

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

COPY

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

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION FOR A COMPLIANCE ORDER AGAINST C&D MANAGEMENT COMPANY, D/B/A FREEDOM VENTURES COMPANY, EDDY COUNTY, NEW MEXICO Case No. 14055

APPLICATION OF THE BOARD OF COUNTY COMMISSIONERS OF RIO ARRIBA COUNTY FOR CANCELLATION OR SUSPENSION OF APPLICATIONS FOR PERMITS TO DRILL APDs FILED BY APPROACH OPERATING, LLC, RIO ARRIBA COUNTY, NEW MEXICO Case No. 14134

APPLICATION OF APPROACH OPERATING, LLC, FOR APPROVAL OF SIX APPLICATIONS FOR PERMITS TO DRILL, RIO ARRIBA COUNTY, NEW MEXICO Case No. 14141

APPLICATION OF APPROACH OPERATING, LLC, FOR APPROVAL OF 14 APPLICATIONS FOR PERMITS TO DRILL, RIO ARRIBA COUNTY, NEW MEXICO Case No. 14278

Case No. 14041: Continued to November 4, 2009
Case No. 14365 and Case No. 14366: Continued to December 16, 2009

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
COMMISSIONER HEARING

BEFORE: MARK E. FESMIRE, Chairman
JAMI BAILEY, Commissioner
WILLIAM C. OLSON, Commissioner

October 7, 2009
Santa Fe, New Mexico

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This matter came on for hearing before the New Mexico Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Wednesday, October 7, 2009, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico.

REPORTED BY: Jacqueline R. Lujan, CCR #91
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A P P E A R A N C E S

FOR THE OIL CONSERVATION COMMISSION:

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ALSO PRESENT:

Florene Davidson

REPORTERS CERTIFICATE

1 CHAIRMAN FESMIRE: The record should
2 reflect that it's 9:00 a.m. on October 7th, 2009, that
3 this is the regulary-scheduled New Mexico Oil
4 Conservation Commission meeting. The record should also
5 reflect that Commissioners Bailey, Olson and Fesmire are
6 all present. We, therefore, have a quorum.

7 And the first order of business before the
8 Commission today is to the minutes of the September 9th,
9 2009 Commission meeting. Have the Commissioners had the
10 opportunity to review those minutes as presented by the
11 secretary?

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

14 COMMISSIONER OLSON: I guess I'll second
15 that, but I wasn't here, so I'll probably abstain from
16 voting on that.

17 CHAIRMAN FESMIRE: I will second the
18 motion. All those in favor of adopting the minutes as
19 presented by the secretary, signify by saying aye.

20 Let the record reflect that two Commissioners
21 who are present voted to adopt the minutes as presented,
22 that they were signed by the Chairman and transmitted to
23 the secretary.

24 COMMISSIONER OLSON: Let the record
25 reflect that I'll abstain because I wasn't here for that

1 meeting.

2 CHAIRMAN FESMIRE: The record shall so
3 reflect.

4 The next order of business before the
5 Commission is Case Number 14055, the application of the
6 New Mexico Oil Conservation Division for a compliance
7 order against C&D Management Company, doing business as
8 Freedom Ventures Company. Are the attorneys present?

9 MR. SWAZO: Sonny Swazo for the Oil
10 Conservation Division.

11 MR. PADILLA: Earnest Padilla for C&D
12 Management.

13 CHAIRMAN FESMIRE: Mr. Swazo, I understand
14 that we have some motions before the Commission.

15 MR. SWAZO: That's correct, Your Honor.
16 C&D Management has filed two motions. One is asking for
17 a continuance, another is asking for an extension of
18 time to file proposed findings of facts and conclusions
19 of law.

20 CHAIRMAN FESMIRE: Mr. Padilla, since
21 they're your motions, is that your understanding?

22 MR. PADILLA: Yes, they are.

23 CHAIRMAN FESMIRE: Mr. Swazo, do you have
24 anything else to add?

25 MR. SWAZO: Yes. I have filed a motion in

1 response -- a response -- I had filed a response in
2 opposition to C&D's motion for the continuance. The
3 continuance is asking for additional time to conduct
4 additional discovery related to the plugging costs
5 associated with the five wells that the OCD plugged.
6 It's my contention that -- well, the motion touches upon
7 this whole Rule 5.9 order. It's part of the 5.9 order
8 that I had raised, that I had asked the Commission to
9 issue at the last hearing, at the conclusion of the last
10 hearing. I believe I may have confused the Commission,
11 so I'd like to go ahead and try and clarify my position.

12 CHAIRMAN FESMIRE: In the context of
13 arguing Mr. Padilla's motion?

14 MR. SWAZO: My position is that this case
15 does not have to be continued. It's my contention that
16 Mr. Padilla misinterprets or misconstrues the whole point
17 of Rule 5.9, and I'd like to clarify that with the
18 Commission before we start going on to another protracted
19 hearing that may all be for nothing.

20 CHAIRMAN FESMIRE: Mr. Padilla, do you
21 mind if he --

22 MR. PADILLA: No. Go ahead.

23 CHAIRMAN FESMIRE: You may proceed, Mr.
24 Swazo.

25 MR. SWAZO: At the conclusion of the

1 hearing, I asked the Commission to issue a Rule 5.9
2 order. Rule 5.9 is an enforcement tool. In order for an
3 operator to receive certain privileges, the operator
4 needs to be in compliance with Rule 5.9. One of ways an
5 operator is not in compliance with Rule 5.9 is if there
6 is an order finding an operator in violation of an order
7 requiring corrective action. That's what I was asking
8 the Commission to issue at the last hearing.

9 I wasn't asking to go into this whole hearing
10 into plugging costs or invoices. I was simply asking the
11 Commission to make a determination based on the facts
12 that were presented to it that Mr. -- that C&D Management
13 was in violation of a compliance order, the Commission's
14 order.

15 The evidence that I presented -- well, let me
16 back up. I was asking for that order because the
17 Commission had ordered C&D Management to plug five
18 inactive wells or otherwise bring them into compliance by
19 either bringing them back into production or TA'ing them
20 by September 14th, 2008. C&D Management did not do that,
21 and as a result, the Division eventually ended up
22 plugging those wells. So it's my contention that C&D
23 Management is in violation of Rule 5.9 simply because it
24 is in violation of the Commission's order requiring it to
25 bring those five inactive wells into compliance.

1 CHAIRMAN FESMIRE: The Commission hasn't
2 ruled on that yet. One of the things that they asked for
3 was the compilation of the costs incurred by the OCD in
4 plugging those wells. It's my understanding that there
5 have been -- that Mr. Padilla's client wants to challenge
6 some of those costs; is that correct?

7 MR. SWAZO: That's correct. I will
8 address that, as well.

9 CHAIRMAN FESMIRE: Are we going to get
10 into the substance of the motions? I think Mr. Padilla
11 is entitled to the first bite of the apple, if we are.

12 MR. SWAZO: Yes. If you want to go to
13 Padilla first, that's fine.

14 CHAIRMAN FESMIRE: Mr. Padilla?

15 MR. PADILLA: Yes. Mr. Chairman, members
16 of the Commission. We filed a motion because, after
17 looking at some of the -- well, the invoices, we felt
18 that there were some costs there that were duplicated.
19 One particular one -- two invoices contained an entry for
20 April 7th, I believe, of 2009, where a rig is located on
21 two different wells. That's one. And there are other
22 things, such as daily reports for a drilling crew as to
23 what was being done on the leases.

24 I think that somebody has got to audit the
25 invoices. Now, Mr. Swazo, in his closing argument at the

1 last hearing, stated they should be required to pay --
2 C&D Management should be required to pay. So my response
3 at that time was, pay what? And so the Commission, then,
4 came back and said, okay, we're going to continue this
5 hearing until another time. In the meantime, Mr. Swazo
6 was to give us the invoices. We looked at the invoices.
7 We found some, what appeared to be discrepancies, so
8 we're simply trying to get additional information on the
9 underlying costs that constitute the invoices.

10 We have not had enough time to get into that,
11 and probably the best way to do it, as far as I know, is
12 to take a Deposition Duces Tecum, have the drilling
13 company submit their invoices, or a request for
14 production of those documents, so we can examine them to
15 see if there are any discrepancies and compare that with
16 what they're allowed to charge under the contract the
17 state has with the plugging company.

18 I don't think that just because a plugging
19 company submits an invoice to the OCD that has been
20 approved, that we're not allowed to challenge some of
21 those costs. And so that's all that we're asking for, is
22 additional time with which to have our expert examine the
23 invoices and the underlying costs to see whether or not
24 there's a challenge to the \$170,000 that constitute the
25 total sum of the invoices, and I think that's fair.

1 I don't think that there's any other issues of
2 dire need here that need to be addressed, like leaking
3 wells or something. The wells have already been plugged.
4 At this point, we're arguing about how much C&D
5 Management is going to have to pay or reimburse the
6 Division for well costs.

7 CHAIRMAN FESMIRE: Mr. Padilla, if I
8 remember correctly, there was a period of time before
9 this hearing where the OCD was to make those invoices
10 available to your client. Did they do that?

11 MR. PADILLA: They did that. The letter
12 is dated -- I don't know when we received it in our
13 office, but it's dated -- the letter is dated August
14 26th, and I informed my client that we needed to have
15 somebody here to look at this. My client got somebody,
16 and when they looked at the invoices, they said that we
17 need additional data, so that's where we're at, at this
18 point.

19 I don't think that we've been dragging our
20 feet on this thing, but I think that -- then, in addition
21 to that, as I explained before the hearing started, Mr.
22 Kaiser became sick on the way here, and that's an
23 additional reason that we asked for the continuance.

24 CHAIRMAN FESMIRE: Okay. Anything
25 further?

1 MR. PADILLA: Nothing.

2 CHAIRMAN FESMIRE: Mr. Swazo?

3 MR. SWAZO: Yes. Well, these plugging
4 invoices really have no bearing on whether or not C&D
5 Management is in violation of the Commission's order. I
6 merely suggested that that's one way that they could
7 satisfy and comply with the Commission's order. The way
8 that --

9 CHAIRMAN FESMIRE: Mr. Swazo, if I
10 remember the rule correctly, one of the ways that they
11 can get out from under that order is to pay the costs
12 incurred by the state for the plugging; is that correct?

13 MR. SWAZO: That's not explicitly stated
14 in the rule. That was what I was suggesting as far as
15 what they could do to satisfy the Commission's order.
16 It's not articulated in the rule. It's not even
17 specified in the rule. The rule provides that if there's
18 an order finding the operator in violation of an order
19 requiring corrective action, the burden then becomes the
20 operator's burden to file a motion with the Commission
21 explaining that it has satisfied the Commission order.
22 At that point, the Commission can either rule on the
23 motion without a hearing or can have a hearing and make a
24 ruling on the motion.

25 CHAIRMAN FESMIRE: Are you asking us to

1 issue a partial order to comply with 5.9, without the --

2 MR. SWAZO: No. What I'm asking you folks
3 for is an order finding C&D Management in noncompliance
4 with the Commission's order. There was testimony at the
5 hearing from Daniel Sanchez that C&D Management was under
6 the Commission's order to bring five inactive wells into
7 compliance with the Inactive Well Rule by September 14th.
8 They did not do it. As a result, the Division had to
9 plug these four wells. That's enough to find C&D
10 Management in violation of this Commission's order. It's
11 then C&D Management's burden -- under the rule, it then
12 becomes their burden to file a motion indicating that
13 they have satisfied the Commission's order.

14 One thing that I'm concerned about, of course,
15 is that we could have another protracted -- we've already
16 had several days of hearing, and we could have a
17 protracted hearing on nothing but just plugging costs.
18 From the information that I saw, C&D Management intends
19 to scrutinize everything. They asked for the bid
20 contract --

21 CHAIRMAN FESMIRE: Aren't they entitled to
22 do that?

23 MR. SWAZO: Not for purposes of Rule 5.9.
24 Plus, Mr. Kaiser indicated that he wasn't even sure that
25 he was going to reimburse the state for its plugging

1 costs. So the hearing -- if you folks decide to go
2 forward with this hearing, which isn't required under
3 Rule 5.9, could be a waste of time and all for nothing.
4 Because, at the end of the day, Mr. Kaiser could walk
5 away.

6 My whole point is that there's enough
7 evidence. I simply asked the Commission to issue an
8 order finding C&D Management in violation of the
9 Commission's order. There was evidence to support that.
10 There's no reason for this case to be continued, and
11 that's why I oppose this motion.

12 CHAIRMAN FESMIRE: So it's your contention
13 that we don't have to have that -- let's call it the
14 terminus amount that he would have to pay to complete the
15 order?

16 MR. SWAZO: That's correct. It's not
17 required under the rule. I was merely suggesting that if
18 C&D intends to comply with the Commission's rule, then
19 they can go ahead and reimburse the state for the
20 plugging costs, but it's not required under the rule.

21 CHAIRMAN FESMIRE: What's the danger to
22 the state if this Commission goes ahead and grants the
23 continuance?

24 MR. SWAZO: Well, if you grant the
25 continuance, does that mean you're going to require

1 another hearing on the plugging process, or --

2 CHAIRMAN FESMIRE: His client isn't here.
3 They do have some challenges to the amount. Don't you
4 think they're entitled to that hearing?

