

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

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

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

**Case No. 14116**

**BRIEF IN SUPPORT OF SEALING CERTAIN EXHIBITS AND TESTIMONY  
AS CONFIDENTIAL**

**I. INTRODUCTION**

Respondent Intrepid Potash – New Mexico, LLC ("Intrepid") moves to have certain exhibits and testimony introduced at the Special Examiner Hearing in this matter protected as confidential by the New Mexico Oil Conservation Division (the "OCD"). These exhibits and this testimony contain Intrepid's confidential business information. At the hearing, Legal Examiner David K. Brooks ordered the sealing of most of these exhibits and this testimony. However, he reserved a ruling with respect to certain other Intrepid testimony and requested that Intrepid brief the basis for sealing such testimony. In addition, certain Intrepid exhibits were not sealed at the hearing that should be sealed. This brief (i) identifies the Intrepid exhibits and testimony that are not now under seal but should be sealed as confidential, (ii) demonstrates the confidential nature of those exhibits and testimony as well as all the other exhibits and testimony already under seal that contain confidential Intrepid information, and (iii) demonstrates that the OCD's disclosure of any of this evidence into the public record would violate N.M. Stat. Ann. § 71-2-8 and the New Mexico Uniform Trade Secrets Act, and also would run contrary to New

Mexico Oil Conservation Commission Order R-111-P. Accordingly, Examiner Brooks should seal the exhibits and testimony identified herein that are not now under seal, and should leave undisturbed his rulings sealing all the other evidence containing confidential Intrepid information.

At issue in this case is Fasken Oil & Ranch Ltd.'s ("Fasken") application for permit to drill the Laguna #2 oil and gas well in Section 16, T. 20 S., R. 32 E., Lea County, New Mexico. The transcript for that portion of the hearing conducted on June 27, 2008 is referred to herein as the "Day 1 Transcript" (cited as "1 Tran."), and the transcript for that portion of the hearing conducted on June 30, 2008 is referred to herein as the "Day 2 Transcript" (cited as "2 Tran.").

## **II. STATEMENT OF FACTS**

### **The Current Status of Intrepid Testimony in the Record**

1. At the outset of the hearing Examiner Brooks acknowledged Intrepid's pre-hearing request that certain testimony and exhibits be deemed confidential. 1 Tran. 6:13. Intrepid did not present any confidential testimony at the first day of the hearing. However, at the beginning of the second day of the hearing, Intrepid explained to Examiner Brooks that it would present testimony that day from James P. Lewis and Kenneth G. Taylor that should be treated as confidential. 2 Tran. 8:14-19. On that basis, the Examiner then ordered the hearing closed to the public. *Id.* 8:20-9:4. At the end of Mr. Lewis' testimony, the Examiner excused Mr. Lewis and asked that Intrepid call its next witness, Mr. Taylor. *Id.* 199:24-200:6. Intrepid called Mr. Taylor to testify. At that time, the Examiner did not reopen the hearing to the public and, consequently, Intrepid did not believe it necessary to restate its request that the hearing remain closed to the public for Mr. Taylor's testimony. *Id.* Intrepid proceeded with Mr. Taylor's testimony on the basis and assumption that the hearing remained closed to the public

and Mr. Taylor's testimony would be protected as confidential as requested by Intrepid at the start of the day.

2. After the conclusion of Mr. Taylor's testimony, Examiner Brooks directed that the entirety of Mr. Lewis' testimony be sealed. *Id.* 265:18. Discussion between the Examiner and Intrepid's counsel followed about whether Mr. Taylor's testimony was also sealed and whether the brief presence of a member of the public throughout some portion of Mr. Taylor's testimony waived confidentiality as to all of his testimony. *Id.* 265:3-268:2. The Examiner concluded that he would accord Intrepid the opportunity to brief the confidentiality issue before making a ruling on the sealing of Mr. Taylor's testimony. *Id.*

### **The Confidential Nature of James P. Lewis' Testimony**

3. Mr. Lewis' testimony is replete with confidential information. His testimony focuses on Intrepid's proprietary geological analyses of the commercial potash deposits in the area of the North Mine, including Section 16. The exhibits introduced and discussed during his testimony include a calculation of the commercial potash deposits that will be affected by the subject well, detailed depictions of where commercial potash deposits are located around Intrepid's North Mine, detailed depictions of Intrepid's plans to mine those deposits, and Intrepid's core hole and oil and gas well log data upon which those geological analyses and mining plans are based. Very little of Mr. Lewis' testimony does not directly contain, address or relate to Intrepid's confidential, proprietary and competitively sensitive information.

4. In particular, Mr. Lewis' testimony directly addresses the contents of confidential Intrepid Exhibits 9, 11, 40, 43 and 50, and Fasken Exhibit 33, the confidential nature of which is further described below in Section II.11 of this brief. Mr. Lewis' testimony is located at pages 10 to 199 of the Day 2 Transcript.

### **The Confidential Nature of Kenneth G. Taylor's Testimony**

5. Upon review of the transcript of Mr. Taylor's testimony, Intrepid has determined that only certain portions contain confidential information that should be protected under N.M. Stat. Ann. § 71-2-8 and the New Mexico Uniform Trade Secrets Act. Those portions, which amount to only approximately 18 pages of his 61 pages of testimony, contain Mr. Taylor's discussion of the content of certain exhibits that the Examiner has already designated as confidential. The confidential portions of Mr. Taylor's testimony (the "Confidential Taylor Testimony") are as follows:

- (a) 209:15 through 210:5 (discussion of page 7 of Intrepid Exhibit 3)
- (b) 217:8-19; 251:19-252:6 (discussion of pricing forecasts contained in Intrepid Exhibit 31)
- (c) 229: 8-20 (verbatim reading from Intrepid Exhibit 31)
- (d) 231:21-16; 233:13 to 240:2; 241:13-17; 251:19 to 252:6; and 259:6-14 (discussion of pages 8-10 of Intrepid Exhibits 3 and 3A)

### **The Current Status of Intrepid Confidential Exhibits in the Record**

6. On the first day of the hearing, Intrepid presented the testimony of Hugh Harvey, Jr. *See* 1 Tran. 144-251. During that testimony, Intrepid offered Exhibits 7, 8, 10, 15 and 16. Examiner Brooks admitted all of these exhibits without objection. *Id.* at 152, 153, 168, 174, 185. Specifically, the Examiner admitted Exhibits 15 and 16 under seal as confidential at Intrepid's request. 1 Tran. 174, 185. Intrepid Exhibits 7, 8, and 10 were not admitted under seal, but should also be sealed for the reasons set forth in Section III.3 of this brief. *Id.* at 152, 153, 168.

