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Peterson v. State of Idaho Department of Transportation Respondent's Brief Dckt. 43374

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IN THE SUPREME COURT
OF THE
STATE OF IDAHO

TONY EUGENE PETERSON,)	SUPREME COURT NO. 43374
)	
Petitioner-Appellant,)	
)	
v.)	
)	
STATE OF IDAHO,)	
TRANSPORTATION DEPARTMENT,)	
)	
Respondent.)	
_____)	

RESPONDENT'S BRIEF

APPEAL FROM SECOND JUDICIAL DISTRICT, NEZ PERCE COUNTY

THE HONORABLE JEFF M. BRUDIE, PRESIDING

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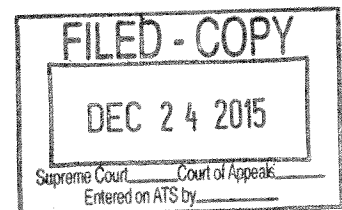


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I. STATEMENT OF THE CASE

a. Nature of the Case.

This is an Appeal by Tony Eugene Peterson (Peterson) of the District Court's decision that an Idaho Transportation Department Hearing Examiner had correctly determined that Mr. Peterson had not met his burden to demonstrate a basis existed under I.C. § 18-8002A(7) to set aside the Department's Administrative License Suspension.

b. Party References.

The Idaho Transportation Department is referred to as the "Department" for purposes of this argument. Mr. Peterson is specifically referred to by name. Where "driver" is used, it is in reference to drivers generally.

c. Reference to the Administrative Record.

The Department's Administrative Record is identified is included in the Clerk's record on appeal and is referenced by page and number. The Transcript of the Department's Administrative Hearing is referred to as the Clerk's Exhibit 1 Tr. by page and number.

d. Factual Statement and Procedural History.

On September 5, 2014 at approximately 2123 hours, Idaho State Police Trooper Chad Montgomery stopped a red Toyota Tundra heading southbound on Thain Road near Airway Avenue for operating a vehicle after sunset without tail lights (R. p. 35).

The driver identified as Tony E. Peterson admitted to Trooper Montgomery that he had consumed alcohol prior to driving. Trooper Montgomery asked Mr. Peterson to exit the vehicle to perform standardized field sobriety evaluations (R. p. 35).

Mr. Peterson performed and failed the field sobriety evaluations. Mr. Peterson

then provided breath samples for alcohol testing with results of .187 and .188 (R. p. 35).

Mr. Peterson timely requested a hearing with the Idaho Department of Transportation's Administrative Hearing Examiner (R. pp. 40-43).

A hearing was held telephonically on October 7, 2014 (R. p. 53). The Department's Hearing Examiner entered Findings of Fact, Conclusions of Law and Order sustaining the suspension of Mr. Peterson's driving privileges (R. pp. 96-104).

Mr. Peterson timely filed a Petition for Judicial Review and the suspension of his driving privileges has been stayed during the pendency of this matter (R. pp. 106-108).

The District Court determined that Mr. Peterson had not met his burden pursuant to I.C. § 18-8002A(7), affirming the decision of the Department's Hearing Examiner in its Opinion and Order on Petition for Judicial Review (R. pp. 166-172).

Mr. Peterson timely filed his Notice of Appeal of the District Court's decision and the suspension of Mr. Peterson's driving privileges has been stayed pending the Appeal (R. pp. 174-178).

II. ISSUES ON APPEAL

Based on Mr. Peterson's characterization of the issue on appeal it is difficult to distill an appropriate characterization of the issues pursuant to I.C. § 18-8002A(7).¹

For purposes of the Department's Response the following issues are presented:

1

Whether the District Court erred in finding that the record contained substantial evidence to support the hearing officer's determination that the tests for alcohol concentration administered at the direction of Trooper Montgomery were conducted in accordance with the requirements of Idaho Code §18-8004(4) where Trooper Montgomery's report was devoid of any information addressing the administration of and Mr. Peterson's performance on the filed sobriety tests and merely stated "the tests were performed in compliance with...and the standards and methods adopted by the Department of Law Enforcement" and those standards and methods are arbitrary and capricious because they were established without adequately determining the applicable standard for reliability?

