

1 NEW MEXICO OIL CONSERVATION DIVISION

2 STATE LAND OFFICE BUILDING

3 STATE OF NEW MEXICO

4 CASE NOS. 10446, 10447, 10448 and 10449

5
6 IN THE MATTER OF:

7
8 The Application of Yates Petroleum
9 Corporation For Authorization to
10 Drill, Eddy County, New Mexico

11
12
13
14
15 BEFORE:

16 MICHAEL E. STOGNER

17 Hearing Examiner

18 State Land Office Building

19 March 19, 1992

20
21
22
23 REPORTED BY:

24 CARLA DIANE RODRIGUEZ
25 Certified Shorthand Reporter
for the State of New Mexico

GINAL

A P P E A R A N C E S

FOR THE NEW MEXICO OIL CONSERVATION DIVISION:

ROBERT G. STOVALL, ESQ.

General Counsel
State Land Office Building
Post Office Box 2088
Santa Fe, New Mexico 87504

FOR YATES PETROLEUM CORPORATION:

LOSEE, CARSON, HAAS & CARROLL, P.A.
300 American Home Building
Post Office Drawer 239
Artesia, New Mexico 88211-0239

BY: A. J. LOSEE, ESQ.
ERNEST L. CARROLL, ESQ.

IN ATTENDANCE FOR YATES PETROLEUM CORPORATION:

MR. A. J. DEANS
MR. RANDY G. PATTERSON
MR. BRENT A. MAY
MR. ROBERT H. BULLOCK
DR. DAVID F. BONEAU
MS. D'NESE FLY

FOR NEW MEXICO POTASH CORPORATION:

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
Post Office Drawer 2800
El Paso, Texas 79999
BY: CHARLES C. HIGH, JR., ESQ.

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
500 Marquette, N.W., Suite 1200
Post Office Box 1276
Albuquerque, New Mexico 87103-1276
BY: CLINTON W. MARRS, ESQ.

IN ATTENDANCE FOR NEW MEXICO POTASH CORPORATION:

MR. R. H. LANE
MR. TIM WOOMER

O T H E R A P P E A R A N C E S

FOR POGO PRODUCING COMPANY:

THE HINKLE LAW FIRM
500 Marquette, N.W., Suite 500
Albuquerque, New Mexico 87103
BY: JAMES G. BRUCE, ESQ.

FOR BASS ENTERPRISES PRODUCTION COMPANY:

KELLAHIN, KELLAHIN & AUBREY
Post Office Box 2265
Santa Fe, New Mexico 87504-2265
BY: W. THOMAS KELLAHIN, ESQ.

OTHERS IN ATTENDANCE:

MS. RHEA GRAHAM, Director
Energy, Minerals and Natural Resources Department

MR. ARMANDO LOPEZ
Bureau of Land Management

MR. MARK STEPHENSON
Mitchell Energy

MR. DAN NUTTER, Consultant

I N D E X

	Page Number
I. APPEARANCES	2
II. ORAL ARGUMENTS/STATEMENTS	
By Mr. Stovall	
9, 19, 25, 37, 44, 63, 72, 92	
By Mr. Carroll	
7, 39, 78	
By Mr. Losee	
10, 17, 22, 34, 48, 53, 68, 74, 80	
By Mr. High	
9, 14, 19, 23, 35, 41, 46, 54, 65	
By Mr. Kellahin	
29	
By Examiner Stogner	
76, 93	
III. CERTIFICATE OF REPORTER	94

1 EXAMINER STOGNER: This hearing will
2 come to order. I'll call next case, No. 10446.

3 MR. STOVALL: Application of Yates
4 Petroleum Corporation for authorization to drill,
5 Eddy County, New Mexico.

6 EXAMINER STOGNER: Call for
7 appearances.

8 MR. CARROLL: Mr. Examiner, I'm Ernest
9 Carroll, and I have with me, as co-counsel, Mr.
10 A. J. Losee. We're both from the law firm Losee,
11 Carson, Haas and Carroll of Artesia, New Mexico.
12 We will be appearing on behalf of the petitioner,
13 Yates Petroleum Corporation.

14 Mr. Examiner, I would, at this time,
15 like to address this question. The following
16 three cases, 10447, 10448 and 10449, all four of
17 these cases are identical, basically. We would
18 propose to you, Mr. Examiner, to present them as
19 a consolidated case.

20 We have prepared all of our exhibits as
21 exhibits for all of them. That way you will not
22 have reams of papers going into your records up
23 there, and I think we can address all the issues
24 because I'm not aware of a single issue that is
25 peculiar to any one particular case. They all

1 are identical.

2 EXAMINER STOGNER: Are there any
3 objections to consolidating all four of these
4 cases at this time?

5 MR. HIGH: Charlie High on behalf of
6 New Mexico Potash, Mr. Examiner. We have no
7 objection.

8 EXAMINER STOGNER: At this time we'll
9 call Cases 10447, 10448 and 10449.

10 MR. STOVALL: Also all entitled the
11 application of Yates Petroleum Corporation for
12 authorization to drill, Eddy County, New Mexico.

13 EXAMINER STOGNER: Are there any
14 additional appearances other than Yates Petroleum
15 and New Mexico Potash?

16 MR. BRUCE: Mr. Examiner, my name is
17 James Bruce from the Hinkle Law Firm in
18 Albuquerque, representing Pogo Producing
19 Company. Pogo owns acreage offsetting Yates'
20 proposed wells, and Pogo is appearing today in
21 support of Yates' applications.

22 EXAMINER STOGNER: Thank you, Mr.
23 Bruce.

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

1 Kellahin, Kellahin & Aubrey, appearing today on
2 behalf of Bass Enterprises Production Company.

3 EXAMINER STOGNER: Are there any other
4 appearances?

5 Mr. Carroll?

6 MR. CARROLL: Mr. Examiner, we have one
7 issue that we would like to bring before the
8 Commission before we present-- I can call my
9 witnesses, if you would like, we can take care of
10 that, but then we would like to have one issue
11 addressed with respect to a subpoena which we had
12 served for these four cases. And Mr. Losee will
13 be making the comments on behalf of Yates
14 Petroleum with respect to that issue.

15 Care for me to call my witnesses so we
16 can get that out of the way?

17 MR. STOVALL: When you say call your
18 witnesses, what do you mean?

19 MR. CARROLL: Get them sworn in and get
20 that nicety out of the way for all four cases.

21 MR. STOVALL: Well, I think the first
22 thing we need to do is, is the subpoena a
23 critical issue to going forward with these
24 cases?

25 MR. CARROLL: It's not a critical issue

1 with respect to going forward, but it is an issue
2 that needs to be addressed before we get started.
3 It may define some of the ground rules, I think.

4 MR. STOVALL: What I'm saying is, are
5 you prepared to present your case on the
6 application, even--

7 MR. CARROLL: Yes, Mr. Stovall, we are
8 prepared to present our case, but I think we
9 ought to at least address the issue of the
10 subpoena. Some information was furnished
11 pursuant to it, others was denied to us, and we
12 wanted to bring that to the attention of the
13 Division. Mr. Losee has some legal arguments
14 which may affect some of the evidence that is
15 presented.

16 There's no sense in every time
17 something comes up arguing the issue. Let's
18 argue it and get our ground rules straight with
19 respect to it, and present the evidence according
20 to what the ruling is.

21 MR. STOVALL: Let's establish where we
22 stand with respect to the supoenas. Yates
23 Petroleum has filed a Supoena Duces Tecum with
24 the Division, which the Division has issued.

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

1 Stovall.

2 MR. STOVALL: Directing New Mexico
3 Potash to provide certain information.

4 MR. CARROLL: I'll let Mr. Losee
5 address your questions from this point forward,
6 then, Mr. Stovall. Is that all right?

7 MR. STOVALL: Okay. New Mexico Potash
8 has filed objections which I will take, Mr. High,
9 as a Motion to Quash the subpoena?

10 MR. HIGH: That's correct.

11 MR. STOVALL: So at this point, the
12 procedural matter to be heard by the Examiner is
13 whether or not to grant the Motion to Quash or
14 grant it in part or sustain the subpoena.

15 Is that a fair statement of where we
16 are procedurally at this point in this case?

17 MR. LOSEE: That's a fair statement,
18 Mr. Stovall.

19 MR. HIGH: I'm not sure I agree with
20 that, but I won't argue the point. I'm not sure
21 whether or not the Commission should quash or not
22 quash or whether or not at this point,
23 procedurally, the Commission would have to go
24 into District Court to enforce the subpoena, but
25 I won't argue that point. I'll certainly go

1 along with the Motion to Quash.

2 EXAMINER CATANACH: Mr. Losee?

3 MR. LOSEE: In response to the subpoena
4 which requested all corehole data in New Mexico
5 Potash's possession involving a nine-section
6 square, it's three miles on a side, nine square
7 miles, in Sections 22, 23, 24, 25, 26, 27, 34, 35
8 and 36 of 22/31--I'm sorry, of 21/31, in the
9 township immediately north of Section 2, which is
10 the subject of this hearing. The four wells are
11 all located in Section 2.

12 New Mexico Potash's mine is located
13 north of Section 2, several miles. When it was
14 last shown on a public map I think it was about
15 four or five miles north of there, and we
16 understand it's much closer now.

17 In response to that subpoena, Mr. High
18 furnished us with data on a corehole recently
19 completed by New Mexico Potash, No. 162, in
20 Section 2, located, I believe, 1200 feet from the
21 east line and 2000 feet from the south line of
22 Section 2.

23 The data on that corehole was analyzed
24 by Mr. Warnick, a mining engineer which Yates
25 Petroleum Corporation had retained, to make a

1 determination whether or not an LMR had been
2 validly created in Section 2.

3 Up until this year, Section 2, on the
4 potash map, all except possibly the very
5 southwest quarter of it, was not within an LMR
6 and, based on the 84 BLM potash map, drilling
7 would have been permitted within that area.

8 It's our understanding, although we've
9 not seen any official dedication, that an LMR,
10 New Mexico Potash has designated essentially all
11 of Section 2 except a small track in the west
12 side of something less than 40 acres, as part of
13 the LMR.

14 New Mexico Potash refused to furnish
15 any of the core samples in the nine sections
16 directly above Section 2, which, if they were to
17 mine down in that direction, they would have to
18 transfer us part of it. Our mining engineer felt
19 that that was the only way he could determine if
20 that was in an LMR as properly defined under
21 Order 111-P.

22 In fairness, we did gather, from the
23 BLM, two federal potash holes in Sections 35 and
24 36 in the township below it, and Mr. Warnick
25 analyzed those, but I think our testimony will

1 show that it's not possible to validly determine
2 an LMR with one corehole per section.

3 As a result, we have no valid way to
4 examine or not examine their designation of an
5 LMR. The only way we could do it is with the
6 corehole data we requested. We think it's
7 implicit in R-111-P that that be accomplished.

8 Now, at this time, we've orally offered
9 to Mr. High to enter into a protective order, a
10 confidentiality agreement, which would provide
11 that the corehole data in their possession in
12 those nine townships that ought to connect their
13 mine to this Section 2, be retained secret except
14 that it would be disclosed to an expert on behalf
15 of Yates, their attorneys, and the Commission,
16 and any hearing concerning data on that would be
17 held by the Oil Commission in camera, so it would
18 not be public data.

19 I think clearly in the objection to the
20 subpoena, Mr. High has raised Section G of Rule
21 111-P that says the data will be considered
22 privileged and confidential, the data on the LMR
23 furnished to the BLM and the State Land Office,
24 as trade secrets and commercial information
25 within the meaning of--and then they quote the

1 Code of Federal Regulations as to BLM data and
2 Section 19-1-2 of New Mexico Statutes Annotated
3 as to State Land Office data.

