STATE OF IDAHO)
County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

WILLIAM SHAWN FILLER,
Petitioner,
vs.
IDAHO DEPARTMENT OF TRANSPORTATION.
Respondent.

Case No. **CV 2009 1965 (CDL)**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

WILLIAM SHAWN FILLER,
Petitioner,
vs.
IDAHO DEPARTMENT OF TRANSPORTATION.
Respondent.

Case No. **CV 2009 4236 (ALS)**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

CARL ROELLER,
Petitioner,
vs.
IDAHO DEPARTMENT OF TRANSPORTATION.
Respondent.

Case No. **CV 2009 3321 (CDL)**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

CARL ROELLER,
Petitioner,
vs.
IDAHO DEPARTMENT OF TRANSPORTATION.
Respondent.

Case No. **CV 2009 3300 (ALS)**

MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

ALVIN ROTHE, *Petitioner,* **vs.** **IDAHO DEPARTMENT OF TRANSPORTATION.** *Respondent.*	Case No. **CV 2009 4482 (CDL)** **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**
ALVIN ROTHE, *Petitioner,* **vs.** **IDAHO DEPARTMENT OF TRANSPORTATION.** *Respondent.*	Case No. **CV 2009 3091 (ALS)** **MEMORANDUM DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW**

Attorney for Petitioners: Suzanna L. Graham
Attorney for Respondent: Susan K. Servick

I. PROCEDURAL HISTORY AND BACKGROUND OF EACH CASE.

These six unconsolidated cases involve petitions for administrative review (appeal) of an agency's (Idaho Transportation Department – ITD) decision suspending both the 90-day Driver's License Suspension (Administrative License Suspension – ALS) and one-year Commercial Driver's License (CDL) Suspension on each of three individuals: William Filler, Carl Roeller and Alvin Rothe. While these cases are not consolidated, this decision will be filed in each of the two cases (each has an ALS suspension and a CDL suspension) involving each of the three individuals (six separate cases total).

On April 15, 2008, **William Shawn Filler** (Filler) was arrested for driving under the influence (DUI) by the Bonner County Sheriff's Department. Filler submitted to a breath test, and blood alcohol content of .085 and .084 was found. He timely requested

an administrative hearing on the 90-day Administrative License Suspension (ALS) and on May 7, 2008, a hearing was held and the 90-day suspension was upheld. Filler timely filed his Petition for Judicial Review. Filler was notified his commercial driver's license (CDL) was withdrawn for one year and he timely requested a hearing thereon. Filler's CDL disqualification hearing was held on June 17, 2008, the one-year withdrawal was upheld and Filler timely filed a Petition for Judicial Review.

On January 25, 2009, **Carl Roeller** (Roeller) was arrested for DUI, upon failing an evidentiary breath test administered by Officer Dan Howard in Kootenai County, Idaho. On January 29, 2009, a Notice of Disqualification of Roeller's Commercial Driver's License (CDL) was mailed to Roeller by the Idaho Department of Transportation (ITD). Affidavit of Amy Kearns, p. 2, ¶ 5. Though the Notice of Disqualification informed Roeller of his right to request an administrative hearing by written request, *Roeller did not request a hearing*. Petitioner's Brief, p. 2. Roeller filed his Petition for Review on April 24, 2009, and this Court granted his *ex parte* motion for a stay of suspension pending the appeal on April 27, 2009. On July 31, 2009, ITD filed its "Motion to Dismiss for Failure to Exhaust Administrative Remedies", where ITD moves this Court for an Order Dismissing Roeller's appeal and vacating the stay of his CDL suspension pending appeal for his failure to exhaust administrative remedies pursuant to I.R.C.P. 56 and 12(b)(6) and I.C. § 67-5271. Roeller has not responded to ITD's motion to dismiss his CDL suspension. As to Roeller's ALS, on January 25, 2009, he was served with his Notice of Suspension and issued a temporary permit by Officer Howard. Roeller sought an administrative hearing on the proposed license suspension on January 27, 2009. The hearing was held on March 2, 2009, and on April 27, 2009, the hearing officer issued his decision, sustaining the 90-day suspension of the non-

commercial driver's license. On April 24, 2009, Roeller filed his petition for review.

On January 31, 2009, **Alvin Rothe** (Rothe) was arrested for DUI by Officer Joshua Schneider in Kootenai County, Idaho. Rothe was sent a Notice of Disqualification of his CDL on February 6, 2009, because ITD's records showed he had failed an evidentiary test. Rothe requested an administrative hearing which was held on April 2, 2009, at which the one-year suspension was upheld. On April 16, 2009, Rothe timely filed his Petition for Judicial Review. On February 2, 2009, Rothe requested an administrative hearing regarding the ALS, which was held on March 2, 2009. On March 4, 2009, the hearing officer upheld the ALS and, thereafter, Rothe timely appealed by filing his Petition for Judicial Review. As to both the ALS and CDL administrative hearings, Rothe filed a motion to provide additional information; specifically, Rothe sought to supplement the record with his criminal case's (CR 2009 2318) motion to suppress, order granting the motion to suppress, and Judgment of Dismissal. ITD objected to Rothe's supplementation. The motion was set for hearing on July 14, 2009. At that hearing this Court sustained the objection and ruled on the record that Rothe would not be permitted to use the Magistrate's ruling, nor would the Court consider the evidence. On August 19, 2009, Rothe filed his "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action" wherein Rothe again seeks an order of this Court "allowing the Petitioner prior to Oral Argument and hearing on the Appeal herein for leave to present additional evidence to the Idaho State Department of Motor Vehicles related to the Administrative License Suspension." Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action, p. 1. Rothe argues:

> The Petitioner attempted to try to have the District Court review the Order granting the Suppression Motion by augmentation to the record which was denied. As such, the dismissal is material to the agency action and the Department has not had the ability to review the same.

Id., p. 3. ITD again objected. To that objection, Rothe then moved for attorney fees and costs incurred in defending "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action". The motion to provide additional evidence was set for hearing on October 13, 2009. It is unclear from the record why the motion was not heard on that date. Following the parties' motions to continue the oral argument on appeal in Rothe's matter, Rothe did not notice up his motion to present additional evidence to the agency below (or his motion for attorney fees) again.

Oral argument on all pending motions and oral argument on all six appeals was held on April 26, 2010. These matters are now at issue.

The arguments made in all three cases on appeal are identical. They will be addressed collectively *infra.* A separate analysis will be conducted first as to the motion to dismiss Roeller's CDL appeal, then Rothe's motion to present additional evidence to the agency below and subsequent motion for attorney fees and costs (based on ITD's response), and ITD's Objection to Filler's Supplemental Opening Brief.

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II. ANALYSIS OF ALL PRELIMINARY MOTIONS AND OBJECTIONS.

A. Motion to Dismiss the Petition for Review of One-year CDL Suspension in *Roeller v. State*, Kootenai County Case No. CV 2009 3321 (Roeller's CDL Appeal).

