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Sent: Friday, June 29, 2018 2:58 PM

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Fugate, Kristina <kristina.fugate@ag.idaho.gov>

Subject: Docket No. CC-2017-OGR-01-002

All –

Attached please find:

1. Brief of Respondent AM Idaho LLC re: Availability of Discovery
2. Declaration of Jerry Haney in Support of Request for Protective Order

Thank you,

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**BEFORE THE OIL AND GAS CONSERVATION COMMISSION
STATE OF IDAHO**

Randy and Thana Kauffman, <i>Complainants</i> ,)	
)	
v.)	Docket No. CC-2017-OGR-01-002
)	
AM Idaho, LLC, and Alta Mesa Services, LP,)	BRIEF OF RESPONDENT
<i>Respondents</i> .)	AM IDAHO, LLC RE: AVAILABILITY
)	OF DISCOVERY
)	
)	

Per the hearing officer’s request, Respondent AM Idaho LLC (“AM”) files this brief regarding the availability of discovery in this contested case.

IDAPA 04.11.01.521 provides:

521. WHEN DISCOVERY AUTHORIZED (RULE 521). 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.

The hearing officer suggested in the previous prehearing conference that Idaho Code § 47-329(1) may provide the authorization for discovery. AM respectfully disagrees. §329(1) provides for the Commission to require the production of records for examination at a hearing or investigation conducted by the Commission. That appears to be the power of *subpoena* for hearing, not authorization for discovery in a contested case. Idaho Code § 47-

329(2) confirms this, as it deals specifically with the failure of a person to comply with a *subpoena* under § 329(1).

Nothing else in the Act authorizes discovery before the Commission or a hearing officer. Because “the Commission was created by statute, the Commission has no jurisdiction other than that which the legislature has specifically granted to it,” and as a result it “therefore exercises limited jurisdiction, with nothing being presumed in favor of its jurisdiction.” *Idaho Power Co. v. IPUC*, 102 Idaho 744, 750 (1981).

The Commission has no currently effective rule providing for discovery in commission proceedings. The Commission’s procedural rules, IDAPA 20.07.01 predate the Idaho Administrative Procedures Act, and per its terms were superseded by the adoption of the Attorney General’s procedural rules, IDAPA 04.11.01. *See* Idaho Code § 67-5206(5)(a) (agency procedural rules predating adoption of the Attorney General’s rules are superseded). As a result, the Commission affirmatively repealed IDAPA 20.07.01 in 2017.¹ The Commission has not adopted new procedural rules since then.² The Commission’s regulatory rules, IDAPA 20.07.02, contain no provision for discovery in a contested case before the Commission.

All of the above indicates that discovery is not “authorized before the [Commission],” or its designated hearing officer, in a contested case.³ Moreover, as AM has

¹ https://adminrules.idaho.gov/legislative_books/2017/pending/17H_ResCon.pdf.

² In any case, former IDAPA 20.08.1.080 and .090 only permitted the hearing officer to issue subpoenas and the parties to conduct depositions. No other form of discovery was authorized.

³ Of course, if discovery is allowed, then AM has the same entitlement as the Kauffmans to engage in discovery and will submit a request of its own for discovery from the Kauffmans.

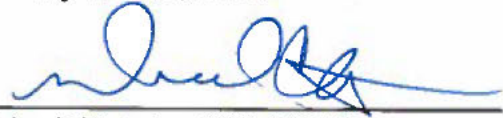
pointed out in previous briefing, Idaho Code §47-332(4) provides only for select categories of records of an operator to be “made available” to a royalty interest owner, not delivered without restriction. See *U.S. v. Baroid Corp.*, 346 F.Supp.2d 138, 143 (D.D.C. 2004) (“‘To make available’ does not include the obligation to deliver or process.”); *Wang v. Kidder, Mathews & Segner, Inc.*, Case No. 62034-7-1 (Wa. Ct. App. Div. I 2010) (“‘[M]ake available’ means only that the subject matter is accessible or attainable [while] ‘deliver’ means delivery or physical transfer of possession.”). Allowing for discovery in the manner apparently sought by the Kauffmans would impermissibly override the limitations included in Idaho Code § 47-332(4).

As AM pointed out in its January 10, 2018 letter, the Kauffman’s complaint purports in part to be, but is not, a complaint to the Commission under Idaho Code § 47-331(4) for “failure to make payments under the lease or seeking payments under this section[.]” There has been no demand made by Kauffmans for any particular payment under their lease. The Kauffmans have alleged a failure to comply with Idaho Code § 47-332(4), but as AM pointed out previously, before the initial prehearing conference call they had never actually made a request of AM to make records available under the statute. AM suggested that they make such a request and AM would comply with it. This is where things now stand. It is not clear what discovery is even necessary, if the only relief the Kauffmans seek is compliance with § 332(4), and AM has already indicated it wishes to comply with § 332(4) – the only issue remaining to be decided being what compliance requires. Request via discovery for the exact same documents AM has indicated it will make available seems redundant.

In the event discovery is permitted, as AM has discussed in previous briefing, a protective order is appropriate. Further to the hearing officer’s request, filed concurrently with this brief is the Declaration of Jerry Haney in Support of Request for Protective Order, setting for

facts showing good cause for entry of a protective order and specific harm to AM if its request for a protective order is not granted.