4 Inasmuch as this is a state section,
5 I'm going to address in a moment the 19-1-2,
6 which simply says that, after first specifying
7 that certain data furnished to the Commissioner
8 will be held confidential, it says that "Nothing
9 in this section shall be construed to prevent
10 statistical information from being derived from
11 the information available to the Commissioner or
12 its use in public hearings before the
13 Commissioner, or in appeals from decision of the
14 Commissioner for which such information is
15 essential."

16 Although the Commissioner at this point
17 is not a party to the Examiner hearing, the
18 Commissioner is the third member of the Oil
19 Conservation Commission and the hearing,
20 implicitly if a de novo proceeding is taken, the
21 hearing would be before the Commissioner.

22 The fact that it is confidential and it
23 is trade secret ought to be no different, for
24 example, than exists in all of the antitrust
25 cases that have ever been tried, all of them

1 under protective orders, confidential data of
2 large companies, statistical as to their
3 financials, their cost, and their net profits,
4 income tax returns, all of which have been
5 handled under protective orders with an in camera
6 hearing.

7 We submit to the Examiner in this case
8 that that's the only proper way that we can
9 determine whether an LMR has been validly
10 determined. We think the objections to the
11 subpoena should be denied.

12 MR. HIGH: Mr. Examiner, counsel, my
13 name is Charlie High and I represent New Mexico
14 Potash Corporation. We have filed objections to
15 the Subpoena Duces Tecum for a couple of
16 reasons.

17 First of all, the information requested
18 is not necessary to the issue before this
19 Examiner. We're here to decide whether or not
20 four wells should be approved. We have provided
21 counsel with corehole data showing the existence
22 of potash within 2600 feet of those wells.
23 That's all that's needed to resolve this.

24 They are trying, through an APD on four
25 wells, to challenge the LMR of New Mexico Potash

1 over 10 sections of land in southeastern New
2 Mexico.

3 Yates has no authority, under R-111-P,
4 the Oil and Gas Act or anything else in the State
5 of New Mexico, to challenge the designated LMR of
6 New Mexico Potash Corporation. R-111-P was very
7 carefully crafted to provide for a safety device
8 on how do you challenge or determine an LMR.

9 It was very specifically set up, and
10 some of the counsel that have entered appearances
11 here were involved in that proceeding. It was
12 specifically set up to where the potash operator
13 would designate his LMR. That data would then be
14 submitted to the State Land Office and the BLM,
15 and they could confirm the data used by the
16 potash operator to designate the LMR. If there
17 were any disputes, it even addressed how those
18 would be resolved.

19 Nowhere in there did it say an oil and
20 gas operator could come in and challenge that.
21 It's up to the state, in their regulatory
22 position, to make that determination. It's up to
23 the BLM, in their federal regulatory position, to
24 make that determination, and not Yates
25 Petroleum.

1 R-111-P went even further and
2 specifically said that the data used by a potash
3 lessee to designate its LMR is privileged and
4 confidential, and it's not to be made public. It
5 even says that in the Order and uses those words,
6 and it was put there for a purpose.

7 All the assets we have are potash
8 deposits, and we don't want our competitors to
9 know the outlines of those. So we don't want to
10 disclose that information, and that's why R-111-P
11 was drafted that way.

12 Yates wants us to disclose that
13 information for whatever reasons they have. I
14 don't know what they are. But whatever they are,
15 they are not relevant to whether or not the four
16 APDs before this Commission should or should not
17 be approved.

18 So we would ask that the Examiner treat
19 our objections as such or as a Motion to Quash,
20 whichever he feels appropriate, and not require
21 us to produce that data.

22 We have produced, notwithstanding our
23 objections, the data in Section 2 because we feel
24 the disclosure of the information of that one
25 corehole is not that critical to us. The

1 corehole data over 10 sections of land is not
2 something that we're willing to produce, and we
3 would ask the Examiner to quash the subpoena.
4 Thank you.

5 MR. LOSEE: I would like to respond to
6 that.

7 EXAMINER CATANACH: Mr. Losee?

8 MR. LOSEE: I think to the extent that
9 Rule 111-P conflicts with the state statute,
10 there is a problem with it. Waste is defined
11 under the statute, and the responsibility of this
12 Commission is to determine whether waste occurs.

13 Let me read the definition of waste
14 with respect to potash. And our argument is to
15 the extent 111-P tries to usurp that
16 responsibility in this Commission, it's invalid.
17 And actually paragraph 20 of the preamble
18 paragraph to order R-111-P, recites that you
19 cannot allow that Order to usurp your
20 responsibility.

21 Subparagraph F of 70-2-3 NMSA provides:
22 "The drilling or producing operations for oil or
23 gas within any area containing commercial
24 deposits of potash, where such operations would
25 have the effect unduly to reduce the total

1 quantity of such commercial deposits of potash,
2 which may be reasonably recovered in commercial
3 quantity or where such operations would interfere
4 unduly with the orderly commercial development of
5 such potash deposits."

6 We submit that this Commission has the
7 responsibility of determining whether the
8 proposed wells would unduly interfere with the
9 orderly commercial development of potash, which
10 Yates, of course, asserts it does not. And to
11 suggest that an order, a designation by the
12 potash company, solely to the State Land Office
13 and solely to the BLM, usurps or preempts the
14 responsibility of this Commission in that area,
15 we think is improper. And we think if you do
16 quash the subpoena, then you will not be
17 following the responsibility given to the
18 Commission in the statute.

19 MR. HIGH: May I make one response?

20 EXAMINER STOGNER: Mr. High.

21 MR. HIGH: Counsel misses the mark
22 entirely. This Commission or this Examiner does
23 have the responsibility to prevent waste of both
24 potash and oil and gas resources. We recognize
25 that. That's precisely why we produced the

1 information from corehole 162 so this Examiner
2 and the OCD and the OCC can carry out its
3 responsibilities to determine whether or not
4 these APDs will not waste potash in Section 2.

5 The subpoena seeks corehole data from
6 areas other than Section 2 where there's no
7 question about drilling. They have no
8 relationship at all to the APD before the
9 Examiner. Thank you.

10 MR. STOVALL: Mr. High, let me ask you
11 a question.

12 MR. HIGH: Certainly.

13 MR. STOVALL: I'm not familiar with the
14 current status out here. Has New Mexico Potash
15 filed an LMR which includes Section 2?

16 MR. HIGH: Yes, sir, we have.

17 MR. STOVALL: These applications are
18 within the LMR?

19 MR. HIGH: Yes, sir, all four of them.
20 The designation of the LMR was filed on--they
21 were designated January 7, 1992, filed with the
22 State Land Office on January 14, 1992, before the
23 applications in this case were filed.

24 MR. STOVALL: Has the State Land Office
25 approved those designations?

1 MR. HIGH: There's no mechanism for
2 approval, there's only a mechanism for
3 disapproval, and they have not been disapproved.
4 There's no affirmative finding by the State Land
5 Office required to approve the LMR. It's a
6 potash lessee designation with a mechanism for
7 confirmation by the State Land Office and the
8 BLM.

9 MR. STOVALL: If I understand what
10 you're saying, your position is that under the
11 R-111-P, that the operator files the potash
12 designation with some information to support it?

13 MR. HIGH: That's correct.

14 MR. STOVALL: And if the Land Office or
15 the BLM or the appropriate agency elects not to
16 challenge that, then that LMR stands, is that
17 correct?

18 MR. HIGH: For purposes of these
19 proceedings, that's correct.

20 MR. STOVALL: Is it also your
21 contention that once that LMR is established,
22 that there's no drilling within it?

23 MR. HIGH: Correct.

24 MR. STOVALL: And therefore the issue
25 of whether or not that LMR is supported by

1 geologic evidence for the presence of potash is
2 not an issue before the Division?

3 MR. HIGH: Is not an issue before this
4 Examiner. If the Commission, the OCC, desires to
5 change R-111-P, of course they can do so. And
6 there is, as counsel for Yates mentioned, there
7 is a Finding No. 20, in the Findings of Fact in
8 R-111-P, that acknowledges that the OCC will not
9 and indeed cannot state that for all purposes,
10 under any circumstances in the future, they will
11 never, ever approve an APD in an LMR.

12 Section G of R-111-P makes very clear
13 that absent some compelling circumstance, there
14 will be no APD approved if the location is within
15 an LMR or its buffer zones. Even the Finding of
16 Fact No. 20 requires a clear demonstration that
17 it will not waste potash.

18 So, our position is very simply: If
19 these APDs are from locations within the LMR,
20 they should be summarily denied, and indeed
21 Section G of R-111-P says that. It says that the
22 OCD will first determine, from the SLO and the
23 BLM, whether or not the locations are within an
24 LMR. That's the very first step. If they are,
25 they should be summarily denied.

1 MR. STOVALL: Mr. Losee, what's your
2 response to that analysis?

3 MR. LOSEE: I think my response to the
4 analysis was the response I made to his initial
5 argument, Mr. Stovall. I don't think this
6 Commission can, simply because of a designation
7 made by the potash company with the State Land
8 Office, that this section is within an LMR,
9 abdicate its responsibility to determine whether
10 or not waste will occur.

11 And, to the extent that R-111-P
12 purports to abdicate that responsibility to the
13 land office or, really, the potash company, when
14 they file this in secret and it's not subject to
15 the scrutiny by any party outside of the Land
16 Office, which really has no mining engineer to
17 look at it, it's not subject to scrutiny by an
18 abdicate who seeks to drill a well, and any
19 decision made that it would unduly waste potash,
20 is arbitrary and capricious.

21 I think, as far as summarily denying
22 it, why, I think Section 20 clearly points out
23 the position of the Commission. Finding 20 in
24 Order R-111-P that there will be exceptions
25 granted to it, and we're here to present that

1 clear demonstration.

2 MR. HIGH: Counsel, may I say one
3 thing? Again, Counsel is making the same
4 argument that I think misses the point. I don't
5 disagree, and I haven't said to this Examiner or
6 you, Counsel, that someone doesn't have a
7 responsibility to determine, in each case,
8 whether or not waste will or will not occur.

9 We are not withholding information that
10 would prevent the OCD or the OCC from carrying
11 out its statutory responsibilities. We have
12 produced the corehole data and we are prepared to
13 show the potash that will be lost if this hearing
14 goes forward and it's not summarily dismissed, we
15 will reluctantly go forward and show the potash
16 that will be lost.

17 But what Counsel wants in addition to
18 that, and our position is that that's sufficient
19 for the OCD and OCC to carry out its
20 responsibilities, what Counsel and Yates want in
21 addition to that is all of our corehole data over
22 10 sections of land so they can map out for
23 themselves what they think our LMR is.

24 We don't want to do that. We don't
25 want to disclose that information. It's not

1 relevant to this proceeding. It's not relevant
2 to whether or not these APDs ought to be
3 approved. We are not trying to withhold data
4 that will keep this agency from carrying out its
5 statutory responsibilities.

6 MR. LOSEE: I'm sorry, but I have one
7 further comment. I think Mr. High may have
8 missed the point. It's not whether there is
9 potash in Section 2. We'll acknowledge that this
10 corehole has potash of similar quality and
11 thickness as they are presently mining.

12 The question is whether or not
13 commercial potash will be unduly interfered
14 with. The word "commercial," it's not potash, it
15 has to be commercial potash, and we submit that
16 one corehole in one section does not provide
17 enough data to determine whether that entire
18 section is part of what's properly designated as
19 an LMR, that there is commercial potash under the
20 whole thing.

