

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

RECEIVED

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**IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION FOR
THE PURPOSE OF CONSIDERING:**

**APPLICATION OF FASKEN OIL & RANCH LTD. FOR
AN ORDER AUTHORIZING AN ADDITIONAL WELL IN
THE "POTASH AREA" AT AN UNORTHODOX WELL
LOCATION IN LEA COUNTY, NEW MEXICO.**

Case No. 14116

**REPLY TO FASKEN'S RESPONSE TO INTREPID'S BRIEF IN SUPPORT
OF SEALING CERTAIN EXHIBITS AND TESTIMONY**

Intrepid Potash – New Mexico, LLC submits the following reply to Fasken Oil & Ranch Ltd.'s Response to Intrepid's Brief in Support of Sealing Certain Exhibits and Testimony (hereinafter "Response").

- 1. Fasken's efforts to cause the public disclosure of Intrepid's confidential information are improperly aimed at causing competitive harm to gain an advantage in this proceeding.**

Fasken's vindictive efforts to force public disclosure of Intrepid's confidential information are nothing more than sharp litigation practices aimed at chilling protection of commercial potash. The Division should not countenance these tactics. During this proceeding, Intrepid produced to Fasken all of the confidential and proprietary information Intrepid had concerning the commercial potash reserves in Section 16 and Intrepid's plan to mine them from its North Mine. Now, even as it lacks nothing to pursue its appeal, Fasken seeks to force public disclosure of this information to try to cause Intrepid to capitulate and allow the destruction of enormous quantities of commercial potash reserves. The Examiner should reject this unseemly tactic and preserve the confidentiality of Intrepid's information as set forth in Intrepid's Brief in Support of Sealing Certain Exhibits and Testimony (hereinafter "Brief").

Fasken has in the past complained to the Division that the oil and gas party in Division hearings is routinely kept from reviewing the potash information relevant to its oil and gas well appeal. For example, in the 2003 hearing concerning its Laguna #1 well in Section 16, Fasken stated that it always lacks access to the potash company's "confidential and proprietary information" and that the internal ore evaluation of the potash company was "a very secretive process." *See* July 24, 2003 Hearing Tr. at 44:5-25, attached hereto as Exhibit A. In the present hearing, Intrepid has provided to Fasken an amount of raw geologic data, detailed internal analyses, and other confidential evidence that may be without precedent at a Division hearing. But now that Fasken has obtained the desired confidential information, it immediately seeks to destroy its confidentiality. Is there any wonder then why Intrepid and other potash companies are loathe to freely offer up their confidential and proprietary information as evidence in Division hearings?

Simply put, as framed by Fasken, Intrepid faces a Hobson's choice: it can choose, as it has done here, to endeavor to protect the commercial potash reserves in Section 16 for development at the risk of public disclosure of its confidential scientific and business information or it can sit idly by and watch Fasken destroy hundreds millions of dollars in potash reserves, thereby permanently depriving the State of New Mexico of the royalties on this potash and the local community of the jobs necessary to mine it. Protection of this critically important and incomparably rare natural resource should not come at such a steep price. A ruling in favor of Fasken on these confidentiality issues would singlehandedly and permanently chill protection of potash in the State of New Mexico. That is plainly not in the public's interest. The Examiner should diligently and liberally protect Intrepid's confidential information from public disclosure as required by applicable law.

2. NMSA § 7-2-8 applies directly to this Division hearing and unequivocally prohibits the public disclosure of Intrepid's confidential information.

Contrary to Fasken's incorrect assertions in Section B of its Response, NMSA § 71-2-8 applies directly to this Division hearing and prohibits the Division from publicly disclosing Intrepid's exhibits and testimony that are "confidential information." Nowhere in the statute is the submitter of information required to prove its status as a "trade secret" or to comply with evidentiary or discovery rules applicable in New Mexico courts. The entire statute reads as follows:

The provisions of any confidential contract or any other confidential information required or possessed by the energy, minerals and natural resources department shall be held confidential by the department upon written request of the party supplying it, and any employee of the department, whether temporary or permanent, who willfully violates the provisions of this section shall be guilty of a misdemeanor. Nothing in this section shall be construed to prevent statistical information from being derived from the information in the hands of the department or its use in public hearings before the department or in appeals from decisions of the department for which such information is essential. Notwithstanding the provisions of *Sections 10-15-1 through 10-15-4 NMSA 1978* or any other act requiring meetings of public bodies to be open, the department may close that part of any meeting where confidential information covered by this section is discussed by the department.

