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WIRT & ICARE Comments on Proposed Negotiated Idaho Oil and Gas Rules

Mr. Schultz and Mr. Johnson,

On behalf of concerned Idaho citizens, potentially impacted residents near oil and gas facilities, and over 3000 members, friends, and allies of Wild Idaho Rising Tide (WIRT) and Idaho Concerned Area Residents for the Environment (ICARE), we respectfully offer and request inclusion in the public record of these comments concerning the recently proposed, negotiated Rules Governing Oil and Gas Conservation in the State of Idaho, IDAPA 20.07.02. We incorporate into this official letter of opposition to and suggested revision of these proposed rules the concerns, remarks, and linked citations enclosed in previous WIRT and ICARE comments submitted to the Idaho Department of Lands (IDL), including our preliminary comments on Idaho oil and gas rulemaking and the proposed negotiated rules, the August 1, 2014 ICARE, Idaho Residents Against Gas Extraction (IRAGE), and WIRT comments on these oil and gas rules, and our comments addressing the latest, proposed, natural gas or oil wells in Payette County, Idaho (Alta Mesa Services applications requesting permits to drill the Kauffman 1-9 and 1-34 wells, the ML Investments 1-3, 1-11, and 2-10 wells, and the Smoke Ranch 1-21 well) and in Canyon County, Idaho (the Trendwell West application to drill the Smith 1-10 well). As noted in our earlier comments about the June 4 to July 22, 2014, negotiated rulemaking public meetings, processes, and outcomes, managed by the Idaho Department of Lands and privately audio recorded, IDL has not posted the designated final draft of the proposed negotiated rules on its website, to facilitate public input during a too-brief, belatedly-posted, ten-day comment period. So the comments in this letter reference the text and renumbered sections of the fifth negotiated rule draft, dated July 25, 2014, while drawing upon oil and gas rulemaking session agendas and citizen and attorney comments available privately, on the Idaho Department of Lands website, and via other electronic media [1, 2].

In April 2014, the Idaho Oil and Gas Conservation Commission (Commission) voted to enter into negotiated rulemaking, to improve and clarify the existing Rules Pertaining to Conservation of Crude Oil and Natural Gas, IDAPA 20.07.02. The Commission published a notice of intent about this process in the Idaho Administrative Bulletin on June 4, 2014, only two days before the first rulemaking session, with little advance notice to accommodate Idaho citizen participation. The Idaho Department of Lands held four negotiated rulemaking public meetings in the Idaho Capitol at 8:30 am MDT on June 6 and 18 and July 2 and 22. Purportedly state-initiated but

primarily industry-instigated, changes to the rules governing oil and gas development in Idaho are open to oral and written public comments and hearings on the final draft of the proposed rules. IDL oil and gas program manager Bobby Johnson managed these rulemaking sessions that attracted the attendance of industry representatives, attorneys, and lobbyists, agency staff, and stakeholders from Alta Mesa, the Idaho Association of Counties, Idaho Conservation League, Idaho Department of Water Resources, Idaho Petroleum Council, IDL, and concerned residents, citizens, landowners, and elected officials from counties presently or potentially impacted by oil and gas development.

Public Disclosure and Participation

As implied by Rule 6, Public Records Act Compliance, of the current draft of the proposed negotiated rules, "All records relating to this chapter are public records," except information obtained by the Idaho Department of Lands under these rules, which provisions of Title 9, Chapter 3 of Idaho Code exempts from public disclosure and which IDL may thus withhold in response to filed public records requests. Apparent in attempts by WIRT, ICARE, and scientific advisors to comment on seven drilling permit applications and associated materials submitted to IDL in 2013 and 2014, applicant requests for partial IDL confidentiality protections, allowed by these rules, have hampered legitimately concerned efforts to insert third-party citizen and expert oversight into permit issuance and well development procedures. Such rules have evidently encouraged substandard documentation by industry and agencies, through redacted and missing, but mandatory, portions of applications and questionable, non-transparent, and unaccountable agency deliberation and approval of permits, all of which avert public oversight and objections. These unreasonable designations of confidentiality neither instill public confidence in industry and the state nor do they protect public interests.

