

STATE OF NEW MEXICO  
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES  
OIL CONSERVATION DIVISION

APPLICATION OF FASKEN OIL &  
RANCH LTD., FOR AN ORDER AUTHORIZING  
AN ADDITIONAL WELL IN THE "POTASH AREA"  
AT AN UNORTHODOX WELL LOCATION,  
LEA COUNTY, NEW MEXICO

CASE NO. 14116

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FASKEN'S RESPONSE TO INTREPID'S BRIEF IN SUPPORT OF SEALING  
CERTAIN EXHIBITS AND TESTIMONY

Fasken Oil & Ranch submits the following response to the Intrepid "Brief in Support of Sealing Certain Exhibits and Testimony as Confidential" (hereinafter "Brief").

**A. Intrepid has failed to Establish with Competent Evidence that Any of the Exhibits or Testimony Offered At the Hearing Constitute a "Trade Secret."**

Just because a party or its attorneys claim certain exhibits and testimony offered at a trial or a hearing constitute confidential information does not make it subject to seal. Evidentiary Rule 11-508 provides limited protection only for documents and testimony that reveal a "trade secret." The same is true with respect to the New Mexico Inspection of Public Records Act (IPRA), which protects "trade secrets" and "attorney-client privileged information" from disclosure. NMSA 1978, § 14-2-1.<sup>1</sup>

"Trade secrets" have been defined by the Legislature as information that "(1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are

<sup>1</sup> The federal statutes and regulations summarily cited by Intrepid, which are not applicable to the Division, likewise only protect "trade secrets." See 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905, 43 C.F.R. § 2.23(j); 43 C.F.R. § 3503.41-43.

reasonable under the circumstances to maintain its secrecy.” NMSA 1978, § 57-3A-2(D). Recently, the New Mexico Supreme Court adopted this legislative definition for purposes of applying Evidentiary Rule 11-508. See *Pincheira v. Allstate Ins. Co.*, 2008 NMSC 49, ¶ 18, 2008 N.M. LEXIS 445 (July 22, 2008).

In *Pincheira*, the Court instructed that the initial burden is on the party alleging a “trade secret” privilege to come forth with evidence that the exhibit or testimony constitutes a valid “trade secret.” The Court described how that initial burden should be met:

In this case, the record shows that Defendant made a good faith claim that the information it sought could be a trade secret, justifying an evidentiary hearing on the trade secret status of the McKinsey documents. See *Pincheira II*, 2007 NMCA 94, P 52, 142 N.M. 283, 164 P.3d 982. The affidavit describes the type of information contained in the document, how Defendant uses that information in its business, how the information would be useful to competitors, and how Defendant kept the information secret.

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[T]he Sullivan affidavit adequately describes the efforts Defendant took to develop the information, the efforts it took to keep the information secret, how the information is used in its business, and how competitors might use the information.

2008 NMSC 49, ¶ 49 and ¶ 55.

In this Division proceeding, Intrepid did not offer an affidavit or evidence addressing these criteria for the slew of exhibits and testimony it seeks to seal. Instead, Intrepid summarily concludes through its attorneys that the information is confidential. Conclusory assertions and arguments by counsel are not sufficient to qualify exhibits and testimony offered at a hearing as “trade secrets.” See *Pincheira v. Allstate Ins. Co.*, 2008 NMSC 49.

**B. Section 71-2-8 Does Not Provide Protection to Exhibits and Testimony Utilized at a Public Hearing.**

Section 71-2-8 does not dispense with the need to demonstrate a trade secret under Rule 11-508. Intrepid only quotes the first portion of this statute governing confidential information submitted to the Department. Brief at p. 12. Intrepid cleverly leaves out the “public hearing” exception to confidential information in the hands of the department:

Nothing in this section shall be construed to prevent statistical information from being derived from the *information in the hands of the department or its use in public hearings* before the department or in appeals from decisions of the department from which such information is essential.

*See* NMSA 1978, § 71-2-8. Hearing exhibits and testimony are not subject to this statute and are governed instead by the provisions of Evidentiary Rule 11-508.

**C. The Content and Context of the Hearing Exhibits and Testimony Do Not Readily Qualify as Trade Secrets.**

Not only has Intrepid failed to offer competent evidence demonstrating that the testimony and exhibits identified in its brief constitute trade secrets, but Intrepid draws its bald conclusions in an unusual context. Since at least 1982, both Intrepid and Mosaic have had access to the same core hole data and analysis that was used to project the potash reserves in this area. *See* Intrepid Ex. 16 (report developed by IMC, Mosaic’s predecessor, and referencing the core hole data at the second page). The area that is the subject of the Division hearing is leased to either Intrepid or Mosaic under long-term federal or state leases. The only exceptions are Sections 16 and 21, which are currently subject to 2008 lease applications filed by Intrepid. *See* Intrepid Ex. 7 and 8. With respect to Section 16, Mosaic applied for a lease in 2003 but was denied by the State Land Office on the grounds that potash mining in Section 16 is “not in the best interest of

the trust” due to the “potential for additional drilling.” *See* Fasken Exhibit 6.

