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Subject:	Docket No. CC-2023-OGR-01-001, Applicant"s Response Brief
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All –

Attached is the Applicant's response brief regarding just and reasonable factors.

Thank you.

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BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of Application of Snake River Oil and Gas, LLC, to Integrate the Spacing Unit Consisting of Section 24, Township 8 North, Range 5 West, Boise Meridian, Payette County, Idaho **SNAKE RIVER OIL AND GAS, LLC, Applicant.**	)	Docket No. CC-2023-OGR-01-001 **RESPONSE BRIEF OF APPLICANT SNAKE RIVER OIL AND GAS, LLC RE: JUST AND REASONABLE FACTORS**

Applicant Snake River Oil and Gas, LLC submits this brief in response to the opening briefs filed by objecting mineral owners.

I. Jordan and Dana Gross and Little Buddy Farms, LLC.

A. Introduction.

Rather than following the direction in the Administrator's January 31, 2023 *Order Vacating Hearing and Notice of Hearing to Determine "Just and Reasonable" Factors* ("*Notice of Hearing*") to suggest factors to be considered to reach a just and reasonable integration order, the Opening Brief filed on behalf of Jordan and Dana Gross and Little Buddy Farms, LLC (collectively, "Gross") is instead devoted largely to attacking the integration process generally, attacking the Applicant with invective and in ad hominem terms, and asserting that the Department's oil and gas regulatory rules do not exist. It displays a nearly complete lack of understanding of the administrative rule promulgation and review process, the Idaho Oil and Gas Conservation Act ("the Act"), and the form of lease proposed by the Applicant. Instead of proposing factors to be considered, it demands the inclusion of several specific terms and conditions to an integration order in direct violation of the instruction in the *Notice of Hearing*. It

ignores the actual requirements of the judgment in *CAIA v. Schultz*. It threatens court action if the entire process is not halted, apparently until the legislature amends the Act to provide for discovery in all contested cases.

Because Gross' brief fails to comply with the Administrator's order, it should mostly be disregarded. However, the Applicant will address its points, to the extent they can be clearly discerned.[1]

B. IDAPA 20.07.02 is in effect.

Gross argues at length that the Rules Governing Conservation of Oil and Natural Gas in the State of Idaho set forth in IDAPA 20.07.02 were not properly authorized by the Idaho Legislature in its 2022 session, and that no rules exist under which oil and gas operations may proceed. Gross' argument is that only fee rules were addressed in the relevant Senate Concurrent Resolution, non-fee provisions of IDAPA 20.07.02 were never approved.

This argument misapprehends the process and ignores the relevant provisions of the Idaho Administrative Procedure Act ("APA"). The *entirety* of IDAPA 20.07.02 was adopted as a "pending fee rule" in December 2021. *See* Idaho Administrative Bulletin, Vol. 21-12SE, https://adminrules.idaho.gov/bulletin/2021/12SE.pdf, pp. 3043-4 (Notice of Omnibus Rulemaking – Adoption of Pending Fee Rule), pp. 3195-3232 (entirety of IDAPA 20.07.02 published). Idaho Code § 67-5201(2) provides, in pertinent part: ""Rule" means *the whole* or a part of an agency statement of general applicability that has been promulgated in compliance with the provisions of this chapter and that implements, interprets, or prescribes: (a) Law or policy; or (b) The procedure or practice requirements of an agency" (emphasis added). Thus, a "rule" includes the whole of an

[1] Gross has since filed a brief in response to the Applicant's opening brief, included in which is a motion to disqualify the Administrator from hearing this matter. The Applicant will respond to those separately.

agency's provisions regarding a particular subject. IDAPA 20.07.02, in its entirety, is a "rule," and was adopted in its entirety as a "pending fee rule." Gross wrongly ignores this definition.