Appellant's Brief, p. 4.

Issue 1: Was there substantial evidence for the Hearing Examiner's determination that Mr. Peterson failed to meet his burden to demonstrate that the evidentiary tests for alcohol concentration were not administered in accordance with I.C. § 18-8004(4)?

Issue 2: Was the Hearing Examiner's determination that Mr. Peterson failed to meet his burden pursuant to I.C. § 18-8002A(7)(d) arbitrary and capricious.

Mr. Peterson has waived any claim that any other ground exists to set aside the Administrative License Suspension pursuant to I.C. § 18-8002A(7)(a)-(c) & (e). *Kugler v. Drowns*, 119 Idaho 687, 809 P.2d 1116 (1991), *Wheeler v. IDHW*, 147 Idaho 257, 207 P.3d 988, 996 (2009).

III. STANDARD OF REVIEW

Idaho Code § 18-8002A(7) sets out the burden of the driver to demonstrate to the Hearing Examiner that driving privileges should be reinstated because:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or;
- (c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
- (d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or
- (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

The review of disputed issues of fact must be confined to the agency record for judicial review. Idaho Code § 67-5277.

Idaho Code § 67-5279(1) sets out the scope of review. "The Court shall not

substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.” *Howard v. Canyon County Board of Commissioners*, 128 Idaho 479, 915 P.2d 709 (1996).

Idaho Code § 67-5279(3) provides:

When the agency was required by the provisions of this chapter or by other provision of law to issue an order, the court shall affirm the agency action unless the court finds that the agency’s findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.

The appropriate remedy pursuant to the Idaho Administrative Procedures Act is:

“ . . . if the agency action is not affirmed, it shall be set aside, in whole or in part and remanded for further proceedings as necessary.” Idaho Code § 67-5279(3).

The Idaho Supreme Court has held that the decision of the Transportation Department must be affirmed unless the order violates statutory or constitutional provisions, exceeds the agency’s authority, is made upon unlawful procedure, is not supported by substantial evidence or is arbitrary, capricious or an abuse of discretion. *Marshall v. Idaho Transportation Department*, 137 Idaho 337, 48 P.3d 666 (2002). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in Idaho Code §67-5279(3) and that a substantial right of that party has been prejudiced. *Druffel v. State, Dept. of Trans.*, 136 Idaho 853, 41 P.3d 739 (2002).

Further, the grounds for vacating a license suspension on judicial review are limited to those set out in I.C. § 18-8002A(7), *State Transp. Dept. v. Kalani-Keegan*, 155 Idaho 297, 311 P.3d 309 (Ct. App. 2013).

Appellate review of the District Court's decision requires the Court to review "the agency record independently of the District Court's decision", *Marshall v. Dept. of Transp.* 137 Idaho 337, 340, 48 P.3d 666,669 (Ct. App. 2002).

Mr. Peterson has not set forth a sufficient legal basis to set aside the administrative action of the Department suspending Mr. Peterson's driving privileges.

IV. ARGUMENT

ISSUE 1

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

Mr. Peterson argues he has met his burden pursuant to I.C. § 18-8002A(7)(d) based on the testimony of Dr. Anstine, a chemistry professor contending that the Hearing Examiner's decision is not supported by sufficient evidence in the record as a whole, I.C. § 67-5279(3)(d).

For these purposes substantial evidence is more than a scintilla of proof, but less than a preponderance; it is relevant evidence that a reasonable mind might accept to support a conclusion. *Pearl v. Board of Professional Discipline of Idaho State Bd. Of Medicine*, 137 Idaho 107, 44 P.3d 1162 (2002), *Suits v. Idaho Bd. Of Professional Discipline*, 138 Idaho 397, 64 P.3d 323 (2003).

