BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMITS TO DRILL, EDDY COUNTY, NEW MEXICO.

APPLICATIONS FOR HEARINGS *de novo* in CASE NOS.:

10446/Order R-9650
10447/Order R-9651
10448/Order R-9654
10449/Order R-9655

RECEIVED

JUL 09 1992

OIL CONSERVATION DIVISION

RESPONSE TO APPLICATION FOR REHEARING

COMES NOW Applicant, Yates Petroleum Corporation ("Yates"), and makes the following response to New Mexico Potash Corporation's ("New Mexico Potash") Application for Rehearing of Order No. 9679, and in support thereof would show the following:

1. In its Application for Rehearing, New Mexico Potash seems to make the claim that, by complying with the subpoenas, the information supplied will be subject to public disclosure. Such a notion is a total misrepresentation of the Commission's Order as contained in Paragraph 4(a)(b) and (c). Additionally, a violation of the confidentiality provisions of the Commission's Order shall be grounds for contempt of the Commission dictates that subpoenaed material is not for public dissemination.

2. Issuance of the subpoenas is not contrary to Order R-111-P, nor is it contrary to the interpretation of Order R-111-P as made by the Commission at the hearing on May 22, 1992.

3. In its Application, New Mexico Potash confuses burden of proof with duty to determine. There is no disagreement by either party with the fact that the Oil Conservation Commission has a duty to determine that there will be no undue waste of commercial potash.

Further, Order R-111-P specifically provides that exceptions to the drilling prohibition within an LMR shall be considered if there is no undue waste of commercial potash. Prior to the issuance of Order R-111-P, the burden of proving such waste fell upon the potash company. Order R-111-P moved that burden to the oil company. The denial of access to the information sought by Yates would completely and unfairly hamstring any effort to carry the burden placed upon it by this Commission. It would be a violation of all concepts of fundamental fairness for this Commission to impose a burden of proof to a dispute before it upon one party and at the same time deny that party access to information within the possession of the other party which is necessary to a resolution of that dispute.

4. It should be noted that most of the argument advanced by New Mexico Potash in its application reintroduces the problems with Order R-111-P which are raised in Yates' Application to Amend Order R-111-P, As Amended, Pertaining to the Potash Areas of Eddy and Lea Counties, New Mexico. Should the Commission consider granting a rehearing or quashing the subpoenas as issued, then the Commission must also reconsider Yates' request to consolidate that application with the four applications for de novo hearings, as such action would reintroduce the necessity of deciding those issues.

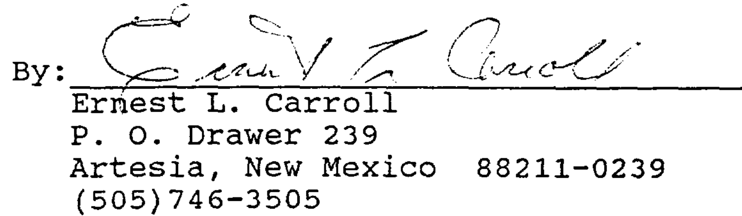
5. New Mexico Potash has failed to state any irreparable harm that could come to it by compliance with the Commission's Order.

6. Order R-9679 does not conflict with Order R-111-P, the laws of the State of New Mexico, and therefore such Order should not be reviewed or changed.

WHEREFORE, Yates respectfully requests that the Oil Conservation Commission deny New Mexico Potash's Application for Rehearing.

Respectfully submitted,

LOSEE, CARSON, HAAS & CARROLL, P.A.

By: 

Ernest L. Carroll
P. O. Drawer 239
Artesia, New Mexico 88211-0239
(505)746-3505

Attorneys for Yates Petroleum Corporation

I hereby certify that I caused to be mailed a true and correct copy of the foregoing to all counsel of record this July 7, 1992.

Ernest L. Carroll

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMITS TO DRILL, EDDY COUNTY, NEW MEXICO.

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By:

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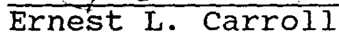
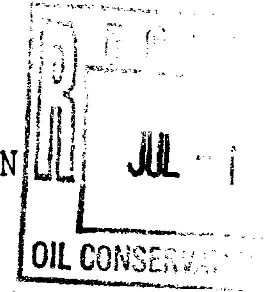


Ernest L. Carroll



BEFORE THE OIL CONSERVATION COMMISSION

STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMITS TO DRILL, EDDY COUNTY, NEW MEXICO	)))	APPLICATIONS FOR DE NOVO HEARING : CASES NOS. 10446, 10447, 10448, 10449

APPLICATION FOR REHEARING

Pursuant to NMSA 70-2-25, NEW MEXICO POTASH CORPORATION ("New Mexico Potash") moves for a rehearing on Order No. R-9679, issued by the Oil Conservation Commission ("OCC") on June 12, 1992 denying its motion to quash the April 16, 1992 subpoena of Yates Petroleum Corporation ("Yates") and in support thereof shows the following:

1. In its subpoena, Yates seeks the production and disclosure of all core hole data in the possession of New Mexico Potash "including but not limited to, the written results or interpretations of the logs, all assays performed thereon and economic analysis derived therefrom," concerning Sections 22, 23, 24, 25, 26, 27, 34, 35 and 36 of Township 21 South, Range 31 East, and Section 2 of Township 22 South, Range 31 East. This information is used by New Mexico Potash to establish its LMR and is considered confidential and proprietary. As such, it is not subject to public disclosure. Section G of Order R-111-P, entered by the OCC on April 21, 1988, expressly states that:

> Information used by the potash lessee in identifying its LMR shall be filed with the BLM and SLO but will be considered privileged and confidential "trade secrets and commercial....information" within the meaning of 43 C.F.R. § 2.13(c)(4) (1986), Section 19-1-2, 1 NMSA 1978, and not subject to public disclosure.

2. Because Order No. R-9679 requires New Mexico Potash to produce and disclose information used by it in identifying its LMR,

it is contrary to the express provisions of existing Order R-111-P and, for this reason, is invalid and should be vacated.

3. Further, and even assuming that the OCC has the authority to disregard or modify Order R-111-P in this proceeding, which New Mexico Potash denies, the Order is erroneous because it incorrectly finds that Yates - instead of the OCC - is responsible for establishing the existence or non-existence of commercial potash deposits in the area of the proposed wells.

4. In its only findings in support of the Order, the OCC found that "[t]he burden is on Yates to prove that the wells in question can be drilled without undue waste of potash" and that "Yates cannot adequately prepare its case without access to the information considered confidential and proprietary by New Mexico Potash." Order No. R-9679, Findings Nos. 6 and 7. This view of the issues misreads the OCC's own statutory obligations and renders the Order erroneous.

5. While it is Yates' burden to prove that the proposed wells will not unduly waste potash, it is the statutory obligation and duty of the OCC - not Yates - to determine the limits of any area of commercial potash deposits. NMSA 70-2-6 provides that the OCC has concurrent authority with the Oil Conservation Division ("OCD") to prevent waste of potash. To prevent this waste, NMSA 70-2-12 imposes a duty on the OCD

> (16) to determine the limits of any area containing commercial potash deposits and from time to time redetermine the limits;

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6. Historically, and until this case, this statutory duty has been performed by the OCD and OCC through the utilization of the expertise and technical data developed and maintained by the Bureau of Land Management ("BLM"). By relying on the BLM determinations of the limits of commercial potash deposits, the OCC has been able to carry out its statutory duty without disclosing or requiring the disclosure of confidential and proprietary information to third parties. The reliability and efficiency of this administrative procedure - as opposed to an adversarial hearing - for determining the existence of commercial potash deposits as required by NMSA 70-2-12 was confirmed as late as 1988, when R-111-P was adopted (see Order R-111-P, Section G). Indeed, in adopting R-111-P, the OCC made the determination that it would carry out this statutory duty to determine the limits of commercial deposits of potash in New Mexico by requiring potash lessees to file a designation with the BLM and State Land Office ("SLO") outlining those potash reserves considered by the potash lessee to be their "life-of-mine reserves" ("LMR"). Order R-111-P, Section G (a). Data supporting this designation is likewise required to be filed with the BLM and SLO but is to be considered confidential "trade secrets and commercial..information" ... not subject to public disclosure. Id. Authorized officers of the BLM and SLO are required by Order R-111-P to review the data submitted by the potash lessee and verify upon request that the data used by the potash lessee in making the designation is consistent with data available to the BLM and SLO. Order R-111-P, Section G(b). Disputes between the potash lessee and the regulatory agencies over

whether an area should or should not be included in an LMR are to be resolved in accordance with the administrative hearing procedure set forth in 43 C.F.R. Part 4 (1988). Id.

7. Within this framework of administratively determining the limits of commercial deposits of potash, Order R-111-P also provides that in processing an application for permit to drill, as here, the OCC will "first ascertain from the BLM or SLO that the location is not within the LMR area." Order R-111-P, Section G(3). No provision is made for the determination of the limits of an LMR in an adversarial hearing before the OCC.

8. In sharp contrast to this requirement that the OCC administratively determine the limits of LMR, the OCC has, by erroneously stating Yates' burden of proof and ordering the production of confidential and proprietary information, disregarded the clear provisions of Order R-111-P and subjected the designation of an LMR to determination in an adversarial hearing before the OCC.

9. Accordingly, and for this additional reason, the Order issued by the OCC is invalid and should be vacated.

10. Finally, there are no compelling reasons to depart from the confidentiality requirements of Order R-111-P. The OCC has information available to it through the SLO and the BLM to administratively determine if the area in Section 2 where the proposed wells will be drilled contains commercial deposits of potash. There is no need, therefore, to provide that information to Yates so it can then present the same information back to the OCC. If the OCC determines that Section 2 does contain commercial

deposits of potash then Yates can, as it is entitled to do, present evidence on whether it can drill the requested wells without undue waste of potash. Its burden of proof on this issue, however, only requires information on the potash that is in the vicinity of the proposed wells, i.e., Section 2. New Mexico Potash has already provided this information to Yates despite the provisions of Order R-111-P specifying that such information is confidential. The additional information requested by Yates and erroneously ordered produced and disclosed by the OCC does not touch on Yates' burden of proof on undue waste but, instead, goes to the issue of New Mexico Potash's designation of Section 2 as part of its LMR. This determination, as stated earlier, is not before the OCC because Order R-111-P states that this issue is to be decided administratively, not in an adversarial hearing before the OCC.

11. In short, the Order issued by the OCC is in violation of the confidentially provisions of Order R-111-P and has the effect of unlawfully modifying the procedure for determining LMR's as set forth in R-111-P. For both of these reasons, New Mexico Potash submits that the Order is erroneous and should be vacated.

WHEREFORE, New Mexico Potash respectfully requests that the OCC grant this application for rehearing and set the matter down for further argument or, alternatively, vacate Order R-9679 and enter an order granting its motion to quash the subpoena.

Respectfully submitted,

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Box 1276
Albuquerque, New Mexico 87103-1276
(505) 247-2315

By: ______________________
Clinton Marrs

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Drawer 2800
El Paso, Texas 79999-2800
(915) 533-4424
(915) 546-5360 (FAX)

By: Charles C. High, Jr.

Attorneys for New Mexico Potash Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Rehearing was sent by facsimile and mailed by certified mail, return receipt requested on this 1st day of July, 1992, to Ernest L. Carroll, Attorney for Yates Petroleum Corporation, Losee, Carson, Haas, & Carroll, P. A., P. O. Drawer 239, Artesia, New Mexico 88210; and hand-delivered and by certified mail, return receipt requested, to James G. Bruce, The Hinkle Law Firm, 500 Marquette, N.W., Suite 500, Albuquerque, New Mexico 87103, attorney for Pogo Producing Company and W. Thomas Kellahin, Kellahin, Kellahin & Aubrey, Post Office Box 2265, Santa Fe, New Mexico 87504-2265, attorneys for Bass Enterprises Production Company.

