A SUMMARY OF REVISIONS TO IDAHO'S OIL AND GAS CONSERVATION ACT AND RULES: RESPONDING AS PRODUCTION IN IDAHO NEARS REALITY

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A SUMMARY OF REVISIONS TO IDAHO'S OIL AND GAS CONSERVATION ACT AND RULES: RESPONDING AS PRODUCTION IN IDAHO NEARS REALITY

JOHN F. PEISERICH* AND MICHAEL R. CHRISTIAN**

I. A SHORT HISTORY OF OIL AND GAS EXPLORATION IN IDAHO

Idaho has no historic production of oil and gas resources. This does not mean hydrocarbons are not present in Idaho, or even well known. For many years some oil and gas potential has been recognized in the state. Between 1903 and 1988, about 145 wells were drilled in the state.[1] Exploration has been concentrated in two primary areas—the southeast thrust belt, which is the source of oil production in Wyoming and Utah, and the western Snake River Plain.[2]

These historic wildcat efforts produced varying results—complete busts, dry holes, and some exciting "discoveries," such as a blowout of the Oregon Oil and Gas No. 1 near Payette in 1907, which was reported to have thrown water, oil, and "boulders nearly as large as a man's head" up to 200 feet in the air,[3] and the 1927 Teton Valley Land and Leasing No. 1 well, which hit a natural gas pocket and burned itself to the ground in the process.[4] The western Snake River Plain had several showings of natural gas during exploration, but nothing in commercial quantities through 1980.[5] Farmers, ranchers, and others living in the western Snake River

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1. John D. McLeod, *The Search for Oil and Gas in Idaho*, *in* GEONOTE 21 (Idaho Geological Survey, 1993).

2. *Id.*

3. THE SPOKESMAN REVIEW, Nov. 5, 1907, at 9.

4. McLeod, *supra* note 1.

5. *Id.* Commercial viability of natural gas production was also complicated by the lack of transmission facilities until the construction of the Northwest Pipeline across southern Idaho during the 1950s.

Plain recalled water wells "popping" their well heads from time to time because of natural gas.[6] Several wells in the area produced steady but small streams of natural gas over many years, and some property owners in Payette County were reported to have used these wells to heat their homes for decades.[7] During the 1980s, exploration focused on the east side of the state, with major oil companies drilling to explore depths up to 16,000 feet.[8]

The Idaho Geological Survey now reports maintaining files on over 150 oil and gas wells in the state.[9] Approximately fifty wells were drilled between 1980 and today.[10] The latest round of exploration began in 2010 and continues today.[11] Exploration is mostly in the western Snake River Plain and is concentrated in an area now known by the participants as the Western Idaho Basin, encompassing Payette and Washington Counties and extending into Canyon, Gem, and Owyhee Counties and eastern Oregon.[12] Since 2007, fourteen permits to drill have been issued by the Idaho Oil and Gas Conservation Commission.[13]

Current development began with Bridge Resources Corporation ("Bridge"). Bridge first acquired lease acreage in the Western Idaho Basin for exploration through a series of transactions with BEPC, which had acquired the concept from Thomasson Partners.[14] Ultimately, Bridge and Paramax Resources, Ltd. ("Paramax") entered into a joint venture agreement and began exploration.[15] In March 2010, Bridge, the operator for the joint venture, started drilling its first five wells, which resulted in the discovery of the Willow and Hamilton fields near New Plymouth.[16] Based upon the success of the initial drilling program, Bridge initiated a second well program of six wells to appraise the Willow and Hamilton discover-

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6. Interview with David Hawk, Member, Idaho Geological Survey Advisory Board (July 2011). Mr. Hawk is a geologist who spent almost twenty-three years as Director of Energy for J.R. Simplot Company.

7. *Id.* One of the authors of this article has also received reports, from a land owner in the New Plymouth area, of shallow gas present in domestic and irrigation wells being ignited, similar to the infamous scene in the film "Gasland." Despite the attention paid to hydraulic fracturing nationally in recent years, the Colorado Oil and Gas Conservation Commission concluded that the methane present in the flammable faucet in "Gasland" was not actually related to oil and gas drilling. *E.g.*, Bill Ritter, Jr., *Gasland Correction Document*, STATE OF COLO. OIL & GAS CONSERVATION COMM'N, (Oct. 29, 2010), http://cogcc.state.co.us/library/GASLAND%20DOC.pdf.

8. *See* Jerry L. Harbour and Roy M. Breckenridge, *Summary of the Overthrust Belt in Parts of Wyoming, Utah, and Idaho, in* TECHNICAL REPORT 80–89 (Idaho Geological Survey, 1980); Roy M. Breckenridge, *Oil and Gas Exploration in Idaho, 1983-1984, in* TECHNICAL REPORT 84–86 (Idaho Geological Survey, 1984); Earl H. Bennett et al., *Maynard Minerals, Mining, and Energy in Idaho, 1985*, INFORMATION CIRCULAR 41, at 31 (Idaho Geological Survey, 1987).

9. IDAHO GEOLOGICAL SURVEY: IDAHO OIL AND GAS, http://www.idahogeology.org/ services/Oilandgas/Table.asp (last visited Jan. 17, 2013).

10. *Id.*

11. *See* MEMORANDUM FROM THE IDAHO DEP'T OF LANDS TO IDAHO OIL AND GAS CONSERVATION COMM'N, (Apr. 11, 2011), *available at* http://www.idl.idaho.gov/bureau/oil-gas/recommended_spacing_order.pdf; Meagher Oil, *Western Idaho Basin*, http://www.meagheroil.com/resources/project/Bridge%20and%20 Paramax/ (last visited Jan. 17, 2013).

12. Meagher Oil, *supra* note 11.

13. STATE OF IDAHO DEPARTMENT OF LANDS: OIL & GAS DRILLING PERMITS, http://www.idl.idaho.gov/bureau/oil-gas/permits/drillpermits.html (last visited Jan. 17, 2013).

14. IDAHO NAT'L RESOURCES: W. IDAHO BASIN RECENT DEVS., http://www. id-nrc.com/recentdevelopments.html (last visited Jan 17, 2013).

15. *Id.*

16. *Id.* Generally, the Willow field is deeper and appears to contain a liquid hydrocarbon fraction, while the Hamilton field is shallower and appears to contain dry gas. *See* IDAHO NATURAL RESOURCES: HISTORY, http://idnrc.com/history.html (last visited Jan. 9, 2013).

ies.[17] In all, Bridge drilled eleven wells, which were completed by November 20, 2010, and provided evidence that commercially prospective oil and gas had been found in Idaho for the first time.[18]

Bridge's and Paramax's Idaho assets were acquired in early 2012 by a group headed by Alta Mesa Holdings, L.P. ("Alta Mesa") of Houston, Texas.[19] Alta Mesa conducted an extensive seismic survey of the Willow Field over a fifty-two square mile area in the latter part of 2012.[20] As of this writing Alta Mesa is about to embark on further testing of several of the wells that Bridge drilled in the Western Idaho Basin, and, after evaluation of the data generated by the seismic survey, it may drill additional wells in the basin in 2013. Successful testing of the existing wells and completion of commercially productive new wells will likely prompt the construction of gathering pipeline to connect productive wells to the Williams Northwest Pipeline, marking the beginning of oil and gas production in Idaho.

