

SEP 14 2016

CHRISTOPHER D. RICH, Clerk  
By MARTHA LYKE  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN THE MATTER OF  
SMALL BREWER EXEMPTIONS,

Case No. CV-OT-2015-12762

OPINION ON APPEAL

ATTORNEY FOR THE PETITIONER: JASON S. RISCH

ATTORNEYS FOR THE RESPONDENTS: KENNETH M. ROBINS, W.

CHRISTOPHER POOSER

The Idaho Beer and Wine Distributors Association, Inc. ("the Distributors") seeks judicial review of a final ruling of the Idaho State Police, Bureau of Alcohol Beverage Control ("the Bureau"). The ruling was made pursuant to I.C. § 67-5232 ("Declaratory Rulings by Agencies.") (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency. (2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter. (3) A declaratory ruling issued by an agency under this section is a final agency action. See also IDAPA 04.11.01.400-402.

## FACTS AND PROCEDURAL BACKGROUND

Idaho Beer and Wine Distributors Association, Inc. is composed of eighteen entities licensed as wholesalers and distributors pursuant to Idaho Code §§ 23-1001 et seq., 23-1101 et seq., and 23-1301 et seq. On December 4, 2014, the Association petitioned the Director of the Idaho State Police for a declaratory ruling concerning the application and interpretation of Idaho Code sections 23-1003(d), 23-1003(e) and any other references in the Idaho Code which provide exemptions and allowances to brewers who produce fewer than thirty thousand (30,000) barrels of beer annually. The petition sought an "order declaring that the location of production of said volumes of beer is immaterial to the exemptions and allowances enumerated therein." The petition was brought pursuant to I.C. § 67-5232 which provides for declaratory rulings by agencies. The Director of the Idaho State Police has the responsibility to administer and enforce the involved licensing statutes. I.C. § 23-1003.

On December 10, 2014, 10 Barrel Brewing Idaho, LLC, petitioned to intervene asserting that it operates a brewery and brew pub in Boise and holds a brewer's pub license issued under I.C. § 23-1003(e) and related provisions. Anheuser-Busch, LLC had purchased the membership interests of 10 Barrel Idaho and a related Oregon based brewer, 10 Barrel Brewing, LLC. According to the petition to intervene Anheuser-Busch is "not an Idaho licensed brewer, Anheuser Busch is itself a brewer and operates numerous other breweries inside and outside the United States."

The petition to intervene stated that "10 Barrel Idaho disclosed the change in ownership of its membership interests and submitted an application to transfer its

RECEIVED  
SEP 14 2016

brewer's pub license and related endorsements to itself under the new ownership structure." Further, the Idaho State Police Alcohol Control Board had issued Temporary Alcohol Beverage Licenses to 10 Barrel Idaho which would have a substantial interest in the decision. The petition to intervene was granted by the Alcohol Control Board.

Anheuser-Bush, LLC is a Missouri Limited liability company affiliated with Anheuser-Busch Companies, LLC, a Delaware limited liability company. Ultimately the Anheuser-Busch Companies are part of a world-wide conglomerate in Belgium which owns controlling interests in nearly 50% of the beer producers in the world.

Anheuser-Busch, LLC (Missouri) is licensed in Idaho as an entity holding a "certificate of approval" as defined in Idaho Code § 23-1001(c):

"Certificate of approval" means a license issued to a person whose business is located outside of the state of Idaho, who sells beer to wholesalers located within the state of Idaho.

10 Barrel Brewing Idaho, LLC is an Idaho limited liability company, doing business as 10 Barrel Brewing Company. At the time of the transfer of all of its interest to Anheuser-Busch, 10 Barrel Idaho was licensed as a small brewer under the small brewer exemptions in Idaho Code sections 23-1003(d), (e) and (f). 10 Barrel Idaho, now owned by Anheuser-Busch, continues to be the license holder and operator of the licensed premises. See I.C. sections 23-1003(d), (e) and (f):

(d) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, upon payment of a retailer's annual license fee, may be issued a brewer's retail beer license for the retail sale of the products of its brewery at its licensed premises or one (1) remote retail location, or both. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

RECEIVED  
SEP 14 2016

(e) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually may be issued a brewer's pub license. Upon payment of a retailer's annual license fee, and subject to the fees in sections 23-1015 and 23-1016, Idaho Code, a brewer may, at its licensed brewery or at one (1) remote retail location, or both, sell at retail the products of any brewery by the individual bottle, can or glass. Any brewer selling beer at retail or selling products of its brewery to a retailer must pay the taxes required in section 23-1008, Idaho Code, on the products of its brewery, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

(f) A brewer licensed under the provisions of subsection (d) or (e) of this section may be licensed as a wholesaler for the sale of beer produced by such brewery to retailers other than at the licensed brewery and one (1) remote retail location and shall not be required to pay an additional fee. Such brewer shall, however, comply with and be subject to all other regulations or provisions of law that apply to a wholesaler's license, except as the laws may restrict sales at the licensed brewery or one (1) other remote retail location. The holder of a brew pub license shall not be disqualified from holding a retail wine license or wine by the drink license for the sale of wine at the brew pub premises on the grounds that the licensee is also licensed as a wholesaler.

The Bureau Chief of Alcohol Beverage Control, Idaho State Police, issued the Order on Petition for Declaratory Ruling determining that Idaho law does not prohibit the holder of a certificate of approval from having a financial interest in a licensed small brewer's business. This petition for judicial review followed.

In the course of proceedings the parties stipulated to the following facts:

1. Beginning in April 2013, 10 Barrel Idaho owned and operated a brew pub located at 830 W. Bannock Street in Boise, Idaho, where it sold its product at retail.
2. In 2014, 10 Barrel Idaho was licensed as a brewer pursuant to Idaho Code § 23-1003(a), and brewed its beer within the state of Idaho.

RECEIVED  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

3. In 2014, 10 Barrel Idaho was also licensed as a retailer pursuant to Idaho Codes §§ 23-1003(d) and 23-1010.
4. In 2014, 10 Barrel Idaho possessed a "brewer's pub license" pursuant to Idaho Codes §§ 23-1003(e) and 23-1010.
5. In 2014, 10 Barrel Idaho was also licensed to sell liquor and wine at its brew pub.
6. Since 10 Barrel Idaho began its operations, its total production of beer has never exceeded 30,000 barrels annually.
7. Anheuser-Busch, LLC ("Anheuser-Busch") is a United States subsidiary of Belgian-based brewer Anheuser Busch InBev, and holds a certificate of approval to sell beer to wholesalers in the state of Idaho.
8. On or about December 1, 2014, Anheuser Busch purchased the equity interests in 10 Barrel Idaho.
9. As a result of the purchase, Anheuser Busch is the sole member of 10 Barrel Idaho.
10. 10 Barrel Idaho's change in ownership was reported to ISPABC and approved on December 10, 2014. ISPABC issued new licenses to 10 Barrel Idaho on that date.
11. In 2014, Anheuser Busch produced over 30,000 barrels of beer, with all brewing occurring outside of the state of Idaho.
12. In 2014, Anheuser Busch sold beer to wholesalers in the state of Idaho.

RECEIVED  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

The general structure of the so-called three-tier system regulating beer distribution is set forth in a 2013 Advocate article:

Idaho adopted a three-tier system for the distribution of beer and wine: retailer[s], wholesaler[s]/distributor[s] and manufacturer[s] [who] sell beer and wine at retail cannot purchase alcohol directly from the manufacturer; they must purchase it through distributors or wholesalers. The rationales for the three-tier system are to 1) promote the state's interest in an orderly market, 2) prohibit vertical integration and dominance by a single producer in the market place, 3) prohibit commercial bribery and predatory marketing practices, and 4) discourage and/or prevent the intemperate use of alcoholic beverages.

*Idaho's Alcohol Beverage Laws: Past, Present and Future*, 56-FEB Advocate 24 (2013), Jenny Crane Grunke.

### STANDARD OF REVIEW

The procedures concerning judicial review of Idaho state agency determinations are set forth in the Idaho Administrative Procedure Act:

(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. I. C. § 67-5270.

In reviewing an agency's decision an appellate court may not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code § 67-5279(1). The court must defer "to the agency's findings of fact unless they are clearly erroneous." *Price v. Payette County Board of County Commissioners*,



131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct. App. 2009).

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of 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. I.C. § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.3d at 506. The party attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner specified in section 67-5279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.3d at 506.

There appear to be no material issues of fact. The issues raised are matters of law, that is, whether the decision violated constitutional or statutory provisions. The petitioners assert that the agency action exceeded its authority by rewriting the law. That issue is encompassed in whether the decision is consistent with the statutory scheme and any applicable constitutional provisions.

### ISSUES

The Distributors assert there are statutory prohibitions which prevent Anheuser-Busch from having a financial interest in a retail establishment and that 10 Barrel no longer qualifies as a small brewer regardless of who owns it. If the beer produced by Anheuser-Busch is counted against the 30,000 barrel limitation for the small brewers exemption it is clear that 10 Barrel would not qualify for the exemption. Stipulation



10 Barrel provides specifically: "In 2014, Anheuser-Busch produced over 30,000 barrels of beer, with all brewing occurring outside the state of Idaho." On the other hand if only the beer production of 10 Barrel in Idaho is counted the exemption remains. Stipulation 6 provides specifically: "Since 10 Barrel Idaho began its operations, its total of beer has never exceeded 30,000 barrels annually."

### **Statutory Prohibitions**

The Distributors assert that statutory prohibitions prevent Anheuser-Busch from having a financial interest in a retail establishment, contending that so long as 10 Barrel and its owners produced less than 30,000 barrels it qualified under the small brewers exemptions and thus was allowed to own the retail establishment. However, the Distributors maintain that Anheuser-Busch cannot avail itself of the small brewer's exemption because it is not, and cannot be, licensed under sections 23-1003(d) and 23-1003(e). Consequently, according to the Distributors, since Anheuser-Busch is not part of the exception, it falls under the regular prohibitions established in the statute which enumerate clear prohibitions for any brewer, dealer, wholesaler, or the holder of any certificate of approval. This necessarily implicates the issue initially raised in the petition for declaratory ruling seeking "an order declaring that the location of production of said volumes of beer is immaterial to the exemptions and allowances enumerated therein." That is, if the production of beer by Anheuser-Busch outside Idaho is counted, the 30,000 barrel limitation to qualify as a small brewer would be exceeded. Consequently, neither Anheuser-Busch nor any other brewer of beer, wherever located, could qualify

**RECEIVED**  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



as a small brewer if the total volume exceeded 30,000 barrels a year. The products would have to be marketed through the three-tier system.

### **Aggrieved Party**

10 Barrel argues that the Distributors have not argued or demonstrated, that the Bureau's statutory construction prejudiced its substantial right or rights. See *Idaho Transportation Department v. Kalani-Keegan*, 155 Idaho 297, 301, 311 P.3d 309, 313 (Ct. App. 2013) (“[A]n agency's decision may be affirmed solely on the grounds that the petitioner has not shown prejudice to a substantial right. In other words, the courts may forego analyzing whether an agency erred in a manner specified by I.C. § 67-5279(3) if the petitioner does not show that a substantial right was violated.”) (citing *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 232, 254 P.3d 1224, 1228 (2011)).

Idaho Code § 67-5232(1) is a broad grant of authority to petition for a declaratory ruling: “Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.”

The Distributors do have an interest in assuring that the three-tier system be honored. The small brewer's exemption allows the distribution that would otherwise be in place to be by-passed which impacts the Distributors.

### **Agency Interpretation**

Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of



agency deference are present. There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.

Duncan v. State Board of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 325 (2010).

Idaho Code § 23-1032 - Financial Interest in Dealer or Wholesaler Prohibited

states:

(1) It shall be unlawful for any brewer, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee to have any financial interest in any licensed wholesaler's or dealer's business, or to own or control any real property upon which a licensed dealer or wholesaler conducts business, except:

(a) For a brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually and is duly licensed as a wholesaler as provided in section 23-1003(f), Idaho Code[.]

Idaho Code § 23-1033 - Financial Interest In or Aid to Retailers Prohibited –

Certain Aid Permitted states:

(1) Except as provided in sections 23-1003(d), and 23-1003(e), Idaho Code, it shall be unlawful for any brewer, dealer, wholesaler, or the holder of any certificate of approval, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee:

(a) To have any financial interest in any licensed retailer's business, or to own or control any real property upon which a licensed retailer conducts his business, except such property as shall have been so owned or controlled continuously for more than one (1) year prior to July 1, 1975; provided however, that a brewer licensed pursuant to section 23-1003(d) or (e), Idaho Code, may be permitted to have a financial interest in one (1) additional brewery licensed pursuant to section 23-1003(d) or (e), Idaho Code[.]

The Bureau concluded Anheuser-Busch is not prohibited from having a financial interest in 10 Barrel with 10 Barrel retaining its exemption for its own beer production:

RECEIVED  
SEP 14 2016

Anheuser-Busch is licensed in Idaho with a certificate of approval. There is nothing in relevant Idaho law that prohibits the holder of a certificate of approval from having a financial interest in a licensed small brewer's business. Such prohibitions do exist for wholesalers and dealers, but these prohibitions do not apply to small brewers. [Idaho Code] § 23-1032(1)(a).