____
Clinton Marrs

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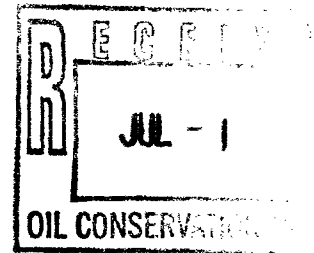
BEFORE THE OIL CONSERVATION COMMISSION

STATE OF NEW MEXICO



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By: Charles C. High, Jr.

Attorneys for New Mexico Potash Corporation

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Clinton Marrs

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OF THE STATE OF NEW MEXICO

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10447/Order R-9651
10448/Order R-9654
10449/Order R-9655

RENEWED REQUEST FOR HEARING DATE

COMES NOW Yates Petroleum Corporation ("Yates"), as Applicant in the above-noted cases, and hereby renews its request that the Oil Conservation Commission set a date for the continuation of the hearing _de novo_ on said applications, and would respectfully reiterate that, at the close of the initial hearing on May 22, 1992, in said cases the Commission indicated that, once it had ruled on New Mexico Potash Corporation's request to quash subpoenas issued at the request of Yates, said hearing should be set. On June 12, 1992, an order was issued by the Oil Conservation Commission denying New Mexico Potash Corporation's Motion to Quash, no action has been taken on New Mexico Potash's Application for Rehearing on said Motion, and ten days have passed since its filing, therefore, Yates once again requests that the hearing date be set.

LOSEE, CARSON, HAAS & CARROLL, P.A.

By:

Ernest L. Carroll
P. O. Drawer 239
Artesia, New Mexico 88211-0239
(505)746-3505

Attorneys for Applicant, Yates Petroleum Corporation

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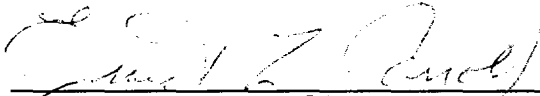

Ernest L. Carroll

United States Department of the Interior

OFFICE OF THE SOLICITOR
Field Office, Southwest Region
P.O. Box 1042
Santa Fe, New Mexico 87504-1042

June 30, 1992

REFERENCE NO.

RECEIVED

JUN 30 1992

OIL CONSERVATION DIVISION

HAND-DELIVERED

State of New Mexico
Oil Conservation Commission
Attention: Bob Stovall
Land Office Building
Santa Fe, New Mexico

Re: In the Matter of the Application of Yates Petroleum Corporation for Permits to Drill, Eddy County, New Mexico

Gentlemen:

Enclosed is a Motion to Quash Subpoena Duces Tecum and a Memorandum in Support of Motion to Quash Subpoena Duces Tecum concerning the above-captioned matter. As evidenced by the Certificate of Service, the Motion and Memorandum were served upon all interested parties.

Sincerely yours,

Margaret Miller Brown

Margaret Miller Brown
Department Counsel

Enclosures

cc:
Charles C. High, Jr., Kemp, Smith, Duncan & Hammond,
P. O. Drawer 2800, El Paso, Texas 79999-2800 (Certified Mail, Return Receipt Requested)
Ernest L. Carroll, Losee, Carson, Haas, and Carroll, P.A.,
P. O. Drawer 239, Artesia, New Mexico 88210 (Certified Mail, Return Receipt Requested)
State Director, Bureau of Land Management, Santa Fe, New Mexico
District Manager, Roswell District Office, Bureau of Land Management, P. O. Box 1397, Roswell, New Mexico 88202-1397
Area Manager, Carlsbad Resource Area, Bureau of Land Management,
P. O. Box 1778, Carlsbad, New Mexico 88220

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMITS TO DRILL, EDDY COUNTY, NEW MEXICO.

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AND IN CONJUNCTION WITH THE APPLICATION OF YATES PETROLEUM CORPORATION TO AMEND ORDER R-111-P, AS AMENDED, PERTAINING TO THE POTASH AREAS OF EDDY AND LEA COUNTIES, NEW MEXICO

Order R-9679

MOTION TO QUASH SUBPOENA DUCES TECUM

I.

Comes now the United States Department of the Interior, on behalf of Leslie Cone, District Manager, Roswell District Office, Bureau of Land Management, an agency of the United States Department of the Interior, by and through the undersigned attorney, entering this special appearance, and moves this Commission to quash the subpoena duces tecum dated May 6, 1992, as modified by Order R-9679, dated June 12, 1992. In support thereof, the Bureau would show the Commission that:

1. By virtue of Department of the Interior Regulation 43 CFR 2.80, which, in turn, cites 43 CFR 2.13, Leslie Cone cannot be compelled to produce documents nor held in contempt for refusing to do so. Leslie Cone has been instructed by the

Department's Office of the Solicitor not to produce the requested documents and, accordingly, disclosure is prohibited by the regulations. The requested records have been determined not to be disclosable pursuant to 43 CFR 2.13(c)(4), (5) and (9).

2. The time and effort of government personnel must be conserved for the discharge of their official duties.

3. If there exists any non-proprietary/confidential information, or information which is otherwise releasable, it can be obtained under the Freedom of Information Act.

4. The majority of the data requested can be obtained directly from the potash companies which produced the data.

5. Order R-9679 was not served on Leslie Cone.

6. This Commission does not have jurisdiction to compel the production of documents by a federal officer.

Wherefore, the United States Department of the Interior, on behalf of Leslie Cone, hereby respectfully requests that the subpoena duces tecum issued to Leslie Cone be quashed.

Respectfully submitted,

Margaret Miller Brown
Office of the Field Solicitor
U.S. Department of the Interior
P. O. Box 1042
Santa Fe, New Mexico 87504-1042
Telephone: (505) 988-6200

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMITS TO DRILL, EDDY COUNTY, NEW MEXICO.	CASE NOS.: 10446/Order R-9650 10447/Order R-9651 10448/Order R-9654 10449/Order R-9655
AND IN CONJUNCTION WITH THE APPLICATION OF YATES PETROLEUM CORPORATION TO AMEND ORDER R-111-P, AS AMENDED, PERTAINING TO THE POTASH AREAS OF EDDY AND LEA COUNTIES, NEW MEXICO	Order R-9679

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

I.

Background

Yates Petroleum Corporation caused a subpoena duces tecum dated May 6, 1992, to be issued to Leslie Cone, District Manager, Roswell District Office, Bureau of Land Management, United States Department of the Interior, Roswell, New Mexico, requiring her to appear and produce certain documents to be used in the matter of the above-captioned proceeding. As a result of a telephone inquiry on May 20, 1992, from undersigned counsel to the legal department of the New Mexico Oil Conservation Division, it was discovered that the subpoena had been stayed. New Mexico Oil Conservation Commission Order R-9679, dated June 12, 1992, purported to reinstate the subpoena effective June 19, 1992 at

1:00 PM, subject to certain modifications which would allow a limited number of persons to view the requested information.

Ms. Cone, through counsel herein, has entered a special appearance, for the sole purpose of moving to quash this subpoena. For the reasons set forth below, the subpoena should be quashed.

II.

By Virtue of Department of the Interior Regulations Set Forth at 43 CFR 2.13 and 2.80, Ms. Cone Cannot be Compelled to Produce Documents Nor Held in Contempt for Refusing to Do So

Grounds for quashing the subpoena can be found in Department of the Interior regulation 43 CFR 2.80, which, in turn, references 43 CFR 2.13. (Exhibit A). These regulations provide, *inter alia*, that no employee of the Department of the Interior may produce records of the Department in response to compulsory process if it is determined in accordance with 43 CFR 2.13 that the record should not be disclosed. The person to whom the compulsory process is directed must appear in answer to the process and respectfully decline to produce the record on the ground that the disclosure, pending the receipt of instructions from the Secretary of the Interior, is prohibited by the regulations. The Solicitor of the Department of the Interior is authorized to exercise all of the authority of the Secretary under this regulation. Such authority has, in turn, been

delegated to the Field Solicitors pursuant to the Solicitor's Manual, I SM 3.4. (Exhibit B).

In this particular case, the Field Solicitor has not given his permission to release the requested documents on the grounds that, so far as can be determined, all of the requested information is believed to be proprietary/confidential in nature and would not be releasable under 43 CFR 2.13(c)(4)(5) and (9). If any requested information exists which is not proprietary/ confidential, it has not yet been identified. Proprietary/ confidential information is information given to the government by outside sources which contains trade secrets, commercial, financial or scientific data under the strict understanding that such information will be used for internal government management purposes and will not be released to the public. Such information is vital to the government's ability to manage and regulate its resources. Much of this information is given to the government voluntarily and would almost certainly not be forthcoming if the government could not promise confidentiality.

The Supreme Court has in the past given effect to similar regulations promulgated by the Secretary of the Treasury, Boske v. Comingore, 177 U.S. 459 (1900), and the United States Attorney General, United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951). In Touhy, the Supreme Court considered whether a subordinate official of the Department of Justice could refuse to

obey a subpoena duces tecum ordering production of papers of the Department in his possession. The official's refusal was grounded on a regulation issued by the Attorney General very similar to the one involved in this case. The Courts have consistently relied on Touhy in upholding the agency's authority to prohibit testimony of their employees in private suits of this type. In Reynolds Metal Co. v. Crowther, CCH ¶ 26,348 (D. Mass. 1982) the Court held:

> The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates through this type of regulation . . . The policy behind prohibition of testimony is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business.

(See also Cates v. LTV Aerospace Corp., 480 F.2d 620 (5th Cir. 1973); United States Steel Corp. v. Mattingly, 663 F.2d 68 (10th Cir. 1980); Saunders v. Great Western Sugar Company, 396 F.2d 794 (10th Cir. 1968); United States v. Bizzard, 674 F.2d 1382 (11th Circ. 1982); United States v. Allen, 554 F.2d 398 (10th Cir. 1977); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971); Giza v. Department of Health Education and Welfare, 628 F.2d 748 (1st Cir. 1980); Ortiz v. Morgen Manufacturing Co., & Commonwealth of Penna., CCH 1983 OSH ¶ 26,681 (D.C. Pa. 1983); Smith v. C.R.C. Builders Co., Inc., et al., No. 82-F-2120 (D. Colo. 1983); Brocard v. Burg, et al., No. 81-2849 (D. Fla. 1983), Boatright, et al. v. Radiation

Sterilizers, Inc. et al., No. 84K-780 (D. Colo. 1984), and Olivas, et al. v. Mountain Pass Canning, EP-85-CA-248 (WDTX 1985).

III.

The Time and Effort of Government Personnel Must Be Conserved for the Discharge of Their Official Duties

Because of the nature of the programs it administers and enforces, the Bureau of Land Management is particularly vulnerable to the demands of private parties seeking proprietary/confidential information acquired from competitors who hold mineral interests in the public lands. If Department of the Interior employees were routinely permitted to appear and produce documents in private civil suits, significant loss of manpower hours would predictably result.

The time and effort of governmental enforcement personnel must be conserved for the discharge of their official duties. The laws which are enforced by the Department of the Interior were intended for the public benefit and for the protection and/or orderly development of natural resources on federal lands, and were not designed to assist private litigants. Just as Department officials should not be obligated to act as expert witnesses in private actions, at public expense, Cf. Frankel v. Securities and Exchange Commission, 460 F.2d 813 (2 C.a. 1972), so should they not be used as a "back-door" source for obtaining trade secrets and other closely-guarded financial, commercial and

scientific information. To require officials of the Department of the Interior to appear and produce proprietary/confidential information in private litigation would readily interfere with the functioning of the Department and the performance of official duties by Department personnel, and may have the effect of hampering the collection of vital industry information which is needed by the Department to assist in its management responsibilities.

IV.

All Non-Proprietary/Confidential Information, or Information Which is Otherwise Releasable, Can Be Obtained Under the Freedom of Information Act

Yates has filed a request under the Freedom of Information Act for the same information which is requested in their subpoena. The Bureau is currently processing such request and will need an extended period of time to sort through the volume of materials requested. In the event any materials are found not to be proprietary/confidential, or are otherwise deemed releasable, they will be given to Yates. As stated earlier, however, it presently appears that all of the requested information is proprietary/confidential.

