

NEW MEXICO OIL CONSERVATION COMMISSION

COMMISSION HEARING

SANTA FE, NEW MEXICOHearing Date MAY 22, 1992 Time: 9:00 A.M.

NAME	REPRESENTING	LOCATION
Charles C. High, Jr. Maurice Trimmer Walter S. Case, Jr. James Bruce Frank L. Carroll N. D. Ketchum NELSON MUNCY DAN MOREHOUSE	New Mexico Potash Byram Co. NMI Potash Hull Law Firm Lore Law Firm Ketchum Ketchum and MYCO IMC FERTILIZER	SF HOBBS Santa Fe Artesia SANTA FE ARTESIA CARLSBAD

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NEW MEXICO OIL CONSERVATION COMMISSION
STATE OF NEW MEXICO
CONSOLIDATED CASE NOS. 10446,
10447, 10448, 10449

IN THE MATTER OF:

The Application of Yates Petroleum Corporation for authorization to drill, Eddy County, New Mexico.

BEFORE:

WILLIAM J. LeMAY, CHAIRMAN
WILLIAM WEISS, COMMISSIONER
GARY CARLSON, COMMISSIONER

State Land Office Building
Morgan Hall
May 22, 1992

TRANSCRIPT OF PROCEEDINGS
VOLUME II

REPORTED BY:

DEBBIE VESTAL
Certified Shorthand Reporter
for the State of New Mexico

COPY

A P P E A R A N C E S

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Page Number

Appearances

2

ORAL ARGUMENTS/STATEMENTS:

By Mr. Carroll

39

By Mr. High

52

By Mr. Bruce

55

By Mr. Kellahin

56

Certificate of Reporter

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1 CHAIRMAN LeMAY: Good morning. This is
2 the Oil Conservation Commission. My name is Bill
3 LeMay. On my right is Commissioner Gary Carlson
4 representing the Commissioner of Public Lands; on
5 my left, Commissioner Bill Weiss. And we welcome
6 you here this morning.

7 We'll begin by calling Case No. 10446.

8 MR. STOVALL: Application of Yates
9 Petroleum Corporation for authorization to drill,
10 Eddy County, New Mexico.

11 Mr. Chairman, I assume the parties are
12 going to want to consolidate the following three
13 cases, which are styled in the same manner
14 because they are the same issues in the same
15 areas, just different wells.

16 MR. CARROLL: That would be the desire
17 of Yates Petroleum, Mr. LeMay.

18 MR. HIGH: We would likewise like to
19 consolidate.

20 CHAIRMAN LeMAY: We'll hear all four
21 cases. Consolidation of Cases 10446, 10447,
22 10448, and 10449, all of which involve
23 applications by Yates Petroleum to drill wells in
24 the potash area of southeast New Mexico.

25 MR. STOVALL: Mr. Chairman, these cases

1 are de novo cases from an order the Examiner
2 entered -- I'm sorry, I don't know what the date
3 of it was, but that order denied two of the
4 permits to drill and granted two of the permits
5 to drill basically on legal arguments at that
6 time. The parties didn't present evidence.

7 The Commission, subsequent to the
8 filing of the applications for de novo hearing,
9 has entered a procedural order in this matter
10 wherein it directs the parties to come to this
11 hearing to discuss first whether the Commission
12 has the authority to grant an exception to Order
13 R-111-P in cases 10446 and 10447. Those were the
14 cases that were denied by the Division based upon
15 the fact that the wells were located in a buffer
16 zone for an existing LMR, an LMR that existed
17 prior to the filing of the applications for a
18 permit to drill.

19 Second procedural and legal question is
20 whether the southwest quarter of Section 2, which
21 is the location of the wells for the other two
22 applications, was within an established LMR at
23 the time the applications to drill were submitted
24 for approval and at the time they were approved
25 by the Division.

1 At the Examiner Hearing the Examiner
2 determined, based upon information provided by
3 the State Land Office, that those two locations
4 were not within an established LMR at the time
5 and therefore could be approved.

6 In addition, there have been numerous
7 subpoenas filed in this matter which have been
8 issued by the Division or the Commission, and I
9 think we need to catalog those, address motions
10 to quash, and put any limitations or
11 restrictions. Of course, these also involve some
12 information which is protected as confidential
13 under Order R-111-P. There may be also other
14 reasons to address those subpoena issues.

15 As a preliminary matter, I'll also
16 state that Yates Petroleum Corporation has filed
17 an amendment to amend Order R-111-P. The
18 Commission has elected not to docket that case at
19 this time. There are ongoing efforts through a
20 committee established by the BLM to address the
21 drilling in the potash area issues and
22 specifically Order R-111-P.

23 I would advise the Commission and the
24 parties that that is not an issue in this case,
25 we'll discuss that because there's no case

1 involved here, and that all decisions in 10446
2 through 10449 need to be made on the basis of
3 R-111-P as it exists today and the facts as they
4 exist today and the information and law at this
5 time. So any amendments are not an issue of
6 discussion before the Commission at this time.

7 And that is the status of this case and
8 the purpose of this hearing. Presumably, we'll
9 set it for an evidentiary hearing after we
10 resolve the procedural issues today.

11 CHAIRMAN LeMAY: I think it's probably
12 appropriate at this time to maybe call for
13 appearances, those who are here representing
14 interests in oil and gas and potash that would
15 like to say something.

16 MR. CARROLL: Mr. LeMay, I am Ernest
17 Carroll of the law firm of Losee, Carson, Haas &
18 Carroll of Artesia, New Mexico. I will be
19 representing Yates Petroleum in all four of the
20 applications today, two of which are our
21 application for de novo and two of which are New
22 Mexico Potash Company.

23 I would also like to note that A. J.
24 Losee will also be appearing with me at most of
25 these proceedings. I got a call this morning

1 about 6:30. He and Randy Patterson of Yates
2 Petroleum are grounded in Artesia. This
3 thunderstorm runs all the way to Artesia, and
4 there was no way that they could get up here.
5 And they apologized. Of course, we're not by any
6 means trying to delay the hearing. That's why I
7 came up by car. We didn't put all our eggs in
8 one basket. Thank you.

9 CHAIRMAN LEMAY: Thank you, Mr.
10 Carroll.

11 MR. HIGH: Good morning. My name is
12 Charlie High. I represent New Mexico Potash
13 Corporation, along with Mr. Clinton Marrs also
14 with our law firm from our Albuquerque office.
15 We both will be counsel to New Mexico Potash in
16 all four cases.

17 CHAIRMAN LEMAY: Thank you, Mr. High.

18 MR. BRUCE: Mr. Chairman, my name is
19 Jim Bruce from the Hinkle law firm representing
20 Pogo Producing Company. Pogo owns leases
21 offsetting Yates' leases and is appearing here
22 today in support of Yates.

23 CHAIRMAN LEMAY: Thank you, Mr. Bruce.

24 MR. KELLAHIN: Mr. Chairman, my name is
25 Tom Kellahin. I'm with the Santa Fe law firm of

1 Kellahin, Kellahin & Aubrey. I'm appearing today
2 on behalf of Bass Enterprises Production
3 Company. We are in a similar position with
4 Pogo. While we do not have an interest in these
5 particular oil spacing units, we have acreage in
6 the immediate vicinity that may be impacted by
7 the decision of this Commission. We are here in
8 support of Yates.

9 CHAIRMAN LeMAY: Thank you, Mr.
10 Kellahin.

11 Additional appearances? Pretty well
12 covers it.

13 Legal proceedings, how do you want to
14 handle it?

15 MR. STOVALL: Well, I think perhaps the
16 first thing we ought to do is to make a list and
17 catalog the items that are before the
18 Commission.

19 In terms of specific motions, first
20 off, there is a motion by New Mexico Potash
21 for the Commission to issue a stay granted in
22 order -- Mr. High, help me with this one. Which
23 case is that, your motion for a stay that is
24 currently the subject of a district court
25 action?

1 MR. HIGH: It involves the Flora No. 1
2 well. I believe it's 10448, if I'm not
3 mistaken.

4 MR. CARROLL: I'm thinking it is -- no,
5 it is 10448. Excuse me. That is correct.

6 MR. STOVALL: And the background of
7 this, as I understand it, is pursuant to the
8 Division order, Yates Petroleum proceeded to
9 drill the well. New Mexico Potash obtained an
10 injunction from the district court in Eddy
11 County.

12 That order, among other things, named
13 the Commission as a -- what's the word?

14 CHAIRMAN LEMAY: Special master is what
15 they call us here.

16 MR. STOVALL: Special master. To
17 determine whether the injunction should have been
18 issued and requires some action by today, or
19 presumably today. And what you're asking at this
20 time, if I'm not mistaken, is for the Commission
21 now to enter a stay to prevent the continued
22 drilling of that well until the legal and factual
23 issues are resolved by the Commission.

24 Is that correct, Mr. High?

25 MR. HIGH: That's correct, Mr.

1 Stovall. We had filed a prior application for a
2 stay, as you mentioned. We found out that Yates
3 was beginning to drill the Flora No. 1 well on
4 Good Friday afternoon, notwithstanding the fact
5 that the OCC had not yet set a hearing.

6 And I talked with Mr. LeMay. I
7 apologized to him then, and I apologize again,
8 but I caught him at the golf course and asked him
9 for an emergency order under Rule 1202 to stop
10 the drilling until this Commission had an
11 opportunity to carry out its statutory obligation
12 to decide whether that well should or should not
13 be allowed.

14 Mr. LeMay could not get in touch with
15 you, as I understand it, therefore could not act
16 or would not act on the request for an emergency
17 order under Rule 1202 until at least Monday.

18 I told him I couldn't wait until Monday
19 because Yates was operating 24 hours a day around
20 the clock and by Monday they would be down to the
21 potash horizons. So we went into district court
22 on Easter Sunday in Carlsbad, got a temporary
23 restraining order that stopped the drilling at
24 861 feet. And that temporary restraining order
25 was returnable two days later -- I'm sorry, three

1 days later, whatever. I don't recall the exact
2 date.

3 But three days later we had a hearing
4 on a temporary injunction. And instead of
5 conducting an evidentiary hearing, Judge Shuler
6 admitted quite frankly he knew very little about
7 potash and oil and gas and that the Commission
8 with its expertise is where this issue ought to
9 be. And I agree with that. This Commission is
10 where that issue ought to be.

11 But, nonetheless, he went ahead and
12 continued that injunction, appointing the
13 Commission as a special master pursuant to the
14 rules of New Mexico to decide the issue so he
15 wouldn't have to get involved. He also specified
16 in that order that the hearing should start by
17 today.

18 Yates has in that proceeding insisted
19 that they have the right to go back in to court
20 and ask for additional relief if the hearing
21 didn't start by today, and Judge Shuler put that
22 in his order.

23 I went ahead and filed an additional
24 application for a stay to get all the issues back
25 before this Commission, because even after we got

1 the injunction, I filed an application for a
2 stay. This Commission, as you know, Mr. Stovall,
3 denied it, saying that the judge had issued an
4 injunction and therefore you didn't want to get
5 involved in it. I think that's wrong.

6 This Commission is the one to whom the
7 state has granted authority to act in these
8 matters, and that's where this issue ought to be
9 resolved.

10 MR. STOVALL: Mr. High, let me
11 interrupt you right here, and let's not argue the
12 state motion at the moment. Let me just explain,
13 my advice to the Commission was that because
14 there was an injunction, we didn't need two
15 documents to prevent the drilling.

16 I think the motion for stay is before
17 the Commission today, and presumably it can act
18 upon that as it sees fit. And then you can go
19 back to Judge Shuler, tell him we had a hearing,
20 and he can decide, based upon what the Commission
21 does, what he wants to do.

22 But I think that the purpose there was
23 the Commission was not advocating jurisdiction,
24 but simply saying the Court has taken care of the
25 matter temporarily. Let's just hold off.

1 Let's go to the next category of
2 issues, if I might, before we get into
3 substance. There are some subpoenas
4 outstanding. What I would request that the
5 parties do is identify the subpoenas that have
6 been issued by the Commission at their request so
7 that we know what we've got on the table.

8 Mr. Carroll, would you like to start
9 that? I think you issued the first one.

10 MR. CARROLL: Certainly. Yates
11 Petroleum has requested and had issued two
12 different subpoenas. The first subpoena that we
13 requested and was issued was directed toward New
14 Mexico Potash requesting core hole data and
15 supporting analyses and what have you. It is
16 exactly the same subpoena that was requested to
17 be issued back prior to the Division hearing.

18 We have also requested a subpoena to be
19 issued for the BLM, Bureau of Land Management,
20 wherein we have requested a fairly large laundry
21 list of various items, items that we feel that
22 they may have in performing their function. They
23 may have collected data.

24 Now, I would also like to advise the
25 Commission that the exact same attachment that

1 was -- or Exhibit A to that subpoena for the BLM,
2 which was basically the laundry list, as I call
3 it, also formed the laundry list for a Freedom of
4 Information request, which was actually submitted
5 prior to the granting of our request of the
6 subpoena.

7 And that Freedom of Information request
8 is being processed. They have, seems like, ten
9 to fifteen days, I've forgot now, in which they
10 have to consider the request. Then they have to
11 respond to it as to whether or not they have the
12 information and whether or not they can release
13 it.

14 We have as of yet not gotten that
15 response. The subpoena was more of a fall-back
16 position. We just didn't know which way to go.
17 We have advised -- I personally talked with
18 Armando Lopez and explained to him we would
19 really rather have it under the Freedom of
20 Information Act. We didn't know what their
21 posture was going to be.

22 And frankly today I still cannot tell
23 this Commission what the BLM's posture is because
24 they are formulating it. And so our position is
25 that we are still going to request that subpoena

1 to be issued. It's the same information and what
2 have you.

3 Those are the two basic subpoenas that
4 we have requested to be issued on behalf of Yates
5 Petroleum.

6 MR. STOVALL: Mr. High, any subpoenas
7 outstanding from New Mexico Potash?

8 MR. HIGH: Yes, sir. We have two
9 outstanding. We issued one subpoena to Yates.
10 Mr. Carroll called me about that. As I
11 understand it, they have no objection to the
12 information that we are seeking. We have not
13 asked them for any proprietary information.

14 We have also issued a subpoena to the
15 BLM, again not for any proprietary information.
16 I have talked with counsel for BLM. And as I
17 understand it, they have no objection to the
18 subpoena we issued to them. So I am unaware of
19 any issue that this Commission has to resolve
20 with respect to subpoenas we have issued.

21 MR. CARROLL: I would, Mr. LeMay,
22 confirm Mr. High's characterization with respect
23 to the subpoena served on Yates Petroleum. I
24 have examined that subpoena. I have already
25 counseled with representatives of Yates

1 Petroleum.

2 In fact, I have all -- part of the
3 requests have already been given to Mr. High in
4 the form of exhibits, which we gave at the
5 Division hearing. I did not ask for those
6 exhibits back, even though we didn't put on the
7 testimony, but they form a lot of it. The rest
8 of them I have in my possession.

9 They are not -- I just need to get them
10 categorized and handed over to Mr. High. But I
11 have reviewed it, and we have no objection to
12 any -- some of the things requested we just don't
13 have. But with respect to what is in our
14 possession or control, we have no objection to
15 turning those items over.

16 MR. STOVALL: So those are nonissues
17 for today's hearing then?

18 MR. CARROLL: No, they are not.

19 MR. STOVALL: Mr. High, what is New
20 Mexico Potash's position with respect to the
21 Yates subpoenas?

22 MR. HIGH: We have filed written
23 objections, Mr. Stovall, with the Commission.
24 What Yates has asked for in their subpoena is all
25 core hole data that we have in ten different

1 sections. They have asked for all complete
2 records of core hole logs and any other
3 information concerning the interpretation of that
4 data or assays of it and economic analysis of
5 that core hole data for Sections 22, 23, 24, 25,
6 26, 27, 34, 35 and 36, and Section 2.

7 MR. STOVALL: Those subpoenas are in
8 the record, so we do have a record of what they
9 are requesting.

10 MR. HIGH: Yes. And we have objected
11 to that. We have provided Yates long ago, even
12 before the last hearing up here, with the core
13 hole data from core hole No. 162. And that is
14 the last core hole drilled. That's the core hole
15 that is within one-half mile of all these wells.

16 MR. STOVALL: I'm trying to catalog
17 these things and not get arguments for the
18 Commission. I'll let them take over that. What
19 about the subpoena to the BLM? Have you
20 responded or reacted at all on that? I don't
21 believe we've gotten anything from the BLM.

22 MR. HIGH: I have not been served a
23 copy of Mr. Carroll's subpoenas. The only
24 subpoena I have seen that Yates has issued is the
25 one he issued New Mexico Potash. He did not send

1 me a copy of the one that he sent to the BLM, nor
2 have we received an inquiry from the BLM under
3 their FOIA request, which we will get that
4 inquiry and get an opportunity to respond to it
5 before that information is released. I've heard
6 nothing from Mr. Carroll or the BLM about that.

7 MR. STOVALL: Are there any other
8 procedural issues to be determined by the
9 Commission?

10 MR. CARROLL: Mr. Stovall, I would
11 point out that, like Mr. High, he did not furnish
12 me a copy with his subpoena to the BLM.

13 MR. STOVALL: We don't need to get into
14 one of these things. I want a list of issues,
15 and let's not have that discussion.

16 MR. CARROLL: Mr. Stovall, what I'm
17 trying to tell you is that because I was not
18 likewise furnished, I may have an issue with
19 respect to that subpoena, but I can't tell you.
20 I'm just ignorant. And I don't know that there
21 is one, but I can't honestly say because I've not
22 had a chance to review it.

23 MR. STOVALL: Any other issues,
24 procedural issues? My inclination, Mr. Chairman,
25 is to suggest that the underlying legal issues

1 may need to be resolved before the subpoena
2 issues become important. They are distinct
3 issues, as I pointed out initially, with respect
4 to Cases 10446 and 10447. Those are within
5 one-half mile of an LMR which has been
6 established for quite some period of time.

