

**From:** [Kourtney Romine](#)  
**To:** [James Piotrowski](#)  
**Cc:** [JJ Winters](#); [James Thum](#); [Marty Durand](#); [External - Joy M. Vega](#); [Mike Christian](#)  
**Subject:** RE: Case No. 2023-OGR-01-001  
**Date:** Friday, October 27, 2023 10:59:00 AM  
**Attachments:** [Brief in Support of Motion to Disclose Communications.pdf](#)  
[image001.png](#)

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All,

I am replying all but correcting email addresses. I removed Kristina Fugate and added Joy Vega. I also corrected Mike Christians email.

Sincerely,

**Kourtney Romine**

**Workflow Coordinator**

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**From:** James Piotrowski <james@idunionlaw.com>  
**Sent:** Thursday, October 26, 2023 05:01 PM  
**To:** Kourtney Romine <kromine@idl.idaho.gov>  
**Cc:** mike@hpklaw.com; External - Kristina Fugate <kristina.fugate@ag.idaho.gov>; JJ Winters <jj.winters@ag.idaho.gov>; James Thum <jthum@idl.idaho.gov>; Marty Durand <Marty@idunionlaw.com>  
**Subject:** Case No. 2023-OGR-01-001

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For filing in the above captioned case, please see the attached Brief.

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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	)	Case No. CC-2023-OGR-01-001
Spacing Unit Consisting of Section 24,	)	
Township 8 North, Range 5 West, Boise	)	BRIEF IN SUPPORT OF MOTION
Meridian.	)	BY NONCONSENTING OWNERS TO
	)	DISCLOSE COMMUNICATIONS
	)	
	)	
_____	)	

At a hearing held in this matter on October 24, 2023, nonconsenting and objecting mineral owners moved for an order requiring disclosure of all communications between members of the Attorney General’s office representing or advising the Idaho Department of Lands, the Division Director of the Oil and Gas Division (the hearing officer in this matter) and the Oil and Gas Commission. During the same hearing, the Hearing Officer indicated he would order production of those communications and required that the requesting parties submit a brief explaining their bases for the request. This brief explains those bases.

**I. Respondents are Entitled to an Adjudicatory System That Ensures Fairness to All Parties.**

The State of Idaho has long taken a dim view on public officials taking official action while having a significant conflict of interest. I.C. §74-404. Not only has the Legislature adopted a specific statute on such conflicts, it also provided in the Idaho Administrative Procedure Act

methods of addressing conflicts in hearings such as the present one. I.C. §67-552. That section allows the parties to any administrative proceeding to seek the removal of any hearing officer for any reason (or no reason) within certain time limits, and to seek removal of any hearing officer for demonstrable bias or prejudice among a laundry list of other potential reasons at any time that a party learns of them. *Id.* The non-consenting owners have not chosen to so move, but for reasons set out herein have concerns that could best be addressed by their request for communications.

The State of Idaho's concern over conflicts of interest is part of the overall effort to ensure that administrative procedures provide fairness to the citizens whose liberty and property will be affected by decisions made. The same concerns inform the due process clauses of the United States and Idaho Constitutions, both of which provide that a person may not be deprived of their property or liberty without first receiving due process of law. U.S. Const. Am. V, XIV; Idaho Const. Art. I §13. The United States and Idaho Supreme Courts have held that the protections of procedural due process apply to administrative bodies as well as to courts. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975), citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Johnson v. Bonner County School District No. 82*, 126 Idaho 490, 493, 887 P.2d 35, 38 (1996).

The Supreme Court has made clear that although a single administrative body may combine investigative or adjudicative functions, courts and policy makers “should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice” and that the “court is not precluded from determining from the special facts and circumstances presented in the case before it that the risk of unfairness is intolerably high.” *Withrow*, 421 U.S. at 54, 58. In this regard, both the United States and Idaho Supreme Courts have held that “[n]ot only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always

endeavored to prevent even the probability of unfairness.” *Withrow*, 421 U.S. at 47, citing *In Re Murchison*, 349 U.S. 133, 136 (1955); *Johnson*, 126 Idaho at 493, 887 P.2d at 38. Both high courts have held that the constitutional “inquiry [is] not whether [decision makers] are actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average person sitting as a judge to try the case with bias for or against any issue presented to the person.” *Gibson*, 411 U.S. at 571; *Johnson*, 126 Idaho at 494, 887 P.2d at 39. These are strict standards, but ones intended to protect the rights of citizens.

