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## Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission

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***Powder River Basin Resource Council v. Wyoming Oil and Gas Conservation Commission,***  
**2014 Wyo. 37, 320 P.3d 222 (Wyo. 2014).**

**Lindsay Thane**

**ABSTRACT**

The Wyoming Supreme Court reversed and remanded the district court’s decision that chemicals used in fracking are confidential “trade secrets” that do not need to be publicly disclosed. The Court ordered the district court to apply the WPRA, not the APA, as the standard of review, and to use the FOIA definition of trade secrets. The Court’s chosen definition will make it more difficult for companies to demonstrate that the chemicals they use should not be disclosed.

**I. INTRODUCTION**

Powder River Basin Resource Council (“Powder River”) and other environmental groups submitted a public records request to the Wyoming Oil and Gas Conservation Commission Supervisor (“Supervisor”) for the chemical compounds used in hydraulic fracturing (“fracking”).<sup>1</sup> The Court determined the district court erred by reviewing the Supervisor’s decision under the Wyoming Administrative Procedure Act (APA) instead of the Wyoming Public Records Act (WPRA).<sup>2</sup> Despite this error, the Court determined that, for judicial efficiency, it would decide the proper definition of trade secrets as well.<sup>3</sup> On remand, the district court must look at the facts and evidence to analyze if the chemicals used in fracking need to be publicly disclosed under the new, narrower definition of trade secrets.<sup>4</sup>

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<sup>1</sup> *Powder River Basin Resource Council v. Wyo. Oil & Gas Conserv. Commn.*, 320 P.3d 222, 224 (Wyo. 2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

Fracking well operators must provide the Oil and Gas Commission (“Commission”) with “detailed information” about chemicals and products used in their production process.<sup>5</sup> In August 2010, the Commission amended its rules to require companies to disclose the identity of chemicals used for well stimulation.<sup>6</sup> The Commission sought to address public concerns about the effects of fracking on groundwater and to make the production process more transparent, while balancing the proprietary and competitive advantage concerns of industry.<sup>7</sup> Under the new rule, companies must submit the: product name, product type, CAS number (a unique identifier assigned to every chemical), and the concentration of the chemicals in the product.<sup>8</sup> Companies can then file a request that the submitted information be held confidential as trade secrets.<sup>9</sup>

On November 15, 2011, Powder River used the WPRA to request access to records discussing the chemicals used in fracking operations.<sup>10</sup> The Supervisor supplied Powder River with some of the information submitted by the companies. Chemical identities that he determined were trade secrets under the APA were redacted.<sup>11</sup> Powder River submitted public records requests for the CAS numbers two additional times over the next month, both were denied by the Supervisor.<sup>12</sup>

On March 23, 2012 Powder River filed a petition for review of administrative action under the APA, claiming that the Supervisor’s failure to disclose the chemical identities was

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<sup>5</sup> 3 Weil’s Code Wyo. R. 45(d) (2010).

<sup>6</sup> *Powder River Basin*, 320 P.3d at 224(for the new rules see Rules, Wyo. Oil & Gas Conserv. Commn. Ch. 1-5 (2010)).

<sup>7</sup> *Powder River Basin*, 320 P.3d. at 225.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; See Wyo. Stat. Ann. § 16-4-203(d)(v).

<sup>10</sup> *Id.* at 226.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

arbitrary and capricious.<sup>13</sup> Powder River and intervenor Halliburton filed cross-motions for summary judgment and the district court granted the defendant's motion.<sup>14</sup> The district court determined that under the APA, deference must be given to administrative agency decisions and thus, upheld the Supervisor's confidentiality determination.<sup>15</sup> The district court applied the WPRA to analyze if the Supervisor used a proper definition of trade secrets, and discussed three possible definitions of trade secret: (1) the Freedom of Information Act (FOIA) definition; (2) the Restatement (third) of Unfair Competition § 39 definition; and (3) the Uniform Trade Secret Act definition (Wyo. Stat. Ann. § 40-24-101).<sup>16</sup> The Supervisor used the Uniform Trade Secret Act which is the broadest definition. Because the district court found that this determination was not arbitrary and capricious under the APA, the court held the Supervisor's decision not to disclose the chemicals was proper.<sup>17</sup>

### **III. ANALYSIS**

#### **A. Review under the WPRA, not the APA**

The first issue the Wyoming Supreme Court addressed was whether the district court should have reviewed the Supervisor's decision under the APA or the WPRA.<sup>18</sup> The APA is used in judicial review of agency action. However, when the Wyoming legislature passed the WPRA they articulated that disputes over access to records should be decided by the district courts under the WPRA procedures, not the APA.<sup>19</sup>

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<sup>13</sup> *Powder River Basin*, 320 P.3d at 227.

