

NEW MEXICO OIL CONSERVATION COMMISSION

COMMISSION HEARING

SANTA FE, NEW MEXICOHearing Date NOVEMBER 10, 1993 Time: 9:00 A.M.

NAME	REPRESENTING	LOCATION
Maurice Trimmer	Byram Co	SF
Patrick Tower	ENRON	SF
Emory Z. Canoll	Yates Pet	Artesia
Nelson Mueny	MYCO	ARTESIA
Randy G. Patterson	Yates Petroleum	Artesia
Charlie High	NM Potash	EP
Walter Case	N.M. Potash	Hobbs
Tim Wooner	NM POTASH	Hobbs, NM
N.T. Kelbuhn	Mitchell Energy	Santa Fe
Elizabeth A. Harris	Phillips Pet. Co.	Odessa Tx
Q. Lucee	Yates Pet	Artesia
DAVE BONCAU	YATES PETROLEUM	ARTESIA

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 NOS. 10446,
10447, 10448,
10449

APPLICATION FOR REHEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: William R. LeMay, Chairman
Gary Carlson, Commissioner
Bill Weiss, Commissioner
Florene Davidson, Senior Staff Specialist

November 10, 1993

Santa Fe, New Mexico

This matter came on for hearing before the
Oil Conservation Commission on November 10, 1993, at
Morgan Hall, State Land Office Building, 310 Old Santa
Fe Trail, Santa Fe, New Mexico, before Deborah O'Bine,
RPR, Certified Court Reporter No. 63, for the State of
New Mexico.

ORIGINAL

A P P E A R A N C E S

FOR THE DIVISION: ROBERT G. STOVALL, ESQ.
General Counsel
Oil Conservation Commission
State Land Office Building
310 Old Santa Fe Trail
Santa Fe, New Mexico 87501

FOR YATES PETROLEUM COMPANY: LOSEE, CARSON, HAAS & CARROLL
P.O. Drawer 239
Artesia, New Mexico 88210-0239
BY: ERNEST L. CARROLL, ESQ.

FOR NEW MEXICO POTASH CORPORATION: KEMP, SMITH, DUNCAN & HAMMOND,
P.C.
P.O. Drawer 2800
El Paso, Texas 79999
BY: CHARLES C. HIGH, JR., ESQ.

1 CHAIRMAN LeMAY: We shall now call Cases
2 Nos. 10446, 10447, 10448, and 10449.

3 MR. STOVALL: These are applications of
4 Yates Petroleum Company for authority to drill in the
5 potash area. These cases are styled for this purpose
6 the applications for rehearing of cases 10446, 10447,
7 10448 and 10449 for oral argument before the
8 Commission on Motion for Rehearing filed by New Mexico
9 Potash.

10 CHAIRMAN LeMAY: Okay. I think at this
11 point we shall call for appearances in these cases.
12 Since the oral arguments will be presented by
13 attorneys, I'd just like the record of those that wish
14 to present oral arguments today.

15 MR. HIGH: Charlie High for New Mexico
16 Potash.

17 CHAIRMAN LeMAY: Thank you, Mr. High.

18 MR. CARROLL: Ernest Carroll for Yates
19 Petroleum.

20 CHAIRMAN LeMAY: Thank you, Mr. Carroll.
21 Are there any other appearances here today
22 to present oral arguments? If not, I think we shall
23 begin then.

24 MR. STOVALL: Mr. Chairman, maybe it would
25 be useful to kind of, since this is a rather unique

1 proceeding at this point, New Mexico Potash has filed
2 motions for rehearing in these cases and raised some
3 specific arguments, objections to the orders that were
4 entered by the Commission.

5 What the Commission has determined to do is
6 give the attorneys this opportunity to raise specific
7 objections to the order with reference to the record
8 that has been made in this case, and then based upon
9 that, the Commission can make a determination if
10 additional evidence is necessary or if it wishes to
11 review the record and amend or do anything else with
12 its order.

13 Based upon that, because these are the
14 motions of New Mexico Potash, it's my recommendation
15 that New Mexico Potash go forward and make its
16 argument, and then allow Yates to respond to that
17 argument, the context being that New Mexico Potash
18 presumably would say that finding such-and-such is not
19 supported by the record, and here are the points in
20 the record, the places in the record that that would
21 be a problem.

22 Mr. High, you're shaking your head?

23 MR. HIGH: We have no intention of doing
24 that this morning. We would bore this Commission to
25 tears, and we have no intentions of doing that.

1 I think our application for rehearing sets
2 forth in five details the objections we have to the
3 Order, which parts and why. And I don't, unless I'm
4 asked to, I'm not going to go one, two, three through
5 all that again. I would simply be repeating what I
6 have in those documents for the Commission.

7 I have some things I'd like to say to the
8 Commission, but I assure you, I don't want to sit here
9 and conduct an evidence class on the record in that
10 case just so these people can hear again what they've
11 already heard, unless they want me to do that, and I
12 don't think they do.

13 CHAIRMAN LeMAY: We have your written
14 objections to the order. I think this is, as I
15 understand it, we've not held this kind of forum
16 before, so in a sense it's kind of open, but rather
17 than hear two weeks of additional testimony, we'd like
18 to give you all a chance one more time to tell us what
19 you'd like to tell us. And if you want to tell us
20 something different, then point by point we're hear to
21 listen to you, Mr. High. So I think it's basically
22 whatever you'd like to say to the Commission.

23 MR. HIGH: Okay.

24 MR. STOVALL: And I guess my intent, Mr.
25 High, was that -- that is true, and it was to give you

1 the opportunity to amplify, if you will. So that's
2 fine if that's the --

3 MR. HIGH: All right. Just proceed now, or
4 do you want to continue explaining what --

5 MR. STOVALL: I think it's pretty clear at
6 this point, unless anybody has any questions. It is a
7 new process.

8 MR. CARROLL: Please, I came only prepared
9 to respond to Mr. High. I do not have a planned
10 presentation based on the record because I was a
11 little unsure what was going to transpire so that is
12 my sole purpose here is to listen to Mr. High and make
13 any comments that I feel are necessary.

14 CHAIRMAN LeMAY: I think in terms of the
15 Commission, we'd like to hear one more time what you
16 all would like to say to us before we looked at the
17 record and before we looked at the order. So this is
18 really a forum for you all to tell us what you want to
19 tell us. And we'll begin with you, Mr. High.

20 MR. HIGH: Thank you, Mr. LeMay. As I
21 said, I did not come prepared to wade through each
22 objection. We have the order. I think I've set that
23 out in our application for rehearing. And I don't
24 want to go through in that finite detail.

25 I will answer any questions you may have,

1 but there are a number of things I do want to say to
2 the Commission.

3 In our closing argument, we set forth our
4 position based upon the evidence that was presented.
5 That's a part of the transcript, and I think the
6 Commission can read that. They can read Yates'
7 closing arguments. And you can see pretty well what
8 our contentions are in this case and what we believed
9 at that time what the evidence showed.

10 What I do want to suggest to the Commission
11 is that in reading the order, one thing is painfully
12 obvious to the potash industry, and that is that this
13 Commission either does not have the expertise or
14 misunderstood the evidence in this case, both of which
15 could be entirely correct. There are so many factual
16 errors of uncontested fact in that order that we are
17 somewhat taken back by whether or not this Commission
18 in fact sat down and truly studied the evidence in
19 this case, the most notable one being Section 5.

20 Throughout the order, there are issues and
21 findings made, both findings of fact and conclusions
22 of law based upon the fact that Section 35 is federal
23 land. It's not. It's state land. So it's hard to
24 argue the law and the facts when you have those kinds
25 of errors throughout the order.

1 We were also taken back a little bit by the
2 conclusion of this Commission on what the State Land
3 Office has authority to do. That's an issue that will
4 obviously be resolved by the courts. What this
5 Commission has in effect done is said, "We're changing
6 the rules on you, guys, and we're applying them
7 retroactively."

8 And the best example of that is Section
9 35. Throughout the order, this Commission said that
10 the BLM established an LMR in Section 35 and because
11 of that, this, this and this. The BLM didn't do
12 that. The State Land Office did. And if this
13 Commission will apply R-111-P with respect to the
14 establishment of an LMR in Section 2 exactly as it did
15 in Section 35 and then have the courage to take
16 R-111-P and apply it to the facts of this case, this
17 case is easily decided because it was the State Land
18 Office that set up that LMR in Section 35.

19 They didn't issue any proclamations. They
20 didn't issue any reports. They didn't do anything.
21 They accepted the fact that under R-111-P as it's
22 drafted and intended, and whether you agree with the
23 concept currently or not, at the time the concept was
24 that the potash lessee would designate the LMR, and
25 that if the oil and gas people wanted information

1 about that LMR, they would ask either the State Land
2 Office or the BLM to verify that in fact the data
3 available to them supported the LMR.

4 Now, if you assume that happened with
5 respect to Section 35, then why do it differently with
6 Section 2? If you're going to change the rules when
7 you're establishing an LMR in Section 35 from the way
8 you do in Section 2, you're going to have to give some
9 notice to somebody. You can't change them overnight
10 behind the scenes and not tell anybody. In the
11 evidence in this case, if you recall, we subpoenaed
12 Mr. Prando and had him testify about all of these
13 because we knew it would be at issue.

14 He testified that the State Land Office has
15 no standards. Yes, they did change the rules, but
16 they didn't tell anybody.

17 Now, that's not right. And this Commission
18 approved that kind of state agency operation. And
19 that is not fair. It is not constitutional. It is
20 not legal, because if you're going to change the
21 rules, people may not like them, but at least they
22 ought to have the right to be informed of them and
23 have an opportunity to comment on them. We weren't
24 given that right. And there are a lot of findings of
25 fact and conclusions that spring off of the conclusion

1 with respect to the authority of the State Land Office
2 in this decision.

3 All of those we suggest need to be looked
4 at again, and if the State Land Office wants to change
5 its rules, that is perfectly okay, but don't do it
6 retroactively at a time somebody can't comply with.
7 Do them prospectively.

8 With respect to the burden of proof in this
9 case, there are a number of findings of fact and
10 conclusions of law again that are based upon who has
11 the burden of proof. And under R-111-P, that burden
12 of proof, at least arguably, and I don't really
13 contest the issue, but the burden of proof under
14 R-111-P depends at least in part on whether or not
15 potash is present somewhere. And the findings in this
16 order carry that thinking forward.

17 And this Commission found that there's no
18 potash in Section 2, no commercial deposits of potash
19 in Section 2. And let me suggest to you that you may
20 review the evidence and reach that conclusion again.
21 I don't believe that any fair-minded, unbiased person
22 can look at the evidence in this case and reach that
23 conclusion. You heard testimony from the New Mexico
24 Potash people as to the grades of potash they're
25 mining. It is lower than what's in Section 2.

1 You heard testimony from Bob Lane who's
2 been working down there for 42 years. You heard
3 testimony from Walt Case who runs the operation that
4 they can mine that ore in Section 2. You heard
5 testimony from the chief mine engineer from New Mexico
6 Potash that, yes, not only can we mine it, we intend
7 to do so. You heard testimony from Niles Grosvenor,
8 an expert witness. You heard just overwhelming
9 evidence about the existence of commercial grade
10 potash in Section 2.

