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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO POWER COMPANY, an Idaho corporation; and AVISTA CORPORATION, a Washington corporation,

Plaintiffs-Respondents-Cross-Appellants,

vs.

IDAHO STATE TAX COMMISSION, in its capacity as the STATE BOARD OF EQUALIZATION,

Defendant-Appellant-Cross-Respondent.

Supreme Court Docket No.: 49126-2021

Ada County No: CV01-20-14896

CROSS-APPELLANTS' OPENING BRIEF AND RESPONSE TO APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada

Honorable Patrick Miller, District Judge, Presiding

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a case involving the equalization of property values for ad valorem tax (property tax) purposes. "Equalization" is a process by which assessed values are adjusted based on comparison to the assessments of other taxpayers, so that if one property owner is assessed at 100% of market value, for instance, and other taxpayers are assessed at 85%, the owner whose property is fully assessed may seek an adjustment so that its values are equalized with the other taxpayers.[1] In this example, equalization would require a downward adjustment of 15% of the assessed value.

The process of equalization is effectively required by two separate provisions of Idaho's Constitution: Article VII, Section 2, which requires that all property owners "shall pay a tax in proportion to the value of his, her or its property," and Article VII, Section 5, which requires that all taxes "shall be uniform upon the same class of subjects." By these provisions, and since

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[1] Property taxes are levied to finance the budgets of counties and other taxing districts. The levy rate is a function of the budget and the total assessed value of property. To use an extreme but illustrative example, assume a $10,000 budget is to be funded by two taxpayers who each own property worth $500,000. A levy rate is determined by dividing the budget amount by the total value of $1 million, yielding .01, or 1%. A 1% levy against each taxpayer's $500,000 property will produce $5,000 in taxes from each, funding the $10,000 budget amount. Now if one taxpayer's property is assessed at $500,000 and the other's is under-assessed at $400,000, the $10,000 in taxes will still be raised, but the levy rate will increase to 1.111% (the $10,000 needed divided by $900,000 in total value). The taxpayer whose property is assessed at market value of $500,000 will pay $5,555 in taxes while the taxpayer whose value is under-assessed at $400,000 will pay $4,445. This outcome is inconsistent with the constitutional right to uniformity in taxation.

property taxes are levied based on value, these constitutional provisions assure that each taxpayer bears his, hers, or its just share of the property tax burden.

The Plaintiffs in this case, Idaho Power and Avista Corporation (referred to in the Tax Commission's brief and now here as the "Companies"), have asserted an entitlement to equalization under each of these provisions. As to Article VII, Section 2, they have presented evidence that for the tax year 2020, they have been assessed at 100% of market value while other taxpayers in the counties in which they operate were assessed at less than 90% of market value. The district court denied the Tax Commission's motion for summary judgment on this claim, and that is the subject of the Tax Commission's appeal.

The claim under Article VII, Section 5 is that the Companies have been assessed disproportionately in comparison with other members of their class of "operating property" taxpayers – specifically railroads, which are members of the class of taxpayers whose values are set by the Idaho State Tax Commission ("Tax Commission"). That is a violation of the mandate in Section 5 that property taxes "shall be uniform upon the same class of subjects." The district court granted the Tax Commission's motion for judgment on the pleadings with respect to this claim, and that decision is the subject of the Companies' cross-appeal.

This case is one of first impression in raising the question of how the Tax Commission, sitting as a State Board of Equalization, should equalize the assessments of operating property taxpayers over whom it has valuation responsibility.

B. Course of Proceedings.

The Tax Commission's brief accurately describes the course of proceedings, except for its characterization of the State Board of Equalization's decision and incomplete description of

the district court's decision. For instance, the Tax Commission asserts that the district court granted its motion for permissive appeal to this Court on the denial of the motion for summary judgment because "it recognized it may have been mistaken as to the correctness of that decision." But the district court had also denied the Tax Commission's motion for reconsideration of that decision, so obviously the court did not believe it was mistaken. Further, the district court's granting of the motion for permissive appeal was certainly affected by the fact that the Companies did not oppose that motion. They recognized that their appeal of the decision to grant the motion for judgment on the pleadings would raise similar issues, and that it would be more efficient for the Court to consider both appeals at the same time.

C. Statement of Facts.

The facts relevant to this appeal are often interwoven with the arguments below, but the following sets forth some important basic facts relevant to both the appeal and cross-appeal:

1. Plaintiff Idaho Power is an electric utility. Avista Electric and Avista Gas are subsidiaries of Plaintiff Avista Corporation. Avista Electric is also an electric utility; Avista Gas distributes and sells natural gas to its customers. All three companies are considered public utilities whose operating property is "centrally assessed" on a statewide basis by the Tax Commission. The Tax Commission also assesses the operating property of railroads and other utilities and similar taxpayers. It allocates the state value of each company to the counties and taxing districts for entry on the tax rolls of the taxing authority along with locally assessed property, all as prescribed by Title 63, Chapter 4 of the Idaho Code. (Complaint ¶¶ 1-4, R., pp. 8-9; Answer ¶¶ 1-4, R., p. 27.)

2. The real and personal property of other taxpayers is assessed by county assessors. Values that are set by the assessor may be appealed to the county board of equalization on the grounds that the property is not valued at market value, or because it is not valued in a uniform manner with other property in the county. I.C. § 63-301, I.C.§ 63-501A.

3. The assessment process involves both valuation and equalization. The equalization process is conducted by the Tax Commission acting in its capacity as the State Board of Equalization ("SBOE") and is subject to the right of appeal as part of the assessment process governed by Chapter 4 of Title 63 of the Idaho Code.

4. For several years, the Tax Commission, in its role as the SBOE, granted the request of certain railroads for an equalization adjustment based on assessment levels of other commercial taxpayers relative to the market value of their property. For instance, in 2018, Union Pacific's assessed value was adjusted downward by 10.75%, Eastern Idaho Railroad by 13.77%; and BNSF Railroad by 9.24%. (Second Smith Decl., Ex. 8, R., p. 368.) In 2019, Union Pacific Railroad was granted an adjustment of 13.17%; BNSF Railroad 14.01%; and Eastern Idaho Railroad 14.61%. (*Id.*, Ex. 7, p. 365.) In 2020, the minutes of the SBOE meetings show that Union Pacific Railroad was granted an adjustment of 12.31%; BNSF Railroad 12.31%; Idaho Northern & Pacific Railroad 23.79%; Eastern Idaho Railroad 16.17%, and Boise Valley Railroad 10.37%. (*Id.*, Ex. 6, p. 311.) These adjustments were made to the market value of the railroads' properties. In other words, the Tax Commission/SBOE assumed that the value set for these railroads was 100% of market value and then authorized the deductions described herein from that market value.

5. If Idaho Power, Avista Electric and Avista Gas had been treated the same as railroads, they would have been entitled to the same type of adjustment as the railroads received. Specifically, based on an analysis prepared on August 5, 2020, by the staff of the Tax Commission for the 2020 tax year, using the same methods, Idaho Power would have been entitled to an adjustment of 12.03%; Avista Electric an adjustment of 12.60%; and Avista Gas an adjustment of 12.59%. (Smith Decl., Ex. C, R., p. 96.) In that analysis, the weighted mean of the ratios of assessment to market value for comparable commercial taxpayers in counties in which the Companies operate was 87.40%, 84.41% and 87.03% for Avista Electric, Avista Gas and Idaho Power, respectively. (*Id.*)

6. In 2020, the pattern of big differences between the Companies, railroads, and other centrally assessed taxpayers continued and in fact has worsened. The weighted mean ratio of sales prices to assessed value for improved commercial property – most comparable to the Companies – declined from 87.55% in the 2019 study to 84.39% in the 2020 study. (2020: Second Smith Decl. Ex. 9, R., pp. 388, 389; 2019: Smith Decl. Ex. C, R., pp. 105, 106.) In the 2020 study, the Tax Commission staff pointed out that "Non-compliance with assessment level standards was more extensive in terms of numbers of categories and wider in terms of numbers of counties with at least one category out of compliance than ever before recorded." (Second Smith Decl. Ex. 9, p. 2, R., p. 372.)

7. Like the railroads, the properties of Idaho Power, Avista Electric and Avista Gas were valued and assessed by the Tax Commission at amounts that were at least 100% of market value. Complaint ¶ 11; Answer ¶ 11. The tools available to the Tax Commission to perform those valuations include annual reports that are required to be filed by the taxpayers in which

detailed information is provided, including balance sheet and income information. (Declarations of Katrina Basye and Jenny Berg.) The availability of this information is one of the differences between local assessment and central assessment, particularly because it gives the Tax Commission a better opportunity to perform valuations using the income approach. The Tax Commission staff also has fewer properties to appraise than local assessors, uses more sophisticated techniques, and performs these valuations annually, where assessors are only required to perform an appraisal every five years. (Basye Decl., R., pp. 453-55.)

