From:	Sarah Hudson
To:	Mick Thomas; Kourtney Romine; External - Joy M. Vega; kristina.fugate@ag.idaho.gov; James Thum; james@idunionlaw.com; marty@idunionlaw.com
Cc:	Michael Christian
Subject:	Docket No. CC-2021-OGR-01-002
Date:	Friday, June 11, 2021 03:25:28 PM
Attachments:	20210611 SROG Response Brief of Applicant Fallon 1-10 Integration Application.docx.pdf

Hello,

Attached please find the Response Brief of SROG from Michael Christian. If you have any issues opening the document or any questions, please feel free to contact us.

Thank you and have a wonderful weekend everyone!
Sarah Hudson
Legal Assistant
SMITH + MALEK, PLLC
101 S. Capitol Blvd., Suite 930
Boise, ID 83702 p. 208. 473.7009 | f. 208.473.7661 | e. sarah@smithmalek.com

MICHAEL R. CHRISTIAN, ISB #4311
SMITH + MALEK, PLLC
101 S. Capitol Boulevard, Suite 930
Boise, ID 83702
P. (208) 473-7009
F. (208) 473-7661
E: mike@smithmalek.com
Attorney for Applicant Snake River Oil and Gas, LLC

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 E ½ of the SE ¼ of Section 9, SW ¼ of Section 10, N ½ of the N ½ of the NW ¼ of Section 15, and the N ½ of the NE ¼ of the NE ¼ of Section 16, Township 8 North, Range 5 West, Boise Meridian, Payette County, Idaho **SNAKE RIVER OIL AND GAS, LLC, Applicant.**	**Docket No. CC-2021-OGR-01-002** **RESPONSE BRIEF OF APPLICANT SNAKE RIVER OIL AND GAS, LLC**

Applicant Snake River Oil and Gas, LLC files this brief in response to the Idaho Department of Lands' Opening Brief and the Submission of Non-Consenting Owners and CAIA RE: Factors for Establishing Just and Reasonable Terms.

1. IDL's Opening Brief.

IDL's appears to support the point that the Applicant raised – that the purpose of integration is to fulfill the Commission's mission to encourage production, protect correlative rights and prevent waste (with "correlative rights" and "waste" as defined in the Act). *E.g., IDL's Opening Brief*, p. 3 ("The requirement that an integration order be "issued upon terms that are just and reasonable" refers to [the agency's] responsibility to prevent waste and ensure

ratable production of shared geologic resources.'"). IDL proposes some factors that go beyond this purpose and would require an inquiry into, and imposition of terms and conditions regarding, subjects over which IDL and Commission lack jurisdiction. *See Idaho Power Co. v. IPUC*, 102 Idaho 744, 750 (1981) (Agency "has no jurisdiction other than that which the legislature has specifically granted to it.").

IDL's reference to Idaho Code § 47-310(11) was discussed in the just and reasonable factors hearing in Docket No. CC-2021-OGR-01-002. *IDL's Opening Brief*, p. 4. The term "market value" is not used anywhere in Idaho Code §47-320, or elsewhere in the Act outside § 47-310(11) other than in Idaho Code § 47-332(4), which sets requirements for reporting to royalty owners. The second sentence of §47-310(11) directs only that severance tax cannot be reduced to account for costs of marketing, transportation, and processing. Severance tax is covered in Idaho Code § 47-330, which in its current form uses the term "gross income," which is similarly defined in that section to exclude deductions for marketing, transportation, manufacturing, and processing. Thus, the second sentence of § 47-310(11) is concerned with severance tax and the form of royalty reporting to owners. Based on the discussion at the prior hearing, the Applicant believes IDL references § 47-310(11) for that purpose.

Some other factors suggested by IDL appear to be beyond the Commission's purpose and authority. *IDL's Opening Brief*, p. 5. It suggests that Snake River be required to "analyze" whether its form of lease, form of JOA and other integration terms (a) "ensure compliance with Idaho Code, IDAPA and any applicable local ordinance"; (b) "ensure that no liability or duty arising from or related to any violation of law, environmental damage, injury to property, personal injury, negligence or nuisance is removed from the operator or placed on, assumed by, or assigned to an integrated owner"; (c) "ensure that no water right owned by an integrated owner is incorrectly used by the operator as a result of any change to the purpose of use of the

water right, the place of use, or the point of diversion without prior approval by the Idaho Department of Water Resources and (d) "ensure that no estate in real property held by an integrated owner can be assumed, subrogated, or redeemed by an operator, as lessee, without the integrated owner having an opportunity to recover such estate from the operator." This phrasing suggests that Snake River should: (a) be tasked with proving that it has investigated every state law and ordinance, without limit (as opposed to simply recognizing that any operator is obligated to follow the law, and recognizing that an operator is subject to regulation and enforcement by other state agencies and local authorities); (b) that it should be made an insurer of mineral interest owners across a broad spectrum of potential (and speculative) liabilities; and (c) that, for example, if it purchases a mineral owner's property interest in a foreclosure action in order to protect its leasehold, it should be required to offer the interest back to the mineral owner even if the applicable foreclosure law contains no such requirement. These formulations seem far afield from IDL's and the Commission's mandate to encourage production while protecting correlative rights and preventing waste.