Dr. Anstine does not testify that Trooper Montgomery administered an evidentiary test for breath alcohol concentration to Mr. Peterson which was unreliable. Dr. Anstine does not testify that the evidentiary breath test results were anything other than the reported .187 & .188 (R. p. 63).

Instead Mr. Peterson argues based upon the testimony of Dr. Anstine that the Department's Hearing Examiner should not have relied on the then existing Idaho State

Police Breath Alcohol Testing Standard Operating Procedures (ISP BATSOP) for purposes of determining that the evidentiary test administered to Mr. Peterson complied with I.C. § 18-8004(4).²

Dr. Anstine does not testify that the evidentiary tests for breath alcohol concentration administered to Mr. Peterson were not administered pursuant to I.C. § 18-8004(4).

² Idaho Code § 18-8002A(7)(d) provides:

The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered.

Idaho Code § 18-8004(4) provides:

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

Instead Dr. Anstine testifies that the use of the term "should" in the ISP BATSOP is not a sufficient scientific standard and therefore the Hearing Examiner cannot rely on the results of the evidentiary test for breath alcohol concentration administered pursuant to those standards.³

Dr. Anstine fails to connect the circumstances of the administration of this evidentiary test for breath alcohol concentration to Mr. Peterson to any unreliability of the Lifeloc breath testing equipment or to any deficiency in the operation of the Lifeloc breath testing equipment. Dr. Anstine's testimony does not indicate the relationship between the particular evidentiary test for breath alcohol concentration administered by Trooper Montgomery to Mr. Peterson and Dr. Anstine's concern about the alleged deficiencies in the ISP BATSOPs.

³ For example Dr. Anstine testifies:

5 Q. And continuing in that same paragraph, it says:
6 If mouth alcohol is suspected or indicated, the operator should
7 begin another 15-minute monitoring period before repeating the
8 testing sequence.

9 Is that an adequate standard?
10 A. It is not.

19 Q. And continuing on, 6.1.4.3 provides that if there
20 is doubt as to the events occurring during the 15-minute
21 monitoring period, the officer should look at results of the
22 subsequent breath samples for evidence of potential alcohol
23 contamination.

24 Again, is that an adequate standard?
25 A. It is not.

Tr. p. 16, LL 5-10 & 19-25.

The Department's Hearing Examiner clearly explains the basis for his decision, what he considered and why he weighed the evidence before him as he did, carefully analyzing the oral and written testimony of Dr. Anstine.⁴

Specifically, the Hearing Examiner indicates why he concludes that Mr. Peterson did not meet his burden. Whether "should" is an insufficient scientific standard when considering the entirety of the ISP BATSOPs is simply not a question before the Department's Hearing Examiner in this review of the action of the Department of Transportation. This is not a judicial review of the administrative action of the Idaho State Police.

Dr. Anstine's testimony is simply a collateral challenge to the ISP BATSOPs. Dr. Anstine does not testify about the circumstances of the evidentiary test for breath alcohol concentration actually administered by Trooper Montgomery to Mr. Peterson. The Idaho

4

- 4.6 D. Timothy Anstine, Ph.D., testified that the usage of the word "should" in numerous sections of the ISP Standard Operating Procedures render those sections invalid scientifically. D. Timothy Anstine, Ph.D., is a chemistry professor who has done extensive research in the field of breath alcohol testing.
- 4.7 In particular, D. Timothy Anstine, Ph.D., looked at Rules 6.1, 6.1.4, 6.1.4.1, 6.1.4.2, and 6.1.4.3 as procedures that previously had been prefaced with the word "shall" and have since been revised to "should". It is his opinion that because the Lifeloc FC20 utilizes fuel cell based technology, the instrument can give a "false positive" if it finds other substances with a similar chemical makeup.
- 4.8 A close review of the applicable Standard Operating Procedures shows a series of guidelines that are to be followed or addressed if certain underlying conditions exist. For examples, if all three samples fall outside the 0.02 correlation, then the fifteen minute observation period should be restarted and the subject retested. Not every condition is going to be applicable to every test. The change in the language used in the Rules (from "shall" to "should") makes more sense logically. The inference that could be drawn from using the word "shall" in the Rules was that failure to strictly comply with all rules could result in invalidating the test results. For example, monitoring the subject for 14 minutes, 59 second would invalidate all of the test results, even though results that fall within the 0.02 correlation confirm the absence of mouth alcohol.
- 4.9 There is no evidence in the record that any of the Standard Operating Procedures were not followed by Officer Montgomery in obtaining the breath samples from Peterson.
- 4.10 The Petitioner, Peterson, did not affirmatively show by a preponderance of the evidence that the test was not performed in compliance with Idaho Law and ISP Standard Operating Procedures.
- 4.11 The evidentiary test was performed in compliance with Idaho Law and ISP Standard Operating Procedures.

