BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of the Application of Snake River Oil and Gas, LLC for Spacing Order 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 **ORDER DETERMINING "JUST AND REASONABLE" FACTORS**

PROCEDURAL BACKGROUND

On April 26, 2021, Snake River Oil and Gas, LLC ("Snake River") filed an application to integrate all uncommitted 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. The Minerals, Public Trust, and Oil & Gas Division Administrator ("Administrator") of the Idaho Department of Lands ("Department") subsequently issued a May 5, 2021 *Order Vacating Hearing, Order Setting Hearing to Determine "Just and Reasonable" Factors, and Notice of Hearing and Setting Filing Deadlines* ("*May 5, 2021 Notice of Hearing*") that set and noticed a June 21, 2021 hearing to determine "just and reasonable factors" and established briefing deadlines for that hearing.

The June 21, 2021 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). *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F.Supp.3d 1216 (D. Idaho 2018).[1] 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 May 28, 2021, the Administrator received opening briefs from (1) Snake River; (2) the Department; and (3) Citizens Allied for Integrity and Accountability ("CAIA") and nonconsenting landowners Dale Verhaeghe, Linda Dernoncourt, Sharon Simmons, Alan and Glenda Grace, Edward and Cheryl Adair, William and Roxie Tolbert, Wendell and Norma 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, and Tim and Kate Kilbourne (collectively "Nonconsenting Owners"). On June 11, 2021, the Administrator received response briefs from Snake River and the Nonconsenting Owners. On June 16, 2021, the Administrator received a reply brief from Snake River. Public comments were received from Tyler Hartung, Jeremy Davis, and Irene Shaver.

The Administrator held the hearing on the factors used to determine "just and reasonable" terms on June 21, 2021, at 1:00pm at the Fruitland City Hall, 200 S. Whitley Dr., Fruitland, Idaho. Michael Christian argued on behalf of Snake River. Richard Brown also attended the hearing on behalf of Snake River and provided comments. James Piotrowski argued on behalf of the Nonconsenting Owners. Nonconsenting Owners Sharon Simmons and Linda Dernoncourt attended the hearing and provided comments. Joy Vega, Deputy Attorney General, argued on

[1] The Oil and Gas Conservation Commission ("Commission") decided at its April 23, 2019 meeting that prior to holding an 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.

behalf of the Department. Stephanie Bonnie appeared on behalf of the City of Fruitland, but did not provide any argument. No other uncommitted owners in the proposed spacing unit appeared at the hearing.[2]

FACTORS PROPOSED

Snake River argues that the factors used to determine just and reasonable terms should broadly consider: (1) whether the terms proposed are consistent with the Oil and Gas Conservation Act and its purposes, which is to encourage and promote development while preventing waste and protecting correlative rights; (2) whether the terms are within the Commission's jurisdiction and do not exceed statute and rule; and (3) whether the terms consider the industry standards, including forms developed for nationwide use and authority in other states. *SR Br.* pp.1-11.

Snake River proposes a list of eleven factors it believes are relevant to determining "just and reasonable terms":

> 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;
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> 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);
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> 3. Whether the requested terms and conditions are within the scope of authority granted to the Commission and the Department under the Act;
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> 4. Whether requested terms and conditions are reasonably similar to those agreed upon by voluntary lessors in the area;
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> 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;

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

6. Whether there are identified and established any particular interests of owners in the spacing unit that may be affected by the applicant's operations, and are within the Commission's and the Department's jurisdiction to address;

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, within the Commission's and the Department's jurisdiction to address;

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);

10. Whether and the extent to which a requested term or condition 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.

SR Br. pp. 13-14.[3] At hearing, Snake River stated that it had reviewed the order in Docket No. 2021-OGR-01-001 and that it believed those factors were appropriate for use in this matter. Tr. p. 9, ll.16-17.

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

(1) factors that are implied from the Oil and Gas Conservation Act;

(2) substantive and procedural due process protections; and

(3) other factors reflecting the unique circumstances of each application.

NC Owners Br. pp. 2-3.

[3] Snake River asserts that "[d]epending on the facts and circumstances regarding a particular spacing unit, not all of these factors will be necessary to consider." *SR Br. p.* 15. However, since Snake River proposes all of these factors for this specific spacing unit, it will be assumed for purposes of this Order that Snake River believes these factors would be necessary for this particular spacing unit.

The Nonconsenting Owners first argue that certain terms are implied by Idaho Code § 47-320(3), 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. Whether and how mineral rights owners will be permitted to participate in decisions about well treatments, and whether and how they will be informed of well treatments before they are decided upon;

c. How hydrocarbons produced will be delivered to market and whether other methods would yield better results;

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

e. Whether and 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) Whether specific lease terms, including the selection of alternative terms from any form of standard or industry-adopted contract, are more or less just and reasonable than those selected by the operator; and

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

NC Owners Br. pp. 2-4.

Second, the Nonconsenting Owners argue that just and reasonable factors should include a prehearing order that specifies certain procedural due process protections:

- Identify the party bearing the burden of proof;
- Provide for the issuance of subpoenas;

- Provide for the Commission to retain qualified, independent experts to assess certain matters; and

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

NC Owners Br. pp. 5-7.

Third, the Nonconsenting Owners argue that just and reasonable factors should incorporate the following substantive due process protections:

- Whether those deemed leased will incur financial losses by declining property values or other property degradation that exceeds the bonus payment and anticipated royalty amounts;

- Whether the proposed terms will violate existing contractual requirements associated with the property integrated;

- Whether the proposed terms equally protect the property interests of integrated owners including those with higher and lower levels of risk aversion and exposure should risks of development result in harmful outcomes;

- Whether the proposed lease and operating agreement terms avoid shifting risk from the operator to property owners; and

- Whether the operator seeks to impose terms that are "unjust, reasonable, unduly discriminatory or preferential" to any party while protecting another party's interests.