1. Standard of Review.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment pursuant to Rule 56. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources.*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of an I.R.C.P. 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

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2. Analysis of ITD's Motion to Dismiss for Failure to Exhaust

Administrative Remedies in *Roeller v. State of Idaho, Department of Transportation [Transportation Department],* Kootenai County Case No. CV 2009 3321.

On July 31, 2009, ITD filed its "Motion to Dismiss for Failure to Exhaust Administrative Remedies", where ITD moves this Court for an Order Dismissing Roeller's appeal and vacating the stay of his CDL suspension pending appeal for his failure to exhaust administrative remedies pursuant to I.R.C.P. 56 and 12(b)(6) and I.C. § 67-5271. ITD supported this motion with an Affidavit of Amy Kearns wherein she states: "Roeller did not request an Administrative hearing to contest this action ["withdrawing your driving privileges to operate a commercial vehicle for one year…"] by the Department (ITD)". Affidavit of Amy Kearns, p. 2, ¶5, ¶6. Also on July 31, 2009, ITD filed its "Memorandum in Support of Motion to Dismiss for Failure to Exhaust Administrative Remedies." Roeller has not responded to ITD's motion to dismiss his CDL suspension.

ITD argues Roeller is not entitled to judicial review of the agency action at issue for having failed to exhaust his administrative remedies. Memorandum in Support of Motion to Dismiss, p. 3, citing I.C. § 67-5271. Roeller writes in his Brief on Appeal:

> Roeller received a notification that his commercial driving privileges were going to be disqualified for one year pursuant to Idaho Code § 49-335, and he did not request a hearing thereon mistakenly believing that the Administrative License Suspension hearing and [sic] been requested and was being appealed.

Petitioner's Brief, p. 2.

Idaho Code § 67-5271 states:

> A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.

I.C. § 67-5271(1). As ITD points out, there was no administrative hearing.

Memorandum in Support of Motion to Dismiss, p. 4. ITD argues:

> Because no hearing was requested, there is no agency record, no hearing transcript, and no Findings of Fact, Conclusions of Law and Order by the hearing officer. Therefore, there is no agency action for this Court to review.

Id. In *State v. Beason,* 119 Idaho 103, 803 P.2d 1009 (Ct.App. 1991), the Court of Appeals wrote:

> Beason has provided no record on appeal of these alleged procedural defects. We will not presume error on appeal. It is axiomatic that an appellant bears the burden of establishing a record, and presenting it on appeal, to substantiate his claims or contentions before the appellate court. *State v. Murinko,* 108 Idaho 872, 911, 702 P.2d 910 (Ct.App. 1985); *see e.g., State v. Sima,* 98 Idaho 643, 570 P.2d 1333 (1977). Without any specific facts supported by the record, we are unable to determine whether the commutation proceeding was held in accordance with the Commission's administrative procedures.

119 Idaho 103, 105, 803 P.2d 1009, 1011. The same reasoning applies here. There is simply nothing before the Court to evince any claims of administrative irregularities. Further, pursuit of statutory administrative remedies is a condition precedent to judicial review. *Park v. Banbury,* 143 Idaho 576, 578, 149 P.3d 851, 853 (2006), citing *Fairway Dev. Co. v. Bannock County,* 119 Idaho 121, 124, 804 P.2d 294, 297 (1990). "The doctrine of exhaustion generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered." *Regan v. Kootenai County,* 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). In *Park,* the Idaho Supreme Court determined the District Court lacked subject-matter jurisdiction over appellant's claims due to the failure to exhaust administrative remedies. 143 Idaho 576, 582, 149 P.3d 851, 857. An exception to the exhaustion doctrine exists where interest of justice so requires or where the agency does no act within its authority. *Bohemian Breweries v. Koehler,* 80 Idaho 438, 446, 332 P.2d 875, 880 (1958). Justice

would so require, for example, where exhaustion would be futile. *Arnzen v. State,* 123 Idaho 899, 907, 854 P.2d 242, 250 (1993).

Here, not only is there no evidence set forth by Roeller, there is not even an argument made by Roeller that the agency (ITD) acted outside its authority or that his having requested an administrative hearing would have been futile such that justice would require relaxation of the exhaustion doctrine. However, Exhibit A to Roeller's Petitioner's Brief states ITD:

> …received your request for a hearing regarding the CDL Disqualification…However, our records indicate that a hearing has been requested and scheduled on the ALS Suspension. It is that suspension which led to the Notice for the CDL Disqualification. Therefore, we are unable to honor your request for hearing on the Notice of Disqualification until the ALS Hearing has been completed….Please submit a new request for hearing on the CDL disqualification if the ALS Suspension is sustained and you wish to proceed further on the disqualification issue.

Petitioner's Brief, Exhibit A, p. 2. No such "new request" was made by Roeller and, therefore, there exists no agency record for this Court to review as to Roeller's Petition for Review of the CDL suspension in *Roeller v. State of Idaho, Department of Transportation [Transportation Department],* Kootenai County Case No. CV 2009 3321.

ITD's "Motion to Dismiss for Failure to Exhaust Administrative Remedies", where ITD moves this Court for an Order Dismissing Roeller's appeal and vacating the stay of his CDL suspension pending appeal for his failure to exhaust administrative remedies pursuant to I.R.C.P. 56 and 12(b)(6) and I.C. § 67-5271, must be granted. Roeller's Petition for Review of his CDL suspension in CV 2009 3321 must be dismissed for that procedural defect.

Alternatively, Roeller's appeal of his CDL suspension, if it were decided on the merits, would result in the same outcome as the CDL appeals of Rothe and Filler.

B. **Motion to Provide Additional Evidence to the Hearing Officer Pursuant to I.C. § 67-5276 in *Rothe v. State of Idaho, Department of Transportation [Transportation Department],* Kootenai County Case No. CV 2009 4482.**

1. Introduction.

On August 19, 2009, Rothe filed "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action and Notice of Hearing." ITD responded on September 30, 2009, filing "ITD's Response to Petitioner's Motion Pursuant to I.C. 67-5276." On October 14, 2009, Rothe filed his "Motion for Attorney's Fees and Costs", requesting attorney fees against ITD, claiming "ITD's Response to Petitioner's Motion Pursuant to I.C. 67-5276" is "…frivolous and vexatious having been filed to harass and/or maliciously injure the Petitioner [Rothe]." No other basis was given for Rothe's objection to ITD's response to Rothe's motion.