Rule 40, Public Comment, notes that, "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 [IDL] prior to permit approval or denial. Relevant comments will be posted on the Department's website following the comment period." As previously mentioned, confidentiality exemptions inhibit substantive citizen consideration of and comments about rules compliance, when the public cannot access large portions of applications and thus influence agency decisions. Moreover, delaying IDL website posting of comments denies collective community consideration of permit applications. These revised rules should extend the IDL website posting period for well drilling and well treatment permit applications from 15 to 30 days, prolong the public written comment period for both types of review from 15 to 30 days, allow for immediate posting of all comments, and archive all well drilling and treatment applications and permits in a publicly accessible place on the IDL website, where many past such documents are currently missing.

In perhaps a state and industry attempt to assuage fact-founded citizen concerns about high-profile controversies surrounding hydraulic fracturing (fracking) in other states, the proposed rules have added Reporting Requirements for Well Treatments (210.06.d) that mandate that oil and gas companies operating in Idaho submit "documentation demonstrating the chemicals used in the well treatment…to the website www.fracfocus.org, its successor website, or another publically accessible database approved by the [Idaho Department of Lands]." However, such disclosure does not reveal these chemical "recipes" nor does it ensure that companies accurately

and completely list all chemicals that may be protected by law as 'proprietary' or 'confidential.' We suspect that other Idaho laws frequently cited in the revised rules may limit public involvement in and oversight of dangerous industry practices, including use of chemical compounds in fracking and acidizing fluids. According to IDL oil and gas program manager Bobby Johnson, under Idaho Title 9 that protects and hides "trade secrets," a company agreeing to full disclosure of its well treatment chemicals can nonetheless claim "proprietary exemptions" that would block such information from the public. Industry spokesman John Foster recently wrote that, "We will follow the state's guidelines. The rules…allow the industry to claim a narrow, trade-secrets exemption if there is a competitive concern…Regardless, the information always goes to the Oil and Gas Conservation Commission and the Department of Lands" [3].

WIRT and ICARE appreciate that the state of Idaho, through these revised, negotiated oil and gas rules, requires full disclosure of all chemicals used in well treatments, but warns that public safety and economic vitality, especially regarding agricultural products and operations, will likely be severely compromised by Title 9 "secret sauce" exemptions. Industry may certainly seek later modifications of this 210.06.d language, further weakening these rules as they undergo the upcoming scrutiny of public hearings and legislative review. Additionally, these rules lack other precautions favoring Idaho citizens over oil and gas exploiters. They do not but should compel IDL and the Commission to release industry-reported but "privileged" well treatment chemical data in probable cases of public and environmental health emergencies and impacts wrought by spills, accidents, explosions, and other industry imposed vectors of air, water, and land pollution. These negotiated rules also do not but should force industry and state disclosure of the chemical constituents of drilling mud and well development fluids that likewise contain known toxic, carcinogenic, hazardous, and volatile substances.

Although the current well owners and permit lease holders in Payette County have constantly asserted that their companies do not intend to frack, documents submitted to the county by the previous industry drillers of those wells, Bridge Resources, clearly state otherwise. In a May 2013 response to WIRT and IRAGE statewide protests and nationwide publicity of Alta Mesa Services' scheme to extract gas from Birding Island at the Smoke Ranch well in Payette County, the Idaho Department of Lands released a Fact Sheet for Media with information that counters WIRT claims and displays alarming duplicity [4]. IDL, the administrative arm of the Idaho Oil and Gas Conservation Commission authorized in the conflicting roles of both leasing state lands and minerals and permitting drilling on them, said that,

> The IDL has received no applications to date for hydraulic fracturing. However, approximately half of the currently completed [11] wells in Idaho will need a *small frac job* [emphasis added] to clear the drilling mud from the *porous* [emphasis added] reservoir rocks. This frac job is estimated to be only about three percent of the size of frac jobs performed to extract oil or gas from shale, as is currently being done in North Dakota, Pennsylvania, and other places outside Idaho. This means they would only be using thousands of gallons of water and not millions…

This IDL statement represents written proof that Idaho is about to be fracked in a similar although smaller way as the American places most poisoned by this risky extraction method.