8. The ratio studies conducted by the Tax Commission pursuant to Idaho Code Section 63-109 and Idaho Tax Commission Property Tax Administrative Rule 131, IDAPA 35.01.03.131 include analysis of a large number of transactions, so its conclusions cannot be said to be based on occasional irregularities, random errors, or lack of exactitude. For instance, in a pro forma analysis prepared by the Tax Commission for the Companies' property, the number of sales examined ranged from 274 for Avista Gas to 630 for Idaho Power, and 897 for nonparty CenturyLink. (Decl. of Richard G. Smith Ex. C, p. 3, R., p. 96.)

9. In the opinion of the Companies' statistical expert Dr. Larry Richards, there are several procedures in the Rule 131 analysis that depart from accepted statistical practice, at least in the context of determining the average level of assessment of locally assessed property to be compared to the assessed values of centrally assessed property. (Declaration of Dr. Larry E. Richards ("Richards Decl."), R., pp. 435-451.[2]) Among these problems is the use of the median as a measure of the average level of assessment for the sample of locally assessed properties.

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[2] The entire expert report of Dr. Richards is also part of the record on appeal, having been attached by the Tax Commission to a brief in the district court. (*See* R., pp. 519-566.)

Correction of this and other errors would require adjustment even if the 10% margin of error is used that the Tax Commission applies to its evaluation of county assessments, in determining whether those assessments must be adjusted. *Id.,* ¶¶ 6, 7, R., pp. 439-440.

II.

ISSUES PRESENTED ON APPEAL

The Tax Commission's brief identifies the issue in its appeal as whether the Tax Commission's Rule 131 is entitled to administrative deference so as to preclude the Companies from claiming that their property was unconstitutionally assessed. The Companies add the following issues, which may or may not be subsumed within the Tax Commission's statement of the issue:

1. Whether the Tax Commission's Rule 131 is the exclusive means for providing equalization relief, for all taxpayers, effectively reversing decisions from this Court over 100 years which have recognized the right of taxpayers to seek an equalization remedy.

2. Even if the equalization process may be limited by the application of a rule, does Rule 131 accomplish that purpose for centrally assessed taxpayers?

3. Are there genuine factual issues concerning the proper formulation of a test for equalization, such as whether equalization using a ratio study would be based on a weighted mean of the sample transactions, or the median?

4. To the extent a taxpayer is required to show that differences in assessments are the result of "systematic" factors, what are those factors and are there genuine issues of fact concerning whether the differences in this case are "systematic"?

Stated differently, once a taxpayer shows that discrimination in assessment is the result of something other than "individual irregularities" or "errors of judgment," should it not be entitled to relief?

On Cross-Appeal, the issue is as follows:

1. Did the district court correctly determine that the Tax Commission's mandate to provide uniformity within the operating property class of taxpayers is excused because the adjustments made for railroads (to achieve uniformity) are required by federal law, so Idaho's guarantee of uniformity is trumped by the federal preemption doctrine? Stated differently, is there any reason why the Tax Commission cannot follow the federal mandate while also providing for uniformity within the class of operating property taxpayers?

III.

ARGUMENT

A. Background Common to Both Equalization Claims.

The Idaho property tax system is based on assessment of property at market value. I.C. § 63-205. Idaho's Constitution also requires that all property in Idaho be assessed in a uniform manner. That applies within a "class" of property pursuant to Article VII, Section 5 of the Idaho Constitution: "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax . . . ." (Emphasis added.) It also applies between classes, pursuant to the mandate of Article VII, Section 2 that taxes must be raised in a way that is "in the proportion to the value" of the property. *See Idaho Tel. Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967).

Article VII, Section 3 provides that “property shall be defined and classified by law” – in other words, by the Legislature. Section 63-204 of the Idaho Code identifies three major classes of property:

> **63-204. Classes of property**. For the purpose of assessment and property taxation, all property within the jurisdiction of this state is hereby classified as follows:
>
> Class 1. Real Property,
>
> Class 2. Personal Property, and
>
> Class 3. Operating Property.

Operating property is one of the “classes” of property referred to in Article VII, Sections 3 and 5. It is the property of utilities, railroads and other centrally assessed taxpayers, where the property is actually used in the operation of that business. I.C. § 63- 201(16). There is no subclass for railroad property within the operating property class. That is, operating property is not separated into different categories of railroad property, utility property and all other centrally assessed property. Even if there were such a differentiation, the Idaho Constitution would require uniform valuation within the larger operating property “class.” In practice, all operating property is valued according to the same processes, using the unit method where the system value of the company nationwide is determined and then allocated in part to Idaho. *See PacifiCorp v. Idaho State Tax Comm’n*, 153 Idaho 759, 291 P.3d 442 (2012); (Decl. of Katrina Basye, R., pp. 453-55.)

The process of equalization is distinct from valuation. The subject property may be properly valued, but if other property in the jurisdiction is undervalued, then the subject property would be taxed on more than its just share of the burden of taxation. The equalization process

provides a remedy for that problem. The equalization process for locally assessed properties begins at the county board of equalization, whose members are county commissioners. *See* I.C. §§ 63-501, *et seq.* In particular, section 63-502 provides that the Board "shall raise or cause to be raised, or lower or cause to be lowered, the assessment of any property which in the judgment of the board has not been properly assessed." If a taxpayer believes its property is not assessed fairly or uniformly, the taxpayer can appeal to the Board of Tax Appeals or to the district court, and there is a long line of cases holding that a taxpayer has an equalization remedy even if its property is correctly valued. I.C. § 63-511. *See, e.g., Ada Cnty. v. Red Steer Drive-Ins of Nev.*, 101 Idaho 94, 99, 609 P.2d 161, 166 (1980).

The Tax Commission has the authority to value the operating property of utilities, railroads and certain other taxpayers, pursuant to Title 63, Chapter 4 of the Idaho Code. With respect to appeals, the Tax Commission performs the same task as county boards of equalization when it sits as the State Board of Equalization. Pursuant to Idaho Code Sections 63-401 and 63-405, it has the duty to "assess" the operating property owned by these centrally assessed taxpayers. As noted above with the local assessment analog, part of the process of assessment is to "equalize" the value of property within the operating property class subject to its jurisdiction. Taxpayers can appeal the SBOE's decisions pursuant to Idaho Code Section 63-409.

The remedy of requiring downward adjustments in assessments in order to equalize property assessments has been recognized notwithstanding the concurrent existence of Idaho Code Section 63-109, and its predecessor statutes prior to a 1996 recodification, including Idaho Code Section 63-605. That set of statutes has given the Tax Commission authority to increase or lower assessments for categories of property in a county if it concludes that there has been under-

or over-assessment of property in that category. Pursuant to Section 63-109 and Rule 131, the Tax Commission annually performs a "ratio study." That study starts with a review of recent sales of commercial and industrial property, and then compares the assessed values of those properties with the prices at which they have sold. If a property had an assessed value of $850,000 and sold for $1 million, the ratio of 85% indicates that this property has been under-assessed. The ratio study is performed by analyzing sales of all property over the previous year. If the "median" of the ratios of sales price to assessed value in a given taxing district is below 90% or above 110% with "a reasonable statistical certainty," section 63-109 and Rule 131 give the Tax Commission the authority to order an increase or decrease in assessments to get to 100%.

In essence, the sales of property represent a statistical sample of observations of actual value. The median ratio of sales prices to assessed value is one measure or estimate of the ratio for the entire population of properties. The median is simply the figure which is in the middle of a sample, so if there are 40 values in a sample, the values would be ranked from 1 to 40 and the median would be the 20th in that array. Because it is only a sample, statisticians can calculate a "confidence interval" around the median which varies in width depending on the size of the sample. For instance, a conclusion of the study could be that for a certain taxing district, the median ratio of sales price to assessed value for commercial property is 88%, with a confidence interval of 83% to 93%. The Tax Commission's Property Tax Rule 131 provides that in such a case, no adjustment would be made. The "reasonable statistical certainty" standard adopted in Rule 131 is that if any part of the confidence interval includes 90% or 110%, then no adjustment is appropriate. So in this example, even though the 88% median is below the 90% accepted level

of underassessment, the upper limit of the confidence interval of 93% is above 90%, so the sample passes the test. The confidence interval is an additional buffer for the counties to avoid adjustment of assessments.[3] (Richards Decl., pp. 3-4, 7, R., pp. 437-38, 441.)

