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STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

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

CASE NO. 14000
de novo

CONTINUATION OF APPLICATION OF THE
HARVEY E. YATES COMPANY FOR EXPANSION
OF UNIT AREA, OTERO COUNTY, NEW MEXICO

AND CASE 14055, continued.

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM C. OLSON, COMMISSIONER

June 19, 2008

Santa Fe, New Mexico

This matter came on for hearing before the Oil
Conservation Commission, MARK E. FESMIRE, Chairman, on
Thursday, June 19, 2008, at the New Mexico Energy, Minerals and
Natural Resources Department, 1220 South Saint Francis Drive,
Room 102, Santa Fe, New Mexico.

A P P E A R A N C E S

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FOR THE COMMISSION:

CHERYL BADA
Assistant General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR THE DIVISION:

MIKAL ALTOMARE
Deputy General Counsel
Energy, Minerals and Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

FOR HARVEY E. YATES PETROLEUM:

JAMES G. BRUCE
Attorney at Law
P.O. Box 1056
Santa Fe, New Mexico 87504

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1 CHAIRMAN FESMIRE: Okay. At this time, we'll go
2 ahead and call the Thursday, June 19, 2008 meeting of the
3 New Mexico Oil Conservation Commission to order. Let the
4 record reflect that all three commissioners, Commissioner
5 Baily, Olson, and Fesmire are present. We, therefore, have a
6 quorum.

7 The first order of business before the Commission is
8 the reading and approval of the minutes from the May 9, 2008,
9 Commission meeting. Have the Commissioners had an opportunity
10 to read the minutes?

11 COMMISSIONER BAILEY: Yes, I have, and I move we
12 adopt them.

13 CHAIRMAN FESMIRE: Commissioner Olson, have you had a
14 chance to read them?

15 COMMISSIONER OLSON: Yes, I have, and I'll second
16 that.

17 CHAIRMAN FESMIRE: Okay. All those in favor of
18 adopting the minutes as presented by the secretary signify by
19 saying aye.

20 COMMISSIONER BAILEY: Aye.

21 COMMISSIONER OLSON: Aye.

22 CHAIRMAN FESMIRE: Aye.

23 Let the record reflect that the minutes were
24 unanimously adopted and will be signed by the Chair and relayed
25 to the Secretary.

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CHAIRMAN FESMIRE: The second order of business before the Commission is the continuation of Case No. 14000, the de novo application of the Harvey E. Yates Company for Expansion of Unit Area, Otero County, New Mexico. This case was continued from the May 9th, 2008, Commission meeting. Are the attorneys for that case present?

MR. BRUCE: Mr. Chairman, Jim Bruce representing Harvey E. Yates Company. Yes, I am here.

MS. ALTOMARE: Mikal Altomare here on behalf of the Oil Conservation Division.

CHAIRMAN FESMIRE: When last we visited this case, we had raised three questions that needed to be answered or at least the Commission or the Chair felt that we needed some guidance in answering, and we asked the parties to brief those questions for us.

The first is: What is the authority of the Division and the Commission to approve exploratory units?

The second is: What should be the criteria for approval under the Oil and Gas Act, if it does have that power?

And third: The contents of an application necessary for approval.

Have the attorneys had the opportunity to brief those questions?

MR. BRUCE: Yes, sir.

1 MS. ALTOMARE: Yes, we have.

2 CHAIRMAN FESMIRE: And the briefs were presented both
3 in a timely manner and represent the results of that research?

4 MR. BRUCE: That is correct.

5 MS. ALTOMARE: Yes, they do.

6 CHAIRMAN FESMIRE: Are you all prepared to discuss
7 those with us today?

8 MR. BRUCE: I'm prepared. I didn't have any
9 presentation, but I'm ready for any questions the Commissioners
10 may have.

11 CHAIRMAN FESMIRE: Ms. Altomare, are you --

12 MS. ALTOMARE: Yes. And I have a couple of things
13 that I'd like to discuss just in -- basically in regard to what
14 was addressed in opposing counsel's brief.

15 CHAIRMAN FESMIRE: Okay. Let's break it down and
16 talk about the questions individually.

17 Let's start with the first question: The authority
18 of the Division and the Commission to approval exploratory
19 units.

20 Mr. Bruce, would you like the summarize the results
21 of your research on that?

22 MR. BRUCE: Well, you can tell I spent several pages
23 finally getting to the idea that in my opinion, the Division
24 probably does have jurisdiction to approve exploratory units.
25 There is nothing specific anywhere in the statutes or the

1 regulations of the Division that I could find that would
2 approve it.

3 But based on a case I didn't cite, the Santa Fe
4 Exploration versus Commission case -- and I think Commissioner
5 Baily may remember that case -- where there was a small
6 Devonian reservoir where there were two wells, and only one
7 well was needed. There was one extremely unorthodox location
8 and in essence, the Division and the Commission forced a
9 voluntary unit. They restricted production severely until the
10 people agreed to unitize and allow full allowable production
11 from the unit. I meant to bring that case along for the
12 Commission. I apologize.

13 But the supreme court took a fairly expansive view of
14 the Division's jurisdiction to prevent waste in that instance.
15 Now, it's not like an exploratory unit because it was a small
16 reservoir defined by faults and it really involved the original
17 problem in that case, an unorthodox location of a small
18 reservoir where only one well was needed and there were two
19 wells and different ownership, obviously, between tracks.

20 But the fact of the matter is, the courts did say
21 that the Commission did have authority to prevent waste. And
22 based on the various -- if nothing else at this point, 60 years
23 of history approving exploratory units et cetera, et cetera, I
24 would say the Division does have jurisdiction.

25 On the other hand, I cited the Texas -- have

1 materials regarding Texas exploratory units. I don't see
2 any -- I think the Division has jurisdiction, but is that
3 exclusive? Can the parties enter into agreements voluntarily?
4 Certainly they do. They enter into JOAs voluntarily, working
5 interest owners enter into working interest units voluntarily
6 covering a number of sections of land, and there's nothing to
7 prevent that.

8 So with that, I would turn it over for any questions
9 or over to Ms. Altomare.

10 CHAIRMAN FESMIRE: Okay. Mr. Bruce, if I understood
11 your argument correctly, it's that the authority in your
12 brief -- that the authority to approve exploratory units,
13 voluntary exploratory units, is based on the fact that we've
14 done it, like you said, for the last 60 years.

15 And part of Ms. Altomare's argument is that the
16 authority and some of the things that you stated in the
17 authority is not there in the rules or the statutes. Do we not
18 have the ability to change bad habits.

19 MR. BRUCE: I hope we all have that authority. Well,
20 I suppose I'd have a question in return. I'm not sure what bad
21 habits you're talking about.

22 CHAIRMAN FESMIRE: Approving units that we are not
23 statutorily or regulatory capable of approving.

24 MR. BRUCE: You're saying even if you don't have
25 regulatory authority at this point, why don't you expand your

1 jurisdiction?

2 CHAIRMAN FESMIRE: We've been doing this for
3 60 years. You've provided several examples that we have been
4 doing it. And I will grant that we have done that in the past.
5 But at the same time, you argue that you cannot put your finger
6 on a statute or regulation that gives the authority to do that.
7 Now that we've recognized that --

8 MR. BRUCE: Frankly, I don't -- an exploratory unit
9 is a voluntary contract among the parties, and if the Division
10 decides that they would not exercise jurisdiction, frankly, I
11 don't see a problem with that. Certainly in New Mexico, where
12 virtually every unit contains state and federal land, you know,
13 the BLM and the Land Office certainly oversee their own land
14 ownership situation.

15 CHAIRMAN FESMIRE: Yet they appear to have conveyed
16 upon us the authority to approve those agreements, the Public
17 State Land Office and the BLM.

18 MR. BRUCE: Well, I would agree with the State Land
19 Office, although that language is not mandatory. It says the
20 Commissioner may defer a decision until it's approved by the
21 Division.

22 With respect to the federal regulations, I believe
23 that that language really pertains to when there is state land
24 involved, the BLM won't approve it until the Land Office
25 approves it. I don't think that language -- because the

1 language was cited by Division counsel in her brief. I
2 highlighted it.

3 CHAIRMAN FESMIRE: So did I.

4 MR. BRUCE: Page 4 talks generally about if state,
5 Indian and/or fee lands are involved, the unit agreement should
6 be approved by the appropriate state agency. Then down at the
7 very last two lines, it talks about the state or Indian agency
8 should be given the opportunity to commit its land prior to
9 authorized officer approval. Obviously, that's the Land Office
10 and that is not the Division. The Land Office is the owner of
11 that land and not the Division.

12 So that's why I think there -- while the BLM seems to
13 go along with Division approval of these exploratory units, I
14 cannot find anywhere in the federal regs or the statutes where
15 the state regulatory agency, whether it's the OCD or the
16 Oklahoma Corporation Commission is required to approve those
17 units.

18 CHAIRMAN FESMIRE: Okay. Did you look at the draft
19 document that Ms. Altomare cited?

20 MR. BRUCE: Not the whole document, no, but I did
21 try. As I said, I've been in Midland too long.

22 CHAIRMAN FESMIRE: And your brain is fried.
23 Commissioner Bailey, do you have some questions?

24 COMMISSIONER BAILEY: Is one of the issues why the
25 OCD approval might have been begun because of issues concerning

1 proration units and without OCD recognition of an exploratory
2 unit, that proration units might not follow the exact state
3 rules.

4 MR. BRUCE: Well, perhaps in New Mexico. I do know
5 that -- because in New Mexico the BLM has conceded spacing unit
6 size. And I don't know how or if it's a memorandum of
7 understanding or if it's just an informal agreement, spacing
8 units are set by the Division. But I do know that in other
9 states, that's not the case. That's not the case in Wyoming
10 with respect to the federal lands.

11 For instance, in Colorado, I know that long before
12 the Division approved infill drilling on the Fruitland Coal,
13 the BLM, on behalf of itself and the Southern Ute Tribe,
14 approved 160-acre spacing after initially the Colorado Oil and
15 Gas Conservation Commission had approved 328-acre spacing. And
16 there is a regulation, and I can get it for the Commission that
17 talks about well spacing, although it does say in appropriate
18 circumstances that it would go along with New Mexico well
19 spacing.

20 So I don't know that that's the issue and
21 furthermore, at least in this case, even though state spacing,
22 as pointed out at the hearing, of these gas reservoirs is
23 160 acres, the BLM and the Land Office is approving PAs based
24 on whole sections. So I don't know if there's that much of a
25 connection, is what I'm saying.

1 COMMISSIONER BAILEY: PAs are not always spaced on
2 whole sections in Land Office approvals.

3 MR. BRUCE: Correct.

4 COMMISSIONER BAILEY: Many times it's just quarter
5 sections or half sections.

6 MR. BRUCE: That is correct. And I believe up in the
7 well units in the northwest especially, they generally do PA
8 approvals on these, you know, the big San Juan units. It
9 generally does go along with well spacing, 320 acres. If I
10 could have anticipated that question, I have been in other
11 situations again -- and this one was probably in Sandoval
12 County -- where the BLM -- it was federal land and the spacing
13 unit, I believe -- even though well spacing in an oil pool, one
14 of the Mancos oil pools was 320 acres, the BLM, it was entirely
15 federal land approved a PA in excess of 320 acres.

