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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	)	
	)	PETITION FOR DECLARATORY RULING
SMALL BREWER EXEMPTIONS	)	
	)	I.C. § 67-5232
	)	I.D.A.P.A. 04.11.01.400 <i>et seq.</i>
	)	
	)	
	)	

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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

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

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

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



**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

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

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



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 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.

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RS20113C1 RELATING TO THE COUNTY OPTON 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, Kiebert, Sweeney, Calabretta, Reed  
NAYS: Ricks, Crapo, Twigg  
A&E: Risch, Smyser

\*

RS20191

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

# Anheuser-Busch and 10 Barrel Brewing Announce Purchase Agreement

November 5, 2014

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[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.

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://fb.com/10barrelbrewingco) and [@10barrelbrewing](https://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).