5 MR. SWAZO: No, I don't, not for purposes
6 of a Rule 5.9 hearing. That's not what the rule
7 provides.

8 CHAIRMAN FESMIRE: So we can find them in
9 violation of 5.9 because they -- the state has incurred
10 costs to do this plugging and not have on the record
11 exactly what those costs are?

12 MR. SWAZO: That's correct. They would be
13 entitled to that hearing once they have filed their
14 motion indicating they have satisfied this corrective
15 action.

16 CHAIRMAN FESMIRE: Okay. Mr. Padilla?

17 MR. PADILLA: First of all, let me address
18 this 5.9 order request. That request was never in the
19 initial application when this case was reopened. It was
20 only in closing arguments that Mr. Swazo brought up the
21 request for a 5.9 order. We went through two days of
22 hearing. At the end of the day, he's asking for a 5.9
23 order and requesting that the Commission order C&D
24 Management to pay.

25 As I said before, my response was, to pay

1 what? It wasn't our directive. It was the Commission's
2 directive to look into the invoices and look at the
3 correct amount that C&D Management had to reimburse the
4 Division for. And so he never brought it up. We never
5 requested that. It was the Commission who directed that
6 those invoices be provided to us.

7 We looked at the invoices, and we have some
8 questions and simply want additional time. I think if
9 the Commission is going to issue an order, I think it
10 should issue the order for the \$170,000, or a lesser
11 figure, if there is some correction to those invoices.
12 And I think at that point, the Division's plugging
13 contractor would be required to reimburse the Division
14 for a portion of the invoices, if these invoices
15 contained overcharges. That's all we're saying.

16 CHAIRMAN FESMIRE: Commissioner Bailey?

17 MR. SWAZO: Chairman Fesmire, can I go
18 ahead and correct some factual statements that Mr. --

19 CHAIRMAN FESMIRE: We're getting into
20 testimony here.

21 MR. SWAZO: I just want to clarify that
22 Mr. Padilla claims it's a big surprise, that we just
23 sprung Rule 5.9 on him at the last minute at the end of
24 the hearing. That's not true. In my July 9th, 2009
25 prehearing statement, I clearly indicated that I was

1 going to ask for a Rule 5.9 order. I laid out what the
2 Rule 5.9 was. I explained how -- the basis for the order
3 in this case. We had a hearing on July 16th. At that
4 time the OCD presented its case, and the case was
5 continued to August 13th, 2009.

6 At that time, that's when C&D Management had
7 the opportunity to present their case, and they did
8 present their case. To claim undue surprise at the last
9 minute is just not true.

10 CHAIRMAN FESMIRE: Commission Bailey, do
11 you have any questions?

12 COMMISSIONER BAILEY: I don't have any
13 questions. I just have some thoughts, that there is no
14 environmental concern to the state, that the only issue,
15 really, is whether or not we want to have another day
16 spent listening to the audit of the invoices. And I
17 think that the company is entitled to that day in order
18 to clarify their costs.

19 CHAIRMAN FESMIRE: Commissioner Olson?

20 COMMISSIONER OLSON: I guess I kind of
21 thought we got where we are because the Division had
22 requested the payment of their costs in plugging, and
23 there was no cost of plug provided, so that's how we
24 moved it forward, so they would be able to provide that,
25 and they should get a chance to question that. I thought

1 we set that out last time. So I don't know if we're now
2 going to change that concept of what we did last time, if
3 they're allowed to question the costs. I don't know what
4 other mechanism there is. Maybe Mr. Swazo can address
5 that. What mechanism is there for them to challenge the
6 costs? How would they do that?

7 MR. SWAZO: I would even go so far as to
8 suggest that they could -- I mean, like I said, the cost
9 really has no bearing on whether or not they are in
10 violation of the Commission's order. It's clear that
11 they are in violation of the Commission's order.

12 I would go so far as to even suggest that even
13 if they had a good-faith basis -- or even to make a
14 good-faith effort to reimburse the OCD for its plugging
15 costs, then they could go ahead and even meet with OCD
16 representatives once the Commission issues an order, and,
17 perhaps, we can come to some type of resolution. You
18 know, once they have -- once they feel that they have
19 satisfied the Commission's order, they can go ahead and
20 file a motion, they can have the hearing or not, and it
21 can be addressed at that time.

22 CHAIRMAN FESMIRE: Mr. Swazo, I see your
23 point, and I understand what you're arguing here, but
24 don't you think it would be better -- I think we have to
25 go under the premise that if C&D Management complies with

1 the order, that they will be able to come back into
2 operatorship in good standing, as long as they comply
3 with everything, including the reimbursement of the
4 costs. But don't you think it would be better to
5 establish what those costs are now, while the memories
6 are fresh and the witnesses are available, rather than at
7 some point in the future when that may not be true?

8 MR. SWAZO: I think the costs are
9 established in the invoices, and the invoices have been
10 provided to Mr. Padilla. We've been going through this
11 for several years now, and we can't even get Mr. Kaiser
12 to file correct C-115s. As of this date, he still has
13 not filed C-115s. We've had -- how many hearings have we
14 had? Two hearings, not including the one from last year.
15 This case has been dragging on for two years. He still
16 hasn't filed his C-115s. He hasn't complied with the
17 Commission's order. I really doubt that he's even going
18 to make any kind of good-faith effort to reimburse the
19 state for the plugging costs that the state paid to plug
20 these wells. I just think that having an additional
21 hearing is unnecessary under the rule, and I think it's
22 going to end up being a waste of time.

23 CHAIRMAN FESMIRE: The danger is -- I
24 think the evidence was pretty -- you know, the Commission
25 hasn't ruled on this yet. But the evidence was pretty

1 clear that he violated and probably should be under a 5.9
2 order. But that having been said, what is the danger to
3 the state of waiting another month until he can examine
4 the invoices and present evidence on those that he thinks
5 are, perhaps, not applicable?

6 MR. SWAZO: I just think that it's going
7 to end up being a waste of time. There's going to be
8 increased costs, expenses. These things are not cheap.
9 These hearings are not cheap. It's not necessary under
10 the rule.

11 CHAIRMAN FESMIRE: We would also be
12 setting a precedent that we would have to establish the
13 costs of the state in every one of these hearings,
14 wouldn't we?

15 MR. SWAZO: That's true.

16 COMMISSIONER OLSON: I guess I kind of
17 still come back to the problem that started this. The
18 Division asked for us to issue an order that directed
19 them to pay the costs. So without having some mechanism
20 for them to be able to challenge the Division costs, I
21 don't -- I guess it's a procedural thing. I'm not quite
22 sure how that's done. I'm going based upon what the -- I
23 think what we acted on was on what the Division had asked
24 of us, so we were just asking for additional information
25 at that point. I'm not quite sure how to resolve that.

1 I don't know if our counsel has got any input.

2 MR. SMITH: Could I ask a couple of
3 questions?

4 CHAIRMAN FESMIRE: Ask Bill.

5 Mr. Padilla, could your client be ready by the
6 next regularly-scheduled Commission meeting?

7 MR. PADILLA: He's going to have to be.

8 CHAIRMAN FESMIRE: When is it?

9 MS. DAVIDSON: November 4th.

10 MR. SWAZO: I'm not sure -- I may be on
11 vacation November 4th. I'll have to check my calendar.

12 MR. PADILLA: Then we'd require Mr. Swazo
13 to be here. He could ask for a continuance and I'd grant
14 it.

15 CHAIRMAN FESMIRE: Mr. Swazo, is there
16 anybody else in your office that could handle that?

17 MR. SWAZO: I'll have to check. I was
18 planning on taking the Veteran's Day and the two
19 preceding days, and I don't know if one of those days is
20 November 4th.

21 COMMISSIONER OLSON: Mr. Swazo, I guess
22 let me try and clarify something. This is what I was
23 trying to get at before, as well. Are you saying that
24 what you really need to do at this point, in the context
25 of the hearing we've just had, is that the Commission

1 needs to issue a 5.9 order, and you can't go forward on
2 reimbursement until there's a procedural action that's
3 then taken by the applicant to satisfy -- right now we're
4 just looking at, is there a 5.9 order and should costs be
5 reimbursed? That's why -- it's a procedural issue here.
6 Maybe you can try to clarify that.

7 MR. SWAZO: I apologize for the confusion.
8 I think it's apparent that I was the source of the
9 confusion at the last hearing. Yes. What I'm simply
10 asking is the Commission to issue an order finding C&D
11 Management in noncompliance. Procedurally, once that
12 happens, the burden then becomes C&D Management's to file
13 a motion indicating that they have satisfied the
14 requirements of the corrective action.

15 COMMISSIONER OLSON: When they file that,
16 is that the procedural mechanism under the rules for
17 challenging costs associated with the plugging? Where do
18 they get to challenge that?

19 MR. SWAZO: It could be, yes. I mean,
20 this is not -- procedurally, this is not where it would
21 happen. It would happen at that point.

22 COMMISSIONER OLSON: I guess that's my
23 concern, is that they do have a procedure to be able to
24 challenge costs. Admittedly, I don't know that I want to
25 have more hearings, because we've had a lot on this

1 already. They do have a right, though, to challenge
2 these costs and, if necessary, potentially have a hearing
3 on it. How we do that, I think, is what you need to help
4 clarify for us.

5 MR. SWAZO: That would be their
6 opportunity to challenge the costs.

7 CHAIRMAN FESMIRE: At that point in the
8 future?

9 MR. SWAZO: Yes. So they would have -- I
10 mean, that would be their option to challenge the costs.

11 COMMISSIONER OLSON: So let me ask another
12 question. Would the 5.9 order still direct them to
13 pay -- that was what you requested at the last hearing,
14 is that they be directed to pay the reasonable costs of
15 the plugging of those wells.

16 MR. SWAZO: Again, I apologize for the
17 confusion. I wasn't asking the Commission to issue an
18 order requiring them to pay the costs. I may have -- I
19 misspoke on that. What I'm simply suggesting is once the
20 Rule 5.9 order has been issued, I'm suggesting that C&D
21 Management could satisfy the requirements of the order by
22 reimbursing the OCD for the plugging costs.

23 CHAIRMAN FESMIRE: That's one of several
24 conditions that would have to be met; right?

25 MR. SWAZO: Yes. In order to comply

1 with -- satisfy the order that the Commission issued,
2 that's how I'm suggesting that they can do it, is by
3 reimbursing the state for plugging costs that OCD paid on
4 behalf of C&D Management in order for them to -- just
5 reimburse the plugging costs.

6 CHAIRMAN FESMIRE: I'm, sort of, of the
7 opinion that the final order needs to include those costs
8 and their attest to those costs. I see your point that
9 we need a 5.9 order, and there are certain things that
10 between now and the next hearing date that they might
11 request without a 5.9 order.

12 I think, perhaps, the way to do it is to go
13 ahead and grant the continuance, and at the same time,
14 request the OCD not to approve any pending applications
15 from C&D for additional wells pending the outcome of the
16 hearing.

17 COMMISSIONER BAILEY: I would certainly
18 agree with that.

19 COMMISSIONER OLSON: I don't have a
20 problem with that.

21 CHAIRMAN FESMIRE: Counsel Smith, is that
22 kosher? Perhaps we need some deliberation on this case.

23 MR. SMITH: Yes.

24 CHAIRMAN FESMIRE: At this time counsel
25 has requested that we go into executive session. He

1 estimates the time to be about five minutes to discuss
2 the decision of this case.

3 (The Commission went into executive session.)

4 CHAIRMAN FESMIRE: Let's go back on the
5 record. The record should reflect that the Oil
6 Conservation Commission has come out of executive
7 session. During the executive session they considered
8 Case Number 14055, including the motion for a
9 continuance.

10 The Commission has decided to deny the motion
11 for continuance. We have reached a decision in the case.
12 We've directed counsel to begin drafting an order that
13 reflects the Commission's decision. We are also
14 directing the attorneys to draft proposed findings and
15 conclusions and order language and submit it to counsel
16 two weeks from today by the close of business.

17 Ernie, does that give you time to get your
18 stuff --

19 MR. PADILLA: Yes.

20 CHAIRMAN FESMIRE: The order will
21 include -- the orders will include a provision that C&D
22 pay the reasonable costs incurred in plugging the wells,
23 and that we will proceed under Rule 5.9. The Commission
24 will issue two orders: One denying the motion, the other
25 one complying with the requirements of Rule 5.9

1 MR. PADILLA: Let me clarify, if I may.
2 You now have decided we're done with this hearing? Is
3 that --

4 CHAIRMAN FESMIRE: Yes, we're done with
5 this hearing. If, at some point, your client has been
6 able to reimburse OCD for the costs of plugging, they can
7 request a hearing under 5.9 to make that determination
8 and to, at that point, attest any costs.

9 MR. PADILLA: Now, the order will reflect
10 reasonable costs, so it's not going to contain the full
11 amount of the invoices as they currently stand?

12 CHAIRMAN FESMIRE: That's correct.

13 COMMISSIONER OLSON: Yeah. They were
14 looking at what the costs of plugging are, so not
15 specifying the amount, the reasonable costs of plugging.

