

BEFORE THE IDAHO OIL AND GAS CONSERVATION COMMISSION

In the Matter of Snake River Oil and Gas, LLC. )  
Application for Permit to Drill, Barlow #2-14 ) **FINAL ORDER**  
Snake River Oil and Gas, LLC, Appellants. )  
\_\_\_\_\_)

**PROCEDURAL BACKGROUND**

Snake River submitted its application for permit to drill (“APD”) the Barlow #2-14 on June 26, 2020.<sup>1</sup> Snake River’s application stated that the proposed well would be located in Section 14, Township 8 North, Range 5 West, Boise Meridian, Payette County, Idaho (“Section 14”). The Application also checked the box to indicate that requested permit was for a “Gas – 640 acre unit.” Snake River did not indicate a current order existed to establish the spacing unit. The Application asserted that the Barlow #2-14 is a Sand “B” test and the Barlow #1-14 is completed in Sand “D,” a separate source of supply.

IDL sent the application to the Idaho Department of Water Resources (“IDWR”) as required in Idaho Code § 47-316(1)(b). IDWR responded that it reviewed the APD with respect to whether the well’s design and construction provided adequate protection of the local ground water resources and existing water wells.<sup>2</sup> IDWR detailed the nearby water wells and stated the well should protect local ground water resources being diverted from wells completed at much shallower depths. IDWR did not have recommendations for additional permit conditions specific to the construction of the well.<sup>3</sup>

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<sup>1</sup> The Application contains the date “April 10, 2020,” but it was filed with IDL on June 26, 2020. Nothing in the record indicates why the application is dated for April.  
<sup>2</sup> IDWR’s response stated that the Barlow #2-14’s proposed well location, directional plan, depth and well completion are very similar to a previously proposed Barlow #2-14. Based on this, IDWR had no comments in addition to those submitted review of the previous 2017 Barlow #2-14 application.  
<sup>3</sup> IDWR recommended several general conditions, summarized as: (1) Applicant will obtain needed water rights through IDWR’s appropriate statutory process (2) If the boring is not produced for oil or gas, it cannot be used for any other purpose and must be decommissioned; and (3) Idaho does not have authority from the EPA to permit Class II injection wells.

IDL also posted the application on its website for a ten (10) business day written comment period as required in Idaho Code § 47-316(1)(c). IDL received many comments.<sup>4</sup> Comments expressed general objections to drilling, including concerns about health and safety, proximity to homes, potential water pollution, decrease in property values, insufficient bonding, liability, lack of revenue, and forced pooling regulations. They also addressed several specific aspects of the Barlow #2-14, including the well's proximity to floodplains, the Payette River, and the City of Fruitland's water supply. Citizens Allied for Integrity and Accountability ("CAIA") and some of its members,<sup>5</sup> including those that owned the proposed surface location, commented that the APD would, if approved, result in a waste, the violation of correlative rights, and the pollution of fresh water supplies and was inconsistent with the previous integration order in Docket No. 2016-OGR-01-001 that applied to Section 14.

The Administrator issued a September 11, 2020 decision denying the Barlow #2-14 APD ("Denial"). He denied the APD for two reasons. First, he relied on Idaho Code § 47-318 and IDAPA 20.07.02.200.05.d. and determined they were not met as the drainage area of the proposed Barlow #2-14 target interval extended beyond Section 14's unit boundaries. Second, he determined that no additional well was authorized in Section 14 because the statewide drilling units found in Idaho Code § 47-317(3)(b) applied only in "the absence of an order . . . establishing drilling or spacing units" and the order in Docket No. 2016-OGR-01-001 did not authorize an additional well within Section 14.

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<sup>4</sup> Comments were received from Bruce and Patti Burrup, Springer Hunt, Thomas Rogers, Kerry Ritchie-Campbell, Martha Bibb, Tim Yoder, Len McCurdy, Brian & Dana McNatt, Brett Smith, Chuck Broschious, Ed Adair, Elizabeth Roberts, Linda S Dernoncourt, Dana Gross, Julie Fugate, Charles Otte, Elden Adams, JoAnn Higby, Joe Morton, Joey & Brenda Ishida, Citizens Allied for Integrity and Accountability and its members, Kris Grimshaw, Nancy Wood, Richard Llewellyn, Sue Bixby, Sherry Gordon, and Nissa Nagel.

