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Subject: Case No. 2023-01-01
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Attachments: Reply on Mot 4 Subpoenas.pdf
Reply on Mot 2 Disqualify.pdf

Ms. Romine,

Please accept for filing in the above-numbered case, each of the attached briefs.

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BEFORE THE IDAHO DEPARTMENT OF LANDS

In the matter of the Application of Snake River Oil and Gas, LLC to Integrate a Spacing Unit Consisting of Section 24, Township 8 North, Range 5 West, Boise Meridian	Case No. CC-2023-OGR-01-001 REPLY BRIEF IN SUPPORT OF MOTION FOR ISSUANCE OF SUBPOENAS

The opposition briefs from Idaho Department of Lands and Snake River Oil and Gas put considerable effort into arguing that "discovery" Is not permitted under the rules. The responses then rely on this claim related to the availability of "discovery" as if it somehow is relevant to determining whether "subpoenas" are authorized by law. This sis despite the fact that the non-consenting owners have not sought "discovery" they seek a "subpoena" to produce evidence for and at the hearing. "Discovery" and "subpoena" are two entirely different words, and also two different legal concepts. IDL and Snake River seek to conflate these two words because there is no reasonable argument that subpoenas are not permitted, nor that due process might require their use. It is well established and beyond any reasonable doubt that in understanding and construing statutes and regulations words are to be given their regular meanings, and where a

statute or rule denies or allows a party "discovery" that does not in any sense affect whether a party will be allowed to utilize a subpoena.

A "subpoena" is, and has been for at least 400 years, a tool for commanding the appearance of a witness to give testimony or to produce documents. A "subpoena" in general is a "process to cause a witness to appear and give testimony." Black's Law Dictionary, 4th Ed., 1968, p. 1595. To be more specific a "subpoena ad testificandum" is one directing appearance of a witness, while a "subpoena duces tecum" is one that "commands a witness who has in his possession or control some document or paper that is pertinent to the issue of a pending controversy, to produce it at trial." Id.

By contrast, "discovery" is a pre-hearing or pre-trial process by which parties to a dispute that is subject to specific rules of civil procedure are allowed to engage in pre-trial investigation of documents, testimony and more. See, Idaho Rule of Civil Procedure 26. In civil litigation practice in Idaho:

> **(a) Discovery methods.** Discovery may be made by:
>
> > **(1)** deposition upon oral examination or written questions;
> > **(2)** written interrogatories;
> > **(3)** production of documents, electronically stored information or tangible things;
> > **(4)** entry upon land or other property for inspection or other purposes;
> > **(5)** physical and mental examinations; and
> > **(6)** requests for admission.

IRCP 26(a).

The distinction between "discovery" and "subpoena" is a critical one. For instance, in civil litigation, discovery can be expanded, curtailed or limited by the application of the Rules of Procedure themselves, by order of the Court hearing the proceeding, or even by agreement of the parties to a pre-trial discovery order. But the power of the parties to request a subpoena, and the

correlating duty of a decisionmaker to issue a subpoena upon request cannot be so easily limited, precisely because while "discovery" is a matter of rule, "subpoenas" are a matter of constitutional right to due process of law:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed [deprivation of property interest], and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970). If a decisionmaker refuses to exercise its power to subpoena witnesses (whether for testimony or to produce documents), the opportunity to be heard becomes meaningless.

The difference between subpoenas and discovery is also a practical one. While a "subpoena" with a return date prior to a trial or hearing is sometimes (rarely) used as a method of discovery (see, e.g., Idaho Rule of Civil Procedure 30(a)(1)) it is only used as a "discovery" method when that discovery is directed to non-parties to that proceeding. Subpoenas directed to the opposing parties in a proceeding are not used as a discovery method in Idaho or federal courts since the Rules of Procedure themselves compel attendance. To simplify and clarify, a subpoena is a legal tool that is used in a wide variety of settings, and only one of those settings is "discovery" where that tool is used quite rarely. But even where discovery is not taking place, subpoenas play a role in resolving contested disputes.

If the non-consenting owners were seeking "discovery" they would have requested the right to issue Notices of Deposition similar to Idaho Rule of Civil Procedure 30, Interrogatories similar to IRCP 33, Requests for Production similar to IRCP 34, and Requests for Admission

pursuant to IRCP 36. Those methods all constitute "discovery" and the non-consenting owners have not requested to use any of those.