Consistent with the foregoing, the entirety of IDAPA 20.07.02 was included in the fee rules review book for the House Resources & Conservation Committee during the 2022 legislative session. *See* https://adminrules.idaho.gov/legislative_books/2022/fee/22H_Fee_ResCon.pdf, at pp. 17-21, 172-209. The entirety of IDAPA 20.07.02 was also included in the fee rules review book for the Senate Resources & Environment Committee. *See* https://adminrules.idaho.gov/legislative_books/2022/fee/22S_Fee_ResEnv.pdf, at pp. 17-21, 172-209. In each case, the *Notice of Omnibus Rulemaking – Adoption of Pending Fee Rule* included in the review book stated: "This pending fee rule adopts and publishes the following *rule chapters* previously submitted to and reviewed by the Idaho Legislature under IDAPA 20, Rules of the Idaho Department of Lands." *Id.*, p 17 (emphasis added). The notice also stated specific to the rules at issue here: "The Oil and Gas Conservation Commission adopts the following pending fee rule under IDAPA 20.07: 20.07.02, Rules Governing Conservation of Oil and Natural Gas in the State of Idaho." *Id.* Thus, when SCR 123 approved IDAPA 20.07.02, it approved it in its entirety. This is all consistent with the definition of "rule" in Idaho Code § 67-5201(2).

The same process was followed for *all* agency rules that included fee provisions, so Gross seems to be arguing that a majority of the state's administrative rules were somehow allowed to expire in 2022. *See* https://adminrules.idaho.gov/legislative_books/2022 (all rule review books for 2022 legislative session). It would be remarkable if only Gross noticed this.

At the end of the 2022 legislative session, the Rules Coordinator published an *Omnibus Notice of Legislative Action* in the Administrative Bulletin listing all rulemakings and rules submitted for review by the legislative committees. *See*

https://adminrules.idaho.gov/bulletin/2022/05.pdf, pp. 12-17. Rulemakings were listed by docket number along with the final status of the rulemaking and whether the rule was approved or partially or entirely rejected. The notice included all pending fee and pending rules that became final rules, the number of (and a link to) any concurrent resolution affecting a rulemaking, if applicable, and the effective dates of all rules reviewed and approved. *Id.* The notice recited that if the legislature did not reject a pending rule submitted for review, it became final and effective at the end of the session. IDAPA 20.07.02 was included in this process. *Id.*, p. 13 (Docket No. 20-0000-2100F). The concurrent resolutions for other agency fee rules are the same – each approves the entire rule in which a fee or charge is included, not merely parts of the rule. *Id.*, pp. 12-17 (links to all concurrent resolutions listed).[2]

C. Discovery is not permitted in integration proceedings, and the *Hawkins* decision Gross relies upon is inapplicable.

Gross argues that extensive discovery into virtually all of the Applicant's business must be permitted before Gross can suggest factors to be considered at the merits hearing. *Gross Opening Brief*, pp. 15 (demanding "accounting and production records for all of [Applicant's] Idaho

[2] Even if the legislature had simply reviewed all of IDAPA 20.07.02 as it did, and then took no action as to the "non-fee portions" of it, the rule would still be effective. Rules which do not include any fee or charge do not require a concurrent resolution to be authorized; rather, if no action is taken regarding non-fee rules, they become effective at the end of the legislative session. Idaho Code § 67-5224(5)(a) ("Except as set forth in sections 67-5226 [relating to temporary rules] and 67-5228, Idaho Code [relating not exemptions for typographical and clerical errors], a pending rule shall become final and effective upon the conclusion of the legislative session at which the rule was submitted to the legislature for review, or as provided in the rule, but no pending rule adopted by an agency shall become final and effective before the conclusion of the regular or special legislative session at which the rule was submitted for review."). Rules which include a fee or charge must be affirmatively approved by concurrent resolution. Idaho Code §67-5224(5)(c) ("Except as set forth in sections 67-5226 and 67-5228, Idaho Code, no pending rule or portion thereof imposing a fee or charge of any kind shall become final and effective until it has been approved by concurrent resolution."). Here, via SCR 123 the entirety of IDAPA 20.07.02 was reviewed and affirmatively approved, but even if only the fee portion had been reviewed and affirmatively approved, the non-fee portion would still be effective because it was reviewed but not affirmatively rejected in whole or in part.

operations), 16 (demanding all Applicant's leases in Idaho).[3] IDAPA 04.11.01.521 recognizes that "no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered." This follows the directive in the APA that the Attorney General promulgate rules for contested cases including "[p]rocedures for the issuance of subpoenas, discovery orders, and protective orders *if authorized by other provisions of law*." Idaho Code § 67-5206(4)(f) (emphasis added). As Gross is aware, Idaho Code § 47-328(3)(d) provides that "[d]iscovery is not permitted" in integration proceedings.

