KEMP SMITH LLP
ATTORNEYS AT LAW

221 NORTH KANSAS, SUITE 1700, EL PASO, TEXAS 79901-1441 | P.O. BOX 2800 79999-2800
915.533.4424 | FAX 915.546.5360 | www.kempsmith.com

CHARLES C. HIGH, JR.
BOARD CERTIFIED, LABOR AND EMPLOYMENT LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
chigh@kempsmith.com

August 24, 2006

VIA FACSIMILE TO
505-476-3220 AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Honorable Joanna Prukop
Secretary
Energy, Minerals and Natural Resources Department
State of New Mexico
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Re: Application for Review by Devon and Bass

Dear Secretary Prukop:

Enclosed is the response of Mosaic Potash Carlsbad, Inc. to the Application filed by Devon Energy Production Company and Bass Enterprises Production Company seeking your review of Orders issued by the Oil Conservation Commission.

Please call if you have any questions.

Yours very truly,

KEMP SMITH LLP

By:
Charles C. High, Jr.

Cc: Dennis Orke, Esq.
Dan Morehouse

12414.00700/CHIG/CORR-3/936793.1

STATE OF NEW MEXICO

DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES

OIL CONSERVATION DIVISION

APPLICATION OF BASS ENTERPRISES PRODUCTION COMPANY FOR AN ORDER AUTHORIZING THE DRILLING OF A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13367
APPLICATION OF DEVON ENERGY PRODUCTION COMPANY L.P. FOR AN ORDER AUTHORIZING THE DRILLING OF A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13368
APPLICATION OF DEVON ENERGY PRODUCTION COMPANY, L.P., FOR APPROVAL OF AN UNORTHODOX WELL LOCATION[1] AND AUTHORIZATION TO DRILL A WELL IN THE POTASH AREA, EDDY COUNTY, NEW MEXICO	)	Case No. 13372

OPPOSITION OF MOSAIC POTASH CARLSBAD, INC. TO APPLICATION FOR REVIEW BY THE SECRETARY OF ORDERS OF THE OIL CONSERVATION COMMISSION (ORDERS NOS. R-12403-A AND R-12403-A) AND THE AUGUST 10, 2006 DENIAL OF APPLICATION FOR REHEARING

MOSAIC POTASH CARLSBAD, INC. ("Mosaic Potash") opposes the Application filed filed by Bass Enterprises Production Company ("Bass") and Devon Energy Company ("Devon")(collectively referred to as "Applicants") pursuant to N.M.S.A. § 70-2-26 (2006) asking the Secretary to review Orders issued by the Oil Conservation Commission (Orders Nos. R-12402-A and R-12403-A) on July 13, 2006, denying three applications for permits to drill oil

---

[1] The portion of the Application seeking an unorthodox well location was dismissed by the Division Hearing Examiner and is not an issue before the OCC. OCC Hearing Transcript, page 21 (hereinafter referred to as "Tr." followed by the page number.

and gas wells in the Potash Area designated by the OCC in its Order R-111-P (1988). As more fully explained below, Mosaic submits that the Secretary should deny the Application for the following reasons:

(1) the OCC Orders complained of do not implicate "public interests" but, instead, involve only private ownership interests that have already been the subject of two full evidentiary hearings;

(2) a public hearing under NMSA § 70-2-26 is not the proper forum to address and resolve Applicants' complaints about the OCC Orders and OCC Order R-111-P; and

(3) Applicants have full appeal rights to the district court pursuant to NMSA § 70-2-25 and 39-3-1.1.

PRELIMINARY STATEMENT

Mosaic does not dispute the fact that the Secretary has the discretion under NMSA § 70-2-26 to hold a public hearing to determine whether the OCC Orders being challenged by Devon and Bass "contravene the public interest." To its knowledge, however, this discretion has never been exercised, at least in a contested case involving a conflict between potash and oil and gas interests. Nor should it be. Indeed, by doing so, absent unusual circumstances not present here, the Secretary would undermine the authority of the OCC, open the flood gates for a continuous stream of future applications every time an unfavorable decision was issued by the OCC, and disrupt the long-standing and well established rules established by the OCC in Order R-111-P for meeting its statutory duty to prevent the waste of valuable potash deposits from drilling oil and gas wells in the Potash Area. Such an unsettling act should not be entertained especially where, as here, the dissatisfied parties have a right under NMSA § 70-2-25 and § 39-3-1.1 to appeal the

OCC Orders to the district courts if they truly believe they are contrary to law or not supported by substantial evidence.

