

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

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

APPLICATION OF BASS ENTERPRISES )  
PRODUCTION COMPANY FOR AN ORDER )  
AUTHORIZING THE DRILLING OF A WELL )  
IN THE POTASH AREA, EDDY COUNTY, )  
NEW MEXICO )

CASE NOS. 13,367

APPLICATION OF DEVON ENERGY PRODUCTION )  
COMPANY, L.P., FOR AN ORDER AUTHORIZING )  
THE DRILLING OF A WELL IN THE POTASH )  
AREA, EDDY COUNTY, NEW MEXICO )

13,368

APPLICATION OF DEVON ENERGY PRODUCTION )  
COMPANY, L.P., FOR APPROVAL OF AN )  
UNORTHODOX WELL LOCATION AND )  
AUTHORIZATION TO DRILL A WELL IN THE )  
POTASH AREA, EDDY COUNTY, NEW MEXICO )

and 13,372

(Consolidated)

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
COMMISSION HEARING

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

February 9th, 2006  
Santa Fe, New Mexico

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These matters came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, February 9th, 2006, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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## I N D E X

February 9th, 2006  
Commission Hearing  
CASE NOS. 13,367, 13,368 and 13,372 (Consolidated)

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## A P P E A R A N C E S

## FOR THE COMMISSION:

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By: WILLIAM F. CARR

## FOR AN UNKNOWN MINERAL OWNER IN THE DEVON ENERGY CASES:

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

\* \* \*

1           WHEREUPON, the following proceedings were had at  
2 9:55 a.m.:

3           CHAIRMAN FESMIRE: The next case on the docket is  
4 Cause Number 13,367. For purposes of our discussion today,  
5 I think that can be consolidated with 13,368 and 13,372.

6           The attorneys of record are present. Would you  
7 like to enter your appearance, please?

8           MR. CARR: May it please the Examiner, my name is  
9 William F. Carr with the Santa Fe office of Holland and  
10 Hart, L.L.P. We represent the Applicants in these cases,  
11 Bass Enterprises Production Company and Devon Energy  
12 Production Company, L.P.

13           CHAIRMAN FESMIRE: Mr. Bruce?

14           MR. BRUCE: And Mr. Chairman, I'm going to be  
15 embarrassed twice today. This is the first time. I've  
16 entered an appearance on behalf of a mineral owner in the  
17 Devon Energy cases, and on my way here this morning I  
18 forgot to look up his name. It's in the record below, but  
19 I apologize. This is the first time I've ever represented  
20 an unknown person.

21           CHAIRMAN FESMIRE: Unknown only to you, not to  
22 the Commission.

23           (Laughter)

24           MR. BRUCE: Not to the Commission, just --

25           MR. CARR: Do you think you'll discover his name

1 before you go?

2 (Laughter)

3 CHAIRMAN FESMIRE: Mr. Bruce, not by way of  
4 criticism but by way of support, there's a young man in the  
5 Texas State Penitentiary that I did the same thing to  
6 before you.

7 (Laughter)

8 CHAIRMAN FESMIRE: Mr. Brooks --

9 MR. CARR: May it also please the Commission,  
10 Charles C. High with Kemp Smith represents Mosaic Potash,  
11 and Mr. Kemp asked me to be here today for him. He has a  
12 conflict in his schedule that required him to be in Dallas  
13 today.

14 CHAIRMAN FESMIRE: And the interests of your  
15 clients and Mr. High's clients are --

16 MR. CARR: -- are absolutely diametrically  
17 opposed.

18 (Laughter)

19 CHAIRMAN FESMIRE: But that having appeared on  
20 the record, Mr. High has granted you permission

21 MR. CARR: Yes, he does, I have an e-mail if you  
22 want to --

23 MR. BRUCE: And in line with Mr. Carr's comments,  
24 I want to see if he sends a bill to Mr. Potash.

25 (Laughter)

1           CHAIRMAN FESMIRE: Counsel Brooks, would you like  
2 to bring us up to speed on these three cases, please?

3           MR. BROOKS: Well, only on the procedural status  
4 of it. I have not informed myself about the substance of  
5 the cases at all.

6           But these cases have been -- were decided by the  
7 Division quite some time ago, I think getting close to a  
8 year ago now, and they were -- *de novo* applications were  
9 filed, and they have been continued numerous times.

10           Counsel has contacted me and indicated that the  
11 parties are in agreement that the Commission should  
12 either -- the parties would be agreeable to the Commission  
13 reviewing this matter on the record that was the record of  
14 the Division Examiner Hearing, without holding a hearing.

15           And in the alternative, if the Commission is  
16 unwilling to do that -- and I advised them that the  
17 Commission had at a former time made a determination that  
18 it would no longer do that procedure, but that  
19 determination was made at a time when two members of the  
20 Commission were -- when there were two persons on the  
21 Commission who are no longer on the Commission, and two of  
22 the present members were not on the Commission. And I did  
23 not know what position the Commission would take on that  
24 now.

