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Subject: Gross Opening Brief Docket No. CC-2023-OGR-O1 -001
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Please find attached the Opening Brief of Objecting Property Owners, the Gross's re: Just and Reasonable Factors.

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Jordan A. and Dana C. Gross and Little Buddy Farm LLC

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of the Application of Snake River Oil and Gas, LLC to Integrate Unleased Mineral Interest Owners in the Spacing Unit Consisting of Section 24, Township 8 North, Range 5 West, Boise Meridian, Payette County, Idaho	Docket No. CC-2023-OGR-O1 -001 **OPENING BRIEF**

COME NOW, Objecting Property Owners, Jordan A. and Dana C. Gross and Little Buddy Farm LLC (the Gross's) by and through their attorney of record, J. Kahle Becker, and files their Opening Brief for review and utilization by the Oil and Gas Division Administrator of the Idaho Department of Lands ("Administrator") in determining whether the terms and conditions of the integration order sought by Applicant Snake River Oil and Gas, LLC ("Snake Oil") in Docket No. CC2023-OGR-01-001 are "just and reasonable" as required by Idaho Code § 47-320(1), and also asserts objections to these proceedings as follows:

OBJECTION TO DUE PROCESS VIOLATIONS INHERINENT IN AN UNCONSTITUTIONAL STATUTORY SCHEME

The Gross's are property owners holding surface and mineral rights within the spacing unit Snake Oil seeks to integrate. As a preliminary matter, the Gross's object to being compelled to

provide a complete and exhaustive list of factors which should be considered "just and reasonable," for what amounts to a state sanctioned taking of their private property -by another private party, approximately one week after their legal counsel was retained. These fast-tracked bare bones proceedings appear to be little more than window dressing on due process required under the 5th and 14th Amendments of the United States Constitution. *See Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216.

The lack of discovery, per the oil and gas industry lobbyist drafted Idaho Code g 47-325(3)(d), and shortened timeframes contained therein, violate Idaho Court precedent. Idaho caselaw prohibits an administrative agency denying a party any mechanism for discovery in administrative proceedings, on the grounds that doing so violates due process.

> Then, in *Beyer*, we **again criticized** the ITD's practice of setting a subpoena compliance date on *the day of* the hearing. *Beyer*, 155 Idaho at 47 n.7, 304 P.3d at 1213 n.7. We stated, "We continue to **strongly discourage this practice**. We see no reason for this practice except to cause a disadvantage to the driver who has the burden of proof at the ALS hearing." *Id.*
>
> Although the rules governing administrative license suspensions do not provide a specific time frame in which subpoenas must be complied with prior to an administrative hearing, we again **admonish the ITD for engaging in such questionable practices**. The suspension of issued drivers' licenses **involves state action that adjudicates important interests of the licensees**; therefore, drivers' licenses may not be taken away without procedural due process. *Dixon v. Love*, 431 U.S. 105, 112, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977). **The minimum constitutional due process requirements for administrative hearings are timely and adequate notice and an opportunity to be heard that is <u>meaningful</u> and appropriate to the nature of the case**. *Bell v. Burson*, 402 U.S. 535, 541-42, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). It stands to reason that to effectuate a meaningful defense against an administrative license suspension for a violation under I.C. § 18-8002A, a driver should have **sufficient prehearing access to the very evidence deemed relevant enough to warrant the issuance of a subpoena by the very administrative hearing officer deciding the case.**
>
> *Hawkins v. Idaho Transp. Dep't*, 161 Idaho 173, 177, 384 P.3d 420, 424, 2016 Ida. App. LEXIS 132, *7-8 (Emphasis added).

On these grounds alone, this hearing should halt immediately and be referred to district court for further guidance, or more likely, legislative amendment. If the Hearing Officer, IDL, or the OGCC does not do so on its own accord, the Gross's will take that as an indication that judicial intervention and an injunction to halt these proceedings will be required.

This entire process appears to be designed to set the stage for a pre-ordained conclusion that the Gross' property will be taken from them, given to a single private company, at a predetermined price, despite the objections contained below. This industry hijacked process does not pass even the most generous 5th Amendment Takings analysis.