11 You even have a map prepared by Leo Lammers
12 presented by Yates that shows commercial grade potash
13 in Section 2, and yet you conclude that there's no
14 commercial grade potash in Section 2. That flies so
15 strongly in the face of the evidence that it can't
16 possibly have been intended. The evidence in this
17 case simply does not support that, nor can those
18 findings that spring from that be supported because if
19 there's potash down there, then the burden is on Yates
20 to prove that there will not be -- by clear and
21 convincing evidence that there will not be an undue
22 waste of potash in that area.

23 So it's hard to argue again what the law is
24 or shouldn't be when you have those kinds of findings
25 that we submit are simply not supported by the

1 evidence.

2 The Commission also concluded that the LMR
3 in Section 2 was based upon one corehole. Again,
4 there's simply no one that testified to that. No
5 one. You heard Bob Lane, and his testimony was clear,
6 he's the one who did it. He's the one that extended
7 the LMR into Section 2. He explained the triangular
8 method that he used, how you go from one corehole to
9 the next.

10 Niles Grosvenor explained the tame thing.
11 Tony Herell from the BLM explained the same thing on
12 how you use three coreholes within a mile and a half
13 of each other to come up with extensions of ore. And
14 yet this Commission concludes it's based on one
15 corehole. That is so wrong that it can't possibly
16 have been intended.

17 The Commission also didn't address a number
18 of things that we submit it is required by law to
19 address. The first is directional drilling. There
20 was no finding in this order anywhere. In fact, the
21 only time I could even find the word used was on the
22 technical committee that was established. Why didn't
23 this Commission find whether or not Yates could or
24 could not economically drill these wells by
25 directional wells? Why didn't this Commission say,

1 "If the wells are not drilled directionally, this
2 much potash will be wasted"?

3 That number compares to whatever the cost
4 is of a directional well. Why wasn't there any
5 analysis between the cost of directional drilling and
6 the waste of potash? That's what this Commission is
7 set up to decide. Will there be an undue waste of
8 potash or not?

9 Before you can make that conclusion, you
10 have to look at the alternatives. Directional
11 drilling is one of them. We presented evidence that
12 the additional cost, and this is disputed by Yates,
13 but, nonetheless, there's evidence in the record, it
14 requires some analysis by this Commission, that the
15 additional cost of drilling one of these wells
16 directionally was something in the neighborhood of
17 \$130,000 or \$140,000.

18 No comment at all by this Commission on
19 that evidence. We submit that there has to be and is
20 required to be under the Oil and Gas Act before any
21 decision in this case can be made.

22 There's no conclusion or finding in these
23 orders with respect to whether or not these wells will
24 or will not constitute a hazard. We want this
25 Commission to say yes or no because the future of

1 miners depends on it. If this Commission is willing
2 to say "These wells will not constitute a hazard to
3 mining," then say it and put it in writing so we can
4 tell our miners that people in Santa Fe said these
5 will not create a hazard.

6 That issue is skirted. No one wants to
7 take it by the horns and look it straight in the
8 eyeball and say yes or no. This Commission has that
9 obligation by law to say it will or will not be a
10 hazard to mining. And to do that, the evidence is in
11 the record. You heard Dr. Mitchell testify about the
12 probabilities of gas being outside these wells.

13 You heard Yates' witnesses. You have their
14 version. You have ours. Somebody has got to take
15 that, look at it, make some decisions, and then have
16 the willingness to put it on paper and say these will
17 or will not be a hazard to mining so we can tell our
18 people.

19 There's also a finding in the order that it
20 could be 30 to 50 years before New Mexico Potash would
21 mine this ore. Again, there's no evidence to support
22 that.

23 You heard the testimony from all of the
24 people who in the mining business, at least, testify
25 that their own mine plans now indicate that it will be

1 anywhere from eight to ten years before we're mining
2 in Section 2. I don't know where the OCC came up with
3 testimony from anyone with any knowledge that it will
4 be 30 to 50 years.

5 As far as the technical committee that's
6 set up, I understand and appreciate the thought behind
7 that. We don't want to do that. We've done that
8 once. We did that at the request of this very
9 Division, the OCD, and we spent a whole lot of time,
10 money, and effort not with just one operator We did it
11 with a whole lot of operators. That's where the
12 industry agreement came from. That's where R-111-P
13 came from. There's no sense repeating that same
14 effort. There has been no new evidence presented
15 during the eight or nine days or however long it took
16 to present this case, there's no new evidence
17 presented that we didn't know about back in '86 and
18 '87 when we sat down with a number of people from the
19 oil and gas industry, including Yates, to discuss the
20 very things that you guys asked us to look at again.

21 It will serve no useful purpose for us to
22 sit down with Yates and address those issues. That's
23 why we're here. We are here because we couldn't sit
24 down with Yates and iron out these decisions.
25 Somebody has to be the decision maker, the referee,

1 the umpire, and that's why we're here. If we could
2 have worked out an agreement with Yates, we would have
3 done so a long time ago, and we wouldn't have come up
4 here.

5 So we don't want to sit down with them with
6 a single operator and decide all of the complex,
7 technical issues that this Commission asked us to look
8 at because, quite frankly, we don't have the
9 resources. We don't have people who are dedicated
10 solely to resolving all of those issues you are
11 requesting. We've got a business to run, and we can't
12 do that. If we had to do that in every instance in
13 which an oil and gas operator filed an APD, we would
14 have full-time people doing all that kind of work.

15 We did it one time back in '86 and '87
16 because it was a joint industry effort. Everybody was
17 doing it. Everyone said, "Let's pause here and sit
18 down and see if we can't come up with a better way of
19 doing things." And we did that. And that's where the
20 industry agreement came from.

21 And, again, part of our problem sitting
22 down with Yates, quite frankly, is we did that once.
23 We reached an agreement with them, they signed it, and
24 now they've reneged. We don't want to reach any more
25 agreements with Yates because we know for an out and

1 out fact, they will not keep their promises. They
2 signed that industry agreement. They had a person on
3 the Small committee that wrote it and signed it, and
4 now they've reneged on it. And you want us to sit
5 down with them again and talk to them and try to come
6 up with an agreement? We don't trust Yates. They
7 have proven to us they are not worthy of our trust.

8 And this Commission ought to be as outraged
9 as we are that they are flaunting R-111-P and the
10 industry agreement. And why you're not outraged, I
11 don't know. You may not agree with the current
12 provisions of R-111-P, there are some of them that we
13 don't agree with, but it's the law. You adopted it,
14 and it's there. And it's your obligation to apply it
15 whether you like it or not. If you don't like it,
16 then that's something we'll talk about down the road,
17 but with respect to the facts of this case, R-111-P,
18 good, bad, or indifferent, is the law.

19 Yates needs to recognize that. We need to
20 recognize it. And this Commission needs to recognize
21 it. You take it. You don't bend it. You don't blind
22 it. You don't discolor it. You apply it as it exists
23 now. If it needs to be changed, that's for the
24 future, if you don't do it retroactively, as some of
25 these findings do.

1 We will be glad to provide additional
2 briefs, additional written arguments. We'll answer
3 any specific questions the OCC has. We suggest and
4 recommend -- and I'm not being critical of the lack of
5 expertise of this Commission because we are painfully
6 aware that it's not called the Potash Commission.
7 It's the Oil and Gas Commission or Oil Conservation
8 Commission. There's never been any position in the
9 OCC or the OCD that demanded mining expertise. The
10 same is true in the State Land Office. We acknowledge
11 that.

12 In fact, we even accept part of the
13 responsibility for not insisting the state government
14 fund a position that has some mining expertise.

15 What we suggest the OCC do in this case is
16 not listen to further argument from us. I submit to
17 you that you people can probably predict our position
18 on virtually any issue that you want to think of in
19 this case. You can probably predict Yates' position
20 on any of them. But let me suggest to you that due to
21 the importance of this case and the technical issues
22 involved and the expertise that's needed to properly
23 address those issues, that this Commission seek
24 outside consultants to help it in this case.

25 Now, I don't know where you're going to get

1 them, but you don't want to hire any witnesses that
2 testified here, but I submit to you that New Mexico
3 Tech down in Socorro has some fine faculty people who
4 have some mining expertise, have some petroleum
5 expertise.

6 I'm sure there's people elsewhere. There's
7 a New Mexico state mine inspector. The Energy &
8 Minerals Department has some people with a little bit
9 of mining experience, no heavy duty mining engineers,
10 but I would ask this Commission not to go it alone.
11 Get help in those areas where you need it. And surely
12 somewhere out there, if it requires some funding, that
13 some funds can be found for some technical advice on
14 the issues in this case. They are too important.
15 They are too complex for us to just go boldly forward
16 and decide them without really, really looking at the
17 evidence, taking time to read it, to study it, to
18 analyze it, and then apply current scientific
19 principles to it. Wherever you have to get that
20 expertise, let me urge you to do so.

21 Thank you very much.

22 CHAIRMAN LeMAY: Thank you, Mr. High.

23 Would you care to answer any questions we
24 might have?

25 MR. HIGH: I'll answer any questions you

1 have, Mr. LeMay.

2 CHAIRMAN LeMAY: Thank you. Let me start,
3 Commissioner Carlson, any questions of Mr. High?

4 COMMISSIONER CARLSON: Mr. High, are you
5 saying that this Commission doesn't have the power or
6 authority to interpret R-111-P?

7 MR. HIGH: I am not. I am not. R-111-P,
8 as we set the ground rules at the outset, is not under
9 attack in this proceeding. It is not being challenged
10 directly. It is not being challenged collaterally.
11 Those were Mr. LeMay's exact words, as I recall. It
12 is not at issue in this case.

13 Whether it should be amended, should be
14 changed, is good or bad, is not at issue in this
15 case. In this particular case, this Commission has an
16 obligation under law to take R-111-P as it exists
17 currently and apply it to the facts of this case.

18 COMMISSIONER CARLSON: Right. And in doing
19 that, the Commission has to interpret R-111-P?

20 MR. HIGH: That may be correct. I don't
21 dispute that at all.

22 COMMISSIONER CARLSON: You mentioned
23 several findings that are directly contrary to R-111-P
24 in this Commission's order. Could you specify what
25 findings those are that you feel are contrary to

1 R-111-P?

2 MR. HIGH: The State Land Office. There is
3 nothing in R-111-P that was intended or that does set
4 up the State Land Office as a reservoir of expertise
5 to decide whether or not an LMR line is correctly or
6 incorrectly drawn.

7 The way R-111-P was set up, the way it was
8 presented and the way it was adopted is this -- and
9 I'll tell you that the addition of the State Land
10 Office was a last-minute afterthought. It was the BLM
11 for a long time because the BLM was the place where
12 all of the information was filed, all of the data, the
13 raw data was filed on what grade of potash could
14 someone mine, what grades were shown by the coreholes
15 in the area. So the oil and gas people wanted some
16 way to make sure that when a potash company drew a
17 line and said, "This is our LMR" -- let me back up.

