LAWRENCE G. WASDEN
Attorney General
State of Idaho

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

STEVEN W. STRACK (ISB #3906)
JOY M. VEGA (ISB #7887)
KRISTINA N. FUGATE (ISB #9242)
Deputy Attorneys General
Natural Resources Division
Office of the Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: 208-334-2400
Fax: 208-854-8072
E-mail: steve.strack@ag.idaho.gov
joy.vega@ag.idaho.gov
kristina.fugate@ag.idaho.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

CITIZENS ALLIED FOR INTEGRITY AND ACCOUNTABILITY, INC.; CHARLENE QUADE; RACHEL HOLTRY; BRITTANY AND CRISTIAN SANDOVAL, Plaintiffs, vs. THOMAS M. SCHULTZ, in his official capacity as Director of the Idaho Department of Lands; CHRIS BECK, MARGARET CHIPMAN, SID CELLAN, JIM CLASSEN, and KEN SMITH, all in their official capacities as members of the Idaho Oil and Gas Conservation Commission Defendants.	Case No. 1:17-cv-264-BLW **REPLY TO RESPONSE TO MOTION TO ALTER OR AMEND THE JUDGMENT OR ALTERNATIVELY, FOR RELIEF FROM THE JUDGMENT**

ARGUMENT

I. Plaintiffs concede, correctly, that the Court erred in concluding that the statutory requirement to include "just and reasonable" terms creates a property interest protected by the Due Process Clause.

Idaho Code § 47-322(a) (2016) directed the Oil and Gas Conservation Commission ("Commission") to craft integration orders "upon terms and conditions that are just and reasonable. The directive to employ just and reasonable terms and conditions appeared in the opening paragraph of Idaho Code § 47-322 (2016), which contained general directives regarding the exercise of the Commission's regulatory authority to integrate oil and gas interests. *See Anderson v. Corp. Comm'n*, 327 P.2d 699, 702-03 (Okla 1957) (integration order "was regulatory and in the exercise of the police power"). The rights to which integrated parties were specifically entitled appeared later in the statute. *Compare* Idaho Code § 47-322(a) (2016) ("[e]ach such integration order shall be upon terms and conditions that are just and reasonable") *with* Idaho Code § 47-322(c)(ii) (2016) ("[n]onconsenting working interest owners are ***entitled*** to their respective shares of the production of the well") (emphasis added) *and* Idaho Code § 47-322(c)(v) (owners who are "deemed leased" "***shall receive*** one-eight (1/8) royalty [and] the same bonus payment per acre as the operator originally paid to other owners in the spacing unit") (emphasis added).

The Plaintiffs agree with the Defendants that the statutory directive to integrate oil and gas rights upon "just and reasonable terms" does not create a property interest. *Pls. Resp. Defs. Mot. Alter Am.* at 3, 5, & 6 (Dkt. 50) ("The Memorandum Decision and Order … may have strayed just off target in understanding the property interest at stake;" "[j]ust and reasonable terms are thus not the property interest itself;" "the precise language of the Court's Memorandum Decision may have misstated the nature of the property interest"). The Plaintiffs' concession is well-founded, given the overwhelming weight of precedent discussed in *Defendants'*

Memorandum in Support of Motion to Alter or Amend (Dkt. 43-1). Significantly, the Plaintiffs have provided no precedent to the contrary.

Further persuasive authority affirming the Plaintiffs' concession is found in *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989). There, as here, the court was faced with the assertion that a statutory mandate created a property interest, the difference being that the mandate reviewed in *B.H. v. Johnson* required a state agency ("DCFS") to provide protective services to children upon receiving a report of abuse. There, as here, the statute included mandatory language requiring the state agency to take action, but employed imprecise terms such as "appropriate services" that "provide little guidance as to what services are to be provided to which families and children." *Id*. at 1400. The court ultimately concluded that the statute was "insufficient" to create a property interest in the services because "while the mandatory language gives DCFS no discretion as to ***whether*** to provide services, the broad statutory language grants DCFS discretion about ***what*** particular services to provide." *Id*. (emphasis in original); *see also Porter v. S. Nevada Adult Mental Health Servs*., No. 16-CV-02949-APG-PAL, 2017 WL 6379525, at *10 (D. Nev. Dec. 13, 2017) ("just because a statute contains mandatory language for government officials, it does not necessarily create a property interest for affected groups") (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764-65 (2005)).

