

July 18, 1996

The Honorable JoAn Wood
The Honorable Hal Bunderson
Cochairs, Interim Committee on Ports of Entry
STATEHOUSE MAIL
Boise, ID 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Representative Wood and Senator Bunderson:

As stated in your letter of July 9, 1996, your interim legislative committee is reviewing Ports of Entry operations. As part of its review, the committee is concerned that various state statutes "may no longer be in compliance with federal law" given the elimination of the Interstate Commerce Commission ("ICC"). This review is further prompted by national trends to deregulate various industries, including the motor transportation industry. Pursuant to this inquiry, the committee has requested that the Attorney General render an opinion on nine questions. Following the summary, the answers to all your questions are explained in greater detail.

**SUMMARY OF
QUESTIONS PRESENTED AND CONCLUSIONS**

1. Do recent revisions of the federal Motor Carrier Act preempt the Idaho Public Utilities Commission and the Idaho Transportation Department from enforcing various provisions of Idaho Code relating to the regulation of motor carriers?

Provisions of the federal Motor Carrier Act (revised and recodified in the ICC Termination Act of 1995) (the "Act") preempt state regulation of prices, routes and services for intrastate motor carriers of property. However, the Act also contains two "savings" clauses that allow states to exercise regulatory authority over motor carriers in areas not preempted by federal law. Areas not preempted by federal law include but are not limited to safety, vehicle size and weight, the transportation of hazardous cargo and highway route controls, financial responsibility related to insurance requirements, certain transportation practices, and registration.

2. If the federal Motor Carrier Act preempts the collection of state regulatory fees from motor carriers, should these fees be refunded?

Federal law has not preempted the collection of state regulatory fees from motor carriers. Consequently, there is no necessity to refund these fees.

3. Do Idaho statutes become “invalid” when they contain references to federal agencies that are subsequently abolished but the federal agencies’ functions are transferred to other agencies?

It is the opinion of this office that statutes do not become invalid when references to federal agencies contained in the statutes are changed following enactment. Statutes should be construed to give effect to the intent of the legislature. Idaho courts avoid statutory interpretations that result in absurd or harsh results.

4. Is the Public Utilities Commission required to enforce motor carrier laws without regard to federal preemption until such time as the Idaho Legislature amends the Idaho Code to remove the preempted provisions?

No. Once it has been reasonably determined that a statute has been preempted by federal law, enforcement of that statute should be withheld. A statute which is federally preempted is deemed to be unconstitutional by operation of the Supremacy Clause of the U.S. Constitution. In essence, the statute is nullified.

5. Is the legislature in violation of federal law “for failing to remove” Idaho statutes which are subsequently preempted by federal law?

No. As a practical matter, the legislature is not always in session when statutes are found to be preempted. In a strict legal sense, a law which is federally preempted is unconstitutional and therefore is void and of no effect.

BACKGROUND

A. Federal Motor Carrier Act

In the past three years, Congress has twice exercised its authority under the United States Constitution’s Commerce Clause to preempt state regulation of intrastate transportation. In 1994, Congress enacted section 601 of the Federal Aviation Administration (“FAA”) Authorization Act, Pub. L. 103-305, 108 Stat. 1606 (1994) (amending 49 U.S.C. § 11501, subsequently recodified). Section 601 became effective January 1, 1995. Section 601 generally preempted a state from enacting or enforcing a law or regulation “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” Section 601(c)(2) permitted states to continue to exercise regulatory authority with respect to safety, highway route controls, vehicle

size and weight restrictions, the transportation of hazardous materials, and financial responsibility insurance requirements. Pub. L. 103-305, 108 Stat. 1606 (formally codified at 49 U.S.C. § 11501(h)(2) (1994)).

In December 1995, Congress revised and recodified the federal Motor Carrier Act when it enacted and the President signed into law the ICC Termination Act of 1995. Pub. L. 104-88, 109 Stat. 803 (1995). The ICC Termination Act abolished the 108-year old Interstate Commerce Commission (ICC); eliminated unnecessary provisions and streamlined other provisions of the federal Motor Carrier Act; transferred many of the ICC's motor carrier functions to the U.S. Department of Transportation; and established the Surface Transportation Board within the Department. H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 796. The ICC Act became effective January 1, 1996. With minor exceptions, section 601(c) of the FAA Act was recodified as section 14501(c) of the ICC Termination Act.

In pertinent part, section 14501(c) provides:

(c) Motor Carriers of Property.

(1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service, of any motor carrier (other than a carrier affiliated with a direct air carrier . . .) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1) [above]

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods¹; and

(C) does not apply to the authority of a State or political subdivision of a State to enact or enforce a law, regulation, or other

provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authority of the owner or operator of the motor vehicle.²

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to

- (i) uniform cargo liability rules,
 - (ii) uniform bills of lading or receipts for property being transported,
 - (iii) uniform cargo credit rules,
 - (iv) antitrust immunity for joint line rates or routes, classifications and mileage guides, and pooling, or
 - (v) antitrust immunity for agent-van line operations.
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if such law, regulation, or provision meets the requirements of subparagraph (B).