V.

The Majority of the Data Requested Can Be Obtained Directly From the Potash Companies That Produced the Data

The original source of the data requested is from the potash industry, itself. The Bureau of Land Management, while it may be a central and convenient source for such information, is not a guarantor of the authenticity of such documents, nor can there be any assurance that the records maintained by it are current, since much of the information given to it is on a voluntary basis. Accordingly, if Yates desires to obtain information regarding potash reserves and mining practices, the best and primary source is from the industry, itself. That the potash industry may balk at revealing such information is a matter between the industry, Yates and the Oil Conservation Commission.

The Bureau of Land Management also has in its possession certain other internal documents generated by the agency from the proprietary/confidential data obtained from industry, but to the extent revealing such internal documents would disclose proprietary/confidential data, such documents also may not be revealed. Again, Yates' best source of information is directly from industry, itself, and Yates can generate its own conclusions and summaries based on an analysis thereof.

VI.

Order R-9679 Was Not Served on Leslie Cone

Leslie Cone is the District Manager of the Roswell District Office of the Bureau of Land Management. As such, her office is in Roswell, New Mexico. The Carlsbad Area Office is a sub-office of the Bureau and is located in Carlsbad, New Mexico. A copy of New Mexico Oil Conservation Commission Order R-9679, dated June 12, 1992, was received by the Carlsbad Resource Area on June 15, 1992. To date, no copy of the Order has been served on the Roswell District Office. The Department of the Interior is not a party to this proceeding and it is under no obligation to produce records from offices which are geographically distinct from the one served, nor is it obligated to consider service on any random one of its offices as service on a particular person in a different office.

VII.

The Commission Does Not Have Jurisdiction to Compel the Production of Documents by a Federal Officer

While the Department of the Interior has a long history of cooperation with the New Mexico Oil Conservation Commission, in this particular case, the Department respectfully objects to the present order and subpoena duces tecum on the grounds that they will interfere with the duties and responsibilities of federal officers. U.S. Const. Art. VI, Cl. 2. Similarly, a federal

officer cannot be held in contempt under State law for carrying out his or her duties as an officer of the United States. In re Neagle, 135 U.S. 1 (1890). In this case, that duty is to safeguard proprietary/confidential information.

For this and the above-stated reasons, the Department prays that the subpoena duces tecum issued to Leslie Cone be quashed.

Respectfully submitted,

Margaret Miller Brown

Margaret Miller Brown
Office of the Field Solicitor
U.S. Department of the Interior
P. O. Box 1042
Santa Fe, New Mexico 87504-1042
Telephone: (505) 988-6200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above motion and brief were sent on this 30th day of June 1992 to the following:

State of New Mexico Oil Conservation Commission State Land Office Building Santa Fe, New Mexico	(Hand-Delivered)
Charles C. High, Jr. Kemp, Smith, Duncan & Hammond P. O. Drawer 2800 El Paso, Texas 79999-2800	(Certified Mail - Return Receipt Requested)
Ernest L. Carroll Losee, Carson, Haas and Carroll, P.A. P. O. Drawer 239 Artesia, New Mexico 88210	(Certified Mail - Return Receipt Requested)

Margaret Miller Brown

(9) Trespass Cases, Interior/Reclamation-37.

(10) Litigation, Appeal and Case Files System, Interior/Office of the Solicitor-1 to the extent that it consists of investigatory material compiled for law enforcement purposes.

(11) Endangered Species Licenses System, Interior/FWS-19.

(12) Investigative Case File, Interior/ FWS-20.

(13) Timber Cutting and Trespass Claims Files, Interior/BIA-24.

(c) Investigatory records exempt under 5 U.S.C. 552a(k)(5), the following systems of records have been exempted from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I) and (f) of 5 U.S.C. 552a and the provisions of the regulations in this subpart implementing these subsections:

(1) [Reserved]

(2) National Research Council Grants Program, Interior/GS-9

(3) Committee Management Files, Interior/Office of the Secretary—68.

(5 U.S.C. 301, 552a and 5 U.S.C. app. sections 9(a)(1)(D) and 9(b); 5 U.S.C. 301, 552, and 552a; 31 U.S.C. 483a; and 43 U.S.C. 1460)

[40 FR 44505, Sept. 26, 1975, as amended at 40 FR 54790, Nov. 26, 1975; 47 FR 38328, Aug. 31, 1982; 48 FR 37412, Aug. 18, 1983; 48 FR 56586, Dec. 22, 1983; 49 FR 6907, Feb. 24, 1984]

Subpart E—Compulsory Process and Testimony of Employees

§ 2.80 Compulsory process.

(a) If the production of any record of the Department is sought by compulsory process and if it is determined in accordance with the provisions of § 2.13 that the record should not be disclosed, the person making such determination shall immediately report the matter to the Solicitor. The person to whom the compulsory process is directed shall appear in answer to the process and respectfully decline to produce the record on the ground that the disclosure, pending the receipt of instructions from the Secretary of the Interior, is prohibited by the regulations in this subpart.

(b) The solicitor of the Department of the Interior is authorized to exercise all of the authority of the Secretary of the Interior under this section.

§ 2.82 Testimony of employees.

(a) An officer or employee of the Department shall not testify in any judicial or administrative proceeding concerning matters related to the business of the Government without the permission of the head of the bureau, or his designee, or of the Secretary of the Interior, or his designee. If the head of a bureau or his designee, concludes that permission should be withheld, he shall report the matter immediately to the Solicitor for a determination, and the officer or employee shall appear in answer to process and respectfully decline to testify, pending the receipt of instructions from the Secretary, on the ground that testimony is prohibited by the regulations in this part. Pending instructions from the Secretary or his designee, an officer or employee in the Office of the Secretary shall follow the same procedure.

(b) Any person (including a public agency) wishing an officer or employee of the Department to testify in a judicial or administrative proceeding concerning a matter related to the business of the Government may be required to submit a statement setting forth the interest of the litigant and the information with respect to which the testimony of the officer or employee of the Department is desired, before permission to testify will be granted under this section.

(c) The Solicitor of the Department of the Interior is authorized to exercise all of the authority of the Secretary of the Interior under this section.

Appendix A—Fees

The following uniform fee schedule is applicable to all constituent units of the Department. It states the fees to be charged to members of the public for services performed in searching for, reviewing and duplicating requested records in connection with FOIA requests made under Subpart B of this part and to services performed in making documents available for inspection and copying under Subpart A of this part. The duplicating fees stated in the schedule are also applicable to duplicating of records

EXHIBIT A

.), and copies may be obtained by
oscription from the Superintendent
Documents, U.S. Government Print-
; Office, Washington, DC 20402.
4) Copies of final opinions and
lers issued by Regional Solicitors on
t claims and irrigation claims, and
oies of final opinions and orders on
peals in Indian probate proceedings
ued by Regional Solicitors prior to
ly 1, 1970, are available for inspec-
n and copying in their respective of-
es. Copies of final opinions and
lers issued by Field Solicitors on
t claims are available for inspection
d copying in their respective offices.
b)(1) Copies of final decisions and
lers issued prior to July 1, 1970, on
peals to the Director, Bureau of
nd Management, and by hearing ex-
iiners of the Bureau of Land Man-
ement, in proceedings relating to
ids and interests in land are avail-
e for inspection and copying in the
fice of Hearings and Appeals, Ball-
n Building No. 3, 4015 Wilson Bou-
ard, Arlington, Va. 22203, and in
offices of the Departmental ad-
nistrative law judges.
2) Copies of final decisions, opinions
l orders issued on and after July 1,
0, by departmental administrative
judges in all proceedings before
m are available for inspection and
ying in their respective offices and
he Office of Hearings and Appeals,
lston Building No. 3, 4015 Wilson
ılevard, Arlington, VA 22203.
) Copies of final decisions, opinions
orders issued by administrative
judges in Indian probate proceed-
; are available for inspection and
ying in their respective offices.

Administrative manuals.

ıe Departmental Manual is avail-
for inspection in the Departmen-
Library, Interior Building, Wash-
on, D.C., and at each of the re-
al offices of bureaus of the De-
ment. The administrative manuals
hose bureaus which have issued
documents are available for in-
tion at the headquarters officers
at the regional offices of the bu-
s.

Subpart B—Requests for Records

Source: 52 FR 45586, Nov. 30, 1987, unless otherwise noted.

§ 2.11 Purpose and scope.

(a) This subpart contains the procedures for submission to and consideration by the Department of the Interior of requests for records under the Freedom of Information Act.

(b) Before invoking the formal procedures set out below, persons seeking records from the Department may find it useful to consult with the appropriate bureau FOIA officer. Bureau offices are listed in Appendix B.

(c) The procedures in this subpart do not apply to:

(1) Records published in the Federal Register, opinions in the adjudication of cases, statements of policy and interpretations, and administrative staff manuals that have been published or made available under Subpart A of this part.

(2) Records or information compiled for law enforcement purposes and covered by the disclosure exemption described in § 2.13(c)(7) if—

(i) The investigation or proceeding involves a possible violation of criminal law; and

(ii) There is reason to believe that—

(A) The subject of the investigation or proceeding is not aware of its pendency, and

(B) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

(3) Informant records maintained by a criminal law enforcement component of the Department under an informant's name or personal identifier, if requested by a third party according to the informant's name or personal identifier, unless the informant's status as an informant has been officially confirmed.

§ 2.12 Definitions.

(a) *Act* and *FOIA* mean the Freedom of Information Act, 5 U.S.C. 552.

(b) *Bureau* refers to all constituent bureaus of the Department of the Interior, the Office of the Secretary, and the other Departmental offices. A list of bureaus is contained in Appendix B.

(c) *Working day* means a regular Federal workday. It does not include Saturdays, Sundays or public legal holidays.

§ 2.13 Records available.

(a) *Department policy.* It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act.

(b) *Statutory disclosure requirement.* The Act requires that the Department, on a request from a member of the public submitted in accordance with the procedures in this subpart, make requested records available for inspection and copying.

(c) *Statutory exemptions.* Exempted from the Act's statutory disclosure requirement are matters that are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(ii) Are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than the Privacy Act), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings,

(ii) Would deprive a person of a right to a fair or an impartial adjudication,

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigtion, information furnished by a confidential source,

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(d) *Decisions on requests.* It is the policy of the Department to withhold information falling within an exemption only if—

(1) Disclosure is prohibited by statute or Executive order or

(2) Sound grounds exist for invocation of the exemption.

(e) *Disclosure of reasonably segregable nonexempt material.* If a requested record contains material covered by an exemption and material that is not exempt, and it is determined under the procedures in this subpart to withhold the exempt material, any reasonably segregable nonexempt material shall be separated from the exempt material and released.

§ 2.14 Requests for records.

(a) *Submission of requests.* (1) A request to inspect or copy records shall be made to the installation where the records are located. If the records are located at more than one installation or if the specific location of the records is not known to the requester, he or she may direct a request to the head of the appropriate bureau or to the bureau's FOIA officer. Addresses for bureau heads and FOIA officers are contained in Appendix B.

(2) *Exceptions.* (i) A request for records located in all components of the Office of the Secretary (other than the Office of Hearings and Appeals) shall be submitted to: Director, Office of Administrative Services, U.S. Department of the Interior, Washington, DC 20240. A request for records located in the Office of Hearings and Appeals shall be submitted to: Director, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203.

(ii) A request for records of the Office of Inspector General shall be submitted to: Inspector General, Office of the Inspector General, U.S. Department of the Interior, Washington, DC 20240.

(iii) A request for records of the Office of the Solicitor shall be submitted to: Solicitor, Office of the Solicitor, U.S. Department of the Interior, Washington, DC 20240.