ARGUMENT

A. THE OCC ORDERS BEING CHALLENGED DO NOT IMPLICATE PUBLIC INTERESTS BUT, INSTEAD, INVOLVE PRIVATE INTERESTS

In their Application, Devon and Bass argue that the OCC Orders complained of involve "public interests," a necessary requirement, of course, for review under NMSA §70-2-26. While not entirely clear, it appears that the "public interest" they identify is whether the OCC Orders have "due regard for the conservation for the state's oil, gas, and mineral resources." Application, p. 3. Once this "public interest" is identified, they then argue that the OCC Orders are contrary to this "public interest" because they "cause the waste of the state's oil and gas and mineral resources and therefore violate the public interest." *Id.* This argument, in addition to be circular, seriously misrepresents the findings and decisions by the OCC.

As clear from the OCC's Orders, but not mentioned by Applicants, the OCC did not deny the owners of the fee lands in these cases the right to develop their oil and gas interests. On the contrary, the OCC simply said that instead of drilling vertical wells, there were other alternative means to develop the oil and gas interests that would not result in the waste of valuable potash deposits. These alternatives included directional drilling, horizontal drilling, and unitization. Order R-12403-A (Finding 47); Order 12402-A(Finding 44). Thus, while Applicants claim that the oil and gas underlying the fee lands will be "wasted" because development was denied, that is simply wrong.

Nor is this "waste of oil and gas" argument supported by Appellants' further contention

that the alternative methods of development identified by the OCC will not allow for the "economic recovery" of the oil and gas. On the contrary, the record in this case is completely devoid of any evidence regarding the economics of directional vs. straight hole drilling. Applicants knew from the very beginning of these cases that Mosaic was not opposed to the development of the oil and gas underlying the fee tracts at issue but, instead, contended that they could be developed by directional drilling. Surely, if such drilling was not economic, Devon and Bass would have introduced evidence of the comparative costs during one of the two full evidentiary hearings already held in this matter, one before a Hearing Officer at the Oil Conservation Division and the other a *de novo* hearing before the full OCC. Because they failed or refused to introduce such evidence, their claim that directional drilling is not "economic" has no support in the record.

Moreover, this absence of evidence about the additional costs, if any, of directional drilling is especially glaring in this case because virtually all of the existing wells in Section 24 and all of the wells producing in Section 7, where the fee lands are located, were directionally drilled and, presumably profitable. Surely, if the existing wells in these Sections could be directionally drilled, as they were, it strains credulity to say that the three wells at issue here could not likewise be economically drilled. The truth is that they can, but Applicants want, instead, to waste over $50 million dollars in commercial potash belonging to Mosaic instead of spending whatever additional costs, if any, may be involved in directionally drilling these three wells. As observed by the OCC in Finding No. 47 in Order R-12403-A, "There are four producing wells that have been horizontally drilled from the "drilling island" and have bottomhole locations under Section 24.....so drilling such wells is technologically feasible.

Devon could have drilled the Apache 24 Fee Well No. 10 to access the minerals under [the fee tract] but chose not too." Similarly, with respect to the alternative of unitization, the OCC noted in Finding No. 39 in Order R-12403-A that "Devon has not explored unitizing the 40 acre[] [fee tract]."

Far from "public interests," therefore, the Orders complained of by Applicants involve their own private interest in attempting to avoid the cost of directional drilling the three wells at issue or unitizing the fee tracts with existing wells. Even more, a determination on the various methods available to develop a particular tract, as made by the OCC in this case, involves unique and specific facts and circumstances limited to the proposed development of two 40-acre fee tracts by vertical drilling, as opposed to other means of development, and will not, as argued by Applicants, have widespread application in the determination of other applications for permits to drill in different locations with different facts. Because the Orders are so limited in application, there is simply nothing about the OCC's Orders that implicate broader issues of public interest.

This limited application of the OCC's Orders is not altered by Applicants' contention that the OCC has issued a "new interpretation" of Order R-111-P. Application, p. 2. Simply stated, this contention is wrong and misleading.

The underlying premise of this contention is Applicants' oft-repeated but erroneous argument that under the New Mexico Oil and Gas Act and OCC Order R-111-P, which is the long-standing order governing the drilling of oil and gas wells in the Potash Area, a fee owner of potash and an oil and gas operator can, based on nothing more than their agreement and without any oversight or regulatory intervention by the OCC, drill an oil and gas well that will admittedly waste millions of dollars of commercial potash. See Application, p. 7. Such a result was never

intended by Order R-111-P, either expressly or otherwise, nor is such an interpretation even possible given the OCC's clear statutory obligations under NMSA § 70-2-6 and NMSA § 70-2-3.A to prevent oil and gas drilling that "would unduly reduce the total recovery of commercial potash..." This includes all drilling in New Mexico and there is no exception to this statutory obligation when the proposed drilling location is on fee lands.