Mineral Rights and Lease Integration

Among the most troublesome of Idaho oil and gas rule changes favoring industry, the new IDAPA 20.07.02 rules and related prerogatives advanced by Governor Otter's appointed Oil and Gas Conservation Commission and Idaho Department of Lands staff would erode, if not eliminate, Idaho private property rights [5-7]. The state of Idaho and its agency and commission members are displaying corporatism at its best through this negotiated rulemaking process, as the predatory, corporate/capitalist, dirty energy status quo does as it pleases with landowner rights and lands. New "integration" rules 130 and 131 fortunately do not take effect until if and when the 2015 Idaho Legislature approves them, while the first application for such "forced pooling" looms on the Idaho Department of Lands website, and parallel oil and gas invasions of private lands and mineral rights continue all over the country [8]. The current Idaho rules could legally combine or force pool 45 percent of private property owners not participating in oil and gas operations or leases into relinquishing their rights to minerals taken from under their lands. Like landowners who do not own their subsurface minerals and accompanying rights in "split estates," the state of Idaho would allow extraction of oil and gas regardless of property owners' wishes. Regulators say that this policy ensures a limited number of wells in an area, to maintain the natural underground pressure critical to accessing a pocket of gas, and it protects correlated rights and mineral payments.

As the proposed negotiated rules now stand, if oil and gas companies lease 55 percent of the mineral rights in a square-mile section (640 acres), they can apply to the Idaho Oil and Gas Conservation Commission for integration, to force the remaining 45 percent of the mineral rights there into a "pool." Industry would prefer that only one percent of leased mineral rights in sections could compel this procedure, and any out-of-state or out-of-country mineral rights owner could similarly, although unfairly and inequitably, take advantage of adjacent home, land, and business owners. After making "good faith efforts" (undefined in the rules) to contact affected property owners, they can request a "hearing" to determine integration before a hearing officer, usually an industry expert appointed by the Idaho Department of Lands, unlike in trials in front of impartial juries or judges. The officer would not have to allow the forced landowner to pursue any kind of discovery or to produce supporting experts or witnesses, and could ultimately qualify the unwilling property holder as "deemed leased." In Idaho, where the state retains a great deal of the mineral rights under its lands and below surface property owners, this process challenges fundamental democracy, in full collusion with state rule and law makers.

Conveniently overlooked by these fossil fuel wranglers and unrealized by unsuspecting landowners, such "sinkhole" status risks foreclosure imposed by mortgage companies [9]. In the uniform deeds of trust for mortgages covered by any type of government guarantee or insurance (Federal Home Loan Mortgage Corporation, Federal Housing Administration, Federal National Mortgage Association, Veterans Administration, and others), a paragraph entitled Hazardous Substances describes most facilities and practices involved in oil and gas development, including drilling, post-extraction, and transportation activities and substances [10]. The next paragraph, Acceleration: Remedies, explains how landowner allowance of hazardous substances on the covered property can breach the contract and cause the lender to "accelerate" the mortgage, calling it immediately due and payable. Accordingly, IDAPA 20.07.02 Rules 130 and 131 give Idaho and the reckless oil and gas industry carte blanche authority to not only essentially steal

mineral rights but to impose structures and activities on properties, with or without underlying mineral rights, that chance mortgage default with lenders.

To rectify the blatant abuses of Idahoans' rights encouraged by these revised rules, WIRT, ICARE, and allies recommend that the Oil and Gas Conservation Commission drop integration from these negotiated rules altogether. Rules 130 and 131 do not necessarily prevent oil and gas resource waste and protect correlative rights and groundwater, as mandated by the encoded, overarching objectives of the Commission. Forced development, during the present times when the supply of natural gas is high and its market prices are low, may waste this resource in terms of its public value, while hurried production undermines the correlative rights of dissenting landowners, who may wish to retain their mineral assets until economic or personal factors favor greater rights-holder benefits. Risk, not protection, of groundwater increases with any drilling and associated disturbance of subsurface strata.