(B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or regulation issued by the Secretary [of Transportation] or [Surface Transportation] Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

Pub. L. 104-88, 109 Stat. 899-900 (codified at 49 U.S.C. § 14501(c)) (emphasis and footnotes added). The Act did not preempt the regulation of intrastate passenger carriers operating entirely within Idaho. Section 14501(a) codified at 49 U.S.C. § 14501(a).

B. Idaho Motor Carrier Act

The Idaho Motor Carrier Act is found at Idaho Code §§ 61-801, *et seq.* The legislature enacted and recodified the Idaho Act in 1951, and it became effective January 1, 1952. 1951 Sess. Laws ch. 291. Under the present regulatory scheme, the legislature has vested the state's regulatory authority over motor carriers transporting passengers and property with the Public Utilities Commission. The commission was the equivalent state agency to the federal Interstate Commerce Commission ("ICC"). Under the Idaho Act, the Department of Law Enforcement and the Idaho Transportation Department are also vested with the authority to enforce provisions of the Act and rules promulgated pursuant to the Act. Idaho Code § 61-810.

Idaho rules governing intrastate motor carriers have generally mirrored rules promulgated by the ICC for interstate motor carriers. Following passage of the FAA Authorization Act in 1994, the Public Utilities Commission suspended its rules addressing the "prices, routes and services" of intrastate property carriers pending the outcome of a federal court challenge. IPUC Order No. 25847 (Jan. 11, 1995). In June 1995, the commission reduced the registration fee for interstate motor carriers to \$1.00 per vehicle. IDAPA 31.61.01.051 (1995) T.

LEGAL ANALYSIS

The test for federal preemption has evolved in recent years into a two-stage inquiry. The first inquiry is to determine whether federal legislation at issue has been enacted pursuant to powers delegated to the federal government by the United States Constitution. United States v. Lopez, — U.S. —, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (possession of firearm in local school zone did not substantially affect interstate commerce and thus did not fall within gambit of Congressional authority afforded by Constitution's Commerce Clause). Once constitutional authority is evident, the second inquiry is to determine the scope of the intended federal preemption. Preemption may occur:

(1) when Congress enacts federal statutes that express a clear intent to preempt state law; (2) when there is an outright or actual conflict between federal and state law; (3) when compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 2d 369 (1986) (citations and internal punctuation omitted).

A. Constitutional Delegation of Authority

The threshold question is whether the U.S. Constitution authorizes the federal government to enact statutes dealing with the intrastate regulation of motor carriers. The Constitution delegates to Congress the power “to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.” U.S. Constitution, Art. I, § 8, cl. 3; Lopez, 115 S. Ct. at 1626. In Lopez the United States Supreme Court identified three broad categories of activities that Congress may regulate under the Commerce Clause: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “the activities that substantially affect interstate commerce.” 115 S. Ct. at 1629-30; Kelley v. United States, 69 F.3d 1503, 1507 (10th Cir. 1995), *cert. denied* — U.S. —, 116 S. Ct. 1566, 134 L. Ed. 2d 665 (1996).

In Kelley, the Tenth Circuit Court of Appeals held that provisions of the federal Motor Carrier Act intended to preempt state regulation of intrastate motor carriers “fall squarely within the third category of [Commerce Clause] activities cited in Lopez.” 69 F.3d at 1507. Thus, the Commerce Clause provides Congress with the requisite authority to enact statutes addressing state regulation of intrastate motor carriers. *See generally* Texas v. United States, 761 F.2d 211 (5th Cir. 1985) (preempting state regulation of intrastate bus rates); Texas v. United States, 730 F.2d 339 (5th Cir. 1984) (preempting intrastate rail rates is a valid exercise under the Commerce Clause).

B. The Scope of Federal Preemption

Idaho courts that have often been called upon to determine whether Idaho law is preempted through operation of the Supremacy Clause³ of the United States Constitution. “We start with the assumption that the historic police powers of the states were not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress.” Dunbar v. United Steelworkers of America, 100 Idaho 523, 525, 602 P.2d 21, 23 (1979), *quoting* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L. Ed. 2d 179 (1978); Afton Energy v. Idaho Power Company, 114 Idaho 852, 859 n.1, 761 P.2d 1204, 1211 n.1 (Bakes, J., specially concurring). Congressional intent to preempt state law may be evidenced either expressly or by implication. State ex rel. Andrus v. Click, 97 Idaho 791, 797, 554 P.2d 969, 975 (1976); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). The critical question in any preemption analysis is whether Congress intended federal law to supersede state law. Louisiana Public Service Comm'n, 476 U.S. at 355. Preemption

under the Supremacy Clause is a question of law which Idaho courts freely decide. Estate of Mundell, 124 Idaho 152, 857 P.2d 631 (1993).