What they have requested is a "subpoena" as that word is used in Idaho Code §47-329. While not explicitly argued in the opening brief, the issuance of subpoenas in this case is also justified by Idaho Code §58-122. That provision provides that IDL's director shall have the power to issue subpoenas in nearly any type of contested case. This proceeding is being conducted before the Department of Lands in that all integration applications are made to the Department, pursuant to statute. I.C. §47-320(1). The Administrator is to hear the application, but the Administrator is appointed by and exercises those powers within the Director's power. I.C. §58-104A. Whether the authority stems from the Director of IDL or from the Commission is largely irrelevant, as both such parties have the power to issue subpoenas in contested cases, and Mr. Thomas as Administrator is charged with exercising the powers and duties of either the Commission or the Director (or both) as a statutorily-empowered designee of those powers.

The non-consenting owners have further proposed that as a matter of controlling his own docket, and managing the hearing over which he presides, the Hearing Officer should direct that compliance with the subpoena be ordered to occur prior to the hearing. This request reflects the reality that the requested documents are voluminous and allowing review prior to the hearing would reduce the amount of time spent in hearing where multiple parties and counsel would be inconvenienced. This suggestion that the Hearing Officer take appropriate steps to ensure that the hearing process is efficient and as speedy as reasonably possible does not turn the "subpoena" into "discovery." Instead, it reflects the legal doctrine that a hearing officer is necessarily and by implication if not by explication empowered to control the proceedings he is assigned to hear, to

control and regulate the submission and admission of evidence, and to rule on evidentiary disputes that might arise.

While the relevance of the matters requested by the subpoenas should be self-evident, the IDL and Snake River demand (without any basis in law) that the requesting party should demonstrate the relevance of the evidence subpoenaed. Such relevance is not hard to determine or establish. The Hearing Officer has directed that the following matters, among others, will be deemed relevant to determining whether the terms of any integration are "just and reasonable" as required by statute:

> 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 near 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?
>
> * * *
>
> 7. Do the unit's circumstances and operations require additional bonding with the Department?

Order Determining Just and Reasonable Factors, p. 16.

As to factor 2, the similarity of proposed agreements to other agreements and orders, the Hearing Officer further explained that "These factors are important because they inform the Administrator about what terms and conditions are commonly agreed to by participating owners in the oil and gas industry." Order, p. 17. The non-consenting owners have sought evidence about other leases entered into by Snake River and other property owners in the Payette Valley. This is precisely the evidence that addresses factor 3. As the Administrator has explained "Taking into account what those agreeing to oil and gas development in other fields and states and what they

have included as terms in operating agreements and leases allows the Administrator to consider why the oil and gas industry includes those terms." Id.

As to factor 3, the Hearing Officer offered the following justification and example:

> The Utah Supreme Court considered voluntary agreements and the operator's previous joint operating agreements to review the Utah Board of Oil, Gas, and Mining's decision on what terms were "just and reasonable" under Utah's oil and gas statutes. *J.P. Furlong Co v. Board of Oil, Gas, and Mining*,424 P.3d 858 (Utah 2018). In *Furlong,* an operator asked Utah's Board to force pool a mineral owner after the operator denied the owner's requested terms to a joint operating agreement. Id. at 859-62. The Board adopted the operator's terms in its forced pooling order, determining the terms were "just and reasonable" because (a) the terms were materially the same as other working interest owners had agreed to and (b) the agreement was similar to the operator's previous joint operating agreements. Id. at86o-62.

Order, p. 18-19. This makes it even more abundantly clear that the business practices of the operator, particularly with regard to the elases it enters into, is relevant evidence. Furthermore, by specifically identifying "other agreements within and near the unit" the Hearing Officer is making clear that the leases entered into by other property owners, specifically including thbe State of Idaho through the Land Board and the IDL are also relevant.

Regarding Factor 4 the Hearing Officer stated:

> the Administrator must comply with the Oil and Gas Act as it is written, including Idaho Code $ 47-320(3). Therefore, the evidence presented at hearing will be reviewed, including specific proposed terms relating to the language in Idaho Code $ 47- 320(3). As the statute articulates, this includes proposed terms for authorizing the drilling, equipping, and operation of a well, some of which may include those proposed terms found in a proposed lease and joint operating agreement. While some of the statute's language refers to "a well" or "the well," Idaho Code $ 47 -320(l) plainly provides integration can be ordered for "a well or wells." It follows that proposed terms may also address the number of wells and any proposed depth or formation limits for that well or wells. 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.

Order, p. 20.

This makes clear that terms of prior leases, anyh evidence relating to the necessity of more than one well, and terms governing operations, drilling, and equipping are all relevant. And

the evidence sought by subpoena is relevant to deciding these issues about drilling, equipping and operation.