7. On the second day of the hearing, Intrepid presented the testimony of Mr. Lewis and Mr. Taylor. *See* 2 Tran. 10-262. During their testimony, Intrepid offered Exhibits 3, 3A, 9,

11, 31, 40, 41, 43 and 50. At Intrepid's request, the Examiner admitted all of these exhibits under seal as confidential.

8. On first day of the hearing, the Examiner admitted under seal Fasken Exhibits 9, 10 and 25. *See* 1 Tran. 60, 198. Fasken Exhibit 9 is a duplicate of sealed Intrepid Exhibit 40, and Fasken Exhibit 25 is a duplicate of sealed Intrepid Exhibit 15. Fasken Exhibit 10 is not a duplicate of any Intrepid exhibit admitted at the hearing. It is a copy of Intrepid's most recent 3-year mining plans produced to Fasken in discovery under the protection of a confidentiality order entered by Director Mark E. Fesmire of the OCD, dated June 3, 2008.

9. On the second day of the hearing, the Examiner admitted under seal Fasken Exhibits 30, 31 and 33. *See* 2 Tran. 92, 143 and 248. Fasken Exhibit 30 is a duplicate of sealed Intrepid Exhibit 9, and Fasken Exhibit 31 is a duplicate of sealed Intrepid Exhibit 3. Fasken Exhibit 33 is not a duplicate of any Intrepid Exhibit. It is a map that Intrepid brought to the hearing which was not labeled or intended to be introduced as an exhibit, but that was used at the request of Fasken's counsel in Fasken's cross examination of Mr. Lewis. The index to the Day 2 Transcript does not identify Fasken Exhibits 30 and 33 as currently under seal, which is a mistake, as the Examiner ordered that they be sealed. 2 Tran. 92, 143.

10. To summarize, the Intrepid exhibits that are currently in the record under seal as confidential in this case are as follows (the Fasken duplicate is indicated in parentheses): Intrepid Exhibits 3 (Fasken 31), 3A, 9 (Fasken 30), 11, 15 (Fasken 25), 16, 31, 40 (Fasken 9), 41, 43 and 50. Intrepid Exhibits 7, 8 and 10 are also confidential and should be placed under seal in the record of this case for the reasons set forth in Sections II.11(c), (d) and (f) and Section III.3 of this brief. In addition, Fasken Exhibits 10 and 33 are also currently under seal. Collectively,

these exhibits (including the Fasken duplicate exhibits) are referred to herein as the “Confidential Exhibits,” and individually as a “Confidential Exhibit.”

### **The Confidential Nature of the Confidential Exhibits**

11. The confidential nature of each of the sixteen Confidential Exhibits is described below:

(a) ***Intrepid Exhibit 3 (Fasken Exhibit 31, pgs. 7-10)***. Page 7 of this document contains Intrepid’s estimated capital cost figure for reopening the North mine, which is identified and discussed by Mr. Taylor at 229:8-20 of the Day 2 Transcript. The capital cost estimates for North are the subject of an ongoing feasibility study and have not been publicly disclosed. Pages 8-10 of this exhibit contain economic comparisons of the potash affected by drilling the well at issue in this case and the value of that well. The comparisons involve projected revenue, probable royalties to the State of New Mexico, and local economic cash contributions based on Intrepid’s estimated operating costs. The comparisons show commercial potash values in Section 16. The comparisons can be used to estimate Intrepid’s operating costs and Intrepid’s commercial potash calculations for Section 16, and thereby used determine with a considerable degree of accuracy the economic value of a potash lease in Section 16. Because Intrepid’s potash lease for Section 16 remains pending before the State Land Office, all of these figures are competitively sensitive. Mr. Taylor discusses these confidential economic comparisons at length at the following pages of the Day 2 Transcript: 231:21-16; 233:13-240:2; 241:13-17; 251:19-252:6; and 259:6-14.

(b) ***Intrepid Exhibit 3A***. This document constitutes revisions to pages 8-10 of Intrepid Exhibit 3, reflecting the same economic comparisons but using Fasken’s estimated value of the Laguna #2 well received the day before the hearing. *See* 2 Tran. 233:9–234:25; 2236:12-

22; 239:19-24; 243:7-17. It is confidential for the reasons set forth above in connection with Intrepid Exhibit 3.

(c) ***Intrepid Exhibit 7.*** This document is Intrepid's potassium lease application for Section 16, which includes statements about Intrepid's assessment of the commercial potash deposits there as well as the importance of Section 16 in Intrepid's plans for the North Mine. *See* 1 Tran. 153:15–154:6. Attached to the application is a map depicting detailed mine plans for reopening the North Mine. Because the potassium lease for Section 16 remains pending, a review of this document would reveal competitively sensitive information. Section 16 abuts current leaseholds of Mosaic Potash Carlsbad, Inc. In addition, certain oil and gas companies active in the Carlsbad potash area have successfully bid on potash leases in the past and only last year prompted and then participated in a potash lease sale auction held by the Bureau of Land Management (“BLM”). *See Pogo Production Co.*, 138 IBLA 142, 156-57 (1997), *aff'd*, *IMC Kalium Carlsbad, Inc.*, 206 F.3d 1003 (10<sup>th</sup> Cir. 2000). The information in the application is protected from public disclosure under N.M. Stat. Ann. § 19-1-2.1 and part (G) of Order R-111-P.