18 Before the area was blue, it was
19 protected. LMR shrunk that down and made us draw a
20 line on what we considered to be ore we could mine
21 with current day technology. To make sure that line
22 was drawn in the area where it should be drawn, we set
23 up a referee, so to speak, the BLM. They've got all
24 of the raw data to know what particular grade of ore
25 is at certain points. Not only that, what's the

1 mine's cut-off grade, what can they mine and what they
2 can't, because what the oil and gas people didn't want
3 is for a mine to say, "Here's our LMR," and the cutoff
4 is, let's say, 8 percent ore, and the lowest grade the
5 mine -- the lowest grade of ore the mine can mine is
6 10 percent. What the oil and gas people didn't want
7 is an LMR that had a cut-off grade lower than what the
8 mine was capable of mining.

9 So we said, "All right, here's what we'll
10 do. We'll put in a provision that says that if an oil
11 and gas operator wants to find out, make sure that the
12 mining people are not pulling a fast one on them, you
13 will have access to the BLM -- because they have the
14 same data we have in terms of what we can mine, what
15 we can't mine, what grade of ore is, they have that
16 data -- so you can call them." And the BLM agreed to
17 do this. "That the BLM will verify to you that the
18 mining people are not pulling a fast one, and that the
19 LMR line is in fact drawn in an area that contains ore
20 that they can mine." That's the way it was set up.

21 The state people said, "Well, we want in on
22 that process." We said, "Fine. We don't have a
23 problem with that."

24 But they were set up only to verify that
25 the data that they have available to them, because

1 they have data that's not available to the oil and gas
2 people -- the State Land Office was set up so that
3 they could say, "Okay. Here's what the mine operator
4 can mine. Here is what the confidential ore
5 information showed with respect to the grades that's
6 out there," and to verify the oil and gas people, yes,
7 it's properly drawn. There was never even the
8 suggestion that the State Land Office would become a
9 decider of LMR's. Never ever in anyone's imagination
10 was that even thought of.

11 And I assure you, we wouldn't have agreed
12 to it then, nor would we agree to it now. You don't
13 have the people to decide the issue. You don't have
14 any mining people.

15 COMMISSIONER CARLSON: Are you saying the
16 BLM can be a decider but the Land Office can't?

17 MR. HIGH: No. The BLM has to be a decider
18 because the BLM, again, they participated all along.
19 The BLM's position was this. "You guys," being the
20 oil and gas people and potash, "can make your
21 agreements with respect to where you can mine, where
22 you can't mine, where you can drill and where you
23 cannot. We will do what we can to respect those, but
24 bear in mind," as the BLM guy, Fran Cherry, told us,
25 "bear in mind that we have a statutory obligation to

1 protect natural resources, including potash."

2 So there may be instances in which the BLM
3 will say, "No, you can't drill here because there's
4 potash there" to an oil and gas person, even though
5 it's not in an LMR.

6 And the example the BLM used is this.
7 There may be areas that are not leased for potash that
8 contain commercial grade potash. The BLM said, "We're
9 not going to let those be drilled out and that potash
10 wasted. That's in violation of our statutory
11 obligation to protect those resources." So, in some
12 instances, the BLM said, "We can't honor your
13 agreement."

14 If we get into a dispute, and this is
15 written right into R-111-P -- if the BLM says to a
16 mine operator, "The LMR line is drawn. You've got it
17 in the wrong place." We say, "No, we disagree with
18 you." There is a procedure to resolve that because
19 any disputes between a potash or potassium lessee and
20 the BLM is subject to the hearing procedure set forth
21 in the Code of Federal Regulations, I forget now, 43
22 CFR. In fact, even the citation is in R-111-P.

23 Any dispute between a potash lessee and the
24 BLM, whether it's over an LMR, whether it's over
25 anything to deal with the lease, is subject to the

1 hearing and appeal process set forth in 43 CFR.

2 There's no such animal for the State Land
3 Office, none.

4 COMMISSIONER CARLSON: But there's
5 certainly avenues for anybody to appeal a decision of
6 the Commissioner of Public Lands.

7 MR. HIGH: Well, you mean up to the Board
8 of Trustees or whatever? I'm not sure what it's
9 called.

10 COMMISSIONER CARLSON: I assume it would be
11 directed to district court.

12 MR. HIGH: No, I don't think so. No, I
13 don't think -- I think an appeal from the decision of
14 the State Land Commissioner goes to the -- what's the
15 board called, Mr. Losee?

16 MR. STOVALL: The advisory board, Mr. High,
17 is that what you're thinking of?

18 MR. HIGH: Whatever the board is. I'm not
19 sure.

20 MR. LOSEE: I think it's the district
21 court, Charlie.

22 COMMISSIONER CARLSON: Anyway, that's not
23 really an issue here. Are you familiar with the
24 constitutional provision that gives the State Land
25 Commissioner care, custody, and control of the public

1 lands in the state?

2 MR. HIGH: Yes, but it's not unlimited.

3 COMMISSIONER CARLSON: Where is it limited?

4 MR. HIGH: Just because the State Land
5 Commissioner has that constitutional duty doesn't mean
6 it can be exercised in district R. The constitutional
7 rights of the people are also subject to that
8 constitution. The State Land Commissioner has
9 constitutional duties, but people in the State of New
10 Mexico have constitutional protections.

11 COMMISSIONER CARLSON: Oh, sure, I'm not
12 questioning that. My question is, is there any other
13 body or any other entity that has care, custody, and
14 control of state lands in New Mexico, including this
15 Commission?

16 MR. HIGH: I don't know the answer to
17 that. I'm not questioning the authority of the State
18 Land Commissioner. I don't know the answer to that
19 question.

20 From a constitutional source, Mr. Carlson,
21 I don't know the answer to that. I know that under
22 the Oil and Gas Act, this Commission and the Oil
23 Conservation Division has a statutory duty. It's not
24 a constitutional duty but a statutory duty to protect
25 and prevent the waste of potash, as well as its

1 petroleum resources, but I don't know if anyone else
2 has a constitutional responsibility.

3 COMMISSIONER CARLSON: But you're saying
4 that the Land Office is obligated to accept an LMR
5 without questioning it. I don't know where that
6 authority comes from. Because R-111-P does not give
7 them authority to question it?

8 MR. HIGH: R-111-P does not give them that
9 right, that's correct.

10 COMMISSIONER CARLSON: It doesn't deny them
11 that right, does it?

12 MR. HIGH: Well, not in so many words. It
13 wasn't intended either way because the thought process
14 was very clear as to how it would work, and it may
15 have been wrong at the time. The oil and gas people
16 were looking for some way to make sure the mining
17 people didn't pull a fast one in drawing an LMR line.
18 That's why it was set up this way.

19 That procedure may now be unacceptable to
20 some people. It may be archaic. That's the best we
21 could come up with at the time. If the State Land
22 Office or anybody else wants to change it, then that's
23 an issue for the future. It's not something that we
24 are saying that can be done not only in this
25 proceeding but then applied retroactively to affect

1 these APD's. And that's exactly what this Commission
2 did.

3 COMMISSIONER CARLSON: Well, Mr. High, I
4 certainly -- the other way to look at it is this
5 Commission interpreted R-111-P and said, yes, the Land
6 Office does have authority to reject the LMR's.

7 MR. HIGH: You can maintain that position,
8 and I promise you, the courts will resolve it because
9 there is no evidence to suggest that. There is no
10 evidence to support it. There is not even any
11 legislative history, if you want to call it that.
12 That was never intended by anyone. And you've never
13 heard anyone present in evidence in this case that
14 that was ever the intent or the slightest even passing
15 thought to have it happen. No one. No one supports
16 that position until we saw it in writing from this
17 Commission in this decision.

18 And if you decide that's what you're going
19 to do, if you decide that's what you're going to do,
20 and you may feel like you have a constitutional
21 responsibility to do that -- I don't know what your
22 thinking is on that, but if you decide that's what
23 you're going to do, all we're saying is, we're big
24 boys, we can live with that, but we're entitled to
25 notice so we can have some input and make arguments to

1 you and try to convince you that's not true and maybe
2 even alter our other positions because that will, I
3 promise you -- that will have an enormous impact on
4 other aspects of R-111-P, an enormous impact.

5 COMMISSIONER CARLSON: You're arguing that
6 the BLM has authority to accept or reject an LMR; is
7 that correct, because of their statutory
8 responsibilities, but the Land Commissioner does not
9 even though he's got a constitutional responsibility?

10 MR. HIGH: Well, I'm just telling you the
11 arguments that were made during the process of coming
12 up with the industry agreement. BLM was very vocal in
13 terms of their statutory responsibilities. While they
14 wanted to see the two industries come up with some
15 kind of a mutually agreeable process, that they
16 reminded us that they do have a statutory
17 responsibility to carry out, one of which is to
18 protect potash. Even if we both get together and say,
19 "We want to waste this potash," they said there may
20 be times when they have to say no.

21 So they said that they'll go along as best
22 they could, but they couldn't just say, carte blanche,
23 "We're never going to say that everything you guys
24 want to do is okay."

25 Now, that's about as far as it went. We

1 didn't have the type detailed and pointed discussion
2 you and I are having here on this particular point
3 because, quite frankly, I don't know if it just didn't
4 occur to people or it wasn't an issue -- and I'll also
5 tell you that State Land Office was just getting into
6 the picture.

7 Bear in mind that before that industry
8 committee was set up by the OCD, the State Land Office
9 played absolutely no role in these issues. I'm not
10 even sure they knew what the issues were.

11 COMMISSIONER CARLSON: Why is that?

12 MR. HIGH: They had never had a reason to
13 be involved. I don't know. I have no idea. They had
14 never been involved in this. It had always been the
15 BLM.

16 And I can guess that part of the reasoning
17 is that the BLM has always had mining expertise. They
18 have people whose business it is to have mining
19 knowledge because they deal with those issues. The
20 State Land Office has never had people like that. So
21 I assume that over the years, they have relied upon
22 the BLM for their mining expertise and just didn't
23 develop their own in-house. I don't know. I'm
24 guessing.

25 But the State Land Office until the joint

1 industry committee came up never got involved in
2 this. Only at that time did they sit in -- in fact,
3 they made very clear, as did the BLM, that we are not
4 here in an official capacity. In fact, Mr. Szabo is
5 the one who sat in on most of them, along with Fran
6 Cherry from the BLM. Both of them said very clearly
7 and made it very clear to us, "We are not here in an
8 official capacity. We are here as facilitators. We
9 want to advise you and help you and hopefully come up
10 with a mutually agreeable solution" because I promise
11 you, the feelings at the time were running high enough
12 that everyone in the state wanted a resolution.

13 It's one of those things where people said,
14 we don't care what happens, just give us some relief.
15 And they were there to help guide that process, and
16 they made, I think, a great contribution, but in terms
17 of detailing their involvement and what they would do
18 and what they wouldn't do, it never became an issue
19 beyond what I've described to you.