Accordingly, Mosaic has no “competitive interest” in Section 16 or Intrepid’s analysis of that area. *See* NMSA 1978, § 57-3A-2(D) (noting that confidentiality and economic value to a competitor are the touchstones of trade secrets).

Moreover, Intrepid has informed the Division that it “has had discussions with Mosaic regarding the use of Intrepid’s infrastructure already in place at the North Mine to exploit Mosaic’s potash leases.” *See* Amended Prehearing Statement at ¶ 4. It therefore evident that the only two potash mining companies in this area are working in concert to develop mining plans for the acreage they have chosen to lease. *Since the viable potash mining acreage in this area is already subject to long-term leases, and the two potash mining companies are working together to develop potential mining plans for their respective leased acreage, no basis exists to treat the exhibits and testimony from this public hearing as trade secrets.*

**D. Intrepid Mischaracterizes the Nature of Certain Exhibits.**

In addition to Fasken’s general objection to Intrepid’s unsubstantiated claim that certain hearing exhibits and testimony constitute trade secrets, Fasken notes the following with respect to particular exhibits:

Fasken Ex. 10 (three-year mining plans). None of the federal statutes or regulations summarily cited by Intrepid identify the three-year mining plans submitted to the BLM as protected “trade secrets.” *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905, 43 C.F.R. § 2.23(j); 43 C.F.R. § 3503.41-43. In addition, these three year mining plans were not submitted to the BLM with any type of confidential designation, as required for any initial protection under the Freedom of Information Act. *See* 43 CFR 2.23(a) (submitter

must designate the information as confidential commercial or financial information for initial protection). Since no competitive leasing or mining activities are taking place in this area, there is no basis to suggest that these mining plans constitute “trade secrets.”

Fasken Exhibit 31 (price graph): Intrepid suggests this single page graph is a duplicate of Intrepid Exhibit 3. *See* Brief at 5. Not true, they are different exhibits. Fasken Exhibit 31 is nothing more than a compilation and graph of publicly available data from “Green Markets.”

Fasken Ex. 33 (oil & gas production and structure map). This map was lying on the floor at the hearing room and was created by Intrepid using IHS data. 2 Trans. at 83:16-17 and 90:4-6. These types of oil and gas production, isocum and structure maps are routinely created from public data and routinely introduced and utilized at Division hearings without placing them under seal. The mere fact that this map also depicts prior, active mine workings does not turn this map into a “trade secret,” since there is nothing secret about the location of prior or active mine workings.

Intrepid Exhibits 3 and 3A (computer generated slides). These exhibits comprise a compilation of slides showing data from publicly available sources. Intrepid only contends that pages 7-10 of these slides contain confidential information. *See* Brief at p. 6. Accordingly, there is no suggestion the remainder of these exhibits should be sealed.

With respect to Exhibit 7, Intrepid contends that only the first line item on page 7 is confidential. The remaining information on page 7 is “put out...by the owners of the project.” 2 Tran. 229:21-23. The fact that other “owners” put similar data in the public domain itself demonstrates that this type of information is not a trade secret. Moreover, Mr. Taylor testified that the first line item on Exhibit 7 is nothing more than a “best

estimate” that should not be relied upon by investors, and further clarified that he “can’t speak to that estimate as reasonable.” 2 Tran. 230: 11-22. This type of guess-work has no “independent economic value” and accordingly cannot constitute a “trade secret.” NMSA 1978, § 57-3A-2(D).

With respect to pages 8-10 of Intrepid Exs. 3 and 3A, Intrepid suggests these slides could be used “with a considerable degree of accuracy” to estimate the economic value of potentially commercial potash in Section 16 and thereby impact Intrepid’s “competitively sensitive” leasing efforts with the State Land Office. *See* Brief at 6. As noted above, Intrepid’s only potash mining competitor is Mosaic, a party to this proceeding. Mosaic applied for a lease in Section 16 and was denied by the State Land Office on the grounds that a potash lease in Section 16 is “not in the best interest of the trust” due to the “potential for additional drilling.” *See* Fasken Exhibit 6. Mosaic has no “competitive interest” in Section 16, and the tenuous relationship between the guess-work reflected on pages 8-10 of Intrepid Exs. 3 and 3A and any leasing efforts in Section 16 does not rise to the level of a trade secret. NMSA 1978, § 57-3A-2(D).

Intrepid Ex. 7 and 8 (lease application letters): The application letters comprising these exhibits were not marked confidential when submitted to these agencies. Accordingly, they are not protected from disclosure to the public. *See* NMSA 1978, § 19-1-2.1 (only information submitted to the State Land Office “clearly marked as confidential by the person from whom submission is required” is subject to initial protection.); 43 CFR 2.23(a) (submitter must designate the information as confidential commercial or financial information for initial protection). The only aspect of these applications designated confidential by Intrepid at the time of submission are pages

IP001165-67. That unilateral designation alone, however, does not result in the protections afforded by Rule 11-508 for trade secrets. *See Pincheira v. Allstate Ins. Co.*, 2008 NMSC 49, ¶ 49 and ¶ 55.