16 So, again, I'm not -- I don't think that, as such,
17 well spacing is what determines that situation.

18 COMMISSIONER BAILEY: The well spacing is modified by
19 the unit agreement.

20 MR. BRUCE: Correct.

21 COMMISSIONER BAILEY: And I assumed that that was the
22 reason why the OCD had to be at least cognizant of the unit
23 agreement.

24 MR. BRUCE: That could be. Certainly, I mean, you
25 know, at least insofar as state land and fee land, the Division

1 does exercise broad jurisdiction over those lands. I mean,
2 federal land in New Mexico, like I said, seems to be -- federal
3 land in certain other states like Wyoming is, as I understand
4 it, not under the sway of the state agency so much as it is
5 here in New Mexico.

6 But, you know, on the other hand, the BLM does
7 approve APDs with respect to federal quote/unquote "federal
8 units" which is a nebulous term because it doesn't mean 100
9 percent federal unit. It exercises quite a bit of operational
10 authority over those federal units.

11 COMMISSIONER BAILEY: That's all the comments I had.

12 CHAIRMAN FESMIRE: Mr. Olson, do you have any
13 questions of this witness?

14 COMMISSIONER OLSON: Yeah. Mr. Bruce, you were just
15 mentioning Oklahoma in here. I don't know that you have that
16 in your document here. I think I saw you reference Texas.

17 MR. BRUCE: I did not reference it in the brief,
18 Mr. Commissioner.

19 COMMISSIONER OLSON: So Oklahoma also had specific
20 statutes dealing with these agreements?

21 MR. BRUCE: I do not know, and I can provide this to
22 the Commission after the hearing if they so desire, but
23 Oklahoma does not. I've got a listing. There's probably a
24 couple of dozen states that do have reference -- that do
25 reference approval of voluntary units.

1 Now, I can't tell from this listing. I did mention a
2 couple, the Wyoming and the Utah, that appear to apply to
3 exploratory units. The Texas one does not. But there are
4 other states; Alaska, Colorado, Montana, and others out west
5 that do. But Oklahoma does not.

6 COMMISSIONER OLSON: Those other states, they do have
7 a statutory authority for approving those?

8 MR. BRUCE: Yes, they do.

9 COMMISSIONER OLSON: So what about states that don't?
10 Do they still work on approval of those? Do you know?

11 MR. BRUCE: You know, I looked at a couple of
12 specific states. And this was, I think, the cite I gave in my
13 brief. These statutes on Page 3 of my brief, the Kramer and
14 Martin cite, Section 17.03, is what I'm looking at right here.

15 I do not look at -- I did look at the Utah. I did
16 look at the Texas and I did look at the Colorado -- Utah --
17 simply because they were close by. But I did not look at those
18 others.

19 COMMISSIONER OLSON: Okay.

20 MR. BRUCE: And I suppose the other thing I would
21 point out, as I pointed out in my brief, you know, the
22 Division -- even though in the last order I included my brief
23 which was a Yates Petroleum order just earlier this year for
24 the Thurman State Unit -- the state in ordering paragraph four,
25 "That all plans of development, all expansion or contractions

1 or PAs and expansions or contractions of the unit area shall be
2 submitted to the Division director for approval."

3 As I pointed out in my brief, the OCD, for the last
4 decade, has not approved expansions -- creations or expansions
5 of participating areas. It also had not approved plans of
6 development and operations. And I would just simply point to
7 the file in the original case on this matter resulting in the
8 original order where those documents were submitted by HEYCO to
9 the Division, but the Division never acted on them.

10 COMMISSIONER OLSON: So I'll follow up on what
11 Commissioner Fesmire was asking. So the Division's approval of
12 these in the past is, from what you're saying, largely based on
13 history and it's not really on a statutory authority or
14 regulation.

15 MR. BRUCE: That is correct. And as I said before, I
16 think, at the original hearing, 100 percent federal units -- I
17 believe there are a couple of examples of 100 percent federal
18 units being approved by the Division, but for the most part,
19 they were not. I think if you went to the Skelly Unit, which
20 is down in -- an old federal unit in southeast New Mexico and
21 some others that are 100 percent federal, they were not
22 approved.

23 And then, of course, when fee lands are involved, I
24 think -- when fee lands were involved, it was more of the
25 operator seeking approval of the Division because of that

1 language I quoted in my brief, where the fee lands can't be
2 unitized -- can be unitized by the working interest owner if he
3 or she gets Division approval. That was the situation, by the
4 way, of course, in the Bravo Dome. There was plenty of fee
5 lands in that -- there are plenty of fee lands in that unit.
6 And that is why there was the big fight at the Commission
7 regarding unitization. Because I actually, early in my career,
8 represented some of those fee owners. And they just did not
9 want to be part of that unit.

10 So it's almost to the point of a fee lease trying to
11 confer jurisdiction on the Division.

12 COMMISSIONER OLSON: Well, if we don't have statutory
13 authority for approving exploratory units, should we be doing
14 that?

15 MR. BRUCE: Well, again, as I said in my brief, if
16 it's federal or state -- or federal/state, I believe the BLM
17 and Land Office, because of how they review these documents,
18 have the authority to look after their own interests.

19 But when it comes to fee owners, who's going to look
20 after their interests? And, of course, the logical agency for
21 that is the Division.

22 But once again, Mr. Commissioner, I couldn't find
23 anything that granted jurisdiction of the Division to approve a
24 voluntary agreement.

25 COMMISSIONER OLSON: Okay. That's all I have.

1 CHAIRMAN FESMIRE: Ms. Altomare, with respect to
2 question one: Do you want -- and if I read your brief
3 correctly, basically it's your understanding that we do have
4 that authority.

5 MS. ALTOMARE: Yes. Although, I did do some
6 additional research after receiving counsel's brief. And I
7 think that there's a tie-in with the State Land Office and the
8 statutory authority granted to them. The connection is, as I
9 see it in particular, the State Land Office is given the
10 authority basically to modify the model agreement -- unit
11 agreement -- as it sees fit -- to add whatever language it sees
12 fit as long as it doesn't basically adversely affect federal or
13 Indian lands of the authorized officer's authority and
14 responsibility to protect the State's interests when there are
15 state lands involved in a unit.

16 What the State Land Office in New Mexico has done has
17 integrated language that has imposed upon the Oil Conservation
18 Division certain rights, responsibilities, duties and
19 obligations. And in this case, I think that that is from where
20 we are deriving. It's indirectly from the feds, but it is
21 through this process.

22 The State Land Office is given statutory authority to
23 give approval on these units and to work with the feds on these
24 units. There's no denying that the State Land Office is the
25 one who controls the interest in the land. You know, counsel

1 is very clear that if there's an appropriate State entity --
2 they're arguing that it is the State Land Office who has the
3 interest in the land.

4 The State Land Office has published an Oil and Gas
5 and Minerals Division Manual, which I'm sure Commissioner
6 Bailey is probably familiar with.

7 CHAIRMAN FESMIRE: She probably wrote it.

8 MS. ALTOMARE: In the manual, there are requirements
9 for final approval of state, federal fee, and state fee units.
10 For an exploratory unit it expressly states that an order of
11 the Oil Conservation Division, the State Land Office will not
12 approve any units until they receive an order in the State Land
13 Office.

14 So I would disagree with counsel that it is a
15 discretionary act on the part of the State Land Office in
16 statutory form, or regulatory form. It may be -- on its face
17 it may appear to be discretionary. In practice and policy and
18 application, the State Land Office has made the decision in
19 practice to seek the guidance and approval of the Oil
20 Conservation Division in the process of approving these units.
21 Which is -- I think this is why this precedent has been set all
22 these years for approval of these units.

23 CHAIRMAN FESMIRE: So we have to look at the statutes
24 governing the State Land Office to derive our authority to
25 approve?

1 MS. ALTOMARE: Right. It's the -- yeah.

2 CHAIRMAN FESMIRE: Okay. Well, assuming for a minute
3 that is correct, how do we get to the authority to approve
4 federal participation in these units?

5 MS. ALTOMARE: I'm sorry?

6 CHAIRMAN FESMIRE: How do we get the authority to
7 approve federal units?

8 MS. ALTOMARE: Federal where there's no state
9 involved?

10 CHAIRMAN FESMIRE: Right.

11 MS. ALTOMARE: That I'm not sure of, but definitely
12 where there are fee lands or state lands involved. And I did
13 print additional copies of the modified State Land Office
14 version of the unit agreement, if you wanted those. Because
15 they have -- that is where the specific language designating
16 the duties on the OCD basically giving the OCD and the
17 Commission the authority and responsibility, essentially, for
18 approval of these units, so I have those. But I don't -- I
19 thought I had printed --

20 CHAIRMAN FESMIRE: Okay. Well --

21 MS. ALTOMARE: -- the statutory stuff but, I don't
22 know if I have it with me.

23 CHAIRMAN FESMIRE: Let's go to some of the arguments
24 you've made concerning question one. We're talking about the
25 first question now. Basically, if I understood it correctly,

1 you were deriving our authority from a draft BLM manual.

2 MS. ALTOMARE: I was basically saying -- because
3 there wasn't very much out there. I was looking at the history
4 of what our agency has been doing. And assuming that there's a
5 reason that we've been doing it all this time, I was looking at
6 what the expectations of the feds were for what state agencies
7 should be doing, whether or not we have our own statutory
8 structure for it.

9 The feds clearly expect that state regulatory
10 agencies are going to play a role in this process. And from
11 what I can understand from reading the manual, it seems like
12 they are trying to preemptively avoid conflicts of law between
13 state and federal law jurisdictional issues when there are
14 units involving state and fee lands intertwined -- juxtaposed
15 with the federal unit stuff. Which seems like it's reasonable
16 to try and address spacing issues ahead of time, to try and
17 address things ahead of time that might arise that are going to
18 conflict when you are combining these parcels of land that have
19 different laws applicable.

20 I think that the manual actually has a lot of really
21 informative things to say about -- if nothing else, it's very
22 revealing about what the BLM expects of state agencies. Now,
23 whether or not our agency decides to take on those obligations
24 or argue with the feds as to whether or not they actually are
25 our obligations is an entirely different issue. But clearly,

1 that is what they are expecting state agencies to be doing
2 because that's what they've outlined as expectations for
3 operators in the process -- participating in the process -- to
4 be doing with regard to their submissions and the process for
5 these applications.

6 CHAIRMAN FESMIRE: Commissioner Bailey?

7 COMMISSIONER BAILEY: I'd like to point out one small
8 area where you say the Land Office is expecting guidance from
9 the OCD. The fact that we now require OCD approval before we
10 give final approval, that is simply to prevent OCD from being
11 short-circuited and to prevent any kind of conflict between the
12 two agencies.