Findings of Fact and Conclusions of Law and Order p. 6, (R. pp. 166-172).

Court has consistently required more of the driver to meet their burden pursuant to I.C. § 18-8002(A)(7) than simply indicating some deficiency of the standard used by the Idaho State Police.⁵

There is simply nothing in this record that supports a determination that the evidentiary test for breath alcohol concentration administered to Mr. Peterson did not produce an accurate result or that the Lifeloc equipment did not properly function when the evidentiary test for breath alcohol was administered to Mr. Peterson.

Mr. Peterson does not demonstrate that the “test was not conducted in accordance with I.C. § 18-8004”, or that the “breath testing equipment was not functioning properly”, I.C. § 18-8002A(7)(d). Mr. Peterson simply fails to meet his burden pursuant to I.C. § 18-8002A(7)(d), *In re Hubbard*, 152 Idaho 879, 276 P.3d 751 (Ct. App. 2012).

The clear expectation of the Court in considering the Record created before the Hearing Examiner is a demonstration of the effect of the ISP BATSOPs on the results of the test administered to Mr. Peterson. Without more, the Court is appropriately left with the conclusion of the Hearing Examiner, that in this particular case the breath test was administered consistent with I.C. § 18-8004, that there was no inaccuracy in the test administered to Mr. Peterson existed and that the equipment was functioning properly (Finding 4.9 see FN 4).

⁵

Compliance with the ISP's standards for operation of the instrument is not a guarantee that it was operating correctly. Inadequate or incomplete operating standards and procedures could fail to disclose when a testing instrument is not functioning correctly. In *Gibbar*, we interpreted Idaho Code § 18-8002A(7)(c) and (d) “as permitting [administrative license suspension] petitioners to challenge the results of their BAC test by proving that the testing equipment was inaccurate or was not functioning properly because the State has adopted procedures that do not ensure accuracy and proper functioning.”

In re Hubbard, 152 Idaho 879, 883, 276 P.3d 751, 755 (Ct. App. 2012).

Dr. Anstine fails to connect his opinion regarding the scientific uncertainty testimony with an unreliable evidentiary test for breath alcohol concentration administered by Trooper Montgomery. Mr. Peterson does not make the necessary connection between the alleged deficiency of the operation of the LifeLoc or the inadequate scientific underpinnings of the BATSOPs with the specific evidentiary test for breath alcohol content administered to Mr. Peterson.

Dr. Anstine does not challenge Trooper Montgomery's statement that the evidentiary test for breath alcohol concentration administered to Mr. Peterson was administered consistently with the ISP BATSOPs, (R. p. 35). The Record consists of the form reporting the Lifeloc Breath Alcohol Content Test Results (R p. 63) and the Portable Breath Testing Instrument Inspection/Certification form (R. p. 64). There is more than sufficient record of the evidentiary test for breath alcohol being administered to Mr. Peterson consistently with I.C. § 18-8004 and I.C. § 18-8002A(7).