25           In the alternative, if the Commission is

1 unwilling to consider the matter submitted on the Division  
2 Examiner record, the alternative would be that the parties  
3 would request a special setting of these cases.

4 So the parties -- it was represented to me that  
5 the parties were in agreement that that was the way they  
6 wanted the matter presented, and I indicated to them that  
7 they should appear and present that request to the  
8 Commission at this hearing, although no one wants to have a  
9 substantive hearing today.

10 CHAIRMAN FESMIRE: Okay. Mr. Carr?

11 MR. CARR: Mr. Chairman, in late 2004 these three  
12 Applications were presented to Examiner Stogner, and they  
13 were presented on the same day. The hearing took the  
14 better part of a day, as I recall. And then it was last  
15 fall that the orders were actually entered. There was a  
16 nine-, ten-month delay in getting those orders. Since that  
17 time, we've been pretty much embroiled in one little  
18 hearing after another. Even when we don't get to hearing,  
19 we do have them blocked out for a docket.

20 Charles High represents Mosaic Potash, and Mr.  
21 High contacted me several months ago and suggested that  
22 these cases could be disposed of, if the Commission was  
23 willing, simply by asking you to let the parties submit a  
24 brief and then ask you to rule. And I recognize the  
25 concern that has been expressed in the past about wanting

1 to have live witnesses before you so you can really  
2 evaluate the testimony in that fashion.

3 In this case, these cases, they all basically  
4 present the same question. And the question really is a  
5 legal question -- I believe we could even stipulate the  
6 facts if you asked us to -- and it is that there are tracts  
7 within the R-111 area on which there is no oil and gas  
8 lease and that the holder of the mineral estate or the oil  
9 and gas lessee have proposed to drill a well, and the  
10 potash company believes that even without a lease on that  
11 property they are still taken out of play. That's the  
12 question, and it's a legal question.

13 COMMISSIONER BAILEY: Didn't I hear you just say  
14 that there was no oil and gas lease on the property?

15 MR. CARR: Commissioner Bailey, there are three.  
16 And as I recall, there's one where it is an unleased  
17 mineral interest owner and the landowner, who -- the person  
18 who owns that tract came -- and that's Mr. Bruce's client  
19 -- and testified. And my recollection is is that there  
20 is -- one of the other tracts -- I'm trying to remember  
21 back two years -- had an oil and gas lease, and the oil and  
22 gas lessee --

23 MR. BRUCE: Let me interject. It's partly this:  
24 At least with Devon acreage, there is fee acreage inside  
25 the R-111 area --

1 MR. CARR: Yes.

2 MR. BRUCE: -- that has never been leased for  
3 potash.

4 MR. CARR: That's right, and these are tracts  
5 that are all in that posture.

6 MR. BRUCE: And the mineral owner, my client, who  
7 shall remain nameless, wants to -- desires oil and gas  
8 development, and Mosaic Potash is saying it's within their  
9 LMR and are therefore resisting drilling.

10 MR. CARR: It just boils down to this: We had a  
11 legal question we think could be submitted on a page of  
12 facts, probably, that we could all stipulate to. Or, if  
13 you don't want to do that, we really do need a full-day  
14 hearing, at which we would propose, you know, occur early  
15 April. But I have talked with Devon and with Bass. We all  
16 agree the issue is fairly narrow and fairly defined, and  
17 everyone would prefer to submit it that way, but we  
18 understand that you may want these people to come in and  
19 again take the stand and testify.

20 CHAIRMAN FESMIRE: Commissioner Bailey,  
21 apparently there was a prior decision by the Commission not  
22 to proceed like that. Can you remember what the reasons  
23 were for that?

24 COMMISSIONER BAILEY: Number one was access to  
25 all the information that had all of the transcripts, the

1 exhibits, everything given to each of the three  
2 Commissioners, because apparently there was a problem with  
3 -- only one Commissioner had all of the information. So  
4 that was one of the major issues, was that all three of us  
5 needed all of the information there was.

6 And the second issue was that we would each have  
7 our own questions because it is, after all, a *de novo*  
8 hearing. So we needed to have that access to witnesses to  
9 be able to ask the questions that we felt were not asked or  
10 addressed during the Division Hearing.

11 CHAIRMAN FESMIRE: Do you have any -- Those seem  
12 like valid arguments, and they're still valid, aren't they?

13 COMMISSIONER BAILEY: I believe so.

14 CHAIRMAN FESMIRE: Commissioner Olson, do you  
15 have any thoughts on the prospect of live hearings versus  
16 submitted -- legal issues submitted on the record?

17 COMMISSIONER OLSON: I guess I'd agree with  
18 Commissioner Bailey, I do like -- I've always -- one would  
19 like to ask questions too. So I don't know, this same  
20 issue has come up recently with changes to the Water  
21 Quality Act, where appeals now to the Water Quality Control  
22 Commission go on the record of review.

