BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of the Application of Snake River Oil and Gas, LLC to Integrate the Spacing Unit Consisting of Section 30, Township 8 North, Range 4 West, Boise Meridian, Payette County, Idaho. Snake River Oil and Gas, LLC, Applicant.	Docket No. CC-2022-OGR-01-002 **ORDER DETERMINING "JUST AND REASONABLE" FACTORS**

PROCEDURAL BACKGROUND

On August 29, 2022, Snake River Oil and Gas, LLC ("Snake River") filed an application to integrate all uncommitted mineral interest owners in the spacing unit consisting of Section 30, Township 8 North, Range 4 West, Boise Meridian, Payette County, Idaho. The Minerals, Navigable Waterways, and Oil & Gas Division Administrator ("Administrator") of the Idaho Department of Lands ("Department") subsequently issued an September 7, 2022 *Order Vacating Hearing, Order Setting Hearing to Determine "Just and Reasonable" Factors, and Notice of Hearing and Setting Filing Deadlines* ("*September 7, 2022 Notice of Hearing*") that set and noticed a October 13, 2022 hearing to determine "just and reasonable factors" and established briefing deadlines for that hearing.

The October 13, 2022 hearing to determine "just and reasonable factors" was set to comply with the United States District Court for the District of Idaho's order to "hold a new hearing that complies with due process by explaining the factors that will be considered when determining whether the terms and conditions of an integration order are 'just and reasonable' under Idaho Code § 47-320(1).[1] *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d

[1] The Oil and Gas Conservation Commission ("Commission") decided at its April 23, 2019, meeting that prior to holding and evidentiary hearing on the merits of an integration application pursuant to Idaho Code § 47-328(3)(d), the Administrator would hold a hearing and issue a ruling identifying the factors the Administrator would consider.

1216 (D. Idaho 2018). Idaho Code § 47-320(1) requires that when owners within a spacing unit cannot voluntarily agree on terms to develop a unit, an integration order shall be issued requiring participation and sharing of production "upon terms and conditions that are just and reasonable."

On September 23, 2022, the Administrator received opening briefs from (1) Snake River; (2) the Department; and (3) Citizens Allied for Integrity and Accountability (CAIA), Steven and Robin Bishop, Amie and Jason Echevarria, Rex Wilson, and Patricia and Greg Fleshman (collectively "Nonconsenting Owners").

The Administrator held the hearing on the factors used to determine "just and reasonable" terms on October 13, 2022, at 9:00am at the Fruitland City Hall, 200 S. Whitley Dr., Fruitland, Idaho. Michael Christian argued on behalf of Snake River. James Piotrowski argued on behalf of the Nonconsenting Owners. Angela Kaufmann, Deputy Attorney General, appeared on behalf of the Department. No additional uncommitted owners in the proposed spacing unit choose to participate in the hearing.[2] An opportunity for public witness testimony was provided, but no public witnesses participated.

FACTORS PROPOSED BY PARTIES

Snake River argues that the Administrator should apply factors in accordance with Idaho Code § 47-320(1) and use the same factors as those used in the most recent completed integration proceedings, Docket No. CC-2021-OGR-01-001 and Docket No. CC-2021-OGR-01-002. *SR Br.* pp.1-2. Those eight factors are:

1. Are the proposed terms addressed in another source of law?

2. Are the proposed terms and conditions (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its operations?

[2] This does not preclude an uncommitted owner in the proposed unit from participating in the subsequent evidentiary hearing.

3. Are the proposed terms and conditions similar to other agreements within and nearby the unit? If a proposed term is not similar, is there a reason why a different term or condition is appropriate?

4. Are any proposed terms, including those addressed at drilling, equipping, and operating the well, consistent with the Oil and Gas Act and necessary given site-specific conditions?

5. Will the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms necessary to address physical occupation?

6. If the proposed operation includes use of uncommitted owners' surface estate, is the operator's compliance with Idaho Code § 47-334 adequate to protect the surface owner?

7. Do the unit's circumstances and operations require additional bonding with the Department?

8. Does the integration order ensure that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms?

SR Br. pp. 1-2.

Snake River asserts that it is not aware of any special conditions in Section 30 or relating to Snake River's planned operations which require applying different factors. *SR Br.* p. 2.

