

BEFORE THE IDAHO OIL AND GAS CONSERVATION COMMISSION

DEPT. OF LAND
BOISE, IDAHO
2018 JUL 23 AM 8:00

Randy and Thana Kauffman, <i>Complainants</i> ,)	Docket No. CC-2017-OGR-01-002
)	
v.)	ORDER REGARDING
)	DISCOVERY
AM Idaho, LLC and Alta Mesa Services, LP,)	
<i>Respondents</i> .)	
_____)	

Complainants in the above captioned matter have requested certain information from *Respondents* pertaining to their royalty interests in oil and gas operations conducted by *Respondents*. Oral argument having been made and written submissions having been filed, and for good cause appearing, this Hearing Officer hereby orders as follows:

A. Discovery is allowed in this matter.

1. Idaho Code specifically authorizes discovery before the Commission.

The *Complainants* are entitled to the information requested through the discovery process. Idaho Administrative Code 04.11.01, commonly known as the Idaho Rules of Administrative Procedure of the Attorney General (hereinafter "IDAPA") state:

Parties may agree between or among themselves to provide for discovery without reference to an agency's statutes, rules of procedure, or orders. Otherwise no party before the agency is entitled to engage in discovery unless discovery is authorized before the agency, the party moves to compel discovery, and the agency issues an order directing that the discovery be answered. The presiding officer shall provide a schedule for discovery in the order compelling discovery, but the order compelling and scheduling discovery need not conform to the timetables of the Idaho Rules of Civil Procedure. The agency or agency staff may conduct statutory inspection, examination, investigation, etc., at any time without filing a motion to compel discovery.

Rule 521.

Reference to the agency in these rules includes the agency director, board or commission, agency secretary, hearing officer appointed by the agency, or presiding officer, as context requires. Reference to the agency head means to the agency director, board or commission, as context requires, or such other officer designated by the agency head to review recommended or preliminary orders.

Rule 051.

Idaho Code § 47-329(1) states:

POWERS OF COMMISSION — WITNESSES — PENALTY. (1) The commission shall have the power to summon witnesses, to administer oaths, and to require the production of records, books, and documents for examination at any hearing or investigation conducted by the commission.

The Hearing Officer in this matter was appointed by the Commission pursuant to a *Notice of Appointment of Hearing Officer and Presiding Officer* issued by the Oil & Gas Conservation Commission on the 12th day of March, 2018. The Hearing Officer was appointed to act for the Commission and to act as a Presiding Officer “with the Commission members sitting at hearing consistent with IDAPA 04.11.01.414.” (*Notice of Appointment* ¶ 2). “The Commission will make the final decision in this matter...” (*Notice of Appointment* ¶ 3).

Respondents object to the availability of discovery in this matter stating that discovery is not allowed unless specifically authorized by statute and argues that the above cited statute is limited to hearings specifically before the Commission. This Hearing Officer does not agree and finds the statute applicable. Idaho Code § 47-329(1) grants powers to the Commission, and because this Hearing Officer was appointed to act, on a limited basis, on behalf of the Commission, the power to order production of documents granted to the Commission is therefore granted to this Hearing Officer both through 47-329(1) and IDAPA Rule 521. At this time, the only discovery requested, and therefore authorized, is the exchange of information through requests for production.

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2. Idaho Code § 47-328(3)(d) is not applicable.

Discovery is available in this matter even when considering the existence of Idaho Code § 47-328(3)(d) which specifically states discovery is not allowed in certain hearings. However, this Hearing Officer finds Idaho Code § 47-328(3)(d) is not applicable to this matter. This is a complaint filed with the Commission which the Commission has the authority to hear under Idaho Code § 47-328(1) and (2). Such a hearing is distinguishable from an application to the Department and as specifically stated in 47-328(3):

Except as provided in...subsection (2) of this section, any request for an order related to oil and gas activities within the Commission's jurisdiction... shall be made by application to the Department of Lands and processed as provided in this section.

Idaho Code § 47-328(3)(a). Emphasis added.

3. The discovery requested is related to the Complaint filed. This matter falls within the stated exemption.

Respondents assert the position that discovery should not be allowed as *Complainants* are only seeking enforcement of their rights enumerated in Idaho Code § 47-332(4) which is a right to access certain information regarding royalty payments and production records. *Respondents'* position is inaccurate, the complainant does invoke Idaho Code § 47-332(4) but it also clearly states "this letter constitutes our formal complaint to the OGCC, as provided for in Idaho Code 47-331(4)." (*Kauffman Complaint Correspondence* dated December 7, 2017 ¶ 2). Idaho Code § 47-331(4) enumerates:

A royalty owner seeking a remedy for failure to make payments under the lease or seeking payments under this section may file a complaint with the commission or may bring an action in the district court pursuant to section 47-333, Idaho Code. The prevailing party in any proceeding brought under this section is entitled to recover court costs and reasonable attorney's fees.