<sup>14</sup> *Id.* at 228.

<sup>15</sup> *Id.*

<sup>16</sup> *Powder River Basin Resource Council v. Wyo. Oil & Gas Conserv. Commn.*, No. 94650-C at \*\*12-14 (7th D. Wyo. 2013).

<sup>17</sup> *Id.* at \*\*13-14, 17.

<sup>18</sup> *Powder River Basin*, 320 P.3d at 228.

<sup>19</sup> *Id.* at 229-230(citing *Sheaffer v. State ex rel. Univ. of Wyoming*, 139 P.3d 468, 470 (Wyo. 2006)); See Wyo. Stat. Ann. § 16-3-114(a) (2013).

Powder River applied for a show cause order from the district court under WPRA § 16-4-203(e) which allows an applicant to “request a written statement of the grounds for the denial.”<sup>20</sup> The Supervisor is entitled to deny the information if he considers the requested records trade secrets under Wyoming Statute § 16-4-203(d)(v).<sup>21</sup> When Powder River challenged the Supervisor’s decision, the district court improperly applied the APA instead of the WPRA to review the Supervisor’s decision.<sup>22</sup> The Wyoming Supreme Court reversed and remanded so that the district court could properly review the Supervisor’s decision to see if the information constituted trade secrets, not if his decision was arbitrary and capricious.<sup>23</sup>

### **B. Narrow Definition of Trade Secret**

Rather than remanding, the Court decided which definition of trade secret the district court had to apply when deciding if the chemical’s CAS numbers should be withheld as confidential trade secrets.<sup>24</sup> The Court adopted the definition of trade secret from the FOIA definition, “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of product of trade commodities and that can be said to be the end product of either innovation or substantial effort.”<sup>25</sup> The Court acknowledged that the WPRA emphasizes disclosure over secrecy, so the Supervisor must bear the burden to show the information being sought should be protected.<sup>26</sup> This definition is the narrowest of the three the Court considered and will most likely foster disclosure because non-disclosure requires that a trade secret be involved in the productive process itself.<sup>27</sup> There are some exemptions to

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<sup>20</sup> *Id.* at 229.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 230-231.

<sup>24</sup> *Powder River Basin*, 320 P.3d at 231.

<sup>25</sup> *Id.* at 233 (citing *cf. Anderson v. Dep’t of Health & Human Serv.*, 907 F.2d 936, 943-44 (10<sup>th</sup> Cir. 1990)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 233 (citing *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

the WPRA, including the ability of the custodian to deny the right of inspection, unless provided by law, if the information includes: “trade secrets, privileged information, and confidential commercial, financial, geological or geophysical data.”<sup>28</sup>

### **C. Chemicals as Trade Secrets Remanded to the District Court**

After the Court’s determinations, it remanded the case to the district court to assess the facts and evidence and then decide if the chemicals used in fracking are trade secrets under the narrow FOIA definition such that the chemicals do not need to be disclosed.<sup>29</sup> The FOIA definition will apply a heightened level of scrutiny to the Supervisor’s decision to hold the information as confidential. If the information is to be kept confidential, the Supervisor must show the information will harm companies at a cost that outweighs the benefits of releasing the chemical information.<sup>30</sup>

## **IV. CONCLUSION**

The Wyoming Supreme Court decided the Supervisor must apply the FOIA definition of trade secrets to determine if chemicals used in the fracking process should be disclosed. The district court incorrectly applied the APA instead of the WPRA which afforded too much deference to the Supervisor’s decision. Adopting the narrower FOIA definition of trade secrets will make it more difficult for companies to show that the chemicals they use should be exempt from public disclosure.

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<sup>28</sup> *Id.* at 231-232 (citing WPRA § 16-4-203(d)(v) (2014)).

<sup>29</sup> *Id.* at 234.

<sup>30</sup> *Powder River Basin*, 320 P.3d at 235.