7 And the denial was in the form of an
8 administrative summary judgment, if you will,
9 saying that they are within a potash LMR buffer
10 zone and the permit cannot be issued by the
11 Division.

12 Mr. Carroll, am I correct in saying
13 that Yates' position is that with respect to
14 those two cases, an exception to the provisions,
15 the drilling restriction provisions, of R-111-P
16 is sought? Would that be a fair summary of
17 that?

18 MR. CARROLL: I think that's a broad
19 overall view of our position, yes, sir.

20 MR. STOVALL: One of the purposes of
21 your subpoena request, New Mexico Potash and BLM,
22 is to develop evidence that's to contend that
23 there will be no waste of commercial potash, and
24 that's why you're seeking the information?

25 MR. CARROLL: That's why the subpoena

1 is as broad because the definition of waste
2 contained in the statute says commercially
3 minable -- or I may not have the exact wording.
4 But we cannot confine ourselves just to that
5 Section 2 in order to meet that statutory
6 definition.

7 MR. STOVALL: So if the Commission
8 agrees with the Division and determines that
9 there is no provision for an exception to R-111-P
10 with respect to those two wells, then any factual
11 determinations with respect to the
12 commerciability of the potash are moot. There's
13 no point in having evidentiary or discovery,
14 evidentiary-gathering hearing, whatever, and
15 discovery, fact-finding in those cases. It's a
16 legal issue.

17 If the Commission determines that it
18 has the authority to grant an exception to
19 R-111-P, then that would have to be made based on
20 the type of factual information that Yates and
21 New Mexico Potash would present.

22 With respect to the other two cases,
23 10448 and 10449, with your permission, gentlemen,
24 I'll briefly summarize for the record that those
25 applications to drill were filed sometime in late

1 1991. At the time those APDs were filed, there
2 was no LMR, and they were more than one-half mile
3 beyond any existing LMR.

4 Subsequent to the filing of the APDs,
5 and I believe in the case of one well, prior to
6 the filing of an application for hearing by Yates
7 Petroleum, the other case, subsequent to the
8 filing of the application for hearing by Yates
9 Petroleum, New Mexico Potash filed an LMR
10 designation.

11 At the Examiner Hearing there was some
12 discussion about whether the filing of the LMR
13 designation was sufficient to establish an LMR or
14 whether it had to be approved or somehow verified
15 by the State Land Office. The Examiner
16 determined that in order -- well, the order
17 stands. You know what's in the record and the
18 order.

19 The Examiner determined that the LMR
20 was not established and designated until approved
21 by the State Land Office and that it had not been
22 so approved as of the time of that hearing and
23 therefore determined that those applications were
24 approvable, prima facie approvable. And the
25 parties filed no evidence, and therefore those

1 APDs were issued pursuant to that order.

2 I believe the contention of New Mexico
3 Potash is that there is a designation of LMR of
4 record as of the time that the LMR maps were
5 filed with the State Land Office, and therefore
6 those permits would not be issuable.

7 Again, if that were the determination
8 of the Commission, that the effective date of the
9 LMR is when they were filed, then I assume that
10 those cases would be an exception to R-111-P and
11 based upon the same sort of evidentiary basis.

12 And if they are not, if the Commission
13 determines they were not effective as of that
14 time, I would again advise the Commission, as I
15 did the Examiner, that those applications are
16 approvable and they do not require an exception
17 to the rule and the burden would be on New Mexico
18 Potash to show that they should not be approved
19 because they would cause a waste of potash.

20 Is that a reasonably fair
21 characterization in a few words of what went on
22 over five hours in the Examiner Hearing?

23 MR. HIGH: I think it's a reasonable
24 characterization. I don't agree that it's the
25 legal issue that's before the Commission. But I

1 agree it's a fair characterization.

2 MR. CARROLL: Mr. Stovall, I think
3 you've pretty fairly characterized about four or
4 five hours of legal argument. And there may be
5 some -- everybody has their own differing
6 interpretations of those things, but I think it's
7 fair.

8 CHAIRMAN LEMAY: Can I say this?
9 Because we're trying to find out what we're going
10 to decide today, I want to even condense that
11 even further in the statement: Does the
12 Commission have the authority to grant an
13 exception to the buffer zone? I assume that's
14 kind of at the crux of the first order.

15 As a sidelight to that one, because I
16 would certainly interject my opinion, I'm not
17 sure how my fellow commissioners would, but we
18 would not in any way, form, or we would not -- or
19 I would not -- want to entertain any kind of an
20 attack on R-111-P.

21 In the process of looking at these
22 applications, I do not think the R-111-P order
23 should be under attack, and I would continue to
24 rule that way in any kind of discussion. If that
25 particular rule is something that should be

1 addressed, it will be addressed at a future date,
2 but not at these four hearings or these four
3 cases.

4 The other, whether the LMR -- I assume
5 that you want us to judge today on whether -- and
6 I'm not sure we can do this -- whether an
7 official or an effective, whatever you want to
8 call it, an LMR was in place at a critical period
9 of time when applications were filed.

10 Is that a legal argument, or is that
11 something that would take -- that's more
12 evidentiary, isn't it, counsel?

13 MR. STOVALL: Well, I think it's kind
14 of difficult to characterize it. I think, and
15 perhaps one of the parties might make a motion to
16 incorporate the record from the Examiner Hearing,
17 because I think a lot of those arguments have
18 been made there. I think there is a fundamental
19 underlying legal issue in that.

20 I'm concerned about the
21 constitutionality of R-111-P.

22 MR. CARROLL: Mr. LeMay, let me -- I
23 will make the motion that Mr. Stovall just
24 suggested. I will move formally for the
25 Commission to consider in this hearing the

1 testimony that was received during the Division
2 hearing on all four of these cases, and
3 particularly the testimony that was taken from --
4 and it was in camera testimony -- I'm not sure
5 how we're going to do this -- and incorporate the
6 findings that were made by the Division officer
7 on the basis of that testimony with respect to
8 this hearing.

9 Mr. LeMay, I would also like to make a
10 comment. I don't mean to try to -- I understand
11 that you are the chairman and you will decide
12 what issues will be heard, and I respect that in
13 all manner. I do want to raise a dilemma that I
14 see, and it's kind of based on some of the way
15 Mr. Stovall phrased the legal issues just a
16 moment ago of what occurred back at the
17 hearings.

18 I, prior to this hearing at the behest
19 of the procedural order, wherein we were
20 requested to raise any other additional legal
21 issues, I did raise before the 18th the question
22 of considering the issue of amendment and the
23 attack on R-111-P.

24 The reason it's important, Mr.
25 Commissioner, is, one, in the area of the

1 subpoenas. Mr. Stovall very adequately phrased,
2 if we rule this way, we have no issue with
3 respect to the subpoenas. We don't even get into
4 it. But if we rule the other, then there are
5 issues.

6 And Mr. High, based on his response to
7 our subpoena, his major argument against the
8 issuance is the fact that there is this
9 confidentiality created in R-111-P. That is one
10 of the named attacks in our application. It
11 becomes an issue. That's why I think we have a
12 problem here by totally divorcing.

13 There is also another problem I would
14 like the Commissioner to at least address. And I
15 would also, and subject to Mr. High's chance to
16 respond, but we both sat -- we were both on that
17 hearing or committee meeting that occurred in
18 Roswell yesterday with the BLM. And frankly
19 there were flack jackets present; they were not
20 put on. Fisticuffs were not -- we all went to
21 lunch together and sat at the same table. I
22 think that's probably a step that at least has to
23 be considered in the right direction.

24 But we did delineate issues, and we
25 talked about what needs to be considered as far

1 as evidence or things to be thought about in
2 deciding these issues. The fact that we're
3 having these hearings were brought up. And Miss
4 Cone agreed with us. And in fact our next
5 meeting will not occur until after we have had
6 our evidentiary hearings in these four de novo
7 cases because we have at least decided it is
8 important to have before this committee some
9 expert testimony.

10 And it was also decided that in the
11 interest of economy that maybe we'll have the
12 record transcribed. Of course, Mr. Stogner was
13 present, and he agreed to make those transcripts
14 available. And everyone was invited to actually
15 attend these hearings in person to hear the
16 experts testify.

17 That all is a long story to get down to
18 is that a lot of the evidence that I anticipate
19 is going to be heard in these four de novo cases
20 will be heard in the same forum in the R-111
21 attack, and it just seems redundant and a waste
22 of time. It's not judicial economy, even though
23 this is not a true court. But it is a
24 quasi-judicial body, and it has other functions
25 to perform.

1 We at least ought to recognize what's
2 going on. And there is going to be a lot of
3 testimony, and at least we ought to give some
4 thought to that fact in whatever procedural
5 rulings we need to rule on, we need to realize
6 that we're going to get the same evidence, same
7 arguments, and why do we need to do it over and
8 over again.

9 MR. STOVALL: Mr. Carroll, let me
10 address -- I don't think we need to go any
11 further. I don't care whether there's a case
12 pending before the Commission on an amendment to
13 Order R-111-P or not. Any amendment that would
14 come out would not affect the decision in these
15 cases.

16 Should an amendment come before the
17 Commission, the record in this case can be
18 incorporated and we can avoid the concerns that
19 you're worried about.

20 MR. CARROLL: Mr. Stovall, legally I
21 cannot disagree with your statement that this
22 hearing -- these hearings were started based on
23 law that was in effect, and I think that's what
24 you're basically saying. I agree with that.

25 But there are some considerations of

1 our time and the amount of evidence that I at
2 least would like to be thought about by the
3 Commission. And there may be more than one way
4 to handle that issue. But they are inextricably
5 tied because a number of these issues and the
6 confidentiality requirements and subpoenas is
7 just one of several. And I just wanted to point
8 that out to the Chairman.

9 CHAIRMAN LeMAY: Mr. Carroll, let me
10 address at this point, I know you've been an
11 advocate for us looking at R-111-P. What you're
12 saying here is that a lot of the arguments that
13 you want to use, whatever you want to get into,
14 has a lot to do with R-111-P.

15 MR. CARROLL: Yes, sir.

16 CHAIRMAN LeMAY: Where have you been
17 the last six years? I mean, the 111-P has been
18 in place. If there's problems with the
19 confidentiality, if there's problems when R-111-P
20 was initiated, we had two years, I think, at
21 least of conferences involving putting that thing
22 together. Six, seven years later you're before
23 us here saying we've got some major problems with
24 R-111-P.

25 MR. CARROLL: Mr. Chairman, first of

1 all, it's a fundamental rule that without a case
2 in controversy, you can't contest a rule. I have
3 never had a case in controversy to contest this
4 until now.

5 Furthermore, with respect to the issue
6 of the Commission making a rule, I am not aware
7 of anywhere where it's written that rules cannot
8 be changed. In fact, I think that's totally
9 opposite of what the law is.

10 And what was thought relevant in 1986
11 and 87 and early 88, things have changed, Mr.
12 LeMay. And I think that's the reason that we now
13 have a new controversy and we now need to
14 rethink.

15 I'm not trying to indict and say what
16 was done by these people was wrong on the basis
17 of the facts they knew at the time. I think that
18 quite possibly maybe they didn't look at all the
19 evidence, and that's what we're asking for in
20 looking at the new rules is a chance to present
21 new and additional evidence based on changed
22 circumstances.

23 MR. STOVALL: Mr. Chairman, if I might
24 interrupt. This is exactly what I'm going
25 through this little exercise with this morning is

1 that we're already getting off track.

2 Mr. Bruce, did you have a comment
3 before I say anything?

4 MR. BRUCE: One thing. Getting back to
5 the original question, Mr. Chairman, is do we
6 have to take evidence today? And I think
7 regarding the existence of an LMR upon the date
8 that Yates filed its applications, you said you
9 wondered if it was a factual determination or
10 legal determination as to the effective date of
11 the LMR. And that was considered by the Hearing
12 Examiner. I don't think it was brought out.

13 And even though Mr. Carroll made a
14 motion to incorporate the testimony from the
15 prior hearing, whether it's that hearing or even
16 today, I don't think that hearing would be on the
17 record because what we did is we went into a
18 hearing off the record with the Hearing Examiner,
19 Mr. Stovall, and all of the attorneys in the room
20 and questioned Ernie Zaebo of the State Land
21 Office regarding the data on the LMR, the
22 application letters, et cetera, because under the
23 current rule, of course, the oil and gas
24 operators weren't entitled to look at that
25 information.

1 So although I think the Hearing
2 Examiner made a ruling on the record or at least
3 a verbal ruling, there was no evidence in the
4 record. I think Mr. Stovall would agree with
5 that.

6 MR. STOVALL: I would concur. What I
7 would suggest we do, Mr. Chairman, to move this
8 thing forward is if you address the issue right
9 now of whether an exception to R-111-P can be
10 granted under the existing R-111-P, that will
11 determine whether or not there will be an
12 evidentiary hearing in 10448 and 10449.

13 CHAIRMAN LEMAY: Were those the ones
14 that deal with the buffer zone then?

15 MR. STOVALL: Those are ones in the
16 buffer zone.

17 MR. CARROLL: No.

18 MR. STOVALL: Do I have those
19 backwards?

20 MR. CARROLL: You do, Mr. Stovall.

21 MR. STOVALL: Okay. I'm sorry. 10446
22 and 10447 are the ones I mean. Those are the
23 ones in the buffer zone which were denied. If
24 you determine that the Commission does not have
25 the authority to grant an exception to the

1 provisions with respect to the drilling in an LMR
2 and a buffer zone, then those cases are dispensed
3 with. And the only question that is before the
4 Commission is whether or not the applications in
5 10448 or 10449 are for wells within or outside a
6 buffer zone.

7 And I agree that -- there actually was
8 no testimony at the Examiner Hearing, and there
9 was an off-the-record discussion with Mr. Zaebo
10 and that becomes your only issue in those cases
11 is are they in, on or out of an LMR as of an
12 effective time which you have to determine.

13 That narrows the evidentiary issues
14 significantly. If you determine that the
15 Commission has the authority to grant an
16 exception to R-111-P to allow the drilling of a
17 well within an LMR, then that ruling is
18 unnecessary or that ruling if you determine that
19 those wells, 10448 and 10449, are in a buffer
20 zone or in an LMR, then you look at it as an
21 exception to R-111-P and you've also got 10446
22 and 10447 open as an exception.

23 So I think the preliminary
24 determination that the Commission needs to make
25 to focus this argument on is does it have the

1 authority to grant an exception to the
2 no-drilling provisions in an LMR under Order
3 R-111-P. And I think it can be focused directly
4 on that issue right now.

5 Then you'll know where you're going to
6 go for the rest of this day and for the next
7 hearing. And all the other things about bringing
8 things in about what's wrong with R-111-P under
9 today's world don't matter. That's my
10 recommendation to the Commission.

11 CHAIRMAN LeMAY: Now, that addresses
12 the 10446, 10447. What about the other two where
13 we're considering the validity of an LMR? That's
14 separate, isn't it?

15 MR. STOVALL: Let's deal with that
16 next. That's my recommendation.

17 CHAIRMAN LeMAY: We're just
18 concentrating now on 10446 --

19 MR. STOVALL: We're concentrating on
20 the exception because those could be exception
21 cases as well. Commissioner Carlson has a
22 question.

23 COMMISSIONER CARLSON: Mr. High a few
24 minutes ago said that he didn't agree with your
25 summation of the legal arguments before this

1 Commission. Before we decide what we're going to
2 get into, maybe we ought to hear what Mr. High --

3 MR. STOVALL: Mr. Carlson, that's what
4 I'm suggesting is that, Commission Carlson, is
5 that we do that. What I was trying to do was
6 summarize where we ended up, not how we got
7 there. I would agree with Mr. High that I didn't
8 state his position. I'd like him to do that.

9 COMMISSIONER CARLSON: I understand
10 positions. If there's a legal case before this
11 Commission that maybe Mr. High sees that you
12 don't, maybe we ought to hear that now, at least
13 the issue, a statement of the issues, not
14 necessarily your position.

15 MR. HIGH: I would be more than glad to
16 because I do think Mr. Stovall has seriously
17 misstated the issue before this Commission. The
18 issue is not whether something occurred first or
19 second. The issue is: Will the approval of
20 these APDs result in the undue waste of
21 commercial potash? That's the issue.

22 It doesn't make any difference who got
23 there first. If this Commission approves the
24 drilling of these wells, will it or will it not
25 result in the waste of potash?

1 MR. STOVALL: Mr. High, could I ask you
2 a question to clarify again based upon my
3 recommendation to the Commission procedurally?
4 Would you agree that the threshold issue is the
5 exception issue, whether the Commission can even
6 issue an exception? And that takes cares of two
7 applications potentially?

8 MR. HIGH: I do agree that is an issue,
9 I do.

10 MR. STOVALL: And my recommendation to
11 the Commission is that be the first issue that's
12 discussed. I agree that yours are -- if an
13 exception is allowed, that certainly is a factor,
14 and then if it's not allowed, it is also a factor
15 in the granting of the applications in the other
16 two cases.

17 MR. HIGH: Okay. I wouldn't dispute
18 those being issues. I just don't think it's
19 accurate to try to state the issues in terms of
20 time because if the only issue is who got there
21 first, then we don't need this Commission. We
22 can just have someone measure who got there
23 first.

24 I just think the timing aspect is being
25 overstated from a legal standpoint. Does that

1 respond to your question, Mr. Carlson?

2 COMMISSIONER CARLSON: Yes. Thank you.

3 MR. STOVALL: Again, I renew my
4 recommendation to consider whether you have the
5 authority to grant an exception as the
6 preliminary issue and then move forward.

7 CHAIRMAN LeMAY: Is there anything else
8 that counsel would like to say in regard to that
9 issue before we make a decision on it?

10 MR. CARROLL: I would agree with Mr.
11 Stovall. I think this is an appropriate place to
12 get started.

13 CHAIRMAN LeMAY: Mr. Kellahin?

14 MR. KELLAHIN: Mr. Chairman, I concur
15 that Mr. Stovall has correctly phrased the
16 threshold issue. It is whether or not you have
17 authority to grant exceptions in the buffer
18 area. And once you decide, that issue, we can go
19 on to the next series of issues.