The Nonconsenting Owners argue that just and reasonable factors order should incorporate:

- Factors that are implied from the Oil and Gas Conservation Act including:

  (1) Whether a well is authorized to be drilled, and which precise well is authorized;

  (2) How the well will be drilled, by what methods;

  (3) How the well will be equipped once drilled;

  (4) How the well will be operated, including;

    (a) Whether, how, and under what conditions well treatments will be applied;

    (b) How mineral rights owners will be permitted to participate in decisions about well treatments, and how they will be informed of well treatments before they are decided upon;

    (c) How hydrocarbons produced will be delivered to market;

    (d) Whether mineral rights owners will be notified of and permitted to participate in the decision about how to market hydrocarbons produced;

(e) How well operations will be monitored and reported to mineral rights owners;

(5) Royalty rates for those who choose to lease following integration;

(6) Bonus payment amounts for those who choose to lease and those who end up deemed leased;

(7) Specific lease terms, including the selection of alternative terms from any form of standard or industry-adopted contract; and

(8) All matters closely related to those listed above.

NC Owners Br. pp. 3-4.

- Procedural and substantive due process protections. Nonconsenting Owners argue that just and reasonable factors should include a prehearing order that specifies certain procedural due process protections:

  (1) Identify the party bearing the burden of proof;

  (2) Provide for the issuance of subpoenas;

  (3) Provide for the Commission to retain qualified, independent experts to assess certain matters;

  (4) Provide adequate time between the just and reasonable factors order and the evidentiary hearing with 90 days as a minimum.

  NC Owners Br. pp. 4-6

- Substantive due process protections. Nonconsenting Owners argue that property owners' reasonable expectations, and current and foreseeable property uses are fully protected against unanticipated harms.

  NC Owners Br. pp. 4-8.

The Nonconsenting Owners also propose several additional factors:

1. Consider current property uses and whether oil and gas development is of sufficient financial value to justify potentially deleterious effects on current uses, including, for example, potential effects of gas development on groundwater resources vital to agricultural use, effects interfering with the protection of residential property values, interference with reasonably foreseeable future uses such as additional residential or commercial development;
2. Whether gas development presents dangers fundamentally inconsistent with existing uses such as residential use by at-risk individuals;
3. Whether gas development enhances or reduces foreseeable future uses so as to reduce future values of the properties for residential, municipal, commercial, agricultural, or industrial sites. *NC Owners Br.* p. 9

At hearing, Nonconsenting Owners further explained their requested factors as "all economic and noneconomic factors that reflect a bond" and "every factor that will relate to that forced sale." *Tr.* p. 23, ll. 16-21, 22-25.

Additionally, Nonconsenting Owners argued at hearing that they believe it is impossible under the Idaho Oil and Gas Conservation Act for the Administrator to set just and reasonable terms because the Administrator is unable to set economic terms including the royalty, bonus, and price. *Tr.* p. 19, ll. 6-23. They also argued that the Administrator does not have authority to address surface trespass, the number of wells drilled, bonding, or well treatments. ;*Tr.* p. 16, ll. 23 – p. 19, ll. 9. Nonconsenting Owners argue that without the power to address each and every one of these matters, the Administrator cannot implement due process. *Tr.* p. 22, ll. 7-12.

The Department recommended the Administrator consider the following factors, which are similar to the factors Snake River proposes:

(1) Whether the proposed terms are addressed in another source of law.

(2) Whether the proposed terms and conditions are (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its operations.

(3) Whether the proposed terms and conditions are similar to other agreements within and nearby the unit.

(4) Whether any proposed terms, including those addressed at drilling, equipping, and operating the well, are consistent with the Oil and Gas Act and necessary given site-specific conditions.

(5) Whether the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms necessary to address physical occupation.

(6) Whether the proposed operations include use of uncommitted owners surface estate, and if so, is the operator's compliance with I.C. § 47-334 adequate to protect the surface owner:

(7) Whether the unit's circumstances and operations require additional bonding with the Department.

(8) Whether the integration order ensures that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms.

Dept. Br. pp. 3-4.

ANALYSIS

I. The procedures used at the hearing are articulated in statute and outside the scope of this "just and reasonable" factors decision.

The Nonconsenting Owners argue that just and reasonable factors should include a prehearing order with specific procedural due process protections. *NC Owners Br.* p. 6. Their examples of proposed protections relate to identifying the party bearing the burden of proof, providing for the issuance of subpoenas, providing for the Commission to retain qualified, independent experts, and providing for adequate time between the just and reasonable factors order and the evidentiary hearing.