In a complaint under this subsection the *Complainants* bear the burden of proving their case; without the power to compel discovery *Complainants* would be severely disadvantaged from meeting their burden. Moreover, if the *Complainants* chose the alternative of seeking redress in a court of law, discovery would certainly be allowed.

For the reasons stated above the Hearing Officer finds that discovery is available to the parties in this matter. The Hearing Officer further finds that the *Complainants* have requested the *Respondents* produce the information enumerated in 47-332(4) to wit:

...[C]opies of all documents, records or reports confirming the gross production, disposition and market value including gas meter readings, pipeline receipts, gas line receipts and other checks or memoranda of the amount produced and put into pipelines, tanks, or pools and gas lines or gas storage, and any other reports or records that the lessor may require to verify the gross production, disposition and market value.

The Hearing Officer, as have *Complainants* and *Respondents*, have acknowledged that *Complainants*, as royalty owners, are likely entitled to information under the statute itself. However, analyzing whether or not *Respondents* have complied with their statutory duties under this section of law is a matter left for determination at the hearing itself and is premature to decide at this point in time. Nevertheless, *Complainants* have asked for this same information through the discovery process. This Hearing Officer finds they are entitled to it as part of their discovery request.

B. *Respondents* are entitled to make the information available under a Protective Order.

Respondents have moved this Hearing Officer for a protective order under IDAPA 532 which states:

As authorized by statute or rule, the agency may issue protective orders limiting access to information generated during settlement negotiations, discovery, or hearing.

The Idaho Rule regarding protective orders in discovery matters states:

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

Idaho Rules of Civil Procedure, Rule 26.

Respondents set forth their basis for the protective order in their *Brief of Respondents AM Idaho, LLC, in Support of Request for Protective Order* dated June 13, 2018, reiterates their request in their *Brief of Respondents AM Idaho, LLC RE: Availability of Discovery* dated June 29, 2018, and offers the *Declaration of Jerry Haney in Support of Request of Protective Order* dated June 29, 2018 as the factual basis proving why the protective order is necessary. *Complainants* have,

on numerous occasions, throughout informal prehearing conferences and through written correspondence to all parties objected to the entry of a protective order on the grounds that they are only seeking information related to their wells and therefore an entry of protective order is unnecessary.

The Hearing Officer finds that the *Respondents* have met their burden in showing a need for a protective order, specifically because the information is proprietary in nature and further would cause *Respondents* harm if circulated freely. *Complainants'* objection that it is not necessary because the information *Complainants* seek relates only to wells in which *Complainants* have a royalty interest does not prevent the entry of a protective order. Simply because the *Complainants* are entitled to information as a result of being in a contract with *Respondents* does not mean *Complainants* are free to share information that would constitute *Respondent's* proprietary information; further, *Respondents* have indicated that the information sought by *Complainants* cannot be separated from other confidential and proprietary information without extraordinary burden and expense.

This Hearing Officer specifically finds: that the entry of the protective order is perceived as a matter of discretion and consistent with the legal standards enumerated above, this Hearing Officer reaches the decision through an exercise of reason. This Hearing Officer finds based upon the evidence before it at this time the data requested by *Complainants* constitutes the trade secrets and proprietary information of the *Respondents* as it is information, including formulas, computations and methods that derive independent economic value to *Respondents* by not being generally known to other persons who can obtain economic value from its disclosure or use and that the information has been subject to efforts to maintain its secrecy. Therefore, good cause

exists to order the information be made available under limited protective parameters. Protective parameters are enumerated in the protective order entered simultaneously herewith.

C. *Respondents* are only required to make the information available and are not required to physically reproduce the information for *Complainants*.

Both parties have requested this Hearing Officer to resolve the procedural issue as to whether *Respondents* need to copy the requested information and provide it to *Complainants* or merely make the information available. Under the standard procedures for production of discovery, the Idaho Rules of Civil Procedure state as follows:

Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes.

(a) In General. Requests may be served on the plaintiff after commencement of the suit and upon any other party with or after service of the summons and complaint. A party may serve on any other party a request within the scope of Rule 26(b):

- (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control...

I.R.C.P. Rule 34(a)(1).

