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

2005 MAY 12 PM 2 53

IN THE MATTER OF THE APPLICATION OF MEWBOURNE OIL COMPANY FOR CANCELLATION OF A DRILLING PERMIT AND APPROVAL OF A DRILLING PERMIT, LEA COUNTY, NEW MEXICO

CASE NO. 13,492

KAISER-FRANCIS OIL COMPANY'S RESPONSE TO CHESAPEAKE'S MOTION TO QUASH

Kaiser-Francis Oil Company, ("Kaiser-Francis"), hereby responds to the Motion To Quash Subpoena Duces Tecum filed on behalf of Chesapeake Operating, Inc., ("Chesapeake").

5/12/05 WJT

Summary

On approximately April 27, 2005, Chesapeake Operating, Inc.[1] trespassed onto Kaiser-Francis's oil and gas lease in the SE/4 of Section 4, T-21-S, R-35-E and began drilling the KF "4" State Well No. 1. On May 5, 2005, at the request of Kaiser-Francis, the Division issued its Subpoena Duces Tecum specifying the production of 11 items by Chesapeake on May 12, 2005, preparatory to the May 19, 2005 hearing on the merits on the application in this case and in Case No. 13493. With respect to the data derived from drilling, the subpoena seeks information in Chesapeake's possession that is owned by Kaiser-Francis.

On May 10, 2005, Chesapeake moved to quash the subpoena. Chesapeake's motion to quash set forth identical objections to each of the 11 subpoena items. Chesapeake resists the production on the stated grounds that the information sought (1) is not relevant, and (2) is protected by the privileges accorded to trade secrets.[2]

---

1 Chesapeake Operating, Inc. owns no interest in the S/2 of Section 4.

2 Chesapeake also suggests the data is being sought in order to help Kaiser-Francis to assess whether or not to drill the Hunger Buster "9" Well No. 3 located in the SE/4 of the adjoining Section 9. However, drilling of the Hunger Buster well was commenced some time ago.

The Chesapeake motion should be denied for the reasons that (1) the relevance objection is inapplicable in this circumstance, and (2) Chesapeake does not have standing to assert the trade secret privilege over information it does not own.

The Relevance Objection.

While relevance is not a proper basis for refusing to cooperate with pre-hearing discovery, the materials sought by the subpoena are obviously relevant to the Application.

The time for Chesapeake to assert a relevance objection is at a hearing on the merits, not during the course of discovery. For now, it is not Kaiser-Francis's burden to demonstrate the relevance of the materials it seeks by way of the subpoena in the manner contemplated by NMRA 11-401 or 11-402 of the Rules of Evidence.

The Chesapeake motion contains no citations to authority and is devoid of any discussion at all why the Motion To Quash would refer to trial objections to admissibility when the issue concerns a party's obligation to comply with discovery[3]. It is a different context altogether and the law providing for broad and liberal pre-hearing discovery is well established.

The discovery rules were adopted to eliminate surprise and to allow for full preparation of a case. Redman v. Board of Regents of NM School for Visually Handicapped, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct. App. 1984), cert. denied, 102 N.M. 225, 693 P.2d 591 (1985). "[D]iscovery is designed to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.'" United Nuclear Corp., 96 N.M. at 169, 629 P.2d at 245.

In the past, the Division and the Commission have consistently applied the broadest relevance standard in the adjudication of discovery disputes. The information sought by the