Here, the same conclusion applies: while the mandatory language in the integration statute gives the Commission no discretion as to ***whether*** to include just and reasonable terms and conditions, the broad language grants the Commission discretion as to ***what*** particular terms to include. *See Mem. Dec*. at 15 (Dkt. 36) ("the Commission has a significant amount of discretion to decide what 'just and reasonable' means, but not so much discretion that they can decide it means nothing"); *cf. J.P. Furlong Co, v. Bd. of Oil, Gas and Mining*, 424 P.3d 858, 864 (Utah 2018) (integration statute providing that order "***shall*** be made upon terms and conditions

that are just and reasonable" "gives the Board leeway to determine ***what*** the order should contain and invests the Board with considerable discretion to decide ***what*** terms it includes in that order") (emphasis added); *Porter*, 2017 WL 6379525, at *10 (statute requiring state agency to "adopt policies 'to ensure adequate development and administration of services for persons with mental illness'" did not create property interest because "[n]othing in the text of [the statute] requires state officials to adopt certain policies or limits discretion regarding what those policies must include").

Moreover, because the "just and reasonable" provision is a self-enacting directive aimed at the Commission's regulatory authority, there is no constitutional requirement that the Commission identify, prior to hearing, the factors it will consider in making its determination.[1] Rather, courts uniformly uphold determinations of just and reasonable terms if based on substantial evidence developed ***during*** a hearing. *See, e.g.*, *Reichhold Energy Corp. v. State By & Through Div. of State of Lands*, 700 P.2d 282, 284-85 (Oreg. 1985) (the "determination of whether the Board properly applied the terms 'just and reasonable' … involves the interrelated questions of whether the agency's decision was an exercise of discretion consistent with the legislative goals embodied in the statutory scheme … and whether the agency demonstrated the reasons why the facts led to its decision"); *Ranola Oil Co. v. Corp. Comm'n*, 460 P.2d 415, 417-18 (Okla. 1969) (determination of whether terms of integration order were just and reasonable

[1] Several cases cited by Plaintiffs suggest that agencies must prescribe standards for the grant or denial of items such as liquor licenses or public housing, in order to prevent discriminatory decisions. *See, e.g., Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *Holmes v. N.Y.C. Housing Authority*, 398 F.2d 262 (2d Cir. 1968). *Hornsby* and *Holmes* are inapplicable, however, because in both cases the application was denied without an evidentiary hearing and without written explanation. 326 F.2d at 610; 398 F.2d at 264. The other case cited by Plaintiffs, *Powers v. Canyon County*, 108 Idaho 967, 703 P.2d 1342 (1985), involved the denial of medical benefits *after* a hearing. In such case, the court found "nothing unusual or invalid about a broad legislative benefit standard left to judicial interpretation," and cited as an example the "'fair, just and reasonable' standard for setting utility rates by the Public Utilities Commission." *Id.* at 972, 703 P.2d at 1347. *See also Tomas v. Rubin*, 926 F.2d 906, 911 (9th Cir. 1991) (rejecting argument that State violated due process by allowing agency "unfettered discretion" to deny benefits for applicant's failure to cooperate in identifying the father of her child and holding that "the requirement that a finding of noncooperation be supported by substantial evidence is a sufficient limitation on agency discretion").

was limited to "whether the findings and conclusions are sustained by the law and substantial evidence"); *Texaco Inc. v. Indus. Comm'n of State of N. Dakota*, 448 N.W.2d 621, 624–25 (N.D. 1989) (commission's determination of just and reasonable terms in integration order must be affirmed if "its findings and conclusions are sustained by the law and by substantial and credible evidence"); *J.P. Furlong Co*., 424 P.3d at 862-63 ("we review the Board's conclusion that the JOA [included in an integration order] was 'just and reasonable' for substantial evidence");[2] *cf*. Idaho Code § 67-5279(3)(d) (agency orders may be vacated when "not supported by substantial evidence on the record as a whole").

In sum, the Plaintiffs and the Defendants agree that this Court erred in concluding that "Plaintiffs have a protected property interest … in just and reasonable terms and conditions." *Mem. Dec*. at 15 (Dkt. 36). Idaho law vests the Commission with broad discretion to determine the terms and conditions that will be included in an integration order. Given the breadth of that discretion, the Commission's determination of just and reasonable terms, based on substantial evidence developed during an evidentiary hearing, did not, and could not, deprive the Plaintiffs of any property rights.

II. The Plaintiffs err in asserting that the Court's judgment could be upheld on the basis that the "requirement of just and reasonable terms is part of what due process requires."