21 I think our evidence will show, when
22 they've actually mined, New Mexico Potash
23 Company, they've had at least three and four
24 coreholes in every section that they've mined,
25 and we submit that the one they have submitted,

1 upon which they've amended their LMR to include
2 Section 2, is not sufficient.

3 And without the data of surrounding
4 coreholes to disprove it or approve it, we cannot
5 make a valid determination, our expert can't,
6 whether there is or isn't, except there are not
7 enough coreholes in his opinion.

8 If we had the additional data, we could
9 draw some lines which might show the areas that
10 are commercial and are not commercial.

11 MR. HIGH: My response to that is that
12 issue is not before this Examiner or even
13 involved in this case. There has been no
14 application filed with respect to changing who
15 makes determinations with respect to LMRs. Right
16 now, R-111-P says that the State Land Office or
17 BLM will do that, and they cannot be challenged
18 in these proceedings. And that's what Counsel
19 intends to do, and our position is, they have not
20 filed an application to give us notice that
21 that's what they intend to do.

22 MR. STOVALL: Mr. High, let me ask you
23 another question. With respect to the
24 application before the Division at this time for
25 a permit to drill, what is your position,

1 legally, with respect to that? Is the Division
2 even in a position to hear it? In effect, would
3 you make a Motion to Dismiss the application?

4 MR. HIGH: I intend to do that this
5 morning and I can either do it now or when Yates
6 finishes their case. I think the issue needs to
7 be summarily dismissed based upon R-111-P.

8 If this Examiner intends to follow
9 R-111-P, these four APDs have to be dismissed.
10 They may be appealed to the OCC, but at this
11 level they have to be dismissed.

12 MR. STOVALL: I have one concern with
13 respect to that, and it may be it's an OCC
14 question, but it appears that under R-111-P there
15 is no way for an owner of an interest which lies
16 below the potash, and they may have oil or gas,
17 to challenge an LMR, and effectively the mining
18 company does have control, is that correct?

19 MR. HIGH: No, not necessarily. The
20 BLM or the State Land Office is the designated
21 repository for information confirming LMRs,
22 because the whole concept of R-111-P was to set
23 aside certain potash lands for no drilling and to
24 allow drilling in certain lands. Those that were
25 set aside for no drilling are called LMR.

1 So, to the extent there's an oil and
2 gas interest underlying an LMR, yes, there are
3 severe restrictions on those people developing
4 that potash, because that was the entire purpose
5 of R-111-P.

6 MR. STOVALL: What I'm concerned with
7 is that the OCD, the regulatory authority who
8 permits oil and gas operations, is basically
9 locked in, assuming that essentially it is
10 correct that the LMR is filed with an agency
11 other than the OCD, locked in to making a
12 determination under your argument that the oil
13 and gas operator has no right to recover his
14 interest in the property, and there's effectively
15 no way for that oil and gas operator to challenge
16 that, is that not correct? He's depending upon
17 the BLM or the State Land Office to challenge the
18 LMR designation?

19 MR. HIGH: That's correct. The oil and
20 gas lessee is dependent upon the State of New
21 Mexico confirming that the area designated as a
22 Life of Mine Reserve meets the definition in
23 R-111-P, Section G. And it's defined. And it's
24 the State Land Office, with statutory regulatory
25 responsibility, as it is the BLM's, to make

1 certain that if a potash lessee draws a line on a
2 map and gives it to them and says, "We can mine
3 this potash under current-day technology," it's
4 then their regulatory responsibility to say yes
5 or no.

6 If they say, "No, we don't think you
7 can do it," then they're protecting the oil and
8 gas owners underneath that. But, yes, that is
9 the way R-111-P set it up. Whether or not that's
10 the best system in the world, I don't know. But
11 that was the way, the mechanism chosen by the
12 OCC, to put some checkpoint on the potash
13 lessee's ability just to designate any land.

14 So, before we can designate an area as
15 an LMR, we have to have supporting data and we
16 have to submit it to two agencies, one federal
17 agency and one state agency, and they certainly
18 have the capability and the talent to determine
19 whether or not, number one, the corehole data
20 does, in fact, reflect commercial-grade potash,
21 and whether or not that operator can commercially
22 mine that under current-day technology.

23 Assume they carry out their
24 responsibilities, then the oil and gas owner
25 underneath that designated LMR is, in fact,

1 protected. But can the oil and gas lessee
2 himself or herself challenge an LMR designation?
3 The answer to that is no, not under the current
4 state of the law, and it was precisely set up
5 that way to prevent that from happening. And
6 that's exactly why the information used by the
7 potash lessee to draw that line is not
8 disclosing.

9 MR. STOVALL: Mr. Kellahin, I assume
10 you have something to say?

11 MR. KELLAHIN: Mr. Examiner, I'm not
12 sure I can add to the clarity and perhaps it's
13 only to further confuse the issue, but in 1984
14 and 85, when the Commission was considering
15 R-111-P, I represented Bass Enterprises
16 Production in that process.

17 Mr. High and our respective experts
18 helped draft and argue the adoption of R-111-P.

19 It is my recollection that there is a
20 device within R-111-P so that an objecting oil
21 and gas operator, who wants to bring into
22 question the boundary of an LMR, in fact has a
23 device to trigger that review. It is not simply
24 a decision between the potash lessee and either
25 the BLM or the State Land Office.

1 I don't know if anyone has ever
2 triggered the device, but my understanding of
3 R-111-P is that, if you'll turn to page 10 and
4 look at the subsection that is lettered "G," it
5 has some additional subparagraphs at the bottom
6 of the page. It begins with subparagraph B.

7 It says, "The authorized officers of
8 the BLM and the SLO shall review the information
9 submitted by each potash lessee in support of its
10 LMR designation"--going on to the next page--"on
11 their respective lands, and verify upon
12 request"--and it is my recollection that "upon
13 request" was a protection for the oil and gas
14 lessee, if they believed the LMR had been
15 improperly extended or requested by the potash
16 lessee, then the oil and gas operator could
17 request the Land Office or the BLM to verify that
18 technical data and that the agencies involved,
19 then, would make an independent verification of
20 the assertion or the contention by the potash
21 lessee that the LMR is extended.

22 That is my recollection of the safety
23 device that was incorporated into this rule to
24 protect the oil and gas operator from the
25 arbitrary extension of the R-111-P LMR areas.

1 I don't know if anyone has exercised
2 that choice in Section 2, and I raise that for
3 you as a point of inquiry, because I think that
4 is what we had intended back in 85 and 86, to
5 give the oil and gas industry some comfort that
6 they simply did not have to accept the extension
7 of an LMR on the unilateral extension of the
8 potash lessee or operator.

9 MR. STOVALL: Mr. Kellahin, would it be
10 your understanding and recollection--and let me
11 use this case as an example--that if Yates were
12 to challenge that LMR in Section 2, it would ask
13 the State Land Office to review the data and
14 confirm the existence of the LMR? Is that the
15 procedure that would--

16 MR. KELLAHIN: That is what I recall as
17 the basis to trigger that review, is that Yates,
18 or someone else in that position, would make that
19 request, under this paragraph, to have it
20 verified. The rest of the paragraph talks about
21 a process for a dispute resolution concerning the
22 boundary of the LMR, and then it cites a hearings
23 and appeal procedure in the C.F.R. I don't think
24 anybody has ever done that and I don't know how
25 to fill in the blanks for you.

1 MR. STOVALL: Let me ask you, if they
2 trigger that review or make that request, does
3 the oil and gas lessee have any participation in
4 that review, to your understanding?

5 MR. KELLAHIN: I can't tell you, and
6 the order doesn't speak to it. Maybe it's an
7 inherent weakness in R-111-P, but I can't answer
8 your question.

9 MR. STOVALL: Does that create a
10 problem in your mind as to whether or not the oil
11 and gas operator as an interested property that
12 would be effected by the order, has the
13 opportunity to be heard with respect to this
14 fundamental decision which may affect his ability
15 to recover the property?

16 MR. KELLAHIN: Oh, absolutely, I think
17 it's of tremendous concern. And, getting back to
18 Mr. Losee's arguments, he says if that's the
19 procedure, then it's fatally flawed and I need
20 the opportunity, under some arrangement--and he's
21 chosen the confidentiality arrangements typically
22 used in district court--so that there can be a
23 fair and full discussion on whether this LMR has
24 been properly extended.

25 MR. STOVALL: Let me ask you another

1 question. Based upon your familiarity with this
2 order, you agree with Mr. High that there being
3 an LMR designation, that the Division is not in a
4 position, that it's a summarily dismissible
5 application because of the existence of the LMR?
6 And I'm going to ask Mr. Losee a question in a
7 minute on that.

8 MR. KELLAHIN: I'm not going to presume
9 to advise the Commission on how to make that
10 interpretation. I will concur with Mr. High that
11 the whole concept around R-111-P was a negotiated
12 compromise so that the LMR, once established in
13 that boundary, became virtually undisputable.
14 That LMR represented an area where we weren't
15 going to drill and, in exchange, they were going
16 to give up a substantial area of the secretary's
17 enclave and let us drill in those areas where, in
18 past history, we had this very dispute every time
19 you wanted to do anything.

20 So, this was in the sake of compromise
21 and I thought we had drafted a device in this
22 rule to give all parties a procedure to contest
23 the designation of an LMR, as has happened here.

24 MR. STOVALL: Mr. Losee, is it safe to
25 assume that you disagree with Mr. High's position

1 that the LMR precludes drilling approval of an
2 APD?

3 MR. LOSEE: Yes, it is, the unilateral
4 designation that's going to deprive a client of
5 valid oil and gas reserves arbitrarily and
6 capriciously without power to contest it. And I
7 think to suggest that the Commission simply takes
8 that designation and overlooks preamble paragraph
9 20 which simply prevents, as far as I'm
10 concerned, any preemption of responsibility by
11 this Commission in paragraph 20 of the preamble
12 Order.

13 The only way there can be any
14 demonstration about commercial potash or an LMR
15 is in a hearing, and if we do not have the right
16 to contest it before this Commission, then
17 R-111-P has--there isn't any other mechanism that
18 appears to be available to an applicant who has
19 an oil and gas lease.

20 Kind of as a matter of factual
21 assertion, as I explained in my opening
22 statement, this was not in an LMR or a potash
23 enclave except a little bit of the southeast
24 quarter when the Order was entered and this
25 committee was appointed by Mr. LeMay to review

1 the dispute between the two industries. It was
2 outside of the LMR.

3 The LMR was not even designated until
4 after Yates had filed applications to drill in
5 this section. As a matter of fact, there are two
6 or three wells down the east tier of Section 2,
7 and it was only after we filed the applications
8 did they even come to put a corehole.

9 Now, this lease they're talking about
10 in Section 2, New Mexico Potash and its
11 predecessor has held since 1967, without any
12 effort to determine whether there was commercial
13 potash. The first time they made that effort was
14 after Yates Petroleum and, as a matter of fact,
15 Pogo, had filed applications to drill wells and
16 had some of them approved. That was when they
17 drilled the one corehole, which we submit their
18 practice, in establishing whether they're
19 actually going to conduct mining operations, has
20 been at least three or four coreholes per
21 section.

22 MR. HIGH: Counsel, may I say just a
23 few more words?

24 EXAMINER STOGNER: Mr. High?

25 MR. HIGH: I agree with Mr. Kellahin's

1 recollection, and perhaps he stated it more
2 articulately than I did, the State Land Office is
3 the mechanism that was chosen to protect the oil
4 and gas lessees and verify whether or not an LMR
5 was correctly designated. But the "verify upon
6 request" information, we also addressed what
7 would be disclosed during that verification
8 process.