20 CHAIRMAN LeMAY: Well, I would suggest
21 at this point we hear some testimony or legal
22 opinions on that particular issue.

23 MR. STOVALL: It's a legal issue. It's
24 a legal argument as to what R-111-P provides.
25 Mr. Carroll is the proponent of granting an

1 exception, so I think he has the burden of going
2 forward.

3 MR. CARROLL: I'm prepared to lead
4 off.

5 Mr. Chairman and Commissioners, it is
6 Yates Petroleum's position that the simple,
7 plain, and unavoidable answer to that question is
8 yes, this Commission has the authority to grant
9 exceptions to R-111-P. That answer is derived
10 from looking at the statutes, the rules of this
11 Commission that are in effect, and Order R-111-P
12 itself, and even case law of the State of New
13 Mexico.

14 Let me go through those items and
15 explain to you why I say they support the answer
16 of yes. You have not only the right but the duty
17 and the obligation where necessary and
18 appropriate to make exceptions.

19 Turning first to the statutory law, New
20 Mexico statutes, I would direct your attention to
21 Section 70-2-6(A), New Mexico Statutes
22 Annotated: "The Division and concurrently the
23 Commission," as you are well aware, "shall have
24 and is hereby given jurisdiction and authority
25 over all matters relating to the conservation of

1 oil and gas and the prevention of waste of potash
2 as a result of oil and gas operations in this
3 state. It shall have jurisdiction, authority,
4 and control of all persons, matters, or things
5 necessary or proper to enforce effectively the
6 provisions of this act or any other law of the
7 state."

8 I would suggest in order to carry out
9 that mandate you have to be able to grant
10 exceptions to any rules which you pass or orders
11 that you make.

12 Turning to Section 70-2-3(F), New
13 Mexico Statutes Annotated, 1978, "Drilling or
14 producing operations for oil or gas within any
15 area containing commercial deposits of potash
16 where such operations would have the effect
17 unduly to reduce the total quantity of such
18 commercial deposits of potash which may
19 reasonably be recovered in commercial quantities
20 or where such operations would interfere unduly
21 with the orderly commercial development of such
22 potash deposits."

23 That is the definition of waste. And I
24 apologize for not reading the first part. That's
25 what Section 70-2-3(F) is, is a definition of

1 waste. And that waste is drilling or producing
2 operations which will unduly reduce these
3 commercial deposits which may reasonably be
4 obtained or mined through commercial operations.

5 Now, when you turn to Section 70-2-3(B)
6 16 and 17, this is the statute that gives
7 special, direct, and unequivocal direction to the
8 Commission. 16 says that the Commission shall
9 determine the limits of any area containing
10 commercial potash deposits and from time to time
11 redetermine the limits. This Commission cannot
12 follow that mandate unless it does in fact have
13 the authority to grant exceptions to R-111-P.

14 Section 17 under the same statute says,
15 "The Commission is to regulate and where
16 necessary prohibit drilling or producing
17 operations for oil or gas within any area
18 containing commercial deposits of potash where
19 the operation would have the effect unduly to
20 reduce the total quantity of commercial deposits
21 of potash which may reasonably be recovered in
22 commercial quantities or where the operations
23 would interfere unduly with the orderly
24 commercial development of potash deposits."

25 And lastly, Section 70-2-11(A) in more

1 general terms states that this Commission, "The
2 Division," and of course the Commission, "is
3 hereby empowered and it is its duty to prevent
4 waste prohibited by this act and to protect
5 correlative rights as in this act provided. To
6 that end the Division is empowered to make and
7 enforce rules, regulations, and orders and to do
8 whatever may be reasonably necessary to carry out
9 the purpose of this act whether or not indicated
10 or specified in any section hereof."

11 There is no way you can get around the
12 direct, literal meaning of that provision that
13 this Commission must have not only the right, but
14 the duty and the obligation, where the evidence
15 dictates or demands that you grant exceptions to
16 any order or rule that you have created.

17 Now, let's turn to Order R-111-P --
18 no. Before we go to that, let's just look
19 generally at the rules and regulations of the
20 Commission itself. I direct your attention to
21 Rule 1 of the Commission rules. "The following
22 general rules of statewide application have been
23 adopted by the Oil Conservation Division of the
24 New Mexico Energy, Minerals & Natural Resources
25 Department to conserve the natural resources of

1 the State of New Mexico, to prevent waste, to
2 protect correlative rights of all owners of crude
3 oil and natural gas and to protect freshwaters.
4 Special rules, regulations, and orders have been
5 and will be issued when required and shall
6 prevail against general rules, regulations, and
7 orders if in conflict therewith. However,
8 whenever these general rules do not conflict with
9 special rules heretofore or hereafter adopted,
10 these general rules shall apply.

11 "(B) The Division may grant exceptions
12 to these rules after notice and hearing when the
13 granting of such exceptions will not result in
14 waste but will protect correlative rights or
15 prevent undue hardship."

16 Rule 2. "The Division, its agents, and
17 employees are charged with the duty and
18 obligation of enforcing all rules and statutes,"
19 statutes, mind you, "of the State of New Mexico
20 relating to the conservation of oil and gas
21 including the related protection of freshwaters."

22 Commission, this Commission has always,
23 and the Division, recognized no matter what order
24 it issues, no matter what rules it issues, it has
25 not only the right, but the obligation where the

1 evidence dictates to grant exceptions.

2 Now, let's turn to rule -- order,
3 excuse me, R-111-P. Let's look at the language.
4 Findings. This Commission made a number of
5 findings. First of all, in Finding No. 10, the
6 Commission specifically reminded the participants
7 and whoever reads this order that it was
8 cognizant of the statutes I read you a moment
9 ago.

10 It says, "The Oil and Gas Act,
11 70-2-3(F)," and that's the definition of waste
12 that I just read to you, "declares as waste," and
13 it recites the very same definition that I just
14 read to you and said that this Commission must in
15 order to enforce that, must have the power to
16 amend its rules.

17 Finding No. 11, the Commission says,
18 "The Oil and Gas Act in 70-2-12(B)17," again,
19 that's the same act and the obligation I just
20 read to you, in Order R-111 the Commission made
21 it clear that we're following the statutes.

22 Finding No. 12, a very key finding,
23 "The report of the work committee presents a
24 reasonable process for determining where wells
25 for oil and gas would cause waste of potash. And

1 the pertinent portions of said report should be
2 contained in the order as a reasonable process
3 for prohibiting oil and gas drilling in such
4 areas," and here is the key language, "in the
5 absence," this is a reasonable process, ladies
6 and gentlemen, "in the absence of substantial
7 evidence that waste of potash as described by the
8 statute would not result."

9 That finding can have no meaning
10 whatsoever unless this Commission has got the
11 right to hear evidence and consider exceptions.
12 This Commission has already answered the question
13 that you've asked us. It's in R-111-P.

14 But that's not the only place that the
15 Commission spoke to this question. Finding 20.
16 "The Commission cannot abdicate its discretion
17 to consider applications to drill as
18 exceptions." This Commission, when it created
19 R-111-P, not only did it address the issue, but
20 it used the same terminology, "exceptions." And
21 it said, "We cannot abdicate our discretion to
22 grant exceptions to its rules and orders, but in
23 the interest of preventing waste of potash should
24 deny any application to drill in commercial
25 potash areas as recommended in the work committee

1 report unless," key word, "unless a clear
2 demonstration is made that the commercial potash
3 will not be wasted unduly as a result of the
4 drilling of the well."

5 There is no way that an applicant can
6 put on evidence to make a clear demonstration
7 unless you consider exceptions to the rule. The
8 only way this Commission can say we can't grant
9 exceptions to Rule R-111-P is to ignore all of
10 these findings that I've just recited to you.

11 But that's not all. Let's go further
12 into this order. Let's look at part C of the
13 order, C(2) in particular. And this is entitled,
14 C is entitled, "Drilling in the Potash Area."
15 Subparagraph 2: "No wells shall be drilled for
16 oil or gas at a location which, in the opinion of
17 the Division or its duly authorized
18 representative, would result in undue waste of
19 potash deposits or constitute a hazard to or
20 interfere unduly with the mining of potash
21 deposits."

22 And then it says, "No mining operations
23 shall be conducted in the potash area that would
24 in the opinion of the Division or its duly
25 authorized representative constitute a hazard to

1 oil or gas production or that would unreasonably
2 interfere with the orderly development and
3 production of any oil or gas pool."

4 The only way that you can say that this
5 Commission cannot grant exceptions is to ignore
6 that last language. A mining operation, the
7 designation of an LMR in this particular case is
8 unreasonably interfering with the development of
9 an oil and gas pool. Not something that is
10 hypothesized, but several actual oil and gas
11 pools, Delaware oil, out there in this potash
12 area.

13 We have made applications to drill
14 wells that are extensions of a known pool. The
15 potash industry is saying no exceptions should be
16 granted; therefore, Yates Petroleum does not get
17 to drill; they're interfered with. Again,
18 Commissioners, the rule itself says you've got an
19 obligation and a right to consider exceptions or
20 you can't carry out the language of the rule.

21 (C) subparagraph 3. "Upon discovery of
22 oil or gas in the potash area, the Oil
23 Conservation Division may promulgate pool rules
24 for the affected area after due notice and
25 hearing in order to address conditions not fully

1 covered by these rules in the general rules."

2 Again the Commission, when it was
3 writing this rule, realized that there may be
4 situations that could not be covered by R-111-P,
5 and the Commission reserved the power, if there
6 was any doubt before that it had it, to make new
7 rules or amend its rules.

8 And I must say, it's a given, it's
9 common sense that tells us if the Commission has
10 a right to make rules, it's got the corollary
11 right to change the rules it's already made.

12 The last point that I would like to
13 point out, and this is an argument with respect
14 to -- that we will also be making in our
15 challenge against R-111-P. It is that if the
16 Commission takes the position that it cannot
17 amend or grant exceptions to Order R-111-P, then
18 it is saying it cannot determine when and where
19 waste will occur.

20 It is saying that, as part 16 of the
21 statute said, that you will determine where the
22 commercial areas or redetermine when necessary,
23 if you can't grant exception, it's saying that
24 you've delegated or given up the right to
25 redetermine where commercial potash is.

1 And what that in effect does is that
2 you have unlawfully delegated the power to
3 determine what waste is to someone else, whether
4 you call it the industry in our agreement or the
5 potash industry or what.

6 And, Commissioners, the courts of the
7 state of New Mexico have been addressed with a
8 very similar situation, and they have held that
9 this is an unlawful delegation when you do this
10 and abdicate these powers.

11 In the case of Kerr-McGee Corp v. New
12 Mexico Equipment -- excuse me, New Mexico
13 Environment Improvement Board, Court of Appeals
14 case, found at 97 New Mexico 88, 637 Pacific
15 Reporter 38, the facts here, briefly, was that by
16 statute the Environmental Improvement Board was
17 given the mandate, like you are, to go out and
18 regulate the handling of waste products from
19 mining of uranium and so forth.

20 The statute said you shall make
21 regulations, govern this area, but you shall do
22 it upon the advice and consent of a specialized
23 council, which council was made up of scientific
24 personnel, experts. The board were laypeople
25 with respect to mining and the problems of

1 uranium and the waste and what have you.

2 What happened, as the EIB and this
3 council got together, they entered into an
4 agreement which interpreted the legislative
5 mandate. And then the EIB with counsel from the
6 EID promulgated rules. Kerr-McGee objected to
7 this and took it to the courts.

8 Let me quote just a few provisions of
9 the statute because the language is very apropos,
10 excuse me, from the case. The Court recited that
11 the council did not give its advice and consent
12 to the EIB. And the EID seeks to avoid advice
13 and consent by way of a memorandum agreement
14 between the EIB and the council.

15 "All that we find in this agreement is
16 that the council cannot veto EID's adoption of
17 radiation protection regulations and that this
18 council will advise and make suggestions to EID
19 staff to drafting regulations. And after a
20 public hearing, EIB shall take actions the EIB
21 feel is appropriate within the scope of the law."
22 This agreement and the interpretation of Section
23 74-3-5(A), which is the section that gave the
24 mandate, when exercised is a violation of law.

25 "EID had no duty or authority by law to

1 prepare the regulations for EIB. We can only
2 assume that EIB impermissibly delegated its
3 authority to the director of EID to perform its
4 work in preparation of the public hearing. It
5 would have been just as objectionable if EIB had
6 delegated its work to the companies to prepare
7 the regulations and then come before the board at
8 a public hearing to defend themselves."

9 By delegating the authority without the
10 right to contest, look at, and determine the
11 validity of this LMR, this Commission has done
12 just what the court was talking about. This
13 would be just as bad if this board had delegated
14 to the companies, which is exactly what's going
15 on here.

16 Lastly, it said, "Administrative bodies
17 and officers cannot delegate power, authority,
18 and functions under which the law may be
19 exercised only by them which are quasi-judicial
20 in character or which requires the exercise of
21 judgment."

22 Commissioners, that's hornbook law, and
23 that's the dilemma. If you give any other answer
24 to the question posed by this that we're
25 addressing right now, if you give any other

1 answer that this Commission other than it does
2 have the authority and the obligation to grant
3 exceptions, it's a violation of law. It's an
4 unlawful delegation of power. You're not
5 exercising the mandates of the statutes which I
6 read to you. And we already know how the courts
7 are going to rule on this.

8 Basically, then, that's our position:
9 One, the statutes say you have the right to grant
10 exceptions. And this Commission has always
11 recognized that. It's found in its general rules
12 and time after time after time, in references in
13 the very order we're talking about, this
14 Commission reminded everybody, the applicants and
15 the world, that it had a right and a duty and it
16 would not abdicate its obligation to grant
17 exceptions and to take evidence. Thank you.

18 MR. HIGH: I'll be much more brief.
19 This issue apparently is a carryover from the
20 same arguments that were made before the Hearing
21 Examiner in this case. I argued in that case
22 that the Hearing Examiner did not have the
23 authority to create an exception to R-111-P, and
24 I still maintain that position. That Hearing
25 Examiner is to apply the orders issued by this

1 Commission.

2 I don't dispute for one minute that
3 this Commission has the authority, the legal
4 authority to grant exceptions, to reverse, to
5 change, to readopt, to reissue, or do anything it
6 wants to to orders it has previously issued. I
7 think by law you have right. And I don't
8 question that for one moment, and I never have.

9 So if we're addressing the purely legal
10 point of whether or not this Commission has the
11 legal authority to grant an exception to a prior
12 order, I don't doubt for one minute that it does
13 have that legal authority. I don't question
14 that. But I do question whether or not that's
15 what the issue is before the OCC in this case.

16 The applications that were filed in
17 this case did not even seek an exception to
18 R-111-P. If you look at the applications filed
19 in 10446 and 10447, they both state in paragraph
20 4, "Said location is in compliance with Order No.
21 R-111-P, paragraph G-3(d) and upon information
22 and belief is not located within any life of mine
23 reserve or buffer zone as presently designated
24 with the State Land Office. The permitting of
25 such well will not result in undue waste of

1 potash deposits or constitute a hazard to or
2 interfere unduly with mining of potash deposits."

3 These applications were filed claiming
4 that the well locations were not within a buffer
5 zone or an LMR. They were not filed seeking an
6 exception to R-111-P. So I don't think that is
7 even the issue before the OCC.

8 Now, whether or not it should be an
9 issue, I suppose we leave for another day. But
10 if we're not going to change R-111-P in the
11 process of addressing these four cases, then the
12 exception should not be granted in this case
13 because the Commission has already decided in
14 R-111-P in paragraph G-E(3) that an APD will not
15 be approved, and this is on page 11 of the
16 R-111-P under subparagraph E(3).

17 It says very clearly, "Any application
18 to drill in the LMR area including buffer zones
19 may be approved only by mutual agreement of
20 lessor and lessees of both potash and oil and gas
21 interests." That's what the OCC has already
22 held. These APDs don't have the consent of the
23 potash lessees.

24 And there not being an application on
25 file in any of these cases for an exception to

1 R-111-P, then these two wells should be summarily
2 dismissed just like they were before the Hearing
3 Examiner. Thank you.

4 CHAIRMAN LeMAY: Have we got some more
5 testimony or legal argument?

6 MR. CARROLL: I would like to make just
7 a short response.

8 MR. STOVALL: Perhaps Mr. Bruce or Mr.
9 Kellahin might want to go.

10 CHAIRMAN LeMAY: Sure.

11 MR. BRUCE: Mr. Chairman, Mr. High's
12 statement of the issue is whether waste of potash
13 will occur. Unfortunately looking at it from his
14 standpoint, his statement of the issue, number
15 one, presumes that waste will occur, and I don't
16 think there should be any such presumption.

17 And, number two, it really gives
18 absolutely no mechanism to determine whether
19 undue waste of potash will occur, because under
20 his position, the potash company is the sole
21 determiner of LMRs, et cetera. And that is, from
22 my perspective, the sticking point.

23 I was here five or six years ago taking
24 place in the hearings on Rule R-111-P. I was
25 representing Exxon. And, as a matter of fact,

1 Mr. Kellahin and I were on opposite sides of this
2 issue.

3 But Exxon was opposed to what has
4 become R-111-P specifically because there would
5 be no chance for an oil and gas operator to
6 determine the designation of an LMR. And at that
7 time we thought it would lead to what is
8 occurring here today.

9 I really don't have anything other than
10 that. We would second -- Pogo Producing
11 Company's behalf, second Yates' argument. And we
12 believe that it's inherent in the authority of
13 the Commission under its statutes and its
14 regulations to grant exceptions where necessary
15 and to make a determination of whether waste will
16 occur. Thanks.

17 CHAIRMAN LeMAY: Mr. Kellahin.

18 MR. KELLAHIN: I'll speak from here,
19 Mr. Chairman. Small footnote, Mr. Chairman.
20 When we worked with Mr. Lyon and others on behalf
21 of the industry in cooperation with Mr. High on
22 the R-111-P, it's my recollection that we were
23 intending to create a mechanism that would be
24 successful for both industries. I think it
25 largely has been. This is the first one of

1 material dispute I'm aware of.