13 MS. ALTOMARE: Okay.

14 COMMISSIONER BAILEY: It's not conferring authority.
15 It's not conferring or even asking for guidance. It's simply
16 making sure that we don't have any conflict that can arise.

17 MS. ALTOMARE: Okay. So again, it's the same
18 dynamic, I think, that the feds are doing by preemptively
19 trying to make sure that the state agencies are also brought in
20 at an early stage. I think it's probably a similar dynamic
21 that they're making sure that everybody is on the same page
22 early on so that anyone who has any questions early on in the
23 process can speak their mind and get it flushed out before it
24 becomes too late to deal with.

25 CHAIRMAN FESMIRE: Right. And because OCD holds

1 public hearings on any kind of action, it prevents having to
2 have three separate hearings where the BLM would have to have
3 theirs, the Land Office would have to theirs, and the OCD at
4 some point maybe having to have theirs. So it's condensing all
5 that into one public hearing for unit approval.

6 MS. ALTOMARE: Which makes sense. Thank you.

7 CHAIRMAN FESMIRE: Commissioner Olson?

8 COMMISSIONER OLSON: Well, I was just thinking, it
9 seems, then, that the BLM's manual is pretty much just based on
10 the historical practice that's gone on, I'm assuming; is that
11 correct?

12 MR. ALTOMARE: I would presume so, although the BLM's
13 manual, I would presume, is based on a nation-wide approach.
14 So it would be the collective approach of those states that do
15 have statutory structures, frameworks, in place for these kinds
16 of unit approvals and those that don't. I think that being
17 said, it's probably just their generic expectations of what
18 they would see as appropriate to preemptively address these
19 issues early on in the process that they see that might be of
20 concern in dealing with state agencies where state and fee
21 lands are involved in these units. That's my read on it.

22 Again, I mean, the law -- the regs, the federal regs
23 and the federal law is so vague and has given so little
24 guidance for so many years that this manual has been like a
25 watershed. I mean, it's just like all of a sudden there's all

1 this information. I'm not sure from where it's derived. There
2 isn't a whole lot of information provided, but I would assume
3 that it's kind of the collective expectation of the BLM on a
4 nation-wide basis based on the historical approval of these
5 units.

6 COMMISSIONER OLSON: I guess one other question is I
7 saw -- maybe this will come up later, I don't know -- but I saw
8 that Mr. Bruce had given us his brief of a rather large stack
9 of prior approvals of units.

10 MS. ALTOMARE: One thing I'd like to note about that
11 stack is that over 75 percent of them are state-only units. So
12 there is a big distinction there, just for your own
13 information. So not all of them deal with federal issues. So
14 just to bear that in mind when we're talking about applying the
15 standards and the expectations of the federal regulations
16 versus unit approval just for state purposes.

17 COMMISSIONER OLSON: Other cases of denial of
18 exploratory units? There's a lot of approvals here.

19 MS. ALTOMARE: That I don't know. I know that
20 counsel has made the argument that up until this point, the
21 Division role has basically been -- I believe he used the word
22 "ministerial" nature. I would submit that regardless of what
23 the practice has been in the past as far as the rote Commission
24 submission approval practice, there is a time to change bad
25 habits, as they were, if that is the case.

1 And the more recent approvals that are in here, there
2 is a trend where you see a peppering of more fact-specific
3 things being integrated, references to unorthodox well
4 locations, references to more environmental issues, references
5 to more life testimony being given. There's less of the more
6 rote submission of affidavit, approval; submission of
7 affidavit, approval as you get more recent. And, in fact, I
8 think the most recent one that is in here actually makes
9 reference even to the protection of health and human -- human
10 health and the environment and provides that additional
11 information about protection of groundwater and additional
12 investigation about freshwaters on the unit.

13 CHAIRMAN FESMIRE: That would be 13377 -- Case
14 No. 13377, the Hueco South one on there?

15 MS. ALTOMARE: Yeah. And again, that one doesn't
16 happen to be a federal one, but there does seem to be -- as the
17 regulations have changed, as the OCD rules have changed a
18 little bit to integrate more environmental concerns in addition
19 to the traditional waste and correlative rights, there does
20 seem to be a little bit more of a trend to actually put a
21 little more thought into the process.

22 And so I don't know if there are denials. But I know
23 that the approvals have changed a little bit in nature. And I
24 think that the reason that we're here today is because there's
25 a recognition, at least by the Chairman, that it's not really

1 clear what direction we're going with these. And perhaps it is
2 the time to establish once and for all exactly what role the
3 Division is supposed to be playing, whether it is truly a
4 ministerial role or whether we should be putting a little more
5 thought and deliberation into this process.

6 COMMISSIONER OLSON: Well, I noticed the same thing
7 in looking at more recent orders that they have much more
8 detail than they had in earlier orders. Thank you.

9 CHAIRMAN FESMIRE: So I think with respect to
10 question one, we've got both sides arguing that we do have the
11 authority; one based on bureaucratic inertia, essentially, and
12 the other one based on the blessing of the BLM, at least with
13 respect to federal lands. Is that a pretty accurate way to
14 describe it?

15 MS. ALTOMARE: On thing the BLM and the sister
16 office --

17 MR. BRUCE: I disagree with respect to the BLM. I
18 don't think they care. But the Land Office has its -- as I
19 said in the regulations and in my brief, that they may seek
20 Division approval. I think it's more inertia.

21 CHAIRMAN FESMIRE: Okay. Does anybody have anything
22 else they want to add on question one?

23 MS. ALTOMARE: Only that they are, as noted by
24 counsel in his brief, he did cite one case. I note that there
25 are a number of cases where there is tacit recognition of the

1 Division's authority to approve these. There are multiple
2 opportunities for the higher courts to have addressed this and
3 said no, the Division shouldn't be exercising this authority,
4 and they've never done that in all of this time. So I think
5 that, clearly, this authority is being exercised within its
6 rights.

7 CHAIRMAN FESMIRE: Okay. Question two: The criteria
8 for approval under the Oil and Gas Act. Judging from the
9 briefs, we may get kind of into a few more differences between
10 the parties. Mr. Bruce, you want to start with that?

11 MR. BRUCE: Well, I think both briefs recognize that
12 really, it's just based on land. In other words, have a
13 sufficient requisite number of voluntary joinders been obtained
14 to give what the BLM and, I think, the Land Office has always
15 referred to "effective control" of the unit? Which -- and I
16 didn't look it up in any of the documents -- but I've always
17 for decades gone under the assumption that if the BLM and the
18 Land Office see 85 to 90 percent voluntary approval of the unit
19 working interest and royalty interest, they will generally
20 approve it. They certainly wouldn't approve it if there was 50
21 or 60 percent approval.

22 And then the other thing is simply geology. Can you
23 justify the unit outline? That's it. And really, if you go to
24 the cases I cited -- and I only attached one as Exhibit I, one
25 hearing transcript -- but if you go to all of the others except

1 where the units involved in unorthodox locations since that was
2 brought up, really, that's different than approval of a unit.
3 That really does affect correlative rights of on offset
4 operator.

5 Other than this case -- and to a certain extent, the
6 Waco South Unit -- all of the other cases are just dependent on
7 geology, really. There hasn't been any change, and I've been
8 doing this for 25 years. All of the evidence has just been
9 some geology and some land testimony. I could attach -- and
10 addressing one of Commissioner Olson's questions -- I have
11 never seen a unit, exploratory unit, denied, period. Never.

12 And I think you could go upstairs to the Byrams
13 Reporter, you know, as this contains at least the most recent
14 updates, 680 pages of unit orders, and some of them do involve
15 waterfloods. But if you went through those 680 pages and
16 looked at the orders involving those units, every exploratory
17 unit, they've all been approved, going back -- I don't know
18 when the earliest ones were. There were some federal
19 prohibitions against units until the '40s, I believe. And so
20 if you go back 60 years, every single one of them has been
21 approved. And really, it's just based on land control and
22 geology.

23 CHAIRMAN FESMIRE: Mr. Bruce, that's interesting that
24 federal prohibition on units. Wasn't that changed to
25 facilitate waterflooding and secondary recovery?

1 MR. BRUCE: Well, there used to be a limitation on
2 the amount of federal acreage you could lease -- one company
3 could lease. And there was some legal issues with respect
4 to -- especially when the large units were being formed up in
5 the San Juan Basin, you know, it's like the Big A Unit, whether
6 if other companies joined in on that, if it would violate the
7 federal restriction on one company's ownership of federal
8 acreage, control of federal acreage.

9 Now, I don't know about the question you're asking.
10 I wouldn't be surprised. People tried to form units in the
11 '30s. If you go over to the BLM, which I've spent too much
12 time going through those lease files, you see where certain
13 people tried to form units and there were always legal issues
14 until the BLM or the General Land Office sometime, I believe,
15 in the late '40s came to start approving them.

16 CHAIRMAN FESMIRE: So, to sum up your argument, the
17 only two criteria that we should use are the land situation,
18 whether it's been a sufficient voluntary joinder and the
19 geology testimony.

20 Would you refresh my memory? We're talking about --
21 this is a 1600-acre unit currently, if I remember correctly.

22 MR. BRUCE: It's currently about 8500 acres.

23 CHAIRMAN FESMIRE: And you're seeking to add how much
24 to it?

25 MS. ALTOMARE: I thought it was bigger than that.

1 MR. BRUCE: The current -- as expanded, it would
2 contain 11,600 acres-plus. As originally formed, it contained
3 a little over 800 acres of land, all state and federal.

4 CHAIRMAN FESMIRE: Commissioner Bailey, do you have a
5 question on that issue?

6 COMMISSIONER BAILEY: Not really.

7 CHAIRMAN FESMIRE: Commissioner Olson?

8 COMMISSIONER OLSON: Just one question: I guess,
9 what level of -- since you've been involved in a lot of these
10 before -- what level of geology has been submitted in past
11 cases?

12 MR. BRUCE: A very minimal amount. I mean, I know
13 that it's not a -- I can't state the specificity, which is why
14 I enclosed the -- why I referenced in the brief and enclosed
15 that one hearing transcript. It's been so minimal that
16 starting four or five years ago, the Division said, "You know,
17 this is all routine. We really don't even want a witness to
18 question."

19 And that is still used today for the most part. I
20 have the -- you mentioned the Waco South Unit, and of course,
21 although I attended the hearing, that was Mr. Carr who did that
22 case, and I believe there were expiring leases.

23 And they brought witnesses up simply because, number
24 one, the large land area involved, 80-some thousand acres, and
25 they wanted to make sure they answered all the Division's

1 questions because that unit was approved in November 2007. And
2 I believe they had leases -- a number of leases expiring
3 December 1 or thereabouts, in 2007.

4 But if you look through each and every one of these,
5 at least over the last decade -- well, actually, ever since
6 I've been around the Division, you bring up a geologist who
7 vaguely justifies the unit boundary. Maybe I shouldn't say
8 vaguely. But I use that word because these are exploratory
9 units. You don't always have that much geology. Maybe
10 nowadays it's a little easier if you do have some seismic to
11 justify things.