> As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff,* 467 U.S., at 245, 81 L. Ed. 2d 186, 104 S. Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co.* v. *Nebraska,* [*478] 164 U.S. 403, 41 L. Ed. 489, 17 S. Ct. 130 (1896). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. *Kelo v. City of New London*, 545 U.S. 469, 477-478, 125 S. Ct. 2655, 2661, 162 L. Ed. 2d 439, 450, 2005 U.S. LEXIS 5011, *15, 10 A.L.R. Fed. 2d 733, 35 ELR 20134, 60 ERC (BNA) 1769, 18 Fla. L. Weekly Fed. S 437.

Indeed, a pre-ordained result of handing nearly complete and total dominion over (and under) the Gross's property, at submarket rates, with no opportunity to question the affirmations or data allegedly supporting the Application, is exactly what the single private party applicant to take the Gross's property proposes.

> Applicant requests that the Administrator apply the same factors to determine that the integration order is made "upon terms and conditions that are just and reasonable," in accordance with Idaho Code § 47-320(1), as were used in the most recent integration proceedings, Docket No. CC-2021-OGR-01-001, Docket No. CC-2021-OGR-01-002, and Docket No. CC-OGR-2022-01-002. January 23, 2023 Letter from Mike Christian at p. 4 ¶ 12, attached to Application.

The Applicant's preferred outcome is directly contradicted by Idaho Code 47-320(3) and prior holdings of the OGCC.

> Further, the proposed terms will be analyzed to determine their need given any site-specific conditions that may exist and are established at the evidentiary hearing, including those related to water resources.
> Docket No. CC-202 1 -OGR-0 | -002 *Order Determining "Just and Reasonable" Factors* at 21

The Gross's likewise object on grounds that these truncated proceedings violate Idaho Constitution Article 1 Section 1 – Inalienable Rights of Man to Protect Property. These proceedings run afoul of a US Supreme Court decision which prohibited Idaho from setting specific rates, held to be unreasonable, for compensation of railroads. *See Chicago, M. & St. P. Ry. v. Public Utils. Comm'n*, 274 U.S. 344, 47 S. Ct. 604, 71 L. Ed. 1085, 1927 U.S. LEXIS 622 (1927) (A state has no right to require railroad companies to haul logs at a loss or without such compensation that is reasonable in view of the service demanded of them.) With an expedited hearing schedule and no discovery, this hearing officer has no mechanism to determine, as elicited by meaningful cross examination, what a reasonable rate to compensate the Gross's even is.

Lastly, with respect to the Constitutional deficiencies of this truncated process, the February 22, 2022 *Order Continuing Opening Brief Deadline* stated the Administrative Rules which may be applicable to this hearing are:

1) The Idaho Rules of Administrative Procedure of the Attorney General (IDAPA 04.1 1.01), to the extent that the Rules of Administrative Procedure are not superseded by Oil and Gas Conservation Act; and
2) The Rules Governing Conservation of Oil and Natural Gas in the State of Idaho (IDAPA 20.07.02).

Order Continuing Opening Brief Deadline at 5.

This pronouncement appears to be in conflict with Idaho Statutory and Constitutional provisions regarding the expiration and mandatory statutory reauthorization of administrative rules on an annual basis. Article III Section 29 of the Idaho Constitution provides:

> LEGISLATIVE RESPONSE TO ADMINISTRATIVE RULES. The legislature may review any administrative rule to ensure it is consistent with the legislative intent of the statute that the rule was written to interpret, prescribe, implement or enforce. After that review, the legislature may approve or reject, in whole or in part, any rule as provided by law. Legislative approval or rejection of a rule is not subject to gubernatorial veto under section 10, article IV, of the constitution of the state of Idaho.

Idaho Code 67-5292. EXPIRATION OF ADMINISTRATIVE RULES, states:

> (1) Notwithstanding any other provision of this chapter to the contrary, every rule adopted and becoming effective after June 30, 1990, shall automatically expire on July 1 of the following year unless the rule is extended by statute. Extended rules shall then continue to expire annually on July 1 of each succeeding year unless extended by statute in each such succeeding year.
> (2) All rules adopted prior to June 30, 1990, shall expire on July 1, 1991, unless extended by statute. Thereafter, any rules which are extended shall then continue to expire annually on July 1 of each succeeding year unless extended by statute in each succeeding year.
> (3) This section is a critical and integral part of this chapter. If any portion of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall be deemed to affect all rules adopted subsequent to the effective date of this act and such rules shall be deemed null, void and of no further force and effect.

