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BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of the Application of AM	)	Docket No. CC-2019-OGR-01-002
Idaho, LLC for Spacing Order and to	)	
Integrate Unleased Mineral Interest	)	SUBMISSION OF NON-CONSENTING
Owners in the Drilling Unit Consisting of	)	OWNERS AND CAIA RE: FACTORS
the SW 1.4 of Section 10, Township 8	)	FOR ESTABLISHING JUST AND
North, Range 5 West, Boise, Meridian,	)	REASONABLE TERMS
Payette County, Idaho.	)	
	)	
	)	
	)	
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COME NOW Judith and Jimmie Hicks, Karen Oltman, Alan and Glenda Grace, Shady River, LLC, and Citizens Allied for Integrity and Accountability, by and through counsel of record and hereby submit their statement of position regarding the appropriate factors to be addressed or considered in establishing just and reasonable lease terms for mineral rights owners who shall be compelled either to enter into lease agreements or to be deemed leased if they fail to enter such agreements.

Judith and Jimmie Hicks, Karen Oltman and Alan, Glenda Grace and Shady River, LLC are each property owners holding surface and mineral rights within the spacing unit proposed by applicant AM Idaho, LLC (hereafter “AMI”). Citizens Allied for Integrity and Accountability (hereafter “CAIA”) is a non-profit, membership-based organization committed to the responsible

development of natural resources in the State of Idaho. CAIA has members within the proposed spacing unit and appears here in its representative capacity.

Idaho Code §47-320 provides that when an applicant seeks an integration order the bonus payment and royalty amount associated with compelled leases of mineral rights shall be established either by statute, or by the prior conduct of the party petitioning for a spacing and integration order. All other terms must be established so as to ensure those terms are “just and reasonable.” The phrase “just and reasonable” is not defined in either the Oil and Gas Conservation Act nor elsewhere in any legal authority that applies to these proceedings. The Idaho Oil and Gas Conservation Commission (“IOGCC”) has determined that it will establish the factors relevant to a determination of “just and reasonable” on a case by case basis. In the prior proceedings before the IOGCC which led to the decision to establish factors on a case by case basis, petitioner AMI suggested a number of factors that should be considered in establishing just and reasonable lease terms. Those suggestions provide a valid starting point in developing relevant factors. Other relevant factors can be gleaned from the existing standards established under the due process clauses of the U.S. Constitution. Still others will reflect the unique circumstances presented by each application or petition.

**A. The IOGCC Should Utilize the Factors Identified by Alta Mesa In Prior Proceedings.**

On April 16, 2019, the attorney for Alta Mesa responded to a request for submissions regarding the methods the IOGCC should use to determine “just and reasonable” terms of leases. In an act of entirely unexpected candor, Alta Mesa proposed an initial list of factors that it conceded would be relevant in determining the justness and reasonableness of compelled leases. In its Reply to the March 27, 2019 Order seeking submissions, Alta Mesa identified the

following non-exclusive list of factors which, it said, would be “relevant to determining ‘just and reasonable terms:’”

1. Whether lease, operating agreement or other integration terms (a) have been developed over time and used broadly in the oil and gas industry, (b) are applicable to the proposed unit area and the applicant’s proposed operations, and (c) have been either approved or disapproved by other governing bodies or courts;
2. Whether various surface conditions in the proposed unit area require the imposition of specific terms or conditions in order to prevent harm or unreasonable impact to surface owners;
3. Whether existing regulatory, zoning or contract property restrictions in the proposed unit area require the imposition of specific terms and conditions in order to prevent harm or unreasonable impact to surface owners;
4. Whether the character and extent of the applicant’s actual or planned surface and subsurface operations in the proposed unit area require the imposition of specific terms and conditions in order to prevent harm or unreasonable impact to identified property, health, or other interests of owners in the proposed unit area;
5. Whether a requested term or condition would actually address a potential harm or unreasonable impact to owners in the proposed unit area established to the Commission by credible evidence;
6. Whether a requested term or condition is narrowly tailored to address a particular asserted harm or unreasonable impact to mineral owners, or whether it would unreasonably impact the applicant’s actual or planned operations, including by (a) unreasonably increasing the expense to the operator in comparison to the asserted potential harm or unreasonable impact to owners, or (b) effectively or operationally prohibiting the applicant’s actual or planned operations by impeding or prohibiting a necessary element of the operator’s activities;
7. The interest of voluntary lessors in the proposed unit area in developing their respective minerals; and
8. The likelihood of an asserted harm or unreasonable impact, based on whether evidence submitted regarding the asserted harm or unreasonable impact relates to (a) the specific proposed unit area’s surface and subsurface conditions, (b) the specific actual or planned operations of the applicant, (c) surface or subsurface areas outside the proposed unit area but similar to it, (d) operations outside the proposed unit area but similar to it, (d) surface or subsurface areas outside the proposed unit area but dissimilar to it, and (e) operations outside the proposed unit area but dissimilar to those occurring or planned in the proposed unit area.

