

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: 14732

APPLICATION OF Southwest Royalties FOR APPROVAL OF A  
REMEDICATION PLAN PURSUANT TO 19.15.29.11 NMAC FOR THE ARCO  
FEDERAL WELL NUMBER 1 TANK BATTERY, EDDY COUNTY, NEW MEXICO.

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
EXAMINER HEARING

BEFORE: WILLIAM V. JONES, Technical Examiner  
DAVID K. BROOKS, Legal Examiner

September 29, 2011  
Santa Fe, New Mexico

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This matter came on for hearing before the New  
Mexico Oil Conservation Division, WILLIAM V. JONES, Technical  
Examiner, and DAVID K. BROOKS, Legal Examiner, on September  
29, 2011, at the New Mexico Energy, Minerals and Natural  
Resources Department, 1220 South St. Francis, Drive, Room  
102, Santa Fe, New Mexico.

REPORTED BY: Irene Delgado, NM CCR 253  
Paul Baca Professional Court Reporters  
500 Fourth Street, NW, Suite 105  
Albuquerque, New Mexico 87102

A P P E A R A N C E S

FOR THE APPLICANT:

HOLLAND & HART  
MICHAEL FELDEWERT  
P.O. Box 2208  
Santa Fe, NM 87504

FOR OCD:

GABRIELLE A. GERHOLT  
OIL CONSERVATION DIVISION  
1220 South St. Francis  
Santa Fe, NM 87501

I N D E X

EXHIBITS

SOUTHWEST ROYALTIES 1 THROUGH 15 36

RANDALL. T. HICKS

Direct by Mr. Feldewert 04  
Cross by Ms. Gerholt 36  
Redirect by Mr. Feldewert 39

GLENN VON GONTEN

Direct by Ms. Gerholt 47  
Cross by Mr. Feldewert 63  
Redirect by Ms. Gerholt 75

1 EXAMINER JONES: Let's go back on the record this  
2 morning and call Case 14732, which is an application of  
3 Southwest Royalties for approval of a remediation plan  
4 pursuant to 19.15.29.11 NMAC for the Arco Federal Well Number  
5 1 Tank Battery in Eddy County, New Mexico. Call for  
6 appearances.

7 MR. FELDEWERT: Mr. Examiner, Michael Feldewert with  
8 the Santa Fe office of Holland and Hart, appearing on behalf  
9 of the applicant, Southwest Royalties, Inc., and I have one  
10 witness.

11 EXAMINER JONES: Other appearances?

12 MS. GERHOLT: Gabrielle Gerholt on behalf the Oil  
13 Conservation Division, and the Division also has one witness  
14 for this case.

15 EXAMINER JONES: Any other appearances?

16 (No response.)

17 EXAMINER JONES: Will the witnesses please stand and  
18 state your names.

19 MR. VON GONTEN: Glenn Von Gonten.

20 MR. HICKS: Randall Hicks.

21 EXAMINER JONES: Will the court reporter please  
22 swear the witnesses.

23 (Oath administered.)

24 MR. FELDEWERT: Call our witness?

25 EXAMINER JONES: No prehearing or pre --

1 MR. FELDEWERT: I do not.

2 EXAMINER BROOKS: Opening statements?

3 MS. GERHOLT: I do have an opening statement, but we  
4 can move right into testimony.

5 EXAMINER BROOKS: I don't care.

6 EXAMINER JONES: It's up to you.

7 MS. GERHOLT: Why don't we go ahead and start with  
8 testimony.

9 EXAMINER BROOKS: It's customary to ask the  
10 defendant's counsel if they want to make their opening  
11 statement now or defer it until the beginning of the close of  
12 plaintiff's case.

13 RANDALL T. HICKS

14 (Sworn, testified as follows:)

15 DIRECT EXAMINATION

16 BY MR. FELDEWERT:

17 Q. Would you please state your name for the record?

18 A. My name is Randall T. Hicks.

19 Q. Mr. Hicks, what do you do you for a living?

20 A. I'm a hydrologist for R. T. Hicks Consultants.

21 Q. Is that a company that you formed?

22 A. Yes, it is.

23 Q. Does your work regularly include consultations in  
24 developing corrective action plans for oil and gas leases in  
25 Southeast New Mexico?

1 A. Yes, it does.

2 Q. How long have you been engaged in corrective action  
3 projects or remediation projects, oil and gas waste in  
4 Southeast New Mexico?

5 A. Started in the early to mid 1980s, so it's been  
6 about 30 years.

7 Q. Okay, have you previously testified before the  
8 Division and the Commission as an expert witness?

9 A. Yes, I have.

10 Q. Are your credentials as a geohydrologist been  
11 accepted and made a matter of record?

12 A. Yes.

13 Q. Are you familiar with the application filed by  
14 Southwest Royalties in this case?

15 A. Yes.

16 Q. Were you engaged, Mr. Hicks, by Southwest Royalties  
17 to work with BLM to develop a corrective action plan?

18 A. I was.

19 Q. And was that for an area adjacent to the Arco  
20 Federal Well Number 1 Tank Battery?

21 A. Yes, it was.

22 Q. Is that what you are here to discuss today?

23 A. Yes.

24 MR. FELDEWERT: I would tender Mr. Hicks as an  
25 expert witness hydrogeology, oil field waste, and corrective

1 action projects.

2 EXAMINER JONES: Any objection?

3 MS. GERHOLT: I would just ask in which cases that  
4 he appeared before the Commission that you were qualified as  
5 an expert.

6 THE WITNESS: I was -- I have been in front of the  
7 Commission for two of the vulnerable area hearings in the San  
8 Juan Basin. I have been before the Commission for the first  
9 pit rule hearing. I think that was in 2000. I have been  
10 before the Commission in the surface waste hearings. I have  
11 been before the OCD in an environment -- before a hearing  
12 officer for a remediation case near Loco Hills as well.

13 MS. GERHOLT: And you were qualified as an expert in  
14 all of those cases?

15 THE WITNESS: All of them.

16 MS. GERHOLT: No objection, Your Honor.

17 EXAMINER JONES: He is so qualified.

18 THE WITNESS: Thank you.

19 Q. (By Mr. Feldewert) Mr. Hicks, would you briefly  
20 outline what Southwest Royalties seeks under this  
21 application?

22 A. What Southwest Royalties seeks is the authorization  
23 from NMCOD to complete the BLM approved plan to remediate the  
24 environmental impacts near the Arco Federal Battery.  
25 Specifically we are here to seek approval for the trench

1 burial of impacted soil at the site.

2 Q. And was that the transfer, was that the procedure  
3 that was approved by the Bureau of Land Management?

4 A. It was.

5 Q. So this is federal property?

6 A. Yes, it is.

7 Q. Okay. Would you turn to what's been marked as  
8 Southwest Royalties Exhibit Number 1 for purposes of  
9 identifying the location of the area that's at issue?

10 A. Yes. Exhibit Number 1 is a 2009 aerial photograph  
11 from Google Earth, and in the lower right-hand portion of  
12 that photograph, you will see the -- the downtown swinging  
13 area of Loco Hills, New Mexico. North of Loco Hills is, you  
14 will see a series of impoundments, which is a liquid waste  
15 disposal facility, a surface waste management facility. And  
16 then to the -- to the left you will see a small blue  
17 rectangle that is the Arco Federal Battery site.

18 Q. If you then turn to Southwest Exhibit Number 2, is  
19 that an accurate depiction of the site before the restoration  
20 efforts were commenced at this site?

21 A. Yes, it is.

22 Q. And what concerns did the BLM express about this  
23 particular tank, battery site?

24 A. You will notice through the examination of that  
25 particular photograph that the area just above the netted

1 tank is an area of no vegetation relative to the areas above  
2 in the landscape. You will also see that there is some  
3 excavation or sampling trenches that exist in and near the  
4 areas of no vegetation and on the border of the vegetation  
5 and no vegetation. And there has been a small spill area,  
6 which was September 2010 spill, which is in the lower,  
7 right-hand portion of the unvegetated area. And this was the  
8 area of no vegetation that the BLM is concerned about.

9 Q. Now, this area of no vegetation, did you determine  
10 the origin of this particular area -- of the -- and its prior  
11 use?

12 A. What we found through the examination of historical  
13 aerial photographs and other information was that right about  
14 where that individual is walking, above the trench is a  
15 historic or legacy produced water disposal pit which was  
16 authorized by the NMOCD until the periods of the early 1980s,  
17 mid 1980s. The pit had been in existence since the mid 70s,  
18 and so it had been about ten years of operational existence  
19 before new orders from the NMOCD were issued and the surface  
20 disposal of liquid, produced water, oil field waste, was  
21 prohibited and they closed the pit and began to dispose of  
22 their produced water elsewhere.

23 Q. Now, this recent spill that you mentioned, did this  
24 occur in the area of this historic disposal pit?

25 A. It was. The recent spill occupied -- fell over the

1 footprint of the impact that one could see on the historic  
2 aerial photographs.

3 Q. And with the oversight of the BLM, did you conduct  
4 an investigation of this area and in both the spill and the  
5 produced water pit?

6 A. Yes, we did.

7 Q. And did you determine whether this -- this small  
8 spill or this pit posed any threat to groundwater?

9 A. We did a complete -- what I would consider a  
10 complete investigation of the existing data associated with  
11 the existence of groundwater in the area. And we came to the  
12 conclusion, based upon that data, that groundwater,  
13 protectable groundwater was not present at the site.

14 Q. And does BLM agree with that determination?

15 A. BLM agreed.

16 Q. And did the OCD eventually agree by way of a letter?

17 A. OCD agreed, yes.

18 Q. Is there any question that this impacted soil poses  
19 any threat to human health?

20 A. No, there is no concern on the part of -- of BLM,  
21 and there was no concern by NMOCD, and we found no evidence  
22 in our examination that the impact to the soil would cause  
23 threat to public health.

24 Q. So following your investigation, what was the  
25 remaining concern then that the BLM had with respect to this

1 area?

2 A. It was an environmental concern principally  
3 associated with the loss of vegetation, a lack of vegetation  
4 and the subsequent loss of habitat.

5 Q. I want to talk about that then briefly. You  
6 mentioned a concern being loss of vegetation and habitat. If  
7 you turn to Southwest Royalties Exhibit Number 3, is that a  
8 close-up view of the area that's at issue in the blue box?

9 A. Yes. It's the same blue box that was on the  
10 previous exhibit. This is all from Google Earth. It's the  
11 same -- coming from the same program. This is a 2005 aerial  
12 photograph which shows within the blue box the outlines. You  
13 can see the two tanks that are steel tanks, and you can also  
14 see, if you have got probably better eyes than me, the open  
15 top tank just north or up from those two tanks, you can also  
16 see the area of no vegetation. And you may have recalled  
17 from the earlier photograph that there was a road turnout  
18 north of the area of vegetation. You can see that road  
19 turnout on that, within that blue box as well.

20 Q. Now, the next exhibit, Southwest Royalties Exhibit  
21 Number 4, does that assist in demonstrating the BLM's concern  
22 about the growing fragmentation of habitat and loss of  
23 vegetation in the area?

24 A. Yes. And I would direct individuals to take a look  
25 at Exhibit 1, which is the 2009.

1 Q. Keep your finger on 4.

2 A. Keep your finger on 4, and look at Number 1 and  
3 compare them. And what you will see is that in 2009, the  
4 footprint of oil and gas activities in Loco Hills is  
5 significantly different than in 2005. There is increased  
6 activity.

7 With the increased activity came additional loss of  
8 vegetation and habitat, and, as a result, the BLM is very  
9 concerned that they maintain and create as much vegetation  
10 and habitat as possible in areas that are either not being  
11 used for the active development production of oil and gas or  
12 areas that have been impaired on federal surface due to past  
13 activities.