<sup>5</sup> Members listed were Brad and Angela Barlow (owners of the well's surface location), Sue Bixby, Cookie Akins, Janie Rodriguez, Melvin and Terri Person, Jane and James Mitchell, Bruce Burrup, Dale Verhaeghe, Linda Dernoncourt, William Tolbert, Julie Fugate, and Joey and Brenda Ishida. Shelley Brock, CAIA's President, also filed separate comments on behalf of CAIA.

Snake River appealed, arguing that the Denial should be reversed and requesting the Commission grant the application. CAIA and its members (collectively “CAIA Respondents”) filed a response arguing that the application should be denied and raising the issue of whether the appeal was properly served. CAIA Respondents noted that they live either within Section 14 or “near enough to that well site to have an interest in protecting their property,”<sup>6</sup> argued in their response that the APD should be denied and raised the issue of whether the appeal was properly served. JoAnn Higby and Brian and Dana McNatt also filed responses supporting the Denial.

Snake River filed an objection and motion to strike on October 16, 2020, requesting that the Commission strike these responses and not consider oral argument from those persons. Pursuant to Idaho Code § 47-328(4) and (5), the Commission heard oral argument from Snake River and the CAIA Respondents on the motion to strike and appeal at a duly noticed meeting on October 20, 2020.

#### **MOTION TO STRIKE**

Snake River’s motion to strike argued that Respondents were not entitled to service of the appeal or argument because Idaho Code § 47-328(4) does not allow for it as Respondents are only commenters, not “parties,” and the APD was not a “proceeding.”

Statutory interpretation is a question of law. *Valiant Idaho, LLC v. JV L.L.C.*, 164 Idaho 280, 429 P.3d 168, 177 (2018). Statutory interpretation begins with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). The statute must also be construed as a whole. *Id.*

Idaho Code § 47-316(1)(c) requires IDL to post APDs on its website “for a written comment period.” Idaho Code § 47-316(1)(e) then provides that an APD decision “may be appealed to the

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<sup>6</sup> The Barlows, who own the surface of the proposed well site, are included as CAIA Respondents.

commission by the applicant pursuant to the procedure in section 47-328(4) through (6), Idaho Code.”

Idaho Code § 47-328(4) provides, in relevant part:

The oil and gas administrator’s decision on an application or request for an order may be appealed to the commission by the applicant or any owner who filed and objection or other response to the application within the time required. An appeal must be filed with the oil and gas administrator within fourteen (14) calendar days of the date of issuance of the oil and gas administrator’s written decision. . . . 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. *Any person who participated in the proceeding may file a response to the appeal* within five (5) business days of service of a copy of the appeal materials. The appellant shall provide the oil and gas administrator with proof of service of the appeal materials on other persons as required in this section. The commission shall make a decision 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.

(Emphasis added). Idaho Code § 47-328(4) requires service of an appeal on “any other person who participated in the proceedings.” Participate means “to take part.” *Merriam Webster Online Dictionary* (<https://www.merriam-webster.com/dictionary/participate>). Idaho Code § 47-316 allows comments and requires the appeal procedures in Idaho Code § 47-328(4). Idaho Code § 47-328(4) only says service goes to those who “participated in the proceedings.” It does not say anything about being a party. Thus, Snake River’s argument that Respondents are not “parties” does not appear to be relevant to whether service is required in Idaho Code § 47-328(4).

Snake River cited *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 243 P.3d 1055 (2010) in arguing that “only parties may participate in contested case proceedings.” A contested case is a “proceeding by an agency . . . that may result in the issuance of an order.” I.C. § 67-5201(6). Contested cases are “governed by the provisions of [the Idaho Administrative Procedure Act], *except as provided by other provisions of law.*” I.C. § 67-5240 (emphasis added). This again directs that Idaho Code § 47-328(4)’s plain language controls the Commission’s decision.