II. TEMPORARY RULES AND NEGOTIATED RULEMAKING TO UPDATE IDAHO'S OIL AND GAS RULES

Oil and gas exploration, development, and production in Idaho are regulated by the Idaho Oil and Gas Conservation Commission ("IOGCC"), the membership of which is identical to the State Board of Land Commissioners ("Board").[21] The Idaho Department of Lands ("IDL") functions as the administrative arm of the IOGCC and the Board.[22] As a result of Bridge's efforts and the potential for development of an oil and gas resource in Idaho, IDL began consideration of additional rules and legislative changes to modernize the regulatory environment.

A. Temporary Rule for Well Treatments

Effective April 19, 2011, the IOGCC approved a temporary rule for well treatments.[23] In the notice regarding the adoption of the temporary rule, IDL noted that its rules contained no standards for well treatments and hydraulic fracturing performed in the initial development of oil and gas resources, that new wells in the gas field being developed near New Plymouth were near that town's domestic water supply wells, and that officials in Payette County and New Plymouth had expressed concerns regarding the potential for ground water issues associated with the gas wells and well treatments.[24]

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17. IDAHO NAT'L RESOURCES: W. IDAHO BASIN RECENT DEVS., *supra* note14.
18. *Id.*
19. *Id.*
20. IDAHO OIL AND GAS COMM'N, GEOKINETICS USA, INC. SEISMIC PERMIT APPLICATION NO. LU600079 (2012), *available at* http://www.idl.idaho.gov/bureau/Minerals/min_leasing/LU600079_Permit.pdf.; IDAHO OIL AND GAS COMMISSION, GEOKINETICS USA, INC. Seismic Permit Application No. LU600088 (2012), *available at* http://www.idl.idaho.gov/bureau/Minerals/min_leasing/geokinetics-app.pdf. The survey involved both 3-D and 2-D seismic, the generation of seismic signal from over 7,300 points, and the collection of signal data at over 26,100 points. *Id.*
21. IDAHO CODE ANN. § 47-317 (2009).
22. *Id.*; IDAHO CODE ANN. § 58-105 (2009).
23. 11-6 Idaho Admin. Bull. 30 (June 1, 2011), *available at* http://adminrules.idaho.gov/bulletin/2011/06.pdf.
24. *Id.*

The temporary rule was the first regulatory change related to recent oil and gas development. Despite a lack of historic exploration and production, Idaho had proactively passed legislation and enacted rules governing the industry as early as the 1960s.[25] To adopt the temporary rule, pursuant to Idaho Code section 67-5226(1)(a), the governor found that the rule was needed to ensure the protection of the public's health, safety, and welfare.[26] The temporary rule added section 055 to IDAPA 20.07.02, the Rules Governing Oil and Gas Conservation in the State of Idaho ("Rules").[27] The temporary rule was primarily focused on concerns related to hydraulic fracturing. Although the rule was not restricted to hydraulic fracturing, it defined a "well treatment" as including actions performed on a well to acidize, fracture, or stimulate a well or the surrounding earth materials.[28]

Key to the temporary rule was the application process. It provided IDL with the information needed to evaluate any Application for Permit to Drill (which is required under section 050 of the Rules) that included plan for a well treatment.[29] Approval of both the Application for Permit to Drill and the well treatment were required prior to an operator beginning the treatment.[30] The temporary rule required that the application include "permit number [if previously issued], well name, well location, and as-built description[.]"[31] Further, permit applications could be denied if they did not include the following information: permit number, if previously issued; well name; well location; as-built description; depth to perforations or the openhole interval; source of water; trade name and content of fluids; type of proppants; estimated pump pressures; methods for the storage and disposal of well treatment fluids; size and design of storage pits (if proposed); expected fracture length in both the horizontal and vertical directions; information specific to hydraulic fracturing as described elsewhere in the rule; groundwater protection plan demonstrating how groundwater resources will be protected from contamination; geologic well logs identifying all potable water aquifers currently being used from the surface down to the bottom of the surface casing or 800 feet below the surface, whichever is greater, and their vertical distance from proposed treatment zones; and certification by a registered professional engineer that all aspects of the well construction, including the suitability and integrity of the cement used to seal the well, are designed to meet the requirements of proposed well treatments.[32] The IDL could also require additional information with no restrictions or requirements for the additional request.[33]

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25. IDAHO CODE ANN. § 47-315 (2009) (Idaho's Oil and Gas Conservation Act was originally enacted in 1963.).

26. 11-6 Idaho Admin. Bull. 30 (June 1, 2011), *available at* http://adminrules.idaho.gov/bulletin/2011/06.pdf.

27. *Id.* at 30–31.

28. *Id.* (temporary rule § 055.01). While there has been much national attention paid in the last few years to hydraulic fracturing of shale formations, the known extent of the resource in the Western Idaho Basin is hosted in non-marine fluvial and lacustrine turbidite sands. *See* W. IDAHO: GEOLOGICAL SUMMARY, http://idnrc.com/geologicalsurvey.html (last visited Jan. 17, 2013) (stating that none of the wells most recently drilled in the basin have been hydraulically fractured).

29. 11-6 Idaho Admin. Bull. 31 (June 1, 2011) (temporary rule § 055.02).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

The temporary rule specifically addressed hydraulic fracturing, or fracking, in section 055.07. It defined "hydraulic fracturing" as a method of stimulating or increasing the recovery of hydrocarbons by perforating the production casing and injecting fluids or gels into the surrounding rocks at extremely high pressures (up to 10,000 psi and higher).[34] It then required the following of an operator:

- Demonstration via a suitable mechanical integrity test that the selected casing can withstand the anticipated treatment pressures.[35]
- Information regarding the geological names, descriptions and depths of the formation into which stimulation fluids are to be injected.[36]
- The real reason behind promulgating the temporary rule, detailed information regarding the base stimulation fluid source (the carrier fluid for the proppant and chemistry) and the chemical additives, compounds and concentrations or rates proposed to be mixed and injected, including: stimulation fluid identified by additive type; the chemical compound name and Chemical Abstracts Service (CAS) number for each additive; and the proposed rate or concentration for each additive.[37] The IOGCC retained discretion to request the formulary disclosure for the chemical compounds used in a well stimulation.[38]
- To ensure acceptable operating pressures, the operator had to "provide a detailed description of the proposed well stimulation design," including "[t]he anticipated surface treating pressure range."[39] Interestingly, in a state with no industry experience, IDL required a registered professional engineer to certify that the proposed maximum operating pressure was within safe limits.[40] The fracturing plan was to include "[t]he estimated or calculated fracture length and fracture height."[41]
- The rule provided that the injection of volatile organic compounds (VOCs) such as benzene, toluene, ethyl benzene and xylene (the specific group of which is known as "BTEX compounds"), or any petroleum distillates into groundwater was prohibited.[42]
- However, produced water containing petroleum distillates could "be used as well stimulation fluid in hydrocarbon bearing zones."[43] These two provisions appear to be on opposite ends of the spectrum; however, the confusion is relat-