(d) ***Intrepid Exhibit 8.*** This document is Intrepid's potassium lease application for fringe acreage located directly to the south of Section 16. The fringe acreage abuts Section 16 and is adjacent to the North Mine. 1 Tran. 152:18–154:6. Together with Section 16, the fringe acreage forms part of the logical mining area for the North Mine. *Id.* Also, the acreage lies to the south of and abuts existing leases of Intrepid's potash competitor Mosaic Potash Carlsbad, Inc., which also abut Section 16. The same concerns as to oil and gas companies bidding on potash leases apply to this acreage. The information in the application is protected from public disclosure under 5 U.S.C. § 552(b)(4) (exemption to the Freedom of

Information Act for commercial information), 18 U.S.C. § 1905 (Federal Trade Secrets Act) and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(e) ***Intrepid Exhibit 9 (Fasken 30)***. This map depicts Intrepid's initial, internally generated commercial potash analysis of Section 16 and surrounding BLM lands and is based on a professional interpretation of Intrepid's core and log data. *See* 2 Tran. 35:13-44:19; 123:21-135:24. Public disclosure of this map to Intrepid's competitors (including the oil and gas companies active in the area) would be harmful to Intrepid. As to the surrounding BLM lands, the information on the map is protected from public disclosure under 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905 and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(f) ***Intrepid Exhibit 10***. This map is Intrepid's internally generated mine plan for Section 16, which shows mining design, access routes, and Intrepid's evaluation of existing wells, their buffer zones and mine engineering decisions. The map reveals Intrepid's thinking and judgments about how to best mine this specific area. Obviously, public disclosure of this document would be competitively harmful to Intrepid. The map also overlays the commercial potash analysis of Section 16 and surrounding BLM lands as depicted on Intrepid Exhibit 9, and is therefore also confidential for the reasons set forth above pertaining to Intrepid Exhibit 9. As to the surrounding BLM lands, the information on the map is protected from public disclosure under 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905 and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(g) ***Intrepid Exhibit 11***. This document contains Intrepid's most recent internally generated analysis of the commercial potash deposits in Section 16 and the surrounding lands and is based on professional interpretation of Intrepid's core and log data. *See* 2 Tran. 44:20-47:24; 57:17-61:11; 108:11-112:7. It includes ore tonnage calculations and mine



and plant recovery rates, and it reveals unique work product and geologic analysis performed by Intrepid's geologists. The information in this exhibit also reflects Intrepid's compilation of log data in the potash area and demonstrates how Intrepid combines core and log data to determine quantities of commercial potash and economic value, a proprietary methodology pioneered by Intrepid in the Carlsbad potash area. *See* 2 Tran. 27:7 – 42:18.

(h) ***Intrepid Exhibit 15 (Fasken 25)***. This document is a recent email between Intrepid's chief operations officer and an engineering consultant regarding a feasibility study for reopening the North Mine. The email also addresses the scope of the study, the condition of the mine, the timing of the operations and other key data. Intrepid's ongoing, internal study is proprietary and has not been publicly disclosed other than in general terms. *See e.g.*, 1 Tran. 171:13-174:7.

(i) ***Intrepid Exhibit 16***. This document is an estimate of commercial potash deposits and a mine condition analysis of the North Mine (including the federal and state leases comprising the North Mine potash deposits) prepared in 1982 by a consultant for IMC-Carlsbad, now known as Mosaic Potash Carlsbad, Inc. At the time of the analysis, the North Mine was owned by National Potash Company. The North Mine was later acquired by Mississippi Potash Company and then by Intrepid. A copy of this document exists in the files obtained by Intrepid from Mississippi Potash Company. The document includes estimates of the quantity of recoverable commercial potash, potash deposit mapping, calculations, analyses, data and a description of mine conditions related to the North Mine. This document is not disseminated publicly and is closely held by Intrepid. *See* 1 Tran. 181:19-183:4; 2 Tran. 159:13-167:14.

(j) ***Intrepid Exhibit 31***. This document is a report on Intrepid, as a business, prepared by Merrill Lynch for existing and potential investors. The document contains

proprietary analyses, projections and opinions by Merrill Lynch. This is a confidential document made available to Intrepid subject to restrictions on its dissemination and is not publicly distributed, but is only available to certain customers of Merrill Lynch. Mr. Taylor read directly from this report at 209:15 through 210:5 of the Day 2 Transcript. *See* 2 Tran. 217:8-19. He also discusses some pricing forecasts set forth in this report. *See* 2 Tran. 217:8-19; 251:19-252:6.

(k) ***Intrepid Exhibit 40 (Fasken 9).*** This map depicts a recent mine plan for the 10<sup>th</sup> ore zone at the North Mine in the area of Section 16. It details existing and proposed mine workings, as well as the location of nearby core data points. The map conveys Intrepid's determination of where commercial potash deposits are located in relation to the North Mine and surrounding areas. It is a competitively sensitive document that, if made publicly available, would cause Intrepid harm in the marketplace. *See* 2 Trans. 21:22-26:15; 31:70; 99:21-25; 122:9-16; 253:6-18. As to the surrounding BLM lands, the information on the map is protected from public disclosure under 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905 and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(l) ***Intrepid Exhibit 41.*** This document is the executed contract between Intrepid and the consultant referenced in Intrepid Exhibit 15. The document contains the same sensitive information as Intrepid Exhibit 15, in more detail in some instances, and also sets out the confidential contract terms negotiated by the parties. It is a competitively sensitive document that Intrepid has kept confidential. *See* 2 Trans. 207:16-208:16.