14 Q. And just to close the loop on that question, is  
15 Southwest Royalties Exhibit Number 1 a more recent picture  
16 than Southwest Royalties Exhibit Number 4?

17 A. Yes, it is.

18 Q. And that shows the growing development in the area.  
19 Do you recall the dates of these Google Earth pictures?

20 A. Indeed. Exhibit Number 1 is 2009, and with a good  
21 magnifying glass you will see it's on the lower, left-hand  
22 corner. For Exhibit Number 4, it's 2005, and a good  
23 magnifying glass shows it in the lower left-hand corner.

24 Q. Okay. Having raised this concern then about the  
25 lack of vegetation and loss of habitat, what did the BLM ask

1 Southwest Royalties to do at this particular site?

2 A. To develop a plan to revegetate the surface.

3 Q. Did you come up then with a plan in working with the  
4 BLM to meet their revegetation desires?

5 A. Indeed. We investigated the site, characterized it,  
6 exchanged information and data with the BLM via mail,  
7 electronic mail, telephone calls, and we had two meetings.

8 Q. Does Southwest Royalties Exhibit Number 5 contain  
9 the revegetation plan that was approved -- eventually  
10 approved by the Bureau of Land Management?

11 A. That's correct, it does.

12 Q. And then did the companies subsequently submit this  
13 same plan to the Oil Conservation Division under Rule 29?

14 A. We did.

15 Q. That's what you call the Part 29 plan?

16 A. A remediation plan under Part 29, sure.

17 Q. Now, I know this particular exhibit has the details  
18 of the plan within it, but would you briefly outline for the  
19 Examiners what the BLM asked you to do at the site or the  
20 plan that was approved by the BLM?

21 A. We, in a meeting with BLM, we had, for the purposes  
22 of discussion, a plan outlined. And they -- we talked  
23 through that plan, and the BLM made several recommendations  
24 for improvements and different kinds of things, and what we  
25 ended up with is, indeed, through the process of working with

1 BLM, the plan that is imbedded in this particular document,  
2 and that plan involves several steps to address the  
3 revegetation of the surface.

4 Q. Okay. What were those steps? What was the plan?

5 A. The first step, in a nutshell -- I mean, it's  
6 explained in detail in this particular submission, but in a  
7 nutshell, excavate the salt impacts that have occurred due to  
8 the recent 2010 spill and the historic impacts due to the  
9 authorized disposal of produced water in a pit, excavate  
10 those salt impacts to about one to four feet below the  
11 existing surface. Excavate a trench on site and adjacent to  
12 the area of impact, and that trench would provide clean fill,  
13 which would then be emplaced into the areas that had been  
14 where the salty dirt had been excavated. We would add a  
15 little straw and organic matter to that material as necessary  
16 so that it could increase its probability of rapid  
17 revegetation.

18 The -- we placed -- the plan calls for placing the  
19 salt impacted dirt in that same trench that was excavated to  
20 create the clean fill. Cover the salty dirt with a liner,  
21 and on top of that liner place four feet of clean dirt over  
22 that liner. Fence all of the areas, the trench and the area  
23 that has been rehabilitated, where the soil has been  
24 rehabilitated, and then re-seed both areas at an appropriate  
25 time, which is generally spring before the monsoon hits to

1 facilitate the revegetation.

2 Q. Now, turning then to Southwest Royalties Exhibit  
3 Number 6, would you then explain the tool or the process that  
4 was employed by Southwest Royalties and the BLM to determine  
5 that placement of the salt-impacted soil in the existing  
6 trench at the site made the most sense in this particular  
7 circumstance?

8 A. Certainly. In our initial meeting with the Bureau  
9 of Land Management technical staff, we talked about how we  
10 might go forward in developing appropriate remedies, what was  
11 necessary for characterization, et cetera. Earlier the BLM  
12 had expressed -- long before this site was a glimmer in BLM's  
13 eye, the BLM had expressed some interest in use of net  
14 environmental benefit analysis as a tool to determine  
15 appropriate remedies. And so in our first meeting with the  
16 BLM, I brought forward, shall we do a net environmental  
17 benefit analysis of various remedies to determine what is the  
18 best approach at this particular site, and they agreed. And  
19 so --

20 Q. What is this tool?

21 A. The net environmental benefit analysis is explained  
22 in this document to some degree, but it relies upon on Page 1  
23 of that particular document in the center, you will find a  
24 series of bullets, and those bullets are the references that  
25 are used in terms of peer-reviewed published information.

1 about what a net environmental benefit analysis is, how to  
2 conduct it. There is various methods, and there is also  
3 information and links in here that would tell an individual  
4 who is curious that EPA has used this technique for the  
5 evaluation of certain environmental response actions, et  
6 cetera.

7 So it is a -- a -- and you will see, for example,  
8 that some of these references are 2001, 2003, this is nothing  
9 that hasn't been around for a period of time. It's been  
10 used, it's been peer reviewed, and it is a -- and there is  
11 even an AFTM standard for it.

12 Q. Now, using this tool, was there a list of  
13 alternatives that were considered by BLM and Southwest  
14 Royalties in dealing with the salt-impacted soil at the  
15 site?

16 A. Yes.

17 Q. Where do we find that list of alternatives?

18 A. That's right before above those bullets, and we came  
19 up with A through F as a set of remedial response actions  
20 that may or may not be appropriate for the site, and I can  
21 characterize them very briefly by saying that A and B of  
22 those remedies involved digging and hauling, is what we call  
23 it, in terms of the exportation of impacted material to a  
24 centralized facility such as a landfill.

25 C and D deal with disposal of the impacted material

1 in an onsite trench as opposed to exportation to a  
2 centralized facility. E also dealt with the exportation of  
3 material to a centralized facility, but the amount of  
4 exportation that would occur, the amount that we would  
5 actually dig out would be significantly smaller than what is  
6 represented by A and B.

7 And Remedy F was an in-place remedy where we  
8 wouldn't excavate any for exportation or placement in a  
9 trench, we would rip and disk the site as it says in terms of  
10 opening up the permeability, adding some amendment such as  
11 gypsum as required and then flushing the salt out of the soil  
12 to an -- to a zone below the root zone whereby vegetation  
13 would be able to be re-established at the site. And those  
14 are the remedies that we evaluated as part of this net  
15 environmental benefit analysis.

16 Q. So you had your list of options. You had this tool.  
17 Can you then just briefly walk us through this particular  
18 document to demonstrate at a high level what type of  
19 considerations go into an examination of these alternatives  
20 under this net environmental benefit analysis?

21 A. Absolutely. We did use these references as a basis  
22 for determining the specific methodology, and those are  
23 listed in here in terms of which two we used. And what we --  
24 what one has to do with a net environmental benefit analysis  
25 as it suggests. It evaluates the overall impacts to the

1 environment as a whole, as well as some other  
2 non-environmental impacts that are important. So there is a  
3 number of different criteria that are used in terms of  
4 looking at this from a holistic standpoint.

5 And on Page 2, for example, of this net  
6 environmental benefit analysis document, we see that there's  
7 groundwater and surface water. Those were the first two  
8 criteria that we evaluated, and we quickly came to the  
9 conclusion that there was no groundwater there, so there was  
10 no need to include it in an analysis as, you know, the  
11 scoring is basically zero; there is no groundwater.

12 Our evaluation also showed that surface water could  
13 not be impacted by any of these remedies, so we did not  
14 include surface water in our overall analysis. It fell out  
15 because it too scored a zero; it was not important. So with  
16 respect to fresh water, which are important to NMOCD rules,  
17 these two particular factors at this particular site played  
18 no -- played no role in the scoring.

19 All of the remedies would generate some dust, air  
20 pollution, air quality, that's an environmental issue. Dust  
21 is relatively important in the oil patch in terms of BLM,  
22 other stakeholders, et cetera, so we felt it was an important  
23 consideration to -- under air. And so on the next Page 3, we  
24 come up with a scoring which is our professional judgment  
25 regarding how we assigned the scoring for dust. We did this,

1 and you will see that we assign a score. Then there's a site  
2 multiplication factor, how important is dust generation at  
3 that particular site? What is the stakeholder's level of  
4 importance. And then we multiplied to create a weighted  
5 value so that we can consider the factors of that site in  
6 particular as well as the importance the stakeholder has  
7 because this is an interactive process, in this case, with  
8 the BLM.

9 The next, on the bottom of Page 3, exhaust  
10 generation, there is going to be vehicles that are going to  
11 generate exhaust. Page 4 has that scoring. In the middle of  
12 Page 4 it talks about habitat restoration, and that's an  
13 environmental issue that was very important to the BLM. We  
14 looked at native vegetation, what's going on with native  
15 vegetation because that was very important to the BLM. And,  
16 as you can see on the bottom of Page 4, the multiplication  
17 factors are three. The site multiplication factor for native  
18 vegetation is very important because there is so much less of  
19 it than there used to be. It's become a precious commodity,  
20 and it was very important to the BLM, so we gave it those  
21 scores.

22 On the top of Page 5, the restoration of original  
23 land forms, another environmental issue. As you can see from  
24 the scoring, that was not that important to BLM or the site.  
25 It was given a multiplication factor of one.

1           The connectivity of the habitat was important to  
2 BLM, how can this habitat be connected because it is so  
3 fragmented due to the drilling activity. On the top of the  
4 page -- there is no scoring for that or wildlife. We --  
5 because in working with the BLM and also from our analysis of  
6 it, both the fragmentation, the connectivity and the  
7 wildlife, it came up with the same score, you know, for all  
8 of the different remedies, and so it had no bearing. It  
9 didn't change anything. So we didn't bother including it in  
10 this particular analysis.

11           The net environmental benefits process also asks  
12 that you -- that one considers social costs and social  
13 benefits. And so one of the areas of concern that we learned  
14 about from the BLM was the allocation of the regulatory  
15 review time. They don't want -- they want to be able to get  
16 something done, get it processed, and get things revegetated,  
17 and so that was a factor that we considered.

18           Forage for livestock, all remedies worked out to be  
19 the same, so there was not a box for that. It made no  
20 difference in the overall scoring. Impact on resources, the  
21 impact on resources that we are talking about mainly here and  
22 what was most important to the BLM and others is how much  
23 fresh water are we going to be using out here in Loco Hills  
24 where there is very little fresh water to begin with, which,  
25 on the top of Page 7, is why you see a site multiplication

1 factor of three. There is not much fresh water out there to  
2 begin with; it's important for the site.

3 Another element that is of social interest is the  
4 environmental budget that the operator is going to need to  
5 use up in order to implement a different set of remedies and  
6 if BLM agreed -- and I think most people can agree with this  
7 statement -- if you can have a low-cost solution that cures  
8 your problem, one is more likely to see more problems cured  
9 than an expensive remedy that -- that results in the same  
10 cure. And so there is a -- there is a social benefit to  
11 that, and that is why cost is put in here as a -- as a  
12 factor, and it is part of the analysis cost in the published  
13 documentation.

14 Q. And that's on Page 8 of the report?

15 A. That's on -- yes, it's on Page 8 in terms of our  
16 cost analysis.

17 Very briefly, in terms that of that cost analysis,  
18 Remedies A, B, and E are the dig and haul remedies. C and D  
19 are the burial trench, and F, the lowest-cost remedy, was the  
20 in-place remediation of the soil. And I promise you I'm  
21 getting close to the end.