It is thus the job of an administrative hearing officer in Idaho to guarantee that administrative justice is provided without bias, prejudice or the appearance or even a probability of the same.

## **II. The Level of Ongoing Turmoil and the Existence of Credible Concerns Over Unethical Practices by the Attorney General Strongly Caution Against Assuming The Office and Its Members Are Engaged in the Routine Business of Government.**

Due process is also significantly implicated where the same lawyers and law firms are representing multiple parties, and multiple levels of authority in the same agency. This reality is reflected in both regulatory and decisional law in Idaho. The goal of systems of justice, whether court-based or administrative as here, is to separate political powers from judicial powers. Both judges and administrative hearing officers are charged with upholding that standard. While the undersigned are not aware of any objectionable bias related to this particular case on the part of the hearing officer, the laws of the State of Idaho also recognize that conflicts of interest, bias and prejudice can also arise among the lawyers advising administrators. Those conflicts are necessarily treated as conflicts of the decision maker those lawyers serve. Under the present set of known facts about the Idaho Attorney General’s office, the nonconsenting owners made a

prudent request to explore whether the Attorney General and his Deputies may be engaging in conduct that would create precisely such a conflict of interest.

The Idaho Rules of Professional Conduct are adopted by the Idaho State Bar to regulate the conduct of attorneys who choose to be licensed in Idaho. Those rules prohibit a lawyer from proceeding in multiple circumstances, including if the representation is “adverse” to another client, if the representation of one client might material limit the representation of a second client, and if the representation might be adverse to the interests of a former client. *Id.* Rules Prof. Conduct 1.7, 1.8, 1.9. Those rules also explicitly address the situation in which the conflicts of interest of one member of a law office must be imputed to all other members of the same office. *Id.* Rules Prof. Conduct 1.10.

The same concerns and issues motivate the statutory and common law of Idaho in which the Idaho Supreme Court has held that conflicts of interest will also bar the activities of public officials when they are undertaking duties necessary to secure due process of law, such as administrative processes before agencies. As previously noted, the Legislature demands that agency hearing officers must avoid conflicts of interest. I.C. §74-404. Decisions from the Idaho Supreme Court go farther. In addressing due process rights arising from property interests in employment, for instance, Idaho courts have held that a decision maker who has an apparent conflict of interest, or even a likelihood of bias or prejudice arising from a potential conflict should be disqualified from hearing the dispute. *Miller v. Bd. Of Trustees*, 132 Idaho 244, 970 P.2d 512 (1998). In a subsequent decision in that same case, the Court approved an injunction which also prohibited the same attorneys from representing members of an administrative agency and then representing a party before that agency, based on the theory that attorney conflicts of interest can taint the decision making process. *Miller v. Ririe Jt. Sch. Dist.*, 132 Idaho 385, 973

P.2d 156 (1999). Thus, both the Legislature and the Courts have unequivocally directed administrative agencies, hearing officers and their lawyers to observe a strong conflict of interest rule. In normal circumstances, one might presume that members of the Attorney General's office would be aware and observant of these rules. These are not normal circumstances.

In recent years, the Attorney General of Idaho has demonstrated an alarming contempt for conflict of interest rules. The Attorney General's office in the past year has:

- Intervened in both criminal and civil proceedings in a way that created the appearance the Attorney General was acting in the best interests of his campaign donors and political supporters. See, Magic Valley Times-News, "JONES: Already, Idaho AG Raul Labrador is Facing Conflicts of Interest," January 13, 2023, accessed at [https://magicvalley.com/opinion/jones-already-idaho-ag-raul-labrador-is-facing-conflicts-of-interest/article\\_53b4e802-91ff-11ed-b4c7-931ea1ef1759.html](https://magicvalley.com/opinion/jones-already-idaho-ag-raul-labrador-is-facing-conflicts-of-interest/article_53b4e802-91ff-11ed-b4c7-931ea1ef1759.html), October 26, 2023;
- Issued administrative subpoenas to its own clients. See, Idaho Capital Sun, "Idaho AG Can't Pursue Civil Demands in Child Care Grant Case Due to Conflict, Judge Rules," August 10, 2023, accessed at <https://idahocapitalsun.com/2023/08/10/idaho-ag-cant-pursue-civil-demands-in-child-care-grant-case-due-to-conflict-judge-rules/> October 26, 2023;
- Been sued for allegedly terminated a Deputy Attorney General who reported violations of the Idaho Rules of Professional Conduct involving conflicts of interest. Idaho Statesman, "Fired Idaho Attorney Sues AG Raul Labrador, Says She Was Retaliated Against," September 26, 2023, accessed at <https://www.idahostatesman.com/news/politics-government/state-politics/article279777699.html>, accessed October 26 2023;
- Sued its own clients, resulting in the A.G.'s disqualification. Idaho Statesman, "Idaho AG Raul Labrador is Disqualified From Litigating Another Case," August 28, 2023, accessed at <https://www.idahostatesman.com/news/politics-government/state-politics/article278578624.html>, accessed October 26, 2023.<sup>1</sup>

