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

APPLICATION OF FASKEN OIL & RANCH, LTD,
TO AMEND ORDER NO. R-22121,
LEA COUNTY, NEW MEXICO.

CASE NO. 24396

APPLICATION OF FASKEN OIL & RANCH, LTD,
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FASKEN'S RESPONSE TO MARATHON'S OPPOSITION BRIEF

Fasken Oil & Ranch, LTD ("Fasken"), the applicant in the above-referenced matters, submits this response to the brief filed by Marathon Oil Permian LLC ("Marathon") in "opposition" to Fasken's request for additional time to drill the wells approved under pooling Orders R-22121 and R-22122.

A. The Proceedings Giving Rise to the Subject Pooling Orders.

Orders R-22121 and R-22122 were issued by the Division under Cases 22697 and 22698, respectively, in May of 2022 and pooled horizonal well spacing units in the Bone Spring formation underlying the W2 of Sections 15 and 22, Township 20 South, Range 32 East (NMPM), Lea County, New Mexico. Order R-22121 pools the W2W2 of these sections for Fasken's proposed Baetz 22/15 Fed Com 1H well, while Order R-22122 pools the E2W2 of these sections for Fasken's proposed Baetz 22/15 Fed Com 2H well. Prior to issuing these orders, the Division held an adjudicatory hearing to determine whether Fasken's pooling applications and proposed initial development plan met the requirements of the Oil and Gas Act. The Division record for the adjudicatory proceedings reflects that:

- Marathon received timely notice of the pooling applications and appeared in each of the pooling cases through counsel prior to the adjudicatory hearing;

- Marathon appeared through counsel at the April 7, 2022, adjudicatory hearing on Fasken's pooling applications;

- Marathon did not object to the pooling of the acreage, did not object to the designation of Fasken as the operator of the pooled acreage, did not object to the initial development plan, and did offer any competing development plans for the pooled acreage; and

- Marathon did not file a de novo appeal to the Oil Conservation Commission following the issuance of orders R- 22121 and R-22122, thereby allowing the pooling orders to become final.

In May of 2023, Fasken filed applications under Cases 23473 and 23474 to extend the drilling deadlines under each pooling order noting it was waiting on the BLM to issue drilling permits. The record from the May 2023 proceedings reflects that:

- Fasken filed applications to drill with the BLM in June of 2022, within a month of receiving the Division's pooling orders;

- The BLM had not yet issued the drilling permits;

- Marathon received Fasken's applications and notice of the hearing on the request to extend the time drill the wells; and

- Marathon did not object to the request to extend the time to drill the wells approved by the pooling orders.

In June 2023 Division entered Orders R-22121-A and R-22122-A extending the drilling deadline to May 9, 2024, after finding Fasken "has demonstrated good cause to extend the deadlines in the Order." *See* Orders R-22121-A and R-22122-A at ¶3.

B. The Limited Issue Presented by Fasken's Applications.

Paragraphs 9 and 10 of Division Orders R-22121-A and R-22122-A contain the following provisions (emphasis added):

> 9. This Order shall *terminate automatically if* Operator fails to comply with Paragraph 7 *unless* prior to termination Operator applies, and OCD grants, to amend the Order for *good cause shown.*

10. *OCD retains* jurisdiction of this matter for the entry of such orders as may be deemed necessary.

Similar provisions exist in the initial pooling orders for this acreage and are found in all pooling orders issued by the Division for at least the last five years.

Fasken's applications invoke the "good cause" relief provided by paragraph 9 because Fasken is still waiting on the issuance of drilling permits from the BLM. Marathon has not filed an application to reopen pooling orders R-22121 or R-22122, nor has it filed an application seeking to pool any of the acreage pooled by these orders. *See* Marathon Brief at pp. 12-13. Accordingly, the only issue raised *and noticed* for hearing under Fasken's applications is whether there is "good cause" to prevent the pooling orders from "automatically" terminating due to the failure to drill within the one-year period. *See* Division Orders R-22121-A and R-22122-A at ¶9. Any legitimate opposition to the "good cause" issue cannot involve an evaluation of "competing development plans/competing applications filed by other operators" (Brief at p. 12) because that is an unlawful collateral attack on the pooling orders issued by the Division in 2022. The only legitimate inquiry under Fasken's applications is whether "good cause" exists to extend for another period the time to drill the wells authorized by the 2022 pooling orders.