NMSA 1978 § 71-2-8.

Fasken asserts that the second sentence of this statute is a "public hearing exception" to the statute's clear prohibition on disclosing confidential information, which somehow requires conformance with Evidentiary Rule 11-508. *See* Response at 3. Fasken is wrong. The second sentence merely clarifies that the prohibition does not foreclose the use of "statistical information" in public departmental hearings where such information is derived from the confidential information in the department's possession and where the information is essential to the hearing. There is no intent here to strip the confidential information of its confidential status when needed for a hearing, subject only to the trade secret protections of Rule 11-508. Indeed,

the last sentence of the statute expressly states that the department may close the otherwise public hearing in order to protect the information's confidentiality.

Moreover, the second sentence of the statute expressly applies only to "statistical information [] derived from the information in the hands of the department." This is not without careful intent. Deriving statistical information from confidential information for use in a hearing does not reveal the confidential information itself and therefore does not betray its confidential nature. A good example of an analogous statute is the National Materials and Minerals Policy, Research and Development Act of 1980, which governs the handling of mineral industry data provided to the United States Department of the Interior. Section (f) of that statute provides that "information concerning mineral occurrence, production, and use" "provided to the Department by persons or firms engaged in any phase of mineral or mineral-material production . . . shall not be disclosed outside of the Department of the Interior in a nonaggregated form so as to disclose data and information supplied by a single person or firm." *See* 30 U.S.C. § 1604. Similarly, the clear intent of NMSA § 71-2-8 is to prohibit public disclosure of confidential information submitted to the Division without stifling the use of statistical or aggregated data derived from the confidential information.

3. Evidentiary Rule 11-508 does not apply in this Division proceeding where there is broad protection for "confidential information."

Fasken wrongly asserts that the exhibits and testimony at issue here "are not subject to [§ 71-2-8] and are governed instead by the provisions of Evidentiary Rule 11-508." Response at 3. In oblique support of its position, Fasken cites *Pincheira v. Allstate Ins. Co.*, 2008 N.M. LEXIS 445. Fasken is wrong again. *Pincheira* says nothing of § 71-2-8, and the decision clearly shows why Rule 11-508 does not apply here.

“Rule 11-508 is a rule of evidence” “[t]he purpose [of which] is to ascertain the truth by determining what evidence is admissible during the trial.” *Pincheira v. Allstate Ins. Co.*, 2008 N.M. LEXIS 445, ¶ 21. Here, Intrepid’s confidential information has already been judged admissible and made available to Fasken. Fasken’s present efforts are aimed at forcing the public disclosure of that information and not at the information’s admissibility. Thus, Rule 11-508 has no application here, as is made evident by the Court’s discussion of the rule in *Pincheira*. See *id.* at ¶¶ 27, 48 (“It is only when the compelling party seeks to admit the information that the opposing party must assert a trade secret privilege.”).

More importantly, § 71-2-8 does not adopt Rule 11-508 as an evidentiary rule, as the statute fully and independently regulates the submission of confidential data in administrative hearings before the Energy, Minerals and Natural Resources Department. New Mexico Rules of Evidence do not apply in state administrative hearings. See NMAC 19.15.1214 (“The rules of evidence applicable in a trial before a court without a jury shall not control” in Division hearings); see also *Miss. Potash, Inc. v. Lemon*, 133 N.M. 128, 131 (N.M. Ct. App. 2002). Indeed, Rule 11-508 conflicts with § 71-2-8, as the rule only protects “trade secrets” while the statute more broadly protects “confidential information.” Rule 11-508 has no bearing on this Division proceeding.¹

Fasken’s argument therefore falls apart. Intrepid is not required to show the trade secret status of its confidential exhibits and testimony. To the contrary, § 71-2-8 requires only that Intrepid’s exhibits and testimony qualify as confidential under the plain meaning of that word.

¹ *Pincheira* actually supports the broad protection of “confidential information” in Section 71-2-8. As indicated in *Pincheira*, Discovery Rule 1-026(C) prohibits the public disclosure of information that is not a trade secret but is still “other confidential research, development or commercial information.” See *Pincheira* at ¶ 39. Protective orders prohibiting the public disclosure of such information are appropriate under *Pincheira*. See *id.* at ¶¶ 16, 28.

Evidentiary Rule 11-508 does not negate this standard as it has no application here. As discussed below, this is also entirely consistent with the IPRA. Intrepid's confidential exhibits and testimony should accordingly be sealed under the operation of § 71-2-8 and its confidential information standard.