In Opinion No. 77-2, the Idaho Attorney General observed that where Congress exercises its commerce power to regulate a particular field, and state regulation is expressly conflicted, then the state law becomes inoperative and the federal statute becomes exclusive in its application. Cloverleaf v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942). However, when the preemption clause does not cover an entire field or simply covers a particular point, state action is permitted or expressly “saved.” Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 1082 (1963). But where Congress attaches an express preemption clause to legislation, such a clause prohibits any concurrent or subsequent action by the state in that area of regulation. Chemical Specialties Mfrs. Ass’n v. Clark, 482 F.2d 325 (5th Cir. 1973). A narrow preemption section in a statute, especially one dealing with the area of state police power, shall be construed narrowly and preemption will not be presumed. Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969) (citations omitted). 1977 Idaho Att’y Gen. Ann. Rpt. 68, 71.

In the present matter, section 601 (the predecessor of section 14501(c)) contains an explicit preemption clause but the preemption does not occupy the entire field of motor carrier regulation. Louisiana Public Service Comm’n, 467 U.S. at 368. Although not codified in the United States Code, Congress found and declared in section 601(a) of the FAA Authorization Act that:

- (1) the regulation of intrastate transportation of property by the states has
 - (A) imposed an unreasonable burden on interstate commerce;
 - (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
 - (C) placed an unreasonable cost on the American consumers;and
- (2) certain aspects of the state regulatory process should be preempted.

Pub. L. 103-305, 108 Stat. 1605 (1994) (emphasis added). Consequently, the language of section 601(c) (recodified as section 14501(c)) was accompanied by an expressed preemption clause. We next examine the scope of the preemptive effect of section 14501(c)(1) and the savings clauses of section 14501(c)(2) and (3).

At this juncture, a review of Kelley, 69 F.3d at 1503, may be instructive. Following enactment of section 601 of the FAA Authorization Act, representatives of

four states and others filed an action in federal court claiming that section 601 violated the Commerce Clause, the Tenth Amendment⁴ or the Guarantee Clause and was, therefore, unconstitutional. The Tenth Circuit Court of Appeals affirmed the district court's denial of the claims.

Addressing the threshold constitutional issue, the Tenth Circuit noted that inquiry under the Commerce Clause and under the Tenth Amendment are mirror images of each other. Consequently, if the Constitution delegates authority to Congress, “the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.” Kelley, 69 F.3d at 1509, *quoting New York v. United States*, 505 U.S. 144, 155-56, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992).

The primary thrust of the plaintiffs' argument in Kelley was that section 601 was overly broad and preempted not only state economic regulation of intrastate trucking but also a host of other state laws including tort law, antitrust law, consumer protection law, cargo loss and damage claim law, the uniform commercial codes, and laws governing the transportation of hazardous material. Kelley, 69 F.3d at 1508. The court ruled that section 601's preemption of state regulations pertaining to prices, routes or services was clearly within Congress's authority. In spite of the dire consequences to other state laws, the court noted that:

[I]t is far from clear that [§ 601's] impact is as far-reaching as plaintiffs would have the court believe. In fact, as pointed out by the Department of Justice, many of the examples cited by the plaintiffs are purely speculative and are based upon an interpretation of § 601 not shared by the Department of Justice or the Department of Transportation.

Id. Although the court determined that section 601 (again, almost identical to the recodified language contained in section 14501) was constitutional, the court was not called upon to examine the relationship between the preempted areas of prices, routes or services and the regulatory activities specifically reserved to the states.

C. The Scope of Section 14501(c)'s Preemption Clause

Section 14501(c) of the ICC Act provides that states “may not enact or enforce a law [or regulation] . . . related to a price, route, or service of any motor carrier.” In determining legislative intent and the scope of preemption, courts begin with the assumption that the ordinary meaning of the statutory language accurately expresses the legislative purpose. Morales, 112 S. Ct. at 236; State v. Lisby, 126 Idaho 776, 890 P.2d 727 (1995). By its terms, section 14501(c)(1) preempts state laws and regulations

pertaining to the intrastate regulation of rates, routes, or services. Several courts have construed the meaning of “related to” in a broad fashion.

In Morales the U.S. Supreme Court noted that the ordinary meaning of the words “related to” is a broad one. 112 S. Ct. at 2037. In construing the preemptive language contained in the Airline Deregulation Act (ADA), the Court dismissed a claim that the ADA’s remedial savings clause restricted the reach of the preemptive language. *Id.*; West v. Northwest Airlines, Inc., 995 F.2d 148 (9th Cir. 1993) (construing the ADA preemptive clause). Like the two previous cases, the Ninth Circuit in Federal Express Corporation v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S. Ct. 2956, 119 L. Ed. 2d 578 (1992), found that the preemptive language contained in the ADA preempted the California Public Utilities Commission’s economic regulation of Federal Express because the carrier’s motor carrier operation was an integral part of its air carrier operation. 936 F.2d at 1078. The court noted that “despite the very broad and apparently all-inclusive language of the [ADA preemption] statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range.” *Id.*