23 But there is -- there would be, then, an oral  
24 briefing, then, in front of the Commission so the  
25 Commission at least has an opportunity to ask some

1 questions. So if we did it that way, so we still had that  
2 opportunity, I don't know if I would have a problem. I  
3 guess the question would be whether we'd have the right  
4 people to answer the questions, whether the counsel would  
5 be able to -- because they're kind of answering our  
6 questions at that point. I don't know if that's really  
7 appropriate, because they're not technically witnesses,  
8 but...

9           And this is something that's going forward now, I  
10 know, with the Water Quality Control Commission, trying to  
11 change things from *de novo* hearings so they don't have  
12 duplicative hearings, because the agency, I know, at some  
13 point was looking at a couple of major hearings where  
14 they'd have a two-week hearing in front of the agency, and  
15 then they had the exact same hearing, two-week hearing, in  
16 front of the Commission, and that was the purpose of that.

17           CHAIRMAN FESMIRE: One of the issues that we need  
18 to address is, this was first heard in late 2004.

19           MR. CARR: Yes, sir.

20           CHAIRMAN FESMIRE: Are there any -- I guess  
21 they're federal leases, so there probably are no lease-  
22 expiration issues?

23           MR. CARR: No, I'm aware of no lease expiration.

24           CHAIRMAN FESMIRE: However, your clients are --  
25 you know, everybody's clients are entitled to a decision in

1 a timely manner. But I'm -- I think I can address the  
2 concerns of the Commission that I would be inclined towards  
3 an actual hearing, recognizing, of course, the expense and  
4 the time factor. But again, my opinion is that we ought to  
5 have a *de novo* hearing, as I think the Rules call for and I  
6 think both your clients and the Commission are entitled.

7 MR. CARR: We would like a special day for those.  
8 I mean, there are three cases, and although they -- the  
9 Devon cases were consolidated for hearing, it does -- I  
10 mean, the facts are different enough that Bass wants to  
11 present its case and Devon wants to present its cases.

12 CHAIRMAN FESMIRE: So it would be three hearings.

13 MR. CARR: Yeah, and we would hope that we didn't  
14 have to wait until the May Commission hearing. That's the  
15 concern here. There was a delay in getting the Examiner  
16 Hearing out, and the parties have been trying to figure out  
17 what to do with this, and it has been harder to get a  
18 Commission Hearing. And I'm not complaining, don't hear it  
19 that way. It's just practically trying to get these  
20 people, whose names I know --

21 (Laughter)

22 MR. CARR: -- calling me. Is there any  
23 possibility of early April? I mean, it would -- We'd  
24 greatly appreciate it.

25 CHAIRMAN FESMIRE: I -- Would anybody have a

1 recommendation for -- realizing I have just committed  
2 myself to a hearing on the 13th and a drive to Midland  
3 thereafter, can we -- I think the best way to handle this  
4 is to look at the calendars and then by e-mail spet a --  
5 spet a social session? -- set a special meeting, prior to  
6 the May Commission meeting, because as you're aware, those  
7 -- up until the May Commission meeting, we're going to be  
8 pretty much tied up at the --

9 MR. CARR: And there would be a March hearing  
10 where a definite date could be determined too.

11 CHAIRMAN FESMIRE: Okay. So would the  
12 Commissioners be amenable to checking our calendars and  
13 setting a special hearing sometime in early to mid-May?

14 MR. CARR: Or April?

15 CHAIRMAN FESMIRE: Or April? Okay.

16 COMMISSIONER BAILEY: That would be good with me.

17 CHAIRMAN FESMIRE: Okay.

18 COMMISSIONER OLSON: I'll have to look at the  
19 calendar on that.

20 CHAIRMAN FESMIRE: So what we'll do in these  
21 three cases, Case Number 13,367, 13,368 and 13,372, is to  
22 continue them today, and we will set a special hearing  
23 sometime prior to the May meeting.

24 MR. CARR: Thank you, sir.

25 MR. BROOKS: Mr. Chairman, honorable

1 Commissioners, to avoid the necessity of giving new  
2 notices, which would be rather idle since everyone -- the  
3 attorneys are all going to be personally notified, I would  
4 recommend that the statement be made for the record that  
5 they are continued till the March 23rd hearing, and by that  
6 time we will have determined when the special hearing is,  
7 and we can again continue it till that time.

8 CHAIRMAN FESMIRE: Absolutely correct. So for  
9 the record, Cause Number 13,367, 13,368 and 13,372 will be  
10 continued until the March 23rd meeting of the Oil  
11 Conservation Commission, at which time a special setting  
12 will be announced, I hope.

13 MR. CARR: Thank you, sir.

14 (Thereupon, these proceedings were concluded at  
15 10:10 a.m.)

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## CERTIFICATE OF REPORTER

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

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

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

WITNESS MY HAND AND SEAL February 11th, 2006.




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STEVEN T. BRENNER  
 CCR No. 7

My commission expires: October 16th, 2006