(m) ***Intrepid Exhibit 43.*** This document was prepared internally by Intrepid as a further breakdown of the data contained in Intrepid Exhibit 11. It represents considerable work product and commercial potash deposit analysis by Intrepid's professional geologists related to Section 16 and surrounding lands. The potash tonnage calculations on this document reflect the

value of the Section 16 lands, both including and excluding gamma ray log data and un-leased acreage (Section 16). The information also reflects a proprietary compilation of oil and gas well log data compiled and analyzed by Intrepid in the potash area and demonstrates how Intrepid combines core and log data to determine quantities of commercial potash and economic value, a proprietary methodology pioneered by Intrepid in the Carlsbad potash area. *See* 2 Trans. 51:12-54:5; 59:9-61:6; 65:1-66:21; 172:2-23; 180:10-186:25.

(n) ***Intrepid Exhibit 50.*** This large binder contains Intrepid's core hole and oil and gas well log data that is essential to map and quantify the commercial potash that would be destroyed by the subject Fasken well. This raw geologic data is known only to Intrepid or is otherwise closely held and not disseminated publicly. Intrepid takes considerable measures to keep this information private and it is protected from public disclosure under 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905 and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(o) ***Fasken Exhibit 10.*** These maps depict Intrepid's three most recent 3-year mine plans filed with BLM. The plans show when and where Intrepid contemplates mining in areas of its North, East and West Mines. *See* 1 Trans. 49:18-50:15; 237:11-238:3; 2 Trans. 62:1-63:14. These mine plans are protected from public disclosure under 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905 and 43 C.F.R. § 2.23(j). *See also* 43 C.F.R. § 3503.41-43.

(p) ***Fasken Exhibit 33.*** This map is Intrepid's internally generated map of the entire potash area. It depicts in detail the existing mine workings of all of Intrepid's mines. It also depicts various potash ore bodies that are the result of Intrepid's compilation and analysis of large amount of geophysical log data, which constitutes Intrepid's unique application of such log data. The map also reflects Intrepid's compilation of oil and gas well log data in the potash area and demonstrates how Intrepid combines core and log data to determine quantities of

commercial potash and economic value, a proprietary methodology pioneered by Intrepid in the Carlsbad potash area. The contours and dimensions of the ore bodies are shown in relation to existing Intrepid operations and the operations and leaseholds of its competitors in the Potash Area. This map is tremendously competitively important to Intrepid's business and its public disclosure would harm Intrepid greatly. *See* 2 Trans. 83:22-84:24; 90:7-24; 92:25-98:2.

### III. ARGUMENT

**1. N.M. Stat. Ann. § 71-2-8 requires that the OCD not disclose confidential information submitted to OCD upon the request of the party supplying it.**

As a sub-agency of the New Mexico Energy, Minerals and Natural Resources Department, the OCD, its employees and agents have a duty to keep certain information confidential. N.M. Stat. Ann. § 71-2-8 (2007) provides:

“The provisions of any confidential contract or any other confidential information required or possessed by the energy, minerals and natural resources department shall be held confidential by the department upon written request of the party supplying it, and any employee of the department, whether temporary or permanent, who willfully violates the provisions of this section shall be guilty of a misdemeanor.”

N.M. Stat. Ann. § 71-2-8 has two requirements: (i) that the information in OCD's possession is “confidential,” and (ii) that the party supplying the information request in writing that OCD not disclose it. These two requirements are satisfied as to all of the exhibits and testimony for which Intrepid has requested confidential treatment.

**2. The term “confidential information” as used in N.M. Stat. Ann. § 71-2-8 should be given its plain meaning, and can also be defined by reference to the Trade Secrets Act.**

N.M. Stat. Ann. § 71-2-8 does not define “confidential information,” nor does New Mexico case law. The plain meaning of the word “confidential” is fairly broad: “communicated, conveyed, acted on, or practiced in confidence : known only to a limited few : not publicly

disseminated : private, secret.” *Webster’s Third New International Dictionary (Unabridged)* 476 (2002). The meaning of the word “confidential” as used in N.M. Stat. Ann. § 71-2-8 should be given its plain dictionary meaning in application to the Intrepid information at issue in this proceeding.

The New Mexico Uniform Trade Secrets Act (NMUTSA) is also instructive here. It provides for injunctive relief and for actual damages for the “misappropriation” of “trade secrets.” *See* N.M. Stat. Ann. § 57-3A-3, 4. A misappropriation is any disclosure or release of information without consent where the information was “acquired under circumstances giving a duty to maintain its secrecy or limit its use.” *See id.* at § 57-3A-2(B)(2)(b)(2). A trade secret is broadly defined as any “information . . . that . . . derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.” *Id.* at § 57-3A-2(D).

N.M. Stat. Ann. § 71-2-8 and the NMUTSA apply directly here. Intrepid would not have provided this mass of confidential information to the OCD but for the need to oppose Fasken’s application for a permit to drill its Laguna #2 well, a well that threatens Intrepid’s potash leases, its North Mine workings and the commercial potash in Section 16, which Intrepid has applied to lease. This confidential information is now in the possession of OCD within the meaning of N.M. Stat. Ann. § 71-2-8. As set forth above, an employee of OCD has a duty under N.M. Stat. Ann. § 71-2-8 to maintain the confidentiality of confidential information submitted to the OCD upon the written request of the party supplying it. Therefore, the employee’s disclosure of such confidential information without consent would constitute a misappropriation under the NMUTSA, if the information qualifies as a trade secret under that act. NMUTSA’s definition of

a trade secret is also instructive as to the meaning of the word "confidential" as used in N.M. Stat. Ann. § 71-2-8, but the information is also "confidential" within the plain meaning of that word and should be protected under N.M. Stat. Ann. § 71-2-8 on that independent basis.