These proposed factors were drafted, obviously, with a focus on the interests of operators like Alta Mesa. The IOGCC is charged with regulating operators, but, more importantly with actually protecting the rights of property owners in Idaho. While the listed factors are relevant, the focus on oil and gas operations rather than on the rights of Idaho citizens is misplaced. Nonetheless, the factors identified provide a useful starting point.

**B. Since the IOGCC’s Order Will Necessarily Affect a Property Interest, Just and Reasonable Terms Should Incorporate Standards Developed in Case Law Under the Due Process Clauses of the U.S. Constitution.**

The United States Constitution provides in two separate amendments that no person shall “be deprived of life, liberty or property without due process of law.” U.S. Const. Am. 5, Am. 14. As was recently established by the United States District Court for the District of Idaho, mineral rights are a form of property. This outcome should surprise nobody involved in the oil and gas industry since obtaining ownership of oil and gas in order to sell that ownership to others is actually the very purpose of that industry. In the context of compelling property owners to sell their property to others on terms established by the State, there is considerable legal authority for imposing certain conditions, all within the framework of ensuring due process of law. The relevant factors should address both “procedural” and “substantive” due process protections.

**1. Procedural Due Process Protections Should be Incorporated**

The legal doctrine known as “procedural due process” answers the question “how much process is due?” Procedural due process requires that before a state or the IOGCC can transfer one person’s property to another, it must provide a fair process, one that provides “such procedural protections as the particular situation demands.” *Matthews v. Eldridge*, 424 U.S. 319,

334 (1976). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.*, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Several obvious elements of “just and reasonable” terms are strongly implied by these requirements. First, all of those whose property interests will be affected by any decision reached by IOGCC must receive notice and an opportunity to be heard. The statutory system of requiring a spacing order governing an entire “pool” of hydrocarbons is likewise built on the assumption that everyone whose property includes mineral rights to that pool will be included in any proceedings to space wells. I.C. 47-318. The first requirement for a just and reasonable terms then must be that all persons affected by an integration application have been given notice and an opportunity to be heard. This is particularly important in cases such as the present one where the applicant operator is attempting to cut the size of the integrated pool by three-quarters from what it last presented to the commission, thus excluding hundreds of property owners from notice and an opportunity to be heard.

The opportunity to be heard is not enough to satisfy due process if that opportunity is not granted “at a meaningful time and in a meaningful manner.” For property owners not engaged in the oil and gas extraction industry, time is limited, and hearings held during weekdays and at locations distant from their homes are significantly less meaningful. Just and reasonable terms should thus include provisions ensuring that no integration order is entered unless and until affected property owners have had a reasonable opportunity, not just any opportunity to be heard.

## **2. Substantive Due Process Protections Should Be Incorporated**

Notions of substantive due process differ from procedural due process in one important way. While procedural due process standards reflect what procedures must be followed to

ensure a fair opportunity to be heard, substantive due process describes those things that the government simply may not do regardless of the procedure it follows. Substantive due process protections relevant to the oil and gas industry are well developed.

In setting the terms of sale where the government is establishing those terms under a requirement that they be “just and reasonable,” an administrative agency must determine and then act within “a zone of reasonableness within which the [agency] is free to fix” terms as long as those terms are not “confiscatory.” *FPC v. Natural Gas Pipeline Corp.*, 315 U.S. 575, 585 (1942), citing *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413, 422, 423 (1925); *Columbus Gas Co. v. Commission*, 292 U.S. 398, 414 (1934); *Denver Stock Yard Co. v. United States*, 303 U.S. 470, 483 (1938). That zone of reasonableness will be established by consideration of numerous factors including:

- Protection of reasonable, market-based investment expectations “commensurate with returns on [other] investments,” *Hope Natural Gas*, 320 U.S. at 603;
- the establishment of terms “sufficient to assure confidence in the financial integrity” of all entities involved, *Id.*;
- “the requirements of the broad public interests” protected by the relevant statute, *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968);
- the avoidance of terms that are “unjust, unreasonable, unduly discriminatory, or preferential” to one party over another, *Natural Gas Pipeline Corp.*, 315 U.S. at 583;
- ensuring the terms “fairly compensate investors for the risks they have assumed,” *Mobil v. FPC*, 417 U.S. 283, 30 (1974).