Nor is Anheuser-Busch prohibited from having an interest in 10 Barrel because 10 Barrel Idaho is also a retailer at its own premises and at one remote location as [Idaho Code] § 23-1033(1) provides . . . .

As noted earlier, [Idaho Code] § 23-1003(d), (e) and (f) are exceptions to the 'three-tier system' governing the manufacture, distribution or sale of beer in Idaho. These provisions allow a small brewer to act as a retailer at the brewer's own premises and at one remote location, and to act as a wholesaler for the sale of beer the brewer manufacturers to retailers. The holder of a certificate of approval may have an interest in a small brewer, and by virtue of that fact, the small brewer is not prevented from retailing his own or other products in the limited manner set forth in these provisions.

Order on Petition for Declaratory Ruling, at 6-7.

The cardinal rule of statutory construction is that where a statute is plain, clear and unambiguous, we are constrained to follow that plain meaning and neither add to the statute nor take away by judicial construction. Statutory interpretation always begins with an examination of the literal words of the statute. Unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. We must give the words their plain, usual and ordinary meaning, and there is no occasion for construction where the language of a statute is unambiguous. We furthermore must give every word, clause and sentence effect, if possible.

*Poison Creek Publishing, Inc. v. Central Idaho Publishing, Inc.*, 134 Idaho 426, 429, 3 P.3d 1254, 1257 (2000).<sup>1</sup>

---

<sup>1</sup>"When interpreting a statute, this Court must strive to give force and effect to the legislature's intent in passing the statute. 'It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.'" *Wheeler v. Idaho Department of Health and Welfare*, 147 Idaho 257, 263, 207 P.3d 988, 994 (2009).



"[T]he court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature." *Davaz v. Priest River Glass Company*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994).

Idaho Code § 23-1033 states:

(1) Except as provided in sections 23-1003(d), and 23-1003(e), Idaho Code, it shall be unlawful for any brewer, dealer, wholesaler, or the holder of any certificate of approval, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee: (a) To have any financial interest in any licensed retailer's business . . . provided however, that a brewer licensed pursuant to section 23-1003(d) or (e), Idaho Code, may be permitted to have a financial interest in one (1) additional brewery licensed pursuant to section 23-1003(d) or (e), Idaho Code[.]

The statute states, "Except as provided in sections 23-1003(d), and 23-1003(e)," referring to an exception for a brewer licensed within the state of Idaho producing fewer than 30,000 barrels of beer annually, "upon payment of a retailer's annual license fee, may be issued a brewer's retail beer license for the retail sale of the products of its brewery at its licensed premises or one (1) remote selling location, or both." I.C. § 23-1003(d).

Idaho Code § 23-1003(e) states a "small brewer" "may be issued a brewer's pub license. Upon payment of a retailer's annual license fee . . . a brewer may, at its licensed brewery, sell at retail the products of any brewery by the individual bottle, can or glass." Idaho Code § 23-1032(2) states, "It shall be unlawful for any licensed wholesaler or dealer, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee to have any financial interest in a licensed brewer's business, or to own or control any real property upon which a licensed brewer conducts

RECEIVED  
SEP 14 2016

business. (Emphasis added.) This section shall not apply to a noncontrolling de minimis interest in stock held in a publicly traded company including mutual funds.”

Reading these statutory sections together, the Bureau’s conclusion that Anheuser-Busch is not prohibited from having a financial interest in 10 Barrel, including its retail business, is reasonable. If the Idaho Legislature had intended to prohibit a holder of a certificate of approval from having a financial interest in “a licensed brewer’s business,” it could have expressly said so. It did not. There is such a prohibition for a holder of a certificate of approval to have a financial interest “in any licensed retailer’s business.” Holders of certificates of authority are not designated as an entity that cannot have a financial interest in brewers, including small brewers. Small brewers are allowed to engage in retail business, to the extent provided for in I.C. § 23-1003(d), (e) and as allowed by the exception to I.C. § 23-1033(1).

### **Geographic Location of Brewing**

The Distributors also contend the Bureau “arbitrarily inserted a geographical qualifier in the regulatory statutes.” Memorandum in Support of Petition for Judicial Review of Agency Ruling, at 7. “A plain reading of the statutes which provide exemptions to small brewers leads to the conclusion that the location of brewing is irrelevant.” *Id.*

In its decision, the Bureau stated:

[Idaho Code] § 23-1001(b) defines “brewer” as “a person licensed to manufacture beer.” In the same statute, a “retailer” is “a person licensed to sell beer to consumers at premises described in the license,” [Idaho Code] § 23-1001(i), and a “wholesaler” is “any person licensed to sell beer to retailers, wholesalers, permittees or consumers and distribute beer from warehouse premises described in the license.” [Idaho Code] § 23-1001(k).



[Idaho Code] § 23-1003(a) requires that "Before any brewer shall manufacture or dealer or wholesaler import or sell beer within the state of Idaho, he shall apply to the director for a license." While the geographic scope of the term "license" is not defined in [Idaho Code] 23-1001(b), (i) or (k), it is clear that title 23, chapter 10, Idaho code, regulates the brewing, distribution and sale of beer in Idaho.

Where chapter 10 of title 23 expressly addresses the importation of out-of-state beer into Idaho, the term "brewer" is not used to describe the maker of such beer; rather, the term "manufacturer" is used. [Idaho Code] § 23-1027. Thus, the term "brewer" as used in [Idaho Code] 23-1001(b) refers to a person who is licensed to manufacture beer in the state of Idaho.

Anheuser-Busch is not licensed as a brewer, retailer or wholesaler in the state of Idaho. It is licensed only as holding a certificate of approval, defined as "a license issued to a person whose business is located outside of the state of Idaho, who sells beer to wholesalers or brewers located within the state of Idaho." [Idaho Code] § 23-1001(c). Idaho's ABC has no control over regulatory authority over Anheuser-Busch other than in its status of being licensed with a certificate of approval in Idaho. Therefore, its production of beer outside of the state of Idaho is beyond ABC's regulatory authority or control. Order on Petition for Declaratory Ruling, at 4-5.

As stated by the Bureau, nothing in the statutes purports to attempt to regulate beer manufactured outside of the state. In common parlance Anheuser-Busch is a brewer – its own pleadings describe it as such. But rather than use the term "brewer" for out-of-state manufacturers of beer products, the term "manufacturer" is used by the legislature. See I.C. § 23-1027. Consequently, it is a reasonable interpretation to conclude that the term "brewer" "means a person licensed to manufacture beer" in Idaho. Cf. I.C. § 23-1001(c), (d). Whatever the legislature intended, it did not preclude an international giant in the industry from buying out the local competition of small brewers so long as the local entity operates within the statutory parameters for its own



product. If this is not the result intended by the legislature, the solution falls to the legislature.

### Commerce Clause – Standing

The Distributors contend "a geographical location would infringe upon interstate commerce." Memorandum in Support of Petition for Judicial Review of Agency Ruling, at 10.

The Agency and Anheuser-Busch would have this Court believe that the small brewer exemption only makes sense when read with the insertion of a geographic location. While probably unintended, the Agency and Anheuser-Busch are subjecting the whole statute to invalidation if their theory is followed. This is because reading a geographic qualifier into the statutes at issue would serve to institute differential treatment among similarly situation brewers merely based upon their geographical location. This would constitute a type of discriminatory protectionism long found to be in violation of the dormant interstate commerce clause[.]

*Id.* at 10-11.

The Distributors also argue: "that if the Idaho statute were to favor small brewers who produce fewer than 30,000 barrels of beer annually in the state of Idaho over those from another state it would be in violation of the constitutional protections of the dormant interstate commerce clause. Petition for Declaratory Ruling, at 6. Anheuser-Busch and the state maintain the Distributors lack standing to raise this issue on the basis that, "there has been no showing that any of the parties within this trade organization would qualify for treatment as an out-of-state brewer that is being excluded from the small brewers' market in the State of Idaho . . . ." Respondent's Brief in Opposition to Petition for Judicial Review of the Agency's Final Order, at 22.

It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing. Standing is a

RECEIVED  
SEP 14 2016

preliminary question to be determined by this Court before reaching the merits of the case. The doctrine of standing is a subcategory of justiciability. . . . Standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated. To satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury." This requires a showing of a "distinct palpable injury" and "fairly traceable causal connection between the claimed injury and the challenged conduct."

*Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002).

Standing also applies in situations where a declaratory ruling is sought. *See, e.g., American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 871, 154 P.3d 433, 442 (2006) ("Idaho Code section 67-5278 provides a means by which a party may gain standing before a district court, prior to exhausting administrative remedies, in order to seek a declaratory judgment or a rule's validity. The statute requires that the rule itself or its 'threatened application' interfere with or impair, the legal rights or privileges of the petitioner . . . the 'threatened application' language in I.C. § 67-5278 is there to permit standing to challenge a rule . . .").

Possible violations of the commerce clause are relevant in interpreting Idaho statutory law. If a statute clearly violated the commerce clause under one interpretation and not under another it would be reasonable in interpreting the statute to believe the legislature did not intend an interpretation that would render the statute invalid. It is not clear that the agency determination conflicts with the commerce clause.

Further, the nature and extent of injury to the Distributors, if any, is not developed in this record to the extent necessary to determine the interstate commerce issue. Hypotheticals may be constructed that would indicate injury. Whether there are avenues

RECEIVED  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



to avoid transgressing claims of interstate commerce violations is not developed in this record and will not be reached in this decision based on hypotheticals.

### 10 Barrel Small Brewery

The Distributors' final contention is that 10 Barrel no longer qualifies as a small brewer regardless of who owns it. Memorandum in Support of Petition for Judicial Review of Agency Ruling, at 11. The claim is that 10 Barrel could no longer own or operate the retail pub because no matter who owns it, it is currently producing over 30,000 barrels of beer. The Distributors support for this assertion in what appears to be a copy of an Internet announcement dated November 5, 2014, wherein it is stated: "10 Barrel expects to sell approximately 40,000 barrels of beer in 2014." See "Exhibit C," Petition for Declaratory Ruling.

This may be an indiscrete statement that should arouse the interest of the regulators, but it is not evidence in this proceeding. Expecting to sell 40,000 barrels is not the same as producing 40,000 barrels annually. Perhaps there is carryover of old production. Aside from speculation, on December 29, 2015, the Distributors filed and agreed to "stipulated facts," which state, "since 10 Barrel Idaho began its operations, its total production of beer has never exceeded 30,000 barrels annually." Stipulated Facts, at 2 (December 29, 2015). See *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597, 600 (2008): "Judicial estoppel 'precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'" For purposes of this proceeding the Distributors are estopped from pursuing this position. If in fact 10 Barrels is exceeding the limitation the remedy is with the regulator.

RECEIVED  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

## Attorney Fees

10 Barrel seeks an award of attorney fees pursuant to Idaho Code § 12-121, asserting the Distributors have advanced arguments based on a disregard for the plain language of the Idaho beer licensing statute and have, therefore, acted without a reasonable basis in the law.

The Bureau also seeks attorney fees pursuant to I.C. § 12-117 on the basis that the agency provided a reasonable interpretation of the statutes governing the application small brewer's exemption under applicable statutes based upon the factual information presented by the interested parties in this matter.

It should first be noted that I.C. § 12-121 does not apply in this case because where I.C. § 12-117 applies, as it does in this case, it is the sole means for awarding attorney fees . . . The Court employs a two-part test to determine if I.C. § 12-117 is invoked on appeal: (1) the party seeking fees must be the prevailing party and (2) the nonprevailing party must have acted without a reasonable basis in fact or law.

*Buckskin Properties, Inc. v. Valley County*, 154 Idaho 486, 498, 300 P.3d 18, 30 (2013).

"A party is not entitled to attorney's fees if the issue is one of first impression in Idaho. Attorney's fees are also inappropriate if the [non-prevailing party] presented a legitimate question for this Court to address." *Lane Ranch Partnership v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007). *See however, Arnold v. City of Stanley*, 158 Idaho 218, 224, 345 P.3d 1008, 1014 (2015): "Asserting that an appeal involves a matter of first impression is not a 'free pass' to bring an appeal based on unreasonable arguments."

There is no published case law specifically addressing the questions that the Distributors raised in their petition for a declaratory ruling. The petition for judicial review

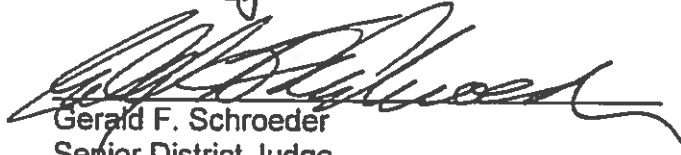


presented legitimate questions for the Court to address. Trying to understand the legislative scheme when entities outside Idaho are involved is a difficult enterprise. The result of that study may lead to a result consistent with what was in the minds of legislators or not. The issues raised are not frivolous. Consequently, 10 Barrel's and the Bureau's requests for attorney fees are denied.

#### CONCLUSION

The Bureau's ruling is affirmed. Attorney fees are denied.

Dated this 2 day of September 2016.