---

3 NMRA 1-026(B)(1) provides, in part: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

subpoena is, on its face, clearly "pertintent" within the meaning of NMSA 1978 Section 70-2-8. The law favors liberal discovery in any proceeding. Carter v. Burns Constr. Co., 85 N.M. 27, 31, 508 P.2d 1324, 1328 (Ct. App. 1973); cert. denied, 85 N.M. 5, 508 P.2d 1302 (1973). The applicable relevance standard in discovery is also broadly construed. Smith v. MCI Telecommunications Corp., 137 F.R.D. 454, 463 (S.D.N.Y.). Objections based on relevance must be viewed in light of the broad and liberal discovery principle consciously built into the rules of civil procedure. "The boundaries defining information relevant to the subject matter involved in an action are necessarily vague, making it practically impossible to formulate a general rule by which they can be drawn." Because courts [and the Division] "are not shackled with strict interpretations of relevancy," discovery is permitted on matters that "are or may become relevant" or "might conceivably have a bearing" on the subject matter of the action, or where there is "any possibility" or "some possibility" that the matters inquired into will contain relevant information. Conversely, courts have said that discovery will be permitted unless the matters inquired into can have "no possible bearing upon," or are "clearly irrelevant" to the subject matter of the action. United Nuclear Corp., 96 N.M. at 174, 629 P.2d at 250. Chesapeake utterly fails to make such a showing.

As the court said in Beler v. Savarona Ship Corporation, 26 F.Supp. 599 (E.D.N.Y.1939):

> The requirement of materiality does not . . . compel the person seeking discovery definitely to prove materiality before being entitled to a discovery. Such an interpretation of the rule would place upon it a narrow construction which would severely limit the bounds of the discovery procedure. It might compel a party to know what was in the documents before he had seen them. One of he basic purposes of the new Rules is to enable a full disclosure of the facts so that justice might not move blindly.

United Nuclear Corp., 96 N.M. at 179, 629 P.2d at 255.

The Trade Secret Objection

Chesapeake has no standing to invoke the privilege under Rule 11-508, first and foremost for the fundamental reason that Chesapeake does not own the information in its possession it seeks to withhold. Second, but equally important, allowing Chesapeake to withhold information it has unlawfully appropriated results in an injustice.

Privileges in New Mexico are recognized only as provided for in the New Mexico Constitution and the rules adopted by the New Mexico Supreme Court, and except as therein provided, no person has the privilege to refuse to disclose any matter, refuse to be a witness or refuse to produce any object or writing. Rule 11-501 NMRA 2004; Public Service Company of New Mexico v. John Lyons, 2000-NMCA-077, ¶11, 129 N.M. 487, 491, 10 P.3d 166, 170. New Mexico Courts (and administrative tribunals) "are bound by the privileges expressly stated in Rule 11-502 NMRA 2000 (required reports privileged by statute), Rule 11-503 NMRA 2000 (attorney-client privilege), Rule 11-504 NMRA 2000 (physician-patient and psychotherapist-patient privilege), Rule 11-505 NMRA 2000 (husband-wife privileges), Rule 11-506 NMRA 2000 (communications to clergy), Rule 11-507 NMRA 2000 (political vote), Rule 11-508 NMRA 2000 (trade secrets), Rule 11-509 NMRA 2000 (communications to juvenile probation officers and social service workers), Rule 11-510 NMRA 2000 (identity of informer), and Rule 11-514 NMRA 2000 (news media)." *Id.* at ¶ 13.

Under Rule 11-508 NMRA 2004 (Trade Secrets), a person has a privilege to refuse to disclose and to prevent others from disclosing a trade secret owned by the person, but only if assertion of the privilege will not tend to conceal fraud or otherwise work injustice. If the assertion of the privilege would otherwise work an injustice, then the Court should order disclosure of the material while taking such protective measures as the interests of the privilege-holder and the furtherance of justice may require. *Id.* Further, the privilege is waived if the

holder of the privilege has voluntarily disclosed any significant part of the matter to anyone under circumstances where the disclosure is not privileged. Rule 11-511 NMRA 2004.

With the ownership of its lease on the SE/4, Kaiser-Francis is the undisputed owner of the "right to exploration", a protected property right. See Phillips Petroleum Co. v. Cowden, 241 F.2d 586, 590 (5th Cir. 1957.) In Cowden, the specific right protected by the court was that of the landowner to acquire information regarding the subsurface structure of his land through geophysical operations performed within the boundaries of his land.

