Trade Secrets in Oil & Gas

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Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).

Trade secrets must have independent economic value

The economic value must be as a result of the secrecy.

**Requirements:**

- formulas
- recipes
- manufacturing methods
- industrial processes
- source code
- geological survey data
- customer lists

**Examples:**
the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

What does “independent economic value” mean?

On eligible subject matter, the current trend, exemplified by the UTSA, is to protect any valuable information as a trade secret. So long as the information is capable of adding economic value to the plaintiff, it can be protected by trade secret law.

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What does “independent economic value” mean?

This seems almost unbounded. Many courts take a narrower view, although the bounds of that narrower view are often not well articulated.

As a general proposition, to come within the ambit of this definition, the claimant must show that the information: (1) was originally gained at the holder’s expense; (2) is still of value to the holder because it provides the holder with a demonstrable, continuing competitive advantage; (3) is not generally known or readily ascertainable by third parties, especially competitors; and (4) has been kept confidential by the holder. The fourth element often proves to be the real battleground over the existence of an alleged trade secret.

§ 9.2.2 Scope of the Privilege, WIGMORE’S EVIDENCE
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§ 9.2.2 Scope of the Privilege, Wigmore's Evidence

This also seems largely unbounded. The decisions of many courts are narrower than this implies ...

Trade Secret - Subject Matter

What does “independent economic value” mean?

A plausible uniting concept:
- Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

EEJ's way of looking at this ... FWIW
What does “independent economic value” mean?

A plausible uniting concept:

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**Realothetical:** A list of local customers who use gutter-cleaner services. *Is there independent economic value?*

Yes, because competing gutter-cleaners could efficiently target marketing to these customers, the same way the owner could to get a commercial advantage.

(Indeed, probably all courts would hold the customer list to be trade-secret eligible subject matter.)
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Realothetical: The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss. Is there independent economic value?
No, because the financial statements help C-level officers manage Mars in a general way. Hershey could use them offensively to exploit Mars’s weaknesses.
But courts are split on whether financial statements can be trade secrets.
Trade Secret - Subject Matter

Key takeaways

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have economic value that comes from their secrecy.
- Classic examples are: formulas, recipes, manufacturing methods, industrial processes, source code, geological survey data.
- Unitig concept: Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

Confusion in the doctrine ...

- There is room to argue for a very broad conception of trade secret subject matter.
- This is because:
  - There is a lack of development of the doctrine.
  - Precedent is slippery, since a successful assertion of trade-secret status means a court decision won't say exactly what it is (otherwise, the secret would be out!).
  - Litigants are often non-adverse when courts rule on trade secret subject matter.
    - E.g., both parties to a business dispute want to keep everything away from the press, so they will stipulate to trying to treat a wide swath of discovery as trade secret.
Because of doctrinal confusion and a lack of an adversarial dynamic in many proceedings, businesses can sometimes successfully assert trade secret status to avoid public disclosure of things that are not classical trade secrets.

Examples:
- Toxic emissions, effluents, pollutants.
- Regular corporate financial data.
- And hydraulic fracturing chemicals.
Two requirements:

- Must be actually secret.
- Must be the subject of reasonable efforts to maintain secrecy.

Must be an actual secret:

- Secret means "secret" in the ordinary sense.
- Two or even more independent parties can have the same secret.
- If a trade secret becomes generally known, it stops being a protectable trade secret.
  - Trade secret status can be lost by wrongful means
    - E.g., someone steals the secret and publishes it.
  - or non-wrongful means.
    - E.g., disclosure by mistake, or everyone else eventually figures it out independently.
Must be the subject of **reasonable efforts to maintain secrecy**

- What’s reasonable depends on the circumstances and how valuable the secret is.
- Might include:
  - Locks, fences, security guards, password protection, firewalls
  - Limiting the number of people who know
  - Splitting up knowledge among different people
  - Employee contracts, non-disclosure agreements, non-compete agreements
Remedies

Sources of law

- **Uniform Trade Secrets Act**
  - Adopted in 47 states + DC, PR, VI
  - Common law preempted
  - Not adopted in NY, MA, NC

- **Common Law**
  - NY, MA, NC

- **Defend Trade Secrets Act**
  - Federal, new as of May 2016
  - Applies nationally to any secret used in interstate or foreign commerce
  - Does not preempt state law
UTSA adopted in 47 states, plus DC, PR, VI
not adopted in NY, MA, NC

**Remedies under UTSA:**

- **Injunctions**
  - Can be prophylactic
  - Can be against innocent third parties

- **Damages**
  - Larger of
    - Plaintiff’s losses
    - Defendant’s wrongful gains
  - Reasonable royalties as an alternative
Remedies Under the Federal DTSA

- Injunctions
- Ex parte seizure - §1836(b)(2)
  - Powerful new remedy, cf. state law
  - For "seizure of property necessary to prevent the propagation or dissemination of the trade secret" in "extraordinary circumstances"
  - Heavily criticized by scholars
  - Also there’s a cause of action for wrongful seizure, meant as a balance to the power of ex parte seizure

- Damages
  - lost profits, cost of materials, loss of goodwill
  - punitive damages if in bad faith
  - attorney’s fees unless extenuating circumstances

Misappropriation
With trade secrets ... 