9 Under R-111-P, paragraph G, subsection
10 d, it says that the State Land Office will reduce
11 the information submitted by the potash lessee to
12 a map, but that the map will not be disclosed.
13 It is private, confidential and not subject to
14 public disclosure. So it's on the veracity of
15 the state agency that the oil and gas lessee
16 relies with respect to the designation of an LMR.

17 As far as Mr. Losee's comments, I would
18 like to point out to both the Examiner and
19 Counsel, that I don't know if they are seemingly
20 surprised with the provisions of R-111-P or not,
21 but my recollection is that Yates was involved in
22 the negotiation of the industry agreement that
23 led to R-111-P, every step of the way.

24 In fact, my recollection is that an
25 employee of Yates Petroleum even signed the

1 industry agreement. So, to the extent that they
2 think they don't know what R-111-P provides,
3 they've been involved in this ever since I have,
4 1984.

5 MR. STOVALL: Getting back to
6 the--we've kind of addressed the issue of the
7 entire application up to this point to a certain
8 extent, and getting back to the issue of the
9 subpoena, Mr. Losee, with respect to the need for
10 the information, am I correct in understanding
11 that you are saying that you need this
12 information in order to challenge the validity of
13 the designation of LMR, at least with respect to
14 Section 2, but that you need to look beyond
15 Section 2 to challenge the commerciality of the
16 potash deposits? Is that correct?

17 MR. LOSEE: I think we need to
18 determine whether or not Section 2 should have
19 been included in an LMR on January 7 of 1992 and
20 determine whether it is commercial potash.
21 Obviously they can't stick a new shaft to drill
22 in Section 2, so they have to run their mining
23 operation with the shaft up about six or seven
24 miles north of Section 2--I believe it's in
25 Section 4 in the township above it--and Mr. High

1 can verify that.

2 It's our argument that we need to know
3 whether they can mine, from where their present
4 location is, down through two or three of these
5 sections, to get to Section 2, to make it a
6 commercial deposit that can be mined.

7 The data that would be obtained from
8 those coreholes, which they have in their
9 possession, allows a mining engineer, just like
10 an oil and gas geologist, to draw some lines and
11 determine the quality and the thickness of the
12 potash running down to Section 2.

13 You can't take merely one hole, if a
14 geologist is going to determine where the
15 reserves are, and we don't believe you can
16 clearly do it in potash.

17 MR. STOVALL: In effect you are
18 challenging the LMR in this proceeding?

19 MR. LOSEE: Yes, we are challenging the
20 LMR, yes, sir, Mr. Stovall.

21 MR. STOVALL: Let's assume for the
22 moment that if the Division were to determine
23 that this is not the forum to challenge the LMR,
24 could this, in any way, be construed as an
25 application for an exception to R-111-P and for

1 authority to drill within an LMR?

2 MR. LOSEE: Yes. We're challenging the
3 LMR, but we're also asking for an exception to
4 Rule R-111-P.

5 MR. STOVALL: And how, with respect to
6 the data requested in the subpoena, how does that
7 data affect this application as a request for an
8 exception to R-111-P?

9 MR. LOSEE: Well, the exception process
10 requires a demonstration that there is not
11 commercial potash. We think the data we have
12 goes to both purposes, to challenge the LMR and
13 also to apply for the exception on the ground
14 that it is not commercial potash.

15 My co-counsel wanted to show me some
16 more of R-111-P.

17 MR. CARROLL: Mr. Stovall, and it may
18 take me just a moment, but I think in the
19 Findings of R-111-P, I think in No. 10, clearly
20 state that the Oil and Gas Act of Section 70-2-3
21 declares as waste "drilling or producing
22 operations for oil and gas within any area
23 containing commercial deposits of potash, where
24 such operations would have the effect unduly to
25 reduce such total quantity of commercial deposits

1 or where such operations would interfere
2 unduly."

3 That's the test that the Commission
4 regarded, and there is another provision in
5 R-111--oh, here it is. Okay. In going back to
6 20, there's a burden of proof placed on the
7 operator, and this is the last phrase of 20 which
8 says, "Unless a clear demonstration is made, the
9 commercial potash will not be wasted unduly as a
10 result of the drilling of the well." I think
11 that burden of proof is clearly upon the
12 operator.

13 MR. STOVALL: The oil and gas
14 operator?

15 MR. CARROLL: The oil and gas operator,
16 and without the information that we're being
17 denied, we have no way of carrying that burden of
18 proof. Now, we can make suppositions based on
19 the one corehole, yes, and we're prepared to put
20 on evidence today with our mining engineer, but
21 again, I'm not sure that we can make a clear
22 demonstration unless we have that information,
23 and that's the point, the very rock-bottom point
24 of the whole thing.

25 We are being denied the ability to make

1 this clear demonstration by their withholding of
2 information, and it's information--all throughout
3 this act, all it says is "protect this
4 confidential nature," and we have offered, time
5 and time again, to protect that confidential
6 information. We're not going to use it except to
7 determine the validity with respect to our
8 request of an application and their use of the
9 LMR designation to prevent us from drilling.

10 They're using that designation as a
11 sword, to take away, and you cannot ignore the
12 fact that that LMR designation came after we
13 drilled the first two successful wells in our
14 northeast quarter and came only a few days before
15 our application to drill and after we had given
16 notice and they had turned us down.

17 So, I think the Commission cannot
18 forget that, that they're using this offensively,
19 in both senses of the word, to keep us from
20 drilling.

21 EXAMINER STOGNER: Mr. High.

22 MR. HIGH: If I may, for the Examiner
23 and Counsel's information, R-111-P, Section G,
24 subparagraph C says that "If new information
25 comes to a potash lessee's attention, they can

1 amend their LMR designation and they're to do so
2 by the January 31st following receiving that
3 information.

4 Corehole 162 was drilled on December
5 11, 1991. As soon as we got the information,
6 found out what was there, we filed our amendment
7 on January 14th, exactly in compliance with
8 R-111-P(G), subparagraph C.

9 And I'd also like to say, I'm a little
10 taken back or surprised at Counsel's
11 characterization of the application in this case
12 as being a request for an exception to R-111-P.

13 Paragraph 4 of the application filed in
14 this case specifically says and represents that
15 the locations of these wells is not within the
16 LMR, and that's simply wrong. There's no request
17 for an exception to R-111-P.

18 MR. CARROLL: Mr. Examiner, when I
19 filed that application, we had no knowledge that
20 an LMR had been designated. And as Mr. High just
21 told you, they've had a lease since 1967. They
22 waited until December 11th of last year, just a
23 few weeks before we filed our application and
24 after we had drilled our good wells in Section 2,
25 after they knew we were going to make these

1 things, after they knew we were going to request
2 additional application, did they ever get out and
3 make an application or make the efforts to drill
4 a corehole, then they only drilled one.

5 Now, I think that is a very important
6 aspect. Yes, our application didn't say--I mean,
7 upon our information and best beliefs there was
8 no LMR at that time and there wasn't one until
9 January, and they certainly didn't give us any
10 notice that they had filed an LMR. We didn't
11 learn about it until after we filed this
12 application in conversations with Mr. High, after
13 we filed this application and he gave notice that
14 he was going to represent New Mexico Potash.

15 MR. STOVALL: We need to take a recess
16 and have a discussion, Mr. Examiner.

17 EXAMINER STOGNER: How long of a recess
18 do you think would be adequate, Mr. Stovall?

19 MR. STOVALL: Would five years be
20 enough?

21 EXAMINER STOGNER: We'll reconvene at
22 10 after 11:00.

23 [A recess was taken.]

24 EXAMINER STOGNER: We'll go back on the
25 record and at this time, Mr. Stovall?

1 MR. STOVALL: Mr. Examiner, based upon
2 a review of order R-111-P, the subpoena and the
3 Motion to Quash or objection, however you wish to
4 designate it, my recommendation to you as far as
5 a decision, I think at this time the question
6 about whether or not the Motion to Quash the
7 subpoena should be deferred, because there is an
8 underlying issue which needs to be determined
9 before this Division can proceed, in reading
10 R-111-P and the provisions therein, I don't
11 believe that this Division has any authority to
12 determine whether or not an LMR is properly
13 designated, and I don't think there's any basis
14 for us to take evidence with respect to that
15 designation. That is the responsibility of the
16 State Land Office and the Bureau of Land
17 Management.

18 Reading further in R-111-P, and
19 specifically rule--I'm sorry, this gets
20 convoluted and let me try to go through it,
21 (G)(E)(3), if, in fact there is an LMR
22 designation for the areas covering these
23 applications, then I don't believe that the
24 Division, at this level at least, has any
25 discretion with respect to the approval or

1 disapproval of the APDs.

2 According to that paragraph,
3 applications to drill can only be approved by
4 mutual agreement of the lessor and the lessees on
5 both the potash and the oil and gas interests.
6 Therefore, it seems to me that the threshold
7 question that has to be answered before we can
8 proceed anywhere on this application is whether
9 or not there is an LMR designation for Section 2
10 or the portions thereof on which these wells are
11 located.

12 Therefore, I recommend that you not act
13 on the subpoena or the objection to the subpoena
14 at this time, and we determine how to proceed
15 with that threshold question.

16 EXAMINER STOGNER: Thank you, Mr.
17 Stovall. We will then put off the question on
18 the subpoena.

19 Mr. High, do you have anything further
20 on the other underlying tone that Mr. Stovall has
21 suggested?

22 MR. HIGH: We do not, except we are
23 prepared to establish, for the Examiner's
24 information, that the area in which these wells
25 are proposed is in fact within New Mexico

1 Potash's designated LMR. And we're prepared to
2 go forward on that issue if the Examiner wishes
3 at this time.

4 MR. STOVALL: It seems to me, Mr. High,
5 as a practical and procedural question, and Mr.
6 Losee I'll want your response on this as well,
7 that Yates Petroleum is the applicant in this
8 case and, under normal consideration, they would
9 have the burden of going forward and burden of
10 proving their right to drill, and your defense or
11 opposition would be based upon the LMR.

12 However, you had indicated, it seems to
13 me it's appropriate in some way that New Mexico
14 Potash have the burden first of going forward on
15 that threshold question of the designation of the
16 LMR, because that's within your control. What do
17 you recommend is the context in which to do
18 that?

19 MR. HIGH: I don't agree that we have
20 the burden under R-111-P, although we're willing
21 to take it to expedite this proceeding. I think
22 that in accordance with R-111-P, it's the
23 obligation of the OCD to make that determination
24 initially, before a hearing is ever scheduled,
25 but we are willing to go forward.

1 We won't stand on ceremony and argue
2 that point. We are prepared to establish for the
3 Examiner that this area is within our designated
4 LMR, to expedite these proceedings, and we're
5 willing to go first, even though we understand
6 that Yates is the applicant. It's however you
7 want to proceed.

8 MR. STOVALL: Well, I understand what
9 you're saying, because under that same provision
10 it says the Division will ascertain from the SLO
11 whether the location is within an LMR.

12 MR. HIGH: That's correct.

13 MR. STOVALL: And I think the timing
14 has been such on this that at the time the
15 applications were filed, I think there was no
16 designation on the map.

17 MR. HIGH: I'm not sure I would agree
18 with that. It's my understanding, and Counsel
19 may have other documents to show otherwise, it's
20 my understanding that the designation of these
21 locations within New Mexico Potash and LMR was
22 filed in the letter dated January 14th. I
23 understand that no application was filed with the
24 OCD until January 21st.

25 MR. STOVALL: I guess, Mr. Losee, as

1 far as proceeding on this, because the threshold
2 question of the LMR really determines a lot of
3 what this case is about today, what's your
4 recommendation as to how to proceed?