2 The Commission does have the
3 authority. We intended to preserve the authority
4 for the Commission to grant exceptions. You need
5 to deal with the issue that these counsel have
6 framed as to whether or not these applications
7 are in fact applications for exemptions. If they
8 are so characterized, then you have the authority
9 to hear them.

10 We intended to keep that process in
11 R-111-P, and I think it's there. What we
12 intended to do, however, is to acknowledge that
13 within the declared LMRs that there was a
14 presumption that those potash resources within an
15 LMR did represent known commercial potash that
16 was at risk.

17 To acknowledge that factual
18 information, we accepted and increased the burden
19 of proof on the oil and gas operators so that
20 when they sought exemptions in an LMR or a buffer
21 area, the standard of proof was increased to
22 clear demonstrations that the activity of oil and
23 gas within an LMR or a buffer area would not
24 unduly waste potash.

25 We thought about the due process

1 problems, and we recognized it within the context
2 of the order. I think you have the process to
3 address exemptions within that context. We don't
4 think that there has been an improper delegation
5 of authority by this Commission to anyone else,
6 either industries, with regards to the mechanisms
7 in place under that order.

8 So I will concur with both counsel that
9 there is an exemption process intended in this
10 order. You have the authority to act on it if
11 you decide these applications are in fact
12 exemption applications.

13 CHAIRMAN LeMAY: Someone else have
14 something to say? Mr. High?

15 MR. HIGH: I would like to respond, if
16 I may, Mr. Chairman, very briefly to Mr. Bruce's
17 comments about my presumption of waste, and I
18 won't repeat everything Mr. Kellahin said.

19 But in issuing R-111-P, this Commission
20 has already decided that drilling of oil and gas
21 wells in those areas designated as LMRs and
22 buffer zones will constitute undue waste under
23 state law. That decision has already been made.

24 Now, and I agree, an exception can be
25 made, but the applications filed in this case are

1 not part of those exceptions. Thank you.

2 CHAIRMAN LeMAY: Mr. Carroll.

3 MR. CARROLL: With respect to that
4 issue, I think Mr. High is not being fair. The
5 application that was filed in these two cases
6 where the denial was given stated that upon
7 information and belief these wells are not within
8 an LMR and buffer zone.

9 Mr. High is using the rule unfairly
10 here. They don't tell us where an LMR is and
11 where a buffer zone is. We don't have that
12 information when we filed an application. We
13 filed it on the basis of what we knew. And the
14 only thing we knew is that there wasn't one and
15 that this should be properly considered as it was
16 written.

17 At the hearing, the Division hearing,
18 we made a motion to amend because we were then
19 informed for the first time officially that New
20 Mexico Potash had just prior or about the same
21 time, within a day or two before these
22 applications were filed, but considerable time
23 after we had made application to drill and gave
24 them notice, had filed a change in the LMR.

25 And again, that information is

1 privileged under R-111-P, and we had no notice.
2 We asked to amend our application to cover that
3 situation at the time. So this is an issue. Not
4 as Mr. High -- Mr. High wants to say, "Well, Mr.
5 Carroll is right, but we've got you because of a
6 procedural question. You don't have an
7 application here to fight that." That's not
8 correct.

9 We filed that application on the basis
10 of the only information we had. We learned
11 differently at the Division. We brought that to
12 the attention, and it was made quite clear that
13 if in fact that's the case, then this has to be
14 an exception case. But until we got that
15 information, we couldn't ask for an exception.

16 So, please, I never considered that as
17 a problem because it shouldn't be because we've
18 already discussed it. And the way the system is
19 set up, we're caught behind the eight ball, and
20 that should not be used against us to throw us
21 out of this hearing, as Mr. High is suggesting.

22 We have an application, as best we
23 could raise it and in the proper sequence based
24 on the information available to us, we have
25 contested this on the basis of granting an

1 exception. And that's what I understand that
2 we're here for.

3 And I thought the Commission understood
4 it by the phrasing because they understood that
5 we were here asking an exception and the
6 Commission wanted to know from us: Do we have a
7 right based on that request for an exception?

8 MR. STOVALL: Mr. Chairman, if I might
9 address that before Mr. High gets up again. Just
10 to clarify so the Commission is fully aware of
11 it, my understanding is that there are two LMRs
12 which are in question.

13 One is an LMR which has been in
14 existence for some time to the north of Section 2
15 where the wells are drilled. I believe it ends
16 right about Section 2. And the wells in 10446
17 and 7 would be in the buffer zone for that LMR.
18 The other one, the one Mr. Carroll referred to,
19 is the LMR that was filed about the time these
20 cases were docketed for hearing.

21 But Mr. Carroll is right that the oil
22 and gas operators do not have access to the LMR
23 maps. They can't see them when they ask for
24 them. They simply have to call up and find out
25 if there is an LMR and have to rely on that

1 information.

2 My recommendation to you is that
3 whether or not they have characterized it as an
4 exception to an LMR rule or in their initial
5 filings said we don't think we're in one is not
6 determinative of your decision.

7 I think that they have provided
8 sufficient notice and stated their objective
9 clearly enough that you can -- you don't dispense
10 with the case by simply saying they didn't ask
11 for an exception so we're not going to give them
12 one.

13 MR. HIGH: Excuse me, Mr. Stovall.
14 Before you reach a decision, may I respond?

15 MR. STOVALL: I'm making a
16 recommendation, and now I'd like you to respond
17 based on that, Mr. High.

18 MR. HIGH: I'd like to respond before
19 you reach a conclusion to what Mr. Carroll said
20 because I can assure you it's not accurate.
21 Yates Petroleum has known since day one that
22 these two wells that we're talking about in 10446
23 and 10447 were within a buffer zone.

24 The LMR that they are within the buffer
25 zone of has been in existence since this order

1 was issued in 1988. It's been there since day
2 one. They could have found out from the BLM or
3 the State Land Office that these two wells were
4 in a long existing LMR.

5 It's the other two wells, Mr. Stovall,
6 that are in dispute with respect to the extension
7 of the LMR, not these two. These two wells are
8 in the buffer zone of the very first LMR map ever
9 filed by New Mexico Potash.

10 So Mr. Carroll's client has known since
11 day one, and that's why we initially objected to
12 these, that they're within the buffer zone of an
13 existing LMR. They've known that since day one.

14 So if they had wanted to file an
15 application for an exception, they could have
16 done so because the information on whether they
17 were or were not in a buffer zone was clearly
18 available.

19 The reason they didn't file for an
20 exception is exactly what Mr. Carroll has been
21 arguing all along including this morning. He
22 wants to argue that the ore in the LMR of which
23 these wells are in the buffer zone of shouldn't
24 be within our LMR.

25 That's why he wants the core hole

1 data. That's why he wants to attack it. He
2 wants to show that what we think is commercial
3 grade ore is not commercial grade ore. That's
4 why he filed the application the way he did, not
5 because he didn't know about the buffer zone, not
6 with respect to these two wells. Thank you.

7 MR. STOVALL: That doesn't change my
8 recommendation to the Commission that the exact
9 wording of the application is not sufficient to
10 get this case before the Commission.

11 CHAIRMAN LEMAY: Additional arguments
12 concerning this legal issue of whether the
13 Commission has the authority to grant an
14 exception to a well in the buffer zone?

15 Is it appropriate that we ask questions
16 of the various lawyers or not? We take this
17 thing under consideration without asking
18 questions?

19 MR. STOVALL: Absolutely. You have
20 every right to ask them questions if you have
21 some concerns.

22 CHAIRMAN LEMAY: I'll start with
23 Commissioner Carlson. Do you have some questions
24 you would like to ask?

25 COMMISSIONER CARLSON: Yes, I'm sure I

1 do.

2 First of all, do we have a factual
3 issue here on whether Yates knew or should have
4 known the existence of the LMR at the time the
5 locations were filed?

6 MR. HIGH: I don't think we do,
7 Commissioner. The LMR in this particular section
8 has been on file since R-111 was adopted. It was
9 included in the first LMR map filed after the
10 adoption of R-111-P. That is the buffer zone.
11 The buffer zone to that initial LMR has been in
12 place since that time.

13 There's no reason why Yates couldn't
14 have found out from the State Land Office or the
15 BLM: Where is the buffer zone here?

16 MR. CARLSON: Was that public
17 information?

18 MR. HIGH: Yes, sir, that is public
19 information. All they have to do is call up and
20 say I want to drill at this particular spot. Can
21 I do that? Is it in an LMR or a buffer zone?
22 They will say yes, it is in a buffer zone, or no,
23 it's not.

24 COMMISSIONER CARLSON: Right. But
25 that's different. Calling and giving your

1 location is different than giving a map of the
2 LMR; isn't that correct?

3 MR. HIGH: That's correct. They cannot
4 get a map of the LMR. That is proprietary and
5 confidential information. They can't get a map
6 of the LMR. But they can be told whether or not
7 a particular location is within an LMR or a
8 buffer zone.

9 The conclusion is public information.
10 The underlying data is not.

11 MR. CARROLL: If I may respond to that
12 same question, I agree limitedly with Mr. High.
13 It is not a factual determination for this
14 Commission in order to reach the question that
15 they've posed: Does the Commission have the
16 authority to grant exception? The timing and the
17 knowledge just does not because -- and the reason
18 for that is the very statement that Mr. Stovall
19 gave.

20 Mr. High is trying to say,
21 Commissioners, you can't hear Yates' applications
22 because of a procedural glitch. They didn't give
23 us notice and put the proper word in there, in
24 the language of their application.

25 Mr. Commissioner, Mr. Stovall has

1 suggested to you that notice is the only
2 requirement. The Division Examiner knew very
3 well what was going on at the Division hearing.
4 We moved to amend, and this issue was discussed.
5 This is not a procedural question, as Mr. High
6 would like to bounce us out of here on. No facts
7 are needed to determine that.

8 The only issue is notice. Was this
9 issue adequately addressed to the Commission?
10 How it got adequately addressed is really
11 immaterial. But just was it finally given? And
12 that question was addressed at the Division
13 hearing. We amended orally, and we then
14 proceeded on that basis.

15 And that's all that really needs to be
16 considered by the Commission today.

17 CHAIRMAN LEMAY: Do you have any
18 others?

19 COMMISSIONER CARLSON: Yes.

20 Mr. Carroll, aren't you really arguing
21 two different things: One, you're saying that
22 this Commission can grant an exception under
23 existing statutes and R-111; and second, that
24 R-111 is an unconstitutional delegation of
25 authority anyway and, therefore, it's an attack

1 on R-111? Is that fair to say?

2 MR. CARROLL: It is fair to say, and
3 that was the reason that I addressed myself and
4 have been asking for consolidation of these
5 cases, because they are inextricably entwined.

6 But I can and do, in deference to the
7 recommendations given by Mr. Stovall, here's the
8 dilemma I pose for the Commission. If the
9 Commission answers this question in the
10 affirmative, they have in effect skirted my
11 argument about the constitutionality, at least
12 for the time being.

13 If they say, no, we don't have the
14 power, then I think you have fallen into the trap
15 of what I speak and the problem with Order
16 R-111-P, among others.

17 That's how I see the problem. And
18 that's why I say it's inextricably intertwined.
19 But at least for the limited issues that I see
20 Mr. Stovall delineating for the Commission, you
21 can -- I can see appropriate legal argument to
22 avoid that decision about constitutionality, at
23 least for the time being, if you say yes, the
24 Commission has the right to grant exception.

25 And so I can, you know, while I would

1 like to see both issues addressed because I'm
2 somewhere we're going to cross that threshold, I
3 cannot honestly, in all honesty, disagree with
4 the very narrow analysis that Mr. Stovall has
5 been -- I know he's not speaking for the
6 Commission, but he's been recommending, as he
7 sees it.

8 And so that's -- I hope I'm
9 explaining -- I think you understand quite
10 frankly the dilemma that I see forming up here.
11 And I don't want to say -- there is a narrow line
12 here, and we have to be very careful. And I
13 think Mr. Stovall has described a very narrow
14 walkway here for us. But I warn that if we ever
15 get off that walkway, then you fall into the
16 areas of my concern.

17 COMMISSIONER CARLSON: But wouldn't you
18 agree that this Commission has to follow its own
19 regulations? I mean, when it doesn't like a
20 particular regulation, it just can't amend it
21 without notice and hearing that it's going to
22 amend R-111-P.

23 MR. CARROLL: That's very correct. But
24 in this particular case, one of the rules of the
25 Commission is we grant exceptions. And Rule 111

1 says if you can come in and show that there won't
2 be an undue waste of commercial potash, then you
3 get it. You get to drill. And that's all I'm
4 saying, is that we're entitled to raise this
5 evidence.

6 What Mr. High's interpretation of this
7 act is doing is saying you forever and never get
8 to challenge it. Once we in our dark, back rooms
9 designate an LMR, nobody gets to look at it.

10 MR. HIGH: May I say, Commissioners,
11 that's exactly what I said a minute ago. That's
12 what Mr. Carroll really wants to do, is to argue
13 that we should not have designated this area as
14 an LMR; therefore, the buffer zone shouldn't be
15 where it is. That's exactly his argument.

16 He's not arguing for an exception to
17 drilling a buffer zone. Instead he's arguing
18 that we improperly designated an area as LMR and
19 created a buffer zone which shouldn't be. That's
20 the thrust of his argument. That's the point I
21 wanted to make a minute ago. And I'm glad to see
22 that he finally conceded that.

23 MR. CARROLL: Well, I disagree with Mr.
24 High. I did not concede it, and he's totally
25 misconstruing what I said.

1 Finding 20 of the order says that there
2 will be no application to be granted unless,
3 unless a clear demonstration is made that
4 commercial potash will not be wasted unduly as a
5 result of drilling a well.

6 That, Commissioners, is all I'm asking
7 to do, is put on evidence that there will be no
8 undue waste of commercial potash by the drilling
9 of these two wells.

10 COMMISSIONER CARLSON: How do you
11 reconcile that Finding 20 with the language on, I
12 guess it's G-E(3) on page 11, which says that
13 "Application to drill in the LMR area including
14 buffer zones may be approved only by mutual
15 agreement of lessor and lessees of both potash
16 and oil and gas interests?"

17 MR. CARROLL: 20 reconciles it, Mr.
18 Commissioner. It says, "The Commission cannot
19 abdicate its discretion to consider applications
20 to drill as exceptions." It cannot give up that
21 right. These subsequent writings are bound by
22 that point of rule.

23 And then it says and orders, "but in
24 the interest of preventing waste of potash,
25 should deny any application to drill in

1 commercial areas is recommended." That's what
2 that rule says. It should be denied.

3 And the rule says yes, R-111-P says,
4 yes, it should be denied unless we come in and
5 show that there's not going to be an undue waste
6 of commercial potash.

7 The Commission reconciled that, Mr.
8 Carlson. You know, that's my best argument. The
9 Commission thought about it. That's why it's in
10 the findings, I think, and because it crops up so
11 many times throughout this order, as I recited to
12 you, this Commission.

13 And here's the problem. Mr. High has
14 got up here in our Division hearing and said this
15 is the interpretation of R-111-P. His
16 interpretation is correct, is unconstitutional,
17 andd is all the things I say is wrong.

18 See, I don't know which side to get
19 on. If we accept the rule as I say it is, then
20 maybe we don't have the constitutional problems.
21 But if we accept the rule as he says it is, we
22 really do have a delegation of unlegislative
23 power and unconstitutional problems.

24 That's the dilemma: Whose
25 interpretation of R-111-P are we going to take?

1 You haven't told me yet. That's what this
2 question is. When I find out the answer, then
3 I'm going to know what track I'm going to be on.

4 But I pose for you the dilemma, and
5 that's what I was talking about. If you answer
6 it yes, you've skirted the problems, as Mr.
7 Stovall says. If you answer it no, then you've
8 fallen into the trap I feel is posed for us.

9 That's my point.

10 CHAIRMAN LeMAY: Commissioner Weiss?

11 COMMISSIONER WEISS: I've got a simple
12 question. Is there a potash mine there?

13 MR. HIGH: Yes, sir, there is.

14 COMMISSIONER WEISS: Is it where these
15 wells are going to be drilled?

16 MR. HIGH: They are part of a potash
17 mine, yes, sir.

18 COMMISSIONER WEISS: A potash mine, as
19 I recollect, has got elevators and such and
20 miners and all that?

21 MR. HIGH: These wells will be within
22 the deposits owned by an operating potash mine.
23 The wells will not be literally down through the
24 tunnels or underground workings of the mine. I'm
25 not sure what you're asking.

1 COMMISSIONER WEISS: That's what I'm
2 talking about.

3 MR. HIGH: No. These proposed wells
4 will not pierce, so to speak, the underground
5 workings of the mine, at least not now. But they
6 will be in the life of mine reserves -- I'm
7 sorry, the buffer zones to the life of mine
8 reserves of an operating potash mine. That they
9 will.

10 MR. CARROLL: Mr. Weiss, I would direct
11 your attention, to truly satisfy that question,
12 the potash mines are required to file with the
13 OCD. And I know within the bowels up here is an
14 actual map of the open mine workings. And you'll
15 see that they're several miles from Section 2.

16 And I can only tell you in deference to
17 this, that the potash representatives -- and
18 we've been having meetings -- and back in January
19 the potash representatives of New Mexico Potash
20 told our people that they had no immediate plans
21 to ever mine down there in Section 2.

22 Now, I know Mr. High is going to say
23 that that can change. But there are no plans.
24 The mine workings are several miles from there.
25 And that's one of our contentions. And that's

1 what we're asking to prove, the opportunity to
2 prove, is those are not, one, commercial deposits
3 and, two, that they are not even reasonably
4 foreseeably minable, and we won't waste them if
5 we do drill.

6 I'm sorry, I didn't mean to interrupt.

7 MR. HIGH: Again, Commissioner, Mr.
8 Carroll has again identified the issue. He wants
9 to prove that our LMR does not contain commercial
10 grade potash, nothing to do with the buffer
11 zones.