Numerous procedural requirements are articulated and addressed in the Oil and Gas Act, the Idaho Administrative Procedures Act, and their related rules. As stated in his *September 7, 2022 Notice of Hearing*, the Administrator will follow those requirements. Any party can make procedural requests within the limits of these legal requirements, and the Administrator will consider those as appropriate. However, this particular order relates to factors used to determine "just and reasonable" terms, which is a question separate from what procedures are appropriate at a future hearing that has not yet been noticed. Procedural requests are beyond the scope of this hearing and should be made as a separate request after reviewing existing law. Thus, in this order the Administrator will not address procedures used at any future evidentiary hearing.

II. The broad requirement for an integration order to be on "just and reasonable" terms does not include authority to award additional compensation beyond statutory requirements.

The Nonconsenting Owners' argue the Administrator should protect their "full financial interests" because an integration order should ensure no "actual loss in value," and any loss in value can be addressed through terms other than the royalty and bonus payment. *NC Owners Br.* p. 8.

The Legislature enacted the Idaho Oil and Gas Conservation Act ("Oil and Gas Act") in 1963. The 1963 Oil and Gas Act included the current requirement that "[e]ach integration order shall be upon terms and conditions that are just and reasonable." 1963 Idaho Sess. Laws 441. With that requirement, the Legislature also gave the Commission broad power and discretion to determine how integrated owners could choose to participate in a well:

> Each such integration order . . . shall prescribe the time and manner in which all the owners in the spacing unit may elect to participate therein; and shall make provision for the payment by all those who elect to participate therein; of the reasonable actual cost thereof, plus a reasonable charge for supervision and interest.

1963 Idaho Sess. Laws 441. That broad power and discretion is still found in statute today. *See* Idaho Code § 47-320(3).

Beyond that broad discretion and the requirement for just and reasonable terms, the 1963 Legislature did not prescribe the exact options and compensation the Commission was required to offer. From 1963 until 2016, the Oil and Gas Act provided that:

> If requested, each such integration order shall provide for *one or more just and equitable alternatives* whereby an owner who does not elect to participate in the risk and cost of the drilling and operation, or operation, of a well *may elect to surrender his leasehold interest* to the participating owners *on some reasonable basis* and *for a reasonable consideration* which, *if not agreed upon, shall be determined by the Commission*, or *may elect to participate* in the drilling and operation, or operation, of the well, *on a limited or carried basis upon terms and conditions determined by the Commission to be just and reasonable.*

1963 Idaho Sess. Laws 441-442 (emphasis added). In other words, the 1963 Oil and Gas Act only required at least one "just and equitable" alternative for uncommitted owners. That alternative or alternatives could include: (1) allowing an owner to elect to give up his leasehold interest on some Commission-determined reasonable basis and consideration; or (2) allowing an owner to participate in the well on a limited basis upon terms and conditions the Commission determined "to be just and reasonable."

The 1963 Oil and Gas Act did not name the exact alternatives that the Commission must provide owners to participate. It did not specify exactly the compensation and terms available to an owner electing to give up his leasehold interest. It did not specify the exact compensation and terms available to an owner participating in the well on a limited basis.[3] Thus, the 1963 Legislature gave the Commission broad discretion over what options it made available to integrated owners and what compensation it determined was reasonable to ensure an order was "upon terms and conditions that were just and reasonable."

That changed in 2016. The 2016 Legislature enacted Senate Bill 1339, which mandated distinct options and exact compensation that could be offered in each integration order. Idaho Code § 47-320, the current integration statute, continues to mandate distinct options[4] and compensation for each integration order. With the Legislature now providing the exact compensation available for certain options in an integration order, the requirement to issue integration orders "upon terms and conditions that are just and reasonable" no longer includes broad authority regarding compensation.

Instead, the Administrator is limited to the statutory compensation limits in Idaho Code § 47-320(3). Working interest owners who share in the costs of drilling and operating the well are

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[3] However, the Oil and Gas Act did provide some direction as to compensation for integrated owners who choose to participate. It provided that in that instance an operator:

> shall be entitled to the share of production . . . exclusive of a royalty not to exceed one-eighth (1/8) of the production, until the market value of [integrated owners'] share of the production, exclusive of such royalty, equals the sums payable by or charged to the interest of [the integrated owner].

1963 Idaho Sess. Laws 442. In other words, integrated owners who choose to retain their ownership interest and participate in the well were entitled to no more than a 1/8 royalty, until their share of production equaled the costs the operator incurred. The Act did not fix an exact compensation for these instances, but instead offered a limit on the royalty (1/8) received before the cost of the well was paid off from production.

