to IDAPA 11.03.01.014 setting out the Breath Alcohol Testing Rules as they were approved by the Legislature with an effective date of April 11, 2015.

The *Haynes* decision in the context of a criminal prosecution is merely prospective, that is the decision to void the former Breath Alcohol Testing Standards only applies to cases arising subsequent to the *Haynes* decision of August 20, 2015.

The retroactive application of the Supreme Court's voiding of ISP's Breath Alcohol Testing Standards to an administrative decision occurring prior to the Supreme Court's announcement would be inappropriate.

The Supreme Court does not indicate whether its decision in *Haynes* or *Riendeau* should be retroactively applied, the Court simply voids the Breath Alcohol Testing Standards which had not been adopted as rules.³

The Court however does not find that the use of the Breath Alcohol Testing Standards would produce unreliable breath test results.

The Idaho Court has indicated the consideration of the following to determine whether a Court's ruling should be applied retroactively; 1) the purpose of the decision; 2) reliance on the prior rule of law and 3) The effect on the administration of justice, *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977).

The Court is to engage in a balancing process considering the gain achieved in the administration of justice by voiding the Breath Alcohol Testing Standards against the adverse effect on the administration of justice resulting from the Department's reliance on the Breath Alcohol Testing Standards in effect at the time of the Hearing Examiner's

³ Neither of the Supreme Court's decisions in *Haynes* or *Riendeau* references ISP's rule making which was complete prior to the date of the Supreme Court's decisions.

decision here and the appropriateness of reconsidering those decisions made pursuant to the now void Breath Alcohol Testing Standards, *Jones at 609*.

To require the Department to “reconsider” every Administrative License Suspension as a result of the voiding of the Breath Alcohol Testing Standards would result in a crippling impact on the administration of the Department’s decision making authority. To set aside Administrative License Suspensions which removed drivers who drove a motor vehicle with an unlawful blood alcohol from Idaho’s Highways would be tragic, particularly in light of the Court’s finding that the Breath Alcohol Testing Standards produced reliable results. To require the Department to reconsider every Administrative License Suspension decision in light of a still reliable Breath Alcohol Testing Standard would produce an absurd and adverse effect on the Department’s Administrative License Suspension process. The marginal gain achieved by retroactively applying the Haynes decision voiding the Breath Alcohol Testing Standards only for their failure to not be adopted by rule is inconsistent with the Court’s determination that the Breath Alcohol Testing Standards are otherwise reliable. Finally, the Hearing Examiner’s reliance on the Breath Alcohol Testing Standards is not misplaced or inappropriate since the Breath Alcohol Testing Standards are fundamentally reliable.

The Department’s Hearing Examiner is entitled to rely upon the existence of ISP’s Breath Alcohol Testing Standards in existence at the time that the Hearing Examiner makes a determination and when the District Court on judicial review affirmed the Hearing Examiner’s decision.

Mr. Hern fails to meet his burden pursuant to I.C. §18-8002A(7). Mr. Hern cannot show based on this record that the Breath Alcohol Tests performed in this matter did not

comply with the then existing Breath Alcohol Testing Standards of the Idaho State Police.

ISSUE 2

Application of the McNeely analysis.

If the Court's invitation for supplemental briefing asks the Department to consider the effect of the *Haynes* and *Riendeau* discussion of a driver's voluntary submission to breath testing, *McNeely* and its application by the Idaho Supreme Court is inapplicable here.⁴

There is no warrantless blood draw for the Court's consideration. Mr. Hern's presently existing appellate argument does not ask the Court to address the circumstances of determining whether consent exists for Mr. Hern's submission to breath testing.⁵

Mr. Hern consistent with Idaho's implied consent provisions, did not withdraw his consent to submit to a breath alcohol test and offered his breath for testing voluntarily after having been appropriately advised of the consequences of a refusal.

The only inquiry for the Court in the review of the Hearing Examiner's Administrative decision here is whether there is a reasonable basis for the Police Officer's request that Mr. Hern submit to evidentiary testing.

⁴ This Court recently noted the lack of clear Court direction:

Neither *State v. Haynes*, No. 41924-2014, 2015 WL 4940664, *State v. Riendeau*, No. 41982-2014, 2015 WL 4999120, (Idaho Aug. 24, 2015), nor *State v. Padley*, 354 Wis.2d 545, 849 N.W.2d 867, 879 (Wis.Ct.App.2014) are administrative licensing cases—rather, they are criminal cases and the United States Supreme Court has not yet indicated whether constitutional safeguards apply equally to both administrative cases and criminal cases.

Bobeck v. Idaho Transp. Dep't, No. 42682, 2015 WL 5602964, at *7 (Idaho Ct. App. Sept. 24, 2015).

⁵ Chief Justice Jones concurring opinion in *Haynes* sets out the fundamental difference between a warrantless blood draw and a driver's submission to a breath test which only requires the driver to exhale, *State v. Haynes*, No. 41924-2014, 2015 WL 4940664, at *11 (Idaho Aug. 20, 2015).

Breath cannot be tested involuntarily, *State v. Haynes, No. 41924-2014, 2015 WL 4940664, at *9*10 (Idaho Aug. 20, 2015)*. Where there is legal cause for the Police Officer's Breath Alcohol Test request, the circumstances of the breath test are reasonable, I.C. § 18-8002A(7)(b) and the breath test is voluntarily administered, *In re Suspension of Driver's License of Gibbar, 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2006)*.

Mr. Hern does not appeal from the Hearing Examiner's decision that Mr. Hern failed to meet his burden pursuant to I.C. § 18-8002A(7). Specifically, Mr. Hern does not challenge the Hearing Examiner's determination that legal cause exists for Trooper's Schoonmaker's request that Mr. Herm submit to evidentiary testing for breath alcohol.


Mr. Hern fails to meet his burden.

V. CONCLUSION

Mr. Hern has not met his burden to show that the breath testing administered here did not comply with the then existing Breath Alcohol Testing Standards.

Mr. Hern voluntarily submitted to the breath test and fails to meet his burden that the Trooper Schoonmaker did not have the legal cause required by I.C. § 18-8002A(7)(b).

