From: Amy Hardee
To: Kourtney Romine
Cc: External - Joy M. Vega; JJ Winters; Mick Thomas; James Thum; kahle@kahlebeckerlaw.com; James Piotrowski; marty@idunionlaw.com; Mike Christian
Subject: Docket No. CC-2023-OGR-01-001
Date: Wednesday, June 07, 2023 01:43:17 PM
Attachments: 20230607.Applicant"s Response to Motions for Issuance of Subpoenas.pdf

Good afternoon Ms. Romine:

Please file in the record of this case the attached Response of Applicant Snake River Oil and Gas, LLC to Motions for Issuance of Subpoenas, which is hereby being served upon the parties who have appeared in this matter to date.

Thank you.

If you would like to send me secured documents, please click on the SendSafely link provided below:

https://hpklaw.sendsafely.com/u/amy@hpk.law

Amy Hardee
Legal Assistant
HARDEE, PIÑOL & KRACKE, PLLC
1487 South David Lane
Boise, Idaho 83705
Telephone: (208) 433-3913 X109
Facsimile: (208) 342-2170
amy@hpk.law

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 OF APPLICANT SNAKE RIVER OIL AND GAS, LLC TO MOTIONS FOR ISSUANCE OF SUBPOENAS**

I. Introduction.

Both sets of objecting mineral owners have filed motions for issuance of subpoenas in this proceeding. Jordan and Dana Gross and Little Buddy Farms, LLC (collectively, "Gross") purport to direct their motion to the Commission, although the motion is filed under the caption for this proceeding and included on its docket listing. The other group of objecting owners (collectively, "Objecting Owners") direct their motion to the Administrator. Both motions cite Idaho Code § 47-329(1) for the proposition that subpoenas may be issued. These arguments were largely already addressed in the *Response of Applicant Snake River Oil and Gas, LLC to Motion for Issuance of Subpoenas*, filed April 30, 2023. Both motions completely misread the statute, which provides no authority for the Administrator to issue subpoenas, and should be denied. Gross' motion should be denied for the additional reasons that (a) there is no authority for the Commission to act in this proceeding other than as an appellate body; and (b) as has already been repeatedly discussed, the *Hawkins* decision does not require discovery in every contested case, and does not provide authority for the issuance of subpoenas here in conflict with clear statutory limitations.

II. Argument and Legal Authority.

A. IDAPA 04.11.01.525 and Idaho Code 47-329 do not provide for issuance of subpoenas by the Administrator.

The entirety of the Objecting Owners' assertion of authority for issuance of subpoenas is:

> The issuance of subpoenas is authorized by the Rules of Practice and Procedure including:
>
> > IDAPA 04.11.01.525. SUBPOENAS (RULE 525). The agency may issue subpoenas as authorized by statute, upon a party's motion or upon its own initiative. The agency upon motion to quash made promptly, and in any event, before the time to comply with the subpoena, may quash the subpoena, or condition denial of the motion to quash upon reasonable terms.
>
> The Commission, and by necessary implication its secretary, has express statutory power to compel the attendance of witnesses and production of documents. I.C. §47-329.

Motion for Issuance of Subpoenas (Objecting Owners), pp. 1-2. Gross similarly cites IDAPA 04.11.01.525 and Idaho Code § 47-329. *Motion for issuance of Subpoenas (Gross)*, pp. 1-3.

As the Applicant previously pointed out, the Idaho Administrative Procedure Act and the AG's procedural rules only allow for discovery when otherwise provided by law. IDAPA 04.11.01.521 provides 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 IAPA 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). Again, Idaho Code § 47-328(3)(d) expressly provides that "[d]iscovery is not permitted" in integration proceedings, and contains no provision for issuance of subpoenas.

IDAPA 04.11.01.525 and Idaho Code § 47-329 do not change this. The moving parties both completely ignore that Rule 525 expressly provides for an agency to issue subpoenas only "as authorized by statute." Stymied by Idaho Code §47-328(3)(d)'s express prohibition of discovery, both moving parties shift to relying on Idaho Code §47-329. They likewise completely ignore that it limits the Commission to issuing subpoenas "any hearing or investigation conducted by the commission." Idaho Code § 47-329(1). Proceedings on an integration application are not a "hearing or investigation conducted by the commission." Rather, an application is "made by application to the department of land," and "[t]he oil and gas administrator shall hear the application and make a decision on the application's merits." Idaho Code § 47-328(3), (3)(d). The Administrator's decision on the merits may be appealed to the Commission. *Id.*, § 328(4). However, the Commission evaluates the appeal "based on the record as set forth in the written submittals of only the appellant and any other participating qualified person, the oil and gas administrator's decision, and any oral argument taken by the commission at an appeal hearing." *Id.* The Act thus makes clear that the Commission may not, in its appellate capacity, issue subpoenas.