But if the state of Idaho insists on unfairly decimating private property rights to profit interloping, private, oil and gas extractors, Rule 130 should include clauses that ensure that the Commission issues an integration order for all tracts or interests within the spacing unit only when at least 75 percent of the mineral owners, through affidavits, support the integration application before any drilling occurs. This revised rule should also require that the integration application contains a plat of the spacing unit proposed for integration, which identifies the ownerships of tracts and the planned locations of all wells, pipelines, roads, and other production, transmission, and processing structures. While scheduling a formal hearing no less than 60 days after IDL receipt of the integration application, the Commission should appoint a hearing officer who allows hearing participants opportunities to conduct discovery and who has neither leased his or her mineral rights nor retained ownership interest in an oil or gas company operating in the state of Idaho. During this time, the Commission and this hearing officer should ensure that the applicant and all owners of mineral rights in the spacing unit proposed for integration receive by certified mail a notice of the hearing, a complete copy of the integration application, a resume of the geologist who prepared the geological report for the spacing unit, and disclosure of report funding.

Rule 131, Integration Orders, pertaining to Commission approval of integration applications, should allow the Commission to issue an integration order, after meeting the terms of Rule 130, which either approves the statement of proposed operations and various structure locations outlined in the plat of the spacing unit or prescribes modifications to protect property rights, privacy interests, and long-term human and environmental health and safety. The integration order should determine the time and manner in which all owners in the spacing unit may elect to participate, should prescribe the just and reasonable terms of payment of well drilling and operating costs, and should authorize appropriate well drilling and operation and other construction in the spacing unit. Upon Commission issuance of an integration order, the operator(s) of the integrated spacing unit should send a participation election form to all non-leased owners in unit, by certified U.S. mail requesting a return receipt. This form should clearly identify the participation terms, a response deadline no sooner than 30 days from the date of form receipt, and the implications of owner non-response.

Air and Water Quality Protection

Nowhere in these most recent, negotiated Idaho oil and gas rules can we find clauses that compel baseline data collection and ongoing scientific monitoring of freshwater sources around proposed and operating wells. WIRT, ICARE, and our allies representing thousands of Idaho and continent-wide citizens suggest that the Idaho Oil and Gas Conservation Commission, charged with protecting water resources potentially affected by oil and gas development, and the Idaho Department of Lands add the following provisions to the draft negotiated rules. These agencies should require operators to fund and accomplish baseline studies of nearby air quality and surface and groundwater quality, before any exploration, drilling, or permitting occurs, as well as ongoing monitoring, including air quality at fence lines near gas processing facilities. If the state or local governments allocate funds for broader, similar tests, the U.S. Geological Survey has pledged matching available funds for these purposes. To obtain representative groundwater quality samples, applicants should provide a monitoring well, if no water wells exist within the affected area, and should hire and pay a state-certified, county-approved hydrogeologist, who will determine the appropriate location and depth of surface and subsurface water quality sampling.

For each exploration and extraction project, a state-certified hydrogeologist should complete a groundwater protection plan. Operators should file baseline testing results and groundwater protection plans with the county and state 180 days prior to any development, so citizens, adjoining property owners, and responsible agencies can review and respond to the information. Ground water sampling and testing meeting the obligations of these rules should assess and document field parameters, including water temperature and pH, and specific conductivity, total dissolved solids, major ions (calcium, chloride, fluoride, magnesium, nitrate, potassium, silica, sodium, and sulfate), trace elements (aluminum, arsenic, barium, boron, iron, manganese, selenium, and uranium), radiochemical (gross alpha/gross beta radioactivity), ethane, propane, and especially organics (benzene, ethylbenzene, toluene, and xylene), and for samples with sufficient methane, its stable isotopic composition (carbon and hydrogen).

