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

APPLICATIONS OF FASKEN OIL & RANCH, LTD TO EXTEND THE DRILLING DEADLINE UNDER ORDERS R-22121 AND R-22122, LEA COUNTY, NEW MEXICO.

CASE NOS. 24396 and 24397

MARATHON OIL PERMIAN LLC'S BRIEF IN SUPPORT OF ITS OPPOSITION TO FASKEN'S SECOND EXTENSION APPLICATIONS

Pursuant to the Hearing Examiner's direction at the June 27, 2024 status conference in the above captioned cases, Marathon Oil Permian LLC ("Marathon") hereby submits this Brief in Support of Marathon's Opposition to Fasken Oil & Ranch, LTD's ("Fasken") applications to amend filed in Case Nos. 24396 and 24397 (the "Fasken Second Extension Applications"). As a pooled working interest owner subject to the orders Fasken seeks to amend and extend (the "Baetz Orders"), Marathon clearly has the right to object to the Fasken Second Extension Applications, and, as both Fasken and Marathon have requested, the Second Extension Applications should be set for a contested hearing. *See* June 27, 2024 Hearing Transcript (Tr.) at 59, lines 20-25; *id.* at 73, lines 1-4.[1] Thus, as of now, whether Fasken is entitled to a second extension is going to be the subject of a contested hearing. The issue before the Division is the scope of that hearing.

As Marathon agued at the June 27, 2024 Status Conference, the good cause requirement to obtain an extension request itself provides the Division and parties opposing the extension an opportunity to assess whether, in light of changed circumstances and the very specific situation presented by these cases, a second extension of time to commence drilling is warranted. The

[1] As discussed at the June 27 status conference, a hearing on this motion and Fasken's response will be set on August 8, 2024, with oral replies allowed at that hearing, and with a contested hearing to follow. *See* Tr. at 82. Marathon reserves the right to provide an oral reply.

Division need not reopen the underlying cases to make this assessment—the Division can undertake this assessment in the present cases, based on the fact that Fasken itself has put the underlying Baetz Orders at issue by seeking to amend them, and because those Orders can only be amended for good cause shown, which necessarily implicates the Division's discretion, and the Division cannot exercise its discretion in a manner contrary to the Oil and Gas Act's mandates.

SUMMARY OF ARGUMENT

Marathon does not dispute that extensions are sometimes necessary, especially for circumstances outside of an operator's control. In fact, Marathon has applied for extensions based on, among other things, BLM's delay in approving APDs. Marathon's position, though, is that under the unique circumstances presented here, Fasken is advancing an overly restrictive view of what the Division can consider when evaluating a *contested* extension request. Fasken's position seems to be that the Division can *only* consider whether the BLM's delay constitutes good cause, and that BLM's delay in issuing APDS *per se* satisfies good cause. *See, e.g.*, May 2, 2024 Status Conference Hearing Tr. at 72, lines 10-12 ("We're waiting on the BLM. That is a good cause."); *id.* p. 75 at lines 11-13 ("[O]ur point would be the BLM -- we're waiting on the BLM, and the -- neither the Division nor the parties can control the BLM's timeline.").

Fasken's position is contrary to the Oil and Gas Act's mandate that the Division prevent waste and protect correlative rights and the Act's acknowledgement that the Division has jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce the Act. NMSA 1978, § 70-2-6(A). Under the specific situation presented here, the Division should reject Fasken's position and, instead, make a fully-informed decision based on all the circumstances. Again, the Division need not reopen the initial Fasken cases to make this assessment. Rather, the Division can, and should, evaluate the totality of the circumstances as part

of its present determination of whether Fasken has met its burden to justify good cause for the Division to approve a second extension.