DATED this 9 day of October, 2015.


Edwin L. Litteneker
Special Deputy Attorney General

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Lewiston, Idaho 83501

On this 9 day of October, 2015.



Edwin L. Litteneker

Exhibit A

Supplemental Brief

State of Idaho Transportation Department

LEGAL NOTICE

Summary of Proposed Rulemakings

PUBLIC NOTICE OF INTENT TO PROPOSE OR PROMULGATE NEW OR CHANGED AGENCY RULES

The following agencies of the state of Idaho have published the complete text and all related, pertinent information concerning their intent to change or make the following rules in the latest publication of the state Administrative Bulletin.

*The written comment submission deadline is October 22, 2014 unless otherwise noted.
Public hearing request deadline is October 15, 2014 unless otherwise noted.
(Temp & Prop) indicates the rule is both Temporary and Proposed.
(*PH) indicates that a public hearing has been scheduled.*

IDAPA 01 - BOARD OF ACCOUNTANCY PO Box 83720, Boise, ID 83720-0002

01.01.01 - Idaho Accountancy Rules

01-0101-1401, Provides for a new license renewal extension deadline date of April 30th each year.

01-0101-1402, Only firms performing any of the services set out in Rule 602 must register annually with the Board.

IDAPA 02 - DEPARTMENT OF AGRICULTURE PO Box 790, Boise, ID 83701

02-0605-1401, Rules Governing Diseases of Hops (*Humulus Lupulus*). (Temp & Prop) Changes hop quarantine area to allow free movement of hops green matter among Idaho, Washington, and Oregon and requires a negative test and Clean Plant Health Network certification prior to shipment into Idaho if imported from outside the three-state area.

02-0627-1402, Rules Governing Bacterial Ring Rot of Potatoes. Requires testing for BRR to prevent the introduction and spread of BRR into Idaho and the United States and to ensure that certified seed potatoes and table stock exported from Idaho are free from the disease.

IDAPA 07 - DIVISION OF BUILDING SAFETY PO Box 83720, Meridian, ID 83542

07-0103-1401, Electrical Licensing and Registration - General. Requires anyone who has previously been licensed in any jurisdiction as a journeyman or master electrician to disclose such licensure history to the Division upon application and prevents any such individual from obtaining an apprentice registration.

07-0107-1401, Continuing Education Requirements. Allows for an additional category of instruction in the area of electrical code-related training to qualify toward the continuing education credits that a journeyman and master electrician must obtain in each licensing period.

07-0111-1401, Rules Governing Civil Penalties. Establishes a civil penalty for applicants who fail to disclose the required information on any Division electrical license application, specifically to include their licensure history and any licenses previously held in any state or jurisdiction; clarifies that the required CEU hours must be completed in each 3-year licensing period.

07-0204-1401, Rules Governing Plumbing Safety Inspections. Incorporates by reference the 7th Edition of the Cross Connection Control Manual published in 2012 by the American Water Works Association replacing 1995 6th Edition.

07-0205-1401, Rules Governing Plumbing Safety Licensing. Clarifies schooling and work experience requirements for all in-state and out-of-state applicants to obtain a journeyman license or certificate of competency or plumbing contractor license.

07-0206-1401, Rules Concerning Idaho State Plumbing Code. Allows certain materials to be used for potable water distribution piping and building sewers and eliminates several provisions of the code which can unnecessarily cost contractors and property owners additional expense.

07.03.01 - Rules of Building Safety

07-0301-1401, Reinstates an exemption for building permits for fences under 7 feet in height; amends table for residential exterior wall fire resistance ratings and fire separation distances; amends a provision requiring residential mechanical ventilation for air exchange in a dwelling and creates an exception where the air infiltration is already greater than required.

07-0301-1402, (Temp & Prop) Allows owner-occupied lodging house occupancies (bed and breakfast) with 5 or fewer guestrooms to be constructed or remodeled in accordance with the residential code instead of the commercial building code, and allows them to be operated without the installation of fire sprinklers.

**IDAPA 08 - STATE BOARD OF EDUCATION / DEPARTMENT OF EDUCATION
PO Box 83720, Boise, ID 83720-0037**

08-0111-1401, Registration of Post-Secondary Educational Institutions and Proprietary Schools. Amends definition of what constitutes having an "Idaho presence"; allows Board to use financial instruments other than an institution's audited financial statements as part of the registration process.

**08-0201-1402, Rules Governing Administration.* (*PH) (Temp & Prop) Makes technical corrections to rule.

08.02.02 - Rules Governing Uniformity

**08-0202-1401,* (*PH) Amends the certification requirements to add a tiered certification system.

**08-0202-1402,* (*PH) Adopts the current revisions to the Idaho Standards for Initial Certification for Professional School Personnel and the Operating Procedures for Idaho Public Driver Education Programs manuals that are incorporated by reference.

**08-0202-1403,* (*PH) Removes an unapproved endorsement; adds Interim Speech Language Pathologist endorsement and clarifies that an emergency need not be declared to request alternative authorization for these interim certificates; clarifies types and nature of electronic or photographic images of students that a professional educator may not take or possess.

**08-0202-1404,* (*PH) For teacher evaluation purposes, allows for one classroom observation when a teacher is unavailable for two classroom observations; clarifies the individuals responsible for measuring teacher performance.

08.02.03 - Rules Governing Thoroughness

**08-0203-1401,* (*PH) Clarifies the substitution clause to require a student to show mastery of the content standards to receive one credit of physical education for graduation; a student may elect an exemption in grade 11 from the college entrance exam requirement if enrolled for the first time in grade 12 at an Idaho high school after the fall statewide administration of the college entrance exam; increases student proficiency standards.

**08-0203-1402,* (*PH) (Temp & Prop) Clarifies that a limited English proficient (LEP) student is one who does not score "proficient" on the approved test and meets one of the other listed criteria.

**08-0203-1403,* (*PH) (Temp & Prop) Use of accommodations/adaptations for LEP students must accurately reflect the Designated Supports and Accommodations guidelines; science End of Course Assessments have been added to the list of required assessments.