For these reasons, the Application does not implicate a "public interest" and, therefore, should be denied.

B. A PUBLIC HEARING UNDER NMSA § 70-2-26 IS NOT THE PROPER FORUM TO ADDRESS APPLICANTS' COMPLAINS ABOUT THE OCC ORDERS AND OCC ORDER R-111-P

In further support of their Application, Devon and Bass also argue that the OCC Orders at issue "abdicate" to the U. S. Bureau of Land Management and the State Land Office the OCC's duty to conserve "the minerals of this State." Application, p. 7. The basis of this argument, as best as can be determined, is Applicants' contention that "Order R-111-P authorizes the creation of LMRs (life-of-mine reserves) based on data submitted to the State Land Office for state and fee lands and to the BLM for federal lands that is kept confidential and not shared with either the owner of the oil and gas interests or the Division or Commission." Application, p. 8. This argument is both irrelevant and, simply stated, just plain wrong.

First, the fee lands at issue here are not part of an LMR determination. The OCC has previously addressed this issue and concluded that an LMR cannot include lands not leased by the mine operator. For this reason, there was no LMR determination made with respect to these fee tracts from which the fee owners were excluded. As such, there was nothing "abdicated" to anyone.

Further, as a review of the record will clearly show, no attempt was made by either Bass or Devon to challenge or otherwise question Mosaic's LMR in either Section 7 or Section 23, which adjoins the location of Devon's proposed wells in Section 24. If they truly believed that Mosaic's LMR was improperly determined they could have raised that issue either before the Hearing Officer or before the full OCC. Having failed to do so, they waived the issue and should not now be heard to complain.

Finally, and in any event, the OCC has previously held - contrary to Applicants' assertions of non-disclosure - that when the designation of an LMR may prevent the owner of oil and gas rights from accessing the property, the oil and gas operator "must be given the opportunity to review the geologic basis for the designation..." New Mexico Potash, Order R-9650. This access to data used by a mine operator in designating an area as LMR refutes, without more, Applicants' bald, and false, assertion that data used in designating an LMR is "kept confidential and not shared with either the owner of the oil and gas interests or the Division or Commission." Application, p. 8.

For these reasons, Applicants' claim that the OCC has "abdicated" its statutory duty to the State Land Office and the BLM is neither correct nor relevant to any issue in this case and does not support its request for a public hearing by the Secretary.

Finally, and in any event, a public hearing by the Secretary is not the proper forum to address any issue regarding the interpretation and meaning of Order R-111-P. That Order, adopted by the OCC after public hearing in 1988, has provided stability and predictability to the concurrent development of oil and gas and potash in the designated Potash Area for over 18 years and reduced substantially the number of disputes between mine operators and oil and gas

operators appealed to the OCC. The reason for this, Mosaic submits, is the manner in which Order R-111-P was developed.

The driving force behind the adoption of R-111-P was the then-Director of the Oil Conservation Division. Concerned over the increasing number and contentious nature of disputes between oil and gas operators and mine operators, the then-Director issued an Order calling all interested parties to a hearing before the OCD to discuss the possibility of developing agreed-upon rules to govern the drilling of wells in the Potash Area. Interested parties, including Devon and Bass as well as Mosaic, appeared at the hearing, as did many others, including representatives from the State Land Office and BLM. Following this hearing, the procedure was divided into three phases. Phase I was educational and required mine operators to educate oil and gas operators on how underground mines operated, the hazards encountered, and the basis for their concerns over the possibility of methane gas escaping and entering an underground mine. Interested oil and gas operators, as well as OCD, State Land Office, and BLM personnel, participated and were given a tour of an underground mine. Oil and gas operators took their turn and explained the drilling and cementing process, casing standards, and the problems and standards encountered and/or observed in the drilling and producing process. This likewise included a tour of an active drilling rig as well as the Oil and Gas Museum.

Once the educational phase was completed, Phase II followed. This included the negotiation by representatives of oil and gas operators and mine operators of rules that each could agree to with respect to the drilling of oil and gas wells in the Potash Area. Oil and gas operators were allowed to chose their representatives to do the negotiating and the same right was extended to the potash mine operators. Bass was represented on the negotiating committee.