5 MR. LOSEE: Let me ask a couple of
6 questions about statements you made. You said
7 you didn't think you had any discretion in the
8 OCD, at least at this level. Was that an
9 implication that the Commission has the--

10 MR. STOVALL: The Commission rule, and
11 this Division, can't, and it's pretty clear, that
12 there is nothing with respect to filing or
13 designating an LMR at the Division level.

14 If there is any question about the
15 interpretation of the rule, that would have to go
16 before the Commission. My advice is that the
17 rule is pretty clear about that there's no way
18 for the Division to, in a hearing between an
19 applicant, an oil and gas operator and a mine
20 operator, to challenge that LMR.

21 MR. LOSEE: Are you saying it's your
22 interpretation that the Commission can entertain
23 the challenge?

24 MR. STOVALL: That would be up to the
25 Commission to decide. I'm not recommending or

1 denying that. I'm just simply saying the
2 Division can't.

3 MR. LOSEE: Now, the next question is,
4 how do you reconcile the Division's
5 responsibility under the section that I quoted
6 under waste, to determine whether it's commercial
7 potash? Are you saying that the Division has
8 allowed this Order to preempt the field of
9 determining whether or not there are commercial
10 potash underlying this Section 2?

11 MR. STOVALL: No. It's a two-part
12 process and why we have a threshold question, and
13 I think it's a fair one. Under Section C of
14 Order R-111-P, on page 5 of the order, there's
15 language which talks about drilling in the potash
16 area and sets out those waste guidelines?

17 MR. LOSEE: Yes.

18 MR. STOVALL: Then you go back to the
19 rule which I just quoted, and that talks about
20 the potash area which is the entire area within
21 Exhibit A. Then it goes back and talks about
22 LMRs and the designation of LMRs, and the rule
23 says that "No applications will be approved
24 without the mutual agreement of the lessor and
25 lessees of both potash and oil and gas."

1 So that narrows the focus to a smaller
2 part of that potash area to being an LMR, as
3 designated. That's my interpretation of that
4 rule, and I interpret that to be consistent with
5 that statutory provision that you've discussed.

6 MR. LOSEE: And also, do you think it's
7 consistent with the preamble paragraph about no
8 exceptions? The paragraph reciting the
9 responsibility of the Commission that it cannot
10 abdicate that responsibility and it must retain
11 the right to approve exceptions to 111-P?

12 MR. STOVALL: I don't believe that the
13 Division is in a position to go against the
14 provisions of the LMR designation and the
15 no-drilling application. That certainly is a
16 Commission question, if there is a Commission
17 question.

18 MR. LOSEE: Mr. Stovall, you may or may
19 not be aware, but I discussed this matter with
20 Mr. LeMay back, oh, 20 or 30 days ago, and
21 suggested to him that he had the discretion to
22 remove it from an Examiner hearing, when we had
23 objections from Mr. High, and place it in the
24 Commission as a de novo matter.

25 I think Mr. LeMay recited that, and I

1 may be mistaken, but that you all had decided not
2 to follow that posture, which, when I was doing
3 Commission work, occurred many times. I didn't
4 disagree with him, he said we just flat refuse to
5 do that on the theory that everybody will want a
6 Commission hearing, and I can understand that.
7 But--

8 MR. STOVALL: Well, Mr. Losee, I'm
9 familiar with the Commission's policy, Mr.
10 LeMay's policy with respect to referring it
11 directly to the Commission. I had no discussions
12 with Mr. LeMay on this specific case, and these
13 issues didn't come up.

14 But at this time I believe, and I'm
15 recommending to the Examiner, that any decision
16 that is made, either procedurally or
17 substantively, is based solely on whether or not
18 there is an LMR designation on the lands or not.
19 And I think that is the threshold question that
20 the Examiner's got to resolve to consider these
21 applications.

22 MR. LOSEE: Okay. Well, let me ask
23 this question. I think you can imply that the
24 application requests an exception, and if not, we
25 would so move to amend it. If Mr. High thinks

1 that he's prejudiced or his evidence would be
2 different in looking at it as to whether it's an
3 exception to 111-P or whether it's a direct
4 attack on LMR, he can recite that to the
5 Division, and they can decide whether to continue
6 it so he can get his evidence together.

7 MR. STOVALL: Are you stipulating with
8 Mr. High that there is an LMR filed for this
9 area?

10 MR. LOSEE: No, we're not. No, I'm
11 not.

12 MR. STOVALL: Then let's solve that
13 point, because we don't need to determine whether
14 it's an exception until we decide whether there's
15 an LMR.

16 MR. LOSEE: Well, yes, but I'm trying
17 to put it in a position to go forward. If he
18 wants to put on his evidence as to whether it's
19 an LMR, why we can respond to that. But I have
20 no problem in the alternative saying that this is
21 a request for an exception.

22 MR. STOVALL: And I guess my concern
23 is, my strict reading of the rule says it doesn't
24 give the Division any ability to deal with an
25 exception.

1 I would like to resolve the question of
2 whether or not there is an LMR first, before we
3 go any further, because that--I think that
4 flavors the entire proceeding. If there's no
5 LMR, then you don't need an exception. If
6 there's an LMR, then I guess we can reargue
7 whether or not we can grant you an exception at
8 the Division level.

9 MR. CARROLL: Mr. Stovall, could Mr.
10 Losee and I visit with co-counsel here just two
11 minutes just here at the side?

12 MR. STOVALL: I think that would be a
13 grand idea.

14 EXAMINER STOGNER: Three-minute
15 recess.

16 [A recess was taken.]

17 EXAMINER STOGNER: The hearing will
18 come to order. Mr. Losee?

19 MR. LOSEE: I think, at this time, we
20 object to any statement or any evidence by New
21 Mexico Potash that this is or is not an LMR. We
22 think the Division here can walk down the hall or
23 up on the first floor and check with the State
24 Land Office and see whether or not it has been
25 approved as an LMR by the State Land Office, and

1 that that's the procedure that should be followed
2 rather than taking statements. We suspect they
3 filed it, but the question is whether or not that
4 has been approved by the Land Office.

5 We ask that you recess for the few
6 minutes it takes to make that determination, and
7 see if the Land Office has approved it or has
8 requested additional data from them.

9 EXAMINER STOGNER: Mr. High, do you
10 have any response?

11 MR. HIGH: We have a letter dated
12 January the 14th of 1992 where we transmitted to
13 the State Land Office and the BLM a new map,
14 designating this area as the LMR. I assume that
15 that was received by both those people.

16 We were asked to go forward and we are
17 ready to do so, and I don't know why Counsel
18 wants to adjourn and let you do something now.
19 We can wrap this whole thing up in five minutes,
20 and we're ready to do that.

21 MR. STOVALL: Let me ask a couple of
22 questions with respect to that, Mr. High. Are
23 you contending that under the provisions of
24 R-111-P that all you have to do to designate an
25 LMR is submit a map and say, "This is the LMR"?

1 MR. HIGH: Yes, sir.

2 MR. STOVALL: And once you've done
3 that-- All right, if I read, we're in paragraph
4 G now on page 11, R-111-P, I assume we are under
5 the provision with respect to subparagraph C that
6 you're amending the LMR by filing a revised
7 designation with the SLO accompanied by the
8 information referred to in Section A above, and
9 that such amendment was filed by January 31st,
10 next following the date the data became
11 available, is that correct?

12 MR. HIGH: That's the provision that
13 provides for an amendment of an LMR, that's
14 correct.

15 MR. STOVALL: And you are amending an
16 LMR, not designating a new one, is that correct?
17 New Mexico Potash is amending an existing LMR?

18 MR. HIGH: We've had an LMR for years,
19 and we've added some stuff to it. Section 2 is a
20 new LMR added to an old LMR. We're not amending
21 anything in Section 2, it's being added to.

22 MR. STOVALL: I assume that adding
23 acreage is an amendment of a designated LMR. I
24 don't think it matters because the procedure is
25 the same either way.

1 MR. LOSEE: Mr. Stovall, I want to
2 address one other thing. I don't take issue that
3 that's exactly what New Mexico Potash did, but I
4 do suggest that the State Land Office has asked
5 for additional information before they approve
6 the LMR, and Mr. High can address that or not.

7 MR. STOVALL: Well, that's kind of
8 where I'm going, Mr. Losee. If you'll let me
9 finish up with Mr. High here, we'll get to your
10 questions.

11 Now, if I go back to Section A--now,
12 let me make sure that I'm correct. It talks
13 about Section A. Do you see where I'm looking
14 at, Mr. High, at page 11?

15 MR. HIGH: I don't know if mine is
16 numbered the same here.

17 MR. STOVALL: Okay. Section G(c), and
18 it refers to, "Must be accompanied by the
19 information referred to in Section A." You see
20 what I'm saying?

21 MR. HIGH: That's right, designation of
22 the LMR.

23 MR. STOVALL: Correct. Now, if you go
24 back here to G(a), that refers to some
25 information. If you go to Section A, it talks

1 about objecting.

2 Can we agree that Section A referred to
3 in (c) refers to (a), the information for filing
4 of a designation of LMR? This is getting real
5 lawyerese. I'm sorry about that, folks. In
6 other words, G(a) says, "Information used by the
7 potash lessee in identifying its LMR should be
8 filed with the BLM and SLO, but will be
9 considered privileged and confidential," et
10 cetera, et cetera. And it talks about the
11 information, showing that it's in sufficient
12 thickness and grade to be mineable.

13 And then, when you try to read the rule
14 as a whole, you go on to Section B that says,
15 "Authorized officers of the SLO shall review the
16 information submitted. Any disputes between the
17 BLM and potash lessee"--that's not applicable
18 here because we're not talking about going to
19 hearing under the C.F.R.--"the SLO has to verify
20 the information which supports the designation."
21 Am I reading that correct so far?

22 MR. HIGH: You're reading it correct.
23 I don't know, in looking at this, what is being
24 claimed has to or does not have to be filed at
25 the State Land Office. We have to file a

1 designation, God knows what that is, with the
2 BLM/SLO, and clearly they have the right to
3 review the information submitted, whatever is
4 submitted.

5 MR. STOVALL: Then you get down to
6 paragraph (d), and what I'm really driving
7 at--and we're getting to the real crux of the
8 issue--when does that LMR designation become
9 effective? Is it at the time that you submit a
10 map saying "this is our LMR," or is that at a
11 time, under paragraph (d), "authorized officers
12 of the SLO shall commit the designated LMR of
13 each potash lessee to a map of suitable scale and
14 revise the maps to reflect the latest
15 amendments"?

16 Now, if I'm going to go upstairs and
17 ask the State Land Office whether this is an LMR,
18 what's your interpretation of what they should be
19 telling me so that I know what to ask them?

20 MR. HIGH: If they have received a
21 letter from a potash lessee saying "This area is
22 within our designated LMR," that's all that's
23 required for R-111-P, in my judgment.

24 MR. STOVALL: What if the SLO says, "We
25 don't think it is. We don't think you've

1 supported that designation"?

2 MR. HIGH: They clearly have the right
3 to do that. And that's exactly the mechanism
4 that was set up in R-111-P.

5 MR. STOVALL: Is it within an LMR
6 during that time while you are providing that
7 information?

8 MR. HIGH: It is. They say, "Show us
9 your stuff." If they choose to do so, they can
10 say, "Show me your stuff." Then we have to come
11 forward, only if they request us to do so, and
12 give them the information they request. And I'll
13 tell you we did that in this case.

14 We filed with the State Land Office a
15 map designating Section 2 within our LMR. They
16 said, "You've got to give us some more stuff."
17 We did that.