34. *Id.* at 32 (temporary rule § 055.07(a)).
35. *Id.* (temporary rule § 055.07(b)).
36. *Id.* (temporary rule § 055.07(c)).
37. *Id.* (temporary rule § 55.07(d)).
38. *Id.*
39. *Id.* (temporary rule § 055.07(e)).
40. *Id.*
41. *Id.*
42. *Id.* at 33 (temporary rule § 055.07(g)). The problem with this broad prohibition was that "ground water" is defined in Idaho to include any subsurface water. Idaho Code § 42-230(a) (defining "ground water" as "all water under the surface of the ground whatever may be the geological structure in which it is standing or moving"). This technically includes hydrocarbon-bearing zones that contain water but also naturally contain BTEX compounds, and the water, in which is unsuitable for most uses as a result of being commingled with hydrocarbons.
43. *Id.* "Produced water" is water produced with oil or gas from a well. Thus, the temporary rule appeared to: (a) prohibit the injection of non-native VOCs including BTEX compounds into hydrocarbon-bearing zones; but (b) allow the injection of produced water containing VOCs including BTEX compounds into hydrocarbon-bearing zones.

ed to the terminology used in crafting the rule, which failed to reflect the actual geologic circumstances that may occur.

- The operator was required to monitor and record the annulus pressure including pressure between intermediate casing, if set, and the production casing;[44] if the annulus pressure increased by more than 500 pounds per square inch gauge as compared to the pressure immediately preceding the stimulation, the operator was required to verbally notify the IOGCC as soon as practicable but no later than twenty-four hours following the incident.[45]
- Upon completion of the well stimulation, the operator was required to submit a report of the same information detailed in the application including the materials used and the pressures reached.[46] As an alternative to reporting these items themselves, operators could submit service company tickets which provide the information.[47]

The remainder of the temporary rule, Section 055.08, prohibited the use of pits or other subsurface storage of completion fluids from well treatments conducted "within Idaho Department of Environmental Quality (DEQ) public drinking water system delineated well capture zones."[48] "Operators [were] required to store and transport" well completion fluids "using above ground storage facilities and tanker trucks for well treatments in these locations."[49] The rule also allowed the IOGCC to require operators to complete groundwater monitoring before and after well treatments in such zones, using existing water wells or installed groundwater monitoring wells (installed at the cost of the operator).[50] IDL retained the right to determine the number of monitoring locations and the type of monitoring, including frequency.[51] This combination of uncertainty and potential significant expense arguably created a disincentive to conduct exploration and development work, at least during the pendency of the temporary rule, in areas designated as public drinking water system delineated well capture zones.

B. Negotiated Rulemaking to Update IDAPA 20.07.02

Following adoption of the temporary rules for well treatments, IDL conducted negotiated rulemaking to overhaul the agency's oil and gas rules in their entirety. The rules in their then-current form had not changed since 1992.[52] As there had been no production in the state, and thus no experience from which to expand and update the rules, they could be described as basic.

IDL issued a notice of the negotiated rulemaking process on May 25, 2011.[53] Negotiated rulemaking was conducted through the summer of 2011 over ten sessions starting July 20, 2011.[54] Fifty individuals actively participated in the negotia-

44. *Id.* (temporary rule § 055.07(h)).
45. *Id.*
46. *Id.* (temporary rule § 055.07(i)).
47. *Id.*
48. *Id.* at 33–34 (temporary rule § 055.08(a)).
49. *Id.* at 33.
50. *Id.* at 34 (temporary rule § 055.08(b)).
51. *Id.*
52. IDAHO ADMIN. CODE r. 20.07.02 (2011).
53. 11-7 Idaho Admin. Bull. 133 (July 6, 2011).
54 *Id.*

tions, and a total of 133 attendees signed in over the ten sessions.[55] Attendance at the sessions ranged from six to thirty individuals.[56] IDL also conducted meetings with other state agencies outside the negotiation sessions, and spent significant additional time researching relevant issues and revising drafts of the rules.[57]

Following the conclusion of the negotiation sessions, IDL conducted a hearing on October 12, 2011, to receive public comment on the final draft of the proposed rules.[58]

On December 21, 2011, the IOGCC adopted the final draft that resulted from the negotiated rulemaking process as both a pending rule, to be submitted to the legislature for review, and as a temporary rule to ensure its effectiveness as to any activity between then and the conclusion of the legislative session.[59] Simultaneously, it rescinded the temporary rule it had earlier adopted regarding well treatments, as those requirements were incorporated into and expanded in the pending and new temporary rule.[60]

According to the summary provided to the legislature with the final revisions to the rules, the new version contains the following changes:[61]

- Formatting changes were made to conform with chapter 52, title 67, Idaho Code;
- Changes were made to definitions for the purpose of consistency and clarity;
- Thirty-eight of fifty-two definitions were added or changed from the 1992 version of the rules;
- "Hydraulic fracturing" and "proppant" along with fifteen other terms were added to the definitions;
- "[Well drilling permit requirements were expanded to ensure that the [D]epartment has the information needed to properly review them."

In the 1992 version of the rules, with an Application for Permit to Drill, an operator was to submit "an accurate plat showing the location of the proposed well with reference to the nearest lines of an established public survey."[62] Additional information to be supplied included "the type of tools to be used," "proposed depth to which the well [was to] be drilled, estimated depth to the top of the important [geological] markers, [and the] estimated depth to the top of" objective horizons[;] the proposed casing program, including size and weight thereof[;] the depth at

55. Email from Eric Wilson, Manager, IDL Minerals Program, to the author (Nov. 27, 2012) (on file with author). Mr. Wilson ably directed the negotiated rulemaking sessions and was responsible for the several draft revisions to the rules that were prepared and reviewed through the process. The authors each attended most of the negotiation sessions, and between them attended all of the sessions. Participants in the negotiation sessions included representatives of industry, environmental interest groups, water user associations, local governments, the Idaho Department of Environmental Quality, and the Idaho Department of Water Resources. The authors estimate that aside from the approximately seventy hours of negotiation sessions, they each spent at least that much time again on reviewing drafts, researching issues for discussion, and preparing written comments and proposed language.

56. *Id.*

57. *Id.*

58. 11-10 Idaho Admin. Bull. 454 (Oct. 5, 2011).

59. 12-1 Idaho Admin. Bull. 137 (Jan. 4, 2012).

60. *Id.* at 126.