A key argument in the Tax Commission's opening brief is that there can be no discrimination or lack of uniformity because section 63-109 and Rule 131 make "impossible" the types of systematic assessment errors the Tax Commission asserts are a predicate to an equalization claim. (Br., pp. 7, 8, 15.) Yet, this Court's approval of such equalization claims dates back at least to 1922, in *Washington County v. First National Bank of Weiser*, 35 Idaho 438, 206 p. 1054 (1922), where the Court upheld a 50% reduction in the assessment of the taxpayer's property. The Court noted that the question of value is secondary to the constitutional mandate of equality of taxation and held that value must be reduced even if the resulting value is less than market value because this was the only practicable way of enforcing the constitutional rights of the property owner.

At the time of that decision, Idaho had a statute similar in wording and effect to section 63-109. In the Revised Code (1908), Title 10, section 1706, it provided that the SBOE "shall have power to increase the total value of any class of property in the county … when, in the opinion of the board, the valuation of that class … is not just and equal as compared with the valuation of other classes of property in that county…." Notwithstanding the SBOE's authority

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[3]This additional buffer probably reflects the concern that Rule 131 is a blunt instrument for equalization. An entire category of property is subject to upward adjustment in value, including property that was properly valued at market value in the first place. There can be no doubt that these orders are not popular with county assessors or the owners affected by them. In *Chastain's, Inc. v. State Tax Comm'n*, 72 Idaho 344, 241 P.2d 167 (1952), property owners successfully challenged such an upward adjustment.

to oversee assessments and order them to be adjusted upward, the court in *Washington County* authorized a private remedy for taxpayers to seek downward adjustments in assessed values based on the under-assessment of other property.

Subsequent cases have made that even clearer, in the face of reenactments of that old statute with the same authority. *See McGoldrick Lumber Co. v. Benewah Cnty.,* 54 Idaho 704, 714, 35 P.2d 659, 664 (1934) ("the court should have determined whether reductions or increases should have been made on the appellant's lands to bring them in line with the other assessments in the county and found and concluded accordingly"); *Anderson's Red & White Store v. Kootenai Cnty.*, 70 Idaho 260, 265, 215 P.2d 815, 818 (1950) (Court remanded case to consider uniformity claim where the taxpayer contended that its inventory was valued at 20% of market value, while the inventory of other taxpayers was valued at 10%; "[t]he law does not require exactitude, but it does require uniformity"); *Chastain's, Inc. v. State Tax Comm'n*, 72 Idaho 344, 241 P.2d 167 (1952) (relief authorized where the taxpayer's merchandise, machinery and furniture and fixtures was valued at 30% of full cash value and all other taxable property in the county was assessed at 23%); *Farmer v. State Tax Comm'n*, 80 Idaho 72, 325 P.2d 278 (1958) (Court accepted the testimony of the taxpayer's expert that other property in Bannock County was assessed at 13% of its fair market value, and granted equalization relief); *Boise Cmty. Hotel, Inc. v. Bd. of Equalization,* 87 Idaho 152, 163, 391 P.2d 840, 846 (1964) (Court remanded the case to make findings of fact as to the market value of the taxpayer's properties and to find what ratio of market value other property in Ada County was assessed for the tax year 1958); *Idaho Tel. Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967) (Tax Commission conceded that Article VII, sections 2 and 5, require uniformity within a class of property, but argued

unsuccessfully that it is not required between classes); *Ada Cnty. v. Red Steer Drive-Ins of Nevada*, 101 Idaho 94, 99, 609 P.2d 161, 166 (1980) (Court approved equalization remedy that reduced the assessed value of the subject property).

When all these cases were decided, there were statutes comparable to the current section 63-109, with procedures that would also arguably make it "impossible" to show systematic differences in value. *See* 1918 Compiled Statutes, § 133.74; 1929 Compiled Statutes, § 3171; I.C. § 61-506 (1932); I.C. § 63-605 (1969). In the *Red Steer* case, when the applicable statute was Idaho Code Section 63-605, the taxing authority made the same argument the Tax Commission makes in this case: the remedy, if any, should be to increase the values of other taxpayers' properties, which in this case the Tax Commission purports to do, if necessary, pursuant to the Rule 131 process. The Court rejected that argument "in light of our numerous holdings in the past to the contrary." 101 Idaho at 99, 609 P.2d at 166. *See also Boise Cmty. Hotel v. Bd. of Equalization,* 87 Idaho 152, 162, 391 P.2d 840, 846 (1964), where it was the taxpayer who argued that the Tax Commission's ratio study should be conclusive as the ratio of assessed value to actual value, and the Court held that "the data compiled in a report of the state tax commission is not conclusive. The courts may consider other sources of relevant information."

Federal law has a special equalization and uniformity requirement for railroads. To prevent discriminatory taxation of railroad property by the states, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 ("4–R Act"), 49 U.S.C. § 11501, *et seq.* The 4-R Act provides that a state may not "assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the

assessed value other commercial and industrial property has to the true market value of the other commercial and industrial property." 49 U.S.C. § 11501(b)(1). It is important to observe at the outset of this discussion that the 4-R Act is entirely consistent with Idaho's uniformity requirement; it simply commands that a principle Idaho already embraces – uniformity in taxation – be maintained as a matter of federal law.

In order to comply with the 4-R Act, the Tax Commission has made adjustments to the assessed values for certain railroads in recent years. The adjustment process is based on the ratio study described above. When the Tax Commission considers its equalization adjustments for railroads, it starts with the sample of transactions used in the ratio study and then makes certain changes from the procedures normally applied in Rule 131. First, it examines whether certain sales are "outliers" – sales that are not representative of the population, and it may cull those from the sample.

Second, the staff does not rely on the median of the sample to determine the measure of central tendency – i.e., the key statistic used to compare to railroad values. As the Tax Commission states at page 21 of its *Idaho Ratio Study Manual*, the purpose of using either a median or some other statistic "is to determine one number which best represents the assessment level."[4] For the railroad analysis, the staff uses the weighted mean, which gives weight to each item in the sample based on its value. The weighted mean is used because of the size and value of railroad properties, a characteristic also shared by the Companies' property. (Second Smith Decl. Ex. 2, p. 1, R., p. 329.) The author of the *Idaho Ratio Study Manual,* the Tax

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[4]The Manual is available at the following web address: https://tax.idaho.gov/pubs/EPB00091_06-11-2020.pdf

Commission's Alan Dornfest, has stated in a published article that "to adjust typically high-value, centrally assessed property values to the level of a comparison group of properties, however, the conceptually preferred measure of central tendency is the weighted mean." (Second Smith Decl. Ex. 3, p. 48, R., p. 339.) He also made this assumption in the memo he prepared with the pro forma calculations to determine whether the Companies' assessments would be adjusted if the same methods were used as for the railroads. (Second Smith Decl. Ex. 4, p. 1, R., p. 351.)

The third variation from the normal ratio analysis is to use a 5% margin of error as mandated by the 4-R Act, rather than a 10% margin, so that if the weighted average of the sales-assessment ratio for a given category of property in a taxing district is 91%, then an adjustment is made. That conclusion is qualified by the fact that the Tax Commission still uses the confidence interval concepts, so if the confidence interval around the 91% figure is 87%-95%, no adjustment would be made because the upper limit of the confidence interval – 95% – is within the 5% margin of error. If the confidence interval is 88%-94%, then a 9% downward adjustment would be made to the railroad assessed values (i.e., 100-91). (*See* Second Smith Decl. Ex. 2. R., p. 329.)

This is a case of first impression. The Tax Commission, sitting as the State Board of Equalization, is clearly charged with equalization of the assessments of centrally assessed taxpayers, yet has no process for doing so. Rule 131 is not such a process; it serves an entirely different purpose in the goal of supervising local assessors and ordering upward adjustments on a category basis in extreme cases. It is unclear whether the Tax Commission now asserts that the upward adjustments possible through the Rule are the exclusive means for accomplishing

equalization, even for locally assessed taxpayers, and that cases such as *Red Steer* are now irrelevant where they recognize a right of taxpayers to seek reductions in value – or if its position is that the Rule is exclusive only as to centrally assessed taxpayers, and that only centrally assessed taxpayers do not have a right to seek reductions in value.

One other alternative the SBOE appears to have adopted is that Rule 131 does not prevent centrally assessed taxpayers from an equalization remedy by seeking downward adjustments in their values, but instead is the exclusive means by which these taxpayers may do so. In the SBOE hearing, the Companies had argued that if Rule 131 applies in this context, it should at least be applied in a statistically correct manner for situations such as this, involving large commercial or industrial taxpayers. In the SBOE's decision to deny the Companies equalization relief, the SBOE did not say that the Companies could never obtain relief, but that it was limited by Rule 131 and that a departure from that Rule to use the weighted mean would not be allowed:

> To Petitioners argument requesting the use of the weighted mean, the Board is not willing to depart from the methodology in Property Tax Rule 131 except for where that departure is mandated by the unique preemption of federal law for the railroad industry.