C. Marathon's Unprecedented Request to Allow Any Affected Party Another Opportunity to Propose Competing Development Plans Is Contrary to Division Practice, Not Supported by Any Division or Commission Order, and Contrary to the Legal Doctrines of Waiver and Res Judicata.

Due to the delay in receiving BLM drilling permits, Fasken has not requested that Marathon or any other affected working interest owner make an election under the pooling orders and pay a share of the estimated wells costs. Marathon further recognizes that delays in obtaining BLM drilling permits constitutes "good cause" to extend drilling deadlines and notes it has invoked "good cause" relief from the Division for the same reason. *See* Marathon Brief at p. 2 ("Marathon

has applied for extensions based on, among other things, BLM's delay in approving APDs.") Marathon has also identified in its brief legitimate lines of inquiry with respect to the "good cause" relief sought by Fasken. *See, e.g.,* Marathon Brief at p. 5 (the status of a BLM approved Drilling Island and Development Area); Brief at p 12, fn. 6 (acknowledging "development in this area is constrained by regulatory issues involving the Potash Area" and outlining inquiries about those constraints).

It is also important to note that if, after examining the acknowledged development constraints that all working interest owners face in the Potash Area, the Division finds the absence of "good cause" for another drilling extension, then the pooling orders terminate "automatically." *See* Division Orders R-22121-A and R-22122-A at ¶9. If the pooling orders are terminated, then Fasken, Marathon and any other working interest owner in the subject acreage is free to initiate the procedural steps to proposed new development plans, to file applications and bring competing development plans before the Division, provide notice of the competing development plans to all affected parties, and have a hearing on the competing development plans.

Marathon, however, wants to expand the scope of the "good cause" hearing to include consideration of "competing development plans/competing applications filed by other operators." Marathon Brief at p. 12. Marathon suggests that anytime an operator files an application to demonstrate "good cause" to extend drilling or completion deadlines under a pooling order, any working interest owner can bring forth competing development plans and relitigate whether the pooled acreage, the approved operator, and the initial development plan complies with the Oil and Gas Act. This unprecedented position is not supported by Division practice, not supported by any Division or Commission order, and violates legal doctrines that exist to prevent endless litigation of adjudicated matters.

1. Marathon's Desire to Reopen the Adjudicated Pooling Orders to Consider Competing Development Plans Is Not Supported by Any Division or Commission Case, Order, or Practice.

Marathon, like the Division, is aware of the number of applications the Division receives for extensions of drilling or completion deadlines under pooling orders, particularly where federal lands are involved. *See* Marathon Brief at p. 2 ("Marathon has applied for extensions based on, among other things, BLM's delay in approving APDs.") All pooling orders recognize that circumstances may warrant an extension of the time to drill or complete the approved wells and therefore allow extensions if the operator demonstrates "good cause." The Division has never suggested that applications requesting "good cause" extensions provides an avenue for affected working interest owners to essentially re-open the pooling order and relitigate whether the approved pooling, the approved operator, and the approved initial development plan comply with the Oil and Gas Act. It is also contrary to administrative efficiency for Marathon to suggest that each time an operator files an application to demonstrate good cause to extend the drilling or completion deadlines, that affected working interest owners get another chance to bring forth "competing development plans/competing applications" for consideration by the Division. Marathon Brief at p. 12.

Accordingly, Rule 19.15.4.12(D) limits the stated grounds for "reopening" an adjudicated matter to "failure to provide notice." While the Division "retains jurisdiction of this matter for the entry of such orders as may be deemed necessary" under every pooling order (*see, e.g.* Orders R-22121-A and R-22122-A at ¶10) that does not mean a pooled working interest owner retains the right to reopen a final pooling order a month, six months, a year, or two years after the issuance of that final pooling order. The orders referenced by Marathon do not support any notion that affected working interest owners get another chance to litigate "competing development plans/competing

applications" whenever an operator seeks an extension of the drilling or completion deadlines under a final pooling order.

Marathon's reference to XTO's application filed in **Case 22207** is curious. This case demonstrates the Division routinely grants extensions of drilling obligations under pooling orders where the BLM has delayed issuing federal permits. For the pooling orders referenced in XTO Case 22207, the BLM delay was over two years resulting in the issuance of two approved extensions of the drilling obligations in the pooling orders issued under Cases 16484 and 16486. XTO's Case 22207 simply asked the Division to require the operator (Ascent Energy) to provide notice of the extension requests to XTO, a pooled party. XTO's application in Case 22207 notes that shortly after the administrative approval of the second extension request, the Division changed its policy to require notice to all parties subject to the pooling order and to set the mater for a hearing to address the good cause raised by the operator. The record in Case 22207 reflects XTO voluntarily dismissed its application after XTO and Ascent Energy reached agreement on the drilling extension request.