12 But I probably shouldn't say this, but a better
13 person to answer that question would probably be Mr. Martinez
14 of the Land Office who's in the audience who looks at these on
15 the weekly basis. Because these -- he's the one who decides --
16 and whoever the person is down at the BLM in Roswell -- who
17 decides these things.

18 But, you know, this isn't like a waterflood unit
19 where you pretty much have an idea of what the exterior of the
20 pool is and how you're going to form the boundaries of that
21 unit. It is exploratory. We don't know exactly what the final
22 outline of the unit is. And I think that's -- therefore, it is
23 kind of a loose standard. Because until you really start
24 drilling, you don't know.

25 And the unit agreement itself takes that into

1 account, because after a certain period, if lands haven't been
2 developed, the unit starts contracting down. And so there's
3 already a method in place if you make a unit too large, it's
4 going too expand down in the long run anyway. Well, not in
5 that long of a run. I believe there's a five-year period in
6 which to justify the size of the -- the final size of the unit.

7 So, you know, not being a geologist myself, I can't
8 give you a hard and fast statement as to what geologically is
9 required. But if you went back and looked at these affidavits
10 of the engineers -- I mean, of the geologists -- submitted in
11 these cases over the last five years, you'd see some structure
12 maps and some proposed -- or what the geologist thinks is a
13 reasonable isopach on the Morrow or the Strawn or whatever to
14 justify the unit boundary.

15 CHAIRMAN FESMIRE: Can I interrupt with a question on
16 that issue? On Page 9 of your brief, you summarize HEYCO's
17 evidence in this case. And you just hit on it. You said
18 there's not enough exploration that has been done to contract
19 the acreage out of the unit. But has there been enough
20 exploration done to expand the unit by 2800 acres?

21 MR. BRUCE: Well, I'd say two things about that:
22 First of all, the reason I say not enough exploration to
23 contract the unit is because that's what the Division's order
24 said or suggested that it should be contracted. And my
25 argument on that is, number one, there hasn't been enough

1 exploration because they have -- HEYCO has been prevented from
2 further exploration over the last six years. And so how can
3 you say it should be contracted if they are not allowed to
4 develop, number one?

5 And insofar as expansion goes, they have drilled two
6 wells. And just by those two wells, the current participating
7 areas include 65 or 70 percent of the unit. So obviously
8 there's not only the geologist for HEYCO, but the Land Office
9 and the BLM believes that based on subsequent development, it
10 may -- the final size of the unit as expanded is justified.
11 And so if the BLM and the Land Office have looked at this
12 pertinent data under the unit agreement and says yes, why is
13 the Division now objecting?

14 And again, what is the harm? Because if it's not
15 prospective, it will be contracted out. And again, looking at
16 the unit outline -- and this was brought up in the Division
17 order about expansion -- all of the expansion acreage includes
18 sections in which there is already unit land in it.

19 And if there is to be a greater -- if participating
20 areas have been expanded based on 640 acres, in essence, or if
21 the Division has suggested in its order thinks that spacing
22 should be increased to 640 acres, then the well units just
23 including current land within the unit, would encompass the
24 entire unit as expanded.

25 CHAIRMAN FESMIRE: Commissioner Olson?

1 COMMISSIONER OLSON: Well, I guess to still follow up
2 on the geologic information, because I see the Division will be
3 addressing this -- because I see in their brief that the BLM
4 manual -- I guess, this draft manual -- provides for
5 submissions of, as they say, detailed geologic data to support
6 the revision. So it sounds like you're saying you can't
7 provide detailed geologic data. But that's what they're
8 requiring. And they even go into greater depth as to what that
9 is.

10 MR. BRUCE: Well, I mean, I suppose it depends on as
11 detailed as you can get at this time. Certainly, they
12 submitted well information, the engineering data on the well,
13 on the two wells that have been completed insofar as
14 permeability and porosity. And that type of engineering data,
15 actually, was submitted to the Division -- excuse me -- to the
16 BLM, and if these are the regulations, I presume the BLM down
17 in Roswell was following these regulations. And, obviously,
18 HEYCO submitted enough data --

19 CHAIRMAN FESMIRE: This is a draft manual. It hasn't
20 been adopted as --

21 MR. BRUCE: Well, and I think if you look just at the
22 current regulations themselves, they in essence state the same
23 thing as Exhibit A to my brief. It just says, "Geologic
24 information including the results of any geophysical surveys
25 and any other available information showing unitization as

1 necessary should be furnished."

2 It's basically -- this expands on it. But it's
3 basically saying the same thing. And what I'm saying is HEYCO
4 submitted enough data to the BLM and to the Land Office whereby
5 they looked at it and thought expansion was justified.

6 COMMISSIONER OLSON: I guess, then, if it's coming
7 for Division approval, shouldn't the same information be
8 provided to the OCD?

9 MR. BRUCE: All the information that was submitted to
10 those two agencies was submitted to the Division. It's all in
11 the case file for the original case. I forgot the case number,
12 which was incorporated in the record.

13 COMMISSIONER OLSON: Thank you.

14 CHAIRMAN FESMIRE: Ms. Altomare, do you want to
15 address question number two?

16 MS. ALTOMARE: Yeah. Just to be clear, the State
17 Land Office has not yet approved the unit expansion. They have
18 given it preliminary approval. They simply looked at it and
19 said, okay, it's all right to go to the Oil Conservation
20 Division -- correct me if I'm wrong -- through their stage.

21 And then once the Oil Conservation Division gives
22 their approval, the State Land Office will review it in full
23 for final approval. So just for the record, I wanted to be
24 clear about that, because there is some confusion in the record
25 as to that.

1 While it is a draft manual, the manual has been
2 published for use for guidance for operators, so I don't know
3 whether or not HEYCO was aware of that or was using it, but it
4 does provide some pretty instructive information about what is
5 to be included in these geological reports. In these
6 applications, it specifically says that the BLM expects
7 operators to:

8 "Furnish, as part of the application, a geological
9 report including a public land survey base showing the proposed
10 unit boundary and detailed geological maps illustrating the
11 limited mechanism for production of the objective formation
12 along with structure cross sections and other geologic data as
13 they relate to the proposed unit. Geologic map and cross
14 section should show the strike and dip of all pertinent faults.
15 The map must show the location of all wells drilled in the unit
16 area and immediate vicinity thereof and should indicate the
17 status and depth of each well and the lowest formation
18 penetrated."

19 None of that was provided on any of the information
20 that was provided by HEYCO in this case.

21 CHAIRMAN FESMIRE: To us, or to the BLM?

22 MS. ALTOMARE: If what was provided to us was
23 provided to the BLM, then neither; but certainly not to us.

24 "Appropriate cross sections and stratigraphic columns
25 identifying prospectively productive formations and indicating

1 expected depths." The cross sections that were provided to us
2 were hand drawn and omitted significant details.

3 "Pertinent geophysical interpretations and the
4 geologic basis for selecting the proposed unit area boundary
5 such as closing structural or stratigraphic contour fault or
6 pinch-out." In addition to the geologic report, seismic data,
7 schematics, anything else that would be helpful to determining
8 whether or not the expansion is justified should have been
9 submitted. And nothing of that nature was submitted.

10 To be clear, the OCD is not opposing the expansion.
11 The OCD is opposing granting the expansion based on
12 insufficient information. As far as answering question number
13 two, I think that opposing counsel has conceded in his brief
14 that if it's a given that the OCD has the authority to review
15 and approve these unit applications and revisions, then the
16 same information should be submitted to the OCD for review and
17 the Commission for review as it is submitted to the State Land
18 Office and the BLM. As far as materials that are submitted for
19 review, that's what I would argue should be submitted to the
20 Oil Conservation Division for review and consideration.

21 Further, it seems clear from the BLM materials,
22 including the manual, that the same standard applies for unit
23 revision applications as it does for initial unit establishment
24 consideration. So the same stack of materials that is
25 submitted for a unit application should be submitted for a unit

1 expansion. It shouldn't be a lesser application simply because
2 they've already gone through the process once.

3 Indeed, I would submit that it should be even more
4 comprehensive because unlike the initial application where they
5 have even less geologic information, they should have more at
6 the time that they're submitting an application for revision.
7 So the argument that it's less, that it's an exploratory unit,
8 that they don't have a lot of information to submit to justify
9 what they're asking for, has less merit at the time that
10 they're submitting an application for revision than it does at
11 the initial time of application.

12 And in this case, they submitted less information at
13 the time of the application for revision than they did at the
14 initial time of application, which is one of the reasons that
15 the OCD found the application troublesome.

16 As far as the other issues, as far as the submission
17 process -- jumping around to other issues -- one thing that's
18 interesting in the manual is that it specifically says that
19 when an application is being considered for request for
20 revision of a participating area and, granted, we're talking
21 about the unit. But as counsel has indicated, at least
22 according to the modified State Land Office version of the unit
23 agreement, OCD is also supposed to be participating in the
24 revision of the participating area consideration, any doubts
25 are to be resolved against participation. And I would submit'

1 that --

2 CHAIRMAN FESMIRE: How do you cite that?

3 MS. ALTOMARE: That is part of the manual description
4 and it's in Section 2G(1) and 2G(2) where it's discussing the
5 initial participating area and revision of participating area.

6 CHAIRMAN FESMIRE: Ms. Altomare, isn't -- I mean, the
7 question is what criteria we should use. Basically, you're
8 saying we should use the same criteria that the BLM proposes --

9 MS. ALTOMARE: Right.

10 CHAIRMAN FESMIRE: -- that we use.

11 MS. ALTOMARE: All I'm saying is that the burden is
12 on the applicant.

13 CHAIRMAN FESMIRE: In that draft BLM manual.

14 MS. ALTOMARE: Correct. And I think that the draft
15 BLM manual is for the first time giving us a window into what
16 is being -- what the BLM has all this time really expected of
17 applicants. It is flushing out what has been underneath all of
18 the regs and federal law that has been unspoken all this time
19 and just kind of expected but not actually put into writing in
20 a way that applicants and operators can look at and say, "Okay.
21 This is what we're supposed to do."

22 It is actually provided the much-needed guidance to
23 agencies and to operators in the process.

24 CHAIRMAN FESMIRE: Okay. So assuming that we adopt
25 the BLM's outlook on burden and the materials need to be

1 submitted to support that, what's the criteria we should base
2 our decision on?

3 MS. ALTOMARE: I think the criteria is that the
4 operators should be required to submit sufficient information
5 to justify what they're asking for. They should submit the
6 geologic data and the mappings that are outlined in the manual
7 to the extent possible based on the degree that the unit is an
8 exploratory unit.

9 Obviously, it's going to be a case-by-case basis.
10 They are exploratory. There's going to be times when there
11 isn't information known. But certainly, in cases such as this,
12 there is additional information that has been accrued over the
13 last decade, and you would expect that a reconvening for an
14 application for a revision you would have more information. So
15 in cases like that, on a case-by-case basis, I would think that
16 you would expect additional evidence to be accrued and present
17 it.