(Complaint, Exhs. A & B, p. 2. R., pp. 18, 23.) The Declaration of Dr. Larry Richards establishes that the use of the weighted mean, and not the median, is the only statistically valid means by which to conduct this analysis. (Richards Decl., ¶ 5, R., pp. 38-39.) This is the same opinion expressed by the Tax Commission's expert Mr. Dornfest in the article he wrote, noted above.

Dr. Richards also identifies other areas where Rule 131 is flawed as a means of establishing discrimination. (Richards Decl., R., ¶¶ 7-10, R., pp. 439-442.) Included among

those areas is the question of what percentage variation is permitted between one class of taxpayers (i.e., centrally assessed) and another. The *Standard on Ratio Studies*, a publication the Tax Commission has adopted by reference in its Property Tax Rule 006, states as a standard that there should be no more than a 5% variation between classes. IDAHO TAX COMM'N PROPERTY TAX ADMIN. R. 006, IDAPA 35.01.03.006, (Richards Decl. ¶ 7, R., pp. 439-40.) *See* International Association of Assessing Officers, *Standard on Ratio Studies*, § 9.1 (2013). Rule 131 purports to follow those *Standards,* yet uses a 10% margin of error for its different purpose of ordering adjustments for categories of property within a county.

The arguments in the Tax Commission's opening brief about deference to Rule 131 leave open the question of deference in what sense? That taxpayers now have no equalization remedy at all, and that potential upward adjustments by the Tax Commission are now the only equalization remedy? Or that the Rule defines and limits the remedy, including use of a median that the Tax Commission's own staff acknowledge is not appropriate to this purpose? As discussed later in this brief, Rule 131 should be afforded no deference in the context of an equalization claim by a centrally assessed taxpayer.

In conclusion of this lengthy Background section of the brief, the two claims before the Court have in common the question of whether and how to make equalization adjustments for centrally assessed taxpayers. The requirements of the 4-R Act are completely consistent with the mandate of Idaho's Constitution that property tax assessments must be uniform within a class. If the Court rules that these requirements cannot be applied to other centrally assessed taxpayers, the first question is what legal standard applies to provide that uniformity protection. Whatever

legal standard applies, there are factual issues, involving expert opinion, that preclude entry of summary judgment.

B. Issues in the Cross-Appeal: Does Federal Preemption Prevent the Accomplishment of Uniformity?

1. Introduction.

The district court held that the Companies are not entitled to equalization adjustments to achieve uniformity with the railroads, reasoning that because the uniformity adjustments for railroads resulted from the 4-R Act, the doctrine of preemption excused the Tax Commission from providing the same uniformity adjustments for other members of the centrally assessed class of taxpayers. (Order, pp. 14-15, R., pp. 633-34.) As we address this issue in this section of the brief, the Companies suggest that the Court keep the following important points in mind:

- There is no reason in law, principle or policy, why the Tax Commission cannot follow the federal mandate and also provide uniformity relief to other centrally assessed taxpayers.
- The district court's statement that state law is "preempted to the extent of the conflict" between federal and state law (Order, p. 14) is correct, but actually works to support the Companies' position. Idaho's equalization procedures as they relate to railroads are preempted and that is the extent of the preemption. There is nothing in federal law that prevents Idaho from treating other members of this class in the same way as railroads.
- The federal law is not inconsistent with Idaho's uniformity requirement. The policy it advances is exactly the same, and the process of comparing the assessments of railroads to those of locally assessed properties is the same as what

the Tax Commission should be doing to perform its equalization duties with respect to other centrally assessed taxpayers.

2. Standard of review.

The Court's review of a district court's dismissal of a complaint under I.R.C.P. 12 is *de novo*. *Raymond v. Idaho State Police,* 165 Idaho 682, 451 P.3d 17, 20 (2019).

3. Federal preemption as it affects railroads is not a justification for failing to assess property uniformly within the operating property class.

The Tax Commission's argument for failing to assess other operating property consistently with railroads is that it is required to treat railroads differently by the 4-R Act, and that such treatment is mandated by the Supremacy Clause and the related doctrine of federal preemption. As discussed throughout this brief, the Companies do not dispute that federal law does require these adjustments for railroads, where their ratio of assessed value to market value is 100% and where the ratio for commercial and industrial taxpayers is much lower than that percentage. But that does not mean that other centrally assessed taxpayers should not also be assessed at a lower ratio if the same comparison to commercial and industrial taxpayers shows the same relative over-assessment. And it is relevant to consider – what is the risk or cost of assessing other centrally assessed taxpayers uniformly? Only that Idaho has erred, if at all, on the side of uniformity of taxation. Relief would not be available to a railroad unless discrimination had been established between how it was assessed and how locally assessed property was assessed. It is that same discrimination that Idaho's uniformity guarantee is intended to prevent.

In considering the preemption question, and whether it allows non-uniform treatment when the "cost" of uniformity is so small, we must recognize the importance of uniformity to

Idaho's system of taxation. As the Supreme Court stated as early as 1922 in *Washington County v. First National Bank of Weiser*, "The requirement that all property be assessed at its actual cash value is secondary to the constitutional mandate of equality of taxation." 35 Idaho at 444. One of the more recent decisions repeats that principle. *Ada Cnty. v. Red Steer Drive-Ins of Nevada*, *supra*, 101 Idaho at 99, 609 P.2d at 166. In light of the long history of protection of the guarantee of uniform taxation in Idaho, the following description of *Washington's* similar constitutional guarantee is also accurate in Idaho: "We have held consistently tax uniformity is 'the highest and most important of all requirements applicable to taxation under our system.'" *Inter Island Tel. Co. v. San Juan Cnty.*, 883 P.2d 1380, 1382 (1994), quoting *Savage v. Pierce Cnty.*, 68 Wash. 623, 625, 123 p. 1088 (1912); *Boeing Co. v. King Cnty.*, 75 Wash. 2d 160, 165, 449 P.2d 404 (1969).

The lead case relied on by the Tax Commission in the district court for its preemption argument is *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986). Most of the analysis in this short opinion is devoted to the question of whether the Federal Express company was a "public utility." Public utilities in Tennessee were subject to a 55% assessment ratio, while commercial and industrial taxpayers were subject to tax based on a 30% ratio. The Court held that Federal Express was a public utility, and so was subject to the higher ratio of assessment. The 4-R Act required that railroads be assessed at the lower ratio applicable to commercial and industrial property.

Federal Express argued that the uniformity provision of Tennessee's Constitution required that it be assessed at the lower rate at which railroads were assessed because of the protection of the 4-R Act. The court devoted one paragraph of its opinion to this issue. It noted

that Tennessee's Constitution includes a uniformity provision, which is similar to Article VII, Section 5 of Idaho's Constitution as it relates to uniform assessments within a class. The Tennessee provision (Article II, Section 28) required that "the ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the state." Without analysis, the court held that the 4-R Act preempted the state classification of railroads and provided that they should be taxed as commercial and industrial properties are taxed; and that the 4-R Act affected only railroads, "thus leaving in effect state classification of other businesses as public utilities." 717 S.W.2d at 876.

The court did not even address the argument that the preemption issue could be resolved while still maintaining uniformity simply by requiring the assessment of other "public utilities" at the same rate as the railroads. This is the practical, logical, and most legally sound approach to resolving this conflict between pre-preemption and uniformity. The Tax Commission relies on, and the district court accepted the argument, that where federal law conflicts with state law, preemption is required only "to the extent of the conflict." (Order, p. 14, R., p. 633, citing *Christian v. Mason,* 148 Idaho 149, 219 P.2d 473, 476 (2009)). The Companies agree with this principle, and agree it applies in this case, but not the way the Tax Commission asserts. Federal law has not preempted Idaho's uniformity provisions, so there is no "conflict" between allowing the lower assessment ratio for railroads while also lowering the assessments of the other taxpayers in this operating property class in order to maintain uniformity.

In addressing the Companies' assertion that there is no basis for treating Plaintiffs differently than railroads, the Tax Commission has argued that federal law requires railroads and only railroads to be treated differently. This is a key logical flaw in the Tax Commission's

preemption argument – the suggestion that somehow federal law is limiting the Tax Commission's ability to protect uniformity in assessments. Federal law does not affect Idaho's uniformity requirement. The 4-R Act does not say that railroads must be given relief from discrimination and that no other taxpayer in the railroads' class can obtain such relief. Federal law does not require railroads to be treated differently. This is not a question of federal law, but of state law. State law requires taxpayers in the same class to be treated the same.

The Tennessee decision should not be applied in Idaho, both because of its shallow and flawed reasoning and because the uniformity guarantee is obviously not as strong in that state as it is in Idaho. The Tennessee Constitution already expressly permitted discrimination between classes, as witnessed by the different assessment rates applied to public utilities compared to commercial taxpayers. It should not be surprising that it would not enforce uniformity within a class when that uniformity is impacted by federal law.