Snake River also argues that Respondents are not “participating qualified persons” because that phrase only refers to uncommitted owners participating in Idaho Code § 47-328(3)’s applications with hearing requirements. Idaho Code § 47-328(4) limits the Commission to considering the written submittals to the appellant and any “participating qualified person.” Additionally, Idaho Code § 47-328(5) allows the Commission to take argument from the appellant and “other qualified participating persons” at hearing. The addition of the word “qualified” is more restrictive than the service requirement on persons who “participated in the proceedings.” However, Idaho Code § 328(3)(b) and (c)’s restriction on participation by uncommitted mineral interest owners does not refer to “participating qualified persons” because the first sentence of Idaho Code § 47-328(4) provides that a decision “may be appealed to the commission by the applicant or any owner who filed an objection or other response to the application.” Thus, the Legislature recognized in the same paragraph that there were more specific descriptions for those persons who may participate, but choose to use a broader term – “participating qualified persons” – later in the paragraph. If the Legislature intended service of the appeal materials to be limited to uncommitted owners, it would have used that the term “uncommitted owners” or the phrase found earlier in the same subsection of the statute: “the applicant and any owner filing an objection or other response.” Instead, the term “qualified” appears shortly after the requirement to timely file a response. Hence, “qualified” refers to those who participated below by filing comments on an APD and file a response.

Further, the word “proceeding” does not clearly refer to hearings as Snake River argues.

Black’s Law Dictionary defines proceeding as:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
2. Any procedural means for seeking redress from a tribunal or agency.
3. An act or step that is part of a larger action.
4. The business conducted by a court or other official body; a hearing.

*PROCEEDING*, *Black's Law Dictionary* (11th ed. 2019). That definition leaves open the possibility that proceeding could mean either “acts and events” in a larger action, or just a hearing itself. However, the Legislature used the more precise term “hearing” in other subsections of the same statute when it was referring specifically to the evidentiary hearings for integration and spacing applications. *See* Idaho Code § 47-328(3)(d) (the administrator “shall set regular *hearing* dates”; can continue untimely applications “until the next *hearing*”; “may for good cause continue any *hearing*”; allow approval “without a *hearing*” for uncontested applications). Thus, the Legislature was aware of the more specific term “hearing,” but used the broader term proceeding instead when describing appeal procedures.

Snake River noted that Idaho Code § 47-328(3) expressly excludes applications for well permits from hearing procedures. Indeed, well permits use the comment procedures in Idaho Code § 47-316(1). That statute then directs that appeals use the procedures in Idaho Code § 47-328(4). And Idaho Code § 47-328(4) then uses the term “proceeding.” The use of the word “proceeding” in a subsection that directs appeals procedures for more than just evidentiary hearings indicates it was intended to broadly apply to more than just a “hearing,” but also to well permit application participation by comment.

For the reasons stated above, the motion to strike is DENIED because Respondents are “participating qualified person[s]” who can argue before the Commission at this appeal.

#### **APPEAL ANALYSIS**

The Oil and Gas Conservation Act, Idaho Code Title 47, chapter 3, gives the Commission authority over this matter. The Commission is authorized to consider applications on APDs and issue orders on appeals of permit decisions. I.C. §§ 47-316(1)(e), 47-428(4)-(6). The Commission as the agency head retains the ultimate authority to make the decision. *See* I.C. §§ 67-5244, 67-5245, *Dupont v. Idaho State Bd. of Land Comm'rs*, 134 Idaho 618, 622, 7 P.3d 1095, 1099 (2000) (holding that an

agency head reviews a hearing officer's recommendation and makes an independent determination). Thus, the Commission reviews the record, the written submittals, the Administrator's decision, and oral argument from Snake River and CAIA Respondents, but is not bound to follow the Administrator's findings of fact or conclusions. The Administrator denied the application for 2 reasons: (1) previous order in Docket No. 2016-OGR-01-001 ("2016 Order") did not authorize an additional well to be drilled within Section 14; and (2) the well would drain outside of Section 14 unit boundary and thus violate Idaho Code § 47-318 and IDAPA 20.07.02.200.05.d.