[4] Senate Bill 1339 (2016) required five options. *See* 2016 Idaho Laws Ch. 48. After legislation in 2017, today there are four options. *See* Idaho Code § 47-320(3)(a)-(d).

entitled to their respective share of the well's production. Idaho Code § 47-320(3)(a). Nonconsenting working interests are also entitled to their respective share of production after all costs have been recovered by the consenting owners. *Id.* at § 47-320(3)(b). For those leased, the royalty is at least 1/8 and the bonus payment is the highest payment paid to other owners. *Id.* at § 47-320(3)(c). For those deemed leased, the royalty is 1/8 and the bonus payment is the highest payment paid to other owners. *Id.* at § 47-320(3)(d). These statutory limits do not allow the Administrator to address financial risks to uncommitted owners with additional compensation awarded to uncommitted owners. For that reason, the Administrator will not consider any proposed terms related to additional monetary compensation in exchange for extraction of oil and gas beyond what is outlined in Idaho Code § 47-320.

This does not mean that the Administrator has no power over any compensation term. As already set forth above, Idaho Code § 47-320(3)(c) contains a mandate to provide for a "Leased" option where the "owner shall receive no less than one-eighth (1/8) royalty." The royalty must be no less than 1/8, but a higher royalty is permitted. Thus, the Administrator could adjust the royalty for that particular option in the integration order based on evidence presented at the evidentiary hearing. The Administrator has determined that he will not consider "any proposed terms related to additional monetary compensation in exchange for extraction of oil and gas *beyond what is outlined in Idaho Code § 47-320.*" This language is unambiguous and clearly recognizes the ability to adjust the royalty rate within the limits set forth in the leased option in Idaho Code § 47-320(3)(c).

III. The Administrator will not consider denying integration when uncommitted owners' economic risks exceed benefits because the Legislature made integration mandatory upon meeting certain statutory requirements.

The Administrator also will not consider denying integration when uncommitted owners' economic risks exceed benefits. This is because the Legislature made integration mandatory when

an operator meets statutory terms. The Legislature's mandate is found in Idaho Code § 47-320(1), which provides that "the department, upon the application of any owner in that proposed spacing unit, *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." (Emphasis added). The word "shall" means integration is mandatory upon meeting application requirements. Given this legislative mandate to order integration, the Administrator does not have the ability to deny integration for deficiencies outside of the required jurisdictional and statutory elements, including for the reason that economic risks exceed benefits.

Indeed, the Legislature's decision as to what type of economic benefits and risks are assumed and result from integration is consistent with the United States Supreme Court's instruction that it is within a Legislature's duty to "adjust" the benefits and burdens of economic life to promote the common good. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Further, the Court "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Id.*

If the Legislature's adjustment of the benefits and burdens of compensation for an integration order is unconstitutional, then that issue is left for the courts to decide. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989); *See also* IDAPA 04.11.01.415. The Administrator does not have authority to declare a statute unconstitutional or deviate from the Legislature's direction.

IV. An integration order's terms and conditions must be within the Commission's statutory authority and be consistent with the purposes of the Oil and Gas Conservation Act.

The Commission is an administrative agency created by the Legislature and therefore a creature of statute. *Henderson v. Eclipse Traffic Control & Flagging, Inc.*, 147 Idaho 628, 632, 213 P.3d 718, 722 (2009). For that reason, its powers are expressly defined and limited by the

Legislature. *Id.* Agencies "must exercise any authority granted by statute within the framework of that statutory grant." *City of Sandpoint v. Indep. Highway Dist.*, 161 Idaho 121, 125, 384 P.3d 368, 372 (2016) (citing *Roberts v. Transportation Dep't*, 121 Idaho 727, 732, 827 P.2d 1178, 1183 (Ct. App. 1991)).

Administrative agencies may not exercise their powers to modify, alter, enlarge, or diminish the provisions of the legislative act they administer. *Id.* If a subject is already addressed by an existing statute, the Commission may be prohibited or restricted in its ability to impose requirements in addition to those imposed by the statute. *See In re Truman*, No. 36082, 2010 WL 9585673, at *2 (Idaho Ct. App. Jan. 27, 2010) (mandatory language in statute left "little room for an unfettered exercise of discretion"). Therefore, any "just and reasonable" factors must be within the Commission's statutory authority and not impose burdens, conditions, or restrictions in excess of or inconsistent with existing statutory provisions.