4. The IPRA is consistent with § 71-2-8 in the protection of confidential information, not just trade secrets.

Fasken cites the New Mexico Inspection of Public Records Act (IPRA) to support its argument that Intrepid's confidential information cannot be protected in this Division hearing without a showing that the information contains trade secrets. *See* Response at 1. This too is wrong. In addition to protecting "trade secrets," the IPRA also protects other confidential information from disclosure when required by other law. NMSA 1978, § 14-2-1 (6) & (12). Here, § 71-2-8 unequivocally prohibits the Division's disclosure of "confidential information" to the public when requested by the submitter of the information. *See* 1986 N.M. AG LEXIS 24 ("If a statute provides that a particular record is confidential, that statute prevails over the general language of the [IPRA]."). Also, the 'other law' exception to the IPRA is to be applied broadly. *See id.* Thus, the IPRA is consistent with § 71-2-8 in protecting confidential information, not just trade secrets. Accordingly, a request under the IPRA for Intrepid's confidential information submitted in this proceeding would be subject to the protections of § 71-2-8 and the protective orders of the Examiner.

5. Intrepid has satisfied all the requirements of § 71-2-8 necessary to protect its confidential information from public disclosure.

A person submitting confidential information to the Division under § 71-2-8 is only required to request in writing that the information be kept confidential. Section 71-2-8 does not require anything more. *Cf.* NMSA § 69-26-2 (imposing the same minimal burden to prevent the public disclosure of production data of individual mines by the Department). This makes sense,

given the exceedingly minor interest in the public disclosure of a potash lessee's sensitive commercial information compared to the overwhelming interest of the lessee to maintain that information's confidentiality. Fasken attempts to go far beyond this and saddle Intrepid with a different burden of proof derived from *Pincheira's* discussion of Rule 11-508, which rule clearly does not apply in this division proceeding.²

As set forth in Intrepid's Brief, the exhibits and testimony at issue here clearly fit within the plain meaning of the word "confidential." See Intrepid Brief, Sections III.3 and III.4. In addition, Intrepid has provided detailed explanations of the confidential nature of the exhibits and testimony. See *id.* at Section II.11. In many instances, Intrepid has also provided citations to the hearing transcript where the confidential nature of the exhibits is directly discussed or is otherwise made evident. See *id.* Intrepid has sufficiently shown the confidentiality of all of the exhibits and testimony at issue under the requirements of § 71-2-8. Accordingly, the Examiner should seal the exhibits and testimony at issue in this proceeding, absent a clear and countervailing interest in public disclosure or a showing of abuse or bad faith on the part of Intrepid in seeking the protections of § 71-2-8.

If the Examiner requires a greater showing of the confidential nature of the exhibits and testimony under § 71-2-8 or any other law, Intrepid requests the opportunity to expeditiously provide affidavits in support of the confidentiality protection it is seeking here. The Examiner should not render a decision adverse to Intrepid's confidentiality interests without first requesting

² In any event, Fasken is wrong that *Pincheira* requires a specific level of evidence, such as an affidavit, to establish an initial good faith claim of a trade secret under Rule 11-508. See Response at 2. *Pincheira* does not specify what constitutes a good faith assertion of a trade secret. It only indicates that the trial court's discretion is not limited when deciding the sufficiency of the initial good faith claim, and advises that "the trial court should consider both the nature of the information and how easily it can be made available under a protective order." *Pincheira* at ¶ 38. Indeed, the Court there simply found that the affidavit presented was sufficient, not that it was necessary. See *id.* at ¶¶ 49, 55.

such affidavits or otherwise affording Intrepid the opportunity to fully comply with whatever procedure and burden of proof the Examiner may apply here.³

6. Fasken's attacks on the confidential status of Intrepid's confidential information center on two false assertions.

In Sections C and D of its Response, Fasken relies primarily on two false assertions to try and discredit the confidential status of the exhibits and testimony at issue here. The first is that there is no competitive interest in lands leased for potash. The second is that Intrepid's competitor, Mosaic, has no real competitive interest in the Section 16 lands. Fasken merely repeats these two false assertions in blanket fashion with respect to Fasken Exhibit 10 and Intrepid Exhibits 3, 3A, 9, 10, 11, 40, 43. *See* Response at 5-8. The falsity of these assertions is discussed below.

(a) The competitive interest in potash lands does not evaporate when lands are finally leased.