  
Gerald F. Schroeder  
Senior District Judge

RECEIVED  
SEP 14 2016

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

## CERTIFICATE OF MAILING

I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed (or emailed), one copy of the OPINION ON APPEAL as notice pursuant to the Idaho Rules to each of the parties of record in this cause as follows:

JASON S. RISCH  
RISCH PICA, PLLC  
ATTORNEYS AT LAW  
407 WEST JEFFERSON ST.  
BOISE, ID 83702  
VIA EMAIL: [courts@rischpisca.com](mailto:courts@rischpisca.com)

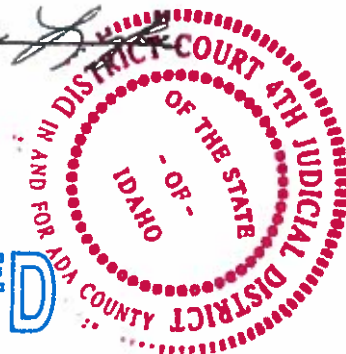
KENNETH M. ROBINS  
DEPUTY ATTORNEY GENERAL  
700 S. STRATFORD DR.  
MERIDIAN, ID 83642  
VIA EMAIL: [ken.robins@isp.idaho.gov](mailto:ken.robins@isp.idaho.gov)

W. CHRISTOPHER POOSER  
STOEL RIVES, LLP  
101 S. CAPITOL BLVD., SUITE 1900  
BOISE, ID 82702-9000  
VIA EMAIL: [christopher.pooser@stoel.com](mailto:christopher.pooser@stoel.com)

CHRISTOPHER D. RICH  
Clerk of the District Court  
Ada County, Idaho

Date: Sept. 14, 2016

By   
Deputy Clerk



RECEIVED  
SEP 14 2016

OPINION ON APPEAL – PAGE 20

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

FILED  
Monday, September 28, 2015 at 08:44 AM  
CHRISTOPHER D. RICH, CLERK OF THE COURT  
BY: [Signature]  
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN RE: THE MATTER OF  
SMALL BREWER EXEMPTIONS.

CASE NO. CV-OT-2015-12762  
NOTICE OF HEARING

APPEARANCES:

Colonel R. Powell, Director  
ISP  
700 S. Stratford Dr.  
Meridian, ID 83642

Lt. Russel Wheatley  
Alcohol Beverage Control  
700 S. Stratford Dr.  
Meridian, ID 83642

Susan M. Johnson  
W. Christopher Pooser  
STOEL RIVES LLP  
101 S Capitol Blvd, Ste 1900  
Boise, ID 83702

Stephanie A. Altig  
Kenneth M. Robins  
IDAHO ATTORNEY GENERAL'S OFFICE  
700 S Stratford Dr  
Meridian, ID 83642

PLEASE TAKE NOTICE That the Honorable Gerald Schroeder, District Judge,  
has set this matter for Motion/Objection to Agency Record on the Thursday, November 05, 2015 at  
01:30 PM, at the Ada County Courthouse, 200 West Front Street, Boise, ID.

CHRISTOPHER D. RICH  
Clerk of the Court  
Ada County, Idaho  
By: [Signature]  
Ric Nelson, Deputy Clerk

CC: Counsel/ ml  
Notice of Hearing

RECEIVED

SEP 30 2015

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

JASON S. RISCH (ISB # 6655)  
RISCH ♦ PISCA, PLLC  
Attorneys at Law  
407 West Jefferson Street  
Boise, Idaho 83702  
Telephone: (208) 345-9929  
Facsimile: (208) 345-9928

Attorneys for Petitioner, the Idaho Beer and Wine Distributors Association, Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IN RE: THE MATTER OF	)	CASE NO. CV-OT-2015-12762
	)	
SMALL BREWER EXEMPTIONS	)	<b>OBJECTION TO, AND</b>
	)	<b>MOTION TO CORRECT,</b>
	)	<b>SETTLED AGENCY RECORD</b>
	)	
	)	<b>ORAL ARGUMENT IS REQUESTED</b>

COMES NOW, the Idaho Beer and Wine Distributors Association, Inc., by and through its counsel of record, the law firm of Risch Pisca, PLLC and pursuant to Idaho Code § 67-5274(3) and other relevant law, hereby objects to the settled agency record lodged with this court and moves this court to order the record be corrected as requested herein.

Pursuant to administrative rule the Idaho Beer and Wine Distributors Association (hereinafter "IBWDA") objected to the initial record proposed by the Department of Alcohol Beverage Control and requested additions of all relevant information in the Department's possession necessary for this court to rule on IBWDA's petition for review. While the Department of Alcohol Beverage Control appears to have included some additional information, its *Notice of Lodging of Settled Agency Record with the District Court* contains the following

RECEIVED  
SEP 24 2015

OBJECTION TO, AND MOTION TO CORRECT, SETTLED AGENCY RECORD - ID STATE POLICE ALCOHOL BEVERAGE CONTROL

statement:

The Court and the parties are hereby notified that some documents submitted by the licensee have been withheld from collection of documents received by the Agency because these documents were submitted under the protections authorized under the former version of Idaho Code § 74-107(2). The Agency is prepared, upon order by the Court, to lodge these records for review by the court in an in-camera setting whether further disclosure of this material is appropriate.

It is apparent that the Department is confusing the exemptions of Idaho's Public Records Act codified in Title 74, Chapter 1 with the requirement to produce relevant documentation in a contested legal proceeding. Idaho's Public Records Act does not control the production of documents in court proceedings; rather, it governs citizens' rights to examine the public records of this state. The "protections" cited by the Department are actually "exemptions" to generalized public records requests. In a judicial proceeding the production of documents is controlled by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence which require the production of all non-privileged relevant information:

Except as otherwise provided by constitution, or by statute implementing a constitutional right, or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Idaho Rule of Evidence 501.

Neither the Idaho Rules of Evidence nor the Idaho Public Records Act cited by the Department convey any right of privilege regarding documents provided to a state agency. Absent a rule conveying a privilege the Department must produce all relevant documents.

To the extent that the documents withheld by the Department are relevant to the issue



before the court, IBWDA hereby requests they be added to the settled agency record and produced to all parties with interest in these proceedings.

**CONCLUSION**

IBWDA hereby respectfully requests this court order the Department to correct the record to include a privilege log detailing each document withheld, the legal basis for withholding it, who created the document and who reviewed it. This can be done without divulging the specific contents of the documents. A privilege log would allow all parties to decide the necessity of pursuing the production of the withheld documents and/or the need for further corrections to the agency record. Until the record is settled IBWDA hereby procures all rights to object to the same.

DATED This 24<sup>th</sup> day of September, 2015.

RISCH ♦ PISCA, PLLC  
Attorneys for Idaho Beer and Wine Distributors Association

By: 

\_\_\_\_\_  
JASON S. RISCH, of the firm

RECEIVED  
SEP 24 2015  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of August, 2015, I caused to be served a true and correct copy of the foregoing *Objection to, and Motion to Correct, Settled Agency Record* as follows:

Colonel Ralph Powell, Director  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642

- U.S. Mail
- Hand Delivery
- Facsimile (208) 884-7290
- Overnight Mail

Lt. Russel Wheatley  
Alcohol Beverage Control  
700 S. Stratford Drive, Ste. 115  
Meridian, Idaho 83642

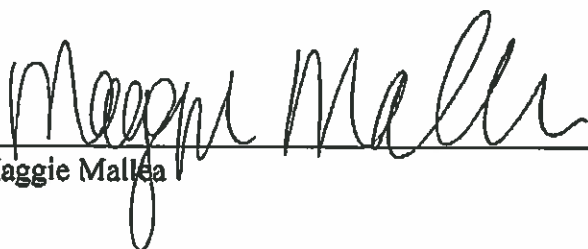
- U.S. Mail
- Hand Delivery
- Facsimile (208) 884-7096
- Overnight Mail

Susan M. Johnson  
W. Christopher Pooser  
STOEL RIVES, LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 83702-9000

- U.S. Mail
- Hand Delivery
- Facsimile (208) 389-9040
- Overnight Mail

Stephanie A. Altig  
Kenneth M. Robins  
DEPUTY ATTORNEYS GENERAL  
IDAHO STATE POLICE  
700 S. Stratford Drive  
Meridian, ID 83642

- U.S. Mail
- Hand Delivery
- Facsimile (208) 884-7228
- Overnight Mail

  
\_\_\_\_\_  
Maggie Mallea

RECEIVED  
SEP 24 2015  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



ruling failed to answer the request and instead ruled, *inter alia*, that a “Certificate of Approval” holder may have a financial interest in a “Small Brewer” and discussed ABC’s regulatory authority over a Certificate of Approval holder.

The IBWDA believes that ABC ruled in error and misinterpreted numerous sections of Idaho Code, including:

23-1003 (d) – Which states that “Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually ... may be issued a brewer’s retail beer license...” The IBWDA believes that the only requirement in this statute is that a brewer is licensed in Idaho. References to production are not tied to a geographic location and should include all of a brewer’s production, regardless of where such production occurs.

23-1003 (e) – Similar to the issue presented in 23-1003(d), this section states that “Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, may be issued a brewer’s pub license.” Again, the IBWDA believes the location of production is immaterial to applying the exemption allowed in this section of code.

23-1001 (b) – Much of the ABC order discussed small brewer ownership interests and the definition of “brewer” as set forth in 23-1001 (b). “Brewer” is defined by this section as “a *person* licensed to manufacture beer. ABC apparently failed to consider its own definition of “person” as set forth in Idaho Code at § 23-1001(g), which includes “corporations” and other forms of entity ownership.

23-1033 – ABC misapplied and misinterpreted Idaho’s prohibition on “financial interest in or aid to retailers” statute, holding that “There is nothing in relevant Idaho law that prohibits the holder of a certificate of approval from having a financial interest in a licensed small brewer’s business.” In direct contrast to the ABC’s ruling, § 23-1033 particularly states that “it shall be unlawful for any brewer, dealer, wholesaler, or the *holder of any certificate of approval*,

directly or indirectly ... (a) to have *any* financial interest in a retailer's business, or to own or control any real property upon which a licensed retailer conducts its business... (emphasis added). That section does reference Idaho Code § 23-1003(d) and (e), however, nothing in those sections exempts a certificate of approval holder.

Finally, ABC failed entirely to consider constitutional considerations regarding the interstate commerce clause, and its ruling and interpretations essentially violate said clause.

### **I.R.C.P. 84(d) STATEMENTS**

Pursuant to I.R.C.P. 84(d) Petitioner hereby provides the following mandatory information:

1. The name of the agency being reviewed: The Idaho State Police, Bureau of Alcohol Beverage Control.
2. The title of the court to which this petition is taken: The Fourth Judicial District of the State of Idaho in and for the County of Ada.
3.
  - a. Date of Agency Ruling: June 24, 2015
  - b. Agency Heading and Case Number: *In RE: The Matter of Small Brewer Exemptions*, Case Number 14 ABC 024.
  - c. Action Being Reviewed: Agency's *Order on Petition for Declaratory Ruling*.
4. Transcript/Hearing Information: No hearing was conducted and therefore no recording or transcript exists.
5. Short Statement of the Issues:
  - a. May a certificate of approval holder have an interest in a licensed Idaho retail establishment?
  - b. Is there a geographical requirement as to production of beer when applying the thirty thousand (30,000) barrel exemption to Idaho's three tier system?

- c. Is a corporation considered a “person” under Idaho law?
  - d. Does ABC’s application of the law violate the interstate commerce clause of the United States Constitution in treating in-state brewers differently from out-of-state brewers?
6. Transcript request: Not applicable.
7. Counsel certification:
- a. This petition was or will be served upon the Idaho State Police simultaneously with its filing with the court.
  - b. No transcript exists therefore no estimated fee is required.
  - c. The clerk of the agency has been, advised no fee was necessary for the presentation of the record; however if a fee becomes necessary it will be paid by Petitioner.

DATED This 22<sup>nd</sup> day of July, 2015.