12 COMMISSIONER WEISS: How come you
13 haven't dug it out after four years?

14 MR. HIGH: You can't mine all your
15 reserves in four years, Commissioner. A potash
16 mine owns a lot of reserves, and it mines those
17 reserves as the market demands in different
18 areas. It's a continuous operation. But you own
19 a lot more reserves than you can mine in four
20 years.

21 I mean, our existence is not going to
22 cease in four years. We're not like an oil well
23 where you go in and pump it out and leave. We
24 have a lot of reserves, and we will mine those
25 reserves over the course of our life, which will

1 be anywhere from five years to one hundred years,
2 depending on which mine you're talking about.

3 We can't mine out all of our reserves
4 in four years.

5 COMMISSIONER WEISS: Thank you.

6 MR. CARROLL: Mr. Weiss, I would also
7 like to offer this. The particular lease on this
8 Section 2 is some 20 years old. It's a held-by
9 production lease and was a group of a lot of
10 leases that were scattered. There were a number
11 of sections held.

12 And until just shortly the lease just
13 to the north wasn't even owned by New Mexico
14 Potash, though I understand that they have now
15 bought the lease to the north of it.

16 So, you know, I think that verifies
17 what their representative said. There were no
18 immediate plans.

19 COMMISSIONER WEISS: No more. Thank
20 you.

21 CHAIRMAN LeMAY: Mr. Carroll, I would
22 just like you to address two questions, but in
23 this order.

24 MR. CARROLL: All right.

25 CHAIRMAN LeMAY: First, are you

1 granting that there is an LMR in place,
2 legitimate LMR in place, that you respect in
3 terms of being north of these two locations? Do
4 you accept that LMR?

5 MR. CARROLL: I think for the purposes
6 of this argument and the way we've been
7 structuring it legally, yes, I have to.

8 CHAIRMAN LeMAY: Okay. Then the second
9 question is: The argument that Mr. High made
10 that the OCC has already made the determination
11 that drilling in an LMR or buffer zone will
12 create waste by virtue of taking testimony at the
13 initial hearing and arguing these points, what
14 constitutes waste, that we already made that
15 determination.

16 So by defining a buffer zone as an area
17 that if you drill in it, you'll create waste,
18 that we've in essence answered your argument.

19 MR. CARROLL: I think that the answer
20 to that is that no, the Commission has stated
21 that there is a reasonable process for
22 determining whether or not there should drilling
23 in an area. That's all this says.

24 It says, Finding 12, it says, "The
25 report of the work committee presents a

1 reasonable process for determining where wells
2 for oil and gas would cause waste of potash. And
3 pertinent portions of said report should be
4 contained in the order as a reasonable process
5 for prohibiting the drilling of oil and gas in
6 the absence of substantial evidence that waste of
7 potash described in the statute would not
8 result."

9 Now, that's what the Commission is
10 saying. This is a reasonable process. But it's
11 only a process. It's not a final determination.
12 And that's why they say we're going to go along
13 with that process unless, unless there is a clear
14 demonstration, a clear demonstration that waste,
15 as defined in our state statutes, will not
16 occur.

17 The Commission said this is a process,
18 but we recognize the right of an operator, oil
19 and gas operator, to come in and make an
20 exception to that process. And that's what we're
21 here for.

22 We have a right because this is not a
23 true finding. And remember, Mr. LeMay, I would
24 also address this question, I mean, this dilemma
25 to you: That if you say that this was a

1 determination of waste, then you have made an
2 unlawful abdication of your legislative function
3 as contained in the statutes that I read to you.

4 Only this Commission can determine when
5 there is waste. And by designation of an LMR,
6 that's defining where waste is going to occur.
7 It's a process, Mr. LeMay, not a determination.
8 And it's a process that will stand unless someone
9 comes forward with substantial evidence to
10 disprove it. That's how it works.

11 CHAIRMAN LeMAY: I'm not sure you
12 answered my question. By definition if you're
13 saying waste occurs if you drill in the buffer
14 zone because evidence has been taken, this
15 Commission, could they have the same authority to
16 go back and say okay, we'll make a determination
17 that the previous Commission was correct in its
18 definition of buffer zone?

19 MR. CARROLL: Mr. LeMay, in its
20 findings the Commission said no. That's not the
21 interpretation. What you just asked me, "Isn't
22 this true?" no, it's not true. The Commission
23 did not make a finding that waste will occur.

24 The Commission made a finding that
25 there is a process out here by which we will

1 determine whether oil and gas drilling will
2 create waste, not that waste is automatically and
3 forever foreclosed.

4 And the Commission said the reason we
5 make this determination as to a process and not
6 waste is because we cannot abdicate our duty to
7 grant exceptions. The Commission answered the
8 question for it.

9 The interpretation you're asking me,
10 "Isn't this true?" the Commission says we can't
11 ever make that determination because that would
12 be abdicating our legislative delegation or
13 mandate and that we're going to say that in the
14 absence of proof, in the absence of a dispute,
15 this is the process that will control.

16 CHAIRMAN LeMAY: Well, I need to get,
17 because I'm not a lawyer, I need to get a little
18 further. I hope I'm not getting outside the
19 legal realm here. As a practical matter, if what
20 you say is correct, you would ask this Commission
21 to make a determination on every location that's
22 available in the potash area, whether waste would
23 occur, and take great amount of legal arguments
24 and evidence on that because that's our
25 responsibility.

1 And for every location, orthodox or
2 unorthodox, which to my way of thinking is an
3 unworkable, maybe legally correct, but really
4 unworkable type process, I'm asking you whether
5 the Commission in their defining of an LMR put
6 that argument to rest by defining an LMR in a
7 buffer zone and therefore defining waste in terms
8 of those two definitions?

9 MR. CARROLL: My answer is twofold:
10 One, you do not put it to rest because you said
11 you didn't in the findings and in the order. The
12 second, if it is a contention that you put it to
13 rest, then you are running right into the trap
14 that I was posing with Mr. Carlson that you have
15 unlawfully delegated authority and you have set
16 up some constitutional attacks on the whole
17 process. That's the problem I pose for you.

18 If you accepted the interpretation of
19 R-111-P, that I and the other companies here
20 support, then you may have skirted those
21 arguments.

22 CHAIRMAN LeMAY: You're saying it's
23 unlawful for us to define, as a Commission,
24 define waste as drilling in a buffer zone after
25 taking testimony as to what a buffer zone

1 constitutes and what an LMR constitutes, which is
2 in the record?

3 MR. CARROLL: That's right. That's
4 because in section -- the Statute 70-2-12(B)16,
5 it says that the Commission has the following
6 duties: "to determine the limits of any area
7 containing commercial potash deposit," to
8 determine the areas. What you've turned this
9 over to is to the potash company to determine
10 anywhere they want to.

11 CHAIRMAN LeMAY: Back up on that. I
12 would argue with that, only to the sense that
13 there is the BLM, the State Land Office, and
14 other people involved in the LMR determination.
15 So I don't think what you said is true.

16 MR. CARROLL: Well, Mr. LeMay, I am
17 basing that on what Mr. High has argued. When he
18 argued here before the Division, he frankly told
19 us, I can give you the quotation, that the State
20 Land Office, the BLM has no authority to dispute
21 that.

22 CHAIRMAN LeMAY: Have you checked with
23 the BLM and State Land Office to verify whether
24 they have authority or not?

25 MR. CARROLL: Again, Mr. LeMay, that's

1 an issue up. If we accept the definitions -- and
2 that's the problem I have here. If we accept the
3 definition of Mr. High and the interpretations
4 given, one thing happens: You accept what I say,
5 you accept what the State Land Office says.

6 Yeah, they disagree. I know at
7 least -- now, I'm not sure that the BLM disagrees
8 because I quite frankly determine at this point
9 where they're coming down.

10 CHAIRMAN LeMAY: I'm not what sure Mr.
11 High said. This is a de novo hearing, so I'm
12 going to bring up that point again.

13 If Mr. High made that statement, you're
14 going to stand by that statement at this hearing,
15 Mr. High?

16 MR. HIGH: Mr. Chairman, I did not make
17 that statement. If you will look at the industry
18 agreement, we even wrote into the industry
19 agreement that any dispute between the potash
20 lessee and the BLM is subject to a resolution
21 procedure set forth in the code of federal
22 regulations.

23 We set up a dispute mechanism in case
24 the BLM tells us your LMR is not -- no, I didn't
25 make the statement.

1 CHAIRMAN LeMAY: Whether you did or
2 not, I think, is maybe even irrelevant to what
3 we're considering today because this is de novo.
4 And I think the Commissioners need to know the
5 process of an LMR determination. That's all.

6 MR. HIGH: I do question whether or not
7 the State Land Office has the right to approve or
8 disapprove, but not BLM --

9 MR. STOVALL: Mr. Chairman.

10 MR. HIGH: -- under R-111-P.

11 CHAIRMAN LeMAY: Maybe we're getting
12 beyond our scope. Is that what you're
13 recommending?

14 MR. STOVALL: No. I think this is
15 perhaps an appropriate time for me to jump in and
16 tell you what I recommended to the Examiner
17 because it goes directly on this point.

18 With respect to the granting of an
19 exception under Order R-111-P, I advised the
20 Examiner that he, as an Examiner at the Director
21 level, did not have the authority to grant an
22 exception. If there was any authority, it
23 resided with the Commission.

24 With respect to Order R-111-P, I think
25 my point initially, and I think Mr. Carroll is

1 agreeing with it, is that in this proceeding, I
2 think Commissioner Carlson raised that, we can't
3 change the rule in this proceeding.

4 The advice I gave the Examiner at the
5 Examiner Hearing was that we need to interpret
6 and apply R-111-P in a manner in which it is
7 constitutionally sound and defensive.

8 My concern, and I think Mr. Carroll has
9 raised a very good point, and it's the point I
10 raised at the Examiner Hearing, is that the way
11 R-111-P works -- I'm going to state it practical,
12 and, Mr. High, we'll give you a chance to jump
13 in -- but the way R-111-P works is the potash
14 company files a map with the appropriate
15 mineral-owning authority, the BLM or State Land
16 Office, and essentially they do nothing. In the
17 most recent case, the Land Office raised some
18 questions and requested some data from the mining
19 company.

20 The impact of that is, from a
21 constitutional standpoint and the issue that I'm
22 concerned with in terms of making the current
23 R-111-P a valid constitutional question, is that
24 the impact of filing an R-111-P -- I mean, excuse
25 me, an LMR under R-111-P is that the oil and gas

1 mineral interest owner is effectively denied
2 their property without any opportunity to
3 challenge that R-111-P because, as Mr. High
4 describes the process and as I perceive it, the
5 only person in the legal sense of being an entity
6 that can even review or ask for a review of an
7 LMR is the state or federal agency.

8 Therefore, the owner of an interest,
9 which is affected and which is denied, is denied
10 any opportunity whatsoever to challenge the basis
11 upon which their property is taken.

12 Now, I would contend that there are two
13 ways that that could be done. In a real world
14 thing would be, one, is that there could be an
15 adversarial process at the time an LMR is created
16 at which those challenges could be made. And
17 perhaps a second way is to deal with it on a
18 individualized basis.

19 But my concern from the standpoint of
20 making R-111-P as it exists as a constitutional
21 rule is that the owner of a property interest has
22 to have some opportunity to be heard on
23 deprivation of that property interest.

24 Now, Mr. Carroll has couched it in
25 terms of a delegation of authority, and I've

1 couched it kind of in terms of the taking of
2 property.

3 CHAIRMAN LeMAY: Wasn't your purpose in
4 trying to frame this is to get away from this
5 argument you're just presenting right now; that
6 we're getting into a larger argument here than we
7 should in trying to find what this Commission is
8 to decide today?

9 I grant you, that's got to be a big
10 problem, and we're all cognizant of that
11 problem. But in making our legal determination
12 of the issue here, by just tackling that
13 question, I think we're really getting into a --

14 MR. STOVALL: I make it in the context
15 of a request for an exception to R-111-P,
16 prohibition against drilling, in that I think
17 that because the current rule does not allow any
18 method for effective property interest owner to
19 challenge an LMR, that possibly the only
20 mechanism for that property owner to have at
21 least a forum to present their interest in
22 property rights is through an exception process.

23 CHAIRMAN LeMAY: By granting that
24 exception process, you're opening up the argument
25 on whether R-111-P is a valid, defensible --

1 MR. STOVALL: No. What I'm suggesting
2 is that if you interpret it to allow an
3 exception, and it doesn't go to the issue of
4 whether waste occurs, but it gives them then the
5 opportunity under the existing R-111-P to --

6 CHAIRMAN LeMAY: Try to make that
7 argument?

8 MR. STOVALL: -- try to make that
9 argument and discuss it.

10 Now, procedurally, Mr. Chairman, let me
11 suggest what I think you can do. I think you're
12 going to have to -- you're going to rule today, I
13 assume?

14 CHAIRMAN LeMAY: Well, I think we have
15 to because in order for this thing to go on, I
16 think everyone here has to know where we're
17 going.

18 MR. STOVALL: Obviously you cannot go
19 and meet in closed session.

20 CHAIRMAN LeMAY: Can't we?

21 MR. STOVALL: I'm going to have to
22 advise you no.

23 CHAIRMAN LeMAY: Can we speak in very
24 quiet terms up here, or does everyone have to
25 hear it?

1 MR. STOVALL: What we can do, you may
2 or may not -- you can go off the record and have
3 a discussion amongst the Commissioners with
4 instructions to the folks sitting out there to
5 sit down and shut up, that you're not going to --
6 it's now your deliberation session and you don't
7 have to hear their input anymore.

8 CHAIRMAN LeMAY: Let's get off the
9 record only to get away from the legal stuff.
10 Can we do that?

11 MR. STOVALL: Absolutely.

12 MR. CARROLL: Mr. LeMay, just before
13 you do --

14 CHAIRMAN LeMAY: Sure. Please, Mr.
15 Carroll, address the issue.

16 MR. CARROLL: I'm sorry. I made a
17 statement that Mr. High has made comments earlier
18 that he did not think the State Land Office had
19 the authority to approve or disapprove, and he
20 got up here and contradicted that statement.

21 All I want to do is that the
22 Commissioners have the transcript. There is a
23 dialogue that starts about on page 65 by Mr.
24 High, and on page 66 he flatly states, "The
25 function of the State Land Office is not to

1 approve or disapprove. It is to receive the
2 information that we use in our judgment to
3 designate something an LMR and to see whether it
4 is consistent with the data it has."

5 And that's what I was referring to, and
6 I just wanted to clarify that.

7 MR. HIGH: I agree I said that. I
8 agree I said that.

9 CHAIRMAN LeMAY: Good. Now, can we go
10 off the record for a minute and discuss this?

11 [A discussion was held off the record.]

12 [A recess was taken.]

13 CHAIRMAN LeMAY: Let the record show
14 that we're back on the record and that we
15 conducted our deliberations in public and have
16 come to the following conclusions.

17 First of all, we will take a vote on
18 whether the Commission has the authority to grant
19 exceptions under their R-111-P rules.

20 Commissioner Weiss?

21 COMMISSIONER WEISS: Yes.

22 CHAIRMAN LeMAY: Commissioner Carlson?

23 COMMISSIONER CARLSON: Yes.

24 CHAIRMAN LeMAY: No.

25 Two to one, the Commission has the

1 authority to grant exceptions in the buffer zone.

2 MR. STOVALL: Within an LMR.

3 CHAIRMAN LeMAY: Within an LMR, yes.

4 The buffer zone --

5 MR. STOVALL: -- is a part of it.

6 CHAIRMAN LeMAY: Well, the buffer zones
7 are defined by LMRs.

8 MR. STOVALL: Right.

9 CHAIRMAN LeMAY: Next in our
10 deliberations it was suggested that these issues
11 will take place before the Examiner, exceptions
12 to the rule, like exceptions on unorthodox
13 locations, would be cases brought before the
14 Examiner. Do you agree with that?

15 COMMISSIONER WEISS: Yes.

16 CHAIRMAN LeMAY: Commissioner Carlson?

17 COMMISSIONER CARLSON: Yes.

18 CHAIRMAN LeMAY: And I do too. So let
19 the record show that all three of us vote in the
20 affirmative that there will be exceptions.
21 Granted, however, the issue to exceptions will
22 be, like exceptions to the unorthodox locations,
23 will be brought before Examiner Hearings.

24 Is there anything else concerning the
25 legal issues?

1 MR. STOVALL: Having opened that up, of
2 course, that raises all the questions that are
3 procedurally involved here.

4 I think, Mr. High, perhaps you can help
5 me with this one. With respect to the southern
6 two wells, the wells in the southwest quarter, I
7 made the statement that timing might be an issue
8 on that as to whether there was in fact an LMR in
9 effect at the time those applications were filed,
10 when the cases were docketed, and when the cases
11 were heard and orders issued.

12 Your contention is that that's not
13 critical; that that is a question of whether they
14 are -- whether waste of potash would occur; is
15 that correct?

16 MR. HIGH: Yes. There's nothing in the
17 statutes in New Mexico that says you can waste
18 potash just because someone gets there before the
19 other one. It says you can't waste potash. So
20 timing to me is not an issue. It's obviously one
21 in which evidence will be offered. I don't think
22 it is a critical issue that would resolve the
23 matter.

24 MR. STOVALL: That would become as much
25 a factual determination as a legal one that would

1 have to be made today. Is that what you're
2 suggesting?

3 MR. HIGH: That's correct.

4 MR. STOVALL: Mr. Carroll? That's the
5 next threshold question, I think, the Commission
6 would address if it's a legal question.

7 MR. HIGH: Could I comment on the
8 Examiner part of this? If this is going back to
9 the Examiner, I think that raises some other
10 legal issues.

11 I don't think this is the type of a
12 matter that's appropriate for the Examiner. The
13 Examiner is bound by OCC orders. If this goes
14 back to an Examiner now for a hearing on
15 exceptions -- and I don't have any problem with
16 the ruling on exceptions, as I said earlier.

