STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:	CASE NO. 12,177
APPLICATION OF THE OIL CONSERVATION DIVISION TO AMEND THE NOTICE REQUIREMENTS THROUGHOUT DIVISION RULES AND ALSO AMENDMENTS TO THE PROCEDURAL RULES FOUND IN PART N (19 NMAC 15.N) AND AMENDMENTS TO RULES 11 AND 12 (19 NMAC 15.A.11 AND 12)	ORIGINAL

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OIL CONSERVATION DIV

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: LORI WROTENBERY, CHAIRMAN
JAMI BAILEY, COMMISSIONER
ROBERT LEE, COMMISSIONER

May 19th, 1999

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, LORI WROTENBERY, Chairman, on Wednesday, May, 19th, 1999, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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I N D E X

May 19th, 1999
Commission Hearing
CASE NO. 12,177

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E X H I B I T S

OCD	Identified	Admitted
Exhibit 1	6	-
Exhibit 2	6	-
Exhibit 3	7, 64	-

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NMOGA	Identified	Admitted
Exhibit 1	17	-

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Additional submission by Burlington, not offered or admitted:

	Identified
"Comments on Industry Notice Requirements"	48

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A P P E A R A N C E S

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ALSO PRESENT:

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(Continued...)

A P P E A R A N C E S (Continued)

ALSO PRESENT:

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* * *

WHEREUPON, the following proceedings were had at 10:45 a.m.:

CHAIRMAN WROTENBERY: Okay, we'll go back on the record now and take up Case 12,177. This is the Application of the Oil Conservation Division to amend the notice requirements throughout the Division's rules and also to amend the procedural rules found in Part N.

And what we plan to do today is take public comment on the rules as they were circulated with the docket and posted -- actually they were posted on the Internet -- for people to review. And we'll plan on taking comment today, but we won't be planning to take final action. That will be deferred to a later Commission meeting.

So let me find out who is making appearances in this case today.

MR. CARROLL: May it please the Commission, my name is Rand Carroll, appearing on behalf of the Oil Conservation Division.

CHAIRMAN WROTENBERY: Mr. Carroll.

MR. KELLAHIN: Madame Chairman, I'm Tom Kellahin of the Santa Fe law firm of Kellahin and Kellahin, appearing on behalf of the New Mexico Oil and Gas Association.

We have various representatives of that

Association here to make statements and comment on various portions of the proposed rule changes for which there is not yet agreement between the Division and the Association.

CHAIRMAN WROTENBERY: Thank you. Anybody else?

MR. HAWKINS: Bill Hawkins with Amoco Production Company. I participated with NMOGA but also want to make some comments for Amoco.

MR. FOPPIANO: I'll enter my appearance, Rick Foppiano, with OXY USA, again, Houston, Texas. And also we participated in the NMOGA comments and would like to offer some additional comments.

MR. PATTERSON: Randy Patterson with Yates Petroleum. And likewise we participated with the New Mexico Oil and Gas Association and have our own comments.

CHAIRMAN WROTENBERY: Will those of you who are going to make comments today please rise and be sworn in?

(Thereupon, the witnesses were sworn.)

CHAIRMAN WROTENBERY: Thank you.

Mr. Carroll, do you want to lay it out for us?

MR. CARROLL: Thank you, Madame Chairman.

You have three exhibits in front of you. Exhibit Number 1 is the proposed new Rule 1207. The last page of that exhibit are proposed additions to the definitions, Section A.7 of the Division rules.

Exhibit Number 2 is a summary I've prepared of

the changes that were made to the existing rules by Exhibit Number 1, and also I've included a copy of the old rule.

Exhibit Number 3 is a red-line and strike-out version of the other rules we propose to amend today. Those rules are 11 and 12 and then all of the procedural rules found in Part N, which is 1201 to 1223, I believe. Yeah, 1223 is a new rule.

So I'd like to, rather than start with Rule 11, just start with Rule 1207 and then handle the other rules after that.

CHAIRMAN WROTENBERY: Thank you.

MR. CARROLL: So I think it would be helpful if you put Exhibit Numbers 1 and 2 side by side so we can go through it.

We'll start with 1207.A. Actually, we've -- there's a reference here to Rule 1204. There's some ambiguity as to who gave the public notice. We've changed 1204 to require that the Division give the public notice. So the ambiguity here as to -- You could read it where the applicant would give the public notice. That's incorrect. If you go to Rule 1204, it's the Division that will give public notice. So that was a change made to the rule that I didn't put in this summary.

1207 -- And there's been a lot of cleanup of the existing language in 1207, and I haven't set forth all

those minor changes. I'm just addressing the substantive issues with this summary.

1207.A (1) deals with notice for compulsory pooling and statutory unitization. And that's split into two subsections: One is the regular hearing and one is an alternate procedure.

For the regular hearing we have changed the definition of who is entitled to notice. Prior to the change I think I've listed all the various interest owners. We've changed it to "each owner of an interest in the mineral estate whose interest is evidenced by a written document of conveyance either of record or known to the applicant at the time of filing the application".

And as I state here, "This change avoids the problem of persons playing games with the hearing process by..." various conveyances after the application is filed, or notification of various interest owners after the application is filed.

So "each owner of an interest in the mineral estate" incorporates all the various interest owners that we're not setting forth: unleased mineral interests, lessees, operators. It will just be each owner of interest in the mineral estate. And that phrase appears a few times during the rest of Rule 1207.

We had a problem with persons being notified then

notifying the applicant that they've conveyed certain interests to certain people -- actually, not even that they've conveyed interests, that certain people have interests that should be notified when there is no document of conveyance. It's just the person notified's assertion that other people should be notified.

We believe this language will clarify who exactly is entitled to notice. And the cutoff date is, you know, at the time of filing the application.

Conveyance documents of records should -- well, should be found by the applicant, and then any other ways that the applicant would know of other interests, the cutoff date would be the time of the filing of the application.

Shall we ask questions now, rather than going through the whole thing and coming back?

CHAIRMAN WROTENBERY: What do you think would work best? I'm not sure on this particular one.

MR. CARROLL: I'd prefer to discuss each section as it comes up.

CHAIRMAN WROTENBERY: Okay. Do you want to hear comments from other folks --

MR. CARROLL: Yeah.

CHAIRMAN WROTENBERY: -- as we --

MR. CARROLL: And then I also put down here that

the OCD and NMOGA agree on this change, the change to 1207.A (1) (a).

CHAIRMAN WROTENBERY: Then I'll open it up. Is there anybody that would like to make a comment on this particular provision?

MR. KELLAHIN: Madame Chairman, I'm Tom Kellahin. Perhaps I could give you a brief statement, and then Mr. Carroll and I can go through this for you, and we can narrow it down to about the three or four areas of difference and start there, rather than show you how we made this thing. Focus you right on the ones for which there is still a difference.

Would that be all right?

MR. CARROLL: Well, shouldn't we go through the ones that have been changed, regardless of whether we have differences on them?

MR. KELLAHIN: I can do it either way, whatever you --

CHAIRMAN WROTENBERY: Yeah, we certainly want to hear about each change, and then we'll probably have maybe more detailed discussion on the --

MR. KELLAHIN: All right --

CHAIRMAN WROTENBERY: -- three or four.

MR. KELLAHIN: -- I'm confused. I'll start wherever you like.

CHAIRMAN WROTENBERY: So...

MR. CARROLL: Well, we -- Do you have any comments to add? We agree on the changes made to 1207.A (1) (a).

MR. KELLAHIN: 1207.A (1) (a), we met on Monday afternoon, and Mr. Carroll and I have edited the various drafts.

Originally in the April hearing we submitted you the NMOGA proposal. We then took the Division proposal off the Internet. There were substantial differences between the two drafts.

The lawyers got together on Monday of this week. We went through all the legal issues, the definitions of terms, and Mr. Carroll and I are in agreement upon how compulsory pooling and statutory unitization have been edited, and the members of the NMOGA Regulatory Practices Committee concur in those changes.

CHAIRMAN WROTENBERY: Thank you.

MR. CARROLL: Okay, we'll go to 1207.A (1) (b). This is --

CHAIRMAN WROTENBERY: Just a minute, let me make sure that the Commissioners don't have any questions, because this is the first time that they've seen these changes.

COMMISSIONER LEE: (Shakes head)

COMMISSIONER BAILEY: No.

CHAIRMAN WROTENBERY: Okay.

MR. CARROLL: Okay, we'll go to 1207.A (1) (b), which is the alternate procedure for compulsory pooling applications. And the change made was to clarify when the procedure can be used. Now it is, quote, "When the applicant is unable to locate all the interests [*sic*] owners" -- there's just a typo in my summary -- "to be pooled and the application is unopposed by those located".

And also in the list of things the application shall include we have altered (iii) to include an attestation that "a diligent search has been conducted of all public records" in the county where the well is located "and of phone directories, including computer searches".

Other than that, it's pretty much the same as it was before.

Prior to this, the current rule says only when an application for compulsory pooling is known to be unopposed, and we think it should be narrowed to the definition set forth here.

CHAIRMAN WROTENBERY: Mr. Kellahin, any comment?

MR. KELLAHIN: Madame Chairman, the Division's recommendations to you this morning are consistent with the Association's recommendations to you back in April, and we concur in what Mr. Carroll has described for you as a

requested change.

CHAIRMAN WROTENBERY: Any questions?

COMMISSIONER BAILEY: No questions.

CHAIRMAN WROTENBERY: Proceed.

MR. CARROLL: Madame Chairman, we'll turn to 1207.A (2), which is unorthodox well location notifications. The new rule clarifies which persons are entitled to notice. We have a definition of "affected persons".

The current rule can be read to exclude working interest owners and limits notice only to adjoining **leases** which can be substantially less in area than adjoining **spacing units.**

In effect, notice has been given the last several years to the adjoining spacing units, but the rule does read "adjoining leases".

The OCD creates this definition of "affected persons" that creates a hierarchy for who is to be notified.

Number one is the "Division-designated operator".

If there is no Division-designated operator, then the lessees with documents, conveyance of record or known to the applicant, which tracks the language in A (1) (a).

And then, three, if there is "no operator or lessee, then mineral interest owners with documents of

conveyance of record or known to applicant."

And for unorthodox-location notification purposes, we did have a definition of adjoining spacing units right in 1207, but we decided to stick it in the front of the rule book under definitions.

If you look at the last page behind the new Rule 1207, you'll see the definition of "adjoining spacing units", which means those existing or prospective spacing units in the same pools that are touching at a point or line the spacing unit which is the subject of the application.

So you'll see under the definition of "affected persons", they are "persons owning interests in the adjoining spacing units".

Under (a) (4) of the definition, we're trying to solve the common-operator problem where the operator of the proposed unorthodox location is also the operator of an adjoining spacing unit. And in that case we require notice to all the working interest owners in that adjoining spacing unit only if ownership is not common between that adjoining spacing unit and the spacing unit containing the proposed unorthodox well.

So if ownership is common between the two spacing units, there really is no difference of interest.

The big difference between the OCD and NMOGA

regards giving notification to prospective spacing units. That's when the adjoining acreage doesn't contain an existing spacing unit. The orientation of the offsetting rectangular spacing unit is not known. And this would only occur in situations where there's 80-acre spacing or 320-acre spacing, where you have a rectangle.

The OCD proposal is to notify in the case of 40-acre -- or 80-acre spacing, the applicant would have to notify owners of 120 acres. That would not only be the immediately adjoining 40-acre tract, but both potential 40-acre tracts that may be joined with that immediately adjacent 40-acre tract to form an 80-acre unit. And the same would hold with a 320-acre spacing unit.