(b) *Form of requests.* (1) Requests under this subpart shall be in writing and must specifically invoke the Act.

(2) A request must reasonably describe the records requested. A request reasonably describes the records requested if it will enable an employee of the Department familiar with the subject area of the request to locate the record with a reasonable amount of effort. If such information is available, the request should identify the subject matter of the record, the date when it was made, the place where it was made, the person or office that

records in response to a judicial subpoena pending a ruling on a motion to quash, or may decline to answer specific questions at a judicial hearing pending a ruling on the objection. In addition to giving instructions to employees concerning the providing of testimony or records, therefore, the Solicitor's Office may be called upon, in appropriate cases, to request that the Justice Department file a motion to quash or represent a Departmental witness at a judicial hearing for the purpose of asserting and arguing a privilege or other objection.

3. Testimony or Production of Records by Employees of the Solicitor's Office. Each Associate and Regional Solicitor may testify concerning matters within his area of responsibility, may produce records within his custody or control, and may grant permission to testify or produce records to employees of the Office of the Solicitor within his area of jurisdiction, when a proper request for such testimony or records has been made (including service of a subpoena), provided that, when appropriate, an objection should be asserted to the disclosure of any privileged or otherwise inadmissible evidence. The Associate or Regional Solicitor will notify the Solicitor, Deputy Solicitor, or Special Assistant to the Solicitor prior to exercising the authority delegated by this paragraph.

4. Testimony or Production of Records by Departmental Officers or Employees Outside the Solicitor's Office. Upon request from the Secretary or his designee or the head of a bureau or his

EXHIBIT B

designee, an Associate, Regional or Field Solicitor may make a determination under 43 C.F.R. §§ 2.80, 2.82 concerning any request addressed to a Departmental employee outside the Office of the Solicitor for testimony or the production of records in any judicial or admininstrative proceeding. In connection therewith, the Associate, Regional or Field Solicitor may require the person seeking such testimony to submit a statement providing the information set forth in 43 C.F.R. § 2.82(b), and may give appropriate instructions to the employee concerning matters subject to a privilege or other evidentiary objection.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Field Office, Southwest Region
P.O. Box 1042
Santa Fe, New Mexico 87504-1042

September 8, 1992

REFERENCE NO.

HAND-DELIVERED

State of New Mexico
Oil Conservation Commission
Attention: Bob Stovall
Land Office Building
Santa Fe, New Mexico

Re: In the Matter of the Application of Yates Petroleum Corporation for Permit to Drill on State Lease

Gentlemen:

Enclosed is a Motion to Quash Subpoena and Memorandum in Support concerning the above-captioned matter. As evidenced by the Certificate of Service, copies of the Motion and Memorandum were served upon all interested parties.

Sincerely yours,

Margaret Miller Brown

Margaret Miller Brown
Department Counsel

Enclosures

cc:
Charles C. High, Jr., Kemp, Smith, Duncan & Hammond, P. O. Drawer 2800, El Paso, Texas 79999-2800 (Certified Mail, Return Receipt Requested)
Ernest L. Carroll, Losee, Carson, Haas, and Carroll, P.A., P. O. Drawer 239, Artesia, New Mexico 88210 (Certified Mail, Return Receipt Requested)
State Director, Bureau of Land Management, Santa Fe, New Mexico
District Manager, Roswell District Office, Bureau of Land Management, P. O. Box 1397, Roswell, New Mexico 88202-1397
Area Manager, Carlsbad Resource Area, Bureau of Land Management, P. O. Box 1778, Carlsbad, New Mexico 88220

BEFORE THE OIL CONSERVATION COMMISSION

OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION OF YATES PETROLEUM CORPORATION FOR PERMIT TO DRILL ON STATE LEASE

CASE NOS.:

MOTION TO QUASH SUBPOENA AND MEMORANDUM IN SUPPORT

Comes now the United States Department of the Interior, on behalf of Tony Herrell, an employee of the Bureau of Land Management (BLM), Carlsbad Area Office, Carlsbad, New Mexico, an agency of the United States Department of the Interior, by and through the undersigned attorney, entering this special appearance, and moves this Commission to quash a subpoena of uncertain date, apparently issued in May 1992 on behalf of the potash industry represented by Mr. Charles High. In support thereof, the Bureau would show the Commission that:

1. The May 1992 subpoena is no longer valid, the time for Mr. Herrell's appearance, as stated in the subpoena, having passed. Mr. Herrell has not been issued a new subpoena and the old, invalid subpoena can no longer be found.

2. Insufficient notice has been given to Mr. Herrell and this office of the need for Mr. Herrell to appear before the Commission on Wednesday, September 9, 1992 at 9:00 A.M. Mr. Herrell was notified by Mr. Charles High of the impending hearing by a telephone call to Mr. Herrell's personal residence

on Saturday, September 5, 1992, of the Labor Day weekend. No notice from Mr. High has been received by this office as of the time of this writing. Mr. Herrell notified the undersigned by telephone call on Tuesday, September 8, 1992, the first work day of the week.

3. As a practical matter, it is not possible for Mr. Herrell to leave his busy work schedule and engage in an all-day drive from Carlsbad to Santa Fe on such short notice. Additionally, the undersigned, who would otherwise represent Mr. Herrell at the hearing, has a conflict with another administrative prehearing conference.

4. Since Mr. Herrell's initial subpoena in May, the factual and legal situation surrounding this matter has changed. On May 11, 1992, when the undersigned spoke to Mr. Charles High by telephone, it was represented to the undersigned that the APD concerned a State lease, and that the hearing had nothing to do with the BLM. Mr. High stated that Mr. Herrell's testimony was intended to simply be used to show one method by which the commerciality of potash might be shown. Since then and in the last couple of weeks, the BLM has received appeals from Yates Petroleum involving alleged conflicts with the potash industry, which appeals will be decided before the Interior Board of Land Appeals (IBLA), an administrative board within the Department of the Interior. It is believed that these appeals involve similar issues to the ones presently before the Commission. It is also

anticipated that numerous additional appeals on the same subject will be forthcoming from both Yates Petroleum Corporation and other similarly-situated companies. The BLM has not yet had a chance to formulate its official appeals position or to respond to these appeals. Forcing Mr. Herrell to testify on this same subject before the Commission is premature and will potentially jeopardize the BLM's position in the IBLA appeals.

5. In light of the changed factual and legal situation, the party requesting the subpoena should be required to submit a written statement regarding the proposed testimony in accordance with 43 CFR 2.82(b).

6. In light of the subpoena duces tecum served on Leslie Cone, District Manager, Roswell District Office, BLM, dated May 6, 1992, as modified by Order R-9679, dated June 12, 1992, involving case nos. 10446, 10447, 10448 and 10449, the BLM is concerned that Tony Herrell may be asked to reveal proprietary/confidential information either on direct or cross-examination. For this office's arguments concerning the opposition to release of proprietary/confidential information, see the Motion to Quash and Memorandum in Support regarding the Leslie Cone subpoena, hand-delivered to the Commission under cover of letter dated June 20, 1992, which documents are incorporated herein by reference.

7. Permission for Mr. Herrell to testify has not been granted pursuant to 43 CFR 2.82.

8. The BLM offers to re-tender the $78.00 witness fees submitted with the earlier May 1992 subpoena.

Respectfully submitted,

Margaret Miller Brown
Office of the Field Solicitor
U.S. Department of the Interior
P. O. Box 1042
Santa Fe, New Mexico 87504-1042
Telephone: (505) 988-6200

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the above Motion to Quash Subpoena and Memorandum in Support were sent on this 8th day of September 1992 to the following:

State of New Mexico Oil Conservation Commission State Land Office Building Santa Fe, New Mexico	(Hand-Delivered)
Charles C. High, Jr. Kemp, Smith, Duncan & Hammond P. O. Drawer 2800 El Paso, Texas 79999-2800	(Certified Mail - Return Receipt Requested)
Ernest L. Carroll Losee, Carson, Haas and Carroll, P.A. P. O. Drawer 239 Artesia, New Mexico 88210	(Certified Mail - Return Receipt Requested)

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September 14, 1993

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. William J. LeMay, Director
New Mexico Oil Conservation Division
P. O. Box 2088
Santa Fe, NM 87501

Re: Application of Yates Petroleum Corporation for Permits to Drill, Eddy County, New Mexico, Case Nos. 10448, 10449, De Novo/Order Nos. R-9654-B/R-9655-B

Dear Mr. LeMay:

Enclosed herewith, please find Yates Petroleum Corporation's Response to Application for Order Staying Order of Oil Conservation Commission Pending Ruling on Rehearing and Appeal.

Very truly yours,

LOSEE, CARSON, HAAS & CARROLL, P.A.

Ernest L. Carroll

ELC:kth
Enclosure

xc w/encl: Charles High, Jr.
Randy Patterson

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NOS. 10448 and 10449
(DE NOVO)
Order No. R-9654-B/R-9655-B

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

RESPONSE TO APPLICATION FOR ORDER
STAYING ORDER OF OIL CONSERVATION COMMISSION
PENDING RULING ON REHEARING AND APPEAL

COMES NOW YATES PETROLEUM CORPORATION, by and through its attorneys of record, and makes this response to New Mexico Potash's Application for a stay order of the Order issued by this Commission on August 23, 1993, and in support thereof would state the following:

1. On August 23, 1993, the Oil Conservation Commission issued its Decision and Order in this matter approving the application of Yates Petroleum Corporation ("Yates") to drill its Flora "AKF" State Wells No. 1 and No. 2 in Section 2, Township 22 South, Range 31 East, N.M.P.M.

2. Precedence for New Mexico Potash's Application can neither be found in the statutes of New Mexico nor in the rules of the Commission.

3. New Mexico Potash's Application is premature, and assumes facts not in existence. New Mexico Potash has not

inquired of Yates as to its intentions with respect to the resumption of the drilling of its Flora wells, and Yates has given no notice to New Mexico Potash that it has any intention to resume drilling operations on its Flora wells prior to the expiration of the period of time in which an Application for Rehearing of the Commission's order could be made, or if a request were made during the ten-day period during which the Commission has to rule on such a request. Yates will not make a decision concerning the resumption of drilling until the ten-day period for acting on New Mexico Potash's Application for Rehearing has expired.

4. New Mexico Potash's Application is improper and is nothing more than an attempt to circumvent Section 70-2-25(C) NMSA 1978, which sets forth the right of New Mexico Potash to a stay of the Commission's Order and the procedure for obtaining such stay. It is quite clear that the statute set forth the procedure which was to be the only manner in which a stay of a Commission order could be obtained in the event of either an appeal to the courts or an appeal to the Secretary of the Energy, Minerals, and Natural Resources Department.

5. New Mexico Potash's Application is an improper attempt to avoid the burden of proof with respect to the issues of granting an injunction which would be placed upon it if Section 70-2-25(C) NMSA 1978 were followed. With respect to the issues of the likelihood that New Mexico Potash would prevail on an appeal, whether or not it would suffer irreparable damage, and

whether Yates would suffer substantial harm, New Mexico Potash cannot prevail on those issues, as established by the findings of this Commission after many days of hearing on those very issues and that fact alone should dictate against the granting of New Mexico Potash's application for a stay.

6. The granting of the Application of New Mexico Potash would in fact deprive Yates of presenting evidence with respect to such issues, because such a grant would come without right of a hearing on those issues as is guaranteed by Section 70-2-25(C).

7. Granting the Application of New Mexico Potash would irreparably harm Yates because it would deny it the right to drill wells which it has spent considerable time and money proving that it has the right to drill. Further, Yates has been denied the time value of the production from those wells and from the information to be gained from the drilling of those wells in the use of developing its other adjacent acreages.

WHEREFORE, Yates Petroleum Corporation respectfully requests that the OCC enter an order denying the application of New Mexico Potash.

Respectfully submitted,

LOSEE, CARSON, HAAS & CARROLL, P.A.