The Legislature gave the Commission authority over all persons and property necessary "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." Idaho Code § 47-315(1). *See also* Idaho Code § 47-314(8).[5] The Oil and Gas Act also gives the Commission specific authority to regulate: (a) drilling and plugging wells and all other production operations; (b) well treatments; (c) well spacing and location; (d) operations to increase ultimate recovery; and (e) disposal of salt water and oil-field wastes. Idaho Code § 47-315(6). These subjects are soundly within the Commission's authority. The Commission further has specific authority to require other specific actions, including the drilling, casing, operation and plugging of wells in such manner as

[5] The Legislature has also expressly provided that the Commission's "duty to prevent waste is paramount." Idaho Code § 47-315(1).

to prevent: (i) escape of oil and gas out of one pool into another; (ii) detrimental intrusion of water into an oil and gas pool that is avoidable by efficient operations; (iii) pollution of fresh water supplies by oil, gas, or saltwater; (iv) blow-outs, cavings, seepages, and fires; and (v) waste. Idaho Code § 47-315(5).

The Legislature has additionally specifically articulated conditions that must apply to uncommitted royalty owners. These include:

- Idaho Code § 47-331(3) requires that if a certain amount of time passes before oil and gas royalties of $100 or more are paid, then the operator must pay interest on those royalties. Idaho Code § 47-331(3).
- Idaho Code § 47-331(2) requires that for those that do not voluntarily agree with an operator must get a certain royalty amount and specifies what that royalty is due on.
- Idaho Code § 47-332 requires certain reports to royalty owners, including reports or records necessary to verify market value as defined in Idaho Code § 47-310(11).
- Idaho Code § 47-333 requires an operator to provide an accounting to a royalty owner upon an owner's written demand.

The Commission's statutory requirement to regulate oil and gas and administer the Act includes the ability to provide additional terms in an integration order that require an operator to comply with the law. For example, it would be within the Commission's authority to include legal requirements such as proper metering of the well (Idaho Code § 47-322), that production not be commingled (Idaho Code § 47-323), that wells comply with setback requirements (Idaho Code § 47-319), and that the operator comply with reporting requirements (Idaho Code § 47-331).

Also, Idaho Code § 67-5279 provides that an administrative order cannot be arbitrary or capricious. In order to avoid a finding of arbitrariness, an agency is bound by the rules that it has promulgated. *Vitarelli v.* Seatori, 359 U.S. 535, 540 (1959). Therefore, any proposed "just and reasonable" factors must comply with existing Commission rules. The mandate that an integration

order be made upon "just and reasonable terms" does not include an opportunity to re-write rules and debate what they should require. However, it is relevant to consider, as indicated above, the particular current statutes and rules that should be included in the final order.

Further, examining proposed factors and ultimately proposed terms for consistency with the Oil and Gas Act's purpose is important because the Legislature has clearly defined how the Act is in the public interest in Idaho Code § 47-311. Idaho Code § 47-311 first declares that is in the public interest "*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.* (Emphasis added). This sentence emphasizes two things: (1) that the Legislature thought it was important to develop, produce, and use oil and gas, and (2) that development must be done in a manner that prevents waste. Additionally, Idaho Code § 47-311 also provides a third key concept: that it is in the public's interest to provide for operation and development "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.*" (emphasis added).[6] Thus, the Oil and Gas Act emphasizes the importance of developing oil and gas, but also the importance of preventing waste and protecting correlative rights.

The Oil and Gas Act does not focus on just the benefit of one particular group or interest. Instead, it emphasizes the view that oil and gas development is good for many interests. Idaho Code § 47-311 provides that preventing waste and protecting correlative rights should be done "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." (Emphasis added.) This

[6] The Oil and Gas Act also declares that it is in the public interest to provide for uniform and consistent regulation of production, as well as encourage voluntary agreements for pressure maintenance and secondary recovery. Idaho Code § 47-311.

indicates the Legislature's intent that no one person or group is intended to realize the benefits of oil and gas production, but instead many different interests are served by oil and gas development. The Act does not go so far as to guarantee maximum financial recovery for all persons. Because the Administrator is required to exercise authority over integration orders within the framework of the Oil and Gas Act's grant of authority, he will consider whether the proposed terms of an integration order are consistent with the Act's purposes.

Nonconsenting Owners suggest that the Administrator cannot address surface trespass, the number of wells drilled, well treatments, or bonding. *Tr.* p. 17, ll. 14 – p. 18, ll. 2. However, the factors the Administrator adopted in prior proceedings, which are the factors Snake River and the Department propose, do not have any such limits. Several of those factors expressly allow the Administrator to consider surface occupation and bonding. No factor precludes evidence being presented at an evidentiary hearing related to proposed terms for well treatments or number of wells that do not conflict with the Oil and Gas Act or its associated rules. Instead, the scope of several proposed factors allows the opportunity for a party to present evidence and argument about possible proposed terms related to those topics. For instance, evidence related to the number of wells drilled could be presented under Factor 3 related to the number of wells provided, or any treatment options included under voluntary agreements with other owners. That factor also would permit evidence to be presented as to reasons why a different number of wells or a different well treatment option should be allowed in the order. That is just one example of how evidence related to the number of wells or a well treatment may present itself at an evidentiary hearing. Thus, the Administrator may consider arguments and evidence on surface occupation, bonding, the number of wells drilled, or well treatments within the factors provided as set forth in this order.

