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Subject: Docket No. CC-2021-OGR-01-001
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Hello everyone,

Attached, please find the Opening Brief of Applicant SROG from Michael Christian. If you have any questions or issues, please feel free to contact me.

Thank you,
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BEFORE THE OIL AND GAS CONSERVATION COMMISSION
STATE OF IDAHO

In the Matter of Application of Snake River Oil and Gas, LLC, for Integration of Unleased Mineral Interest Owners in the Spacing Unit Consisting of the SE ¼ of Section 10, the SW ¼ of Section 11, the NW ¼ of Section 14, and the NE ¼ of Section 15, Township 8 North, Range 5 West, Boise Meridian, Payette County, Idaho **SNAKE RIVER OIL AND GAS, LLC, Applicant.**	**Docket No. CC-2021-OGR-01-001** **OPENING BRIEF OF APPLICANT SNAKE RIVER OIL AND GAS, LLC**

Applicant Snake River Oil and Gas, LLC ("Snake River"), submits its *Opening Brief* pursuant to the *Order Vacating Hearing*, *Order Setting Hearing to Determine "Just and Reasonable" Factors*, *and Notice of Hearing and Setting Filing Deadlines*, issued April 1, 2021, by the Administrator ("Order").

I. INTRODUCTION

In the Order, the Administrator directed participants to propose factors to be used in determining "just and reasonable" terms and conditions for an integration order,[1] and to

[1] Idaho Code § 47-320(1) provides that each integration order "shall be upon terms and conditions that are just and reasonable."

demonstrate how proposed factors: (a) comply with existing statutes; (b) comply with the Commission's rules; and (c) are within the Commission's statutory authority and discretion and do not impose burdens, conditions or restrictions in excess of or inconsistent with the provisions of the Idaho Oil and Gas Conservation Act. *Order*, pp. 3-4. Additionally, the Administrator directed participants to "clearly identify the precedent they rely upon for any assertion that a particular factor is necessary to determine whether an integration order is just and reasonable," including "citing whether the factor is used to determine compliance with a 'just and reasonable' requirement in other state integration or forced-pooling proceedings." *Id.*, p. 4.

Snake River will provide an overview of the stated purposes of the Act, and the scope of the Commission's authority under the Act and the state oil and gas conservation rules at IDAPA 20.07.02 ("Rules"). It will review the salient points of the United States District Court's order in *CAIA v. Schultz*, which led to the current procedure for determining "just and reasonable" terms of integration. It will discuss how forms of agreement have developed for industry-wide use, and what courts in other jurisdictions have to say about "just and reasonable" terms in pooling or integration. Finally, it will list proposed factors to consider, in light of the previous discussion.

II. ARGUMENT AND AUTHORITY

A. The purposes and scope of Idaho's Oil and Gas Conservation Act.

The Idaho Oil and Gas Conservation Act (the "Act") states that it is the public policy of the state "to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the State of Idaho in such a manner as will prevent waste; to provide for uniformity and consistency in the regulation of the production of oil and gas throughout the state of Idaho; to authorize and to provide for the operations and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and

that the correlative rights of all owners be fully protected[.]" I.C. § 47-311. All of this is to the end "that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers and the general public may realize and enjoy the greatest possible good from these vital natural resources." I.C. § 47-311.

"Correlative rights" is defined by the Act to mean "the opportunity of each owner in a pool to produce his just and equitable share of oil and gas in a pool without waste." I.C. § 47-310(4).

Meanwhile, the Act defines "waste" is as follows:

> (32) "Waste" as applied to gas shall include the escape, blowing or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas in an excessive or unreasonable amount from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil and gas that might ultimately be produced; excepting gas that is reasonably necessary in the drilling, completing and testing of wells and in furnishing power for the production of wells.
>
> (33) "Waste" as applied to oil means and includes underground waste; inefficient, excessive or improper use or dissipation of reservoir energy, including gas energy and water drive; surface waste, open-pit storage and waste incident to the production of oil in excess of the producer's above-ground storage facilities and lease and contractual requirements, but excluding storage (other than open-pit storage) reasonably necessary for building up and maintaining crude stocks and products thereof for consumption, use and sale; the locating, drilling, equipping, operating or producing of any well in a manner that causes, or tends to cause, reduction of the quantity of oil and gas ultimately recoverable from a pool under prudent and proper operations.