The clear language of 18-8004(4) requires something more of Peterson.⁶

⁶ For example the Court analyzed the breath testing equipment's margin of error argument:

After the 1987 amendment, a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements. With that change, the margin of error in the testing equipment is irrelevant. The equipment need not precisely measure the alcohol concentration in the person's blood. The test need only be based upon the correct formula, and the equipment must be properly approved and certified.

After the 1987 amendments, the standard is no longer the concentration of alcohol in the driver's blood. It is simply the alcohol concentration shown by an approved and properly administered test of the driver's breath, blood, or urine. Because the actual alcohol concentration in the driver's blood is no longer the standard, the testing machine's margin of error is irrelevant.

Elias-Cruz v. Idaho Dep't of Transp., 153 Idaho 200, 205-06, 280 P.3d 703, 708-09 (2012).

Mr. Peterson is simply asking the Court to substitute its judgment for the judgment of the Department's Hearing Examiner contrary to I.C. § 67-5972, *In re Trottier*, 155 Idaho 17, 304 P.3d 292 (Ct. App. 2013).

A collateral challenge to the scientific validity of the ISP BATSOPs is not a basis for the Department's Hearing Examiner to set aside the Administrative License Suspension, *State Transp. Dept. v. Kalani-Keegan*, 155 Idaho 297, 311 P.3d 309 (Ct. App. 2013).

There is clearly sufficient evidence in the record as a whole to support the Hearing Examiner's conclusion that Mr. Peterson failed to meet his burden to demonstrate that the evidentiary test for breath alcohol concentration was not properly conducted or that the equipment was not functioning properly.

ISSUE 2

The Hearing Examiner's determination that Mr. Peterson failed to meet his burden pursuant to I.C. § 18-8002A(7)(d) was not arbitrary and capricious.

Mr. Peterson challenges the Hearing Examiner's conclusion that Mr. Peterson failed to meet his burden pursuant to I.C. § 18-8002A(7)(d) to show that the evidentiary test for breath alcohol concentration administered to Mr. Peterson was not conducted in accordance with I.C. § 18-8004(4) or that the LifeLoc breath testing equipment was not functioning properly.

Mr. Peterson argues that the Department's Hearing Examiner was arbitrary and capricious in relying on the evidentiary test for breath alcohol concentration results which were based on an inadequate breath alcohol testing standard.

Arbitrary and capricious for these purposes means the Hearing Examiner's decision was made on an unreasonable grounds or that the Hearing Examiner did not properly consider the record before him.⁷

Mr. Peterson contends that the evidentiary test for breath alcohol concentration administered to Mr. Peterson was conducted by a scientific method that is arbitrary and capricious and therefore could not comply with I.C. § 18-8004(4) seeming to bootstrap to an argument that the Hearing Examiner's decision must be arbitrary and capricious.

⁷ Justice Jones in the concurring opinion describes arbitrary & capricious.

The (Court's majority) Opinion holds that " a ditch owner's ^[6] determination whether to permit an encroachment [in its easement or right-of-way] will be reviewed to determine whether the decision-making process was reasonable, the determination was arbitrary and capricious, or the findings upon which the determination was reached were clearly erroneous." Thus, a decision made by an irrigation district pursuant to Section 42-1209 must be the result of a reasonable decision-making process and the determination must be based upon findings. A reasonable decision-making process implicates procedures such as the Legislature has required for state administrative agencies in I.C. § 67-5242 and for local planning agencies in Section 67-6535. That is, a right to notice, a meaningful opportunity to be heard, a record of the proceedings, findings of fact, and a reasoned decision. While the Legislature has not specified the type of procedure to be employed pursuant to I.C. § 42-1209, this Court has the inherent " power to fashion the procedures necessary to perform [its] duties." *City of Boise v. Ada County*, 147 Idaho 794, 802, 215 P.3d 514, 522 (2009). The process requirements we here adopt for review of irrigation district decisions under Section 42-1209 will help to ensure the due process rights of the adverse party and a reviewable record on appeal. By adopting standards comparable to those mandated by the Legislature for other proceedings, the Court has a tested yardstick to ensure against arbitrary and capricious decision-making.