Mindful of the courts’ conclusions regarding the breath of preemptive language similar to that contained in section 14501, there are some distinguishing features between the cases set out above and this examination. In particular, the Morales, Federal Express and West cases were construing preemption language under the ADA. The preemptive sweep of the ADA has been compared to the preemption provisions contained in the Employer Retirement Income Securities Act (ERISA) which preempts “all state laws ‘in so far as they . . . relate to any employee benefit plan.’” Morales, 112 S. Ct. at 2037. The type of preemption incorporated in the ADA demonstrates Congress’s intent to completely occupy a field of regulation, leaving no room for state participation. Louisiana Public Service Comm’n, 476 U.S. at 368. The other significant difference between the preemptive clauses of the ADA and the federal Motor Carrier Act is that the ADA did not have a substantive savings clause. By allowing states to exercise some jurisdiction in the field of motor carrier regulation, Congress envisioned a “dual” regulatory scheme in the Motor Carrier Act provided, however, that state regulatory activities not interfere with areas subject to federal preemption.

The savings clause of subparagraph (c)(2) provides that the federal preemption (applicable to intrastate prices, routes and service) does not restrict state regulatory authority in areas of safety, highway route controls, size or weight of motor vehicles, the regulation of hazardous cargo, or regulating the minimum amounts of financial responsibility relating to self-insurance. 49 U.S.C. § 14501(c)(2). Subparagraph (c)(3) also “saves” state authority to regulate standard transportation practices if motor carriers request that such regulation apply to them. 49 U.S.C. § 14501(c)(3).

The legislative history accompanying section 601 further indicates that Congress intended to preempt state regulation of prices, routes, and services but did not intend to preempt state regulation regarding safety, financial responsibility related to insurance, transportation of household goods, tow truck operations, vehicle size and weight, hazardous material routing. H. Conf. Rpt. No. 103-677, *reprinted in* 1994 U.S. Code Cong. & Admin. News, Vol. 4 at 1756. The House Conference Report further notes that this enumerated list of areas not preempted was not “intended to be all inclusive, but merely to specify some of the matters which are not “prices, rates or services” and which are therefore not preempted.” *Id.* With this background, we now turn to an examination of motor carrier statutes embodied in the Idaho Motor Carrier Act, codified at Idaho Code §§ 61-801, *et seq.*, and the committee’s questions.

EXAMINING THE IDAHO MOTOR CARRIER STATUTES

A. The Statutes

1. Idaho Code § 61-802

The committee first asks whether the “permit for intrastate operations required by the provisions of section 61-802, Idaho Code, [is] invalid, either in part or in whole?” In its entirety, Idaho Code § 61-802 provides:

It shall be unlawful for any motor carrier, as the term is defined in this chapter, to operate any motor vehicle in motor transportation without first having obtained from the commission a permit covering such operation.

A permit shall be issued to any qualified applicant authorizing the whole or any part of his operations covered by the application made to the commission in accordance with the provisions of this chapter, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent authorized by the permit, is or will be required by the present or future public convenience and necessity.

In considering public convenience and necessity the commission shall, prior to issuance of a permit, consider the effect of such proposed motor carrier operation upon the operations of any authorized common carrier then operating over the routes or in the territory sought. The mere existence of a common carrier in the territory sought who possesses

authority similar to that sought shall be insufficient cause to deny the issuance of the permit.

This section of the Idaho Motor Carrier Act sets out the necessary requirements that the commission must consider when reviewing an application for an intrastate permit. The first paragraph of this section requires that a motor carrier obtain a permit before beginning operations within Idaho. The second and third paragraphs of this section delineate the standards that the commission is to utilize when considering an application for a motor carrier permit. A permit “shall be issued” if the commission finds that the applicant is: (1) fit, willing, and able to perform the proposed service; (2) will conform to the provisions of the Motor Carrier Act and the requirements, rules and regulations of the commission; and (3) that the proposed service is or will be required by the present or future public convenience and necessity. The third paragraph requires the commission to consider the competitive effects of the applicant’s proposed service on the operations of any existing common area operating “over the routes or in the territory sought” by the applicant.

In analyzing whether the statute is preempted in its entirety or in part, a court must determine whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Estate of Mundell, 124 Idaho at 154, 857 P.2d at 633, *quoting Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S. Ct. 2114, 2129, 68 L. Ed. 2d 576 (1981). If Congress has preempted state regulation in a limited manner, preemption is not to be inferred unless state law “actually conflicts with federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” Boundary Backpackers v. Boundary County, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996), *quoting California Coastal Comm’n v. Granite Rock Company*, 480 U.S. 572, 581, 107 S. Ct. 1419, 1425, 94 L. Ed. 2d 577 (1987).