V. Factors the Administrator will consider when determining just and reasonable in this matter.

The Legislature's inclusion of Idaho Code § 47-320(1)'s requirement that "[e]ach integration order shall be upon terms and conditions that are just and reasonable" provides the Administrator with the discretion to enter an order based on the factors and circumstances of each individual case. For the reasons articulated in this order, the Administer will consider the following factors:

1. Are the proposed terms addressed in another source of law?
2. Are the proposed terms and conditions (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its operations?
3. Are the proposed terms and conditions similar to other agreements within and nearby the unit? If a proposed term is not similar, is there a reason why a different term or condition is appropriate?
4. Are any proposed terms, including those addressed at drilling, equipping, and operating a well, consistent with the Oil and Gas Act and necessary given site-specific conditions?
5. Will the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms necessary to address physical occupation?
6. If the proposed operation includes use of uncommitted owners' surface estate, is the operator's compliance with Idaho Code § 47-334 adequate to protect the surface owner?
7. Do the unit's circumstances and operations require additional bonding with the Department?
8. Does the integration order ensure that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms?

The Administrator discusses each factor and his reasoning for including those factors in turn below.

Factor 1: Are the proposed terms addressed in another source of law?

The Administrator can consider where the Legislature has expressly recognized the power of other entities over proposed terms and conditions and whether it is therefore appropriate for the Administrator to include those terms in an integration order. For example, the Legislature

recognized the Commission's authority exists along with the "responsibility of local governments to protect the public health, safety, and welfare." Idaho Code § 47-314(10). For that reason, the Legislature provided that extraction could be subject to certain local ordinances that "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." Idaho Code § 47-314(10)(b). Thus, the Administrator may consider whether a term proposed for inclusion in an integration order is already addressed by another entity and thus does not need to be included.

Another example is that the Administrator can consider whether proposed terms and conditions are already addressed by a current Department permit or may be addressed in a future statutorily-required permit. For example, Idaho Code § 47-316(2) addresses applications for permits to drill and confirms that those permits can contain limits, conditions, controls, and rules for the protection of freshwater supplies. If certain requirements already exist in a permit to drill or other permit or may be addressed in a future permit, the Administrator can consider that in determining whether there is a need to place additional requirements in the integration order.

Because there are many other potential sources of law depending on the proposed terms, the Administrator cannot enumerate all of those sources here. The parties to an integration proceeding are encouraged to identify when a proposed term is addressed by another source of law and refrain from proposing requirements that exist elsewhere.

Factor 2: Are the proposed terms and conditions (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its proposed operations?

Other factors the Administrator will consider in determining whether proposed integration terms are just and reasonable are industry standard terms and conditions, the consistency of those standards, and how those standards apply to this particular unit. These factors are important

because they inform the Administrator about what terms and conditions are commonly agreed to by participating owners in the oil and gas industry, what other states have found are terms used for participating and nonparticipating owners, and how those terms and conditions may or may not apply to this specific integration.

Taking into account what those agreeing to oil and gas development in other fields and states and what they have included as terms in operating agreements and leases allows the Administrator to consider why the oil and gas industry includes those terms. Reviewing how other courts or administrative entities have analyzed certain terms allows the Administrator to compare the reasoning of those decisions to this particular unit and operations. The Administrator will also consider whether unique terms deviating from these standards might be applicable based on the specific attributes of the unit and proposed operations.

Factor 3: Are the proposed terms and conditions similar to other voluntary agreements with owners within and nearby the spacing unit? If a proposed term is not similar, is there a reason why a different term or condition is appropriate?

The Administrator will consider how the proposed terms and conditions relate to other agreements within and nearby the spacing unit. The factor will also take into account how these terms apply to the unit's area and operations and why certain proposed terms are necessary or important to include in this particular unit.