Pioneer Irr. Dist. V. City of Caldwell, 288 P.3d 810, 820, 153 Idaho 593 (Idaho 2012).

Justice Jones opinion is consistent with the commentators early analysis of the IDAPA standards for judicial review.

The standard used to evaluate legislative actions is whether the agency's factual conclusions are "arbitrary or capricious. This requires the agency to "examine the relevant data and articulate a satisfactory explanation" for its factfinding. In short, the court is to examine the information before the agency and the explanations that the agency provides to determine whether there is a rational relationship between the evidence and the facts found. *Gilmore & Goble, the Idaho Administrative Procedure Act: a primer for the practitioner*, 40 Idaho Law Review 273, 365 (1994).

Consistent with Idaho State Police's statutory charge found in I.C. § 18-8004, the definition of evidentiary testing for Administrative License Suspension purposes.⁸

The action of the Idaho State Police creating a breath alcohol test standard is not before this Court on Judicial Review of the Department's Hearing Examiner's decision to suspend Mr. Peterson's driving privileges based on a failed evidentiary test for breath alcohol concentration is similar.

Mr. Peterson's failure to name the Idaho State Police as a party to this action is dispositive of any claim that the administrative action of the Idaho State Police in adopting Idaho's BATSOP was arbitrary and capricious. Clearly, ISP must be a party to the administrative action being reviewed for the Court to consider the action of ISP, "the agency shall be made a party....", I.C. § 67-5278.⁹

A collateral attack on the ISP BATSOPs adopted by the Idaho State Police simply cannot be made in the judicial review of the action of the Department of Transportation's

⁸ Idaho Code § 18-8002A(1)(e):

"Evidentiary testing" means a procedure or test or series of procedures or tests utilized to determine the concentration of alcohol or the presence of drugs or other intoxicating substances in a person, including additional testing authorized by subsection (6) of this section. An evidentiary test for alcohol concentration shall be based on a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath, or sixty-seven (67) milliliters of urine. Analysis of blood, breath or urine for the purpose of determining alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by the Idaho state police, or by any other method approved by the Idaho state police. Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated and approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

Mr. Peterson does not argue that the Lifeloc breath testing equipment does not use this statutory formula for breath alcohol testing.

⁹ Simply naming the State of Idaho as a party is not sufficient. The State of Idaho operates an agency model of administrative procedure, "agency means State Board, Commission, Department or Officer authorized by law to make rules or determine contested cases..." I.C. § 67-5201(2).

Hearing Examiner regardless how the issue is characterized.¹⁰

The only record for the Court's review is the Department's Hearing Examiner's record and resulting decision to suspend the driving privileges of Mr. Peterson. Mr. Peterson cites no authority permitting the Court on judicial review to review the action the administrative action of another state agency, I.C. § 67-5275.

Mr. Peterson argues that the evidentiary presumption available in criminal prosecutions for a DUI where the driver's breath alcohol test was administered consistent with I.C. § 18-8004 somehow applies in the Administrative License Suspension setting. Mr. Peterson has the burden here, not the Department to show that the administration of the evidentiary test for breath alcohol content does not comply with I.C. § 18-8004(4).¹¹

There is no question of the admission of evidence in this Administrative License Suspension. The Department's Hearing Examiner considers the results of the evidentiary test for breath alcohol based on I.C. § 18-8002A(5), "...the peace officer shall forward to the Department a certified copy or duplicate original of the results of the tests for alcohol concentration."

¹⁰ The Idaho Administrative Procedures Act permits the Court's review of an agency's decision.

Idaho Code § 67-5270 provides:

(1) Judicial review of agency action shall be governed by the provisions of this chapter unless other provision of law is applicable to the particular matter.

(2) A person aggrieved by final agency action other than an order in a contested case is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code.

(3) A party aggrieved by a final order in a contested case decided by an agency other than the industrial commission or the public utilities commission is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279, Idaho Code. Emphasis added.