2. Standard of Review.

The decision to grant or deny a motion for augmentation is reviewed under the abuse of discretion standard. *Crown Point Dev., Inc. v. City of Sun Valley,* 144 Idaho 72, 75-76, 156 P.3e 573, 576-77 (2007). Judicial review of an agency decision is usually limited to the record, unless the party requesting the augmentation can demonstrate the evidence falls within the statutory exceptions found in Idaho Code § 67-5276. That statute states application must be made for leave to present additional evidence before hearing set in the matter, and the evidence must (1) be material, (2) relate to the validity of the agency action, and (3) either (a) there were good reasons for the failure to have presented the evidence before the agency (in which case the Court would remand with instructions that the agency receive the evidence and conduct additional fact-finding) or (b) there were irregularities in the procedure before the agency

(in which case the Court may take proof on the matter). I.C. § 67-5276(1). The agency may then modify its action and file any modifications, new findings, or decisions with the reviewing Court. I.C. § 67-5276 (2). Where good reasons for the failure to present the evidence at the agency hearing are presented, and the record is augmented, the District Court should remand the matter to the agency for additional fact-finding. See *Crown Point,* 144 Idaho 72, 76, 156 P.3d 573, 577; *Urrutia v. Blaine County,* 134 Idaho 353, 361, 2 P.2d 738, 746 (2000). Similarly, where procedural irregularities are shown, the District Court should remand the case to the agency for a final determination on the merits. *Soloaga v. Bannock County,* 119 Idaho 678, 683, 809 P.2d 1157, 1162 (Ct.App. 1990) (remanding case to the agency where an application was "voided" without hearing or findings of fact and conclusions of law.) Additionally, even where a District Court has abused its discretion, it must also be shown that any error in augmenting the record is prejudicial. *Crown Point,* 144 Idaho 72, 77, 156 P.3d 573, 578 (2007) (finding erroneous inclusion of additional evidence prejudicial where the Court relied on the improperly admitted evidence). "An error is prejudicial only if it could have affected or did affect the outcome of a proceeding." *Id.*

3. Analysis.

Rothe moves the Court for leave to present additional evidence to ITD in the form of his motion to suppress, the Order granting the motion to suppress, and the Judgment of Dismissal in his criminal case, Kootenai County Case No. CR 2009 2318. Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action and Notice of Hearing, p. 3. Rothe argues: "the matter should be remanded with direction for the Agency to consider said information in light of the Order dismissing and at a minimum that the Reconsideration/Remand be

made part of the record subject to Appeal herein." *Id.,* p. 4. Rothe notes that following this Court's sustaining ITD's objection to his Supplementation of the Record, heard by this Court on July 14, 2009, ITD did not propound a written order. *Id.,* p. 3. Rothe argues there was good reason for his failure to present the evidence below because the motion to suppress had not been heard at the time the ALS hearing was held. *Id.* Rothe identifies court congestion preventing the motion to suppress from being heard before hearing on the ALS as an irregularity in the procedure before the agency. *Id.,* pp. 3-4. Rothe also argues the hearing officer never issued a ruling on Rothe's motion to reconsider, which incorporated the Order dismissing the criminal action. *Id.* Rothe states the agency can modify its findings and decisions in light of the additional evidence and "[a]t a minimum, Petitioner has a right to review of the entire record." *Id.,* p. 4.

ITD argues there is no legal or factual support for Rothe's motion. ITD's Response to Petitioner's Motion Pursuant to I.C. § 67-5276, p. 2. ITD states the evidence is not material because the DUI was dismissed not on the facts of the arrest, but because the officer failed to attend the motion to suppress; "[t]here is no evidence that the evidence Rothe wants augmented…would be material to ITD's decision to suspend Rothe's driver's license." *Id.,* pp. 3-5.

Indeed, materiality is the first issue this Court must consider. As stated *supra,* Rothe must demonstrate that the evidence (1) be material, (2) relate to the validity of the agency action, and (3) either (a) there were good reasons for the failure to have presented the evidence before the agency (in which case the Court would remand with instructions that the agency receive the evidence and conduct additional fact-finding) or (b) there were irregularities in the procedure before the agency (in which case the Court

may take proof on the matter). I.C. § 67-5276(1). Here, the record demonstrates Rothe's suspension was based on the results of the evidentiary test indicating an alcohol concentration in violation of I.C. § 18-8004. Findings of Fact and Conclusions of Law and Order, pp. 5-6; A.R., pp. 29-30. As a result of Rothe's BAC testing at .164/.167 per his breath sample, "the peace officer *shall* take possession of [Rothe's] driver's license, *shall* issue a temporary permit…and, acting on behalf of the department, *will* serve [Rothe] with a notice of suspension…" I.C. § 18-8002A(5)(emphasis added).

> Upon receipt of the sworn statement of a peace officer that there existed legal cause to believe a person had been driving…while under the influence of alcohol…in violation of section18-8004,…the department *shall* suspend the person's driver's license…

I.C. § 18-8002A(4) (emphasis added). At oral argument, it was made clear that the granting of the motion to suppress was due to the State's witness, the arresting officer, being unavailable. Counsel for Rothe made unsubstantiated hearsay statements about discussions she had with the prosecutor on the merits of the motion to suppress, but ignoring the insurmountable evidentiary hurdles, counsel's representations at oral argument do not change the fact that the reason for the dismissal was unavailability of the State's witness. Rothe has not set forth any evidence to demonstrate the motion to suppress' being granted, with the State's stipulation, because of the police officer's unavailability at the hearing, is in any way material to or related to the validity of ITD's suspending Rothe's license. It is simply the uncontradicted fact that Rothe failed the evidentiary testing which gave rise to the suspension. Rothe's "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action and Notice of Hearing" must be denied.

It follows then that Rothe is not entitled to attorney's fees or costs as a result of having to defend ITD's objection to his motion to provide additional evidence to the hearing officer below. Not only is "ITD's Response to Petitioner's Motion Pursuant to I.C. 67-5276" **not** "…frivolous and vexatious having been filed to harass and/or maliciously injure the Petitioner [Rothe]", "ITD's Response to Petitioner's Motion Pursuant to I.C. 67-5276", is well taken, and, as set forth immediately above, ITD prevailed. Rothe's "Motion for Attorney's Fees and Costs" must be denied.

C. ITD's "Motion for Judicial Notice" Filed in Each of the Two Cases Concerning Each of the Three Petitioners.

On January 14, 2010, in all six cases involving all three petitioners currently before this Court, respondent ITD filed a "Motion for Judicial Notice" asking this Court to take judicial notice of the decision in *Bartholome Burg v. State of Idaho (ITD),* Benewah Co. Case No. CV2007 541; *Donnie Ely v. State of Idaho (ITD),* Benewah Co. Case No. CV 2008 536; *James Buell v. State of Idaho (ITD),* Benewah Co. Case No. CV 2007 488; and *Paul Brebner v. State of Idaho (ITD).* Benewah Co. Case No. CV 2007 542. Counsel for petitioners filed no response to ITD's Motion for Judicial Notice.

At the April 26, 2010, hearing before this Court, counsel for all three petitioners in all six cases before this Court stated she had no objection to the Court taking judicial notice of the transcript of First District Judge Fred M. Gibler's decision which was stated on the record in all four of those cases on December 18, 2009. This Court finds the transcript of the hearing before Judge Gibler on December 18, 2009, to be a proper item of which this Court may take judicial notice. This Court finds the transcript of those cases to be something of which this Court may appropriately take judicial notice. *Esquivel v. State of Idaho,* Docket No. 35792, 2010 Opinion No. 7S, p. 4, n. 3 (Ct. App.