By: ______________________________

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Attorneys for Yates Petroleum Corporation

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NOS. 10448 and 10449
(DE NOVO)
Order No. R-9654-B/R-9655-B

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

RESPONSE TO APPLICATION FOR ORDER
STAYING ORDER OF OIL CONSERVATION COMMISSION
PENDING RULING ON REHEARING AND APPEAL

COMES NOW YATES PETROLEUM CORPORATION, by and through its attorneys of record, and makes this response to New Mexico Potash's Application for a stay order of the Order issued by this Commission on August 23, 1993, and in support thereof would state the following:

1. On August 23, 1993, the Oil Conservation Commission issued its Decision and Order in this matter approving the application of Yates Petroleum Corporation ("Yates") to drill its Flora "AKF" State Wells No. 1 and No. 2 in Section 2, Township 22 South, Range 31 East, N.M.P.M.

2. Precedence for New Mexico Potash's Application can neither be found in the statutes of New Mexico nor in the rules of the Commission.

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inquired of Yates as to its intentions with respect to the resumption of the drilling of its Flora wells, and Yates has given no notice to New Mexico Potash that it has any intention to resume drilling operations on its Flora wells prior to the expiration of the period of time in which an Application for Rehearing of the Commission's order could be made, or if a request were made during the ten-day period during which the Commission has to rule on such a request. Yates will not make a decision concerning the resumption of drilling until the ten-day period for acting on New Mexico Potash's Application for Rehearing has expired.

4. New Mexico Potash's Application is improper and is nothing more than an attempt to circumvent Section 70-2-25(C) NMSA 1978, which sets forth the right of New Mexico Potash to a stay of the Commission's Order and the procedure for obtaining such stay. It is quite clear that the statute set forth the procedure which was to be the only manner in which a stay of a Commission order could be obtained in the event of either an appeal to the courts or an appeal to the Secretary of the Energy, Minerals, and Natural Resources Department.

5. New Mexico Potash's Application is an improper attempt to avoid the burden of proof with respect to the issues of granting an injunction which would be placed upon it if Section 70-2-25(C) NMSA 1978 were followed. With respect to the issues of the likelihood that New Mexico Potash would prevail on an appeal, whether or not it would suffer irreparable damage, and

whether Yates would suffer substantial harm, New Mexico Potash cannot prevail on those issues, as established by the findings of this Commission after many days of hearing on those very issues and that fact alone should dictate against the granting of New Mexico Potash's application for a stay.

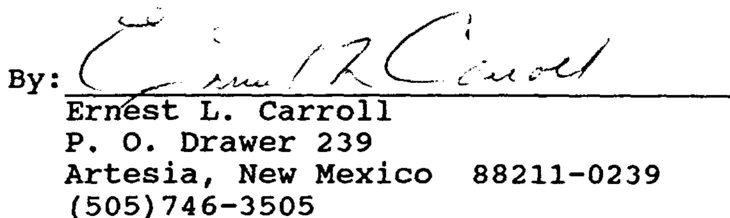
6. The granting of the Application of New Mexico Potash would in fact deprive Yates of presenting evidence with respect to such issues, because such a grant would come without right of a hearing on those issues as is guaranteed by Section 70-2-25(C).

7. Granting the Application of New Mexico Potash would irreparably harm Yates because it would deny it the right to drill wells which it has spent considerable time and money proving that it has the right to drill. Further, Yates has been denied the time value of the production from those wells and from the information to be gained from the drilling of those wells in the use of developing its other adjacent acreages.

WHEREFORE, Yates Petroleum Corporation respectfully requests that the OCC enter an order denying the application of New Mexico Potash.

Respectfully submitted,

LOSEE, CARSON, HAAS & CARROLL, P.A.

By: 

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Attorneys for Yates Petroleum Corporation

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASES NOS. 10448 and 10449
(DE NOVO)
Order No. R-9654-B/R-9655-B

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

APPLICATION FOR ORDER STAYING ORDER OF OIL CONSERVATION COMMISSION PENDING RULING ON REHEARING AND APPEAL

NEW MEXICO POTASH CORPORATION ("New Mexico Potash") applies for an order staying the decision and order issued by the New Mexico Oil Conservation Commission ("OCC") on August 23, 1993, and in support thereof shows the following:

1. On August 23, 1993, the OCC issued its decision and Order in this matter approving the application of Yates Petroleum Corporation ("Yates") to drill its Flora "AKF" State Well No. 1 and "AKF" State Well No. 2 in Section 2, Township 22 South, Range 31 East, NMPM.

2. On September 10, 1993, within the time specified in Rule 1222 of the OCC's Rules on Procedure, New Mexico Potash filed an Application for Rehearing before the OCC.

3. A copy of the Application for Rehearing by the OCC was served on counsel for Yates. A certification of service was attached to the Application and filed with the OCC.

4. The OCC has ten (10) days in which to rule on the Application for Rehearing and thereafter either party may take further appeals. Because there is a possibility that Yates will

begin the drilling of these two wells during the pendency of the Application for Rehearing and/or appeal to the Secretary or court, New Mexico Potash respectfully requests that the OCC enter an order staying the decision and order issued on August 23, 1993 approving the application of Yates to drill its Flora No. 1 and Flora No. 2 wells until such time as the appeal process through the Secretary's level is exhausted.

5. The entry of the requested order is consistent with the intent and purpose of the Oil and Gas Act and the OCC's own procedural rules.

6. Section 70-2-25, NMSA 1978, as well as Rule 1222, specifically provides for the filing of an application for rehearing and 70-2-26 provides for an appeal thereafter to the Secretary of Energy, Minerals and Natural Resources.

7. The appeal process provided by Section 70-2-25 and 70-2-26 only has meaning if it occurs at a time before the well being challenged is drilled.

8. New Mexico Potash submits that it is entitled to a stay based upon traditional equitable standards considered by the courts when deciding whether agency action should be stayed during an appeal. See e.g., Tenneco Oil Company v. New Mexico Water Quality Control Commission et al., 105 N.M. 708 (App. 1986)(test for determining whether to enjoin agency action during appeal requires consideration of (1) likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to the applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) s showing that no harm will ensue to the public interest.)

9. With respect to the first condition, there is at least a likelihood that New Mexico Potash will prevail on its Application for Rehearing before the OCC. The factual findings of the OCC are so erroneous as shown by testimony and evidence cited to the OCC that a rehearing is clearly needed to resolve the factual issues. This first condition, therefore, is clearly met.

10. Second, if a stay is not granted, New Mexico Potash will suffer irreparable harm. During the pendency of the application and appeal to the Secretary, Yates may begin drilling the wells in issue. Indeed, in this very case they did so during the pendency of New Mexico Potash's appeal from the Hearing Examiner to the OCC. If this were to occur again the wells could be drilled and completed while the issue is awaiting hearing and decision by the OCC and/or Secretary. This would effectively render moot New Mexico Potash's right to appeal because even if it prevailed, the well could not be removed. Such deprivation of a statutory right, under any standard, is irreparable injury. This clearly satisfies the second factor.

11. With respect to the third factor, there can be no substantial harm to Yates if a stay is granted. No drilling is currently taking place. Thus, there is no basis to claim that the granting of a stay will somehow harm Yates. Moreover, the fact that the drilling of the well will be delayed until the issue is decided by the OCC and Secretary is certainly not the type harm contemplated in this situation. On the contrary, the OCC Rules of Procedure and the Oil and Gas Act specifically provide for a determination of this matter by the OCC and Secretary regardless of the decision by the OCC. Therefore, there can be no basis on which

Yates can claim that it will suffer substantial harm if a stay is granted in this case pending a decision by the OCC and Secretary.

12. Finally, there can be no claim that the granting of a stay will result in harm to the public interest. The public interest mandates that New Mexico Potash receive that to which it is entitled by statute - a decision by the OCC and Secretary on whether these wells should be allowed. A stay which ensures that New Mexico Potash receives this statutory right at a time when it has meaning - before the wells are drilled - is in the public interest, not harm to the public.

13. The necessity that a stay be entered to avoid this irreparable harm is clearly and vividly demonstrated by the conduct of Yates in attempting to drill one of these wells before the OCC had an opportunity to exercise its statutory duty to decide whether the well should or should not be allowed. The possibility that this conduct will be repeated, therefore, mandates the entry of a stay in this matter.

WHEREFORE, New Mexico Potash respectfully requests that the OCC enter an order staying the OCC Order approving the wells until

its Application for Rehearing can be heard and the matter decided by the OCC and Secretary, Energy, Minerals and Natural Resources.

Respectfully submitted,

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By: Clinton Marrs

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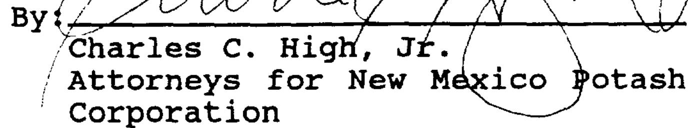

By: ______________________
Charles C. High, Jr.
Attorneys for New Mexico Potash Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for Order Staying Order of the Oil Conservation Commission Pending Order on Rehearing and Appeal was sent by facsimile and mailed by certified mail, return receipt requested on this 10th day of September, 1993, to Ernest L. Carroll, Attorney for Yates Petroleum Corporation, Losee, Carson, Haas, & Carroll, P. A., P. O. Drawer 239, Artesia, New Mexico 88210.

Charles C. High, Jr.

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASES NOS. 10446 and 10447
(DE NOVO)
Order No. R-9650-A/R-9651-A

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

APPLICATION FOR REHEARING

New Mexico Potash Corporation ("NMPC"), party of record adversely affected by the Order entered by the Oil Conservation Commission ("OCC") in this matter on August 23, 1993, files this Application for Rehearing pursuant to Section 70-2-25, NMSA 1978 (1987 Repl.) and Rule 1222 of the OCC's Rules of Procedure, and in support thereof respectfully shows the following:

I.

The finding in Paragraph 6 of the Order concerning life-of-mine reserves, with the exception of the last two sentences, as well as the facts recited in that paragraph, are identical to those found by the OCC in Cases Nos. 10448 and 10449 (Flora Wells). Instead of needlessly repeating the many reasons these duplicate findings and facts are clearly erroneous, New Mexico Potash simply incorporates its responses from Cases Nos. 10448 and 10449. With respect to the last two sentences, New Mexico Potash submits that the finding in the last sentence is unnecessary and contrary to Order R-111-P. That finding states:

"If an LMR designation and associated buffer zone prevents an oil and gas operator from developing his

reserves, there should be a process for challenging that LMR designation or granting exceptions to allow drilling."

Order R-111-P already contains a provision governing the establishment of LMRs. This finding, therefore, is unnecessary to the resolution of this matter and can only result in confusion regarding otherwise specific provisions of an existing Order of the OCC not at issue in this case.

II.

The finding in paragraph 7 of the Order and the facts cited in support of the finding are vague, incorrect, unnecessary to the issues presented by Yates' applications for permit to drill the wells at issue, and are contrary to Order R-111-P. Their inclusion in the Order can only lead to confusion regarding specific provisions of an existing Order of the OCC not at issue in this case and which addresses specifically the subject matter of these findings.

III.

The finding in Paragraph 8 of the Order that New Mexico Potash did not prove the existence of commercial potash under Section 2 and the facts cited in support of the finding are identical to those set forth in Paragraph 8 of the Order entered on August 23, 1993 in Cases Nos. 10448 and 10449. Instead of needlessly repeating the reasons this finding and supporting facts are erroneous, New Mexico Potash submits that they are clearly erroneous for the same reasons stated in the Application for Rehearing in Cases Nos. 10448 and 10449. Indeed, a finding that Section 2 does not contain a commercial deposit of potash is so wildly at odds with the evidence that it is apparent that the OCC

either failed to understand the evidence presented or seriously misunderstood it.

IV.