61. See *id.* at 126, 137.

62. IDAHO ADMIN. CODE r. 20.07.02.050.04 (2011).

which each casing string [was] to be set, and the amount of cement to be used."[63] Information was also to be provided "relative to the drilling plan, together with any other information which may be required by the [IOGCC]."[64]

In the newly revised version of Idaho's oil and gas rules, the following is required to be included with an Application for Permit to Drill:[65]

- An accurate plat showing the location of the proposed well with reference to the nearest lines of an established public survey;
- The location of the nearest structure with a water supply, or the nearest water well as shown on the Idaho Department of Water Resources registry of water rights or well log database;
- Information on the type of tools to be used and the proposed logging program;
- 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;
- The proposed casing program, including size and weight thereof, the depth at which each casing string is to be set;
- The type and amount of cement to be used, and the intervals cemented;
- Information on the drilling plan;
- Best management practices to be used for erosion and sediment control;
- A plan for interim reclamation of the drill site after the well is completed, and a plan for final reclamation of the drill site following plugging and abandonment of the well; these plans must contain the information needed to implement reclamation as described in subsection 080.15 and section 325 of the rules;
- Applications that include the following actions must also provide the information from the respective section of these rules:
    - Well treatments require the submittal of the information in section 055;
    - Pit construction and use requires the submittal of the information in section 085; and
    - Directional or horizontal drilling requires the submittal of the information in Section 170;
- Any other information which may be required by the Department based on site-specific reasons.

Obviously, the revised rules require substantially more information to be provided to IDL before a permit to drill will be issued. Additionally, and not typically found in oil and gas applications found in other states, a public comment period on applications was added.[66]

In a fairly substantial change from both the 1992 rules and temporary rule adopted in April, 2011, section 055, relating to well treatments, grew dramatically.[67] While the rule now recognizes that well activities below the fracture gradient do not necessitate such burdensome measures, completion activities that are conducted beyond acid cleaning of perforations now require burdensome reporting,

63. *Id.*
64. *Id.*
65. IDAHO ADMIN. CODE r. 20.07.02.050.04 (2012).
66. *Id.* r. 20.07.02.051.
67. *Id.*

record keeping, and, in some cases, sampling and monitoring.[68] In addition to the information required in an Application for Permit to Drill, the following information is required:[69]

- Depth to perforations or the openhole interval;
- The source of water or type of base fluid;
- Additives, meaning any substance or any combination of substances including proppant, having a specified purpose that is combined with base treatment fluid by trade name, if available, and Material Safety Data Sheet ("MSDS") for each additive;
- Type of proppant(s);
- Anticipated percentages by volume and total volumes of base treatment fluid, individual additives and proppant(s);
- Estimated pump pressures;
- Method and timeline for the management, storage, and disposal of well treatment fluids, including anticipated disposal site of treatment fluids or plans for reuse;
- Size and design of storage pits, if proposed, in conformance with section 085 of the rules;
- Information specific to hydraulic fracturing as described in section 056 of the rules;
- Summary identifying all water bearing zones from the surface down to the bottom of the well;
- A fresh water protection plan describing the proposed site-specific measures to protect water quality from activities associated with well treatments; the Department will review this plan in consultation with DEQ; the Fresh Water Protection Plan must include the following information:
    - o Ground water and storm water best management practices;
    - o Statement certifying that the owner or operator is complying with Spill Prevention, Control, and Countermeasures (SPCC) requirements administered by the EPA;
    - o A preconstruction topographic site map or aerial photos identifying all habitable structures, wells, perennial and intermittent springs, surface waters, and irrigation ditches within one-quarter (1/4) mile of the oil or gas well. The distance or location may be changed based on site-specific factors such as horizontal drilling, the expected length of fractures, or lack of suitable water sample locations within one-quarter (1/4) mile;
    - o A brief description of the structural geology that may influence ground water flow and direction; and
    - o The general hydrogeological characteristics of the treatment area and surrounding land;

68. IDAHO ADMIN. CODE r. 20.07.02.055.01 (2012).
69. *Id.*

- Certification by the owner or operator that all aspects of the well construction, including the suitability and integrity of the cement used to seal the well, are designed to meet the requirements of proposed well treatments;
- An affidavit signed by the owner or operator stating that all home owners and water well owners within one-quarter (1/4) mile of the oil or gas well, and all owners of a public drinking water system that have a DEQ-recognized source water assessment or protection area within one-quarter (1/4) mile of the oil or gas well, have been notified of the proposed treatment; if a well deviates from the vertical, these surface distances will be from the entire length of the well-bore from the surface to total depth; (the notification will also offer an opportunity to have the owner or operator sample and test the water, at the owner or operator's cost, prior to and after the oil or gas well being treated; notification must be by certified mail to the surface owner as identified by the county assessor's records, or to the well owner as identified on the IDWR registry of water rights or well log database);
- Proof of publication in a newspaper of general circulation in the county where the well is located of a legal notice briefly describing the well treatment to be performed; (the notice must also advise all water well or public drinking water system owners, as described in Section 055.01.m. of the rules, of the opportunity to have their water tested at the owner's or operator's cost before and after the well treatment);
- Additional information as required by the Department.

The two items of greatest concern are: (1) the groundwater protection plan, simply because it is not fully defined but imposes requirements without limits, which can lead to overreaching on the part of the regulating agency; and (2) the water well and drinking water system sampling requirement. The sampling requirement is troublesome for the same reason as noted for the groundwater protection plan requirement, but more problematic is the lack of information concerning water well or drinking water system construction, maintenance, and geologic factors.[70] Without adequate construction standards and knowledge of the as-built circumstances, the sampling information obtained has little if any value. Additionally, without historic groundwater information, one or two samples are unlikely to evidence any trends. The rule does not address the potential liabilities created by requiring an owner/operator to sample wells and the possible issues related to that physical activity.[71] The analysis is undefined, which opens up questions about appropriate analyses, methodologies, and cost. Finally, a consequence of sampling is the identification of contamination prior to oil and gas exploration activities. No provisions are made for the discovery of preexisting contamination that may present a risk to human health and the environment. Such a finding could have substantial financial impacts and, if not reported, health impacts from the drinking water sources to be sampled.

Similar concerns arise related to the sampling required under section 055.07 of the revised rules, which requires monitoring of surface waters, or groundwater if

70. *See generally* MICHAEL J. BARCELONA, JAMES P. GIBB, JOHN A. HELFRICH & EDWARD E. GARSKE, PRACTICAL GUIDE FOR GROUND-WATER SAMPLING (1985), *available at* http://www.epa.gov/oust/cat/pracgw.pdf.

71. Pennsylvania has enacted a liability scheme related to groundwater contamination by oil and gas activities, but it has since been repealed. *See* 58 P.S. § 601.208(d)(1) (repealed 2012).

no surface water is present, within the predetermined radius.[72] Concerns here range from the lack of historical information regarding surface water to potential construction of monitoring wells in the appropriate geologic zone. It would not be practical to construct monitoring wells in the oil- and gas-producing zone where the well treatment would occur; effectively one would simply be drilling a second oil and gas well, likely doubling the cost.[73]

As a general rule, the requirements related to hydraulic fracturing in the temporary rule carried over to the final version approved by the legislature.[74] There is one notable exception. In Section 056.02, IDL recognized that a complete prohibition on the use of hydrocarbon-based products in well treatment is unreasonable and changed the language to allow the use of such materials as additives in concentrations that ultimately did not exceed water quality standards.[75]

The 1992 version of the rules provided for individual well bonds of at least $10,000, and statewide blanket bonds of at least $25,000.[76] With support from industry and non-governmental organizations, IDL increased bond amounts and imposed additional bonding requirements in the revised rules.[77] The higher bonds and increased obligations were added to decrease the potential well-plugging liabilities for the state and in recognition of abandoned well issues in other jurisdictions resulting from historic operations.[78] The revised rules set out the following obligations:[79]