RISCH ♦ PISCA, PLLC  
Attorneys for Idaho Beer and Wine Distributors Association

By:   
\_\_\_\_\_  
JASON S. RISCH, of the firm

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of July, 2015, I caused to be served a true and correct copy of the foregoing *Petition for Judicial Review of Agency Ruling* as follows:

Colonel Ralph Powell, Director	<input type="checkbox"/>	U.S. Mail
Idaho State Police	<input checked="" type="checkbox"/>	Hand Delivery
700 S. Stratford Drive	<input type="checkbox"/>	Facsimile (208) 884-7290
Meridian, Idaho 83642	<input type="checkbox"/>	Overnight Mail

Lt. Russel Wheatley	<input type="checkbox"/>	U.S. Mail
Alcohol Beverage Control	<input checked="" type="checkbox"/>	Hand Delivery
700 S. Stratford Drive, Ste. 115	<input type="checkbox"/>	Facsimile (208) 884-7096
Meridian, Idaho 83642	<input type="checkbox"/>	Overnight Mail

Susan M. Johnson	<input type="checkbox"/>	U.S. Mail
W. Christopher Pooser	<input type="checkbox"/>	Hand Delivery
STOEL RIVES, LLP	<input checked="" type="checkbox"/>	Facsimile (208) 389-9040
101 S. Capitol Boulevard, Suite 1900	<input type="checkbox"/>	Overnight Mail
Boise, ID 82702-9000		

Stephanie A. Altig	<input type="checkbox"/>	U.S. Mail
Kenneth M. Robins	<input checked="" type="checkbox"/>	Hand Delivery
DEPUTY ATTORNEYS GENERAL	<input type="checkbox"/>	Facsimile
IDAHO STATE POLICE	<input type="checkbox"/>	Overnight Mail
700 S. Stratford Drive		
Meridian, ID 83642		

  
\_\_\_\_\_  
Tyler Mallard

**BEFORE THE DIRECTOR OF THE IDAHO STATE POLICE**

IN RE: THE MATTER OF  
SMALL BREWER EXEMPTIONS

)  
) Case No. 14 ABC-024  
)  
) ORDER ON PETITION FOR  
) DECLARATORY RULING  
)  
)

---

**I. Introduction and Procedural History.**

On December 4, 2014, the Director of the Idaho State Police, Alcohol Beverage Control (“ABC”) received a Petition for Declaratory Ruling filed on behalf of the Idaho Beer and Wine Distributors Association, Inc. (“Distributors”).<sup>1</sup> The Distributors seek a declaratory ruling<sup>2</sup> from the Director as to whether Anheuser Busch, LLC (“Anheuser Busch”), who recently purchased 10 Barrel Idaho, LLC (“10 Barrel Idaho”), can continue to operate 10 Barrel Idaho as a small brewer and/or brew pub under IDAHO CODE § 23-1003(d) and (e). The Distributors argue that Anheuser Busch cannot do so and want the Director to enter a declaratory ruling consistent with their position.

On December 10, 2014, ABC received 10 Barrel Brewing Idaho’s Petition to Intervene in the Petition for Declaratory Ruling. Having received no objection from the Distributors and 10 Barrel Idaho having met the standards for intervention in an administrative proceeding, on

---

<sup>1</sup> In their Petition for Declaratory Ruling, the Distributors describe the Idaho Beer and Wine Distributors Association...as consisting of “eighteen (18) entities licensed as wholesalers and distributors of beer and wine pursuant to Idaho Code § 23-1001 *et seq.*, 23-1101 *et seq.*, and 23-1301 *et seq.*”

<sup>2</sup> Declaratory rulings by state agencies are governed by IDAHO CODE § 67-5232 and IDAPA 04.11.01.400-402.

January 6, 2015, ABC Bureau Chief Lt. Russ Wheatley<sup>3</sup> granted the Petition to Intervene,<sup>4</sup> thus making 10 Barrel Idaho a party to these proceedings.

10 Barrel Idaho's position is opposite that of the Distributors. They argue that Anheuser Busch's purchase of 10 Barrel Idaho is consistent with Idaho law and that 10 Barrel Idaho can continue to operate as a brewer and brew pub under IDAHO CODE § 23-1003(d) and (e).

## **II. Laws and Rules Governing Administrative Procedure.**

All proceedings in this matter at the administrative level are governed by the Idaho Administrative Procedures Act, title 67, chapter 52, Idaho code, and the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01.

Laws governing alcohol beverage control beer licensing, regulation and enforcement are at title 23, chapter 10, Idaho code and the administrative Rules Governing Alcohol Beverage Code, IDAPA 11.05.01.

## **III. Analysis.**

### *a. 2015 Session of the Idaho Legislature – House Bill 184.*

During the 2015 Session of the Idaho Legislature, Jeremy Pisca, attorney and lobbyist for the Idaho Beer and Wine Distributors Association, proposed House Bill 184,<sup>5</sup> which was passed

---

<sup>3</sup> Lt. Wheatley has since been promoted to the rank of Captain.

<sup>4</sup> IDAPA 11.05.01.011.02;

The Director hereby delegates his authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code, to the, Alcohol Beverage Control Bureau, Idaho State Police. All applications and inquiries concerning alcoholic beverage licenses must be directed to the Alcohol Beverage Control Bureau at P.O. Box 700, Meridian, Idaho 83680. The Alcohol Beverage Control Bureau provides forms for all applications and inquiries. Nothing contained herein shall interfere with the Director's supervisory authority for alcoholic beverage licensing.

Under this administrative rule, this Petition for Declaratory Ruling will be decided by the Bureau Chief of ABC, Idaho State Police Capt. Russell Wheatley as a final order under IDAPA 11.04.01.402.

<sup>5</sup> A copy of House Bill 184 from the 2015 Idaho legislative session is attached as Exhibit A.



by both houses of the Idaho Legislature and signed by the Governor. It becomes effective July 1, 2015.

House Bill 184 amended IDAHO CODE § 23-1001 to clarify the definition of certificate of approval such that a certificate of approval holder cannot sell its products directly to Idaho brewers. House Bill 184 also amended IDAHO CODE § 23-1003(d), and (e), and (f) to clarify that upon proper application a small brewer can be licensed to sell at retail the beer it produces at its licensed brewery directly from its premises or one remote retail location, or both, and that a small brewer may also be licensed as a wholesaler for the sale of beer produced at its brewery to retailers. These authorizations are an exception to what is known as “the three tier system” under which all beer and wine products manufactured in or outside of the state of Idaho (“Tier 1”) must be sold to an Idaho distributor/wholesaler (Tier 2”) who then sells it to Idaho retailers (“Tier 3) for consumer purchase. To the extent the passage of House Bill 184 resolves any of the concerns raised by the Petition for Declaratory Ruling, ABC forgoes consideration of those concerns.

*b. The 2014 Anheuser-Busch Purchase of 10 Barrel Idaho.*

The primary question in this request for a declaratory ruling is whether the Anheuser-Busch purchase of Idaho brewer 10 Barrel Idaho operates to exempt 10 Barrel Idaho from the what is commonly known as the “small brewers” exceptions in IDAHO CODE § 23-1003(d), (e) and (f) because Anheuser-Busch manufactures more than 30,000 barrels of beer annually. The Distributors argue that ABC must consider Anheuser-Busch as a brewer whose total beer production outside of the state of Idaho together with the beer produced by 10 Barrel Idaho in Idaho far exceeds the 30,000 barrel per year limit for 10 Barrel Idaho to operate as a small brewer in Idaho under IDAHO CODE § 23-1003(d), (e) and (f). If this is the result, 10 Barrel

Idaho could no longer produce and sell its beer at retail directly from its premises or to retailers; it would instead have to sell the beer it produces to an Idaho distributor who would in turn sell it to Idaho retailers, including back to 10 Barrel Idaho, for retail sale to the public.

The analysis of this question turns on the authority ABC has over Anheuser-Busch and 10 Barrel Idaho, i.e., the licensing status of Anheuser-Busch and 10 Barrel Idaho under title 23, chapter 10, Idaho Code, in the state of Idaho. This series of statutes defines and regulates the licensing of those involved in the beer industry as they conduct their businesses in the state of Idaho.

IDAHO CODE § 23-1001(b) defines “brewer” as “a person licensed to manufacture beer.” In the same statute, a “retailer” is “a person licensed to sell beer to consumers at premises described in the license,” IDAHO CODE § 23-1001(i), and a “wholesaler” is “any person licensed to sell beer to retailers, wholesalers, permittees or consumers and distribute beer from warehouse premises described in the license,” IDAHO CODE §23-1001(k). IDAHO CODE § 23-1003(a) requires that “Before any brewer shall manufacture or any dealer or wholesaler import or sell beer with in the state of Idaho, he shall apply to the director for a license.” While the geographic scope of the term “license” is not defined in IDAHO CODE 23-1001(b), (i) or (k), it is clear that title 23, chapter 10, Idaho code, regulates the brewing, distribution and sale of beer *in Idaho*.

Where chapter 10 of title 23 expressly addresses the importation of out-of-state beer into Idaho, the term “brewer” is not used to describe the maker of such beer; rather, the term “manufacturer” is used. IDAHO CODE § 23-1027. Thus, the term “brewer” as used in IDAHO CODE 23-1001(b) refers to a person who is licensed to manufacture beer in the state of Idaho.

Anheuser-Busch is not licensed as a brewer, retailer or wholesaler in the state of Idaho. It is licensed in Idaho only as holding a certificate of approval,<sup>6</sup> defined as “a license issued to a person whose business is located outside of the state of Idaho, who sells beer to wholesalers or brewers located within the state of Idaho.” IDAHO CODE § 23-1001(c).<sup>7</sup> Idaho’s ABC has no control or regulatory authority over Anheuser-Busch other than in its status of being licensed with a certificate of approval in Idaho. Therefore, its production of beer outside of the state of Idaho is beyond ABC’s regulatory authority or control.

10 Barrel Idaho is licensed in Idaho as a brewer<sup>8</sup> as that term is defined at IDAHO CODE § 23-1001(b). Because it produces less than 30,000 barrels of beer per year, it also qualifies for licensure and to conduct business as a retailer and wholesaler of the beer it produces at its licensed premises to a limited extent under several subsections of IDAHO CODE § 23-1003:

(d) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, upon payment of a retailer’s annual license fee, may be issued a brewer’s retail beer license for the retail sale of the products of his brewery at his licensed premises or one (1) remote retail location, or both. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

(e) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually may be issued a brewer’s pub license. Upon payment of a retailer’s annual license fee, and subject to the fees in sections 23-1015 and 23-1016, Idaho Code, a brewer may, at his licensed brewery or at one (1) remote retail location, or both, sell at retail the products of any brewery by the individual bottle, can or glass. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, on the products of his brewery, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

---

<sup>6</sup> Copies of Anheuser-Busch’s Idaho certificate of approval licenses for 2013-present are attached as Exhibit B.

<sup>7</sup> As amended by 2015 House Bill 184, the definition of certificate of approval will no longer include the phrase “or brewers” which eliminates this avenue of sale by the holder of a certificate of approval.

<sup>8</sup> Copies of 10 Barrel Idaho’s Idaho licenses and applications for 2013-present are attached as Exhibit C.

(f) A brewer licensed under the provisions of subsection (d) or (e) of this section may be licensed as a wholesaler for the sale of beer to retailers other than at the licensed brewery and one (1) remote retail location and shall not be required to pay an additional fee. Such brewer shall, however, comply with and be subject to all other regulations or provisions of law that apply to a wholesaler's license, except as the laws may restrict sales at the licensed brewery or one (1) other remote retail location. The holder of a brew pub license shall not be disqualified from holding a retail wine license or wine by the drink license for the sale of wine at the brew pub premises on the grounds that the licensee is also licensed as a wholesaler.

Anheuser-Busch is licensed in Idaho with a certificate of approval. There is nothing in relevant Idaho law that prohibits the holder of a certificate of approval from having a financial interest in a licensed small brewer's business. Such prohibitions do exist for wholesalers and dealers, but these prohibitions do not apply to small brewers. IDAHO CODE 23-1032(1)(a).

Nor is Anheuser-Busch prohibited from having an interest in 10 Barrel Idaho because 10 Barrel Idaho is also a retailer at its own premises and at one remote location as IDAHO CODE § 23-1033(1) provides:

*Except as provided in sections 23-1003(d), and 23-1003(e), Idaho Code, it shall be unlawful for any brewer, dealer, wholesaler, or the holder of any certificate of approval, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee:*

(a) To have any financial interest in any licensed retailer's business, or to own or control any real property upon which a licensed retailer conducts his business, except such property as shall have been so owned or controlled continuously for more than one (1) year prior to July 1, 1975; provided however, that a brewer licensed pursuant to section 23-1003(d) or (e), Idaho Code, may be permitted to have a financial interest in one (1) additional brewery licensed pursuant to section 23-1003(d) or (e), Idaho Code...

As noted earlier, IDAHO CODE § 23-1003(d), (e) and (f) are exceptions to the "three-tier system" governing the manufacture, distribution or sale of beer in Idaho. These provisions allow a small brewer to act as a retailer at the brewer's own premises and at one remote location, and to act as a wholesaler for the sale of beer the brewer manufactures to retailers. The holder of a certificate

of approval may have an interest in a small brewer, and by virtue of that fact, the small brewer is not prevented from retailing his own or other products in the limited manner set forth in these provisions.

*c. Constitutional Questions.*

To the extent any constitutional issues or claims have been raised by any of the parties to this action, ABC declines consideration of them. If any party petitions this Order on Petition Declaratory Ruling for judicial review, constitutional questions may then be raised for consideration by the district court. IDAPA 04.11.01.415.

**IV. Conclusion and Declaratory Ruling.**

Based on the foregoing and its authority pursuant to IDAHO CODE § 67-5255 and IDAPA 04.11.01.4012, ABC hereby issues its declaratory ruling that the Anheuser-Busch purchase of 10 Barrel Idaho did not operate to prohibit either entity from pursuing those businesses as they are licensed by ABC in the state of Idaho.

**V. Right to Judicial Review and Appeal.**

This is a final agency action issuing a declaratory ruling and is a final agency order.

Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this declaratory ruling may appeal to district court by filing a petition in the District Court in the county in which:

- i. A hearing was held;
- ii. The declaratory ruling was issued;
- iii. The party appealing resides, or operates its principal place of business in Idaho; or
- iv. The real property or personal property that was the subject of the declaratory ruling is located.

This appeal must be filed within twenty-eight (28) days of the service date of this declaratory ruling. IDAHO CODE § 67-5273 and IDAPA 04.11.01.402.01 and .02.