18 MR. STOVALL: Mr. High, if I go
19 upstairs and ask the State Land Office and the
20 Examiner goes up and says, "Is Section 2 within
21 the LMR?" and they say "yes" or "no," is that the
22 determination that we're going to rely on here?

23 MR. HIGH: No, not phrased that way. I
24 would go up and ask them, "Did you receive a
25 letter from New Mexico Potash?"

1 MR. STOVALL: No, sir. I'm now going
2 down to paragraph (3) under (G). "The Division
3 will ascertain from the BLM or SLO that the
4 location is not within the LMR area," or
5 conversely that it is.

6 That seems to me that I just go up and
7 say, "Is this application within an LMR?" And
8 that's how the OCD makes a determination whether
9 it's within the LMR. Do you disagree with that?

10 MR. HIGH: I agree you have to go up
11 and do that.

12 MR. STOVALL: So we don't determine
13 whether the SLO has properly called it an LMR or
14 not. We just ask them, "Is this an LMR or is it
15 not," is that correct?

16 MR. HIGH: If you want to do that.
17 I'm not sure I'm willing to stand here and tell
18 you I will agree to allow the State Land Office
19 to decide these issues we're talking about.

20 For example, does it become
21 automatically an LMR when we file it?

22 MR. STOVALL: Who does decide it, Mr.
23 High?

24 MR. HIGH: R-111-P sets forth the
25 provisions. We're required to designate an LMR.

1 We have done that with the State Land Office.

2 MR. STOVALL: But that's not all it
3 says.

4 MR. HIGH: I understand that. It also
5 says that they can verify, and they don't have to
6 accept it. If they don't, we submit additional
7 information.

8 MR. STOVALL: All right. Okay.

9 MR. HIGH: All I'm saying is, I don't
10 know the words they're going to tell you, and I'm
11 not going to tell you in advance I'll accept
12 their words. I'll tell you that we have done
13 everything we believe we had to do under R-111-P
14 in connection with the State Land Office. I
15 don't know what they're going to tell you, but as
16 far as we're concerned we've done everything
17 we're required by R-111-P to do and to file with
18 the State Land Office.

19 I don't know what kind of internal
20 procedures they've set up, if any, with respect
21 to processing these. I don't know how they mark
22 them with respect to confidentiality. I don't
23 even know if they look at them. All I'm saying
24 is, I'm perfectly willing to go up to the State
25 Land Office, and you're going to find our

1 documents up there. I don't know what they're
2 going to tell you with words, and I'm not going
3 to tell you in advance that I'll agree with the
4 words they're going to use. But our stuff is up
5 there.

6 MR. STOVALL: My Examiner, my
7 recommendation is, based upon the reading of this
8 section, that the OCD does not have the authority
9 to determine whether or not something is within
10 the LMR.

11 That authority is, under Rule R-111-P,
12 vested with the land agencies, and in the case of
13 Section 2 the State Land Office. Therefore, I
14 recommend that you and I and counsel for the
15 parties in this case go to the State Land Office
16 and ask them whether this is LMR or not, and that
17 their determination is the determination upon
18 which this Division relies, because we can't make
19 that determination.

20 EXAMINER STOGNER: I will go one step
21 further. If an LMR is up there previous, we also
22 have to contend with the buffer zone. Let's keep
23 that in mind, and that is covered under--I don't
24 know who numbered these, (G)(3)(a) and (b).

25 MR. STOVALL: So we'll take another

1 recess. Did you want to make this a lunch
2 recess?

3 EXAMINER STOGNER: Let's make this a
4 lunch recess, and we'll reconvene at one
5 o'clock. Is that sufficient? Okay. We're in
6 recess until one o'clock.

7 (The noon recess was taken.)

8 EXAMINER STOGNER: This hearing will
9 come to order. Mr. Stovall?

10 MR. STOVALL: Oh, thanks, Mr. Stogner.
11 Well, off the record and during the noon recess,
12 we met with representatives of the State Land
13 Office who advised us as to the status of
14 the--we'll refer to it as the amendment to the
15 New Mexico LMR potash.

16 The information we were provided with
17 states that New Mexico Potash filed an amended
18 LMR map, that the State Land Office had made a
19 determination or at least made an inquiry, said
20 "This map is not supported by sufficient data at
21 this time. Please provide us with the
22 information," and that they've not accepted that
23 LMR as an established LMR at this time. That LMR
24 would include all of Section 2.

25 Mr. Examiner, therefore I recommend

1 that the preliminary threshold determination be
2 that there is not an existing and established LMR
3 in Section 2. Part of the rationale behind that
4 is that there needs to be some sort of process in
5 order for this Order to be valid. The simple
6 filing of an LMR by a mining company, which would
7 have the effect of preventing an oil and gas
8 operator from access to their property, which
9 would not be subject to some check in the process
10 of being approved, would amount to, in effect, a
11 taking of the property by the mining company
12 without any sort of process at all.

13 Therefore, in order to make the process
14 valid, the action by the State Land Office in
15 reviewing the LMR designation and the supporting
16 data involved in that, is the necessary review,
17 and until they have completed that review and
18 accepted the LMR as being justified by the
19 technical evidence, I believe that they do not
20 have an LMR approved within the State Land
21 Office. And that is my recommendation.

22 EXAMINER STOGNER: Thank you, Mr.
23 Stovall.

24 MR. HIGH: Excuse me, Mr. Examiner, may
25 I speak to that before the Examiner rules?

1 EXAMINER STOGNER: Mr. High?

2 MR. HIGH: Thank you. Mr. Examiner, I
3 just want to point out that despite the
4 recommendation from Counsel, the requirements of
5 R-111-P, I believe, speak for themselves.

6 R-111-P, Section G, says how LMRs are
7 determined. It says that the potash lessee will
8 file a designation. It doesn't say what has to
9 be included, it says a designation. "It shall
10 file a designation of the potash deposits," not
11 considered by the State Land Office, "considered
12 by the potash lessee to be its Life of Mine
13 Reserves."

14 We have complied with that part of
15 R-111-P. Section R-111-P (G)(c) says, if we want
16 to change that designation, we again file a
17 revised designation. It doesn't say what we have
18 to include, just a designation. We have done
19 that. We have complied with the obligation under
20 subparagraph (c).

21 We have submitted to the State Land
22 Office information in support of that. We have
23 submitted all information requested by the State
24 Land Office. There is nothing else left for New
25 Mexico Potash to do or that it can do, under

1 R-111-P, to get this to be an LMR. We have
2 complied with R-111-P. Therefore, Section 2 is
3 an LMR.

4 The State Land Office may have some
5 questions about it, but R-111-P (G)(b) says that
6 "Authorized officers of the State Land Office
7 shall review the information submitted by each
8 potash lessee in support of its LMR designation
9 on their respective lands and verify upon
10 request," not approve, "and verify upon request
11 that the data used by the potash lessee," and
12 we've given that to the State Land Office, "that
13 the data used by the potash lessee in
14 establishing the boundaries of its LMR is
15 consistent with data available to the BLM and
16 SLO."

17 The function of the State Land Office
18 is not to approve or disapprove. It is to
19 receive information that we use, in our judgment,
20 to designate something an LMR and to see whether
21 it's consistent with the data it has. The State
22 Land Office has available to it the gamma logs
23 from other wells in that area, and the intent of
24 R-111-P was to say, okay, New Mexico Potash has
25 submitted information saying that there's a

1 certain height and grade of potash in this
2 particular area.

3 The State Land Office has available to
4 it the gamma logs and other information showing
5 the grades of potash in particular areas. They
6 can verify and compare what we give them with
7 what they have available, and to verify and keep
8 us honest as to whether or not we've designated
9 something that has a grade, a potash that we can
10 mine. That's the function of the State Land
11 Office.

12 There is nothing in R-111-P that says
13 they will approve or disapprove, and I submit to
14 you that in the absence of that, that the mere
15 filing of a designation as we have done in this
16 case, carries with it at least a presumption that
17 that area designated is, in fact, an LMR.

18 We have supplied everything asked of us
19 by the State Land Office. There's nothing to
20 approve or disapprove. There's no mechanism for
21 that. There's a presumption. And that
22 presumption has not been rebutted because the
23 State Land Office has not informed New Mexico
24 Potash that its designation is rejected.

25 There's been no communication from the

1 State Land Office that our designation has been
2 rejected, and I would ask the Examiner to
3 consider that, and I would ask even Counsel to
4 reconsider his recommendation. Thank you.

5 EXAMINER STOGNER: Mr. Losee, I'm
6 assuming you want to say something?

7 MR. LOSEE: Well, two things. First,
8 an observation. We object to the ability of the
9 potash company to unilaterally deprive us of our
10 oil and gas rights by simply filing a map which
11 they say nobody has the right to approve.

12 I think subsection D of R-111-P
13 confirms that that's a function of the State Land
14 Office as well as the BLM, when they're satisfied
15 they're committed to increasing it as a map.

16 But the first thing, I don't think that
17 111-P ever envisioned that the potash company
18 could make a unilateral designation without
19 anybody having their right to approve or
20 disapprove, and the only purpose of using the
21 word "verify" is to verify, not the data, but the
22 determination, if you please, of whether there's
23 commercial potash.

24 Secondly, I would call the Examiner's
25 attention to the fact that the LMR designation

1 was not filed until January of 1992, and three of
2 the four applications in this case were filed
3 with the Oil Conservation Division on December 1,
4 1991.

5 The potash companies were given notice
6 on November of 1991 that we had staked our
7 location, and the applications were filed with
8 the Division on December 1, 1991, two in the
9 northeast quarter, the Graham 3 and 4 were both
10 filed on December 1 of 1991. The Flora No. 1 is
11 one of the two wells in the east half/southwest.
12 And I would submit if there's any question about
13 when the designation was made, that the time in
14 which the determination is to be made as to
15 whether there is or is not an LMR comes on the
16 date on which the oil operator files his
17 applications for a permit to drill.

18 And under that theory, the potash
19 companies did not object until sometime in
20 January of 91, didn't file their LMR designation
21 until then, and under Rule 111-P, the Division
22 should approve, clearly, the well outside of the
23 buffer zone that was filed--which was the Flora
24 No. 1.

25 It was filed on December 1, notice was

1 given to them about November 24, they didn't
2 object within the 20-day period, and that APD
3 should be approved.

4 The Graham 3 and 4 were within the
5 buffer zone. As I understand it, the LMR covered
6 Section 35 and the township above this, and those
7 two wells, the applications on the Graham 3 and
8 4, were also filed on December 1, 1991, which
9 preceded, by about 45 days, the unilateral
10 designation by the potash company of an LMR.

11 And the potash company's not having
12 objected within the 20-day period provided in
13 Rule 111-P, those two applications should be
14 approved in the east half/northeast.

15 The time for which they were to object
16 has expired, and those two applications should be
17 approved. The only one that is properly in
18 question is the Flora 2, which was filed on
19 January 24, 1992, and that is one of the wells
20 outside of the buffer zone originally.

21 I submit, as far as that well is
22 concerned, that the State Land Office has really
23 not approved the designation, so it is outside of
24 an LMR and it should be approved.

25 My argument, if I don't make it clear,

1 Mr. Stovall, is that we filed one that was
2 outside of the buffer zone 45 days prior to the
3 time they made their designation of an LMR. We
4 filed it with the Division's office in Artesia
5 and that one, on its face, should be approved,
6 because the filing date of that application, or
7 permit to drill, is the time at which the
8 determination should be made on whether there is
9 or isn't an LMR.

