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ATTORNEY GENERAL OPINION NO. 88-8

TO: Mack W. Richardson, Jr., Director  
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does Idaho Code § 23-1003 exempt the holder of a brew pub license from the requirement to have a wholesaler's license when the licensee sells beer to other retail outlets in addition to retailing at the brewery and at one remote location?

CONCLUSION:

Yes. Idaho Code § 23-1003 allows an Idaho licensed brewer who produces fewer than 30,000 barrels of beer annually to obtain a "brewer's retail beer license" or a "brewer's pub license." While the two licenses differ in the types of beer products allowed to be sold by a licensee, both licenses permit the licensee to "sell at retail" at his own brewery and at one remote location, while further permitting the licensee to "sell to retailers" without having to be licensed as a wholesaler.

Although the legislature failed to amend the Idaho Code § 23-1055(d) requirement that retailers purchase beer for resale only from licensed dealers or distributors, it is our opinion that an Idaho court would find this requirement repealed by implication to the extent it conflicts with § 23-1003(d) and (e) and the exemption granted to small breweries from other requirements of a wholesaler's license.

ANALYSIS:

I. Construction of Idaho Code § 23-1003.

In interpreting the provisions of § 23-1003, we are guided by the basic rule of statutory construction that we give effect to the legislature's intent. Umphrey v. Sprinkel, 682 P.2d 1247, 106 Idaho 700 (1983). In determining the application of a statute, the initial determination is whether its meaning is clear or ambiguous. If it is clear, one reads the statute literally, neither adding nor taking away anything by statutory construction. Only if it is ambiguous must one go outside the language of the statute itself to ascertain and effectuate the legislative intent. St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 148, 686 P.2d 88, 93 (Ct. App. 1984).

Idaho Code § 23-1003 establishes a three-tiered system requiring brewers, dealers and wholesalers of beer to obtain licenses from the Director of the Idaho Department of Law Enforcement. Section 23-1003(a) provides:

Before any brewer shall manufacture, or any dealer or wholesaler import or sell, beer within the state of Idaho he shall apply to the director for a license so to do. . . .

In 1987, the legislature amended § 23-1003 by creating two new types of licenses available only to Idaho licensed brewers who produce fewer than 30,000 barrels of beer annually. 1987 Sess. Laws, ch. 22, added subsections (d) and (e) to provide as follows:

(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 premise 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. [Codification errors led to the misspelling of the word "his" twice in subsection (d) in the Idaho Code 1988 Supplement. This opinion adheres to the correct spelling found in the Session Law.]

(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, 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.

Both subsections distinguish "selling beer at retail" from "selling beer to a retailer." This distinction is significant, because in each subsection, the sentence which limits places of sale to the licensee's brewery, or one remote location, or both, applies only to "retail sale" (in subsection (d)) or, equivalently, to "sell at retail" (in subsection (e)).

Thus, from the clear wording of the 1987 amendments, it appears that § 23-1003(d) and (e) place limitations only upon direct retail sales by the brewer, prescribing the types of beer products that a brewer can directly sell at retail and defining where such direct retail sales can take place. These subsections do not place limitations upon the licensee's ability to sell to retailers. They only require that the brewer pay wholesale taxes on all the beer products produced and sold, whether directly at retail or to retailers. Both subsections expressly relieve the brewer of the requirement of obtaining a wholesaler's license.

The legislative history of § 23-1003(d) and (e) supports our interpretation that these subsections exempt brew pub license holders from the requirement of obtaining a wholesaler's license as a precondition to selling brew to retailers. State Representative Phil Childers explained his understanding of this issue to the House Commerce, Industry and Tourism Committee:

Representative Childers told the Committee that this legislation would do away with the occupational restriction of the strict 3-tiered system. It would allow 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. (Emphasis added.)

House Commerce, Industry and Tourism Committee Minutes, February 3, 1987. See also, the January 27, 1987, minutes from the same committee:

Representative Childers said that this legislation would make allowances for the strict 3-tiered system that prevents a brewer from being a distributor or retailer. (Emphasis added.)

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 restrictions of the three-tiered system that accompany those licenses. Reading the language of § 23-1003(d) and (e) to require small brewers to apply for a wholesaler's license before distributing beer to retailers would be contrary to the clear statutory language and to the express legislative intent.

## II. Conflict With Idaho Code § 23-1055.

A problem is presented by the fact that when the legislature enacted the legislation creating the brewer's retail beer license and brewer's pub license, it did not amend § 23-1055(d), which provides that it shall be unlawful:

for any retailer licensed in this state to purchase beer for resale except from a dealer or wholesaler licensed in this state.

As § 23-1055(d) is written, a retailer who purchases beer from a brewer retail beer licensee or a brewer pub licensee pursuant to § 23-1003(d) or (e) violates § 23-1055(d) if the licensee has not also obtained a wholesaler's license.

The apparent conflict between § 23-1003(d) and (e) and § 23-1055(d) gives rise to the principle of repeal by implication, described by the Idaho Supreme Court in Jordan v. Pearce, 91 Idaho 687, 691, 429 P.2d 419, 423 (1967):

"Repeals by implication are not favored; but if inconsistency is found to exist between the earlier and the later enactments, such that the legislature could not have intended the two statutes to be

contemporaneously operative, it will be implied that the legislature intended to repeal the earlier enactment." (Citations omitted.)

See also, Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986). Repeal by implication need not result in repeal of the entire earlier enactment. As the Idaho Supreme Court held in Paullus v. Liedkie, 92 Idaho 323, 326, 442 P.2d 733, 736 (1968), "a later enactment will impliedly repeal an earlier one only to the extent of any conflict between the two."

Despite the fact that repeals by implication are disfavored by Idaho courts, it is our opinion that a court would find § 23-1003(d) and (e) to be irreconcilable with § 23-1055(d) and deem § 23-1055(d) repealed by implication to the extent that the two statutes conflict. The language of § 23-1003(d) and (e) and the legislative history of those subsections indicate that the legislature intended to allow small breweries to obtain special permits for limited direct retail sale and unlimited distribution through sales to retailers, without having to obtain a wholesaler's license and without having to be bound by the wholesale license restrictions of the three-tiered system applicable to large breweries.

AUTHORITIES CONSIDERED:

Idaho Statutes:

Idaho Code § 23-1003.  
Idaho Code § 23-1055.

Session Laws:

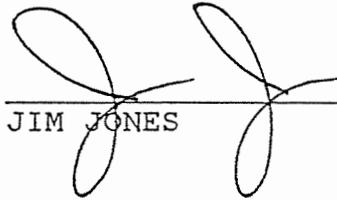
1987 Sess. Laws, ch. 22, p.29.

Idaho Cases:

DOE v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986).  
Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983).  
Paullus v. Liedkie, 92 Idaho 323, 442 P.2d 733 (1968).  
Jordan v. Pearce, 91 Idaho 687, 429 P.2d 419 (1967).  
St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 686 P.2d 88 (Ct. App. 1984).

DATED this 12<sup>TH</sup> day of December, 1988.

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Analysis by:

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cc: Idaho Supreme Court  
Supreme Court Library  
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