- Except as may be otherwise required, the owner or operator must provide a good and sufficient bond in favor of IDL in the sum of not less than $10,000 plus $1 for each foot of planned well length. The bond must be conditioned upon the performance of the owner's or operator's duty to comply with the requirements of the Act and the rules of the IOGCC, with respect to the drilling, maintaining, operating, and plugging of each well drilled for oil and gas and the reclamation of surface disturbance associated with these activities. The bond must remain in force and effect until the plugging of the well is approved by IDL and the well site is reclaimed as required under the rules, or the bond is released by IDL.
- In lieu of an individual bond, an owner or operator may file with the IDL a good and sufficient blanket bond covering all active wells drilled or to be drilled in the state. The amount of the blanket bond will be as follows according to the number of active wells covered by the bond:
    - Up to ten wells, $50,000;
    - Eleven to thirty wells, $100,000;

72. IDAHO ADMIN. CODE r. 20.07.02.055.07 (2012).
73. Interview with David Hawk.
74. *Compare* 11-6 Idaho Admin. Bull. 31 (June 1, 2011), *with* IDAHO ADMIN. CODE r. 20.07.02.056 (2012).
75. IDAHO ADMIN. CODE r. 20.07.02.056.02 (2012).
76. *Id*. r. 20.07.02.070 (1992).
77. *Id.* r. 20.07.02.070 (2012); Interview with Eric Wilson, Manager, IDL Minerals Program (July 2011). The amount of individual and blanket bonds was the subject of spirited discussion during the negotiation sessions. Eric Wilson and his staff extensively researched bonding requirements in other western states, and the amounts ultimately included in the rules are at or above average for those states.
78. Interview with Eric Wilson, *supra* note 77.
79. *Id.*

- More than thirty wells, $150,000.

- The Department may impose additional bonding on an owner or operator given sufficient reason, such as non-compliance, unusual conditions, horizontal drilling, or other circumstances that suggest a particular well or group of wells has potential risk or liability in excess of that normally expected. The owner or operator may request a hearing to appeal either the decision to impose an additional bond or the proposed amount of the bond.
- An owner or operator must provide IDL with a bond of at least $10,000 plus $1 for each foot of planned well length for each inactive well conditioned upon the performance of the duty to comply with the requirements of the Act and the rules of the IOGCC, with respect to the drilling, maintaining, operating, and plugging of each well drilled for oil and gas. Such bond must remain in force and effect until the plugging of the well is approved by IDL, or the bond is released by IDL. Inactive wells may not be covered by a blanket bond.

Basic surface owner protections were added, and geophysical exploration requirements were expanded, to reduce conflicts between surface and mineral owners and thereby enhance orderly development of oil and gas resources.[80] In particular, "[i]f the mineral estate has been severed from the surface estate where an oil or gas well is to be located, the owner or operator shall attempt a good faith negotiation of a surface use agreement with the surface owner."[81] The surface use agreement must include lost agricultural income and lost value of improvements directly caused by oil and gas exploration and production.[82] If a surface use agreement cannot be reached, then the owner/operator must provide written notice to the surface owner "by certified mail at least sixty (60) days prior to the commencement of surface disturbing activities, unless otherwise agreed to by the surface owner. The notification must include a proposed surface use bond amount, and a copy must be sent to the Department."[83] The surface owner can object, notifying the IDL, and provide a counter proposal to the surface bond amount.[84] The objection will not delay development.[85] If the parties don't agree, IDL can determine the amount, which is never less than $5,000, paid in cash to the Department.[86] Once the bond is determined, "[t]he Department may issue the permit and authorize the commencement of drilling operations after this bond has been received."[87] If the parties cannot ultimately agree, a hearing will determine the final bond amount.[88] The hearing is a final appealable order which can be reviewed judicially.[89] IDL will hold the bond until efforts are completed, but it may forfeit the bond if the owner/operator fails to reclaim the land or reach a surface use agreement.[90] It should be noted that the administrative process created here is atypical in the industry. More typical would be the dominance of the mineral estate and the ability of the dominant estate to under-

80. IDAHO ADMIN. CODE r. 20.07.02.075 (2012).
81. *Id.* r. 20.07.02.075.01.
82. *Id.*
83. *Id.*
84. *Id.* r.20.07.02.075.03.
85. *Id.*
86. *Id.* r. 20.07.02.075.04.
87. *Id.*
88. *Id.* r. 20.07.02.075.05.
89. *Id.*
90. *Id.* r. 20.07.02.075.06–07.

take development without obligation to the surface owner other than to make reasonable use of the property and to compensate for any damages in a common law setting.[91]

Well drilling and plugging requirements were modified in the revised rules to better prevent waste and protect fresh waters.[92] IDL improved the rules related to wildcat wells, high-pressure environments, and high-temperature environments to require the use of appropriate cement and casing.[93] The Department also established minimum requirements for conductor pipe, and surface, intermediate, and production casing.[94] These improvements follow the national trend of improving regulations related to well integrity.[95]

IDL also adopted new, more stringent pit requirements.[96] The changes were substantial and broad based. For the owner/operator, the pits can be addressed as short term or long term.[97] Notable requirements include the use of synthetic liners in both types of pit.[98] Short-term pits have typical requirements for fluid volumes, wall slope, fencing and/or netting to prevent access, and restoration of the surface.[99] Long-term pits have the same requirements as short-term pits but have substantial additional requirements, more reflective of landfill design, e.g., secondary liners and leak detection and collection systems.[100]

After a long period of relative inactivity, IDL recognized the need to improve the flow of information, specifically information about well logs and well completions.[101] At one time Idaho had little protection for intellectual property related to mining and oil and gas exploration, but that was dramatically changed by the legislature in 1992 when language passed that allowed information of this type to be held confidential indefinitely.[102] In addition to introducing the legislative changes made during 2012 to limit the confidentiality period to one year,[103] IDL also updated its well log reporting rules.[104] The rules now require at a minimum a lithologic log and a bottom-hole survey.[105] In all wells that are cased and cemented, a cement

91. *See generally* RAILROAD COMMISSION OF TEXAS, OIL & GAS EXPLORATION AND SURFACE OWNERSHIP, *available at* http://www.rrc.state.tx.us/about/ faqs/SurfaceOwnerInfo.pdf.

92. IDAHO ADMIN. CODE r. 20.07.02.080 (2012), r. 20.07.02.320.

93. *Id*. r.20.07.02.080.01–03.

94. *Id.* r. 20.07.02.080.04-05, r. 20.07.02.080.07–08.

95. The Texas Railroad Commission is currently in the process of revising Statewide Rule 13 related to casing, cementing, drilling and completion requirements. The proposed revision has already been subject to publication, comment and revision. As of January 17, 2013, the latest revision of Statewide Rule 13 is available at http://www.rrc.state.tx.us/rules/2012-12-11-Rule13-Revisedamendmentsinresponseto comments-informalcomment.pdf.