**08-0203-1404,* (*PH) (Temp & Prop) Replaces the inadvertently removed requirements for physical education and professional technical education as required instructional offerings of a high school; clarifies that learning plans are reviewed throughout a student's high school career.

**08-0203-1406,* (*PH) (Temp & Prop) Allows for the 5 new data elements to be collected from the districts which will provide information to accurately calculate payments for staffing and for the Advanced Opportunities option.

**IDAPA 10 - IDAHO BOARD OF LICENSURE FOR PROFESSIONAL ENGINEERS AND
PROFESSIONAL LAND SURVEYORS
1510 Watertower St., Meridian, ID 83642**

**10-0103-1401, Rules for Corner Perpetuation and Filing.* (*PH) Requires surveyors to perpetuate historic corner

record information on the corner perpetuation and filing (CP&F) forms filed or recorded in the county courthouse in lieu of listing all corner record instrument numbers on the record of survey map.

**IDAPA 11 - IDAHO STATE POLICE
700 S Stratford Dr., Meridian, ID 83642
ISP FORENSIC SERVICES**

11-0301-1401, Rules Governing Alcohol Testing. (Temp & Prop) Adds the following to current standard operating procedures: breath alcohol instrument training requirements for operators and specialists; breath alcohol instrument performance verification and calibration requirements; breath alcohol testing requirements and procedures; alcohol laboratory approval and operational standards; minor in possession/minor in consumption testing methods; and passive testing procedures.

IDAHO RACING COMMISSION

11-0409-1401, Rules Governing Claiming Races. Clarifies that it is not necessary for a horse that has been claimed to re-establish eligibility for a starter allowance race by running in a claiming race; further prevents the use of "protective claims."

11-0410-1401, Rules Governing Live Horse Races. Allows thoroughbred horses that are owned by the same owner to be uncoupled for wagering purposes.

POST COUNCIL

11-1101-1403, Rules of the Idaho Peace Officer Standards and Training Council. Addresses home schooling and foreign education, and clarifies required proof of education documentation; removes certain medical standards from rule that are the responsibility of the employing agencies; requires applicants to be physically capable of passing all requirements while in the academy or face disenrollment; clarifies the different disciplines trained by POST.

11-1104-1401, Rules of the Idaho Peace Officer Standards and Training Council for Correction Officers and Adult Probation and Parole Officers. Conforms the minimum employment standards to other POST disciplines for education and physical and medical requirements.

COMMERCIAL VEHICLE SAFETY DIVISION

11.13.01 - The Motor Carrier Rules

11-1301-1401, Incorporates by reference federal regulations that allow interstate carriers, who have been declared an imminent hazard or who have failed to pay fines for previous violations, to be put out of service until the issues are resolved.

11-1301-1402, Incorporates by reference federal regulations that allow exemptions for interstate operations of "covered farm vehicles" and vehicle engaged in the transportation of agricultural commodities and farm supplies.

**IDAPA 12 - DEPARTMENT OF FINANCE
PO Box 83720, Boise, ID 83720-0031**

12-0110-1401, Rules Pursuant to the Idaho Residential Mortgage Practices Act. Incorporates by reference the most recent changes to Regulation X, Regulation Z, the Real Estate Settlement Procedures Act, and the Truth in Lending Act.

**IDAPA 13 - IDAHO FISH AND GAME COMMISSION
PO Box 25, Boise, ID 83707**

13-0102-1401, Rules Governing Hunter Education and Mentored Hunting. (Temp & Prop) Clarifies that a 10 year old can hunt big game.

13.01.04 - Rule Governing Licensing

13-0104-1402, (Temp & Prop) Change in eligibility rules for nonresident disabled American veterans would reduce fees for a hunting license and certain tags.

13-0104-1403, (Temp & Prop) Adds IRS status 501(c)(4) and 501(c)(19) non-profits to list of qualified organizations for the disabled veteran big game tag program.

13-0104-1404, (Temp & Prop) Implements new discretionary Commission authority to add bear tags to the Landowner Appreciation Program.

13.01.08 - Rules Governing the Taking of Big Game Animals in the State of Idaho

13-0108-1402, Allows Commission to designate specific unlimited controlled hunts for deer and elk as “first-choice only” hunts when applied for during the controlled hunt application process.

13-0108-1403, (Temp & Prop) Per statute, lowers the age of hunters who can apply for youth-only controlled hunts from 12 to 10 years of age.

13-0108-1404, (Temp & Prop) Reorganizes some of the elk zones, and the units contained within a zone, within the Smoky Mountains, Bennett Hills, Owyhee/South Hills, Teton, Palisades, Island Park, and Bannock elk zones.

13-0109-1401, Rules Governing the Taking of Game Birds in the State of Idaho. (Temp & Prop) Allows Commission flexibility to modify shooting hours on Wildlife Management Areas where pheasants are stocked.

**IDAPA 15 - OFFICE OF THE GOVERNOR
IDAHO FOREST PRODUCTS COMMISSION
PO Box 855, Boise, ID 83701**

15-0301-0104, Rules of Administrative Procedure of the Idaho Forest Products Commission. Addresses the nomination and vacancy of the at-large Commission member; amends the assessment basis of forest landowners.

**IDAPA 16 - DEPARTMENT OF HEALTH AND WELFARE
PO Box 83720, Boise, ID 83720-0036**

16-0202-1401, Rules of the Idaho Emergency Medical Services (EMS) Physician Commission. Revises the Standards Manual that is incorporated by reference to align rules with state law by redefining “Emergency Medical Services.”

***16-0219-1401, Food Safety and Sanitation Standards for Food Establishments.** (*PH) (Temp & Prop) Allows individuals to donate harvested wild game meat to food banks and other organizations that help feed Idaho citizens and provides a way for these organization to be able to accept the donated wild game meat.

16-0301-1401, Eligibility for Health Care Assistance for Families and Children. Clarifies definitions and amends the rules with regard to parent and caretaker relatives.

***16-0303-1401, Rules Governing Child Support Services.** (*PH) Updates income withholding processes; clarifies good cause factors that can be considered during suspension of license proceedings and those that may not be appropriate when applying them to recreational licenses.