18 So I think the standard should be that, on a
19 case-by-case basis, we should expect applicants to submit
20 sufficient information to justify --

21 CHAIRMAN FESMIRE: So I guess what I'm asking is,
22 should our decision criteria be, given the geologic information
23 as presented, should there be a reasonable inference from the
24 data presented at the time it was presented at hearing that the
25 area that is to be included in the unit -- or in this case,

1 added to the unit -- can reasonably be expected to be
2 productive within the zone that the unit is intended to
3 explore -- zone or zones that the unit is intended to explore?
4 Is that the --

5 MS. ALTOMARE: Yes. I think that's fair. But I
6 think that they should be expected to present sufficient,
7 solid, thorough testimony, through legitimate testimony, to
8 support what they're asking for. And one of the things --
9 counsel noted that in the recent case, that the only reason
10 they had brought witnesses up was because there was so much
11 land involved et cetera, et cetera. I think that the cases
12 that I was seeing where they were presenting live testimony and
13 additional issues were involved, I think that where there are
14 cases where there are complexities involved, live testimony is
15 critical.

16 Whether that be because there is excessive acreage
17 involved or whether that be because we are dealing with a
18 highly vulnerable area of the State, such as this case, I think
19 there are cases where it is not unreasonable to expect and
20 demand live testimony be presented by appropriately qualified
21 individuals to justify the application approval. And I don't
22 think that it flies in the face of the precedent as submitted
23 by counsel.

24 CHAIRMAN FESMIRE: Okay. Anything else?

25 MS. ALTOMARE: No.

1 CHAIRMAN FESMIRE: Commissioner Bailey?

2 COMMISSIONER BAILEY: Is there a reason this is
3 called a draft manual?

4 MS. ALTOMARE: I would presume it's because it's
5 still being revised. And maybe it's still being reviewed
6 and --

7 COMMISSIONER BAILEY: Open to change or modification
8 and having input from the industry and the public --

9 MS. ALTOMARE: But it has --

10 COMMISSIONER BAILEY: -- and other interested
11 parties?

12 MS. ALTOMARE: Sure. But I would submit that it is
13 still an indicator of the intentions of BLM, and it's the only
14 thing that we have at this point to give us any indication as
15 to the intentions of -- the underlying expectations. And it
16 has a disclaimer or a notice at the top of the manual that it
17 is to be used as guidance in the interim until final approval.

18 COMMISSIONER BAILEY: But it's still subject to
19 change and modification.

20 MS. ALTOMARE: Yes.

21 COMMISSIONER BAILEY: You're asking for the same
22 information that's submitted to the Land Office and to the BLM?

23 MS. ALTOMARE: Yes.

24 COMMISSIONER BAILEY: Not additional information?

25 MS. ALTOMARE: No. I think if they meet the

1 expectations once -- I think that if they meet the expectations
2 that are laid out in the manual, then it should be the same
3 information that's submitted.

4 COMMISSIONER BAILEY: This information that was asked
5 for in the order included financial statements and locations of
6 pipelines. Are those requested in the manual?

7 MS. ALTOMARE: No.

8 COMMISSIONER BAILEY: So that information was not
9 given to the BLM. It was not given to the Land Office. And so
10 my question is: On what basis is OCD asking for that
11 information, if the same information is being requested?

12 MS. ALTOMARE: Well, at this point, I mean -- I'm not
13 requesting that information. That was the Hearing Examiner
14 that had prepared that and had suggested that those might be
15 questions that might be asked.

16 Honestly, there's been limited communication. I
17 didn't know what had been given to the BLM and the State Land
18 Office. We were under the impression that we had been given a
19 partial application. So we were kind of shooting in the dark
20 and asking for whatever information might help us better
21 ascertain what the status was.

22 But you are correct that it isn't -- now that we've
23 located the manual we have a better understanding of what the
24 intended scope of review is by the BLM.

25 COMMISSIONER BAILEY: If the same information is

1 given to the BLM as is given to the OCD, and there is agreement
2 between the two management agencies, I'm wondering why the OCD
3 would look at the same information and come up with a different
4 determination. On what basis, -- if we're looking at geology
5 and the unit agreement itself, the number of wells to be
6 drilled, the locations, that type of information.

7 MS. ALTOMARE: Well, I don't think we've gotten to
8 that question yet, but I believe there are different mandates
9 and different standards applicable to the two agencies. That's
10 my understanding. But the OCD has certain standards that it
11 applies when it's reviewing applications. I'm not sure what
12 the State Land Office looks at when it is looking at an
13 application.

14 COMMISSIONER BAILEY: I'm just wondering if your
15 geologist is any better than our geologist.

16 MS. ALTOMARE: I don't know. As far as -- the OCD
17 looks at things in terms of protection of correlative rights,
18 protection of human health and the environment, and prevention
19 of waste. And I don't know that those are the three exact same
20 mandates that the State Land Office is going to be applying --
21 the same framework that the State Land Office is applying when
22 they are reviewing the applications.

23 COMMISSIONER BAILEY: That's all the questions I
24 have.

25 CHAIRMAN FESMIRE: Commissioner Olson?

1 COMMISSIONER OLSON: Just to clarify something; I
2 think Mr. Bruce had suggested that there's three criteria for
3 approval. One was the approval of the unit owners, and the
4 second was geology, and then his other was correlative rights
5 of offset owners.

6 MS. ALTOMARE: Yeah. I mean to say that I don't -- I
7 concede that the other two are not in dispute. My one point of
8 contention was the issue that I raised as far as what should be
9 submitted.

10 COMMISSIONER OLSON: So at least there's agreement
11 that those are the three criteria that would be considered,
12 though.

13 MR. BRUCE: Well, when you say correlative rights of
14 who?

15 MS. ALTOMARE: Are you talking about the correlative
16 right of the people within the unit or the people outside the
17 unit?

18 COMMISSIONER OLSON: I thought Mr. Bruce said the
19 correlative rights of the offset owner. That's what I thought
20 you said.

21 MR. BRUCE: No. What I was saying is in one of the
22 orders that Division counsel mentioned, one of the unit orders
23 I attached, the initial unit well was going to be at an
24 unorthodox location and, therefore, the Division looked at the
25 correlative rights. Obviously, unorthodox locations are

1 something where the Division -- where you're seeking an
2 exception to the well location and spacing rules, correlative
3 rights of offsets do apply.

4 But in this case, I vehemently disagree that we have
5 to look at those outside the unit.

6 COMMISSIONER OLSON: Sorry. I thought that's what
7 you said.

8 Well, just a question, too, on approval of the unit
9 owners, then. What if you have a fee owner that doesn't want
10 to participate in the unit? How does that work?

11 MR. BRUCE: Well, if I can answer that: Unless
12 there's some provision in his lease, he can't be forced in.
13 And that's the way it goes. Then if you drill in a spacing
14 unit that doesn't contain his lease, he gets nothing, whereas
15 he probably would under a unit agreement. But if you drill on
16 a spacing unit including his lease, then he would participate
17 more than somebody else in the unit. That's just a matter of
18 contract.

19 COMMISSIONER OLSON: And then just a final question
20 on the geology. So this goes back to the question Commissioner
21 Bailey had. If we take the same information, the same geologic
22 information that's presented to the BLM and the Land Office --
23 and it almost sounded to me like if it's acceptable to them --
24 and maybe you can clarify this -- it's acceptable to the
25 Division. So I wonder if why the Division would even have an

1 approval if it's already been through -- the proper information
2 has been through --

3 MS. ALTOMARE: Because I think --

4 COMMISSIONER OLSON: -- the BLM and the Land Office.

5 MS. ALTOMARE: Because I think we're being asked to
6 look at it through different lenses. We're looking at it in
7 terms of our own mandates, our own vision. The State, we're
8 looking at it, first of all, in terms of the State --

9 CHAIRMAN FESMIRE: You're saying the State Land
10 Office, for instance, has the authority to basically -- I mean,
11 the requirement that they protect the surface and otherwise
12 maximize the value of the land; whereas we're looking at it
13 with respect to waste, correlative rights, and protection of
14 human environment. Is that --

15 MS. ALTOMARE: Right. We have particular mandates
16 that prioritize what we are supposed be doing as an agency that
17 other agencies don't necessarily prioritize in the same
18 fashion. So for instance, there are a number of these orders
19 in here that while they are approved -- he may be correct that
20 there aren't denials -- they note that they are going to do
21 additional studies to locate water or locate high risk channels
22 or do particular things to protect the well bore or things that
23 might not necessarily be addressed by the State Land Office in
24 terms of how they review the application.

25 That's my understanding. And like I said, there is

1 very little information out there. But that's my understanding
2 of how these different agencies intersect. So the BLM is
3 looking at it in terms of their land and their particular
4 vision for their agency. And OCD is looking at it in terms of
5 what we do here.

6 COMMISSIONER OLSON: But then, I guess, doesn't that
7 acknowledge that those issues on protection of public health
8 and the environment are part of subsequent activities? They're
9 not really part of the unit agreement. They're part of the
10 things that are going to happen that come up with the APDs and
11 when things actually start occurring, not the actual agreement
12 itself.

13 MS. ALTOMARE: I think there's a gray area. Because
14 while -- I mean, as my witness did testify at the hearing on
15 the 9th, yes, a lot of those issues are issues that would be
16 best addressed at the time of APDs when more specific
17 information for a particular well is known and the drilling is
18 imminent for a particular well. There are more general
19 formation-specific issues and unit-specific issues that I think
20 that I exemplified by some of these orders where it comes up at
21 the unit approval stage that it's known that a particular
22 reservoir sits near something that creates a risk, an
23 environmental risk, or that there's a needs for additional
24 seismic testing.

25 And the Oil Conservation Division Hearing Examiners

1 have seen fit to not specifically order detailed testing, but
2 to at least put in there that the operators are aware of it and
3 they're going to conduct additional investigations. So it's at
4 least referenced in there so it starts the chain of information
5 so that it can tie in later on when it is later on addressed at
6 the APD stage.

7 COMMISSIONER OLSON: Because that's kind of the way I
8 read the -- looking at the Waco South exploratory unit, there
9 was a provision in the order that said that the wildcat
10 drilling applications shall be individually reviewed by the
11 Division to insure prevention of waste, protection of
12 correlative rights, and then protection of human health and the
13 environment.

14 So it seemed to me that even in that prior order of
15 this year -- actually, April of 2008 -- was acknowledging that
16 you deal with those issues through the APD. And it was just
17 making sure that it was clear to everyone that those issues
18 will be addressed in the APD, but not as part of the unit
19 agreement.

20 MS. ALTOMARE: Right. But as I read it, by
21 addressing it at the time of the unit approval, the unit
22 agreement approval, they are at least acknowledging those
23 issues are out there. We're aware of them, there's been
24 testimony presented, don't forget about them. We're not going
25 to forget about them. Let's make sure that we come back and

1 revisit them. And it starts the -- it makes a record so that
2 it starts the process right then and there. That's how I read
3 it, at least.