¹¹ Mr. Peterson also suggests that the state could not find an expert whose testimony would demonstrate the reliability of a particular breath testing instrument. ISP forensic toxicologist Mr. Jeremy Johnston testified in the *Riendeau supra* pretrial motions to determine the admissibility of the results of the evidentiary test for breath alcohol concentration resulting in Defendant *Riendeau's* Motion in Limine being denied.

The argument offered by Mr. Peterson now is no different than the argument rejected by the Court of Appeals in *State v. Besaw*, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013).¹²

There is nothing in this Record to support a conclusion that the Hearing Examiner was arbitrary and capricious in his reliance on the then existing ISP BATSOP.¹³

The Idaho Supreme Court in two recent cases determined that ISP's BATSOPs were void, *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (April 20, 2015) and *State v. Riendeau*, 159 Idaho 52, 355 P.3d 1282 (August 24, 2015). The Court determined that ISP's failure to adopt the BATSOP by rule instead of implementing the standards as permitted by IDAPA was insufficient to salvage the breath alcohol testing standards.¹⁴

The Court of Appeals has heard oral argument in *Hern v. ITD Idaho Supreme Court Case 42287* considering the application of the Supreme Court's decisions in *Haynes and Riendeau* but has yet to determine the application of those Idaho Supreme

¹²

Besaw contends that the SOPs are so strewn with "weasel words" and "wobble room" that they lack scientific basis and permit testing procedures that will not yield accurate tests, but there is no evidence in the record to support that conclusion... (we) cannot say that the emails in and of themselves, or any other evidence in the record, establishes that the test procedures actually authorized by the SOPs and applied in Besaw's case are incapable of producing reliable tests.

State v. Besaw, 155 Idaho 134, 144, 306 P.3d 219, 229 (Ct. App. 2013), review denied (Sept. 4, 2013).

¹³ ISP engaged in emergency and interim rulemaking subsequent to the date of the evidentiary test for breath alcohol concentration administered to Mr. Peterson, see Exhibit A.

(Idaho Administrative Bulletin, October 1, 2014, Volume 14-10, p. 549).

The Idaho State Police received legislature approval of the adoption of the breath testing procedures by rule, , Rules Governing Alcohol Testing IDAPA 11.03.01, see Exhibit B.

¹⁴ Idaho Code § 67-5201(21) provides:

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

Court decisions on an Administrative License Suspension.

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.¹⁵

The Court in *Haynes* and *Riendeau* however does not find that the use of the Breath Alcohol Testing Standards would produce unreliable breath test results and declines to set aside the driving under the influence convictions.

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 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

¹⁵ Neither of the Supreme Court's decisions in *Haynes id.* or *Riendeau id.* references ISP's rule making which was complete prior to the date of the Supreme Court's decisions (See Exhibit B).

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 produce reliable test results. The Hearing Examiner's reliance on the Breath Alcohol Testing Standards is not misplaced or inappropriate since the Breath Alcohol Testing Standards continue to be the standard for the administration of evidentiary tests for breath alcohol concentration results.

The Hearing Examiner sets out his understanding of the testimony of Dr. Anstine (See FN 3 Findings 4.7 & 4.8).

The Hearing Examiner's analysis is careful and consistent with the record before him. The Hearing Examiner concludes there is no basis in the Record to believe that Trooper Montgomery did not comply with the ISP BATSOPs (See FN 3 Findings 4.9).

Mr. Peterson also makes a unique argument that the final order of the Hearing Examiner is inappropriately a "recommendation" contrary to I.C. § 67-5240.

Mr. Peterson would seem to suggest that since the ISP BATSOP are just a recommendation, demonstrated by the use of the term "should", the Hearing Examiner's decision relying on the ISP BATSOP must only be a recommendation. A recommended decision was not entered by the Department's Hearing Examiner.

The Hearing Examiner enters a final order pursuant to I.C. § 67-5243(1)(b) and

provides notice as required by I.C. § 67-5245(1) that the Hearing Examiner's order here is a final order.

