

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

**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. 13492

2005 MAY 10 PM 2 12

**CHESAPEAKE OPERATING INC.'S
MOTION TO QUASH
SUBPOENAS ISSUED AT THE REQUEST OF
KAISER-FRANCIS OIL COMPANY**

CHESAPEAKE OPERATING INC. ("Chesapeake") by its attorneys, Kellahin & Kellahin, hereby moves the Division to Quash a Subpoena Duces Tecum issued by the Division on May 5, 2005 at the request of J. Scott Hall, attorney for Kaiser-Francis Oil Company ("Kaiser") in Case 13492 which commands Chesapeake to appear at 9:00 AM, Thursday, May 12, 2005 before the Division and to produce documents set forth in the Subpoena Duces Tecum.

As grounds for its Motion to Quash this subpoena, Chesapeake states the following:

THE DISPUTE

Chesapeake and Mewbourne are actively competing with each other in the exploration for oil and gas in Lea County, New Mexico. Kaiser has recently entered into this competition and in this case has sided with Mewbourne.

The only issue in this case is whether the Division will revoke its approval of Chesapeake's APD and an APD approved for Mewbourne for a different spacing unit. The Division has already denied Mewbourne's request for an Emergency Order to stop Chesapeake from continuing to drill its KF "4" State Well No. 1.

Kaiser attempt to subpoena Chesapeake's data for the KF State "4" State Well No. 1 is simply an effort by Kaiser to gain information from Chesapeake under the guise of being relevant or leading to relevant data for Mewbourne's application to canceled Chesapeake's valid and properly approved APD for the S/2 of Section 4. Chesapeake is concerned that this subpoena is simply an effort by Kaiser, one of Chesapeake's competitors, to gain information under the guise of being relevant or leading to relevant date so that Kaiser can use Chesapeake's data to assess the risk and adjust to drilling program for the Kaiser's Hunger State Well No. 3 (API 30-025-537177) in which Chesapeake does not have an interest.

Kaiser's subpoena is simply Kaiser's latest attempt to interfere in Chesapeake's business and overcome the Division's denial of an emergency order in this case.

CHESAPEAKE RESPONSES TO SUBPOENA ITEMS

Chesapeake objects to Kaiser's request to the extent that they attempt to impose obligations that are beyond those imposed by the New Mexico Rules of Civil Procedure, impose an undue burden, or seek discovery in violation of the work product, attorney/client, trade secret and other applicable privileges.

Subpoena Item #1

Request: All open-hole and cased-hole logs from surface to total depth.

Response: Not relevant, trade secret, confidential/proprietary business data,
This matter was had moot by Order R-12343. There are none

Subpoena Item #2:

Request: All mud logs from the surface to total depth

Response: Not relevant, trade secret, confidential/proprietary business data
This matter was made moot by Order R-12343. There are none

Subpoena Item #3:

Request: All DST reports, including pressure charts, fluid recovery data and observed flow rates, together with service company analysis thereof with respect to reservoir parameters

Response: Not relevant, trade secret, confidential/proprietary business data.
This matter was made moot by Order R-12343. There are none.

Subpoena Item #4:

Request: All daily drilling reports from commencement through completion of the well

Response: Not relevant, trade secret, confidential/proprietary business data.
This matter was made moot by Order R-12343

Subpoena Item #5:

Request: All data, analysis and reports for cores or side-wall cores.

Response: Not relevant, trade secret, confidential/proprietary business data
This matter was made moot by Order R-12343. There are none.

Subpoena Item #6:

Request: All surface access, easements and use agreements, along with all surface damages agreements.

Response: Not relevant, confidential/proprietary business data
Beyond the jurisdiction of the Division.
This matter was made moot by Order R-12343

Subpoena Item #7:

Request: A copy of the drilling plan for the subject well

Response: Not relevant, trade secret, confidential/proprietary business data
This matter was made moot by Order R-12343

Subpoena Item #8:

Request: All documents or a summary reflecting actual expenditures from commencement of operations on the well to drilling to total depth.

Response: Not relevant, confidential/proprietary business data
This matter was made moot by Order R-12343

Subpoena Item #9:

Request: All completion reports as such become available

Response: Not relevant, confidential/proprietary business data.
Chesapeake will file all require Division completion reports in accordance with Division's rules.
This matter was made moot by Order R-12343

Subpoena Item #10:

Request: All Leases, permits, licenses or other evidence of your authority to enter onto the lands described above.

Response: Not relevant. Matter rendered moot by Division Order R-12343

Subpoena Item #11:

Request: All documents and materials in any way related to your decision to (1) enter onto the lands and (2) commence drilling operations.