Marathon's reference to three other related orders likewise fails to suggest the Division can or should reopen a pooling order and allow parties to present alternative development plans whenever an operator seeks an extension of drilling or completion deadlines. **Commission Order R-21454** simply stayed de novo appeals of Division cases 16481, 16482, 20171 and 20202 until all competing pooling applications filed by multiple operators could be heard by the Division and then addressed, as needed, on appeal to the Commission. No final order had been issued pooling the lands for a development plan. **Commission Order R-21454-A** simply denied a motion to reconsider Order R-21454, with the Commission noting that its stay "promotes administrative efficiency and economy by ensuring that all of the related applications be heard in

conjunction with one another, or be entirely consolidated for the purpose of hearing" before the Commission or Division issues a final order. Finally, related **Division Order R-21675** rejected a third attempt by a party in the cases subject to Commission Order R-21254 to dismiss competing pooling applications prior to hearing on the competing development plans. None of these related orders suggest a party subject to a final, non-appealable pooling order can seek to reopen that final order to present competing development plans or to otherwise assert the pooling order does not comply with the Oil and Gas Act.

2. Marathon Has Waived Its Right to Reopen the Pooling Orders and Submit Competing Development Plans.

New Mexico cases have defined waiver as "the intentional relinquishment or abandonment of a known right." ***J.R. Hale Contractor Co. v. United N.M. Bank,*** 1990-NMSC-089, ¶11. The *J.R. Hale* court provides an extensive analysis of waiver and notes waiver "may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct." *Id.* The doctrine of waiver extends to all types of civil or criminal privileges and rights. *See, e.g.,* ***State v. Boeglin,*** 1987-NMSC-002, ¶16 (finding a criminal defendant waived his right to have the jury instructed on second degree murder). The Division record for the subject pooling orders reflects that:

- Marathon received timely notice of the pooling applications in 2022 and appeared in each of the pooling cases through counsel prior to the adjudicatory hearing;
- Marathon appeared through counsel at the April 7, 2022, adjudicatory hearing on Fasken's pooling applications;
- Marathon had the opportunity in the 2022 adjudicatory hearing to contest whether Fasken's pooling applications complied with the Oil and Gas Act, to contest whether the proposed wells prevented waste or protected correlative, and to offer competing development plans for the subject acreage;
- Marathon did not object to the pooling of the acreage, the designation of Fasken as operator of the pooled acreage, or Fasken's initial development plan;

- Marathon did not file a de novo appeal to the Oil Conservation Commission following the issuance of orders R- 22121 and R-22122, thereby allowing the pooling orders to become final; and

- In May of 2023, Marathon received notice of Fasken's applications under Cases 23473 and 23474 to extend drilling deadlines under the pooling orders, did not object to the request, and accepted the issuance of Orders R-22121-A and R-22122-A.

This record demonstrates Marathon legally waived its right to contest the pooling of the acreage, to contest the designation of Fasken as operator of the pooled acreage, to contest the approved wells, and to bring forth a competing development plans for consideration by the Division.

3. The Doctrine of Res Judicata Prevents Marathon from Reopening the Pooling Orders or to Otherwise Submit Competing Development Plans.

At the June 27th status conference in these matters, Marathon requested approval to file a motion to "reopen the cases" and allow consideration of competing development plans:

> EXAMINER: And now, Ms. Bennett, your motion -- let's see. What would it be titled? The motion to what?
> MS. BENNETT: Well, it's almost a motion to, I suppose, reopen the cases.
> HEARING EXAMINER: Yeah, okay.
> MS. BENNETT: And I suppose that's what it will be captioned. I don't know that that is ultimately what the relief will be. But that's what the motion will be captioned. And then I -- otherwise I would say that the onus might be on Mr. Feldewert to file a motion to dismiss our competing applications. But we won't have them filed by that time.
> THE HEARING EXAMINER: All right. So your motion would be to reopen the orders?
> MS. BENNETT: Yes.

TR. 81-82. Marathon further noted that it intended to brief the legal doctrine of res judicata:

> EXAMINER: Okay. Let's get to that in just a moment. So Ms. Bennett, do you have a response to the res judicata argument?
> MS. BENNETT: I mean, I'm looking forward to briefing that issue.
> EXAMINER: Ah, you're going to brief that issue?
> MS. BENNETT: Yes.