10 Regardless of Mr. High's argument that
11 the designation creates the LMR, even assuming
12 that argument is correct, which I do not, I think
13 the State Land Office has to serve a function in
14 this, but that application should be approved.
15 It was outside of the buffer zone. We gave them
16 notice because the office asked us to give them
17 notice. They didn't file any objection until up
18 in January.

19 The other two wells in the east half of
20 the northeast, the Graham wells, were also filed
21 on December 1, some 45 days before the LMR was
22 designated. We gave notice to the potash company
23 actually back about 10 days before that, on
24 November 24, and we did not receive an objection
25 on those wells until January. The 20-day period

1 had elapsed in which they had a right to object
2 to those applications, and we think they should
3 be approved, without regard to when there was a
4 designation of an LMR.

5 The only one that does not come within
6 that filing requirement is the Flora No. 2, which
7 is a well in the southwest quarter. I say that
8 if there's no designation, that's outside of the
9 buffer zone, and it should be approved.

10 MR. STOVALL: Let me respond to the
11 arguments. I'm particularly concerned about the
12 argument of Mr. High, something about the
13 providing information to verify that there is, in
14 fact, minerals that are commercially mineable or
15 probably mineable.

16 My concern, Mr. Examiner, is with
17 protecting the integrity of R-111-P. I'm very
18 concerned that if that review process,
19 verification process, approval process, whatever
20 you call it at the State Land Office doesn't have
21 some significance, that if Mr. High's approach is
22 correct that all a mine operator needs to do is
23 file an LMR, and that can deny an oil and gas
24 operator the right to go after his property, his
25 minerals, then, in fact, that would certainly

1 subject R-111-P to a constitutional challenge.

2 I believe it's my obligation, as
3 counsel to the Division, to try to preserve the
4 integrity of the rule and to interpret the rule
5 in such a way that will make it Constitutionally
6 defensible.

7 By interpreting the Land Office's
8 communication to New Mexico Potash requesting
9 additional information and saying they have no
10 basis upon which to assume it is not arbitrary
11 and capricious or something to that effect, that
12 in fact there is no LMR and then the integrity of
13 R-111-P can be best approved.

14 The question of the buffer zone wells
15 is different than the existing LMR in Section
16 35. I think the rule, subparagraph (3) under
17 (G)(e), is governed by the rule which requires
18 agreements.

19 So any wells within the buffer zone of
20 the existing LMR which exists in Section 35, we
21 think is not in question. I think those can only
22 be approved with the agreement of the lessor and
23 the lessees. I think the issue of any wells and
24 application outside of the buffer zone are
25 subject to hearing this afternoon by the

1 Examiner.

2 And that is my recommendation based
3 upon my interpretation of all the information
4 we've gathered today.

5 EXAMINER STOGNER: Mr. Losee?

6 MR. LOSEE: I would like to address the
7 last phrase. I agree with your interpretation of
8 the buffer zone and these wells are
9 within--although I don't think that was probably
10 the intention there--they're under what's
11 classified as a deep well even though Delaware
12 wells are about 7000 feet, I suggest to you that
13 the wells that were outside of the buffer zone at
14 the time they were filed should have been
15 approved.

16 And, as I point out, that that is true
17 of the Flora No. 1 well in the southwest
18 quarter. It's over a half a mile below the
19 designation--

20 MR. STOVALL: Let's associate these
21 with cases so we can decide which ones we're
22 dealing with here, Mr. Losee. Can we do that?
23 That appears to be 10448, is that correct?

24 MR. LOSEE: I guess the notice doesn't
25 tell us what they are.

1 MR. STOVALL: Southeast/southwest of
2 Section 2, is that correct?

3 MR. LOSEE: I think that's right, but
4 let's make sure.

5 MR. CARROLL: The Flora AKF "State" No.
6 1 well is Case No. 10448. And the Flora AKF
7 "State" No. 2 well is Case No. 10449.

8 MR. LOSEE: My argument is applying to
9 the Flora No. 1, which is Case 10448. There was
10 no protest filed within the 20-day period. It's
11 outside of the buffer zone. The application was
12 filed on December 1, 1991, 45 days before the
13 designation was made and 10 days before they
14 started the corehole.

15 MR. STOVALL: You're saying that that
16 should be administratively approved by the
17 district office?

18 MR. LOSEE: Yes, that's correct. Yes,
19 it should have been approved in the first place.
20 I think that's the only reading you can give of
21 111-P (G)(3)--no, (G)(E)(3)(b). Little "b" is
22 the half-mile. It's outside of the (a) and (b),
23 the well location is, so we're a half-mile.

24 MR. STOVALL: We're giving new meaning
25 to the term alphabet soup, aren't we?

1 MR. LOSEE: Yes, we are, from capital
2 A's to little a's, Mr. Stovall.

3 MR. STOVALL: How would you suggest
4 that that, procedurally, be handled, Mr. Losee?

5 MR. LOSEE: That the Examiner instruct
6 Mr. Williams in the Artesia office to approve it,
7 and those instructions will either dismiss the
8 case or continue it until the approval is
9 granted.

10 MR. STOVALL: Mr. High, with respect to
11 10448--well, I guess what we need to do is get a
12 ruling from the Examiner first, and we've not yet
13 gotten that on the LMR issue. We've moved ahead
14 of him a little bit on this one. I think we need
15 to go back and get a determination on the LMR.

16 EXAMINER STOGNER: At this time, I was
17 at the meeting that Mr. Stovall alluded to, I
18 concur with his recommendations at this time.

19 And also the two wells, the Graham 3
20 and 4, which is Case 10446 and 10447, are
21 definitely within a half-mile of the LMR
22 designated in January, that was in effect at that
23 time, and pursuant to the wording of (G)(E)(3),
24 "Any application to drill in an LMR area,
25 including buffer zones, can be approved only by

1 mutual agreement of lessor and lessees of both
2 potash and oil and gas interests," I'll ask one
3 last time, Mr. High, do you give that
4 authorization at this time?

5 MR. HIGH: I'm sorry, Mr. Examiner, I
6 was reading some dates.

7 EXAMINER STOGNER: The Graham 3 and 4,
8 I assume that New Mexico Potash still objects to
9 those?

10 MR. HIGH: Yes, we do, Mr. Examiner.

11 EXAMINER STOGNER: Case 10446 and 10447
12 will be dismissed at this time.

13 Now, since the other two wells, the
14 Flora 1 and 2 are outside of the half-mile radius
15 and are not within an LMR, I guess we go back to
16 what was alluded to, that one well was, as I
17 understand you, Mr. Losee, the application to
18 drill was made with the Artesia District Office,
19 but yet I have applications for them to go to
20 hearing. I guess I'm still confused.

21 MR. LOSEE: Well, no, you're not
22 confused. Maybe we've confused you, Mr.
23 Examiner. Those two wells are outside of
24 the--the Examiner now determined the LMR has been
25 approved by the Land Office in Section 2, and

1 they are outside of the buffer zone area.

2 And regardless of when we filed them,
3 they should be approved. There's no procedure
4 for someone to object. The objections were to
5 the well outside of the buffer zone.

6 [Discussion off the record.]

7 MR. STOVALL: Mr. Losee, I'm a little
8 confused procedurally. Yates Petroleum
9 Corporation filed the application for a hearing.

10 MR. LOSEE: That's correct.

11 MR. CARROLL: Mr. Stovall, since I
12 procedurally handled that, let me address it.
13 The application C-101 permit to drill was
14 submitted by an employee, Cliff May, of Yates
15 Petroleum. It was submitted for the Flora No. 1
16 on December 1, 1991, at the district office, and
17 should have been approved down there.

18 It was not approved because the
19 district office got word that the potash
20 companies were objecting and they would not take
21 any action. That then forced me to file an
22 application for the permit to drill, and that was
23 so stated in my application, and I attached to
24 that application a copy of the C-101, dated
25 November 21--I think it's November 21, or it may

1 be the 25th--no, it's November 25th. The actual
2 C-101 was signed by Mr. May. It was submitted on
3 December 1, and I attached a copy of that C-101,
4 which was never acted upon by the district
5 office, to my application to drill.

6 It was in limbo. We did not know what
7 to do, and I think probably, well, just because
8 of the situation with all four of these wells,
9 the State District Office, Mr. Williams, just
10 would not grant them and we were forced to file
11 the application.

12 MR. STOVALL: Mr. High, do you want to
13 respond to that one?

14 MR. HIGH: I didn't understand the
15 procedural argument. The documents I have don't
16 match up to the dates Counsel is using, so I
17 really don't know.

18 MR. STOVALL: Well, let's get that
19 cleared up first so we're all talking about the
20 same thing.

21 MR. HIGH: This is the first I've heard
22 of any procedural objection, and that's why I'm
23 struggling through papers here trying to find out
24 what Counsel is saying.

25 I have a letter dated January 16, 1992,

1 from Yates to New Mexico Potash, asking us to
2 either agree or object to Flora No. 2. Attached
3 to that is a C-101, and it's dated January 21,
4 1992.

5 MR. STOVALL: You're talking about
6 Flora No. 2?

7 MR. HIGH: No. 2.

8 MR. STOVALL: We're talking about Flora
9 No. 1.

10 MR. HIGH: I don't have the information
11 for No. 1.

12 MR. STOVALL: Mr. Losee, can you
13 provide a copy?

14 MR. HIGH: I don't have anything filed
15 on November 1 that was served on us.

16 MR. LOSEE: Well, here's a return
17 receipt. It shows it was served on Mr. Bob Lane,
18 postmaster date 11/21/91.

19 MR. STOVALL: We're talking about Case
20 10448, Flora No. 1, right?

21 MR. LOSEE: Yes.

22 MR. STOVALL: That's southeast of the
23 southwest, to make sure we're all in the same
24 place?

25 MR. LOSEE: Yes, sir. Now, let me make

1 my point clear. In view of Mr. Stogner's ruling
2 that there's no LMR in Section 2, I don't believe
3 the date of filing has anything to do with the
4 application. They're outside of the buffer
5 zone.

6 MR. STOVALL: You're relying under--

7 MR. LOSEE: I have two things I'm
8 relying on, Mr. Stovall. The first is, the
9 actual Order R-111-P doesn't even require the
10 potash company to consent or anything. It's
11 outside the buffer zone. These two Flora wells
12 are over a half-mile away.

13 MR. STOVALL: But it does give them the
14 opportunity to object, right?

15 MR. LOSEE: That's right. Well, I
16 don't know if it gives them the opportunity; they
17 have objected.

18 MR. STOVALL: I'm going back to
19 (G)(E)(3)(b). The language there says,
20 "Applications to drill outside the LMR will be
21 approved as indicated below, provided there is no
22 protest from potash lessee within 20 days from
23 his receipt of a copy of the notice, right?

24 MR. LOSEE: Yes.

25 MR. STOVALL: And then presumably, if

1 there is protest within the 20 days--

2 MR. LOSEE: You mean, anyplace in
3 southeastern New Mexico?

4 MR. STOVALL: Anyplace in the potash
5 lease in the potash area, defined in Exhibit A of
6 the Order. That's how you started out on this,
7 was this thing on the 20-day objection. I'm
8 assuming that's where you were on.

9 MR. LOSEE: I'm on two things, please.
10 I'm on one, the date the Flora No. 1 was filed,
11 and it was clearly filed back prior to any
12 designation, and there was no objection made
13 within the 20 days, and the 20-day period
14 actually expired on the 21st day of December.
15 And we have the return receipt here showing--

16 MR. STOVALL: I have a copy of that.

17 MR. LOSEE: Okay. I think the Flora
18 No. 1 should have been approved by the District
19 Office. I think the only thing this hearing
20 would be proceeding on, under any theory, would
21 be the Flora No. 2, and procedurally the other
22 one should be approved.