16-0304-1401, Rules Governing the Food Stamp Program in Idaho. Includes the term “trafficking” to include fraudulent activities not previously considered to be program violations.

16-0305-1401, Rules Governing Eligibility for Aid to the Aged, Blind and Disabled (AABD). Clarifies participant liability for pre-existing medical expenses based on guidance received from the Centers for Medicaid and Medicare (CMS); improves the administration of the AABD program for participants in long-term care settings, which include a change to the share of cost determination for participants who enter or leave a nursing home during the middle of the month.

16-0507-1401, The Investigation and Enforcement of Fraud, Abuse, and Misconduct. Addresses current practice concerning reinstatement of an individual or entity who has been excluded from the Medicaid program.

16-0733-1401, Adult Mental Health Services. Amends and add definitions; removes obsolete rules; clarifies current mental health services available through the Department.

**IDAPA 17 - IDAHO INDUSTRIAL COMMISSION
PO Box 83720, Boise, ID 83720-0041**

17-0204-1401, Administrative Rules of the Industrial Commission Under the Workers' Compensation Law - Benefits. Allows an injured worker attending medical appointments resulting from an industrial injury or occupational disease to be reimbursed for travel expenses; removes the health care travel expense reimbursement form from rule and directs the injured worker to the Commission office or website to obtain the form.

17-0206-1401, Employer's Reports. Removes language that extends the deadline for filing a summary of payments

for adjusters who do not timely make indemnity payments; changes the time period from 60 to 120 days to file a summary of payments in case of default by an employer for reason of insolvency or bankruptcy.

17-0208-1401, Miscellaneous Provisions. Adds Commission's mailing address; removes from rule the form used to notify claimants of a status change and directs them to the Commission office or website to obtain the form.

17-0209-1401, Medical Fees. Updates the facility fee schedule; changes the CPT code range affecting psychiatric diagnostic evaluations; changes the reimbursement for certain hospital outpatient diagnostic lab services; the allowable period for prompt payment by a payer is changed to commence upon acceptance of liability if made after receipt of the provider's bill.

17-0501-1401, Rules Under the Crime Victims Compensation Act. Implements updates under the CVC Medical Fee Schedule and clarifies the calculations of the allowable payment of CPT Codes; provides a consistent method for calculating mileage reimbursement for the necessary treatment and services for eligible victims of the program.

IDAPA 24 - BUREAU OF OCCUPATIONAL LICENSES

PO Box 83720, Boise, ID 83720-0063

24-0201-1401, Rules of the Board of Barber Examiners. Provides for the issuance of a contiguous barber shop license to the address of the primary shop allowing licensees to move their workspaces within the primary shop without reapplying for a new license; standardizes the inspection process.

24-0401-1401, Rules of the Idaho Board of Cosmetology. Provides for the issuance of a contiguous license to the address of the primary establishment which will allow licensees to move their workspaces within the primary establishment without reapplying for a new establishment license.

24-0601-1401, Rules for the Licensure of Occupational Therapists and Occupational Therapy Assistants. Decreases initial licensure fee, limited permit or temporary license fee, annual active license renewal, and inactive license renewal.

24-0901-1401, Rules of the Board of Examiners of Nursing Home Administrators. Increases fees for the original application, endorsement application, annual renewal, original license, and the Administrator-in-training registration.

24-1401-1401, Rules of the State Board of Social Work Examiners. Increases fee for initial application and endorsement, and annual renewals fees for Clinical Social Worker, Social Worker and Masters Social Worker, Inactive Clinical Social Worker, and Inactive Social Worker and Inactive Masters Social Worker.

24-1501-1401, Rules of the Idaho Licensing Board of Professional Counselors and Marriage and Family Therapists. Updates the incorporation by reference of the American Counseling Association Code of Ethics, amended effective 2014.

24-2601-1402, Rules of the Idaho Board of Midwifery. Clarifies when newborns must be transferred and when newborn consultation is required.

IDAPA 27 - IDAHO BOARD OF PHARMACY

PO Box 83720, Boise, ID 83720-0067

27.01.01 - Rules of Idaho State Board of Pharmacy

***27-0101-1401, (*PH)** Allows a biosimilar product to be substituted for a prescribed biological product, upon the determination by the FDA that the biosimilar product is interchangeable.

***27-0101-1402, (*PH) (Temp & Prop)** Defines outsourcing facilities, creates new registration category, establishes a registration fee, and institutes practice standards for outsourcing facilities.

***27-0101-1403,** Creates a labeling rule for distributed compounded drug product; establishes general compounding standards, including controls that regulate equipment, practices, policies and procedures, compounding accuracy, and recordkeeping; limits pharmacy distribution of non-sterile compounded drug product; expands sterile product preparation and hazardous drug rules.

***27-0101-1404, (*PH)** Prohibits patients from using their dispensed drugs when being admitted to an institutional facility because the drugs are not unit dosed packaged; clarifies that a pharmacist foreign graduate is required to obtain 1,500 student pharmacist hours; clarifies that a technician-in-training may only renew two times; amends

standard drug labeling rule; creates a new limited pharmacy repackaging rule; clarifies when a controlled substance inventory is to be taken; allows pharmacist immunizers to utilize all forms of injectible epinephrine; clarifies that statutory requirements of nonresident registered pharmacists also pertain to nonresident licensed pharmacists; clarifies pharmacy security requirements; combines various pharmacy authorized entry rules into one rule; and updates remote dispensing site security and training requirements, also requiring a continuous quality improvement program.

*27-0101-1405, Amends rule to be consistent with federal requirement regulating wholesale distribution.

IDAPA 28 - IDAHO DEPARTMENT OF COMMERCE

PO Box 83720, Boise, ID 83720-0093

28-0401-1402, *Rules Governing the Idaho Reimbursement Incentive Act*. Establishes the applications, templates, workflow processes, incentive agreements and other supporting documentation necessary to execute the Idaho Reimbursement Incentive Act.

IDAPA 33 - IDAHO REAL ESTATE COMMISSION

575 E. Parkcenter Blvd., Suite 180, Boise ID 83706

*33-0101-1401, *Rules of the Idaho Real Estate Commission*. (*PH) Deletes obsolete rules and makes technical corrections.