April 8, 2010). Accordingly, this Court takes judicial notice of the transcript of the proceedings in those four Benewah County cases held on December 18, 2009, and Judge Gibler's ruling therein. ITD's Motion for Judicial Notice was granted on the record at the April 26, 2010, hearing.

D. ITD's Objections to Filler's Supplemental Opening Briefs in *Filler v. State,* Kootenai County Case No. CV 2009 1965 [CDL] and *Filler v. State,* Kootenai County Case No. CV 2008 4236 [ALS].

On August 19, 2009, in each of Filler's two cases, *Filler v. State,* Kootenai County Case No. CV 2009 1965 [CDL] and *Filler v. State,* Kootenai County Case No. CV 2008 4236 [ALS], Filler filed "Appellant's Supplemental Opening Brief. On August 25, 2009, ITD filed an "Objection and Response to Appellant's Supplement Brief" in both of Filler's appeals (Kootenai County Case No. CV 2009 1965 [CDL] and CV 2008 4236 [ALS]).

ITD objects to Filler's "Appellant's Supplemental Opening Brief", filed in each case, and ITD argues the Court should not consider issues not raised until the reply brief. Objection and Response to Supplemental Brief (CDL Appeal), p. 4; citing *Baccus v. Ameripride Service, Inc.,* 145 Idaho 346, 351179 P.3d 309, 314 (2008). Both as to his CDL and ALS appeals, Filler filed extensive Supplemental Opening Briefs "which contend [violations of] double jeopardy principles supported, <u>for the first time</u>, by an analysis of U.S. Supreme Court and State case law, and, <u>for the first time</u>, that Idaho Code Section 18-8002A is unconstitutionally vague." Objection and Response to Supplemental Brief (CDL), p. 4; *see also* Objection and Response to Supplemental Brief (ALS Appeal), p. 4.

In *Suitts v. Nix,* 141 Idaho 706, 117 P.3d 120 (2005), the Idaho Supreme Court held Nix had waived issues raised on appeal which were unsupported by propositions of

law or authority. "In her reply brief, Nix does present argument and authority supporting some of the eleven assignments of error, but 'this Court will not consider arguments raised for the first time in the appellant's reply brief." 141 Idaho 706, 708, 117 P.3d 120, 122, quoting *Myers v. Workmen's Auto Ins. Co.,* 140 Idaho 495, 508, 95 P.3d 977, 990 (2004).

> A reviewing court looks only to the initial brief on appeal for the issues presented because those are the arguments and authority to which the respondent has an opportunity to respond in the respondent's brief.

141 Idaho 706, 708, 117 P.3d 120, 122. Here, despite being in the form of an objection, ITD has had the opportunity to thoroughly respond to the issues raised in Filler's Supplemental Opening Briefs. Additionally, despite not being supported by authority or argument, Filler's Opening Brief does give ITD notice that his argument is whether the act of suspending a non-commercial license followed by the Department's then suspending a CDL constitutes double jeopardy for the same actions. Appellant's Opening Brief, p. 6. And, Filler, despite not using "unconstitutionally vague" language, did argue in his Opening Brief that ITD failed to inform him of any impact of evidentiary testing on his CDL, "thereby failing to comply with I.C. § 18-8002 by substantially informing the driver of the consequences if [sic] submitting to the evidentiary testing. See I.C § 18-8002A(7)(e) and I.C. § 18-8002A(2)." *Id.,* p. 3.

At oral argument on April 26, 2010, this Court unfortunately did not call this issue for oral argument, and neither did counsel for the three petitioners nor counsel for the respondent ITD bring the supplemental briefs to the Court's attention.

Given the Idaho Supreme Court's reasoning in the cases cited above (looking only to those arguments and authority to which the respondent has had the opportunity to respond), Court to overrules ITD's objection to Filler's Supplemental Briefs, given that

the issues were raised, albeit obliquely, in his opening brief, and ITD had an opportunity to respond, albeit in the form of an objection.

III. ANALYSIS OF ALL SUBSTANTIVE ISSUES ON APPEAL.

A. Introduction.

The three petitioners in each of their two cases on appeal (all six unconsolidated appeals), raise three issues:

> 1. Whether an administrative license suspension under I.C. S 18-8002A violates double jeopardy principles because, although it is civil in nature, under the multi-factored *Hudson* analysis, it is so punitive in effect that it is transformed into a criminal penalty.
> 2. Whether a commercial disqualification under I.C. § 18-800A and [I.C. § 49-335 violates double jeopardy principles because, although it is civil in nature, under the multi-factored *Hudson* analysis, it is so punitive in effect that it is transformed into a criminal penalty.
> 3. Whether I.C. § 18-8002A is unconstitutionally vague as applied to [FILLER, ROELLER and ROTHE] because, by pointing out the difference between commercial and non-commercial drivers with regard to the availability of restricted permits, the statute implies that is the only difference between commercial and non-commercial drivers in the administrative suspension scheme.

Petitioner's Brief (all six cases), pp. 1-2. (This Court notes the briefing and pagination of that briefing is essentially identical in all six cases).

B. Standard of Review.

Review of decisions to deny, cancel, suspend, disqualify, revoke, or restrict driver's licenses is governed by the Idaho Administrative Procedures Act (IDAPA). *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Reviewing courts review the agency record on appeal independently. *Marshall v. Idaho Dep't of Transp.,* 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). But reviewing courts do not substitute their judgment for that of the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. An agency's findings of fact are

deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum,* 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'rs,* 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

C. Analysis of Petitioners' Arguments Regarding Double Jeopardy and Unconstitutional Vagueness.

1. Double Jeopardy.

a. Introduction.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and Article 1, § 13, of the Idaho Constitution prohibits three abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969); *U.S. v. Halper,* 490 U.S. 435, 441, 109 S.Ct. 1892, 1898 (1989). The third protection is at issue in the cases at issue on appeal before this Court.

Each petitioner's first argument is that their administrative license suspensions under I.C. § 18-8002A violate double jeopardy because they are so punitive in effect that, despite being civil in nature, they are transformed into a criminal penalty. Petitioner's Brief, p. 3. They argue the United States Supreme Court decision in *Hudson v. United States,* 522 U.S. 93, 118 S.Ct. 488 (1997), altered the double jeopardy analysis used in the Idaho case (*State v. Talavera,* 127 Idaho 700, 905 P.2d 633 (1995)) holding administrative license suspensions under I.C. 18-8002A do not violate double jeopardy. *Id.*, Petitioner's Brief, pp. 3- 4. All three petitioners argue the proper analysis is that which is found in cases existing prior *Talavera,* specifically *U.S. v. Halper*, 490 U.S. 435, 441, 109 S.Ct. 1892, 1898 (1989) and requires the Court to determine: (1) whether the legislature in establishing a penalizing mechanism indicated expressly or impliedly a preference for criminal or civil punishment; and (2) even where the intention was to create a civil penalty, whether the statutory scheme is so punitive in purpose or effect as to transform a civil penalty into a criminal one. *Hudson,* 522 U.S. 93, 99, 118 S.Ct. 488, 493. The petitioners argue I.C. § 18-8002A has been designated as being civil in nature by the legislature and the second prong of the *Hudson* analysis is therefore necessary. *Id.,* p. 7. In this regard, they list the seven factors, listed in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-68 (1963) and quoted in *Hudson*:

1. whether the sanction involves an affirmative disability or restraint
2. whether it has historically been regarded as punishment
3. whether a finding of "scienter" comes into play
4. whether its operation will promote the traditional aims of punishment- retribution and deterrence
5. whether the behavior to which it applies is already a crime
6. whether an alternative purpose to which it may rationally be connected is assignable for it; and

7. whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 522 U.S. 93, 99-100, 118 S.Ct. 488, 493-94. Petitioners argue numbers (2), (4), (5), (6), and (7) indicate I.C. § 18-8002A suspensions are so punitive as to have been transformed into a criminal punishment. Appellant's Supplemental Opening Brief(s), p. 7. They also note, "'these factors must be considered in relation to the statute on its face' and must provide 'the clearest proof' in order to override legislative intent and transform the sanction in to a criminal penalty." *Id.,* quoting *Hudson,* 522 U.S. 93, 100, 118 S.Ct. 488, 493. In response, ITD analyzes the same factors (*see infra*) and argues, "there was a very small showing, to say nothing of the 'clearest proof' as required by *Ward* and *Hudson*, that the license suspension at issue is criminal in nature." Respondent's Brief, p. 16.

b. Driver's License Suspensions Have Not Historically Been Regarded as Punishment.

Petitioners argue Idaho driver's licenses are a right, not a privilege, and as such, taking of a driver's license is subject to due process restraints and "has a punitive criminal element." Appellant's Supplemental Opening Brief, p. 8. They argue the Idaho Supreme Court in *State v. Ankney,* 109 Idaho 1, 704 P.2d 333 (1985), recognized that a driver's license is a valuable property right and therefore cannot be taken away without being subject to due process constraints. *Id.* Therefore, petitioners argue "because Idaho recognizes a driver's license as a right, under *Hudson,* the suspension of a driver's license has a punitive criminal element." *Id.* Petitioners also argue, apart from suspensions pursuant to I.C. § 18-8002A, a driver's license suspension has long been a criminal punishment for driving under the influence of alcohol and/or drugs, driving without privileges, vehicular homicide, and minors being in possession of alcohol. *Id.,* p.

9.

In response, ITD argues driver's license suspensions have not traditionally been viewed as punishment in large part because "provision of a driver's license is a privilege, not a right." Respondent's Brief, p. 13, quoting *Talavera,* 127 Idaho 700, 705, 905 P.2d 633, 638. ITD points the Court to language in *Hudson,* and urges the Court to recognize the similarity between a debarment in *Hudson* and a suspension in the instant matter; "suspension of a driver's license is the revocation of a privilege which was voluntarily granted and is therefore free of a punitive criminal element." *Id.,* p. 14.

Petitioners' reliance on *Ankney* rests upon language in the concurring opinion of Justice Shepard. The majority opinion in *Ankney* recognizes that driver's license suspensions involve state action and adjudicate important interests of licensees, thus licenses may not be taken without procedural due process. 109 Idaho 1, 3, 704 P.2d 333, 336.

> Although an individual does have a substantial right in his driver's license, the state's interest in preventing intoxicated persons from driving far outweighs the individual's interest, particularly when the individual is entitled to the prompt post-seizure hearing.

109 Idaho 1, 5, 704 P.2d 333, 337. In his concurring opinion, Justice Shepard refers to a driver's license as a valuable property right, but only in the context of United States Supreme Court decisions supporting the validity of a statute which would permit police officers to immediately seize a driver's license upon arrest; this statute (I.C. § 49-352) was repealed in 1984. There is no support in *Ankney* for petitioners' contention that (1) Idaho recognizes a driver's license as a right, or (2) that suspension of a license has a punitive criminal element. Indeed, in *Wheeler v. Idaho Dept. of Health and Welfare,* the Idaho Supreme Court stated:

> Although we have held the power to operate a motor vehicle upon public streets and highways is a right or liberty that is afforded constitutional protections, we have never specifically recognized that a driver's license is a "property interest" in Idaho.

147 Idaho 257, 263, 207 P.3d 988, 994 (2009) (upholding driver's license suspension under Family Law License Suspensions Act (FLLSA) for nonpayment of child support). Petitioners have not presented this Court with authority sufficient to demonstrate that a punitive criminal element is at the basis of a driver's license suspension, either currently or historically. ITD's argument, found in *Hudson,* is well-taken; revocation of a privilege voluntarily granted is characteristically free of a punitive criminal element. 522 U.S. 93, 104, 118 S.Ct. 488, 495-96.

c. While Suspension Will Promote the Traditional Aims of Punishment, Retribution and Deterrence, the Civil Driver License Suspension Does Not Amount to a Criminal Penalty.

Petitioners argue: "[i]t is clear that a driver's license suspension promotes retribution and deterrence." Appellant's Supplemental Opening Brief(s), pp. 9-10, quoting *Talavera,* 127 Idaho 700, 703-05, 905 P.2d 633, 636-38. ITD argues that the simple fact petitioners' conduct was criminal in nature and formed the basis of a DUI, does not amount to rendering the license suspension criminally punitive. Respondent's Brief, p. 14. ITD again points to *Hudson,* in which the Court rejected the "same-conduct" test for purposes of double jeopardy. *Id.,* quoting *Hudson,* 522 U.S. 93, 105, 118 S.Ct. 488, 496. ("the conduct for which… sanctions are imposed may also be criminal….This fact is insufficient to render the money penalties and debarment sanctions criminally punitive.").

As argued by petitioners, *Talvera* does discuss second sanctions and their role in *vis a vis* the traditional goals of punishment. In *Talvera,* the Court noted, "a primarily

remedial sanction may serve some deterrent purposes without crossing the line to punishment for double jeopardy purposes." 127 Idaho 700, 705, 905 P.2d 633, 638. Ultimately, in *Talvera,* the Idaho Supreme Court found the remedial purpose of I.C. § 18-8002A (quickly revoking driving privileges from those who show themselves to be safety hazards by driving with an over the limit BAC) was not outweighed by the deterrent purpose in the same sanction. *Id.* Citizens' rights to operate motor vehicles on public streets and highways are subject to reasonable regulation; "[o]bviously one of the agreed conditions of the driving privileges is that the driver shall not operate a motor vehicle while under the influence of alcohol." *Id.* Absent more, petitioners have not sufficiently demonstrated to this Court that the mere fact each of their conduct led to criminal charges automatically means each of their civil driver's license suspensions amount to a criminal penalty.

d. The Behavior to Which the Civil Sanction Under I.C. § 18-8002A Applies is a Crime, but That Does Not Transform Suspension Into Criminal Punishment.