96. IDAHO ADMIN. CODE r. 20.07.02.085 (2012).

97. *Id.*

98. *Id.* r. 20.07.02.085.05(c), r. 20.07.02.085.06(c).

99. *Id.* r. 20.07.02.085.04-05.

100. *Id*. r. 20.07.02.085.06.

101. Interview with Eric Wilson, *supra* note 77.

102. Interview with David Hawk, *supra* note 6.

103. *See* discussion *infra* Part III.

104. *Id.* r. 20.07.02.091.

105. *Id.* r. 20.07.02.091.01–02.

bond log is required.[106] If other logs are run, the owner/operator is required to submit them to IDL in digital format.[107]

To address concerns about wells being abandoned without coming to the attention of the IDL, the rules were amended to define active and inactive wells.[108] For all active wells, an annual report to IDL is required documenting the well status including future plans.[109] Failure to submit the report could result in a well being deemed inactive by the Department.[110] A finding of inactive status ultimately triggers the plugging and abandonment of the well unless an extension is granted.[111] The owner/operator must post an inactive well bond in the meantime.[112] As written, and upon testing as required by the rule, a well can remain inactive for up to five years.[113] An owner/operator can apply to IDL to convert an inactive well to active status and, if approved, move the well back under a blanket bond.[114] The rule is similar to the inactive-well rule in Arkansas.[115]

Section 105 regarding mechanical-integrity testing was added to address concerns related to leaks in the casing, packers, or tubing.[116] All wells are required to maintain mechanical integrity, and any well that fails a mechanical integrity test, or is determined through any other means to lack mechanical integrity, must immediately be investigated by the owner/operator.[117] Such a well must be repaired or immediately shut down, and repairs must be completed within six months, or the well must be plugged and abandoned.[118] If the repair cannot be completed within six months, the owner or operator may request an extension and provide a plan for the repair.[119]

Other revisions and additions were made to the rules, including:

- Class II injection wells will no longer be permitted by IDL but instead by Idaho Department of Water Resources, subject to future rule making;[120]
- Basic emergency response requirements were added to ensure that accidents and fires are handled appropriately and public safety issues are addressed;[121]
- Surface reclamation and geophysical requirements were modernized;[122]
- Other sections of the rules addressing wellhead equipment, tools with radioactive material, the pulling of casing, gas-oil ratios, and multiple zone completions were upgraded or added based on the existing standards used in other states to prevent waste, protect correlative rights, and protect fresh water supplies;[123]

106. *Id*. 20.07.02.091.03.
107. *Id*. r. 20.07.02.091.04–05.
108. *Id.* r. 20.07.02.095–096.
109. *Id.* r. 20.07.02.095.03.
110. *Id.*
111. *Id.* r. 20.07.02.096.02.
112. *Id.* r. 20.07.02.096.02(b).
113. *Id.* r. 20.07.02.096.
114. *Id.* r. 20.07.02.096.05.
115. *See* 178.00.1 ARK. CODE R. § B-7 (LexisNexis 2012).
116. IDAHO ADMIN. CODE r. 20.07.02.105.01 (2012).
117. *Id.* r. 20.07.02.105.05.
118. *Id.*
119. *Id.*
120. *Id.* r. 20.07.02.250.
121. *Id.* r. 20.07.02.200.
122. *Id.* r. 20.07.02.325, r. 20.07.02.360.
123. *Id.* r. 20.07.02.220, r. 20.07.02.255, r.20.07.02.280, r.20.07.02.340.

- Responsibilities of the IOGCC were clarified;[124]
- Multiple documents were incorporated by reference to allow the industry standards to be adopted in Idaho.[125]

As is required for all agency rules in Idaho, revised IDAPA 20.07.02 was reviewed by the legislature during its 2011-2012 session.[126] The final rule became effective March 29, 2012, the last day of the legislative session.[127]

III. LEGISLATIVE CHANGES

As a result of the rash of activity, including the rule-making efforts, several oil- and gas-related legislative items were advanced in the 2011-2012 legislative session.[128] The legislation covered a variety of subject matter, from taxation to local government to public utilities commission jurisdiction over gathering pipeline.[129] The legislature was concerned about giving the fledgling industry the tools necessary to further investigate the potential resource and develop it if a commercial source of oil or natural gas was found.

A. House Bill 379

House Bill 379, which was introduced by IDL, amended and repealed existing law relating to oil and gas to revise provisions relating to the levy and imposition of tax on all oil and gas produced, saved, and sold or transported from Idaho.[130] It also provided that the State Tax Commission shall enforce collection of the tax and that specified provisions of the Idaho Income Tax Act shall apply and be available to the State Tax Commission for enforcement, assessment and collection, and distribution of moneys collected.[131]

The oil and gas severance tax collected by the IOGCC prior to the legislative change was collected and audited separately from the similar tax collected by the State Tax Commission.[132] The legislative changes altered the tax distribution because the prior amount of the tax allocated to the IOGCC was not sufficient to cover the administrative expenses of the oil and gas program, and the legislative change specifically addressed that problem.[133]

Several portions of the previous versions of Idaho Code section 47-330 through 332 also contained outdated language and processes that the State Tax Commission no longer uses, and these sections contain many redundancies. The changes allow the State Tax Commission to collect both portions of the severance

124. *Id.* r. 20.07.02.001, r. 20.07.02.015.
125. *Id.* r. 20.07.02.004.
126. 12-5 Idaho Admin. Bull. 125 (May 2, 2012).
127. *Id.*
128. *See infra* Part III.A–F.
129. *See infra* Part III.A–F.
130. IDAHO CODE ANN. §47-330(1) (2012).
131. *Id.* § 330(4).
132. Interview with Eric Wilson, *supra* note 77; Interview with Tom Schultz, Director, Idaho Dep't of Lands (Sept. 2011).
133. *See* § 47-330(1).

tax and eliminate the redundancy of tax collection and enforcement duties.[134] The changes also redirect the general fund portion of the State Tax Commission's severance tax to the IOGCC.[135] The stated intent was to fund the oil and gas program exclusively from dedicated funds generated by production and permit fees.[136] Excess funds, as a result of the legislative change, are transferred to the general fund.[137] IDL requested the changes to bring the statute into conformance with the current standards of the Tax Commission and to simplify the tax code.[138] Interestingly, despite a lack of production at the time of passage, an emergency was found to exist such that the Act was effective beginning the first calendar quarter after its passage and approval.[139]

B. House Bill 460

House Bill 460 was introduced by IDL. It amended existing law relating to oil and gas wells to require certain notices and permits relating to treating wells for oil or gas and to revise fee provisions relating to permits for drilling and treating wells for oil or gas.[140] The legislation added Idaho Code section 47-320(2) which covers drill permit application fees submitted to the Oil and Gas Conservation Commission.[141] Prior to amendment, the fee amount was one-hundred dollars.[142] IDL, supported by industry, believed the amount was not sufficient to cover the costs of reviewing and administering these permits.[143] A fee increase was necessary for the program to become self-sufficient and reduce the burden on the general fund which was important to IDL.[144] Industry was concerned that, without higher fees, permit processing would be delayed and that these delays would ultimately impact development, and so supported the increase.[145] A five-year sunset provision was included in the bill so that higher fees are not permanent and do not require further legislative action to rollback.[146] As production increases and more severance tax revenue is generated, and as IDL gains experience and efficiency in processing applications, the fees should decrease. Under the revision, fees are placed into an existing dedicated account for the use of the Commission.[147] Again, even though there was

134. *Id.* § 47-330.