*33-0102-1401, *Rules of Practice and Procedure of the Idaho Real Estate Commission Governing Contested Cases*. (*PH) Clarifies agency office hours; deletes gender specific and obsolete terms; provides for electronic service of process.

IDAPA 35 - IDAHO STATE TAX COMMISSION

PO Box 36, Boise, ID 83722-0410

35.01.01 - Income Tax Administrative Rules

35-0101-1401, Amends rule to conform to Supreme Court interpretation of statute; clarifies the broadband equipment tax credit and its allowable 14 year carryover period.

35-0101-1402, Clarifies how a nonresident or part-year resident can deduct suspended losses; explains how a nonresident partner of a multistate investment partnership calculates the taxable income from the partnership that is included in Idaho taxable income.

35-0101-1403, Adds tax brackets for 2014 and removes 2009 information; increases the maximum amount deductible for the Idaho Medical Savings Account to \$10,000 single/\$20,000 married filing joint; updates amount of guaranteed payments that is sourced as compensation for services per Idaho Code §63-3026A(3)(a)(i)(2); adds tax year 2014 and the applicable grocery credit amounts to the table; changes language from split monthly to semi monthly.

35.01.02 - Idaho Sales and Use Tax Administrative Rules

35-0102-1401, Clarifies that software accessed remotely (ie. cloud-based), electronically delivered or by load and leave method is not tangible property; clarifies that digital books, games, music and movies are tangible property regardless of how obtained.

35-0102-1402, Clarifies manufacturer, retailer, and customer responsibilities related to sales and use tax liability on drop shipment transactions.

35-0102-1403, Clarifies what is and is not covered by out-of-state contact exemption; regarding renting or leasing tangible property, clarifies intent that only one lease type applies to a particular lease contract; clarifies that materials and equipment used on a tree farm for uses other than harvesting can qualify under the production exemption but not the logging exemption; requires exempt organizations to use the ST-104-HM for claiming an exemption on purchases of lodging accommodations.

35-0102-1404, Amends definition for 'contractor improving real property' by using the term 'speculative builder' in place of 'speculation contractor' and 'spec contractor'; clarifies that a single payment may be made to cover multiple tax types; updates the use tax exemption for new residents and military personnel.

35.01.03 - Property Tax Administrative Rules

35-0103-1403, Provides an opportunity to challenge one of the two required courses by passing a test for appraisal certification and for cadastral certification.

35-0103-1406, New rule regarding operating property required to be assessed by the State Tax Commission that includes gathering lines as defined in Idaho Code, regardless of whether such lines are owned or operated in

conjunction with a public utility, and also includes property owned by the same taxpayer and associated with the extraction of any oil or gas to be carried by such gathering lines.

35-0201-1401, Tax Commission Administration and Enforcement Rules. Adds interest rate for calendar year 2015 and the Revenue Ruling where the federal rate for the calculation can be found; details current division changes in the agency.

IDAPA 37 - DEPARTMENT OF WATER RESOURCES

PO Box 83720, Boise, ID 83720-0098

**37-0311-1101, Rules for Conjunctive Management of Surface and Ground Water Resources.* (*PH) Deletes obsolete rule regarding conjunctive administration of connected ground and surface water supplies in the Eastern Snake River Aquifer.

IDAPA 38 - DEPARTMENT OF ADMINISTRATION

PO Box 83720, Boise, ID 83720-0036

38-0501-1401, Rules of the Division of Purchasing. Clarifies state agency purchasing processes and addresses processes for high dollar service contracts and for contract administration and management.

38-0601-1401, Rules of the Department of Administration Governing Billing Procedures of the Office of the Chief Information Officer. Documents calculation methods for allocating technology overhead costs and technology service charges billed from the Department of Administration, Office of the Chief Information Officer to State government organizations.

IDAPA 39 - IDAHO TRANSPORTATION DEPARTMENT

PO Box 7129, Boise ID 83707-1129

39-0203-1402, Rules Governing Vehicle Dealer's Principal Place of Business. Further defines principal place of business requirements; requires retail dealers to be open 20 hours a week and wholesale dealers 4 hours a week, part of which must be between 8am and 5pm Monday to Friday; adds information regarding the Idaho Consumer Asset Recovery Fund (ICAR); addresses dealer liability insurance and surety bond requirements.

39-0310-1401, Rules Governing When An Overlegal Permit Is Required. (Temp & Prop) Allows a motorized vehicle to be hauled on a trailer behind a self-propelled vocational vehicle when the hauled vehicle is to be used solely for the return trip after the delivery of the self-propelled vocational vehicle.

39-0350-1401, Rules Governing Safety Rest Areas. Defines "soliciting" and "fireworks" and reinstates the ban on fireworks at rest areas; increases occupancy time limit for rest areas on interstate highways to comply with federal law.

IDAPA 49 - CERTIFIED SHORTHAND REPORTERS BOARD

PO Box 83720, Boise, ID 83720-0063

49-0101-1401, Rules of Procedure of the Idaho Certified Shorthand Reporters Board. Clarifies the nature and scope of the certification exam and segments of the exam, and the qualifications for a temporary permit.

IDAPA 50 - IDAHO COMMISSION OF PARDONS AND PAROLE

3056 Elder St., Boise, ID 83705

50-0101-1401, Rules of the Commission of Pardons and Parole. Updates terminology and deletes obsolete language; expedites hearing process; updates language regarding general conditions of parole; grants authority to the executive director to add special conditions; changes detainer provision; clarifies Interstate Compact procedures; adds additional language to the section on victims for public safety; includes victims not included in the instant offense and those removed from the instant offense as a result of a plea bargain; and limits the time of jail time served on the first and each subsequent offense.

IDAPA 55 - DIVISION OF PROFESSIONAL-TECHNICAL EDUCATION

PO Box 83720, Boise, ID 83720-00637

55-0104-1401, Rules Governing Idaho Quality Program Standards Incentive Grants and Agricultural Education Program Start-Up Grants. New chapter establishes the eligibility requirements, application process, and selection process for the two grant programs.