Finally, IDL asks that the Administrator consider whether terms have been "[a]ccepted and agreed to by Snake River . . . when it is an interest holder and not an operator[.]" *Id*. To the extend IDL means that Snake River's contracts in other states when it is a lessor or non-operating working interest owner should be evaluated, the differing geological conditions, economic conditions, and operating conditions elsewhere that led to contact terms in another jurisdiction suggest that the relevance of those terms is remote at best.

2. Non-Consenting Owners' Brief.

Snake River objects to CAIA's participation in this proceeding. Idaho Code § 47-328(3)(b) provides, "Only an uncommitted owner in the affected unit may file an objection or

other response to the application [for integration.]" While counsel for CAIA also represents two sets of uncommitted owners in the unit, CAIA itself is not properly a party.[1] Because the integration order is addressed to economic aspects of integration (lease terms and JOA terms), non-mineral owners outside the unit do not have a direct interest in the proceeding in any event.

The nonconsenting owners focus largely on specific outcomes rather than factors, e.g., they demand a 90-day minimum between the order setting factors to be considered and a final hearing, creation of subpoena power for non-consenting mineral owners, specific notice and hearing procedures apparently through the life of a well, and guarantees that they will be insulated from alleged negative impacts.[2] All of this is both contrary to the Administrator's prehearing order, far beyond the scope of the Act, and to the extent it is not, largely redundant given existing protections and procedural requirements in the Act and Rules.

The attempt to fabricate a subpoena power, set months-long prehearing schedules, and create mandatory notice and hearing processes for all well processes (as defined outcomes, not a "factor to be considered") wildly exceed the scope and authority provided in the Act regarding integration applications. They are effectively an attempt to go around the Act. They are also far beyond what the decision in *CAIA v. Schultz* requires – it makes clear that due process requirements are satisfied as long as IDL simply provides "a clear explanation of the factors considered in applying the 'just and reasonable' standard." *Memorandum Decision and Order* at 19. The May 20 hearing, and the order that will follow it, will produce exactly that result. The hearing is being held in Fruitland. Participating uncommitted mineral owners have had multiple opportunities to file responses and briefs, over a period of several weeks, and will have an

---

1 As in other proceedings, CAIA alleges that it represents the interests of other owners in the unit, but never identifies them.

2 The nonconsenting mineral owners make several assertions about alleged negative or speculative impacts and about the operator's motivations, none of which are supported by any evidence.

opportunity to present argument at the May 20 hearing, and to present testimony and argument at a subsequent hearing based on the factors identified by the Administrator. The demand for subpoena power is prohibited by the Act, which specifically precludes discovery. *See* Idaho Code § 47-328(3)(d) ("Discovery is not permitted.").

Much of what CAIA and the objecting owners request, in terms of notice and the opportunity to be heard regarding operations, or regulation of operations in the unit, is already covered either by the Act or by the Oil and Gas Conservation Rules in any event. *See, e.g.*, Idaho Code § 47-316(c) (applications for drilling permits required to be posted for public comment); § 47-317(1) (notice and hearing opportunity required before issuance or order establishing drilling unit); §47-317(3)(d) (notice and hearing opportunity required after completion and testing of well in drilling unit); § 47-323 (notice and hearing opportunity required before commingling of production prior to metering); § 47-328(3)(c) (all applications for orders subject to objection by uncommitted mineral owners in area covered by application and opportunity for hearing); IDAPA 20.07.02.040 (Applications submitted under Sections 100, 200, 210, 230 and 330 of the Rules required to be posted for public comment); IDAPA 20.07.02.100.04, .05 (published and mailed notice required before geophysical operations); IDAPA 20.07.02.201.02 (hearing may be required for multiple zone completions); IDAPA 20.07.02.210.01.m, .n (notice of proposed well treatments required); IDAPA 20.07.02.310.05 (advance notice of well spudding required to be posted); IDAPA 20.07.02.330.04 (hearing may be required for directional drilling); IDAPA 20.07.02.404.02 (notice and hearing opportunity required regarding oil-gas ratios). The integration process concerns the economic terms of pooling of mineral interests to *encourage and enable* development. It is not concerned with the details of operational regulation.

As is often the case, CAIA seeks to delay. It and the opposing mineral owners ask for a *minimum* of 90 days between the issuance of the order describing factors to be considered, and the hearing at which those factors will be applied. This would violate the Act. *See* Idaho Code § 47-328(3) ("The oil and gas administrator shall set regular hearing dates."). The process has already been stretched beyond what the Act contemplates, with two hearings now being required and the regularly scheduled hearing date often vacated. Again, what is required is an opportunity to be heard, not a particular outcome or a particular process.