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<sup>1</sup> It is worth noting that in that case an Ada County District Judge found that the factual representations made in sworn declarations by A.G. Labrador and Deputy A.G. Wold were not worthy of credence, and that contradictory sworn statements from members of the State Board of Education were "more plausible" than the stories told by the A.G. and his deputies.

The ongoing turmoil in the Attorney General's office has continued to this date. Idaho Statesman, "Turnover Under Idaho Attorney General Raul Labrador Continues, High-Ranking Officials Resign," October 6, 2023, <https://www.idahostatesman.com/news/politics-government/state-politics/article280212259.html>, accessed October 26, 2023.

With specific respect to the Idaho Department of Lands and the Idaho Oil and Gas Commission, there is reason for concern about conflicts of interest. The Attorney General's office, through its Deputy AGs, represents the members of the Oil and Gas Commission individually. See, *CAIA et al. v. Miller, Coppersmith, Shigeta, Classen and Hinchcliff*, USDC Dist. of Idaho Case No. 1:21-cv-367, Notice of Appearance, Dkt. No. 3 (showing the Attorney General, the Deputy Attorney General serving as Chief of the Natural Resources Division, and Deputy A.G.'s Vega and Fugate appearing on behalf of all Defendants). In addition to providing legal representation for the members of the commission, the Attorney General's office also represents the employees of the Idaho Department of Lands who choose to appear as parties in certain Oil and Gas proceedings, including integration applications. See, e.g., IN THE MATTER OF: The Application of Snake River Oil and Gas, LLC to Integrate the Spacing Unit Consisting of Section 30, Township 8 North, Range 4 West, Boise Meridian, Payette County, Idaho, Case No. CC-2022-OGR-01-001, "Idaho Department of Lands' Opening Brief" submitted August 19, 2022; IN THE MATTER OF: The Application of AM Idaho, LLC, for Spacing Order and to Integrate Unleased Mineral Interest Owners, in the Drilling Unit Consisting of the SW ¼ of Section 10, Township 8 North, Range 5 West, Boise Meridian, Payette County Idaho, Case No. CC-2019-ogr-01-002, "Idaho Department of Lands Opening Brief," submitted July 31, 2019.

The Idaho Attorney General's office is a law firm, subject to all of the rules governing the legal profession (just as the undersigned is), as well as the duties imposed as a result of being

public officials sworn to uphold the law and constitutions. Law offices are barred from representing multiple parties with potentially adverse position, and their conduct in doing so can result in both the lawyers and the decisions makers they represent from being permitted to proceed as decision makers in administrative proceedings. *Miller v. Jt. Sch. Dist.*, 132 Idaho 385.

Over the past several years, the Attorney General's office has chosen to represent the Department of Lands as an entity, its employees such as the Oil and Gas Program Manager, the Director of the Oil and Gas Division, as well as the members of the Oil and Gas Commission an independent commission within the Department of Lands. These various individuals and entities represent diverse interests and have distinct roles to serve in the overall process which is intended, and must be intended as a matter of law, to secure the due process rights of affected property owners.

In light of all these circumstances, it is reasonable to investigate the fairness, impartiality and objectivity of the participants. For these reasons, non-consenting owners have asked for disclosure of communications between the members of the Attorney General's office who have advised or are advising distinct elements of the relevant agency including the Oil and Gas Division Director, the Oil and Gas Program Manager, and the members of the Oil and Gas Commission in order to determine whether improper influence might have arisen. They ask for all communications, verbal, written or otherwise, that relate in any way to the present application or the possibility of appeal, judicial review or constitutional challenge.

Dated this 26<sup>th</sup> day of October, 2023.

PIOTROWSKI DURAND, PLLC  
          /s/          James M. Piotrowski  
James M. Piotrowski  
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 26<sup>th</sup> day of October, 2023.

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/s/ James M. Piotrowski  
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