NOTICES OF ADOPTION OF TEMPORARY RULE

IDAPA 08 - STATE BOARD OF EDUCATION / DEPARTMENT OF EDUCATION

08-0202-1405, Rules Governing Uniformity

08-0203-1405, Rules Governing Thoroughness

IDAPA 39 - IDAHO TRANSPORTATION DEPARTMENT

39-0203-1401, Rules Governing Vehicle Dealer's Principal Place of Business

NOTICES OF INTENT TO PROMULGATE - NEGOTIATED RULEMAKING

IDAPA 11 - IDAHO STATE POICE - ALCOHOL BEVERAGE CONTROL UNIT

11-0501-1401, Rules Governing Alcohol Beverage Control.

Please refer to the Idaho Administrative Bulletin, October 1, 2014, Volume 14-10, for the notices and text of all rulemakings, public hearings schedules, information on negotiated rulemakings, executive orders of the Governor, and agency contact information.

Issues of the Idaho Administrative Bulletin can be viewed at adminrules.idaho.gov.

Office of the Administrative Rules Coordinator, Dept. of Administration, PO Box 83720, Boise, ID 83720-0306
Phone: 208-332-1820; Fax: 332-1896; Email: rulescoordinator@adm.idaho.gov

Exhibit B

Supplemental Brief

State of Idaho Transportation Department

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IDAPA 11
TITLE 03
CHAPTER 01

IDAHO STATE FORENSIC LABORATORY

11.03.01 - RULES GOVERNING ALCOHOL TESTING

000. LEGAL AUTHORITY.

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

001. TITLE AND SCOPE.

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

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

002. WRITTEN INTERPRETATIONS.

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

003. ADMINISTRATIVE APPEALS.

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

004. INCORPORATION BY REFERENCE.

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

01. Conforming Products List of Evidential Breath Measurement Devices (revised 3/11/2010).

This document is available on the internet at <http://edocket.access.gpo.gov/2010/pdf/2010-5242.pdf>. (4-7-11)

005. MAILING ADDRESS AND OFFICE HOURS.

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

006. PUBLIC RECORDS AVAILABILITY.

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

007. WEBSITE.

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

008. -- 009. (RESERVED)

010. DEFINITIONS AND ABBREVIATIONS.

01. Alcohol. "Alcohol" shall mean the chemical compounds of ethyl alcohol, methyl alcohol, or isopropyl alcohol. (4-11-15)

02. Approved Vendor. "Approved vendor" shall mean a source/provider/manufacture of an approved standard. (4-11-15)

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

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

05. **Breath Alcohol Test.** "Breath alcohol test" shall mean a breath sample or series of separate breath samples provided during a breath testing sequence. (4-11-15)
06. **Breath Alcohol Testing Sequence.** "Breath alcohol testing sequence" shall mean a sequence of events as determined by the Idaho State Police Forensic Services, which may be directed by the instrument, the Operator, or both, and may consist of air blanks, performance verification, internal standard checks, and breath samples. (4-11-15)
07. **Breath Testing Certification Class.** "Breath testing certification class" shall mean a department approved training class for prospective or uncertified breath alcohol Operators/Breath Testing Specialists. (4-11-15)
08. **Breath Testing Specialist (BTS).** "Breath Testing Specialist" shall mean an operator who has completed advanced training approved by the department and are certified to perform routine instrument maintenance, teach instrument operation skills, proctor proficiency tests for instrument Operators, and testifying as an expert on alcohol physiology and instrument function in court. (4-11-15)
09. **Calibration.** "Calibration" shall mean a set of laboratory operations which establish under specified conditions, the relationship between values indicated by a measuring instrument or measuring system, or values represented by a material, and the corresponding known values of a measurement. (4-11-15)
10. **Certificate of Analysis.** "Certificate of analysis" shall mean a certificate stating the standards used for performance verification have been tested and approved for use by the ISPFS or are manufactured by an ISO 17025:2005 vendor and are traceable to N.I.S.T. standards. (4-11-15)
11. **Certificate of Instrument Calibration.** "Certificate of instrument calibration" shall mean a certificate stating that an individual breath alcohol testing instrument has been evaluated by the ISPFS and found to be suitable for forensic alcohol testing. The certificate bears the signature of the calibration analyst at Idaho State Police Forensic Services, and the effective date of the instrument approval. (4-11-15)
12. **Changeover Class.** "Changeover class" shall mean a training class for currently certified Operators during which the Operator is taught theory, operation, and proper testing procedure for a new make or model of instrument being adopted by their agency. Breath Testing Specialists complete BTS training that qualifies them to perform BTS duties related to the new make or model instrument. (4-11-15)
13. **Department.** "Department" shall mean the Idaho State Police. (7-1-93)
14. **Deprivation Period.** "Deprivation period" shall mean a minimum time period of fifteen (15) minutes immediately prior to evidentiary breath alcohol testing during which the subject/individual shall not be allowed to smoke, drink, or eat substances containing alcohol. (4-11-15)
15. **Evidentiary Test.** "Evidentiary test" shall mean a blood, breath, or urine test performed on a subject/individual for potential evidentiary or legal purposes. A distinction is made between evidentiary testing and non-quantitative screening/monitoring. (4-11-15)
16. **Idaho State Police Forensic Services (ISPFS).** "Idaho State Police Forensic Services" shall mean a division of the Idaho State Police. ISPFS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFS is the administrative body for the alcohol testing programs in Idaho. (4-11-15)
17. **Laboratory.** "Laboratory" shall mean the place at which specialized devices, instruments and methods are used by trained personnel to measure the concentration of alcohol in samples of blood, vitreous humor, urine, or beverages for law enforcement purposes. (4-11-15)
18. **MIP/MIC.** "MIP/MIC" shall mean an abbreviation used to designate minor in possession or minor in consumption of alcohol. (4-11-15)
19. **Monitoring Period.** "Monitoring Period" shall mean a minimum deprivation period of fifteen (15)

minutes immediately prior to evidentiary breath alcohol testing during which the subject/individual should be observed by the officer and any belch/burp/vomit/regurgitation should be noted by the operator. (4-11-15)