16 CHAIRMAN FESMIRE: Okay. And the order
17 will include payment of the costs of plugging. Is that
18 clear?

19 MR. PADILLA: It's clear, but I'm confused
20 about the mechanism for how we can get to challenge those
21 well costs. In other words, how we obtain through some
22 formal procedure, either subpoena records or -- in other
23 words, we may have to go outside the Commission just in
24 order to get these well costs.

25 CHAIRMAN FESMIRE: Rule 5.9 sets out the

1 procedure where that -- a way by which that can be
2 accomplished. Once you have complied -- under D(3), "An
3 operator who completes the corrective action the order
4 requires, may file a motion with the order's issuer to
5 declare the order is satisfied. The Division or
6 Commission, as applicable, may grant the motion without
7 hearing or may set the matter for hearing."

8 MR. PADILLA: I understand the ruling.
9 I'm just -- I'm sure we'll work it out either through a
10 motion or some other way.

11 CHAIRMAN FESMIRE: Anything further in
12 Case Number 14055? Mr. Swazo?

13 MR. SWAZO: Yes, I have some questions. I
14 neglected to point out that there was prior Commission
15 precedent with the same exact issue. My recommendation
16 is that we use actual costs, because that's what the
17 Commission issued in the order. And I actually attached
18 the prior precedent to the response in opposition. So
19 I'll draft the order denying the motion for continuance.

20 CHAIRMAN FESMIRE: You will draft a
21 version. Mr. Padilla will have the same opportunity to
22 draft an order that complies with the Commission's
23 decision. Mr. Smith will then compile those for
24 presentation to the Commission.

25 MR. SWAZO: Is there a deadline? The

1 reason I'm asking is because I'm going to be out of the
2 office for a week starting tomorrow.

3 CHAIRMAN FESMIRE: How long will it take
4 you to do this?

5 MR. SWAZO: I plan to do it immediately.

6 CHAIRMAN FESMIRE: We're asking for two
7 weeks from today, the deadline.

8 MR. SWAZO: That's for the proposed order
9 denying their motion to continue?

10 CHAIRMAN FESMIRE: That's correct.

11 COMMISSIONER BAILEY: No.

12 MR. SMITH: It's for both orders and
13 findings and conclusions.

14 CHAIRMAN FESMIRE: That's for both orders
15 and the findings and conclusions.

16 MR. SWAZO: Okay. You had indicated that
17 you were denying the motion to continue --

18 CHAIRMAN FESMIRE: We're denying the
19 motion for continuance.

20 MR. SWAZO: -- granting the 5.9 motion.

21 CHAIRMAN FESMIRE: We're granting the 5.9
22 motion. Those are the two different orders.

23 MR. SWAZO: I did ask for, at the
24 conclusion of the last hearing, for a plugging order
25 pursuant to 70-2-14(B) to plug all of C&D's wells for

1 their noncompliance with reporting requirements. I'm
2 going to submit findings of fact and conclusions of law
3 on that point. I want to make it clear that I'm still
4 pursuing that, and I haven't abandoned that.

5 MR. SMITH: You haven't made a decision on
6 that.

7 CHAIRMAN FESMIRE: We still have a little
8 bit of deliberation to do on that. We will handle that
9 at the end of today's meeting. We will finish that
10 deliberation. I wasn't aware that we had an issue
11 hanging.

12 Mr. Padilla, you understand that you, too,
13 have the same opportunities when you draft --

14 MR. PADILLA: Let me make sure I
15 understand. An order denying the motion for continuance,
16 and an order granting the 5.9?

17 CHAIRMAN FESMIRE: An order compliant with
18 5.9.

19 MR. PADILLA: And requested findings of
20 facts and conclusions?

21 CHAIRMAN FESMIRE: Yes. By the close of
22 business two weeks from today.

23 Mr. Swazo, you're capable of complying with
24 that, are you not?

25 MR. SWAZO: Yes.

1 CHAIRMAN FESMIRE: Now, is there anything
2 further in 14055?

3 MR. SWAZO: No, sir.

4 CHAIRMAN FESMIRE: The next case before
5 the Commission is 14041, the application of New Mexico
6 Oil Conservation Division for a compliance order against
7 Marks and Garner Production, Ltd., and request for
8 determination of noncompliance with OCD Rule 19.15.5.9
9 NMAC for a violation of an order requiring corrective
10 action. Are the attorneys present?

11 The Chair has granted a motion for a
12 continuance, and it will be continued to the next
13 regularly-scheduled meeting of the New Mexico Oil
14 Conservation Commission, which I understand is November
15 4th.

16 The next case before the Commission is Case
17 Number 14134, the application of the Board of County
18 Commissioners of Rio Arriba County for cancellation or
19 suspension of applications for permits to drill APDs
20 filed by Approach Operating, LLC, in Rio Arriba County,
21 New Mexico. That case is consolidated with Case Number
22 14141, the application of Approach Operating, LLC, for
23 approval of six applications for permits to drill, Rio
24 Arriba County, New Mexico, and Case Number 14278, the
25 application of Approach Operating, LLC, for approval of

1 14 applications for permits to drill in Rio Arriba
2 County, New Mexico.

3 Are the attorneys for those cases present?

4 MR. HALL: Yes, Mr. Chairman.

5 CHAIRMAN FESMIRE: May we have an entry of
6 appearance, please?

7 MR. HALL: Mr. Chairman and Commissioner,
8 Scott Hall, Montgomery and Andrews lawfirm, Santa Fe,
9 appearing on behalf of Approach Operating, LLC, no
10 witnesses today.

11 MR. SUGARMAN: Mr. Chairman and
12 Commissions, good morning. This is Steve Sugarman on
13 behalf of Intervenor Rice Family Living Trust.

14 CHAIRMAN FESMIRE: In this case we also
15 have motions. I believe most of the motions are yours,
16 Mr. Sugarman.

17 MR. SUGARMAN: I don't believe that's
18 correct. I don't know if you received Mr. Hall's motions
19 of yesterday afternoon, which are a motion to strike and
20 a motion to remand to the district. In response to the
21 filing of those two motions --

22 CHAIRMAN FESMIRE: Don't we have some
23 preliminary issues?

24 MR. SUGARMAN: Yes. In fact, in response
25 to those motions that were filed by Mr. Hall on behalf of

1 Approach yesterday afternoon, I did cause to be filed a
2 motion that's styled, "Motion to Continue October 7, 2009
3 Hearing." I don't know if the Commission members have
4 had an opportunity to review that pleading.

5 First of all, let me say, unfortunately,
6 because of the timing of the motions which triggered the
7 need for me to file the motion to continue, I wasn't able
8 to file with the 48-hour rule, the rule requiring 48
9 hours' advance notice of a motion to continue if 48
10 hours' notice is possible. Here the precipitating events
11 happened late yesterday afternoon. As soon as I was made
12 aware of those events and had an opportunity to process
13 those and think of the appropriate way to respond, I
14 filed a motion to continue.

15 CHAIRMAN FESMIRE: Okay. The events
16 you're talking about are the agreements between the
17 original parties in the case?

18 MR. SUGARMAN: The events that I'm talking
19 about, two events -- the two motions, first of all, is
20 Mr. Hall's motion to strike, which is essentially a
21 motion that would, if granted, preclude my client from
22 participating in any of the three consolidated cases.
23 That was the first motion.

24 The second motion was the agreed motion to
25 remand to the Division, which does two things,

1 essentially. What the agreed motion does or what it asks
2 the Commission to do, is it asks the Commission for the
3 withdrawal of certain APDs and then to remand the
4 remaining APDs to the Division with instructions to the
5 Division for approval of those APDs.

6 In my motion to continue, Mr. Chairman and
7 Commissioners, what I endeavored to do is highlight for
8 the Commission the fact that both of these motions that
9 were filed by Mr. Hall on behalf of Approach raise issues
10 of transcendent public importance, insofar as
11 administration of the state's oil and gas resources are
12 concerned.

13 CHAIRMAN FESMIRE: But, Mr. Sugarman,
14 you've entered an appearance here on behalf of the Rice
15 Trust.

16 MR. SUGARMAN: That's correct.

17 CHAIRMAN FESMIRE: And if I understand
18 correctly, Approach has withdrawn the wells that are
19 located on the Rice Trust.

20 MR. SUGARMAN: I have two responses to
21 that, Mr. Chairman. First of all, as a factual matter,
22 the Rice Trust wells, there were originally two APDs
23 filed, Rice Number 1 and Rice Number 2. After some
24 further review of those geographic locations, Approach,
25 on its own initiative, decided that it was not pleased

1 with the locations of Number 1 and Number 2 for reasons
2 that have not yet been disclosed to us, and they
3 identified a preferred location where they intended to
4 drill that well.

5 They actually opened up the county permitting
6 process, the Rio Arriba County permitting process, with
7 the newly-identified location where there was not a
8 pending APD. However, what they did was they called the
9 newly-identified location Rice Number 1, which was a
10 location that was identified in a state APD. This was
11 just something that was done unilaterally by Approach,
12 the change of location from Rice Number 1 to wherever it
13 was originally located in the APDs, to an alternative
14 location that was more convenient for them.

15 Apparently, presumably upon the advice of
16 counsel, Approach realized that they simply could not
17 move a well location when an application had already been
18 filed for a well in another location with that same name,
19 so they withdraw Rice 1 and Rice 2.

20 But, at the same time as they withdrew those,
21 they wrote in a letter to Charlie Perrin that as soon as
22 Rice Number 3 was surveyed and staked, that a new APD
23 would be filed. And Rice Number 3 is in the location
24 where Approach -- that Approach had been previously
25 calling Rice Number 1, which is in a location -- a

1 different location than Rice Number 1 on the APD.

2 CHAIRMAN FESMIRE: Is there or is there
3 not an APD pending on the Rice --

4 MR. SUGARMAN: Momentarily, for this
5 moment in time, there is not. The second point, and I
6 believe, Mr. Chairman, that it's a more important point,
7 is that the Trust has an interest in this matter that
8 goes beyond Approach's use of its surface. The Trust has
9 an interest in protection of surface water quality,
10 groundwater quality, the environment and human health.

11 CHAIRMAN FESMIRE: Hasn't the county
12 addressed those issues in the new county ordinance?

13 MR. SUGARMAN: Your Honor, the county can
14 only address those issues insofar as it has regulatory
15 authority. As you know, there's concurrent jurisdiction
16 between the Oil Conversation Commission and the Division
17 and the county. There are certain areas -- certain
18 issues as to which the county simply does not have
19 authority to regulate.

20 CHAIRMAN FESMIRE: But the Rice Trust
21 does?

22 MR. SUGARMAN: No. The Division and the
23 Commission do. And it's the Trust's position that the
24 Commission's decision -- the Commission's decision in
25 this particular matter will affect an interest of the

1 Trust that is within the zone of interest that is
2 intended to be protected by the New Mexico Oil and Gas
3 Act. And that because the Rice Trust has an interest
4 that is within the zone of interest of the Oil and Gas
5 Act that is subject to injury in this matter, that it
6 does have the right to intervene in this matter, apart
7 from -- entirely apart from its ownership of any surface
8 of a well location where Approach proposes to drill the
9 well.

10 MR. HALL: Mr. Chairman --

11 CHAIRMAN FESMIRE: Hang on for just a
12 second, Mr. Hall.

13 MR. SUGARMAN: I'd just like to say, as I
14 started -- and I'm pleased to be able to answer your
15 questions, Mr. Chairman. But the thought that I had
16 started here was that both the motions, including the
17 motion to strike, raise issues of transcendent public
18 importance. It may well be, Mr. Chairman and Commission,
19 that after deliberating on the matter, that you decide
20 that the Trust does not have an interest in this matter
21 which is subject to impairment, and that they should not
22 be given a right to intervene. That may be the
23 conclusion of this matter.

24 However, we have not had an opportunity to
25 file any response to Approach's motion to strike. That

1 motion was filed late yesterday afternoon, and we feel
2 that in light of the importance of the issues that are
3 raised by that motion, that we ought to be afforded an
4 opportunity to provide a responsive memorandum to that
5 motion.

6 I'll also note that there is confusion in the
7 motion to strike. What Mr. Hall does in his motion is he
8 cites to one case from the New Mexico courts that deals
9 with the issue of standing. Now, we actually commenced
10 our participation in this case as an intervenor, and the
11 New Mexico case law is very clear on the fact that the
12 standards for participation in a case as an intervenor
13 and the standards for standing are very different
14 inquiries. A cite for that is Wilson vs. Massachusetts
15 Mutual Life Insurance Company, 135 NM 506.

16 This is a complicated issue. The rule dealing
17 with intervention actually does speak of a person with
18 standing having the right to intervene. However, the
19 case law also raises or uses the phrase, "standing to
20 intervene." So the legal issue is complicated. Standing
21 to intervene doesn't mean that there is an inquiry as to
22 standing that will follow. What it means is that there's
23 an inquiry as to intervention that will follow, and, as I
24 just said, the standards are different.

25 It's not at all clear to the Trust right now

1 that Mr. Hall's objection to our standing means that --
2 even if he's correct, means that we wouldn't have the
3 right to intervene in this case under New Mexico case
4 law. So this is an issue which I think needs to be fully
5 aired and briefed prior to the Commission's decision.

