

**From:** [Sarah Hudson](#)  
**To:** [Kourtney Romine](#); [james@idunionlaw.com](mailto:james@idunionlaw.com)  
**Cc:** [Michael Christian](#)  
**Subject:** Objection to Response- Barlow 2-14  
**Date:** Thursday, October 15, 2020 01:21:55 PM  
**Attachments:** [20201015 Objection to Caia Response to Appeal and Motion to Strike \(1\).pdf](#)

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Hello,

Attached please find the Objection to CAIA Response to Appeal and Motion to Strike from Michael Christian. If you have any questions, please feel free to contact us.

Thank you,  
Sarah Hudson  
Legal Assistant

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updated.” The email contained no instruction or request regarding service of the materials on any person.

On October 5, the Department sent a notice of the hearing on the appeal to all persons who submitted written comment, stating in part: “The person appealing is required by Idaho Code § 47-328(4) to serve a copy of the appeal materials “on any other person who participated in the proceedings, by certified mail,”. [sic] The Idaho Department of Lands has provided service in this matter as it did not include this direction to the operator in its denial of the application for permit to drill. The Idaho Department of Lands will serve those who provided addresses by certified mail, and those who only provided an e-mail address will be served by e-mail.”

Idaho Code § 47-318(1)(e) provides that the Department’s decision on an application for a permit to drill a well “may be appealed to the commission by the applicant pursuant to the procedure in section 47-328(4) through (6), Idaho Code.” Nothing in Idaho Code § 47-318 contemplates that any person submitting a public comment via email may participate in the appeal.

There is no contested case hearing proceeding associated with an application for a permit to drill a well. The Department merely posts a copy of the application on its website and receives public comments. IDAPA 20.07.02.040 provides: “Applications submitted under Sections 100, 200, 210, 230 and 330 of these rules will be posted on the Department’s website for a fifteen-day (15) written comment period. The Department will also send an electronic copy of the application to the respective county, and city if applicable, where the proposed operation is located. The purpose of the comment period is to receive written comments on whether a

proposed application complies with these rules. These comments will be considered by the Department prior to permit approval or denial. Relevant comments will be posted on the Department's website following the comment period."

Idaho Code § 47-328(4) states in pertinent part: "Any person appealing shall serve a copy of the appeal materials on any other person who participated in the proceedings, by certified mail, or by personal service." The word "proceedings" clearly refers to contested case hearing procedures, which are discussed for non-permit applications in Idaho Code §47-328(3). Notably, Idaho Code §47-328(3) expressly excludes applications for well permits under §47-316(1). Idaho Code § 47-328(3) ("Except as provided in section 47-316(1)(a), Idaho Code..."). Similarly, Idaho Code 47-328(4) limits the Commission's consideration in appeals to written submittals of the appellant and any "participating qualified person"; this is a reference to the restriction in § 328(3)(b) and (c) on participation in non-permit contested case proceedings to uncommitted mineral interest owners in an area affected by an application. *See* Idaho Code § 47-328(3)(b) ("Only an uncommitted owner in the affected unit may file an objection or other response to the application..."), (c) ("For applications not involving paragraph (b) of this subsection, the department and any uncommitted owner within the area defined in the application may file objections or other responses to the application..."). Thus, those submitting public comments on a well permit application are not "participants" in "proceedings" for purposes of Idaho Code § 47-328(3) or (4). The Department should not have served the appeal materials on public commenters, and they are not entitled to participate as parties in Snake River's appeal to the Commission.

CAIA's own Response points out the flaw in its position when it repeatedly refers to itself and its members as "parties." See Response to Appeal, pp. 1 ("All of these parties requested that the IDL and the IOGCC deny the requested permit..."), 2 ("In the present case, SROG failed to serve its Notice of Appeal on other parties..."). Even ignoring the express exclusion of well permit applications from the hearing provisions of Idaho Code § 47-328, those submitting public comments are not "parties" participating in proceedings, for purposes of the Idaho Administrative Procedures Act ("IAPA") or the application of Idaho Code § 47-328(4) to this appeal. *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 874, 243 P.3d 1055 (2010) (Dismissing petition for judicial review of permit application because individuals submitting written comment in opposition to permit issuance were not "parties" for IAPA purposes).

The IAPA, Idaho Code § 67-5201 (13), provides: "'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." IDAPA 04.11.01.150 provides: "Parties to contested cases before the agency are called applicants or claimants or appellants, petitioners, complainants, respondents, protestants, or intervenors." Those different types of parties are listed in Rules 151 through 156. IDAPA 04.11.01.158 provides, in pertinent part: "Persons other than the persons named in Rules 151 through 156 are not parties for the purpose of any statute or rule addressing rights or obligations of parties to a contested case." In other words, public commenters are not parties for purposes of a contested case.

Because they have no statutory right to contest the permit application (only the right to submit comments), public commenters are not protestants. IDAPA 04.11.01.155 provides: "Persons who oppose an application or claim or appeal and who have a statutory right

to contest the right, license, award or authority sought by an applicant or claimant or appellant are called “protestants.” The Idaho Oil and Gas Conservation Act (“the Act”) does not provide CAIA or any of the other individuals providing public comment “statutory right to contest” the permit, so they cannot be considered “protestants.”