4 COMMISSIONER OLSON: Okay. Well, that's kind of how
5 I read it, too.

6 MS. ALTOMARE: Okay. We're on the same page.

7 COMMISSIONER OLSON: Thanks.

8 CHAIRMAN FESMIRE: I'm going to have to go back to
9 Mr. Bruce here.

10 Mr. Bruce, if I understood your argument correctly,
11 the answer to question two basically is that there are two
12 criteria; sufficient voluntary joinder and geology. I want to
13 comment on sufficient voluntary joinder. We have no authority
14 to force-pool anybody into exploratory units.

15 MR. BRUCE: That's absolutely correct.

16 CHAIRMAN FESMIRE: Voluntary joinder would be 100
17 percent joinder by the working interest owner, right?

18 MR. BRUCE: No, no.

19 CHAIRMAN FESMIRE: No?

20 MR. BRUCE: I, mean, in this instance --

21 CHAIRMAN FESMIRE: In an exploratory unit?

22 MR. BRUCE: No, no. And as I said before, if you go
23 through those orders, sometimes it's 100 percent approval. In
24 this case, it was 100 percent approval in the original unit.
25 In the unit as expanded, there's one tract outstanding. But if

1 you look at it overall, it's probably 97 percent working
2 interest approval.

3 But you will see that the Division and the BLM and
4 the Land Office have approved voluntary units where there's --
5 and generally in excess of 90 percent voluntary approval
6 royalty and working interest. Unanimous approval is not
7 required.

8 As I said, in answer to Commissioner Olson, if
9 somebody -- I think it was in answer to him -- if somebody
10 doesn't join, then they just --

11 CHAIRMAN FESMIRE: Are you talking about royalty
12 interest owners who are forced under the provisions of their
13 lease to join, or are you talking about working interest
14 owners?

15 MR. BRUCE: Either/or. I mean, I'm not quite sure
16 what you're getting at if you're putting it that way. If you
17 go through the case files for these units just over the last 10
18 years or eight years, you will see various levels of approval,
19 but generally well in excess of 85 percent approval of the
20 working interests.

21 CHAIRMAN FESMIRE: But I guess the question I'm
22 asking is: How do you force a working interest owner into an
23 exploratory unit?

24 MR. BRUCE: You cannot. You cannot. He would just
25 be under his contract. And if you're drilling a well on

1 acreage containing his or her lease, then you force-pool them.

2 CHAIRMAN FESMIRE: Okay. So how can you have less
3 than 100 percent joinder in an exploratory unit?

4 MR. BRUCE: You mean, why is it allowed? Is that
5 your question?

6 CHAIRMAN FESMIRE: No, no.

7 MR. BRUCE: I mean, generally -- and this goes back
8 to historical. Going back, most of the units contain state and
9 federal land. You cannot force the Land Office or the BLM into
10 anything. You need their voluntary agreement. They will not
11 approve the exploratory unit unless you show sufficient
12 joinder. And that does not mean unanimous joinder of
13 everybody. General -- as I said, generally well in excess of
14 85 percent.

15 COMMISSIONER BAILEY: Non-participating --
16 participate on a lease basis, not on a unit basis.

17 MR. BRUCE: So if, for instance, spacing was 320
18 acres and -- let's take the unit whether expanded or not
19 expanded. There was let's say 160-acre spacing -- which it
20 currently is -- and there was one tract sitting out there, a
21 fee tract, with 80 acres in that 160-acre well unit, that
22 working interest owner and that royalty owner would be entitled
23 to have the revenue from the well. The other half would be
24 distributed to the unit working interest owners.

25 CHAIRMAN FESMIRE: And they could be force-pooled --

1 MR. BRUCE: They could be force-pooled.

2 CHAIRMAN FESMIRE: -- on a per well basis.

3 MR. BRUCE: That is correct.

4 CHAIRMAN FESMIRE: Or they could be unitized in a
5 secondary recovery operation.

6 MR. BRUCE: Correct.

7 CHAIRMAN FESMIRE: How, with a -- I may have to get
8 Commissioner Bailey to explain it to me. How do we come to
9 them in the exploratory phase and say we are going to force you
10 into an exploratory unit?

11 MR. BRUCE: No, no.

12 CHAIRMAN FESMIRE: We couldn't.

13 MR. BRUCE: The Land Office -- the only way the Land
14 Office and the BLM can participate, number one, in oil and gas
15 activities, is through leasing --

16 CHAIRMAN FESMIRE: Right.

17 MR. BRUCE: -- number one. And number two, you
18 cannot do anything with their leases absent their voluntary
19 consent, whether it's an exploratory unit or a waterflood unit.

20 And, for instance, you cannot force-pool unleased
21 federal or state land into a --

22 CHAIRMAN FESMIRE: Right.

23 MR. BRUCE: -- well unit.

24 CHAIRMAN FESMIRE: Correct.

25 MR. BRUCE: They are not subject to force pooling.

1 CHAIRMAN FESMIRE: I understand that. But if you've
2 got an operator with a lease -- say it's a fee lease -- within
3 the boundary of the area that you're trying to create an
4 exploratory unit with -- out of, you cannot --

5 MR. BRUCE: You cannot force him in under any
6 circumstances.

7 CHAIRMAN FESMIRE: So when you come to any -- the
8 State Land Office, the BLM or the OCD -- with a voluntary unit
9 proposal, don't you have to have 100 percent joinder?

10 MR. BRUCE: No, sir.

11 CHAIRMAN FESMIRE: I've skipped a cog somewhere,
12 then. I'll get Commissioner Bailey to explain it to me.

13 MR. BRUCE: No. And I would submit that very few
14 voluntary units have unanimous joinder. If you go through
15 these -- and, of course, Yates Petroleum, through buying a lot
16 of frontier areas, have a lot of units involved in state land
17 where they do have, since it's Yates and it's related
18 entities -- 100 percent working interest approval.

19 And if it's all state land, and they get the approval
20 of the Land Office, then it's 100 percent. But when you go
21 through these unit agreement orders where there's state,
22 federal, and fee land, you do not always have 100 percent
23 joinder.

24 And that also goes for -- by the way, if some of
25 these leases have overriding royalty interests in them,

1 absent -- a lot of the instruments -- if, for instance,
2 Mr. Examiner, I assign an override to you --

3 CHAIRMAN FESMIRE: But your lease agreement would
4 require you to join in any unit.

5 MR. BRUCE: Generally, overriding royalty assignments
6 would say that I could pool or unitize your interest without
7 your approval, and therefore, they would be subject to -- but
8 there are people out there, overrides, who are not subject to
9 that.

10 CHAIRMAN FESMIRE: Okay. So my concern was tracts,
11 leased tracts, where the operator did not want to join the
12 exploratory unit. And when you talk about less than 100
13 percent participation, are you talking about these, for
14 instance, overrides, assigned overrides, and things like that
15 where they are essentially forced into it by their original
16 lease or their assignment out of that lease?

17 MR. BRUCE: Certain people -- I won't say it's forced
18 in that instance. People aren't forced into it. It's part of
19 their --

20 CHAIRMAN FESMIRE: But they are required under their
21 contract.

22 MR. BRUCE: -- contractual arrangement. But again,
23 getting back to if one of the wells drilled in this unit had an
24 80-acre fee tract where the working interest owner didn't
25 voluntarily join in nor the fee royalty owner, they would have

1 gone and force-pooled them into that particular well unit,
2 160-acre well unit.

3 CHAIRMAN FESMIRE: Okay. And you can be essentially
4 force-pooled into a well unit that has contributed by the
5 operator to the exploratory unit.

6 MR. BRUCE: That is correct.

7 CHAIRMAN FESMIRE: Okay. So I think I know -- I
8 don't think we were disagreeing. I think we were just using a
9 slightly different terminology there.

10 So do you agree with the idea that the second
11 criteria, the geology criteria, should be that the proposed
12 unit area could reasonably be expected to be productive given
13 the information available at the time of the proposal?

14 MR. BRUCE: I would disagree. I don't know how you
15 can say it's going to be reasonably deemed to be productive,
16 because then you're not having an exploratory unit.

17 CHAIRMAN FESMIRE: Reasonably be expected to produce?

18 MR. BRUCE: Well, I don't know about expected. I
19 would go more that geologic zone or zones may be present --

20 COMMISSIONER BAILEY: It has the potential.

21 MR. BRUCE: -- that have the potential to produce. I
22 do not think you can say they are reasonably productive.
23 Again, this is an exploratory unit. If all the lands in an
24 exploratory unit are deemed reasonably productive, it's not
25 exploratory.

1 CHAIRMAN FESMIRE: Okay. So have the potential to
2 produce from the same pool, the same horizon?

3 MR. BRUCE: Well, one or more. Again, the unit
4 agreement covers all depths. It is not depth restricted. Now,
5 one or two of the units -- ignore any waterflood units.

6 CHAIRMAN FESMIRE: Right. We're talking about
7 exploratory units.

8 MR. BRUCE: There are some of the exploratory units
9 referenced in here, contained in here. The orders do refer --
10 I think I saw one that really only pertained to the Strawn or
11 the Cisco/Canyon. I think the Strawn Formation, and some of
12 them said below the base of the Bone Spring. And there are --
13 I hate to use this term again -- historical reasons for that.

14 If they're -- under certain circumstances, if there
15 have already been shallow wells drilled that are productive in
16 a certain zone or that had been reasonably tested, sometimes
17 the Land Office and the BLM will not allow you to unitize the
18 entire strata. And then again, some operators just look at it
19 and say, no, I just want it to apply to certain depths because
20 there's nothing above the base of the Bone Spring or something
21 like that.

22 CHAIRMAN FESMIRE: Okay. If we were to use this case
23 to essentially establish a criteria, a geologic criteria -- we
24 started talking about it a minute ago -- but why don't you
25 elaborate on your idea? A zone? That area which based on the

1 available geologic information can potentially be expected
2 to -- how would you word that?

3 MR. BRUCE: I would just say that the formation is
4 present. You know, and I'm not -- I'd rather talk with my
5 geologist before I say that, but obviously, you have
6 situations, faulting or pinch-outs, where the zone would not be
7 prospective.

8 CHAIRMAN FESMIRE: Right. And you wouldn't want to
9 grant somebody an exploratory unit anywhere the Strawn
10 Formation existed in that county, would you?

11 MR. BRUCE: Obviously, you wouldn't want to grant an
12 Eddy County-wide unit covering the Morrow Formation because
13 it's going to be there in most places.

14 CHAIRMAN FESMIRE: So --

15 MR. BRUCE: And once again, I would say it's not a --
16 you cannot look at it and say, "Ah-ha. It's going to produce
17 there."

18 I think you just have to look at it and say, "Well,
19 based on the evidence at hand, it may be productive. It may be
20 potentially productive. Or the zone is there. It hasn't
21 pinched out as far as you can tell and it may be there."