22 Human safety is another element that is concerned  
23 both in the NEBA process. Human safety is also -- you know,  
24 there is chapters on safety in the OCD rules, and so --

25 Q. That got a high factor as well?

1 A. That got a very high factor.

2 Q. What type of things are you looking at in terms of  
3 human safety --

4 EXAMINER BROOKS: Excuse me, gentlemen. I realize  
5 that it's gotten much later than I thought it was. I need to  
6 take a lunch recess at this time.

7 EXAMINER JONES: We will break until 1:30.

8 EXAMINER BROOKS: Okay.

9 (Lunch recess taken at 11:47 a.m. The hearing  
10 resumed at 1:32 as follows:)

11 EXAMINER JONES: Okay. Let's go back on the --  
12 let's go back on the record here in Case 14372 and continue  
13 the applicant's examination of the witness.

14 CONTINUED DIRECT EXAMINATION

15 BY MR. FELDEWERT:

16 Q. Let's go back, Mr. Hicks, where we were on Exhibit  
17 Number 6, which is the environmental benefit analysis. I  
18 think you were finishing up your testimony on the safety  
19 issue.

20 A. Yeah. We had just finished up evaluation of the  
21 cost. We were talking about human safety, and one of the  
22 things I had just answered before we left was the fact that  
23 human safety is a consideration as part of the net  
24 environmental benefit analysis, and one of the biggest  
25 factors that went into that was vehicular traffic on public

1 roadways as being a relatively high level of threat to human  
2 safety. So that's why these scores came the way they did.  
3 And, of course, with respect to human safety, the multiplier  
4 factor needs to be the highest, which is what we scored it  
5 at.

6 Q. One of the questions I had then when I looked at  
7 this is I noticed it was marked as a draft. Do you see that?

8 A. That's correct.

9 Q. Can you explain why this particular exhibit is  
10 marked as draft and what ended up resulting?

11 A. The part of the net environmental benefit analysis  
12 is a consensus or interactive approach with the affected  
13 parties. And, as I had indicated earlier, the Bureau of Land  
14 Management had expressed an interest back in 2010 concerning  
15 the use of the net environmental benefit analysis as a tool  
16 that they might want to put into their quiver.

17 So this gave us an opportunity to look at it, and  
18 part of like -- it's a consensus issue. So it stays draft  
19 until you get the input that's necessary from the  
20 stakeholder. In this case, it was the -- thank you very  
21 much -- in this case it was the Bureau of Land Management.  
22 And so when we submitted it to the BLM for meetings and  
23 discussion it was marked draft because we didn't want to  
24 presume that it was final until we talked to them about it  
25 and got their input which is what we did.

1 Q. Did you actually -- is this the plan then that you  
2 submitted to BLM?

3 A. It is.

4 Q. Was it then the subject of subsequent discussion?

5 A. Yes, it was.

6 Q. And did the BLM then use this and decide upon a  
7 particular option?

8 A. We -- we met them on June 9 and we discussed all of  
9 the options and what -- how we should go forward in order to  
10 create the cure of the environmental impairment that they  
11 wanted us to work with, and we came up with the selected  
12 remedy, the selected alternative, and we asked if BLM wanted  
13 us to go any further with the net environmental benefit  
14 analysis, and they said, "No thanks. This is good. You're  
15 done. Let's get with the program and begin the surface  
16 remedy."

17 Q. If I look then at the last page of Exhibit Number 6,  
18 does it contain the result of the net environmental benefit  
19 analysis?

20 A. Yes, it does.

21 Q. And I see that Option C had the highest score?

22 A. Yes, both --

23 Q. Is that, having the highest score, that's a good  
24 thing?

25 A. Yeah, that's a good thing. It's not like golf.

1 Q. It looked like my golf score. What option then did  
2 BLM decide to utilize using this net environment benefit  
3 analysis?

4 A. What we came up with and BLM contributed to the  
5 elements of the final remedy which was based on Remedy C.  
6 Both C and D involved trench burial. E was a minimal dig and  
7 haul, and A and B were the largest amount of removal of soil,  
8 and they scored the lowest.

9 Q. And then if I go back to Page 1 that identifies  
10 Option C, does it not, that was chosen in part using this net  
11 environmental benefit analysis?

12 A. That's correct.

13 Q. Did Option C then become, with -- become the plan  
14 reflected in Southwest Royalties Exhibit Number 5?

15 A. It -- let me just -- Number 5 is our -- yes.

16 Q. Okay. Then having developed this -- this corrective  
17 action plan with the BLM using this net environmental benefit  
18 analysis, did you then apprise the OCD that you were going to  
19 proceed with the BLM approved plan?

20 A. We did.

21 Q. Okay. And what was the -- the Division's response  
22 contained in what is marked as Southwest Royalties Exhibit  
23 Number 7?

24 A. Yes, it is. The June 17 letter is in response to  
25 a -- a kind of a notice of construction we had -- BLM asked

1 for a couple of changes that we created to the Alternative C.  
2 We resubmitted those changes in a final plan that we had  
3 worked with BLM that was submitted to the BLM on June 13 with  
4 a copy to NMOCD and with a start date of June 20 for  
5 construction.

6 Q. And the first paragraph of this letter reflects that  
7 the Division had reviewed the work plans and reports you had  
8 submitted on behalf of Southwest Royalties, correct?

9 A. That's correct.

10 Q. And that work plan and reports were in essence the  
11 Option C that was -- that had been chosen under the net  
12 environmental benefit analysis?

13 A. That is true.

14 Q. So if I then look at the second paragraph of this  
15 June 17 letter, about halfway through, does it reflect the  
16 fact that the -- that the Division agreed that there was no  
17 protectable groundwater in this area?

18 A. Yes. The second or third sentence reads, "OCD  
19 accepts Southwest Royalties' assessment of both the chloride  
20 soil contamination and its conclusion that there is no  
21 protectable groundwater at this site and no risk to human  
22 health."

23 Q. And then they go on to cite to you Part 29, correct?

24 A. That's correct. That's the next sentence.

25 Q. Which deal with corrective actions for releases that

1 endanger public health or the environment?

2 A. Or the environment, that's true.

3 Q. Did the Oil Conservation Division in this letter  
4 then recognize that the main environmental concern here --  
5 and I'm reading from the last sentence -- that the main  
6 environmental concern is the timely reestablishment of  
7 vegetation at the site?

8 A. That's what that letter reads. That's exactly  
9 correct.

10 Q. Did they -- however, they didn't -- they indicated  
11 that you could not go forward with the approved plan,  
12 correct?

13 A. The first sentence of the last paragraph on that  
14 first page says, "However, Southwest Royalties is prohibited  
15 from disposing of oil field waste, including remediation  
16 waste," paren, "contaminated soil," which is what we were  
17 dealing with, "in a pit by Rule 19.15.34.11."

18 Q. Okay. And then in the next page of this letter, if  
19 I go to the carry-over paragraph at the top, last sentence,  
20 they point out that the -- they contend -- point out that the  
21 BLM does not have authority to authorize disposal of oil  
22 field waste or remediation waste in a pit, correct?

23 A. That's what the last paragraph says. And I might  
24 want to also say that, you know, the disposition of produced  
25 water rule does have some exceptions in it so, there are some

1 ways where you can dispose of it in their listing.

2 Q. That kind of leads me to my next question. I look  
3 at this June 17 letter, and they reference on there on that  
4 first page in the second paragraph is what I will call Part  
5 29, or Rule 29.11. You see that?

6 A. Yes, I do.

7 Q. After receiving this letter, did you then submit --  
8 resubmit the BLM approved plan under the very regulation  
9 cited here, Part 29.11?

10 A. I did. Southwest Royalties did.

11 Q. And did you do that because that is indeed an  
12 administrative exception to the Rule 34 that they cited here  
13 in the same letter?

14 A. That's correct.

15 Q. So if I look at, for example, Southwest Royalties  
16 Exhibit Number 8, which is a copy of the Rule 34 cited in the  
17 last paragraph of the first page of the June 17 letter, and  
18 you flip over to Part 34.11, it lists in the first line of  
19 that, that a Part 29 plan is an administrative exception to  
20 Rule 34, correct?

21 A. That's how I read it.

22 Q. Okay. And then if we flip over to Exhibit 9, which  
23 contains the Part 29 section that was cited in the Division's  
24 June 17 letter, and you go to the second page of that rule,  
25 and specifically at Rule 29.11, is that the language that you

1 believe that the Division was relying upon when they cited  
2 this rule to you in that letter?

3 A. That's correct.

4 Q. And when does this rule -- this rule apply and the  
5 language of this particular, Section 29.1?

6 A. I think that if one reads that section, "The  
7 responsible person shall complete Division-approved  
8 corrective action for releases that endanger public health or  
9 the environment."

10 Q. And the release here that endangered the environment  
11 in the form of vegetation was the release from the water and  
12 the minor release that you previously talked about?

13 A. That's correct.

14 Q. And as they had mentioned in their letter, the main  
15 environmental concern was the revegetation of the earth?

16 A. That's correct.

17 Q. All right. You then submit your Part 29 plan  
18 pursuant -- following the leave of that June 17 letter,  
19 right?

20 A. That's correct.

21 Q. Okay. Then does Southwest Exhibit Number 10 contain  
22 the response that you got from the OCD in response following  
23 submission of your Part 29 plan?

24 A. That is the June 25 letter, correct.

25 Q. Okay. And to quickly walk through this, in the

1 first paragraph, again we see the reference to the  
2 prohibition -- the administrative prohibition set forth in  
3 Division Rule 34.11, correct?

4 A. That's correct.

5 Q. Second paragraph notes, does it not, that this is a  
6 response to your Part 29 plan that you had submitted  
7 following receipt of their June 17 --

8 A. That's the first sentence that refers exactly to  
9 what you said.

10 Q. And do they again recognize here that there is no  
11 protectable groundwater within the area and nor any threat to  
12 human health?

13 A. The first full sentence reads, "OCD is not requiring  
14 Southwest Royalties to conduct corrective action at this site  
15 because there is no protectable water and no threat to human  
16 health."

17 Q. But again we have the last sentence in which they  
18 then, do they not, Mr. Hicks, deny your Part 29 plan?

19 A. The last paragraph of that page says, indeed,  
20 "However, OCD will not allow Southwest Royalties to dispose  
21 of contaminated soil in a pit and hereby denies Southwest  
22 Royalties' proposed surface remedy."

23 Q. Despite the fact you had gotten approval from the  
24 BLM using this net environmental assessment process, and  
25 despite the fact that you then submitted a Part 29 plan

1 following their June 17 letter, they still denied you the  
2 ability to move forward and complete the BLM-approved plan?

3 A. That's correct.

4 Q. Is that why Southwest Royalties filed their  
5 application in August with the Division's Examiners?

6 A. That is correct.

7 Q. Now, with this history, I think we need to add a  
8 little bit more, since the filing of your application, did  
9 the BLM send an e-mail to Southwest Royalties demanding it  
10 proceed with the revegetation efforts?

11 A. BLM did so.

12 Q. And is that reflected in Southwest Royalties Exhibit  
13 Number 11?

14 A. It is.

15 Q. Okay. And if I look at the end of that e-mail,  
16 fourth line from the bottom, it states, "By the end of  
17 September the stockpile contaminates will either be buried as  
18 per our approved procedure" -- that would be the trench  
19 burial?

20 A. That's the trench burial that BLM approved.

21 Q. Okay. "Or transported to an approved facility.  
22 Failure to start the excavation within ten days will result  
23 in issuance of an INC." What's an INC?

24 A. Incidents of Noncompliance, similar to a notice of  
25 violation, et cetera.

1 Q. So does this e-mail still confirm that as of  
2 September 2011 the BLM's approved procedure was to place the  
3 salty dirt in the existing trench at the site?