- We speak of "misappropriation" rather than "infringement"

Forms of misappropriation:

- Improper disclosure.
  - E.g., violating confidence, breaching contract
- Improper use.
  - E.g., breaching contract, violating business norms, violating reasonable expectations
- Improper acquisition.
  - Includes criminal actions, contract breach, and torts, but need not be any of those
Things that are not improper acquisition:

- Reverse engineering.
- Independent discovery.
- Getting from patent or published patent application.
- Getting through a business deal or license.
Top Five Facilities by Total Disposal or Other Releases
Grand Forks, ND, 2016

Top Five Chemicals Released to Air and Water
Grand Forks, ND, 2016

<table>
<thead>
<tr>
<th>Chemical</th>
<th>Air</th>
<th>Water</th>
<th>Land</th>
<th>Off-site Disposal or Other Releases</th>
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<tbody>
<tr>
<td>**1-**BENZENE</td>
<td>7%</td>
<td>6%</td>
<td>5%</td>
<td>3%</td>
</tr>
<tr>
<td>OXIDIZED</td>
<td>3%</td>
<td>4%</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>ACETONE</td>
<td>1%</td>
<td>6%</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>KEROSINE</td>
<td>1%</td>
<td>4%</td>
<td>1%</td>
<td>2%</td>
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<tr>
<td>HYDROGEN SULFIDE</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
</tr>
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</table>

Notes:
- ** = Carcinogenic Chemical
- Trend graphs were created using the 2001 core chemicals/industries list.

2016 TRI Fact Sheet: City – Bismarck, ND

Data Source: 2016 Dataset (released October 2017)

You are here: EPA Home • Toxics Release Inventory (TRI) Program • 2016 TRI National Analysis: Where You Live • 2016 TRI Fact Sheet: City – Bismarck, ND

The Toxics Release Inventory (TRI) tracks the management of certain toxic chemicals that may pose a threat to human health and the environment. Certain industrial facilities in the U.S. must report annually how much of each chemical is recycled, combusted for energy recovery, treated for destruction, and disposed of or otherwise released on-site or off-site. This information is collectively referred to as production-related waste managed.

Map of TRI Facilities in Bismarck, ND

Quick Facts for 2016

<table>
<thead>
<tr>
<th>Biomes</th>
<th>United States</th>
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<tr>
<td>Number of TRI Facilities:</td>
<td>3</td>
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<tr>
<td>Total Production-Related Waste Managed:</td>
<td>45.0 thousand lbs</td>
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<tr>
<td>Total On-site and Off-site Disposal or Other Releases:</td>
<td>532 lbs</td>
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<tr>
<td>Total On-site:</td>
<td>402 lbs</td>
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<tr>
<td>• Air:</td>
<td>181 lbs</td>
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<tr>
<td>• Water:</td>
<td>0 lbs</td>
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<tr>
<td>• Land:</td>
<td>221 lbs</td>
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<tr>
<td>Total Off-site:</td>
<td>125 lbs</td>
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North Dakota ranks 29 out of 56 states/territories nationwide based on total
### Hydraulic Fracturing Fluid Product Component Information Disclosure

**Operator Name:**
- **Purchaser:** Williams

**Well Name and Number:**
- **Well ID:** 2254-15-5

**Location:**
- **Latitude:** 41.0778
- **Longitude:** -100.7671

**True Vertical Depth (TVD):** 10,570 ft.

**Total Water Volume:** 14,000 bbl.

### Hydraulic Fracturing Fluid Composition

<table>
<thead>
<tr>
<th>Trade Name</th>
<th>Supplier</th>
<th>Purpose</th>
<th>Ingredients</th>
<th>Chemical Abstract Service Number (CAS #)</th>
<th>Maximum Ingredient Concentration in Additive by Weight (lb/1000 bbl)</th>
<th>Maximum Ingredient Concentration in IF Fluid by Weight (lb/1000 bbl)</th>
<th>Comments</th>
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<tr>
<td>Source</td>
<td>Code</td>
<td>Volume</td>
<td>Concentration</td>
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<td>0.00006%</td>
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<td>JACAR</td>
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<td>Proprietary Component</td>
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<td>1.00000%</td>
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<td>Shriners</td>
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<td>1.00000%</td>
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<td>0.08482%</td>
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<td></td>
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</tr>
</tbody>
</table>

* Total Water Volumes sources may include fresh water, produced water, and/or recycled water.
** Information is based on the maximum potential for concentration and thus the total may be over 100%.

Ingredient information for chemicals subject to 20 CFR 1910.1200(g) and Appendix D are obtained from suppliers' Material Safety Data Sheets (MSDS).