22 CHAIRMAN FESMIRE: Can we say that -- how, if we were
23 setting up a criteria to satisfy the geologic requirement that
24 you've talked about, how would we word it?

25 MR. BRUCE: Well, again I would rather have the input

1 of a geologist before I risked my life on saying that. But if
2 the zone is present, you know, it's not faulted out of
3 something, you know --

4 CHAIRMAN FESMIRE: When we're creating an exploratory
5 unit, and we're assuming for the minute that we have the
6 ability to do that, are we looking just for anywhere within
7 that area that the unit might be productive? I guess what
8 we're doing is exploration within the unit would help us define
9 the productive horizon in the unitized area, right?

10 MR. BRUCE: Yes.

11 CHAIRMAN FESMIRE: Okay. So how would we establish
12 criteria like that for exploratory units?

13 MR. BRUCE: Well, I hate to suggest it, but it would
14 be easier to put a committee together to look at that -- of
15 geologists -- to define that, rather than have me speculate.

16 And here's my problem with this case, Mr. Chairman,
17 and I think I make it abundantly clear in my brief. You know,
18 it's kind of hard to know what to prove when you don't know
19 what the standards are that are going to be applied. And I
20 think that's what was done to HEYCO in this case.

21 And with all due respect to my opposing counsel here,
22 the order denying the unit relied on affecting the -- adversely
23 affecting the correlative rights of people outside the unit,
24 which has never been raised before. It raised the issue of
25 well spacing. That's never been raised before. It raised the

1 well design issues. That's never been raised. And it raised
2 economics, which has never been used before. And the order
3 itself really didn't focus on the geology. It focused on
4 canyon geology, which is in the southern part of the unit, but
5 it didn't focus on geology of any other zone.

6 And so this is the first and only time this has been
7 done. And so to have me here and state a geologic standard
8 would be geologic malpractice on my part. I won't say legal
9 malpractice.

10 But, in going back again, the other agencies approved
11 it. And if you go to the case file for Case No. 11394, there
12 are hundreds of pages of submittals of documents from HEYCO to
13 the Division which are sitting in cyberspace somewhere right
14 now. And those are -- that's essentially what the Land Office
15 and BLM relied on.

16 So, you know, to out of the blue say, "Hey, you
17 haven't done items A, B, C, and D," when that had never been
18 done before in 60 years, or has never been required before in
19 60 years, it's just unfair.

20 CHAIRMAN FESMIRE: Okay. Let's go back to one thing
21 that you said. We can't consider the correlative rights of
22 people outside of the proposed unit?

23 MR. BRUCE: I'm not saying that. I'm saying it had
24 never been done before. So if it had never been done before
25 and we come in and make a case, regardless -- ignore this case.

1 Take any case. And, for example, the most recent unit order I
2 have here issued in February, the approval of the proposed unit
3 agreement will serve to prevent waists and protect correlative
4 rights within the lands assigned to the unit area. You go
5 through all these orders and except for the HEYCO order, that's
6 what the orders say, "inside the unit area."

7 But if the Division decides that it wants to look at
8 correlative rights outside the unit, I don't see a problem with
9 that. But you got to tell us ahead of time. And, furthermore,
10 that has to do with well spacing. And I think the question to
11 one of my witnesses by you yourself, said, "Well, isn't that
12 what well spacing, Division well spacing, rules are supposed to
13 accomplish, protective correlative rights of people outside a
14 certain well unit?"

15 The same thing would apply to the Division. But
16 certainly, correlative rights is an issue the Division can look
17 at. I don't have a problem with that, but don't use that to
18 deny it after 60 years of ignoring it.

19 CHAIRMAN FESMIRE: So the argument is we can't change
20 bad habits?

21 MR. BRUCE: No. I'm not saying that. I'm saying let
22 us know beforehand and we can make a presentation. But I
23 really, at this point, as I said in the brief, if you're
24 looking at correlative rights outside the unit, that's not a
25 non-issue. That's a non-issue in this instance because the

1 landowners outside the unit have approved the expansion. Every
2 single party adjoining the unit has approved the expansion. So
3 obviously, they're not interested or they don't -- it's no
4 concern to them about their correlative rights -- the BLM, the
5 Land Office and HEYCO itself which owns one lease adjoining the
6 unit as expanded.

7 So it's not a concern in this case. And,
8 furthermore, if the Division thought it was a concern, well, I
9 think the Division could establish a buffer zone on the outside
10 of the unit, on the exterior of the unit. That's often done
11 with pool rules cases where you are asking for leeway within a
12 unit or within a pool and you say that as to the exterior, you
13 might have to have a buffer zone so that you don't -- where is
14 that done? Indian Basin boundary between the Indian Basin and
15 the Upper Pennsylvania gas pool.

16 And it's not the South Dagger Draws. It's one of the
17 other -- Indian Basin, Upper Penn associated pools -- there's a
18 buffer area between the two pools. That can be done. No
19 problem with that. Go ahead and do it, but don't use it to
20 deny approval of the expansion or approval of the unit itself.

21 CHAIRMAN FESMIRE: Anything else on the second
22 question?

23 MS. ALTOMARE: I don't believe so.

24 CHAIRMAN FESMIRE: Mr. Bruce?

25 MR. BRUCE: The only thing I'll mention is again,

1 contrary to what my opposing counsel said, the only other order
2 of these 100 pages of orders that I have that talks about
3 water, et cetera, things like that, would be the Waco South.
4 And that was after the hearing, the original hearing, in this
5 case.

6 So once again, it's good to be put on notice, but
7 it's good to be put on notice before you go to a hearing.

8 MS. ALTOMARE: There's actually a number of them that
9 dealt with environmental issues that aren't necessarily related
10 to water, but that do deal with -- and there's -- let's see
11 here. There's one that talks -- let's see here.

12 CHAIRMAN FESMIRE: Ms. Altomare, why don't we take a
13 10-minute break. When we come back, you can inform us on that.
14 And then we'll start with the third question.

15 MS. ALTOMARE: Okay.

16 CHAIRMAN FESMIRE: We'll reconvene at 10 minutes to
17 11:00.

18 [Recess taken from 10:44 to 10:52, and testimony
19 continued as follows:]

20 CHAIRMAN FESMIRE: Okay. Let's go back on the
21 record. The record should again reflect that this is a
22 continuation of Case 14000, in the matter of Application of
23 Harvey E. Yates Company for the Expansion of a Unit Area in
24 Otero County.

25 The record should also reflect that all three

1 commissioners are still present. We therefore have a quorum.

2 I believe Ms. Altomare, you were going to make a
3 point on question two.

4 MS. ALTOMARE: I pulled some, but I don't think I
5 need to pull them all, just several. I have one, two, three,
6 four, five, six, seven, I can direct your attention to. And
7 then there's an additional five or six in there as well. The
8 first one is the Orbison State Exploratory Unit. It's
9 Case No. 13333.

10 MR. BRUCE: Ms. Altomare, could you tell me the page
11 number at the top?

12 MS. ALTOMARE: New Mexico, Page 637, and it is a
13 Yates Petroleum -- I think they're all Yates, actually. And
14 the letter F at the very top of column number two of the order,
15 it's noted that, "Yates is attempting to locate the high-risk
16 Atoka and Morrow Channel Sands using 3D seismic, log
17 correlation, and regional mapping."

18 The next one is noted at Page 638, New Mexico. It's
19 the Boffin State Exploratory Unit, Case No. 13332, the Yates
20 Petroleum Corporation. This one is not necessarily
21 environmental in nature, but it's noting a unique
22 reservoir-specific issue. Again, it's letter F at the top of
23 column two, "Within the Soloro Devonian, Yates is attempting to
24 use seismic and well control to locate a productive dolomite
25 reservoir on a closed structural high."

1 The next one is New Mexico, Page 639, Elvis State
2 exploratory unit. It's Case No. 13331, Yates Petroleum
3 Corporation at the same location on the order, "Yates is
4 attempting to locate the high-risk Atoka and Morrow Channel
5 Sands using 3D seismic, log correlation, and regional mapping."

6 That particular quote is used in a number of other
7 ones. I don't know if you want me to go ahead and give you
8 other examples. My point is that increasingly throughout the
9 years as these cases have come before the Division and the
10 orders have been issued, the examiners have seen fit to at
11 least make a note in the order when there have been unique
12 circumstances or specific high-risk situations that were
13 necessitating additional investigation by the operators, such
14 that they wanted to at least make a record that it was going to
15 be something that was going to be addressed.

16 COMMISSIONER BAILEY: I think there's a confusion
17 over risk. It's high risk to the operator in the fact that
18 it's an exploratory unit that could come to nothing at all. So
19 it's a monetary exploration risk.

20 MS. ALTOMARE: Okay.

21 COMMISSIONER BAILEY: You're seeing it as something
22 different, I think, is what you're saying.

23 MS. ALTOMARE: Okay. I was reading it as high-risk
24 channel sands as environmentally high risk.

25 COMMISSIONER BAILEY: No. This means that the

1 potential for a dry hole --

2 MS. ALTOMARE: Okay.

3 COMMISSIONER BAILEY: -- or a completely dry unit is
4 a high risk.

5 MS. ALTOMARE: Okay. But regardless, they are at
6 least giving these units in these applications a more thorough
7 read. And they are addressing unit-specific,
8 formation-specific, reservoir-specific issues in their
9 evaluation. There is the one case where they did specifically
10 address the water issue that was environmental. I apologize
11 for my misunderstanding of that.

12 But my point being, that they are not just simply
13 rubber stamping. They are specifically reading and actually
14 incorporating things to indicate when further analysis about
15 the specific unit is going to be done. So that might actually
16 be an indicator that contraction might occur as to the unit
17 then later.

18 COMMISSIONER BAILEY: It says contractions will occur
19 in five years for those lands that have been drilled.

20 MS. ALTOMARE: Right. Right. So my point is, the
21 Division is making efforts to make a record earlier on about
22 things that down the road are likely going to come to fruition,
23 whether it be contraction or issues regarding the environment
24 or other things that are going to be addressed later on,
25 whether at the APD stage or at a contraction or expansion

1 stage.

2 COMMISSIONER BAILEY: Because that's part of the unit
3 agreement, is an enforced contraction.

4 MS. ALTOMARE: Right.

5 CHAIRMAN FESMIRE: Any other issues on question two?

6 MR. BRUCE: Well, I would simply like to put out
7 really, the only one that had anything to do with water or
8 anything like that other than the HEYCO unit is that Waco
9 South. And I would point out that it did raise the water
10 issue, but it still approved the unit, number one. And again,
11 that was early after the HEYCO matter.

12 CHAIRMAN FESMIRE: Okay. Proceeding to the third
13 question, we've touch it on several of the arguments. The
14 contents of an application necessary for approval.