**3. Each Confidential Exhibit and the Confidential Taylor Testimony are confidential under the meaning of N.M. Stat. Ann. § 71-2-8 and qualify as a trade secret under the NMUTSA.**

As evidenced above in Section II.11 of this brief, each Confidential Exhibit contains information that clearly fits within the plain meaning of the word "confidential." Such information is known only to Intrepid or is otherwise closely held and not disseminated publicly. Intrepid takes considerable measures to keep this information private. In addition, such information also derives independent economic value, actual or potential, by not being publicly available or readily ascertainable by others who can obtain economic value from its disclosure.

Specifically, information contained in the Confidential Exhibits is competitively sensitive and its disclosure would cause Intrepid competitive injury. The information would inform a party about the quality and location of commercial potash deposits in the area of the North Mine and Section 16 and where and how Intrepid intends to mine those deposits in the future. Armed with this information, such a party could more strategically, cheaply and effectively bid on future potash leases in areas not currently leased for potash. The party could do so without incurring the significant costs necessary to generate or acquire this information, thus causing an obvious and unfair competitive disadvantage to Intrepid. Similarly, the Confidential Exhibits would inform an oil and gas company's understanding of the juxtaposition of potash and oil and gas deposits and thereby affect that company's decision to drill for petroleum or in taking other action to oppose potash development.

The Confidential Taylor Testimony is likewise confidential because it discusses and describes in express terms the content of one or more Confidential Exhibits, as set forth above in

Sections II.11(a), (b) and (j). Accordingly, the Confidential Exhibits and the Confidential Taylor Testimony constitute confidential information under N.M. Stat. Ann. § 71-2-8 and trade secrets under the NMUTSA, and Examiner Brooks should seal this evidence.

**4. The vast majority of the Lewis Testimony is confidential and subject to the protection of N.M. Stat. Ann. § 71-2-8 and the NMUTSA.**

Examiner Brooks should not disturb the sealing of the entirety of Mr. Lewis' testimony in this case. As evidenced above in Sections II.3 and II.4 of this brief, his testimony is replete with Intrepid's confidential information. Largely focusing on five of the most competitively sensitive Confidential Exhibits, Mr. Lewis presents Intrepid's highly confidential commercial potash analyses for the area of the North Mine, including Section 16, as well as the details of Intrepid's future mining plans there. Fasken's cross examination of Mr. Lewis scrutinized in detail the actual core hole data upon which these analyses of commercial potash are based. Much of Mr. Lewis' testimony and related exhibits present a method of compilation and analysis of core hole and well log data that has been pioneered by Intrepid in the Carlsbad potash area and represents the investment of enormous resources by Intrepid over the past several years. Very little of Mr. Lewis' testimony does not directly address or relate to such confidential information and trade secrets of Intrepid.

**5. As required by N.M. Stat. Ann. § 71-2-8, Intrepid hereby requests in writing that the Examiner seal the entirety of the Lewis Testimony, the Confidential Taylor Testimony, and each Confidential Exhibit.**

Intrepid requested at the outset of the hearing that Examiner Brooks seal the testimony of Mr. Lewis and Mr. Taylor in their entirety. Intrepid proceeded to call those witnesses to testify based on its understanding that each would testify in a closed hearing and that their testimony would be placed under seal. Intrepid hereby requests that the Examiner seal the Confidential Taylor Testimony for the reasons given at the hearing and set forth above in Sections II.11(a), (b)

and (j) and Section III.3 of this brief. Also, the Examiner should not disturb the previous sealing of the entire testimony of Mr. Lewis for the reasons given at the hearing and set forth above in Sections II.2-3 and Section III.4.

With the exception of Intrepid Exhibits 7, 8, and 10, at the hearing, Examiner Brooks ordered the sealing of each Confidential Exhibit. Intrepid hereby requests in writing that the Examiner not disturb the sealing of such Confidential Exhibits for the reasons given at the hearing and set forth above in Sections II.11(a), (b), (e), (g)-(p) and Section III.3 of this brief. Upon review of Intrepid Exhibits 7, 8 and 10 and transcript relating to them, Intrepid also hereby requests that the Examiner likewise seal these exhibits for the reasons set forth above in Sections II.11(c), (d) and (f) and Section III.3 of this brief. No party will suffer any prejudice by the further sealing of these three exhibits, since the transcript and exhibits have not yet been released to the public. The exhibits themselves are patently "confidential" within the meaning of N.M. Stat. Ann. § 71-2-8 and trade secrets under the NMUTSA.

Intrepid has made every reasonable effort to maintain the confidentiality of this evidence in this proceeding. Intrepid has also endeavored to tailor its confidentiality requests as narrowly as is reasonably possible given the sensitive nature of this evidence. Intrepid believes that disclosure of this evidence would clearly violate N.M. Stat. Ann. § 71-2-8 and the NMUTSA and would evoke the penalties under those laws. Intrepid has endeavored to be responsive in discovery and to introduce as much evidence as possible regarding the existence of commercial potash that would be wasted by Fasken's proposed well for the purposes of this case, and it has supplied all this evidence in good faith and as confidential to Fasken as a party litigant and to the OCD as the decision-maker in this proceeding. Intrepid's confidentiality concerns are not trivial, but real and have been reinforced through other similar litigation in the potash area. Indeed,



Intrepid has fought in other state and federal cases attempts by oil and gas companies to disclose and otherwise use for their own purposes Intrepid's confidential information about its mining operations and leaseholds, confidential information that Intrepid is forced to disclose to defeat APDs that threaten egregious potash waste.

Indeed, the issue here is not obstruction to Fasken's adjudicative rights, as Fasken has been provided with all information it has requested and no purpose of this proceeding has been frustrated by Intrepid's withholding of relevant information. The issue here is public disclosure. Failure to observe the confidentiality of the information at issue here would force Intrepid in future proceedings to risk waste of its commercial potash deposits and withhold relevant information, or defend commercial potash and risk its public disclosure and the competitive injury that would likely follow. Only the protections of N.M. Stat. Ann. § 71-2-8 and the NMUTSA protect Intrepid from being put to this unreasonable choice.

