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 ON RES JUDICATA AND WAIVER[1]

Contrary to Fasken Oil & Ranch, LTD's ("Fasken") Response, res judicata and waiver do not bar the Division from evaluating competing applications as part of the contested hearing on Fasken's Second Extension Applications seeking to extend Fasken's Baetz Orders, which will expire by their express terms unless "good cause" is shown. The Division must be allowed to consider any facts that have developed since the already once-extended Orders were issued. As the New Mexico Supreme Court has held:

> The doctrine of res judicata was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants.

Bellet v. Grynberg, 1992-NMSC-063, ¶ 14, 114 N.M. 690, 845 P.2d 784. Nor does res judicata bar an agency exercising its authority to review previously issued orders to ensure compliance with on-going statutory mandates.

Marathon is not asking to re-open a pooling order; rather Marathon's position is that when an operator has to re-open an order for a second time to extend the time to commence drilling, a pooled working interest owner whose property rights will be affected by the extraordinary grant

[1] Marathon provides this brief as ordered by the Hearing Examiner at the August 8, 2024 OCD docket and incorporates by reference the brief Marathon filed on July 19, 2024, as well as Marathon's arguments made on August 8, 2024.

of the police power through compulsory pooling has the right to advance a competing development plan for the Division's evaluation of whether good cause exists to grant the additional extension.

ARGUMENT

I. MARATHON IS NOT BARRED BY RES JUDICATA.

Res judicata does not bar Marathon from advancing its competing application, now filed as Case No. 24771, as a basis to deny Fasken's Second Extension Application. Fasken, as the party asserting res judicata, "must establish that (1) there was a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties in the two suits are the same, and (4) the cause of action is the same in both suits."[2] *Potter v. Pierce*, 2015-NMSC-002, ¶ 00, 342 P.3d 54; *Anaya v. City of Albuquerque*, 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735. Significantly, and ignored by Fasken, Fasken must establish that all four elements have been met. *Anaya*, 1996-NMCA-092, ¶¶ 6, 19 (finding res judicata did not bar subsequent suit, despite three elements being met, because the party asserting res judicata did not meet the fourth element). New Mexico courts have held that, when, as here, circumstances have changed since the first suit was brought, res judicata is not a bar to the subsequent action. *See Bellet*, 1992-NMSC-063, ¶14 ("[C]hanged circumstances may prevent res judicata from operating[.]").

A. Res Judicata Does Not Apply Because the Second Extension Applications Involve Facts Arising After the Baetz Orders Were Issued

Fasken's argument that Marathon is barred by res judicata ignores the change in circumstances that has occurred since 2022, which altered the legal rights of both Fasken and Marathon, thereby preventing the application of res judicata. The Division should reject Fasken assertion of res judicata to prevent the Division from undertaking a full examination of whether

[2] As Marathon establishes, the causes of action are not the same, but because Fasken's Response did not address this element of res judicata, Fasken cannot meet and has not met its burden and Fasken's res judicata argument should be rejected for this reason alone. As a result, the Division need not reach the merits of Fasken's res judicata argument.

good cause exists to grant a second extension of time to commence drilling. As the New Mexico Supreme Court has held:

> The doctrine of res judicata was never intended to operate so as to prevent a reexamination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants.

Bellet, 1992-NMSC-063, ¶ 14 (quoted authority omitted). Given the change in circumstances from 2022 to 2024 and the Division's on-going mandate to prevent waste and protect correlative rights, res judicata is not a bar to the Division's evaluation of Marathon's competing application as a factor of whether good cause exists to grant Fasken's Second Extension Applications. *Bellet*, 1992-NMSC-063, is instructive, because in that case the New Mexico Supreme Court held that res judicata was not a bar to a subsequent suit between the same parties due to changed circumstances that occurred between the time the first order was issued and the second suit was brought.

Bellet involved a dispute between an oil and gas operator and working interest owners. In 1977, the operator filed suit against the working interest owners, which culminated in a district court order in 1983, which ordered the working interest owners to pay their share of operating costs and continue to pay those costs into the future, until the parties entered into an operating agreement. 1992-NMSC-063, ¶ 2. The parties never entered into an operating agreement and the working interest owners did not pay their share of operating costs. *Id.* ¶ 3. The working interest owners sued the operator to obtain an accounting on six wells that they alleged were operating at a loss. *Id.* The operator argued that the working interest owners' suit was barred by the 1983 order. *Id.* ¶ 13. The New Mexico Supreme Court agreed with the lower court that changed circumstances prevented the 1983 order from having preclusive effect. *Id.*