Idaho Code 47-310(32), (33). Thus, in the Act "waste" is concerned with maximizing the ultimate production of oil or gas from a pool. The overall purpose of the Act, as expressed in the

above provisions, is to promote the greatest ultimate production from a pool while protecting mineral owners' right to produce their just and equitable share from the pool.

Pursuant to this policy, voluntary integration of tracts or interests in a spacing unit is encouraged, but in the absence of an agreement and satisfaction of the conditions for integration, the Idaho Department of Lands is mandated to order integration. I.C. § 47-320 ("[U]pon the application of any owner in [a] proposed spacing unit, [the Department of Lands] shall order integration of all tracts or interests in the spacing unit for drilling of a well or wells, development and operation thereof and for the sharing of production therefrom."). Such orders must be issued on terms and conditions that are "just and reasonable." *Id.* What is "just and reasonable" must be viewed within the express purposes of the Act, i.e., to encourage and promote development while preventing waste and protecting correlative rights.

Because the Commission was created by statute, it "has no jurisdiction other than that which the legislature has specifically granted to it." *Idaho Power Co. v. IPUC*, 102 Idaho 744, 750 (1981). The Department is the administrative arm of the Commission. Idaho Code § 47-314(7).

The Commission is "given jurisdiction and authority over all persons and property, public and private, necessary to enforce the provisions of this act, and shall have power and authority to make and enforce rules, regulations and orders, and do whatever may reasonably be necessary to carry out the provisions of" the Act. Idaho Code § 47-314(8). Similarly, the Act provides that the Commission "is authorized and it is its duty to regulate the exploration for and production of oil and gas, prevent waste of oil and gas and to protect correlative rights, and otherwise to administer and enforce this act." *Id.* § 47-315(1). The Act directs that "[i]n the event of a

conflict, the duty to prevent waste is paramount." *Id*.[2] Consistent with this, the Act directs that the Commission and the Department "shall protect correlative rights by administering the provisions of this chapter in such a manner as to avoid the drilling of unnecessary wells or incurring unnecessary expense, and in a manner that allows all operators and royalty owners a fair and just opportunity for production and the right to recover, receive and enjoy the benefits of oil and gas or equivalent resources, while also protecting the rights of surface owners." Idaho Code § 47-315(2). The Act then describes several specific powers of the Commission, all of which relate to regulating the operation of drilling and production of wells, and the classification of hydrocarbon pools. Idaho Code § 47-315 (5)-(7). Finally, the Act authorizes the Commission to "make and enforce rules, regulations, and orders reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act." Idaho Code § 47-315(8).

B. The *CAIA v. Schultz* Order.

The Court in *CAIA v. Schultz*, Case No.1:17-cv-00264-BLW (August 13, 2018), recognized that "the Commission has a significant amount of discretion to decide what 'just and reasonable' means[.] *Memorandum Decision and Order* at 15. As the Court explained, due process does not require a hearing conducted according to a specific formula or a particular outcome, but only "the opportunity to be heard 'in a meaningful manner," i.e., in a manner "tailored to the capacities and circumstances of those who are to be heard." *Id.* at 17. In this context, the District Court concluded all that requires is "a clear explanation of the factors considered in applying the 'just and reasonable' standard." *Id.* at 19.

[2] This directive is key, and reflects the fundamental purpose of the Act and the Commission's role -- to encourage the maximum ultimate production of oil and gas from a pool. Terms and conditions of integration which prevent or unduly impair production, directly or indirectly, arguably create "underground waste" (by having the resource effectively be abandoned underground), and unreasonably diminish the ultimate production of oil and gas.

C. Terms that are largely prescribed by the Act or the Rules.

Several terms and conditions of integration, and details of operations within a spacing unit, are addressed either in the Act or in the Rules. These include:

1. Compensation for use of minerals, through payment of bonus and royalty, is addressed in Idaho Code § 47-320. The royalty is set by statute at 1/8th for those deemed leased, and at "no less than one-eighth (⅛)" for those electing to lease, and the lease bonus payment to be made is "the highest bonus payment per acre that the operator paid to another owner in the spacing unit prior to the filing of the integration application." I.C. § 47-320(3).

