

Oil Field Confidential: Protecting Seismic Data and Other Trade Secrets

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Seismic surveys and other methods of geophysical exploration are integral to today's E&P industry. As new exploratory techniques evolve, companies increasingly rely on geophysical information to locate and develop oil and gas prospects. Courts in Louisiana and Texas have taken notice. In several recent decisions, courts have acknowledged the significant costs associated with acquiring geophysical data, as well as the significant value of processing that data to determine the location and scope of oil and gas reservoirs. Courts have also recognized the economic importance of protecting this information from disclosure, and have held that maps and other interpretations of geophysical data, as well as raw data itself, may be entitled to trade secret protection under Louisiana and Texas law.

A "trade secret" is information that derives independent economic value because it is not generally known or readily ascertainable and efforts have been taken to maintain its secrecy. As its name implies, the fundamental aspect of trade secret protection is *secrecy*. Unlike patents and copyrights, there is no limit to the period of protection for trade secrets—as long as the information remains secret, it retains its protected status.

This is not to say, however, that secrecy of the information must be absolute. For information to be protected as a trade secret, the party seeking protection must have taken “reasonable” measures to maintain relative, not absolute, secrecy. Under some circumstances, a trade secret owner, without destroying the protected status of the information, may disclose it to employees or third parties with whom the owner has a confidential relationship.

As the following cases show, trade secret owners should strictly limit disclosure of their proprietary information and should ensure that disclosure is made only pursuant to a confidentiality agreement.

I was recently involved in a case where a Louisiana federal court recognized that seismic information may be entitled to trade secret protection. In *In re Virgin Offshore USA, Inc.*, the U.S. District Court for the Eastern District of Louisiana last year considered a bankruptcy appeal involving the assumption of a seismic license. Before bankruptcy, the debtor acquired a license from a geophysical company to use certain seismic data. During the bankruptcy proceedings, the trustee moved to assume the license on behalf of the bankruptcy estate. The geophysical company objected to the assumption, arguing that transfer of the license was prohibited under federal copyright law. It asked the court to treat the seismic data as something akin to a map or a photograph, claiming that because it “chose the parameters to gather the data and decide[d] how to assemble and process the data,” the data was an original work of authorship and was therefore copyrightable. The court acknowledged the novelty of this argument, but found it to be at odds with opinions from several jurisdictions, including the federal Fifth Circuit in its 2001 *Musser Davis* decision, which have traditionally treated seismic data as trade secrets.

Texas courts have also traditionally protected seismic as trade secrets. For example, in *In re Bass*, the Texas Supreme Court squarely held in 2003 that seismic data qualifies for trade secret protection under Texas law. Examining such factors as the extent to which the seismic information was known to others, the measures taken to guard the secrecy of the information, the value of the information to its owner and to its competitors, the cost and effort of developing the information, and whether the information could be readily obtained through an independent source, the Court ruled that the seismic data met the definition of a trade secret.

Since *Bass*, other Texas courts have afforded trade secret protection to geophysical information and have imposed severe penalties for its misappropriation. In *Lamont v. Vaquillas Energy Lopeno Ltd., LLP* for example, Lamont was the co-founder of Ricochet Energy, which entered into “prospect generation agreements” with Vaquillas Energy and JOB Energy Partners, whereby Ricochet agreed to generate oil and gas prospects in exchange for payment of overhead costs by

Vaquillas and JOB. The agreements required Ricochet to prepare seismic maps and granted Vaquillas and JOB a proprietary interest in both the maps and the raw seismic data. Ricochet's geologist soon identified the Lopeno Prospect, a 161-acre gas reservoir containing 10-12 billion cubic feet of gas worth an estimated \$40-60 million. A seismic map of the reservoir was produced (referred to by the parties as the "Treasure Map"), and plans for development were put into motion. Lamont later resigned from Ricochet and formed a new venture with a third party investor. Armed with knowledge of the Lopeno Prospect's size and location, the new venture acquired mineral leases and depleted gas from the reservoir.

Vaquillas and JOB sued Lamont for trade secret misappropriation. The court agreed. The court found that the seismic information was a trade secret and that, even after Lamont resigned his position at Ricochet, his duty to protect the confidentiality of the information survived. The court ruled that Lamont breached this duty when he misappropriated the seismic map and used it to the detriment of his competitors. This past December, the appellate court upheld a \$4.9 million award in favor of Vaquillas and JOB for lost profits.

Although it appears to be established that seismic data may qualify for trade secret protection, courts have not stopped there. Recently, trade secret protection has been extended to other prospecting information, including reserve estimates, projected future revenues, and oil field services software. Given the valuable role of such information in today's E&P industry, it is evident that protecting oil field trade secrets is vital to success. Trade secret owners should take care in drafting transactional documents involving the use and/or transfer of seismic data and other proprietary information (geophysical services contracts, seismic license agreements, etc.), and should ensure that each parties' rights and obligations are clearly defined. Trade secret owners should also ensure that the confidentiality of their information is maintained by restricting access and disclosure as much as possible. This includes express confidentiality agreements with employees and third parties, and, in the case of data contained on field tapes and other physical media, storing those materials in a secured location.