4 A. Indeed.

5 Q. Now, did Southwest Royalties do as the BLM  
6 requested?

7 A. Southwest Royalties implemented the remedy so that  
8 we could rehabilitate the surface, and we stockpiled the  
9 impacted soil on a liner on site per the suggestion of BLM.

10 Q. Pending the result of this hearing?

11 A. Yeah, that's why we are here.

12 MR. FELDEWERT: Mr. Examiner, I apologize. There  
13 was another exhibit -- I already gave it to Ms. Gerholt --  
14 that I neglected to put in the packet. If I may approach.

15 EXAMINER JONES: Okay.

16 MR. FELDEWERT: This would be Southwest Royalties  
17 Exhibit Number 15.

18 Q. Mr. Hicks, does Exhibit Number 15, is that an  
19 accurate depiction of the work that has been commenced  
20 following receipt of the BLM September 2, 2011 e-mail?

21 A. I took this picture. It shows the excavation of the  
22 impacted soil, and it also shows, in the upper, left-hand  
23 corner, the impacted dirt placed on a synthetic liner.

24 Q. Does this picture depict where the trench is  
25 located, existing trench out there?

1 A. Not yet. We hadn't constructed the trench at this  
2 time.

3 Q. That's right, because you didn't need the dirt  
4 yet?

5 A. We didn't need the dirt yet. That comes next.

6 Q. Anything else about this picture?

7 A. I think the only other thing, as you can see in a  
8 little bit clearer, some of the other pictures that you have  
9 seen, just the landscape around there, the nature of the  
10 vegetation and remembering that there was no vegetation in  
11 this area that's now being excavated.

12 Q. Then if I move to what's been -- what we just went  
13 through was Southwest Royalties Exhibit Number 15?

14 A. Correct.

15 Q. If I now move out of order to Southwest Royalties  
16 Exhibit Number 12 --

17 A. Yes.

18 Q. -- in our packet, is that -- is this an accurate  
19 depiction taken after completion of the work required by the  
20 BLM?

21 A. Tuesday afternoon is when this was taken by the  
22 contractor that completed the work.

23 Q. Tuesday afternoon this week?

24 A. Yeah.

25 Q. Okay. All right. And does this picture then depict

1 the trench?

2 A. It does.

3 Q. And where is that located?

4 A. I'm going to -- let me walk you from the bottom of  
5 the picture to the top. The bottom of the picture is the  
6 open top netted tank which is part of the tank battery. Just  
7 above that is a square area, and you can see some of the area  
8 off to the right as well below the telephone pole, that's all  
9 the rehabilitated soil that was excavated from the trench and  
10 placed at this location to rehabilitate the soil.

11 Just above the new soil area you will see an  
12 excavation. That is the borrow trench that exists. And up  
13 from the borrow trench is the stockpiled soil on the liner.  
14 So the surface remedy relating to the area of the historic  
15 produced water pit and the former -- the 2010 spill has been  
16 implemented, and now we are waiting to complete --

17 Q. Is that the --

18 A. -- the BLM-approved remedy.

19 Q. Is it an accurate depiction of the amount of soil at  
20 issue here?

21 A. Yes, it is.

22 Q. Okay. And the trench is located kind of at the top  
23 of the shadow from the -- I'm not sure that's a shadow.  
24 There is like a black line along this picture. The trench is  
25 basically --

1           A.    The trench is right in the middle.  If you want to  
2 look up here, it's just right between -- it's below the  
3 stockpile and above the new soil right in the middle of the  
4 photograph.

5           Q.    So that's how things sit out there today?

6           A.    It's fenced now, you know, for safety and other  
7 reasons, but that -- that's how it exists now.

8           Q.    Has the BLM visited this site and approved the work  
9 to date?

10          A.    This same day that this picture in Exhibit 15 was  
11 taken, the BLM sent a representative to the site, inspected  
12 the excavation, and took -- I'm sorry, it was the day  
13 after -- took samples of the soil as confirmation samples  
14 that we had met the objectives of the BLM-approved plan.

15          Q.    Okay.  So absent the Division's most recent letter  
16 that we received in June preventing the placement of the soil  
17 in the trench, if they had allowed things to be finished, you  
18 would be done, right?

19          A.    That's correct.

20          Q.    To your knowledge, Mr. Hicks, has anyone from the  
21 Division visited this site?

22          A.    Not that I know of.

23          Q.    What does your application ask the Division  
24 Examiners to do here?

25          A.    What we are asking for is that the NMOCD issue an

1 order to authorize Southwest Royalties to complete the BLM-  
2 approved corrective action, which specifically is to bury the  
3 stockpiled impacted earth in the trench, and with a liner on  
4 top and four feet of clean soil on top of the liner, which is  
5 what the remedy is.

6 Q. Now, just a few homework questions. Is Southwest  
7 Royalties Exhibit Number 13, is that a copy of the legal  
8 notice for this hearing here today?

9 A. That's my understanding, yes.

10 Q. And is Southwest Royalties Exhibit Number 14 a  
11 letter providing notice of filing of this application to the  
12 Bureau of Land Management down in Carlsbad?

13 A. It is.

14 Q. Okay. Mr. Hicks, one final question. Do you agree  
15 with what the BLM identified in Exhibit Number 11 as their  
16 approved procedure to bury this salt contaminated soil to the  
17 available trench at the site?

18 A. I agree that BLM was looking at things from an  
19 environmental standpoint and their interests, their concerns,  
20 it was the best remedy, and they agreed with it, and I agree  
21 with their approval of it.

22 Q. Okay. Were Southwest Royalties Exhibits 1 through  
23 12 and then 15 prepared by you, or compiled under your  
24 direction and supervision?

25 A. They were.

1 Q. And Southwest Royalties Exhibits 13 and 14 were just  
2 the notice of affidavit and the letters that we prepared  
3 providing notice of the hearing. I would move then,  
4 Mr. Examiner, for the admission of Exhibits 1 through 15.

5 MS. GERHOLT: No objection.

6 EXAMINER JONES: Exhibits 1 through 15 will be  
7 admitted.

8 (Exhibits 1 through 15 admitted.)

9 MR. FELDEWERT: And that completes my examination of  
10 this witness.

11 CROSS-EXAMINATION

12 BY GABRIELLE GERHOLT:

13 Q. Good afternoon, Mr. Hicks.

14 A. Good afternoon.

15 Q. Could you please tell me the dates that the Exhibit  
16 15 photo was taken?

17 A. I received it from the contractor -- 15?

18 Q. 15.

19 A. Oh, that was me. It would have been on or about the  
20 12th, 13th or 14th, in that time frame.

21 Q. Of this month?

22 A. Of September.

23 Q. Thank you. Mr. Hicks, if I could have you please  
24 turn to Exhibit 6 in the Southwest Royalties exhibit packet.

25 A. Yes, I'm there.

1 Q. All right. And this is the net environmental  
2 benefit analysis?

3 A. Correct.

4 Q. This analysis does not specifically include any OCD  
5 rules, does it?

6 A. Well, I would beg to differ with that  
7 characterization.

8 Q. Can you point to me within the analysis where an OCD  
9 rule is specified, specifically?

10 A. It does not specify NMOCD rules. It specifies  
11 elements that are incorporated into NMOCD rules, like  
12 groundwater, for example.

13 Q. But there is no reference within the analysis to a  
14 specific OCD rule or rules?

15 A. No, there is not.

16 Q. Thank you. If I could then have you take the OCD's  
17 exhibit notebook, it should be in front of you.

18 A. It's here.

19 Q. Okay. And if I could have you turn to Exhibit 1.

20 A. Yes.

21 Q. Have you -- drawing your attention to the  
22 highlighted portion -- have you seen this e-mail  
23 previously?

24 A. Oh, yes.

25 Q. That's e-mailed to you, is it not?

1 A. It is.

2 Q. And it is from Terry Gregston at the BLM.

3 A. It is.

4 Q. And according to the e-mail, it was sent on June 14  
5 of this year, correct?

6 A. Correct.

7 Q. And would you please read the highlighted portion  
8 for the record?

9 A. "Tuesday, June 14, 2011, 12:45 p.m., Mr. Hicks, the  
10 BLM requires like approval from other regulatory agencies.  
11 In that regard, no response does not qualify as like  
12 approval. The BLM is not in a position to decide for the OCD  
13 what is or is not of a regulatory concern to the OCD. In  
14 short, we need to hear from the OCD in writing or by phone  
15 call that the OCD has no issues with the proposed action.  
16 Thank you for your attention to this matter. Terry Gregston,  
17 Environmental Protection Specialist, Bureau of Land  
18 Management."

19 Q. Thank you. OCD has regulatory authority over the  
20 oil and gas industry in New Mexico. Is that correct?

21 A. That's my understanding.

22 Q. And according to this e-mail from the BLM, the BLM  
23 requires like approval from other regulatory authorities,  
24 don't they?

25 A. That's what it says.

1 MS. GERHOLT: I have no further questions from you,  
2 Mr. Hicks.

3 MR. FELDEWERT: I have one follow-up.

4 EXAMINER JONES: Go ahead.

5 REDIRECT EXAMINATION

6 BY MR. FELDEWERT:

7 Q. Mr. Hicks, turn to Southwest Royalties Exhibit  
8 Number 7.

9 A. Seven. I'm there.

10 Q. This is dated June 17, 2011?

11 A. Correct.

12 Q. That was after receipt of the e-mail from the BLM  
13 that's marked as Exhibit Number 1?

14 A. That's correct.

15 Q. Is that why you sent the letter June 17, 2011?

16 A. That's why I sent the Part 29 plan to the NMOCD, and  
17 that Part 29 plan is Exhibit -- Exhibit 5.

18 EXAMINER BROOKS: Excuse me, Mr. Feldewert, I'm  
19 confused. It looks to me like Exhibit 7 is excerpts from  
20 the -- from the OCD rules.

21 THE WITNESS: I'm fixing that right now.

22 MR. FELDEWERT: Hold on. There is confusion. I had  
23 Southwest Royalties Exhibit Number 7. I'm sorry, Mr. Brooks.

24 EXAMINER BROOKS: I'm sorry.

25 Q. And just so, Mr. Hicks, I want to avoid any

1 confusion, I want to get my time line first, so circle back  
2 here. You received the OCD's Exhibit Number 1 on June 14,  
3 2011?

4 A. That's correct.

5 Q. Then you sent your letter, which has been marked  
6 Southwest Royalties Exhibit Number 7 on June 17, 2011,  
7 correct?

8 A. June 17, Exhibit 7, is from the OCD to us, to  
9 Southwest Royalties in response to a document that we sent.

10 Q. Thank you very much. I'm sorry. I'm glad you  
11 cleared that up. And what they are responding to are the  
12 work plan reports that you had sent -- previously sent to  
13 them?

14 A. June 20.

15 Q. Well, you sent to them the work plans and reports  
16 before the receipt of the June 17 letter?

17 A. I did. That was to BLM and OCD was copied on  
18 that.

19 Q. All right. And then you get the June 17 response  
20 letter from the Division?

21 A. That's correct.

22 Q. And then you submit your Part 29 plan to them --

23 A. That's correct.

24 Q. -- this letter, and they write back and say, "Sorry,  
25 we're still not going to let you put salty dirt in the

1 trench."

2 A. Correct.

3 Q. I just wanted to point out, all of that was after  
4 the BLM e-mail?

5 A. Indeed.

6 MR. FELDEWERT: That's all the questions I have.

7 EXAMINER JONES: Mr. Hicks, you work with Mike  
8 Batcher. Is that who you would --

9 THE WITNESS: Yes. Yes.

10 EXAMINER JONES: Whereabouts is Loco Hills -- north  
11 Loco Hills, but is Maljamar gas plant pretty close to here?

12 THE WITNESS: Maybe 10, 15 miles south, and a little  
13 bit east.

14 EXAMINER JONES: Okay. So south and east. So the  
15 Empire Abo is past -- is west of --

16 THE WITNESS: Empire Abo is a good 15 miles, if not  
17 more. Gas plant, you are talking about? Empire Abo Gas  
18 plant, or the field?

