

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

**IN THE MATTER OF THE APPLICATION
OF BURLINGTON RESOURCES OIL & GAS
COMPANY FOR COMPULSORY POOLING
AND A NON-STANDARD GAS PRORATION
AND SPACING UNIT FOR ITS
SCOTT WELL NO. 24 (SECTION 9, T31N, R10W)
SAN JUAN COUNTY, NEW MEXICO**

CASE NO. 11808

**IN THE MATTER OF THE APPLICATION
OF BURLINGTON RESOURCES OIL & GAS
COMPANY FOR COMPULSORY POOLING,
AN UNORTHODOX GAS WELL LOCATION AND
NON-STANDARD GAS PRORATION AND
SPACING UNIT FOR ITS MARCOTTE WELL NO. 2
(SECTION 8, T31N, R10W)
SAN JUAN COUNTY, NEW MEXICO**

CASE NO. 11809

**BURLINGTON RESOURCES OIL & GAS COMPANY'S
MEMORANDUM
IN SUPPORT OF MAINTAINING ITS
TRADE SECRET PRIVILEGE
FOR ITS PROPRIETARY SEISMIC DATA**

BURLINGTON RESOURCES OIL & GAS COMPANY ("Burlington") by its attorneys, Kellahin & Kellahin, submits this Memorandum in support of the Division's decision to quash the subpoena issued at the request of Jason Doughty, attorney for the "Moore-Bard" which, among other things, sought the disclosure of Burlington's proprietary seismic data. At the hearing held on July 10, 1997, LaForce also sought disclosure of Burlington's seismic data.

**MOORE-BARD SEEK BURLINGTON'S
CONFIDENTIAL SEISMIC DATA**

Burlington has applied to the Division for two compulsory pooling orders requesting the pooling of certain working interest owners:

(a) In Section 8, (Marcotte Well No. 2) Burlington with approximately 46 % working interest has obtained the voluntary agreement of some 13 owners and now has approximately 93 % voluntary participation. The only non-participating parties are as follows:

- (a) Moore 2.25 %
- (b) Minatome (GLA-46) 4.65 %
- (c) Bard-LaForce (GLA-66) has no interest in this Section

(b) In Section 9, (Scott Well No. 24), Burlington has been joined by some 15 owners who collectively control approximately 35 % of the working interest. The non-participating parties are as follows:

- (a) Moore: 0.295 %
- (b) Minatome (GLA-46) 3.55 %
- (c) GLA-66 Group
58 owners with 61 % which includes:
 - LaForce 1.11 %
 - Bard 1.23 %

Moore-Bard/LaForce oppose the entry of compulsory pooling orders and contend that Burlington must surrender its proprietary seismic data to Moore-Bard/LaForce before they will be able to decide if they will voluntarily participate in these wells or will concede to having the Division involuntarily commit their interest pursuant to a compulsory pooling order.

**BURLINGTON'S SEISMIC DATA
IS CONFIDENTIAL IN NATURE
AND DESERVES TO BE PROTECTED
AS A TRADE SECRET**

Burlington has seismic data which is the confidential business information and the trade secrets of Burlington. Although the Division is not required to strictly adhere to the New Mexico Rules of Evidence,¹ Rule 11-508 of the New Mexico Rules of Evidence provides:

"a person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice..."

The basic purpose of this privilege is to foster technological advances and innovations. Although there is no definition of "trade secret" contained within the rule, an often cited definition from the **Restatement of Torts**, Section 575 Comment b (1939) is informative:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers..."

¹ OCD Rule 1212 provides in part: "In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, **provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served.**" (emphasis added).

In addition, it is instructive to note that Congress in drafting the Freedom of Information Act ("FOIA"),² which requires that every agency of the United States make available to the public certain information, found justification for withholding certain types of information from the public, including two specific types: (1) trade secrets and other confidential information, and (2) confidential geological and geophysical information.

One of the major incentives for gas exploration is the opportunity to obtain exclusive knowledge concerning potential gas reserves. Without the additional incentive of having this seismic data remain confidential, Burlington's exploration for the deep gas would be curtailed or abandoned. Such information meets the definition of a trade secret defined above because it is information which Burlington is using in its gas exploration business, and which gives it an opportunity to obtain an advantage over competitors who do not have this seismic data.

**DISCLOSURE OF TRADE SECRETS
PERMITTED IN LIMITED INSTANCES**

Although the trade secret privilege is not absolute, the courts have recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. **Covey Oil Co. v. Continental Oil Co.**, 340 F.2d 993 (10th Cir 1965).

² 5 **American Law of Mining** Section 186.01 (Matthew Bender 1994).

When deciding the issue of whether to require disclosure of a trade secret and if so under what circumstances, the Division is faced with the following issues:³

(1) What is the need for disclosure?

Will disclosure of this type of information significantly aid the Division in fulfilling its functions? In this case, Moore-Bard/LaForce claim to need the seismic data in order to evaluate whether they should participate in these wells and to determine the specific areas Burlington has selected for its deep gas well tests. However, that "need" is not relevant to any issue to be decided by the Division. The seismic data is not needed by the Division in order to decide the risk factor penalty, because the presence or absence of the seismic data does not change the risk:

(a) Burlington seeks a pooling order providing options to participate or to be a carried interest subject to a non-consent penalty.