With respect to The Rules Governing Conservation of Oil and Natural Gas in the State of Idaho (IDAPA 20.07.02), according to the Commission's own website, https://ogcc.idaho.gov/rulemaking/docket-no-20-0000-2100f/ only the **fee rules** were approved by the 2022 Idaho Legislature. SCR 123, citied by the OGCC as its purported authority for utilizing IDAPA 20.07.02, is actually fairly limited in its statutory reauthorization.

> NOW,THEREFORE,BE IT RESOLVED by the members of the Second Regular Session of the Sixty-sixth Idaho Legislature, the Senate and the House of Rep representatives concurring therein, that **pending fee rules** adopted by the Department of Fish and Game, Forest Products Commission, **Department of Lands**, Department of Parks and Recreation, and Department of Water Resources, pursuant to the Administrative Procedure Act and submitted through the Office of Rules Coordinator to the Legislature for review during the 2022 legislative session and reviewed by the Senate Resources and Environment Committee and the House Resources and Conservation Committee, be, and the same are hereby approved, with the

> exception of the following enumerated pending fee rule. SCR 123. (Emphasis added).

The <u>fee rules</u> in IDAPA 20.07.02 became effective on March 18, 2022 by SCR 123. However, by operation of I.C. 67-5292, the non-fee based rules were not extended by statute. Therefore, per I.C. 67-5292, those rule "automatically expired" on July 1, of 2022 – or earlier. The Commission likewise neglected to extend those rules on a temporary basis. *See* I.C. 67-5226. Therefore, the non-fee based rules found at IDAPA 20.07.02 are inapplicable to these proceedings. It would appear the Idaho Legislature has created an unintended, or perhaps intended, consequence of invalidating the Rules the Hearing Officer believes are in place, thus leaving the parties unable to proceed in a rule based administrative forum. These proceedings should be stayed until IDL goes through proper rulemaking procedures.

Based on the Constitutional arguments listed above, and with all due respect to a hearing officer - who is appointed pursuant to a clearly unconstitutional statutory scheme, the Gross's reserve their right to challenge the constitutionality of this statutory scheme and the state's compulsion of their participation in these integration proceedings, which are devoid of traditional protections of due process.

PROPOSED FAIR AND REASONABLE FACTORS TO CONSIDER

Subject to and without waiving the Constitutional objections stated above, as well as the Gross's right to seek judicial intervention to halt this unconstitutional process, the Gross's propose the Hearing Officer consider the following factors in these proceedings. As a preliminary matter, the Hearing Officer has analyzed arguments and proposed factors put forward by other objecting parties in other integration proceedings. In a prior proceeding, the Hearing Officer erroneously amended the terms "just and reasonable" out of Idaho Code § 47-320(1) by concluding:

> [T] he broad requirement for an integration order to be on "just and reasonable" terms does not include authority to award additional compensation beyond statutory requirements and integration will not be denied when uncommitted owners' economic risks exceed benefits because the Legislature made integration mandatory upon meeting certain statutory requirements.
> *September 13, 2021 Findings Of Fact, Conclusions of Law, and Order* Docket No. CC-2021-OGR-01-001

This conclusion is directly contrary to the plain language of Idaho Code § 47-320(1) and will not survive judicial scrutiny. The standard of review of a hearing officer's findings on appeal is found in Idaho Code § 67-5279, which provides in pertinent part:

> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.
> Idaho Code § 67-5279.

The Hearing Officer has explicitly authorized the imposition of terms which are unreasonable, in that he feels impowered to impose terms which defy logic, reason, and economics. This is an unlawful statutory amendment in excess of the powers granted to the Hearing Officer. While no reasonable businessman may make an arm's length transaction with Applicant, this Hearing Officer has set the stage for a state imposition of terms on non-consenting parties which may very well be unjust and unreasonable, terms which may negatively impact those parties' properties for decades – despite the uneconomical implications thereof, and which may abrogate their common law and statutory rights to seek tort-based remedies. To be blunt, this process treats non-consenting owners as second-class citizens in favor of an out of state business who can cut and run and leave them with the responsibility to clean up a mess they had no part in making.