Turning to the permitting provision contained in the first paragraph of section 802, this paragraph is not preempted by federal law. Section 14501 specifically recognizes the state’s right to continue regulating in some areas. The requirement that motor carriers obtain permits does not conflict with federal law, *i.e.*, it is possible to comply with state law without running afoul of federal preemption. Boundary County, 128 Idaho at 376, 913 P.2d at 1146; State ex rel. Andrus v. Click, 97 Idaho at 797-98, 554 P.2d at 975-76. Moreover, the House Conference Report accompanying section 601 stated that federal law would not “preempt the ability of a state to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with state requirements which are not preempted by these sections” H. Conf. Rpt. No. 103-677, *reprinted in* 1994 U.S. Code Cong. & Admin. News., Vol. 4 at 1757. Likewise, the legislative history of the ICC Termination Act does not reveal any basis that would preempt Idaho from issuing permits to its intrastate motor carriers. *See* H. Rpt. No. 104-

311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 828; H. Conf. Rpt. No. 104-422, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 899. Although mindful of the preemptive intent of section 14501 and yet recognizing that Congress did create a “dual” regulatory scheme, it is clear that a permitting process is not federally preempted.

Turning to the second paragraph of section 802, it appears that the commission’s consideration of whether the proposed “service” is required by the public convenience and necessity does relate to “service” and is therefore preempted. Boundary Backpackers, 128 Idaho at 377, 913 P.2d at 1147; Kelley v. United States, 69 F.3d at 1508.

The requirement that the commission consider whether the applicant is “fit, willing and able to properly perform the service proposed” is a closer question. Although this clause refers to the proposed “service” of a motor carrier, it does not run afoul of the preemptive effect of federal law. More specifically, federal law recognizes that states may continue to regulate in specific areas affecting motor carriers. For example, an applicant for an intrastate motor carrier permit may legitimately be deemed to be unfit, unwilling, or unable to perform the proposed service because the applicant has failed to meet insurance requirements, applicable safety standards, or regulations pertaining to the transportation of hazardous materials. Section 13902 of the federal Motor Carrier Act states that the Secretary “shall register a person to provide transportation . . . if the Secretary finds that the person is willing and able to comply with federal laws and applicable regulations” 49 U.S.C. § 13902 (emphasis added). In this instance, it is not impossible for motor carriers to comply with both federal and state law. Boundary Backpackers, 128 Idaho at 377, 913 P.2d at 1147.

The third paragraph of section 802 is also preempted by federal law. The state law relating to the services (in this case the “operations”) and the “routes” of carriers is clearly preempted. Morales, 112 S. Ct. at 2037; Kelley, 69 F.3d at 1508. The commission may not “bootstrap” regulatory authority over services or routes through the permitting or registration statutes.

2. Idaho Code § 61-802B

The committee’s next question asks “[w]ith respect to interstate carriers, is the requirement to file operating authority with the P.U.C. pursuant to the provisions of section 61-802B, Idaho Code, invalid.” This section generally requires that interstate motor carriers must register their interstate operating authority or declare that they are exempt from the interstate registration system. In pertinent part, this section states that it shall be unlawful for any interstate carrier of persons or property to operate upon the public highways of this state without having registered with the Idaho public utilities

commission his operating authority granted by the interstate commerce commission or an affidavit of exemption therefrom. Such registration shall be granted annually upon application, without hearing, upon payment of the filing fee prescribed in Idaho Code § 61-812, as amended.

Such registration shall be revoked by the Idaho Public Utilities Commission upon revocation of the operating authority by the Interstate Commerce Commission.

Registration of interstate carriers is not preempted by federal law. Section 14504 expressly authorizes states to register interstate carriers under the Single State Registration System (“SSRS”). 49 U.S.C. § 14504. This section authorizes the Public Utilities Commission to continue registering interstate motor carriers. The ICC Termination Act contemplates that the Secretary shall examine the various motor carrier registration systems in existence, but the Act continues the current registration systems for a period of 24 months while the Secretary conducts a rulemaking to study the consolidation of the various registration systems. H. Rpt. No. 104-311, *reprinted in 1995 U.S. Code Cong. & Admin. News*, Vol. 2 at 798-99. Although section 13908 permits the Secretary to “preempt States from imposing substantially similar requirements upon carriers,” the Secretary cannot preempt registration systems until such time as he has finished the study. *Id.* at 828. In addition, “the Secretary can prevent States from requiring insurance filings and collecting fees only if the Secretary could insure that fees collected by the Secretary under the new registration system and distributed to the States will provide each State with at least as much revenue as that State received in fiscal year 1995 under the single-State registration system.” H. Conf. Rpt. No. 104-422, *reprinted in 1995 U.S. Code Cong. & Admin. News*, Vol. 2 at 899 (emphasis added).⁵ Taking into consideration the scope of the federal preemption and the legislative history outlined above, it is apparent that Idaho Code § 61-802 is not preempted.

3. Inapplicable Code References

In a related matter, the committee also asks what the legal effect is on agency operations when Idaho Code references to federal law are no longer applicable. As set out above, Idaho Code § 61-802B contains two references to the Interstate Commerce Commission. The ICC was abolished by section 101 of the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (1995). However, most of the ICC’s authority over the commercial operations of the motor carrier industry was transferred to the Department of Transportation. H. Rpt. No. 104-311, *reprinted in 1995 U.S. Code Cong. & Admin. News.*, Vol. 2 at 797. If the Committee intended to ask whether the obsolete reference to the ICC “invalidates” this statute, we believe the answer is no.