Gross argues that the integration statute is unconstitutional, but a hearing officer lacks authority to determine whether a statute is unconstitutional. That authority rests in the courts. *Alcohol Beverage Control v. Boyd*, 148 Idaho 944, 231 P.3d 1041, 1043 (2010); IDAPA 04.11.01.415 ("A hearing officer in a contested case has no authority to declare a statute unconstitutional.").

Gross's reliance upon *Hawkins v. Idaho Transp. Dep't*, 161 Idaho 173 (Ct. App. 2016) is misplaced. *Hawkins* does not state that discovery is required in every administrative proceeding (and the APA, as discussed above, expressly provides to the contrary). *Hawkins* did not even involve a proceeding under the APA. Rather, it dealt with a hearing following a driver's license suspension for failure of a blood alcohol test, governed by entirely different statute and administrative rules, which expressly provide for certain discovery. Idaho Code § 18-8002a(1)(f) (providing that a hearing officer has authority to issue subpoenas); IDAPA 39.02.72 (rules governing hearings pursuant to Idaho Code § 18-8002(7)); Idaho Code § 67-5240 ("A proceeding

[3] Of course, the Applicant's production records are a matter of public record, as it is required to file monthly production reports pursuant to Idaho Code § 47-324, and those reports are posted on the Commission's website. *See* https://ogcc.idaho.gov/monthly-and-annual-reports/. All of this information is readily available.

by an agency *other than* . . . the Idaho transportation department's driver's license suspension contested case hearings, which may result in the issuance of an order, is a contested case and is governed by the provisions of this chapter, except as provided by other provisions of law."). Only judicial review of orders in license suspension proceedings is governed by the APA. Idaho Code § 67-5270.

The scenario discussed in *Hawkins* was that a subpoena authorized under the statute was issued by the hearing officer with a return of *after* the hearing date. The decision nowhere states that discovery is required in all contested cases. Moreover, even the portion of *Hawkins* cited by Gross is dicta. Immediately after that passage, the Court of Appeals stated: "However, in the case at hand, we need not reach the issue of the purported due process violation or whether Hawkins invited the error, as Hawkins has failed to establish that he was prejudiced by the agency's actions." 161 Idaho at 177.

Gross argues that "this hearing officer has no mechanism to determine, as elicited by meaningful cross examination, what a reasonable rate to compensate the Gross's [sic] even is." *Gross Opening Brief*, p. 4. This is false. The Applicant has established in previous proceedings that the market royalty rate across hundreds of leases in the basin is 1/8th. It has established that all voluntary leases in Section 24 (which cover more than 70% of the mineral acres in the section) contain a 1/8th royalty. *See Declaration of Travis Boney*, ¶¶ 6, 11; *Declaration of Richard Brown*, ¶ 5. All state leases purchased at auction contain a 1/8th royalty, and all BLM leases purchased at auction are the same. If an objecting owner wishes to present evidence that a different market royalty rate should apply, they are free to do so. If they wish to propose factors to be considered in setting the royalty rate (supported as required and under the guidelines set forth in the

Administrator's order), they are free to do so. Gross' concerns about reporting and accounting are already covered by the Act. Idaho Code §§ 47-324, -332, -333.

Gross' assertion that the matter should "halt immediately" and be "referred to district court for further guidance, or more likely, legislative amendment" (*Gross Opening Brief*, p. 3) is meaningless and lacking any legal basis. If a party is aggrieved by the final order in this matter, they may petition for judicial review under the APA. Idaho Code § 67-5270(3).