The Hearing Officer seems to have rejected consideration of the bulk of the factors previously proposed by objecting owners and has settled on a narrow list of just and reasonable factors. Those factors utilized in prior hearings are:

> 1. Are the proposed terms addressed in another source of law?
> 2. Are the proposed terms and conditions (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its operations?
> 3. Are the proposed terms and conditions similar to other agreements within and nearby the unit? If a proposed term is not similar, is there a reason why a different term or condition is appropriate?
> 4. Are any proposed terms, including those addressed at drilling, equipping, and operating a well, consistent with the Oil and Gas Act and necessary given site-specific conditions?
> 5. Will the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms are necessary to address physical occupation?
> 6. If the proposed operation includes use of uncommitted owners' surface estate, is the operator's compliance with Idaho Code § 47-334 adequate to protect the surface owner?
> 7. Do the unit's circumstances and operations require additional bonding?
> 8. Does the integration order ensure that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms?
>
> Docket No. CC-2022-OGR-01 -002 November 10, 2022 *Order Determining Just And Reasonable Factors* at 23-24.

The Gross's reserve their rights to challenge what appears to be an overly narrow view of the factors which could be considered "just and reasonable" to a state sanctioned private party taking of their property, under an unconstitutional statutory scheme. Moreover, the hearing officer is incorrect in limiting its own authority to determine what is just and reasonable to property owners whose property is on the auction block – with one state sanctioned bidder, at what appears to be a largely predetermined opening and final bid. Why are Snake Oil's or the oil and gas industry's proposed lease terms given deferential treatment? Even under the industry drafted I.C. § 47-320(1) the terms "just and reasonable" contain no such limitation.

Additionally, the Applicant generally bears the burden of proof in this matter. "The customary common law rule that the moving party has the burden of proof – including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings." *Intermountain Health Care, Inc. v. Bd. of County Comm'rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984), *rev'd on other grounds* 109 Idaho 299, 707 P.2d 410 (1985). Therefore, Snake Oil bears the burden of proof that each and every item in its application and exhibits thereto are "just" and "reasonable." Under Idaho law, "preponderance of the evidence" is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). "A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not." *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

This hearing officer must look at the totality of the impacts contemplated by the Application and place the unweighted burden of proof on the Applicant. The Hearing Officer may not utilize any presumptions that oil and gas industry standards, forms, or leases are "just" or "reasonable." The Hearing Officer's job is straightforward; ensure objecting surface owners are protected and adequately compensated for both their mineral rights and any impacts which occur on or around the surface estate. Anything less is neither "just," nor "reasonable."

1. Surface Use of Non-Consenting Owners Should Be Prohibited or Compensated in Light of the Policy Considerations Expressed in the 2018 Civil Trespassing Law.

The lease forms proposed by the Applicant are far reaching in defining the legal rights of the parties. It seeks to authorize Snake Oil "the right at any time and from time to time to utilize the leased premises or any portion or portions thereof." *See* Exhibit E to Application at ¶ 12. If

Snake Oil wants to park a drill rig in someone's living room, this lease authorizes that conduct. The Idaho Supreme Court has held the right to contract is qualified by a public right to regulate it in the common interest.

> "[T]he right to make contracts is embraced in the conception of liberty as guaranteed by the [Fourteenth Amendment to the] Constitution." *Chicago, B. & Q.R. Co. v. McGuire*, 219 U.S. 549, 566, 31 S. Ct. 259, 55 L. Ed. 328 (1911). However, "that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses." *Id.* at 567. "Equally fundamental with the private right [to contract] is that of the public to regulate it in the common interest." *Ricks v. State Contrs. Bd.*, 164 Idaho 689, 701, 435 P.3d 1, 13, 2018 Ida. App. LEXIS 55, *25, 2018 WL 6273484

This process is a state compelled interference with the constitutional right to contract for nearly complete and total dominion over the Gross's surface and subsurface property rights. Snake Oil does not have an absolute right to do as it chooses. As such, any and all terms of the proposed lease must be open for an analysis as to how those terms advance the Public Interest – as compared to the purely private interest of Snake Oil.

For example, the introductory paragraph of the lease attached as Exhibit E to the Application, which is the lease Snake Oil proposes this Hearing Officer issues an Order compelling the Gross's to be a party to, seeks an easement of unknown location for roads, pipes, utility lines – which could last for decades, if some nominal amount of gas continues to be produced, no matter how uneconomical – by Snake Oil or some unknown successor in interest (per ¶ 11 and 15).

Moreover, Snake Oil's proposed lease (Exhibit E ¶ 6) seeks to have this Hearing Officer to provide it with a groundwater right, in violation of I.C. 42-226 and Idaho Constitution Article XV Section 5, because the proposed lease term makes no allocation for any diminution in quantity or quality of the water pumped by prior appropriating non-consenting surface owners.