Flaring and Air Quality

Topography and weather patterns subject the Treasure Valley to some of the most severe and increasing incidences of atmospheric temperature inversions and accompanying polluted air quality conditions in the intermountain West. During winter months, cold air trapped at the valley floor below warmer air concentrates pollutants and the frigid temperatures that encourage even greater smog from home heaters and idling vehicles [11]. Among the ambient moisture inherent in the wetlands and floodplains surrounding the convergence of the Boise, Payette, and Snake Rivers – ground-zero for Idaho oil and gas development – inversions add humidity and dense fog, frost, and ice that accumulate near the ground across the landscape. But the nascent oil and gas industry in the state seems oblivious to this situation, proposing rules that set the southwestern Idaho gas drilling area on course for some of the most horrific airborne health hazards in the country, as experienced by oil and gas field residents of Colorado, Utah, Texas, and Wyoming.

During an unusually long, cold, and thick air inversion over the valley that lasted over three weeks in January and February 2013, Idaho agencies allowed unhealthy gas flaring at Payette

County natural gas wells around New Plymouth, for two to three weeks [12]. Constrained by few state rules and regulations on flaring and venting of natural gas, this intensive flaring may have tested gas reservoir size at three wells among the 11 purportedly conventionally drilled by financially challenged, Idaho oil and gas pioneer Bridge Resources. Esteemed colleagues of Idaho Residents Against Gas Extraction observed industry activity during that time. On January 11, 2013, an industry representative told a neighbor adjacent to the Teunnisen Dairy gas well that his company would be flaring and transporting the resulting oil/water mixture to Salt Lake City refineries. No critical infrastructure, like pipelines and processing plants built to accommodate and connect with the Williams Northwest Pipeline and Idaho Power's Langley Gulch power plant, could move this payload to market.

Although flaring relieves accumulated pressure (and plenty of health-wrecking, climate-altering gases) behind well valves, it seems like just another method for profit-driven energy companies and their investors to access more lucrative and marketable condensate "wet gas" and/or oil, like in the Bakken shale region of North Dakota. That state's Department of Mineral Resources allows drillers to burn off 30 percent of the natural gas now extracted as a byproduct of oil production, for up to a year with extensions. Such senseless waste of the natural gas resource, carried to the surface with more profitable oil, forgoes the high industry cost of building infrastructure to clean and compress natural gas and pump it through pipelines. But the profusion of flaring fires in these fracking fields, seen from deep space burning in the North Dakota night, imposes severe climate and human health degradation issues. As scientific studies note, the health implications of flaring could buttress arguments for an injunction in a civil lawsuit requesting a flaring ban. Even an industry insider asserts that, "If you ban flaring (assuming that venting is verboten), then you would be banning oil production, and you would never know if the associated gas could be recovered…" [13]. As guardians of the public lands and minerals and subsequent public health, the Commission and IDL should consider well this research report excerpt, before again capriciously and arbitrarily allowing any flaring or venting in the inversion-prone Treasure Valley or establishing and implementing associated, destructive state rules:

> …Between 0.2 to 35 kilometers [up to 22 miles] from the flare stack, gas flares have harmful effects on the health and livelihood of the communities in their vicinity, as they release a variety of poisonous chemicals. Some of the combustion by-products include nitrogen dioxides, sulfur dioxide, volatile organic compounds like benzene, toluene, xylene, and hydrogen sulfide, as well as carcinogens like benzapyrene and dioxin…These chemicals can aggravate asthma, cause breathing difficulties and chest pain as well as chronic bronchitis…[and] adverse health effects…ranging from mortality and hospital admissions to respiratory symptoms and decrements in lung function…Pollution and degradation arising from oil and natural gas exploitation [impact]…a decrease in agricultural yield, depression in flowering and fruiting in crops and trees, deformities in children, lung damage and skin problems, increasing concentrations of airborne pollutants, acidification of soils and rainwater, corrosion of metal roofs, and significant increases in concentrations of sulfates, nitrates, and dissolved solids, with associated socio-economic problems…Flares…coat the land and communities in the area with soot and

> damage adjacent vegetation. Almost no vegetation can grow in the area directly surrounding the flare, due to the tremendous heat it produces… [14]

To be clear, Wild Idaho Rising Tide and Idaho Concerned Area Residents for the Environment oppose language in Rule 413, which should be modified to explicitly ban the practice of non-emergency gas release by flaring or venting during regular operations at wells and gas processing facilities not constructed on well sites. Many states have enacted such bans on flaring of cheaper dry gas and have thus conserved – not wasted – that resource. After a well is completed or recompleted and while it is being tested, the owner or operator should not be allowed to flare gas for any amount of time. Such wording precludes the need for royalty and severance tax fines or owner/operator notifications prior to flaring gas, sent to of IDL, the county, all landowners within the ridiculously inadequate distance of a one-quarter mile radius of the well, and all at-risk populations, including day care centers, schools, nursing homes, hospitals, and individuals with compromised respiratory health or who have requested such notice, within a suggested five mile radius.