While the Plaintiffs agree that "[t]he State may be right to complain that the right to 'just and reasonable' terms cannot itself be a property interest," *Pls. Resp. Defs. Mot. Alter Am.* at 5 (Dkt. 50), they err in asserting, contrary to the plain language of Idaho Code § 47-322(a)(2016), that the directive to include just and reasonable terms is intended to be "the proper measure of process due" if an integration order is entered. *Id*. Elsewhere, they assert that "[t]he requirement

[2] "JOA" is shorthand for "joint operating agreement." *J.P. Furlong Co*., 424 P.3d at 859.

of just and reasonable terms is part of what due process requires before an owner can be deprived of [their] property interest." *Id*.

If the Plaintiffs were correct in asserting that the requirement for just and reasonable terms is a procedural directive to the Commission, then their claims should be dismissed, because the Due Process Clause only "guard[s] against unfair deprivation by state officials of ***substantive*** state-law property rights or entitlements." *Town of Castle Rock. v. Gonzales*, 545 U.S. 748, 771 (2005) (Souter, J., concurring) (emphasis added). Parties cannot "claim[] a property interest in a state-mandated process in and of itself [because such an] argument is at odds with the rule that "'[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.'" *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)).

The Plaintiffs' effort to recast the "just and reasonable" provision as a procedural requirement does not avoid the fact that such provision is too discretionary to create a property interest or entitlement: procedural requirements create a protectable property interest "[o]nly if the governing statute compels a result upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body." *Hamell v. Idaho Cty.*, No. 3:16-CV-00469-EJL, 2018 WL 3758565, at *3 (D. Idaho Aug. 8, 2018) (quoting *Shanks v. Dressel*, 540 F.3d 1082 1091 (9th Cir. 2008)). Here, the Plaintiffs admit no such criteria exist; indeed, they go so far as to insist that without further definition, "'just and reasonable' imposes a completely arbitrary and meaningless standard between a property owner's interest in oil and gas rights, and the compelled transfer of those interest to an operator …." *Pls. Resp. Defs. Mot. Alter Am.* at 6 (Dkt. 50). While the Defendants disagree that the statutory "just and reasonable" standard is

without meaning, [3] it appears that the Defendants and the Plaintiffs agree that the "just and reasonable" standard does not compel a predictable or ascertainable result. That being the case, there can be no property interest in the outcome of the administrative hearing held, in part, to determine just and reasonable terms and conditions.

III. Plaintiffs' attempt to revive their assertion that the integration order deprives them of the right to withhold their mineral interest ignores this Court's Order as well as the overwhelming precedents cited in summary judgment briefing.

The Plaintiffs repeat the assertion, rejected by this Court in its *Memorandum Decision*, (Dkt. 36 at 12-14), that the integration statute deprives them of their property "right to withhold their consent and to prevent extraction of their oil and gas" by providing for the "compelled transfer" of such right once 55% of property in a spacing unit is leased to an operator. *Pls. Resp. Defs. Mot. Alter Am.* at 4, 6 (Dkt. 50); *compare with Mem. Dec.* at 14 (Dkt. 36) (Plaintiffs "each have a protected property interest in a reasonable share of the oil and gas production, as determined by the Idaho legislature"). The assertion that integration orders deprive property owners of the right to withhold oil and gas from development has been soundly and thoroughly rejected by every court that has reviewed the issue, *see Defs. Summ. J. Br.* at 5-8 (Dkt. 24-1); *Defs. Re. Br.* at 6 (Dkt. 32), and not be readdressed here, particularly since Plaintiffs have not moved for reconsideration of the Court's holding on that issue.

IV. In the alternative, Defendants request the Court amend its order to clarify that the Final Order is vacated, and a new hearing required, only with regard to the integration of the mineral interests of Plaintiffs Holtry and Quade.

A. The Court should clarify that the Commission's spacing order remains enforceable.

[3] *See Blacks Law Dictionary* 880 (8th ed. 2004) (defining "just" to mean "[l]egally right; lawful; equitable"); *Id*. at 1203 (defining "reasonable" to mean "[f]air, proper, or moderate under the circumstances").

The Final Order[4] that the Court directed the Commission to vacate has two separate and independent components – one established a temporary spacing unit, one integrated unleased mineral interests into the spacing unit. *Fugate Aff.* at Ex. 4 (Dkt. 24-5); *Mem. Dec*. at 22-23 (Dkt. 36). The Defendants have asked the Court to alter or amend its Memorandum Decision so as to not apply to those portions of the Final Order addressing spacing. The Defendants' motion is well founded:

> Courts may set aside part of an agency action only if it is severable from the rest of the agency's action. *See Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir .2009). "Whether an administrative agency's order or regulation is severable, permitting a court to affirm it in part and reverse it in part, depends on the issuing agency's intent." *North Carolina v. FERC*, 730 F.2d 790, 795-96 (D.C. Cir. 1984). Thus, "[w]here there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted, partial affirmance is improper." *Id*.