Traditionally, in responding to discovery most parties will provide copies of the documents requested either physically or in electronic format. However, there are circumstances in which it is inconvenient, expensive or otherwise impractical to do so. Despite the traditions of practice, the hard and fast rule pertaining to production of documents during the discovery process is that the party producing the documents only has the legal obligation to "produce and permit the requesting party or its representative to inspect, copy, test, or sample..." the information requested. Ultimately, if a responding party chooses not to duplicate the information for the requesting party it is the responding party's prerogative to do so.

Complainants have argued that the documents have to be copied and physically provided to *Complainants*, not only through the discovery process but also pursuant to Idaho Code § 47-

332(4). However, this statute uses language similar to the Idaho Rules of Civil Procedure language stated above. Specifically, it states “the lessee must maintain, for a period of five (5) years, and make available to lessor...” This Hearing Officer finds the statutory language to be on par with the Idaho Rules of Civil Procedure, therefore, to the extent the cited statute is applicable, the interpretation, and outcome, are the same. *Respondents* need only to make the information available to *Complainants*.

As cited by *Respondents*, courts have held the same:

A promise to make documents available for inspection and a promise to deliver these documents are very different promises. As the trial court instructed, “[M]ake available’ means only that the subject matter is accessible or attainable [while] ‘deliver’ means delivery or physical transfer of possession.”

Shu-Chin Wang V. Kidder, Mathews & Segner, Inc. Wa. Ct. App. Div.I 2010
Case Number 62034-7-1.

However, it is important to note that once *Respondents* make the information available, *Complainants* are free to copy the information. (I.R.C.P. 34). In the event *Complainants* choose to do so and remove information from *Respondents’* place of production, the information produced and copied is still guarded by the protective order entered simultaneously herewith.

D. *Respondents* shall produce the requested information no later than July 25, 2018.

Normally when discovery is ordered to be produced, the parties are afforded an ample opportunity to compile, review and redact said information. However, based upon the special circumstances of this case and the previous representations by *Respondents’* legal counsel, the documents are already available for *Complainants’* review, it is hereby ordered that *Respondents* make the information requested available to *Complainants* no later than July 25, 2018.

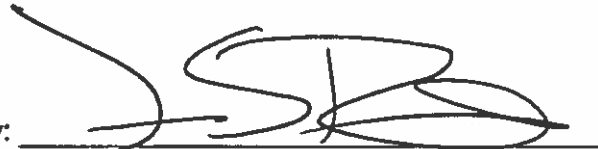
Based upon the foregoing, IT IS THEREFORE ORDERED:

That the parties hereto are entitled to discovery in the above captioned matter. That the discovery is currently limited to requests for production of documents. That the discovery presently requested by *Complainants* shall be produced under, and protected by, the protective order entered simultaneously herewith. That the *Respondents'* legal obligation to produce the information only requires *Respondents* to make it available to *Complainants* for inspection, copying, testing or sampling as stated herein. If *Complainants* copy and remove information from a location where it was produced by *Respondents*, that information is still protected by the protective order.

BE IT SO ORDERED.

DATED this 20th day of July, 2018.

By: _____

A handwritten signature in black ink, appearing to read "J. S. Risch", written over a horizontal line.

JASON S. RISCH, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2018, I caused to be served a true and correct copy of the following items in the Docket No: CC-2017-OGR-01-002: *Order Regarding Discovery* by the method indicated below and addressed to the following:

AM Idaho, LLC
c/o Michael Christian
Marcus, Christian, Hardee & Davies, LLP
737 North 7th Street
Boise ID 83702-5595

- U.S. Mail, postage prepaid
- Hand Delivery
- Certified mail
- Email: mchristian@mch-lawyer.com

Randy and Thana Kauffman
4040 Little Willow Rd.
Payette ID 83661

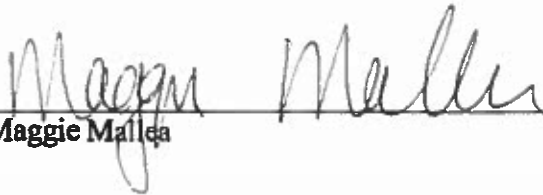
- U.S. Mail, postage prepaid
- Hand Delivery
- Certified mail
- Email: [REDACTED]

Mick Thomas
Division Administrator
Idaho Department of Lands
PO Box 83720
Boise ID 83720-0050

- U.S. Mail, postage prepaid
- Hand Delivery
- Certified mail
- Email: mthomas@idl.idaho.gov

Kristina Fugate
Deputy Attorney General
PO Box 83720
Boise, Idaho 83720-0010

- U.S. Mail, postage prepaid
- Hand Delivery
- Certified mail
- Email: kristina.fugate@ag.idaho.gov


Maggie Mallea