The Division strongly believes that the owners of both tracts that might be joined to that immediately adjacent tract, whether it be 40 acres or 160, should receive notice because the interests in whichever of the tracts is attached will definitely be potentially affected by the application. We believe the Commission should err on the side of providing notice to all those that may be potentially affected, and not limit notice to those just definitely known to be potentially affected.

NMOGA disagrees with this, due to an economic argument, the cost of notifying interest owners that may not even be joined in the offsetting spacing unit, and

would limit notice to only the immediately adjacent 40- or 160-acre tract, 40 acres in the case of 80-acre spacing and 160 acres in the case of 320-acre spacing.

So when you look at the offsetting square, NMOGA wants to, I guess, notify 25 percent of that square, and we'd like to have the applicant notify 75 percent of that square.

And I guess we could draw it out if it's confusing.

MR. KELLAHIN: There was a --

CHAIRMAN WROTENBERY: Okay, Mr. Kellahin?

MR. KELLAHIN: There was a plat submitted to the presentation NMOGA made back in April, and we gave you a schematic that identified the issue, and can go over that again when it's appropriate.

MR. CARROLL: Okay, and then (b) and (c) of 1207.A (2) states that if -- you know, if a "location is unorthodox by being located closer to the outer boundary of the spacing unit than permitted by rule, notice shall be given to the affected persons in the adjoining spacing units towards which the unorthodox location encroaches."

That's pretty much the current rule.

And then (c) is also the current rule, that NMOGA agrees with, "If the proposed location is unorthodox by being located in a different quarter-quarter section or

quarter section than provided in special pool orders, notice shall be given to all affected persons." That would be all the adjoining spacing units surrounding that spacing unit.

And that's it for 1207.A (2).

CHAIRMAN WROTENBERY: Mr. Kellahin?

MR. KELLAHIN: What I've submitted to you as NMOGA's Exhibit Number 1 is a compilation of my notes following the Monday afternoon conference with the Division attorneys, and represents a summary of the different items.

I'd like you to turn to page 5 with me, and we'll talk about where we are on the location. There are extra copies up in front here if there are people that don't have copies of our Exhibit 1.

The current rule for hearing unorthodox well location exceptions has two categories of notification. If you're encroaching towards offset operators you notify the operator. In the absence of an offset operator, the rule says the owner of an undrilled lease.

You can see how ambiguous and how problematic that current definition is.

When you look back over at the Division's proposal today, there is one editing suggestion for you, and that is, when you look at adjoining spacing units, to be clear on what you're to do in the absence of an

operator, I would suggest that after the word "adjoining" and before the word "spacing" you would insert "adjoining existing or prospective spacing unit", and the reason is this:

By adding a definition in the front of the book to an existing spacing unit, we are talking about a unit that contains a producing well. Normally you have an operator and you notify that operator.

If you don't have a producing well, then you have this hypothetical spacing unit. We have characterized that as a prospective spacing unit.

And that really is what Mr. Carroll is describing for you, is this hypothetical spacing unit where, in the absence of an operator, what do you?

The example is this: The 320 example is the easy one. If you have the north half of a section, moving to the east side and the adjoining east section is undrilled, totally uncommitted, the dilemma is, what do you do for notice?

The current rule says the offset undrilled lease. It could be substantially less than the spacing unit size than the hypothetical unit you're encroaching on.

The dilemma for us is, you either assume the rectangle is a standup or a laydown, and if you have to notify all those possibilities, you notify three-fourths of

the section owners in an undrilled section, and you have to do all that title work.

Our suggestion for you is to reduce that level of effort to identify those individuals to the quarter section immediately adjacent to the encroaching well. We believe in all instances those are the parties adversely affected by the activity at the encroaching well. The presumption is, in that quarter section, they are the parties that are about to be drained, and they have the greatest interest in complaining.

Alternatively, when you look to the next quarter section removed, either to the west or to the south, those people tend to be indifferent. And our practice is, to the best of my knowledge, I'm not aware of anyone who did not own an interest in the encroached-upon 160, but had one in the next adjoining 160, ever coming to complain.

We've tried that notification; there's an absence of complaint by those individuals and companies. We have representatives of those companies here; they can tell you why they don't object in those circumstances, why it's not of concern to them. And they believe there needs to be a balance between providing due-process notification and the inherent expense of trying to determine ownership in a section that has not yet been developed.

And that's the argument on that point.

The second issue with the location is, what do you do when the operator of the offending well is encroaching upon operations offsetting that in which he is the operator?

The debate is split among the Association. There are those, about half of us, think that when you have a common operator the Division should require notification to the underlying working interest owners, because this is their best, first opportunity to raise an objection before the well is drilled.

There is approximately an equal number of the Committee that says, that really is a contractual dispute between the working interest owners in the spacing unit being crowded by the common operator, and they have contractual remedies to go after him if he's taken action to drain properties that are theirs and are not being managed by him appropriately.

So that's the debate. There are people here that will describe both sides of that to whatever extent you desire to listen to them.

Those are the three comments we had as to this rule change.

Everything else that Mr. Carroll has described for you is -- we concur in those changes.

CHAIRMAN WROTENBERY: Mr. Foppiano?

MR. FOPPIANO: Did you want to open it up a little bit more?

CHAIRMAN WROTENBERY: Yeah, I would like to hear some more discussion on --

MR. KELLAHIN: I think it may be appropriate --

CHAIRMAN WROTENBERY: -- probably both of those issues.

MR. KELLAHIN: That's the point.

MR. FOPPIANO: I apologize, I've participated in so many of these drafts I've lost count. I don't know where it dropped out but in reading and listening to the testimony, we somehow have lost the pool-specific portion of the notice on unorthodox locations here, and I don't know how that happened.

I think the intent was -- is to -- like for example, in the Morrow, if you're encroaching in the Morrow, that you notify affected parties in that same pool. And we don't -- I don't see the language "in the same pool" anymore.

And so I would strongly suggest that we maintain that concept from the standpoint of an operator trying to figure out who to give notice to, because there are operators in other pools that, you know, arguably could be given notice that don't operate in the pool for which the encroachment is occurring.

So I would suggest that we go back to that. And I haven't had the opportunity to go back and look and find out where it got dropped out, but at least I don't see it in here. Maybe I'm missing something. I had to look at this latest draft rather quickly.

Also, I'd like to echo Mr. Kellahin and NMOGA's concerns about these prospective spacing units and whether they be laydown or standup. That triples the area that is required for an applicant to do title search on in an undrilled area.

And NMOGA's recommendation, which we support, attempted to capture those people who were most directly affected and give them notice and really go -- make sure that they got notice, realizing that people as much as a mile away in a 320-acre pool, by and large, are probably not going to care.

So to go through the time and expense of giving them notice really didn't seem to be reasonable to us.

And also I would like to point out that with prospective spacing units as the Division has proposed to define them, read alongside the requirement of 104 -- I'm sorry, it would be 1207.A (2) (c), which is the well being unorthodox by being located in a different quarter-quarter section or quarter section, I believe that with prospective spacing units the way we define them -- I just did some

rough calculations here -- that would require title searches on as much as four and a half sections for a 320-acre pool. And that's a lot of title search, very expensive.

And one other thing I'd like to add. I hesitate to do so, but having experience in operating in other states and knowing that these other states wrestle with the same problems of the need to balance due process with reasonable notice burdens, what we currently have and what NMOGA has proposed, really, that in and of itself would result in the most stringent notice requirements of any state that we're familiar with on unorthodox locations, Oklahoma, Texas, other states that have widespread operations and regulatory actions of a sort.

And so we just offer that as an observation that -- and hopefully to give us some pause about, do we really need to go as far as we're going to try to capture this?

Because as I've said in testimony at the last Commission hearing, at the end of the day it is the operators who are impacted if our order is struck down by a district court saying that we didn't give proper notice. We are the ones that suffer the financial harm.

So that really concludes my comments on this particular section.

CHAIRMAN WROTENBERY: Mr. Patterson?

MR. PATTERSON: Yes, Randy Patterson. I would like to echo Mr. Foppiano's comment about that. It is, in our minds, quite burdensome to reach out and pick up all these parties to notice in parcels of land which is unknown whether or not they will ever be included into a spacing unit. It is burdensome, it is expensive to do this title work. You're reaching out and doing title work on land that may possibly not even be in your prospect. You have a large cost burden there to do that.

And so we would also agree that to extend this notice to those other parcels is not what we would like to see with the regulation. We would -- We concur with the NMOCD-proposed -- I mean, I'm sorry --

CHAIRMAN WROTENBERY: NMOGA.

MR. PATTERSON: -- NMOGA proposal as it was written.

I also have a question and possibly a comment on another part, whenever it's appropriate, and that is the language, "any owner of an interest in the mineral estate". So when you're ready to talk about that, I'd like to talk about it.

CHAIRMAN WROTENBERY: Yes, Mr. Hawkins?

MR. HAWKINS: Bill Hawkins with Amoco. The comment I've got on the notifying the offset owners when we

have a prospective spacing unit is that, you know, current language, right now, requires that we only notice the owners of the undrilled lease, and then to go to the quarter section is going to expand our current requirement already, and then to go beyond that to the proposal for -- by the NMOCD, is going to significantly expand the current rule.

So I feel that going to the NMOGA proposal is still expanding notice from what we have to do today, but not going as far as what NMOCD has asked. And it seems to be appropriate to us, too. It's already going to be increasing the amount of notice, just to go to the NMOGA proposal.

CHAIRMAN WROTENBERY: Anybody else want to make a comment?

If not, Mr. Kellahin, you had indicated that you could discuss a little bit this issue from the perspective of the interest owners in those other quarters that would not be notified under the NMOGA proposal, in those other 160s, I guess I should say, or 40s, in the case of 80-acre spacing.

How is their interest different from the interest of those folks in the section right next to the unorthodox location?

MR. KELLAHIN: I think in several ways. They're,

in all probability, beyond the scope of actual drainage of the offending well.

If there is not yet a spacing unit committed in that undrilled section, they have the advantage of participating or not in offsetting that drainage effect by proposing a well that has an orientation that would include their quarter section or, in the alternative, to be excluded by whether you stand it up or lay it down.

When you talk about sharing the equity from that production, though, you're correct in perceiving that the interest is the same. If the offended section drills a well and it's equivalent distance off the common boundary, then because you're included in the 320, even though I'm 160 away, I will be sharing in that production.

But I guess my point of view is, the only difference I can perceive is the fact I am farther removed and care less about the actual drainage. And the activity in my section is going to be triggered, in all probability, by the owners in the quarter section immediately adjacent to the offending well. And they will take action because their interests are best served by the offset well and propose something in my section.

That's the only difference I can perceive. And if you're looking at the opportunity to share in production on the spacing unit, then there is no difference. The

industry simply has the economic dilemma of finding title for another 260 acres that they wouldn't otherwise have to search for. And if you think that's a fair burden they should assume, then I guess that's the assumption we'll make.

CHAIRMAN WROTENBERY: I guess I'd also like to get some clarification. There was some discussion about whether either the NMOGA proposal or the OCD proposal would represent an expansion of current requirements. It was my understanding that though the rule was ambiguous, the current practice is to require notice to the people in these -- the interests in these spacing units.

MR. KELLAHIN: The current practice is to use your administrative rule under 104, which is more expansive than the notice provisions for that activity when it's engaged in the hearing process. And it's my personal practice to ask my clients to notify three-fourths of the section.