6 I'll also note that in the section of the NMAC
7 that deals with intervention, which is 19.15.4.11,
8 there's a provision that says that even if a party who
9 believes that it has standing, as the Rices do, if the
10 Commission find that that party doesn't have standing,
11 that the Commission can still allow intervention, in the
12 event that the intervenor will contribute substantially
13 to the protection of public health and the environment.

14 So 19.15.4.11 provides two bases for our
15 participation in this case. It provides a basis for our
16 participation as an intervenor, but it also provides a
17 basis for our participation to act as sort of an amicus
18 in this case, if you will, and to raise issues that we
19 feel will contribute substantially to the protection of
20 public health and the environment.

21 CHAIRMAN FESMIRE: What would you, as a
22 representative of the Rice Trust, have to contribute that
23 would exceed what the county has, in their ordinance,
24 have the ability to contribute this case?

25 MR. SUGARMAN: I think what the Trust

1 would like to see happen in this case, we would like to
2 see -- if we can divide the world up sort of
3 schematically, there is -- in the world of possible
4 regulation of an oil and gas production facility or well,
5 there is, I believe we'd all agree, an area where the
6 county can regulate, and those are issues mainly having
7 to do with -- issues having to do with noise, dust,
8 property values, those sorts of things, and an area where
9 the Commission can regulate. And those two areas,
10 although there might hypothetically be some overlap,
11 those are two different areas of regulation.

12 For instance, the county would not have the
13 authority to impose unitization as a requirement in the
14 frontier of Rio Arriba County in order to attempt to
15 minimize any possible surface damage. The county would
16 not have the authority to alter spacing rules that govern
17 Approach's activities in the frontier of Rio Arriba
18 County. The county does not have the authority to
19 regulate downhole issues. For instance, issues
20 pertaining to any sorts of conditions of requirement
21 about concrete casing and those sorts of things. These
22 are all areas that are specifically within the regulatory
23 purview and, more importantly, within the technical
24 expertise and competence of the Commission.

25 I think that it is incorrect -- and the county

1 pointed this out in their response to Mr. Hall's first
2 motion, which is presumably withdrawn, the motion for
3 conditional approval, which appears to be superseded by
4 the agreed motion. The county, in its response to that
5 motion, made the point, we have two separate permitting
6 authorities that are exercising concurrent jurisdiction.
7 They are attempting to prevent different sorts of injury.

8 It's incorrect to say, well, the county can do
9 everything that the state would do or, conversely, to say
10 the state can do everything that the county would do.
11 It's essential that both permitting authorities be given
12 the opportunity to exercise their jurisdiction and to
13 apply their expertise. And the Trust hopes and expects
14 that the Commission's application of its jurisdiction and
15 expertise will lead to better permitting decisions in the
16 subject area.

17 CHAIRMAN FESMIRE: Okay. Mr. Hall, do you
18 have a response to what I'm going to take as an opening
19 statement?

20 MR. HALL: Thank you, Mr. Chairman. I
21 appreciate the opportunity. I know this is the first
22 time that the Commission has met as a body on these
23 applications, so if you feel like you're being hit with a
24 lot of this, I thought it might be helpful to give you
25 some background information. And, also, I think I can

1 offer the Commission a way out, or a way forward, which
2 will satisfy the county, satisfy my client, and I think
3 address Mr. Rice's concerns, as well.

4 My client owns a 90,000-acre fee oil and gas
5 lease in the Tierra Amarilla area. It had made
6 applications for APDs in 2008, and, in fact, had begun to
7 build a location on one of the sites that got the
8 attention of the county. Rio Arriba County Land Use and
9 the Planning and Zoning Department asked us to come and
10 talk to them. They informed us that the county would
11 pursue a moratorium and would also pursue the
12 promulgation and adoption of an oil and gas drilling
13 ordinance. We participated in that process with them and
14 started to negotiate, frame out the parameters of the
15 ordinance.

16 In the meantime, the county filed an
17 application with the Division, challenging four of the
18 APDs. The Division requested that Approach file its own
19 application to place six additional APDs that it applied
20 for, up for adjudicatory hearing. We did that.

21 A hearing was held before Examiner Brooks in
22 June of last year, I believe. It was a two- or three-day
23 hearing, and the matter was taken under advisement.
24 Before an order was issued, these two cases were removed
25 to the Commission. Two cases were subject to numerous

1 continuances. In January of this year, on behalf of
2 Approach, I filed a third application to have the
3 Commission address 14 more APDs in a consolidated
4 proceeding.

5 All the while, we continued to work with the
6 county, negotiate with them and participate in the
7 regulation drafting process. In March of this year, the
8 Commission did pass its oil and gas ordinance. We
9 provided you with a copy of that. It's appended to our
10 agreed motion. We discussed with the county that we now
11 had dual proceedings, parallel proceedings, and that we
12 didn't want one to interfere with the operation of the
13 other.

14 I proposed, initially, a conditional motion to
15 approve the APDs. The county objected to that. I
16 believe it was laboring under some misapprehension that
17 Approach took the view that some of its APDs were
18 grandfathered in. We satisfied them that that was not
19 the case, that in each and every case, Approach would
20 make application to the county through its special use
21 application process.

22 CHAIRMAN FESMIRE: So Approach has agreed
23 with the county to comply with the new county ordinance?

24 MR. HALL: In each case, with every well.
25 In further discussions with them, we were striving for a

1 way to resolve the administrative impasse. We hit on a
2 solution, and that was to have the wells -- the APDs for
3 each of the wells remanded back to the Division for
4 administrative approval in the regular course of the
5 Division's processes, and we also agreed that in each
6 case, for each APD, that they carry an express provision
7 that the operator comply with all applicable county
8 ordinances. We will do that. On the strength of that
9 agreement --

10 CHAIRMAN FESMIRE: So they will waive any
11 argument that they were grandfathered in; right?

12 MR. HALL: That's correct. With respect
13 to the county ordinance, that's correct. So that brings
14 us to where we are today. We had filed our motion for
15 conditional approval today. It's not necessarily
16 subsumed by the new agreed motion, but I think they're
17 compatible, and we ask for substantially the same relief.

18 What I would also like to explain for the
19 interest of Mr. Sugarman's client, Dwight Rice, is that
20 as part of the administrative approval process, we had
21 agreed with the county that should the county have an
22 issue with respect to the Division's approval of any
23 single APD, it would be free to seek an adjudicatory
24 hearing review of that APD.

25 CHAIRMAN FESMIRE: Before this Commission?

1 MR. HALL: Before the Commission or the
2 Division. I anticipated we would start at the examiner
3 level, work our way up here, if necessary.

4 In addition to that, I believe -- well,
5 Approach will honor the efforts of any record title land
6 owner to establish standing to do the same. If they wish
7 to have the Division review the approval of an APD on
8 their surface, we will honor that. We will participate
9 in that process with them. That allows the county
10 hearing process to go forward. It's the first time the
11 county has done this, and we are the first applicant. I
12 believe we have a good working relationship with the
13 county staff and the Board of County Commissionrs.

14 We are trying to identify what the first
15 application ought to look like, what well or wells ought
16 to be included, and we'll submit that through their
17 process. And in that process, there are also provisions
18 for public hearing in which Mr. Sugarman's client may
19 participate, I believe. So it's not as if there's no
20 opportunity for public participation, land owner
21 participation, in the county process and now in the
22 Division process.

23 Our concern was that we were in stasis.
24 Neither process could proceed unless we had some
25 resolution on how the Division's approval of APDs were to

1 go forward. So this is the compromise we've agreed on.
2 The county has authorized me to represent to you that
3 they've agreed to the motion and the form of order that
4 we presented to you.

5 CHAIRMAN FESMIRE: Mr. Sugarman, the
6 agreed motion to remand to the Division is not acceptable
7 to your client, even if it included a provision to remand
8 everything except wells that would be located on the
9 Rice property?

10 MR. SUGARMAN: I'm sorry, Mr. Chairman.
11 Could you please restate that question?

12 CHAIRMAN FESMIRE: The agreed motion to
13 remand to the Division, I assume from the statement you
14 made, that it was not acceptable to your client, even if
15 it were to include a provision to remand all of the
16 applications that have not been withdrawn, except those
17 on Rice property, and maintain any application --
18 maintain jurisdiction in this Commission over any
19 application to be made on the Rice property?

20 MR. SUGARMAN: I want to provide -- I feel
21 like if I answer the right question -- I'm sorry, Mr.
22 Chairman. I'm not following the question.

23 CHAIRMAN FESMIRE: If I understood Mr.
24 Hall correctly, he and the county have come to an
25 agreement, and that agreement involves remanding these

1 cases back to the Commission, not with the direction to
2 the Division -- not with the direction to approve, but
3 with direction to consider, like they would any other new
4 application. Is that my understanding, Mr. Hall?

5 MR. HALL: They are all pending except for
6 the ones that have been withdrawn or will be withdrawn,
7 as we've indicated. We've accounted for all 24 wells
8 now. For purposes of clarification, there are no APDs
9 pending for Rice Trust surface, but we simply haven't
10 been able to get on the surface to come to terms on a
11 location. We hope to make that happen.

12 At such time as that happens, we would submit
13 an APD for that location with the district office,
14 subject to the same express condition, and it would be
15 our view that if Mr. Rice sought an adjudicatory hearing
16 to review the administrative approval of the APD, we
17 would go along with that.

18 CHAIRMAN FESMIRE: Before we start
19 considering these motions, is that --

20 MR. SUGARMAN: Mr. Chairman, we have a
21 concern, and perhaps Mr. Hall can illuminate. The way
22 that I read the motion, the agreed motion that was filed
23 yesterday afternoon, on page 2, is that Mr. -- it seems
24 to me that what Approach is doing -- two things, two
25 comments. What Approach is doing is, it's asking the

1 Commission to remand to the Division, and then for
2 administrative approval. That's what the motion says.
3 It doesn't say for processing the applications. My
4 reading of the motion was that what Mr. Hall is
5 requesting is not an adjudicatory hearing on these -- on
6 the --

7 CHAIRMAN FESMIRE: You're saying that the
8 motion, as drafted, would mandate approval.

9 MR. SUGARMAN: Is requesting an order from
10 the Commission directing the Division to approve, and
11 that's the way that I have interpreted --

12 CHAIRMAN FESMIRE: If the wells were
13 remanded back to the Division for administrative action,
14 you know, handled like they would any other APD, would
15 that be satisfactory to your client?

16 MR. SUGARMAN: The problem with that, Mr.
17 Chairman, is that we'd end up right back in here after
18 some wheel spinning in the Division. If you look on that
19 same page 2, and this is along the lines of an issue that
20 Mr. Hall just raised, what this motion says is, "For any
21 APD submitted for administrative approval, any interested
22 party" -- and this is an important phrase -- "any
23 interested party would be at liberty to invoke the
24 Division's rules to establish standing and seek an
25 adjudicatory hearing on the propriety of approval of any

1 individual APDs."

2 As I've been expressing to the Commission this
3 morning, we feel that regardless of our status as a
4 record owner of land where a well is to be located, that
5 we do have -- that we are an interested party, and that
6 we do have a right to participate under the Division's
7 rules in any administrative proceeding.

8 CHAIRMAN FESMIRE: So any attempt I would
9 make to short circuit this hearing is not going to be
10 successful; right?

11 MR. SUGARMAN: To short circuit this
12 hearing?

13 CHAIRMAN FESMIRE: Yeah, to come to an
14 agreed conclusion would not be successful.

15 MR. SUGARMAN: I feel that this hearing is
16 premature. I feel that -- I can't stress strongly enough
17 that issue as to who is a properly interested party in an
18 adjudicatory proceeding on an APD is an issue of
19 significant public importance. It should not be resolved
20 on the basis of a two-page motion to strike that's filed
21 by an operator without any opportunity for response.

22 Certainly it would short circuit this hearing
23 today if this matter were continued so that the parties
24 could file the briefs that need to be filed, so that this
25 Commission can issue a fully-informed decision on that

1 particular legal issue which has yet to be resolved.

2 That also -- Mr. Chairman, it's an issue that
3 the Division, even if we don't go with Mr. Hall's -- what
4 might be Mr. Hall's notion of the motion, which is an
5 order directing the Division to approve, rather than to
6 process, even if the Division were to be ordered to
7 process those applications, we'd have to come right back
8 up here to the Commission for a determination of the
9 threshold legal issue on who is the interested party who
10 has --

11 CHAIRMAN FESMIRE: Whereas, if we go ahead
12 and have the hearing today and accept the Rices as an
13 interested party, what happens to their abilities to
14 affect the decisions, then?

15 MR. SUGARMAN: If the Rices were -- if
16 their intervention as interested parties were allowed in
17 the three cases today, and the Commission were to order
18 these applications to be remanded to the Division for
19 processing, then --

20 CHAIRMAN FESMIRE: I guess what you're
21 telling me is there's no hope for a settlement between
22 the three parties today.

23 MR. SUGARMAN: Without going into
24 specifics, Mr. Chairman, I contacted Mr. Hall on Friday,
25 when I became aware of the fact -- this past Friday when

1 I first became aware of the fact that there was a
2 possibility of a settlement between Approach and the
3 county, and I proposed to Mr. Hall in an email that he
4 and I get together to talk about whether there was some
5 way that we would be able to make a package settlement
6 that would take care of all these issues, and I didn't
7 hear back from him. He and I were just actually talking
8 during the recess, just moments ago --

9 CHAIRMAN FESMIRE: If we take a break,
10 could you further those discussions?

11 MR. SUGARMAN: We might be able to, Mr.
12 Chairman. We might be able to. Our conversation outside
13 was all of five or seven minutes, and there weren't any
14 great indications that things were going to be
15 successful, but I'm always, of course, willing to talk.