Idaho Code § 73-102(1) provides that the statutes of this state are to be liberally construed, with the view to effect their objectives and to promote justice. As previously

mentioned, most of the ICC functions were transferred to the Department of Transportation including “motor carrier registration and the setting and maintenance of the minimum levels of liability insurance.” H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 796. Moreover, section 205 of the Act states that all references to the ICC in any federal law, rule, order, or any document is deemed to refer to the Secretary of the Department of Transportation or to the Surface Transportation Board. Pub. L. 104-88, 109 Stat. 943 (1995). In addition, section 204 provides that all orders, rules, regulations or other documents issued or promulgated by the ICC are to remain effective until modified, terminated, or revoked. Pub. L. 104-88, 109 Stat. 941-42 (1995); 61 Fed. Reg. 1842 (Jan. 24, 1996). Obsolete references in the Code of Federal Regulations will remain until the Code undergoes its annual reprinting.

When examining statutes, they should be construed to give effect to the intent of the legislature. By its own terms, Idaho Code § 61-802B embodies the legislature’s intent that interstate carriers operating within Idaho register with the Public Utilities Commission. In Idaho, courts avoid statutory construction which lead to absurd or harsh results. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

4. Idaho Code § 61-805

This section provides:

[I]t shall be unlawful for any common carrier or contract carrier as defined in this chapter to fail or refuse to operate on the whole of the route except in case of emergencies due to act of God or unavoidable accidents or casualties, or in case such route becomes impassable or in case it becomes necessary to make temporary detours.

The failure of any common or contract carrier, as defined by this chapter, to register at least one (1) power unit required to be registered as provided in § 61-811, Idaho Code, and in any calendar year as a contract or common carrier, shall be prima facie evidence of a failure to operate for that calendar year.

Section 61-805 makes it unlawful for motor carriers to deviate from their routes. It is our opinion that the first paragraph of this section is federally preempted because it seeks to regulate in an area specifically preempted by section 14501(c).

The second paragraph of Idaho Code § 61-805 was added by the legislature in 1967. 1967 Sess. Laws, ch. 49. This paragraph creates a presumption that failure of a motor carrier to register one power unit (*i.e.*, vehicle) is evidence that the carrier did not operate for that calendar registration year. This paragraph does not affect the area of

prices, routes or service but pertains to the registration procedures employed by the Public Utilities Commission. Consequently, it is our opinion that this paragraph is not preempted by federal law.

5. Idaho Code 61-806

This section addresses undue advantage or prohibited preference:

a. Every contract carrier hereby is forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as a compared with patrons of any common carrier or to subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage or by unfair competition to destroy or impair the service or business of any common carrier or the integrity of the state's regulation of any such service or business.

b. Every contract carrier, except carriers engaged exclusively in transporting logs, poles, piling or ore and concentrates shall file with the commission copies of his contract, immediately upon the making of said contract including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review, revision and approval and modification of the commission as to rates, fares, charges and practices; provided that no contract carrier, except as herein provided shall enter upon the performance of any contract contemplated by this section, until approval of such contract has been given by the commission.

Subsection (a) seeks to ensure that contract carriers do not unreasonably discriminate or disadvantage common carriers in a manner “to destroy or impair the service or business of any common carrier or the integrity of the State's regulation of any such service or business.” Idaho Code § 61-806(a) (emphasis added). Subsection (b) requires that every contract carrier file copies of its contracts with the commission. Contracts by their very nature, and as pointed out in the statute, pertain to rates and the services that a carrier provides its shippers. Thus, this statute must give way to the preemptive reach of section 14501(c). Accord Federal Express Corp., 936 F.2d at 1078 (regulations regarding “discounts and promotional pricing” (e.g., preferences) preempted by ADA).

6. Idaho Code § 61-807

This section is the commission's general grant of authority to establish rates, promulgate safety rules, require the filing of necessary reports and data, and regulate the relationship between carriers “and the traveling and shipping public.” In its entirety, this section states:

The commission is hereby vested with the power and authority, and it is hereby made its duty, to fix just, fair, reasonable and sufficient rates, fares, charges, and classifications, and to alter and amend the same, and to prescribe such rules and regulations for common carriers as may be necessary to provide for adequate service and safety of operation, and to require the filing of such reports and other data with the commission as may be necessary, and to adopt such other rules and regulations as may be necessary to govern the relationship between such common carriers and the traveling and shipping public; and also to prescribe such rules and regulations for contract carriers and private carriers as may be necessary to provide safety of operations. Such rules and regulations as may be adopted and promulgated by the said commission shall be adopted and promulgated by general order of such commission or otherwise.