Finally, as the Applicant pointed out in its opening brief, nothing in the judgment in *CAIA v. Schultz* indicates that discovery is required in order for parties to merely suggest appropriate factors to consider in the process of reaching an integration order. The judgment does not even require this briefing and hearing procedure. It only directed the Department to "explain[] the factors that will be considered when determining whether the terms and conditions of an integration order are 'just and reasonable,'" and stated that "[t]he only change required will be specification of the basis on which Defendants determine factors to be relevant or irrelevant to the determination of 'just and reasonable' terms." *CAIA v. Schultz,* 335 F.3d 1216, 1228, 1230 (D. Idaho 2018).

D. The March 14 hearing is for the purpose of discussing *factors to be considered* in reaching an integration order on just and reasonable terms, not the terms themselves.

Gross argues at length that certain specific terms and conditions should (or must) be included in an integration order in order to make it just and reasonable, ignoring the Administrator's admonition that he "will not consider the substantive question of whether terms and conditions proposed are in fact 'just and reasonable.'" *Notice of Hearing*, p. 3. The Administrator may ignore those arguments (and in previous integration proceedings he has already

explained why some of them are not appropriate), but the Applicant will discuss some of them and address why they are wrong.

Gross argues that an integration order entered in this proceeding must "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," and that "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." *Gross Opening Brief*, pp. 9, 11. First, the surface owner protections in the Act already cover much of this. Idaho Code § 47-334. Second, Gross provides no evidence that any of this will occur. Third, the Administrator has already detailed in previous proceedings why this type of compensation is not within his authority under the Act. *See* https://ogcc.idaho.gov/wp-content/uploads/sites/3/020_20210720_OrderDeterminingJRFactors-002.pdf; https://ogcc.idaho.gov/wp-content/uploads/sites/3/016_20210621_OrderDeterminingJRFactors-001.pdf.

Gross argues that the legislature "superseded and clarified the 2017 Oil and Gas Act with the enactment of the 2018 civil trespassing law, I.C. § 6-202," and that trespassing statute "constitutes a legislative pronouncement that interference with the real property of another must be compensated at treble damages and payment of attorney's fees." *Gross Opening Brief*, p. 11. Based on this, Gross argues that well 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," and for "potential harm surface owners may suffer decades from now." *Id.*, pp. 11-12. This argument is spurious. The trespass statute makes no reference at all to "superseding" or "clarifying" the Act. An order integrating mineral interests is

not a trespass. Idaho Code § 6-202(7)(a)(iii) and (c) expressly exclude from the definition of a civil trespass entry or occupancy on property a " privilege or other legal right to enter, remain upon, possess or use the real property" and any "legally prescribed right to enter or remain upon the real property in question." An integration order, to the extent it allows any surface or subsurface use or occupancy, falls squarely within both of these exclusions.

Gross argues that integration must be on the condition that the operator pays a lease bonus but is granted no surface or subsurface access to any integrated tract. No evidence is provided to support this, but it also ignores the point of an oil and gas lease. A lease which denies the access necessary to drill for and produce hydrocarbons and then transport them from the unit to market is no lease at all. Again, a great majority of mineral owners in the unit have already indicated their desire to develop their minerals by leasing. Terms and conditions which make it impossible to drill, produce and transport directly violate their correlative rights, and are necessarily unjust and unreasonable.

Gross suggests that the integration order should be limited to one well and misrepresents the Application. The Applicant made clear that it seeks integration to all depths and formations. The Commission has already rejected the argument that the integration provisions of the Act limit an operator to a single well in an integrated unit. *See* https://ogcc.idaho.gov/wp-content/uploads/sites/3/063_20210528_FinalOrder.pdf.

Gross urges the Administrator to prohibit flaring entirely, based on the earlier argument that the oil and gas rules do not exist. This suggestion can be disregarded for the reasons discussed above regarding the legislature's review and approval of the IDAPA 20.07.02. In any case, it is wrong to suggest that *any* flaring constitutes waste. As the Applicant pointed out in earlier briefing, flaring is a normal part of the well completion and testing process. Without it, drilling

would be effectively prohibited, which would violate the correlative rights of consenting mineral owners. Of course, any term or condition that in practice makes operations impossible violates the correlative rights of the majority of mineral interest owners in the unit who have leased and are committed to development of their minerals, and therefore cannot be just or reasonable.