Fasken incorrectly asserts that there is no competitive interest in the lands surrounding Section 16 because those lands are currently leased by Intrepid or are under a lease application. *See* Response at 3-4. Under this rationale, data and analysis pertaining to lands already leased for potash is no longer competitively sensitive. The illogic of this rationale is shown by Order R-111-P, which expressly provides that "Information used by the potash lessee in identifying its

³ Even if *Pincheira* were made to apply to this Division hearing, Intrepid has already met the requirements of Evidence Rule 11-508 and Discovery Rule 1-026(C). The trade secret nature of the exhibits and testimony at issue here is evident on their face. In addition, in its Brief, Intrepid provided detailed explanations of the trade secret status of each such exhibit and testimony as well as supporting citations to the hearing transcript. This sufficiently constitutes a good faith assertion of trade secrets under *Pincheira*. *See Pincheira* at ¶ 38, 46. Thus, if these rules were made to apply here, the Examiner must convene a special hearing to decide the trade secret status of the exhibits and testimony. *See id.* at ¶¶ 34-35, 47. Moreover, should the Examiner conclude after the special hearing that any exhibit or portion of Intrepid's testimony is not a trade secret, then Intrepid may seek to protect that information as "other confidential research, development or commercial information." *See id.* at 39. At that point, Intrepid need only show that "disclosure will work a clearly defined and serious injury to the party seeking closure." *See id.* at n. 3, citing *Krahling v. Exe. Life Ins. Co.*, 959 P.2d 562 (1998).

LMR shall be filed with the BLM and SLO *but will be considered privileged and confidential* “*trade secrets and commercial information.*” Order R-111-P, part (G)(a) (emphasis added).

Fasken cannot credibly argue that information about leased lands has no confidential status, as Fasken has argued that a potash lessee’s LMR is synonymous with its leaseholds, and Order R-111-P identifies LMR information as confidential trade secrets. *See* July 24, 2003 Hearing Tr. at 44:5-25, attached hereto as Exhibit A.

In addition, this assertion ignores the reality of potash leasing, which involves the expiration of leases. This is amply illustrated in Section 16, where IMC held a lease until it expired, forcing IMC to reapply for a lease in the section, which the State Land Office eventually denied in 2003. *See* Mosaic Prehearing Statement, July 9, 2003, attached hereto as Exhibit B; Fasken Ex. 6. Plus, as Fasken acknowledges, Section 21 is directly south of Section 16 and is open for leasing. *See* Intrepid Ex. 8. Fasken’s assertion here regarding a lack of competitive interest in the lands surrounding and including Section 16 simply has no basis in fact.

(b) Mosaic continues to have an acute competitive interest in the Section 16 area, and Mosaic is not the only interested competitor.

Fasken also incorrectly asserts that Mosaic has no competitive interest in Section 16 and the surrounding lands or in Intrepid’s analysis of that area. According to Fasken, this is because Mosaic has had “discussions” with Intrepid about the possibility of using the surface installations at the North Mine to develop its own leases lying to the east of Section 16, and because Mosaic was denied a lease in Section 16 five years ago. Response at 3-4. Fasken’s assertions here have no basis in logic, fact or law.

First, Mosaic’s prior discussions with Intrepid are just that – discussions. Second, the discussions do nothing to prevent Mosaic from applying for a lease in Section 21 or from attempting to acquire leases in other sections in this area that reopen to competitive leasing in the

future. These discussions simply do not in any way diminish Mosaic's competitive interests in the Section 16 area, including Section 16.

Likewise, the denial of a lease to Mosaic in Section 16 in 2003 does not mean that Mosaic no longer has a competitive interest in Section 16. Mosaic is not precluded from now seeking a lease in Section 16 or anywhere else. Until the State Land Office issues a new potash lease in Section 16, it is open to Mosaic as much as any other person wishing to acquire a leasehold there.

Mosaic currently has large potash leaseholds located just to the east of Section 16 and Intrepid's North Mine, so it already has significant and concentrated interests in the area. *See* Fasken Ex. 1. It is therefore Intrepid's most immediate competitor in the Section 16 area. But competitive leasing is not the only sensitivity here. As recognized by Order R-111-P, Intrepid's analysis of the Section 16 area, which is largely within its LMR, is valuable commercial information generated by Intrepid that qualifies as a trade secret regardless of whether Mosaic has the opportunity to lease in this area. *See* 1 Tran. 176:20-178:4; 2 Tran. 119:8-12; Order R-111-P, part (G)(a).