19 EXAMINER JONES: No, just the Empire Abo -- it's  
20 west --

21 THE WITNESS: Yes, it is, quite a bit.

22 EXAMINER JONES: And the Caprock is east of here a  
23 little?

24 THE WITNESS: Right at Maljamar, that's probably ten  
25 miles to the east.

1 EXAMINER JONES: So ten miles off the Caprock?

2 THE WITNESS: Yes.

3 EXAMINER JONES: And you said there is no fresh  
4 water here, groundwater?

5 THE WITNESS: That's correct.

6 EXAMINER JONES: And no surface water? How did you  
7 know there is no groundwater?

8 THE WITNESS: If I may direct you to our first  
9 exhibit, which is the this map showing various facilities  
10 here, the ponds that are located here are subject to an NMOCD  
11 surface waste management permit. They drilled a number of  
12 monitoring wells down 60 feet to the top of the red beds and  
13 completed them as monitoring wells. Their hypothesis when  
14 they drilled them was there was no water, so they completed  
15 these wells at the top of the clay red bed with an open  
16 screen, and that was done, gee whiz, like 80s. They still  
17 don't have water in them in the most recent report, and this  
18 is a series of wells there.

19 In addition, as part of a surface waste management  
20 application that my company put forward for Marbob, we  
21 drilled a well right down here, doing -- using the same kinds  
22 of practices of leaving open the borehole. And it was a  
23 double completion well; we went all the way down to 200 some  
24 feet, but we completed the top one with a full sand pack to  
25 collect any water to the depth of about 180 feet, and it's

1 dry.

2           And so when you -- and when you look at the  
3 structure through here, this whole area is, as you probably  
4 are aware, it's literally sitting on top of that Vacuum  
5 Artesia Flexure, the arch. And so apparently these data that  
6 show that there is no groundwater is certainly consistent  
7 with the structural interpretation that the permeable units  
8 on top of the red beds are just structurally too high. They  
9 are above the water, whatever water table there might be  
10 around there. So there is, in fact, no water. No -- and  
11 when I say no water, I'm talking about there is probably  
12 water in the red beds, but it's confined, and it might even  
13 be salty, but there is no water table aquifer, no water table  
14 groundwater.

15           EXAMINER JONES: Okay. I saw the Division agreed  
16 with that, too. Is Jim Amos concerned about getting -- the  
17 time for getting this re-seeded?

18           THE WITNESS: He was.

19           EXAMINER JONES: In other words, before wintertime?

20           THE WITNESS: My feeling was that we had scheduled  
21 this for, you know, to be done in June, and we were -- we had  
22 the contractor lined up and everything ready to go, and I  
23 think that there was two things, he wanted to make certain  
24 that Southwest Royalties was addressing their concern, number  
25 one, and that was a primary concern of Jim Amos. And number

1 two, that it gets done so that it can be seeded at the right  
2 time, you know, that wintertime won't come, there won't be  
3 delays, because now all we have to do is run out there with  
4 some seed, and it will take care of it itself.

5 EXAMINER JONES: Are you aware of Southwest  
6 Royalties retaining any internal legal help or external legal  
7 help before their retaining Mr. Feldewert here?

8 THE WITNESS: I cannot answer that. I do not know  
9 what they did in Midland. What I -- I had heard is that, you  
10 know, they have internal counsel. I think that their own  
11 internal counsel was looking at it, and when it came time to  
12 address issues before this group here, that's when they  
13 looked at Holland and Hart.

14 EXAMINER JONES: Which is --

15 THE WITNESS: But, you know, there is some  
16 speculation on that.

17 EXAMINER JONES: Okay. This NEBA process, is that  
18 precedent in a lot of other -- is that a method of addressing  
19 an issue like this, or --

20 THE WITNESS: Yes.

21 EXAMINER JONES: -- for environmental remediation,  
22 is that --

23 THE WITNESS: Probably the place that net  
24 environment benefit analysis is used most happens to be with  
25 marine oil spills. It's been used in Alaska and other kinds

1 of places, and it generally has been used extensively in  
2 impairment of surface water issues, wetlands, and those kinds  
3 of -- one would consider those kinds of -- of where there is  
4 a response that needs to be made.

5 EXAMINER JONES: Okay. But the factors are, they  
6 are subjective?

7 THE WITNESS: Yeah, they are --

8 EXAMINER JONES: Weighting factors?

9 THE WITNESS: The weighting factors, and they are  
10 subjective, and which is, you know, the reason why it's a  
11 draft is because you -- you work with the stakeholders to  
12 make sure that you have considered what's important to them.  
13 And so you don't finalize it until the -- the people that  
14 have the concern agree with it.

15 EXAMINER JONES: Okay. But the NEBA doesn't have a  
16 place in there to put in the limiting rules and regs or --

17 THE WITNESS: It is -- it is designed to determine  
18 what the best remedy is, you know. It is designed to say --  
19 not being considered with regulation, it's a tool that says  
20 what's going to be best for this site from a holistic  
21 environmental standpoint.

22 EXAMINER JONES: I understand it. But sometimes it  
23 might be impractical to drive 80 miles an hour, but if the  
24 law says you can't go past 55 or -- in other words, the NEBA  
25 does not have any limiting regulatory -- you have to take the

1 NEBA and apply the limits of whatever rules are involved.

2 THE WITNESS: Oh, you have to fit it into a box --

3 EXAMINER JONES: Yes.

4 THE WITNESS: -- that conforms with the rules,  
5 that's absolutely true. And -- and, in fact, you know, one  
6 could argue that this might be the way to make rules in the  
7 first place, but that's another issue. But you -- you do the  
8 NEBA, and then it has to fit within the sideboards of the  
9 regulations.

10 EXAMINER JONES: Okay. Now I'm going to turn this  
11 over to David after --

12 EXAMINER BROOKS: Well, I picked up on one or two  
13 things. The BLM has not ordered you to bury the waste in  
14 this trench, as I understand it, they have merely given you  
15 permission to do so. Is that correct?

16 THE WITNESS: When we met in Carlsbad -- the short  
17 answer is yes. When we met in Carlsbad, we worked out the  
18 remedy and BLM said, you know, that's the way we used to do  
19 it for decades, and it's worked great. And then -- and now  
20 there is issues with the pit rule and other kinds of things,  
21 and so they did not order us to bury the waste in a trench.

22 EXAMINER BROOKS: So if Southwest Royalties were to  
23 haul this waste to a landfill, that would make BLM happy.

24 THE WITNESS: That's -- those were the two choices  
25 that BLM put forward.

1 EXAMINER BROOKS: That's all I can ask right now.

2 MS. GERHOLT: I have nothing further of this  
3 witness.

4 EXAMINER JONES: Thanks a lot, Mr. Hicks. Is that  
5 the applicant's case?

6 MR. FELDEWERT: Mr. Examiner, that concludes our  
7 case, yes.

8 EXAMINER JONES: All right.

9 MS. GERHOLT: Mr. Examiner, OCD will call Glenn Von  
10 Gonten to the stand.

11 GLENN VON GONTEN

12 (Having been sworn, testified as follows:)

13 DIRECT EXAMINATION

14 BY GABRIELLE GERHOLT:

15 Q. Mr. Von Gonten, before we begin, would you like a  
16 glass of water?

17 A. I'm fine. Thank you.

18 Q. Please state your name for the record.

19 A. Glenn Von Gonten.

20 Q. And where do you work?

21 A. I work with the Oil Conservation Division of the  
22 Energy Minerals and Natural Resources Department,  
23 specifically in the Environmental Bureau.

24 Q. What is your current position?

25 A. I'm presently the acting Environmental Bureau

1 chief.

2 Q. And how long have you had that position?

3 A. About two and a half years.

4 Q. And what was your previous position with the OCD?

5 A. I was a senior hydrologist.

6 Q. And how many years were you a senior hydrologist?

7 A. I started in January 2005 with OCD as a senior  
8 hydrologist.

9 Q. And as the acting bureau chief, what are your  
10 current job responsibilities?

11 A. I oversee the Environmental Bureau.

12 Q. And what is the Environmental Bureau's  
13 responsibility? What is the Environmental Bureau responsible  
14 for?

15 A. We handle the environmental regulation in the oil  
16 and gas industry under the implementing regulations of the  
17 Oil and Gas Act, and the Water Quality -- excuse me -- yes,  
18 the Water Quality Act and the Geothermal Energy Act or  
19 Geothermal Act.

20 Specifically we are responsible for issuing some H2S  
21 contingency plans. We are responsible for dealing with  
22 permanent pits under Part 17. We also process a number of  
23 the low-grade tank permit applications that were submitted as  
24 a response to Part 17 or the pit rule under an agreed  
25 compliance order.

1           We deal with remediation plans, some remediation  
2 plans, although the districts also deal with remediation  
3 plans. We deal with the abatement plans under Part 30. We  
4 deal with disposition of produced water, specifically issuing  
5 C-133 permits, and also produced water permits under Part 34.  
6 We, under Part 35, authorize the disposal of certain oil  
7 field waste to non-OCD permitted facilities, which we  
8 permitted solid waste facilities under the environment  
9 department's permitting scheme, and we also regulate surface  
10 waste management facilities under Part 36, and their -- also  
11 the other permits that permits by rule that are previously  
12 issued before Part 36. Under the Water Quality Control  
13 Commission regulations, we issue discharge permits for  
14 certain oil and gas facilities. We issue geo permits for the  
15 geothermal facilities, and we also issue permits for the  
16 hydrostatic tests of pipelines, and there was one other, but  
17 I can't remember.

18           Q.    Okay. While at the OCD, have you had the  
19 opportunity to testify before the Oil Conservation  
20 Commission?

21           A.    Yes, I have.

22           Q.    And what did you testify about?

23           A.    I have testified before the Commission on five  
24 occasions, once as a fact witness, and four times as an  
25 expert hydrologist or hydrogeologist. Three of those four

1 testimonies were for rulemaking, specifically the pit rule,  
2 the Galisteo Basin rulemaking and a while back the Surface  
3 Waste Management Facility rulemaking.

4 MS. GERHOLT: Mr. Examiners, I would request that  
5 you recognize Mr. Von Gonten as an expert in hydrology and as  
6 a hydrologist and hydrogeology.

7 EXAMINER JONES: Any objection?

8 MR. FELDEWERT: What's the difference between --  
9 hydrologist is the study of water, correct?

10 THE WITNESS: Correct.

11 MR. FELDEWERT: And hydrogeologist is the study of  
12 the geology that affects water?

13 THE WITNESS: I would say that hydrogeologists focus  
14 on groundwater, where the larger field of hydrology, it could  
15 include surface water, construction of dams, rivers, things  
16 like that.

17 MR. FELDEWERT: So primarily your expertise is in  
18 the area of dealing with either surface water or groundwater?

19 THE WITNESS: Groundwater, primarily.

20 MR. FELDEWERT: Okay. I have no objection.

21 EXAMINER JONES: So qualified.

22 Q. (Ms. Gerholt) Okay. And where were you employed  
23 prior to the OCD?

24 A. Prior to 2005 I worked in the Environment Department  
25 Hazardous Waste Bureau as a supervisor.

1 Q. All right. Approximately how much of your career  
2 has been spent with the regulatory body?

3 A. Eighteen years.

4 Q. And during the course of that -- those 18 years,  
5 have you had the opportunity to review and implement  
6 regulations?