17 But whatever the Hearing Examiner
18 decides, we are entitled, either side, either Mr.
19 Carroll or myself, is entitled to by statute to a
20 hearing de novo back before this Commission to
21 say that the hearing on exceptions to R-111-P
22 will now be heard by a Hearing Examiner with the
23 right of de novo back to this Commission, that's
24 deciding nothing other than we are going to go
25 through a whole lot of stuff for nothing.

1 The hearing before the Hearing Examiner
2 will be an absolute waste of time.

3 CHAIRMAN LeMAY: Mr. High, can I
4 address that, because that's come up with other
5 issues? The fact that the Commission is charged
6 with writing rules and regulations. The
7 Commission is also charged with hearing de novo
8 cases where we've had many applicants wanting to
9 go directly to the Commission because there are
10 cases -- I mean, they told us, "Hey, we're going
11 to oppose that case; therefore, hear it at the
12 Commission level." Don't screw around with the
13 Examiner level is what they're saying.

14 I've had to deny that; otherwise, every
15 contested case would come before the Commission.
16 And we really -- the Commission isn't staffed to
17 meet as often as the Examiners are.

18 So the reason those things, even though
19 they could be appealed to the Commission, start
20 at the Examiner level is because of that
21 procedure.

22 MR. HIGH: We've already been there
23 once, Mr. LeMay. And if you now send us back
24 there, that's not fair to our clients. It's not
25 fair to Yates Petroleum, and it's not fair to New

1 Mexico Potash.

2 MR. CARROLL: May I ask a point of
3 clarification? I'm not interrupting because I
4 don't even understand what's going on here.

5 I interpreted what the vote just was
6 was that, with respect to these four de novo
7 applications, the Commission has decided that it
8 will consider exceptions to Rule R-111. And then
9 it also took a rule that in the future exceptions
10 to R-111 will be considered by the Division
11 Examiners.

12 Were you also meaning, and this is
13 where my confusion is, were you meaning that
14 these four cases were automatically going to go
15 back to the -- I didn't read that into that.

16 MR. HIGH: That's what I understood.

17 MR. CARROLL: I just don't know. Could
18 you clarify so I can --

19 MR. STOVALL: That's a good question.

20 CHAIRMAN LEMAY: That's a good one.

21 COMMISSIONER CARLSON: I didn't
22 understand it that way when I discussed it. I
23 was talking about future cases.

24 MR. CARROLL: That's what I thought.

25 COMMISSIONER CARLSON: I think it

1 was -- I don't know how my fellow Commissioners
2 felt about the vote on that, but --

3 CHAIRMAN LeMAY: Well, why would these
4 cases be heard by us and future cases be heard by
5 the Examiners? What's the reason behind that?

6 MR. STOVALL: Let me offer you some
7 rationale for that. One is that they're here
8 already. I think you can say they're already de
9 novo cases before you. I think that I understand
10 the Commission's policy with respect to not
11 hearing original cases every time there's a
12 contested case.

13 Given the unique nature of this case, I
14 think to present the factual evidence regarding
15 an exception before the Commission and allow the
16 Commission to make the rulings in the first such
17 application, which is already before them, I
18 think that would be of great assistance to an
19 Examiner because I think, quite frankly, if you
20 throw these back to the Examiner right now to
21 hear that evidence with absolutely no guidance
22 whatsoever, I think that would put the Examiner
23 in a very difficult situation.

24 And I would recommend that you leave
25 these at the Commission for that original

1 hearing.

2 CHAIRMAN LeMAY: I have no problem with
3 that. That was your interpretation when you made
4 the suggestion?

5 COMMISSIONER CARLSON: Yes.

6 CHAIRMAN LeMAY: Bill, is that --

7 COMMISSIONER WEISS: [Nodded.]

8 CHAIRMAN LeMAY: I would agree with
9 that too. So in terms of these four cases,
10 you'll get some guidance from this Commission.
11 But as a procedural thing, exceptions to rules
12 are generally held at the Examiner level.

13 MR. STOVALL: This is an exception to
14 that policy about exceptions to rules.

15 MR. HIGH: I apologize for
16 misunderstanding.

17 CHAIRMAN LeMAY: It's a valid point. I
18 was in doubt on that myself.

19 MR. CARROLL: Distinct group on both
20 sides.

21 CHAIRMAN LeMAY: So we're at the point
22 where the Commission is going to hear all four
23 cases factually.

24 MR. STOVALL: I think Mr. High has made
25 a good point, and I think it does simplify the

1 Commission's task, is if you simply look at all
2 four applications as waste of potash versus waste
3 of oil cases -- is what they're really going to
4 be -- and hear the totality of evidence in that
5 context of which the existence of an LMR can come
6 back up at that time and get the factual evidence
7 and information in with respect to that. I think
8 that makes it procedurally manageable for --

9 MR. CARROLL: I would have to agree.
10 There are some considerations about the timing
11 that will form part of the evidence. And I think
12 as long as our hands are not constrained from at
13 least presenting the evidence so that we get the
14 factual framework where all these things
15 occurred, I've got no problem with that.

16 Just all of them are thrown back there,
17 and there's no limitation on the evidence to be
18 presented, then we can make a good case and not
19 tie our hands at this stage. I don't want to do
20 that either.

21 CHAIRMAN LEMAY: Do you think you could
22 really still walk that narrow line now that we've
23 granted exceptions between waste issues and the
24 collateral attack on R-111-P?

25 MR. CARROLL: I think my client would

1 say no, but I think as a lawyer because, you
2 know, my comment earlier, I am in disagreement at
3 times with Mr. Stovall, but I honestly have to
4 recognize his legal arguments, and he makes some
5 good, sound arguments. And I'm not sure that I
6 have legal precedent to dispute it. Maybe I've
7 got common sense arguments and so forth.

8 And I just wanted to be honest with
9 you, Mr. LeMay. I can see where we can. I can't
10 make a total prediction, but I can at least see
11 that it may be possible. And if that's the --
12 right now what comes to mind where we're going to
13 have to consider this is the issue of subpoenas.

14 And what I'm going to tell the
15 Commission there is that there's been a number of
16 cases. I can give you an order and a case
17 between potash companies and Texaco, which is
18 going on in these discussions in 1977, where you
19 entered into a protective order.

20 And, I mean, the Commission knows how
21 to handle these things and have done it in the
22 past with this privileged material. All I want
23 to suggest to you, we could do that in executive
24 sessions and what have you.

25 And certainly, and it appears to me,

1 and -- well, no, it was not Mr. Bruce that was
2 involved in that. It was Mr. Hall. But it
3 appeared to me that that was a workable
4 solution. It happens all the time in the
5 courthouse. There's no absolute privilege of
6 this kind of documents, though there's a
7 recognized right which we've got to give due
8 deference to.

9 And I will give Mr. High that. And we
10 can certainly come up with a protective order.
11 And again, there we've skirted my constitutional
12 problem. I think there's a mechanism.

13 MR. HIGH: Are we arguing the subpoenas
14 now? Because we don't want to produce that
15 stuff.

16 MR. STOVALL: I don't think we're
17 arguing subpoenas at this point. I think the
18 question was: Can these excepted R-111-P cases
19 be heard without being an attack on R-111-P?

20 I think the answer to that, Mr.
21 Chairman, is that it is very possible that some
22 of the evidentiary stuff and the argument that
23 will come out may be used in the future in a
24 discussion of R-111-P.

25 But I don't think that hearing these

1 cases in and of themselves will -- I think it is
2 made within the context of R-111-P, and I don't
3 think that you've --

4 MR. CARROLL: That's, I think, maybe a
5 shorthand way of saying it.

6 CHAIRMAN LeMAY: Okay. That's what we
7 want to happen.

8 MR. CARROLL: I understand.

9 CHAIRMAN LeMAY: We don't want to
10 broaden this thing. That's always been a
11 concern, I think, of the Commission that if we're
12 going to open it up, we'll open it up. But let's
13 not mix apples and oranges here. We're trying to
14 walk a fine line.

15 MR. HIGH: I think it can be done, Mr.
16 LeMay. I don't know if it will be done.

17 CHAIRMAN LeMAY: I don't know either.

18 MR. STOVALL: We'll manage as best we
19 can.

20 CHAIRMAN LeMAY: Can you get together
21 in terms of case management because you all know
22 how many days? This is after years of committee
23 work and how long the oil potash R-111-P took and
24 how long these things can take. If you get too
25 many issues involved, mine safety or all that

1 stuff, if we hear that, we may get a little bit
2 away from what we're trying to do.

3 MR. HIGH: In terms of Mr. Carroll and
4 I getting together and trying to come up with the
5 issues and that sort of thing, I'll be more than
6 willing to do that.

7 We can't get together on what he
8 subpoenaed. We won't produce that.

9 CHAIRMAN LeMAY: That's a separate
10 issue. First, I want a little bit of case
11 management here. You all meeting with Mr.
12 Stovall can pretty well delineate the issues,
13 boil it down to the narrowest possible framework
14 in exceptions, as we view exceptions.

15 MR. HIGH: We'll be more than glad to
16 try to do that.

17 CHAIRMAN LeMAY: Okay. I think that's
18 important especially.

19 Do you have anything to add to that?

20 COMMISSIONER CARLSON: No, I don't.

21 CHAIRMAN LeMAY: Are we ready to look
22 at the second issue?

23 MR. STOVALL: We're now at the subpoena
24 issues.

25 CHAIRMAN LeMAY: Subpoena issues.

1 Should we hear arguments on those or take a
2 break? How long are you guys going to argue
3 subpoenas?

4 MR. CARROLL: Mr. LeMay, I'm really not
5 going to argue very lengthy. I think that the
6 Commission has recognized that we have a right
7 and the Commission has an obligation to determine
8 within the parameters of R-111-P whether we can
9 make a clear demonstration that commercial potash
10 will not be unduly wasted.

11 Now, that's the burden. R-111-P, and
12 let me -- before our R-111-P was written, I think
13 the burden was -- the oil and gas industry said I
14 want to drill. The burden was then upon the
15 potash company to come in and prove, hey, you're
16 going to waste.

17 One of the things that R-111-P
18 effectively did was shift the burden. It took it
19 out of the potash company and put it squarely on
20 the oil and gas industry. I think that was a
21 recognition of the fact that they have something
22 there to be protected. Whether I agree with that
23 or not, I think that was a recognition of it and
24 give the Commission due deference.

25 But in changing and shifting the

1 burden, it is fundamentally unfair to deny the
2 oil and gas companies information which is solely
3 in the possession of the individual potash
4 companies, deny them that information which is
5 critical to carrying the burden.

6 Now, what we're asking for is critical
7 to determination of whether or not this is
8 commercial and whether we'll be wasting
9 commercial deposits. That's our burden. We have
10 to have it.

11 Now, we recognize, and the Commission's
12 done this over the years, that they consider it
13 proprietary, and I do not doubt that there is
14 extreme competition between the various potash
15 companies for the market and the potash.

16 And whatever they have held is
17 proprietary, I think we need to honor that, but
18 give us access under very strict, protective
19 devices, an agreement between us, which describes
20 how the information will be received, handled,
21 protected.

22 And then when we do have our
23 Commission, we can restrict the audiences so that
24 there's no competitors. It will go into a closed
25 and sealed, as I understand it -- the case I was

1 talking about is Case 9148. This was two
2 applications. It was 9148 and 9158, two
3 applications by Texaco, and resulted in Order
4 R-8491.

5 And the record even reflects the
6 confidentiality agreement that was entered into
7 between the parties. The Commission found that,
8 you know, the order. And in that case all of
9 that information was sealed when it was
10 proprietary.

11 And basically the agreement provides
12 for the potash company to decide what's
13 proprietary. The oil and gas company decides
14 what's proprietary. And if they decide it, it's
15 protected unless there's good cause for it not to
16 be. And quite frankly we have no reason to
17 contest that. We just want to be able to use it
18 for the purposes of this limited hearing. We'll
19 seal it, and we will protect it.

20 I think that's a constitutional right.
21 If you're going to place a burden on us, don't
22 deny us the tools to carry that burden because
23 they're the only ones that got it. Throughout
24 all our jurisprudence, that's a very simple
25 proposition that has always been honored.

1 Furthermore, I direct your attention to
2 the courts and the Rules of Evidence. The rules
3 with respect to trade secrets and confidential
4 material and proprietary information is not an
5 absolute privilege. There is no absolute
6 privilege anywhere in the courts. It is a right
7 that must be protected. We concede that, and we
8 will agree. And we'll work with Mr. High to
9 protect this information.

10 The rules, the statute gives this
11 Commission the power to subpoena documents that
12 are necessary to the presentation of our case.
13 That's all we're asking. And we recognize that
14 they have the same right.

15 Now, the information that they have
16 requested at this point in time does not get into
17 proprietary information. And I'm not saying they
18 can't request other information. Now, again if
19 they get into that, you know, it's still subject
20 to, you know, the normal, it's a harassment or
21 whatever.

22 But if it's really relevant, it's not
23 harassment, it's confidential, all we will ask is
24 for it to be protected and live with the same
25 agreement. And I think the law is clearly on the

1 side of granting the subpoenas. You have the
2 statutory authority to do this.

3 Mr. High's only complaint is that it's
4 proprietary and they don't want to share it.
5 Fine. I know they don't want to share it with
6 the public. But he wants to impose upon us the
7 burden here. It's a very heavy burden, I grant
8 you, so give us the information.

9 CHAIRMAN LeMAY: Mr. High.

10 MR. HIGH: Mr. Chairman, what Yates has
11 asked for here is core hole data covering ten
12 sections of land. And what they can do with that
13 and what they do want to do with it is to create
14 the outlines of our ore body for our entire mine,
15 and we don't want to give that information to
16 anyone under any protective order or anything
17 else. That is simply too secretive for us to
18 release to anyone under any conditions.

19 What we have given them and what we
20 think is relevant to them is what does our core
21 hole data show in Section 2 where these wells are
22 being proposed? That is relevant, and we've
23 given them that data of that core hole No. 162.
24 We gave it to them. And it shows about 16
25 percent K_2O sylvite potash. We've given them

1 that. That is relevant, and I agree they're
2 entitled to it. And they need that to develop
3 their case and try to convince you that they
4 won't waste potash.

5 But they don't need the core hole data
6 over ten other sections of land so they can
7 outline the contours of our ore body, not for the
8 purpose of this proceeding. What they can do
9 that and what they want to do with it is try to
10 show this Commission that our LMR is not properly
11 designated; that it includes some ore that they
12 don't think is commercial; that they don't think
13 we can mine.

14 That's what they want to do. They want
15 to attack the whole LMR. They don't want to
16 limit the issue just to whether or not the
17 drilling in Section 2 will or will not waste
18 potash.

19 If that's the only issue they wanted to
20 address, we've given that to them. We've given
21 them all the core hole data we have in Section
22 2. And we don't mind giving it to them. We've
23 told them we don't want them showing it to
24 anybody. But they can't use that as a
25 springboard to get all of our core hole data in

1 ten other sections to outline the contours of our
2 ore body.

3 That is simply too sensitive, and we
4 don't want to release that under any type of a
5 protective order because it's simply not relevant
6 to the issues here. It might be relevant to
7 wholesale assault on R-111-P and the LMR concept,
8 but it's not relevant to whether or not these
9 wells in Section 2 will waste or will not waste
10 potash.

11 MR. STOVALL: Mr. High, can I ask you a
12 question on that that comes to my mind? It would
13 seem to me that one of the issues in
14 commerciality might be, for example, if you get
15 the information on Section 2 and that was
16 exclusively -- the question would be is it
17 commercial to mine in Section 2? And the answer
18 to that question might be no.

19 But the other question might be if I've
20 got to mine elsewhere, then reaching out and
21 getting Section 2 then becomes commercially
22 feasible and it's a different issue.

23 MR. HIGH: It's the same issue, Mr.
24 Stovall. If you allow that kind of evidence, it
25 is a wholesale assault on R-111-P because the LMR

1 in this area comes right down to the top of
2 Section 2. And since R-111-P was issued, no one
3 has ever questioned that being LMR, defined in
4 R-111-P as being commercial grade potash.

5 Are you now going to allow them to come
6 in and now challenge the designation of that as
7 being, quote, "commercial grade potash"? If
8 you're going to allow that, then we're into this
9 wholesale assault, as Mr. LeMay said, on
10 R-111-P.

11 MR. CARROLL: I have to disagree with
12 Mr. High. And I think Mr. Stovall really hit the
13 nail on the head. What we're charged with is
14 showing that there will not be a waste, an undue
15 waste.

16 What does waste say, the definition of
17 waste? It says, "Drilling or producing
18 operations for oil or gas within any area
19 containing commercial deposits of potash where
20 such operations would have the effect unduly to
21 reduce the total quantity of such commercial
22 deposits of potash which may reasonably be
23 recovered in commercial quantities or where such
24 operations would interfere unduly with the
25 orderly commercial development."

1 Mr. High wants to unreasonably restrict
2 the definition of waste. We have a right. We're
3 charged with this. If we can overcome all of
4 this, we have to consider the waste is not waste
5 unless we unreasonably reduce the total
6 quantities of recoverable potash.

7 Activities are not waste unless we show
8 that we're going to reduce the quantities that
9 may reasonably be recovered in commercial
10 quantities. How do you determine? You don't
11 narrow it to Section 2. You've got to look at
12 this particular mining operation.

13 This is our burden. We need to be able
14 to look at it. We have -- the statute says we
15 can operate in it. I don't think this Commission
16 can narrow that definition.

17 And finally, these operations would
18 have to interfere unduly with the orderly
19 commercial development of such potash deposits.
20 We're not talking about the potash. We're
21 talking about in just one little area where
22 you're drilling the well. We're talking about
23 all the potash deposits. Are we going to
24 interfere?

25 Unless we look at the total picture, we

1 can't define or determine whether or not we're
2 interfering with the orderly development of these
3 commercial deposits or if we're unduly reducing
4 the overall amount of potash that's going to be
5 recovered. If you don't show that, you don't
6 have waste, and then we should be entitled to
7 drill.