For those who elect to be "deemed leased," I.C. § 47-334 is as concerning as the proposed lease in that it purports to allow a producer nearly unfettered use of the surface estate so long as the surface owner is compensated, the uses are minimized, **and** the interference is mitigated. I.C. § 47-334(3). At a bare minimum, this state sanctioned taking must adequately compensate the Gross's and other non-consenting owners for the lost value of their surface property and appurtenances thereto for the duration of the lease or economical production of hydrocarbons.

An analysis under I.C. § 47-334 must therefore look to other tort-based remedies and statutes which express a legislative policy position as to the valuation of interference with the property rights of non-consenting owners. Here, the Legislature has already superseded and clarified the 2017 Oil and Gas Act with the enactment of the 2018 civil trespassing law, I.C. § 6-202. The trespassing law constitutes a legislative pronouncement that interference with the real property of another must be compensated at treble damages and payment of attorney's fees. Therefore, any analysis undertaken by the Hearing Officer to arrive at a fair measure of compensation under I.C. § 47-334 must begin with the proposition that the non-consenting parties should be compensated at the rate of 3x actual loss in property value or other damages, as well as payment of their legal fees and costs associated with participating in these proceedings. On top of that, Snake Oil must minimize its surface occupancy **<u>and</u>** mitigate for any harm caused to the surface owners.

This means bonds should be put in place to ensure Snake Oil cleans up its operations when it is done. Those bonds should be in an amount which can pay 3x the actual potential reduction in property value or other reasonably foreseeable damages of the objecting property owners at the time production ceases. Seeing as there is no end date or anticipated completion date in the

proposed leases or Application, and in light of current rampant inflation, significant bonding should be required to compensate for potential harm surface owners may suffer decades from now.

The risk for a resource extraction company going bankrupt and sticking non-consenting property owners, or the taxpayers of Idaho is not a novel or speculative risk to consider in the context of consideration of "just and reasonable" factors to include in an integration order. It is a well-known and common industry practice. In fact, a gas producer operating in Idaho, Alta Mesa, already filed for and received a discharge in bankruptcy. *See* https://news.bloomberglaw.com/bankruptcy-law/end-to-alta-mesa-bankruptcy-begins-as-liquidation-plan-approved. It would be patently unreasonable to not include bonding sufficient to compensate non-consenting property owners for harm which may occur decades from now. Issuing an Order that created even the slightest risk that non-consenting property owners might bear any costs whatsoever of cleaning up Snake Oil's mess would be unjust.

In light of the requirement under I.C. § 47-334 that Snake Oil "minimize" and "mitigate" its impact on surface owners, a single well on a previously voluntarily leased parcel should be all that is authorized in these proceedings. *See* Idaho Code §47-420(4)(d). Afterall, that is all that Snake Oil has applied for. *See* January 23, 2023 Letter from Mike Christian at p. 2 ¶ 4 & 5 attached to Application. This application for a single well on previously leased premises comports with the plain language of Idaho Code § 47-320(3), which provides:

> Each such integration order shall authorize the drilling, **equipping and operation, or operation, of <u>a well</u> on the spacing unit**; shall designate an operator for the integrated unit; shall prescribe the **time and manner** in which all the owners in the spacing unit may elect to participate therein; and shall make provision for the payment by all those who elect to participate therein of the reasonable actual cost thereof, **plus a reasonable charge for supervision** and interest.

It is important to point out that the Applicant's own mapping indicates there is already an existing well in close proximity to the land it seeks to integrate. *See* Exhibit A to Application and reference

to the Barlow well as well as January 23, 2023 Letter from Mike Christian at p. 2 ¶ 5 (discussing other nearby wells) attached to Application. The presence of these nearby wells belies Snake Oil's arguments that this Application is for is a wildcat well, therefore necessitating what appears to be submarket rates and inflated risk penalties. In support of its proposed 300% risk penalty, Snake Oil asserts:

> c) The well to be drilled in the unit in an area with limited knowledge of and experience with the geology, entailing a higher degree of risk to Applicant than a well drilled in a fully developed area. Other wells drilled in the area have had a different composition of hydrocarbons than anticipated, or have been less productive than anticipated, or have encountered sand conditions less favorable than anticipated. January 23, 2023 Letter from Mike Christian attached to Application at p. 7.