The findings in Paragraph 9 of the Order and cited facts are erroneous and demonstrate the breath of misunderstanding by the OCC of the evidence presented in this case. First of all, the findings in this Paragraph relate to Section 35 which is not at issue in this case. The wells being sought by Yates are located in Section 2. Second, they are simply wrong. In the first two sentences of Paragraph 9, the OCC says that the maps submitted by Yates and New Mexico Potash showing the potash in Section 35 were different. While this has no relevance to the question of whether the drilling of two wells in Section 2 will unduly waste potash, a look at Yates Exhibit 41 (map prepared by Leo Lammers, a geologist and a witness for Yates) clearly shows that Section 35 contains a massive amount of potash. Therefore, the statement that Yates' evidence only showed potash in "the northwest quarter" is, quite simply, contrary to the evidence.

The most serious example that the OCC misunderstood the evidence in this case, however, is the third sentence in Paragraph 9 where the OCC says that Section 35 is Federal land and was included in New Mexico Potash's LMR by the BLM and then states that:

> "The critical question, which was not adequately addressed at the hearing, is whether one mineral estate, federal lands in Section 35, can prevent resource development under a different mineral estate, state lands in Section 2, by virtue of the fact that it was designated by the federal estate to bear the burden of

providing a measure of safety to the development of resources on its land."

This is wrong because Section 35 is not Federal land. It is State land just like Section 2 and there is no issue in this case about any conflict between State and Federal rights. This issue, however, is important and illustrates very clearly why the regulations adopted by the State for the drilling of oil and gas wells in the Potash Area need to be in harmony with those followed by the BLM. This was - and is - the hope and goal of R-111-P and the Industry Agreement upon which it is based.

Given the erroneous nature of the underlying facts found by the OCC in Paragraph 9, it goes without saying that the finding in the same paragraph that a denial of Yates' application for permit to drill the wells at issue would somehow amount to a "confiscation" is incorrect and without foundation in either law or fact.

V.

In Paragraph 10 of the Order the OCC found as a fact that New Mexico Potash said it would be 30 to 50 years "in the future" before Section 2 would be mined. This is wrong and a mischaracterization of the evidence. Bob Lane, a mining engineer for New Mexico Potash with over 40 years of experience, testified that a reasonable mine plan for Section 2 would be 10 years [Hearing Transcript, p. 1476]. Tim Woomer, Chief Mining Engineer for New Mexico Potash, testified that Section 2 would be mined in as little as eight years or as many as 15 years. [Hearing Transcript, p. 1693]. With this specific evidence from witnesses

who are in the best position to know the subject matter, this finding is certainly erroneous.

VI.

The findings and facts cited in Paragraph 11 of the Order concerning the need for cooperation between the industries and a "plan of operation" which prevents waste is vague, unnecessary to the issues in this case, and contrary to the provisions of existing Order R-111-P. That Order was designed to accomplish precisely what the OCC is referring to and was not only agreed to by Yates but signed by a representative of Yates Petroleum, who was on the negotiating committee.

VII.

The finding in Paragraph 12 of the Order that it was not proved that if oil and gas operations make mining unsafe, potash will not be mined and therefore wasted, overlooks direct and specific evidence on the hazards of methane gas to underground miners and the risks to potash operators if methane leaks and enters a mine or is encountered in the strata. This was made clear by Dr. Bill Mitchell, an expert in petroleum engineering, and Warren Traweek, an expert in mining safety and one of the inspectors for the U. S. Mine Safety and Health Administration in the Belle Isle mine methane explosion. In the face of this evidence and the consequences to the mining industry, this finding is unwarranted by the facts and contrary to the evidence.

VIII.

The finding in Paragraph 13 of the Order that there is "no direct surface field measurements in areas where potash mining has already caused some subsidence" is wrong. The various studies in

the Potash Basin were explained by Professor Grosvenor [Hearing Transcript. pp. 1589-1592] and one report prepared for the U.S. Geological Service was even introduced into evidence as NMP Exhibit 33. This finding, therefore, simply ignores the record evidence.

IX.

The finding in Paragraph 14 of the Order is clearly erroneous. Warren Traweek, an expert in mining safety, testified about the presence of oil spots in underground mines, their proximity to oil and gas wells, and how this impacted the safety of underground miners. No mine safety expert was called to testify on behalf of Yates.

X.

The finding in Paragraph 15 of the Order that a Technical Committee is needed to address the complex issues listed is unnecessary, burdensome, and without legal support. What the OCC is suggesting in this Paragraph has already been done on a broader industry scale. This resulted in the Industry Agreement attached as an appendix to Order R-111-P. Yates not only had an opportunity to participate in those discussions but actually did so. Its representative was even on the smaller committee appointed by each industry to negotiate a compromise and reduce it to writing. This was accomplished and Yates' representative signed the agreement. The fact that it wants to renege on that agreement and negotiate another one is not a sufficient basis on which to establish a new committee just for this case. Moreover, the cost to undertake the study set forth in Paragraph 15 would be staggering and would take an enormous amount of time. Further, no new evidence has been

presented that was not considered by the Oil/Potash Study Committee formed (voluntarily) by the OCD in 1986.

XI.

The OCC has seriously misunderstood the record evidence in this case as shown by its findings in Paragraphs 6-15 of its Order.

XII.

The OCC has clearly failed to observe the prohibition in 70-2-6(A) against the "waste of potash as a result of oil or gas operations" and the prohibition against waste of potash in 70-2-12(B)(17) by failing to make findings on the amount of potash that would be wasted if these wells are eventually approved. These prohibitions require, at a minimum, that before approving an application for permit to drill in the Potash Area, the OCC first determine the amount of potash that will be lost if the wells are allowed. Only after such a factual finding can it be determined if the proposed wells will result in "undue" waste of potash. The failure to make such a finding here is particularly significant because it is the position of New Mexico Potash that the value of potash that will be wasted if these wells are allowed far exceeds the additional costs that would be incurred if the wells were required to be drilled directionally drilled from another surface location.

XIII.

The OCC failed to consider and make findings on whether the proposed wells will constitute a hazard to underground miners and mining activities as required by Section C(2) of Order R-111-P. This prohibition against oil and gas activities that create a hazard to mining operations requires careful evaluation and an

affirmative finding by the OCC on whether such activities will or will not create a safety hazard.

XIV.

The OCC failed to make findings on why this lease cannot be suspended. Provisions exist for the suspension of oil and gas leases that cannot be drilled in the Potash Area and no findings were made to indicate why this lease cannot be suspended and the oil and gas recovered after mining of Section 2.

XV.

The failure of the OCC to require that the wells at issue be directionally drilled from a surface location that will not waste potash is in violation of its statutory obligation and duty to prevent the waste of potash as set forth in the Oil and Gas Act, 70-2-1, et seq.

XVI.

The failure of the OCC to deny the applications for permits to drill because the proposed wells will be located in New Mexico Potash's long-established LMR is in violation of R-111-P and contrary to law.

WHEREFORE, for the foregoing reasons, New Mexico Potash respectfully requests that the OCC grant this Application for Rehearing, withdraw the Order entered on August 23, 1993, and

schedule oral arguments on the issues raised or reopen the record so that important issues can be corrected or resolved.

Respectfully submitted,

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Drawer 2800
El Paso, Texas 79999-2800
(915) 533-4424
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By: ______________________________
Charles C. High Jr.
State Bar No. 09605000
Clinton W. Marrs
State Bar No. 4637
Attorneys for New Mexico Potash Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the following by certified mail, return receipt requested, this 10th day of September, 1993:

Ernest l. Carroll, Esq.
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By: ______________________
Charles C. High Jr.
State Bar No. 09605000

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASES NOS. 10448 and 10449
(DE NOVO)
Order No. R-9654-B/R-9655-B

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

APPLICATION FOR REHEARING

New Mexico Potash Corporation ("NMPC"), party of record adversely affected by the Order entered by the Oil Conservation Commission ("OCC") in this matter on August 23, 1993, files this Application for Rehearing pursuant to Section 70-2-25, NMSA 1978 (1987 Repl.) and Rule 1222 of the OCC's Rules of Procedure, and in support thereof respectfully shows the following:

I.

The finding in Paragraph 6 of the Order concerning life-of-mine reserves and the facts recited in that paragraph are clearly erroneous. Indeed, the facts are so erroneous and contrary to the evidence as to reflect a complete lack of understanding by the OCC of underground mining and the intended operation of Order R-111-P. More specifically, the following findings are erroneous for the following reasons:

A. Erroneous Findings Concerning Life-of-Mine Reserves

1. "An LMR is not established on state land until designated as such by the State Land Office."

This finding is erroneous for several reasons. First, it is directly contrary to Order R-111-P and, therefore, constitutes an amendment to that Order without proper notice and hearing. Section G(a) of Order R-111-P specifically provides that "each potash lessee, without regard to whether the lease covers State or Federal lands, shall file with the District Manager, BLM, and the State Land Office (SLO), a designation of the potash deposits considered by the potash lessee to be its life-of-mine reserves ("LMR")." This language clearly provides for the establishment of LMRs by potash lessees, not the SLO. This is confirmed by the additional language in Section G(b) of R-111-P where it states that "Information used by the potash lessee in identifying its LMR shall be filed...." and in Section G(b) where its states that "Authorized officers shall review the information submitted by each potash lessee in support of its LMR designation on their respective lands and verify upon request, that the data used by the potash lessee in establishing the boundaries of its LMR is consistent with data available to the BLM and SLO." This language can have but one meaning - the designation of LMRs is reserved to the potash lessees with no affirmative action required from the SLO prior to the establishment of an LMR. That this was the intent of R-111-P, whether viewed as right or wrong, is made crystal clear by Section G(b), which limits the actions of the SLO to verifying, upon request from an oil and gas operator, that the data used by the potash lessee in designating the LMR is consistent with data available to the SLO. Nowhere is the SLO given the authority in R-

111-P to prevent the establishment of an LMR until it takes some affirmative action in approving such a designation.

Second, this finding denies New Mexico Potash due process of law because instead of applying this new requirement prospectively only, it is adopted as controlling in this case and applied retroactive to a time when New Mexico did not know of the requirement and therefore could not possibly have known what it had to do to get its LMR approved. This is made clear by the following testimony of Mr. Floyd Prando, Director, Oil and Gas and Mineral Division:

> Q. Now, is it the Division's position, Mr. Prando, that it has the right to approve or disapprove the designation of an LMR by a potash operator?
>
> A. Yes.
>
> Q. And when was it that the Division reached that determination?
>
> A. I think it was around March of--that was in a letter of March 27, 1992, around that time.
>
> ****
>
> Q. ***Once the Division made this decision on March 27, 1992, that you had the right to approve or disapprove LMRs, had you previously provided any notice to potash operators that you were undergoing or thinking about adopting such a rule?
>
> A. No.
>
> ****

Q. Would it be a fair statement to say, then, that to get an LMR approved today or any time after March 27, 1992, a potash operator wouldn't know what they had to do to satisfy the State Land Office, is that correct?

A. Yes. At this point, yes.

[Hearing Transcript, pp. 1082-1084].

From this testimony, it is clear beyond question that the requirement now adopted by the OCC as controlling in this case was adopted by the SLO after the critical facts of this case were fixed. To now use it and say that no LMR existed in Section 2 because the SLO had not approved the LMR designated by New Mexico Potash, is to impose on New Mexico Potash a requirement it was not aware of, had no notice of, and one with which it could not have possibly complied. Due process and basic fairness require more.

Further, by finding that no LMR exists until the SLO says it exists denies New Mexico Potash due process because the SLO has adopted no standards, guidelines, or rules informing potash lessees what it is they have to do to obtain SLO approval. Again, this is confirmed by the testimony of Floyd Prando where he testified as follows:

Q. Now, when you made this decision that you had the authority to either approve or disapprove LMRs, have you adopted, either informally or formally, any standards that will be applied to determine whether or not an LMR should or should not be approved?

A. Not at this point.

[Hearing Transcript, pp. 1083-1084].