The Act defines "correlative rights" as "the opportunity of *each owner* in a pool to produce his just and equitable share of oil and gas in a pool without waste." Idaho Code § 47-310(4).[7] Because one of the purposes of the Act is that correlative rights must be protected and because that protection applies to "each owner," the Act requires that the Administrator consider both the

[7] "Owner" means the person who has the right to drill into and produce from a pool and to appropriate the oil and gas that he produces therefrom, either for himself or for himself and others. Idaho Code § 47-310(23).

opportunity of uncommitted owners and other leasing owners in the unit to produce their just and equitable share in a pool without waste in determining whether a proposed term is reasonable.

The Utah Supreme Court considered voluntary agreements and the operator's previous joint operating agreements to review the Utah Board of Oil, Gas, and Mining's decision on what terms were "just and reasonable" under Utah's oil and gas statutes. *J.P. Furlong Co v. Board of Oil, Gas, and Mining*, 424 P.3d 858 (Utah 2018). In *Furlong*, an operator asked Utah's Board to force pool a mineral owner after the operator denied the owner's requested terms to a joint operating agreement. *Id.* at 859-62. The Board adopted the operator's terms in its forced pooling order, determining the terms were "just and reasonable" because (a) the terms were materially the same as other working interest owners had agreed to and (b) the agreement was similar to the operator's previous joint operating agreements. *Id.* at 860-62. The Utah Supreme Court upheld the Board's decision, finding the Board's decision was supported by substantial evidence because it relied on the fact that other owners had agreed to the joint operating agreement and the joint operating agreement was materially the same as other agreements. *Id.* at 862-66. Similar to the Utah Supreme Court's consideration of the terms of other owners and agreements, the Administrator will consider the terms of other agreements in the proposed unit and nearby areas.

Factor 4: Are any proposed terms, including those addressed at drilling, equipping, and operating a well, consistent with the Oil and Gas Act and necessary given site-specific conditions?

The Nonconsenting Owners propose certain factors they refer to as "implied" by Idaho Code § 47-320(3). They note that royalty and bonus payment are directly addressed by that statute, but specific details as to drilling, equipping, and operation of a well are not.

Idaho Code § 47-320(3) provides:

> Each such integration order shall authorize the drilling, equipping and operation, or operation, of a well on the spacing unit; shall designate an operator for the integrated unit; shall prescribe the time and manner in which all the owners in the

> spacing unit may elect to participate therein; and shall make provision for the payment by all those who elect to participate therein of the reasonable actual cost thereof, plus a reasonable charge for supervision and interest.

The subsection goes on to require that each integration order shall provide four participation options.

As articulated in sections above, the Administrator must comply with the Oil and Gas Act as it is written, including Idaho Code § 47-320(3). Therefore, the evidence presented at hearing will be reviewed, including specific proposed terms relating to the language in Idaho Code § 47-320(3). As the statute articulates, this includes proposed terms for authorizing the drilling, equipping, and operation of a well, some of which may include those proposed terms found in a proposed lease and joint operating agreement. While some of the statute's language refers to "a well" or "the well," Idaho Code § 47-320(1) plainly provides integration can be ordered for "a well or wells." It follows that proposed terms may also address the number of wells and any proposed depth or formation limits for that well or wells. Further, the proposed terms will be analyzed to determine their need given any site-specific conditions that may exist and are established at the evidentiary hearing.

Factor 5: Will the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms necessary to address physical occupation?

Idaho Code § 47-320(4)(d) provides that an application must include a "statement that the proposed drill site is leased." The Legislature therefore plainly required that the drill site not be located on the property of any uncommitted owners. While it may be argued that this indicates that no additional drilling or other oil and gas operations take place on or under the lands of uncommitted owners elsewhere in the unit, no statutory language directly prohibits it. Thus, the Administrator will consider whether the proposed operations, including the drill site, is proposed to physically occupy the property of uncommitted owners, including their surface and subsurface.

He will also consider whether any additional terms are necessary to address proposed physical occupation.

Factor 6: If the proposed operation includes use of uncommitted owners' surface estate, is the operator's compliance with Idaho Code § 47-334 adequate to protect the surface owner?

In addition to correlative rights, Idaho Code § 47-315(2) requires that the Administrator consider the rights of surface owners. It provides that the Commission and Department "shall protect correlative rights" by avoiding drilling "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) (emphasis added). Thus, the Administrator will consider whether the proposed operation protects the rights of surface owners.