In contrast, the Supreme Court of Nebraska has held that the necessity of complying with the 4-R Act is no excuse for not treating other state-assessed taxpayers the same. *Northern Natural Gas Co. v. State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *rev'd on other grounds, Vandenberg v. Butler Cnty. Bd. of Equalization,* 796 N.W.2d 580 (Neb. 2011).[5] In that case, a state-assessed pipeline company claimed that it should be entitled to the same level of taxation of its personal property as the railroads had obtained in a federal court action under the 4-R Act. The court agreed, and implicitly addressed the interaction of the federal mandate with the state's uniformity guarantee:

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[5] The decision was reversed not because of the holding regarding the uniform treatment required for state-assessed personal property, but because the definition of "personal property" had changed.

> Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property...." It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. See *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, <u>no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought out by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax</u>.
>
> The state, by not taxing the personal property of railroads and car companies, <u>although acting involuntarily and under compulsion of federal law</u>, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

443 N.W.2d at 255-56 (emphasis added). Although the court provided this analysis by discussing the uniformity clause of the Nebraska Constitution, its actual holding stated that there was a violation of the federal equal protection clause. In later cases, the court made it clear that the state constitution's uniformity clause required this result. *See Natural Gas Pipeline Co. v. State Bd. of Equalization,* 466 N.W.2d 461, 468-69 (Neb. 1991); *Mapco Ammonia Pipeline, Inc. v. State Bd. of Equalization,* 471 N.W.2d 734, 742 (Neb. 1991).

The Nebraska Supreme Court did not frame its analysis in preemption terms, but it did not need to. As discussed above, the issue is not preemption; it is whether the state's uniformity clause should be applied in a way that ensures equal treatment of taxpayers in a given class, regardless of the reasons for the differences.

In its Order, the district court discusses other cases relied on by the Tax Commission (see pp. 12-13, R., pp. 631-32). A careful analysis of those cases shows they are at least distinguishable and even supportive of the Companies' position here. For instance, in *Williams Natural Gas Co. v. State Board of Equalization,* 1994 OK 150, 891 P.2d 1219 (1994), the court ruled against a pipeline but only after distinguishing the Nebraska cases and noting that the Oklahoma constitution was more permissive than Nebraska's in allowing differences in assessments between different types of property. Specifically, Oklahoma's constitution allowed taxation of different properties at different rates, and authorized the creation of a separate class for railroads and airlines (which also benefit from a special federal statute):

> The key distinction between the facts of that case and the present one is that the Nebraska Board treated taxpayers of the same class differently. The Nebraska Constitution requires that "[t]axes shall be levied by valuation uniformly and proportionately upon *all* tangible property...." Neb. Const. art. VIII, § 1. Essentially, the Nebraska taxing scheme treats all tangible property as being within the same class unless certain property, such as motor vehicles and agricultural land, has been exempted. Thus, when a federal court enjoined the state of Nebraska from assessing the personal property of railroads, the result was that the assessments upon others within the class became disproportionately higher. 443 N.W.2d at 256.
>
> …
>
> Oklahoma enjoys a different system of taxation. Our Constitution permits the Legislature to establish different tax classes in which property can be valued differently. See Okla. Const. art. X § 22. <u>Airlines and railroads are in a legislatively created subclass of public service corporation property.</u> This factual distinction brings this case under the persuasive authority of cases cited by the Oklahoma Board. *See In re ANR Pipeline Co.*, 254 Kan. 534, 866 P.2d 1060 (1994), *cert. denied*, 513 U.S. 917, 115 S. Ct. 296, 130 L.Ed.2d 209 (1994). *See also State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala.Civ.App.1984); *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873

> (Tenn.1986). Those cases held that legislative tax classifications of railroads and airlines on one hand and other entities on the other hand, did not violate the Equal Protection Clause.

891 P.2d at 1223 (emphasis added).

Idaho's Constitution is similar to Nebraska's, and unlike Oklahoma's – it does not permit the creation of different classes by which property can be taxed differently. And unlike what occurred in Oklahoma, Idaho's Legislature has not acted to create a separate subclass for railroads. The court in *Williams* recognized implicitly that after the legislature created a new class for railroads and airlines, "No longer are other public service corporations of the same class." *Id.* at 1222. If they had still been in the same class, presumably they would have been entitled to the same treatment as railroads.

The Utah case cited by the district court is also distinguishable, as that court recognized. In *Kennecott Corp. v. Utah State Tax Commission,* 858 P.2d 1381 (1993), the court addressed another claim that a state-assessed taxpayers' property should be assessed at the lower rate mandated by the 4-R Act. The court applied Utah case law requiring that a party must demonstrate that there are differences between those who are similarly situated, which it interpreted to include a number of factors, including whether the properties are valued by the same methods. *Id.* at 1388-89. In Idaho, Article VII, Section 5 of the Constitution requires only that the taxpayers are in the same class.

4. Review of the district court's analysis.

Although this Court reviews this issue *de novo*, the district court's Order provides a useful framework for analysis. The district court correctly observed that ". . . the federal government has preempted a state tax commission's equalization function as applied to

railroads." (Order, p. 14, R., p. 63.) But the court then concluded that, "Likewise, the equalization standards contained in federal law cannot be used to interfere with the state's performance of its equalization function as required by state law as to any property not preempted." This would "in effect require a finding Congress intended to occupy the field of taxation of real property by the states. On the record presented, this Court cannot make such a finding." (*Id*., p. 15, R., p. 634.)

The Companies agree that Idaho is obligated to follow federal law, and also agree with the principle adopted by the district court that preemption operates to invalidate state laws only to the extent those laws actually conflict with federal law. As the district court acknowledged, the Companies' position is that there is nothing about preemption as it relates to railroad taxation that interrupts with or affects the state uniformity requirement: the state can honor federal law by preventing discriminatory taxation of railroads, while also honoring the uniformity requirements of Idaho's Constitution by affording the same treatment to other centrally assessed taxpayers. The court's reasoning for rejecting that argument appears to be a concern with the "interference" that such "forced uniformity" would imply. (The term "interference" is the court's, Order p. 14, R., p. 633; the latter term is ours). The basis for the holding appears to be that if Idaho's uniformity requirement can be used to extend the federal protection to other centrally assessed taxpayers, it has the effect of "preemption by extension" (again, our term, not the court's). The district court viewed this as inconsistent with its duty "to interpret any federal intervention into an area otherwise thoroughly regulated by the states (i.e., taxation of real and personal property) in a manner which minimally interferes with the state's operation of that area." (Order, p. 14, R., p. 633.)

The problem with this analysis, and with the Tax Commission's arguments, is that in the end the preemption doctrine should have little to do with this case. The preemption doctrine requires the state to make the adjustments required by the 4-R Act, but it does not require the state to do more. Instead, it is the state guarantee of uniformity in taxation that requires such adjustments. Whether there is disparate treatment caused by federal law, or state law or some other factor, should be irrelevant. For instance, assume it was the Idaho Legislature that passed a statute providing that railroads are to be assessed at no greater value than locally assessed taxpayers. In this example, centrally assessed taxpayers would be entitled to one of two remedies – a finding that the statute is unconstitutional because it departs from uniformity with other taxpayers in this centrally assessed class, and/or that other centrally assessed taxpayers are entitled to an adjustment each year on the same basis.

In this case, where it is a federal statute, the Court obviously does not have the option of declaring it unconstitutional, but it does have the option of requiring the adjustment in order to assure uniformity. The point here is that whether disparate treatment is from the federal government or state government or something else, there is a remedy in order to protect uniformity among taxpayers.

The framework for a decision in this case should not be whether preemption blocks taxing administrators or the courts from implementing uniformity guarantees. Instead, the question is whether the federal statute, or the hypothetical state statute, or some other factor provides an excuse for disparate treatment. That is how the cases have addressed uniformity issues. The cases both parties cited in their briefing on the broader uniformity issue, discussed further below, suggest there is an excuse where differences in assessment are the result of

"individual irregularities," or from the inability to attain "mathematical exactitude," while "systematic" differences do not represent such an excuse. The district court agreed with that dichotomy, noting that the meaning of "systematic" in previous decisions of this Court is unclear and that in any event it raises issues of fact. (Order, pp. 4-5, 18-19, R., pp. 623-24, 637-38.)