The New Mexico Supreme Court stated that "[i]n the 1983 order, the trial court presupposed that the profits from the wells would exceed the operating costs. In the present action,

the trial court found that production had become marginal…and the wells were operated at a loss….” *Id.* ¶ 15. In addition, the district court in the subsequent action found that the operator’s objective was to preserve the wells for a secondary recovery program, which the district court found was for a speculative purpose. *Id.* The New Mexico Supreme Court reasoned: “These new facts did alter the legal rights of the litigants, thereby preventing the application of *res judicata*.” *Id.* The court held that the “trial court properly reconsidered the operations costs issue.” *Id.* ¶ 16.

The same outcome is warranted here. When the Division analyzed Fasken’s development plans in 2022 and issued the Baetz Orders, the Division not only “presupposed” that Fasken would be able to timely drill the wells under the Orders, the Baetz Orders’ effectiveness were conditioned on timely performance. In the two years since the Baetz Orders were approved, Fasken has not been able to obtain APDs from BLM, only recently (May 2024) applied for approval of a Development Area (DA), which is a requirement in the Potash Area, Fasken’s DA is being objected to, and Fasken is seeking a second extension. Given that Fasken only recently applied for its DA, and given that Fasken’s DA request has been protested, it is speculative whether Fasken will even obtain its APDs in time to meet the deadline for the Second Extension Applications. These facts have altered the legal rights of the parties and prevent the application of res judicata under these circumstances.

In addition, New Mexico courts have held that agencies have “inherent power to cancel and revoke any license which [the agency] finds has been, for any reason, issued without authority or issued in conflict with the statues governing and limiting the issuances thereof.” *See Property Tax Dep’t v. Molycorp*, 1976-NMSC-072, ¶ 11, 89 N.M. 603, 555 P.2d 903 (“*Molycorp*”) (quoted authority omitted). In *Molycorp*, the court held that the New Mexico Property Tax Department could not be “bound as to a 1975 valuation by an order specifically pertaining to a 1972 valuation,

since each taxable year presents a new responsibility for placing a value on taxable property." 1976-NMSC-072, ¶ 12.

That the Division retains authority to review orders it issues is made clear by the Oil and Gas Act and by the Division's orders, cited in Marathon's Brief in Support of its Opposition to Fasken's Second Extension Applications, incorporated herein. The Division is tasked with preventing waste and protecting correlative rights and the Division has the express and inherent authority to review any order that does not advance these goals. Fasken's Second Extension Applications, and its request that the Division exercise its discretion, "present[] a new responsibility" for the Division to assess whether, in light of changed circumstances, Fasken's development plans prevent waste and protect correlative rights. Thus, there is no bar to Marathon's competing application nor is the Division precluded from considering that application in determining whether good cause exists to grant Fasken's Second Extension Applications.

B. Fasken Cannot Establish Finality for Res Judicata Purposes

Contrary to Fasken's Response, the Baetz Orders are not "final" for purposes of res judicata, because the Baetz Orders were conditional and subject to discretionary action by the Division in order to remain valid. New Mexico courts have characterized "final orders" as those that "fully dispose[] of the rights of the parties, and otherwise dispose[] of the matter to the fullest extent possible." *Turner v. First NM Bank*, 2015-NMCA-068, ¶ 7, 352 P.3d 661. Had Fasken drilled the wells under the Baetz Orders, those orders would have been imbued with the finality that Fasken asserts. However, Fasken has not taken all steps necessary to perfect its rights under the Baetz Orders, *i.e.*, drilling a well under the Orders. Instead, the Baetz Orders are presently pending before the Division to amend them, a discretionary action. As a consequence, the Baetz

Orders are before the Division, and subject to objection, not as a collateral attack on the Orders issued in 2022, but as a properly lodged objection to the reopening requested by Fasken itself.

Fasken's argument that the Baetz Orders are final because de novo review of those Orders was not pursued fails here because Fasken has had to reopen those Orders to seek discretionary action by the Division to avoid termination. The Baetz Orders were conditional when granted—conditioned upon Fasken commencing drilling within one year. Fasken did not meet that condition and has not met that condition and thus the Baetz Orders cannot be said to be "final" for purposes of res judicata. As discussed above, if Fasken had timely commenced drilling the wells under the Baetz Orders, those Orders would have been final and, in order to challenge them, Marathon or another operator would need to re-open them. Here, though, Fasken itself has put the Orders at issue and they are, at present, not "final" for purposes of preclusion because they are subject to further Division action, and without such action, would terminate as matter of law.