Intrepid Exs. 9, 10, 11, and 43 (potash analysis of Section 16). Mosaic applied for a lease in Section 16 in 2003 and was denied by the State Land Office on the grounds that a potash mining in Section 16 is “not in the best interest of the trust” due to the “potential for additional drilling.” *See Fasken Exhibit 6*. Accordingly, Mosaic no longer has a “competitive interest” in Section 16. In addition, the remaining areas depicted on these exhibits are subject to long-term potash leases. Intrepid “has had discussions with Mosaic regarding the use of Intrepid’s infrastructure already in place at the North Mine to exploit Mosaic’s potash leases,” demonstrating the two potash lessees in this area are working together to develop mining plans for the areas they have chosen to lease. *See Amended Prehearing Statement at ¶ 4*. Given these circumstances, any analysis of the potash reserves in this area has no readily apparent economic value to Mosaic. *See NMSA 1978, § 57-3A-2(D)* (noting that confidentiality and economic value to a competitor are the touchstones of trade secrets).

Intrepid Exhibit 16 (1982 IMC report) is a prime example of Intrepid’s overreaching with respect to its confidential designations. This 1982 report is authored by Mosaic’s predecessor, IMC. The information in this 1982 document is shared by the two active potash mining companies and lessees in the subject area. Clearly there are no “trade secrets” here. *NMSA 1978, § 57-3A-2(D)*.

Intrepid Exhibit 31 (Merrill Lynch Report) is a third party report authored for dissemination to public investors. *See, e.g.,* Intrepid Ex. 31 at bottom of p. 1 (disclaimer to investors). No “trade secrets” exist in a publicly available document.

Intrepid Ex. 40 (Fasken Ex. 25) (planned North Mine workings). Intrepid owns the North Mine. Intrepid holds long-term potash leases covering ALL of the areas over which this map depicts proposed mine workings. Accordingly, no mining competition can take place in these areas. Given the absence of any potential mining competition for this area, there is no basis to conclude proposed mine workings are “competitively sensitive.” Brief at 10. Indeed, the fact that Intrepid has had discussions with Mosaic “regarding the use of Intrepid’s infrastructure already in place at the North Mine to exploit Mosaic’s potash leases” demonstrates this exhibit does not constitute a trade secret. *See* Amended Prehearing Statement at ¶ 4.

Intrepid Exhibit 50 (core hole data). The second page of the 1982 IMC report (Intrepid Ex. 16) reveals that ALL of the core hole data comprising Ex. 50 was made available to the predecessors of Mosaic and Intrepid. These sundry notices and related drill hole records have not been kept confidential, has been shared by the only two potash mining companies in this area, and accordingly cannot be considered a “trade secret.” *See* NMSA 1978, § 57-3A-2(D).

**E. No Evidence has been Offered to Support Sealing Any of the Hearing Testimony.**

Finally, Intrepid has not been entirely candid with the Examiner. The transcript clearly reflects that Mr. Brooks made inquiry as to exactly what counsel was seeking and closed the hearing ONLY for the testimony of James P. Lewis:

Mr. Brooks: So you are requesting that the hearing be closed *for the purpose of this witness's testimony?*

Mr. Cress: I am.

Mr. Brooks: Okay. We will close the hearing at this time. Is there anyone present....

2 Tran. at p. 8, line 23 to p. 9, line 2. No similar request for closure of the hearing was made at the time Mr. Taylor was called as a witness.

Since no evidence has been offered to demonstrate that either of these witnesses testified about any matter constituting a trade secret, no basis exists to seal their testimony.

### **CONCLUSION**

Intrepid filed an objection for a well location on unleased, state land in the Potash Area that the State Land Office has determined is more suitable for oil and gas development. At the hearing on its objection, Intrepid sought to discredit the State Land Office's position with a slew of exhibits and testimony that it now desires to maintain under seal to avoid any public scrutiny. The New Mexico Supreme Court has on many occasions articulated the reasons for limited protection of hearing exhibits and testimony. Evidentiary Rule 11-508 embodies this analysis by offering limited protection for established trade secrets. However, to invoke the protections afforded by Rule 11-508, the party claiming a trade secret privilege must establish with competent evidence that a trade secret is embodied in each exhibit or area of testimony at issue. Intrepid has failed to meet this burden. Accordingly, Intrepid's request to seal these exhibits and testimony must be denied.

Respectfully submitted,

**HOLLAND & HART, L.L.P.**

A handwritten signature in black ink, appearing to read "Michael H. Feldewert", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I certify that on September 10, 2008, I served a copy of the foregoing *Fasken's Response To Intrepid's Brief In Support Of Sealing Certain Exhibits And Testimony* to the following counsel via U.S. Mail, postage prepaid to:

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