E. Gross' various inflammatory claims entirely lack factual basis and ignore the Act and the contents of the Application.

Gross' brief is replete with anti-industry invective. It unsubtly refers throughout its brief to the Applicant as "Snake Oil." It alleges that Idaho Code Title 47, Chapter 3 is "oil and gas industry lobbyist drafted" or "industry drafted." It characterizes this proceeding as an "industry hijacked process." *Gross Opening Brief,* pp. 1, 2, 3, 8. None of this is supported by any evidence. It is not relevant or productive. Aside from being offensive, it is puzzling given that Gross entered into a right of way agreement with Northwest Gas Processing, LLC to allow a gathering pipeline servicing this area to cross Gross' property.

Gross' claims that Snake River will have "nearly complete and total dominion over" mineral owner's property, could "park a drill rig in someone's living room," and may cause a mineral owner's property "converted to an industrial wasteland" (*Gross Opening Brief,* pp. 3, 10, 19) are made up and false. They completely ignore the proposed form of lease. *See* Exhibit A to proposed form of lease (Exhibit E to Application), ¶ 1 ("No drilling operations shall occur on the leased premises. Surface operations on lands leased herein will be mutually agreed upon by Lessor and Lessee. Surface operations shall require a separate Surface Use Agreement to be entered into by and between Lessor and Lessee prior to any surface operations being conducted. Lessee shall pay the surface owner for damages to growing crops (including perennial crops), grass, buildings, livestock, fences and other improvements and personal property caused by Lessee's operations."), ¶ 4 ("All operations conducted under this Lease, including permitting, drilling, production, pooling

and unitization, plugging and abandonment of wells, and surface reclamation, shall be done pursuant to and in accordance with applicable federal, state and local rules and regulations."). They ignore the well setback and other requirements in the Act and the proposed form of lease. Idaho Code § 47-319; *see* Application, Exhibit E, ¶ 8. They ignore the surface owner protection requirements in the Act. Idaho Code § 47-334.

Gross' claim that the Applicant seeks to establish royalties at "submarket rates" is similarly baseless and ignores the evidence already submitted with the Application, as discussed above. Their argument that "no reasonable businessman may make an arm's length transaction with Applicant" (*Gross Opening Brief*, p. 7) is similarly made up and further displays lack of understanding of the facts or the provisions of the Act. The Applicant cannot even reach the point of applying for an integration order without having *voluntarily* leased over 65% of the mineral acres in the unit (or 55% if a longer good faith leasing effort is made), and the Applicant has leased over 70% of the net mineral acres in Section 24, on terms similar to those proposed in the Application. *See* Idaho Code § 47-320. The applicant holds voluntary leases covering thousands of acres in the basin.

Gross' assertion that the Applicant's proposed lease terms are "given deferential treatment" (*Gross Opening Brief*, p. 8) has no basis. The Applicant has already supplied evidence with the Application that the proposed form of lease is consistent with the forms of lease used across the basin, and that there is nothing about Section 24 that militates against its use. *Declaration of Travis Boney, supra; Declaration of Richard Brown, supra.* Any objecting mineral owner is free to propose different lease terms and support their proposal with relevant evidence.

II. Other objecting mineral owners.

The other objecting mineral owners, allied with CAIA (which is not a proper party), filed an opening brief essentially identical to that filed by objecting mineral owners allied with CAIA in previous integration proceedings. The Administrator has issued orders setting "just and reasonable" factors in previous proceedings that address the same arguments. *See* https://ogcc.idaho.gov/wp-content/uploads/sites/3/020_20210720_OrderDeterminingJRFactors-002.pdf; https://ogcc.idaho.gov/wp-content/uploads/sites/3/016_20210621_OrderDeterminingJRFactors-001.pdf. The mineral owners here do not identify any evidence indicating Section 24 is different from other units for purposes of establishing the factors to be considered. The Applicant therefore refers the Administrator to his previous orders to address the arguments raised by these mineral owners.

DATED this 8th day of March, 2023.

HARDEE, PIÑOL & KRACKE, PLLC

MICHAEL CHRISTIAN
Attorney for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2023, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as follows:

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