Finally, in addressing Factor 7 the Hearing Officer explained:

> the Commission's rules also allow the Department to impose additional bonding in certain circumstances. IDAPA 20.07.02.220.04. Examples of those circumstances include noncompliance, unusual conditions, horizontal drilling, or other circumstances that suggest a particular well or group of wells has potential risk or liability in excess of that normally expected.

Order, p. 22. This means that any situation which might call for additional bonding (the listed items of noncompliance and horizontal drilling were merely examples, not an exhaustive list) should be considered by the Hearing Officer, which further means the parties should be free to seek and enter additional evidence relating thereto.

The non-consenting owners' request for information about industry practices, existing leases in the area, the business practices of Snake River, Snake River's ability to meet the liabilities it exposes property owners to, and the business conditions Snake River will face with respect to drilling and operating, all relate to whether the proposed terms of forced leases are just and reasonable. The consistent emphasis by the Hearing Officer on "site-specific conditions" also justifies requests for production of evidence about those site-specific conditions such as the anticipated location, volume, and quality of the hydrocarbons expected to be recovered, and the likely operating margins, profits, and prices to be expected from this well.

It would be entirely inappropriate for the Hearing to rule that both other leases and site-specific conditions are relevant factors without also recognizing that other leases and evidence about those site-specific conditions should be ordered produced.

For all the reasons set forth herein, but particularly because "discovery" is not a synonym for "subpoena," the request for issuance of subpoenas should be granted. The Hearing Officer

should determine the date of required production, though the undersigned gives notice that if production occurs only at hearing, he will request an appropriate continuance of that hearing so that the non-consenting owners' experts and attorneys have the meaningful opportunity to rebut Snake River's evidence that is required by the due process clauses of the U.S. Constitution.

Dated this 12th day of June, 2023.

PIOTROWSKI DURAND, PLLC

/s/ James M. Piotrowski
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Attorneys for CAIA and Certain Non-Consenting or Uncommitted Owners

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served on the parties indicated below, via electronic mail, this 12th day of June, 2023.

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BEFORE THE IDAHO DEPARTMENT OF LANDS

In the matter of the Application of Snake River Oil and Gas, LLC to Integrate a Spacing Unit Consisting of Section 24, Township 8 North, Range 5 West, Boise Meridian	Case No. CC-2023-OGR-01-001 REPLY BRIEF IN SUPPORT OF MOTION TO DISQUALIFY HEARING OFFICER

It is well-established, perhaps the most well-established principle of American jurisprudence that a decision maker mayh not have an interest in the outcome of a case he is deciding. As one Court explained:

> The Secretary does not quarrel with the indisputable fact that Anglo-American law does not permit anyone to be the judge of his own case. At least since Lord Coke's decision in *Dr. Bonham's Case*, 8 Rep. 114a (C.P. 1610), this has been the rule. The Secretary also recognizes that *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927), established the principle that it violates due process for [**18] a judge to have a direct and substantial interest in the outcome of a case before him.

Utica Packing Co. v. Block, 781 F.2d 71, 77 (6th Cir. 1986).

Yet neither our State's attorney general nor the Department of Lands seems to have even the slightest concern about having the Department of Lands (acting through its Administrator for oil and gas) determine whether the Department of Lands will see its oil and gas leases acftually

turn a profit and produce money for the Department of Lands. The absurdity of that sentence is exceeded onlyh by the absurdity of letting one interested party determine the rights of other interested parties in a disputed case over integration of mineral rights.

The motion for disqualification is not premised on any concern about the integrity of Mr. Thomas, but on the bedrock legal principle that nobody, not even the State of Idaho and its Attorney General may be the judge of their own case. The violation of that principle is exceedingly clear. Mr. Thomas is employed by Director Miller who is employed by the Land Board. The Land Board and the Department have an interest in this case, and yet they have their own chosen judge of the case who works for them, on an at-will basis. Both the Land Board, and the Director, and the Hearing Officer are represented by the same lawyers. So not only is the State the judge of its own case, the state's lawyer is also the lawyer of the judge of its own case.

No more need be said. The only way to interpret the Oil and Gas Consevation Act in a manner that is consistent with the Constitution is to interpret it as requiring the appointment of a truly independent hearing officer, with independent representation. While the Hearing Officer is not empowered to determine thestatute is unconstitutional, he has the duty to apply the statute in accordance with all existing law.

Dated this 12th day of June, 2023.

PIOTROWSKI DURAND, PLLC

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CERTIFICATE OF SERVICE

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