The question here should be where the 4-R Act requirements fit within this framework of whether non-uniform taxation is excused. Clearly, the 4-R Act creates what are now systematic differences between railroads and other centrally assessed taxpayers, so it meets this standard if it is applicable. At the other end of the spectrum, an order requiring an equalization adjustment is not inconsistent with the principle that equalization is not required to account for individual irregularities or the lack of mathematical imprecision. The Tax Commission's implementation of adjustments for railroads accounts for these factors: a 5% margin of error is allowed, together with a "confidence interval" that is applied that expands that margin. (*See* Richards' Decl. ¶¶ 4, 9, R., pp. 438-441.) In other words, by requiring uniformity with railroads, the Court would not be acting contrary to Idaho case-law guidance that equalization should not be available to correct individual irregularities or force unattainable mathematical precision.

Apart from individual irregularities and the allowance for mathematical imprecision, the only excuse for non-uniformity in Idaho has been the granting of exemptions. *See Simmons v. Idaho State Tax Comm'n*, 111 Idaho 343, 723 P.2d 887 (1986). And the Supreme Court reached that conclusion because of the specific constitutional grant of authority to provide for exemptions, even where the effect is non-uniform taxation. In this case, there is no constitutional or statutory bar to requiring an adjustment to assure uniform taxation.

Indeed, it is relevant that the standards that would be in place by requiring uniformity with railroads are consistent with Idaho's constitutional guarantee of uniformity. As discussed in the next section of this brief and in the Order, Idaho does not have specific standards for equalizing centrally assessed taxpayers. As noted above, the district court decided to "interpret any federal intervention into an area otherwise thoroughly regulated by the states . . . in a manner which minimally interferes with the state's operation of that area." (Order, p. 14, R., p. 633.) In the absence of standards in Idaho for equalizing centrally assessed property, there is no such interference.

In summary, Idaho's Constitution is somewhat unique in requiring a single and uniform ratio of assessment relative to market value. It also has a rich tradition of applying the uniformity provisions of the Constitution. As noted by the Supreme Court of Nebraska (which has similar constitutional provisions), it is simply not logical to assert that federal law can abrogate a uniformity guarantee that is as broad as Nebraska's, or Idaho's. There is no "interference" with Idaho's uniformity requirement by providing the same adjustments for all centrally assessed taxpayers that are available for railroads.

C. Issues in the Tax Commission's Appeal – Do the Companies Have a Legal Remedy for Non-uniformity, and Are There Genuine Issues of Fact as to Satisfying the Standards for that Remedy?

1. Introduction.

The Tax Commission asserts that the district court was incorrect in failing to grant its motion for summary judgment on the claim that the Companies are entitled to an equalization adjustment because of the significant differences between their ratio of assessed value to market

value, compared with locally assessed property. There are several issues raised by the Tax Commission's brief, and most of them are factual:

- The one issue that may be purely a legal issue is the Tax Commission's assertion that centrally assessed taxpayers (and perhaps all taxpayers) have no real equalization/uniformity remedy at all. The district court had no difficulty rejecting that argument, as a matter of law. (Order, p. 22, R., p. 641.) Centrally assessed taxpayers should have the same remedy this Court has recognized for taxpayers generally since early in the last century.
- Once it is determined that there is a remedy, the question is the standard by which it is to be granted. The district court noted the language from the *Red Steer* case that a uniformity claim requires proof of "systematic" discrimination (Order, p. 6, R., p. 625), which the district court also referred to as "ongoing, known and structural disparity in value" (Order, p. 22, R., p. 641). There is a question of whether that standard is applicable, in light of the changes in 2003 to the legal standard in Idaho Code Section 63-409, but if it is, factual issues abound concerning whether it is satisfied in this case, which the district court noted will require expert testimony. (Order, p. 23, R., p. 642.)
- A related question is whether there is a percentage threshold for determining whether the discrimination is actionable. For the railroads, that threshold is a 5% variation from the assessment ratio of other commercial taxpayers. For Rule 131, the Tax Commission uses a 10% margin of error after making various assumptions to determine the "average" level of assessment of locally assessed

property. Many of those assumptions are in dispute in this case, and the 10% allowance for error is not the exclusive measure of discrimination, since the authority the Tax Commission relies on for guidance on these issues recommends a maximum 5% variance between assessment levels of classes of property. All these issues are issues of fact that preclude summary judgment.

2. Standard of review.

The Court recently repeated the standard of review of decisions on summary judgment motions as follows:

> On appeal of either a summary judgment order, or an order reconsidering summary judgment, this Court applies the same standard utilized by the district court in considering the motion. *Gregory v. Stallings*, 167 Idaho 123, 128, 468 P.3d 253, 258 (2020) (motion for summary judgment); *Massey v. Conagra Foods, Inc*., 156 Idaho 476, 479, 328 P.3d 456, 459 (2014) (motion to reconsider a motion for summary judgment). "On review, summary judgment is appropriate if `there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Progressive Nw. Ins. Co. v. Lautenschlager*, 168 Idaho 841, 844, 488 P.3d 509, 512 (2021) (quoting I.R.C.P. 56(a)). The moving party carries the burden to demonstrate the absence of a genuine issue of material fact. *Farm Bureau Ins. Co. of Idaho v. Kinsey*, 149 Idaho 415, 419, 234 P.3d 739, 742 (2010) (citation omitted). This Court "construe[s] the record in favor of the nonmoving party, drawing all reasonable inferences in that party's favor." *Id.* If reasonable minds could differ as to the conclusions to be drawn from the record, summary judgment must be denied. *Id.*

Taylor v. Taylor, 504 P.3d 342, 348 (2022). As the Tax Commission notes in its brief, the requirement to draw reasonable inferences in favor of the non-moving party is not applicable in non-jury cases, but there are no inferences that are relevant in this case.

3. The argument that centrally assessed taxpayers have no remedy at all.

In its briefing before the district court, the Tax Commission attempted to explain whether taxpayers (and even locally assessed taxpayers) have any equalization remedy, given the Tax Commission's position that Rule 131 provides adequate equalization relief to taxpayers even though it is an equalization tool available only to the Tax Commission and not to taxpayers. It argued that Rule 131 provides "indirect uniformity protection," and in a footnote acknowledged that the protection is indirect "because it does not allow for a personal claim or cause of action based on the results of the ratio study . . ." and instead allows for correction of locally assessed value by category of property by the Tax Commission. (Mem. in Support of Mot. for Summ. J., pp. 15-16 & n. 3, R., pp. 159-160.) The Tax Commission does not repeat this argument in its opening brief to this Court, but effectively makes the same argument by asserting that its Rule 131 should be entitled to administrative deference. (Op. Br., pp. 16-20).

As discussed earlier in this brief, there is a long line of cases dating back 100 years holding that the Idaho Constitution requires uniformity, and approving reductions in value. These cases include *Red Steer*, where the taxing authority had argued that an upward adjustment for all other taxpayers was the better remedy. That is no different from what the Tax Commission is arguing now. The district court was correct in rejecting that argument. The Tax Commission cites no authority supporting the proposition that such indirect protection is sufficient for constitutional uniformity purposes. And it gives no examples or explanation of why a ruling in the Companies' favor would invalidate Rule 131 for the purposes for which it is intended in monitoring county assessments. Instead, the brief embarks on a long discourse of

how the Tax Commission's "interpretation" of the law through Rule 131 is entitled to administrative deference.

Before responding to this deference issue, the threshold question is, what are giving deference to? The Tax Commission has obviously not adopted a standard for equalizing centrally assessed property values, so there is no deference to be given. (Second Smith Decl. ¶ 11, R., p. 282.) Rule 131 does not state that it is intended to be used for this purpose. Therefore, there is nothing in the Rule for which deference is needed or appropriate, except for the use of a median that even the Tax Commission staff agrees is not appropriate as an input for equalizing large-value property assessments. In this connection, it is unclear whether the Tax Commission is arguing that Rule 131 should be given deference as the exclusive means by which equalization can be performed, solely by the Tax Commission, or whether deference is to be given to its use as a standard by which to judge equalization claims by centrally assessed taxpayers. As discussed above, the SBOE appeared to take the latter approach in stating that it would not depart, in this context of centrally assessed equalization, from the use of the median as a measure of the level of assessment for locally assessed property. This brief will review the deference issue as to both alternatives.

The Tax Commission's brief reviews the four prongs and the rationales from *J.R. Simplot v. Idaho Tax Comm'n,* 120 Idaho 849, 820 P.2d 1206 (1991). The Companies agree with the Tax Commission that the first prong is satisfied, but only that prong – that the agency is entrusted to administer the statute at issue. Indeed, that is what Plaintiffs have argued: the Tax Commission has the responsibility to assess the operating property of Plaintiffs, and that process includes equalization by the SBOE.