**6. Order R-111-P supports maintaining the confidentiality of many of the Confidential Exhibits and Intrepid testimony.**

Section (G)(a) of the New Mexico Oil Conservation Commission Order R-111-P provides:

Information used by the potash lessee in identifying its LMR shall be filed with the BLM and SLO but will be considered privileged and confidential "trade secrets and commercial information" within the meaning of . . . Section 19-1-2.1 NMSA 1978, and not subject to public disclosure.

While this provision specifically references confidential information provided to the New Mexico State Land Office under N.M. Stat. Ann. § 19-1-2.1 (which also prohibits its disclosure), it is instructive here with respect to submitting the same kind of information to the OCD in an adjudicative proceeding. It would be incongruent to protect confidential information submitted to the State Land Office by a potash lessee for the purpose of determining its LMR, but then

publicly disclose the same kind of information once submitted to the OCD by the lessee for the purpose of protecting its LMR from oil and gas drilling.

The following Confidential Exhibits contain information that Intrepid uses to identify its LMR: 3 (pgs. 8-10), 3A, 7-11, 16, 40, 43 and 50. Likewise, as discussed above, the vast majority of Mr. Lewis' testimony is focused on the kind of information used by Intrepid to identify its LMR in the area of the North Mine and elsewhere, as is the testimony of Mr. Taylor where he discusses the content of Intrepid Exhibit 3, pages 8-10 (see above at Section II.11(a)). R-111-P supports protecting this evidence from public disclosure.

Likewise, many of the exhibits contain information that is relevant to Intrepid's federal leaseholds, which is protected from disclosure by the federal government under 5 U.S.C. § 552(b)(4) (exemption 4 to the Freedom of Information Act), 18 U.S.C. § 1905 (federal trade secrets act) and 43 C.F.R. § 2.23(j) (Department of Interior FOIA regulation). *See also* 43 C.F.R. § 3503.41-43. BLM has recently enforced these provisions in refusing to disclose almost identical data of Intrepid in other litigation. *See* BLM Second Supplement to Decision File and Request to Limit Disclosure, attached hereto as Exhibit A. The OCD should observe and enforce those federal protections in this case.

**7. There was no waiver of any of the Confidential Taylor Testimony by the brief presence in the hearing room of a member of the public.**

The brief presence of a member of the public in the hearing room during the testimony of Kenneth G. Taylor does not waive the confidentiality of his testimony. There is no support for this notion. Courts require evidence demonstrating that a trade secret has truly become generally known before it may lose its status as a trade secret. And minor or merely potential breaches in the secrecy of a trade secret will not eviscerate its status where the owner has reasonably endeavored to protect the trade secret. *See Religious Tech. Ctr. v. Netcom On-Line Cmty. Servs.*,

923 F. Supp. 1231, 1255 (N.D. Cal. 1995) (holding that trade secrets, which were disclosed in court proceedings and temporarily available to the public through the court records, did not lose their status as trade secrets without “evidence that the secrets have become generally known”); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 418-419 (4th Cir. 1999) (noting that “disclosure of information solely in a court’s records will not, absent evidence of further publication, destroy the trade-secret status of that information”); *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 849 (10th Cir. 1993) (concluding that moving to seal the record constituted an adequate effort to maintain secrecy).

There are no facts here to defeat the continued confidentiality of Mr. Taylor’s testimony. First, the woman’s brief presence in the hearing cannot effect a waiver of the entirety of Mr. Taylor’s testimony. There is nothing in the record showing that she was present during the entirety of Mr. Taylor’s testimony. Second, there is no evidence to show that she was present during the Confidential Taylor Testimony, specifically. Third, Intrepid made every reasonable effort to protect the confidentiality of Mr. Taylor’s testimony by stating at the outset that his testimony would contain trade secrets and requesting that it be sealed. Intrepid could not control who walked in and out of the hearing room and was not immediately made aware of the woman’s entry into the rear of room. She exited not long after she had appeared. *See* Affidavit of Counsel ¶ 4, attached hereto as Exhibit B. Intrepid cannot be found to have agreed to her presence in the hearing room, and there is no basis to find that Intrepid acquiesced that the testimony presented during her brief presence was no longer confidential and could be publicly disclosed.

Finally, there is no evidence that whatever information the woman obtained during her brief presence in the hearing, if any, has been published to the public. Here, Intrepid is not

required to prove a negative – that some part of Mr. Taylor’s testimony has *not* been publicly disclosed – in order to preserve its confidentiality. It is enough that there is no evidence of its public disclosure. Indeed, the woman has indicated that she does not even recall being present at the hearing. *Id.* at ¶ 3.

Simply put, a single person’s *suspected* knowledge of the Confidential Taylor Testimony, obtained by briefly sliding into the rear of the hearing room, does not defeat the confidentiality that Intrepid has diligently endeavored to maintain in this proceeding.

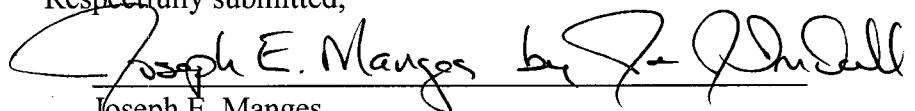
In addition, as a general rule, waiver is the intentional and voluntary relinquishment of a known right and the burden of proving a waiver is upon the party asserting it. *See Albuquerque Nat’l Bank v. Albuquerque Ranch Estates*, 654 P.2d 548, 99 N.M. 95 (holding that the party asserting the waiver of a right has the burden of demonstrating that there was a knowing and voluntary waiver of the right). There is no evidence presented that Intrepid intentionally and voluntarily waived the confidentiality of either the testimony or exhibits at issue and no party can possibly satisfy its burden of showing such a waiver.