These negotiations were extensive but fruitful because each side made significant concessions in an effort to avoid the extensive litigation that had been the norm. The negotiating sessions were chaired by a representative of the OCD and attended by a representative of the State Land Office and the BLM. When agreement was reached in principle, the parties moved to Phase III, which was the drafting phase of the project. After extensive efforts, a final written document was agreed to by all parties. This agreement was referred to as the "Industry Agreement" and is attached to Order R-111-P as an exhibit for reference in interpreting and applying the Order. Following public notice and a full hearing before the OCC, the Industry Agreement was adopted, in substantial part, in 1988 by the OCC as Order R-111-P.

Against this background, it should be apparent why a public hearing by the Secretary is not the proper forum to address any perceived shortcomings of R-111-P or the manner in which the OCC applied the Order in this case. R-111-P is a compromise document, not completely satisfactory to some oil and gas operators as well as to some mine operators, but has served its intended purpose, even if in rough form. The effort in developing the Order was extensive and consumed thousands of hours of work over an almost two year period, including the review and analysis of detailed technical and complicated mining engineering data and procedures. To believe, as Applicants' apparently contend, that these same complicated issues, many of which directly affect the safety of miners working in confined space over 1,000 feet underground, can be properly addressed in a public hearing under § 70-2-26 belies this history.

Of equal importance is the lack of any assurance that if a public hearing were held, interested parties, including the OCD, the State Land Office, and the BLM, in addition to all affected oil and gas and mine operators, would participate. Without the voluntary participation

of all stake holders, coupled with the opportunity to present, discuss, analyze and respond to information submitted by other parties, the outcome of such a hearing would lack the consensus that gave birth to R-111-P and surely usher in a return to the litigation plagued period that preceded R-111-P.

For all of these reasons, Mosaic submits that a public hearing under § 70-2-26 is not the proper forum to review the OCC Orders at issue in this case or the criticisms leveled by Applicants against the long-standing Order R-111-P. Their Application, therefore, should be denied.

C. REVIEW BY THE SECRETARY SHOULD BE DENIED BECAUSE APPLICANTS HAVE FULL APPEAL RIGHTS TO DISTRICT COURT PURSUANT TO NMSA § 70-2-25 AND § 39-3-1.1

The extraordinary remedy of review by the Secretary as requested by Applicants should be denied because Applicants' have a right of appeal of the OCC Orders pursuant to NMSA § 70-2-25 and § 39-3-1.1. Those statutory provisions provide for review of any OCC Order by any party adversely affected. Clearly, if Devon and Bass believe, as they contend, that the OCC Orders are in error, they can appeal them to the district court and make their arguments in that forum.

Indeed, given the nature of the arguments made by Devon and Bass in challenging the Orders, a judicial forum is clearly more appropriate to address them than a public hearing. For example, in their Application for Rehearing by the OCC, Applicants raised the following issues: (1) the Orders cause a waste of oil and gas in violation of the Oil and Gas Act; (2) the Orders impair correlative rights in violation of the Oil and Gas Act; (3) the Orders violate the due process rights of oil and gas interests in the Potash Area; (4) the Orders constitute a taking of oil

and gas interests without compensation to the owners; (5) the Findings and Orders are not supported by substantial evidence; (6) the Orders do not disclose the reasoning of the OCC in rejecting prior interpretations of R-111-P; (7) the Orders are contrary to the record evidence; and (8) the Orders will cause confusion and discourage the development of minerals in New Mexico and cause waste in contravention of the public interest.[2] These contentions, as varied as they are, are the very kind that courts deal with in virtually every case. To attempt to address them in a public hearing would be unwieldy, to say the least, and at best, impossible and non-productive.

Further, the granting of the Application would not only disrupt this established appeal procedure, but, in addition, would undermine the authority and respect for OCC decisions and orders flowing from § 70-2-6A NMSA 1978, which states in words as clear as can be expressed, that: "The division shall have, and is hereby given, 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. It 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."

Finally, and as stated earlier, the Application should be denied because it would surely lead to an avalanche of similar request in the future every time an unfavorable decision is issued by the OCC. With no established standards for when a "public interest" is involved, it would be virtually impossible to distinguish one application from another. Clearly, where, as here, only

---

[2] A copy of Mosaic's Response to the Application for Rehearing detailing these arguments and its response is attached for reference.

private interest are involved, the precedent should not be set.

CONCLUSION

For all the foregoing reasons, Mosaic submits that the Application for Review by the Secretary should be denied.

Respectfully submitted,

KEMP SMITH LLP
P.O. Box 2800
El Paso, Texas 79999-2800
915.533.4424
915.546.5360 (FAX)

By: _____
CHARLES C. HIGH, JR.
CLARA B. BURNS

Attorneys for Mosaic Potash Carlsbad, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record this 29th day of August, 2006.

_____
CHARLES C. HIGH, JR.