

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR
PERMIT NOS. 63-34403, 63-34652, 63-34900
AND 63-34987 IN THE NAME OF CAT
CREEK ENERGY LLC

**ORDER GRANTING PETITION FOR
CLARIFICATION**

BACKGROUND

On June 10, 2020, the Idaho Department of Water Resources (“IDWR”), issued the *Amended Order Consolidating Dockets and Parties; Order to Reorganize Applicant’s Rule 40.05 Information; Order Establishing Protective Order Procedure; Order Authorizing Discovery; Notice of Continue Prehearing Conference* (“Amended Order Consolidating Dockets”). The Amended Order Consolidating Dockets authorized parties to this matter to immediately conduct and engage in discovery pursuant to IDAPA 37.01.01.521.

On June 24, 2020, the Idaho Department of Fish and Game (“IDFG”) filed a *Petition for Clarification* (“Petition”). IDFG asked the Director to clarify whether “the parties may conduct discovery to the full extent allowed by IDAPA 37.01.01.520.02 (“Rule 520.02”) and the Idaho Rules of Civil Procedure *for each application* and that the limits on interrogatories set forth in I.R.C.P. 33(a)(1)¹ will apply to each application individually and not to the four applications as a whole.” *Petition* at 3.

On July 1, 2020, Cat Creek Energy, LLC (“Cat Creek”) filed its *Applicant’s Response to Petition for Clarification* (“Response”). Cat Creek requested “the Director enter an order clarifying that the Rule 33 requirement limitation of 40 interrogatories applies to the consolidated cases, with parties being permitted to make interrogatories that pertain to multiple applications counting as a single interrogator[y].” *Response* at 2.

ANALYSIS

IDFG and Cat Creek both assert discovery in this matter is governed by the Idaho Rules of Civil Procedure (“I.R.C.P.”). The Director agrees. I.R.C.P. 33(a)(1) limits parties to 40 written interrogatories, including subparts, unless otherwise stipulated to or ordered.

IDFG asserted that absent consolidation, parties could have submitted forty interrogatories for each distinct application. *Petition* at 2. IDFG asserted it needs to preserve the ability to posit 40 interrogatories for each application because each application proposes a distinct beneficial use. *Id.*

¹ I.R.C.P. Rule 33(a)(1) states: “*Number.* Unless otherwise stipulated or ordered by the court for good cause allowing a specific additional number of interrogatories, a party may serve on any other party no more than 40 written interrogatories, including all discrete subparts.”

Cat Creek responded that with more than 20 protestants in the consolidated docket, allowing up to 160 interrogatories per protestant could place it in the position of responding to more than a thousand interrogatories. *Response* at 1. Cat Creek argued federal and state rules have recently been changed to clamp down on the modern trend of excessive discovery. *Id.* In this case, “the fact that the applications are interrelated, that they divert water from the same point of diversion and from the same source, and that water is stored in the same reservoir, means that Cat Creek’s discovery responses will in most cases be identical for all four applications.” *Id.* at 2. Cat Creek would instead have the Director allow only 40 interrogatories related to the consolidated docket, but requests could pertain to all four applications, by including, for example, the following statement: “If certain information applies to less than all of the Applications, identify which Applications it pertains to.” *Id.*

The purpose of case consolidation is to attempt to reduce and alleviate duplicative procedure, to increase efficiency, and to decrease burdens on participating parties. However, case consolidation does not end or eliminate an application’s individual character or identity. If each application would have proceeded individually, parties would have been allowed 40 interrogatories toward each individual application under I.R.C.P. 33(a)(1). Consolidation does not remove that opportunity.

However, the Director has the authority to order a change in the scope of discovery under Rule 520.02 and I.R.C.P. 33(a)(1) (“Unless otherwise stipulated *or ordered* [emphasis added] by the court for good cause allowing a specific number of interrogatories . . .”). I.R.C.P. 26(C) also provides the Director the authority to limit the frequency or extent of discovery if

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

I.R.C.P. 26(C). In any of those instances, IDWR may “issue protective orders limiting access to information generated during . . . discovery . . .” IDAPA 37.01.01.532.

At this time the Director will allow 40 interrogatories per application, as allowed under I.R.C.P. 33(a)(1). However, as discovery in this matter moves forward, any party may move the Director for a protective order according to Rule 532 under the rationale expressed in I.R.C.P. 26(C)(i), (ii), or (iii).

ORDER

IT IS HEREBY ORDERED that, pursuant to I.R.C.P. 33(a)(1), 40 interrogatories are allowed each party, for each of Application for Permit Nos. 63-34403, 63-34652, 63-34900, and 63-34987, in the name of Cat Creek Energy, LLC.

DATED this 15th day of July, 2020.



GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of July 2020, the above and foregoing was mailed, and emailed where indicated, to the following parties by United States Postal Service:

James Carkulis
CAT CREEK ENERGY LLC
398 S 9th St Suite 240
Boise ID 83701
jtc@ccewsrps.net

David R Tuthill Jr
Hal Anderson
IDAHO WATER ENGINEERING
2918 N El Rancho Pl
Boise ID 83704
dave@idahowaterengineering.com
hal@idahowaterengineering.com

Wendi Combs
704 Lindenwood Dr
Nampa ID 83638
Missterr52@yahoo.com

Randall C Budge
RACINE OLSON PLLP
PO Box 1391
Pocatello ID 83204
rcb@racinelaw.net

Dana Hofstetter
Richard Goodson
HAWLEY TROXELL ENNIS & HAWLEY
877 Main St. Suite 1000
PO Box 1617
Boise ID 83701 – 1617
dhofstetter@hawleytroxell.com
rgoodsom@hawleytroxell.com

Jim Rice
GWINN RICE RANCH LLC
2851 W. Balata Ct
Meridian ID 83646
Jimrice1965@gmail.com

Albert P Barker
BARKER ROSHOLT & SIMPSON
1010 W. Jefferson St. Suite 102
PO Box 2139
Boise, ID 83701 - 2139
apb@idahowaters.com

John Simpson
BARKER ROSHOLT & SIMPSON
1010 W. Jefferson St. Suite 102
PO Box 2139
Boise, ID 83701 - 2139
jks@idahowaters.com

Allen Thompson
406 N. Thompson Rd
King Hill ID 83633
kimraftertranch@gmail.com

Charles Honsinger
HONSINGER LAW PLLC
PO Box 517
Boise, ID 83701
honsingerlaw@gmail.com

Abigail Germaine
BOISE CITY ATTORNEY
150 N. Capitol Blvd
PO Box 500
Boise ID 83701
agermaine@cityofboise.org

Marie Callaway Kellner
IDAHO CONSERVATION LEAGUE
PO Box 844
Boise, ID 83701
mkellner@idahoconservation.org

Craig White
IDAHO DEPT. OF FISH AND GAME
Magic Valley Region
324 S 417 E Suite 1
Jerome ID 83338
Craig.white@fishandgame.idaho.gov

Michael Lawrence
Christopher Meyer
Charles Baser
GIVENS PURSLEY LLP
601 W Bannock St
PO Box 2720
Boise ID 83701-2720
mpl@givenspursley.com
ChrisMeyer@givenspursley.com

Katie Fite
WILDLANDS DEFENSE
PO Box 125
Boise ID 83701
katie@wildlandsdefense.org

Matt Nykiel
IDAHO CONSERVATION LEAGUE
PO Box 2308
Sandpoint ID 83864
mnykiel@idahoconservation.org

Fredric Price
US DEPT. OF INTERIOR
Bureau of Land Management
1387 S Vinnell Way
Boise, ID 83709
fwprice@blm.gov

Michele Anderson
Angela Kaufmann
IDAHO DEPT. OF LANDS
3284 W Industrial Loop
Coeur d'Alene ID 83815
mandersen@idl.idaho.gov
angela.kaufmann@ag.idaho.gov

Daniel Steenson
Bryce Farris
Andrew Waldera
SAWTOOTH LAW OFFICES PLLC
1101 W. River Street Suite 110
PO Box 7985
Boise 83707
dan@sawtoothlaw.com
bryce@sawtoothlaw.com
andy@sawtoothlaw.com

E Gail McGarry
US DEPARTMENT OF INTERIOR
BUREAU OF RECLAMATION
1150 N Curtis Rd Suite 100
Boise ID 83706
emcgarry@usbro.gov

Scott L. Campbell
CAMPBELL LAW, CHARTERED
P.O. Box 170538
Boise, Idaho 83717
scott@slclexh20.com

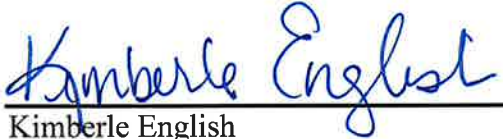
Tom Bassista
IDAHO DEPT. OF FISH AND GAME
317 W Main St
Boise, ID 83735-0001
thomas.bassista@idfg.idaho.gov

Peter Anderson
TROUT UNLIMITED
910 W Main St Suite 342
Boise, ID 83702
Peter.Anderson@tu.org

Ann Vonde
STATE OF IDAHO
OFFICE OF ATTORNEY GENERAL
PO Box 83720
Boise ID 83720-0010
ann.vonde@ag.idaho.gov

Dylan B. Lawrence
VARIN WARDWELL LLC
242 N. 8th Street, Suite 220
P.O. Box 1676
Boise, Idaho 83701-1676
dylanlawrence@varinwardwell.com

William J. Mulder
TREE TOP RANCHES, LP
101 S. Capitol Blvd Ste 1801
Boise, ID 83701
wjmulder@treetopranches.com



Kimberle English