2. Well spacing and drilling location requirements are set out in Idaho Code §§ 47-317 and 47-318.

3. Requirements for setbacks are laid out in Idaho Code § 47-319.

4. Royalty payment and reporting requirements are provided in Idaho Code §§ 47-331 and 47-332.

5. Surface owner protections are provided in Idaho Code § 47-334.

6. Drilling, well construction, well treatments, production, reclamation, and other operational requirements are provided in IDAPA 20.07.02, Subchapters C-F.

An operator must comply with these statutory and administrative provisions in requesting integration and thereafter operating in an integrated spacing unit. For an integration order to be made on just and reasonable terms and conditions, it is unnecessary for the applicant to engage in a lengthy presentation regarding every potentially applicable statute, where these issues are already covered by existing statutes and rules. The order may simply require that the applicant comply with the Act and IDAPA 20.07.02. However, it is useful as a factor in reaching just and reasonable terms to evaluate whether a proposed term or condition exceeds these requirements.

Requiring analysis of any other Idaho Code or IDAPA provision (outside the Act and the Rules) that might apply to oil and gas operations, in order to create terms and conditions for integration, would be an improper expansion of what is required for the issuance of an integration order, and exceeds the jurisdiction and role of the Commission and the Department under the Act, as described above. Moreover, it would be near impossible for operators to analyze every statute or provision of the Idaho Code or the Idaho Administrative Rules that could potentially be relevant to or affect operations in a spacing unit. Doing so would undercut the stated purposes of the Act to encourage development, protect correlative rights and prevent waste.[3] The Commission's role is described in the Act as regulating "[t]he drilling, casing, operation and plugging of wells in such manner as to prevent: (i) the escape of oil and gas out of one (1) pool into another; (ii) the detrimental intrusion of water into an oil and gas pool that is avoidable by efficient operations; (iii) the pollution of fresh water supplies by oil, gas, or saltwater; (iv) blow-outs, cavings, seepages, and fires; and (v) waste as defined in section 47-310, Idaho Code." Idaho Code § 47-315(5). As noted above, these subjects are already covered in IDAPA 20.07.02.

D. Industry standard forms developed for nationwide use.

The American Association of Professional Landman ("A.A.P.L.") provides form agreements developed for use nationwide in the oil and gas industry. *See* https://www.landman.org. The A.A.P.L. Model Form 610 Joint Operating Agreement has been in use in the oil and gas industry in one form or another since 1956 and various versions of this form continue to be widely used. *See* John R. Reeves and J. Matthew Thompson, *The*

[3] Other state agencies already regulate other areas of oil and gas operations, through their own statutory authorization and associated rules. For example, the Idaho Department of Environmental Quality regulates air quality, and well pad equipment and processing facilities are subject to its permitting and operational requirements.

Development of the Model Form Operating Agreement: An Interpretative Accounting, 54 Okla. L. Rev. 211, 213 (2001). In fact, descendants of the original form are now the most popular JOA forms in use. *See* Christopher S. Kulander, *Old Faves and New Raves: How Case Law Has Affected Form Joint Operating Agreements - Problems and Solutions (Part One)*, 1 Oil & Gas, Nat. Resources & Energy J. 1 (2015) (citing to Gary B. Conine, *Property Provisions of the Operating Agreement -- Interpretation, Validity and Enforceability,* 19 Tex. Tech L. Rev. 1263, 1273-74 (1988)). Model form joint operating agreements, including Form 610, simplify negotiations, standardize technical terms and provisions, and obtain consistency in legal interpretations. *See* Conine, 19 Tex. Tech L. Rev. at 1273. As a result of the use of model form joint operating agreements, "judicial and academic concepts developed in the context of one JOA or one dispute are increasingly viewed as generally applicable to all JOAs." Ernest Smith, *The Future of Oil and Gas Jurisprudence, Joint Operating Agreement Jurisprudence*, 33 Washburn L.J. 834, 835 (1994).

E. Authority from other jurisdictions.

Courts do not appear to have widely addressed the issue of defining factors of a "just and reasonable" analysis for integration or pooling orders. However, there are decisions from other states that provide helpful insight.