Petitioners argue a driver's license suspension under I.C. § 18-8002A is imposed when a driver has failed an evidentiary test to alcohol, indicating the driver is operating a vehicle while under the influence; therefore, behavior resulting in a suspension under I.C. § 18-8002A "is already a crime under 18-8004, 18-8004A, and 18-8004C." Appellant's Supplemental Opening Brief, p. 9/p. 10. ITD responds the mere fact that conduct sanctioned by I.C. § 18-8002A is also criminalized by I.C. § 18-8004 is insufficient to transform a license suspension into a criminal punishment. Respondent's Brief, pp. 13-14/pp. 14-15. ITD quotes *State v. McKeeth,* 136 Idaho 619, 624, 38 P.3d 1275, 1280 (Ct.App. 2002), and notes the Court of Appeals there found the conduct sanctioned by the Idaho State Counselor Licensing Board also being criminalized was

"insufficient to transform the minor fine imposed upon McKeeth into a criminal punishment." ITD also cites *Hudson* for the proposition that rendering a sanction as criminal serves civil as well as criminal goals. Respondent's Brief, p. 14/15, quoting *Hudson,* 522 U.S. ___, 105, 118 S.Ct. ___, 496. "License suspension in this case will serve to deter future wrongdoing but it will likewise ensure that the roads and highways in Idaho are protected from unsafe drivers." *Id.*

In *McKeeth,* the Court of Appeals stated:

> To hold that the presence of a deterrent purpose render such sanctions criminal for double jeopardy purposes would severely undermine the state's ability to engage in effective regulation of the practice of counseling.

136 Idaho 619, 624, 38 P.3d 1275. The Court held McKeeth had failed to demonstrate "by the clearest proof" the fine imposed on him was sufficiently punitive to override the legislature's intent that the fine constitute a civil remedy. *Id.* Likewise, here, the legislature's intent to keep Idaho's roadways safe would not be served by simply determining that the same behavior being violative of I.C. § 18-8002A civilly, and § 18-8004 criminally, alone is sufficient to amount to double jeopardy.

e. An Alternative Purpose to Which Suspension May Rationally be Connected is Not Assignable to the Suspension, and the Suspension is Not Excessive in Relation to that Alternative Purpose.

Petitioners next combine the final two factors of the *Hudson* analysis and argue (1) the analysis used by the *Talavera* Court improperly used the truncated *Halper* analysis and (2) in evaluating the sanctions in I.C. § 18-8002A, "we must look at **all** potential suspensions provided for in the statute and **all** the possible circumstances under which they could be imposed." Appellant's Supplemental Opening Brief, p. 12. Petitioners point out that the sanctions imposed may include a one-year suspension (if

more than one evidentiary test is failed within five years), that no restricted privileges are available for commercial driving purposes, and that the statute fails to address those cases in which the charges are reduced (which would warrant withholding imposition of the sanction, according to Appellants.) *Id.,* pp. 12-13. Petitioners' argue:

> In light of the additional suspension possibilities beyond those discussed in *Talavera* and the statute's failure to differentiate between cases when a suspension is appropriate and when it is not based on an underlying charge of DUI, the statute on its face is clearly disproportionate to the remedial purpose of the statute.

Id., p. 13. In response, ITD quotes *Talavera* at length, including the Court's statement that, "The remedial purpose of the suspension is apparent and very directly addresses the problems of removing drivers from the road who should not be driving." 127 Idaho 700, 705, 905 P.2d 633, 638. ITD argues suspension is not disproportionate to the legitimate goal of protecting the public from unsafe drivers. Respondent's Brief, pp. 15-16. In essence, the criminal statute is retrospective, punishing for that which has already been done (driving under the influence); where the civil statute, while addressing the same behavior (driving under the influence), is prospective, it removes "…drivers from the road who should not be driving." 127 Idaho 700, 705, 905 P.2d 633, 638.

Presumably, petitioners are arguing the alternative purpose for the suspension sanction is deterrence, one of the traditional goals of punishment. But, it has been held that the purpose of I.C. § 18-8002A is remedial and intended to "provide maximum safety" by immediately removing unsafe drivers from the roads where delays are inherent in criminal prosecutions. 127 Idaho 700, 705, 905 P.2d 633, 638. The stated mandate of suspension upon failing an evidentiary test does meet this remedial goal, and does so civilly, swiftly, and without regard for the outcome of any criminal

prosecution. The suspension sanction cannot be characterized as retribution or compensation to any party for a loss. And, as stated *supra,* the mere fact that a civil sanction has a deterrent effect is insufficient by itself to implicate double jeopardy principles. The question is whether the sanction can *only* be characterized as a deterrent or retribution. *See e.g. Austin v. US,* 509 U.S. 602, 622, 113 S.Ct. 2801, 2812 (1993) (Finding federal drug forfeiture statute to have remedial, retributive, and deterrent purposes and therefore subject to the Eighth Amendment Excessive Fines Clause.) Petitioners do not appear to be making question the remedial purpose of I.C. § 18-8002A, but rather are arguing the possible sanctions are disproportionate to the remedial purpose of the statute. This argument must fail. There is no support for the proposition that additional suspension possibilities (beyond a 90-day suspension), or suspension being imposed even "when it is not based on the underlying charge of DUI", is excessive in light of the goal of I.C. § 18-8002A. *See* Appellant's Supplemental Opening Brief, p. 13. In fact, the suspension is *never* based on the underlying DUI itself. To the contrary, the license suspension is the failure of an evidentiary test. The failure of an evidentiary test triggers the remedial purpose of the statute to "provide maximum safety."

Finally, there is a contractual component to the license suspension statute which separates that civil suspension remedy from the criminal remedy. In discussing double jeopardy, the Idaho Supreme Court in *Talavera* stated:

> As noted, the fact that a sanction serves some deterrent purpose is not dispositive. *Halper,* 490 U.S. at 448-49, 109 S.Ct. at 1902; *Kurth Ranch,* 511 U.S. at ----, 114 S.Ct. at 1947. The proper inquiry is whether the sanction, as applied, bears a rational relationship to a legitimate remedial purpose. *Halper,* 490 U.S. at 449, 109 S.Ct. at 1902.
>
> "The right of a citizen to operate a motor vehicle upon the public streets and highways, is subject to reasonable regulation by the state in

> the exercise of its police powers." *Adams v. City of Pocatello,* 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). "When issued a license, the vehicle operator agrees to abide by certain conditions and rules of the road ... and acknowledges that the continued use of the license to drive is dependent on compliance with the laws relating to vehicle operation." *State v. Savard,* 659 A.2d 1265, 1267-68 (Me.1995). Thus, "suspension of that privilege merely signifies the failure of the holder to comply with the agreed conditions." *Id.* at 1268. Obviously one of the agreed conditions of the driving privileges is that the driver shall not operate a motor vehicle while under the influence of alcohol.

127 Idaho 700, 705, 905 P.2d 633, 638.

f. The *Hudson* Factors Do Not Weigh in Favor of Petitioners' Arguments, Nor Do Those Factors Provide the Clearest Proof of the Statutes Being So Punitive As to Turn Civil Penalties Into Criminal Penalties.