135. *Id.*

136. *See* H.R. 379, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (statement of purpose accompanying H.R. 379), *available at* http://legislature.idaho.gov/legislation/2012/H0379SOP.pdf (last visited Jan. 17, 2013).

137. § 47-330(5)(c).

138. *See* H.R. 379, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (statement of purpose accompanying H.R. 379), *available at* http://legislature.idaho.gov/legislation/2012/H0379SOP.pdf (last visited Jan. 17, 2013).

139. H.R. 379, 61st Leg., 2nd Reg. Sess. (Idaho. 2012).

140. § 47-320.

141. *Id.*

142. IDAHO ADMIN. CODE r. 20.07.02.050.02 (2012).

143. Interview with Eric Wilson, *supra* note 77; Interview with Tom Schultz, *supra* note 132.

144. *Id.*

145. *Id.* The authors, along with members of the industry, met frequently with IDL staff and the legislature to support the fee increase. Industry's support was primarily based on the concern that, without adequate funding, sufficient resources would not be available to IDL in the form of staffing and industry permit applications would be unnecessarily delayed.

146. §47-320(2).

147. §47-320(1).

no production, an emergency was declared so that the act was effective earlier, the first calendar quarter after its approval.[148]

C. House Bill 462

House Bill 462 was jointly advanced by IDL and the Idaho Public Utility Commission ("PUC") to amend existing law relating to public utility regulation.[149] It revised the definition of "pipeline" and defined "gathering lines" such that the term "public utility" would cover cases relating to certain pipeline used in the gathering of hydrocarbons prior to the first point of sale.[150] The amendments also provide that gathering pipelines are subject to the safety supervision and regulation of the PUC, along with the fees necessary to recover the time and expense devoted to the safety supervision and regulation of each gathering system.[151]

The stated purpose of the legislation was to fill a gap in the safety jurisdiction over "gathering lines" by providing such jurisdiction to the PUC, which already has expertise in the field.[152] Gathering lines are pipelines and other fixtures used to transport, deliver, or distribute natural gas or crude oil from a well head to a transmission line or mainline.[153] The amendments were thought necessary because of the belief in IDL and PUC that no local, state or federal agency had safety jurisdiction over gathering lines.[154] In a statement justifying the basis for the amendments, PUC stated that "federal Pipeline Hazardous Material Safety Administration (PHMSA) does not exert safety jurisdiction over gathering lines until gas is delivered to the interstate pipeline system."[155] Under PUC's prior authority, PUC had authority to regulate natural gas utilities only where the natural gas is delivered and sold "to the public," which would not include gathering lines, where gas is sold or delivered to a single entity, or where the well owner transports its own gas through the lines to a connection with a larger transmission line.[156] The PUC was a natural choice to perform the regulatory function because it has two federally certified pipeline safety inspectors on staff and had already adopted the industry safety standards for pipeline constructions, operation, and maintenance, such that a knowledge center already existed.[157]

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148. H.R. 379, 61st Leg., 2nd Reg. Sess. (Idaho 2012).

149. IDAHO CODE ANN. § 61-114(2) (2012)

150. *Id.*

151. *Id.* § 61-129.

152. *See* H.R. 462, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (statement of purpose accompanying H.R. 462), *available at* http://legislature.idaho.gov/legislation/ 2012/H0462SOP.pdf (last visited Jan. 13, 2013).

153. § 61-114(2).

154. Interview with Paul Kjellander, President, Idaho Pub. Utils. Comm'n (Sept. 2011); Interview with Eric Wilson, *supra* note 77.

155. *See* H.R. 462, 61st Leg., 2nd Reg. Sess. (Idaho 2012) (statement of purpose accompanying H.R. 462), *available at* http://legislature.idaho.gov/legislation/2012/ H0462SOP.pdf (last visited Jan. 13, 2013).

156. § 61-129.

157. Interview with Paul Kjellander, *supra* note 154.

D. House Bill 463

House Bill 463 was advanced upon the request of IDL. The bill functioned as something of a catchall for minor changes needed across Idaho Code section 47-301 et seq. The prior definitions in the statute were not listed alphabetically and some definitions needed revision to be more consistent with industry standards.[158] The act amended prior law to revise provisions relating to the confidentiality of certain exploratory and wildcat wells, which was supported by industry.[159] The confidentiality of oil and gas well logs previously had no time limit.[160] The change to the confidentiality limitation to one year allows other oil and gas operators to access recent well log data,[161] is consistent with the standards of other states,[162] and is intended to foster, encourage, and promote the development and production of oil and gas as described in Idaho Code section 47-315.

The bill also provided for the assessment of civil penalties by the IOGCC,[163] and also specified that the IOGCC may bring civil actions for violations and threats of a violation and allows the IOGCC to collect for damages.[164] Interestingly, the bill specifically provided for enforcement discretion on the part of the IOGCC.[165] As part of the cleanup of the statute, the bill removed provisions relating to actions against the IOGCC and appeals[166] and to revised penalty provisions relating to the falsification of certain records.[167] Industry supported the bill as written.

E. House Bill 464

House Bill 464 was advanced at the request of the industry to clarify existing law and explicitly provide for legislative intent to occupy the field of the regulation of oil and gas exploration and production, thereby limiting patchwork and potentially conflicting local restrictions relating to oil and gas.[168] Specifically, the bill:

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158. IDAHO CODE ANN. § 47–318 (2012) (see annotation which explains that the 2012 amendment rewrote and alphabetized the definitions).

159. *Id.* § 47–319(4)(b).

160. Interview with David Hawk, *supra* note 6. Mr. Hawk recalls that the metal mining industry requested certain revisions to the original confidentiality provisions such that information related to mineral extraction could be protected indefinitely. It is Mr. Hawk's understanding that the provisions were never intended to relate to the disclosure of oil and gas related information, however, as written this information was protected indefinitely.

161. IDAHO CODE ANN. § 47–319(4)(b) (2012).

162. Interview with Shane Khoury, Gen. Counsel, Ark. Oil and Gas Comm'n (Dec. 2012). The Arkansas Oil and Gas Commission recognizes a ninety-day "tight-hole" confidentiality provision related to well logs. The Commission recognizes the competitive advantage to which an operator is entitled, but limits the time in the interest of conservation and prevention of waste.

163. IDAHO CODE ANN. § 47–325(c) (2012).

164. *Id.* § 47-325(d).

165. *Id.* § 47-325(g).

166. *Id.* § 47-325(e)-(g).

167. *Id.* § 47-326.