Fasken also, incorrectly, argues that the Division cannot entertain competing applications filed by other operators as part of a working interest owner's objection to Fasken's Second Extension Applications. Again, Fasken's attempt to limit the scope of the Division's review is contrary to the Oil and Gas Act's mandate, broad grant of jurisdiction, and contrary to Commission and Division precedent. Fasken couches Marathon's position as trying to re-open the Fasken Baetz Orders and collaterally attack them, which Fasken asserts would be barred by res judicata.[2]

Fasken misses the point, though. As discussed above, Marathon does not need to move to re-open the Fasken Baetz Orders or the initial cases—Fasken has presently invoked the Division's discretion and has put the Baetz Orders at issue. Given that the Baetz Orders are at issue, efficiency and the public interest warrant an evaluation by the Division of competing development plans/competing applications—not as an attempt to re-open the underlying cases, but rather to fully inform the Division about whether Fasken's Second Extension Applications are justified under the present circumstances. The Division can evaluate the competing applications as part of its good cause evaluation and give those competing applications and evidence supporting them the weight the Division sees fit.

In sum, the Division should set a contested hearing for the Fasken Second Extension Cases and should fully evaluate whether Fasken can meet its burden, in light of the totality of the circumstances, to show adequate good cause to justify the Division's exercise of its discretion to

[2] Fasken's contention that Marathon cannot propose its own competing development plans is premature—once Marathon files its competing applications, Fasken can challenge them. The Division need not, and should not, address these issues now because they simply are not ripe. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 15, 149 N.M. 42, 243 P.3d 746 ("the doctrine of ripeness prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.…"). Once Marathon files its competing applications, the issues of collateral attack and res judicata can be fully briefed. Marathon reserves the right to do so, in the event Fasken moves to dismiss or otherwise challenge Marathon's filed applications.

allow Fasken yet another year under the Baetz Orders. And, as part of the evaluation of whether good cause exists to justify a second extension, the Division can, and should, consider the entirety of the circumstances, and not simply the BLM's delay, which, for efficiency's sake and to protect the public interest, includes evaluating competing applications, in order to prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells.

BACKGROUND

In initial cases underlying the Fasken Second Extension Cases, Fasken sought to pool two Bone Spring units, together covering the W/2 of Sections 15 and 22, Township 20 South, Range 32 East, NMPM, Lea County, New Mexico. Fasken submitted its original applications on March 8, 2022, in Case Nos. 22697 and 22698. Marathon entered an appearance in the Fasken cases. *See* Marathon's Entry of Appearance. A hearing was held on Fasken's applications on April 7, 2022. Marathon did not object to the cases moving forward but entered an appearance "just to preserve Marathon's rights in the event necessary." *See* April 7, 2022 Hearing Transcript, page 5, lines 11-21. As the exhibits in Case Nos. 22697 and 22698 demonstrate, Marathon has a 47.5% WI in the W/2 of Section 15. *See* Fasken Exhibits Case Nos. 22697-22698, Exhibit A-3. Marathon has an approximately 24% interest in Fasken's proposed Baetz units. *See id*. Under its proposals, Fasken proposed to drill only two (total) Bone Spring wells, the Baetz wells, one in the W/2W/2 and one in the E/2W/2. *See id.*

On May 9, 2022, the Division entered Order R-22121 in Case No. 22697 and Order R-22122 in Case No. 22698 ("Baetz Orders"). Under the terms of the Baetz Orders, Fasken had through May 10, 2023 to commence drilling the wells. Unable to meet that deadline, Fasken, on April 3, 2023, submitted extension applications, requesting an extension of time through May 10, 2024. Application Case No. 23473, ¶ 5; Application Case No. 23474, ¶ 5. In support of its request,

Fasken stated that "Fasken filed permits with the Bureau of Land Management on June 30, 2022, and has not yet received approval…." Application Case No. 23473, ¶ 4; Application Case No. 23474, ¶ 4. On June 7, 2023, the Division issued Order R-22121-A and Order R-22122-A, extending the deadline for Fasken commence drilling until May 9, 2024. Now, Fasken is requesting a second extension of time, which, if granted, would give Fasken through May 9, 2025, to commence drilling the wells under the Baetz Orders.