DATED this 24 day of June 2015.



---

CAPT. RUSSELL E. WHEATLEY  
Bureau Chief  
Alcohol Beverage Control  
Idaho State Police

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of June 2015, I caused to be served a true and correct copy of the foregoing ORDER ON PETITION FOR DECLARATORY RULING in the above-referenced matter by the method indicated below, and addressed to the following:

Susan M. Johnson  
STOEL RIVES, LLP  
600 University Street, Suite 3600  
Seattle, WA 98101-4109

Via facsimile to (206) 386-7500

W. Christopher Pooser  
STOEL RIVES, LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 82702-9000

Via facsimile to (208) 389-9040

Jason S. Risch  
Jeremy Pisca  
RISCH PISCA, PLLC  
ATTORNEYS AT LAW  
407 West Jefferson Street  
Boise, ID 83702

Via facsimile to (208) 345-9928

Stephanie A. Altig  
Kenneth M. Robins  
DEPUTY ATTORNEYS GENERAL  
IDAHO STATE POLICE  
700 S. Stratford Drive  
Meridian, ID 83642

Via hand delivery



---

Nichole Harvey  
Management Assistant  
Alcohol Beverage Control  
Idaho State Police

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 184

BY STATE AFFAIRS COMMITTEE

AN ACT

1 RELATING TO BEER; AMENDING SECTION 23-1001, IDAHO CODE, TO REVISE A DEFINI-  
2 TION; AND AMENDING SECTION 23-1003, IDAHO CODE, TO CLARIFY PROVISIONS  
3 RELATING TO SMALL BREWER SELF-DISTRIBUTION AND TO PROVIDE CORRECT TER-  
4 MINOLOGY.  
5

6 Be It Enacted by the Legislature of the State of Idaho:

7 SECTION 1. That Section 23-1001, Idaho Code, be, and the same is hereby  
8 amended to read as follows:

9 23-1001. DEFINITIONS. As used in this chapter:

10 (a) The word "beer" means any beverage obtained by the alcoholic fer-  
11 mentation of an infusion or decoction of barley, malt and/or other ingredi-  
12 ents in drinkable water.

13 (b) The word "brewer" means a person licensed to manufacture beer.

14 (c) "Certificate of approval" means a license issued to a person whose  
15 business is located outside of the state of Idaho, who sells beer to whole-  
16 salers ~~or brewers~~ located within the state of Idaho.

17 (d) The term "dealer" means a person licensed to import beer into this  
18 state for sale to a wholesaler.

19 (e) The word "director" means the director of the Idaho state police.

20 (f) The words "live performance" mean a performance occurring in a the-  
21 ater and not otherwise in violation of any provision of Idaho law.

22 (g) The word "person" includes any individual, firm, copartnership,  
23 association, corporation or any group or combination acting as a unit, and  
24 the plural as well as the singular number unless the intent to give a more  
25 limited meaning is disclosed by the context.

26 (h) The word "premises" means the building and contiguous property  
27 owned, or leased or used under government permit by a licensee as part of  
28 the business establishment in the business of sale of beer at retail, which  
29 property is improved to include decks, docks, boardwalks, lawns, gardens,  
30 golf courses, ski resorts, courtyards, patios, poolside areas or similar im-  
31 proved appurtenances in which the sale of beer at retail is authorized under  
32 the provisions of law.

33 (i) The word "retailer" means a person licensed to sell beer to con-  
34 sumers at premises described in the license.

35 (j) The word "theater" means a room, place or outside structure for per-  
36 formances or readings of dramatic literature, plays or dramatic representa-  
37 tions of an art form not in violation of any provision of Idaho law.

38 (k) The word "wholesaler" means any person licensed to sell beer to  
39 retailers, wholesalers, permittees or consumers and distribute beer from  
40 warehouse premises described in the license.

EXHIBIT

A



1 (1) All other words and phrases used in this chapter, the definitions of  
2 which are not herein given, shall be given their ordinary and commonly under-  
3 stood and acceptable meanings.

4 SECTION 2. That Section 23-1003, Idaho Code, be, and the same is hereby  
5 amended to read as follows:

6 23-1003. BREWERS', DEALERS' AND WHOLESALERS' LICENSES. (a) Before  
7 any brewer shall manufacture or any dealer or wholesaler import or sell beer  
8 within the state of Idaho, ~~he~~ such brewer shall apply to the director for  
9 a license. The application form shall be prescribed and furnished by the  
10 director and require that the applicant show that ~~he~~ such brewer possesses  
11 all the qualifications and none of the disqualifications of a licensee. To  
12 determine qualification for a license, the director shall cause an inves-  
13 tigation that shall include a fingerprint-based criminal history check of  
14 the Idaho central criminal history database and the federal bureau of inves-  
15 tigation criminal history database. Each person listed as an applicant on  
16 an initial application shall submit a full set of fingerprints and the fee  
17 to cover the cost of the criminal history background check with the appli-  
18 cation. The application shall also be accompanied by the required licensee  
19 fee; provided, that where the applicant is or will be within more than one  
20 (1) of the foregoing classifications, ~~he~~ the applicant shall apply for each  
21 classification but shall pay only one (1) license fee, which shall be for  
22 the classification requiring the highest fee. If the director is satisfied  
23 that the applicant possesses the qualifications and none of the disquali-  
24 fications for the license, ~~he~~ the director shall issue a license for each  
25 classification applied for, subject to the restrictions and upon the condi-  
26 tions in this act specified, which license or licenses shall be at all times  
27 prominently displayed in the place of business of the licensee.

28 (b) Each wholesaler shall, in addition to the application, file with  
29 the director a notice in writing signed by the dealer or brewer and the whole-  
30 saler stating the geographic territory within which the wholesaler will dis-  
31 tribute beer to retailers. The territory will be agreed upon between the  
32 dealer or brewer and the wholesaler and may not be changed or modified with-  
33 out the consent of both the dealer or brewer and the wholesaler. Provided  
34 however, nothing in this section shall be interpreted to prohibit a brewer or  
35 dealer from permitting more than one (1) distributor for the same geographic  
36 territory.

37 (c) In the event that a wholesaler sells beer to a retailer who is lo-  
38 cated outside the geographical territory designated by that wholesaler on  
39 the notice provided for in subsection (b) of this section, the dealer or  
40 wholesaler who has designated the geographical territory in which the sale  
41 occurred may apply to a district court of this state for the issuance of an  
42 injunction enjoining sales of beer by the wholesaler outside of ~~his~~ its des-  
43 ignated geographical territory. The procedure for issuance of an injunction  
44 pursuant to this act shall be subject to the Idaho rules of civil procedure.  
45 Upon proof to the court that a wholesaler has made a sale of beer outside ~~his~~  
46 of its designated geographical territory, the court shall issue an injunc-  
47 tion directed to the wholesaler prohibiting sales of beer outside ~~his~~ of its  
48 designated geographical territory.

1 (d) Any brewer licensed within the state of Idaho who produces fewer  
2 than thirty thousand (30,000) barrels of beer annually, upon payment of a re-  
3 tailer's annual license fee, may be issued a brewer's retail beer license  
4 for the retail sale of the products of ~~his~~ its brewery at ~~his~~ its licensed  
5 premises or one (1) remote retail location, or both. Any brewer selling beer  
6 at retail or selling to a retailer must pay the taxes required in section  
7 23-1008, Idaho Code, but need not be licensed as a wholesaler for the purpose  
8 of selling beer at the brewery or at one (1) remote retail location.

9 (e) Any brewer licensed within the state of Idaho who produces fewer  
10 than thirty thousand (30,000) barrels of beer annually may be issued a  
11 brewer's pub license. Upon payment of a retailer's annual license fee, and  
12 subject to the fees in sections 23-1015 and 23-1016, Idaho Code, a brewer  
13 may, at ~~his~~ its licensed brewery or at one (1) remote retail location, or  
14 both, sell at retail the products of any brewery by the individual bottle,  
15 can or glass. Any brewer selling beer at retail or selling products of its  
16 brewery to a retailer must pay the taxes required in section 23-1008, Idaho  
17 Code, on the products of ~~his~~ its brewery, but need not be licensed as a whole-  
18 saler for the purpose of selling beer at the brewery or at one (1) remote  
19 retail location.

20 (f) A brewer licensed under the provisions of subsection (d) or (e) of  
21 this section may be licensed as a wholesaler for the sale of beer produced by  
22 such brewery to retailers other than at the licensed brewery and one (1) re-  
23 mote retail location and shall not be required to pay an additional fee. Such  
24 brewer shall, however, comply with and be subject to all other regulations  
25 or provisions of law that apply to a wholesaler's license, except as the laws  
26 may restrict sales at the licensed brewery or one (1) other remote retail lo-  
27 cation. The holder of a brew pub license shall not be disqualified from hold-  
28 ing a retail wine license or wine by the drink license for the sale of wine at  
29 the brew pub premises on the grounds that the licensee is also licensed as a  
30 wholesaler.

**BEFORE THE DIRECTOR OF THE IDAHO STATE POLICE**

IN RE: THE MATTER OF  
SMALL BREWER EXEMPTIONS

)  
) Case No. 14 ABC-024  
)  
) ORDER ON 10 BARREL BREWING  
) IDAHO, LLC's PETITION TO  
) INTERVENE IN PETITION FOR  
) DECLARATORY RULING  
)  
)  
)

---

**I. Introduction.**

On December 4, 2014, the Director of the Idaho State Police, Alcohol Beverage Control (“ABC”) received a Petition for Declaratory Ruling filed on behalf of the Idaho Beer and Wine Distributors Association, Inc. (“Distributors”). The Distributors seek a declaratory ruling from the Director as to whether Anheuser Busch, LLC (“Anheuser Busch”), who recently purchased 10 Barrel Idaho, LLC (“10 Barrel Idaho”), can continue to operate 10 Barrel Idaho as a small brewer and/or brew pub under IDAHO CODE § 23-1003(d) and (e). The Distributors argue that Anheuser Busch cannot do so and want the Director to enter a declaratory ruling consistent with their position.

**II. Laws and Rules Governing Administrative Procedure.**

All proceedings in this matter at the administrative level are governed by the Idaho Administrative Procedures Act, title 67, chapter 52, Idaho Code and the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01.

**III. Delegation of Authority.**

Under IDAPA 11.05.01.011:

**SCANNED**

The Director hereby delegates his authority for the licensing of establishments which sell alcoholic beverages, as contained in Title 23, Chapters 9, 10, and 13, Idaho Code, to the, Alcohol Beverage Control Bureau, Idaho State Police. All applications and inquiries concerning alcoholic beverage licenses must be directed to the Alcohol Beverage Control Bureau at P.O. Box 700, Meridian, Idaho 83680. The Alcohol Beverage Control Bureau provides forms for all applications and inquiries. Nothing contained herein shall interfere with the Director's supervisory authority for alcoholic beverage licensing.

Under this administrative rule, this Petition for Declaratory Ruling will be decided by the Bureau Chief of ABC, Idaho State Police Lt. Russell Wheatley as a preliminary order under IDAPA 11.04.01.730.

#### **IV. 10 Barrel Idaho's Petition to Intervene.**

On December 10, 2014, 10 Barrel Idaho submitted a Petition to Intervene in the Distributors' Petition for Declaratory Ruling. The Distributors, through their legal counsel, were served with a copy of 10 Barrel Idaho's Petition to Intervene<sup>1</sup> and did not file a timely objection to it. IDAPA 04.00.01.354.

Consideration of this Petition to Intervene is governed by IDAPA 04.11.01.350-354.<sup>2</sup>

---

<sup>1</sup> See, 10 Barrel Idaho's Petition to Intervene p. 7, Certificate of Service.

<sup>2</sup> Office of the Attorney General, Idaho Rules of Administrative Procedure, IDAPA 11.01.04:

350. Order Granting Intervention Necessary (Rule 350). Persons not applicants or claimants or appellants, petitioners, complainants, protestants, or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party.

351. Form and Contents of Petitions to Intervene (Rule 351). Petitions to intervene must comply with Rules 200, 300, and 301. The petition must set forth the name and address of the potential intervenor and must state the direct and substantial interest of the potential intervenor in the proceeding. If affirmative relief is sought, the petition must state the relief sought and the basis for granting it.

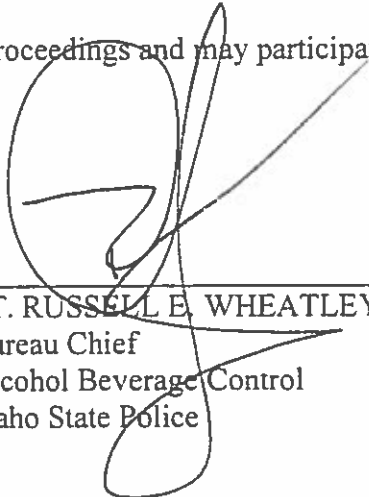
352. Timely Filing of Petitions to Intervene (Rule 352). Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing or prehearing conference, whichever is earlier, unless a different time is provided by order or notice. Petitions not timely filed must state a substantial reason for delay. The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenors who do not file timely petitions are bound by orders and notices earlier entered as a condition of granting the untimely petition.