RESPECTFULLY SUBMITTED this 29th day of June, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT AM IDAHO, LLC RE: AVAILABILITY OF DISCOVERY** in the above-referenced matter by the method indicated below, and addressed to the following:

Randy and Thana Kauffman
4040 Little Willow Road
Payette, Idaho 83661

_____ *HAND DELIVER*
_____ *U.S. MAIL*
_____ *OVERNIGHT MAIL*
_____ *TELECOPY (FAX)*
_____ *:(208) _____*
 E-MAIL:



Mick Thomas
Secretary for the Commission and
Division Administrator
Idaho Department of Lands
PO Box 83720
Boise, Idaho 83720-0050

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Kristina Fugate
Deputy Attorney General
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**BEFORE THE OIL AND GAS CONSERVATION COMMISSION
STATE OF IDAHO**

Randy and Thana Kauffman, <i>Complainants,</i>)	
)	Docket No. CC-2017-OGR-01-002
v.)	
)	DECLARATION OF JERRY HANEY
AM Idaho, LLC, and Alta Mesa Services, LP,)	IN SUPPORT
<i>Respondents.</i>)	OF REQUEST FOR
)	PROTECTIVE ORDER
)	

I, Jerry Haney, declare as follows:

1. I am the Production Accounting Manager for Respondent AM Idaho, LLC (“AM”). I am responsible for maintaining records regarding AM’s production of oil and gas, and reporting production to the Idaho Department of Lands (“Department”) pursuant to the Idaho Oil and Gas Conservation Act.

2. I understand that the Complainants the Kauffmans seek production of documents regarding production, disposition, and revenues relating to AM’s Kauffman #1-9 and Kauffman #1-34 wells in Payette County, Idaho.

3. I understand the Kauffmans’ position is that they should receive hard copies of these documents unredacted and without restriction.

4. AM will suffer specific harm if a protective order is not entered restricting the Kauffmans to review of the requested documents, without taking hard copies, and to review of documents with information regarding wells other than the Kauffman #1-9 and Kauffman #1-34 wells redacted:

a. Plant volume and purchaser statements including financial and volume information regarding wells other than the Kauffman wells, including other AM wells in

Idaho, and wells owned by affiliated companies in other states (e.g. Oklahoma, Texas, and Louisiana). This is confidential and proprietary information of AM or its parent company or affiliate (not a party and not subject to discovery or other disclosure obligations in Idaho), not generally available or ascertainable by others, and subject to reasonable efforts by AM or its parent company or affiliate under the circumstances to maintain its secrecy. AM and/or its parent or affiliate could suffer competitive injury if the information was made publicly available, particularly in other states with active production where other competitors could take advantage of the information to infringe upon the market position of AM's parent company or affiliate.

b. Oil and gas companies generally, and AM in particular, have been the subject of recent opposition from activist groups intent on impeding or ending oil and gas production. The requested information is subject to misinterpretation, which can be wrongly used to harm AM's public reputation. For example, the Department recently made available to the public a spreadsheet apparently derived from daily production records of AM and suggested that it indicated an error in AM's allocation of revenue to individual wells. AM disagrees that this is the case and has communicated to the Department regarding several errors in its analysis based on inaccurate interpretations of the daily production data. However, immediately after the public release of the spreadsheet and the Department's comments regarding it, AM was the subject of at least two (erroneous) negative press reports, including an Associated Press report that was picked up by media outlets in several other states (Oklahoma, Washington, California and others) and nationally (including US News and World Report). In addition, the Kauffmans complained to the hearing officer and the Department about AM based on the erroneous spreadsheet. An irony is that the Department's conclusion appears to be that the Kauffman wells were allocated too much revenue, i.e., that the Kauffmans were paid too much royalty.

c. AM is aware that the Kauffmans have communicated with several third persons regarding AM's operations and is reasonably concerned that the Kauffmans will communicate any documents produced to them to those third persons or others.

d. AM is the subject of public reporting requirements to which no other industry in Idaho is subjected. Consequently, its monthly production reports are made public and posted by the Department on the IOGCC website. Idaho Code § 47-332(4) provides only that an operator must "make available" to royalty owners certain categories of documents beyond monthly production reports, not deliver hard copies of the documents to them. Allowing royalty owners to demand production of hard copies of further records without restriction would effectively eviscerate the limits on the statutory public reporting requirements, violate legislative intent, and eliminate what privacy and trade secret protection AM and other oil and gas operators do still enjoy under the law.

5. I declare under penalty of perjury under the laws of the State of Idaho that the foregoing is true and correct to the best of my knowledge.

Dated this 29th day of June, 2018.



Jerry Haney

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, I caused to be served a true and correct copy of the foregoing **DECLARATION OF JERRY HANEY IN SUPPORT OF REQUEST FOR PROTECTIVE ORDER** in the above-referenced matter by the method indicated below, and addressed to the following:

Randy and Thana Kauffman
4040 Little Willow Road
Payette, Idaho 83661

_____ *HAND DELIVER*
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_____ *OVERNIGHT MAIL*
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maggie@rischpisca.com

A handwritten signature in blue ink, appearing to be "Mick Thomas", written over a horizontal line.