

**BEFORE THE OFFICE OF THE STATE ENGINEER
STATE OF COLORADO**

**IN THE MATTER OF RULES AND REGULATIONS FOR)
THE DETERMINATION OF THE NONTRIBUTARY NATURE) 2 CCR 402-17
OF GROUND WATER PRODUCED THROUGH WELLS)
IN CONJUNCTION WITH THE MINING OF MINERALS)**

ORDER ON CONFIDENTIALITY OF D-J BASIN DATA

On January 8, 2010, the City of Sterling, the City of Boulder, the Centennial Water and Sanitation District, the Harmony Ditch Company and the City and County of Denver acting by and through its Water Board (collectively the “South Platte Senior Water Users”) filed a Motion to Compel or in the Alternative Exclude in order to obtain permeability and porosity data underlying the proposed alternate rule for the Denver-Julesburg (“D-J”) Basin Formations or in the alternative to exclude testimony which relied on that data. The Proponents of the D-J Basin alternate rule (“Proponents”) filed a response in opposition to the motion on January 11, 2010, claiming that the requested data is confidential and proprietary and would only be provided to the South Platte Senior Water Users under a confidentiality agreement.

On January 14, 2010, the State Engineer issued a Protective Order on D-J Basin Confidential Data Disclosure pursuant to its procedural rules, 2 CCR 402-5, Rule 1.1.3.G and J(3) and Colorado Rule of Civil Procedure 26(c), ordering the Proponents to produce the data at issue to the South Platte Senior Water Users subject to their signing a Nondisclosure Agreement.

On January 15, 2010, the South Platte Water Users (including Pawnee Well Users and excluding the City and County of Denver) filed a Motion for Clarification and Reconsideration of Protective Order on D-J Basin Confidential Data Disclosure and the Proponents filed a response to that motion.

On January 15, 2010, the State Engineer issued a Revised Order on D-J Basin Confidential Data Disclosure, clarifying how the confidential data could be used during the rulemaking hearing on the D-J Basin alternate rule and any appeals.

On January 19, 2010, the State Engineer directed the Proponents to file any further support they had to establish that the permeability and porosity data in question was confidential. That same day, the Proponents filed a Notice of Showing of Confidentiality of Data, attaching two affidavits. On January 22, 2010, the South Platte Senior Water Users filed a Response to Notice of Showing of Confidentiality of Data. The Proponents filed a reply on January 26, 2010, attaching two additional affidavits and a Confidentiality and Nondisclosure Agreement between EnCana and URS Corporation (the Proponents’ consultant).

The Colorado Uniform Trade Secrets Act, section 7-74-102(4), C.R.S., provides that for information to be considered a trade secret “the owner must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.” The measures to maintain secrecy “are those reasonable under the circumstances and do not require that extreme and unduly expensive procedures be taken to protect trade secrets.” *Network Telecommunications Inc. v. Boor-Crepeau*, 790 P.2d 901, 902 quoting *Uniform Trade Secrets Act s 1 (commentary)*, 14 *Uniform Laws Annot.* 541 (1980).

Factors which can be considered in making the factual determination as to whether a trade secret exists are: 1) the extent to which the information is known outside the business; 2) the extent to which the information is known inside the business; 3) the precautions taken by the holder to guard the information; 4) the savings effected and the value to the holder in having the information as against competitors; 5) the amount of money or effort expended in obtaining and developing the information; 6) the amount of time and expense it would take for others to acquire and duplicate the information. *Boor-Crepeau*, 790 P.2d at 902.

The affidavits filed in this matter establish that the specific porosity and permeability data in question is not generally known outside the Proponent companies and is shared among Proponent companies and between Proponents and their consultants only if they have signed an agreement to maintain the confidentiality of the data. See *Affidavit of William Lyons*, paragraphs 4g), 5-6; *Affidavit of Craig Andersen*, paragraphs 3-5, 7; *EnCana Confidentiality and Nondisclosure Agreement*. In addition, the evidence shows that employees of Proponents are trained in the importance of keeping the data confidential from third parties. *Id.*; see also *Affidavit of Norman D. Ewart*, paragraphs 3-5. The Proponents have established that the porosity and permeability data is very valuable to them as against competitors and that they have expended substantial monetary and other resources to obtain this data. See *Affidavit of William Lyons*, paragraph 4; *Affidavit of Norman D. Ewart*, paragraphs 5-7; *Affidavit of Craig Andersen*, paragraphs 6-9; *Affidavit of Ronald W. Pritchett*, paragraphs 7-8.

Based on the above submissions and the relevant statutory and case law, the State Engineer finds that the data at issue is confidential and is appropriately subject to the revised protective order issued by him on January 15, 2010.

Dated this 1st day of February, 2010.



Dick Wolfe, State Engineer