C. Fasken Cannot Establish that the Cause of Action Is the Same in Both Proceedings

Fasken cannot establish that the cause of action in the Second Extension Applications is the same as in the underlying Fasken cases, and therefore, res judicata does not apply. Marathon's application includes additional acreage, with additional wells, not at issue in the Fasken Baetz Orders. New Mexico courts have adopted the "transactional approach" to determine whether two suits involve the same cause of action. That analysis includes a consideration of "(1) the relatedness of the facts in time, space, origin, or motivation; (2) whether, taken together, the facts form a convenient unit for trial purposes; and (3) whether the treatment of the facts as a single unit conforms to the parties' expectations or business understanding or usage." *Anaya v*, 1996-NMCA-092, ¶ 12; *Potter*, 2015-NMSC-002, ¶ 11. New Mexico courts have made clear that it is not sufficient to show that claims could have been asserted but instead those claims must arise from

the same transaction. *Anaya*, 1996-NMCA-092, ¶ 8 ("The transactional test requires us to go beyond any similarity in desired outcome and to examine the operative facts underlying the claims made in the two lawsuits.").

Using the transactional approach, Fasken cannot demonstrate that the cause of action in the Fasken Second Extension Applications and the cause of action in the underlying cases are the same. In the underlying cases, the Division considered whether, based on the then-known facts, which included the knowledge of the reservoir, the well proposals and the state of the oil and gas market, Fasken's pooling applications should be granted. Fasken's Second Extension Applications invoke the Division's discretion to avoid automatic termination of the Baetz Orders upon a showing of good cause. The factual and legal issues necessary for the Division to determine whether good cause exists to grant Fasken's Second Extension Application are different than the factual and legal issues presented in the underlying cases, which renders res judicata inapplicable.

In addition, Marathon's competing application covers the W/2 of Sections 15 and 22, **and** the W/2 of Section 10, which was never decided by the Division. Marathon's competing application involves a different development plan than Fasken's, covering additional acres that Fasken's plan excludes, and more wells than Fasken proposed. The complexity of development in this area, along with potentially stranding Section 10, were not at issue in the underlying Fasken cases. As a result, Marathon's competing application is not barred by res judicata because it is not the same cause of action as the underlying cases.

Fasken's argument that Marathon had a full and fair opportunity to advance its competing development plans in the underlying cases misses the mark. At the time Fasken's underlying cases were heard, Fasken presumably intended to timely drill the wells under the Orders. Now, however, circumstances have changed, giving rising to Marathon's desire to protect its interests. Put another

way, Marathon's objections to Fasken's Second Extension Applications only accrued when and because Fasken has to amend its Orders. Similarly, the subject matter of Fasken's Second Extension Applications involves "entirely distinct motivations" from the underlying cases, namely whether Fasken can establish that good cause exists to grant Fasken a second extension of time to commence drilling when, as Marathon will establish, other operators may be better suited to develop this acreage. *See Kirby v. Guardian Life Ins. Co. of America*, 2010-NMSC-014, ¶ 62, 148 N.M. 106, 231 P.3d 87 (cited Fasken Response at 9) (res judicata was not a bar because, although the plaintiff sought the same benefits disallowed in an earlier action, the second cause of action originated at a different time and was based on a new set of facts and different motivations); *Anaya*, 1996-NMCA-092, ¶ 13 (res judicata would not bar a claim where "the significant operative facts differ with respect to substance, time, and [the d]efendants' motivation").

D. Commission and Division Orders Support Marathon's Position

As discussion in Marathon's Brief in Support, incorporated herein, Commission Orders R-21454 & 21454-A and Division Order R-21675 support Marathon's position. In those cases, Ascent Energy, LLC ("Ascent") and Apache Corporation ("Apache") originally had competing pooling applications before the Division. Mewbourne Oil Company ("Mewbourne") timely entered an appearance in the competing pooling cases. Apache dismissed the pooling request from its competing applications, and the Division issued an order granting Ascent's pooling applications. Apache and Mewbourne both sought de novo review of the Ascent orders and filed competing applications, some of which covered the same lands as Ascent's pooling orders and some of which covered adjacent lands. Ascent, like Fasken here, argued:

- "[O]nce the Division decides a pooling issue, it cannot adjudicate another pooling application that covers the same lands and formations." Ascent's Response in Opposition to Motion to Stay at 8; *see also* Ascent Motion to Rehear Order R-21454 at 4-5 (attached as Exhibit 1 to Ascent Motion to Dismiss).