CHAIRMAN WROTENBERY: Also, let me just confirm: Is it fair to assume that at least the members of the NMOGA Regulatory Practices Committee looked at this issue both from the perspective of somebody drilling an unorthodox location and also from the perspective of somebody that might be in one of those distant quarters that would not get --

MR. KELLAHIN: Well, and every company --

CHAIRMAN WROTENBERY: -- notification and --

MR. KELLAHIN: Every company here is in that position where on one instance you may want the location, and tomorrow you're being crowded. And so we have both hats within the Committee, and we debated this at two or three different meetings and finally came down to a unanimous consensus that we felt if we were in the undrilled section with our interest, and our interest was not in the 160 being encroached upon, then we would not expect to get notice.

CHAIRMAN WROTENBERY: Commissioners, do you have any questions?

COMMISSIONER BAILEY: Am I correct in assuming that if the adjacent 40s are unleased mineral acreage, that the owner of the mineral estate is notified?

MR. KELLAHIN: That is the current practice.

COMMISSIONER BAILEY: And your proposal does away with that notification?

MR. KELLAHIN: No, ma'am. It expands the notification. It would include the category of owner that is unleased. If you're a mineral owner in the 160 and that is held by you and not subject to lease, we find that person and send them notice.

COMMISSIONER BAILEY: I just need clarification

on that now and then. But Rand is saying differently?

MR. CARROLL: It seemed to me that Mr. Kellahin misunderstood your question. You're talking about the two adjacent potential tracts.

COMMISSIONER BAILEY: Prospective tracts.

MR. CARROLL: Prospective tracts. They wouldn't be notified, even if they were a mineral interest owner; isn't that correct, under the NMOGA proposal?

MR. KELLAHIN: Well, let me read it and see if I'm misunderstanding. It says, quote, "prospective adjoining spacing units: (a) all lessees of record and any unleased mineral owners of conveyance the existence of which is known to the applicant or is of public record". Does not that cover the mineral owner who is not leased? Wasn't that the question? Did I miss the question?

For example, if the State of New Mexico has got the 160, it's not leased, we send the notice to the Land Office.

MR. CARROLL: Well, look at (b): In the event it's "a rectangle, then only to those in that portion of the adjoining units which consists of a square and is closest."

So the potential adjoining 40- or 160-acre tracts would not be notified.

MR. KELLAHIN: What was this intended to say is,

if you had a 320, you were going to take the portion of that 320 that forms half that spacing unit in the form of a square closest to the unorthodox location. We were trying to describe the quarter section, the entire quarter section, out of the --

MR. CARROLL: Of a hypothetical 320-acre unit. So only the 160 would be notified and the --

MR. KELLAHIN: That's right.

MR. CARROLL: -- the other 160 would not.

MR. KELLAHIN: That's right.

MR. FOPPIANO: But it also is the 160 common to both prospective spacing units.

CHAIRMAN WROTENBERY: Commissioner Lee, any questions?

COMMISSIONER LEE: (shakes head)

MR. CARROLL: Could I follow up with one comment?

CHAIRMAN WROTENBERY: Sure.

MR. CARROLL: The comment was made that the operators are the ones affected. And, you know, taking -- and no one else is. Taking that to the extreme, we don't need any notice rules; it's the operators who should decide who to give notice to, because they're the ones affected. And, you know, it's up to them who to notify.

Unfortunately, when the Supreme Court rules, they order the OCD to provide notice to certain people.

CHAIRMAN WROTENBERY: I can see that it's the operator, perhaps, that has the greatest financial interest at stake, but there are certainly other interests here, including the interests of the agency and the integrity of its orders and complying with the standards of due process. So we're trying to define just what we need to do to meet our own requirements.

MR. CARROLL: Oh, and Madame Chairman, it was brought up, the fact that "in the same pools" was somehow deleted from the OCD proposal. It should be brought out that the current rule doesn't refer to any in the same pool.

And what was in the OCD proposal for unorthodox well locations was contained in the definition of "adjoining spacing units", which we took out of subsection (2) and stuck in the definitions to be inserted in the front of the rule book. And the definition of "adjoining spacing units" there means those existing or prospective spacing units in the same pools that are touching at a point or line the spacing unit which is the subject of the application. So that would cover that problem.

CHAIRMAN WROTENBERY: One question further on the common operator issue. Are there any other places in the Commission's rules or the Division's rules where this is an issue, where we've made the distinction in the common

operator situation and included additional requirements?

MR. CARROLL: I guess any situation where offsets are notified, it would apply to. It could apply in nonstandard proration units if you notify adjoining tracts, couldn't it?

MR. KELLAHIN: The current rules don't have any such critter. When we look at the proposed changes for the special pool rules, in recognizing *Uhden*, we do create a category of notification for beyond the operator where we look at his working interest owners.

Other than that, this is unique to unorthodox locations.

MR. FOPPIANO: Doesn't downhole commingling, where you have the same operator of a well in two different pools -- isn't that a situation comparable?

MR. KELLAHIN: I think Mr. Foppiano is correct. In commingling where we have two different formations by the same operator and a split interest --

CHAIRMAN WROTENBERY: Yes.

MR. KELLAHIN: -- then we do, he's correct. That is another example.

MR. CARROLL: Yeah, but in that situation notice is given to all owners of interests. That would include operators, lessees, mineral interests. So it's really not a common operator. They would be included anyway, or the

other interests would be included, or notified.

CHAIRMAN WROTENBERY: Is there any further discussion, then, on these issues related to unorthodox locations?

Move on -- Oh, I'm sorry.

COMMISSIONER BAILEY: The thought struck me that sometimes if there's a common operator, that the royalty ownership is different between state and federal lands, for instance. Royalty rates may be different, and so the drainage problem arises for the royalty owner.

MR. KELLAHIN: Madame Chairman, Commissioner Bailey, we recognize that issue and debated it. We came to the conclusion that if you had -- you're encroaching upon the working interest owners who had an underlying different royalty, the situation you're describing, then the royalty owner was protected, either by implied covenants to protect against drainage, and they could -- the royalty owner could look directly to the working interest owner in the encroaching spacing unit for relief.

And so we stopped notification with the working interest owner, because we felt the royalty owners, the overrides, have remedies against the working interest owner, the lessee, if you will. So we didn't go to the next level of notifying everybody in the mineral estate. That was our conclusion.

COMMISSIONER BAILEY: If there's any awareness of the potential drainage. Oftentimes there's no awareness without notice that there is a potential drainage.

MR. KELLAHIN: Well, and then the working interest owner in that spacing unit goes back and sues his operator for self-dealing or lack of due diligence and all the rest. So I think it's a chain of events that is triggered under the control of that common operator.

Mr. Pearce made that argument when he was debating for not having the Division require the notice because he thought there were contractual solutions for everybody up and down the food chain.

CHAIRMAN WROTENBERY: Commissioner Lee, you had a question?

COMMISSIONER LEE: What's the IPANM's position on this?

MR. KELLAHIN: They were here at the last Commission hearing. They have been provided the NMOGA drafts, and I have not received any objection from that association.

CHAIRMAN WROTENBERY: I don't believe we've received anything written from IPANM either.

Mr. Patterson?

MR. PATTERSON: There were several independents on the NMOGA committee that participated in this activity.

Although IPA of New Mexico was not represented directly, there were several independents that took part.

COMMISSIONER LEE: Yeah, there's several big independents. I'm worried about a smaller.

MR. PATTERSON: Mack Energy was represented as a smaller independent.

Again, when it's appropriate, I have a question about the interest in mineral estate before we move on to --

CHAIRMAN WROTENBERY: Yes, I'm sorry, I should have come back to that.

MR. PATTERSON: That's okay. My question -- And this is new language that was just come up with, so not being a party to that discussion, I have a question.

But if I could preface my question by thinking about just a moment the different levels of parties that are involved in this notice, and the way I see it -- and I'm asking somebody to correct me if I'm wrong -- that you have one level of -- maybe the highest level is an operator of an existing spacing unit, which is designated by the OCD. That's one level, the operator.

The next would be if you don't have a spacing unit with an operator, you have working interest owners who have leases from mineral owners.

The next level would be the unleased mineral

owner who has not granted a lease to this level.

And then the other level would be the public at large or newspaper-type notice to everybody in the world.

My question here about this is, in the definitions back on the very first page, where it talks about "mineral estate", as the owners of a mineral estate is used, it talks about "is the most complete ownership... and includes all the mineral interest owners and...the royalty interest owners."

Next, you define "mineral interest owners" as being, this party here, a working interest owner that has a lease granted "and mineral interest owners who have not" granted an oil and gas lease.

Then, when next you include "royalty interest owners", you are including in -- if I'm understanding this right, and this is really a question -- in the new language, any owner of an interest in the mineral estate, you're also including royalty interest owners into that notice for this 1207 compulsory pooling, and the other -- when that mineral interest owner has actually granted an oil and gas lease to a working interest owner.

So yet through that definition, I believe that you're pulling in royalty interest owners who have actually given up their executive rights to a working interest owner, and I'm asking the question, is that the intent? I

did not think it was.

MR. KELLAHIN: May I respond, Madame Chairman?

CHAIRMAN WROTENBERY: Please.

MR. KELLAHIN: The attorneys that gathered on Monday had this debate. It is an easy problem to have with definitions. And so we went back to *Williams and Meyers Oil and Gas Treatise* to get clear, concise definitions of terms. Because as we reviewed the various drafts, the Division draft that was on the Internet used the term "real property interests". And as we debated the subject, we became concerned about the dilemma Mr. Patterson has with the definitions.

Here's what we had intended to do, is to look at *Williams and Meyers* for guidance, and we found that we could exclude the surface estate by defining "mineral interest".

And so we took care to say in compulsory pooling instances, if you are an interest owner in the mineral estate and had not voluntarily committed your interest, then you were subject to force pooling. That was intentional, because there are circumstances where you have leases and the royalty cannot be committed.

In other words, you might not have a pooling clause in your lease. And we have instances where we have to pool royalty owners, overrides.

It was intended to be the biggest package, the biggest container, of potential people affected by that activity.

When we looked at *Williams and Meyers*, the subcategory of "mineral estate" is divided into two major components. One is the royalty interest owners. They have the non-executive rights. It's inclusive of royalty owners and overrides.

Saying in the definition "including" doesn't mean we have identified all categories of royalty interest owners, it simply says including at least those. You could -- Net profits interests, sometimes, is categorized as a royalty interest owner.

Conversely, when we identified "mineral interest owner", this is the person that we commonly call the working interest owner. It includes the oil and gas lessee. It also is going to include the mineral interest owner who hasn't signed a lease. It could include other kinds of labels you put on these persons.

And our intent was to try to put the right label for the right activity. This is one of the things that the Association and the Committee need to examine again. This simply represents my work product and Mr. Carroll's, and I hope you'll give us a comment period after the hearing today, and we will test our definitions against Mr.

Patterson and the industry, and if we've made a mistake then we'll have time to fix it.

But the intent was here to get a common understanding of the definitions so that when you read the rule it was not subject to mistake.

MR. CARROLL: Madame Chairman, I see a correction that should be made on the definition page, if you're still looking at that.

CHAIRMAN WROTENBERY: Are we looking at --

MR. KELLAHIN: -- yours?

CHAIRMAN WROTENBERY: -- yours or Mr. Kellahin's?

MR. CARROLL: The last page of OCD Exhibit Number 1.

In the third definition, "royalty interest owners", that parenthetical -- it says "the rights to explore and develop" -- it's meant to refer to the executive rights, and not modified by "non-".

So actually, that parenthetical should go in the definition above that, when it talks about mineral interest owners holding interest in the executive rights, and then put that parenthetical there, "the rights to explore and develop".