Next, addressing the second prong of the test, the Tax Commission argues that Rule 131 is reasonable, citing its genesis from the Standard on Ratio Studies published by the International Association of Assessing Officers (IAAO). For many of the reasons set forth in Dr. Richards' Declaration, there is significant doubt whether the Rule is reasonable even for the purpose for which it is intended – monitoring of county assessments. But there is no question that it is not reasonable for the purpose of evaluating uniformity claims for centrally assessed taxpayers. For instance, even the Tax Commission staff acknowledges that the use of the median is not appropriate and would not be reasonable for this purpose. Instead, the weighted mean is the correct measure. The expert statistical analysis the Companies provided from Dr. Larry Richards identifies other areas where Rule 131 is ill-suited for this equalization process. (*See* Richards Decl. ¶¶ 7-10; R., pp. 439-442.)

The third prong asks whether the statutory (or in this case, constitutional) language addresses the issue, 120 Idaho at 862, thus suggesting that agency interpretation is necessary. In this case, the constitutional language is reasonably clear that uniformity is required within a class and between classes. Rule 131 does not, in any event, address any ambiguity in the uniformity mandate, but simply sets forth guidelines for overseeing county assessors as one part of the uniformity process.

Finally, the fourth prong considers whether there are rationales underlying deference, including the goal of practical interpretation of the statute, whether there has been legislative acquiescence, whether there is agency expertise, how long the rule has been in place (repose), and whether the interpretation is contemporaneous with the relevant legislation. 120 Idaho at 862. None of these factors is relevant to the question of whether the specific techniques

provided in Rule 131 are appropriate for equalization of centrally assessed property. Importantly, the remedy of taxpayers to seek equalization adjustments to their assessments has been recognized concurrently with Tax Commission oversight for at least 100 years. To the extent agency expertise is important, the Tax Commission has conceded that the weighted mean is correct here for this purpose, rather than the median prescribed by the Rule.

4. There are genuine issues of material fact regarding the Companies' right to relief on this claim.

Assuming that taxpayers are not precluded from seeking equalization relief because of Rule 131, the first question is, what is the proper legal standard? The district court cited cases for the proposition that the lack of uniformity must be systematic, and that errors of judgment, "individual irregularities," or the failure to achieve perfection or "exactitude" in assessments are not sufficient to justify equalization relief. (Order, pp. 4-6, R., pp. 623-25.) There are cases which make these statements, while there are also cases requiring equalization adjustments without requiring any more than a showing that the taxpayer's assessments are not proportionate to other taxpayers. In *Red Steer, supra, Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 163, 391 P.2d 840, 846 (1964), and *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950), the Court stated that property must be "systematically" overvalued to provide a basis for granting uniformity relief. However, in *Farmer v. State Tax Comm'n*, 80 Idaho 72, 325 P.2d 278 (1958), and *McGoldrick Lumber Co. v. Benewah County*, 54 Idaho 704, 35 P.2d 659 (1934), the Court ordered relief without requiring that analysis.

All of these cases were decided before 2003, when the statutes governing property tax appeals were dramatically changed. Prior to 2003 there was no statute governing such appeals,

and the case law required that a taxpayer must prove that an assessed value is "manifestly excessive, fraudulent or oppressive, or arbitrary, capricious and systematically discriminatory." *Red Steer*, 101 Idaho at 98, 609 P.2d at 165. This standard was replaced in 2003 with the current statutory requirement that a taxpayer must prove only that the assessment is erroneous. I.C. §§ 63-409, 63-511(4), 63-3812(c). The Statement of Purpose for this legislation (H.B. 302) makes it clear that the old, difficult standard has been replaced: "This legislation changes the legal standard from one that requires proof that an assessment is manifestly excessive, arbitrary and capricious, or fraudulent and oppressive, to one that requires simply that the assessment is erroneous."[6]

The wording of the standard in *Red Steer* (and other cases) is mirrored in the description in the Statement of Purpose except for the term "systematically discriminatory," and it is not logical that the legislature would have intended to identify one legal standard for some appeals, such as valuation or exemption claims, and leave in place an old standard for equalization cases with no statutory guidance. The lead sentence of the Statement of Purpose states: "Identifies the standard to be applied and the burden of proof in appeals of property tax assessments to the County Board of Equalization, the Board of Tax Appeals or the district court." The statement, and more importantly the language of the statute itself, refers to "appeals," which can only mean all appeals. The statute is as broad as it could be, referring to "any appeal" from a Tax Commission decision." I.C. § 63-409. It refers to the standard of value for appeals of "value" to

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[6] https://legislature.idaho.gov/sessioninfo/2003/legislation/H0302/#sop

be simply whether the value determination was erroneous. The term "value" logically encompasses determinations of assessed value as well as market value.

In a post-2003 case, *In re Board of Tax Appeals, Appeal No. 16-A-1079,* 165 Idaho 433, 439, 447 P.3d 881, 887 (2019), the Court recited part of the old standard: "However, uniformity does not require exact uniformity as there will always be 'individual irregularities and inequality in taxation . . .'" because this is "a process which cannot be reduced to an exact science," and the "law does not require exactitude, but it does require uniformity." *Id.,* quoting *Anderson's Red & White Store v. Kootenai Cnty.*, 70 Idaho 260, 265, 215 P.2d 815, 818 (1950) (emphasis added). Although this was a valuation case and not an equalization case, it is noteworthy that the Court did not include the term "systematic discrimination" in describing the standard for uniformity claims. Indeed, in no case after 2003 has the Court used that term.[7]

If the standard for uniformity claims continues to include a "systematic discrimination" component, that is a fact-driven question. The district court pointed to the part of the holding in *Red Steer* that separately addressed two types of inequities, holding that one was "systematic" and the other was not. The part of the inequity that was determined by the district court to be not systematic, after a trial, was described as follows: ". . . while the inequities were pervasive, and

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[7] It is reasonable to conclude that this term was simply part of the tax-appeal lexicon the Court applied to tax appeals generally prior to 2003. Often, the terms "systematic" and "discriminatory" appear in expressions of the legal standard for valuation appeals or appeals that combine both claims (since overvaluation can also be discrimination where all other property is assessed as 100% of value). *See Merris v. Ada Cnty.,* 100 Idaho 59, 64, 593 P.2d 394, 399 (1979): "'the court will grant relief where the valuation fixed by the assessor is manifestly excessive, fraudulent or oppressive; or arbitrary, capricious and erroneous resulting in discrimination against the taxpayer'" (quoting *Appeal of Sears, Roebuck & Co.,* 74 Idaho 39, 46, 256 P.2d 526, 530 (1953)). The "discrimination" addressed in this standard is part and parcel of the valuation claim, consistent with the idea that overvaluation has both market value and equalization components.

resulted from 'spot appraisals,' rapid population growth, constantly inflating property values and the addition of new properties to the tax roll, they were not the kind of systematic, intentional discriminatory practices for which relief could be granted." *Id.* at 100, 609 P.2d at 167. The inequities involved in this case are not from "spot appraisals" and are from factors that may include the causes recited by the Court in *Red Steer,* but clearly are from additional causes. That factual determination has yet to be made in this case, as it was made after a trial in the *Red Steer* case.

The facts are clear (or at least in dispute) that the differences in valuation ratios in this case <u>are</u> the result of systematic and consistent differences between local and central assessment valuations, perhaps driven by the differences in the valuation process and the greater rigor used by the Tax Commission to value utilities, railroads and related companies, but also by other factors. The differences we see in this case are not the result of errors of judgment, individual irregularities or the lack of exactitude. They are not explained away as being minor and one-off differences. The facts listed in the Statement of Facts show that there are pervasive and annual differences in both the processes and the results of valuations at the local level compared to central assessment. Included among those facts are the SBOE's decisions since at least 2018 to adjust railroad values by more than 10% in most cases; a weighted mean ratio of sales prices to assessed value for improved commercial property – most comparable to the Companies – of 87.55% in 2019 and 84.39% in 2020. (See Statement of Facts, *ante*, p. 5, ¶ 6.)

In light of the low and worsening ratios of assessment, this question can fairly be asked: how can Rule 131 be seen as avoiding systemic non-uniformity when, with all of the Tax

Commission's studies and authority to order increases in assessments, the assessments are so much worse in 2020 than in 2019?

Also relevant, and part of the explanation for these differences, is that centrally assessed property is valued with the detailed income statement and balance sheet information provided in annual reports by the taxpayers. In valuing utilities and railroads, the Tax Commission uses techniques that are seldom used in local assessment; there is a smaller overall number of taxpayers to value, allowing more time for performing the valuation; and the annual nature of the centrally assessed valuation process, in contrast to the practice of local assessors to actually appraise property only once every five years, as allowed by law. I.C. § 63-314. (Declarations of Katrina Basye and Jenny Berg, R., pp. 452, 457.)