Finally, Fasken fails to recognize that Mosaic is not the only existing potash competitor in the Carlsbad potash area. Two oil and gas companies have successfully bid on and were issued potassium lease in the Potash Area in 1992 and only last year participated in a potassium lease auction. *See Pogo Prod. Co.*, 138 IBLA 142, 156-57 (1997), *aff'd*, *IMC Kalium Carlsbad, Inc.*, 206 F.3d 1003 (10th Cir. 2000). These and other companies could seek potash interests in the Section 16 area now or in the future.

7. Fasken's more specific attacks on the confidentiality of certain exhibits are also an effort to obfuscate the facts.

In Section D of its response, Fasken makes more specific assertions about the confidentiality of certain exhibits at issue here. None of its assertions has merit. Intrepid responds directly to these erroneous assertions as follows:

Intrepid Exs. 3 and 3A. Contrary to Fasken's snide assertion, Intrepid's current capital cost estimate for reopening the North Mine is far from "guess-work." Response at 6. The estimate represents the best current judgment of an experienced potash company with expertise in making these kinds of capital cost estimates. Whether and when Intrepid is obligated to make disclosures about these internal estimates to the investing public is a matter far outside the expertise of this regulatory body and wholly irrelevant to these proceedings. *See* 2 Tran. 230:4-16. The cost estimate speaks to the potential profitability of the North Mine and how soon potash product may be available in the market from the North Mine, which is obviously valuable to a competitor. *See* 2 Tran. 182:19-183-4.

Intrepid Exs. 7 and 8 (Intrepid lease applications). As acknowledged by Fasken, Intrepid's potash lease application for Section 16 is clearly marked confidential on the application itself. *See* Intrepid Ex. 7 at IP001165. This substantially complies with NMSA 1978, § 19-1-2.1. With respect to the BLM fringe lease application, there are no facts here to show or reason to believe that because the application was not stamped confidential it has now been publicly disseminated in the last six months since it was submitted to BLM. As discussed above, neither lease application must qualify as a trade secret under Rule 11-508 to obtain confidentiality protection in this Division hearing.

Intrepid Exs. 9, 11, 34 (potash reserve analysis for Section 16 area). The only attacks that Fasken makes about the extreme confidentiality of these exhibits are fully addressed above in Section 6 of this brief.

Intrepid Ex. 10 (Section 16 mine plan) and Ex. 40 (planned North workings). Fasken completely overlooks the economic value of these maps that exists aside from competitive potash leasing issues. *See* Response at 7-8. For example, Intrepid Exhibit 10 is a mine plan drawn to scale and shows in detail the mine working layouts developed by Intrepid to mine Section 16. These layouts are designed to maximize the extraction of potash ore in an area containing multiple abandoned oil and gas wells. Similarly, Intrepid Exhibit 40 contains a larger scale depiction of how to design and expand new mine panels from the now idle mine workings of the North Mine. A competitor designing a new mine in the Potash Area or faced with similar mining circumstances would benefit from these maps, which represent the judgments and working designs of an experienced and successful potash company.

Intrepid Ex. 16 (1982 IMC Report) and Ex. 50 (Intrepid Core Data). Fasken incorrectly asserts that Intrepid and Mosaic possess the same core hole data and analysis relevant to the Section 16 area. *See* Response at 3, 8. There is no basis for this assertion. First, there is no indication that core data referenced in the 1982 IMC report is the same data upon which Intrepid bases its current ore reserve analyses in this area. *See* Intrepid Ex. 16 at 1142. Second, the IMC report expressly warns that it is not based on a review of the actual core data, only on National Potash's analysis and interpretation of the core data. *See id.* at 1142, 1145, 1148-52. Thus, the IMC Report did not convey to Mosaic's predecessor IMC the raw geologic data contained in the core hole files comprising Intrepid Exhibit 50. It only conveyed an interpretation of that raw data made in 1982.

Intrepid Ex. 31 (Merrill Lynch Report). Fasken ignores the fact that this report is a confidential document made available to Intrepid subject to restrictions on its dissemination and is not publicly distributed, but is only available to certain customers of Merrill Lynch. The document therefore fits the plain definition of the word “confidential.”

Fasken Ex. 10 (three-year mining plans). Fasken misses the point here with respect to Intrepid’s three-year mining plans submitted to BLM under federal regulations. *See* Response at 4-5. As discussed above, these plans do not need to be trade secrets to qualify for protection in this hearing under NMSA § 71-2-8 or Discovery Rule 1-026(C). Nor does the submittal of these plans to BLM destroy their confidential status, as the plans constitute confidential commercial information under 5 U.S.C. § 552(b)(4) and therefore may not be disclosed by BLM under 43 C.F.R. § 2.23(j).