16 CHAIRMAN FESMIRE: Why don't we go ahead
17 and take a 15-minute break? Do you think you all would
18 need an office?

19 MR. SUGARMAN: Sure. Yes. I think we
20 would. Or just some place where Scott and I could have a
21 private conversation.

22 CHAIRMAN FESMIRE: Having said that, I
23 don't know of a vacant office.

24 MR. SUGARMAN: If I may, in the meanwhile,
25 one other comment. I did make a -- I did file something

1 else this morning.

2 CHAIRMAN FESMIRE: You filed lots of
3 elses.

4 MR. SUGARMAN: I filed something else this
5 morning. I don't know whether you have seen that yet.

6 CHAIRMAN FESMIRE: I got two documents
7 from you this morning.

8 MR. SUGARMAN: The motion to continue was
9 sent to Florene yesterday.

10 CHAIRMAN FESMIRE: We didn't get it until
11 this morning.

12 MR. SUGARMAN: The other thing that was
13 filed that, apparently, you have, is the Trust's
14 suggestion of a jurisdictional impediment to take any
15 action on this matter in light of a failure of personal
16 notice.

17 And, again, we feel that this is an issue that
18 raises a substantial issue of public importance, and we
19 are fully aware of the fact that this a novel issue.
20 It's an issue of first impression in New Mexico law, and
21 it's unresolved, and the issue may be decided against us.
22 This is an issue that's a sua sponte issue. The issue of
23 the Commission's jurisdiction doesn't at all relate to
24 the Rice's standing to bring a case or their right to
25 intervene or their right to participate under the

1 Division's rules for intervention, even for a substantial
2 public understanding.

3 CHAIRMAN FESMIRE: Mr. Sugarman, your
4 client had notice.

5 MR. SUGARMAN: My client had notice -- my
6 client -- the applications on my client's property, there
7 were two pending, Mr. Chairman. They were pending --
8 they were filed on January 27th. My client didn't -- and
9 then the application was calendared before the Commission
10 for the February hearing. I'm going to try and get this
11 right. I might be wrong. They were calendared before
12 the Commission for the February hearing, the May hearing,
13 the July hearing and the September hearing.

14 It wasn't but for 7 or 10 days before the
15 September hearing that my client was given -- had actual
16 notice of the pendency of the applications in this
17 Commission. And the way that we had actual notice was
18 when I was retained to participate in this case on behalf
19 of the client, I just happened to go onto the Division's
20 Website to cruise around and look at dockets, and I saw
21 that this matter was then on its fourth docket.

22 My client had never been given any notice of
23 the fact that this matter had been docketed for hearing
24 before the Commission, and that the APDs were subject to
25 approval at any of those hearings.

1 CHAIRMAN FESMIRE: Hasn't the legislature
2 addressed that, the Surface Owner's Protection Act? This
3 is a split estate; right?

4 MR. SUGARMAN: It is a split estate, Mr.
5 Chairman.

6 CHAIRMAN FESMIRE: I'm assuming your
7 client understood, being -- are they in the oil business?

8 MR. SUGARMAN: My client is, first of all,
9 not a New Mexico resident. And my client is now familiar
10 with the provisions of the New Mexico Surface Owner's
11 Protection Act, yes.

12 CHAIRMAN FESMIRE: When they purchased
13 this land, hadn't the estate already been split?

14 MR. SUGARMAN: Mr. Chairman, quite
15 honestly, I can't tell you when they purchased the land.
16 I'm pretty confident that the estate had already been
17 split, but I'm also pretty confident that the Surface
18 Owner's Protection Act had not been enacted at that time.

19 CHAIRMAN FESMIRE: That's true. But if I
20 understand correctly, they're familiar with the industry
21 and understood what they purchased when they bought a
22 split estate; is that correct?

23 MR. SUGARMAN: They are familiar with the
24 industry. As you know, Mr. Chairman, in many places
25 other than New Mexico -- and in New Mexico when federal

1 minerals are at issue in a split estate situation, an
2 operator is required to give a land owner notice at the
3 time that there is an application for permit to drill
4 filed by the operator.

5 CHAIRMAN FESMIRE: But isn't that the same
6 issue that the legislature addressed?

7 MR. SUGARMAN: No. It's a completely
8 different issue, Your Honor. I hope you don't mind me
9 calling you Your Honor, Mr. Chairman.

10 It's a different issue. We submit that it is
11 legally erroneous to equate the personal notice that's
12 required in an APD context, in an adjudicatory hearing on
13 an APD, with a personal notice that's required for the
14 Surface Owner's Protection Act.

15 CHAIRMAN FESMIRE: Isn't it the same event
16 that triggers the requirements?

17 MR. SUGARMAN: No, it is not.

18 CHAIRMAN FESMIRE: Doesn't the Surface
19 Owner's Protection Act come into effect when an APD is
20 filed?

21 MR. SUGARMAN: No.

22 CHAIRMAN FESMIRE: What triggers the
23 responsibility of the operator under the Surface Owner's
24 Protection Act?

25 MR. SUGARMAN: Drilling.

1 CHAIRMAN FESMIRE: They're not entitled to
2 notice until after they start drilling?

3 MR. SUGARMAN: They're not entitled to
4 notice until they have an intent to drill and come -- the
5 operator has an intent to drill and comes to the surface
6 owner with a proposal for the drilling plan. But by that
7 point in time, the APD would have already been issued,
8 and the interests in the land owner in having notice of
9 the APD are different. They diverge in many ways from
10 the interest of the land owner having notice for purposes
11 of negotiating a compensation agreement under the Surface
12 Owner's Protection Act.

13 CHAIRMAN FESMIRE: Okay. Do we have an
14 office?

15 COMMISSIONER OLSON: Mark went to look.

16 MR. HALL: I think we can step outside.
17 It won't be long.

18 CHAIRMAN FESMIRE: Why don't we take a
19 15-minute break and reconvene at ten minutes until 11:00?

20 MR. HALL: I have to catch a plane soon.

21 CHAIRMAN FESMIRE: When do you have to
22 leave?

23 MR. HALL: I should be on the road pretty
24 soon.

25 MR. SUGARMAN: Maybe Scott and I with five

1 minutes outside would be able to figure out whether we
2 even need an additional --

3 CHAIRMAN FESMIRE: Commissioner Bailey
4 needs a break.

5 MR. SMITH: We have an office in Forestry
6 that you all can use to talk.

7 CHAIRMAN FESMIRE: Okay.

8 (A recess was taken.)

9 CHAIRMAN FESMIRE: Let the record reflect
10 that we've come back from break. This is the
11 continuation of the three consolidated cases, Numbers
12 14134, 14141 and 14278. The record should also reflect
13 that all three Commissioners are present. We, therefore,
14 have a quorum.

15 Since we have motions, Mr. Hall, do you want
16 to start with your motions, or --

17 MR. HALL: Please. I think we should take
18 up the agreed motion to remand. It is submitted in
19 conjunction with the earlier motion for conditional
20 approval. I think they ask for the same relief. And as
21 I've said, the agreed motion accounts for all --

22 CHAIRMAN FESMIRE: Before you go further,
23 what I intend to do is go ahead and hear all the motions,
24 and then go into executive session to make a decision on
25 the motions; okay?

1 MR. HALL: Right. But with the
2 understanding, I believe there may have been motions
3 filed that I haven't seen yet. I'll do my best to
4 address those as I can.

5 CHAIRMAN FESMIRE: The first one we're
6 addressing is Mr. Hall's agreed motion to remand to the
7 Division.

8 MR. HALL: Yes, and it asks that the
9 Commission remand the applications for approvals to drill
10 for the eight wells back to the Division district for
11 review and approval in the ordinary course of the
12 Division's administrative process.

13 CHAIRMAN FESMIRE: You say, "the eight
14 wells." Are you talking about the wells in Case Number
15 14134 and 14141? Unless the two that have already
16 been -- which eight wells, I guess, are --

17 MR. HALL: If you will look at page 2 of
18 the motion, they are listed by case there, and then on
19 into page 3. The wells for which administrative approval
20 is sought, they are the Sena Well No. 2, the Avella
21 Sultemeier Well No. 2, the Montano Well No. 1, the Dora
22 Spill Well No. 2, the Dora Spill Well No. 3, the Jeffrey
23 Spill Well No. 1, the Jeffrey Spill Well No. 3, and the
24 Edward Spill Well No. 4.

25 APDs for the remaining wells in all three of

1 the applications are being withdrawn. When the APDs for
2 the eight wells are submitted to the district office, we
3 are proposing that they be subject to the express
4 condition that the applicant comply with all applicable
5 county ordinances, specifically, Rio Arriba County's Oil
6 and Gas Land Use Ordinance.

7 CHAIRMAN FESMIRE: Okay. So the other --
8 they divide them out by -- not by case. They just --

9 MR. HALL: I have done that, Mr. Chairman.

10 CHAIRMAN FESMIRE: I mean, they're not
11 grouped by case. Some of the wells have each one of the
12 three cases that are being requested.

13 MR. HALL: That's right. That's correct.

14 CHAIRMAN FESMIRE: And the rest of them
15 are sort of being withdrawn without prejudice.

16 MR. HALL: That's correct. So as part of
17 that process, as we've indicated, we had agreed with the
18 Rio Arriba County Commissioners and the county staff that
19 in the event the county saw a need to seek further review
20 of any single APD, pursuant to the adjudicatory hearing
21 process, we would not contest the county's standing, and
22 we would also honor the standing of record title surface
23 owner for each of those locations, if they sought to do
24 that. That is the sum and substance of what we're
25 asking.

1 In conjunction with that, the Commission
2 should note that the lessors are ready to proceed. The
3 operator is ready to proceed.

4 CHAIRMAN FESMIRE: On all eight of these
5 wells?

6 MR. HALL: Yes. Most, if not all, of the
7 surface owners are ready for us to proceed, and the
8 county is ready to receive applications from the operator
9 pusuant to its Oil and Gas Ordinance. And we have
10 committed to the county that for all eight of these
11 wells, and for any well to be drilled on Approach's
12 lease, they will be subject to county's process.

13 CHAIRMAN FESMIRE: I don't remember
14 whether it was -- I don't think it was part of the county
15 process, but Approach has agreed to drill these with a
16 closed-loop system?

17 MR. HALL: All will be drilled with a
18 closed-loop system. That's my understanding, yes.

19 CHAIRMAN FESMIRE: Is that all you have
20 on the first motion?

21 MR. HALL: A final closing comment on
22 that, as I said, we're ready to go. The county is ready
23 to proceed, as well. The county wants its process to
24 work. We want its process to work, and it was
25 substantial effort on the part of industry, interest

1 owners, Forest Service, everyone, to come up with what I
2 think is a fair ordinance. All are ready to see it work.
3 I think it can work.

4 We want to avoid a situation where the
5 operation of the county's ordinance is frustrated by a
6 single land owner who may seek to object to APDs that, in
7 some cases, are 10 miles away from his land. We think
8 the Commission specifically ought to avoid that result.
9 And I believe that is the county's position, as well.
10 They're not here to speak for themselves today, but from
11 my conversation with them, I think they would verify
12 that.

13 CHAIRMAN FESMIRE: Do you have a response,
14 Mr. Sugarman?

15 MR. SUGARMAN: Yes. A little guidance
16 from the Commission, please. Shall I assume, for
17 purposes of my response to this motion, that my client
18 does have standing? Because --

19 CHAIRMAN FESMIRE: Mr. Hall has not
20 objected, and we have not had to rule on it.

21 MR. SUGARMAN: He has objected, actually,
22 in his motion to strike.

23 CHAIRMAN FESMIRE: We aren't addressing
24 the motion to strike.

25 MR. SUGARMAN: So I will assume for

1 purposes of my argument --

2 CHAIRMAN FESMIRE: You can assume that we
3 haven't ruled on that yet.

4 MR. SUGARMAN: Yes. Okay. I understand
5 that the Commission hasn't ruled, so right now I'm trying
6 to think if I need to make two responses. Let me make
7 the response, first, in the event that the Commission
8 does find that we have standing in my response to the
9 motion, and then I will provide a second response to the
10 Commission.

11 Mr. Hall, in his presentation to the
12 Commission a little bit earlier this morning, had
13 indicated that Approach has been in stasis on the state
14 applications, and I think that's an accurate
15 characterization of where Approach has been.

16 Some of these applications have been pending
17 for about 18 months now, and during a portion of that
18 period of time, Approach could not pursue the matter
19 because there was a moratorium, and Rio Arriba County was
20 in the process of promulgating their ordinance. But
21 there has been a long period of time in which Approach
22 could, after the ordinance was adopted, where Approach
23 could have been seeking to expedite the processing of
24 this case, which, after all, has been before the
25 Commission since February and has been on four prior

1 Commission dockets.

2 It has been my understanding, based on
3 previous conversations with Approach's counsel, that
4 Approach's plan was to run an initial set of APDs through
5 the county's permitting process, and then once it had a
6 county permit in hand, if it was able to acquire county
7 special use permits for certain wells, that it would seek
8 to remand this matter to the Division for administrative
9 processing and approval. That made a lot of sense to me.