CHAIRMAN WROTENBERY: Mr. Patterson?

MR. PATTERSON: Madame Chairman, then again, the question -- Am I understanding Mr. Kellahin correctly,

then, that the intent is that if a royalty owner or a mineral owner is leased and has given up his executive right to a lessee, that he is not required to be noticed under this Rule 1207?

MR. KELLAHIN: Under --

MR. CARROLL: Certain cases.

MR. KELLAHIN: Under the unorthodox-location portion of 1207.

MR. PATTERSON: Correct.

MR. CARROLL: And under the compulsory pooling.

MR. PATTERSON: Where you have used this language, the new language, "any owner of interest in the mineral estate", bottom of page 4 in your...

MR. KELLAHIN: In those few instances where you find the use of the phrase "any owner of an interest in the mineral estate", that's the biggest package. And you'll find that under the compulsory pooling portion.

MR. PATTERSON: So is it our intent that a leased mineral owner does not -- is not required to have notice. When he has no executive rights, then he has executed an oil and gas lease with a pooling clause.

MR. KELLAHIN: That's exactly right, he does not get notice, because the notice goes to the working interest owner.

MR. CARROLL: He is voluntarily committed under

his --

MR. PATTERSON: I don't know if that really does that. I think we need to look at that. I'm afraid that he is covered by those definitions.

MR. CARROLL: By leasing, hasn't he voluntarily committed?

MR. KELLAHIN: Well, he's voluntarily committed by leasing, hasn't he, Randy?

MR. PATTERSON: Right, but you're saying -- Are you not saying that any owner of an interest in the mineral estate is going to receive notice under this 1207?

MR. KELLAHIN: Uh-huh.

MR. PATTERSON: And then that mineral estate includes mineral interest owners, which is defined as both working interest owners and the mineral owners not having signed an oil and gas lease, and all the royalty interest owners, which, right under that, says that includes your royalty interest owner and override, and doesn't. It says "holding an interest in the nonexecutive rights including the lessor, a royalty interest owner and an overriding royalty interest owner."

So I'm afraid that we have included those royalty interest owners to have given away their executive rights. That's my question.

MR. KELLAHIN: It's a fair question. I have read

it, I come to a different conclusion. If others read it and agree that Mr. Patterson is correct, then we need to make a change, because that's not what we're trying to do.

MR. PATTERSON: Okay, the intent is what I'm after, and if we need to work on language later, that's all. It's a question.

CHAIRMAN WROTENBERY: Mr. Carroll, do you want to move on, then, to Non-standard Proration and Spacing Units?

MR. CARROLL: Sure. The change made to the existing rule is that notice to offset operators and owners of undrilled tracts is deleted, so there's -- The rule would delete that.

A correction was made. The 80-acre pools were not included in the current rule. We just stuck that in along with 40-, 160-, 320- and 640-acre spacing.

Notice to all owners of interest in the mineral estate to be excluded is still required, we just don't list out all the various interest owners.

And then the Division proposes to have notification "to such other persons as required by the Division" based upon the particular facts and circumstances of the case.

So notice to offset operators and owners of undrilled tracts would be deleted as required in all instances, but in a particular situation the Division may

require notice to certain operators or owners of undrilled tracts.

NMOGA differs with the OCD there, would still require notice to offset operators and NMOGA does not like the discretion given the Division by the phrase "and to such other persons as required by the Division". They feel it's too ambiguous and open to interpretation.

CHAIRMAN WROTENBERY: Mr. Kellahin?

MR. KELLAHIN: Thank you, ma'am.

If you'll turn to page 7 of the NMOGA Exhibit 1, you'll see the current rule. The current rule operates this way. To keep the example simple, if a standard spacing unit is a whole section and if the applicant wants to divide it and make a 320, he asks for a nonstandard spacing unit. His notice requirements are to every interest owner in all categories for the whole section. We don't propose to change that.

In addition, the current rule says that you notify the offset operators, which would be the offset operators to the whole section, and owners of undrilled tracts of adjoining units, whatever that means. We struggled with it. I'm not sure how we've ever resolved it very well.

In the committee meetings we talked about it. We couldn't think of circumstances where the notice should go

beyond the offset operator. We thought they put their money in the ground, they were adjacent to it. If there was going to be a change of spacing in effect near them, they were committed and had to be told.

If you're looking around an entire section, for example, you've got potentially seven sections to do title work and figure out what it means when it says undrilled tracts adjoining your unit. And we balanced the expense of that notice with the necessity of the notice. I couldn't think of examples where parties of undrilled tracts complained to an NSP. I don't handle those very often, I don't see them frequently. Perhaps the Division in their own knowledge bank can find examples. So we struck it.

The Division's proposal is an improvement on the current rule because it says "as the Division may require". Our problem with that is, it's ambiguous. I can't go to the rule book and figure it out. I'm going to have to come over here with a case-by-case example and say, Okay, what do I do now? That's the dilemma, is the ambiguity. We leave it to you to resolve which way we'll be told to handle the notice. We think either proposal is an improvement on the current rule. Frankly, the Association prefers our draft to the Division position.

CHAIRMAN WROTENBERY: Anybody else like to comment on this particular proposal?

MR. CARROLL: We have Mr. Stogner here. He needs to be consulted.

CHAIRMAN WROTENBERY: Pardon me?

MR. CARROLL: We have Mr. Stogner here. He needs to be consulted on the different facts and circumstances that may give rise to different notice and different situations.

CHAIRMAN WROTENBERY: Commissioner Lee, do you have --

COMMISSIONER LEE: (shakes head)

CHAIRMAN WROTENBERY: I don't know, Mr. Stogner, did you have anything that you would like to add here?

I might just paraphrase our discussion. We've heard what your discussion was, and I'll try to paraphrase our discussion.

On the one hand, we were having a little bit of difficulty distinguishing between the interest of an operator and the interest of an owner in an unleased tract.

On the other hand, we were having difficulty determining many cases where even an operator would care about this kind of a change.

And so what we opted for, rather than trying to distinguish leased and unleased tracts, is to eliminate the requirement altogether, except that we could think of maybe a few circumstances where it would affect -- where this

kind of change would affect offset operations or offset leases, and thought that maybe we should have the discretion in that kind of situation to require -- after receiving and looking at an application, to require some additional notice be given.

I don't know if I paraphrased that accurately, but that was basically, I think, the gist of our discussion on this particular issue.

MR. CARROLL: Yeah, that's correct.

MR. KELLAHIN: I think that either the Division's or NMOGA's solution is manageable. We may have to do a few of these on a case-by-case basis, see if it matters. We've raised the issue with you, we'll have to decide.

CHAIRMAN WROTENBERY: Thank you.

Special pool rules?

MR. CARROLL: 12.A (4), I guess, special pool orders, NMOGA finally convinced of the error of our ways, and we've pretty much adopted their proposal. So the recommended OCD language, we feel, will comply with *Uhden* by requiring notice to all owners of interest in the mineral estate in the spacing unit if a change in the size of an existing unit with a producing well is proposed.

In other cases, only notice to operators within the pool and within one mile and in the same formation would be required.

Current rules require notice to all operators of wells and each unleased mineral owner within the existing or proposed pool boundaries and all operators of wells within one mile of such boundaries.

We feel it's an improvement. Special pool rules are really hard to change in a large pool, and this would facilitate needed changes in the pool rules to conserve oil and gas.

So we agree with the NMOGA proposal and have adopted it as the one we recommend.

CHAIRMAN WROTENBERY: Mr. Kellahin?

MR. KELLAHIN: Madame Chairman, the Association truly appreciates the Division's concurrence in our recommendation. This is the most significant change that we see in the administrative processing of these pool rule cases. It's of tremendous benefit to us.

As you may know, it has become historically virtually impossible to satisfy the notice obligations under the current rule. We'll give you an example here in a minute of Burlington's efforts in the Blanco-Mesaverde Pool and the costs involved and the effort made, so you can recognize why the Division does not see special pool rule cases very often. It's too hard for Mr. Carr and I and others to satisfy what we think to be the current obligations for notice.

We think this change is an appropriate one. It provides notice to operators of all rule changes, with the exception of those categories of concern which were articulated in the *Uhden* decision, and any other change, then, is one that affects operators of spacing units in that pool, which gives us the best point of information as to how to manage that resource.

And if you'll allow me, I will hand out Mr. Alexander's handout of his efforts on the Blanco-Mesaverde Pool, and we'll ask him to make a short statement of what he had to do.

Mr. Alexander had to deal with the current rule. You'll see it on the top of page 8 of the NMOGA handout. It simply says "Actual notice shall be given to all operators of wells and each unleased mineral owner within the existing or proposed pool boundaries and all operators of wells within 1 mile of such boundaries".

And I'll turn it over to you, Mr. Alexander, to describe to the Commission an example for the Blanco-Mesaverde Pool.

MR. ALEXANDER: Sometimes it's very hard to visualize the type of work that would have to be done to meet the prior notice requirements, and some of the notice requirements that people thought of may have come out of *Uhden*.

And so since we had actual work in this area, I did want to share this with the Commission. I think it will give you an excellent visual reference to what actually has to go on.

In 1997, we were pursuing developing the Pennsylvanian formation in the San Juan Basin, which ultimately led to spacing that pool on 640 acres, and we had to do a significant amount of work to get us to the point that we thought that we would want to proceed with that effort.

So we contracted with land brokers who have been in the business for many years to do this work. And the piece of that effort that I want to focus on right now consisted of about 500,000 acres, which is 781 sections. It's a large area.

But to compare that -- We'll get to it in a minute down here in the Blanco-Mesaverde Pool and some other pools. We'll compare that, and you'll see that it's not that unusual.

But it took us over 24 months to verify 3405 working-interest-only records. We didn't even attempt to get into the royalty and the overriding and the production payments and all the other types of mineral interest owners.

It took us 24 months to do that with seven

contract brokers, which is the maximum amount we could put in the courthouse during this time period. Any more we tried to put in there, we were just running over ourselves and we weren't accomplishing anything. There is a physical limit to the amount of people you can put either in an abstract office or a courthouse to do the work, and that is one of the limits we have to deal with when we do these types of work.

Our brokers told us that if we had asked them to go and research the other types of mineral ownerships, we would expect to encounter some 26,507 records that would have to be checked in order to do that in this 500,000-acre block. And to do that kind of an activity would take you 186 months, or 15 years, to attempt to do something like that, which is just a tremendous figure, and it really amazed me that it would take that amount of time to work through all of those kind of records.

Now, that was the Pennsylvanian formation that we were looking for, and let's compare that to an example closer to home of what we're talking about here in the Blanco-Mesaverde Pool.

The Blanco-Mesaverde Pool contains approximately 1,045,000 acres, or 1632 sections. And if we wanted to change the rules in there, under the old concepts, we would have to find all of those sets of owners to attempt to do

this.

We have some advantages. Burlington operates about 419,000 acres, so we have computer records that we can go to, to find -- into our Division-order systems to find those types of owners. That is an advantage to us -- we're a major operator -- that wouldn't necessarily be available to other operators in the Basin to do that.

So that would leave an area of acres that we would need to record-check on of about 626,000 acres, or 978 sections.

Now, in the line-up on our -- the information on a very conservative point of view, we pulled the statistics from our actual Penn operation. And I want to say right up front that this will be very conservative, because the Pennsylvanian formation is undeveloped and you don't have many transactions, trades and things going on in an undeveloped formation. But when you get into a pool like the Mesaverde, you'll encounter considerably more records than we did in the Pennsylvanian formation. So this is a conservative view, in our opinion.