The lands at issue are within the Designated Potash Area ("DPA"), which is subject to the Secretary's 2012 Potash Order, Order No. 3324, [3] issued to protect correlative rights by establishing rules to govern oil and gas exploration and potash development. The BLM has implemented several measures within the DPA to further to Potash Order's goals, including the concept of "Development Areas" and "Drilling Islands." *See* Order 3324, § 6(e). A Development Area ("DA") is an area established by the BLM, where an operator can drill wells from a Drill Island, while managing the impact on potash resources. *See* Order 3324, § 4(f) (definition of Development Area). According to the Order 3324, "[e]ach Development Area will typically have only one Drilling Island, subject to narrow exceptions based on specific facts and circumstances. All new oil and gas wells that penetrate the potash formations within a Development Area will be drilled from the Drilling Island(s) associated with that Development Area." *Id.*

When an operator wants to develop oil and gas within the DPA, the operator requests to establish a Drilling Island and Development Area. Upon information and belief, Fasken provided notice that it had submitted its request to establish a Development Area in May 2024—a month *after* Fasken filed its Second Extension Applications, which were filed on April 1, 2024, and nearly two years after the Division issued the Baetz Orders. Fasken's requested DA presumably covers

[3] Available here https://www.blm.gov/sites/blm.gov/files/2012%20Potash%20Secretarial%20Order.pdf

the W/2 of Sections 15 and 22, which is the acreage at issue in the Baetz Orders, and presumably does not include the W/2 of Section 10. There is a drill island in the SW/4 of Section 22, *see* BLM Potash Development Areas Map, attached as Exhibit A (subject area outlined in red and arrow pointing to drill island in SW/4 of Section 22), and presumably Fasken intends to drill its Baetz wells from this drill island. If Fasken's DA is approved and if Fasken's Second Extension Applications are approved, the W/2 of Section 10 could be left undeveloped, if there are no available drill islands to access the reserves in the W/2 of Section 10.[4]

Upon information and belief, Fasken's DA has been protested. As a result, granting Fasken's Extension Cases could amount only to hollow victory, because Fasken may not have an approved DA or approved APDs in time to begin developing this acreage within the deadline in an extension order. Thus, there is no guarantee that, even if the Division grants Fasken's extension request, Fasken would be able to commence drilling by May 2025.

While the BLM DA approval process and the OCD pooling processes are separate, the 2012 Potash Order provides that the BLM must coordinate with the Division concerning development decisions. *See* Order 3324, § 5. The evidence developed at the contested hearing on Fasken's Second Extension Applications could thus inform the BLM's decision as to whether Fasken's DA should be approved and whether Fasken's APDs should be issued.

Despite Fasken's protestations to the contrary, Marathon, who owns 47.5% of the working interest in the W/2 of Section 15, has the right to ask the Division to fully evaluate and deny Fasken's second extension request, based not just on BLM's delay in approving Fasken's APDs, but also based on a full evaluation of whether Fasken's development plans prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells. For efficiency sake, and as part of

[4] Marathon owns interests in Section 10, and is, in fact, developing the E/2 of Sections 10 and 15.

the Division's full evaluation of Fasken's second request for an extension of time to commence drilling, the Division also can, and should, evaluate any competing applications, including whether those competing applications demonstrate that granting Fasken's Second Extension Applications is not warranted under the circumstances, and, based on the record and to the extent the Division deems appropriate, whether approval of the competing applications is warranted to prevent waste and protect correlative rights.

ARGUMENT

Marathon undisputedly has standing to object to the Fasken Second Extension Applications—the question before the Division is whether the Division is limited to only considering whether the BLM's delay constitutes good cause, or, instead, whether the Division can consider other facts, circumstances, and evidence in support of an objection to a second extension request. Given the Division's mandate to prevent waste and protect correlative rights and the Division's broad grant of authority to effectuate that mandate, the Division should reject Fasken's cramped view of the Division's ability to evaluate good cause.

I. THE DIVISION'S REVIEW OF THE FASKEN SECOND EXTENSION APPLICATIONS IS NOT LIMITED ONLY TO WHETHER THE BLM'S DELAY CONSTITUTES GOOD CAUSE.