- The Division was barred by res judicata from hearing Apache and Mewbourne's competing cases. Ascent's Motion to Dismiss Apache's Case Nos. 21489-91 at 4; *see also* Ascent Motion to Rehear Order R-21454 at 4-5 (attached as Exhibit 1 to Ascent Motion to Dismiss).

- Apache and Mewbourne were given a full and fair opportunity to present its competing development plans during the hearing that resulted in the Ascent applications being granted. Ascent Consolidated Reply at 8-11.

- Apache and Mewbourne's causes of action are the same in both hearings. Ascent Consolidated Reply at 11-13.

The Commission and Division both rejected Ascent's arguments, as the Division should do here with respect to Fasken's similar arguments. First, in Order R-21454, the Commission found "that in 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." Then, in Order R-21454-A, the Commission reiterated: "Order No. 21454 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. To do otherwise would result in potentially piecemeal or inconsistent rulings." Finally, the Division, in Order R-21675 determined: "The doctrine of *res judicata* does not bar the Division's consideration of Apache's applications in Case Nos. 21489, 21490 and 21491[]" and "[t]he doctrine of *res judicata* does not bar the Division's consideration of Mewbourne's applications in Case Nos. 21362 and 21364." Order R-21675, ¶¶ 2-3.

Because the Commission and Division have already rejected arguments similar to those Fasken raises, and consistent with Division Order R-21675, res judicata does not bar the Division's consideration of Marathon's application in Case No. 24771. Fasken's attempt to distinguish the above discussed Orders fails because Fasken advances an overly narrow reading of those Orders. Both of the Commission's Orders acknowledged the need to consider the competing applications,

despite the existence of existing pooling orders covering some, but not all of the acreage, in order to protect correlative rights and prevent waste, which rationale applies equally here. Fasken's reliance on the fact that the Ascent pooling order was subject to de novo review is misplaced because, as discussed above, Fasken has not taken all steps necessary to perfect the Baetz Orders.

II. MARATHON DID NOT WAIVE ANY RIGHTS.

Under New Mexico law, waiver is defined "as the intentional relinquishment or abandonment of a known right," which "may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct." *J.R. Hale Contracting Co. v. United New Mexico Bank*, 1990-NMSC-089,¶ 11, 110 N.M. 712, 799 P.2d 581. Fasken's argument is that because Marathon appeared in the underlying pooling cases and did not object to those cases or appeal them, Marathon somehow waived its right to now challenge the Second Extension Applications. By not objecting to the 2022 pooling cases, Marathon did not intentionally relinquish or abandon its right, in 2024, to object to Fasken's Second Extension Applications or its right to advance its development plans in opposition to Fasken's Second Extension Applications. Similarly, by not objecting to Fasken's first extension request, Marathon did not waive its right to object to Fasken's Second Extension Applications. Fasken's need to obtain a second extension of time to commence developing the acreage underlying the Baetz Orders is the basis for Marathon's objection to Fasken's Second Extension Applications. This basis did not exist at the time the underlying pooling cases were before the Division or when Fasken sought its first extension request—it is simply not possible for Marathon to have waived something that did not exist.

Beyond that, Fasken knows that it there is an undisputed right for working interest owners to participate and object to extension requests, which includes the right of working interest owners to protect their rights. In addition, Fasken knows that it has to demonstrate good cause to the

Division in order to avoid the Baetz Orders automatically terminating. Thus, Fasken should be aware of the risk inherent in requesting a second extension request, which is a present risk, which could not have been waived in 2022. Simply put, Fasken cannot rely on waiver to preclude Marathon from asserting Marathon's rights when Fasken itself re-opened the Baetz Orders. Fasken's waiver argument is especially inapt because the Division specifically requires notice of extension applications to pooled working interest owners. If, as Fasken argues, a pooled working interest owner cannot object to a second extension request by asserting its own development plans, then the notice requirement is meaningless.

CONCLUSION

Marathon undisputedly has the right to challenge Fasken's assertion of good cause. Fasken's assertion that Marathon cannot advance Marathon's competing development plans/competing application to challenge Fasken's showing of good cause based on waiver and res judicata fails when, as here, Fasken has not perfected its rights under the Baetz Orders because Fasken has not commenced drilling under those Orders and because Fasken itself had to re-open the Orders and put them at issue. The Division, of course, can give Marathon's objections and evidence the weight the Division thinks they deserve—but, under these circumstances, Marathon is not precluded from submitting a competing application and the Division is not barred from considering such an application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record by electronic mail on August 15, 2024:

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