Response: Not relevant. Matter rendered moot by Division Order R-12343

THIS CASE AND THIS SUBPOENA ARE NOW MOOT

On May 5, 2005, Kaiser obtained this subpoena. On May 5, 2005, the Division entered Order R-12343 and in doing so rendered this subpoena and this Case moot. See Exhibit "A" attached. This order not only denied Mewbourne's application for an emergency order it is a final order that also decided the entire case. There is not factual or technical dispute. There is nothing left for the parties to do in this case or for the Division to decide. There in no basis upon which Kaiser can justify this subpoena or its desire for this data. Chesapeake has filed a motion to dismiss its case that awaits Division action.

**THIS SUBPOENA SEEKS
PRODUCTION OF IRRELEVANT DOCUMENTS**

Having rejected Chesapeake efforts to reach a voluntary agreement for the drilling and development of Section 4, now Kaiser is attempting to have the Division revoke its approval of Chesapeake APD. Subpoena Items #1 through Item #9 have nothing to do with the issue involved in this Case to cancel Chesapeake's APD. This case in not an excuse for Kaiser to have access to Chesapeake's proprietary confidential geologic and engineering data. The production of Chesapeake's data is irrelevant to the issues in this case.

**KAISER SEEKS CHESAPEAKE'S DATA
WHICH IS CONFIDENTIAL IN NATURE
AND DESERVES TO BE PROTECTED
AS A TRADE SECRET**

Chesapeake has data is the confidential business information and the trade secrets of Chesapeake. 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 devise, or a list of customers..."

In addition, it is instructive to note that Congress in drafting the Freedom of Information Act ("FOIA"),¹ 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 or oil reserves. Without the additional incentive of having this data remain confidential, Chesapeake's exploration would be compromised. Such information meets the definition of a trade secret defined above because it is information that Chesapeake is using in its exploration business, and which gives it an opportunity to obtain an advantage over competitors who do not have this data.

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

**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).

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:²

(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? In this case, Kaiser pretends to "need" Chesapeake's data so Kaiser can contest whether Chesapeake APD will be canceled. However, that "need" is not relevant to any issue to be decided by the Division. Kaiser does not need subpoena Items #1 through Item #11 nor does the Division in order to decide whose APD survives this dispute.

While there is no doubt Kaiser and Chesapeake's other competitors will find this data very valuable, the question remains whether any of this data serves any purposes in this case. The answer is no.

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

Because Chesapeake and Kaiser own other mineral interests in the immediate vicinity, the disclosure of Chesapeake's confidential data will in fact give Kaiser either (a) a competitive advantage in other tracts in which they own interests, (b) establish a commercial value for purposes of selling or trading their interest to others, and /or (c) improve its drilling program and refine its well costs.

In this case, the data is not relevant to the Division's decision and can serve only to harm the business interests of Chesapeake. This 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 disclosure of this information would serve a legitimate regulatory function.

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

The disclosure of Chesapeake's data in these cases does not serve any legitimate 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 on 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 this data in this case would be a substantial departure from prior decisions by the Division. If Kaiser believes it needs such information, then it can go out develop its own or purchase it. There is no reason for them to receive it free of costs from Chesapeake.

(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 parties and the furtherance of justice may require".

In this case, it will not be possible for the Division to take adequate measures to protect Chesapeake's trade secret from disclosure. No type of confidentiality agreement will protect Chesapeake in this case. The very act of turning over any part of this data to Kaiser will allow it to use the information to assess the potential of its drilling operations for the Hunger Buster State 33 Well No. 3, other properties and projects.

**KAISER SEEKS CHESAPEAKE'S
CONFIDENTIAL BUSINESS RECORDS**

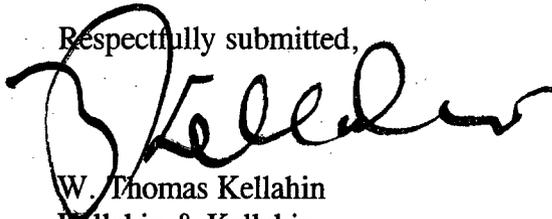
Kaiser seeks production of Chesapeake's internal economic/engineering documents concerning well costs and drilling plans that are not relevant. Chesapeake has no obligation to make or provide documents to assist Kaiser in deciding if it desires to participate in this well or to be involuntarily pooled. Kaiser seeks documents to help it make that decision or decisions for its Hunger Buster Well No. 3 neither of which is relevant to any decision the Division must make in this case.

CONCLUSION

In Case 13492, Mewbourne Oil Company is attempting to have the Division cancel Chesapeake drilling permit for the KF "4" State Well No. 1 which has a spacing unit in direct conflict with the spacing unit denied by the Division District Supervisor for Mewbourne's well.

Mewbourne's application in Case 13492 requires no technical evidence from either Mewbourne or Kaiser and therefore Kaiser does not need Chesapeake's geological or petroleum engineer data in order to present their case. There is no factual dispute. By the entry of Order R-12343, the Division has rendered this subpoena moot and this case should now be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was delivered on this 10th day of May 2005 as follows:

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