**I. A second well can be authorized in Section 14 under the state-wide spacing in IDAPA 20.07.02.120.**

The Administrator's Denial states: "Docket No. 2016-OGR-01-001 contains the current spacing order in place for Section 14. The statewide drilling units found in Idaho Code § 47-317(3)(b) apply only in "the absence of an order . . . establishing drilling or spacing units. The order in Docket No. 2016-OGR-01-001 does not authorize an additional well to be drilled within Section 14."

Snake River argues that the 2016 Order is only an integration order that "pointedly does *not* establish a spacing unit departing from the default state-wide spacing scheme set forth in IDAPA 20.07.02.120.02." The 2016 Order contains the following conclusions of law related to state-wide spacing:

IDAPA 20.07.02.120.02 mandates that a standard state-wide spacing unit area be initially employed for wells drilled in the absence of a Commission Order setting spacing units for the pool. This rule provides in pertinent part that: "[e]very well drilled for gas must be located on a drilling unit consisting of approximately six hundred forty (640) contiguous surface acres, which shall be one governmental section or lot(s) equivalent thereto, upon which there is not located, and of which no part is attributable to, any other well completed in or drilling to the same pool."

Conclusion of Law ("COL") 2, p. 8.

Based on the current evidence available and provided in these Applications, establishing the state-wide spacing units for gas wells consisting of approximately 640 acres in Section 14 . . . [is], by operation of law, deemed to result in the most efficient and economic drainage of a common pool or source of supply.

COL 3, p. 8.

Establishing and accepting this initial spacing of 640 acres best protects the correlative rights of mineral owners in the spacing unit, absent further information gained from drilling these exploratory wells.

COL 4, p. 9.

Thus, the Department accepts and recognizes the initial state-wide spacing of 640 acres for gas wells under IDAPA 20.07.02.120.02 as applicable to the Applications under consideration.

COL 4, p. 9.

The 2016 Order, in these express conclusions, established, accepted, and recognized the initial state-wide spacing of drilling units of 640 acres for gas wells based on the rule in place in 2016: IDAPA 20.07.02.120.02.<sup>7</sup> Thus, the state-wide spacing in IDAPA 20.07.02.120.02 applied to Section 14.

IDAPA 20.07.02.120.02 provided with respect to gas wells:

Unit and Well Location. Every well drilled for gas must be located on a drilling unit consisting of approximately six hundred forty (640) contiguous surface acres, which shall be one governmental section or lot(s) equivalent thereto, upon which there is not located, and of which no part is attributed to, any other well completed in or drilling to the same pool . . . . In areas covered by United States Public Land Surveys, such drilling unit shall consist of one governmental section containing not less than six hundred (600) surface acres. A gas well must have a minimum setback of three hundred thirty (330) feet from the governmental section line.

This rule clearly precludes any other well completed in or drilling to the same pool. However, it does not prohibit a second well from being drilled to a second pool under state-wide spacing. Instead, the only requirements are the size of the unit (not less than 600 surface acres) and the minimum setback from the section line (330 feet). Therefore, under statewide spacing in IDAPA 20.07.02.120.02, two wells on state-wide drilling unit spacing to different sources of supply can be legally requested as long as they comply with the requirements in IDAPA 20.07.02.120.02.

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<sup>7</sup> In 2017 the Legislature enacted Idaho Code § 47-317(3), which established a state-wide drilling units for gas wells that could be 160 acres or 640 acres with fixed setbacks for each size and distance set-backs from wells drilling into the same pool. Idaho Code § 47-317(3) applies “in the absence of an order by the department establishing drilling or spacing units.”



The plain language of the statutory authority in place in 2016, which IDAPA 20.07.02.120.02 necessarily was based upon, is also consistent with interpreting IDAPA 20.07.02.120 to mean that one well for each pool is the standard for an established drilling unit. Idaho Code § 47-318(4) provides:

An order establishing spacing units shall direct that *no more than one (1) well* shall be drilled to and produced *from the common source of supply on any unit*, and shall specify the location for the drilling of a well thereon, in accordance with a reasonably uniform spacing pattern, with necessary exceptions for wells drilled or drilling at the time of the filing of the application.