Finally, another indication that differences in valuation are systematic is that they are revealed in state-wide studies that cover hundreds of transactions. The pro forma analysis the Tax Commission performed, to determine if the Companies' values would have been adjusted if the same process had been used for their property as was used for the railroads, reported that the sample size of transactions to measure market value ranged from 274 for Avista Gas to 897 for CenturyLink. (Smith Decl. Ex. C, p. 3, R., p. 96.) In other words, these are not random or "spot" data points or values that collectively could be considered "individual irregularities" or mistakes.

It is unclear what the Court has meant in the cases opining that differences in assessment must be systematic before uniformity claims may be asserted. But given the context of the discussion in these cases, where the Court has made allowances for errors in judgment, falling short of "exactitude," and allowing individual irregularities, it seems obvious that a systematic

overvaluation is simply one that is not the result of those types of occasional mistakes. Indeed, a synonym for "systematic" is "regular" and an antonym is "irregular."[8] If an occurrence is not "irregular," it is likely to be "systematic." In other words, if inequities are not the result of "individual irregularities," they are regular or systematic.

Thus, if the Court is inclined to address the meaning of "systematic" in this case, or to identify a standard that is consistent with past cases and considers the changes in the appeal standard in section 63-409, a logical standard would be that no relief would be granted if the evidence shows that value inequities are the result of errors in judgment, of falling short of exactitude, or of individual irregularities. If it is more than that, then the failure to achieve uniformity should give rise to a remedy.

The Tax Commission will argue that a reason for allowing classification of property is to allow the use of different methods to obtain market value, and that this can explain such differences. However, where different methods are consistently producing differences in assessment ratios between different types of property, then those are systematic practices that support a uniformity claim. Differences in methods are acceptable if they produce uniform valuations, but when they do not, a taxpayer should be able to obtain relief.

5. There are other genuine issues of fact regarding the elements of the claim Plaintiffs must establish.

As discussed above, it appears that the Tax Commission asserts a taxpayer does not have an equalization remedy because it performs that role through Rule 131. That argument presents

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[8] "Systematic." *Merriam-Webster.com Thesaurus*, Merriam-Webster, https://www.merriam-webster.com/ thesaurus/ systematic. Accessed May 11, 2022.

an issue of law that the district court decided against the Tax Commission and that is squarely before this Court.

In its brief, however, the Tax Commission argues that the district court erred because it is "impossible" to satisfy the "systematic" requirement if the Tax Commission has determined through its Rule 131 process that no upward adjustment is necessary to the assessed values of locally assessed property. That argument runs directly counter to the holding in *Red Steer* and other cases, where the same argument was made that the taxpayers' claims were foreclosed because the appropriate remedy is to make upward adjustments for other taxpayers. Alternatively, the SBOE's decision appears to indicate that if there is a remedy, it is based on Rule 131. In other words, a taxpayer could obtain an adjustment only if its property is assessed at market value and other similar property is assessed at less than 90% of value; that the 90% would be further reduced by the "confidence interval" concept to allow even further disparities in value; and that the level of assessment of the other property would be determined by relying on the median of the sample ratios, not the weighted mean. If that is the Tax Commission's position, it presents issues of fact with respect to all these factors, as demonstrated in the Declaration of Dr. Larry Richards. (R., p. 435.)

The major issue addressed during the hearing before the SBOE was whether the median or weighted mean should be used in measuring the average level of assessment in the sample of transactions included in the ratio study. The author of the Tax Commission's Ratio Study Manual, Tax Commission supervisor Alan Dornfest, has admitted in the Memo addressing Plaintiffs' claims that the weighted mean is "the most appropriate statistical level measure of the level." (Smith Decl. Ex. C, p. 1, R., p. 94.) He also made this observation in an article he

authored with another Tax Commission employee: "When the goal is to estimate the total value of a jurisdiction or to adjust typically large-value, centrally assessed property values to the level of a comparison group of properties, however, the conceptually preferred measure of central tendency is the weighted mean." (Second Smith Decl. Ex. 4, p. 48, R., p. 339.) The authors also noted that an IAAO survey shows that other states "adjust the assessed values of centrally assessed properties based on ratio study results . . . and Idaho has been added to this group and uses the weighted mean as the basis for such valuation." (*Id*., p. 46, R., p. 337.)

During the hearing before the SBOE, the Tax Commission suggested that it uses the weighted mean because case law under the 4-R Act indicated it was the most appropriate measure of central tendency. However, in his deposition, Mr. Dornfest conceded that the weighted mean is appropriate when adjusting large-value properties not because of any case law directive, but because of accepted statistical principles. (Second Smith Decl. Ex. 10, pp. 88-89, R., pp. 416-17).

The difference between the median and the weighted mean is important in this case, since it can make the difference between whether the Companies are entitled to relief or not, at least if the 10% margin of error from Rule 131 is also used. And it is a question that is the subject of expert opinion. Although the Tax Commission's admissions should be sufficient for this purpose (that only the weighted mean is appropriate to equalize large-value property), the conclusion that the weighted mean is the <u>only</u> appropriate measure is confirmed in the Declaration of Dr. Larry Richards, an experienced statistical expert.

A ruling for the Companies in this case would not invalidate Rule 131 for purposes of monitoring county assessments, although there are many reasons why it is flawed for any

application. The Tax Commission's own analysis shows that at least Idaho Power would obtain relief in this case, at the 10% tolerance level used in Rule 131, if the weighted mean is used as the statistical benchmark. (Smith Decl. Ex. 4, p. 3, R., p. 96.) It would not obtain relief if the median is used and if all other aspects of the Tax Commission's methods are applied as they are used for railroads. So this is an example of situations where Rule 131 does not require the Tax Commission to command assessors to increase values, but where use of the more appropriate weighted mean allows a necessary adjustment for this taxpayer and for this purpose. In other words, there is no linkage between how Rule 131 operates for the Tax Commission in monitoring local assessments and how it would apply a 10% tolerance level for centrally assessed equalization.

There are other statistical issues addressed in Dr. Richards' Declaration that justified the district court's denial of summary judgment and eventually should entitle the Companies the relief they seek. For instance, the Tax Commission adjusts the sample it uses for the railroads, and for the Companies in the "pro forma" analysis it prepared for their property, by "trimming" or excluding certain large value sales from the sample. Dr. Richards opined that this trimming process is improper in the application of accepted statistical principles and impairs the results of the analysis. (Richards Decl. ¶ 8, R., pp. 439-40.) He also noted, as discussed above, that the Tax Commission uses the upper limit of the "confidence interval" as the threshold for determining whether to make adjustments to assessed value. (*Id.*, ¶ 9, R., p. 441.) Yet, the Tax Commission's own Ratio Study Manual concedes that in developing a sample in a ratio study, "[t]he goal is to determine one number which best represents assessment level." (See *ante*, p. 15.) As Dr. Richards observes, the "one number" that is relevant as a measure of the average

level of assessment is the weighted mean, and the upper limit of the confidence interval has no importance as a measure of central tendency or of a level of assessment. (Richards Decl. ¶ 9, R., p. 441.) The confidence interval gives county assessors an additional margin of error – even below 90% – and that may be good practice where there will be resistance to ordering county-wide increases in assessments. But the procedure is not statistically valid and has the effect of moving the goal posts for a taxpayer seeking uniformity in assessments. Finally, as noted in the Background section of this brief, the 10% tolerance level accepted in Rule 131 is inconsistent with the IAAO's guidance that differences in assessment levels between classes should be no more than 5%. See *ante,* pp. 17-18.

Dr. Richards' Declaration shows that with the use of the weighted mean alone and none of the other corrections he recommends, Idaho Power would be entitled to relief based on a 10% margin of error. With any of the other adjustments, all three Companies would be entitled to relief. (Richard Decl. ¶ 6, R., p. 439.)

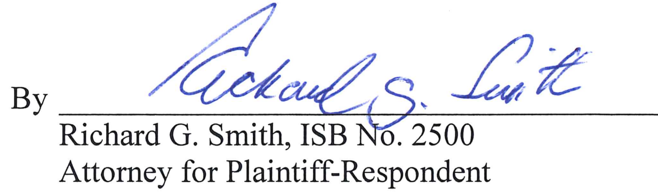
IV.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court reverse the district court's decision to grant the Tax Commission's motion for judgment on the pleadings (with respect to the claim of uniformity with the railroads), and affirm the district court's decision to deny the Tax Commission's motion for summary judgment on the "alternative" claim (involving the claim of uniformity with locally assessed taxpayers).

DATED THIS 20th day of May, 2022.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2022, I caused to be served a true copy of the foregoing CROSS-APPELLANT'S OPENING BRIEF AND RESPONSE TO APPELLANT'S OPENING BRIEF by the method indicated below, and addressed to each of the following:

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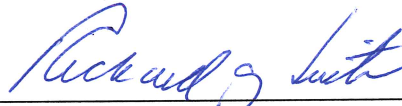

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