In addition to this total absence of standards on what a potash lessee must do to obtain approval of a designated LMR, both then and now, Mr. Prando also admitted that the SLO has no standards to determine the existence of commercial deposits of potash and, even more, employs no one with a mining engineering degree or who has experience in mining. Thus, by this finding, the OCC is not only applying a new requirement retroactively to a time when it was unknown to New Mexico Potash, but imposing a requirement that was, and is, standard-less to be administered by an agency with no existing expertise in mining. Due process requires more than this.

In sum, there is no support for this finding. If the SLO wants to do more than allowed by R-111-P, i.e., verify, upon request, that a designated LMR is based upon data that is consistent with information on file in its office, there are ways in which it can do so. However, such changes cannot be made retroactive to the detriment of a potash lessee or without some notice of what is required to get an LMR approved. For this reason, this Application should be granted and this finding reconsidered and revised to provide New Mexico Potash with at least a minimum of due process.

2. "<u>Furthermore, an LMR designation by itself cannot act retroactively to prohibit the drilling of wells for which an application to drill has previously been filed</u>."

This finding is erroneous because it (a) ignores the OCC's statutory duty to prevent the waste of potash, and (b) seemingly authorizes the waste of potash if "an application to drill has been previously been filed." Such a finding has no support in law.

The OCC's duty to prevent the waste of potash is clear. See NMSA 70-2-6, 70-2-11, and 70-2-12. There is nothing in any statute which says that potash can be wasted simply because of the timing of the filing of an application for permit to drill. Thus, to decide an issue involving the waste of potash on the basis of who did what first is to ignore a clear statutory mandate. For these reasons, this finding is clearly erroneous and warrants the granting of this Application.

3. "<u>At the time the Applications to Drill the Flora No. 1 and No. 2 wells were filed, the proposed locations were not within the boundaries of a designated LMR or its buffer zone</u>."

This finding, too, is erroneous. Again, the OCC refers to the time of filing of an application for permit to drill as though it is some magical date that excuses its duty to prevent the waste of potash. Such is not the case and there is simply no statutory support for such a concept. If the OCC wants to give some credence to the "first-in-time first-in-right" concept, then it should look to when the parties acquired the leases for the respective interests. In this case, the evidence is undisputed that New Mexico Potash has owned the lease covering Section 2 since 1965 [Hearing Transcript, p. 1117; NMP Exhibits 1(a), 1(b) and 1(c)] while Yates did not acquire its oil and gas lease until 1988, some 23 years later and after R-111-P was in effect. Thus, if timing is a consideration, and it should not be, then the lease acquisition date should have been considered instead of the date a form was filed with the OCD.

Further, this finding is wrong because it assumes that the LMR designated by New Mexico Potash had to first be approved by the SLO. As stated earlier, to apply such a requirement retroactively deprives New Mexico Potash of due process of law because it had no knowledge of such a requirement and certainly had no knowledge of what the SLO required for it to obtain such approval. If, instead, the OCC had followed Order R-111-P, as we submit it is required to do, then this finding is clearly wrong. Randy Patterson, a witness for Yates, testified that the application for permit to drill the Flora No. 2 well was file on January 21, 1992. [Hearing Transcript, p. 17]. Seven days prior to this, on January 14, 1992, New Mexico Potash filed an amended LMR designation with the SLO which included Section 2. [NMP Exhibit 4(a)]. Therefore, under the terms of R-111-P, Section 2 was included within New Mexico Potash's LMR on the date the APD for Flora No. 2 was filed.

Finally, we submit this finding is wrong because it has no support in law and is contrary to Order R-111-P. Indeed, this very finding illustrates the fallacy in attempting to use the date the applications for permits to drill were filed as a key date for decision purposes. Here it is undisputed that on March 27, 1992, the SLO finally agreed with New Mexico Potash that commercial deposits of potash existed in Section 2. [Letter from Floyd Prando to New Mexico Potash, NMP Exhibit 11]. From this date forward, we assume, based upon the interpretation being adopted by the OCC, that the southeast one-quarter of Section 2 was part of New Mexico Potash's LMR. This being so, then a portion of the southwest one-quarter of Section 2 would have become the buffer zone for the

southeast one-quarter. Thus, on the date the OCC issued its decision in this case, the wells at issue were within New Mexico Potash's LMR as approved by the SLO. Yet, by arbitrarily using the date for filing of an APD as some kind of cutoff date, instead of the date its decision is issued, the OCC is approving the drilling of wells in an LMR - the very thing prohibited by R-111-P and a sure way to waste potash in violation of the Oil and Gas Act. This anomaly alone warrants the granting of this motion.

B. Erroneous Facts Underlying the Foregoing Findings

The facts cited by the OCC in Paragraph 6 of the Order and upon which the foregoing findings are based are clearly erroneous. In fact, the factual errors are so obvious and pervasive that reliance on them, without more, warrants the granting of this Application.

1. "Mine operators file LMR designation maps **annually** with the New Mexico State Land Office ("SLO") and with the U.S. Bureau of Land Management ("BLM") as required under [Order R-111-P]." [emphasis supplied].

This is wrong. Order R-111-P clearly states in Section G(a) that potash lessees are to file a designation of LMRs within ninety (90) days of the effective date of the Order. Additional filings are only required if an LMR is amended as allowed by Section G(c). There is no requirement for an annual filing as believed by the OCC.

2. "NM Potash had filed for and the BLM had established LMR designation for Section 35, Township 21 South, Range 31 East which LMR covers Federal minerals under BLM jurisdiction and had claimed LMR designation for Section 2 which is totally under jurisdiction of the SLO."

This is wrong. New Mexico Potash had designated Section 35 as being within its LMR but the LMR was not "established" by the BLM. On the contrary, Section 35, like Section 2, is State land - not Federal as believed by the OCC. Thus, if the LMR covering Section 35 was "established" by anyone it was "established" by the SLO since it, like Section 2, was "totally under the jurisdiction of the SLO." And had the SLO handled the LMR designation in Section 2 in the same manner as it had the LMR in Section 35, then the applications for permits to drill would be denied in accordance with Order R-111-P. This factual finding is correct to the extent that it says that New Mexico claimed LMR designation for Section 2.

3. "The north half of Section 2 would be designated as either a SLO created LMR or as a BLM created buffer zone to the LMR designation established in Section 35."

This is wrong. First, the north half of Section 2 is a long established buffer zone to New Mexico Potash's LMR as it existed prior to January 14, 1992. This buffer zone was to protect an LMR on State land and was not "a BLM created buffer zone to the LMR designation established in Section 35" as believed by the OCC and relied upon for its findings in this case. See NMP Exhibits 1(a), 1(b), and 1(c).

Second, if the provisions of R-111-P were observed by the OCC, as they should be, the entire area of Section 2 - not just the north half - would be within New Mexico Potash's LMR as of January 14, 1992, the date of its designation as LMR. [NMP Exhibit 4]. As such, this would require dismissal of the applications for permit to drill. There are no facts of record to support the stated

conclusion that only the north one-half of Section 2 "would be designated as ... a SLO created LMR..."

> 4. "The south half of Section 2 would be outside the buffer zone created by the LMR in Section 35 by the BLM but would be within the SLO created LMR covering Section 2."

This, again, is wrong because the buffer zone covering the north half of Section 2 was "created" by the LMR designation covering Section 35, which is State land. The BLM did not create anything in connection with either Sections 35 or 2. If anyone other than the potash lessee "created" an LMR or buffer zone in Section 2 or Section 35 it was the SLO.

Further, this finding is wrong because it ignores the determination by the SLO in connection with New Mexico Potash's amendment to its LMR that the southeast one-quarter of Section 2 contains a commercial deposit of potash. [NMP Exhibit 11]. This determination acted to approve the addition of the southeast one-quarter of Section 2 to New Mexico Potash's LMR. Accordingly, the record evidence establishes - not what the OCC said here - but that New Mexico Potash's LMR covers the north half and southeast one-quarter of Section 2. Given this, then the buffer zone for the southeast one-quarter would also extend into the southwest one-quarter of Section 2, an issue not even mentioned by the OCC but yet crucial to the decision of whether these wells are allowable under R-111-P.

II.

In Paragraph 7 of the Order the OCC makes the following finding concerning waste:

"Since the subject wells are not within the boundaries or the buffer zone of a designated LMR, the applications to drill should be granted unless N.M. Potash can show that drilling or producing the wells would have the effect to excessively reduce the total quantity of commercial deposits of potash."

This finding is patently wrong because it ignores undisputed record evidence that at the time the Order was issued, the southeast one-quarter of Section 2 was included in New Mexico Potash's LMR. This meant that the only part of Section 2 that was not within New Mexico Potash's LMR, assuming that the SLO has to approve LMRs as the OCC states, was the southwest one-quarter. However, once the southeast one-quarter is included in the LMR, a portion - and specifically the locations of the proposed wells - of the southwest one-quarter became part of the buffer zone for the southeast one-quarter. Ignoring this evidence clearly renders this finding unsupportable in law or logic.

In addition, there is no support in law or fact for the conclusion in Paragraph 7 that unless these wells are approved, Yates will be deprived of their opportunity to recover their fair share of oil and gas from the Delaware, thus violating their correlative rights. On the contrary, the evidence clearly established that technologically and economically, Yates can directionally drill these wells from an offset location. This would allow Yates to develop its leases and, at the same time, prevent the waste of potash on New Mexico Potash's lease. The failure of the OCC to consider this evidence and make findings on this alternative renders illogical and erroneous its conclusion that allowance of the wells is necessary to protect correlative rights.

III.

The findings in Paragraph 8 of the Order concerning the presence of commercial potash in Section 2, as well as the facts cited in support of the finding, are not only erroneous but contrary to the overwhelming weight of record evidence.

A. Erroneous Finding Concerning Waste

In Paragraph 8 the OCC makes the following finding:

> "NM Potash did not prove the existence of commercial potash under Section 2 and therefore, the application of Yates to drill their Flora No. 1 and Flora No. 2 in the south half of Section 2 should be granted."

This finding is erroneous, first, because it incorrectly concludes that the proposed well locations are not within New Mexico Potash's LMR and that New Mexico Potash therefore has the burden of proving the presence of commercial potash in Section 2. For the reasons previously stated, the proposed locations are within the LMR designated by New Mexico Potash on January 14, 1992 in accordance with R-111-P and, further, they are within the buffer zone to the southeast one-quarter of Section 2 based upon the SLO's approval of an LMR in the southeast one-quarter of Section 2. Given this, R-111-P clearly and unequivocally states that the wells should be denied unless the oil and gas operator makes "a clear demonstration" that the wells will not unduly waste potash. [Order R-111-P, Finding No. 20, NMP Exhibit 9].

More importantly, however, this finding is erroneous because it flies in the face of overwhelming evidence that Section 2 does, in fact, contain commercial deposits of potash. The best evidence of this, as even admitted by counsel for Yates [Hearing Transcript,

p. 1037: "I'm not trying to deny Mr. High developing testimony about whether there's commercial ore or not. His client is the best source of that. Whether or not its minable, his client is the best source of that."] is evidence from New Mexico Potash. That evidence is clear, consistent, and beyond attack:

1. Documents admitted into evidence show the grade of ore in Section 2 and also show that it even exceeds the grade routinely mined by New Mexico Potash. [See NMP Exhibits 6, 7, 8, 25, and 26].
2. Bob Lane, who has a mining engineering degree and 42 years of experience in potash mining, testified that he determined that Section 2 contained potash using the triangulation method that he has been using for 29 years [Hearing Transcript, p. 1455];
3. Tony Herrell, of the BLM, testified that most of Section 2 contained commercial grade potash according to BLM standards [Hearing Transcript, pp. 1042-1043, 1056-1058];
4. Niles Grosvenor, an expert in mineral valuation with experience in the Potash Basin, testified that Section 2 contained commercial deposits of potash [Hearing Transcript, pp. 1611-1615];
5. Tim Woomer, Chief Mine Engineer for New Mexico Potash who has a degree in mining engineering, testified that Section 2 contained enough potash to employ 260 employees for three years and had a market value of $102,274,580 [Hearing Transcript, p. 1673, 1680]. The biggest lost, according to Mr. Woomer, is from Flora No. 2 which would

waste almost all of the ore in the entire Section. [NMP Exhibit 27].