10 Barrel Idaho's Petition to Intervene is timely filed. It describes its direct and substantial interest in this proceeding for a declaratory ruling, simply summarized as whether, having been purchased by Anheuser Bush, 10 Barrel Idaho can continue to operate as a small brewer/brew pub under Idaho law. 10 Barrel Idaho's participation in this matter will not unduly broaden the issues because the issue remains the same. 10 Barrel Idaho's arguments are, of course, are in direct opposition to those of the Distributors and as such will help frame both sides of this debate for the analysis that will eventually lead to the decision in the declaratory ruling.

**V. Order Granting Petition to Intervene.**

Based on the foregoing, the undersigned having carefully considered this matter and being fully advised in the premises, hereby GRANTS 10 Barrel Idaho's Petition to Intervene. 10 Barrel Idaho is now therefore a party to these proceedings and may participate accordingly.

DATED this 6th day of January 2015.



---

LT. RUSSELL E. WHEATLEY  
Bureau Chief  
Alcohol Beverage Control  
Idaho State Police

---

353. Granting Petitions to Intervene (Rule 353). If a petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions. If it appears that an intervenor has no direct or substantial interest in the proceeding, the presiding officer may dismiss the intervenor from the proceeding.

354. Orders Granting Intervention – Opposition (Rule 354). No order granting a petition to intervene will be acted upon fewer than seven (7) days after its filing, except in a hearing in which any party may be heard. Any party opposing a petition to intervene by motion must file the motion within seven (7) days after receipt of the petition to intervene and serve the motion upon all parties of record and upon the person petitioning to intervene.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January 2015, I caused to be served a true and correct copy of the foregoing ORDER ON 10 BARREL BREWING IDAHO, LLC's PETITION TO INTERVENE IN PETITION FOR DECLARATORY RULING in the above-referenced matter by the method indicated below, and addressed to the following:

Susan M. Johnson  
STOEL RIVES, LLP  
600 University Street, Suite 3600  
Seattle, WA 98101-4109

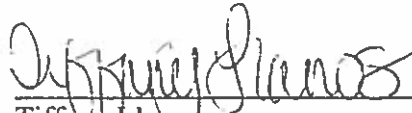
Via facsimile to (206) 386-7500

W. Christopher Poosner  
STOEL RIVES, LLP  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 82702-9000

Via facsimile to (208) 389-9040

Jason S. Risch  
RISCH PISCA, PLLC  
ATTORNEYS AT LAW  
407 West Jefferson Street  
Boise, ID 83702

Via facsimile to (208) 345-9928

  
\_\_\_\_\_  
Tiffany Llanos  
Legal Assistant



101 S. Capitol Boulevard, Suite 1900  
Boise, Idaho 83702  
main 208.389.9000  
fax 208.389.9040  
www.stoel.com

	Name:	Fax No.	Company/Firm	Phone No.
TO:	Jason S. Risch	208- 345-9928	Risch & Pisca PLLC	
	SUSAN POE	208-884-7228	Idaho State Police	
	LT. RUSS WHEATLEY	208-884-7096	Idaho State Police	

	Name:	Sender's Direct Dial:	Sender's Direct Email:
FROM:	W. Christopher Pooser	(208) 387-4289	christopher.pooser@stoel.com

Client:	10 Barrell Brewing Idaho, LLC	Matter:	
---------	-------------------------------	---------	--

Date: December 10, 2014

No. of Pages (including this cover): 14

Originals Not Forwarded Unless Checked:  First Class Mail  Overnight Delivery  Hand Delivery

**In case of error, call the fax operator at (208) 387-4200.**

*This facsimile may contain confidential information that is protected by the attorney-client or work product privilege. If the reader of this message is not the intended recipient or an employee responsible for delivering the facsimile, please do not distribute this facsimile, notify us immediately by telephone, and return this facsimile by mail. Thank you.*

**COMMENTS:**

**Please find the attached Petition to Intervene in Petition for Declaratory Ruling.**

RECEIVED  
DEC 10 2014  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

Susan M. Johnson  
Email: *susan.johnson@stoel.com*  
**STOEL RIVES LLP**  
600 University Street, Suite 3600  
Seattle, WA 98101-4109  
Telephone: (206) 386-7684  
Fax: (206) 386-7500

W. Christopher Pooser, ISB No. 5525  
Email: *christopher.pooser@stoel.com*  
**STOEL RIVES LLP**  
101 S. Capitol Boulevard, Suite 1900  
Boise, ID 83702-7705  
Telephone: (208) 389-9000  
Fax: (208) 389-9040

Attorneys for 10 Barrel Brewing Idaho, LLC

**BEFORE THE DIRECTOR OF THE IDAHO STATE POLICE**

**IN RE: MATTER OF SMALL BREWER  
EXEMPTIONS**

Case No. 14ABC024

**10 BARREL BREWING IDAHO, LLC'S  
PETITION TO INTERVENE IN  
PETITION FOR DECLARATORY  
RULING**

Pursuant to IDAPA 04.11.01.353, 10 Barrel Brewing Idaho, LLC ("10 Barrel Idaho"), by and through its attorneys of record, hereby petitions to intervene in the Petition for Declaratory Ruling filed by the Idaho Beer and Wine Distributors Association (the "Association"). This petition to intervene is supported by Idaho State Police Temporary Alcohol Beverage License No. 14407 (attached as Exhibit A), Idaho State Police Temporary Alcohol Beverage License No.

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION  
FOR DECLARATORY RULING - 1**

**RECEIVED**  
DEC 10 2014  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



11400 (attached as Exhibit B), and the Association's cover letter accompanying the Petition for Declaratory Ruling (attached as Exhibit C).

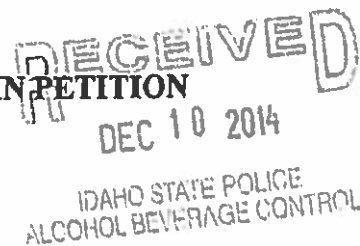
## I. INTRODUCTION AND BACKGROUND

Idaho Code § 23-1003(d) allows “[a]ny brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually” to obtain a “brewer’s retail beer license for the retail sale of the products of his brewery at his licensed premises.” Idaho Code § 23-1003(e) allows the same brewer to obtain a brewer’s pub license, which allows the brewer to “sell at retail the products of any brewery by the individual bottle, can or glass.” On December 4, 2014, the Association filed a Petition for Declaratory Ruling asking the Director of the Idaho State Police (the “Director”) to declare that the 30,000 barrel limitation must include all the beer produced by the brewer, regardless of where the brewing occurs—i.e., whether brewed in or outside of Idaho.

10 Barrel Idaho operates a brewery and brewpub in Boise, Idaho and held a brewer’s pub license issued under Idaho Code § 23-1003(e) and related retail wine, liquor, and keg endorsements. Anheuser Busch, LLC (“Anheuser Busch”) recently purchased the membership interests of 10 Barrel Idaho. It also purchased the membership interests of a related Oregon-based brewer, 10 Barrel Brewing, LLC (“10 Barrel Oregon”). While not an Idaho licensed brewer, Anheuser Busch is itself a brewer and operates numerous other breweries inside and outside the United States.

Based on the guidance of the Idaho State Police-Alcohol Beverage Control (“Idaho ABC”), 10 Barrel Idaho disclosed the change in ownership of its membership interests and submitted an application to transfer its brewer’s pub license and related endorsements to itself

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION  
FOR DECLARATORY RULING - 2**



under the new ownership structure. On November 26, 2014, Idaho ABC issued Temporary Alcohol Beverages License Nos. 14407 and 11400 to 10 Barrel Idaho. *See* Exs. A, B. As the Association acknowledges in its Petition for Declaratory Ruling, the Director's ruling on the interpretation of the 30,000 barrel limitation under Idaho Code § 23-1003(e) will affect 10 Barrel Idaho's application to transfer and/or its continued eligibility to hold its licenses. As a result, 10 Barrel Idaho has a direct and substantial interest in the subject matter of the petition, and the Director must allow it to intervene as a party.

## II. ARGUMENT

### A. Standard of Review for Intervention.

Intervention in this matter is governed by the Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01, *et seq.* (the "Administrative Rules"). *See* IDAPA 11.05.01.003 (stating that administrative appeals before the Director are governed by IDAPA 04.11.01). The Administrative Rules allow a person who claims a "direct and substantial interest in the proceeding" to petition for an order granting intervention to become a party. IDAPA 04.11.01.350. A petition to intervene must be filed at least 14 days before the date set for formal hearing or prehearing conference, whichever is earlier. IDAPA 04.11.01.352. "If a petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding and does not unduly broaden the issues, the presiding officer will grant intervention, subject to reasonable conditions." IDAPA 04.011.01.353.

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION  
FOR DECLARATORY RULING - 3**

**RECEIVED**  
DEC 10 2014

**B. Because the Association's Petition for Declaratory Ruling Admittedly Impacts the Transfer of 10 Barrel Idaho's Licenses, 10 Barrel Idaho Has a Direct and Substantial Interest in the Petition and Must Be Allowed to Intervene.**

10 Barrel Idaho has timely petitioned to intervene in this proceeding and has a direct and substantial interest in the subject matter of the Association's Petition for Declaratory Ruling. 10 Barrel Idaho applied with Idaho ABC to transfer its brewer's pub license and related retail endorsements and was recently issued temporary License Nos. 14407 and 11400. *See* Exs. A, B. 10 Barrel Idaho obtained the licenses pursuant to Idaho Code § 23-1003(e) due to its status as a "brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually." As a brewer licensed under that provision, 10 Barrel Idaho may also be "licensed as a wholesaler for the sale of beer to retailers other than at the licensed brewery." *See* Idaho Code § 23-1003(f). 10 Barrel Idaho, however, is not licensed as a wholesaler under Idaho Code § 23-1003(f) and does not intend to seek wholesaler licensing.

The Association's Petition for Declaratory Ruling asks the Director to declare that the location of the production of the 30,000 barrel limitation is immaterial. Pet. for Decl. Ruling at 1. In other words, contrary to the statutory reference to Idaho brewer licensure (something out of state brewers are not required to receive), the Association asks the Director to include all the barrels brewed by a brewer, no matter where the brewing takes place, and by implication, to include all barrels brewed by a parent or affiliate entity of the Idaho licensee. According to the Association, such an interpretation means that "any brewer brewing beer anywhere in the United States, not just in Idaho—or anywhere in the world for that matter—who brews in excess of 30,000 barrels will be disqualified from obtaining or holding the licenses enumerated in 23-1003(d) and (e) or from receiving any benefit afforded to a small brewery." *Id.* at 4.

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION FOR DECLARATORY RULING - 4**

The impact of the Association's interpretation of Idaho Code § 23-1003(d) and (e) would have an immediate and direct effect on 10 Barrel Idaho. 10 Barrel Idaho brews beer only at its Boise location and brews significantly less than 30,000 barrels per year. Including all barrels brewed by 10 Barrel Oregon and/or Anheuser Busch in states other than Idaho would prevent it from receiving final approval to transfer and/or from being eligible to hold its brewer's pub license and related retail endorsements. 10 Barrel Idaho cannot continue to brew beer and operate its brewpub in Boise without the final license and endorsements.

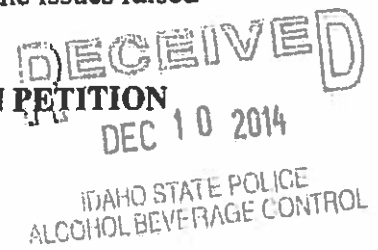
The direct and substantial impact to 10 Barrel Idaho cannot be denied. As the Association states in its petition, "[o]ne need not look further than an application currently before Alcohol Beverage Control. It is public knowledge that Anheuser Busch, the largest brewer in the world, recently purchased the smaller Oregon-based brewery known as 10 Barrel Brewing Company." *Id.* at 7. And as the Association's legal counsel explained in the cover letter transmitting the petition to the Director:

It has come to my attention that an application to transfer license #11400 and #14407 is currently pending before the Alcohol Beverage Control bureau. As I am sure you are aware this licensee [sic] was obtained under the very statutes that are at issue in my client's petition. I think it would be prudent to hold off on a final decision regarding this application until the interpretation of the small brewers statute is resolved.

Ex. C. Given that the Association's Petition for Declaratory Ruling is a collateral attack on the transfer of 10 Barrel Idaho's brewer's pub license and retail endorsements, 10 Barrel Idaho has a substantial and direct interest in the outcome of this proceeding.

It follows that 10 Barrel Idaho must be allowed to intervene as a party pursuant to IDAPA 04.11.01.353. 10 Barrel Idaho's participation will not unduly broaden the issues raised

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION  
FOR DECLARATORY RULING - 5**



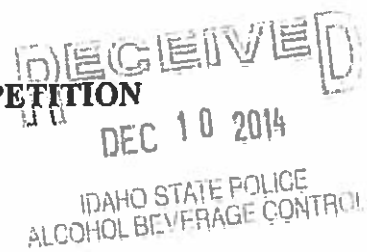
in the Association's petition. In fact, it will have the opposite effect and will focus the issues before the Director. Allowing 10 Barrel Idaho to participate now will also ensure the issues raised are addressed quickly and efficiently, rather than in multiple proceedings. If 10 Barrel Idaho's request to intervene is denied and the Association's petition granted, the subsequent denial of 10 Barrel Idaho's application to transfer would result in additional contested case proceedings, in which the same issues would be litigated. 10 Barrel Idaho thus meets the standard of IDAPA 04.011.01.353 and must be allowed to intervene and participate as a party.