It is theoretically possible that a person could seek to intervene in the permit application process (although, since Idaho Code §47-316 only provides for written comment, and the administrative permitting process does not involve hearing, unlikely). IDAPA 04.11.01.156 provides: “Persons, not applicants or claimants or appellants, complainants, respondents, or protestants to a proceeding, who are permitted to participate as parties pursuant to Rules 350 through 354 are called ‘intervenor.’” Rules 350 through 354 require the filing of a petition to intervene and the showing of an interest sufficient to support participation as a party. Neither CAIA nor any of the named individuals petitioned to be admitted as intervenors. In any event, again, there is no contested case hearing associated with an application for a well permit in which to participate.

IDAPA 04.11.01.355 provides: “Persons not parties and not called by a party who testify at hearing are called ‘public witnesses.’ Public witnesses do not have parties’ rights to examine witnesses or otherwise participate in the proceedings as parties.” Because there is no hearing procedure associated with an application for a well permit, and they do not “testify at hearing,” public commenters do not even rise to the level of public witnesses.<sup>1</sup>

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<sup>1</sup> Additionally, the unsupported statement in the Response that the “individual members of CAIA participating herein are mineral rights owners either within the spacing unit encompassing the well site subject to this application or living near enough to that well site to have an interest in protecting their property” is a misrepresentation. Several of the individuals appear to live on Cottonwood Drive, in a subdivision on the west side of Highway 95 in Fruitland – approximately a mile and a half from the Barlow well pad, and further from the target interval. Others also live outside the spacing unit. Many of the CAIA members regularly comment in opposition to *every* application an operator files with the Department.

Only parties may participate in contested case proceedings. *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 873, 243 P.3d 1055 (2010) (“Respondents sent a number of written comments and objections to the ITD to oppose ConocoPhillips’s application for an overlegal permit, but never filed as intervenors or any other kind of party. . . . They therefore were not parties entitled to judicial review[.]”); *Id.*, 149 Idaho at 874 (“Persons seeking admission must still file a protest, a petition to intervene, or another similar pleading to be admitted as a party. . . . Because Respondents never sought to be admitted as parties, it is irrelevant whether the proceedings were in a formal or informal phase.”). The Department’s overly expansive application of the statute, by serving the appeal materials on the public commenters and inviting their active participation in the appeal, incorrectly treats any person who files public comment on a well application, no matter where they live (even out of state) and irrespective of a lack of any cognizable interest, as a party to a contested case, able to take full part in the applicant’s appeal of the well permit denial. There is no basis for this approach in the Act. It is contrary to the IAPA and the Attorney General’s Rules implementing it. Public commenters as to a well permit application are not parties, and are not even public witnesses under the IAPA.

The Department’s approach simply provides an anti-industry group such as CAIA<sup>2</sup> a means to make every single well permit application a battleground and cause the applicant and the agency more delay and expense – which is exactly what has been occurring for virtually every application for an order filed with the Department for years, not merely well permit

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<sup>2</sup> Several of the individuals listed in CAIA’s objection also participated in the federal court litigation challenging the Fallon #1-10 spacing unit. CAIA is based in Eagle, Idaho. Most of its officers and directors live in Eagle or Emmett.

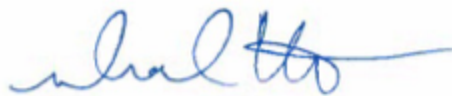
applications. This cannot be the intent of the Act, and such an intent certainly is not stated within its plain terms. It is clearly contrary to the intent of the IAPA. *See Laughy*, 149 Idaho at 876 (“It would place a crushing burden on state agencies if anyone supposedly aggrieved by an agency action could become a ‘participant’ by commenting on a permit application, then drag the agency into court and force it to hold formal hearings after making its decision. This would eviscerate the administrative process and allow anyone to unfairly prevent an applicant from receiving a license from a state agency.”).

Even if CAIA and its members should have been served, they were, albeit by the Department. As a consequence, any right they may have to notice of and participation in the appeal has been preserved. Nothing in Idaho Code § 47-328(4) suggests that an error in service on third persons is jurisdictional to the appeal. CAIA’s citation to Idaho Appellate Rule 17 is irrelevant here. In any case, Idaho Appellate Rule 21 expressly provides that any step *other than* timely filing of a notice of appeal “shall not be deemed jurisdictional,” which directly contradicts CAIA’s argument.

CAIA’s Response is not properly before the Commission, and the Commission should strike it and end CAIA’s and its members’ further participation in the appeal.

RESPECTFULLY SUBMITTED this 15th day of October, 2020.

SMITH+MALEK, PLLC



Michael R. Christian  
Attorney for Applicant Snake River Oil and Gas,  
LLC



**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of October, 2020, I caused to be served a true and correct copy of the preceding motion by the method indicated below and addressed to the following:

Idaho Department of Lands  
Attn: Mick Thomas  
Kourtney Romine  
[kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

*via Email*

James M. Piotrowski  
PIOTROWSKI DURAND, PLLC  
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*via Email*

/s/ Sarah Hudson /s/  
SARAH HUDSON