#### IV. CONCLUSION

For the foregoing reasons, the New Mexico Oil Conservation Division should seal and protect from disclosure as confidential the entirety of the testimony of Mr. Lewis, the Confidential Taylor Testimony, and each Confidential Exhibit, as set forth herein.

Dated this 3<sup>rd</sup> day of September, 2008.

Respectfully submitted,

  
Joseph E. Manges


Comeau, Maldegen, Templeman & Indall, LLP  
P.O. Box 669  
Santa Fe, NM 87504-0669  
(505) 982-4611

Attorneys for Intrepid Potash - New Mexico, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was hand  
delivered this 3 day of September, 2008 to:

Michael H. Feldewert, Esq.  
Holland & Hart, LLP  
110 N. Guadalupe  
Santa Fe, New Mexico 87501

  
\_\_\_\_\_  
Joseph E. Manges

UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
Interior Board of Land Appeals  
801 North Quincy Street, Suite 300  
Arlington, Virginia 22203

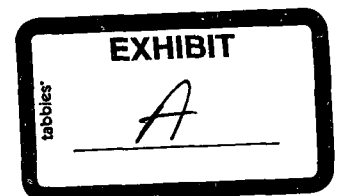
December 28, 2006

|                                 |   |   |
|---------------------------------|---|---|
| INTREPID POTASH-NEW MEXICO LLC, | : | IBLA 2006-288                             |
|                                 | : |   |
| Appellant                       | : | Appeal of Decision Approving Applications |
|                                 | : | for Permits to Drill Caper Wells          |
| v.                              | : |   |
|                                 | : | Lease No. NM-94095                        |
| BUREAU OF LAND MANAGEMENT,      | : |   |
|                                 | : |   |
| Respondent                      | : |   |

**Second Supplement to Decision File  
and Request to Limit Disclosure**

The Bureau of Land Management ("BLM") initially submitted the Decision File in this matter, which included the file for Oil and Gas Lease NM NM 94095 and files for the 11 applicable Applications for Permit to Drill ("APD"), on September 29, 2006. BLM supplemented the Decision File on October 24, 2006 with "Protest of Yates' Applications for Permit to Drill Caper Wells; Failure to Consider Gamma Ray Logs; Section 17, Township 21 South, Range 32 East; Lea County, New Mexico" dated June 9, 2006 and "Petition for State Director Review and Request for Immediate Stay of Yates Petroleum Company Caper BFE Application for Permit to Drill Approvals, Decision Record and Finding of No Significant Impact, and Request for Expedited Decision" dated September 13, 2006.

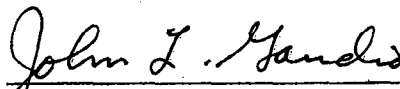
BLM now submits this "Second Supplement to Decision File and Request to Limit Disclosure" in the above-captioned appeal in order to add the following attached documents to the Decision File:



1. Copy of BLM's automated map showing the potash enclave for the area in which the Applications for Permits to Drill under appeal in this matter are located. This map is based in part on BLM's automated ore zone maps for the relevant area.
2. BLM's automated ore zone maps for the relevant area. These maps are based in part on the core hole data and the face sample listed at Item No. 3.
3. Intrepid Potash-New Mexico LLC's Life of Mine Reserves map, 3-Year Life of Mine Plan, core hole data, and face sample for the relevant area.

BLM requests that this Board limit the public disclosure of Item Nos. 2 and 3 pursuant to 43 C.F.R. § 4.31(a), because those items are confidential information. This information is exempt from disclosure as "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4) (2000), and as confidential information protected under the Trade Secrets Act, 18 U.S.C. § 1905. And in accordance with 43 C.F.R. § 4.31(d), please review the evidence contained in Item Nos. 2 and 3 as a basis for BLM's decision without disclosing the information to Yates Petroleum Corporation, Intervenor in this matter.

Respectfully submitted,

  
John L. Gaudio  
Agency Counsel



### **Certificate of Mailing**

I certify that I sent the preceding "Second Supplement to Decision File and Request to Limit Disclosure" with attachments by U.S. Certified Mail, Return Receipt Requested, on December 28, 2006 to:

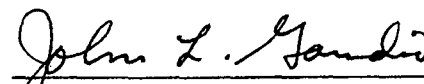
Bruce R. Harris, Deputy Chief Administrative Judge  
U.S. Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 North Quincy Street, Suite 300  
Arlington, Virginia 22203  
(703) 235-3750 (voice)  
(703) 235-8349 (fax)

and copies without attachments to:

Robert Tuchman, Steven B. Richardson, James F. Cress, and Colin G. Harris  
Holme Roberts & Owen LLP  
1700 Lincoln, Suite 4100  
Denver, Colorado 80203-4541  
(303) 861-7000 (voice)  
(303) 866-0200 (fax)  
(Attorneys for Intrepid Potash-New Mexico LLC)

James E. Haas  
119 W. Main  
P.O. Box 1720  
Artesia, New Mexico 88211-1720  
(505) 746-3503 (voice)  
(505) 746-6316 (fax)  
(Attorney for Yates Petroleum Corporation)  
(in response to letters from Mr. Haas to John Gaudio dated November 20, 2006 and to Linda Rundell dated December 19, 2006)

Phillip Wm. Lear and Stephanie Barber-Renteria  
299 South Main, Suite 2200  
Wells Fargo Center  
Salt Lake City, Utah 84111  
(801) 538-5000 (voice)  
(801) 538-5001 (fax)  
(Attorneys for Yates Petroleum Corporation)

  
\_\_\_\_\_  
John L. Gaudio  
Agency Counsel

## AFFIDAVIT OF COUNSEL

STATE OF NEW MEXICO   )  
  ) ss.  
COUNTY OF SANTA FE   )

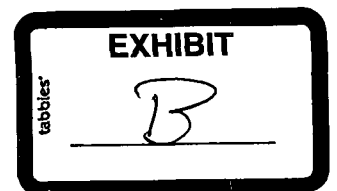
Joseph E. Manges, being first duly sworn, deposes and states as follows:

1. I am counsel to Intrepid Potash - New Mexico, LLC and have personal knowledge of the matters set forth herein.

2. On September 2, 2008, I contacted Ms. Kate McGraw regarding the hearing held June 27 and 30, 2008 in the Application of Fasken Oil and Ranch, OCD Cause No. 14116. I contacted Ms. McGraw in order to determine whether she was the woman who briefly entered the hearing room during the afternoon of the June 30, 2008 hearing.