The Division has the authority and duty to fully evaluate whether Fasken can establish good cause for a second extension, including whether Fasken's Second Extension Applications prevent waste, protect correlative rights, and avoid the drilling of unnecessary wells. Thus, contrary to Fasken's statements at the status conference, the Division is not limited only to considering the BLM's delay when assessing good cause.

Fasken's overly cramped view of what the Division can consider when evaluating whether an applicant has established good cause is inconsistent with the Oil and Gas Act and its provisions

setting out the Division's jurisdiction and its mandate. NMSA 1978, Section 70-2-6, which sets forth the Oil and Gas Commission and Division's general powers and duties, provides a broad grant of "jurisdiction and authority over *all matters relating to the conservation of oil and gas* and the prevention of waste of potash as a result of oil or gas operations in this state." NMSA 1978, § 70-2-6(A) (emphasis added). The statute further provides that: "[the Division] shall have *jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of this act or any other law of this state relating to the conservation of oil or gas* and the prevention of waste of potash as a result of oil or gas operations." *Id.* The Oil and Gas Act requires the Division to prevent waste and to protect correlative rights. *See* NMSA 1978, § 70-2-11(A) ("The division is hereby empowered, *and it is its duty*, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided.") (emphasis added)). "To that end, the division is empowered to make and enforce rules, regulations and orders, and *to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof*." *Id.* (emphasis added).

As the New Mexico Supreme Court has recognized, "the basis of [the Division's] powers is *founded on the duty to prevent waste and to protect correlative rights*. Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights." *Continental Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 11, 373 P.2d 809 (emphasis added); *see also El Paso Natural Gas Co. v. Oil Conservation Comm'n*, 1966-NMSC-092, ¶ 4, 76 N.M. 268, 414 P.2d 496 ("[T]he primary concern of [the Oil and Gas Act is] eliminating and preventing waste in the pool so far as it can practicably be done, and next the protection of the correlative rights of producers from the pool."). The Oil and Gas Act defines "underground waste," in part, as "the locating, spacing, drilling, equipping, operating or producing,

of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil or natural gas ultimately recovered from any pool[.]" NMSA 1978, § 70-2-3(A). The Oil and Gas Act defines "surface waste," in part, as "unnecessary or excessive surface loss or destruction without beneficial use, however caused...especially such loss or destruction incident to or resulting from the manner of spacing, equipping, operating or producing, well or wells…." *Id.* § 70-2-3(B).

The Oil and Gas Act, then, is clear that the Division has jurisdiction to enforce the Oil and Gas Act's mandate that the Division prevent waste and protect correlative rights. The Act makes clear that the Division can "do whatever may be reasonably necessary to carry out the purpose of this act." Contrary to Fasken's apparent argument, the Division's jurisdiction is not constrained under these circumstances to only whether the BLM's delay constitutes good cause—rather, the Division has the authority to consider whether Fasken's Second Extension Applications satisfy the Oil and Gas Act's requirements of preventing waste and protecting correlative rights. Marathon does not disagree that BLM's delay is a factor to be considered in the "good cause" analysis, but, under the circumstances presented here, it is only one factor. Other factors the Division can, and should consider, is whether Fasken's development plans justify a second extension.

OCD's orders refute Fasken's argument that the Division can only consider whether BLM's delay constitutes good cause. Order R-22121, ¶ 35 states: "OCD retains jurisdiction *of this matter* for the entry of such orders *as may be deemed necessary*." (Emphasis added.) Paragraph 10 of Order R-22121-A includes the same statement. In other words, the Division, as its orders correctly state, retains jurisdiction over cases for the entry of future orders as the Division deems necessary. An order denying a second extension request on the basis that the applicant failed to demonstrate that its development plan warranted a further extension would certainly fit within the category of orders the Division may deem necessary.