Discovery into all aspects of the production and cost of operation of the Barlow well, other nearby wells, and Snake Oil's profit therefrom should be authorized so that evidence derived therefrom can be considered at the evidentiary hearing. Afterall, if this area is so speculative and costly, then it is reasonable to ask why Snake Oil is moving forward with the Application in the first place.

The Hearing Officer must also comply with the directive to limit the time and manner of the operation of the single well he is authorized to permit. Operations should not be so loud as to disrupt sleep, raising of livestock, conducting other established business operations, or day to day living. Flaring (if allowed) should not occur at night, and owners should be provided adequate prior notice to allow them to leave. Furthermore, Snake Oil must and compensate surface owners if their operations disrupt surface owner's day to day living. This compensation should reimburse surface owners for alternate housing, travel costs, lost wages, lost agricultural production, legal fees and costs for "supervision" of Snake Oil's operations, and any other reasonably foreseeable damages they may incur.

2. Flaring Must Be Prohibited.

The OGCC and IDL have been directed by the legislature to enable the development of hydrocarbon resources, protecting and enforcing the property rights of owners and producers; and, in doing so, prevent the waste of hydrocarbon resources. I.C. §§ 47-311, 47-312. The failure to reauthorize the non-fee based portions of IDAPA 20.07.02 means that flaring is prohibited under a strict interpretation of I.C. § 47-312, which states, "The waste of oil and gas or either of them as defined in this chapter is hereby prohibited." I.C. § 47-310 defines Waste as:

> (33) "Waste" as applied to oil means and includes underground waste; inefficient, excessive or improper use or dissipation of reservoir energy, including gas energy and water drive; **surface waste**, open-pit storage and waste incident to the production of oil in excess of the producer's above-ground storage facilities and lease and contractual requirements, but excluding storage (other than open-pit storage) reasonably necessary for building up and maintaining crude stocks and products thereof for consumption, use and sale; the locating, drilling, equipping, **operating or producing of any well in a manner that causes, or tends to cause, reduction of the quantity of oil and gas ultimately recoverable from a pool under prudent and proper operations.** (Emphasis added).

This hearing officer also has a statutory duty to protect correlative rights. *See* I.C. § 47-315(1). "Correlative rights" are defined in the Act as "the opportunity of each owner in a pool to produce his just and equitable share of oil and gas in a pool without waste." Idaho Code § 47-310(4). With no administrative rules in place, the statutory obligation to protect the correlative rights of non-consenting owners so that they have the opportunity to produce their just and equitable share of hydrocarbons underlying their land at some point in the future must be protected.

IDAPA 20.07.02.413, assuming it was even a proper exercise of rulemaking in light of the definition of "Waste" above, was not reauthorized by the Legislature. Therefore, this Hearing Officer is prohibited from authorizing flaring. Furthermore, again due to the invalidly of the OGCC administrative rules, any Order of the hearing officer would be futile as the Applicant

would be prohibited from actually drilling a well because there are no provisions for a subsequent application for permit to drill (APD). *See* IDAPA 20.07.02.200.04. In fact, any and all references to the Applicant's alleged compliance with non-fee based rules must be disregarded. Thus, the Hearing Officer is prohibited from considering Snake Oil's proposed future compliance, with currently invalid rules, in its analysis of what is "just" and "reasonable." The only outcome available to the Hearing Officer is to deny the Application so as to prevent waste and protect the non-consenting property owners' correlative rights.

3. The Royalty Rates and Bonus Payments Must be Set at Market Rate

Idaho Code § 47-320 provides that when an applicant seeks an integration order the bonus payment and royalty amount associated with compelled leases of mineral rights shall be established either by statute, or by the prior conduct of the party petitioning for a spacing and integration order. However, U.S. Supreme Court precedent requires that the rates be set at reasonable market rates – not some submarket rate industry lobbyists convinced the legislature to include in statute. *See Chicago, M. & St. P. Ry. v. Public Utils. Comm'n*, 274 U.S. 344, 47 S. Ct. 604, 71 L. Ed. 1085, 1927 U.S. LEXIS 622 (1927).