Finally, the opposing mineral owners suggest a set of requirements (beyond simply factors to be considered) that are designed on their face to provide levers to shut down oil and gas development and production, including through taking evaluation of the economics of production out of the hands of the operator. *Submission of Non-Consenting Owners*, pp. 9-10. These suggestions are based on various allegations of harm without any factual basis. Again, extensive operational regulations are already contained within the Act and Rules, and the results suggested by the opposing mineral owners would effectively rewrite them.

Given that integration involves regulation of mineral rights – an economic right – and not an outright deprivation, the substantive due process arguments of the opposing mineral owners are misplaced. *See Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) ("[G]overnment action that 'affects only economic interests' does not implicate fundamental rights.") (quoting *Jackson Water Works, Inc. v. Pub. Utils. Comm'n*, 793 F.2d 1090, 1093 (9th Cir. 1986)). To establish a substantive due process violation, the opposing mineral owners would have to show that the integration process is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id*. The state's procedures, however, are "presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality." *Id*. This is an "exceedingly high burden." *Id*. It

requires a showing of a departure so "egregious" as to "amount to an abuse of power lacking any reasonable justification in the service of a legitimate governmental objective." *Id.* Balancing the majority mineral owners' interest in development, and the public interest in encouraging production, against the interest of uncommitted mineral owners in receiving their proportionate share of production, is clearly a legitimate governmental objective.

The nonconsenting mineral owners' reliance upon federal rate cases also is misplaced. Those decisions, which chiefly involve issues related to regulation of interstate commerce and interpretation of the federal Natural Gas Act, are irrelevant to this setting (and it is illustrative that no other state's appellate court appears to have applied them in the context of integration or pooling, across many decades). To the extent they have any relevance at all, they confirm the broad discretion of the Commission, and that "[a] presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid[.].'" *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (quoting *FPC v. Hope Natural Gas Co*., 320 U. S. 591, 602 (1944)).

4. Conclusion.

The mission of the Commission to encourage production while protecting correlative rights and preventing waste, and the jurisdiction of the Commission and IDL in following that mission, must be kept in mind. Some of the factors (or outcomes) suggested by IDL, and almost all of those suggested by the opposing mineral owners, are well beyond the purposes and scope of the Act. This is illustrated by the examples of integration and pooling orders previously provided by the Applicant from states with similar regimes. Most of the issues raised by IDL and the opposing mineral owners are already addressed by the Act and the Rules, or are already regulated by other bodies. The integration process is straightforward and should not be turned

into a wide-ranging, open-ended investigative or regulatory tool for the state or for those who simply oppose development.

DATED this 11th day of June, 2021.

SMITH + MALEK, PLLC

MICHAEL CHRISTIAN
Attorney for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June 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:

Mick Thomas Idaho Department of Lands P.O. Box 83720 Boise, Idaho 83720-0050	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [x] Email: mthomas@idl.idaho.gov
Kourtney Romine Idaho Department of Lands P.O. Box 83720 Boise, Idaho 83720-0050	[ ] U.S. Mail [ ] Certified Mail, return receipt requested [ ] Overnight Delivery [ ] Messenger Delivery [x] Email: kromine@idl.idaho.gov
Joy Vega Deputy Attorney General P.O. Box 83720 Boise, ID 83720	[ ] U.S. Mail [ ] Certified Mail [ ] Overnight Delivery [ ] Messenger Delivery [x] Email: joy.vega@ag.idaho.gov
Kristina Fugate Deputy Attorney General P.O. Box 83720 Boise, ID 83720	[ ] U.S. Mail [ ] Certified Mail [ ] Overnight Delivery [ ] Messenger Delivery [x] Email: kristina.fugate@ag.idaho.gov

James Thum
Idaho Department of Lands
P.O. Box 83720
Boise, ID 83720

[ ] U.S. Mail
[ ] Certified Mail
[ ] Overnight Delivery
[ ] Messenger Delivery
[x] Email: jthum@idl.idaho.gov

James Piotrowski
Piotrowski Durand, PLLC
1020 W. Main St., Suite 440
P.O. Box 2864
Boise, ID 83701
Attorneys for:
Dale Verhaeghe, Linda Dernoncourt, Sharon Simmons, Alan and Glenda Grace, Edward and Cheryl Adair, William and Roxie Tolbert, Wendell and Normal Nierman, Cheryl and Richard Addison, Jimmie and Judy Hicks, Antonio and Danielle Anchustegui, Philip and Kathleen Hendrickson, Dawna and George Jackson, Karen Oltman, Bonnie McGehee, Lorinda Shuman, Samuel Butorovich, Tim Kilbourne, Kate Kilbourneand, and Citizens Allied for Integrity and Accountability

[ ] U.S. Mail
[ ] Certified Mail
[ ] Overnight Delivery
[ ] Messenger Delivery
[x] Email: james@idunionlaw.com
marty@idunionlaw.com

/s/ Sarah Hudson
SARAH HUDSON