Marathon has now retreated from reopening the adjudicated pooling cases and from briefing the legal doctrine of res judicata. *See* Marathon Brief at p. 3 (suggesting "Marathon does not need to move to re-open the Fasken Baetz Orders or the initial cases…"); Brief at p. 3, fn. 2 ("Once

Marathon files its competing applications, the issues of collateral attack and res judicata can be fully briefed."); Brief at p. 12 ("Again, Marathon is not at this time briefing the issues of whether Marathon's competing applications, once filed, are somehow barred…"). Marathon's decision to avoid briefing on res judicata is not surprising since that doctrine, like the doctrine of waiver, prevents Marathon from pursuing two years later undisclosed "competing development plans."

The New Mexico Supreme Court instructed on the legal doctrine of res judicata in ***Kirby v. Guardian Life Ins. Co. of Am***:

> Res judicata bars not only claims that were raised in the prior proceeding, *but also claims that could have been raised*. Res judicata precludes a claim when there has been a full and fair opportunity to litigate issues arising out of that claim. (emphasis added)

2010-NMSC-014, ¶61 (finding res judicata did not apply because the asserted claims could not have been brought in the prior proceeding). ***Potter v. Pierce*** explains the reason for this doctrine:

> Res judicata is a judicially created doctrine designed to promote efficiency and finality by giving a litigant *only one* full and fair opportunity to litigate a claim and by precluding any later claim that could have, and should have, been brought as part of the earlier proceeding. (emphasis added)

2015-NMSC-002, ¶ 1. The New Mexico Court of Appeals in ***Fannie Mae v. Chiulli*** further noted that res judicata is also known as "claim preclusion":

> Res judicata is also called claim preclusion, and we use both terms interchangeably here. The doctrine of res judicata is founded on principles of fairness and justice, and ensures finality, advances judicial economy, and avoids piecemeal litigation. To achieve these purposes, res judicata bars litigation of claims that were or could have been advanced in an earlier proceeding.

2018-NMCA-054, ¶ 16. *See also* ***Potter v. Pierce,*** *supra* (finding an alleged malpractice claim was barred because it could have been brought in a prior bankruptcy proceeding).

The time for Marathon to challenge Fasken's pooling applications under the Oil and Gas Act or to otherwise protect Marathon's "right to exploit the oil and gas minerals" (Brief at p. 12) was two years ago when Fasken's pooling applications were set by the Division for an

adjudicatory hearing. That 2022 hearing provided Marathon a "full and fair opportunity" to contest the pooling of the acreage, to contest the designation of Fasken as operator of the pooled acreage, to contest the initial development plan and to bring forth competing development plans. Marathon chose to waive that right. Accordingly, the legal doctrines of waiver and res judicata prevent Marathon from changing its mind two years later and litigating "competing development plans" or contesting whether the pooling orders satisfy the requirements of the Oil & Gas Act. The only issue for hearing is whether Fasken has "good cause" to extend the drilling deadline under the pooling orders for another period.

Respectfully submitted,

HOLLAND & HART LLP

By: _____

Michael H. Feldewert
Adam G. Rankin
Paula M. Vance
Post Office Box 2208
Santa Fe, NM 87504
505-988-4421
505-983-6043 Facsimile
mfeldewert@hollandhart.com
agrankin@hollandhart.com
pmvance@hollandhart.com

ATTORNEYS FOR FASKEN OIL & RANCH LTD

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2024, I served a copy of the foregoing document to the following counsel of record via Electronic Mail to:

Dana S. Hardy
Jaclyn M. McLean
HINKLE SHANOR LLP
P.O. Box 2068
Santa Fe, NM 87504-2068
(505) 982-4554
(505) 982-8623 FAX
dhardy@hinklelawfirm.com
jmclean@hinklelawfirm.com

Attorneys for Read & Stevens, Inc. and Earthstone Operating, LLC.

Deana Bennett
Earl E. DeBrine, Jr.
Yarithza Peña
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Post Office Box 2168
Albuquerque, New Mexico 87103-2168
(505) 848-1800
deana.bennett@modrall.com
earl.debrine@modrall.com
yarithza.pena@modrall.com

Attorneys for Marathon Oil Permian, LLC

Ocean Munds-Dry
Michael Rodriguez
555 17th Street, Suite 3700
Denver, CO, 80202
(505) 920-5201
omundsdry@civiresources.com
mrodriguez@civiresources.com

Attorneys for Civitas Permian Operating, LLC

Michael H. Feldewert