The Utah Supreme Court, in *J.P. Furlong Company v. Board of Oil, Gas and Mining*, upheld an agreement in form similar to the industry standard joint operating agreement (Form 610 from the A.A.P.L.) as "just and reasonable." 424 P.3d 858 (Utah 2018). Furlong, one of the three holdout working interest owners, agreed to participate in the costs of a well but refused to sign the joint operating agreement. *Id.,* at 860. Furlong desired the following changes to the joint operating agreement: (1) that it not be publicly available or recorded; (2) that the operator be

responsible for accounting for any future burdens; (3) that the operator accept broader liabilities for breach of contract than what is industry standard; (4) that the operator require written pre-authorizations from all non-operators for any excess expenditures; (5) that cash-call provisions be changed to expedite payment; (6) that the statute of limitations be extended for certain contract claims; and (7) that the bid process for affiliated companies be more rigorous than industry standards. *Id.,* at 860-862. The operator did not agree to the requested changes and asked the Utah Board of Oil, Gas and Mining (the "Board") to issue a forced pooling order. *Id.,* at 860. The Board adopted the joint operating agreement as written, because it was in "materially the same form as the [joint operating agreement] signed by the other participating working interest owners," and it was also "materially identical" to joint operating agreements the operator had used for the preceding seven years. *Id*. The Board found the terms of the operator's joint operating agreement to be "just and reasonable," explaining that:

> The [American Association of Professional Landmen] model-form-based JOA proposed by [the operator] is similar to other [joint operating agreements] previously adopted by this Board in prior compulsory pooling matters. The Board also notes that [joint operating agreement] terms materially the same as those proposed by [the operator] in this matter have been agreed upon and are presently in effect between other consenting owners within the subject drilling unit. Although [joint operating agreements] substantially similar to this form of operating agreement were previously deemed just and reasonable in prior matters, the Board analyzed the JOA proposed by [the operator] anew for purposes of making its determination in the present case. The Board's analysis included consideration of testimony given by the parties' witnesses regarding Furlong's proposed edits and amendments to certain provisions of the JOA as proposed by [the operator]. While legitimate disagreement can exist about the provisions at issue, and while the parties' differing proposed terms might be reasonable under certain circumstances, on balance, the Board finds that under the facts of this case, the terms of the [operator's] proposal are just and reasonable and adopts them for purposes of this matter.

Id., at 862. Furlong appealed, but the Utah Supreme Court held that because the joint operating agreement was in almost the same form as the model industry agreement, and was materially the

same joint operating agreement that the other leaseholders in the unit had voluntarily agreed to use, that the Board properly followed its mandate to adhere to terms that were "just and reasonable." *Id.,* at 864. The Court confirmed that the Board could justly and reasonably allow the operator to "treat all members of the drilling unit similarly" and to require the non-consenting owner "to abide by an agreement that was materially the same as the others." *Id.* The Court made it very clear that the statute did not impose an obligation on the Board "to ensure that the parties' interests are in perfect equipoise." *Id.,* at 865.

The Oklahoma Supreme Court has found that a just and reasonable pooling order does not require the evidentiary backing of or divulgence of geologic studies regarding the future returns of the proposed wells. *Home-Stake Royalty Corp. v. Corp. Comm'n,* 594 P.2d 1207, 1209-10 (Okla. 1979). Rather, the measure of compensation for forced pooling orders is the fair market value. *Miller v. Corp. Comm'n,* 635 P.2d 1006 (Okla. 1981). Requiring an operator to complete every potentially productive formation in the initial well, or engage in dual completion, is often a practical impossibility, and is therefore not just and not reasonable. *Amoco Prod. Co. v. Corp. Comm'n,* 751 P.2d 203, 206-07 (Okla. 1986).

While compulsory pooling is very limited in Texas, the Texas Supreme Court has defined a "fair and reasonable offer," as "one which takes into consideration those relevant facts existing at the time of the offer, which would be considered important by a reasonable person in entering into a voluntary agreement concerning oil and gas properties." *Carson v. Railroad Comm'n,* 669 S.W.2d 315, 318 (Tex. 1984).