So we would estimate, based upon our Penn experience, that we would have roughly 4200 working interest owners, and we'd have 33,186 royalty or overriding royalty production payment records that we would have to check to verify records for notice requirements.

Now, if -- And I broke this down and I gave you some assumptions which I think are valid. We generally experience about 260 working days a year, and we currently -- Oh, on the average we'll pay our contract people about $250 a day to run those records.

And so based upon the assumptions that I've made which I've given to you in this report here, if we were to utilize probably the maximum amount of people we could get in there, seven contract brokers, it would take us 30 months, or two and a half years, just to verify the working interest owners on that unchecked portion of the Blanco-Mesaverde Pool. And it would take us about 15 1/2 years to verify the other types of mineral owners.

The costs you see are significant. Just to verify the working interest owners, we would expend over a million dollars to do that. And to verify the royalty and overrides the others, $17 million over that time period, to attempt to do that kind of record-checking to meet the old type of notice requirements.

Now, I did give you on the second page a hypothetical. If we could cram as many people as we needed to in the courthouse and we could conduct a search in one year -- and I said one year because any search you conduct over a period of a year, if you go much beyond that then the records -- by the time you've finished that search,

then the records that you had searched have changed because of assignments, death and heirship, agreements of various kinds that have changed all of the things that you've just checked. So it becomes obsolete and invalid after about a year's time period, and you have to go back and start over again.

But if we could put as many people as we wanted into there, we could probably check those records with 17 brokers for the working interest owners at an expense of a little over a million dollars, and we could check the royalty and the other types of mineral owners with 108 contract brokers at an expense of about $7 million.

Now, I've given that to you and I did explain that this is just for illustration purposes, since it practically can't be done. You can't do that, you can't put that many people into either an abstract office or a courthouse to do that work.

So when we're considering these rules and the types of notices that we want to give, I just want to wanted to offer this as a real-life visual approach to the problems that we face in the industry in trying to provide these types of notices, and that was my purpose.

CHAIRMAN WROTENBERY: Thank you.

Questions of Mr. Alexander?

COMMISSIONER BAILEY: I'm mulling over the

problems of lack of notice to unleased mineral owners, and I can understand that there may be so many out there that it would be very expensive.

Would it be helpful to industry and to the Land Office if these rules specified, for state lands, the State Land Office is notified, and eliminate the broad-brush definition for the unleased mineral interest owners?

MR. ALEXANDER: It would certainly reduce the obligation in those instances where we would want to notify a mineral interest owner, particularly the State. But if we did that, I think we would probably have to include in there, probably, the BLM and probably the tribes. And where do you cut that off? That's been a problem, you know.

It is an approach, but then you're saying, Well, Mr. John Smith out there that owns minerals, he's not entitled to the same level of notice, and it does present some problems.

COMMISSIONER BAILEY: Well, they're the right problems.

MR. ALEXANDER: Yeah.

MR. CARROLL: Commissioner Bailey, the State Land Office gets a copy of the docket. I mean, they get notice. I don't see why they need a special notice, as opposed to all other similar-situated lessors. I mean, the Land

Office follows our docket and --

COMMISSIONER BAILEY: Right --

MR. CARROLL: -- knows if there's any proposed special pool rule changes.

COMMISSIONER BAILEY: Right, but I'm trying to go beyond the special pool rules and take into account these other issues that we've also been looking at, such as unorthodox well locations or any other order that may not actually go to an Examiner hearing.

MR. CARROLL: Well, then we run into the problem of treating similar situated persons the same.

COMMISSIONER BAILEY: Just mulling around ideas.

CHAIRMAN WROTENBERY: As an alternative, this may be something that the Oil Conservation Division and the Land Office might want to sit down and look at as sibling agencies and see what kind of exchange of information that we might put into place that might satisfy your interest in knowing about what's happening in the State, particularly in the vicinity of State lands, without having to put something in the rules that would create a distinction that might not be -- So we could certainly look at that.

MR. ALEXANDER: But in summary, we certainly appreciate you revising these rules.

We were faced with the fact that we could not comply with the notice requirements, either economically or

physically, physically could not do those things. And as a consequence of that you either say, Well, we will never change special pool rules, or we will change them and know that we haven't met the notice requirements and we're still out there -- hanging out there legally. And so we were trapped.

And so I think the revisions that we've made today are good revisions, and they reflect the basis of reality, on what we can and can't do.

CHAIRMAN WROTENBERY: Thank you, Mr. Alexander.

Commissioner Lee, did you have --

COMMISSIONER LEE: (shakes head)

CHAIRMAN WROTENBERY: Thank you.

Okay, Mr. Patterson?

MR. PATTERSON: I would just venture a comment to Commissioner Bailey's concern here. Our opinion of the State Land Office is that the Land Office is a very capable and very sophisticated royalty owner.

The Land Office has their own geologist and own personnel that look at these things all the time. And, at least in our minds, the State Land Office is affected by every hearing that comes before this Commission because of the proximity of their lands to everything that happens. And it's been our experience that the Land Office does a good job of holding their own on any of these issues.

So I would say that you all do a real good job of covering all these things, and to further burden the notice procedures seems to be unnecessary.

CHAIRMAN WROTENBERY: Okay, have we finished up the discussion on the pool rules? I think so.

We're down to the last few items, I think. Maybe we can continue working here until we finish up.

MR. CARROLL: Madame Chairman, these shouldn't take long at all.

(5) is the Potash Areas.

For some reason, the current rule left out oil and gas lessees and skipped from all potash lessees to operators to unleased mineral interest owners. So the only change made here was to include oil and gas lessees as notified parties. NMOGA and the OCD agree as to that change.

(6) Downhole Commingling.

Notice to offset operators was deleted, and the terminology was again changed to "all owners of interest in the mineral estate...if ownership is not common for all commingled zones within the spacing unit." The OCD and NMOGA agreed as to those changes.

(7) Surface --

CHAIRMAN WROTENBERY: Commissioners, please speak up if you've got any questions on these.

COMMISSIONER BAILEY: Would it be helpful to industry to have some sort of notification in this rule, that even though the OCD may approve either downhole or surface commingling, that it doesn't apply to the state lands unless the Commissioner also approves?

Just a suggestion. It may prevent confusion and frustration on the part of industry.

CHAIRMAN WROTENBERY: We do include that language in the permits themselves, I believe.

COMMISSIONER BAILEY: No, it's just a suggestion that industry --

CHAIRMAN WROTENBERY: Yeah.

COMMISSIONER BAILEY: -- may appreciate having --

CHAIRMAN WROTENBERY: -- in the rule.

COMMISSIONER BAILEY: Uh-huh.

MR. CARROLL: Just to notify industry that they also need State Land Office approval?

COMMISSIONER BAILEY: Yes.

MR. KELLAHIN: Well, we have that same obligation on the federal lands and elsewhere. I think we're accustomed to dealing with the agency's rules within the contents of their own rules, and once we get approval at the Division, we recognize that there is additional commingling approval --

COMMISSIONER BAILEY: Most operators do, but many

don't. I come across them all the time. It was just a suggestion to ease the frustration level.

MR. KELLAHIN: I guess it troubles me to have Division rules linked like that.

MR. CARROLL: Well, in the next one, "Surface disposal of produced water", then we could notify them that they should get appropriate county approval or zoning approval, BLM approval.

COMMISSIONER BAILEY: How far do you want to take it?

MR. CARROLL: Yeah, I don't know how far you want to go. I think they're responsible for complying with all the applicable regulatory agencies' requirements, and I don't know if it's our duty to tell them about all the others. We could tell them about the State Land Office and might leave out somebody, and they'll say, Well, why didn't you notify us of this other agency's requirements?

CHAIRMAN WROTENBERY: Have there been particular types of special concern?

COMMISSIONER BAILEY: Quite often, for both downhole and surface commingling.

CHAIRMAN WROTENBERY: Commingling?

COMMISSIONER BAILEY: Uh-huh.

CHAIRMAN WROTENBERY: We'll look into that. I was thinking we included that in the permits. I may not be

remembering that correctly, but we'll check on that one and look at that, look at that issue.

MR. CARROLL: (7) Surface disposal of produced water or other fluids.

Really no change here, just shortening it, and NMOGA and OCD agreed not to change it.

(8) Adjudications not listed above.

"Notice shall be given as required by the Division." The Division doesn't know exactly what type of case it is, and the notice will vary, depending upon what type of application, and it's going to be an unusual application that doesn't fit one of the above seven categories.

And NMOGA and OCD agree as to (8).

Then we get into B, C, D and E.

B, there's some changes. It was -- Instead of "Content of Notice" it was changed to "Type and Content of Notice". Rather than state in every one of the above eight categories that notice shall be sent by certified mail, return receipt requested, we just moved it to this section so we didn't have to repeat it.

And then a couple changes were made as to what's included with the application -- or what's included with notice.

Now, we propose to require that a copy of the

Application be sent and that the date, time and place of the hearing be set forth.

And then we deleted the language that said a statement as to the nature and pendency of the case, because a copy of the application and the time of hearing would take care of the nature and pendency of the application. The OCD and NMOGA agreed as to those changes.

CHAIRMAN WROTENBERY: Mr. Carr, we called that copy of the application provision the Carr Rule.

(Laughter)

MR. CARR: I appreciate that.

MR. CARROLL: C and D, no changes, and some cosmetic changes were made.

E is a new provision, and this deals with the situation where an administrative application was filed and notice was sent to the affected parties required to be notified under the applicable rule.

Up to recently the Division either set the case for hearing and told the applicant to again send notice of the hearing or -- I forgot what the other situation was. Or else told the applicant to file an application for a hearing and send notice again.

This change would require notice, and this notice would be by the Division, only to the applicant and the parties that file a protest to the administrative

application. If other parties that were notified of the administrative application did not protest the application, they would not receive another notice. They had their opportunity once, and we don't see any reason to give it again.

And the NMOCD and NMOGA agree to that change also.

And that is it with our proposed new Rule 1207.

CHAIRMAN WROTENBERY: Mr. Kellahin, did you have any remarks on those revisions?

MR. KELLAHIN: As to 1207, we would like to have a comment period after hearing so that I can meet with Mr. Patterson and others of the industry to make sure I can defend what we think are the language changes here, and, if not, to alert the Commission that we believe that there is a flaw in how it's drafted.

CHAIRMAN WROTENBERY: Fine, we'll talk about that in just a minute.

Are there other provisions that were included with the docket that we need to discuss at this point?

MR. KELLAHIN: Just by way of describing for you where we are in the process, Mr. Carroll's Exhibit Number 3 includes a number of other topics that also are addressed by the NMOGA proposal submitted to you at the April Commission hearing. There are a number of yet-unattended-

to details of the rule change, and I've noted some of them in the handout I gave you today as Exhibit 1.

For example, if you take action on 1207 you need to recognize there's the possibility that you'll have a difference of activity and requirements for notice for a hearing of a location exception, for example, which will be different, if that was filed administratively.

So there's going to be a gap in time before you address 104 within the context of notice.

That occurs in 303, for example. If you delete notice to offset operators, it's still in the administrative part of 303.

In addition, NMOGA approached you with a solution on Rule 509, which is pool creation and pool allowable notices. The Division has not yet attended to that one. And so on and so forth through the various rule changes.

We would recommend to you that, should you choose to do so, within the contents of this particular case you have before you, you could do it in chapters. You could attend to 1207 today or next month, and we could continue this case as the managing case to handle the rest of the rule changes that we've all been discussing here for the last few months.