8 So that's our burden. You've got to
9 let us deal with that burden. And the only way
10 we can deal with this burden, as Mr. Stovall was
11 suggesting in his question, is to get all the
12 information.

13 CHAIRMAN LeMAY: Does anyone else have
14 anything to say on the subpoena issue?

15 Additional questions, Commissioner
16 Carlson?

17 COMMISSIONER CARLSON: I don't think
18 so.

19 CHAIRMAN LeMAY: Commissioner Weiss?

20 MR. STOVALL: Let me ask one question.
21 We're actually talking about two subpoenas, I
22 think. One is the subpoena to the BLM, which is
23 also, as you stated, covered by an FOI. And the
24 other one is the subpoena directed to New Mexico
25 Potash.

1 And, Mr. High, let me ask you, again
2 because I think he's basically the objector to
3 the subpoenas, the same arguments apply to both
4 subpoenas; is that correct?

5 MR. HIGH: Again, Mr. Stovall, I have
6 not seen the subpoena to the BLM, so I can't
7 really comment. The only one I've really seen is
8 the one Mr. Carroll sent me.

9 I will assure you the BLM will not
10 under any circumstances, subpoena or otherwise,
11 release proprietary information. So, I mean,
12 I've been that route before myself, so I wish Mr.
13 Carroll good luck.

14 MR. STOVALL: Will the Freedom of
15 Information Act take care of it?

16 MR. HIGH: No, they will not release it
17 under FOIA.

18 MR. STOVALL: Let me rephrase my
19 question. Will the Freedom of Information Act
20 request take care of the issue, as far as you're
21 concerned, of Yates getting the information?
22 They'll get what they can get under the Freedom
23 of Information Act, and then the subpoena here
24 doesn't change what they'll get?

25 MR. HIGH: No. Whatever they're

1 entitled to under the FOIA, that's fine with me.
2 I don't have any problem with that. They will
3 not get proprietary information under the FOIA.

4 MR. STOVALL: They'll get what they can
5 get under the subpoena, they can also get under
6 the FOIA; is that correct? It doesn't matter
7 which method they use to acquire the
8 information?

9 MR. HIGH: No. They cannot get the
10 outline of our ore body under the FOIA.

11 MR. STOVALL: And you're saying they
12 can't get it under a subpoena from us either; is
13 that correct?

14 MR. HIGH: I hope not. Now, I don't
15 know what BLM will release. There's a lot of
16 core holes out there around the WIPP site, and I
17 suspect that that core hole data is in the public
18 domain. That they can probably get.

19 But the private information we have
20 with respect to the contours of our ore body and
21 our reserves, BLM has that. But that they cannot
22 get, at least it's my understanding, they cannot
23 get that under FOIA. That's my understanding.

24 But again, I can't comment on the
25 subpoena they've sent because I've seen neither

1 the FOIA request nor the subpoena to the BLM.
2 All I've seen is the subpoena to me for all this
3 core hole data, economic analysis, and everything
4 else we have over eleven different sections.

5 MR. STOVALL: Let me rephrase the
6 question. If this Commission were to decide to
7 uphold, and I understand it is kind of in
8 abstract, uphold the subpoena and if BLM were to
9 determine that that was proprietary information
10 which they could not release, I'm assuming that
11 you're suggesting that they would not honor our
12 subpoena?

13 MR. HIGH: The BLM? That's my
14 understanding.

15 MR. STOVALL: Okay. That's all I
16 wanted. That's really what I was trying to get
17 to.

18 MR. CARROLL: I suspect that's
19 correct.

20 MR. KELLAHIN: Mr. Chairman?

21 CHAIRMAN LEMAY: Yes.

22 MR. KELLAHIN: Just a point.

23 CHAIRMAN LEMAY: Please, Mr. Kellahin.

24 MR. KELLAHIN: Mr. High seeks a level
25 of protection under the subpoena that no oil and

1 gas operator before this Commission has ever been
2 able to achieve.

3 Equate that to the situation of an oil
4 and gas operator with an oil pool that has
5 substantial data of the size, shape, and
6 configuration of that source of supply. And he
7 wants -- his opponent needs to construct an
8 isopach to demonstrate the size and shape of
9 reservoir. We give that operator the data points
10 so that he can test that configuration.

11 For Mr. High's clients to give Yates
12 one data point is intimately unfair.

13 MR. BRUCE: Mr. Chairman?

14 CHAIRMAN LEMAY: Yes, Mr. Bruce.

15 MR. BRUCE: I would, having been on
16 the receiving end of a subpoena from Mr. Kellahin
17 and --

18 CHAIRMAN LEMAY: I sympathize with
19 you.

20 MR. BRUCE: -- I have to admit he's
21 right in that the Commission decided this
22 before. It was a case about a year ago
23 concerning forced pooling.

24 And Mr. Kellahin's client was able to
25 get some title data from two or three wells. And

1 they needed it, and they proved to the Commission
2 they needed it in order to make a determination
3 as to whether to join in the wells.

4 And I think even just looking at the
5 map of the potash that the BLM puts out, you can
6 see that the areas weave in and out among the
7 whole area, what is a known potash area, et
8 cetera. I think it would take several core holes
9 at the very least to make a determination on the
10 appropriateness of an LMR designation, and one is
11 just not sufficient.

12 CHAIRMAN LeMAY: Well, I don't think
13 we're talking about the appropriateness of an LMR
14 designation. We're talking about a waste issue.

15 MR. BRUCE: What I'm saying is where is
16 the potash? Can you determine it by one core
17 hole?

18 CHAIRMAN LeMAY: Mr. High?

19 MR. HIGH: Mr. Chairman, again Yates is
20 challenging our LMR. That's why they want this.
21 And if you recall, you have heard all of these
22 debates before. I don't think there's been
23 anything said in the last 20 minutes that you
24 haven't heard before because it came up during
25 the OCD study committee when we developed this

1 life of mine reserve concept.

2 The same issue came up then. The oil
3 and gas company said well, we want to see where
4 your ore body is, the good stuff. And we said
5 no, that's proprietary information. We won't do
6 that. We had been filing it for years with the
7 BLM. We agreed to add the State Land Office as
8 an additional place where we would file it so
9 that the regulatory agencies could confirm and
10 have the same data that we used to designate an
11 LMR.

12 But we included in R-111-P the
13 following language for precisely the reason that
14 Yates is arguing this morning. Paragraph G, this
15 is on page 10 of R-111-P, paragraph G(a) says as
16 follows: "Information used by the potash lessee
17 in identifying its LMR shall be filed with the
18 BLM and SLO but will be considered privileged and
19 confidential trade secrets and commercial
20 information within the meaning of 43 CFR, Section
21 2.13 C(4) and Section 19-1-2.1 NMSA 1978, and not
22 subject to public disclosure."

23 Now, we did that to prevent what Yates
24 is trying to do now. We don't want people
25 getting all of our reserve data so they can plot

1 the contours of our high grade reserve. We don't
2 want that. And that was specifically why that
3 was put in there. And now Yates is trying to
4 circumvent it and get that data.

5 It is unnecessary for them to have all
6 of this data to determine whether or not these
7 four wells in Section 2 will or will not waste
8 potash.

9 CHAIRMAN LeMAY: Anything else on the
10 subpoena issue?

11 COMMISSIONER CARLSON: Mr. High, is
12 there some middle ground that you would be
13 willing to reach? I mean, instead of ten
14 sections, could they look at three? Or is there
15 something where they can determine and a logical
16 extension of your present operation would include
17 Section 2? I think that's the issue we're
18 looking at here.

19 MR. HIGH: We might take a look at
20 that. We don't want to give them something they
21 can plot the whole thing. We might consider
22 giving them more than just the section of the
23 core hole No. 162, if we thought that would
24 resolve it.

25 But again, Commissioner, what they have

1 told us and what they want to do is challenge our
2 whole LMR. If they want to restrict the data to
3 something beyond core hole No. 162 to determine
4 the existence of potash in Section 2, then we
5 would try to work with them.

6 But we don't want to give them, and we
7 don't think they need it, and quite frankly we're
8 afraid to give it to them, to plot the outlines
9 of our reserves. We don't have anything more
10 secret than that. And we don't think they're
11 entitled to it. They don't need it.

12 But we'll work with them in trying to
13 give them something more. I don't think it will
14 be successful because I know what they want and
15 what they want to do with it. They have an
16 expert sitting here in the room this morning that
17 they're going to have testify, potash, a mining
18 person, hearing what we say here today.

19 They want to get all this data and give
20 it to him and have him testify that the BLM
21 standards of commercial potash, 4 feet, 10
22 percent, and 4 feet of 4 percent, is not, quote,
23 "commercial" because you can't economically mine
24 it. That's what they're going to have him
25 testify for.

1 So they want all this core hole data so
2 they can find out what grade of potash we have in
3 our whole ore reserves and so they can give it to
4 him and have him testify this is not commercial
5 potash. We don't want to do that. That's why we
6 don't want to let them have all this data.

7 We don't mind giving them the data for
8 Section 2 because that's what we're talking
9 about. But we don't want them to come in and
10 have all that other stuff. I hope I've responded
11 to your question. But we will try to work with
12 them to give them what it is they want in Section
13 2. We're not going to let them map out our whole
14 ore body on the south side. We just can't do
15 that.

16 COMMISSIONER CARLSON: Well, just a
17 minute. If you do give them all ten sections,
18 what is the matter with their expert coming and
19 saying -- I assume you would have an expert that
20 would say it is commercial.

21 But what is wrong with their expert
22 evaluating that whole ore body and making a
23 recommendation whether it's commercial or
24 noncommercial? Isn't that by its nature what
25 defines a commercial ore body is that kind of

1 information?

2 MR. HIGH: I don't know Commissioner.
3 I don't know what he considers commercial.

4 COMMISSIONER CARLSON: I don't either.
5 I don't have a clue. Doesn't he need that kind
6 of information to make a determination as with
7 your expert?

8 MR. HIGH: Only if you're going to
9 allow them, as I thought Mr. LeMay said that he
10 wasn't going to, to challenge or to do a
11 broadsided attack on R-111-P. If you're going to
12 allow Yates to come into this hearing and say
13 that this buffer zone is improper because the LMR
14 is improper because it's not commercial grade
15 potash, then perhaps you can argue it's
16 relevant.

17 But in the narrow issue that Mr. LeMay
18 said a minute ago, it's not relevant.

19 COMMISSIONER CARLSON: Well, but if
20 this Commission would restrict them from
21 attacking R-111-P, which I think we decided
22 that's not within the context of this hearing at
23 all, all we're trying to determine is if these
24 wells would unduly waste potash.

25 To make that determination, you have to

1 also determine if that potash is commercial
2 deposit; is that correct?

3 MR. HIGH: That's correct.

4 COMMISSIONER CARLSON: Then isn't it
5 logical for their expert to have that information
6 to determine? I mean, I think he can make that
7 recommendation without attacking your LMR or
8 without attacking R-111-P.

9 MR. HIGH: Commissioner, that
10 information is not necessary, and it's not
11 necessary for this reason. He can get from the
12 BLM -- he's already been down there. He's
13 already been to the BLM. He can get from the BLM
14 the average grade of potash mined in the basin.
15 He can get that. He already has that. So he's
16 going to know the average grade of potash mine.

17 He knows that all four of these wells
18 are within 2600 feet of a core hole that shows 16
19 percent K_2O sylvite. And he ought to know that
20 that's going to waste potash because I will
21 assure you that if you look at the average grade
22 of potash mined in the basin, 16 percent is good
23 stuff. We'd like to have as much as 16 percent
24 as we can get because we don't always have it.

25 So if he has that information, if he

1 knows that within 2600 feet of these wells is 16
2 percent potash, what does he need to know what's
3 over in Section 34 and 26 and what have you? He
4 knows what people can mine. He knows what the
5 technology is. He knows what we can mine and
6 process. And he knows that we can make a living
7 on something far less than 16 percent potash.

8 COMMISSIONER CARLSON: But isn't it
9 conceivable that one core hole with 16 percent
10 potash does not by itself show a commercial
11 deposit?

12 MR. HIGH: You might argue that in the
13 abstract. You might argue that. I don't think
14 you can here, again, unless you're going to let
15 them attack the LMR. Bear in mind that after
16 R-111-P was put into place, we filed an LMR. It
17 came down to the top of Section 2. Well, at some
18 point that ought to become final and people ought
19 to accept it.

20 And if you have another core hole
21 that's in the section just below that that shows
22 16 percent potash and we extend our LMR down that
23 far, at what point are you going to say all
24 right, this has been a designated LMR now for
25 five years, or four years, whatever it is, at

1 what point do you accept that as being a
2 commercial grade potash, like R-111-P says it
3 is?

4 If you let them get all the data now,
5 you're going to let them go back and challenge as
6 being improper a whole lot of area that was a
7 designated LMR back in 1989. Well, that's just
8 going to throw open the whole issue of LMR, the
9 concept of LMR.

10 If we filed that map in 1989 and said
11 it's LMR down to this point and no one had any
12 problem with it, no one objected, BLM didn't, the
13 State Land Office said nothing, at some point
14 that ought to become final. And for these
15 proceedings we ought to be able to accept it as a
16 given fact that, by golly, down to that point it
17 is an LMR.

18 And an LMR is defined in R-111-P as
19 being commercial deposits of potash. We ought to
20 forget about it and go on. And what else is in
21 issue? Well, the only thing in issue, if you
22 accept that, is Section 2.

23 What information do you have from that
24 LMR line down to these wells? Well, you have an
25 additional hole, No. 162, which shows 16 percent

1 potash, and we've given them that information.

2 CHAIRMAN LeMAY: Can I ask one
3 question? Commissioner Carlson, along your line
4 of argument, it's one thing to acknowledge the
5 concept of an LMR. I think that's an integral
6 part of the R-111-P order.

7 It's probably another issue to look at
8 the definition of that LMR because R-111-P by its
9 nature says these LMRs can be expanded and
10 contracted. In fact, that was your argument; we
11 have a fluid map here. We're not saying this is
12 cast in concrete.

13 So, as I visualize the waste issue,
14 aren't we talking about the fringes of this LMR:
15 How far it goes down and how far it goes up and
16 what logical projection you might take from a
17 core hole, how to further define it?

18 And if you're dealing with that
19 definition, you're not dealing with the concept
20 of the LMR; you're just dealing with trying to
21 define it more closely and argue its definition.

22 MR. HIGH: That's true with respect to
23 the extension of the LMR from its initial
24 boundary down to include all of Section 2.
25 That's the timing issue.

1 Two of these wells are in the buffer
2 zone of an old LMR, and two of the wells are in
3 the new amended LMR. The old LMR and its buffer
4 zone have been there in place for a long time,
5 since the first map we filed. The first
6 designation we made after R-111-P designated that
7 LMR and that buffer zone, and it's been in place
8 ever since.

9 When people started requesting wells
10 down in this area around Section 2, we allowed
11 some. And then we said, wait a minute. Let's
12 put down a core hole to see what's down there.
13 We put down a core hole down in the southeast
14 quarter of Section 2, and it showed 16 percent
15 potash.

16 We then filed a letter amending our
17 LMR, as allowed under R-111-P, to move the LMR
18 line from its old initial place down to include
19 Section 2 based upon this core hole 162. So the
20 timing issue is: When did we amend? So that's
21 what Mr. Stovall is referring to.

22 So to me the only issue is: What data
23 is there to show commercial grade potash below
24 the old LMR?

25 CHAIRMAN LeMAY: You're at a critical

1 point, I feel. If you can take a core hole and
2 extend this LMR down by something you said has
3 been established forever, why can't the
4 opposition take the available data and try and
5 extend the LMR up?

6 We're talking about varying the limits
7 of the LMR which affect the waste of commercial
8 potash, not the concept of protecting LMRs, just
9 its definition.

10 MR. HIGH: Because, Commissioner, if
11 you allow the oil and gas companies, if that's
12 the definition of commerciality you're talking
13 about, if you're going to allow the oil and gas
14 people to come in here and try and convince you
15 that a certain area of potash is not commercial
16 because it's not economical, okay, we're going to
17 be up here a whole lot because they're going to
18 say, "Well, for them to mine this, it may be 16
19 percent potash, and that certainly meets BLM's
20 definition of commercial grade potash, but it
21 really is not commercial because the amount of
22 money it would take to mine it would not make it
23 recoverable because they would have to put down a
24 shaft; they would have to do this; they would
25 have to do that; the rate of return is 10

1 percent, 12 percent." They're going to get into
2 all our overhead factors.

3 CHAIRMAN LeMAY: Well, that was a
4 different question than I was addressing. I
5 wasn't addressing necessarily the commerciality.
6 I was addressing the outline of the ore body on
7 the southern end. If you've extended it
8 recently, they might want to push it back based
9 on core data that they hope to get.

10 I mean, I don't know what they're going
11 to argue. But I would think a lot of it has to
12 do with that southern boundary of that ore
13 pocket.

14 MR. HIGH: But to push it back, they
15 would have to claim that it's not commercial
16 grade potash.

17 CHAIRMAN LeMAY: Or maybe it wasn't
18 there. I don't know what they're going to
19 argue. That's their business. But how can they
20 do it without the information? I don't
21 understand. That's the dilemma.

22 MR. HIGH: Again, this is the same
23 argument we had with the R-111-P. We decided we
24 would file the information with the regulatory
25 agency, because it is proprietary and

1 confidential, and let them address these issues
2 you're talking about.

3 If we file a designation of an LMR
4 that's improper, that includes in that
5 designation ore that is not minable using
6 current-day technology and techniques and what
7 have you, the regulatory agencies are there for
8 that purpose.

9 Now, what Yates want to do, they want
10 to come in and say, "We don't think that the
11 agencies are doing what they should. We want to
12 get the data and look at it ourselves and
13 convince the agency you shouldn't have allowed
14 this LMR." That's what they want to do.