7 A. Yes. I have worked in the hazardous waste  
8 regulation arena both here in New Mexico and in the  
9 Commonwealth of Virginia, and, as I mentioned, we deal with  
10 the Oil and Gas Act, and Water Quality Control Commission  
11 Act, which both deal with waste management and corrective  
12 action.

13 Q. And of the 18 years with the regulatory body, how  
14 much of your career has specifically been regulation of oil  
15 field waste?

16 A. The past six and a half years.

17 Q. And in your own words, would you tell the Examiners  
18 what oil field waste is?

19 A. Well, oil field waste has a specific definition in  
20 the OCD rules, but it is basically waste generated as a  
21 result of drilling for or producing, transporting,  
22 processing, refining oil, and natural gas and CO2. It also  
23 includes specifically waste that is generated in oil field  
24 surface companies, and it also includes waste that is  
25 generated as a result of remediation.

1 Q. And in the state of New Mexico, who regulates oil  
2 field waste?

3 A. OCD.

4 Q. And is that regulate -- is OCD's regulation limited  
5 by who owns the land?

6 A. No.

7 Q. Again, in your own words, what is OCD's purpose in  
8 regulating oil field waste?

9 A. Our purpose is to make sure the waste is properly  
10 managed from the time it is generated through any sort of  
11 transportation, storage, treatment, and final disposal.

12 Q. Mr. Von Gonten, if I could have you take the OCD  
13 notebook and turn to Exhibit Number 2. Could you tell the  
14 Examiners what that is?

15 A. This was a surface remedy proposal submitted to the  
16 BLM on behalf of Southwest Royalties by R. T. Hicks  
17 Consultants.

18 Q. And have you had the opportunity to review it?

19 A. I have.

20 Q. Do you recall when you reviewed it?

21 A. I saw this earlier, a version of this, I believe, in  
22 like February or March. Something was sent to me from Mike  
23 Bratcher in our district office in Artesia, and then this was  
24 sent at sometime in June, and I believe it was via e-mail or  
25 forwarded or something, and we were asked to review it for

1 the issue BLM brought up about OCD concurrence.

2 Q. Okay. And Mr. Von Gonten, do you agree there is no  
3 protectable groundwater in this area?

4 A. Yes. In addition to the information provided in  
5 this report, I also reviewed the state engineer's high waters  
6 database, and it shows there is no water well of any use in  
7 the nearby area.

8 Q. And do you agree there is no threat to human health  
9 at this Arco Federal Site?

10 A. That's correct.

11 Q. And do you also agree that the main environmental  
12 concern is re-establishment of vegetation?

13 A. I understand that that is the main concern, that  
14 there is salt scarring, and, as a result, there has been no  
15 revegetation on the salt scars.

16 Q. Okay. If I could now draw your attention to OCD  
17 Exhibit Number 3. Could you please tell the Examiner what  
18 this is?

19 A. My understanding of this is it was a red-line  
20 strike-out version of the previous exhibit, which appears --  
21 my understanding is that Southwest Royalties made certain  
22 revisions as a result of meeting with BLM to address some of  
23 BLM's concerns. It is basically the same proposal as  
24 previously submitted.

25 Q. If I could draw your attention to Page 2 of that

1 exhibit, and specifically Paragraph b, Paragraph III b, 1  
2 and 2.

3 A. III b, 1 and 2, okay.

4 Q. Okay. Is that your understanding of what the two  
5 proposals are currently from Southwest Royalties for the oil  
6 field waste?

7 A. My understanding is that the options available to  
8 Southwest Royalties is that their proposal to BLM is that  
9 they either trench bury in an unlined pit the contaminated  
10 soil, or they dispose of the contaminated soil at an OCD-  
11 approved landfill.

12 Q. Okay. Drawing your attention back to that June 13  
13 proposed surface remedy, was that approved by the OCD?

14 A. No.

15 Q. Why was it not approved?

16 A. In our denial letter we looked at the issue that was  
17 brought before us which was a non-reportable, less than five  
18 barrel spill of produced water, and we looked at the volume  
19 of the spill, we looked at the fact that there is no  
20 protectable groundwater, no known protectable groundwater in  
21 the area, and determined that there was no threat to human  
22 health or the environment, and we determined that we were not  
23 going to require Southwest Royalties to conduct any sort of  
24 activities as a result of that five-barrel spill.

25 Q. And Mr. Von Gonten, if I could have you turn to

1 Exhibit 4, could you tell the Examiners what that is?

2 A. The letter, the first of the two letters is dated  
3 June 17. It is a letter that I drafted as -- to respond to  
4 the issue of -- brought to us by Southwest Royalties. I  
5 drafted this letter for Director Bailey's signature, and you  
6 can see on the second page that, below the signature block,  
7 you can see my initials.

8 Q. Okay.

9 A. I drafted this letter and Director Bailey reviewed  
10 it, as well as the administrative record that existed at that  
11 time and made a few revisions and then signed the letter.

12 Q. Okay. And does this June 17 letter reject Southwest  
13 Royalties' June 13 proposal? Is that correct?

14 A. It does. It makes a couple of statements. One is  
15 we summarized our understanding of what the issue was in the  
16 first paragraph. In the second paragraph we discuss the  
17 results of the reports that had been prepared by R. T. Hicks  
18 and Associates, specifically about the contamination may go  
19 much deeper than 20 feet, and it could be as deep as 60  
20 feet --

21 Q. Mr. Von Gonten, if I could stop you right there,  
22 what does BGS mean?

23 A. Below ground surface.

24 Q. Thank you.

25 A. We specifically accepted Southwest Royalties'

1 assessment of both the chloride soil contamination, the  
2 extent at the site, and its conclusion that there was no  
3 protectable groundwater at the site and no risk to human  
4 health. We noted that corrective actions are required under  
5 Part 29 for releases that endanger public health or the  
6 environment. And we concluded Paragraph 2 by saying that we  
7 agree that the main environmental concern is the timely  
8 re-establishment of vegetation at the site. And Chapter --  
9 or in Paragraph 3, we informed Southwest Royalties that Part  
10 34.11 prohibited the disposal of, among other things,  
11 produced water and other oil field waste in a pit. It  
12 concluded by noting that the proposed surface remedy far  
13 exceeds our requirements under Part 29, and we suggested that  
14 they work with BLM about a surface restoration program that  
15 does not involve disposal of the contaminated soil in an  
16 unlined pit on site.

17 Q. And if I could draw your attention to the second  
18 letter within Exhibit 4.

19 A. June 25, 2011.

20 Q. Do you recognize this letter?

21 A. Yes. It's a letter that I drafted for the signature  
22 of Director Bailey. Again, on Page 2, you can see, below the  
23 signature block, my initials. This is a review of the June  
24 20 submittal by Southwest Royalties, which is essentially the  
25 same proposal as before, disposal of contaminated soil in an

1 unlined pit on site, just this time under -- being proposed  
2 as a Part 29 corrective action.

3 We make this statement in the second paragraph which  
4 is that Southwest Royalties has resubmitted its proposal as a  
5 remediation plan according to Part 29. And we again noted we  
6 were not going to require Southwest Royalties to correct --  
7 to conduct any corrective action at this site because there  
8 is no protectable water and no threat to human health, and we  
9 again reminded them that any sort of revegetation purposes  
10 should be in accordance with the Surface Land Management's  
11 requirements. That's for future reference. Specifically  
12 here we are talking about BLM, but it also would be the same  
13 answer if this was the State Land Office site of the spill.

14 We conclude by saying we are not going to allow  
15 Southwest Royalties to dispose of contaminated soil in an  
16 unlined pit, and we deny its proposed surface remedy.

17 Q. If I could have you turn to Exhibit 5. Could you  
18 please identify Exhibit 5?

19 A. This is Part 34 which deals with produced water and  
20 also other oil field waste.

21 Q. Okay. If I could draw your attention to the  
22 highlighted portion of 34.11.

23 A. 34.11 is the disposition of produced water and other  
24 oil field waste.

25 Q. If someone wants to dispose of oil field waste in

1 the pit, according to 34.11, can they?

2 A. They are prohibited from doing so by 34.11, but it  
3 does note there is a possibility of being allowed to do so  
4 under Part 30, Part 17, Part 36, Part 29 and Part 26, but  
5 that would be specifically as authorized in those regulations  
6 or in those rules.

7 Q. Okay. Does Part 34 set forth methods for disposal  
8 of oil field waste?

9 A. Yes. 34.13, methods for disposal of other oil field  
10 waste.

11 Q. And would you please read the highlighted portions  
12 for the record?

13 A. It's not highlighted, but if you want me to read  
14 that section into the record.

15 Q. Sorry.

16 A. "Persons shall dispose of other oil field waste by  
17 transferring to an appropriate permitted or registered  
18 surface waste management facility or injection facility or  
19 applied to a division-authorized beneficial use. Persons may  
20 transport recovered drilling fluids to other drill sites for  
21 reuse provided that such fluids are transported and stored in  
22 a manner that does not constitute a hazard to fresh water,  
23 public health, safety, or the environment."

24 Q. Okay. Thank you. Now, if I could draw your  
25 attention to OCD Number 6. Could you please identify 6 for

1 the Examiners?

2 A. Part 30 deals with remediation.

3 Q. And what is the objective of remediation?

4 A. This is to remediate both surface water and  
5 groundwater that are, in the particular case of groundwater,  
6 that is protectable, that is the background concentration is  
7 less than 10,000 milligrams per liter TDS.

8 Q. Could Southwest Royalties obtain approval their  
9 proposed Part 30 remediation plan?

10 A. No. Part 30 deals with protection of water or  
11 remediation of either surface water or groundwater. We  
12 accepted the -- the fact that the area does not have  
13 protectable groundwater and -- or surface water.

14 Q. Now, drawing your attention to Exhibit 7. What is  
15 Exhibit 7?

16 A. This is the pit rule, which is Part 17, which deals  
17 with pits, closed-loop systems, below-grade tanks and sumps.

18 Q. Could Southwest Royalties seek authorization for  
19 their proposed pit -- for their pit based upon the pit  
20 rule?

21 A. No. This deals with temporary pits and permanent  
22 pits, and temporary pits as defined here under 17.7I are pits  
23 that are including drilling or workover pits, constructed  
24 with the intent that the pit will hold liquids for less than  
25 six months and be closed in less than one year. It doesn't

1 meet the definition of temporary pit because it's not going  
2 to hold liquids, it will hold contaminated soil, and it will  
3 be there in perpetuity.

4 Permanent pit is also a pit that is used for  
5 managing produced water or a brine for drilling. Again, the  
6 trench that Southwest -- unlined trench that Southwest  
7 Royalties is proposing is not used for management of produced  
8 water or brine and is used for the disposal of contaminated  
9 soil.

10 Q. Now, drawing your attention to Exhibit 8, and  
11 specifically to 26.8, injection of fluids into the  
12 reservoirs. Could Southwest Royalties obtain approval for  
13 their pit with this regulation?

14 A. No, there is no fluid to be injected.

15 Q. Okay. Moving right along to Exhibit 9, what is  
16 Exhibit 9?

17 A. Exhibit 9 is Part 29 which deals with release  
18 notification and corrective action.

19 Q. Is Part 29 the rule under which Southwest Royalties  
20 has submitted their remediation plan?

21 A. Yes. They have submitted a remediation plan that  
22 would be pursuant to or what they have styled as a  
23 remediation plan under 29.11 which deals with corrective  
24 action.