The Department's Hearing Examiner is entitled to rely upon the ISP's Breath Alcohol Testing Standards in existence at the time of Mr. Peterson's failed evidentiary test and when the District Court on judicial review affirmed the Department's Hearing Examiner's decision.

Mr. Peterson fails to meet his burden pursuant to I.C. § 18-8002A(7) to show that the evidentiary test performed by Trooper Montgomery did not comply with I.C. § 18-8004. Mr. Peterson does not contend that the breath testing equipment was not properly functioning or that the results of the evidentiary test for breath alcohol concentration were inaccurate.

Again, Mr. Peterson cannot show based on this record that the evidentiary test for Breath Alcohol concentration performed in this matter did not comply with the then existing Breath Alcohol Testing Standards of the Idaho State Police.

The Hearing Examiner's findings are sufficiently detailed, demonstrating that the Hearing Examiner considered the circumstances of Mr. Peterson's burden. The Findings and Conclusions demonstrate that the Hearing Examiner made a reasonable decision, *Brett v. Eleventh Street Dockowner's Association, Inc.*, 141 Idaho 517, 112 P.3d 805 (2005).

V. ADDITIONAL ISSUES ON APPEAL

The decision of the Department's Hearing Examiner must be limited to what is included in the Administrative Record. The Court's review is correspondingly limited to what is included in the administrative record, I.C. § 67-5277.

On page 15 of Mr. Peterson's Appellant Brief reference is made to several "Jeremy Johnston emails."¹⁶

Mr. Johnston's emails were not made part of the Department's administrative record here. Representations as to what the emails might have indicated should not be considered by the Court.

No objection to the administrative record was made by Mr. Peterson. No Motion for the Court to consider additional evidence has been made pursuant to I.C. § 67-5276.

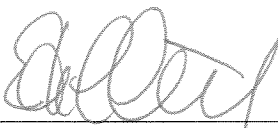
The Court cannot consider argument based on evidence which is not part of the record before the Department's Hearing Examiner.

VI. CONCLUSION

Mr. Peterson has not demonstrated that he met his burden before the Hearing Examiner or that a basis in law exists to set aside the license suspension pursuant to I.C. §18-8002A(7).

The Hearing Examiner's decision was not arbitrary and capricious and sufficient evidence exists in the record as a whole to support the Department's Hearing Examiner's decision.

DATED this 21 day of December, 2015.



Edwin L. Litteneker
Special Deputy Attorney General

¹⁶

"For instance, Jeremy Johnston, in an email dated December 19, 2012 and addressed to prosecutors, among others, states: "I have made some changes to the SOPs due to rulings, suggestions and need for clarifications. Please review this and see if there needs more or less added."

"On May 11, 2012, just a few days after the SOP was modified in April 2012, Jeremy Johnston sent the following email to one "kmumford@kcgovus": "What was the wording you wanted for the SOP change that we had talked about a few weeks back? I'm having a conference call next week about the changes and wanted to get the wording right in there so it works for all sides".

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile and mailed by
Regular first class mail, and
Deposited in the United States
Post Office

Sent by Federal Express, overnight
Delivery

Hand delivered

To:

Paul Thomas Clark
Clark and Feeney
PO Drawer 285
1229 Main Street
Lewiston, Idaho 83501

On this 21 day of December, 2015.



Edwin L. Litteneker

Exhibit A

Respondent's 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

Respondent's 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 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 ISPFPS 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 ISPFPS 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 (ISPFPS).** "Idaho State Police Forensic Services" shall mean a division of the Idaho State Police. ISPFPS is dedicated to providing forensic science services to the criminal justice system of Idaho. ISPFPS 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 ISPPS. (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 ISPPS. (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. ISPFPS is not responsible for storage of documentation not generated by ISPFPS. (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 ISPFPS. The instrument only needs to be initially certified by ISPFPS. 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)

015. -- 999. (RESERVED)

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