

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

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.

(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.

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.

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



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:

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>

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<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

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

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



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.

## 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."

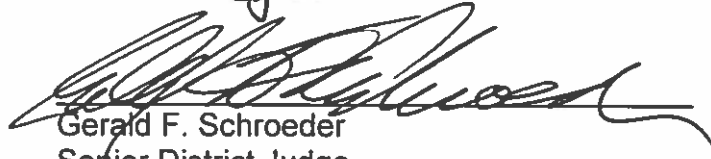
There is no published case law specifically addressing the questions that the Distributors raised in their petition for a declaratory ruling. The petition for judicial review

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

## 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:

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Date: Sept. 14, 2016

By   
Deputy Clerk