Petitioners make the argument that, because the *Hudson* factors indicate I.C. § 18-8002A violates double jeopardy, I.C. § 49-335 clearly also violates double jeopardy. Appellant's Supplemental Opening Brief, pp. 14-15. In addition to the arguments they raised with regard to I.C. § 18-8002A, petitioners argue I.C. § 49-335 is even more punitive because of the economic impact a commercial driver's license suspension has upon a driver; the statute directly impacts petitioners' abilities to earn a livelihood. *Id.,* p. 15.

Ultimately, petitioners argue four of the seven factors discussed above support the finding that both I.C. § 18-8002A and § 49-335 promote the traditional goals of punishment, that the underlying behavior giving rise to the sanctions imposed is already a crime, and that the various disqualification possibilities do not regard possible resolutions to the underlying criminal charge and are disproportionate to the remedial purposes of the statutes. Appellant's Supplemental Opening Brief, p. 15. ITD argues there has only been a very small showing, to say nothing of the clearest proof required, that the sanctions are so punitive as to be considered criminal penalties. Respondent's

Brief, pp. 15-16.

As reasoned above, revocation of a privilege voluntarily granted, such as a regular or commercial driver's license, is characteristically free of a punitive criminal element. Courts have long recognized primarily remedial sanction may serve some deterrent purposes without crossing the line to punishment for double jeopardy purposes. The only factor as to which petitioners have provided clear proof regards the question of whether the behavior sanctioned is already a crime. The failure of an evidentiary test is conduct giving rise to both the sanctions at issue in I.C. § 18-8002A and I.C. § 49-335 and forms the basis of a criminal prosecution. Finally, the fact that possible resolution of the criminal matter is not considered in the statutory scheme being challenged is of no import. It is the failure of an evidentiary test which gives rise to the sanctions. Whether criminal charges are ever brought is not weighed. I.C. § 18-8002A or in I.C. § 49-335. A person who operated a commercial vehicle is disqualified from operating a commercial vehicle for one year if they refuse to submit to or fail a test to determine the driver's alcohol concentration while operating a motor vehicle. I.C. § 49-335 (2). Likewise, the department suspends driver's licenses upon receipt of a police officer's sworn statement that legal cause existed to believe a driver was under the influence of alcohol and the person submitted to a test which indicated the presence of alcohol in violation of I.C. § 18-8004. I.C. § 18-8002A(4). There is no requirement that criminal proceedings be initiated or that prosecution of a driver be successful for the suspensions to stand.

There has been, as argued by ITD, no showing by petitioners that the *Hudson* factors demonstrate by "clearest proof [sufficient] to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson,*

522 U.S. 93, 100, 118 S.Ct. 488, 494 (1997).

g. First District Judge Fred M. Gibler's Decisions in *Bartholome Burg v. State of Idaho (ITD),* Benewah Co. Case No. CV2007 541; *Donnie Ely v. State of Idaho (ITD),* Benewah Co. Case No. CV 2008 536; *James Buell v. State of Idaho (ITD),* Benewah Co. Case No. CV 2007 488; and *Paul Brebner v. State of Idaho (ITD).* Benewah Co. Case No. CV 2007 542.

As mentioned above, this Court takes judicial notice of the December 18, 2009, decision of First Judicial District Judge Fred M. Gibler made on the record in the above cases regarding an identical double jeopardy argument made in those four cases. ITD has appropriately attached to their Motion for Judicial Notice in each case, as Exhibit A, the transcript of that hearing.

Judge Gibler had looked at *Talavera* and *Hudson*, and considered the license holders' arguments as to whether *Talavera* was still good law in light of *Hudson.* Motion for Judicial Notice, Exhibit A, p. 5, Ll. 13-24. Judge Gibler's analysis, in its entirety, is as follows:

> Even if one assumes the *Hudson* analysis is applicable, that analysis would be as follows: The first inquiry is whether the license suspension statutes or the license suspension practice under the statutes has historically been used as punishment. The answer to this question, I think, is clearly no, as evidenced by the *Talavera* case, itself.
>
> The second inquiry is whether a driver's license suspension promotes traditional aims of punishment. The answer here is most likely yes because the same conduct which leads to the license suspension also led to the criminal charges of driving while under the influence.
>
> I say the answer is "probably" yes because, as Mr. Siebe has noted, there are cases where the – there is a suspension for failure to take a test or dismissal or acquittal of a DUI charge. That the suspension of a license or a commercial license pursuant to the statutes promotes traditional aims of punishment does not result in the conclusion of double jeopardies principles have been violated. As in *Hudson* the fact the same conduct has led to criminal charges is not sufficient to lead – to automatically lead to the conclusion that the driver's license suspension is in effect a criminal penalty.
>
> That's because we go to the third inquiry under *Hudson*, which is

> whether the behavior to which the sanction applies is already a crime. Here the behavior driving while under the influence is a crime which is also the basis for the license suspension. This is insufficient, however, to render the license suspension in the present cases the equivalent of a crime. That's because the loss of driving privileges serves a civil as well as a commercial goal. The DUI statute is punitive, calling for jail and fines, which are designed for punitive and deterrent effects. Loss of driving privileges serves an additional civil deterrence goal, which is ensuring that Idaho roads are protected from unsafe drivers.
>
> The conclusion is reached that, even if one applies the *Hudson* analysis that the Idaho statues do not violate double jeopardy principles, Brebner and Burg make the additional argument that the statues violate double jeopardy principles because the loss of the driving – loss of a commercial license affects the licensee's ability to earn a living. This really does not change the analysis. The loss of any driver's license, commercial or otherwise, might result in the inability of the licensee to pursue his or her customary employment. This does not make the suspension criminal in nature.
>
> The conclusion is reached that the procedures for operators license suspensions in Idaho Code Section 18-8002[A] and 49-335 do not violate double jeopardy principles.

Motion for Judicial Notice, Exhibit A, p. 5, L. 25 – p. 8, L. 4. This Court agrees completely with that analysis and conclusion.

2. Idaho Code § 18-8002A is Not Unconstitutionally Vague as Applied to Petitioners Because it Does Not Fail to Provide Fair Notice of Additional Suspension/Disqualification Consequences.

As to the three CDL suspensions in each of the petitioner's cases, petitioners argue the void for vagueness doctrine is applicable to I.C. § 18-8002A because the statute, although usually applied in criminal settings, fails to inform *commercial* drivers of additional suspensions/disqualifications they may suffer for failing an evidentiary test. Appellant's Supplemental Opening Brief (Filler cases), pp. 16-23; Petitioner's Brief (Roeller and Rothe cases), pp. 16-23. Petitioners urge the Court to utilize the more stringent criminal standard, permitting less vagueness because the statue, though it involves a civil penalty, is part of the Crimes and Punishments portion of the Idaho Code. *Id.,* p. 18. Petitioners take issue with the failure of the statute to require drivers

be notified of the true consequences of refusing or failing an evidentiary test. "By carefully notifying drivers of some suspension consequences, but leaving out others, I.C. § 18-8002A implies that suspension consequences included in the statute are the only ones drivers will face." *Id.,* p. 22

ITD argues the hearing officer properly made the finding that the notice requirements of I.C. § 18-8002A are not affected or modified by I.C. § 49-335; the additional consequences for commercial drivers are not part of the notice requirements in I.C. § 18-8002A. Respondent's Brief, p. 17. ITD states the Appellants have failed to demonstrate the hearing officer acted in violation of constitutional principles so as to require this Court to vacate or remand his decision. *Id.*

The constitutionality of a statute is a question of law over which reviewing courts exercise free review. *Lochsa Falls, LLC v. State,* 147 Idaho 232, 237, 207 P.3d 963, 968 (2009) (quoting *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)).