20 COMMISSIONER CARLSON: That's all I have.

21 CHAIRMAN LeMAY: Thank you, Mr. Carlson.

22 Commissioner Weiss?

23 COMMISSIONER WEISS: I have no questions.

24 CHAIRMAN LeMAY: Just to clarify something
25 you said, Mr. High, did you say that, assuming we did

1 not do anything with setting up the technical
2 committee, that New Mexico Potash would not
3 participate, or you just felt it would serve no useful
4 purpose, and you would rather not participate?

5 MR. HIGH: I don't want to make any carte
6 blanche statements, Mr. LeMay. We've tried over here
7 to be as cooperative as we can. And let me answer
8 this way. Number one, we don't have the resources.
9 We don't have the people that we can assign to do all
10 the stuff that you said to do in there.

11 That is an enormous undertaking. Where in
12 the world are we going to get the resources or the
13 people to drill wells alongside oil and gas wells to
14 see if there's methane on the outside of the casing?
15 We don't have the money to do that. Yates is not
16 going to pay for it. They don't want to know what's
17 out there. I don't blame them. If I were them, I
18 wouldn't pay for it. Their position is it's better
19 not knowing what's out there. So who's going to pay
20 for that?

21 Who's going to pay for studying the cost of
22 directional drilling? We can go out and get bids and
23 that kind of stuff. I just don't know how we would do
24 what you outline in that order. We don't have the
25 number of people we can assign to that full time. Our

1 technical department has three people. They've got
2 mining responsibilities. We run a fairly lean staff.

3 So, number one, we don't know where we
4 would get the resources, the people power to do what
5 you say. We don't know how long it would take, how we
6 would fund that. And, number three, as I said a
7 minute ago, I don't know that it would be beneficial.
8 We reached one agreement with Yates, and they signed
9 it, and now they've reneged on it. Now, why should we
10 jump at the chance to sit down with them again?

11 CHAIRMAN LeMAY: Just point of
12 clarification, this is called a technical committee,
13 not an industry committee. We didn't anticipate
14 having lawyers on it.

15 MR. HIGH: Oh, I wouldn't be on it. Don't
16 misunderstand.

17 CHAIRMAN LeMAY: So I don't think we'd want
18 to hear arguments again with this committee, but I
19 thought the collective judgment might be that this
20 Commission needed additional information to reach
21 certain conclusions. If that information was not
22 available, we'd have to acquire it some way. Whether
23 the resources were available by two industries to
24 supply that or two companies may be open to question,
25 but the fact that this Commission might deem it

1 necessary to have this kind of information raises the
2 issue, how do we get it.

3 And you're telling me, I guess, that you
4 can't supply it, that you don't have the resources to
5 supply it, and that we don't need it anyways or --

6 MR. HIGH: No, no, I'm not saying that at
7 all. If this Commission wants additional information,
8 we will be johnny-on-the-spot to give it to you, but
9 it ought to come from here and not by people sent out
10 in the field.

11 CHAIRMAN LeMAY: You say "here." What do
12 you mean "here"?

13 MR. HIGH: In this hearing. The decision
14 in this case needs to be based upon the evidence
15 admitted in this case, not what you go out and learn
16 from somebody else. The record evidence in this case
17 is what will drive this decision. If fact (A) is
18 admitted into evidence here, that controls this
19 decision even if you were aware of fact (B). If you
20 want to reopen the record and take evidence on fact
21 (B), that's okay, but you've got to decide this case
22 based upon the record evidence because that's what
23 we're going to appeal on. That's the record for
24 purposes of appeal.

25 So your decision has to be based upon --

1 and I don't want to preempt your own counsel -- but
2 it's got to be based upon the evidence in this case.
3 So if you're looking to this technical committee for
4 additional factual evidence, then what we need to do
5 is for you to tell us what you need. Then let us
6 develop it, and we'll come back here and present it
7 through witnesses so we all know what it is.

8 I, quite frankly, don't want you going out
9 privately getting evidence or facts from Yates. They
10 don't want you coming to us and getting private,
11 unknown evidence from the potash people. They don't
12 want that. We don't either. I don't want to speak
13 for them, but I've got a pretty good idea what Mr.
14 Carroll would say about that.

15 CHAIRMAN LeMAY: Do you view an interim
16 order as an appealable order or a final order?

17 MR. HIGH: Probably not. I don't think we
18 can appeal it to the courts, no.

19 CHAIRMAN LeMAY: We were exploring other
20 avenues based on the fact that a technical committee
21 wouldn't necessarily resolve the issues here but was
22 another avenue for possible cooperation between New
23 Mexico Potash.

24 I mean, we have the legal forum here
25 basically, but that doesn't exclude other types of

1 conflict resolution or solutions to problems. As
2 you've mentioned, Mr. High, we've had this problem
3 since R-111-A. And I don't -- maybe you can answer
4 this. Did you visualize the industry agreement of
5 '86, '87 being a final solution to a problem or as an
6 interim solution? You were involved in that process.

7 MR. HIGH: I was, and I don't, quite
8 frankly, think that anything is so final that it can't
9 be tinkered with. If we need to do that to encourage
10 a greater participation and cooperation among the two
11 industries, we're not opposed to that. But we don't
12 think that ought to be the driving factor in the
13 decision in this case.

14 R-111-P should decide this case whether we
15 like it or not. And if we want to change R-111-P to
16 make it better for both sides, then that's something
17 that ought to come out of this case, not something
18 that decides this case.

19 We will cooperate with this Commission and
20 with the Division and with the oil and gas industry in
21 trying to resolve any disputes they have, but we don't
22 want to have things applied retroactively. R-111-P
23 was the ground rules when these facts started
24 developing. And right, wrong, or indifferent, it
25 ought to govern what happens. And if you want to set

1 up another committee through this technical committee
2 or whatever it is, whether it's with Yates or someone
3 else, to take another look at these things, we will
4 participate right along with that. We will not stand
5 aside and not cooperate with this Commission or this
6 Division.

7 If the Commission decides to do that, to
8 set up another committee or whatever it is, we don't
9 think it ought to be limited to one potash mine and
10 one oil and gas operator because they may come to some
11 resolution, and that doesn't solve anything for the
12 future. The next thing you know, we'll have IMC
13 Fertilizer and Bass or somebody else with a dispute.
14 What are we going to do then, reinvent the wheel?

15 If we're going to have any types of
16 technical committees, they ought to be broad enough so
17 that we get some benefit out of them. And that was
18 the very thinking behind the industry agreement in '86
19 is, let's do it in a way that we have enough
20 widespread participation that, by golly, we don't have
21 to keep doing it over and over and over. Let's do it
22 in a group effort where we get as large a consensus as
23 we can that this is the way we're going to handle
24 these problems so that we don't have to fight them
25 every time they come up.

1 You don't want, I hope, to appoint a
2 technical committee on every contested APD. We don't
3 want to have to go through that effort because we do
4 that before we ever come to Santa Fe in an informal
5 way. We talk with the oil and gas people. But we
6 don't want that technical committee to become the way
7 these things are resolved in every instance. There
8 ought to be some discussions before it ever gets to
9 the litigation stage. And I thought R-111-P does that
10 now. Maybe that needs to be broadened, I don't know.

11 But, again, I don't think setting up this
12 technical call committee in the hope that some
13 compromise will be arrived at is the way to decide a
14 contested case.

15 R-111-P is a compromise. It reflects the
16 best compromises on both sides that could be
17 accomplished on these very issues, and there is a
18 point beyond which there is simply no more
19 compromising. You've just got to take it and apply it
20 to the facts and arrive at a decision.

21 CHAIRMAN LeMAY: Thank you.

22 Any questions for Mr. High?

23 MR. STOVALL: If I might, Mr. Chairman, I'd
24 like to just ask one on that point is, do you think,
25 Mr. High, that there could be some analysis in

1 specific, if you will, geographic, geologic areas and
2 come up with more precise solutions in a specific area
3 where they might be different from one mine and one
4 oil play to another?

5 MR. HIGH: I'm not sure --

6 MR. STOVALL: Based on technology? I mean
7 based on looking at the specific facts, like where is
8 the potash in an area, where is the oil, how can you
9 get to it in this way that might work for a specific
10 -- say this one, say Section 2, that you'd sit down
11 and say, okay, how can we develop the oil in Section 2
12 and still reserve the commercial potash, where you sit
13 down and look at it, rather than look at it as an
14 R-111-P revision solution, say within the context of
15 this specific area, how can we do that.

16 MR. HIGH: Yes and no, unlike maybe and
17 maybe not; right? Let me tell you the problems that
18 raises, and there's some historical precedent for
19 this.

20 If you recall some years ago, Mississippi
21 Chemical and Bass Enterprises tried to enter into an
22 agreement with respect to drilling wells within
23 Mississippi potash leases. And if you recall, the
24 potash industry opposed that. That was one of the few
25 instances when the potash people split the sheet, so

1 to speak, and took different philosophical approaches.

2 The general feeling of the industry was
3 that no individual potash operator/lessee has a right
4 to sit down and in effect change state law by entering
5 into an agreement with an oil and gas operator that
6 will waste potash. As long as the Oil and Gas Act
7 says that you can't unduly waste commercial deposits
8 of potash, that no two individual companies have the
9 right to enter into an agreement that will override
10 that state law.

11 So the potash industry opposed that
12 individual effort to do that, and we took the position
13 that if -- what we ought to do instead is to have a
14 new law in New Mexico that defines where you can drill
15 and where you can't that in advance decides what is or
16 is not undue waste of potash so that we have better
17 guidelines for both sides and don't resolve it on an
18 individual basis.

19 That's one reason that the joint industry
20 committee came about. And the reason for that is
21 this. We don't want, when oil is \$20 a barrel, we
22 don't want some oil and gas operator having such
23 leverage over a potash operator whose price per ton
24 may be real low.

25 By the same token, when oil is \$10 a

1 barrel, the potash operator ought not to have leverage
2 over the oil and gas people. There ought to be a set
3 of guidelines, there ought to be a law, and that's
4 what we thought R-111-P hopefully would fill -- there
5 ought to be a law that gives each side guidelines on
6 where drilling can and can't take place. There may be
7 some exceptions in there, but as a general rule where
8 drilling can take place so that each time we don't
9 have individual agreements driving where oil and gas
10 will result.

11 So in some instances I guess what you're
12 saying may work. By the way, it's happening now. We
13 get literally hundreds, hundreds of letters each year
14 for oil and gas people wanting to drill here and
15 there. I don't know what the percentage is; I haven't
16 counted them. But I will tell you, more often than
17 not, we respond to those letters saying, we have no
18 objection to that proposed well because it's outside
19 our LMR.

20 So you guys don't even know about those,
21 but there's a lot of negotiation and talking going on
22 now on an individual level that gets -- in fact, we've
23 had some instances where we've told the oil and gas
24 operator, if you will move it 300 feet to the east or
25 west, we won't oppose it, and they've agreed to do

1 that. So there's some of that going on now.

2 CHAIRMAN LeMAY: Any other questions of --
3 Commissioner Carlson?

4 COMMISSIONER CARLSON: Mr. High, you
5 mentioned, you suggested that this Commission consult
6 with an outside expert such as New Mexico Tech.

7 MR. HIGH: Right.

8 COMMISSIONER CARLSON: How would you
9 envision such a consultation occur? Wouldn't that be
10 ex parte if we went to somebody else and gathered
11 their opinion without allowing input from Yates or
12 from New Mexico Potash?