Wood v. Betlach, No. CV-12-08098-PCT-DGC, 2012 WL 4762466, at *4 (D. Ariz. Oct. 5, 2012).

There is little doubt that those portions of the Final Order establishing a spacing unit may be severed with no prejudice to Plaintiffs. First, neither the Plaintiff's Complaint (Dkt. 1), nor their memorandum in support of motion for summary judgment (Dkt. 23-1) alleged that those portions of the Final Order addressing spacing violated their 14th Amendment rights. Second, spacing is an entirely separate process from integration. The sole consideration in spacing is the "size and shape of the units [that will] result in the efficient and economical development of the pool as a whole." Idaho Code § 47-321(1) (2016). Where circumstances require, the Commission may "establish spacing units of different sizes or shapes for different parts of a pool

[4] "Final Order" refers to the Amended Order and Withdrawal of January 17, 2017, issued by then-Director Thomas Schultz, filed here as Exhibit 4 to Affidavit of Counsel (Dkt. 24-5 at 11-51).

or may grant exceptions to the size or shape of any spacing unit or units or may change the sizes or shape of one (1) or more existing spacing units." Idaho Code § 47-321(3) (2016).

Spacing orders are typically stand-alone orders. Idaho Code § 47-321 (2016). Where economical to do so, a spacing application can be heard at the same time as an integration application. Idaho Code § 47-322(a) (2016) ("[t]he department, as a part of the order establishing a spacing unit or units, may prescribe the terms and conditions upon which the royalty interests in the unit or units shall, in the absence of voluntary agreement, be deemed to be integrated without the necessity of a subsequent separate order integrating the royalty interests"). The fact that spacing and integration were considered in a single hearing, however, does not alter the fact that the hearing officer, in establishing a temporary spacing unit, based her decision solely on findings of fact (Dkt. 24-5 at 17-22) and conclusions of law (Dkt. 24-5 at 27-31) relevant to the issue of whether "the spacing unit is of approximate size and shape so as to economically drain the pool with only one well," and with consideration of the fact that "development of the mineral estate should be done in a reasonable and prudent manner as to not unreasonably interfere with the established surface use." Dkt. 24-5 at 29 (Final Order).

Because the legal and factual considerations underlying the spacing decision are separate from those underlying integration, there is no "substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984). Under the circumstances presented here, it is appropriate to sever those portions of the Final Order addressing only spacing and allow those provisions to remain in place.

B. The Court should clarify that the integration order is vacated only as to the integration of the mineral interests of Plaintiffs Holtry and Quade.

The Plaintiffs only sought injunctive relief in their individual capacities: they did not seek to certify a class. "While injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification, 'an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*.'" *Easy Riders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (quoting *Bresgal v. Brock,* 843 F.2d 1163, 1170-71 (9th Cir. 1987)) (emphasis in original). .

Here, the Plaintiffs assert only that other integrated parties may benefit by holding a new hearing, even if they "did not participate in writing or in person" in the proceedings that led to the Final Order. *Pls. Resp. Defs. Mot. Alter Am.* at 11 (Dkt. 50). The Plaintiffs make no effort, however, to demonstrate that the ***named Plaintiffs*** will not be accorded full relief if the injunction, and any subsequent hearing, is limited to the integration of the mineral interests of the named Plaintiffs. Absent such a demonstration, it is appropriate to limit any injunctive relief so that the Final Order is vacated only as applied to Plaintiffs Quade and Holtry.

CONCLUSION

Based upon the Defendants' foregoing arguments, and those previously presented (Dkt. 43-1), the Court is respectfully requested to alter and amend its Judgment (Dkts. 36 and 37) to grant summary judgment to the Defendants, and eliminate its instructions to vacate the Final Order, rescind the lease contracts of Plaintiffs Quade and Holtry, and to hold a new hearing. *Defs. Mot. Alter Am.* at ¶¶ 1-2 (Dkt 43). Alternatively, the Court should provide the Defendants partial relief from the Judgment by clarifying and limiting the instructions to vacate the Final Order. *Id.* at ¶ 3.

DATED this 16th day of November, 2018.

/s/

STEVEN W. STRACK
JOY M. VEGA
KRISTINA N. FUGATE
Deputy Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2018, I caused the foregoing to be electronically filed with the Court using the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

James M. Piotrowski
james@idunionlaw.com

Marty Durand
marty@idunionlaw.com

/s/

STEVEN W. STRACK
JOY M. VEGA
KRISTINA N. FUGATE
Deputy Attorneys General