Fasken Ex. 31 (price graph). Fasken is correct that this single page graph is not an exact duplicate of Intrepid Exhibit 3. The graph is part of the same computer file from which Intrepid Exhibit 3 was assembled and that was produced to Fasken in discovery. Intrepid does not seek to prevent its public disclosure.

Fasken Ex. 33 (composite potash reserve map). Fasken’s discussion in its Response of this highly confidential Intrepid map completely ignores the fact that it depicts various ore bodies that are the result of Intrepid’s compilation and analysis of a large amount of geophysical log data (from oil and gas wells) and core hole data using a methodology pioneered by Intrepid in the Carlsbad potash area. *See* 2 Tran. 90:7-91:24.

8. Fasken’s attack on Intrepid’s confidential testimony is based on the same empty argument.

Intrepid seeks to maintain the Examiner’s sealing of all of James P. Lewis’ testimony and to seal limited portions of Kenneth G. Taylor’s testimony. *See* Brief at III.3 and III.4. Fasken’s

only response is, again, that Intrepid must demonstrate the trade secret status of this testimony. *See* Response at Section E. As discussed above, Intrepid is not required to show the trade secret status of this testimony to prevent its public disclosure under § 72-2-8, only that the testimony clearly fits within the plain meaning of the word “confidential.” *See* Brief at II.3-5, III.3 and III.4. Intrepid has provided detailed explanations of the confidential nature of the testimony and citations to the hearing transcript where the confidentiality of the testimony is apparent. *See id.* Accordingly, the Examiner should seal this confidential testimony, absent a clear and countervailing interest in public disclosure or a showing of abuse or bad faith on the part of Intrepid in seeking the protections of § 71-2-8.

9. There is additional Intrepid testimony that is confidential and requires protection from public disclosure.

In its Brief, Intrepid misstated that it did not present any confidential testimony at the first day of the hearing. *See* Brief at 2. There is a small but highly confidential portion of Mr. Hugh Harvey’s testimony located at 1 Tran. 181:19-183:4. There, Mr. Harvey discussed the ore reserve figure for the North Mine set forth in the 1982 IMC report, which report is Intrepid confidential Exhibit 16. He also discussed Intrepid’s capital cost estimate for reopening the North Mine, which figure is also presented on page 7 of Intrepid confidential Exhibit 3. Intrepid has consistently asserted the confidentiality of the confidential information contained in Intrepid Exhibits 16 and 3, including these particular ore reserve and capital cost figures, and the Examiner has ordered those exhibits sealed as confidential. 1 Tran. 185:2; 2 Tran. 240:7; Brief at II.11(a), II.11.(i), and III.3. Mr. Harvey also explains the significance of North’s reserve and capital cost estimates in terms of the value of the North Mine asset. *See* 1 Tran. 182:19-183:4. This data would inform a competitor’s expectation of Intrepid’s future actions and its production strengths at its Carlsbad operations.

Likewise, at 1 Tran. 156:5-11, Mr. Harvey identifies the recovery rates for potash and langbeinite at Intrepid's East and West Mines. This specific information appears in Intrepid confidential Exhibit 11 in calculating the value of the ore reserves that will be destroyed by the proposed well. The Examiner has already ordered the sealing of Intrepid Exhibit 11 as confidential. 2 Tran. 54:14. Intrepid and Mosaic are the only two producers of naturally occurring langbeinite in the world, and as so information regarding the mining, processing and marketing of this mineral are closely guarded secrets from a competitive standpoint. The recovery rates discussed by Mr. Harvey would inform Mosaic and other competitors about Intrepid's pricing strategies and profitability for various potash and langbeinite products. A competitor could use this information to evaluate its operations against Intrepid's operations from an economic and pricing standpoint, and identify areas to gain competitive advantage.

For the reasons set forth herein and in Intrepid's brief, the Examiner should seal as confidential the testimony of Mr. Harvey set forth at 1 Tran. 181:19-183:4; 156:5-11.