13 MR. HIGH: No, I don't think so, and let me
14 tell you what I would have in mind, and, quite
15 frankly, I think this is done across the country on
16 commissions like this. I don't think it's unusual to
17 have a consultant. But here's the way I would
18 envision it.

19 If this Commission took the record evidence
20 in this case, and had some outside mining people or
21 petroleum people review that evidence and submit to
22 this Commission a report on whatever issues you wanted
23 them to submit a report on, an analysis, a
24 recommendation. They can't decide anything because
25 you have the power to do that, but they can give you

1 recommendations. They can give you analyses, that
2 sort of thing, based upon the record evidence so
3 they're not producing new evidence. They're just
4 giving you their opinions and analysis based upon the
5 analysis of evidence in this case.

6 Those people, once they have arrived at a
7 recommendation, can give you a written report. You
8 can provide that to both sides here and give us an
9 opportunity to comment on it. That's not new
10 evidence. That's just a different mind taking the
11 same stuff and churning it out. That's how I would
12 envision it working.

13 MR. STOVALL: If I might follow up on that
14 procedurally, Commissioner Carlson, if the Commission
15 were to elect to pursue that route, would you then
16 suggest that -- or, rather, my initial suggestion
17 would be, and I'd ask your response to it, that the
18 Commission, or that the parties be asked to specify
19 what are the issues. For example, the presence of
20 commercial grade potash in Section 2 would be one of
21 those issues, I would assume. Another issue might be
22 the effect of mining on the potential potash
23 recovery.

24 Would you not want to be in the position
25 then to select the information from the record that

1 would go to that expert so that it didn't become -- so
2 that you each had your input into it, and in fact you
3 could make sure that all of the appropriate evidence
4 that was in the record and in the record only went to
5 that expert?

6 MR. HIGH: If you wanted us to get that
7 involved in that process, we would be more than glad
8 to, but I would just assume that they would have
9 access to the entire record and go through the entire
10 record, so that they were making recommendations to
11 you based on the entire record, not just selected
12 portions.

13 MR. STOVALL: I guess my question would be,
14 Mr. High, perhaps picking out the parts of the record
15 might not be right but that identifying the issues
16 from a technical standpoint so that a technical mining
17 engineer, if you will, or mining geologist could look
18 at it and know what he was being asked to figure out,
19 because there's a whole lot of stuff that's lawyer
20 stuff in there and a whole lot of stuff that's
21 engineering stuff, and those questions are crossing
22 over. Even if your argument today, how would we
23 identify those questions?

24 MR. HIGH: We would be more than glad to
25 participate to the extent you wanted us to in either

1 identifying those issues, identifying the evidence
2 that relates to those issues.

3 One thing that we would like to do if the
4 Commission chose to take that approach is we would
5 like to recommend to the Commission, for example, say,
6 two names of people with mining knowledge who might be
7 in that role and let you select one of the two.
8 Obviously, they'd want to be people who don't work for
9 us. We wouldn't want you using Yates' petroleum
10 engineer, but we would like to at least make some
11 recommendations on who might have the expertise to
12 address them. And we would be willing to help
13 identify the issues and that sort of stuff to the
14 extent you want us to.

15 We just think very strongly that the issues
16 in this case are so complex that they require some
17 very identifiable expertise that we think may be
18 lacking here on the Commission. And we think that
19 before these issues are decided, that that expertise
20 ought to be sought by this Commission so that we get a
21 decision that is based on current scientific
22 knowledge.

23 MR. STOVALL: In fact, what you would do is
24 suggest that that type of activity be substituted for
25 the technical committee that --

1 MR. HIGH: I think so.

2 MR. STOVALL: I guess "substituted for" is
3 probably as good a term as any.

4 CHAIRMAN LeMAY: Any other questions?

5 COMMISSIONER WEISS: Yes, I have one.

6 CHAIRMAN LeMAY: Commissioner Weiss.

7 COMMISSIONER WEISS: Would that -- if that
8 took place, would it influence your decision on
9 whether to go to district court or not?

10 MR. HIGH: No, sir. Well, maybe I spoke
11 too quickly. We don't know what the decision would
12 be. We don't know if we're going to district court
13 until we see the final decision from this Commission.
14 If you told us right now, we're not going to change
15 anything in here, we would be in district in a minute
16 because this decision is so wrong and so unsupported
17 by the law and the evidence, that we would be there.

18 I don't know what your final decision is
19 going to be; so I really can't tell you whether or not
20 we will pursue it. I will tell you that we are tired
21 of litigating these issues. We thought R-111-P put an
22 end to that, and it did for almost five years. So we
23 would prefer to have an R-111-P-type resolution system
24 so we don't have to litigate these. We don't enjoy
25 spending money on litigation.

1 COMMISSIONER WEISS: Thank you.

2 MR. HIGH: Thank you very much.

3 CHAIRMAN LeMAY: Additional questions?

4 Thank you, Mr. High. I appreciate it.

5 We'll just go on, I think, Mr. Carroll.

6 MR. CARROLL: Thank you, Mr. LeMay.

7 My initial inclination was to take each one
8 of the issues raised by Mr. High and deal with them in
9 the same chronological order so that you could use
10 your notes and keep track of them, but I think the
11 last comments that were being made and exchanges
12 between the Commission and Mr. High scream out for me
13 to deal with this last issue first because we're
14 talking about a very fundamental problem that all
15 administrative boards, agencies, commissions have to
16 deal with. And, frankly, I want to label what Mr.
17 High is suggesting is just one more chance to get a
18 brand new commission, three new fact-finders because
19 he doesn't like the decision rendered thus far.
20 That's what it is. And let's look at why that's what
21 it is.

22 First of all, Mr. High is speaking out of
23 both sides of his mouth. He's counted to you that,
24 look at the BLM. The BLM would have really been the
25 best choice of this because they have all this process

1 of appeals and what have you. And remember the
2 questioning that Mr. Carlson -- the line of
3 questioning that Mr. Carlson took with Mr. High, but
4 there's one thing that was not brought out. That
5 appellate process goes to the IBLA.

6 What's the IBLA? I suggest to you,
7 gentlemen, it's just like the three of you. They are
8 professionals. They are lawyers. They are
9 engineers. That's all they are. And they hear these
10 appeals just like you do. But what do they do? They
11 depend upon the parties to the dispute, those who have
12 most at stake, most at risk, to develop the expertise,
13 to develop the testimony so that it can be presented
14 and then you as fact-finders -- and, believe me, I
15 think the composition of this board is as good as any
16 board that you could ever ask for in the whole United
17 States or the IBLA -- you have the expertise necessary
18 to understand what's going on and what's been
19 presented here.

20 I, without a doubt, take the comments of
21 Mr. High as a slap in your gentlemen's faces when he
22 says, first of all, that you don't have the expertise,
23 and you don't understand.

24 What was this case all about, and what were
25 the ultimate facts that we had to determine? We had

1 to determine in a section way far away from any mining
2 whether or not the geology says there is potash down
3 there and whether or not the engineering says that you
4 can get to it and mine it.

5 Now, gentlemen, you people hear geology
6 testimony, our geologists, hear engineering testimony
7 every day. That's what you're paid for. You know how
8 to judge that kind of testimony. I will suggest to
9 you that the testimony that the potash industry
10 developed was so woefully -- I don't want to say
11 unprepared or what have you, but I think they have
12 been sitting on their laurels for the last 10 or 15
13 years. They had their Bible. They had their story
14 accepted. And they have been closed-minded about it
15 ever since.

16 One statement that I just want to -- I've
17 got to comment on, and this is Mr. High said no new
18 evidence was presented at this hearing. Gentlemen, I
19 want you to stop a minute and remember my closing
20 arguments, and I want you to go back to that record
21 and you read it because I spent a good portion of my
22 argument going over what we would not have known but
23 for this hearing, twenty or more specific examples of
24 where we have had the wool pulled over our eyes.

25 We learned a lot. We've learned what is

1 going on. And, quite frankly, the one major finding
2 that the potash industry can't live with is that
3 finding that this Commission made when it dealt with
4 whether or not there's commercial potash in Section
5 2. And you pointed out the fact that they ignored
6 corehole results, that that they misconstrued and used
7 carnalite in another one. They misled this
8 Commission, and you were smart enough, you had the
9 expertise enough, you had the knowledge enough to know
10 that.

11 I cannot stand here and listen to these
12 kinds of statements that this Commission doesn't know
13 what it's doing. It's our jobs to make sure you know
14 what you're doing. A statement like that is a flat,
15 bald-faced admission, "Commission, I didn't do my
16 job. I want you to hire some experts to do it for
17 me." That's all that is.

18 Let's talk about one other real important
19 concept that goes through this entire debate and
20 hearing and this role of R-111-P and this statement
21 that R-111-P is the law, and we've got to enforce it.
22 You're darned tootin' we've got to, but we're not
23 supposed to misuse it. And I suggest to you that's
24 just exactly what Mr. High is trying to get you to
25 do. He tells you and wants you to believe that

1 R-111-P gives a total carte blanche without any
2 watchdog power on the potash industry to block out
3 areas and say there will never be oil and gas
4 drilling. That's his interpretation.

5 I suggest you go back to two paragraphs in
6 R-111-P, the opening group of paragraphs, first
7 paragraph 12. "The report of the work committee
8 presents a reasonable process for determining where
9 wells for oil and gas would cause waste of potash, and
10 the pertinent portions of said report should be
11 contained in the order as a reasonable process for
12 prohibiting oil and gas drilling in such areas" --
13 now, that's as far as Mr. High wants you to read, but
14 the sentence continues -- "in the absence of
15 substantial evidence that waste of potash as described
16 by the statute would not result."

17 Paragraph 20, and this paragraph flies in
18 the face of the position of Mr. High and New Mexico
19 Potash. 20, "The Commission cannot abdicate its
20 discretion to consider applications to drill as
21 exceptions to its rules and orders, but in the
22 interest of preventing waste of potash, should deny
23 any application to drill in commercial potash areas as
24 recommended in the work committee report unless a
25 clear demonstration is made that commercial potash

1 will not be wasted unduly as a result of drilling the
2 well."

3 Now, what does this tell us? What is the
4 process? Mr. High has really blended over what goes
5 on and how this statute -- excuse me, it's not a
6 statute -- but this rule of the Commission was
7 intended to work. It was intended to work as a
8 preliminary method in which to weed out the more wild
9 cases. It gave a way to cut down on the number of
10 hearings. Let the two industries work it out, but if
11 there is a case where the oil and gas industry really
12 feels like it has a right to contest, and it should be
13 contested, the fact that commercial potash is going to
14 be wasted, that right is preserved by R-111-P. And
15 that's what this Commission heard back in May. You
16 have to determine that because that's what the
17 statutes say you will do.

18 Any delegation of that authority, I would
19 suggest to you, is totally unconstitutional because
20 you don't have that authority. You have the authority
21 to determine if waste. We have brought that issue to
22 the forefront.