3. I inquired whether she recalled attending the hearing and she stated that she did recall attending the first day of the hearing held on June 27, 2008 and that she had noted the names of the parties and the witnesses. She recalled that there was discussion concerning confidential testimony. She stated that she did not recall attending the hearing held on the second day, June 30, and does not believe she attended because she had other commitments. I asked if she would be willing to sign an affidavit or letter summarizing this, but she declined to become involved.

4. Based on my review of the transcript of the June 30, 2008 hearing and notes, it appears that one unidentified, uninvited woman entered the hearing room at some point during the first portion of Mr. Taylor's testimony which covers pages 200 to 231 of the transcript. The woman left sometime before the break which occurred at approximately 4:43. See transcript, p. 231. The woman did not subsequently re-enter the



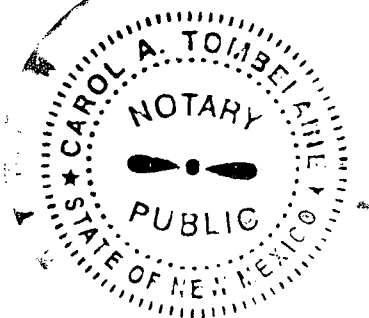
hearing room. All of the foregoing is in accordance with my contemporaneous statements made on the record at the conclusion of the hearing. Transcript, p. 267, attached.


5. I do not know the identify of the woman who entered the hearing room on June 30 or whether she was an employee of one of the state agencies located in the Chino Building. The woman was reading a paperback novel and did not appear to take any notes. She was not authorized nor requested by Intrepid to enter the hearing room.

Further affiant sayeth naught.

  
\_\_\_\_\_  
Joseph E. Manges

SUBSCRIBED AND SWORN TO before me this 3rd day of September 2008, by Joseph E. Manges.



  
\_\_\_\_\_  
Notary Public

My commission expires:

9/27/2008

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

**ORIGINAL**

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

CASE NO. 14116

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

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
SPECIAL EXAMINER HEARING

BEFORE: DAVID K. BROOKS, Legal Examiner  
TERRY WARNELL, Technical Examiner

June 30, 2008

Santa Fe, New Mexico

This matter came for hearing before the New Mexico Oil  
Conservation Division, DAVID K. BROOKS, Legal Examiner, and  
TERRY WARNELL, Technical Examiner, on June 30, 2008, at the  
New Mexico Energy, Minerals and Natural Resources Department,  
1220 South St. Francis Drive, Room 102, Santa Fe, New Mexico.

REPORTED BY: JOYCE D. CALVERT, P-03  
Paul Baca Court Reporters  
500 Fourth Street, NW, Suite 105  
Albuquerque, New Mexico 87102

1 MR. CRESS: Thank you. I'd like to call Mr. Ken  
2 Taylor.

3 MR. BROOKS: And for your information, you have  
4 2 hours, 38 minutes remaining. Did you retrieve your copy of  
5 this exhibit? Is this another copy or --

6 MR. CRESS: Please keep that one.

7 KENNETH G. TAYLOR

8 after having been first duly sworn under oath,  
9 was questioned and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. CRESS:

12 Q. Mr. Taylor, would you please state your name for  
13 the record, please, and your position with Intrepid.

14 A. Kenneth G. Taylor, manager of financial planning.

15 Q. And you've worked for Intrepid for how long?

16 A. Three years in August.

17 Q. Okay. If you could turn to Intrepid Exhibit 29.

18 Okay. This is a copy of your resume?

19 A. Yes, it is.

20 Q. Okay. Can you describe your education for me,  
21 please?

22 A. Yeah. I have three degrees. I have an undergrad  
23 in civil engineering from Brigham Young University. I have two  
24 Master's in business. One is an MBA and one is a Master's in  
25 business research from the University of Chicago and Stanford

1 opportunity, and then Mr. Feldewert will have an opportunity to  
2 respond.

3 MR. MANGES: Well, the lady left. She was here for a  
4 very brief interval --

5 MR. BROOKS: Right.

6 MR. MANGES: -- before we noticed, and then she left,  
7 and then we broke, and she never came back.

8 MR. BROOKS: She was here for only a portion of the  
9 testimony. I do not know exactly how much. But it was not all  
10 of it. But I don't have any record of when she came in or when  
11 she left.

12 MR. MANGES: Well, when -- it should be clear on the  
13 transcript.

14 MR. BROOKS: If you will brief these issues for me.  
15 I have taken the approach that I have on the exhibits,  
16 basically, because we have that statute with regard to the  
17 Energy, Minerals, and Natural Resources Department about the  
18 maintenance of confidential information.

19 And as far as I know, the statute has not been  
20 construed by anybody. So a good question as to what it means,  
21 but unfortunately it imposes some penalties on the person  
22 responsible -- on the individual responsible for its violation  
23 which causes me some concern.

24 But I will ask the parties to brief that issue on  
25 Mr. Taylor's testimony. Because I do believe there's a waiver

1 on the issue since there was a member of the public present  
2 during part of the testimony.

3 Okay. That concludes all I have except that nobody  
4 is free to leave until the court reporter is satisfied that she  
5 has all the exhibits and knows which ones are under seal.

6 This hearing stands adjourned.

7 [Hearing concluded.]

8 \* \* \*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25