If you want to attend to anything other than 1207, we will have comments for you at the appropriate time

if you decide to make other rule changes.

There was a procedural change concerning prehearing conferences. There's a proposed change on the table to talk about pre-filed testimony in advance of Commission hearings, all of which are of interest to us, and we can give you comments whenever that's appropriate.

MR. CARROLL: Madame Chairman, the Division is ready to go through all the other rules we propose to amend today -- that's Rules 11 and 12 -- and then all the rules in Part N 1201 to 1223. I don't know if you want to do that now or break for lunch and then come back after lunch. It shouldn't really take that long.

CHAIRMAN WROTENBERY: I'd like to go ahead and proceed. I don't mean to torture people, but I know some people have flights out and other things to attend to this afternoon, but let's keep on working through it if we can.

MR. CARROLL: Madame Chairman, what has been marked as OCD Exhibit Number 3 is the red-line and strike-out version of the rules I just referred to.

11 is just cleanup and restatement of the rule that was already there. We haven't received any comments, and I don't believe NMOGA has any comments. NMOGA -- is it correct? -- you'll make any comments when we go through these?

MR. KELLAHIN: Let me give you a general

observation. What we've worked with in detail was the May 12th draft off the internet.

CHAIRMAN WROTENBERY: Uh-huh.

MR. KELLAHIN: This latest Exhibit 3 is hot off the press --

CHAIRMAN WROTENBERY: Uh-huh.

MR. KELLAHIN: -- and the Committee has not yet been able to go through it and make sure there's no glitches.

CHAIRMAN WROTENBERY: Uh-huh.

MR. KELLAHIN: My reading of it, I think it's consistent with our discussions on Monday, and I will show you points of difference as they occur, but we would like to have time to comment after the hearing.

CHAIRMAN WROTENBERY: Certainly.

MR. CARROLL: We'll go to 12. 12 is just some cosmetic changes. And we also add, where applicable, to protect the public health and environment as OCD duties in certain rules.

1201, we're splitting out adjudications from rule-making proceedings. 1201 would just apply to rule-making proceedings, and it deals with notice, and it requires publication notice by the Division not less than 20 days prior to the hearing date, and then also notice by the docket being sent to the docket list.

1202, cosmetic changes.

1203, Initiating a Hearing. We've added a few requirements. One is, "The application shall be signed by the person seeking the hearing or by his attorney." We require two copies of the application be filed.

We've added a couple of items to the application. Number (4), which is listed, is "a list of the names and addresses of persons to whom notice has been sent". And then what is not on this version is a new number (5) which would be a proposed advertisement. And then (5) would be re-numbered as (6).

And then at the bottom, this is what is happening in effect, but we are putting it in the rule that applications must be in writing and received by the Division at least 23 days in advance of the hearing on the application.

1204, I mentioned this earlier. This requires the Division give public notice of hearings. The rest of the changes are cosmetic.

Contents of Notice of a Hearing, cosmetic changes.

1206 is Reserved.

1207 we've gone over.

1208, Pleadings and Copies. New requirement, "For pleading and correspondence filed in cases pending

before a Division Examiner, two copies must be filed". For cases before the Commission, five copies must be filed for the Commission. The Division will disseminate the copies to the members of the Commission.

In the middle of that paragraph we've added some language regarding "The party filing the pleading", and we propose to add the words "or correspondence" shall at the same time either hand-deliver or transmit by facsimile or electronic mail to the other parties who have entered an appearance. This deals with the problem of a person filing something with the Division and just mailing it to the opposing parties and it taking a few days when time is of the essence in a number of situations. And with the current state of computer e-mail and faxes and hand delivery, it doesn't seem to be that much of a burden to require that.

1208.B is new. This is regarding prehearing statements. We put this in the rule, the requirement that a prehearing statement must be filed three days in advance of a scheduled hearing, and then it states what must be contained in that prehearing statement. This is from a memo that was sent out a number of years ago by the Division.

One thing that is missing here is a sanction for failing to file a prehearing statement, and we haven't been

too strict in imposing sanctions in the past, and the Commission might want to consider imposing sanctions.

MR. KELLAHIN: Perhaps the Carr Rule Number 2?

(Laughter)

CHAIRMAN WROTENBERY: These statements are helpful to us in planning our hearing schedules --

MR. CARROLL: Docket management.

CHAIRMAN WROTENBERY: -- preparing for the hearing, so...

Mr. Patterson?

MR. PATTERSON: If it's appropriate, I'd like to make a comment about that, I guess a question, because Mr. Carroll brought that up: If you miss the three-day-in-advance deadline, is it the intent of the Commission to then prohibit someone from coming before the Commission and enter an appearance into the hearing, or, on the other side of that, if someone misses that deadline, is that then grounds for a continuance to prolong and delay a hearing? This is another opportunity, possibly, for people who just want to delay, to cause delay in getting a hearing.

It's just a concern. I would hate to be precluded from coming to a hearing if it missed a deadline and didn't get a prehearing statement in until two days before.

CHAIRMAN WROTENBERY: Mr. Carroll, do you want to

respond?

MR. CARROLL: I know from the Division perspective we're not going to preclude anybody from appearing at the hearing because they haven't filed a prehearing statement, and we're not going to dismiss the case either or continue it. I guess we'll just be mean to you if you don't --

CHAIRMAN WROTENBERY: Scowl at you.

MR. CARROLL: -- file a prehearing statement. But at least this requires that -- Like I said, sanctions we didn't touch.

MR. KELLAHIN: There's a difference between the drafts. As you may see from the NMOGA draft we submitted in April, there's an additional line. NMOGA supports the use of the following sentence: "Failure to timely file a prehearing statement may adversely affect that party's standing and may preclude that party from participating in the case." It's in the LeMay memo, and we simply repeated it here.

For the most part, the prehearing statement, for your information, does accomplish the purpose for which it was intended. It was intended just to flush out the opposition, and in most instances it works because we talk among ourselves, and we know what's about to happen.

This rule has accomplished its intended purpose

in that it precludes someone from coming up at the hearing, having not previously disclosed their position, and announcing their opposition at the time the case is called. That is a serious ambush, and it should not be tolerated. So this was for that purpose, and it has stopped that.

In addition, it discloses generally who the witnesses are and approximate time. The Division now knows who has contested cases, and it's a docket-management thing.

If you're reading it to try to understand the details of the facts, you often will not find that disclosed, but I think the Division certainly has the authority to require better disclosures within the context of the hearing process.

So we endorse putting this memo formally within the rule book. We think it's a good device to keep from being ambushed.

MR. CARROLL: The Division agrees with adding that last sentence, however it read, regarding it may affect the person's -- adversely affect the person's standing.

MR. KELLAHIN: We'll provide that to you. It's in the NMOGA proposal.

MR. CARROLL: And then we also propose a change to the first line, and we require two copies of a

prehearing statement be filed.

1209, cosmetic changes.

1210, cosmetic for A. There's a new B, and this deals with filing prepared written testimony. The intent of this subsection is to deal with those very complicated cases where there's going to be a lot of testimony. It does require that the witness whose testimony is in the prepared written testimony be present at the hearing, and shall adopt that testimony under oath and be subject to cross-examination and motions to strike.

Then there's some requirements as to the form of that testimony.

It is not anticipated that this will be used very often, especially at the Division level, for Division cases.

That's it.

CHAIRMAN WROTENBERY: Mr. Patterson?

MR. PATTERSON: Yes, Madame Chairman, the written testimony prior to a hearing is a -- could be a very costly item to companies to have to have an attorney 30 to 60 days prior to a hearing prepare a long brief as such, or this written testimony, when that testimony has, in the case of a Commission -- full Commission hearing, already been given in the original Division hearing. That testimony is all in the previous hearing and can be obtained in the court

reporter's report -- the transcript, is what I'm trying to say.

To take that transcript and rehash all of that testimony, even though we like to take care of Mr. Carr and Mr. Kellahin and these fellows and pay them nice fees for doing these things -- Well, I made him cry.

(Laughter)

MR. PATTERSON: It is and can be a very costly item to prepare this testimony, and especially considering that it's already in the record. So our comment on this would be that that not be included. We would request that that be deleted and that the previous testimony and the previous transcript be used by the Commission in order to do this.

Now, my understanding, Mr. Carroll just said that that probably wouldn't be used very often at the Division level. My reading of this says, "pending before the Commission". And so I guess as a form of a question, is it intended that, as written here, this could be used by a Division Examiner?

MR. CARROLL: Mine says "Commission".

MR. FOPPIANO: Exhibit 3 says "Commission".

MR. PATTERSON: Well, the version that I have says before the --

MR. KELLAHIN: 518? You're right...

MR. CARROLL: Just the Commission.

MR. PATTERSON: Just the Commission?

MR. CARROLL: My version is the mistake. The Division was deleted and this only applies to the Commission.

MR. KELLAHIN: All right, which way is it?

CHAIRMAN WROTENBERY: The Commission.

MR. CARROLL: Just the Commission.

MR. PATTERSON: Well, again, then, that testimony is already in transcript, and I request that it be used rather than preparing a prehearing testimony.

CHAIRMAN WROTENBERY: Mr. Foppiano, do you want to add something? Then I'll explain what our thinking is, because we are already using this procedure in a couple of cases pending before the Commission this summer, and I'll explain what we're doing. Go ahead.

MR. FOPPIANO: Certainly I can see some benefit to it from the parties involved and also from the Commission's standpoint.

I would just offer, having experienced this situation in Oklahoma with pre-filed testimony, I've seen it devolve into an argument at a Commission hearing or a proceeding that if the argument or the issue or the testimony was not put forth in the pre-filed written testimony, that it could not be raised at the hearing, and

there was a lot of legal maneuvering to just confine a witness's testimony, direct testimony, to whatever was the subject that he testified to in the pre-filed testimony, arguing that it was -- to do otherwise was ambush.

So with all due respect to Mr. Kellahin and Mr. Carr, it did seem to be a great employment activity for attorneys and yielded some marginal benefit in some cases to the other companies.

And so we're just concerned about how it might evolve into a legal tactic to employ at hearings. And we think the current process of testifying at the hearing works well for my company.

CHAIRMAN WROTENBERY: Mr. Patterson?

MR. PATTERSON: If I could continue on with Mr. Foppiano's comment there, if it's the intent to, as he alluded to, restrict the testimony at the hearing to what is submitted in writing before and no further testimony could be given at a hearing, then I submit to you it's not even necessary to have a hearing. Just file the testimony in writing and forget the hearing, because there's no reason to sit and listen to someone read what's already been filed. The only reason --

CHAIRMAN WROTENBERY: Well, there is a reason, and the main one is to allow for cross-examination of the direct testimony.

MR. PATTERSON: I understand that.

CHAIRMAN WROTENBERY: Let me just say, we are testing this practice here at the Commission in a couple of cases that are coming up this summer, we've issued some prehearing orders that require the direct testimony to be filed in advance of the hearing, which will give the Commission an opportunity to review the direct case before the hearing date. And there's a couple of reasons for that.

Generally -- For one thing, we're trying to just manage the cases as well as can, and when you've got three Commissioners and are trying to arrange schedules so that they can attend multi-day hearings in particular -- both of these are projected to be three -- well, two- or three- or four- or five-day hearings -- we want to try to make the process as efficient as possible. And we've talked at a prior Commission meeting, and it felt like it would be helpful to have that material available in advance and be better prepared to move through the hearing process a little more quickly, with a little better preparation on everybody's part.

We are sensitive to the cost issues involved. To the extent that there is a transcript from the Examiner hearing, that the parties want to use that, would, I think, actually speed up the process of preparing direct testimony

in a number of ways.