### III. RELIEF REQUESTED

10 Barrel Idaho requests permission to intervene as allowed by the Administrative Rules. Upon issuance of an order granting intervention, 10 Barrel Idaho will request that the Association's Petition for Declaratory Ruling be dismissed with prejudice, as a matter of law. The Association's interpretation of Idaho Code § 23-1003(d) and (e) does not conform with the plain meaning of the provision's clear and unambiguous language. Therefore, 10 Barrel Idaho requests the following relief:

1. That the Director grant its Petition to Intervene in the Association's Petition for Declaratory Ruling;
2. That the Director dismiss the Association's Petition for Declaratory Ruling with prejudice; and
3. That the Director grant such other relief as it determines appropriate, just, and equitable, including an award of reasonable attorney's fees, costs, and expenses as permitted by law.

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION  
FOR DECLARATORY RULING - 6**



**IV. CONCLUSION**

For all the reasons set forth above, 10 Barrel Idaho is entitled to intervene in the Association's Petition for Declaratory Ruling. 10 Barrel Idaho requests an order allowing it to intervene and to fully participate as a party in this proceeding.

DATED: December 10 2014.

STOEL RIVES LLP



Susan M. Johnson

W. Christopher Pooser

Attorneys for 10 Barrel Brewing Idaho, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on December 10, 2014, I served the foregoing **10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION FOR DECLARATORY RULING** on the following parties in the manner set forth below:

Jason S. Risch (ISB # 6655)  
Risch + Pisca, PLLC  
407 West Jefferson Street  
Boise, Idaho 83702  
Fax: (208) 345-9929

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Via Email

Attorneys for the Idaho Beer and Wine Distributors Association

Idaho State Police  
c/o Susan Poe  
Fax: (208) 884-7228  
c/o Lt. Russ Wheatley  
Fax: (208) 884-7076

- Via U.S. Mail
- Via Facsimile
- Via Overnight Mail
- Via Hand Delivery
- Via Email

  
W. Christopher Pooser

**10 BARREL BREWING IDAHO, LLC'S PETITION TO INTERVENE IN PETITION FOR DECLARATORY RULING - 7**

**RECEIVED**  
DEC 10 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

JASON S. RISCH  
ATTORNEY AT LAW

**RISCH ♦ PISCA, PLLC**

LAW AND POLICY

407 W. JEFFERSON STREET  
BOISE, IDAHO 83702

TELEPHONE  
(208) 345-9929

TELEFAX  
(208) 345-9928

December 4, 2014

Colonel Ralph Powell, Director  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642

Re: Small Brewers License Determination

Dear Colonel Powell:

Enclosed herewith please find my client's petition for a declaratory ruling pertaining to your agency's application of the small brewers statutes.

It has come to my attention that an application to transfer license #11400 and #14407 is currently pending before the Alcohol Beverage Control bureau. As I am sure you are aware this licensee was obtained under the very statutes that are at issue in my client's petition. I think it would be prudent to hold off on a final decision regarding this application until the interpretation of the small brewers statute is resolved. Given the existence of the temporary licenses issued for the 10 Barrel premise, I see no urgency to finalize that license.

If your agency does intend to issue this license, I would appreciate a twenty-four hour advance notification. In addition, I would welcome the opportunity to meet with you, Lt. Wheatley and the deputy attorney general handling this matter. Please feel free to contact me at your earliest convenience if you are amiable to such meeting.

Very truly yours,



JASON S. RISCH

JSR/ah  
Enclosures  
Cc: Lt. Wheatley  
David Hensley

RECEIVED  
DEC 04 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

JASON S. RISCH (ISB # 6655)  
RISCH ♦ PISCA, PLLC  
Attorneys at Law  
407 West Jefferson Street  
Boise, Idaho 83702  
Telephone: (208) 345-9929  
Facsimile: (208) 345-9928

Attorneys for the Idaho Beer and Wine Distributors Association, Inc.

A MATTER BEFORE THE DIRECTOR OF THE IDAHO STATE POLICE

IN RE: THE MATTER OF )  
SMALL BREWER EXEMPTIONS ) PETITION FOR DECLARATORY RULING  
I.C. § 67-5232  
I.D.A.P.A. 04.11.01.400 *et seq.*  
\_\_\_\_\_)

COMES NOW, the Idaho Beer and Wine Distributors Association, Inc., by and through its counsel of record, Risch Pisca, PLLC and hereby petitions the Director of the Idaho State Police for a declaratory ruling as to the applicability and interpretation of Idaho Code § 23-1003(d), 23-1003(e) and all other references in Idaho Code which afford exemptions and allowances to brewers who “produce fewer than thirty thousand (30,000) barrels of beer annually” and specifically requests an order declaring the location of production of said volumes of beer is immaterial to the exemptions and allowances enumerated therein.

The Idaho Beer and Wine Distributors Association, (hereinafter “Association”) consists of eighteen (18) entities licensed as wholesalers and distributors of beer and wine pursuant to Idaho Code § 23-1001 *et seq.*, 23-1101 *et seq.* and 23-1301 *et seq.* Under Idaho’s three-tier regulatory system, the Association’s members and others like them, have the statutory responsibility to distribute and sell beer and wine products to licensed retailers across the state.





The Association and its members rely on the uniform, proper and just interpretation, application and enforcement of Idaho's regulatory statutes as a significant foundation and protection of their commercial activity and thus have great interest in this matter. Therefore, the Association hereby requests this declaratory ruling in order to clarify statutory applicability and ensure that licensing practices do not effectively erode the three-tier system as it exists in Idaho. The collapse of this system or any erosion cause a distinct and palpable injury upon the Association, its members and every wholesaler and distributor across Idaho as well as brewers and retailers of such products.

### **STATUTORY AUTHORITY**

67-5232. DECLARATORY RULINGS BY AGENCIES. (1) Any person may petition an agency for a declaratory ruling as to the applicability of any statutory provision or of any rule administered by the agency.

(2) A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.

(3) A declaratory ruling issued by an agency under this section is a final agency action. (Idaho Code 67-5232).

### **STATUTES APPLICABLE TO DECLARATION**

The statutes and sections of Idaho Code applicable to this petition are:

23-1003. (d) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually, upon payment of a retailer's annual license fee, may be issued a brewer's retail beer license for the retail sale of the products of his brewery at his licensed premises or one (1) remote retail location, or both. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

(e) Any brewer licensed within the state of Idaho who produces fewer than thirty thousand (30,000) barrels of beer annually may be issued a brewer's pub license. Upon payment of a retailer's annual license fee, and subject to the fees in sections 23-1015 and 23-1016, Idaho Code, a brewer may, at his licensed brewery or at one (1) remote retail location, or both, sell at retail the products of

**RECEIVED**  
DEC 04 2014

any brewery by the individual bottle, can or glass. Any brewer selling beer at retail or selling to a retailer must pay the taxes required in section 23-1008, Idaho Code, on the products of his brewery, but need not be licensed as a wholesaler for the purpose of selling beer at the brewery or at one (1) remote retail location.

The director of the Idaho State Police has the statutory responsibility to administer and enforce the above referenced licensing statutes. (Idaho Code § 23-1003).

## ARGUMENT

### A. The Literal Words of the Statute do not Mention a Location

A plain reading of the statutes cited above leads to the conclusion that the location of brewing is irrelevant. The statutes clearly refer to a volume of production without regard to whether the brewing occurs within or without the borders of the state of Idaho. The only requirement is that a brewer be licensed in Idaho. There is no reference or qualification in the statutes as to where any or all of the 30,000 barrels of beer are produced. The statutes are not ambiguous and would require one to insert language in order to find that the geography of production is relevant. When a statute is clear one cannot or need not add words to it.

The interpretation of a statute begins with its literal words. Those words must be given their plain, obvious, and rational meaning. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502,506 (2011); *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003), *abrogated on other grounds by Verska*, 151 Idaho 889, 265 P.3d 502. A statute is ambiguous where the language is capable of more than one reasonable construction. *Porter v. Bd. of Trustees, Preston School Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). Ambiguity is not established merely because different interpretations are presented by the parties. If that were the test then all statutes whose meanings are contested in litigation could be considered ambiguous. “[A] statute is not ambiguous merely because an astute mind can devise more than one interpretation of it.” *2007 Legendary Motorcycle*, 154 Idaho at 354, 298 P.3d at 248; *see also In re Permit No. 36-7200 in Name of Idaho Dep't of Parks & Recreation*, 121 Idaho 819, 823, 828 P.2d 848, 852



(1992), *abrogated on other grounds by Verska*, 151 Idaho 889, 265 P.3d 502.

*Bonner County v. Cunningham*, 156 Idaho 291, 323 P.3d 1252, 1256 (2014).

Based upon the literal words of the statutes, any brewer brewing beer anywhere in the United States, not just in Idaho – or anywhere in the world for that matter – who brews in excess of 30,000 barrels will be disqualified from obtaining the licenses enumerated in 23-1003(d) and (e) or from receiving any benefit afforded to a small brewery.

### **B. The Legislative Intent was to Assist All Small Brewers**

Even if the statutes were ambiguous the legislative intent would control.

If the statute is ambiguous, then it must be construed in accord with legislative intent. *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). Legislative intent is determined by examining “the literal words of the statute the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.” *Id.*; *see also American Bank v. Wadsworth Golf Const. Co. of the Southwest*, 155 Idaho 186, 192, 307 P.3d 1212, 1218 (2013). Statutory provisions that are in *pari materia*, i.e., relating to the same subject, should be construed harmoniously, if possible, so as to further the legislative intent.

*Cunningham*, at 1256.

The legislative intent was to allow small brewers that lacked economic means or a history of production the ability to get to market, and eventually require those brewers to enter into the traditional three-tier regulatory structure.

The statutes at issue were created in 1987 under House Bill 82. The official *Statement of Purpose* of this House Bill, a copy of which is attached hereto as Exhibit A, clearly states that the purpose of the legislation is to allow for the creation of “small local brewery operations.” Moreover, Representative Phil Childers, the sponsor of this legislation, testified in committee “it would allow the small local breweries to brew, distribute and retail their product up to 30,000



barrels per year.” A copy of the committee minutes are attached hereto as Exhibit B. Further, in a 1988 opinion Idaho’s Attorney General interpreted the same statute to apply only to lower volume breweries:

The legislative history of § 23-1003(d) and (e) thus indicates that the legislature intended to allow small breweries to “brew, distribute and retail” without having to obtain the usual wholesaler or retailer licenses or be bound by the restriction of the three tiered system that accompany those licenses. (Attorney General Opinion 88-8).

Assuming that the statute was ambiguous, the tenets of statutory interpretation require deference to the legislative intent which was for small brewers to be exempted. Inserting a geographical qualification into the statute so that the statute only applied to brewers who were brewing 30,000 barrels in the state of Idaho would be directly contrary to legislative intent. It would allow extremely large brewers who brew a very small quantity of their product in Idaho to obtain a brewer’s retail license or a brewer’s pub license thereby allowing them to directly distribute their entire product line throughout the state.

### **C. A Geographical Location would Infringe upon Interstate Commerce**

Reading a geographic qualifier into the statutes at issue would serve to institute differential treatment among similarly situated brewers merely based upon their geographical location outside the state. Allowing a small brewer who brews less than 30,000 barrels within the state of Idaho to be exempted from economic burdens of the three-tier system and yet mandating that a small brewer from another state distribute his product through the three-tier system is impermissible. It would constitute a type of discriminatory protectionism long found to be in violation of the dormant interstate commerce clause:

Although the Commerce Clause is phrased merely as a grant of authority to Congress to “regulate Commerce ... among the several States,” Art. I, § 8, cl. 3, it is well established that the Clause also embodies a negative command forbidding the States to



discriminate against interstate trade. See, e.g., *Oregon Waste Systems, Inc. v. Department \*647 of Environmental Quality of Ore.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 1349 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 1807, 100 L.Ed.2d 302 (1988). The Clause prohibits economic protectionism-that is, “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”

*Associated Industries of Missouri, v. Lohman*, 114 S.Ct. 1815, 1820 (1994).

Application of the dormant interstate commerce clause was directly at issue in *Granholm v. Heald*, 125 S.Ct. 1885 (2005). In that case the Supreme Court struck down various state alcohol distribution laws that treated in-state wineries differently than out-of-state wineries. “Laws of the type at issue in the instant cases [alcohol distribution laws] contradict these principles.” *Id.* at 1896.

If the Idaho statute were to favor small brewers who produce fewer than 30,000 barrels of beer annually in the state of Idaho over those from another state would be in violation of the constitutional protections of the dormant interstate commerce clause. Not only is the geographical qualification not in the statute, it would be illegal if it were.