20. Operator Certification. "Operator certification" shall mean the condition of having satisfied the training requirements for administering breath alcohol tests as established by the department. (4-11-15)

21. Operator. "Operator" shall mean an individual certified by the department as qualified by training to administer breath alcohol tests. (4-11-15)

22. Performance Verification. "Performance verification" shall mean a verification of the accuracy of the breath testing instrument utilizing a performance verification standard. Performance verification should be reported to three decimal places. While ISPFPS uses the term performance verification, manufacturers and others may use a term such as "calibration check" or "simulator check." (4-11-15)

23. Performance Verification Standard. "Performance verification standard" shall mean an ethyl alcohol standard used for field performance verifications. The standard is provided or approved, or both, by the department. (4-11-15)

24. Proficiency Testing. "Proficiency testing" shall mean a periodic analysis of blood, urine, or other liquid specimen(s) whose alcohol content is unknown to the testing laboratory, to evaluate the capability of that laboratory to perform accurate analysis for alcohol concentration. (4-11-15)

25. Quality Control. "Quality control" shall mean an analysis of referenced samples whose alcohol content is known, which is performed with each batch of blood, vitreous humor, urine or beverage analysis to ensure that the laboratory's determination of alcohol concentration is reproducible and accurate. (4-11-15)

26. Recertification Class. "Recertification class" shall mean a training class offered by the department for currently certified personnel, completion of which results in uninterrupted continuation of their BTO or BTS status for an additional 2 years. (4-11-15)

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

011. (RESERVED)

012. GENERAL PROVISIONS.

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

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

013. REQUIREMENTS FOR LABORATORY ALCOHOL ANALYSIS.

01. Laboratory. Any laboratory desiring to perform urine alcohol, vitreous humor, blood alcohol, or beverage analysis shall meet the following standards: (4-11-15)

a. The laboratory shall prepare and maintain a written procedure governing its method of analysis, including guidelines for quality control and proficiency testing. A copy of the procedure shall be provided to ISPFPS for initial approval. Whenever procedure, protocol, or method changes (however named) are adopted by a laboratory, a copy of the update with the changes clearly indicated shall be approved by ISPFPS before implementation; (4-11-15)

b. The laboratory shall provide adequate facilities and space for the procedure used. The laboratory

alcohol related functions shall be subject to an assessment by either an accrediting body or the department each calendar year, and the results from the annual audit shall be submitted to the department. The assessment shall be at the expense of the laboratory; (4-11-15)

c. Specimens shall be maintained in a limited access and secure storage area prior to analysis. A chain of custody shall be maintained while the evidence is in the laboratory; (4-11-15)

d. All instrumentation, equipment, reagents and glassware necessary for the performance of the chosen procedure shall be on hand or readily available on the laboratory premises. Instrument maintenance documentation shall be available for review by the department; (4-11-15)

e. The laboratory shall participate in approved proficiency testing and pass this proficiency testing according to standards set by the department. Laboratories must participate in proficiency testing from a department approved provider at least once a calendar year. Approved providers include National Highway Traffic Safety Administration (NHTSA) and Collaborative Testing Services (CTS). Each test consists of at least four (4) blood samples spiked with an unknown concentration of ethyl alcohol, and possibly other volatiles, for qualitative determination. Participating laboratories must obtain proficiency tests from approved providers and are responsible for all costs associated with obtaining and analyzing such tests. Results from proficiency tests must be submitted by the due date to the test provider and ISPFs. Results not submitted to a test provider within the allowed time do not qualify as a proficiency test. An alcohol concentration range is determined from the target value and ± 3.0 standard deviations as provided by the proficiency test provider. Reported values must fall within this range. If a laboratory determines more than one (1) alcohol value for a given sample, the mean value of results will be submitted and evaluated. Upon satisfactory completion of an approved proficiency test, a certificate of approval will be issued by the department to the participating laboratory. Approval to perform legal blood alcohol determinations is continued until the results of the next proficiency test are reviewed and notification is sent to the respective laboratory by ISPFs. Failure to pass a proficiency test shall result in immediate suspension of testing by an analyst or laboratory in the form of a written inquiry from the department. The test is graded as unsuccessful when the mean results are outside the tolerance range established from the accepted mean values. The laboratory shall have thirty (30) calendar days to respond to the department inquiry. The department shall notify the laboratory within fourteen (14) calendar days regarding corrective action steps necessary to lift the testing suspension, or the department may issue a written revocation. The department shall not lift a proficiency testing related suspension or revocation until a successful proficiency test has been completed by the individual analyst or laboratory. (4-11-15)

f. For a laboratory performing blood, urine, vitreous humor, or beverage analysis for alcohol, approval shall be awarded to the laboratory director or primary analyst responsible for that laboratory. The responsibility for the correct performance of tests in that laboratory rests with that person; however, the duty of performing such tests may be delegated to any person designated by such director or primary analyst. The department may temporarily suspend or permanently revoke the approval of a laboratory or analyst if the listed requirements are not met. The department will issue the suspension or revocation in writing to the laboratory director or primary analyst responsible; (4-11-15)

g. Reinstatement after revocation requires completed corrective action of any items listed on the revocation documentation issued by the department. Documentation of corrective actions taken to address the nonconformities shall be submitted to the department for review. Once the department is satisfied that the laboratory is in compliance with all requirements, the department will issue written approval for the resumption of testing by that laboratory or analyst. A laboratory may appeal a suspension or revocation to the Director of the department. (4-11-15)

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

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

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

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

03. **Blood Reported.** The results of analysis on blood for alcohol concentration shall be reported in units of grams of alcohol per one hundred (100) cubic centimeters of whole blood. (4-11-15)

04. **Urine Collection.** Urine samples shall be collected in clean, dry containers. (4-11-15)

05. **Urine Reported.** The results of analysis on urine for alcohol concentration shall be reported in units of grams of alcohol per sixty-seven (67) milliliters of urine. Results of alcohol analysis of urine specimens shall be accompanied by a warning statement about the questionable value of urine alcohol results. (4-11-15)