15 Mr. Bruce, do you have anything to say on that?

16 MR. BRUCE: Probably nothing much useful,
17 Mr. Examiner -- Mr. Chairman. I apologize.

18 CHAIRMAN FESMIRE: So you don't want to commit
19 geological malpractice?

20 MR. BRUCE: As you well -- I think if you went back
21 and looked at all the applications, they were pretty bare
22 bones, just on the lines of here's what we want. I mean, the
23 Division does not require at this time that you attach every
24 exhibit you are going to use for your application, so the
25 exhibits are pretty bare bones to say here it is. This is what

1 we want and it's in the interest of conservation and the
2 prevention of waste. Kind of like the district court notice
3 pleadings if you file a complaint and what the answers are
4 like.

5 Certainly, the Division could request more. That's
6 certainly within the bounds of its rule-making authority. But
7 if you look at all of the applications, including the one in
8 this case and the one in the original application in Case
9 No. 11394, they just say this is the unit. It's been
10 preliminarily approved by the BLM and the State Land Office,
11 and it's in the interest of conservation and then you make your
12 presentation. So certainly, if the Division wants more, we can
13 give it more. That's about all I have to say on that.

14 CHAIRMAN FESMIRE: Ms. Altomare?

15 MS. ALTOMARE: I think I spoke to that kind of
16 jumbled up with my discussion about what the criteria should be
17 regarding the geology. So unless the Commission has additional
18 questions, I think I probably pretty well addressed that.

19 CHAIRMAN FESMIRE: Commissioner Bailey, do you have
20 any questions?

21 COMMISSIONER BAILEY: No, not really.

22 CHAIRMAN FESMIRE: Commissioner Olson?

23 COMMISSIONER OLSON: No.

24 CHAIRMAN FESMIRE: Nor do I. Counsel, thank you very
25 much. I think at this time, we will go into closed session to

1 deliberate on the case.

2 MS. ALTOMARE: Do we want to address the standard? I
3 think that was the remaining question.

4 CHAIRMAN FESMIRE: Wasn't that question two?

5 MS. ALTOMARE: No. I think question two --

6 MR. BRUCE: I thought we had.

7 MS. ALTOMARE: Maybe I misunderstood how you were
8 phrasing them. I thought we were walking about the standard of
9 review as to whether or not to apply protection of public
10 health and the environment.

11 CHAIRMAN FESMIRE: Did we ask that that be --

12 MS. ALTOMARE: I thought the questions that we were
13 being asked to discuss were -- well, I guess that would have
14 been part of the criteria for approval. My mistake. I just
15 assumed that rolled into part of that discussion would have
16 been what standard the Division would apply and whether or
17 not -- because it was addressed in both of our briefs --
18 whether protection of human health and the environment would be
19 included in that. Seeing as it -- or it does seem to be a
20 point of contention.

21 CHAIRMAN FESMIRE: Well, Mr. Bruce, with your
22 approval, we'll give everybody a chance to -- one last chance
23 to wrap up their arguments if they so desire.

24 COMMISSIONER OLSON: So to clarify, you then see that
25 as an additional criteria that needs to be considered as part

1 of making the unit?

2 MS. ALTOMARE: Yeah. I think that it's -- given the
3 trend that is exemplified by these orders, especially the most
4 recent order that has come down where there's an indication
5 that the Division is taking a serious interest in addressing
6 groundwater issues and protecting human health and the
7 environment.

8 I think that statutorily, the legislature has given
9 the OCD the authority to do what it needs to do to address oil
10 and gas issues within the State, and included within that is
11 the protection of human health and the environment. And I
12 think that that should be included as part of the review in
13 addition to the protection of correlative rights and the
14 prevention of waste, that they're all part of the mandate of
15 this agency, and that it has been an increasing trend to apply
16 all three as part of the review process.

17 CHAIRMAN FESMIRE: Okay. Mr. Bruce, do you have
18 anything to add?

19 MR. BRUCE: Well, since she addressed that, that is
20 the issue I will address. I would like to state one thing,
21 although I could not find my copy regarding this BLM handbook,
22 and if they finalize this, this will be quite nice to have.

23 I would submit that in the past there have been
24 various BLM guidelines addressing specific issues regarding
25 unitization. If you went and looked at various unitization

1 seminars at the Rocky Mountain Mineral Foundation over the last
2 20 years, you would find those BLM guidelines, which it looks
3 like the BLM is trying to incorporate in one document. But
4 there have been -- what I'm trying to say is the BLM wasn't
5 flying by the seat of its pants before the adoption or before
6 the promulgation of this draft guideline.

7 Now, regarding protecting health and human
8 environment, in looking at the Division's brief, it was based
9 solely on OCD Rules 11 and 12, but I didn't see any specific
10 statutory authority. And if Mr. Carr was here, as he always
11 lectures me, the OCD is a creature of statute and its authority
12 must be found in the statutes. And I don't see any for that.

13 Now, the OCD can say in a regulation like Rule 11
14 that they're going to prevent human hunger, but if it doesn't
15 have any authority to do so, it doesn't have any authority to
16 do so. The fact is, outside of making sure wells are properly
17 drilled and operated, I don't see the authority.

18 It does have certified related authority with respect
19 to its specific statutory duties, but I assert that that's left
20 to other agencies. In fact, the Resource Management Plan, the
21 RMP, which is the subject of litigation, is the BLM's document
22 that is designed to protect the health and human environment.

23 Plus, we have in this State the Environment
24 Department. I think that's its statutory mandate. In federal,
25 you have the EPA. What other agencies look at land use and

1 protecting of the environment? Army Corps of Engineers, Bureau
2 of Reclamation -- I'm not saying in this specific case, but
3 that's what they're there for.

4 Furthermore, if you go to the regulations, the BLM
5 has tons of surface use regulations for oil and gas drilling on
6 its land. The Land Office has its Rules 66 and 67 that deal
7 with surface use and reclamation on state owned surface. If
8 you're looking at fee owners, obviously, they have the right to
9 protect their surface.

10 But I don't see where that one fits in so much. And
11 besides, what is human health and the environment? Yeah, you
12 know, you want to protect the health, you want to protect the
13 environment, but how does that relate to this unit? I submit
14 that it doesn't.

15 I mean, that's a pretty vague standard. If the
16 Division can come up with some guidelines on what the operators
17 are supposed to do to protect that, I would go along with it.
18 But I think those regulations are already in there with respect
19 to well design, well drilling, well operations, and that's
20 about as far as you can go on that issue.

21 Insofar as unit formation or unit expansion, I don't
22 think those issues have anything to do with this case.

23 CHAIRMAN FESMIRE: Okay.

24 MS. ALTOMARE: If I might just --

25 CHAIRMAN FESMIRE: A short rebuttal?

1 MS. ALTOMARE: Yeah. New Mexico Statute 70-2-6A is
2 what grants the Division jurisdiction and authority over all
3 matters relating to the conservation of oil and gas in this
4 State. And the statute goes on to say that the Division may do
5 whatever may be reasonably necessary to carry out the purpose
6 of the Act, whether or not indicated or specific in any section
7 hereof.

8 And it is out of that statute that the regulations
9 are -- the OCD rules are written. From there, there's a rule
10 written that charges the OCD the obligation of enforcing all
11 rules -- I'm sorry -- that charged the OCD with the obligation
12 of protecting human health and the environment.

13 I see that as a direct correlation, and I think that
14 that statutory authority -- I think that there's a direct
15 statutory authority mandating that as part of OCD obligations
16 and rolled in with the protection of correlative rights and the
17 prevention of waste, we are also supposed to protect human
18 health and the environment. I think that that is all rolled
19 into one standard.

20 CHAIRMAN FESMIRE: Anything else? Okay. With that,
21 the Oil Conservation Commission will go into executive session
22 for the sole purpose of considering their decision in Case
23 No. 14000, the Application of Harvey E. Yates for Unit
24 Expansion in Otero County. Thank you all.

25 [Executive session from 11:09 a.m. to 11:31 a.m., and

1 testimony continued as follows:]

2 CHAIRMAN FESMIRE: Okay. Let's go back on the
3 record. The record should reflect that it is 11:30 a.m. on
4 Thursday, June 19th, 2008. The Commission is going back into
5 regular session after having met in executive session for the
6 sole purpose of deliberating Case No. 14000, the Application of
7 Harvey E. Yates Company for Expansion of a Unit Area in Otero
8 County, New Mexico.

9 During those deliberations, the council reached a
10 decision. The council has determined that it shall go ahead
11 and grant the unit expansion pursuant to some conditions. They
12 have instructed counsel to draft an order to that effect and
13 that order shall be drafted and circulated to the Commissioners
14 prior to the next regularly scheduled Commission meeting, at
15 which time the case will again be called for the purpose of
16 finalizing the order, and hopefully, signing the order as
17 drafted by counsel.

18 Is there anything else with respect to
19 Case No. 14000?

20 COMMISSIONER BAILEY: No.

21 COMMISSIONER OLSON: No.

22 * * *

23 CHAIRMAN FESMIRE: Seeing none, the Chair will call
24 the final case on the docket today.

25 It's Case No. 14055, the de novo application of the

1 New Mexico Oil Conservation Division for a Compliance Order
2 Against C&D Management Company, doing business as Freedom
3 Ventures Company.

4 At the request of counsel for the Division, the Chair
5 has granted a continuance in this case due to a family
6 emergency of Division's counsel. It has been continued to the
7 July 30th regularly scheduled meeting.

8 With that, the Chair would ask if is there anything
9 else before the Commission today?

10 COMMISSIONER BAILEY: No.

11 COMMISSIONER OLSON: No.

12 CHAIRMAN FESMIRE: The Chair would entertain a motion
13 for adjournment.

14 COMMISSIONER BAILEY: I so move.

15 COMMISSIONER OLSON: Second.

16 CHAIRMAN FESMIRE: All those in favor of adjourning,
17 signify by saying aye.

18 COMMISSIONER BAILEY: Aye.

19 COMMISSIONER OLSON: Aye.

20 CHAIRMAN FESMIRE: Let the record reflect that the
21 counsel adjourned its regularly scheduled meeting at 11:34 a.m.

22 Thank you.

23 [Thereupon, these proceedings were concluded at
24 11:34 a.m.]

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REPORTER'S CERTIFICATE

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I, JOYCE D. CALVERT, Provisional Court Reporter for the State of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

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

Signed this 19th day of June, 2008.



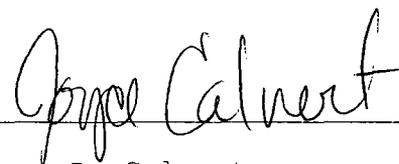
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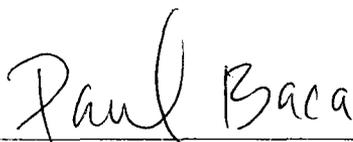
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I, JOYCE D. CALVERT, a New Mexico Provisional Reporter, working under the direction and direct supervision of Paul Baca, New Mexico CCR License Number 112, hereby certify that I reported the attached proceedings; that pages numbered 1-73 inclusive, are a true and correct transcript of my stenographic notes. On the date I reported these proceedings, I was the holder of Provisional License Number P-03.

Dated at Albuquerque, New Mexico, 19th day of June, 2008.



Joyce D. Calvert
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