Here, with no discovery authorized, the objecting landowners are at a disadvantage of lacking access to the accounting records of the applicant. The Gross's hereby demand that they be provided with access to Snake Oil's accounting and production records for all of their Idaho operations. These records should be produced in time for the Gross's to hire expert witnesses to review those records prior to the hearing, as is required by *Hawkins v. Idaho Transp. Dep't*, 161 Idaho 173, 177, 384 P.3d 420, 424, 2016 Ida. App. LEXIS 132, *7-8. Indeed, an issue of applicant's lack of credibility has already arisen based on Snake Oil's prior bonus payment of $250

per acre in another spacing unit, as is reflected on pages 15 and 20 of the *Findings of Fact, Conclusions of Law, and Order* issued in Docket No. CC-2021-OGR-01-001.

Likewise, the Applicant must produce any and all leases it has used in Idaho so that the objecting property owners can assess Snake Oil's compliance with Idaho Code § 47-320(3)(c) as well as the representations the Applicant makes in its declarations regarding rates it has offered.

> Determining the credibility of witnesses and evidence is a matter within the province of the Commission. *Stevens-McAtee v. Potlatch Corp*., 145 Idaho 325, 331, 179 P.3d 288, 294 (2008). However, such findings are still subject to review by this Court. When analyzing the Commission's findings regarding credibility, this Court has bifurcated the issue into two categories, "observational credibility" and "substantive credibility." *Painter v. Potlatch Corp*., 138 Idaho 309, 313, 63 P.3d 435, 439 (2003). Observational credibility "goes to the demeanor of the appellant on the witness stand and it requires that the Commission actually be present for the hearing in order to judge it." *Id*. In contrast, substantive credibility "may be judged on the grounds of numerous inaccuracies or conflicting facts and does not require the presence of the Commission at the hearing." *Id*. The Court will not disturb the Commission's findings regarding credibility if the findings are supported by substantial and competent evidence. *Id*. *Knowlton v. Wood River Med. Ctr*., 151 Idaho 135, 144, 254 P.3d 36, 45, 2011 Ida. LEXIS 77, *27-28

With no discovery, objecting property owners are incapable of conducting a meaningful cross examination of Snake Oil's witnesses. How are objecting property owners to know what has actually been paid to consenting property owners within this unit and surface or mineral owners in "nearby" units? The lack of discovery deprives objecting property owners of their right to due process and sets the stage for a one-sided dictation of factors the hearing officer should consider under Idaho Code § 47-320(3)(c). The lack of discovery also undermines any findings of credibility the hearing officer may make if and more likely, when, this matter goes before a reviewing court.

Indeed, the term "royalty" is not even defined in the Act. Yet there are several references in the Act to the calculation of a royalty interest at 1/8. *See* Idaho Code § 47-320(3)(d) for owners

who object but can be compelled to be "deemed leased." That begs the question of 1/8 of what? The lease proposed as Exhibit E to the Application seeks to apply a royalty to what appears to be essentially 1/8 of Snake Oil's net profit. Before that 1/8 is calculated, Snake Oil deducts its costs of compressing, processing, treating, dehydrating, fractionating, gathering, transporting, marketing incurred in processing or selling the gas. Exhibit E at ¶ 3 b. That begs the question as to why objecting property owners are not provided access to Snake Oil's accounting data. How are objecting property owners to know if they are being charged market rates for these costs or if Snake Oil is gaming the system with captive subcontractors?

Furthermore, it is a well-known industry practice of producers to sell the gas to wholly owned or controlled shell companies to reduce the sales price to which the royalty payment is calculated. *See* https://www.propublica.org/article/unfair-share-how-oil-and-gas-drillers-avoid-paying-royalties. To comply with the statutory mandate to ensure terms are "just and reasonable," the Hearing Officer must prohibit this conduct. To comply with due process requirement, discovery should be permitted to ensure this practice is not occurring.

Additionally, OGCC's website indicates that the Oil and Gas Act Modernization bill is making its way through the Idaho legislature. https://ogcc.idaho.gov/rules-and-statutes/47-3-changes/. This proposed bill appears to make this truncated process even more industry friendly, to the detriment of actual surface dwelling Idaho residents. This begs the question as to whether objecting surface owners are being forced to pay for lobbying of an out of state company, in support of a bill designed to further deprive Idaho residents of their valuable property interests. The Hearing Officer should ensure these lobbying costs are not deducted prior to the calculation of royalty payments. The Hearing Officer should also ensure that all other alleged costs Snake Oil seeks to deduct prior to calculation of royalty

payments are reasonable and arise from an arm's length, verifiable, independent contractual relationship.