(b) the Division is authorized to approve a maximum 200% risk factor penalty in pooling cases. Burlington seeks the adoption of the maximum penalty.

(c) publicly available geologic and engineering data conclusively demonstrates at this time that the "deep gas" in the San Juan Basin is, with few exceptions, unexplored, untested, and not yet proven to be commercially productive.

(d) the nearest commercial Pennsylvanian gas production is more than twenty (20) miles from Sections 8 and 9.

³ **Pennzoil Co. v. Federal Power Commission**, 534 F.2d 627 (5th Cir. 1976).

(e) the reliability of Burlington's confidential, proprietary geophysical data has not yet been established because no successful commercial "deep gas" well has been drilled using this data.

(f) Burlington does not dispute and Moore-Bard/LaForce cannot dispute the undisputed fact that these are very risky exploratory wells entitled to the maximum penalty.

(g) Burlington contends and Moore-Bard/LaForce must concede that the 200 % risk factor penalty is appropriate based upon the simple fact that there is no proven production in the Pennsylvanian formation which could be used to lower the risk factor penalty.

While there is no doubt Moore-Bard/LaForce and Burlington's other competitors will find this seismic data very valuable, the question remains whether any of this data serves any purposes in this pooling case. The answer is no. Even if seismic data influenced the selection of Section 8 and 9 as spacing units, it is the applicant's prerogative to select the proposed spacing unit. In a pooling case, the Division never substitutes its judgment for that of the applicant in the selection of the spacing unit to be pooled.

(2) What is the danger to the owner of the trade secret in requiring disclosure?

Because Moore-Bard/LaForce own other mineral interests in the immediate vicinity of Section 8 and 9, the disclosure of Burlington's confidential data will in fact give Moore-Bard/LaForce either (a) a competitive advantage in other tracts in which they own

interests and/or (b) establish a commercial value for purposes of selling or trading their interest to others.

In this case, the seismic data is not relevant to the Division's decision in a compulsory pooling case and can serve only to harm the business interests of Burlington. Mr. Moore testified that he owns interests in at least 300 wells in the San Juan Basin. The LaForce Group also has considerable interests in the San Juan Basin, including other potential spacing units in this immediate vicinity. It is without doubt that Moore-Bard/LaForce are competitors of Burlington. The disclosure of the seismic data to Moore-Bard/LaForce would allow these competitors to estimate and undercut Burlington's ability to obtain other leases in these areas. This is information was developed at great cost and is of a type not normally released to the public or to uncommitted investors and would cause substantial competitive harm if released.

In **Pennzoil Company v. Federal Power Commission**, 534 F.2d 627 (5th Cir. 1976) the United States Court of Appeals held that the Federal Power Commission had abused its discretion when it required disclosure of trade secrets including confidential geophysical information. The Court remanded the case because the Commission failed to demonstrate that the disclosure of this information would serve a legitimate regulatory function.

The disclosure of Burlington's seismic data in these cases does not serve any legitimate compulsory pooling function of the Division. See 70-2-17(C) NMSA (1979).

In **Amerada Hess Corp.**, 50 FPC 1048 (1970), the Federal Power Commission held that:

"The general disclosure of proprietary reserve data would have an inhibiting effect of future exploration of natural gas reserves so speculators could equally benefit with those producers when they make geological and geophysical expenditures"

(3) Are there alternative means of obtaining the same or similar information without requiring disclosure?

To require disclosure of seismic data in this case would be a substantial departure from prior decisions by the Division. Even in cases where seismic data is relevant to an issue, the Division has respected requests for the confidentiality of seismic data and has allowed applicants and opponents to rely upon conclusions based upon 3-D seismic study/data without disclosing any of the data.⁴

If Moore-Bard/LaForce believe they need such information, then they can go out and purchase their own seismic study. There is no reason for them to receive it free of costs from Burlington.

⁴ For Example, See OCD Case 11724 (Gillespie-Crow)

(4) How adequate are the protective measures available to the Division?

The second sentence of Rule 11-508 requires the Court (the Division) to take "such protective measures as the interests of the holder of the privilege and of the partes and the furtherance of justice may require".

In this case, it will not be possible for the Division to take adequate measures to protect Burlington's trade secret from disclosure. No type of confidentiality agreement will protect Burlington in this case. The very act of turning over any part of this data to Moore-Bard/LaForce will allow them to use the information to assess the potential of their other properties.

CONCLUSION

These are plain vanilla compulsory pooling cases in which Moore-Bard/LaForce are seeking to unnecessarily obtain confidential seismic data so that Moore-Bard/LaForce can give themselves a competitive advantage in other tracts in which they own interests and establish a commercial value for what up until now has been "rank wildcat" property.

Burlington has no obligation to provide confidential seismic data to assist Moore-Bard in deciding if they desire to participate in these wells or to be involuntarily pooled. They seek documents to help them make that decision or to market their interest neither of which is relevant to any decision the Division must make in these cases.

Regardless of their motives, the discovery of Burlington's trade secrets is not relevant to any issue in these pooling cases and would be an abuse of the Division's powers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. Thomas Kellahin', written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was hand delivered to opposing counsel this 22 day of July, 1997 as follows:

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