(Emphasis added). The first part of Idaho Code § 47-318(4)'s first sentence states that no more than one well "shall be drilled *to and produced from the common source of supply* on any unit." (Emphasis added). When separate pools underlie a spacing unit, each pool can constitute a "common source of supply." *See, e.g., C. F. Braun & Co. v. Corp. Comm'n*, 609 P.2d 1268, 1271 (Okla. 1980) ("the thirteen common sources of supply underlying the 640 acre tract in the case at bar constitute thirteen separate and distinct spacing and drilling units"). The fact that state-wide spacing was only intended to prohibit the drilling of more than one well into each pool underlying a state-wide spacing unit is embodied in the previous state-wide rule in IDAPA 20.07.02.120:

Every well drilled for gas must be located on a drilling unit consisting of approximately six hundred forty (640) contiguous surface acres . . . upon which there is not located, and of which no part is attributed to, any other well completed in or drilling to the same pool.

While § 47-318(4) provided that state-wide spacing orders cannot allow the drilling of more than one well into a pool that forms a common source of supply, it did not prohibit drilling a second well into a second pool that forms a second source of supply within an established state-wide spacing unit. Like the first pool, the second pool is subject to the established state-wide spacing unless superseded by a more specific spacing order.

**II. The Barlow #2-14 met all permit application requirements for drilling a wildcat well in a state-wide drilling unit.**

The Administrator's alternative basis for denial was based on his finding that the drainage area of the proposed Barlow #2-14 target interval extended beyond Section 14's unit boundaries and thus violated correlative rights. CAIA Respondents argue that the Administrator's decision was proper and permit provisions should be read within the larger context of Idaho's law on oil and gas exploration, including the requirement for spacing units, integration orders, and holding proper leases and other legal authority before allowing oil and gas wells.

IDAPA 20.7.02.200.05.d provides that an application may be denied if the proposed well "will result in a waste of oil or gas, a violation of correlative rights, or the pollution of freshwater supplies."

The Denial found that drainage would occur beyond the Section 14 unit and cited the following:

- In 2017, AM Idaho LLC applied for an Integration / Spacing unit for the proposed B Sand target. This 640-acre unit, referred to as Unit D, Docket CC-2017-OGR-01-001, encompassed Quarter-Quarter sections from four separate government sections, including the SW1/4 of Section 14 (Figure 1). The application was subsequently withdrawn, and the unit was not established. The Geologic Statement accompanying the application included a seismic amplitude map submitted in support of the geologic limits of the Sand B target, which appears to extend beyond section 14 (Figure 2).
- The Geologic Statement submitted with the Barlow #2- 14 APD indicates the target sand as the "B" Sand in the SW1/4 of Section 14 (Figure 3). Based on the limits of the "B" Sand as defined in the Geologic Statement in Docket CC-2017-OGR-01-001, the target sand appears to be the same in both applications.

The Denial also included explanatory notes that refer to Docket CC-2017-OGR-01-001 application's seismic amplitude maps and the geologic statement that explain the Administrator believes those documents relate to the Barlow #2-14.

IDAPA 20.07.02.200.04 includes the requirements for applications for permits to drill. The Application "shall include a Department approved form." The rule also includes 11 requirements:

- (a) An accurate plat showing the proposed well's location with reference to the nearest lines of an established public survey;

- (b) The location of the nearest structure with a water supply, or the nearest water well as shown on the IDWR registry of water rights or well log database;
- (c) Information on the type of tools to be used and the proposed logging program;
- (d) Proposed total depth to which the well will be drilled, estimated depth to the top of the important geologic markers, and the estimated depth to the top of the target formations;
- (e) The proposed casing program, including size and weight thereof, the depth at which each casing type is to be set;
- (f) The type and amount of cement to be used, and the intervals cemented;
- (g) Information on the drilling plan;
- (h) Best management practices to be used for erosion and sediment control;
- (i) Plan for interim reclamation and a plan for final reclamation;
- (j) If applicable, information regarding (i) well treatments (Section 210); (ii) Pit construction (Section 230); (iii) Directional or horizontal drilling (Section 330).
- (k) Any other information which the Department requires based on site specific reasons.