168. The authors worked with the legislature, IDL, the Association of Idaho Cities, the Idaho Chapter of the American Planning Association and the Idaho Association of Counties ("IAC"). IAC's Executive Director Dan Chadwick and Lobbyist Kerry Ellen Elliott were instrumental in coordinating input from the Association of Idaho Cities and the Idaho Chapter of the American Planning Association and without the assistance of IAC the legislation would never have come to fruition. Because of possible issues related to water usage, the authors also worked extensively with Norm Semanko with the Idaho Water Users Association and Lynn Tominaga with the Idaho Groundwater Appropriators. Mr. Semanko and Mr. Tominaga were both supportive and helpful throughout the process. Similar efforts have occurred in other

- Amended Idaho Code section 47-315 to expressly provide that uniformity and consistency in the regulation of the production of oil and gas throughout the State of Idaho is in the public interest.
- Amended Idaho Code section 47-317 to expressly state the intent of the legislature "to occupy the field of the regulation of oil and gas exploration and production," with the limited exception of the exercise of planning and zoning authority granted cities and counties under the Local Land Use Planning Act, Idaho Code Title 67, Chapter 65, and as further limited in the bill,[169] and amended Idaho Code section 47-319 to expressly state that it is part of the duty of the Commission to "regulate the exploration for and production of oil and gas."[170]
- Amended Idaho Code section 47-317 to provide for the Commission to notice the affected city or county upon receipt of an oil and gas application and to provide an electronic copy of all application materials.[171]
- Amended Idaho Code section 47-317 to prohibit any ordinance, resolution, requirement or standard of any city, county or political subdivision (except a state agency with authority) that "shall actually or operationally prohibit the extraction of oil and gas," but provided that extraction may be "subject to reasonable local ordinance provisions, not repugnant to law, which protect public health, public safety, public order or which prevent harm to public infrastructure or degradation of the value, use and enjoyment of private property."[172]
- Amended Idaho Code section 47-317 to require any local ordinance regulating oil and gas extraction to provide for administrative permitting, not to exceed 21 days, unless extended by agreement of the parties up "upon good cause shown."[173]
- Amended Idaho Code section 47-317 to prohibit any local ordinance, resolution, requirement or standard that "shall actually or operationally prohibit construction or operation of facilities and infrastructure needed for the post-extraction processing and transport of gas and oil," but provided that such facilities and infrastructure are subject to local ordinances, regulations and permitting requirement (e.g., public hearing processes), not repugnant to law, as provided in LLUPA.[174]
- Amended Idaho Code section 47-319 to provide that one of the specific powers of the IOGCC is to regulate the compression or dehydration of produced oil and gas.[175]

The bill also amended Idaho Code section 42-233 to clarify that oil and gas activities utilizing low temperature geothermal resources are not subject to the pro-

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oil and gas producing states. Pennsylvania recently enacted specific language that supersedes and preempts local regulation and requires local ordinances to "allow for the reasonable development of oil and gas resources." *See* 58 P.S. §§ 3302 and 3304.

169. IDAHO CODE ANN. § 47-317(3) and (4).
170. *Id.* § 47-319(2).
171. *Id.* § 47–317(4)(a) (Supp. 2012).
172. *Id.* § 317(4)(b) (Supp. 2012).
173. *Id.*
174. *Id.* § 317(4)(a) (Supp. 2012).
175. *Id.* § 319(5)(a).

visions of Idaho Code section 42-233[176] and section 42-4003,[177] but grants the director of IDWR the authority to initiate a contested case against an owner or operator.[178] The director can do so if IDWR "has reason to believe that an oil and gas well will cause, is causing, or has caused, significant negative impacts to pressure, temperature, quality necessary for beneficial use or quantity of water available to water rights existing at the time of the development of the oil and gas well or to a water resource that can be beneficially used."[179] Under Idaho Code section 42-233(2) as amended, the evidence of such causation must come from the department or "be credible information from a water right or a geothermal resource permit holder existing at the time of development of the oil and gas well."[180] If a contested case is initiated, the burden is on the oil and gas well operator to establish that it is not causing, will not cause, and has not caused significant adverse impacts of the types enumerated.[181] If the director of IDWR determines through the contested case proceeding that significant adverse impacts are occurring, will occur, or have occurred, the director may order that the operator undertake mitigating measures.[182] The bill amended Idaho Code section 42-4003 similarly.[183]

Finally, the bill aligns Idaho with the 2005 Energy Policy Act and exempts, at the state level, natural gas storage and hydraulic fracturing from the definition of "injection" for purposes of regulating injection wells.[184]

F. House Bill 526

House Bill 526 was advanced to address concerns that section 47-325, Idaho Code, as enacted by section 3, House Bill No. 463, provides that time when a civil penalty starts to accrue starts upon notice of the violation.[185] It also clarifies that for

176. *Id.* § 42-233(2).
177. *Id.* § 4003(2).
178. Id. §42-233(2) and §42-4003(2).
179. *Id.* Identical language is used in both statutes.
180. *Id.* § 42–233(2).
181. *Id.*
182. *Id.*
183. *Id.* § 4003(2).
184. *Id.* § 3902(8).This was especially important in Idaho because there is no current permitting process for permitting injection wells and, in fact, a prohibition exists on the establishment of Class II injection wells. *See* IDAHO ADMIN. CODE r. 37.03.03.025.03(a) (2012). Since 1985 the Idaho Department of Water Resources ("IDWR") has been the U.S. Environmental Protection Agency ("EPA") delegated entity for the Underground Injection Control Program, which regulates the construction, operation, and abandonment of all injection wells. *See* IDAHO DEP'T OF WATER RESOURCES, *Underground Injection Program*, http://www.idwr.idaho.gov/WaterManagement/WellInformation/Injection/injection.htm (last visited Jan. 13, 2013). The current rules, found at IDAPA 37.03.03.025.03(a), specifically prohibit the "permitting, construction or use" of any Class II injection well. *See* IDAHO ADMIN. CODE r. 37.03.03.025.03(a) (2012). At the present time, IDWR is developing new rules related to injection, and the authors have participated in the development of the new rules. *See generally* IDAHO DEP'T OF WATER RESOURCES, *Underground Injection Program*, http://www.idwr.idaho.gov/WaterManagement/WellInformation/Injection/injection.htm (last visited Jan. 13, 2013). However, because any changes to the program must be approved, the new rules are not expected to be effective for many months and possibly several years despite the fact that the proposed rules closely mirror current federal regulations. *See generally* IDAHO DEP'T OF WATER RESOURCES, *Underground Injection Program*, http://www.idwr.idaho.gov/WaterManagement/WellInformation/Injection/injection.htm (last visited Jan. 13, 2013); *see also* UNITED STATES ENVTL PROT. AGENCY, *Class II Wells – Oil and Gas Related Injection Wells*, http://water.epa.gov/type/groundwater/uic/class2/index.cfm (last updated May 09, 2012).
185. *Id.* §47–325(c); *see also* IDAHO LEGISLATURE, *2012 Legislation, Statement of Purpose House Bill 526*, http://legislature.idaho.gov/legislation/2012/H0526SOP.pdf (2012).

a person to be criminally liable for violating Idaho Code section 47-325, the person must have acted knowingly.[186]

186. *Id.* §325(f).