23 What Mr. High doesn't want to do is have to
24 get in there and determine and present evidence as to
25 whether or not there's commercial potash. We have

1 shown that based on the available evidence -- and we
2 had to pick and pry to get a lot of this from the
3 potash company -- that Section 2 doesn't contain
4 commercial potash.

5 Now, they want you to say, now, wait a
6 minute, we took a corehole that's about this big, and
7 in this corehole we've got a grade of potash that
8 we're mining over here.

9 Wait a minute. This Commission doesn't buy
10 that because they didn't buy it when they handed down
11 these orders.

12 What is commercial potash? Commercial
13 potash is mineralization, mineralization of a
14 sufficient grade, mineralization of a sufficient
15 thickness, mineralization covering a sufficient aerial
16 extent, mineralization that is accessible to mining,
17 and it is all of these kinds of mineralization that is
18 sufficient to warrant the investment of the money to
19 go in and mine it.

20 New Mexico potash -- and this was the whole
21 point of the finding -- never proves that. We
22 challenged it. We put on evidence. And the evidence
23 that the New Mexico Potash put on to disprove our
24 evidence, this Commission blew holes in their
25 findings. It was not truthful. It was not fair. And

1 it did not prove that all of Section 2 contained
2 commercial potash.

3 I suggest you read Mr. High's request for
4 rehearing because many, many times when he's refuting
5 statements or referring to statements made by Yates'
6 experts, he drops some very necessary words. We quit
7 talking about commercial potash and we talk about
8 mineralization. Well, there's mineralization all over
9 that area, outside and inside of the KPLA, but that's
10 not the kind of mineralization we're worried about.
11 But then again, the statute doesn't tell us that we
12 have to prevent all waste. Mr. High reads that
13 language into it, and I direct your attention back to
14 the statute because it says "undue waste."

15 Now, if you don't have and you haven't
16 proven that there's commercial, commercial potash,
17 then there's no way you can have the undue waste of
18 commercial potash.

19 Keep the potash industry honest is what
20 we're asking. Make sure they keep the horse ahead of
21 the cart. Every time when you look at the arguments,
22 potash keeps wanting to put the cart ahead of the
23 horse. They want you to assume that there is mineral
24 commercial potash out there. And why do they want you
25 to assume it? Because New Mexico Potash unilaterally

1 without any watchdog said this is an LMR. Take it for
2 granted, folks.

3 Well, if you had taken it for granted, you
4 wouldn't have known about the coreholes that they
5 ignored. You wouldn't have known about the coreholes
6 that they misconstrued. You wouldn't have known about
7 other evidence that they didn't take into account.
8 That's the problem of giving unilateral power. And
9 that's the problem our legislature set up to take care
10 of with the statutes when it gave the power to this
11 Commission to determine those things.

12 Let's talk about this problem that Mr. High
13 spent a lot of time about the State Land Office, what
14 it did or did not do. First of all, this Commission
15 can't control the State Land Office. It can't tell
16 the Commission through R-111-P what it's going to do.
17 It has no authority.

18 The State Land Office can frankly do as it
19 chooses. This Commission cannot be concerned with
20 what it does or what it does not, but let me suggest
21 to you that whole argument really is moot, and it's
22 just because of what I just went through a moment
23 ago. We are not dealing with that part of R-111-P
24 which sets up the procedure for just, maybe if you
25 want to call it administratively handling these

1 requests for drilling and what have you. We're
2 outside of that. We're outside of where the State
3 Land Office determines or not determines because we're
4 now on the side of R-111-P with this Commission
5 deciding whether or not there should be an exception
6 to R-111-P, whether or not there's going to be the
7 undue waste of potash.

8 We've really gotten out of that problem.
9 That problem has been answered for you because we're
10 now over here in this other area of your legislative
11 duties, and that's to determine whether or not waste
12 is going to occur.

13 Mr. High has made awfully broad-brushed
14 statements that no fair person can reach the same
15 decision that this Commission has reached. That
16 statement is unwarranted. This Commission heard
17 conflicting evidence, and then it heard evidence as to
18 why the evidence of the potash companies should not be
19 given the full credit that Mr. High thinks it should
20 be.

21 There was undoubtedly substantial evidence,
22 and that's the test to take the position that this
23 Commission took. That evidence came in the form of
24 independent interpretations, and it also came not only
25 in the contradiction and the pointing out of where the

1 geological testimony offered by New Mexico Potash was
2 just flat incorrect and did not follow the norms of
3 the industry, and then where it gave false
4 interpretations to coreholes or ignored coreholes all
5 together.

6 I can tell you, in my experience, that
7 determination process and thought process commended by
8 this Commission is going to stand muster of any court
9 in the land because no court in the land is going to
10 replace your thought processes. It's just going to
11 look to see if there's good evidence there. And,
12 frankly, there is a tremendous amount of evidence
13 there to support this Commission's position.

14 Mr. High's response to that has always been
15 ignore the evidence of the other side. Theirs doesn't
16 count because we're potash. This gets back to the
17 same old problem where Mr. High is saying, you don't
18 have the expertise. Balderdash. You do have the
19 expertise. You do have geology. You did have the
20 opportunity to hear experts such as Leo Lammers, who
21 has explored not only for oil and gas but for potash,
22 give you his interpretation of what was out there,
23 using all of the available data.

24 I would suggest to you, don't put on the
25 blinders Mr. High has prepared for you. Blinders,

1 again, he's gone into the findings -- first of all, he
2 says your finding was about 30 to 50 years before this
3 potash will be mined. Mr. High just didn't read
4 that finding of fact. What you stated in the entire
5 finding was that when you were determining whether or
6 not there would be any oil and gas value left or value
7 to the oil and gas after 30 to 50 years that it would
8 take for potash to get in there and get out so that
9 mining could occur, that's your finding. And that was
10 the evidence. And your finding was the oil and gas
11 would be worthless. You did just exactly what Mr.
12 High said you didn't do. It's just because he chose
13 not to read it correctly.

14 He doesn't like the technical committee.
15 I've already talked about this one with respect, in a
16 sense, that his comment that we didn't learn anything
17 new. Gentlemen, I suggest to you that this entire
18 argument about, don't expect any new facts to come
19 out. We can't trust Yates. They're low-lives. They
20 renege on agreements. Do you know what that really
21 is, gentlemen? That's just a threat to you. That's a
22 threat that said, we're going to call names, and we're
23 going to publicly disparage this whole process and try
24 to embarrass you into giving them their way. They're
25 trying to discredit the whole deal.

1 Well, I would, first of all, suggest that
2 Mr. High has taken an unreasonable interpretation of
3 R-111-P. I agree, that's what I would want if I were
4 Potash. But you cannot refute paragraph 12, paragraph
5 20 of R-111-P, gentlemen, and that controls.

6 It does not say what Mr. Charlie High has
7 been telling you R-111-P says. It does not give carte
8 blanche authority to the potash companies to do as
9 they please without any watchdog over them. And I
10 suggest to you that is the most unconstitutional
11 delegation of power and confiscatory taking that man
12 has known.

13 What I would also suggest to you is that
14 Mr. High cannot stand any more technical committees.
15 They cannot stand any more hearings. And why is
16 that? Right now if we adopt his position and we give
17 into his argument, we're saying, "Mr. High, you're
18 right. Potash companies have a right to unilaterally
19 say this, unilaterally stop all oil and gas
20 development."

21 Would you want -- what have you got to
22 gain? You're sitting on top of the world, gentlemen.
23 You're sitting on that tower, the pinnacle. There is
24 no place to go up from there. Wouldn't you be a
25 little hesitant to come down?

1 Well, frankly, they got to the pinnacle by
2 their own bootstraps. They have unilaterally
3 interpreted R-111-P, and they've gotten away with it,
4 and I suggest to you, I know exactly how they got away
5 with it. It's just about the little scenario that he
6 described when Mississippi Chemical tried to deal with
7 Bass. "Don't you dare get out of line, Mississippi
8 Chemical. We're going to force you back into line,
9 and you're going to do as the rest of the industry
10 says."

11 I agree with Mr. High. His troops are in
12 line. And that's the problem, and that's why we
13 haven't been able to work with potash is because
14 they're on that pinnacle. They put themselves there,
15 and they're not going to come down voluntarily. You,
16 the Commission, is going to have to enforce what the
17 intent and the meaning of the Commission was.
18 Remember, you said in this thing that we got this
19 committee report, but we don't buy it totally. We
20 cannot abdicate our legislatively decreed
21 responsibilities. Thank goodness for that. You were
22 out there protecting the rest of us. But, by golly,
23 that's what you did. And, by golly, you were right.

24 Mr. High, I guarantee you, is never going
25 to come off of this because they have no incentive

1 to. And that's why I suggest to you another reason,
2 another technical -- when you sit out for another
3 fact-finding -- wait a minute, it's time to draw the
4 line. We've got to divvy up now. Let's empty our
5 pockets and put them on the table. We've got to do
6 that, or we're going to be headed for disaster because
7 we've thrown away all of the authority that belongs to
8 the government here to protect all of the people of
9 this state, all of our correlative rights, no matter
10 whether they're potash or oil and gas.

11 We've learned through this hearing process,
12 and, remember -- I want to draw your attention to the
13 fact that we did not get full disclosure. We've never
14 gotten it. We fought over the subpoenas until it just
15 wasn't worth fighting over. We just went out and got
16 our own evidence. Remember, that was the testimony.

17 We learned that there are wells in these
18 potash companies, and we have reason to believe
19 there's more evidence out there, gentlemen. That's
20 the biggest fear that potash has of this committee
21 that has been set up in the order.

22 Now, frankly, and I'll tell you the
23 position of Yates, they think the Commission should
24 have granted our applications, and there should not
25 have been any further need for the committee because

1 we developed the evidence, but we're not opposed to it
2 under the way the Commission did it because we know
3 and we are confident that all that's going to come out
4 is the truth. And there's only one group that has to
5 fear the truth, and that's potash because it just
6 isn't so what they have been preaching for the last 20
7 years. We have shown that time after time after time.

8 But I would suggest to you that if Potash
9 kicks and screams about it, then there is no need for
10 this committee. Just grant the applications. That's
11 what should be done because you have sufficient
12 evidence to do that, and that's what your duty is,
13 because they had the opportunity, they knew what was
14 going on, they had their experts, they presented them,
15 but every time their experts testified, they always
16 held a little back. They didn't deal with the whole
17 problem. They twisted the evidence.

18 And, furthermore, when it came time to be
19 able to cross-examine those, they withheld discovery
20 so that we could properly cross-examine, though I
21 think we did an admirable job with what we had. And
22 with the expertise of our experts sitting there
23 helping us, we exposed time after time the flaws in
24 Potash reasoning.

25 I hope I have answered the questions that

1 the Commission might have in their mind after Mr.
2 High's talk here before you. I dealt with some of the
3 issues a little bit out of order, and I don't know if
4 I completely covered all of the issues that I wanted
5 to. But just as a last word, this Commission did its
6 job. It defined what the material facts or the
7 material issues were. And while we went on for eight
8 or nine days of testimony, I think this Commission did
9 a very admirable job of getting back -- I mean,
10 there's a foundation somewhere. There is always the
11 foundation. You have to start somewhere, and that's
12 what the law and the courts that have looked at your
13 decisions say, "Determine what the material issues are
14 here."