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

014. REQUIREMENTS FOR PERFORMING BREATH ALCOHOL TESTING.

01. **Instruments.** Each breath testing instrument model shall be approved by the department and shall be listed in the "Conforming Products List of Evidential Breath Measurement Devices" published in the Federal Register by the United States Department of Transportation as incorporated by reference in Section 004 of this rule. The department will maintain a list of benchtop and portable instruments approved for evidentiary testing use in Idaho. Each individual breath testing instrument must be certified by the department. The department may, for cause, remove a specific instrument by serial number from evidential testing and suspend or withdraw certification thereof. (4-11-15)

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

03. **Administration.** Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing instrument used in Idaho, and such standards shall be issued in the form of Idaho administrative rules, ISPFS analytical methods, and ISPFS standard operating procedures. (4-11-15)

a. The breath alcohol test must be administered by an operator (BTO or BTS) currently certified in the use of the instrument. (4-11-15)

b. Prior to administering the monitoring period, any foreign objects/materials which have the potential to enter the instrument/breath tube or may present a choking hazard (e.g. gum, chewing tobacco, food) should be removed. (4-11-15)

c. The operator shall administer a monitoring period prior to evidentiary testing. (4-11-15)

d. If mouth alcohol is suspected or indicated by the testing instrument, the operator shall begin another fifteen (15) minute monitoring period if repeating the testing sequence. If during the monitoring period the subject/individual vomits or regurgitates material from the stomach into the breath pathway, the monitoring period should start over. If there is doubt as to the events occurring during the monitoring period (e.g. silent burp, belch, vomit, regurgitation), the operator should evaluate the instrument results for any indication of mouth alcohol. (4-11-15)

e. A complete breath alcohol test includes two (2) valid breath samples taken during the testing procedure and preceded by air blanks. The subsequent breath samples performed with a portable breath testing instrument should be approximately two (2) minutes apart or more. If the subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the single test result shall be considered valid. If a single test result is used, then the subject must have been observed during the fifteen (15) minute monitoring period. For hygienic reasons, the operator should use a new mouthpiece for each subject/individual tested. (4-11-15)

f. The operator has the discretion to end breath testing, repeat breath testing, or request a blood draw

at any point during the testing process as the circumstances require (including but not limited to lack of sample correlation, lack of subject participation or cooperation, subject is incoherent or incapable of following instructions, subject incapacitation). If a subject/individual fails or refuses to provide a subsequent, adequate sample as requested by the operator, the results obtained are still considered valid, provided the failure to supply the requested samples was the fault of the subject/individual and not the operator. (4-11-15)

g. A third breath sample shall, when possible, be collected if the first two (2) results differ by more than 0.02 g/210L alcohol. Unless mouth alcohol is indicated or suspected, it is not necessary to repeat the monitoring period prior to obtaining a third breath sample. (4-11-15)

h. The results for subsequent breath samples should correlate within 0.02 g/210L alcohol to show consistent sample delivery, indicate the absence of RFI, and to indicate the absence of alcohol contamination in the subject/individual's breath pathway as a contributing factor to the breath results. (4-11-15)

i. In the event of an instrument failure, the operator should attempt to utilize another instrument or have blood drawn. (4-11-15)

04. Training. Each individual operator (BTO or BTS) shall demonstrate sufficient training to operate the instrument correctly. This shall be accomplished by successfully completing a training course approved by the department on each instrument model utilized by the operator. Operator certifications issued after July 1, 2013 are valid for two (2) calendar years from the course completion date. The department may revoke individual operator (BTO/BTS) certification for cause. (4-11-15)

05. Performance Verification Checks. Each breath testing instrument shall be checked for accuracy with a performance verification standard approved by the department. Performance verification checks shall be performed according to a procedure established by the department and shall be documented. The official time and date of the performance verification is the time and date recorded on the printout, or the time and date recorded in the log. (4-11-15)

a. A performance verification check shall occur within twenty-four (24) hours before or after an evidentiary test. The benchtop instrument requires a performance verification check as part of the testing sequence. On the portable instrument, multiple breath alcohol tests may be covered by a single performance verification. (4-11-15)

b. A performance verification on a portable instrument consists of two (2) samples at either the 0.08 or 0.20 level. Both samples must be run with the same performance verification standard. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument shall be taken out of service. The instrument shall not be returned to service until it has been calibrated and certified by ISPFPS. (4-11-15)

c. A performance verification acquired during a breath testing sequence on an approved benchtop instrument consists of one (1) sample at either the 0.08 or 0.20 level. A performance verification acquired outside the breath testing sequence on an approved benchtop instrument consists of two (2) samples at either the 0.08 or 0.20 level. Three (3) attempts at obtaining an acceptable performance verification are allowed. Troubleshooting measures may be employed during this process. If the third performance verification fails, the instrument must be taken out of service. The instrument must not be returned to service until it has been calibrated and certified by ISPFPS. (4-11-15)

d. Performance verification checks must be within +/- 10% of the performance verification standard target value. (4-11-15)

e. A wet bath 0.08 performance verification standard should be replaced with fresh standard approximately every twenty-five (25) verifications or every calendar month, whichever comes first. For a closed loop, recirculating system (e.g. the Intox 5000 series), the 0.08 performance verification standard should be replaced with fresh standard approximately every one hundred (100) verifications or every calendar month, whichever comes first. (4-11-15)

f. A wet bath 0.20 performance verification standard should be replaced with fresh standard

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

each individual. (4-11-15)

f. A third breath sample is required if the first two (2) results differ by more than 0.02 g/210L alcohol. In the event that all three (3) samples fall outside the 0.02 g/210L alcohol correlation, and testing indicates or the officer suspects mouth alcohol, they must administer a fifteen (15) minute monitoring period and then retest the subject. If mouth alcohol is not suspected or indicated by the test results, then the officer may retest the subject without administering a monitoring period. (4-11-15)

g. The operator should manually log test results and/or retain printouts for possible use in court. (4-11-15)

h. The instrument must not be in passive mode for the testing of subjects for evidential purposes. (4-11-15)

i. The passive mode of testing using the Lifeloc FC20 or ASIII should be used for testing liquids or containers of liquid for the presence or absence of alcohol. (4-11-15)

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