NC Owners Br. pp. 7-8. They go on to explain that "the full financial interests of non-consenting owners should be protected" with terms that "ensure that property owners do not suffer an actual loss in value." *Id.* at 8. They argue that such protections must apply to all mineral rights owners and that if integration causes "some, even one, mineral rights owners to suffer a net loss (royalties minus external costs), the terms cannot be considered just and reasonable as to those owners." *NC Owners Resp. Br.* p. 4.

The Nonconsenting Owners also raised additional proposed factors:

- Consider current land uses, including the financial value of oil and gas versus its effects on current uses; the potential dangers and possible impacts of oil and gas on

the residential use of the area by at-risk individuals; and the impact on future property values;

- Consider steps to reduce risks from development, including risks to municipal water resources, by imposing certain conditions, such as monitoring, the use of "tracker" chemicals or isotopes, and monitoring of groundwater resources;
- Whether the financial value of the risks to water resources outweigh the value of the hydrocarbons to be produced; and
- Whether lessors and/or the operator are attempting to externalize the costs or potential harms of development and operation while internalizing the profits.

NC Owners Br. pp. 9-10.

The Department recommended that the Administrator include factors that are consistent with applicable provisions of the Oil and Gas Conservation Act, including whether surface occupation is proposed, whether royalty payment is consistent with statute, and the analysis of several other conditions. *Dept. Br.* pp. 1-6.

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. 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 the related rules. As stated in his *May 5, 2021 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 assert that the Administrator should protect their "full financial interests." *NC Owners Br.* p. 9. They argue that the United States Constitution requires that 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. *Id.* [4]

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 [] 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).

[4] Nonconsenting Owners also cite federal public utility rate cases for the premise that a royalty owner must always come away with an overall financial benefit after an integration.

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 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.[5] Thus, the 1963 Legislature gave

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[5] 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

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[6] and compensation for each integration order. With the Legislature now providing the exact compensation available 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 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 no less than 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 provide uncommitted owners with additional compensation to address allegations of financial risk. For that reason, the Administrator will not consider any proposed terms related

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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.

[6] 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).

to additional monetary compensation in exchange for extraction of oil and gas beyond what is outlined in Idaho Code § 47-320.

The Administrator's June 21, 2021 *Order Determining "Just and Reasonable" Factors* in Docket No. 2021-OGR-01-001 reached the same conclusion. Nonconsenting Owners argued at the June 21, 2021 hearing that after reviewing the order in Docket No. 2021-OGR-01-001 they believed the Administrator may have decided that he had no power to establish compensation terms and in doing so failed to recognize Idaho Code § 47-320(3)(c), which allows adjustment of the royalty for the "leased" option.

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 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 as set forth 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 that 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).[7] 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 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:

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

- 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).[8]

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.

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[8] Snake River contends that an order can simply include a term that requires compliance with the Act and rules. *SR Br.* pp. 7-8. That is true. However, an order could require general compliance and then also include individual statutorily required terms that the Administrator finds are important to articulate in full so as to emphasize to an applicant and uncommitted owners that certain terms apply going forward.

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).[9] 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.

Nonconsenting owners argue that Idaho Code § 47-311 makes it "clear that the greatest 'economic recovery' is one of the goals of the Act" and that means that "only economically positive recovery of oil and gas." *NC Owners Resp. Br.* p. 3. They argue it follows that "if the net result of integration is to cause some, even one, mineral rights owners to suffer a net loss (royalties received minus external costs imposed), the terms cannot be considered just and reasonable as to those owners." *Id.* at 4.

The Act's purpose statement does not go so far as to guarantee positive financial recovery for all persons. Idaho Code § 47-311 begins with a declaration that it is "in the public interest to

[9] 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.

foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the state of Idaho," when done in the manner specified in the Oil and Gas Conservation Act. It goes on to provide that the "end" or ultimate outcome of such regulated production is 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). While this reflects the Legislature's declaration that oil and gas production is in the public interest, it does not guarantee an overall positive economic benefit for every person in every aspect of their property. Instead, the Act's purpose statement emphasizes the Legislature's finding that the regulated extraction of oil and gas, including the payment of royalty and working interest shares as provided in Idaho Code § 47-320, provides economic and non-economic benefits across broad classes of people. Nothing in Idaho Code § 37-311 authorizes the Administrator to require compensation above and beyond that specified in Idaho Code § 47-320.

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.

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 Administrator 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 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?

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).[10] 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 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 an operator's previous joint operating agreements to review the Utah Board of Oil, Gas, and Mining's decision on what terms

[10] "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).

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.

One example of a possible term and condition that may be evaluated in other voluntary agreements is the royalty rate. Idaho Code § 47-320(3)(c) expressly requires that royalty for "Leased" owners shall be "no less than one-eighth (1/8) royalty." Thus, the Administrator may evaluate the royalty rate and the reasons that may or may not be similar to what is proposed. Other terms may also be included in voluntary agreements within and nearby the spacing unit and those can be evaluated in the context of this factor as well.

Factor 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?

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 the 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. 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, including those related to water resources.

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, are 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?

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 and other "risks" they would like offset. *NC Owners Br.* p. 8-10. 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-2021-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 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 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 20 day of July 2021.

Richard "Mick" Thomas

Division Administrator
Minerals, Public Trust, Oil & Gas
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CERTIFICATE OF MAILING

I hereby certify that on this _20th_ day of July 2021. I caused to be served a true and correct copy of the foregoing by regular mail unless indicated otherwise addressed to the following and emailed courtesy copies as shown:

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