15 And that one material issue was, are we
16 really talking about commercial potash out here in
17 Section 2? And that's what this Commission directed
18 its findings toward. And it found it wasn't. You
19 don't get to all these other problems unless you first
20 have that one found in your favor. And that's what
21 you decided. Your reasoning process was right. You
22 found then ultimate facts to support your decision
23 with respect to that issue. I think you did your
24 job. I think this motion for rehearing should be
25 totally denied. Thank you.

1 CHAIRMAN LeMAY: Thank you, Mr. Carroll.

2 Commissioner Carlson, any questions?

3 COMMISSIONER CARLSON: Were you quoting
4 from R-111-P there when you were defining commercial
5 deposits of potash?

6 MR. CARROLL: No, sir. That is my
7 interpretation of the statutes and all of --

8 COMMISSIONER CARLSON: You don't have a
9 cite for that?

10 MR. CARROLL: I do not have a specific cite
11 other than the statutes which define what commercial
12 potash -- and, frankly, I was using some of the
13 statements by the Commission, and it just -- I think
14 it was also what the experts developed for you, all of
15 the experts developed for you in this hearing. It's
16 not commercial -- and, remember, that's the areas that
17 every one of the experts dealt with: quality,
18 thickness, aerial extent, accessibility, and such that
19 it would justify the cost. And we heard, remember,
20 all that testimony about the cost of opening up and
21 getting down to whether you go from an existing
22 tunnel, can you get it back to the haulage ways, to
23 the surface and what have you. No one has done that
24 job in a court case that I could find with respect to
25 potash.

1 Now, I think there are plenty of court
2 cases that talk with the word "commercial." And,
3 again, it's the same theories. I think this is a
4 common sense definition that was developed here for
5 you by the experts, and it also finds foundation
6 within our statutes that talk about potash.

7 And when they use the term "commercial,"
8 what is "commercial"? You just have to define what
9 "commercial" is. "Commercial" is something that is
10 for a profit. You use this term in the oil and gas
11 industry. Is this well, is it commercial production?
12 Does it return a profit? Well, if it returns a
13 profit, you have to look at all of the components in
14 it.

15 Now, if we were talking about -- and, quite
16 frankly, just like you do in the oil and gas industry,
17 you look at whether it's a commercial well, if you've
18 already got the well and the well is pumping or if
19 you're looking at drilling a new well and whether or
20 not you should go out there and force someone to
21 further develop the lease. Understand that, and that
22 gives us good training for here, because this is not
23 potash which has a mine on it. It is potash that is
24 miles from the nearest entryway and the nearest
25 diggings and all of the attendant problems with

1 getting down there.

2 So, again, I think I have summarized the
3 key elements from all of those sources.

4 COMMISSIONER CARLSON: That's all I have.

5 CHAIRMAN LeMAY: Thank you. Commissioner
6 Weiss?

7 COMMISSIONER WEISS: I have no questions.

8 CHAIRMAN LeMAY: Mr. Carroll, maybe one
9 question. Again, you had a statute about preventing
10 undue waste. Do you have a definition for "due
11 waste"?

12 MR. CARROLL: Well, I haven't thought about
13 it in that sense. I have adopted the Commission -- I
14 think the Commission used in its order "unnecessary,"
15 something that you have to weigh it against your
16 return. What do you seek to lose; what do you seek to
17 gain.

18 And in this particular sense, and if you
19 remember the testimony, we're talking about pillars
20 around these oil and gas wells at best because we had
21 lots of testimony, as soon as that well is plugged,
22 you can mine right through it. No waste. There's no
23 unnecessary waste in that case. And when you start
24 looking just solely at the pillars, then you weigh
25 that amount against totally stopping development of

1 oil and gas.

2 But let me suggest one thing that, again,
3 let's don't get the cart ahead of the horse. You
4 didn't do that in your initial order. You got to
5 determine if there's potash down there, commercially,
6 aerial extent to justify mining. We never even got
7 there. I mean none of the incidents there were
8 talking about it. We never got to the point of where
9 the drilling and how much of the potash is actually
10 going to be affected. We never got over the hurdle
11 that there's commercial potash in a big enough
12 extent.

13 And that's not a total distinction, but I
14 want you to understand that that's the process that
15 needs to go into our definition. What are we looking
16 at? Are we looking again at a mine? Are we sitting
17 there trying to drill right next to a mine, or are we
18 looking at something that's just a dream in somebody's
19 eyes about mining.

20 That's the two processes, and that's the
21 only reason I asked it.

22 CHAIRMAN LeMAY: I just have one other
23 question. Would Yates be interested whether there's
24 commercial potash under Section 2 if there wasn't a
25 good Delaware play offsetting Section 2, in part of

1 Section 2 developed in the Delaware?

2 MR. CARROLL: I don't know that I fully
3 understand. If there were no --

4 CHAIRMAN LeMAY: If the Delaware play
5 wasn't there, if there were some dry holes around and
6 you didn't have a Delaware prospect, would Yates be
7 interested in whether there's commercial potash under
8 Section 2?

9 MR. CARROLL: If we had no intent to ever
10 drill there, we wouldn't have ever looked at the
11 area. Yates is not -- at least, in the potash
12 industry we do have or have tried to buy -- well, I
13 take that back. Years ago Yates did own potash
14 leases. They have been out of the business of owning
15 potash leases until recently. They have looked at it
16 as a stand-alone-type operation, yes, but as to
17 Section 2, I don't think Yates ever had the reason to
18 look at Section 2 other than as an oil and gas
19 prospect.

20 And I'm not sure if I'm answering your
21 question. I just haven't really grasped maybe where
22 it's going, but there would be no reason to drill
23 unless we thought there was oil and gas there.

24 CHAIRMAN LeMAY: I guess maybe trying to
25 phrase it another way, would you question whether

1 there's commercial potash in Section 2 or not if you
2 didn't want to drill there?

3 MR. CARROLL: With the evidence that we
4 have now, yes, we would still question it, based on
5 the experience that we have done because we have now
6 evaluated potash prospects and bought potash leases.
7 Prior to that time, I don't know that anyone within
8 Yates really thought that.

9 And the reason I can stand here and tell
10 you yes, we would contest it, is because I think Yates
11 stands firmly behind the testimony of Leo Lammers.
12 Mr. Lammers was an exploration geologist for potash,
13 I've forgotten, Arco or one of the big, major oil
14 companies that was looking into potash development.
15 His decision and his statement is this -- and its
16 unqualified. If you're asking me for a representation
17 of my evidence as if we have tried to butter it up
18 just because we're fighting potash, let me tell you
19 unequivocally, no. That testimony stands, and we
20 stand behind it because we put experts who knew what
21 they were talking about in the mill to develop that,
22 and we stand behind that to the end.

23 CHAIRMAN LeMAY: If you didn't have a
24 drilling prospect -- let me phrase it another way --
25 would it be an issue with Yates?

1 MR. CARROLL: Well, if we didn't --

2 CHAIRMAN LeMAY: If you didn't have a
3 drilling prospect in Section 2, would the --

4 MR. CARROLL: It would be an issue if we
5 owned a lease there, Mr. LeMay. It would always be an
6 issue if we owned the lease because we've expended
7 money and we -- you know, while we may not have -- and
8 you have to understand that this Delaware play, that
9 acreage has been there for years. Dagger Draw is one
10 of the biggest examples. Yates bought that after a
11 number of companies flat gave up on it, and now it's
12 one of the premier oil-producing areas in the state of
13 New Mexico because the Yates family had a little bit
14 of fortitude and wildcatting instinct and belief in
15 what they think and their experts and people and spent
16 the money and risked it.

17 And so what I'm saying is, if they bought
18 acreage, they're going to look at it. They're going
19 to protect it because what we know today may change
20 totally, and that may become a prime prospect for some
21 other kind of area. And, yes, we're going to protect
22 it. We're going to make the same kind of decision.

23 CHAIRMAN LeMAY: If Yates did not own the
24 lease, would it be an issue?

25 MR. CARROLL: Well, if it's something we

1 don't own, it would -- well, I think it has become an
2 issue for Yates. Yates has on its own spent a
3 tremendous amount of money in this area trying to
4 develop knowledge which, quite frankly, the knowledge
5 which we've developed in this case and the other
6 potash case, the Noranda and Snyder Ranch case, every
7 oil and gas company is benefiting.

8 We did it, and we spent a lot of money
9 which we don't know that we'll ever get back in
10 developing the facts. We didn't know what the facts
11 were, but we went out and developed them. I think
12 that in itself answers the question that you've just
13 posed. They have already shown that interest. They
14 have already put hundreds of thousands of dollars into
15 this battle to find out the truth.

16 And, frankly, they have shown to the world
17 what was going on. And, frankly, there weren't a lot
18 of oil companies out there that wanted to risk the
19 money like Yates did.

20 So, again, I feel quite confident in saying
21 yes, Yates is interested, no matter what, in that
22 area.

23 CHAIRMAN LeMAY: That's the only question I
24 have.

25 Anything else?

1 MR. CARROLL: Thank you.

2 CHAIRMAN LeMAY: Thank you, Mr. Carroll.

3 Anything else in the rehearing, Mr. High?

4 MR. HIGH: I'd like to respond. Since Mr.
5 Carroll got so personal with me, I'd like to respond
6 if I may.

7 CHAIRMAN LeMAY: Sure.

8 MR. HIGH: I'm not going to stand here and
9 defend myself. It is not necessary --

10 MR. CARROLL: Mr. Chairman --

11 MR. HIGH: Excuse me. I didn't interrupt
12 you.

13 MR. CARROLL: I just wanted to have one
14 clarification.

15 CHAIRMAN LeMAY: Yes.

16 MR. CARROLL: One, I'm not sure that a
17 response is really appropriate in this case. And if
18 he responds, do I get a response?

19 CHAIRMAN LeMAY: Yes.

20 MR. CARROLL: I think that's a never-ending
21 dead line. And, quite frankly, I would ask the
22 Chairman to direct one comment to Mr. High in this
23 business about personal. I didn't cast the first
24 stone. He is the one that said Yates won't live up to
25 these things. And, frankly, he asked for it. I had

1 not intended to say those things until he made those
2 comments. And I would just ask that we dispense with
3 that. We've had enough of it.

4 CHAIRMAN LeMAY: I think we're all grown
5 adults, and I just want to give Mr. High the chance to
6 respond, I hope briefly, and the same with you, Mr.
7 Carroll, if you have something to say. This is a
8 rehearing. We want you to say, get in the record what
9 you want to get in the record. And that's the reason
10 for it.

11 MR. HIGH: Thank you, Mr. LeMay. Let me
12 just say, and I'll be brief --

13 COMMISSIONER CARLSON: Could we take a
14 little break?

15 CHAIRMAN LeMAY: Sure.

16 COMMISSIONER CARLSON: Five, ten minutes,
17 and then we'll give you, Mr. High --

18 CHAIRMAN LeMAY: Okay. Let's take a break.

19 (A recess was taken.)