Generally, for conditions of a pooling order to be deemed just and reasonable, it is acceptable for such terms to be based on industry standards, to be within the confines of statutorily prescribed ranges, and to provide for the protection of correlative rights. In other

words, the focus is largely consistent with the purposes of Idaho's Act, i.e., to encourage development, prevent waste, and protect correlative rights. *See e.g., Matter of Western Land Servs., Inc., v. Department of Envtl. Conservation of New York,* 26 A.D.3d 15 (N.Y. App. Div. 2005) (finding that the agency has no authority to waive cost penalty imposed on nonconsenting owners without specific statutory directives); *Slawson v. North Dakota Indus. Comm'n,* 339 N.W.2d 772 (N.D. 1983) (for conditions of a pooling order to be just and reasonable, the order must afford an unleased mineral owner all that he is entitled to because of his ownership in the minerals); *In re Luff Exploration Co.,* 864 N.W.2d 4 (S.D. 2015) (finding that the South Dakota Board of Minerals and Environment erred in issuing a compulsory pooling order and risk penalty without including a time and manner in the order for nonconsenting record owners to elect to participate, or not, in the cost of drilling and developing a well).

D. Proposed factors.

Keeping in mind the purposes of the Act and the Rules, and the scope of the Commission's and the Department's authority and discretion under them, Snake River suggests that at least the following factors are relevant to determining "just and reasonable terms," all as established to the hearing officer by credible evidence or authority:

1. Whether lease, joint operating agreement or other integration terms not already prescribed by the Act: (a) have been developed over time and used broadly in the oil and gas industry, and (b) have been either approved or disapproved by other governing bodies or courts;

2. Whether requested terms and conditions further the purposes and public policy of the Act, i.e., whether they encourage production, prevent waste (as defined in the Act), and protect correlative rights (as defined in the Act);

3. Whether the requested terms and conditions are within the scope of authority granted to Commission and the Department under the Act;

4. Whether requested term and conditions are reasonably similar to those agreed upon by voluntary lessors in the area;[4]

5. Whether unique or specific surface conditions in the spacing unit require the imposition of specific terms or conditions in order to prevent unreasonable impact to surface owners within the Commission's and the Department's jurisdiction to address;

6. Whether there are identified and established any particular interests of owners in spacing unit that may be affected by the applicant's operations;

7. Whether the character and extent of the applicant's actual or planned surface and subsurface operations in the spacing unit require the imposition of specific terms and conditions in order to prevent unreasonable impact to such identified and established interests;

8. Whether a requested term or condition would actually address an alleged potential unreasonable impact to owners in the spacing unit;

9. Whether a requested term or condition is narrowly tailored to address an alleged potential 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 impact to owners, or (b) effectively or operationally prohibiting the applicant's actual or planned operations by impeding or prohibiting a necessary or desirable element of the operator's activities (i.e., result in waste);

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[4] This is not to suggest that the terms and conditions for integration must be equal to or better than the conditions enjoyed by voluntary lessors. In fact, given the purpose of the Act to encourage and maximize development of the resource, this should never be the basis for imposing a term or condition. To adopt this approach would be to incentivize mineral owners *not* to voluntarily lease, and instead to hold out for better terms in an integration order. This would create market distortions and unfairly reward those opposing development.

10. Whether and the extent to which a requested term or conditions would adversely impact the majority interest of voluntary lessors in the spacing unit in developing their respective minerals (i.e., their correlative rights); and

11. The likelihood of an alleged potential unreasonable impact.

Depending on the fact and circumstances regarding a particular spacing unit, not all of these factors will be necessary to consider. Each of these proposed factors is consistent with the focus of the Act and the public policy stated in it -- encouragement of production while protecting correlative rights and preventing waste. Each recognizes the limits of the Commission's and the Department's authority under the Act. Each recognizes that several subjects are already addressed in the Act or in the Rules. Each is consistent with authority from other states, consistent with the Act, indicating that the focus of a pooling or integration order is ensuring the greatest overall recovery while protecting correlative rights.

III. CONCLUSION

The purposes of the Act, and the Commission's jurisdiction under it, should be at the forefront in considering what constitutes "just and reasonable terms and conditions" for an integration order. The Act is concerned with the promotion of development, the prevention of waste and the protection of correlative rights. Many subjects are already covered by the Act and Rules. Requiring granular evaluation of every possibly applicable statute or rule outside the Act and Rules would be beyond the Commission's jurisdiction.

DATED this 28th day of April, 2021.

SMITH + MALEK, PLLC

MICHAEL CHRISTIAN
Attorney for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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