10 Right now, what's happening is that Approach,
11 for some reason that has not been made clear, has decided
12 that it wants to modify that particular strategy, and
13 that even before it runs an initial set of well locations
14 through the county approval process, it wants this
15 Commission to wash its hands of this matter and send it
16 back to the Division for administrative approval.

17 We feel that to the extent that we're in
18 stasis right now, that that stasis has been a strategy
19 decision approach, and that Approach, therefore -- and
20 that Approach hasn't shown that any injury would result
21 from holding this case in abeyance until such time as the
22 county had run its permitting process.

23 You, Mr. Chairman, had indicated that you
24 might think -- and I'm sorry if I'm misconstruing your
25 question -- that there might be some consideration of

1 issues at the county permitting process -- in the county
2 permitting process that would obviate the need for
3 concurrent or parallel consideration here at the state.

4 CHAIRMAN FESMIRE: Mr. Sugarman, I don't
5 believe I've made that statement, but -- I guess I don't
6 understand what you're --

7 MR. SUGARMAN: The point I'm trying to
8 make is that I don't see that there is any injury to
9 Approach in holding this motion on the Commission's
10 docket until such time as Approach is ready to proceed
11 for its state permits.

12 Now, I understand right now that Approach does
13 not object to a record title surface owner's
14 participation in the process that will ultimately be
15 carried out by the Division on these applications. But,
16 again, this is what I was arguing to the Commission this
17 morning, we -- the Rice Trust is not a record title
18 surface owner on all of the locations. Yet, it is within
19 the zone of interest that's to be protected by the New
20 Mexico Oil and Gas Act.

21 CHAIRMAN FESMIRE: What is that, Mr.
22 Sugarman? I guess I don't understand what that zone of
23 interest you mentioned is.

24 MR. SUGARMAN: Yes, I will answer your
25 question, Mr. Chairman, but I want to preface my remarks

1 with the point that I've made a number of times. I feel
2 right now that it would be manifestly unfair for this
3 Commission to rule on the pending motions without giving
4 the Trust an opportunity to file a responsive memorandum.

5 CHAIRMAN FESMIRE: You've raised this
6 issue, and I'm curious. What is it?

7 MR. SUGARMAN: As I said earlier -- and
8 I'm sorry if this is going to be -- there's a lot of
9 strands that run through legal considerations of what is
10 sufficient to establish standing and what is sufficient
11 to establish intervention.

12 CHAIRMAN FESMIRE: I don't think my
13 question gets to that. It's the statement that they have
14 a zone of interest in these locations that were not on
15 their property.

16 MR. SUGARMAN: The zone of interest
17 test -- the courts have adopted a zone of interest test
18 for purposes of standing analysis. That's an analysis
19 that's used by both the federal courts and the New Mexico
20 courts. In Key vs. Chrysler Motors Corp., 121 NM 764,
21 the Court says that a plaintiff who can demonstrate that
22 the interest that he seeks protected are within the zone
23 of interests to be protected or regulated by a statute,
24 that plaintiff has standing.

25 CHAIRMAN FESMIRE: That is my question.

1 What zone of interest does your client have, and how does
2 that apply -- how does the test apply?

3 MR. SUGARMAN: The zone of interest and
4 making a determination of whether my client does fall
5 within the zone of interest, of course the relevant
6 statute would be the New Mexico Oil and Gas Act. The
7 question would be, does anybody -- well, in this
8 particular case, does the Trust fall within a zone of
9 interest that was created by the New Mexico legislature
10 when it enacted the New Mexico Oil and Gas Act.

11 CHAIRMAN FESMIRE: In 1935?

12 MR. SUGARMAN: And as it's been amended
13 through the years. Because, of course, the relevant
14 consideration is the Act that exists right now, and not
15 as it existed when it was originally promulgated.

16 CHAIRMAN FESMIRE: How does the statute
17 apply?

18 MR. SUGARMAN: The statute applies in this
19 way, Mr. Chairman. The statute authorizes, empowers and
20 imposes a duty on the Commission not only to prevent
21 waste and to protect correlative rights, but, also, to
22 assure the oil and gas operations do not unreasonably
23 impair surface water quality, groundwater quality, human
24 health or the environment. That's what the statute does
25 in the provision that enumerates the powers of the

1 Commission.

2 CHAIRMAN FESMIRE: That's the Oil and Gas
3 Act? Where is that at?

4 MR. SUGARMAN: Yes. I direct the
5 Commission to 70-2-12(B)(15), (B)21 and (B)22.

6 COMMISSIONER OLSON: Can I ask a question?
7 It seems like we're getting into arguing the issue of
8 standing, and I guess my question is -- and maybe both
9 attorneys can answer this -- if this was remanded to the
10 Division, isn't their ability to argue standing in front
11 of the Division, and, therefore, maybe the Division -- at
12 that Division level, they could narrow this issue for
13 whatever is presented to the Commission at that point, if
14 there's still a point of contention over standing.

15 From what I heard from Mr. Sugarman earlier,
16 it sounded like he didn't really have -- and clarify me
17 if I'm understanding you wrong. He didn't really have an
18 objection to remanding this back to the Division, as long
19 as some language didn't say, "It's not for approval.
20 It's for the processing the applications," and that your
21 main concern, Mr. Sugarman, was that you have standing.

22 I would think, though, that you could be
23 making those arguments in front of the Division, and if
24 it's not satisfactorily resolved, it could be then taken
25 up in front of the Commission. That's my thinking on

1 that.

2 MR. SUGARMAN: I think, Commissioner
3 Olson, that what you say makes a lot of sense. It's my
4 position, as the Commission knows, that this Commission
5 at this particular hearing ought not to decide the issues
6 that are raised by the motion to strike, which are
7 standing and intervention, because, again, we haven't had
8 an opportunity to file any responsive brief. So I do
9 feel like a Division at this time is inappropriate.

10 Commissioner Olson, I think that we -- yes,
11 it's entirely true that if this matter were to be
12 remanded to the Division, that, in that particular forum,
13 we would be able to, again, litigate the issue of
14 standing as a threshold issue. And, presumably, the
15 Division would establish a briefing schedule where we
16 would be able to fully flesh out the issue for the
17 Division's consideration and resolution.

18 My concern is that we'll be right back here
19 again on a de novo appeal of the legal issue the way it's
20 resolved by the Division, that if the issue is resolved
21 adversely to Mr. Hall's client, that he would want to
22 appeal the legal issue to the Commission. Conversely --

23 CHAIRMAN FESMIRE: So why not address it
24 now while it's before the Commission?

25 MR. SUGARMAN: I would like to address it

1 now, Mr. Chairman, after I have been given a chance to
2 respond to the motion in writing. I received the motion
3 at 6:00 yesterday afternoon. I've done a little bit of
4 research, and I would be happy to present the product of
5 the little bit of research that I've been able to do with
6 the Commission, if the Commission would like to hear my
7 argument now.

8 However, I want to respectfully submit that
9 when I receive a motion to strike that would essentially
10 make my -- that would preclude my client from
11 participating in this proceeding, and when the relief
12 that's sought in the motion to strike would preclude
13 anybody from -- a record surface owner from proceeding in
14 an adjudicatory proceeding on an APD, that fairness and
15 the public interest require that I be given an
16 opportunity to file a written response to the motion.

17 CHAIRMAN FESMIRE: You're not claiming
18 that Mr. Hall filed his motion in an untimely manner, are
19 you?

20 MR. SUGARMAN: I do not know. I will
21 profess that I do not know that there are any time limits
22 on the filing of such motions.

23 CHAIRMAN FESMIRE: That's not part of your
24 argument, is it?

25 MR. SUGARMAN: To the extent that there

1 is -- I shouldn't say that because I don't want to waive
2 this objection. To the extent that there is some
3 requirement for a timely filing of a motion, I would
4 submit that that requirement was not complied with.
5 That's not what I'm arguing right now. If I had received
6 Mr. Hall's motion sufficiently in advance of this
7 hearing, so that I would have had an opportunity to
8 prepare a response to his motion, I would have prepared a
9 response to his motion.

10 CHAIRMAN FESMIRE: Likewise, he didn't get
11 a chance to respond to most of your motions, either; is
12 that correct?

13 MR. SUGARMAN: No, that's not correct.
14 Which motion?

15 CHAIRMAN FESMIRE: The one you filed last
16 night. The one you filed this morning.

17 MR. SUGARMAN: I filed one motion to
18 continue, Mr. Chairman. I have filed one motion. There
19 is a motion that I filed for production of certain
20 documents, and the motion that I -- that motion was filed
21 a month ago or so, and Mr. Hall has had an opportunity to
22 respond the that. The jurisdictional issue that I
23 raised, I didn't raise by motion, because, again --

24 CHAIRMAN FESMIRE: What's the difference
25 between the suggestion and motion?

1 MR. SUGARMAN: The motion is that I would
2 like to have an opportunity -- I have suggested to the
3 Court that sua sponte the Court has, as you know -- the
4 Commission has a sua sponte obligation to ensure that it
5 has subject matter jurisdiction to take valid and
6 enforceable acts in a proceeding. That's a sua sponte
7 duty. My suggestion to the Commission is that sua
8 sponte --

9 CHAIRMAN FESMIRE: We keep going farther
10 afield here. The fact is that both parties have filed
11 motions that, with the exception of your motion for
12 continuance, were probably timely under the rules, and
13 neither has had the time to respond; is that correct?

14 MR. SUGARMAN: I feel like I filed -- I
15 don't feel. What the record will reflect, Mr. Chairman,
16 is that I filed a motion to continue that Mr. Hall, I'm
17 assuming, has not had a chance to respond to yet. That
18 is the case.

19 CHAIRMAN FESMIRE: And you filed the
20 suggestion that Mr. Hall has not filed a timely response.

21 MR. SUGARMAN: Right. And I --

22 CHAIRMAN FESMIRE: That's the point. We
23 keep getting farther afield. Both parties have taken it
24 upon themselves to take advantage of that. There is no
25 time requirement, except for the motion to continue in

1 the motions that have been filed here; right?

2 MR. SUGARMAN: As I said, I really have to
3 honestly and respectfully say I don't know, and I should
4 to be here in this forum, but I don't know that to be the
5 case. But if you tell me that that's the case, I'm sure
6 it's true.

7 CHAIRMAN FESMIRE: Let's go back to what
8 you were arguing in the first place, before we started
9 going into these different routes. We were talking about
10 standing.

11 MR. SUGARMAN: Okay. I'll talk about
12 standing. It's a somewhat complicated argument, and I'm
13 sorry that it's going to maybe be not so easy to follow,
14 because I haven't had a chance to file a written
15 memorandum, so I please encourage all of the
16 Commissioners to stop me at any point to ask for
17 clarification or to ask me questions.

18 COMMISSIONER OLSON: I guess that's why I
19 keep coming back to -- it seems like some of these issues
20 aren't fully briefed, and I know we have one motion for
21 continuance. It almost seems to me that the parties
22 could stipulate to remand this back to the Division and
23 address all of these issues in front of the Division.
24 Right now it doesn't sound like we're going to have the
25 information here necessary to even determine the standing

1 at this point. So why wouldn't the parties just
2 stipulate to remand it back to the Division and let these
3 issues be addressed in front of the Division? I guess
4 that's -- and that way it can be adequately briefed, as
5 well as have those things fleshed out, and then present
6 it back to the Commission if there's still a dispute.
7 Just a suggestion.

8 MR. HALL: I would agree, Commissioner
9 Olson. I think a stipulation to remand would be
10 appropriate. I want to make sure what I'm stipulating
11 to. I think it's in the spirit of what we proposed in
12 our agreed motion with the county.

13 The motions to strike were filed really as a
14 precaution, but bear in mind that I have represented to
15 this agency that we will honor the standing of Mr. Rice
16 to challenge an APD on his surface. The agency has
17 always taken a fairly circumspect view of standing, and
18 I've thought long and hard about this, and there's only
19 one case that I'm aware of where standing of a surface
20 owner was recognized. If you look pretty closely at Rule
21 17, it clearly provides for a surface owner standing in
22 that process. And I think in the spirit of that, we can
23 recognize Mr. Rice's standing.

24 I cannot, however, recognize the standing of
25 the public. I don't think any of the rules allow for

1 that. It has to be a party. It seems to me, Mr.
2 Sugarman is arguing for public standing. That's really
3 what he's saying here. He's saying there would be no
4 injury that would accrue to Approach if we did that.

5 In fact, filings to this agency, we pointed
6 out that the oil and gas lease has a term. There's an
7 eight-well drilling obligation under it. There is force
8 majeure provision, but it is not a perfectly-crafted
9 force majeure provision. There is a substantial chance
10 that this lease will expire, and I think we ought to do
11 everything we can to avoid a situation where one surface
12 owner is able to hold up APDs across the entirety of the
13 lease, because he may or may not object to an APD that's
14 10, 12, 15 miles away from his property. That's what I
15 think we need to guard against.