15 CHAIRMAN LeMAY: But even granting that
16 point, they've asked us to make a determination.
17 That doesn't give them -- I mean, if the State
18 Land Office says you can't drill there, I don't
19 see how they could drill -- the BLM says you
20 can't drill. I mean, we have one designation.
21 They might accept it; they might not.

22 But I feel that what we've heard, maybe
23 the decision that this Commission is going to
24 have to look at exceptions to the rule and now
25 we're at that point of looking at exceptions to

1 the rule and what's needed to look at exceptions
2 to the rule.

3 MR. HIGH: The exception, Mr. LeMay,
4 should not swallow up the rule. And if this
5 Commission is going to start ordering us,
6 contrary to R-111-P, to disclose all of our
7 proprietary information where they can sit down
8 on a map and literally draw the outlines of our
9 commercial grade reserves, then we're going to
10 have to do a whole lot more work on R-111-P
11 because we simply cannot live with that.

12 I mean, that is not something that we
13 as an industry can live with to give that kind of
14 sensitive information. There's not a protective
15 order in the world you can write that would
16 satisfy us to release that information.

17 CHAIRMAN LeMAY: Well, I think that's
18 what we're talking about.

19 Now, Commissioner Carlson asked if they
20 could, as I understand, reduce it maybe five
21 sections or three sections, or is there something
22 that can be negotiated there that would give them
23 the core holes to argue the southern limits of
24 the ore body?

25 MR. HIGH: We'll talk with anyone and

1 try to resolve it if we can. But again, I don't
2 think Yates will back off one second from what
3 they've requested. They've requested -- this is
4 the second time we've been served with a
5 subpoena.

6 In the initial hearing before the
7 Hearing Examiner, they had the same subpoena, and
8 it was quashed at that point. The Hearing
9 Examiner quashed the subpoena at that point. So
10 I don't know if they're willing to back off of it
11 and try to work with us -- I don't know.

12 CHAIRMAN LeMAY: Can I ask them?

13 MR. CARROLL: Commissioner LeMay, I
14 would like to.

15 CHAIRMAN LeMAY: Do you want to back
16 off that, or do you want to go for the full ten
17 sections?

18 MR. CARROLL: Let me explain to you why
19 we can't back off. One, because those ten
20 sections, to the best of our knowledge and
21 belief, there may not be core holes in all ten of
22 them.

23 Secondly, this whole dispute revolves
24 around a misconception or a confusion of two
25 terms. The definition of waste talks about

1 commercial deposits which can be recovered in
2 commercial quantities and whether or not there
3 can be orderly commercial development.

4 Mr. High is trying to take the term
5 commercial grade and say you can find out what
6 the commercial grade in Section 2 is and you
7 ought to be satisfied. I can tell you that
8 that's not going to work just by a simple
9 reference to the 1984 potash map because in
10 Section 2 there's a barren area shown.

11 There may be right there in that spot
12 some commercial grade potash, but that doesn't
13 mean that there's a commercial deposit in Section
14 2, nor does it mean that the commercial grade
15 deposit in Section 2 is anywhere near the kind of
16 deposits that can be mined and developed with
17 respect to an orderly commercial development.

18 That's why you need all of these core
19 hole datas. You have to look at the mine once
20 it's mining. And we're not asking them to give
21 us their interpretation of where they're going.
22 Let us look at these core holes, and let us make
23 the determination.

24 The case that we referred to, the
25 Texaco case, I would ask the Commission to look

1 at the order because in that order the Commission
2 specifically found that the interpretation given
3 by the potash company was not supported by the
4 core hole data.

5 With that one evidence right there in
6 the case, I don't think we can trust because we
7 don't know the extent of this deposit. Maybe
8 there is commercial grade in one area. But we
9 are charged with this definition. We have to
10 look, and it takes all of these core holes.

11 In the oil and gas side, the comparable
12 thing, we look at cross-sections. It's very
13 important to look at cross-sections so that you
14 can determine the areal extent of something, and
15 we use that. And that's all we're asking to do,
16 is to be able to use that corollary reasoning
17 process.

18 CHAIRMAN LeMAY: But you couldn't do
19 with just Sections 34, 5, and 6? You need 22
20 through 27 to give you the full picture is what
21 you're saying?

22 MR. CARROLL: The reason why is because
23 that first layer of sections is just right across
24 the top.

25 CHAIRMAN LeMAY: Right.

1 MR. CARROLL: You've got to get through
2 there before you can even get it. And that may
3 have a relevant importance on the commercial
4 quantities, commercial development, all that.

5 Now, also another key ingredient: Is
6 it commercially developable? Is that what the
7 mine is going to do? And the mine is not in that
8 first layer of sections. It's even above that.
9 So problems may develop in those sections which
10 make this commercially undevelopable.

11 Now, Mr. High may dispute the expert
12 testimony that I've got. And, you know, that's
13 what we're here for. And he's going to have the
14 same information. But at least put us on an
15 equal footing. You've already said "you're
16 right," when we don't know that. We haven't
17 tested that.

18 And we've got a much broader question
19 than commercial grade. Let's address the
20 commercial quantities, an issue like the statute
21 says. And that's why we have to have the
22 subpoena.

23 MR. STOVALL: May I add something that
24 might help you a little bit with this? Whatever
25 information you restrict Yates to receiving is

1 also the information which New Mexico Potash is
2 going to be restricted from presenting.

3 I think if you issued a subpoena that
4 says you only get the core hole in Section 2,
5 then New Mexico Potash has got to come in and say
6 there's commercially recoverable reserves in
7 Section 2 independently.

8 So it's a double-edge sword, as Mr.
9 High referred to earlier. And perhaps Mr. High
10 needs to be aware of that.

11 CHAIRMAN LEMAY: No. How do you feel
12 about that, Mr. High?

13 MR. HIGH: I wouldn't agree with that
14 at all. We'll come in with whatever evidence we
15 have available to us. If our expert testifies
16 that Mr. Carroll knows, then he's entitled to ask
17 him what he looked at and get into it from that
18 standpoint.

19 So if I show an expert proprietary
20 information, Mr. Carroll can get it on
21 cross-examination. So I have to be careful with
22 the way I present evidence to avoid the
23 disclosure, but I'm certainly not subject to
24 limiting my experts to what information he has.
25 That's unknown in the legal profession.

1 CHAIRMAN LeMAY: I think on this
2 point -- excuse me for interrupting. I don't
3 want to characterize, unless Mr. Stovall is
4 asking, but I would ask if you're going to claim
5 commercial ore -- and I'm a Commissioner
6 listening -- in the section and you say, "I'm
7 sorry, you can't look at the data. I'm claiming
8 commercial ore. You'll have to accept my
9 expert's word for it," visualize the position
10 that puts us in as Commissioners. We have to
11 accept that or we have to through
12 cross-examination get at the source of it.

13 I think maybe that's where Mr. Stovall
14 is coming from.

15 MR. HIGH: Listen, I don't mind sitting
16 down with Mr. Carroll and trying to work out the
17 core hole data upon which we use to extend our
18 LMR from its old point down to include Section
19 2.

20 Now, what I don't think I ought to have
21 to do is to go back now and give him all the core
22 hole data of an LMR that's been in place since
23 R-111-P came into play.

24 CHAIRMAN LeMAY: Yes. Commissioner
25 Weiss?

1 COMMISSIONER WEISS: You know, in our
2 business up here, we frequently ask that these
3 parties exchange their exhibits beforehand, and
4 then they get these things worked out. So if
5 it's only Section 2, it's only Section 2. If
6 it's 2 through 8, you know, whatever, 2 through
7 36, whatever it is.

8 MR. HIGH: Let me make one other
9 comment, too, and tell you part of the problem,
10 as you may understand, why this is such a serious
11 issue to us. We have for years tried to protect,
12 and we think that the OCC has a statutory
13 responsibility to protect, as does the BLM, to
14 protect commercial deposits of ore.

15 That's defined, at least by the BLM, as
16 being the blue part on their 1984 map. We backed
17 off of that in the negotiations going up to
18 R-111-P.

19 And we gave the oil and gas people a
20 portion of that blue and told them, "Fellows, you
21 you can drill in a portion of the blue, where
22 historically we would have objected to it, we
23 will no longer object provided you don't drill in
24 our LMRs."

25 Now, we are being squeezed some more on

1 those LMRs. That's not right, Commissioner.

2 CHAIRMAN LeMAY: Anything else on the
3 subpoena issue? Can we go off the record and
4 discuss this thing? I think all these things
5 need to be decided, if we can do it.

6 [A discussion was held off the record.]

7 CHAIRMAN LeMAY: Back on the record.

8 After due deliberation we decided
9 that -- the Commission decided that it needs to
10 do some legal research into this area of
11 subpoenas, and therefore we will take the
12 subpoena question under advisement.

13 I would also like to instruct both
14 sides that while we're doing this, that the
15 record will be open and that any accommodation
16 that you all can make concerning the records that
17 you have in your subpoena, if you do reach an
18 accommodation, please let us know.

19 Now, I will instruct you to try and
20 reach an accommodation.

21 MR. CARROLL: I understand that, Mr.
22 LeMay.

23 CHAIRMAN LeMAY: And we understand that
24 too.

25 MR. CARROLL: And I will visit with my

1 client and see.

2 CHAIRMAN LeMAY: Are there any other
3 issues we need to decide here?

4 MR. STOVALL: The stay of the drilling
5 of the one well, which is -- my understanding of
6 what you're suggesting, Mr. High, is that if the
7 Commission issues a stay on the drilling of that
8 well and it sort of supplants the Court's
9 directive and now it's completely back in the
10 hands of the Commission and the district court is
11 out of the picture?

12 MR. HIGH: That's correct. We would
13 file a motion with the district court to dissolve
14 the injunction.

15 CHAIRMAN LeMAY: Any objection to that,
16 Mr. Carroll?

17 MR. CARROLL: I don't think that's
18 proper. I don't think -- basically I don't think
19 the Commission has the authority to do that once
20 the district court acted. And, furthermore, I
21 think, as a practical matter, it doesn't -- Mr.
22 High has got to have a problem, and the district
23 court order certainly protects him. Nothing can
24 be done without notice and hearing, and I think
25 it's just a dead or moot issue.

1 CHAIRMAN LeMAY: Where do we stand in
2 terms of -- this is a legal question -- in terms
3 of being this special master.

4 MR. CARROLL: I think, very simply,
5 you've fulfilled -- and, quite frankly, this was
6 my suggestion to the district court because I saw
7 the dilemma that the district court was voicing
8 for us, "Hey, I don't have the expertise, but
9 I've got jurisdiction in this matter."

10 The order of that district court just
11 says that "you shall commence a hearing," and
12 that's the actual language. It says you will
13 commence a hearing by the 21st or the 22nd -- I
14 don't remember. We have done that.

15 That court order did not say you have
16 to complete that process by then. It's up to
17 you. We use this in trial of civil cases all the
18 time. When you need an expert to go in and
19 determine facts, you send him out and you allow
20 him to do that the best way he knows how and he
21 takes the amount of time.

22 And if it becomes too burdensome, then
23 you go back to the Court and say, hey, this
24 process is bogged down. And that's what the
25 court's ruling. I mean, the additional language

1 in there is that upon notice and hearing if
2 there's a problem, bring it back up.

3 And, frankly, I think you are
4 proceeding right along the lines. And if I went
5 to the district court right now and said, judge,
6 I need another order because the OCD is not
7 performing the functions that you gave it to do,
8 I'd be laughed out of there. I think you're
9 performing those functions to the letter.

10 CHAIRMAN LEMAY: Can I ask you a
11 question here because I want a more specific
12 answer to this?

13 MR. CARROLL: Yes, sir.

14 CHAIRMAN LEMAY: The OCC -- this is
15 what we're talking about. "The OCC should be
16 appointed to act at said hearing as special
17 master" -- we're talking about the hearing
18 today?

19 MR. CARROLL: Yes.

20 CHAIRMAN LEMAY: -- "pursuant to Rule
21 53 of the New Mexico Rules of Civil Procedure"--
22 Is that what you referred to?

23 MR. CARROLL: Yes, sir. That is the
24 provision.

25 CHAIRMAN LEMAY: -- "to make finding as

1 to whether plaintiff is entitled to preliminary
2 injunction under New Mexico law." Did we make
3 those findings?

4 MR. STOVALL: I think we've not made
5 those findings yet. Again, my advice to the
6 Commission on not granting the stay after the
7 injunction was issued is that you don't need two
8 documents to do what one can do.

9 I think the Commission is perfectly
10 within its right to take the matter back into its
11 hands, say that we'll issue a stay or not issue a
12 stay.

13 If you elect to issue a stay, then Mr.
14 High, who is the proponent of the injunction, can
15 go to the court and say, okay, you can drop it.
16 If you elect not to issue a stay, then Mr. High
17 can go back to the court and say the Commission
18 didn't issue a stay, but I still want an
19 injunction.

20 But my personal opinion and my
21 recommendation is that Mr. High has set forth the
22 basis for a stay in that there will be
23 irreparable harm caused if the well is drilled
24 through the potash, assuming that they are
25 correct.

1 And there's no reason not to bring it
2 back into the hands of the Commission. Judge
3 Shuler may get to see this thing again someday,
4 but you've got the authority and the jurisdiction
5 to do it. The only reason you didn't is because
6 of the circumstances that have been described.
7 And I think it's totally discretionary as to
8 whether or not to issue the stay.

9 CHAIRMAN LeMAY: Can we go off the
10 record now? Let's go off the record again.

11 [A discussion was held off the record.]

12 CHAIRMAN LeMAY: We're going to vote on
13 whether the Commission should issue the stay as
14 its appointed special master in this hearing.

15 MR. STOVALL: Actually, not as special
16 master because you're not determining on the
17 injunction. You're only issuing a stay under the
18 Commission as its own independent authority.

19 CHAIRMAN LeMAY: Aren't we acting as --

20 MR. STOVALL: I don't think you're
21 acting as the special master to determine whether
22 the injunction was appropriate.

23 CHAIRMAN LeMAY: Okay. Off the record
24 again.

25 [A discussion was held off the record.]

1 CHAIRMAN LeMAY: The Commission has
2 decided that either agency can issue the stay
3 staying the order that Judge Shuler is currently,
4 I guess, contemplating in his court. And the
5 Division will probably make a decision on it next
6 week.

7 And now the decision -- I guess we
8 ought to take that and talk about it a little
9 bit.

10 MR. STOVALL: I think the Commission is
11 saying -- what the Commission is saying, if I
12 understand correctly, is that the matter of the
13 issuance of a stay of a Division order is
14 properly in the hands of the Division Director
15 and he should make that decision pending bringing
16 the case before the Commission.

17 I think that's what I heard the
18 Commission saying, and then we can close the
19 record and the Division Director can make a
20 decision.

21 CHAIRMAN LeMAY: That's what I heard
22 the Commission saying too.

23 Did you hear the Commission say that?

24 COMMISSIONER WEISS: Yes.

25 CHAIRMAN LeMAY: That's in the record

1 that way then.

2 Do we have any other issues to decide?

3 MR. CARROLL: I have none to bring
4 before the Commission at this time.

5 CHAIRMAN LEMAY: Mr. High, do you have
6 any legal issues that are part of this hearing?

7 MR. HIGH: No, Commissioner, I don't
8 think so. No, I don't. I understood our stay
9 was going to be before the OCC.

10 MR. STOVALL: They changed their mind.

11 CHAIRMAN LEMAY: It's going to be
12 before the OCD, and there will be something
13 forthcoming on that from the OCD shortly.

14 MR. HIGH: Okay. That controls a lot
15 of issues for us. Both the subpoena and the
16 application for a stay controls a lot of issues
17 for us.

18 Depending on how those are ruled, we
19 want a hearing either next week -- I mean, we
20 want one right away, because depending on what
21 the OCC does with respect to the information
22 asked for on the subpoena or whether or not it
23 grants this stay will determine how that impacts
24 us.

25 If, for example, the stay is not

1 granted and the injunction continues in effect,
2 we want an expedited hearing.

3 MR. STOVALL: At the district court
4 level?

5 MR. HIGH: No. Before the OCC.

6 MR. STOVALL: Oh, I see what you're
7 saying. Okay.

8 MR. HIGH: Because the Court at any
9 time can require us to post a bond. Thus far we
10 can do that at any time. And if this thing is
11 going to be prolonged for any time, then it
12 wouldn't surprise me if a request wasn't made for
13 us to post a bond. We don't want to have to do
14 that. That's too costly, and we shouldn't be
15 doing it.

16 So if that stay is not going to be
17 granted, we've got some problems in terms of
18 timing. The same thing with respect to the
19 subpoena.

20 CHAIRMAN LeMAY: Well, the subpoena, we
21 agreed to take that under advisement and issue a
22 written decision on that because of some legal
23 research we need to do. You need both those
24 things is what you're saying before you can
25 address your next course of action; right?

1 MR. STOVALL: Let me restate. You need
2 a decision on the stay as quickly as possible
3 because that tells you what you do in district
4 court, whether you have to worry about a bond or
5 anything else.

6 CHAIRMAN LEMAY: I understand that.

7 MR. STOVALL: The subpoena question
8 then affects -- you don't need the subpoena this
9 afternoon in order to move forward. The stay is
10 the one that's really critical.

11 MR. HIGH: That's the one that's the
12 most critical.

13 CHAIRMAN LEMAY: Okay. You've got the
14 telephone number to the country club out there,
15 don't you?

16 MR. HIGH: Let the record show I did
17 not identify where you were playing golf. You
18 did.

19 MR. STOVALL: I make a motion to strike
20 that comment.

21 CHAIRMAN LEMAY: I second that one.

22 MR. CARROLL: No objection.

23 CHAIRMAN LEMAY: Any other legal issues
24 before us here that you want to talk about?
25 We'll take the subpoena issue under advisement,

1 and you'll hear from the Division shortly.

2 That's not -- the Division will.

3 MR. STOVALL: The Division will act on
4 the stay.

5 CHAIRMAN LEMAY: This case is
6 extended.

7 [And the proceedings were concluded
8 at the approximate hour of 12:45 p.m.]

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