Other Idaho Oil & Gas Rule Concerns

Wild Idaho Rising Tide and Idaho Concerned Area Residents for the Environment also harbor myriad concerns about the proposed, draft Idaho oil and gas rules as currently written. As demonstrated by regulator discussion and behavior at recently-concluded negotiated rulemaking sessions, we believe that state commissions and agencies will largely ignore our requests for stronger IDAPA 20.07.02 rules that could significantly improve protections of Idahoans' democratic participation, property rights, and air and water quality. As the Idaho Department of Lands presents these rule changes, governing development of the state's modest oil and gas play, to the Idaho Oil and Gas Conservation Commission on Tuesday, August 5, 2014, we assume that decision makers may once again favor industry over the best interests of Idaho citizens. Although the proposed rules will again undergo public scrutiny through a hearing and 21-day comment period in early September 2014, we suspect that few citizen-suggested alterations will occur before commission approval and Idaho Legislature consideration and enactment [15].

But for the public record, we incorporate into these comments and refer the Commission and IDL to the Comments on Negotiated Rulemaking IDAPA 20.07.02 offered by Idaho Concerned Area Residents for the Environment, Idaho Residents Against Gas Extraction, Wild Idaho Rising Tide, and numerous tribal and Idaho citizens. Those comments seek to increase regulation of an industry that conspicuously overlooked Idaho oil and gas resources for more than a century, until the disastrous advent and aftermath of extreme energy extraction techniques and technology, such as fracking and acidizing oil and gas reserves. To further ensure the betterment of the lives and livelihoods of Idahoans, the best management practices of state regulatory agencies, and higher standards and reasonable guidelines for oil and gas development in Idaho, we advocate that these proposed, negotiated Idaho oil and gas rules:

* Provide more transparency and information in operator applications for well drilling, completion, and treatment
* Mandate earlier and more frequent public notification of development activities and monthly production reports from well and processing facility operators

* Require pre-drilling environmental assessments open to public review, and expand state publication of legal notices
* Extend buffer distances beyond 200 feet between drilling, fracking, and processing operations and public and private structures and all freshwater sources
* Increase to greater than 200 feet the space between wells, tank batteries, and dikes and surface water high water marks, water wells, occupied structures, and highways
* Offer better public opportunities to participate in and appeal IDL decisions on applications for exceptions to well location and spacing requirements
* Raise bonding responsibility for active and inactive wells, to cover state costs to plug abandoned wells
* Confer stronger, unwaivable state inspection and oversight of casing, cementing, and drilling operations
* Require landowner/operator acceptable fencing around well sites to maintain safety and security and to prevent wildlife and livestock access
* Restrict the presence of trash, debris, and scrap metal and the storage of produced oil and gas and unused chemicals at well sites
* Provide more robust measures for spill containment and fire protection at well pads and processing facilities and along pipelines and transportation routes
* Heighten quality and safety requirements and inspection of blowout prevention and heavy equipment
* Regulate gas processing facilities through accurate metering and monitoring, safety precautions, quarterly state inspections, operator/landowner acceptable fencing, half-mile-plus setbacks from adjacent property, and public access to facility design plans, well connection reports, and log books

Wild Idaho Rising Tide and Idaho Concerned Area Residents for the Environment respectfully request that, through the promulgation of these negotiated oil and gas rules, the Idaho Oil and Gas Conservation Commission and the Idaho Department of Lands uphold citizen rights to clean air and water and a strong local democracy and economy based on healthy lands and solid infrastructure undiminished by mercenary corporate and state interests.

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