But because we are hearing these cases *de novo*, I don't think it would be appropriate for the Commission to just take the transcript of the Examiner hearing as the evidence that is to be submitted --

MR. CARR: In these cases --

CHAIRMAN WROTENBERY: -- to the Commission.

MR. CARR: -- when you envision pre-filed testimony --

CHAIRMAN WROTENBERY: Uh-huh.

MR. CARR: -- is it your intention to limit the testimony to what is pre-filed? Because -- And I'm talking about a particular case. There's ongoing testing, and pre-filed testimony actually occurs two and a half months prior to the hearing date, and it becomes a problem in those situations if, in fact, you can't bring to the Commission those recent test results.

CHAIRMAN WROTENBERY: I think there would be good reason to bring, you know, new information that --

MR. CARR: Would it be appropriate to supplement your testimony if there's new testimony?

CHAIRMAN WROTENBERY: I think that would be appropriate, yes, and helpful to everybody. The concept is that you would include everything that you have available and plan to use as of the date that the pre-filed testimony

is supposed to be filed. And if you have an opportunity to gather additional information that you want to present and time allows, then I think it would be good to supplement the pre-filed testimony before the hearing.

But certainly there will be times, we recognize, that there will be information that comes up that we need to supplement the record with at the hearing itself. So...

Yes?

MR. ALEXANDER: Would it be possible to alleviate a little bit of that hardship in preparing all that testimony to go ahead and use the transcripts from the prior hearing that didn't have pre-filed testimony on new evidence and material that would be presented?

CHAIRMAN WROTENBERY: I would think that would be an option for the attorneys to consider, if that's what they wanted to do, if basically the testimony was going to be the same at the Commission hearing as at the Examiner hearing. But oftentimes there is new information or a different approach at the Commissioner level, so that wouldn't always work.

Mr. Kellahin?

MR. KELLAHIN: I'm getting old enough, I'm worried about new things. But in 27 years I don't think I've seen but a handful of cases that were so technically complicated or so extensive or exhaustive that they could

not have been managed as those cases were managed, and they were managed by the Commission attorney running prehearing conferences. We did that in the Gavilan-Mancos wars, that were the most involved cases I think the Commission has seen in 20 years, and they went on exhaustively.

To suggest that all that stuff could have been reduced to pre-filed testimony is simply not believable, it could not have been done. But it was managed through the Commission attorney doing prehearing conferences so that the issues were narrowed to the specific technical disputes that were important, and everything else was resolved.

And quite frankly, I think Mr. Carr and I do that when we bring Commission cases to you. If we have not done it, please tell me now so I can my bad ways. But by the time it comes to a Commission hearing, it's gone through a Division process that gives you, in fact, depositions. That's your discovery chance, you get to see what the other side is doing.

And by the time we come before you -- and there have not been many cases lately, fortunately a few, perhaps, but not me. We'd like to have more cases. And when they come, I think they're managed in a way that you get to the heart of the issues very quickly. And you can do that without a lot of preparation, you can see what's happening. It comes to common sense and a little science,

and you make a decision.

To suggest that we need prehearing testimony filed may be an indication of more than you really need, and maybe you need to decide a few cases that are more complicated and see if it really is helpful. I don't know.

CHAIRMAN WROTENBERY: Well, that may be the case. Right now, I feel like it is needed in some lengthy cases. And yeah, Commissioner Lee is pointing out, this is discretionary with the Division Director, the way it's written right now. So we will try to exercise that discretion in a way that we don't unnecessarily burden the participants in our hearing process.

And I would not anticipate that the vast majority of the cases would require that. The vast majority of them we handle within the course of a few hours, and I'm not looking at this kind of procedure for that kind of case. But we think it may be helpful to the Commission in some more complex cases.

And we hope that the whole process of narrowing the issues and using prehearing conferences for that purpose will continue and that the two practices will complement each other as well.

MR. ALEXANDER: Madame Chairman --

CHAIRMAN WROTENBERY: Yes?

MR. ALEXANDER: -- do you envision that you would

maybe order a pre-filed testimony just upon the request of one of the parties, as a matter of just formality, or are you really going to be discretionary?

CHAIRMAN WROTENBERY: It would be discretionary, it wouldn't be an automatic practice at the request of any particular party.

MR. ALEXANDER: Well, we would -- I would hope not. I mean, that can definitely be used as a ploy to --

CHAIRMAN WROTENBERY: Right.

MR. ALEXANDER: -- really balk down everybody's efforts and to create a lot of expense, and I would hope that if the Division -- or the Commission utilizes this concept that they would be very discretionary when they do it.

CHAIRMAN WROTENBERY: That's our intent.

Mr. Foppiano?

MR. FOPPIANO: At the risk of raising something that we may not have thought about, I am having a little trouble figuring out how pre-filed testimony without the associated exhibits that the testimony relates to --

CHAIRMAN WROTENBERY: The exhibits come in as well, with the pre-filed testimony.

MR. FOPPIANO: I was worried about that answer.

CHAIRMAN WROTENBERY: So -- yes.

MR. FOPPIANO: So it is really pre-filed

testimony and exhibits?

CHAIRMAN WROTENBERY: Yes, the exhibits are part of the pre-filed testimony.

MR. FOPPIANO: We would urge utmost discretion in the use of this, because I did work in Oklahoma, and I've seen also the exhibits get thrown out for failure to -- They weren't part of the direct pre-filed testimony, and it became massive legal maneuvers to cut your opponent's testimony down to nothing, where it really was an exercise for the lawyers more than it was for the technical people.

MR. CARROLL: Okay, with that lead-in, I'll discuss adding --

CHAIRMAN WROTENBERY: Did any of the other Commissioners have any comments? Okay.

MR. CARROLL: -- adding prehearing conferences to Rule 1211.

1211.A is cosmetic changes, and 1211.B puts in the rules what is done already. Prehearing conferences are called when necessary by the Division or the Commission, and the purpose of the conferences are to narrow issues, eliminate or resolve other preliminary matters and encourage settlement, and a prehearing order may be issued following the conference.

MR. FOPPIANO: Just a point of clarification. That would continue to be a very discretionary type of

mechanism?

MR. CARROLL: It says "may".

MR. FOPPIANO: Because the language, upon the request of a party --

MR. CARROLL: May be held upon the request of a party.

MR. FOPPIANO: -- when the parties request, the Commission can.

MR. CARROLL: May or may not.

CHAIRMAN WROTENBERY: This is something we're doing now too. This one really isn't a new procedure.

MR. CARROLL: Right, we've been doing this for years. And it is very discretionary. It's rarely, rarely used.

1212, cosmetic changes in the first. B just requires that exhibits must be provided by parties to the court reporter, each Commissioner, the Division Examiner and other parties of record.

1213, cosmetic changes.

Same with 1214.

Same with 1215, 1216.

1217 is deleted, no more umpires.

1218, 1219.

1220.A is cosmetic.

B is new, but that is putting into the rule what

was done by a memo done years ago, and it change the memo somewhat. It says, "Any party requesting a stay of a Division order must file the request with the Division and provide copies of the request to the parties of record...at the time the request is filed." I think the memo stated that a request for a stay must be filed with the request, and we no longer require that time limit. A proposed stay order must be attached to the request, and the Director may grant stays under other circumstances.

1220.C is cosmetic.

So is 1221, 1222.

And then we propose a new 1223, which is Ex Parte Communications, and the Division is proposing some -- I change to this rule. The proposed change would, in the second line, delete the first three words, "filing of an", and then after "application" insert the words "is set for hearing".

So the first sentence would read, "In an adjudicatory proceeding, except for filed pleadings, at no time after the application is set for hearing shall any party, interested participant or their representatives communicate regarding the issues involved in the application with any Commissioner or Division Examiner when all other parties to the proceedings have not had the opportunity to be present."

The change to this proposed rule is meant to deal with the situation where an administrative application is filed and before a protest is received, so the case is not adversary. The rule will not, then, prevent communications between the applicant and the person reviewing the application. So only when the case becomes adversarial does the rule kick in.

COMMISSIONER BAILEY: There's no conflict between this one and 1211, new paragraph, is there? The prehearing conference?

MR. CARROLL: No, because the other parties have an opportunity to be present. Will be present, or have had the opportunity to be present.

CHAIRMAN WROTENBERY: Mr. Kellahin?

MR. KELLAHIN: Madame Chairman, NMOGA submitted to you an *ex parte* communication rule back in April -- it was on page 22 -- and our approach is a little different. I think I like mine better.

MR. CARROLL: Naturally.

CHAIRMAN WROTENBERY: Will you give us a minute to find --

MR. KELLAHIN: Sure.

CHAIRMAN WROTENBERY: -- yours?

MR. KELLAHIN: It will be April 7th, and it's on page 22.

MR. CARROLL: Yours is twice as long.

MR. KELLAHIN: That's why I like it.

This is the one NMOGA struggled with and, after several meetings, recommended unanimously. It says, In an adjudicatory proceeding, at no time after filing of an application for hearing or after receiving notice from the Division that an objection has been filed to an administrative application shall any party, interested participant or their attorneys or representatives discuss the substantive issues, et cetera, et cetera, without all present.

We chose the word "substantive issues" so that Mr. Foppiano can find out the procedure. We don't have to bring everybody into the room to see how you would handle the procedures of filing different things.

The other thing is, we have found a trigger that we can find. I can come over here and look at the date stamp of an application and know that that's the filing date, and *ex parte* things stop. I don't know when you set this stuff on docket, I don't know how to find out the day that actually is going to be on the docket, if that's the trigger.

And for the administrative application, then, Mr. Foppiano can talk to Mr. Stogner until such time he's notified there is an objection.

And so the need to have dialogue with the Division about your administrative application still can take place until such time as there's notice of an objection, and now you have a contested matter and you're trying to keep your Hearing Examiners impartial.

So it took more words to say that, but I would hope you don't dismiss it casually, because it's the collective effort of our group to try to come to grips with this very issue.

MR. CARROLL: Madame Chairman, the Division agrees with the definite time periods there for determining when *ex parte* communications kick in.

And we don't agree with the use of the word "substantive issues". I think you can distinguish that from procedural issues. If there's procedural issues in a case, this wouldn't seem to bar that.

CHAIRMAN WROTENBERY: There was also another issue that we had identified in this language that would need to be addressed, and that is, this says that you can't have any communication unless all parties are present. Well, I think what you really need is to give all parties an opportunity to be present.

MR. KELLAHIN: I concur, I think that's an appropriate modification.

MR. CARROLL: So I think we can combine the two

versions.

CHAIRMAN WROTENBERY: I'm sorry, Ms. Hebert?

MS. HEBERT: Chairman Wrotenbery, I guess I don't understand why we would be treating these administrative applications, which potentially could be objected to, a lot of extraneous information could come in during that time period before objection is made that would be very difficult to undo, that person is not going to even know what had been said or communicated, and yet they are objecting.

So I guess I don't see why we would be treating those differently if you know there's a possibility there could be an objection to these applications that you're calling in the administrative process.

MR. CARROLL: But --

CHAIRMAN WROTENBERY: The difficulty --

MR. CARROLL: -- till there's an objection, it isn't adversarial, and I think it's needed in administrative applications to communicate with the Applicant regarding additional needed information.

MS. HEBERT: But --

MR. CARROLL: And then just responding to that request would be --

MS. HEBERT: -- couldn't you do that after the time period had gone for objections to be made? I'm

concerned about the party that's going to come forward and make an objection, is going to have no idea about what's been communicated, other than the filed application.