Gross also argues: "The Gross's [sic] believe the Hearing Officer is empowered to act as the designee of the Commission and issue subpoenas on its behalf. *See* I.C. § 67-5245 (7)." *Gross Motion*, p. 3. Idaho Code § 67-5245 deals only with review of preliminary orders. Idaho Code § 67-5245(7) merely provides: "The head of the agency or his designee *for the review of preliminary orders* shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing." Gross' argument is wrong for at least two reasons. First, even if an order of the administrator is a preliminary order, §67-5245 only deals with review of the order after its issuance. It has nothing to do with conduct of the hearing *before* the Administrator issues

his decision on an application. Second, §67-5245(7)'s provision that the agency head "shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing" merely means that in reviewing a preliminary order, the agency head is not limited to overturning or modifying the preliminary order for abuse of discretion, lack of substantial evidence or other legal standard, but may substitute its judgment for the hearing officer's. Again, this has nothing to do with the conduct of the hearing preceding the Administrator's order.[1]

B. ***Hawkins*** **does not require discovery or subpoenas in every contested case, and there is no general Constitutional right to discovery in administrative proceedings.**

Gross repeats the argument first made in briefing in advance of the hearing to determine just and reasonable factors – that the Court of Appeals decision in *Hawkins v. Idaho Transp. Dep't*, 161 Idaho 173 (Ct. App. 2016) purportedly requires discovery in every contested case. This remains wrong. The Applicant previously briefed the reasons why. *See Response Brief of Applicant Snake River Oil and Gas, LLC re: Just and Reasonable Factors* (March 8, 2023), pp. 4-7. Gross raised the argument again in the *Motion for Issuance of Subpoenas* filed April 18, 2023. This is the third time Gross raises the argument. It remains wrong.

Hawkins does not state that discovery is required in every contested case and did not involve a contested case under the IAPA. It dealt with a hearing following a driver's license suspension for failure of a blood alcohol test, a proceeding governed by an entirely different statute and administrative rules which expressly provide for certain discovery. Idaho Code § 18-

[1] The Gross motion purports to be directed to the Commission, which is not conducting this proceeding, but was filed under the docket number for this proceeding. In an email accompanying the motion upon its filing, Gross' counsel asked Ms. Romine, the workflow coordinator, for legal advice regarding whether a new proceeding should be filed before the Commission but appears to have taken no further action. As discussed in this brief, the Commission has no non-appellate role in this proceeding under Idaho Code §47-328. Gross' motion is not properly before the Commission and may be denied summarily on that basis alone.

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 (defining a contested case governed by the IAPA as a "proceeding by an agency *other than* . . . the Idaho transportation department's driver's license suspension contested case hearings[.]"). Only judicial review of orders in license suspension proceedings is governed by the IAPA. Idaho Code § 67-5270.

The scenario discussed in *Hawkins* was that a subpoena *authorized under the applicable statute* was issued by the hearing officer with a return of after the hearing date. The decision does not state 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. The case does not come close to the proposition Gross cites it for, and no other court appears to have relied upon it for that proposition.

Both moving parties continue to argue that due process requires discovery generally, but this is wrong. It is widely recognized that there is no fundamental or due process right to discovery in administrative proceedings. *See, e.g., Cimarusti v. Superior Court,* 79 Cal.App.4th 799, 808-809, 94 Cal.Rptr.2d 336 (2000) ("Generally, there is no due process right to prehearing discovery in administrative hearing cases"); *Weber v. State Univ. of N.Y.*, 150 A.D.3d 1429, 55 N.Y.S.3d 753, 757 (N.Y. App. Div. 2017) ("[I]t is settled ... that there is no general constitutional right to discovery in ... administrative proceedings."); *Kenrich Petrochems., Inc. v. NLRB*, 893 F.2d 1468, 1484 (3d Cir. 1990) ("[N]either the [C]onstitution nor the Administrative Procedure Act confer[s] a right to discovery in . . . administrative proceedings."), vacated on other grounds, 907 F.2d 400 (3d Cir.

1990); *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc*., 874 F.3d 604 (9th Cir. 2017) ("[N]ot even constitutional due process—a standard which our sister circuits have recognized as being more demanding than 'fundamental fairness' —requires full pretrial discovery."); *Kelly v. U.S. E.P.A*., 203 F.3d 519, 523 (7th Cir. 2000) ("But there is no constitutional right to pretrial discovery in administrative proceedings.").

For the foregoing reasons, the motions for issuance of subpoenas should be denied.

DATED this 7th day of June, 2023.

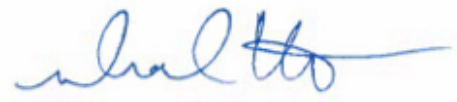
HARDEE, PIÑOL & KRACKE, PLLC

MICHAEL CHRISTIAN
Attorney for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2023, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as follows:

Joy Vega Deputy Attorney General P.O. Box 83720 Boise, ID 83720-0010	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: joy.vega@ag.idaho.gov
JJ Winters Deputy Attorney General P.O. Box 83720 Boise, ID 83720-0010	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: jj.winters@ag.idaho.gov
Mick Thomas Division Administrator Idaho Department of Lands P.O. Box 83720 Boise, ID 83720-0050	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: mthomas@idl.idaho.gov
James Thum Idaho Department of Lands P.O. Box 83720 Boise, Idaho 83720-0050	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: jthum@idl.idaho.gov
J. Kahle Becker 223 N. 6th St., Suite 325 Boise, ID 83702	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: kahle@kahlebeckerlaw.com
James Piotrowski Piotrowski Durand, PLLC P.O. Box 2864 Boise, ID 83704	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [X] Email: james@idunionlaw.com, marty@idunionlaw.com



MICHAEL CHRISTIAN