But the evidence establishing the existence of commercial deposits of potash in Section 2 was not limited to witnesses called by New Mexico Potash. Mr. George Lammers, a geologist called by Yates, testified that the wells at issue would be in a mineralized area [Hearing Transcript, p. 505, 511]. A cross-section map he prepared and offered as an exhibit [Yates Exhibit 41] shows that almost all of Section 2 contains sylvinite ore.

In the face of this evidence, it is inconceivable how any factfinder could conclude that Section 2 does not contain a commercial deposit of potash. Even the SLO, who admittedly has no standards or expertise in mining, finally agreed - on far less evidence than this - that there was a commercial deposit of potash in at least part of Section 2. [NMP Exhibit 11].

B. Erroneous Facts Underlying the Foregoing Finding

The facts cited by the OCC in Paragraph 8 of the Order in support of the foregoing finding are equally as flawed. In some instances the facts cited are not even relevant and in others they are just plain wrong.

1. "<u>NM Potash failed to use valuable information such as radioactivity logs to help define mineralization and barren zones</u>."

This supporting fact is relevant to nothing. The issue in this case is not what New Mexico Potash or Yates used or did not use to determine the presence of commercial potash, but the results of whatever was used. Moreover, the logs referred do not meet long-standing BLM requirements to establish the presence of

measured ore [Hearing Transcript, pp. 1075-1076] and, as made clear by Mr. Leo Lammers, one of Yates' witnesses, they do not always include the salt section. [hearing Transcript, p. 504]. The reason for not including the potash zones is obvious - no oil operator wants anyone to know that the well was drilled through potash or any other valuable mineral for that matter.

> 2. <u>They used carnallite in combination with sylvite to arrive at their determination of commercial potash ore in core hole F-65 ... even though carnallite must be blended to obtain commercial ore, and they did not incorporate in their interpretation available data in core hole ERDA-6...</u>"

This finding reflects such a lack of understanding of potash mining and the evidence as to render any finding based upon it as arbitrary and capricious. Indeed, whether it is supported by the evidence or not - and without regard to whether it is even true or not - every witness who testified stated that Section 2 contained a commercial deposit of potash. This is true even if one considers only the testimony of Leo Lammers, one of Yates' witnesses. He certainly took everything favorable to Yates into consideration in arriving at his conclusions and still testified as follows:

Q. [By Commissioner Carlson] If I'm eyeballing the four locations that Yates wants to drill on, they'd be in your blue area that shows mineralization; is that correct? (referring to Yates Exhibit 41)

A. More correctly they would be within their LMR, blue area. [Hearing Transcript, p. 511].

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This finding, therefore, supports nothing and is clearly no basis on which to decide the presence or absence of potash in Section 2 or on which to approve or disapprove the wells at issue.

3. "Their contention that commercial potash ore is present throughout Section 2 is based upon the results of one core hole K-162 drilled in January, 1992 .... which did encounter commercial mineralization in both the 4th and 10th ore zones of the Salado Salt."

This is contrary to uncontested evidence, right down to the date core hole K-162 was drilled [NMP Exhibit 6 clearly shows that this core hole was started on December 11, 1991 and completed on December 12, 1991]. It is also arbitrary in that this "factual" finding and the resulting finding that New Mexico Potash failed to prove the presence of commercial potash in Section 2 is based on what "their" contention and evidence was instead of upon the record evidence. Aside from that, the finding is just plain wrong. Bob Lane, who has more experience in the Potash Basin than any other witness, testified as follows on this very issue:

Q. Were there any other core hole data or data from core holes that you relied upon to revise the LMR?

A. There is.

[Hearing Transcript, p. 1452]. He then identified the core holes shown in NMP Exhibits 7(a), (b), and 8(a) and (b) and testified that he used five core holes and the triangular method to plot isogrades on each of the legs and then connected the grades at the point used as a cutoff grade. [Hearing Transcript, p. 1453]. Professor Grosvner also testified that he used data from numerous core holes [Hearing Transcript, pp. 1611-1613] as did Tony Herrell

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of the BLM [Hearing Transcript, p.1047-1048]. And surely, Leo Lammers in preparing his map for Yates, which shows the well locations to be in a mineralized area, used a method most favorable to Yates and still concluded that most of Section 2 was mineralized. [See Yates Exhibit 41]. Thus, regardless of what "their" contention is regarding the presence of commercial potash in Section 2, the overwhelming record evidence establishes that it does, if fact, exist.

IV.

The OCC, in approving the applications for permit to drill in this case, has seriously misunderstood the record evidence in this case as shown by its findings in Paragraphs 6, 7 and 8 of its Order.

V.

The OCC, in approving the applications for permit to drill in this case, has clearly failed to observe the prohibition in 70-2-6(A) against the "waste of potash as a result of oil or gas operations" and the prohibition against waste of potash in 70-2-12(B)(17). These prohibitions require, at a minimum, that before approving an application for permit to drill in the Potash Area, the OCC first determine the amount of potash that will be lost if the wells are allowed. Only after such a factual finding can it be determined if the proposed wells will result in "undue" waste of potash. The failure to make such a finding here is particularly significant because it is the position of New Mexico Potash that the value of potash that will be wasted if these wells are allowed far exceeds the additional costs that would be incurred if the

wells were required to be drilled directionally drilled from another surface location.

VI.

The OCC, in approving the applications for permits to drill in this case, failed to consider and make findings on whether the proposed wells will constitute a hazard to underground miners and mining activities as required by Section C(2) of Order R-111-P. This prohibition against oil and gas activities that create a hazard to mining operations requires careful evaluation and an affirmative finding by the OCC on whether such activities will or will not create a safety hazard.

VII.

The OCC, in approving the applications for permits to drill in this case, failed to make findings to support its conclusion that denial of the wells would deprive Yates of the opportunity to recover their fair share of oil and gas from the Delaware reservoir. Provisions exist for the suspension of oil and gas leases that cannot be drilled in the Potash Area and no findings were made to indicate why this lease cannot be suspended and the oil and gas recovered after mining of Section 2.

VIII.

The failure of the OCC to require that the wells at issue be directionally drilled from a surface location that will not waste potash is in violation of its statutory obligation and duty to prevent the waste of potash as set forth in the Oil and Gas Act, 70-2-1, et seq.

WHEREFORE, for the foregoing reasons, New Mexico Potash respectfully requests that the OCC grant this Application for Rehearing, withdraw the Order entered on August 23, 1993, and schedule oral arguments on the issues raised or reopen the record so that important issues can be corrected or resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the following by certified mail, return receipt requested, this 10th day of September, 1993:

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September 14, 1993

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. William J. LeMay, Director
New Mexico Oil Conservation Division
P. O. Box 2088
Santa Fe, NM 87501

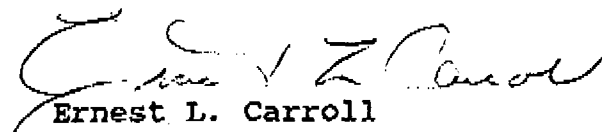
Re: Application of Yates Petroleum Corporation for Permits to Drill, Eddy County, New Mexico, Case Nos. 10448, 10449, De Novo/Order Nos. R-9654-B/R-9655-B

Dear Mr. LeMay:

Enclosed herewith, please find Yates Petroleum Corporation's Response to Application for Order Staying Order of Oil Conservation Commission Pending Ruling on Rehearing and Appeal.

Very truly yours,

LOSEE, CARSON, HAAS & CARROLL, P.A.



Ernest L. Carroll

ELC:kth
Enclosure

xc w/encl: Charles High, Jr.
Randy Patterson

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 OF NEW MEXICO FOR
THE PURPOSE OF CONSIDERING:

CASE NOS. 10448 and 10449
(DE NOVO)
Order No. R-9654-B/R-9655-B

APPLICATION OF YATES PETROLEUM
CORPORATION FOR AUTHORIZATION
TO DRILL, EDDY COUNTY, NEW MEXICO

**RESPONSE TO APPLICATION FOR ORDER
STAYING ORDER OF OIL CONSERVATION COMMISSION
PENDING RULING ON REHEARING AND APPEAL**

COMES NOW YATES PETROLEUM CORPORATION, by and through its attorneys of record, and makes this response to New Mexico Potash's Application for a stay order of the Order issued by this Commission on August 23, 1993, and in support thereof would state the following:

1. On August 23, 1993, the Oil Conservation Commission issued its Decision and Order in this matter approving the application of Yates Petroleum Corporation ("Yates") to drill its Flora "AKF" State Wells No. 1 and No. 2 in Section 2, Township 22 South, Range 31 East, N.M.P.M.

2. Precedence for New Mexico Potash's Application can neither be found in the statutes of New Mexico nor in the rules of the Commission.

3. New Mexico Potash's Application is premature, and assumes facts not in existence. New Mexico Potash has not

inquired of Yates as to its intentions with respect to the resumption of the drilling of its Flora wells, and Yates has given no notice to New Mexico Potash that it has any intention to resume drilling operations on its Flora wells prior to the expiration of the period of time in which an Application for Rehearing of the Commission's order could be made, or if a request were made during the ten-day period during which the Commission has to rule on such a request. Yates will not make a decision concerning the resumption of drilling until the ten-day period for acting on New Mexico Potash's Application for Rehearing has expired.

4. New Mexico Potash's Application is improper and is nothing more than an attempt to circumvent Section 70-2-25(C) NMSA 1978, which sets forth the right of New Mexico Potash to a stay of the Commission's Order and the procedure for obtaining such stay. It is quite clear that the statute set forth the procedure which was to be the only manner in which a stay of a Commission order could be obtained in the event of either an appeal to the courts or an appeal to the Secretary of the Energy, Minerals, and Natural Resources Department.

5. New Mexico Potash's Application is an improper attempt to avoid the burden of proof with respect to the issues of granting an injunction which would be placed upon it if Section 70-2-25(C) NMSA 1978 were followed. With respect to the issues of the likelihood that New Mexico Potash would prevail on an appeal, whether or not it would suffer irreparable damage, and

whether Yates would suffer substantial harm, New Mexico Potash cannot prevail on those issues, as established by the findings of this Commission after many days of hearing on those very issues and that fact alone should dictate against the granting of New Mexico Potash [illegible]tion for a stay.

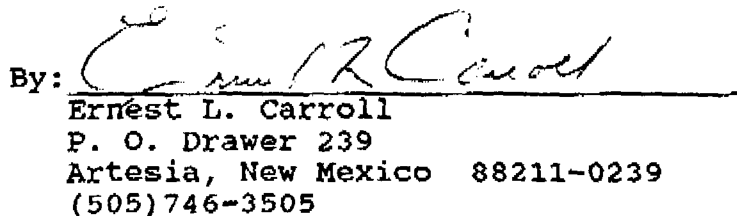
6. The gr[illegible] of the Application of New Mexico Potash would in fact deprive Yates of presenting evidence with respect to such issues, because such a grant would come without right of a hearing on those issues as is guaranteed by Section 70-2-25(C).

7. Granting the Application of New Mexico Potash would irreparably harm Yates because it would deny it the right to [illegible]ll wells which it has spent considerable time and money proving that it has the right to drill. Further, Yates has been denied the time value of the production from those wells and from the information to be gained from the drilling of those wells in the [illegible] of developing its other adjacent acreages.

WHEREFORE, Yates Petroleum Corporation respectfully requests that the OCC enter an order denying the application of New Mexico Potash.

Respectfully submitted,

LOSEE, CARSON, HAAS & CARROLL, P.A.

By: 

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