With no discovery and no ability to see what costs constitute what amounts to Snake Oil's alleged overhead, this process seems to permit a hearing based on the principle of garbage in garbage out. In the context of rate setting under the Natural Gas Act, this conduct violates US Supreme Court precedent.(Section 5(a) of the Natural Gas Act of 1938, 15 U.S.C.S. § 717, provides that whenever the Federal Power Commission, after a hearing, shall find that any rate is unjust, unreasonable, unduly discriminatory, or, the commission shall determine the just and reasonable rate and shall fix the same by order.) *FPC v. Natural Gas Pipeline Co*., 315 U.S. 575, 578, 62 S. Ct. 736, 739, 86 L. Ed. 1037, 1045, 1942 U.S. LEXIS 1062, *1. At a minimum, for purposes of setting "just and reasonable" royalty and bonus payments, the Hearing Officer should discuss the terms of a subpoena to Snake Oil at the March 14, 2023 hearing. With no traditional discovery, a subpoena is necessary to compel Snake Oil to produce its accounting records and allow the objecting owners sufficient time to review that information prior to the evidentiary hearing.

Finally, in light of the shortened time frames employed in these proceedings, which deprives the Gross's of their right to meaningful due process, Gross's endorse and request the Hearing Officer consider the factors put forward in the *Submission of Non-Consenting Owners and CAIA Re: Factors for Establishing Just and Reasonable Terms*.

CONCLUSION

When and if this process moves forward in a manner which provides objecting parties meaningful due process, the Hearing Officer should issue a strict and narrow order permitting a single well. All parties should be provided a map specifying exactly where and what surface

operations will take place. If Snake Oil wants to alter its operations thereafter, it should be compelled to begin a new administrative hearing process on the narrow issue of those proposed alterations. The integration order should contain an expiration date and a timeline for Snake Oil to remove its wells, pipelines, and any other surface occupancy. Bonds should be put in place which are sufficient to account for harm which may occur many years from now based on expected costs, accounting for inflation. Notice and prior compensation should be provided to any property owners who may be negatively impacted by surface activity – whether it be flaring, pumping, construction, or demolition. As has been the case in prior integration orders, it is "just and reasonable" to include a term that a deemed leased owners retain any and all private rights of action they have in law against the operator for any future harms. The presence of the navigable Payette River, which runs through the middle of the proposed unit, requires extra precautions be taken so that its waters are protected under applicable state and federal laws.

Idaho has a long-held reputation for protecting private property. The impacts and potential long term duration of the activity proposed by Applicant can not be understated. Applicant seeks to impose what amounts to complete dominion over the surface estates of the objecting property owners. The Gross's simply ask that the Hearing Officer place himself in their shoes and ponder what it would be like to have one's home in rural Idaho converted to an industrial wasteland. If oil and gas production is to occur in Idaho, then 1) mineral owners must be compensated at reasonable and transparent market rates and 2) surface owners must be made whole for being forced to live with each and every harm, nuisance, and damage arising from the extraction of hydrocarbons beneath their properties. Anything less is neither "just" nor "reasonable" and will be challenged in a court of competent jurisdiction.

WHEREFORE, Objecting Property Owner Goss and Little Buddy Farm LLC prays:

1) The hearing presently set for March 14, 2023 be vacated so that the Constitutional issues raised herein can be addressed by a court of competent jurisdiction;
2) All briefing deadlines be vacated so that the Constitutional issues raised herein can be addressed by a court of competent jurisdiction;
3) In the Alternative, and subject to and without waiving the objections stated herein, the Hearing Officer consider the factors proposed herein for its just and reasonable analysis so as to adequately compensate and protect the interests of the objecting property owners.
4) The Hearing officer immediately issue subpoenas to Snake Oil for the documentation and records discussed herein, such that production is required in sufficient time prior to the hearing so as to enable the parties to consult with their own expert witnesses and prepare for cross examination.

DATED this __1st__day of March 2023.

By: ______/s/ J. Kahle Becker___________________

J. KAHLE BECKER
Attorney for Objecting Property Owners
Jordan A. and Dana C. Gross and
Little Buddy Farm LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this __1st___day of March 2023, a true and correct copy of the foregoing **OPENING BRIEF** was served upon opposing counsel as follows:

Snake River Oil & Gas LLC c/o Michael Christian Hardee, Pinol & Kracke PLLC 1487 S. David Lane Boise ID 83705 mike@hpk.law and amy@,hpk.law	_____ US Mail _____ Personal Delivery _____ Facsimile ___X__ Email
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