In addition, under the Division's orders, an operator must commence drilling within a year of the order being issued and must complete the well within the following year. *See* Fasken Order R-22121, ¶ 19 ("The Operator shall commence drilling the Well(s) within one year after the date of this Order, and complete each Well no later than one (1) year after the commencement of drilling the Well."). If an operator cannot meet these deadlines, an operator can invoke the Division's discretion by seeking to amend an order for good cause shown, otherwise the order terminates automatically. *See id.* ¶ 20 ("*This Order shall terminate automatically* if the Operator fails to comply with Paragraph 19 unless Operator *obtains an extension by amending this Order* for good cause shown.") (emphasis added)). Fasken bears the burden of demonstrating that good cause exists for the Division to grant the extraordinary relief of a second extension.

The use of the term "good cause" necessarily invokes the Examiner's discretion to evaluate what circumstances constitute good cause as opposed to those that do not. Contrary to Fasken's contentions, good cause is not limited only to the BLM's delay; instead, the Examiner can, and should, evaluate whether the totality of the circumstances presented here weigh in favor or against an extension of time.

Division practice required Fasken to provide notice to the parties it pooled in the original cases—this requirement would be meaningless if, as Fasken seems to contend, a pooled party could not object to an extension request for reasons other than those advanced by the applicant. In Case No. 22207, XTO (represented by Fasken's current counsel) asked the Division to either rescind the Division's approval of a second drilling extension received by Ascent Energy, LLC ("Ascent") or require Ascent to file applications to amend the orders for which Ascent had obtained an administrative approval. *See* Application, Case No. 22207. XTO's position in that case was that

XTO, as a working interest owner in the units subject to the orders being extended, should have had an opportunity to object to Ascent's extension request. In its application, XTO noted:

> Recognizing the unfairness inherent in such orders that allow operators to obtain extensions without providing notice, the Division now requires operators *to amend pooling orders* to obtain an extension of time to commence drilling. *Amendment requires filing an application, giving notice* to all parties subject to the original force-pooling proceeding, and *going to hearing* before a Division Examiner.

Application, Case No. 22207, ¶ 10 (emphasis added). XTO also argued that "[a] temporary stay pending the outcome of this case will not prejudice Ascent or other interested parties [because] Ascent has delayed drilling its proposed wells under these orders for more than two years." *Id.* ¶ 15. XTO, which owned 12.5% in the pooled spacing units, asserted that a stay of the Division's approvals of Ascent's second extension request was warranted because the stay would "protect the public interest by ensuring parties with valuable mineral interests have a recourse against the issuance of pooling order extensions without the opportunity to be heard." *Id.* ¶ 15. While XTO eventually dismissed its application, the point of XTO's application point was clear—pooled working interest owners have a right to object to extension requests to protect their valuable mineral interests.[5]

The fact that the Division requires notice of an extension request be provided to pooled working interest owners so that pooled working interest owners can object to such a request must, logically, include the right to object to protect their rights—which includes the "right to exploit the oil and gas minerals." *See* Rule 19.15.2.7(10) (defining working interest owner). If, as Fasken argues, the Division is limited to only whether BLM's delay constitutes good cause, pooled

[5] Based on Fasken's argument at the June 27, 2024 status conference that notice is the only basis to re-open a case, which is incorrect in any event, Fasken may try to argue that XTO was only challenging notice in its application in Case No. 22207. Notice certainly was at issue, but notice alone was not XTO's apparent end goal—XTO wanted notice so it could participate in and object to Ascent's second extension requests to protect its valuable mineral rights.

working interest owners will not be able advance arguments in support of protecting their "right to exploit the oil and gas minerals."

II. THE DIVISION CAN CONSIDER OTHER DEVELOPMENT PLANS/COMPETING APPLICATIONS AS PART OF THE CONTESTED HEARING ON FASKEN'S SECOND EXTENSION APPLICATIONS

As things currently stand, there is going to be a contested hearing on Fasken's Second Extension Applications. And, as established above, the Division can and should *fully* evaluate whether good cause justifies extending the Baetz Orders a second time, including analyzing whether Fasken's plan to develop the acreage at issue will prevent waste and protect correlative rights. Thus, the only question that remains is whether the Division can, at the contested hearing, consider competing development plans/competing applications filed by other operators. The answer to this question under Commission and Division precedent is yes.