Idaho Code § 47-315(2) does not elaborate further on the scope of the rights of surface owners. However, Idaho Code § 47-334 addresses specifically an operator's right to use and occupy surface property. That section provides that an operator "may [e]nter onto surface land under which the owner or operator holds rights to conduct oil and gas operations." Idaho Code § 47-334(2)(a). An operator may also use that surface land "[t]o the extent reasonably necessary to conduct oil and gas operations; and consistent with allowing the surface landowner the greatest possible use of the surface landowner's property, to the extent that the surface landowner's use does not interfere with the owner's or operator's oil and gas operations." Idaho Code § 47-334(2)(b). The statute also outlines the requirements for mitigation, interference with surface landowner's use, compensation, mediation, and bonding. Idaho Code § 47-334(1), (3), (7), (8). Therefore, if the operator proposes surface operations, the Administrator will consider whether an

integration order ensures compliance with Idaho Code § 47-334 and whether that compliance is adequate to protect surface owners.

Factor 7: Do the proposed unit's circumstances and operations require additional bonding?

The Nonconsenting Owners argued that the Administrator should consider whether bonding is appropriate. *NC Owners Br.* p. 10. Whether the operation requires additional bonding is a factor the Administrator will consider because it is within the Administrator's discretion under IDAPA 20.07.02.220.04 to impose additional bonding at any time.

The Commission has specific authority to require an operator furnish a "reasonable performance bond with good and sufficient surety" conditioned on compliance with the Oil and Gas Act "with respect to the drilling, maintaining, operating and plugging of each well drilled for oil and gas." Idaho Code § 47-315(5)(e). Bonding is further addressed in rule. An operator is required to post an individual bond, a blanket bond, or an inactive well bond. IDAPA 20.07.02.220.01-.03. If that was all that was contained in the rules, it would appear that bonding was already addressed in regulation and thus not a possible term for an integration order.

However, the Commission's rules also allow the Department to impose additional bonding in certain circumstances. IDAPA 20.07.02.220.04. Examples of those circumstances include 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. *Id.* While the Department can assess this additional bonding independently of an integration order, the rule does not preclude the Administrator making that decision in an integration order. Thus, the Administrator will consider a factor about whether the proposed unit's circumstances and operations require additional bonding with Department specific to a well's "drilling, maintaining, operating and plugging" and conditioned on compliance with the Oil and Gas Act.

Factor 8: Does the integration order ensure that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms?

Throughout the Nonconsenting Owners' briefing they mention "risks" of loss of property value. *NC Owners Br.* p. 7. They also discuss other "risks" they are unwilling to take and that they believe others should not have to take. *Id.* The power to award damages for torts rests with the courts and is strictly a judicial function. *Pounds v. Denison*, 115 Idaho 381, 384-85, 766 P.2d 1262, 1265-66 (1988). Therefore, the Administrator cannot provide a method for awarding a property owner damages in an integration order.

However, the Administrator can consider a factor of whether uncommitted owners retain the ability to independently attempt to recover for any future damages. The Administrator finds this is an appropriate factor to consider because when an undetermined future risk may exist and may cause damages, the ability to utilize a private cause of action is an uncommitted owner's remedy to receive any damages.

ORDER

The Administrator, having considered the arguments presented and based on the analysis above, hereby ORDERS that for the purposes of only Snake River's application in Docket No. CC-2022-OGR-01-002, the factors he will use to determine just and reasonable are:

1. Are the proposed terms addressed in another source of law?
2. Are the proposed terms and conditions (a) consistent with industry standards; (b) consistent with terms previously accepted or rejected by courts or other oil and gas administrative agencies; and (c) applicable to the unit and its operations?
3. Are the proposed terms and conditions similar to other agreements within and nearby the unit? If a proposed term is not similar, is there a reason why a different term or condition is appropriate?
4. Are any proposed terms, including those addressed at drilling, equipping, and operating a well, consistent with the Oil and Gas Act and necessary given site-specific conditions?

5. Will the proposed operations, including the drill site, physically occupy the property of uncommitted owners, and are any additional terms are necessary to address physical occupation?

6. If the proposed operation includes use of uncommitted owners' surface estate, is the operator's compliance with Idaho Code § 47-334 adequate to protect the surface owner?

7. Do the unit's circumstances and operations require additional bonding?

8. Does the integration order ensure that integrated owners that do not choose to participate as an owner retain the private right of action against the operator for any future harms?

PROCEDURES AND REVIEW

The Administrator has issued this order that describes the factors he will use to determine whether an integration order's terms and conditions are "just and reasonable." Next, the Administrator will set the matter for an evidentiary hearing at which he will take evidence relating to such factors and to other matters specified in Idaho Code § 47-320.

Dated this 10th day of November 2022.

Richard "Mick" Thomas
Division Administrator
Minerals, Navigable Waterways, Oil & Gas
Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this _10th_ day of November 2022. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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