> There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Id. The void-for-vagueness doctrine is premised on the due process clause of the Fourteenth Amendment to the United States Constitution; it is a basic principle of due process that an enactment is void where its prohibitions are not clearly defined. *State v. Korsen,* 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). (citing *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972)). A statute is void for vagueness where it "either forbids or requires the doing of an act in terms so vague that people of common

intelligence must necessarily guess at its meaning." *Haw v. Idaho State Bd. Of Med.,* 140 Idaho 152, 157, 90 P.3d 902, 907 (2004). Civil statutes will not be held void for vagueness where they can be given "any practical interpretation" or where persons of common intelligence "can derive a core meaning" from them. *MDS Inv., LLC v. State,* 138 Idaho 456, 461, 65 P.3d 197, 202 (2003). In a civil context, a statute is unconstitutionally vague where it persons of ordinary intelligence must guess at the statute's meaning. *Terrazas v. Blaine County ex rel. Bd. Of Com'rs,* 147 Idaho 193, 203, 207 P.3d 169, 179 (2009). Greater tolerance is permitted when addressing a civil statue as opposed to a criminal statute under the doctrine. *Olsen v. J.A. Freeman Co.,* 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990). In the criminal context, the doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and so as not to allow arbitrary and discriminatory enforcement. *State v. Martin,* 148 Idaho 31, 35, 218 P.3d 10, 14 (Ct.App. 2009).

Petitioners' arguments are misplaced. Whether the Court applies the criminal or civil standard of the void-for-vagueness doctrine, the question ultimately posed is whether a person must guess at a statute's meaning. There is no question that the conduct prohibited is clearly defined. As written, the statute specifically as to its notice requirements does not allow for arbitrary or discriminatory enforcement. Here, the statute identifies itself by its own language as civil; it imposes a civil penalty. Therefore, so long as the notice requirements in I.C. § 18-8002 can be given "any practical interpretation" or where persons of common intelligence "can derive a core meaning" from them, they will be upheld. *MDS Inv., LLC v. State,* 138 Idaho 456, 461, 65 P.3d 197, 202. The statute refers to an officer's not providing the driver of a commercial vehicle a temporary license upon refusal or failure of an evidentiary test. There is no procedure for obtaining temporary, restricted

commercial privileges. And, there simply is no requirement that petitioners be notified of possible additional consequences for their failures in their respective evidentiary tests. The absence of any such warning does not make the statute vague, nor does it require Appellants to guess at its meaning. Indeed, I.C. § 49-335 contains no notice provisions; it is simply the failure of an evidentiary test which gives rise to the suspension.

Judge Gibler also address the constitutionally vague argument presented to him. The argument is that license suspensions under Idaho Code § 18-8002A mislead the holders of commercial licenses because they do not inform a CDL licensee that he or she is subject to additional penalties under I.C. § 49-335. Motion for Judicial Notice, Exhibit A, p. 8, Ll. 5-13. Judge Gibler noted such argument to be “misplaced”. *Id.,* Ll. 13-25. Judge Gibler stated:

> The proper analysis is under Idaho Code Section 49-335, which clearly states that a commercial license is subject to the one-year suspension. Idaho Code Section 18-8002[A] doesn not purport to deal with all license suspensions. Brebner and Burg, by virtue of the fact they hold commercial licenses, knew there were obligations and requirements to holding a commercial license which are different from ordinary licenses. The statute is not unconstitutionally vague as applied to those petitioners.

Id., Ll. 15-24. This Court finds that analysis persuasive, and agrees with that analysis.

3. Conclusion.

For the reasons set forth above, the decision entered by the State of Idaho Transportation Department in each of the six cases regarding the each of the three petitioners’ CDL disqualification and ALS suspension herein must be affirmed.

IV. ORDER.

IT IS HEREBY ORDERED that ITD’s “Motion to Dismiss for Failure to Exhaust Administrative Remedies”, filed July 31, 2009, in *Roeller v. State*, Kootenai County Case No. CV 2009 3321 (Roeller’s CDL Appeal), is GRANTED. Roeller’s Petition for

Review of his CDL suspension in CV 2009 3321 is DISMISSED. Alternatively, Roeller's appeal of his CDL suspension, if it were decided on the merits, would result in the same outcome as the CDL appeals of Rothe and Filler, and is DISMISSED for that alternative reason.

IT IS FURTHER ORDERED Rothe's "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action and Notice of Hearing" filed August 19, 2009, is DENIED.

IT IS FURTHER ORDERED that Rothe's "Motion for Attorney's Fees and Costs" based on "Petitioner's Motion Pursuant to I.C. § 67-5276 to Provide Additional Evidence to the Hearing Officer Related to Dismissal of the Action and Notice of Hearing" is DENIED.

IT IS FURTHER ORDERED ITD's "Motion for Judicial Notice" filed in each of the two cases concerning each of the three petitioners at issue in this decision (to which counsel for petitioners did not object) is GRANTED. This Court takes judicial notice of the singular decision on the record in *Bartholome Burg v. State of Idaho (ITD),* Benewah Co. Case No. CV2007 541; *Donnie Ely v. State of Idaho (ITD),* Benewah Co. Case No. CV 2008 536; *James Buell v. State of Idaho (ITD),* Benewah Co. Case No. CV 2007 488; and *Paul Brebner v. State of Idaho (ITD).* Benewah Co. Case No. CV 2007 542, transcript of which was filed in each of the six cases at issue before this Court per the directive of *Esquivel v. State of Idaho,* Docket No. 35792, 2010 Opinion No. 7S, p. 4, n. 3 (Ct. App. April 8, 2010).

IT IS FURTHER ORDERED ITD's Objections to Filler's Supplemental Opening Briefs in *Filler v. State,* Kootenai County Case No. CV 2009 1965 [CDL] and *Filler v. State,* Kootenai County Case No. CV 2008 4236 [ALS], is OVERRULED.

IT IS FUTHER ORDERED the decision entered by the respondent State of Idaho Transportation Department in each of the six cases regarding the each of the three petitioners' CDL disqualification and ALS suspension herein, is AFFIRMED.

Entered this 3rd day of May, 2010.

____

John T. Mitchell, District Judge

Certificate of Service

I certify that on the ________ day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Suzanna L. Graham	665-7079	Susan K. Servick	667-1825

Hon. Fred M. Gibler

____

Jeanne Clausen, Deputy Clerk