25 Q. What is a corrective action?

1           A. Well, corrective action may be -- could be any sort  
2 of action that the responsible person takes as a result of a  
3 release that endangered public health or the environment. It  
4 is defined, what a remediation plan is, in our definitions in  
5 the first part of our rule book, and basically it could be  
6 anything from what we refer to as dirt work, and that's  
7 handled mostly by the districts, but it could also involve  
8 remediation of groundwater for up to one year.

9           Q. And you specifically said spill, did you not,  
10 Mr. Von Gonten?

11          A. Yes, these releases were spills.

12          Q. Releases are spills. And in this instance, there  
13 was a release of five barrels, was there not?

14          A. Less than five barrels of produced water was the  
15 most recent spill. I believe Mr. Hicks testified that there  
16 was historic releases of unknown volume.

17          Q. But the most recent release, did that cause any  
18 threat to your public health or the environment?

19          A. No, not according to the information provided to us  
20 by Southwest Royalties and as we assessed it. The produced  
21 water release of 2010 was estimated at less than five  
22 barrels, and therefore it was not required to be reported to  
23 the district office as either a major release or a minor  
24 release.

25          Q. Okay. And could Southwest Royalties be authorized

1 pursuant to Part 29 remediation plan?

2 A. We could authorize the use of a pit, but I don't  
3 think that we're going to authorize an unlined pit for  
4 corrective action. I would say that the proposal that was  
5 put forward by Southwest Royalties did not address the  
6 remediation of the contaminated soil, the volume of the  
7 contamination remains the same at the end as when it began.  
8 It was surface restoration rather than remediation of the  
9 groundwater which would be what we deal with under Part 29.

10 Q. Okay. And if I could draw your attention to Exhibit  
11 Number 10, what is Exhibit Number 10?

12 A. Part 36 is the Surface Waste Management Facility  
13 Rule.

14 Q. And could, in your opinion, could Southwest  
15 Royalties obtain authorization for its pit under Part 36?

16 A. Southwest Royalties could, I imagine, obtain or  
17 apply for a centralized landfill. It would be a centralized  
18 facility rather than a commercial facility. I think we would  
19 have to investigate that, but in that particular case on this  
20 particular site, we would have to have BLM involved as the  
21 owner, and then Southwest Royalties as the operator.  
22 However, they could not get an unlined pit permitted under  
23 Part 36.

24 Q. Okay.

25 A. And they do not meet any -- there is many

1 requirements under Part 36 dealing with siting, financial,  
2 assurance, operational requirements, construction  
3 requirements, and the unlined pit meets none of those.

4 Q. So in review, Mr. Von Gonten, disposition of oil  
5 field waste pursuant to Rule 34.11, you cannot dispose of oil  
6 field wastes unless you seek authorization pursuant to Rule  
7 30, Rule 17, Rule 36, Rule 29, or 26.8. Is that correct?

8 A. That's correct. That's what the plain language of  
9 Part 34 says.

10 Q. And you have testified here today that currently  
11 Southwest Royalties would not receive authorization for their  
12 pit under those parts. How could Southwest Royalties dispose  
13 of the oil field waste?

14 A. Going back to Exhibit 5, 34.13 says that persons  
15 shall dispose of other oil field waste, which includes  
16 contaminated soil, by transfer to an appropriate permitted or  
17 registered surface waste management facility. Dig and haul.

18 Q. And that is one of the options that was presented by  
19 Mr. Hicks' consulting firm to the BLM, was it not?

20 A. Yes.

21 MS. GERHOLT: I have no further questions.

22 CROSS-EXAMINATION

23 BY MR. FELDEWERT:

24 Q. Mr. Van Gonten --

25 A. Excuse me, Mr. Von Gonten, please.

1 Q. Excuse me. Mr. Von Gonten, you recognize the  
2 purpose of this hearing was Southwest Royalties to seek an  
3 exception to Rule 34.11, correct?

4 A. That's what today is for.

5 Q. And we have a situation here, as I understand it,  
6 where you agree that this is a surface restoration issue, a  
7 revegetation?

8 A. It's an issue with BLM about surface restoration,  
9 yes.

10 Q. Which in itself is an environmental issue,  
11 correct?

12 A. Correct.

13 Q. And we have a circumstance here where we have no  
14 protectable groundwater in this area?

15 A. That's correct.

16 Q. So the fact that we place salty dirt in the trench  
17 poses no threat to groundwater.

18 A. It does not pose any threat to groundwater. It's a  
19 violation of the rules, but it poses no threat to  
20 groundwater.

21 Q. Therefore there is no need for a lined pit here?

22 A. There is no reason for a pit there at all except so  
23 they can take the contaminated media and put it in the  
24 landfill.

25 Q. But there is no reason to have a lined pit in this

1 area because there is no protected groundwater, correct?

2 A. Well, when you talk about pits, we have to talk  
3 about what the use of the pit is for. If you are talking  
4 about a disposal pit, that's prohibited by the rules, Part  
5 State 136.

6 Q. I understand. I want to put aside the fact that you  
7 are reading the rules and you are saying they are prohibited  
8 by the rules. There is no environmental reason to require a  
9 lined pit in this area because there is no protectable  
10 groundwater?

11 A. There is no protectable groundwater in this area.

12 Q. And the salty dirt poses no threat to human  
13 health?

14 A. That's correct.

15 Q. Would you agree that putting this dirt in this  
16 trench and putting a liner over top and then putting four  
17 feet of clean soil on that liner is going to allow for  
18 revegetation, is it not?

19 A. It might. It's not a sure thing.

20 Q. But of course your area of expertise is in  
21 groundwater?

22 A. That's correct.

23 Q. And you recognize here that the surface owner here  
24 is the BLM. Is that right?

25 A. That's correct.

1 Q. Hence, there is no place that their approved  
2 procedure is to put this salty dirt in the trench?

3 A. There are two approved procedures. One is to put  
4 the -- dispose of the contaminated soil in the trench, and  
5 the other is to dig and haul it to an OCD-approved  
6 landfill.

7 Q. You recognize in the e-mail they sent Southwest  
8 Royalties, their approved procedure was to put it in the  
9 trench?

10 A. Which exhibit are you referring to?

11 Q. Exhibit Number 11, Southwest Royalties Exhibit  
12 Number 11, at the end of that e-mail, on four lines from the  
13 top -- from the bottom, it says, does it not, Mr. Von Gonten,  
14 that, "By the end of September this stockpiled contaminants  
15 will either, be deep buried as per our approved procedure, or  
16 transported to an approved facility.

17 A. Yes.

18 Q. That's what that says, correct?

19 A. That's what it says.

20 Q. All right. Now, did you -- these response letters  
21 you said that you -- that the OCD issued a response to  
22 Southwest Royalties request to proceed with this approved  
23 procedure, you drafted those letters?

24 A. Yes, I did.

25 Q. Did you have any meeting with Ms. Bailey in

1 connection with those letters?

2 A. Yes. We talked about it. I provided her with  
3 copies of e-mails that had been provided to me by Mike  
4 Bratcher in our Artesia office. Some of those e-mails  
5 pre-dated her arrival at OCD.

6 Q. Did you inform her that Part 29 is an exception  
7 to -- an administrative exception to Rule 34.11, its  
8 prohibition?

9 A. I would not characterize it as an exception. It  
10 says it's authorized under that rule. They can -- they can  
11 do it under that rule.

12 Q. Okay. So you can get authorization to trench bury  
13 here under Part 29?

14 A. You might. I'm not aware of anybody getting  
15 approval to do that.

16 Q. That's what we are trying to do in this case,  
17 correct?

18 A. That's what you are trying to do, yes.

19 Q. And you all denied us, and now we are going to  
20 hearing?

21 A. That's correct.

22 Q. Do you agree with me then that Part 29, under the  
23 terms of that language, applies to this particular surface,  
24 does it not?

25 A. No, it does not.

1 Q. Well, don't we have a release that affects the  
2 environment?

3 A. You have a release that does affect some of the  
4 environment. It sounds to me like what was happening was a  
5 small release on top of a bigger release that was more salt  
6 on top of a salt scar, so I don't know that there was any  
7 vegetation that was killed as a result of this release. I  
8 didn't see that in any of the work plans or reports.

9 Q. Would you turn to Southwest Royalties Exhibit Number  
10 9 for me, please. Now, I only have to go on the language of  
11 the rule here, Mr. Van Gonten. I'm looking at Section 29.11.  
12 Okay? Are you familiar with that section?

13 A. I am.

14 Q. It states here, does it not, that the responsible  
15 person shall complete a division-approved corrective action  
16 for releases that endanger public health or the environment.

17 A. That's what it says.

18 Q. Is that what it says? So under the terms of this  
19 rule, if we have a release, it is deemed to be an  
20 endangerment to the environment, it falls under this rule,  
21 does it not?

22 A. It could. It says further, "The RB shall address  
23 releases in accordance with remediation plan submitted to and  
24 approved by the Division."

25 Q. Okay.

1 A. We denied it.

2 Q. And you denied it because of Rule 34 --

3 A. Yes.

4 Q. -- point 11, correct?

5 A. Yes.

6 Q. But Part 29 is an exception to Rule 34?

7 A. Again, under Part 29, it stands on its own. It  
8 says, "Unless otherwise authorized by these other rules."  
9 It's not an exception to Part 34. It would have to be  
10 approved specifically under the other rules.

11 Q. Okay. But at least you and I agree that this is a  
12 circumstance that under the terms of the rule, this is a  
13 circumstance that appears to fall under Part 29?

14 A. The release falls under Part 29 if it was  
15 reportable.

16 Q. Okay. Where do you see that in Section 29.11?

17 A. It's not in 29.11, Mr. Feldewert. It's under Part  
18 29.7.

19 Q. Now, 29.7 deals with the release notifications,  
20 correct?

21 A. That's correct.

22 Q. So it tells you when you have to notify in a  
23 particular circumstance of a release?

24 A. That's correct?

25 Q. But 29.11 deals with corrective action, something

1 different, correct?

2 A. Correct.

3 Q. Not notification, but corrective action?

4 A. Correct.

5 Q. There is nothing here that says the release has to  
6 be reportable to fall under this provision, does it?

7 A. Well, how would we know about it otherwise?

8 Q. You could have a release that was authorized, could  
9 you not?

10 A. That would only be under a discharge permit in the  
11 Water Quality Control Commission regulations.

12 Q. In this case, how do you consider a release from a  
13 tank in the 80s through a produced water bed, isn't that a --  
14 at the time, an authorized release?

15 A. It was permitted by rule.

16 Q. Okay. If can I look at --

17 A. Excuse me -- by rule.

18 Q. If I look at the definition of the release within  
19 the OCD regulations, it doesn't talk about it requiring to be  
20 a reportable release or non-reportable release or anything  
21 like that, does it?

22 A. It has to be a release that endangers public health  
23 or environment. We determined there was no threat to public  
24 health and the salt was a minor release, de minimis release  
25 of a few barrels on top of a salt scar did not damage the

1 environment further.

2 Q. Then you recognize in your letter, Mr. Von Gonten,  
3 that the main environment concern was the impact on the  
4 vegetation?

5 A. Yes, from the historic spill.

6 Q. And that's an issue that's affecting the  
7 environment, is it not?

8 A. Yes, but we are not dealing with -- our regulations  
9 do not deal with surface restoration as a result of historic  
10 release. We have over 90,000 wells, and probably a like  
11 number of pits to deal with. The pit rule was not  
12 retroactive. As you pointed out, if you had a release that  
13 was by rule -- authorized by rule, prior to Rule 50, which  
14 was the original pit rule, then that was authorized  
15 release.

16 Q. But you and I can agree then, can we not, Mr. Von  
17 Gonten, at least, that 29.11, the language of that rule would  
18 appear to apply to this circumstance?