This statute regulates matters which are both preempted and not preempted. In particular, the commission's authority to establish rates, fares and charges for intrastate property carriers is clearly preempted. At first blush, the reference to "adequate service" would appear to be preempted. However, section 14501(c)(3) allows the commission to continue regulating certain transportation practices (*i.e.*, uniform cargo liability and credit rules, uniform bills of lading, antitrust immunity, etc.), albeit within certain regulatory parameters. Consequently, the commission has residual authority to prescribe rules dealing with "specific services" not preempted by federal law. As the Idaho Court of Appeals stated in State v. Holden, a statute that abridges federal law "need not be stricken in its entirety. Rather, 'the statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.'" 126 Idaho 755, 761, 890 P.2d 341, 347 (Ct. App. 1995), *quoting* Brockett v. Spokane Arcades, 472 U.S. 491, 504, 105 S. Ct. 2794, 2802, 86 L. Ed. 2d 394 (1985). Likewise, the filing of reports and other data is not necessarily preempted so long as the information requested is reasonably related to those regulatory areas not preempted by section 14501(c).

B. Regulatory Fees

The next area of inquiry concerns the imposition and collection of regulatory fees pursuant to various provisions of the Idaho Motor Carrier Act. More specifically, the committee asks:

Whether section 601 of the FAA Authorization Act preempts the Public Utilities Commission and its agents, the Idaho Transportation Department and each county assessor, from collecting the intrastate regulatory fees set out in Idaho Code § 61-812(A)?

Is the Idaho Transportation Department in violation of federal law by continuing to collect the PUC fee under the provisions of Idaho Code § 49-401B(3)?

Has imposition of the regulatory fee under the provisions of Idaho Code §§ 61-811 and 61-812(b) been preempted by federal law? If so, should the PUC refund such fees collected subsequent to the enactment 47 U.S.C. § 14501 effective January 1, 1995?

Is collection of the annual regulatory fees under the provisions of chapter 10, title 61, Idaho Code, invalid?

Idaho Code § 61-811 provides that motor carriers operating in Idaho shall pay a regulatory fee based on the number of power units registered in any given year. The regulatory fees applicable to interstate and intrastate motor carriers are set out in Idaho Code § 61-812. Idaho Code § 61-811A designates the Idaho Transportation Department (“ITD”) and each county assessor as “agents of the public utilities commission for the purpose of collecting and remitting the regulatory fee provided for by section[s] 61-811. . . [and] section 61-812, Idaho Code. . . .” Idaho Code § 49-401B(3) addresses and implements the collection of the regulatory fees when motor carriers register their vehicles with ITD or with a county assessor. Once collected, the regulatory fees are deposited into the Public Utilities Commission Fund subject to legislative review. Idaho Code § 61-1001. During each regular session, the legislature determines the amount of money to be expended by the commission and appropriates such operating revenues from the Public Utilities Commission Fund. Idaho Code § 61-1002.

The interim committee asks whether federal law preempts the Public Utilities Commission or its agents from collecting the intrastate or interstate regulatory fees set out in Idaho Code § 61-812. Based upon our review of the federal Motor Carrier Act and the Idaho statutes, we conclude the regulatory fees assessed interstate or intrastate motor carriers are not preempted. Indeed, section 14504 of the federal Motor Carrier Act continues the Single State Registration System (SSRS), including the fee system. 49 U.S.C. § 14504. This section permits participating states (including Idaho) to collect up to \$10.00 per motor vehicle for filing proof of insurance. In conformance with this federal authority, Idaho Code § 61-812(b) authorizes the commission to collect no more than \$10.00 for each motor vehicle operated by a motor carrier. This statute also grants the Public Utilities Commission discretion to reduce the per vehicle fee by rule. *Id.* Pursuant to this authority, the commission lowered the regulatory fee to \$1.00 per vehicle for registrations occurring in calendar year 1996 and beyond. IDAPA 31.61.01.051.02 (1995) T.

A review of the federal Motor Carrier Act and its accompanying legislative history does not reveal any explicit preemption of states collecting fees to support those activities they may legally carry out under federal or state law. This issue was not squarely addressed in Kelley v. United States, 69 F.3d at 1503.

The office is aware of one unreported case (1993 W.L. 399380) where the California PUC was prohibited from collecting the regulatory fee from Federal Express following the Ninth Circuit's opinion in Federal Express v. California Public Utilities Commission, 936 F.2d at 1075. However, the holding in that unreported case is not dispositive on this question. As previously mentioned, the Federal Express case dealt with a broad preemptive statute under the Airline Deregulation Act. In addition, the regulatory fee scheme in California significantly differs from the regulatory fees assessed in Idaho. California's fee was based upon a percentage of Federal Express's gross operating revenues in California as compared to a prorated per vehicle fee in Idaho. Idaho Code §§ 61-812 and -812A. Based upon our review of the federal Motor Carrier Act and our statutes, we cannot find that the fee statutes are facially preempted. Consequently, it is unnecessary to address the committee's refund question.