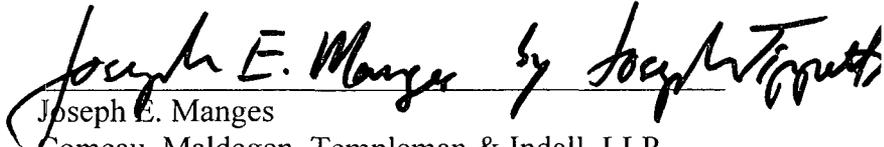
CONCLUSION

For the foregoing reasons, the Examiner should seal and protect the exhibits and testimony at issue in this Division hearing. All of the exhibits and testimony qualify as confidential information under § 71-2-8 because they contain information of Intrepid that fits squarely within the plain meaning of the word "confidential." Such information is known only to Intrepid or is otherwise closely held and not disseminated publicly. Fasken's attacks on the confidentiality of the exhibits and testimony at issue here amount only to obfuscation. As shown herein, Intrepid is not required to prove the trade secret status of its information to prevent its public disclosure in this Division proceeding. Nor is Intrepid saddled with a burden of proof derived from Fasken's misconstruction of *Pincheira*.

If the Examiner requires a greater showing of the confidential nature of the exhibits and testimony under § 71-2-8 or any other law, Intrepid requests the opportunity to expeditiously provide affidavits in support of the confidentiality protection it is seeking here. The Examiner should not render a decision adverse to Intrepid's confidentiality interests without first requesting such affidavits or otherwise affording Intrepid the opportunity to fully comply with whatever procedure and burden of proof the Examiner may apply here.

Dated this 22nd day of September, 2008.

Respectfully submitted,



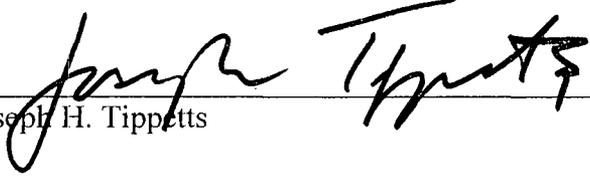
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was delivered via email and via Federal Express this 22nd day of September, 2008 to:

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1220 South St. Francis Drive
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STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY)
THE OIL CONSERVATION DIVISION FOR THE)
PURPOSE OF CONSIDERING:)
)
APPLICATION OF FASKEN OIL AND RANCH,)
LTD., FOR AN ORDER AUTHORIZING THE)
DRILLING OF A WELL IN THE POTASH AREA,)
LEA COUNTY, NEW MEXICO)

CASE NO. 13,107

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: MICHAEL E. STOGNER, Hearing Examiner

July 24th, 2003

Santa Fe, New Mexico

RECEIVED
AUG . 7 2003
Oil Conservation Division

This matter came on for hearing before the New Mexico Oil Conservation Division, MICHAEL E. STOGNER, Hearing Examiner, on Thursday, July 24th, 2003, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

STEVEN T. BRENNER, CCR
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EXHIBIT A

1 EXAMINER STOGNER: Yes.

2 MR. FELDEWERT: As I alluded to earlier, I have a
3 difficult time understanding how IMC can claim to the
4 Division that this is part of their LMR when they do not
5 have a lease in this Section 16. One of the problems that
6 we always face is that whenever oil and gas development is
7 proposed in this area, the potash companies -- particularly
8 I think IMC -- comes forward with an objection claiming it
9 is within their LMR.

10 That LMR map and the procedures that go into
11 determining what is and is not an LMR is a very secretive
12 process, it's confidential and proprietary information.
13 It's my understanding that under R-111-P, that LMR analysis
14 is supposed to be periodically adjusted and reviewed. To
15 my knowledge, that does not occur on a regular basis.

16 So what we're stuck with is a situation where
17 whenever someone desires to drill a well within this
18 particular area, the potash companies, and particularly
19 IMC, come forward claiming it's within an LMR, and that
20 automatically results in a -- it seems to automatically
21 result in a denial of the application by the District
22 Office.

23 In this particular case I think what you have is
24 a situation where there was some confusion over whether
25 this indeed is and should be an LMR, and I think by --

1 given the fact that IMC did not appear here today, given
2 the fact that they have -- while they have not, I guess,
3 officially withdrawn their objection, they certainly have
4 indicated to you in a telephone conversation that because
5 they do not have a lease in Section 16, I think the words
6 were, they believe that their standing in this matter has
7 seriously been eroded.

8 I would submit that it has been completely
9 eroded, that because they do not have a lease in Section 16
10 they cannot stand here and claim that they have an LMR, and
11 that they cannot at this point -- should not be in a
12 position to deny continued development in a section of land
13 that has been the subject of extensive oil and gas
14 development in the past and which is State land, and
15 particularly in a situation where the State Land Office has
16 indicated that they want to see this well and this drilling
17 go forward.