23 MR. HIGH: The only thing I can say,
24 Counsel, like I say, I don't have those documents
25 with me so I can't respond. I had no idea that

1 the applicant would raise a procedural issue, so
2 I'm certainly not prepared to address that except
3 to say that it's their application we're here on,
4 and I submit that if there is a procedural
5 irregularity of some sort, they have waived it by
6 filing these applications and having us come to
7 Santa Fe to have this hearing.

8 MR. STOVALL: I think the applicant was
9 put in a little bit of a tough position by the
10 Division, apparently, because the Division
11 wouldn't act.

12 MR. LOSEE: That's right.

13 MR. STOVALL: Let's move on to the
14 other well, the Flora No. 2 well for a moment,
15 and chuck this one for a second.

16 Now, what's your position with respect
17 to the Flora No. 2, Mr. Losee?

18 MR. LOSEE: Let me just get a little
19 more in order.

20 EXAMINER STOGNER: And when we talk
21 about the Flora No. 2, we're talking about the
22 well in Case No. 10449?

23 MR. LOSEE: Yes. That's the one our
24 file indicates we did not file until January the
25 24th, which was after they made the designation,

1 but which still has not been approved by the Land
2 Office.

3 MR. STOVALL: Let me ask you, with
4 respect to Application 10449, which is the Flora
5 No. 2, which is in the northeast of the southwest
6 of Section 2, is that correct?

7 MR. CARROLL: The No. 2 is the
8 northeast of the southwest, yes.

9 MR. STOVALL: Now, I believe your
10 statement is that, in effect, New Mexico Potash
11 has protested. In fact I think we have a letter,
12 a copy of the objection to that APD.

13 MR. LOSEE: Yes. We sent them the
14 APD.

15 MR. STOVALL: Now, the Examiner having
16 ruled there is no LMR, the issue flips back to
17 making a determination under paragraph C(2) of
18 R-111-P regarding the--really, what it amounts
19 to, is balancing the waste between the potash and
20 the oil, is that correct?

21 You present evidence and say that it
22 won't result in the waste of potash and would
23 result in the waste of oil if we don't grant it,
24 and presumably Mr. High would say the opposite?

25 MR. LOSEE: Yes.

1 MR. STOVALL: And that would be the
2 procedural discussion with respect to the Flora
3 No. 2?

4 MR. LOSEE: Yes.

5 MR. STOVALL: I think my
6 recommendation, Mr. Examiner, since we have to
7 hear evidence, is we leave both cases open, 10448
8 and 10449, at this point in time at least. You
9 can reserve decision on making a procedural
10 determination on 10448, the Flora No. 1.

11 I would recommend that you hear the
12 evidence, because I believe the evidence will be
13 the same for both cases, is that not correct,
14 with respect to that issue, Mr. Losee? Assuming
15 we decide that 10448--

16 MR. LOSEE: Actually, the one hole they
17 drilled is a little closer to 2. Let me make
18 sure that I understood the Examiner's ruling on
19 10446 and 10447.

20 You dismissed the cases, and can you
21 explain to me the reason for it? And I'm not
22 trying to be argumentative.

23 EXAMINER STOGNER: I don't know why I
24 need to digress but I sure will, Mr. Losee, and
25 after I explain I would ask that we move ahead.

1 I'm referring to, here again, to
2 (G)(E)(3). "Active mine workings in mined-out
3 areas shall also be treated as LMR. Any
4 application to drill in the LMR area, including
5 buffer zones"--and this was in a buffer zone, the
6 northeast quarter. You were at the meeting when
7 you heard Dr. Szabo say that the northeast
8 quarter was in a buffer zone. That buffer zone
9 for a deep well is one-half mile, and that is (b)
10 underneath that subparagraph.

11 Therefore, it was within a half-mile
12 radius, and New Mexico Potash has not agreed, so
13 therefore that's a moot issue, and those two
14 cases were dismissed.

15 MR. LOSEE: Okay. I wish to ask one
16 further question with respect to that dismissal.
17 Is that on the basis that you feel that the
18 Division does not have the power to grant
19 exceptions to Rule 111-P?

20 MR. STOVALL: Correct.

21 MR. LOSEE: And you think if anyone
22 does, it's the Commission?

23 EXAMINER STOGNER: Yes.

24 MR. STOVALL: Correct.

25 MR. LOSEE: I think we would like to

1 have the ruling, and I think we're entitled to
2 it, on the Flora No. 1. There's nothing in this
3 testimony that's going to change it, Mr. Stovall,
4 procedurally, and legally my argument is correct,
5 that it was outside of any buffer zone, that
6 there was no objection filed within 20 days, and
7 the Division delayed in approving it. So that
8 any evidence we put on at this date would not
9 have any effect on that argument at all.

10 MR. STOVALL: I understand that, Mr.
11 Losee, but I think you're going to have to put on
12 a case anyway, and my recommendation to the
13 Examiner is it doesn't really matter from the
14 standpoint of what we have to hear for the rest
15 of the afternoon, whether we hear it in
16 connection with one case or both.

17 There may be something come out. I
18 don't necessarily agree that it may not have some
19 bearing on the decision. I'm a little concerned
20 about the fact that it's Yates' application.
21 It's a procedural gray area, so I think it
22 doesn't matter what you have to do.

23 My recommendation to the Examiner is
24 that we leave both cases open at this time and he
25 reserve ruling on your motion, that you proceed

1 with your case.

2 How would you be procedurally
3 disadvantaged in that?

4 MR. LOSEE: I guess we would be
5 proceeding on something which we think should
6 have been approved; but because it was not
7 approved, we filed the application.

8 We have tried to point out here the
9 reason that we think it should be approved then
10 and should be approved now. It might effect what
11 we do in this case, as far as offering evidence
12 or proceeding forward, and I think we are
13 entitled to a ruling on that question of whether
14 the Flora No. 1 is a well that should be approved
15 by the Division.

16 MR. STOVALL: I think the other problem
17 is that I'm not sure the Examiner has the
18 authority to tell the district supervisor what to
19 do, except by Order. So it may be that in order
20 for the district supervisor to get direction, the
21 Director could direct, but the Director has to
22 make his decision based upon the recommendation
23 of the Examiner, and the Examiner can't tell the
24 District Supervisor to approve it.

25 So you could be left out in the wings,

1 if we don't go ahead and get an order issued in
2 this case at this time and proceed with the
3 hearing.

4 The other side is a practical side, and
5 I think it's something to consider, and I'm not
6 sure whether it's determinative or not, but the
7 evidence presented is a practical matter and
8 there could be, I assume, some problems if
9 there's a determination that the No. 2 should be
10 drilled because it would result in the waste of
11 potash and it would be a violation of our
12 statutory obligation there. Allowing the one to
13 be drilled would be destructive of that.

14 I think if we can preserve that option
15 until we go through and hear the testimony, I
16 think it would result in a better, overall
17 decision.

18 MR. LOSEE: Well, what I'm saying is,
19 what we do at this hearing should have no effect
20 whatsoever on the Flora No. 1.

21 MR. STOVALL: I hear what you're saying
22 and I'm saying that I'm not sure I'm willing to
23 recommend that to the Examiner. It's his
24 choice.

25 I think you've heard both of our

1 arguments on that, Mr. Examiner, and I think in
2 the interest of all in this room perhaps you
3 should make a ruling, and we'll get on with it,
4 either hear one case or two.

5 EXAMINER STOGNER: Mr. Losee, I
6 understand your predicament, but that is beyond,
7 I feel, my capabilities, to instruct a District
8 Supervisor. I'm here in the capacity as an
9 engineer. I provide engineering data. My main
10 capacity as Chief Hearing Officer is to make
11 recommendations to the Supervisor, so I have no
12 choice but to--

13 MR. STOVALL: To the Director, I
14 believe is what you mean.

15 EXAMINER STOGNER: What did I say?

16 MR. STOVALL: You said "Supervisor."

17 EXAMINER STOGNER: My Supervisor, who
18 is the Director. So I have no choice but to
19 delay your motion, and I'll probably make that a
20 part of the Order.

21 MR. LOSEE: We would like to ask for
22 about 15 minutes so we can visit with our
23 client.

24 EXAMINER STOGNER: We'll take a
25 15-minute recess, and we'll reconvene at five

1 after.

2 [A recess was taken.]

3 EXAMINER STOGNER: The hearing will
4 come to order. Mr. Losee?

5 MR. LOSEE: Mr. Stogner, Yates, in the
6 two applications that are still pending, elects
7 to stand on the applications as filed with the
8 Division and not put on any evidence.

9 EXAMINER STOGNER: Does anybody else
10 have anything further in this matter or these two
11 matters, 10448 and 10449?

12 MR. HIGH: We choose not to put on any
13 evidence at this time, Mr. Stogner.

14 EXAMINER STOGNER: I'll let my elation
15 show.

16 MR. CARROLL: I do want to address the
17 subpoena question, but--

18 MR. HIGH: You go ahead and take care
19 of it.

20 MR. STOVALL: Well, wait a minute.

21 MR. LOSEE: Have you made a ruling on
22 the subpoena?

23 MR. STOVALL: Well, no, but I guess if
24 we're not going to have any evidence--

25 MR. LOSEE: Well, let's go ahead and

1 dispose of--we're not going to have any evidence
2 at this level of the proceeding.

3 MR. STOVALL: Mr. Examiner, I think
4 there being no LMR question involved in this, I
5 think that generally the policy of the Division
6 not to go too far afield in subpoenas, it appears
7 that Yates has probably been provided with all
8 the information relating to Section 2, and since
9 we're not going to have any evidence, any other
10 applicability or relevancy of the information on
11 coreholes outside of Section 2 probably isn't
12 there.

13 I think the confidentiality issue is a
14 major one, because the statute and all the other
15 things provide for confidentiality. I recommend
16 you grant the Motion to Quash with respect to the
17 information which has not yet been provided at
18 this time. There would be no reason not to do
19 that at this time.

20 EXAMINER STOGNER; Mr. Losee, Mr. High,
21 anything further in the quashing of this
22 subpoena?

23 MR. HIGH: We have nothing further, Mr.
24 Examiner.

25 MR. LOSEE: Nothing further, Mr.

1 Examiner.

2 EXAMINER STOGNER: The subpoena for the
3 information, as it stands in Cases 10448 and
4 10449, considering 10446 and 10447 have been
5 dismissed, is hereby quashed, and I'll take Cases
6 10448 and 10449 under advertisement at this
7 time.

8 Hearing adjourned.

9 (And the proceedings concluded at 2:10
10 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I do hereby certify that the foregoing is
a complete record of the proceedings in
the Examiner hearing of Case Nos. 10446 thru 449
heard by me on 19 March 1992.

Michael E. Stogner, Examiner
Oil Conservation Division

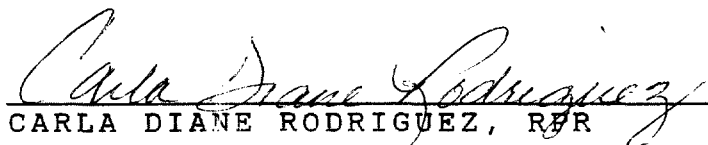
CERTIFICATE OF REPORTER

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

I, Carla Diane Rodriguez, Certified
Shorthand Reporter and Notary Public, HEREBY
CERTIFY that the foregoing transcript of
proceedings before the Oil Conservation Division
was reported by me; that I caused my notes to be
transcribed under my personal supervision; and
that the foregoing is a true and accurate record
of the proceedings.

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

WITNESS MY HAND AND SEAL March 20,
1992.


CARLA DIANE RODRIGUEZ, RPR
CSR No. 4