Again, Marathon is not at this time briefing the issues of whether Marathon's competing applications, once filed, are somehow barred (which, if challenged, Marathon will demonstrate they are not). Those issues are not yet ripe for Division review and will not be ripe until Marathon files its applications and if Fasken challenges them. For purposes of this brief, then, the question is whether the Division is precluded from considering competing applications when a pooling order that has already been issued is still subject to further Division action to retain its validity, and, when, as here, the existing pooling orders only cover some, but not all of the lands at issue in the competing applications. Under the limited circumstances presented here,[6] there simply is no

[6] At the June 27, 2024 status conference, Fasken outlined steps that operators take in reliance on a pooling order, and suggested that allowing a pooled working interest owner to substantively challenge an extension request, including by requesting that the Division consider a competing development plan, would result in enlarging the Division's docket. June 27, 2024 Tr. at 57-59. That is simply not true under the very limited circumstance presented here: These cases involve a second extension request, where a working interest owner with a substantial interest seeks to protect its rights, and development in this area is constrained by the regulatory issues regarding the Potash Area. In addition, the facts that Fasken identified at the status conference could all be weighed by the Division in assessing whether the extension applicant has demonstrated good cause. For example, the Division can and should consider whether the extension applicant has had meetings with the BLM for its DA, the status of the DA approval, what steps the extension

reason why the Division cannot consider other development plans/competing applications as part of the contested hearing on Fasken's Second Extension Applications.

First, and contrary to Fasken's assertions at the status conference, Marathon is not seeking to and does not need to reopen Fasken's Baetz initial cases—Fasken did that when it filed its Second Extension Applications requesting that the Division exercise its discretion to amend the Baetz Orders. Under Division practice, "the Division now requires operators *to amend pooling orders* to obtain an extension of time to commence drilling. Amendment requires filing an application, giving notice to all parties subject to the original force-pooling proceeding, and going to hearing before a Division Examiner." XTO Application, Case No. 22207, ¶ 10. Simply put, Fasken's Second Extension Applications put at issue the validity of the Baetz Orders because Fasken bears the burden of demonstrating that good cause warrants a second extension. Having invoked the Division's jurisdiction, and bearing the burden of establishing good cause under the Orders and the Oil and Gas Act, Fasken cannot now seek to cabin the Division's review.[7]

The Commission and the Division have both allowed competing cases, even those filed after a pooling order has been issued, to be heard together. *See* Order R-21454 (finding "that in

applicant has undertaken to advance development, such as staking locations, contracting with rigs, building locations, executing contracts for oil and gas takeaway.

[7] Fasken's position also seems to be that no one can challenge an order or move to re-open a case, except if there is evidence of failing to provide required notice. June 27, 2024 Tr. at 59, lines 6-11. This contention is not supported by the language of the Rule or the language of the orders Fasken seeks to extend. Rule 19.15.4.12(D) does not contain any indication that it is the exclusive situation under which a case can be re-opened. In addition, Rule 19.15.4.12(D) appears in the subsection of the Rules identifying the notice requirements for specific adjudications, and should not be read more broadly to cover every possible situation under which a case can be reopened, especially when the Rule's language gives no indication of an intent for such an expansive reading. Beyond that, the Rule states that failure to provide notice may "*be considered cause* for reopening the case," meaning that a case can be reopened for cause, and one circumstance satisfying cause may be failure to provide notice. In sum, a better reading of Rule 19.15.4.12(D) is that the Division or Commission may reopen a case for "cause," including, but not limited to, whether notice was properly provided. OCD's orders themselves also refute Fasken's argument that failure to provide notice is the only reason that OCD can re-open a case. Order R-22121, ¶ 35 states: "OCD retains jurisdiction of this matter for the entry of such orders as may be deemed necessary." Order R-22121-A includes the same statement. If, as Fasken contends, the Division's authority is limited to reopening for notice only, this paragraph in Fasken's orders and all other Division orders in which this language appears has no meaning.

order to prevent waste and protect correlative rights, it is in the best interest of the public and the parties that all of the related applications be heard in conjunction with one another, or be entirely consolidated for the purpose of hearing"); Order R-21454-A (rejecting the argument that allowing the competing cases to move forward before the Division meant that the Division was required to "rehear" the previously approved pooling orders); Order R-21675 (rejecting a motion to dismiss the competing applications).