18 So we would ask that this case be taken under
19 advisement and that the Division issue an order approving
20 the drilling of this well.

21 EXAMINER STOGNER: So noted, Mr. Feldewert.
22 However, one correction. You stated a telephone
23 conversation. That was a voice-mail message left me. My
24 contacting him was to discuss procedural matters and
25 representation by legal counsel. I never did talk to Mr.



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JUL 14 2003

OIL CONSERVATION
DIVISION

Case 13107

IMC Carlsbad Potash Company Inc
1361 Potash Mines Road
PO Box 71
Carlsbad NM 88221-0071
505.887.2871

July 09, 2003

Ext. 318

Division Examiner, OCD
Department of Energy, Minerals and Natural Resources
State of New Mexico
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Re: Application of Fasken Oil & Ranch for an Order Authorizing the Drilling of a
Well in the Potash Area, Lea County, New Mexico.

Dear Sir:

IMC Potash Carlsbad Inc. (IMC), as an owner of interest, will attend the application hearing of Fasken Oil & Ranch Ltd., scheduled to be set before a Division Examiner on July 24, 2003.

IMC requests that John Purcell, Chief Mine Engineer be allowed to testify at the hearing.

The Prehearing Statement for the application hearing is included, and the time needed to present the facts offered in the statement should be approximately one hour.

If there are any further requirements needed to be included as a party of record at the application hearing, please let us know.

Sincerely,

John Purcell
Chief Mine Engineer

Enclosure

EXHIBIT B

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

**PREHEARING STATEMENT TO THE
APPLICATION OF FASKEN OIL & RANCH Ltd.
FOR A ORDER AUTHORIZING THE DRILLING
OF A WELL IN THE POTASH AREA,
LEA COUNTY, NEW MEXICO**

CASE NO. _____

PREHEARING STATEMENT

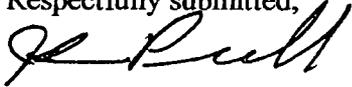
IMC Potash Carlsbad Inc. (IMC) applies to the New Mexico Oil Conservation Division to testify at the application hearing of Fasken Oil & Ranch Ltd. (Fasken) to drill its Laguna "16" State Well No. 1 at a location 660' FSL and 660' FEL, in the SE/4SE/4 (Unit P) of Section 16, Township 20 South, Range 32 East, NMPM, Lea County, New Mexico. IMC is an affected party, and in support of the OCD District Office's decision to disallow the well states:

1. The assignment of the State Potassium Lease covering Section 16, T20S, R32E to IMC was approved by the State of New Mexico on December 6, 1994, and on February 2, 1995 IMC made the annual rent payment for the lease.
2. The initial term of the lease expired on February 21, 1995; when it was learned that the Land Office was requiring a new lease application instead of routinely renewing the lease for another ten-year term, an application was made on May 1, 1995. Since that time, IMC has paid additional rent on the tract as required by the State Land Office, and has maintained a "Tenant at Will" status on the lease.
3. IMC holds Federal Potassium lease NMNM 013298C in Section 15, T20S, R32E.
4. Both sections 15 and 16 contain potash ore reserves that are included in IMC's "Life of Mine Reserves", as part of R-111-P requirements.
5. Potassium Core Test Hole No. IMC-170 was drilled in June 1953, 1320' FSL and 1320' FEL in Section 16, T20S, R32E. The analysis of the core shows potash ore on the 10th ore zone with a grade of 14.70% K₂O sylvite with a thickness of 5.2 feet. The sylvite grade and thickness of the ore is comparable to sylvite ore currently being mined by IMC.
6. IMC has submitted a mine plan to the State, as part of the on-going lease application process, that outlines 250,000 tons of recoverable potash ore from Section 16 that will be lost if the applied for well is approved.

7. Approval of this well will result in waste of potash deposits, constitute a hazard and interfere the mining of potash reserves.

WHEREFORE, IMC requests to testify at this application hearing before an Examiner of the Oil Conservation Division, and that after notice and hearing, the Division uphold the OCD District Office's decision to deny Fasken's application for a permit to drill its proposed Laguna "16" State Well No. 1 at a location 660' FSL and 660' FEL, in the SE/4SE/4 (Unit P) of Section 16, Township 20 South, Range 32 East, NMPM, Lea County, New Mexico.

Respectfully submitted,



John Purcell
Chief Mine Engineer