IDAPA 20.07.02.200.04. The applicant submitted information for all of these requirements. Further, the proposed well is a wildcat well, which is an exploratory well drilled in an area of unknown subsurface conditions. IDAPA 20.07.02.010.50. The information in the Denial from the 2017 integration application, Docket CC-2017-OGR-01-001, is limited and was submitted by another operator, not Snake River, and was part of an application that was ultimately withdrawn. In addition, the evidence was an amplitude map that, by itself, is not sufficient evidence to establish drainage. Without a well drilled to the proposed sand in this area of field, the well is a wildcat well, the subsurface conditions remain unknown, and there is not evidence to establish drainage of the well.

The Denial concluded that the proposed well would violate correlative rights. “Correlative rights” are defined in the Oil and Gas Conservation 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.” I.C. § 47-310(4). The Act goes further in describing how correlative rights should be protected, providing:

The commission and the department shall protect correlative rights by administering the provisions of this chapter in such a manner as to avoid the drilling of unnecessary wells or incurring unnecessary expense, and in a manner that allows all operators and royalty owners a fair and just opportunity for production and the right to recover, receive and enjoy the benefits of oil and gas or equivalent resources, while also protecting the rights of surface owners.

I.C. § 47-315(2). Here, mineral interest owners outside of Section 14 are not included in the Section 14 spacing unit. If the Barlow #2-14 drains outside Section 14, uncommitted owners outside Section 14 retain the right to drill an offset well to recover the hydrocarbons underlying their land, which gives them an opportunity to produce the oil and gas under their properties. The well also allows drilling of an exploratory well within Section 14 that meets state-wide spacing requirements and allows the mineral interest owners within Section 14 the opportunity to produce the well and recover their interest in oil and gas. Thus, state-wide spacing allows them production of a just and equitable share of oil and gas without waste. Therefore, the Commission determines that the application met the requirements in IDAPA 20.07.02.200.

### **ORDER**

Based on the analysis above and the Commission's review of the record below as set forth in the written submittals of the Appellants, the Respondents, and the Administrator's written decision, and the oral argument taken by the Commission at the October 20, 2020 appeal hearing, the Commission GRANTED Snake River's application for permit to drill the Barlow #2-14 in accordance with the Idaho Oil and Gas Conservation Act and the Rules Governing Conservation of Oil and Natural Gas in the State of Idaho (IDAPA 20.07.02).

### **PROCEDURES AND REVIEW**

This is the Commission's final order. The Commission's final order "shall not be subject to any motion for reconsideration." Idaho Code § 47-328(5).

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in

this case to district court by filing a petition in the district court of the county in which: (1) a hearing was held, (2) the final agency action was taken, (3) the party seeking review of the order resides, or (4) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. See Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 26th day of October 2020.



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BETTY COPPERSMITH

Chairman  
Idaho Oil and Gas Conservation Commission

## CERTIFICATE OF MAILING

I hereby certify that on this 26<sup>th</sup> day of October 2020. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Snake River Oil & Gas LLC  
c/o Michael Christian  
Smith + Malek  
101 S. Capitol Blvd, Suite 930  
Boise ID 83702

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [mike@smithmalek.com](mailto:mike@smithmalek.com)  
[sarah@smithmalek.com](mailto:sarah@smithmalek.com)

Chris Weiser  
Snake River Oil & Gas, LLC  
PO Box 500  
Magnolia, AR 71754

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [Chrisw@weiser-brown.com](mailto:Chrisw@weiser-brown.com)

Mick Thomas  
Idaho Department of Lands  
PO Box 83720  
Boise ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [mthomas@idl.idaho.gov](mailto:mthomas@idl.idaho.gov)

James Thum  
Idaho Department of Lands  
PO Box 83720  
Boise ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [jthum@idl.idaho.gov](mailto:jthum@idl.idaho.gov)

Chad. F. Hersley, P.G.  
Technical Hydrogeologist  
Idaho Department of Water Resources  
Ground Water Protection Section

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [Chad.Hersley@idwr.idaho.gov](mailto:Chad.Hersley@idwr.idaho.gov)

Bruce & Patti Burrup  
2260 NE 16<sup>th</sup> St  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [fruitlandrefrig@hotmail.com](mailto:fruitlandrefrig@hotmail.com)