C. Severability

Having determined that specific statutes or portions of statutes are preempted by federal law, the question arises whether the remaining statutes or portions of statutes are sufficiently independent from the stricken statutes to be effective after the unconstitutional provisions are severed. The Idaho Supreme Court recently observed in Re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995), that when part of a statute is determined to be unconstitutional "yet is not integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance." 128 Idaho at 263, 912 P.2d at 631, *quoting* Voyles v. City of Nampa, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976). When examining severability issues, courts, when possible, will "recognize and give effect to the intent of the legislature as expressed through a severability clause in the statute." *Id.* at 264, 912 P.2d at 632, *citing* Lynn v. Kootenai Fire Protective Dist. No. 1, 97 Idaho 623, 627, 550 P.2d 126, 130 (1976).

The Idaho Motor Carrier Act does contain a severability clause. Idaho Code § 61-816 provides that "[i]f any section, subsection, sentence, clause or phrase of this chapter [8, title 61] is for any reason held by any court to be unconstitutional, such decision shall not affect the validity of or the constitutionality of any of the remaining portions of this chapter." Based upon a review of the preempted statutes and portions of other statutes, we find that the stricken portions do not prevent the remaining statutes from functioning as the legislature intended. Such a result is further supported by the fact that the federal Motor Carrier Act specifically recognizes that states retain regulatory authority over

portions of the motor carrier industry. Consequently, this case is distinguishable from the recent decision in Boundary Backpackers, where the Idaho Supreme Court found that the preempted provisions contained in a county ordinance were “so integral and indispensable to the ordinance,” that the entire ordinance must fall. 128 Idaho at 378, 913 P.2d at 1148.

OTHER QUESTIONS

The committee also asked two related questions. First, the committee asks whether the Public Utilities Commission is required to enforce motor carrier laws without regard to federal preemption until such time as the Idaho Legislature amends the Idaho Code to remove the preempted provisions. Second, the committee asks whether the Legislature is in violation of federal law for failing to remove from the Idaho Code statutes which provide for any economic regulation of intrastate motor carriers by the Public Utilities Commission. Each of these questions will be addressed in turn.

A. Enforcement of a Preempted Statute

Once it has been ascertained that a statute has been preempted by federal law, common sense would dictate that enforcement of the statute be withheld. Once a statute or regulation is determined to be federally preempted, it is then deemed to be unconstitutional by operation of the Supremacy Clause. Boundary Backpackers, 128 Idaho at 378, 913 P.2d at 1148. In essence, the statute is nullified. If the state were to attempt to enforce a statute or regulation known to be unconstitutional, an agency and possibly its employees might be liable under the civil rights statute, 42 U.S.C. § 1983. See Lubcke v. Boise City/Ada County Housing Authority, 124 Idaho 450, 860 P.2d 653 (1993); Owner-Operator Indept. Drivers Assoc. v. Idaho PUC, 125 Idaho 401, 871 P.2d 818 (1994).

B. Legislative Liability

Finally, we turn to the committee’s last question asking whether the legislature is in violation of federal law when it fails to remove preempted statutes. The simple answer is no. As a practical matter, the legislature is not always in session when statutes are found to be preempted. In a strict legal sense, a law which is preempted is unconstitutional and therefore is void and of no effect. Reynoldsville Casket Co. v. Hyde, — U.S. —, —, 115 S. Ct. 1745, 1752, 131 L. Ed. 2d 820 (1995) (Scalia, J., concurring). As Justice Scalia pointed out, “an unconstitutional statute, . . . is not in itself a cognizable ‘wrong.’ (If it were, every citizen would have standing to challenge every law.) In fact, what a Court does with regard to an unconstitutional law is simply to ignore it.” *Id.* See also Chicago, I. & L.R. Co. v. Hackett, 228 U.S. 559, 33 S. Ct. 581,

57 L. Ed. 966 (1913) (an unconstitutional act is inoperative “as if it had never been passed, for an unconstitutional act is not a law”).

In conclusion, this office has reviewed provisions of the federal Motor Carrier Act and the statutes contained in the Idaho Motor Carrier Act. After reviewing the federal statutes, accompanying legislation and applicable case law, we have determined that some Idaho motor carrier statutes and portions of other motor carrier statutes are preempted by federal law. Although federal law preempts state regulation of intrastate property carriers concerning the areas of prices, routes and services, the federal “savings” clauses embodied in subsections 14501(c)(2) and (3) authorize Idaho to continue to exercise portions of its traditional regulatory authority.

If you have further questions, please contact me.

Sincerely,

DONALD L. HOWELL II
Deputy Attorney General

¹ Idaho Code § 61-801(k)(12) exempts the intrastate transportation of household goods from regulation by the Public Utilities Commission.

² Idaho Code § 61-801(k)(13) exempts the intrastate operation of tow trucks from regulation by the Public Utilities Commission.

³ “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Constitution, Art. VI, cl. 2.

⁴ The Tenth Amendment provides that the “powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to States respectively, or to the people.”

⁵ Nothing in the federal Motor Carrier Act dictates that a particular state agency promulgate rules, participate in registration programs, or enforce motor carrier laws. This is a discretionary matter left to the states.