16 CHAIRMAN FESMIRE: Okay.

17 MR. SUGARMAN: I agree that the Commission
18 needs to look carefully at the issues that are raised by
19 Mr. Hall's motion. And I don't think that the Commission
20 right now is in a position to take that careful look.
21 I'm amenable to Commissioner Olson's suggestion for a
22 remand.

23 However, I am also prepared to give further
24 argument insofar as I'm able at this time on the issue of
25 standing. I feel that doing that at a time when the

1 issues, which are complicated -- as I say, the rule is a
2 rule about intervention. There is a substantial body of
3 case law regarding intervention in New Mexico. There's
4 also a substantial body of case law regarding standing in
5 New Mexico, and the two are not identical. And it's
6 going to be important for the decisionmaker on this issue
7 to be fully aware of what the difference is on those two
8 separate lines of authority.

9 CHAIRMAN FESMIRE: Okay. How long would
10 it take to be prepared to argue the case on remand?

11 MR. HALL: Tell me which case we would be
12 arguing.

13 CHAIRMAN FESMIRE: The case for the eight
14 wells that you're proposing here, and any accompanying
15 standing issue or anything that can be raised.

16 MR. HALL: I wouldn't agree that we can
17 combine all eight wells in one single case before the
18 Division. What I envisioned was that there would be
19 administrative approval, and if anyone sought
20 adjudicatory review, any of them, they could make their
21 case at that time.

22 CHAIRMAN FESMIRE: Okay. What I think we
23 can do is remand it back to the district office for
24 consideration -- I'm not going to remand it back for
25 approval -- remand it back for expedited consideration,

1 and get it back up to the Division as quick as possible,
2 if, after they're considered in the district, there is an
3 appeal on the state specific wells. Is that
4 satisfactory?

5 MR. SUGARMAN: Well --

6 CHAIRMAN FESMIRE: I'll take that as a no.

7 MR. SUGARMAN: What I think makes sense
8 from a procedural standpoint, given where we are today
9 and the importance of the issues, is for the issues that
10 are raised by Mr. Hall's -- for the time being, I can
11 withdraw my motion for the production of documents -- and
12 I'll do that verbally right now, so that is no longer
13 pending -- with the right to refile that motion. And
14 having done that, it seems to me that the most efficient
15 process insofar as moving the permitting along, would be
16 to have a remand to the Division for consideration of
17 issues relating to standing, and in that same hearing,
18 to -- well, for standing.

19 CHAIRMAN FESMIRE: First of all, we don't
20 know whether the district office is going to approve
21 these. And the district office has a function that they
22 have to go through to approve these wells. It would be
23 very quick, because they have been looking at them, but
24 they have to approve it first. If we're going to remand
25 it, it's got to go back to the district. That can be, in

1 terms of bureaucratic time, almost instantaneous. Then
2 we will assume that your client will look at those of the
3 applications that were approved, and choose to appeal
4 one, two, all. At that point, it will be assigned to the
5 Division docket for further consideration by the
6 Division. Is that --

7 COMMISSIONER BAILEY: And at the district
8 level, they will determine casing programs and those
9 details that should come out in the Division hearing.

10 CHAIRMAN FESMIRE: Right.

11 MR. SUGARMAN: Now --

12 CHAIRMAN FESMIRE: No?

13 MR. SUGARMAN: I'm sorry. I said now, not
14 no. I'm trying to assimilate all of this as it happens.
15 So the issue -- what you're proposing, Mr. Chairman, is
16 that the issue as to standing won't be raised --

17 CHAIRMAN FESMIRE: It won't be addressed
18 until it gets to the Division hearing level.

19 MR. SUGARMAN: So how would my client,
20 then, have any guidance, insofar as how it can and should
21 participate, if it desires to continue its participation,
22 which it does, when it's at the district level, without
23 there being an affirmative finding somehow of our
24 standing?

25 CHAIRMAN FESMIRE: What are you proposing,

1 then? I guess I don't understand. This is the way --
2 this is the process that has been in place for a long
3 time, that the district has some technical
4 responsibilities they have to address. This is what
5 you're objecting to. Your client will have notice. I
6 mean, as of right now, your client has notice that -- if
7 we proceed with this procedure, your client has notice;
8 is that correct?

9 MR. SUGARMAN: It has notice, but it's Mr.
10 Hall's position, as I understand it, that my client, if
11 none of the eight wells are on its surface, doesn't have
12 any right to participate in the administrative processing
13 of the APDs.

14 CHAIRMAN FESMIRE: That's an argument that
15 you'll have to take up at the Division level.

16 MR. SUGARMAN: Right. I'm wondering, Mr.
17 Chairman -- I understand that we can take that up at the
18 Division level. I'm just -- does that mean that my
19 client, in the interim, would not be able to participate
20 in whatever happens at district level?

21 CHAIRMAN FESMIRE: No. The district is a
22 technical review. If there is concerns raised there,
23 that's what the appeal process is for. That's where you
24 can bring it to the Division. We don't -- at that point,
25 you know, we're looking at, as Commissioner Bailey said,

1 casing programs, water protection, technical issues, just
2 for that. Then, once they get an APD, the Surface
3 Owner's Protection Act -- and I realize that we disagree
4 on this -- the Surface Owner's Protection Act kicks in.
5 There is notice to the surface owner and an opportunity
6 for appeal from that point forward.

7 MR. SUGARMAN: If that's relevant to your
8 analysis, Mr. Chairman, that's not what the Surface
9 Owner's Protection Act calls for. There's no obligation
10 that an operator has to provide notice of an application
11 for permit to drill --

12 CHAIRMAN FESMIRE: No, that's not what I
13 said.

14 MR. SUGARMAN: -- or for the issuance of
15 an application for permit to drill. A permittee -- an
16 operator can acquire a permit from the state in the
17 ordinary course of the state's --

18 CHAIRMAN FESMIRE: Okay. In the order
19 here we will order that it be -- after it's approved by
20 the district, that it can go on to the Division hearing
21 process. Your client has notice of that, okay? Do you
22 want your client to sit in there while they discuss
23 casing programs, casing points, pressure testing, logging
24 programs? Is that what your client is seeking?

25 MR. SUGARMAN: I think my client is

1 concerned about the protection of groundwater and surface
2 water quality, Mr. Chairman. That is what my client is
3 concerned about. And I think that it's because of the
4 nature of my client's concern for the protection of water
5 quality that this notion that standing is somehow limited
6 to the right of the record surface owner, there's a
7 misfit there.

8 CHAIRMAN FESMIRE: Go ahead.

9 COMMISSIONER OLSON: I think we're still
10 getting on this procedural issue, because -- and this is
11 no different than what happens in front of the
12 environment department on a discharge permit application.
13 It comes in -- the application comes in, and there is
14 technical review by the agency to determine what are the
15 criteria that this may be approved under or denied at
16 that point, and then, at that point, it narrows the
17 issues, so that if -- maybe the Division, at this point,
18 would take care of all of the concerns of Mr. Rice or --
19 in regards to casing and maybe protection of water zones,
20 maybe some other issues.

21 That way it narrows -- I think the purpose of
22 the procedure here is that there is that administrative
23 process that goes forward that narrows the issues that
24 now you can appeal the things that you still have some
25 issues with, and maybe they took care of all the others.

1 That's the process, I think, that the Chair is trying to
2 get through. They do this technical review first --

3 CHAIRMAN FESMIRE: Then you can appeal it.

4 COMMISSIONER OLSON: -- then what's left,
5 at that point, is the issues that you still have
6 disagreement on, and then the issue, too, of standing can
7 be addressed at that point, and that can be fully briefed
8 and addressed and fleshed out, so that we, I think, on
9 our side -- I got a little uncomfortable doing it kind
10 of -- which, to me, seems kind of haphazard at the
11 moment, and that we're not getting all the full
12 information that could be fleshed out at the Division
13 level, and then be refined -- by the time it's coming to
14 us, we'll have a little bit more focused issue for us to
15 address.

16 I was not considering in any kind of
17 stipulation that the parties make, that they would be
18 waiving any of their rights to argue any issue on
19 standing. They would be fully reserving their right to
20 say you don't have standing, and you're fully reserving
21 your right to say that you do, and it's something that
22 would be addressed through a Division order at that
23 point. Maybe you guys would come to some agreement maybe
24 on some wells and maybe not on others. I don't know.

25 CHAIRMAN FESMIRE: Let me make absolutley

1 clear that I am not saying that the district office's
2 work cannot be reviewed and appealed and discussed in
3 hearing, but we have to have some place to start, just
4 from a procedural standpoint. We start there, we give
5 them API numbers there, start putting them into the
6 computer system. They have to do that. Then why do they
7 have to go to the Division? Why can't they come back to
8 the Commission? Why are you wanting to go to the
9 Division?

10 MR. SUGARMAN: I am not, actually. I
11 don't believe that was my suggestion, Mr. Chairman. If
12 you would like -- if you want to go right from the
13 district office to the Commission, that's fine with me.
14 I believe either I misspoke or you misunderstood
15 something that I had said.

16 I think that my feeling is that the Commission
17 is the appropriate place to be, because these are legal
18 issues. They are important public legal issues. They're
19 crying out for a determinative answer. Whatever the
20 Division decides, presumably, will be appealed to the
21 Commission. So if, in the Chair's discretion, it feels
22 that the matter ought to come back to the Commission, we
23 would be amenable to that.

24 COMMISSIONER OLSON: Maybe part of the
25 confusion is mine, and maybe Mr. Hall can clarify that.

1 I was assuming that they would go back for the district
2 processing and then I thought, under your proposal, it
3 would potentially go for a hearing in front of the
4 Division. Or are you envisioning it coming straight to
5 the Commission?

6 MR. HALL: I thought we would follow the
7 rules.

8 CHAIRMAN FESMIRE: Your interpretation of
9 the rule is?

10 MR. HALL: My interpretation would be that
11 the next step would be that it go before the Division and
12 we could flesh out standing there, and the Division could
13 issue an order.

14 CHAIRMAN FESMIRE: The rules also allow
15 the Chairman to bring it to the Commission directly
16 without going to the Division. What are we going to
17 accomplish by going to the Division?

18 MR. HALL: How much workload you wish take
19 on, Mr. Chairman.

20 CHAIRMAN FESMIRE: Chances are this is
21 probably going to get appealed from the Division no
22 matter what their decision; right?

23 MR. HALL: Don't know.

24 CHAIRMAN FESMIRE: Ms. Bailey, you've been
25 doing this forever.

1 COMMISSIONER BAILEY: It seems to me that
2 this is one of those cases that will make headlines no
3 matter what happens. So I believe that we should allow
4 the district to process the APDs and then bring it to the
5 Commission for all issues connected to standing or
6 intervention and determination of the questions before
7 us. I do believe that it should go first to the district
8 for their technical review and their requirements and
9 then come on to us and just skip the Division.

10 It's been docketed before us for many, many
11 months as it is, so let's just continue to put it on the
12 docket. I believe we should continue this case until the
13 attorneys have had the chance to respond to the briefs
14 and the district has had the chance to review and process
15 the APDs.

16 CHAIRMAN FESMIRE: We've got three
17 different cases. Do we want to continue it as three
18 cases? And the eight wells represent each one of those
19 three cases, don't they?

20 MR. HALL: No. I think I can withdraw the
21 last case unilaterally all together, and it's just a
22 matter of sending the APDs down. And I don't know if you
23 want them to come back up in the form of the currently
24 docketed case numbers. I think they ought to be
25 considered on a well-by-well basis. If there's some

1 motion to consolidate APDs, the Division or the
2 Commission can take that up at the time. It may be the
3 case that we come to terms on one or more wells.

4 MR. SUGARMAN: I'm sorry. I'm looking at
5 your motion. Presumably your position that you can
6 unilaterally withdraw one of the three cases, you're
7 referring to 14278 you can unilaterally withdraw; is that
8 correct?

9 MR. HALL: Right.

10 MR. SUGARMAN: Our position would be that
11 you can't -- that there are two that Approach has
12 indicated that it has a continuing interest and will
13 submit it to the district for processing there.

14 CHAIRMAN FESMIRE: They can't withdraw?

15 MR. SUGARMAN: They can't withdraw the
16 case. There is a case there in 14278. If there were no
17 pending APDs in that particular case, then, presumably,
18 they would have an argument for dismissing that case.

19 MR. HALL: I just don't see the need to do
20 that. I think we have to start a new APD technical
21 review at the district office, and then bring up APDs as
22 they may be appealed.

23 CHAIRMAN FESMIRE: Dismiss the three cases
24 and bring cases back up -- bring the APDs back up, each
25 one under its own case number? Is that your proposal?

1 MR. HALL: It makes the most sense to me.

2 COMMISSIONER BAILEY: That would be eight
3 separate cases that have essentially the same
4 circumstances.

5 CHAIRMAN FESMIRE: We can consolidate them
6 for hearing, but we'd be able to track them individually
7 that way, and the outcome of each one could be handled
8 individually.

9 COMMISSIONER BAILEY: That would make
10 sense.

11 CHAIRMAN FESMIRE: Okay.

12 COMMISSIONER OLSON: I would offer up
13 something to think about. If this case has extreme
14 significance, maybe it should follow the process of the
15 Division and potentially two hearings. I know that's
16 more work for the Division, but it seems like you have a
17 chance to make sure you really flesh out those issues
18 properly by going through the Division first. And if
19 it's not satisfactorily resolved, bring it back to the
20 Commission. I expect it's probably going to come here
21 anyway. But considering the significance of the issues,
22 it may warrant following that process and not bypassing
23 the Division. Just a thought.