These requirements suggest a set of specific factors which should be reflected in the determination of “just and reasonable” terms of lease, including:

1. Assuring that the compelled leases will not result in financial losses to those whose property interests are integrated (e.g., losses occasioned by declining property values,

or other property degradation the value of which exceeds the bonus payment and anticipated royalty amounts);

2. Avoiding the compelled violation of existing contractual requirements associated with the property of those whose interests are integrated;
3. Establishing terms that protect, equally, the interests of all integrated owners including those with higher and lower levels of risk aversion, and with varying levels of exposure should risks of development result in harmful outcomes;
4. Ensuring that lease and operating agreement terms avoid the shifting of risk from the operator to the property owners.

### **C. Just and Reasonable Terms Should Also Ensure that Property Owners'**

#### **Reasonable Expectations Are Fully Protected Against Unanticipated Harms.**

The ownership of real property and its associated mineral rights constitutes a substantial investment whether made by individual homeowners, agricultural owners, municipal entities or business entities. The relative value of mineral rights compared to the total investment owners have in their property is often not just small but *de minimus*. While correlative rights of other property owners are protected by statute, the full financial interests of non-consenting owners should be protected as well. Terms of leases should ensure that property owners do not suffer an actual loss in value. While AMI will undoubtedly complain that the financial terms of leases are set by law, the loss of value can be addressed through terms other than the royalty rate and bonus payment. Such terms could include stop-loss provisions requiring the cessation of operations when and if the market value of hydrocarbons is too low to offset risks of loss in property value, mitigation of factors likely to cause losses, and other tools the parties address in the course of hearings in this matter.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 31<sup>st</sup> day of July, 2019, I caused to be served a true and correct copy of the following item in Docket No: CC-2019-OGR-01-002: *SUBMISSION OF NON-CONSENTING OWNERS AND CAIA RE: FACTORS FOR ESTABLISHING JUST AND REASONABLE TERMS* by the method indicated below and addressed to the following:

Idaho Department of Lands	U.S. Mail	<input type="checkbox"/>
Attn: Mick Thomas	Hand Delivery	<input type="checkbox"/>
300 N. 6 <sup>th</sup> Street, Suite 103	Certified Mail	<input type="checkbox"/>
PO Box 83720	E-Mail	<input checked="" type="checkbox"/>
Boise, ID 83720		
<a href="mailto:kromine@idl.idaho.gov">kromine@idl.idaho.gov</a>		

AM Idaho, LLC	U.S. Mail	<input type="checkbox"/>
c/o Michael Christian	Hand Delivery	<input type="checkbox"/>
Smith & Malek, PLLC	Certified Mail	<input type="checkbox"/>
101 S. Capitol Blvd, Suite 930	E-Mail	<input checked="" type="checkbox"/>
Boise, ID 83702		
<a href="mailto:mike@smithmalek.com">mike@smithmalek.com</a>		

Kristina Fugate	U.S. Mail	<input type="checkbox"/>
Deputy Attorney General	Hand Delivery	<input type="checkbox"/>
PO Box 83720	Certified Mail	<input type="checkbox"/>
Boise ID 83720-0010	E-Mail	<input checked="" type="checkbox"/>
<a href="mailto:kristina.fugate@ag.idaho.gov">kristina.fugate@ag.idaho.gov</a>		

Joy Vega	U.S. Mail	<input type="checkbox"/>
Deputy Attorney General	Hand Delivery	<input type="checkbox"/>
PO Box 83720	Certified Mail	<input type="checkbox"/>
Boise ID 83720-0010	E-Mail	<input checked="" type="checkbox"/>
<a href="mailto:joy.vega@ag.idaho.gov">joy.vega@ag.idaho.gov</a>		

James Thum	U.S. Mail	<input checked="" type="checkbox"/>
Idaho Department of Lands	Hand Delivery	<input type="checkbox"/>
PO Box 83720	Certified Mail	<input type="checkbox"/>
Boise ID 83720-0050	E-Mail	<input type="checkbox"/>

City of Fruitland	U.S. Mail	<input checked="" type="checkbox"/>
Attn: Rick Watkins-City Clerk	Hand Delivery	<input type="checkbox"/>
PO Box 324	Certified Mail	<input type="checkbox"/>
Fruitland, ID 83619	E-Mail	<input type="checkbox"/>

Anadarko Land Corp.	U.S. Mail	<input checked="" type="checkbox"/>
Attn: Dale Tingen	Hand Delivery	<input type="checkbox"/>
1201 Lake Robbins Dr	Certified Mail	<input type="checkbox"/>
The Woodlands TX 77380	E-Mail	<input type="checkbox"/>

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/s/ James M. Piotrowski  
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