Further, the right to exploration is an exclusive right and includes the right to the geological and geophysical information. Layne Louisiana Co. v. Superior Oil Co., 26 So.2d 20 (La. 1946). See, also, Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987). In Grynberg, the Colorado Supreme Court held that only the mineral owner or its lessee could authorize geological testing, noting that "the recognition of the exclusivity of the right of the mineral owner to consent to such exploration is based upon the central importance of information concerning mineral deposits to the value of the mineral estate." Grynberg v. City of Northglenn, at 234. It is clear under the facts of this case that the data derived from drilling, including geologic data, are owned by Kaiser-Francis and not Chesapeake. Correspondingly, Chesapeake is simply not in a position to assert the trade secrets privilege under Rule 11-508.

In certain past cases, this agency has utilized a relevance standard in determining whether materials subpoenaed should be produced and it has rejected objections based on the proprietary or confidential nature of the materials, even in those cases where clearly proprietary information such as seismic data are sought. (See May 22, 1998 letter decision in NMOCC Case No. 11724 (*de novo*); Application of Gillespie Crow, Inc.; See, also the Commission's Motion to Dismiss and Reply in *EEX Corporation vs. Oil Conservation Commission*). In other cases, the Division has acted to protect against the disclosure of a party's analysis of data. But, having assumed the

ability in the past to act in either circumstance, it is unquestionably the Division's view that it has the jurisdiction to resolve such disputes.

Here, by law, the Division is obliged to make findings of ultimate facts materials to the issues before it. Further the Division's findings are required to have substantial support in the record and must also disclose the reasoning of the Division. See Fasken v. Oil Conservation Comm'n., 87 N.M. 292, 532 P.2d 588 (1975). This the Division cannot do without receiving evidence from the materials to be produced pursuant to the subpoena. Accordingly, absent full and complete compliance with the subpoena it is not likely that the parties will be able to make a complete presentation of relevant evidence to the Division and due process will be disserved as a result. This is the very form of injustice that the law instructs adjudicators to avoid when resolving objections based on an assertion of a privilege.

Mootness

Chesapeake is wrong when it suggests that the subpoena has been obviated by Order No. R-12343. The express terms of the Division's interim order make clear that Mewbourne's Application for Emergency Order did not resolve the merits of the dispute. Rather, the pre-hearing Application asked only that the Chesapeake APD be vacated "pending a full hearing on Mewbourne's Application...".

The Division, in entering Order No. R-12343, did not resolve all the issues under Mewbourne's main Application. Neither did it decide the merits of the case. Rather, the order noted simply that in the context of its request for interim relief, Mewbourne did not show that it's correlative rights will be "irreparably infringed" under the criteria articulated by the Division for the issuance of stay orders. The order went on to indicate that absent such a showing, "...the Division should not grant an interim emergency order prior to hearing the case on its merits." (emphasis added).

Clearly, just as it did in the *TMBR/Sharp* and *Pride* cases, the Division is indicating that it wishes to maintain the APD proceeding intact and consider the matter in tandem with the compulsory pooling proceeding. The agency's determination of the proper operator for the SE/4 well continues to be unresolved. Pending the final configuration of the spacing unit for the well, it will be necessary for the Division maintain the APD case in order to designate the proper operator.

Conclusion

The Chesapeake Motion To Quash directly contravenes the well-established authority requiring compliance with a pre-hearing discovery subpoena. The motion should be rejected and the materials ordered immediately produced.

MILLER STRATVERT, P.A.

By: _____

J. Scott Hall
Attorneys for Kaiser-Francis
Oil Company
Post Office Box 1986
Santa Fe, New Mexico 87504-1986
(505) 989-9614

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 11 day of May, 2005 as follows:

Thomas Kellahin, Esq.
Post Office Box 2265
Santa Fe, New Mexico 87504
Attorneys for Chesapeake Operating, Inc.
And Chesapeake Permian, LP
(505) 982-2047/Facsimile

Gail MacQuesten, Esq.
New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87504
(505) 476-3462/Facsimile

J. Scott Hall

G:\Data\Clients\11375\35019\Pleadings\ReplyMotionQuash^051105.doc