24 MR. SUGARMAN: May I, Mr. Chairman?

25 CHAIRMAN FESMIRE: You may.

1 MR. SUGARMAN: I'm amenable to -- I'm
2 generally amenable to what is being proposed, and
3 proceeding after the district has an opportunity to
4 exercise its expertise and give the applications their
5 technical review and appearing at whatever forum or fora
6 are determined by the Commission to be the appropriate
7 forum.

8 I'm happy to discuss the issues of standing
9 with state regulators as many times as is required by the
10 rules. My request would be because of the threshold
11 nature of the issue that we're raising with the standing
12 issue, that we have -- when this -- after we come from
13 the district office, wherever it lands next, whether it's
14 the Division or the Commission, that we be given an
15 opportunity to brief, fully brief, and I believe the
16 Commission is on board with that for the issue of
17 standing, but that we also have a resolution by -- final
18 resolution, administrative resolution, whether it's by
19 the Division or the Commission, on the standing issue
20 prior to the time that we prepare for the case on the
21 merits. Because, after all, if we are going to, in the
22 end of the day --

23 CHAIRMAN FESMIRE: You're proposing two
24 completely different proceedings.

25 MR. SUGARMAN: I'm proposing one

1 proceeding that would be a proceeding on the legal issue,
2 which is the issue of standing. And, presumably, if the
3 Commission is interested in hearing more, or if I do
4 decide to file a motion on the issue of jurisdiction,
5 then in the event that if -- if there were a
6 determination that I don't have standing, that my client
7 doesn't have standing, in that initial phase, there would
8 be no reason for this Commission or for the Division, for
9 that matter, to have a hearing on the merits of the
10 application.

11 What I'm suggesting is that a factual hearing
12 on merits of the applications might end up being a lot of
13 wheel spinning and might end up consuming a lot of the
14 Commission's time if, ultimately, the determination will
15 be that we don't have standing or the right to intervene.

16 CHAIRMAN FESMIRE: What about simply
17 briefing that issue, the issue of jurisdiction and
18 standing, prior to the next hearing? Go ahead and remand
19 this back to the district for their analysis with
20 instructions to send it back -- I'm not convinced that
21 the Division needs to hear this. We've pretty much
22 reached the conclusion that it will be appealed, at least
23 to the Commission, so why take the extra step to have it
24 heard by the Division?

25 MR. SUGARMAN: Again, Mr. Chairman, I am

1 not a proponent of taking that extra time-consuming step.
2 What I'm trying to convey to you is I'm trying to look
3 for a way for the Commission not to -- for the Commission
4 or the Division not to have to spend time doing anything
5 that would be a needless expenditure of time. And it was
6 actually for that express purpose that I propose that we
7 do get a determination of these threshold legal issues
8 before there's some hearing on the merits.

9 COMMISSIONER OLSON: Maybe we ought to
10 just go into executive session for a few minutes just to
11 discuss some of this with our counsel.

12 MR. HALL: One quick request. I note,
13 also, I'm asking that Order R-12976 be vacated, because
14 it has the effect of suspending the approved APDs.

15 CHAIRMAN FESMIRE: We'll go into executive
16 session. We will discuss nothing but these three cases,
17 14134, 14141 and 14278, and we'll reconvene in public
18 session when we're done discussing it.

19 (The Commission went into executive session.)

20 CHAIRMAN FESMIRE: Let's go back on the
21 record. At this time the record should reflect that the
22 Commission has gone back into public session. During the
23 executive session immediately previous to this time, we
24 discussed only cases 14134, 14141 and 14278.

25 We have have reached a decision on the agreed

1 motion to remand to the Division. We are going to grant
2 that motion. We think that there will be an opportunity
3 for a stipulated motion. The motion should not include
4 the instruction to approve, but should include the
5 instruction to process, and, essentially, that is going
6 to be the action that we're going to -- we're going to
7 ask Mr. Hall and Mr. Sugarman to withdraw the other
8 motions as moot, and we will deal with any objection or
9 any further actions on these wells if they are approved
10 by the district, and when they come back.

11 At that point, we'll decide what issues we're
12 going to have to address and where that should be
13 addressed. As of right now, we are remanding the eight
14 wells in the motion to remand, and we're asking Mr. Hall
15 to withdraw without prejudice his other APDs, and we're
16 going to leave them under the case numbers that exist
17 now.

18 MR. HALL: One question: What are we
19 doing with Order R-12976?

20 CHAIRMAN FESMIRE: I don't have that in
21 front of me, unless Florene was very efficient and put it
22 in this book.

23 COMMISSIONER BAILEY: That's the
24 suspension of APDs; right?

25 CHAIRMAN FESMIRE: Yes.

1 MR. HALL: Here's the order. The
2 operative effect of that was to suspend these APDs. It
3 also --

4 CHAIRMAN FESMIRE: Consolidated the cases.

5 MR. HALL: -- consolidated the cases and
6 dismissed the APD for one location which we are
7 withdrawing -- two locations which are being withdrawn
8 anyway.

9 CHAIRMAN FESMIRE: What we'll do in the
10 new order is we will vacate this order and include the
11 provisions on consolidating the cases and withdrawing
12 that APD in the new order.

13 We're going to ask counsel to try to draft a
14 stipulated order to accomplish what the Commission has
15 requested. And, like I said, to reiterate for the time
16 being, we are granting the agreed motion to remand to the
17 district with respect to the eight wells in that motion,
18 and we will address the other issues as they arise in the
19 future.

20 The order to the district will not -- like I
21 said, will save two processes. It will not order the
22 district to approve it. And so that there will be no
23 risk of anyone thinking we've ruled on any other issue,
24 we request both parties to stipulate to the remand -- I
25 think that will be relatively easy -- because,

1 essentially, you've agreed to it. Have you not, Steve?

2 MR. SUGARMAN: I believe I have, Mr.
3 Chairman. We haven't talked about what's going to happen
4 with everything else. You did mention that you were
5 hoping they'd get an agreement with the motions. But
6 assuming that all of this process works the way it's
7 supposed to, yes, we would stipulate to a remand to the
8 district.

9 CHAIRMAN FESMIRE: Okay.

10 MR. SUGARMAN: With the proviso that we --
11 just to make sure that we don't miss anything, that we be
12 given notice of the district's action on those APDs.

13 CHAIRMAN FESMIRE: In what form should
14 that notice take?

15 MR. SUGARMAN: It could take -- a letter
16 from Mr. Hall would be sufficient.

17 MR. HALL: I will call him up.

18 CHAIRMAN FESMIRE: So if Mr. Hall would
19 notify Mr. Sugarman when he submits those eight APDs to
20 the district office.

21 MR. HALL: Yes. I want to say I think
22 some may have been submitted, but we'll certainly follow
23 up on that and certainly notify him of approval.

24 MR. SUGARMAN: I'm more interested for
25 purposes of the appeal of the district's action with

1 respect to the applications. I think that Scott and I
2 will be able to work that out.

3 CHAIRMAN FESMIRE: Mr. Hall, you'll work
4 with the district office to make sure we don't get
5 duplicates and they know which eight wells we're applying
6 for here?

7 MR. HALL: Yes.

8 CHAIRMAN FESMIRE: Will both parties
9 stipulate to withdrawing all motions filed in this case
10 without prejudice to refile at a later date if it becomes
11 necessary?

12 MR. HALL: Yes.

13 MR. SUGARMAN: Yes, Mr. Chairman, I will.
14 I guess that sort of begs the question of the suggestion
15 of jurisdictional impediment, which I don't consider a
16 motion. Would you like me to withdraw that right now, as
17 well?

18 CHAIRMAN FESMIRE: Yes. And if we need to
19 address that issue, I guess you can withdraw the
20 suggestion without prejudice. I don't know if that's a
21 proper way to do it, but no prejudice should apply to the
22 suggestion; right?

23 MR. SUGARMAN: I've never filed such a
24 thing before, Mr. Chairman, honestly. I will look for --
25 my feeling is that it is incumbent on the Commission,

1 obviously, to look into its jurisdiction. Having said
2 that, I will look for a way to craft a stipulation in
3 which we, at this point, withdraw our objections to the
4 Commission's subject matter jurisdiction without waiving
5 our right to resuscitate those objections at some point
6 in the future if it seems appropriate.

7 CHAIRMAN FESMIRE: And after we get the
8 APDs processed, if there is going to be an appeal, we'll
9 determine how that will go from that point forward. I
10 don't know whether it will be with the Commission or the
11 Division, if an appeal is necessary, but we'll determine
12 that at some point in the future.

13 MR. SUGARMAN: Okay. So questions as
14 to -- I think I understand, just to make sure. Questions
15 as to our standing and our intervention and the procedure
16 that I had proposed whereby we would bifurcate the
17 procedural matters and the merits hearing, all of those
18 issues will be deferred --

19 CHAIRMAN FESMIRE: What we're doing,
20 basically, is falling back and proceeding by the rules;
21 okay?

22 MR. SUGARMAN: Okay.

23 COMMISSIONER OLSON: I might maybe suggest
24 that they get these stipulations together, and they
25 present them to our counsel so he can check to make sure

1 things are consistent with what --

2 MR. SUGARMAN: I think, also, we need to
3 talk with Adan. I mean, presumably you would like -- I
4 don't know if you would like Adan to be a signatory as
5 attorney for the County of Rio Arriba on the stipulation.

6 CHAIRMAN FESMIRE: I'm informed by counsel
7 that we don't need that on the withdrawals, that the
8 stipulation from you two will be satisfactory.

9 MR. SMITH: On the other order you may
10 want the county, unless they've withdrawn.

11 CHAIRMAN FESMIRE: Mr. Hall, do you think
12 there will be any problem getting the county's
13 stipulation on the other order?

14 MR. HALL: We'll run it by them.

15 CHAIRMAN FESMIRE: Anything further on
16 Cases Number 14134, 14141 and 14278?

17 MR. SUGARMAN: Just I feel that it's
18 really important for me to clarify for the record that my
19 stipulations have been based on an understanding that I
20 have not waived a right to raise at a future time
21 anything that I have previously raised by motion with the
22 Commission.

23 CHAIRMAN FESMIRE: That's understood.

24 MR. SUGARMAN: Thank you very much.

25 CHAIRMAN FESMIRE: Mr. Hall?

1 MR. HALL: That's all I have. Thank you.

2 CHAIRMAN FESMIRE: Good luck.

3 With this we will -- we've got one more
4 case. The Commission will call Case Number 14365, the De
5 Novo application of COG Operating, LLC, for designation
6 of a nonstandard spacing unit and compulsory pooling in
7 Eddy County, New Mexico, on the Blackhawk 11 Federal Com
8 No. 1H. That case has been continued to the December
9 16th meeting.

10 And, lastly, we have Case Number 14366, the De
11 Novo application of COG Operating, LLC, for designation
12 of a nonstandard spacing unit, unauthorized well location
13 and for compulsory pooling in Eddy County, New Mexico, on
14 the Blackhawk 11 Federal Com No. 2H. That case has also
15 been continued until the December 16th meeting. Is there
16 any further action before the Commission today?

17 COMMISSIONER BAILEY: Don't we have to go
18 into the executive session for one more decision on that
19 first case?

20 CHAIRMAN FESMIRE: Oh, yes. That is
21 correct.

22 CHAIRMAN FESMIRE: At this time the
23 Commission will go into executive session in Case Number
24 14055.

25 (The Commission went into executive session.)

1 CHAIRMAN FESMIRE: Let's go back on the
 2 record. The record should reflect that the Commission
 3 has emerged from executive session where we considered
 4 case Number 14055 -- that is the correct number; right --
 5 the compliance or order against C&D Management Company.
 6 The Commission has reached a decision, and we have
 7 communicated that decision to counsel and instructed him
 8 to draft an order reflecting that decision for
 9 presentation and signature at the next
 10 regularly-scheduled meeting of the New Mexico Oil
 11 Conservation Division.

12 With that, is there any further business
 13 before the Commission today?

14 COMMISSIONER BAILEY: I move that we
 15 adjourn.

16 COMMISSIONER OLSON: I'll second.

17 CHAIRMAN FESMIRE: All those in favor
 18 signify by saying aye.

19 Let the record reflect that the Commission
 20 meeting was adjourned at 12:30 p.m.

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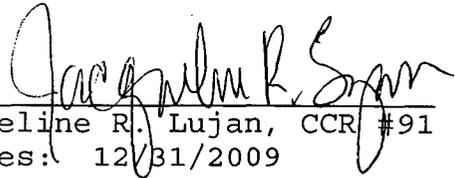
REPORTER'S CERTIFICATE

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I, JACQUELINE R. LUJAN, New Mexico CCR #91, DO
HEREBY CERTIFY that on October 7, 2009, proceedings in
the above captioned case were taken before me and that I
did report in stenographic shorthand the proceedings set
forth herein, and the foregoing pages are a true and
correct transcription to the best of my ability.

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

WITNESS MY HAND this 21st day of October, 2009.



Jacqueline R. Lujan, CCR #91
Expires: 12/31/2009