The following principles can be distilled from the pleadings and orders in this line of cases:[8]

1) The Commission expressed a preference that competing applications, even those that have yet to be filed, should be heard together, to prevent waste and protect correlative rights, and in the best interest of the public.

2) The existence of approved pooling orders does not preclude the Division from evaluating competing pooling applications.

3) The Commission was not ordering the Division to rehear the cases underlying the existing pooling orders—only to evaluate the competing applications.

As applied here, these principles confirm that the Division can evaluate competing applications in Fasken's Second Extension Application cases. First, in order to prevent waste and protect correlative rights, it is in the best interest of the public for the Division to evaluate competing applications. Second, the fact that Fasken has approved pooling orders does not *per se* preclude the Division from considering competing pooling applications, especially in light of the fact that Fasken has not yet perfected the Baetz Orders by commencing drilling. Third, the Division need not "rehear" and Marathon need not "reopen" the Baetz Orders; rather the Division can

[8] A full discussion of the cases underlying Orders R-21454, R-21454-A, and Order R-21675 is outside the scope of this motion and Marathon reserves the right to brief these cases more fully if Fasken objects to Marathon's applications, once filed.

evaluate any competing applications as part of its good cause evaluation and give those competing applications and evidence supporting them the weight the Division sees fit.[9]

Based on statements made at the status conference, Fasken may try to argue that Order R-21454 and Order R-21454-A are inapposite because the previously approved pooling orders were the subject to de novo review before the Commission and were thus not final. While accurate, that fact is not dispositive here. First, Fasken has not taken all steps necessary to perfect its rights under the Baetz Orders, *i.e.*, commence drilling a well under the Orders. Instead, the Baetz Orders are presently pending before the Division to amend them, a discretionary action. Second, and significantly, the rationale underlying Order R-21454 and Order R-21454-A is one of efficiency and protection of the public interest, including the prevention of waste and protection of correlative rights. That rationale applies equally under the narrow circumstances present here.

In addition, a Hearing Examiner, "[i]n the absence of any limiting order…*shall have the power to regulate all proceedings* before him and *to perform all acts and take all measures necessary or proper for the efficient and orderly conduct of such hearing*…." NMSA 1978, § 70-2-13 (emphasis added). The rules governing a Division hearing examiner's power similarly state that the Division examiner "shall have full authority to hold hearings" and "shall have the power to perform all acts and take all measures necessary and proper for the hearing's efficient and orderly conduct." Rule 19.15.4.19 NMAC. Simply put, the Division has the authority to evaluate and rule on competing applications during the contested case on Fasken's Second Extension Applications because "in order to prevent waste and protect correlative rights, it is in the best

[9] The Commission and the Division also rejected the argument that the competing applications were barred by res judicata under the circumstances of those cases. That issue is not ripe for review by the Division, but, if Fasken objects to Marathon's competing applications once filed, Marathon will address that issue.

interest of the public and the parties that all of the related applications be heard in conjunction with one another or entirely consolidated for hearing." Order R-21454.