Springer Hunt  
3316 S. Artic Fox Ave  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [springerhunt@hotmail.com](mailto:springerhunt@hotmail.com)

Thomas Rogers  
1828 North Longridge Place  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [ThosRogers@GMail.COM](mailto:ThosRogers@GMail.COM)

Kerry Ritchie-Campbell  
2195 W. Hill Rd  
Boise, ID

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [kritchiecampbell@gmail.com](mailto:kritchiecampbell@gmail.com)

Martha S. Bibb  
810 CD Olenda Dr  
Hailey, ID 83333

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [marthasbibb@gmail.com](mailto:marthasbibb@gmail.com)

Tim Yoder  
2700 North 30<sup>th</sup> St  
Boise, ID

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [timmyoutside@live.com](mailto:timmyoutside@live.com)

Len McCurdy  
PO Box 384  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [mc@fmtc.com](mailto:mc@fmtc.com)

Brian & Dana McNatt  
1085 W. Quarter Dr  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [brianmcnatt@boisestate.edu](mailto:brianmcnatt@boisestate.edu)

Brett Smith  
372 S. Eagle Rd Suite 146  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [ecabrett@cableone.net](mailto:ecabrett@cableone.net)

Chuck Broschious  
PO Box 220  
Troy, ID 83871

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [edinst@tds.net](mailto:edinst@tds.net)

Edward Adair

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [eadair2900@gmail.com](mailto:eadair2900@gmail.com)

Elizabeth Roberts  
1351 N. Mansfield Pl  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [adadems14@gmail.com](mailto:adadems14@gmail.com)

Linda Dernoncourt  
1303 Cottonwood Dr  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [Dernoncourt@cableone.net](mailto:Dernoncourt@cableone.net)

Dana Gross  
2820 NW 4<sup>th</sup> Ave  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [danacayleen@hotmail.com](mailto:danacayleen@hotmail.com)

Julie Fugate  
1861 NW 24<sup>th</sup> St  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [letstalkjp2004@yahoo.com](mailto:letstalkjp2004@yahoo.com)

Charles Otte  
1208 Jessica Ave  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [charlesotte57@gmail.com](mailto:charlesotte57@gmail.com)

Elden Adams  
10485 Virginia Ln  
Payette, ID 83661

- U.S. Mail, postage prepaid
- Hand Delivery
- Email:

JoAnn Higby

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [mrsjosie38@gmail.com](mailto:mrsjosie38@gmail.com)

Joe Morton  
5726 Silver Leaf Ext  
Emmett, ID 83617

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [jmorton@silverleafidaho.com](mailto:jmorton@silverleafidaho.com)

Joey & Brenda Ishida  
2800 NW 4<sup>th</sup> Ave  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email:

James Piotrowski  
1020 W. Main St, Suite 400  
PO Box 2864  
Boise, ID 83702

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [james@idunionlaw.com](mailto:james@idunionlaw.com)  
[Molly@idunionlaw.com](mailto:Molly@idunionlaw.com)

Kris Grimshaw

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [wegrim4@gmail.com](mailto:wegrim4@gmail.com)

Nancy Wood  
1291 N. Echo Creek Pl  
Eagle, ID 83616

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [1nbwood@comcast.net](mailto:1nbwood@comcast.net)

Richard Llewellyn  
9170 W. Hill Rd  
Boise, ID

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [llewelr@gmail.com](mailto:llewelr@gmail.com)

Sue Bixby  
2133 Maple Court  
Fruitland, ID 83619

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [suebee@fmtc.com](mailto:suebee@fmtc.com)

Shelley Brock  
Citizens Allied for Integrity and Accountability

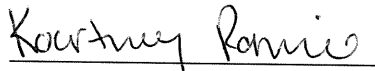
- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [ushorsepoor@yahoo.com](mailto:ushorsepoor@yahoo.com)

Sherry Gordon  
PO Box 1091  
Emmett, ID 83617

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [sherrygordon5@gmail.com](mailto:sherrygordon5@gmail.com)

Nissa Nagel  
2201 W. Pleasanton Ave  
Boise, ID

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: [nissajnagel@gmail.com](mailto:nissajnagel@gmail.com)



Kourtney Romine  
Workflow Coordinator