19 A. It is a release. I do not agree that it applies  
20 because it does not endanger public health and does not  
21 impact the environment.

22 Q. Okay. So putting the salty dirt --

23 A. If I may finish that, please.

24 Q. I'm sorry.

25 A. And also we looked at this, as we said in our

1 letters, that there is no protectable groundwater. We  
2 accepted not only Southwest Royalties' assertion, but we did  
3 our own research and, in fact, this is an area where there is  
4 no protectable groundwater.

5 Q. So putting the salty dirt in this trench, likewise,  
6 isn't going to affect the environment?

7 A. It's not going to impact the environment, no,  
8 because you just moved it from one place on site to another  
9 place on the site and probably causing additional surface  
10 damage by creating -- digging up a trench that was  
11 unnecessary. So the proposal appears to have more negative  
12 impact, in my way of thinking, than positive impact.

13 Q. But the BLM found otherwise, didn't they?

14 A. They did, but they don't deal with management of oil  
15 field waste.

16 Q. Do you agree, Mr. Von Gonten, that the Division,  
17 through a hearing process, can grant an exception to your  
18 administrative prohibition in Rule 34.11?

19 A. Excuse me, rephrase that. I didn't understand the  
20 question.

21 Q. Do you agree that the Division during the hearing  
22 process can grant an exception to Rule 34?

23 MS. GERHOLT: Objection. Calls for a legal  
24 speculation.

25 EXAMINER BROOKS: I'm going to overrule that

1 objection, and allow the witness to express his opinion.

2 A. One more time.

3 Q. Do you agree that the Division, through the hearing  
4 process, can grant an exception to Rule 34?

5 A. I have not dealt with exceptions to rules before --  
6 before the hearing Examiners, so I'm not very familiar with  
7 how the process works in detail.

8 Q. So you can't offer us anything on that particular --

9 A. That's correct.

10 Q. So you are here suggesting that, because of Rule  
11 34.11, no matter what the circumstance is, that this salty  
12 dirt cannot be put in that trench?

13 A. The Commission has prohibited unlined pits in New  
14 Mexico, and that is what is proposed here.

15 Q. Even in a circumstance, Mr. Von Gonten, even in an  
16 area where there is no protectable groundwater?

17 A. Yes.

18 Q. Even in a circumstance where the salty dirt poses no  
19 threat to human health?

20 A. The arguments about threat to human health were  
21 considered by the Commission during the pit rule, the Surface  
22 Waste Management Facility rulemaking, and as a result of that  
23 you have the regulations in Part 34.

24 Q. But I mean as apply here to this circumstance where  
25 we have no protectable groundwater, and we have salty dirt

1 that poses no threat to human health, it's your position, as  
2 environment bureau chief, they cannot dispose of this dirt in  
3 the trench, even if that is a BLM-approved procedure?

4 A. Correct.

5 MR. FELDEWERT: That's all the questions I have.

6 EXAMINER JONES: I'm going to defer to David.

7 EXAMINER BROOKS: Okay. So if the plan that they  
8 have got approved by BLM, if it were modified to provide that  
9 they would take and haul this dirt to a landfill, would you  
10 all have approved it?

11 THE WITNESS: We said that we didn't need to weigh  
12 in on this particular site, that we told them they did not  
13 have to take any remediation action, that if they needed to  
14 take action in accordance with a land management agency's  
15 requirements, then they should work with that agency. If  
16 that involved digging and hauling, they didn't need to talk  
17 to us about it.

18 EXAMINER BROOKS: Well, BLM is required approval.  
19 So if they said they were going to dig and haul it, and they  
20 said, "Okay, BLM requires your approval. Do you give your  
21 approval," there would be no reason for you to deny it,  
22 correct?

23 THE WITNESS: That is true.

24 EXAMINER BROOKS: But you are denying it because of  
25 Rule 34?

1 THE WITNESS: Correct.

2 EXAMINER BROOKS: Okay. That's what I wanted to  
3 understand. I think that's my only question.

4 REDIRECT EXAMINATION

5 BY GABRIELLE GERHOLT:

6 Q. Just a couple of questions for redirect. Getting  
7 back to the salt-impacted soil that is being proposed to be  
8 disposed of, Mr. Von Gonten, is that salt-impacted soil oil  
9 field waste?

10 A. Yes, it is. It meets the definition of oil field  
11 waste.

12 Q. So it's beyond a release?

13 A. Excuse me, I don't understand that.

14 MS. GERHOLT: I withdraw that question. No further  
15 questions.

16 MR. FELDEWERT: I have no further questions... I do  
17 have a brief closing statement.

18 EXAMINER JONES: Yeah.

19 EXAMINER BROOKS: Since we didn't let Ms. Gerholt  
20 make an opening statement, we ought to --

21 THE WITNESS: Mr. Brooks, am I excused?

22 EXAMINER BROOKS: Mr. Chairman is the one who has  
23 that authority.

24 THE WITNESS: Mr. Jones, am I excused?

25 EXAMINER JONES: You are excused.

1 MR. FELDEWERT: Mr. Examiner, as you heard today,  
2 the BLM employed this tool, this net environment benefit  
3 analysis to determine in this circumstance the best ways of  
4 disposing of this salt-impacted soil. And, after conducting  
5 that analysis, they determined that trench burial in this  
6 circumstance made the most sense because there is no  
7 protectable groundwater. We have no issue about public  
8 health, the trench is there -- already there because they  
9 used that dirt as clean fill for the area, and BLM is surface  
10 owner here, so that should carry some weight. The OCD hasn't  
11 even been out there.

12 But they sit here and say, "Well, we are not going  
13 to let you go forward with the BLM-approved plan because we  
14 have this Rule 34.11. That's our wooden approach. Over and  
15 out, done."

16 And no matter what we do, whether we submit a Part  
17 29 plan, as we think is applicable here, which we did,  
18 because that's a recognized exception to Rule 34, or any  
19 other plan, they are just not going to approve, which means  
20 they don't want this company, as every other company, to be  
21 running around in the oil field hauling this dirt from one  
22 spot to another. In a circumstance like this, it makes no  
23 sense.

24 Now, Rule 34.11 may be some administrative roadblock  
25 for administrative approval of this application. I think

1 they are reading that Part 29 wrong. I think that should  
2 have been approved here, and they would have their  
3 administrative exception, and we could have gone forward a  
4 long time ago. But for whatever reason, it's their wooden  
5 policy, they are not going to allow it.

6 But now we are in a different posture. We are in a  
7 hearing process. And now we are at Examiner level. The  
8 issue is, what makes sense here under this unique set of  
9 circumstances where we have an area where everyone agrees  
10 there is no protectable groundwater, where we have a volume  
11 of dirt that poses no threat to human health, and we are  
12 trying to deal with the environmental issue in the most  
13 efficient, safe fashion. In that circumstance, it seems to  
14 me that that's where we need an exception to this particular  
15 rule, because to deny -- just think about this -- to deny  
16 that exception, you would have to say, "Well, first part of  
17 29 doesn't apply. There is no exception whatsoever,  
18 therefore, there is a complete barrier here." Which means  
19 that essentially you are going to have to craft an order that  
20 says why the BLM is involved in concluding that trench burial  
21 makes more sense here, because that's their approved  
22 procedure.

23 You are not stuck with this wooden approach that  
24 they have put on up to this point, and they have offered you  
25 absolutely nothing to demonstrate why this dirt, salty dirt

1 shouldn't be put out there in that existing trench. They  
2 cite nothing to you from Rule 34.11. They have given you no  
3 technical analysis. They have given you no concerns. They  
4 have given you no reason why you shouldn't put this salty  
5 dirt in that existing trench.

6           So it seems to me that this case is one that clearly  
7 calls for an exception to Rule 34.11. There is no reason why  
8 an exception should not be granted here. So we ask that the  
9 Division consider the record, weigh the facts and either  
10 grant an exception to Rule 34.11 either by way of approval  
11 under Part 29, which is listed as an exception to Rule 34.11  
12 because we have a release, historic releases that have  
13 affected the environment, and this is a plan that's going to  
14 deal with that environmental issue. So you can do it under  
15 Part 29, or you can do it as a matter of accommodation to BLM  
16 and grant an exception here under your general powers to  
17 grant exceptions to the rules of this agency because you have  
18 the authority and the power to weigh the facts and determine  
19 what is best in this unique circumstance.

20           That's why we filed this application, because it was  
21 clear we were getting nowhere with the environment board, and  
22 it's clear there is an area under this circumstance where it  
23 makes the most sense to take that dirt that's sitting on that  
24 tarp, put it in that trench, put that liner on top of that  
25 trench, put four feet of dirt on top of it, re-seed it like

1 everything else, and we are done. And we're not hauling  
2 trucks back and forth, not putting people in danger, not  
3 generating dust, and not generating exhaust. So we ask that  
4 you follow the BLM procedure and grant an exception to Rule  
5 34.

6 MS. GERHOLT: Mr. Examiners, the OCD did not choose  
7 to disapprove this proposed plan because of a policy. It  
8 denied the proposed plan because of the rule. Rule 34.11 is  
9 clear that the only way that an individual is authorized to  
10 dispose in a pit is if it falls under one of the other rules,  
11 whether it's 30, 17, 29, et cetera. This plan does not  
12 fallen under Part 29.

13 You heard Mr. Hicks testify that from June 14,  
14 Southwest Royalties was aware that BLM required OCD's like  
15 approval for the surface remedy. OCD was just unable to  
16 provide it's like approval because the remedy does not comply  
17 with OCD regulations.

18 Again, Mr. Von Gonten testified that the surface  
19 remedy cannot be forced into Part 29 remediation plan because  
20 the release did not endanger public health or the  
21 environment, but the salt-impacted soil that is there, that  
22 is being dug and proposed to be buried on site is oil field  
23 waste, and oil field waste must be disposed of in accordance  
24 with the standards of 34.11 or 34.13.

25 New Mexico Oil Conservation Division has the

1 authority to regulate old field waste within the state; BLM  
2 does not. So BLM may have approved a surface remedy, but  
3 they do not have the authority to regulate the oil field  
4 waste. BLM can also approve the dig and haul method, which  
5 you heard Mr. Von Gonten testify that OCD would not deny that  
6 method for disposal of that salt-impacted soil.

7 Southwest Royalties has argued, "What's the harm in  
8 disposing of that salt-impacted soil on site?" The harm is  
9 that if OCD fails to enforce the rules, the rules will be  
10 suspect and people will not abide by the regulations. We  
11 have regulations for a purpose. They are written. They are  
12 current on the books, and this is what we need to follow.

13 Therefore, the Oil Conservation Division would  
14 respectfully request that you do not grant Southwest's  
15 application for an exception.

16 EXAMINER JONES: Okay. Thank you both.

17 MR. FELDEWERT: Thank you for your time.

18 EXAMINER JONES: With that, we will take case 14722  
19 under advisement.

20 (Concluded.)

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I do hereby certify that the foregoing is  
a complete record of the proceedings in  
the Examiner hearing of Case No. \_\_\_\_\_  
heard by me on \_\_\_\_\_

\_\_\_\_\_, Examiner  
Oil Conservation Division

REPORTER'S CERTIFICATE

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I, IRENE DELGADO, New Mexico CCR 253, DO HEREBY CERTIFY THAT ON September 29, 2011, proceedings in the above-captioned case were taken before me and that I did report in stenographic shorthand the proceedings set forth herein, and the foregoing pages are a true and correct transcription to the best of my ability.

I FURTHER CERTIFY that I am neither employed by nor related to nor contracted with any of the parties or attorneys in this case and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND this \_\_\_\_\_ day of October 2011.

  
Irene Delgado, CCR 253  
Expires: 12-31-2011