MR. KELLAHIN: We shared your concern. As a lawyer, that was my position at the NMOGA meeting, is that when you filed this administrative application there was a great opportunity for contaminating the objectivity of the Hearing Examiner, because you didn't know there was going to be objection, you did it in good faith, but you've talked to him. You've talked to him about what you could do and how you could do it and when you could do it. And he has, in effect, prejudged what would happen. And so you could draw the line as you've suggested, Ms. Hebert, is -- is where you've suggested.

Mr. Foppiano and others on the Committee debated the other side, and, you know, he's welcome to state those reasons. But he thought it was more important to have access to the engineer during the process in which this thing was ongoing. And so we chose sort of a compromise position.

MR. FOPPIANO: May I respond, since my name has been brought up on numerous occasions, and I don't know why.

MR. KELLAHIN: And he's never been without words, so...

MR. FOPPIANO: I think, to respond to your concern about filing administrative applications, the only parties that are parties at that point is everybody.

So I think to try to keep them in the loop with any discussion that might go on with the Division staff regarding questions about whether proper notice was given or questions about the technical data that was submitted, or even in some cases where we now have discretion or are even considering discretionary notice things, once an application is filed, the only thing that would be able to happen is, the 20-day notice period would be run, and if the application is deficient it might not be able to be set back until the end of the 20-day period.

And so all this would add to, I think, a really inefficient process. Whereas the way it is right now, quite frankly, we view it as -- if it's filed as an administrative application, we can still have contact with the Division staff. We don't know who the Examiner is going to be that hears the case, if it's protested.

And since a large majority of them are not protested, to apply or to draw the line for *ex parte* all the way back to where the filing is made for the application, I think, is to be -- is to create a very inefficient regulatory process, one that's not really needed.

I have never seen a problem that there was -- and I have seen a lot of good that had happened between communications, between at least myself and Division staff after an application is filed, to clarify things on the application.

And if we say that's *ex parte*, then all we're really saying to the Examiner or the Division staff is, send the application back, or wait 20 days and then ask your questions. And I don't think that's very efficient.

CHAIRMAN WROTENBERY: Mr. Carr?

MR. CARR: It may not be efficient, but Ms. Hebert's concern is real important, I think.

I've had cases where I have been involved, before any Examiner process, where your client comes in the day before the hearing, they start telling you that they've already talked to people on the staff, that this is what's going to happen, and it was all long before you've had any opposition. And it is a real problem, you have to be aware of that.

It may make the process a lot less efficient, and there's a real value, I recognize, in being able to talk to someone about what I need to get this done --

CHAIRMAN WROTENBERY: Well, I would propose -- I'm sorry, Mr. Hawkins?

MR. HAWKINS: Bill Hawkins with Amoco again. I

was going to just kind of reiterate some of the points that Rick made, that the vast majority of these administrative applications aren't set for hearing, and there's a lot of benefit to being able to discuss something or provide additional information or something and try to get a response on an administrative application back as soon as possible.

And something that's going to delay it is, in my mind, very inefficient, and we shouldn't be looking for changes that make it be inefficient.

I think with the rule that's proposed, that once a protest is entered, that then you start an *ex parte* communication period, that pretty much covers a lot of the questions that Mr. Carr was concerned about, that, you know, you show up for hearing and you didn't know that you were going to talk to anybody.

But I just feel like you need to have that opportunity to discuss or at least provide information or whatever, for 95 percent or more of the administrative applications.

MR. CARR: I would also note that those communications can occur long before an application is filed --

CHAIRMAN WROTENBERY: -- is filed, and most of them --

MR. CARR: It's just a general problem, and I don't know where you draw that line or set that date.

CHAIRMAN WROTENBERY: Well, this all sort of ties into the second concern I had about the NMOGA language, and that is that it would preclude discussion with any Examiner about the applications, and I don't know that we want to go that far.

It would seem to me that there's a real concern: We don't want to hold up 98 percent of the applications because of the possibility -- the very small possibility that they will be protested. I think our presumption is, when we're processing administrative applications, that we're not going to get a protest.

At the same time, I understand the concern about some of the discussions that might have gone on and some of the information that might have been exchanged early on in an application that does get to be protested.

I'm thinking if we're going to try to address this issue, perhaps what we need to do is looking at assigning a case that is referred to hearing to an Examiner that wasn't a participant in those discussions, that that might be a way to allow us to continue processing applications and working with applicants to move them along through the process as quickly as possible, but, in the event that a protest does come in, make sure that those

communications haven't tainted the process.

MR. KELLAHIN: It really is a difficult problem. And like Mr. Carr said, most of that activity that concerns us as lawyers occurs before the application is filed.

CHAIRMAN WROTENBERY: Uh-huh.

MR. KELLAHIN: And Mr. Carr and Mr. Catanach and Mr. Ashley are always very helpful, to try to give them guidance on what is a hypothetical in their mind, and which the inquirer has a real-life example he's about to lay on the world.

CHAIRMAN WROTENBERY: Uh-huh.

MR. KELLAHIN: You can't -- You don't have the resources to separate your Examiners from those dealing with the public or providing the assistance, and it's always of concern to come to a hearing and find out that your own people or the opponent's people have had lengthy involvement in setting up whatever you're about to decide. It's hard to keep your Examiner free of that kind of concern about bias.

MR. CARR: And I do think the Examiners do a good job. I mean, I do know that all of a sudden somebody will stop communicating, period, because of concerns that the case is moving into an opposed posture --

CHAIRMAN WROTENBERY: Uh-huh.

MR. CARR: -- and I think that being smart and

careful about it is one thing that needs to be done with the rules so they can also provide that.

CHAIRMAN WROTENBERY: Okay.

MR. FOPPIANO: One additional comment I have on the Division's suggested language is the phrase "all other parties to the proceedings". That's somewhat confusing in light of what we've said earlier on about parties of record.

I guess the first question I've got is, what do we mean -- In the context of a docketed hearing, who are the parties to the proceedings? And if that's the same as parties of record, then perhaps we should say parties of record.

MR. CARROLL: The Division has no problem with that.

MR. FOPPIANO: Since they have no problem with that, if -- There isn't a party of record until a protest is filed?

MR. CARROLL: Right.

CHAIRMAN WROTENBERY: Commissioners, if you have any questions or comments?

MR. CARROLL: Your logic is inescapable.

COMMISSIONER BAILEY: No, I need to understand, though, you and I both deal with issues every day that may or may not come to hearing.

CHAIRMAN WROTENBERY: Uh-huh.

COMMISSIONER BAILEY: We need to be able to do our jobs, both as directors of divisions and also as Commissioners. So I don't -- I need to watch out, that we don't have our handcuffs on --

CHAIRMAN WROTENBERY: Yeah.

COMMISSIONER BAILEY: -- in order to do our daily jobs.

CHAIRMAN WROTENBERY: Yes, some of these issues that we're talking about could affect, definitely, the two of us in the administration of our --

COMMISSIONER BAILEY: We just need to be careful.

CHAIRMAN WROTENBERY: Uh-huh.

Mr. Carr, did you have something?

MR. CARR: I just wanted to note that, to go along with the Carr Rules, I was glad to see you were finally considering something to deal with Mr. Kellahin.

(Laughter)

CHAIRMAN WROTENBERY: Okay, what did you spot?

MR. CARR: Just the *ex parte* communication.

MR. KELLAHIN: It's an art form, and he's censoring art.

MR. CARR: I learned it from --

CHAIRMAN WROTENBERY: Okay, then I think what we'll do -- Florene, when is the hearing in June? What,

the 17th of June? It will be at nine o'clock on the 17th.

I kind of need -- Rand went out of the room, I think, to get the order on the incentive rules. But Ms. Hebert, do you think we'll have a revised version of the notice rules available on the Internet shortly?

MS. HEBERT: When is shortly?

CHAIRMAN WROTENBERY: Yes, I'm trying to leave it open for you to tell me what's reasonable.

MS. HEBERT: Well, I think we've got -- The 20-day notice we have today, so we'd have to meet that deadline --

CHAIRMAN WROTENBERY: Yes.

MS. HEBERT: -- to get --

CHAIRMAN WROTENBERY: Well, I'm looking at perhaps spot-requiring written comments to be filed -- it would be a week or so in advance of the next Commission hearing, if that would work, so that we would all have a chance to review whatever written comments have been filed on the next version of the proposal and maybe be a little better prepared to deal with those, and I hope take final action on this set of rules at the June meeting.

MS. HEBERT: I think they can be on the Internet by early next week.

CHAIRMAN WROTENBERY: By early next week? Let's see, where are we now? So by the 24th they could be on the

Internet?

Do we need to allow at least 20 days before the written comments are due, or is that just 20 days before the hearing?

MS. HEBERT: Twenty days before the hearing.

CHAIRMAN WROTENBERY: Okay.

MS. HEBERT: And we do need to add to it the amendments, proposed amendments to the definition section.

CHAIRMAN WROTENBERY: Yes, okay. Well, here's what I'm proposing we look at doing: We'll post the revised version of the notice rule based on the discussion that we've had today and the calls that the Division is going to make on their recommendation on this rule by Monday the 24th.

And then with that, we'll ask that anybody who has further comments on those rules, submit those in writing to the Division by Friday, June 11th, and we will get those distributed just as quickly as we get them to the other Commissioners.

And then we will take the package up again at the meeting in June and review the comments that were received. And I anticipate we'll be able to take final action on this particular package of rules.

MR. FOPPIANO: Have any written comments been filed as yet?

CHAIRMAN WROTENBERY: No.

Okay. Then, Mr. Carroll, did you have the materials, the draft order on the incentive rules?

MR. CARROLL: Yeah, I just got them.

CHAIRMAN WROTENBERY: There's just the one copy?

MR. CARROLL: Yes.

CHAIRMAN WROTENBERY: Okay.

(Off the record)

CHAIRMAN WROTENBERY: Okay, we've got here a draft order of the Commission adopting the new incentive rules and the revisions to the existing incentive rules. We've had a quick opportunity to review this order.

COMMISSIONER BAILEY: And just for clarification, the language always tracks the statutory language and not modifications as suggested today?

CHAIRMAN WROTENBERY: I think that's true, except in one circumstance, and that had to do, perhaps, with the issue of what was meant by a producing well in the New Well Incentive, and I think we decided there that that meant it was a well that had been completed as a producer.

COMMISSIONER BAILEY: I think it's important that we have clarification before we sign --

CHAIRMAN WROTENBERY: Yes, yes.

COMMISSIONER BAILEY: -- what was decided.

CHAIRMAN WROTENBERY: Yes. Can you think of any

other --

MR. CARROLL: No, I can't.

CHAIRMAN WROTENBERY: -- changes that we made along those lines?

MR. CARROLL: No, we retained the statutory language.

CHAIRMAN WROTENBERY: Yes. Okay, I'll entertain a motion, then, to adopt this order.

COMMISSIONER BAILEY: I intend to sign this order.

COMMISSIONER LEE: I second.

CHAIRMAN WROTENBERY: All in favor of adopting this order indicate by saying "aye".

COMMISSIONER BAILEY: Aye.

COMMISSIONER LEE: Aye.

CHAIRMAN WROTENBERY: Aye.

Okay, great. Thank you very much. Do we have anything else that we need to take up today?

Well, thank you for everybody's patience and everybody's input. I think it was a real constructive session today, appreciate it.

(Thereupon, these proceedings were concluded at 1:03 p.m.)

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CERTIFICATE OF REPORTER

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

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL May 23rd, 1999.

STEVEN T. BRENNER
CCR No. 7

My commission expires: October 14, 2002