20 CHAIRMAN LeMAY: We'll continue on the
21 rehearing. Mr. High.

22 MR. HIGH: Thank you, Mr. LeMay. Just a
23 few brief points. One of the concepts underlying
24 R-111-P that I want to again speak to is that in
25 mining, we make decisions based upon an expectation

1 that our reserves will be there, and we have made the
2 decision at New Mexico Potash based on the assumption
3 that the ore in Section 2 will be available to mine.

4 And that was the entire concept behind the
5 life of mine reserves is to allow a mine to protect
6 that ore, its assets, to justify the expenditures made
7 over time. And each time we encounter a situation
8 like this where someone tries to chip away at those
9 resources, it retroactively complicates our life
10 because we made investments based on the assumption
11 that that ore would be there. That's why we're here.

12 Mr. Carroll said he has learned a lot of
13 times for the first time during these hearings.
14 That's true. He hasn't been involved in it before. I
15 wish he had been involved back in 1986 when we went
16 through with everyone. Then he would see that we saw
17 nothing new in this proceeding that we didn't see in
18 that effort back in '86 and '87 or that we have seen,
19 quite frankly, in other potash cases that we have
20 tried before this Commission.

21 I don't think we'd even be here, quite
22 frankly, if the Livingston Ridge finding hadn't been
23 made. R-111-P seemed to work okay until Livingston
24 Ridge, and then all of a sudden R-111-P was no longer
25 acceptable. I think, at least in my judgment, that's

1 the driving force behind this whole thing.

2 Mr. Carroll said I have dropped words and
3 didn't read things correctly to you. Let me say to
4 you now that I have not intentionally tried to misled
5 you, and I hope I have not. On anything I have said
6 or submitted to this Commission, let me encourage you
7 to read it and reread it and see if I in fact have
8 dropped anything or read it incorrectly, and I will
9 suggest to you that I did not. And I encourage you to
10 read it and double-check.

11 As far as the use of outside experts, let
12 me tell you why I believe that is a good procedure.
13 If you took the evidence we presented in this case
14 from our experts, your decision would be clearly in
15 our favor. If you ignored all of that and took the
16 evidence presented by Yates, your evidence would be in
17 their favor. If you want to just take that and look
18 at it, fine. I think if you had someone else to give
19 you their judgment call on that, it would be
20 beneficial.

21 Our experts, quite clearly, told you that
22 there's potash in Section 2, which wasn't news to us.
23 We have owned the lease in Section 2 at New Mexico
24 Potash since 1965. It was even leased before then.
25 It wasn't leased because there's no potash out there.

1 It was leased because everyone thought there was
2 potash out there. You heard our experts say the same
3 thing.

4 Maybe you ought to get someone else to see
5 what they say. You're still going to make the final
6 decision, and I'm not suggesting for one second that
7 you have someone else making decisions for you, but
8 any guidance you can get from the outside I think will
9 be helpful.

10 Finally, with respect to questions Mr.
11 Carlson asked on commercial potash, let me just say
12 that we tried in the industry agreement, and it was
13 carried through in R-111-P to define the potash that
14 we were talking about. What potash was it that the
15 mining people could protect, and what potash could the
16 oil and gas people drill in, and we defined that in
17 the industry agreement. We didn't try to hide
18 anything from anybody. We defined it in the industry
19 agreement, and it was adopted in R-111-P. So the
20 potash that we are trying to protect is defined in
21 R-111-P. We don't have to rely upon Mr. Carroll's
22 definition or anybody else. It's defined right here
23 in the agreement. We came to that agreement with the
24 oil and gas people. That's all we're trying to
25 protect.

1 Thank you very much.

2 CHAIRMAN LeMAY: Thank you, Mr. High.

3 Mr. Carroll?

4 MR. CARROLL: One of the concepts that I
5 think that we've heard over and over again today, it
6 goes back to this issue and allegation of Mr. High
7 that you changed the rules on us, that the State Land
8 Office has changed how R-111-P works. And I think
9 this was, again, touched upon when Mr. High said,
10 "Well, in mining you make long-term assumptions, and
11 we have to count on the law being certain ways."

12 Don't be fooled by what Mr. High has said.
13 The State Land Office has not changed anything with
14 respect to R-111-P, nor has this Commission. The
15 Commission interpreted R-111-P as it should have been
16 interpreted, as it was written. The real problem
17 here, which Mr. High will not admit, is that this
18 assumption, this long-range assumption made about
19 R-111-P by the potash company was wrong, and it was
20 totally wrong. It's unsupportable.

21 That assumption was that the potash
22 companies have the right without anyone looking over
23 their shoulder to block off through the use of an LMR
24 areas in the potash enclave and keep it for
25 themselves. That's the assumption that they're trying

1 to sell to you that they have a right to always make.
2 And I suggest to you, that right was never given to
3 them. It's denied them by the statutes because it
4 says the Oil and Gas Commission shall determine
5 whether or not there is an undue waste of commercial
6 potash, the Oil and Gas Commission.

7 I cannot give any credence to the argument
8 that Mr. High is saying that, "Give us some
9 consideration because we made this assumption" when
10 their assumption totally ignored the language in
11 R-111-P which says that this is a process that we will
12 look at. We're not going to agree to accept all of
13 the things that they vote in this agreement because we
14 understand that this Commission has an obligation to
15 determine if a party brings it to our attention and
16 wants to contest whether or not there's commercial
17 potash out there and whether or not it will be unduly
18 wasted, we cannot deny those people that right.
19 That's what Mr. High wants. That's a right you cannot
20 give him. You cannot dictate or give that away.

21 Lastly -- well, not lastly. Mr. High
22 brings up this use of outside experts. Well, let me
23 suggest this to you. Isn't it reasonable that when
24 Yates Petroleum and New Mexico Potash was faced with
25 this upcoming hearing back a year or so ago, that they

1 went out and got the best experts that money can buy?
2 Are we now saying, we need to call in the second
3 string?

4 No. What we're saying is that we don't
5 like the fact-finders' decision, and we want another
6 panel. Let's try again. Let's delay things. And,
7 you know, if we delay things long enough, maybe we'll
8 break Yates and they'll go away. Well, that's not
9 going to happen, ladies and gentlemen, and that's just
10 a further answer to Mr. LeMay's question.

11 Yates is committed to that area. Yates is
12 going to be not only taking care of leases they own
13 today, but they're going to be looking to buy leases
14 out there in the future. That's the nature and that's
15 the business of Yates, and I don't have to
16 prognosticate about what Yates is going to do. You
17 know what Yates is going to do because they're in the
18 business to do that, and they've always done that, and
19 they've bid at every land sale, and they have always
20 been the biggest buyer, and they've been the biggest
21 bidder on federal acreage. They've gone out and
22 bought fee acreage.

23 They're interested in that part of the
24 world. Their livelihood is there. They live there.
25 They work there. And they'll die there. And they're

1 going to take care of the resources down there. They
2 live developing the natural resources of this state,
3 and, quite frankly, so does this state. This state
4 depends on people like Yates Petroleum.

5 The last in closing argument or comments
6 made by Mr. High just totally illustrates the fallacy
7 of the position of New Mexico Potash. They said, in
8 answer to this question about what is commercial
9 potash, they said, wait a minute, we answered that.
10 Everything on the map that's blue is commercial
11 potash. Baloney. You know that's not true. You
12 can't say every lease that the State Land Office is
13 going to put up at the next land sale has got oil and
14 gas under it. It's not true.

15 You start developing evidence, and you work
16 towards that area, and then you spend your money where
17 you think your best thoughts are. And that's the
18 right that was preserved by R-111-P because you cannot
19 give the right to one mineral owner to completely deny
20 another mineral owner the right to develop his
21 property. It's the concept of correlative rights. We
22 live and die by it every day.

23 Everybody has their right to develop what
24 they can get with respect to their minerals. Oil and
25 gas has the same rights as potash. Potash has the

1 same rights as oil and gas. But the Commission said,
2 at least with respect to the best available evidence,
3 you have to give us some indication that we're talking
4 about commercial potash. We've drilled wells right up
5 against and in fact in Section 2. We're talking about
6 offsets to good wells. We're not talking about a mile
7 offset. We're talking about direct next proration
8 unit offsets.

9 We presented our evidence. We showed that
10 you cannot say by drilling one potash corehole in
11 500,000 acres and say this 300,000 is commercial, this
12 200,000 is absolutely not, and this other few acres is
13 a maybe. You don't do that with one potash corehole.

14 That's what they want you to believe that
15 they can do, nor can you do it ignoring what's in
16 other coreholes in the proximity of the one that says
17 you've got something. You've got to look at all the
18 evidence.

19 Gentlemen, we had our shot. We had our
20 best experts up here. They have presented the
21 evidence, and, frankly, you are competent, trained
22 people that are charged with the duty of deciding what
23 that means and interpreting R-111-P. And what you've
24 done is clearly within your power, and you have done
25 and made a correct decision based on the evidence.

1 And we, therefore, respectfully request that you deny
2 this motion for rehearing.

3 CHAIRMAN LeMAY: Mr. High?

4 MR. HIGH: At the risk of provoking Mr.
5 Carroll further, let me just say that one thing that
6 he and I do agree on, and that is as oil and gas
7 leaseholders they have the right to develop their
8 lease. In this particular case, they can do that in a
9 particular well, and that's through directional
10 drilling. There's no reason in the world that these
11 wells cannot be directionally drilled, nor is there
12 any reason why they should not be. He just told you,
13 these are direct offsets, by golly, right next to
14 producing wells. The risk factor has gone away. What
15 better shot of directional drilling will this
16 Commission ever have?

17 Thank you.

18 CHAIRMAN LeMAY: Thank you.

19 Mr. Carroll?

20 MR. CARROLL: Brand new issues but, again,
21 it's the same old theme, putting the cart ahead of the
22 horse. He never proved there's any reason to drill
23 directionally. He's never proved that there was
24 commercial potash to be protected, but directional
25 drilling we know from the evidence is expensive, it

1 increases the risks, and it's unnecessary.

2 Again, this is just another red herring
3 which he's throwing up his hands and saying, "Guys, we
4 didn't do our job, but would you do something for us?
5 We haven't proven the need for it." Cart ahead of the
6 horse. Again, not a valid reason.

7 CHAIRMAN LeMAY: Anything else?

8 MR. HIGH: I won't risk it again.

9 CHAIRMAN LeMAY: Mr. Carlson?

10 We'll take this one under advisement.

11 Thank you very much, gentlemen.

12 MR. HIGH: Thank you.

13 MR. CARROLL: Thank you.

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1 CERTIFICATE OF REPORTER
2

3 STATE OF NEW MEXICO)

4) ss.

5 COUNTY OF SANTA FE)

6 I, Deborah O'Bine, Certified Shorthand
7 Reporter and Notary Public, HEREBY CERTIFY that I
8 caused my notes to be transcribed under my personal
9 supervision, and that the foregoing transcript is a
10 true and accurate record of the proceedings of said
11 hearing.

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

16 WITNESS MY HAND AND SEAL, November 12,
17 1993.

18 
19

DEBORAH O'BINE
CCR No. 63