CONCLUSION

Marathon's position is straightforward—the Division can and should consider more than whether the BLM's delay constitutes good cause to justify a second extension of time under these circumstances. At the end of the day, after being fully informed, the Division may nevertheless conclude that an extension of time for Fasken is warranted, but the Division's evaluation of good cause to extend the deadlines under an order for a second time need not be and should not be as cabined as Fasken argues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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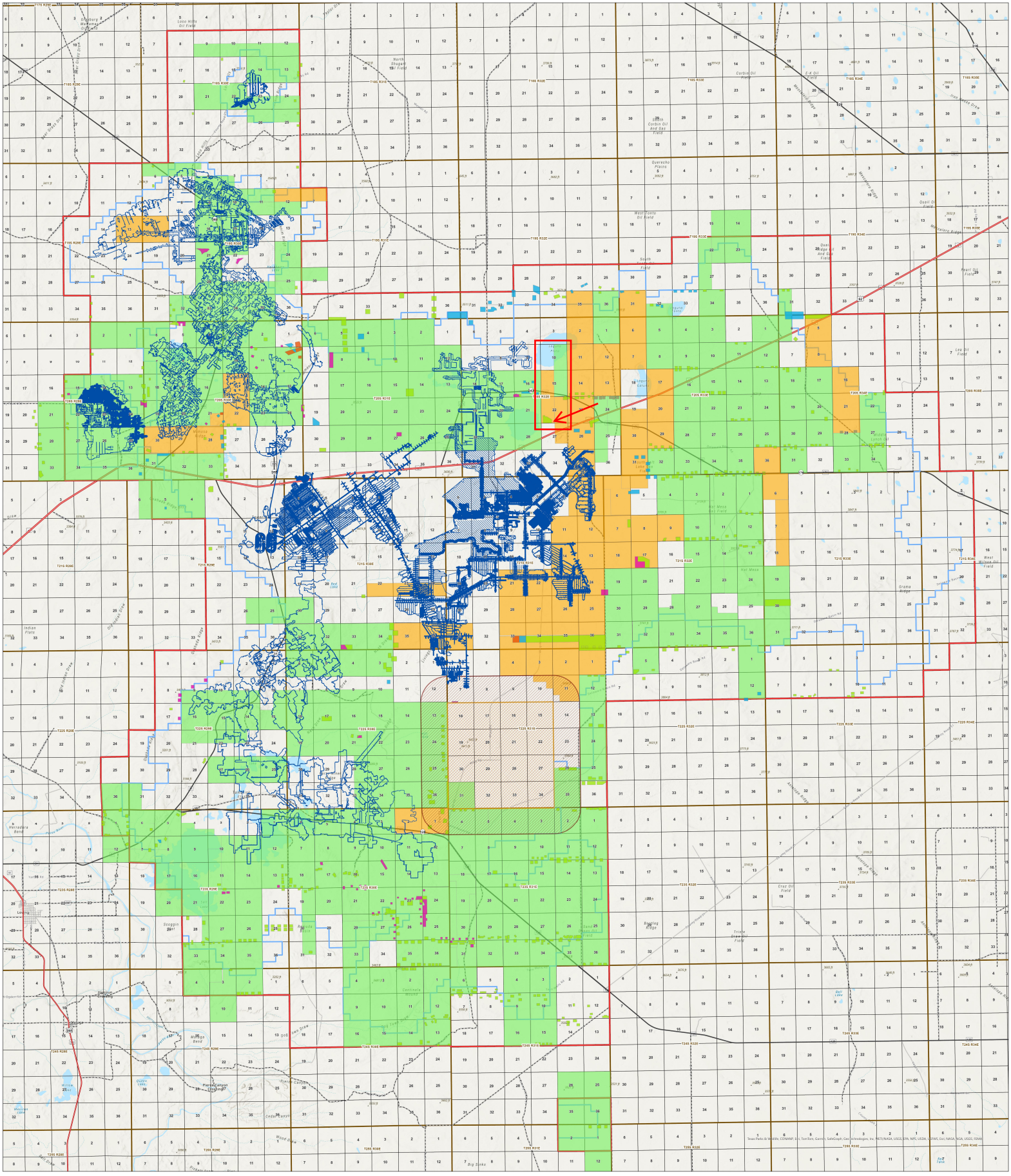
Potash Development Areas



Legend

US Highway
State Highway
County Road
NAME
Approved

Pending
Approved, All Depths
Approved, Shallow
Deferred, All Depths
Nominated Shallow
Withdrawn, Shallow

Secretary Potash Area
KPLA - R111 Potash Area
Township and Range
Sections

Exhibit A

Scale: 1:70,000

0 25 50 100 Miles

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N W E S

Potash Area in the Carlsbad Field Office