#### **D. Any other Reading of the Statute would Collapse the Three-Tier System**

Reading the statutes at issue to apply only to brewers who brew 30,000 barrels of beer within the state of Idaho would serve to completely undermine the three-tier system currently in place. The exemptions afforded to small brewers in Idaho Code go beyond the direct retail and brew pub statutes listed above. They in fact allow a brewer licensed under either of those sections to also become a wholesaler, thus bypassing the entire three-tier regulatory system:

23-1003 BREWERS', DEALERS' AND WHOLESALERS'  
LICENSES

...

(f) A brewer licensed under the provisions of subsection (d) or (e) of this section may be licensed as a wholesaler for the sale of beer to retailers other than at the licensed brewery and one (1) remote

RECEIVED  
DEC 14 2014

retail location and shall not be required to pay an additional fee...

While this statute as written may not seem earth-shattering, if one interprets Idaho Code 23-1003(d) and (e) to read 30,000 barrels of beer brewed in the state of Idaho then the effect of (f) is truly catastrophic to the three-tier system. One need not look further than an application currently pending before Alcohol Beverage Control. It is public knowledge that Anheuser Busch, the largest brewer in the world, recently purchased the smaller Oregon-based brewery known as 10 Barrel Brewing Company. 10 Barrel was previously licensed under 23-1003(d) and (e) due to its alleged status as a small brewer. This license allowed 10 Barrel to operate a brewpub in downtown Boise. In the various press releases from Anheuser Busch, the company made it clear that it was going to continue to operate the Boise brewpub. "In addition to the Bend brewery, the acquisition will include the company's existing brewpubs in Bend and Boise, Idaho; and a Portland brewpub scheduled to open in early 2015." (Anheuser Busch Press Release, November 5, 2014). This brewpub can only be operated under the type of license enumerated in 23-1003(e). If Anheuser Busch obtains a brewpub license it will be allowed to "retail the products of any brewery" at this brewpub. This concept is directly offensive to the three-tier system. However, the problem is much larger than that. Once Anheuser Busch has received a license under 23-1003(e) then pursuant to subsection (f) it becomes automatically qualified to "be licensed as a wholesaler for the sale of beer to retailers other than at the licensed brewery..." The simple application of this statute would allow the world's largest brewer to provide beer directly to retailers, at which point the destruction of Idaho's three-tier system will be complete.

Elimination of the three-tier system in Idaho would be contrary to the direct statement and intent of Article III, Section 24 of the Idaho Constitution which states:

PROMOTION OF TEMPERANCE AND MORALITY. The first

RECEIVED  
DEC 04 2014

concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

It is evident from the 2014 legislative session that the state of Idaho does not intend to retreat from the protections provided in the three-tier system. To the contrary, it reaffirmed its position enacting legislation strengthening these protections by prohibiting brewers from having any financial interest in a wholesaler's business. (Idaho Code § 23-1032).

### CONCLUSION

For the reasons stated herein, petitioners respectfully request a ruling from the Director of the Idaho State Police declaring that the special status and exemptions afforded to small brewers under Idaho Code § 23-1003(d), (e) and elsewhere in Idaho Code, be granted and applied only to those brewers who brew less than 30,000 barrels of beer without regard to the location or state where the brewing occurs.

DATED This 4<sup>th</sup> day of December, 2014.

RISCH ♦ PISCA, PLLC  
Attorneys for Idaho Beer and Wine Distributors Association

By: \_\_\_\_\_

JASON S. RISCH, of the firm

RECEIVED  
DEC 04 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

**CERTIFICATE OF SERVICE**


I hereby certify that on the 4<sup>th</sup> day of December, 2014, I caused to be served a true and correct copy of the foregoing *Petition for Declaratory Ruling* as follows:

Colonel Ralph Powell, Director  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642

- U.S. Mail
- Hand Delivery
- Facsimile (208) 884-7290
- Overnight Mail

Lt. Russ Wheatley  
Alcohol Beverage Control  
700 S. Stratford Drive, Ste. 115  
Meridian, Idaho 83642

- U.S. Mail
- Hand Delivery
- Facsimile (208) 884-7096
- Overnight Mail

  
\_\_\_\_\_  
Tyler Mallard

**RECEIVED**  
DEC 04 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



STATEMENT OF PURPOSE

RS 13319C3

It is the intent of this legislation to encourage the production, use in manufacturing, and consumption of agricultural products grown within the State by providing for the existence of small local brewery operations. Creation of these brew pubs and micro-breweries will stimulate the creation of jobs and investments in both small and large communities, encourage the use of lands upon which crops used in the production of beer may be grown, and provide tax revenue which would not otherwise be realized.

FISCAL NOTE

No fiscal impact

RECEIVED  
DEC 04 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

STATEMENT OF PURPOSE/FISCAL NOTE

EXHIBIT

A

H

82

COMMERCE, INDUSTRY AND TOURISM COMMITTEE

DATE: Tuesday February 3, 1987

TIME: 2:00 PM

PRESENT: Chairman Reynolds  
Rep. Allan Hodge      Rep. Stone  
Rep. Sessions      Rep. Folkinga  
Rep. Robbins      Rep. Peters  
Rep. Callen      Rep. McCann  
Rep. Childers      Rep. Lasuen  
Rep. Martens

EXCUSED: Rep. Judd  
Rep. Vincent

ABSENT: Rep. Schaefer

GUESTS: Max Jensen-----Idaho Transportation Department  
Harry Dennis-----self  
C.J. Kubik-----self  
Terry Dennis-----President of Idaho Home Brewers  
Rod Allen-----home brewing  
Jeff Friel-----Office of the Governor  
Roger Seiber-----Mountain Bell

Chairman Reynolds called the meeting to order at 2:25 PM.

HB 82 RELATING TO THE EXISTENCE OF SMALL LOCAL BREWERY OPERATIONS

Rep. Childers told the Committee that this legislation would do away with the occupational restriction of the strict 3-tiered system. It would allow the small local breweries to brew, distribute and retail their product, up to 30,000 barrels per year. Lifting this restriction could provide a boost to Idaho's economy, and they would meet all local and State health, safety, and tax requirements. "Brewing has become centralized in recent decades, and the growth of brewing pubs is in it's initial stage of getting back to where brewing used to be," he said. California, Washington, Oregon, Wisconsin, Minnesota, and New York already have similar laws and other States are considering them.

Terry Dennis - President Idaho Home Brewers said they have been observing for 5 years the happenings in Washington, Oregon, California and British Columbia. Allowing them to retail has established clientele and increased the success rate of their businesses. He favored this legislation and mentioned the availability of raw products, such as hops and barley, grown in Idaho.

Rod Allen - supported this legislation and felt that the new varieties of beer resulting from such breweries in Idaho would give connoisseurs more choices. He said others were interested in brewing and selling, but they couldn't do it now because State law allows breweries to sell only in wholesale amounts.

Rep. Folkinga made a motion to send HB 82 to the floor with a do pass. Rep. Martens seconded the motion. The motion carried. Rep. Childers will be floor sponsor.

Max Jensen - Traffic Supervisor from the Idaho Transportation Department presented the Committee A Study of Highway Signing for Idaho's Scenic Attractions and Historic Sites prepared for the Idaho Travel Council by Planners. At the present time there are 123 Historical Markers and the cost of a new one is approximately \$800.00. The Idaho Transportation Department is slowly implementing the signs, the goal being Idaho's Centennial in 1990. Dr. Merle Wells has agreed to prepare the legends for potential historic markers. Major questions raised by the Committee were: 1) Why no sign noting Idaho's Capital on I 84? 2) Why the improper wording on the Cataldo Mission sign (oldest standing building) on I 90? 3) What criteria is used to place rest areas? 4) Can these sites be re-located? 5) What is the possibility of having rest areas/information centers leased and operated by the private sector? Mr. Jensen said that the Idaho Travel Council, under the auspices of the Department of Commerce, and the Idaho Transportation Department would be the ones to approach for changes.

Meeting adjourned at 3:20 PM.

  
Dorothy L. Reynolds, Chairman

  
Marilyn Plott, Secretary

EXHIBIT B

RECEIVED  
DEC 04 2

IDAHO STATE PUBLIC BEVERAGE

STATE AFFAIRS COMMITTEE

MINUTES

Room 350

February 16, 1987

3:00 p.m.

PRESENT: All Committee members were present.

H 82

TO PROVIDE FOR A BREWER'S RETAIL BEER LICENSE; MICRO BREWERIES

Representative Childers addressed the Committee and spoke to the benefits of this legislation. He informed the Committee that small brewers cannot market their product and cannot sample product at production site. This legislation limits the size of the brewery to less than 30,000 gallons and no large brewery objects.

MOTION

CARRIED

Moved by Fairchild, seconded by Calabretta, that H 82 be sent out of Committee with a "Do Pass" recommendation. By voice vote, the motion carried with Senator Ricks voicing a Nay vote.

\*

RS20113C1

RELATING TO THE COUNTY OPTION KITCHEN AND TABLE WINE ACT

Senator Carlson informed the Committee that the purpose of this legislation is to encourage the little businesses in Idaho and allows a winery to contract with farmers to grow grapes. It provides that Idaho wineries may sell their product to distributors or retailers.

MOTION

Moved by Reed, seconded by Calabretta, that RS20113C1 be sent to print. After the voice vote, the Chair was in doubt and a roll call vote was taken. (6-3-2)

CARRIED

AYES: Batt, Fairchild, Klebert, Sweeney, Calabretta, Reed  
NAYS: Ricks, Crapo, Twiggs  
A&E: Risch, Smyser

\*

RS20191

PARI-MUTUEL RACING; TO CREATE THE IDAHO CENTENNIAL FUTURITY ACCOUNT

RECEIVED

DEC 14 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

EXHIBIT B

# Anheuser-Busch and 10 Barrel Brewing Announce Purchase Agreement

November 5, 2014

- [Press Releases](#)
- [Anheuser-Busch](#)
- [Facebook](#)
- [Twitter](#)

[Newsroom](#) » Anheuser-Busch and 10 Barrel Brewing Announce Purchase Agreement

# 10 BARREL BREWING CO

## *Oregon-based brewery and three brewpubs to be included in acquisition*

ST. LOUIS and BEND, Ore. (November 5, 2014) – [Anheuser-Busch](#) today announced it has agreed to purchase [10 Barrel Brewing Company](#), located in Bend, Ore. One of the country's fastest-growing and most innovative breweries, 10 Barrel was one of only four U.S. breweries to win three medals and tied for most medals won at this year's Great American Beer Festival, the largest beer competition in the world.

"For the past eight years, we've been brewing beer, drinking beer and having fun doing it," said co-founder Jeremy Cox, who will continue to lead 10 Barrel along with his partners, co-founder and brother Chris Cox, and Garrett Wales. "We are excited to stay focused on brewing cool beers, get our beers in more hands, and make the most of the operational and distribution expertise of Anheuser-Busch," said Cox.

10 Barrel expects to sell approximately 40,000 barrels of beer in 2014. Apocalypse IPA, the brewer's most popular beer, accounts for nearly half of the company's total volume.

"10 Barrel, its brewers, and their high-quality beers are an exciting addition to our high-end portfolio," said Andy Goeler, CEO, Craft, Anheuser-Busch. "The brewery is a major contender in the Northwest, an area with a large number of craft breweries. We see tremendous value in the brewery's unique offerings and differentiated style, which 10 Barrel fans know and love."

In addition to the Bend brewery, the acquisition will include the company's existing brewpubs in Bend and Boise, Idaho; and a Portland brewpub scheduled to open in early 2015.

Anheuser-Busch's purchase of 10 Barrel is expected to close by the end of 2014. Terms of the agreement were not disclosed.

First Beverage Group acted as financial adviser to 10 Barrel, and Spencer Fane Britt & Browne provided legal counsel.

DECEIVED  
DEC 04 2014  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL  
EXHIBIT **C**

## **About 10 Barrel Brewing Co.**

10 Barrel Brewing Co. is a Bend, Ore., based brewery with one simple mindset ... brew beer, drink beer and have fun doing it. They currently distribute their brands in Oregon, Idaho and Washington. For more information, check out [www.10barrel.com](http://www.10barrel.com) or get social at [fb.com/10barrelbrewingco](https://www.facebook.com/10barrelbrewingco) and [@10barrelbrewing](https://www.instagram.com/10barrelbrewing) on Instagram and Twitter.

## **About Anheuser-Busch**

For more than 160 years, Anheuser-Busch and its world-class brewmasters have carried on a legacy of brewing America's most-popular beers. Starting with the finest, all-natural ingredients sourced from Anheuser-Busch's family of growers, every batch is hand-crafted using the same exacting standards and time-honored traditions passed down through generations of proud Anheuser-Busch brewmasters and employees. Best known for its fine American-style lagers, Budweiser and Bud Light, the company's beers lead numerous beer segments and combined hold 47.2 percent share of the U.S. beer market. Anheuser-Busch is the U.S. arm of Anheuser-Busch InBev and operates 12 breweries, 17 distributorships and 23 agricultural and packaging facilities across the United States, representing a capital investment of more than \$15.5 billion. Its flagship brewery remains in St. Louis, Mo., and is among the global company's largest and most technologically capable breweries. Visitor and special beermaster tours are available at its St. Louis and four other Anheuser-Busch breweries. For more information, visit [www.anheuser-busch.com](http://www.anheuser-busch.com).

RECEIVED  
DEC 04 2014

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL