

3 IN THE MATTER OF THE HEARING CALLED
4 BY THE OIL CONSERVATION COMMISSION FOR
5 THE PURPOSE OF CONSIDERING:

6 APPLICATION OF LOS LOBOS RENEWABLE
7 POWER, LLC FOR APPROVAL TO INJECT
8 INTO A GEOTHERMAL AQUIFER THROUGH
9 TWO PROPOSED GEOTHERMAL INJECTION
10 WELLS AT THE SITE OF THE PROPOSED
11 LIGHTNING DOCK GEOTHERMAL POWER
12 PROJECT, HIDALGO COUNTY, NEW MEXICO.

CASE NO. 14948

ORIGINAL

13
14 REPORTER'S TRANSCRIPT OF PROCEEDINGS

15 COMMISSION HEARING

16 VOLUME 2

17
18 BEFORE: JAMI BAILEY, CHAIRPERSON
19 TERRY WARNELL, COMMISSIONER
20 ROBERT S. BALCH, COMMISSIONER

21 March 20, 2013

22 Santa Fe, New Mexico

23 This matter came on for hearing before the
24 New Mexico Oil Conservation Commission on Wednesday,
25 March 20, 2013, at the New Mexico State Land Office, 310
Old Santa Fe Trail, Morgan Hall, Santa Fe, New Mexico.

26
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1 (8:01 a.m.)

2 CHAIRPERSON BAILEY: Good morning. This is
3 the meeting of the Oil Conservation Division Commission
4 on Tuesday, March 20th. We are in Morgan Hall in the
5 State Land Office building, in Santa Fe, New Mexico. We
6 are here to have a continuation of Case Number 14948.
7 All three Commissioners here, so we do have a quorum.

8 I believe when we broke last night, we had
9 met Chuck Smiley, and he had been passed to Mr. Lakins
10 for his cross-examination.

11 You're still under oath, Mr. Smiley.

12 THE WITNESS: Yes, ma'am.

13 CHAIRPERSON BAILEY: If you could sit up
14 here in the comfortable chair.

15 CHARLES P. SMILEY,
16 after having been previously sworn under oath, was
17 questioned and testified as follows:

18 CHAIRPERSON BAILEY: Mr. Lakins, you may
19 proceed.

20 MR. LAKINS: Thank you, Madam Chair.

21 CROSS-EXAMINATION

22 BY MR. LAKINS:

23 Q. Good morning, Mr. Smiley.

24 A. Good morning.

25 Q. Do you have all the exhibits up there?

1 A. I have yours and ours, yes, sir.

2 Q. Let's go to your Exhibit Number 9.

3 A. Yes, sir.

4 Q. Let me back up a minute. What exactly is your
5 position with Los Lobos/Cyrq/Raser?

6 A. As I said yesterday, I'm a site manager.

7 Q. Site manager?

8 A. Yes, sir.

9 Q. What exactly does a site manager do?

10 A. Well, as I said yesterday, I was hired to
11 orchestrate and choreograph a section of the power
12 plant. At the time when I was hired, that's what we
13 thought -- it looked as if we were going in that
14 direction, and that will be my role once we're there.

15 Q. Do you have any other duties there as the site
16 manager aside from orchestrating construction, because,
17 to me, the term "manager" is kind of broad.

18 A. It is.

19 Q. What else do you do?

20 A. What else do I do? Well, aside from preparing
21 for these hearings and so forth, I orchestrate the
22 office activities that go on in the Animas office that
23 the company requires me to do.

24 Q. Are you basically -- is it fair to paint you as
25 the boss in Animas?

1 A. The boss of two, yes.

2 Q. You're the top guy in Animas?

3 A. So far as I know.

4 Q. Now, turning to Exhibit -- your Exhibit Number
5 9 --

6 A. Yes.

7 Q. -- part of what you talked to was this one
8 paragraph, three bravo -- or bravo three; if you could
9 turn to that, page 6.

10 A. I'm looking at it.

11 Q. What does that paragraph mean?

12 A. Well, to me, it's fairly clear. If I can just
13 read it, it says: We will provide -- my company will
14 provide AmeriCulture with effluent heat in an amount
15 equivalent to that by which their resource is depleted.

16 Q. Do you interpret that paragraph to mean no
17 matter where production takes place?

18 A. I'm sorry, I don't understand. Where the
19 production takes place? You mean where AmeriCulture's
20 production takes place?

21 Q. Your production.

22 A. Okay. I'm still unclear where you're going.
23 If you're asking if, during the test that we're
24 proposing to do -- if that's your question, if that were
25 to happen -- I understand that Mr. Seawright's tilapia

1 fish require 85 degrees Fahrenheit. So if you're asking
2 me, if, during the course of the test, his ability to
3 provide adequately heated water to maintain that
4 temperature for his fish, we would provide heat -- we
5 would provide water at the proper heat for their
6 operation.

7 Q. And it's your contention, then, that that's an
8 obligation of Los Lobos under this agreement? Is that
9 what your testimony is?

10 A. My -- my understanding -- the way I read this
11 Joint Facility Operating Agreement was just as I said,
12 and it parrots what the -- I think, what the agreement
13 says.

14 Q. Well, let's look a little bit more at this
15 agreement, because what -- let's turn to the first page.

16 (The court reporter experienced technical
17 difficulties; break taken, 8:06 a.m. to
18 8:13 a.m.)

19 COMMISSIONER BAILEY: I believe you had
20 asked a question, Mr. Lakins.

21 Q. (BY MR. LAKINS) All right. Let's go to
22 the --

23 MR. LAKINS: I'm going to re-ask the
24 question, and please don't object as asked and answered,
25 just for the purpose of the court reporter and clarity

1 of the record.

2 Q. (BY MR. LAKINS) So, Mr. Smiley, based on your
3 20-plus years of experience in the Air Force and dealing
4 with various contracts, et cetera, you would agree that
5 the language in the contract controls?

6 A. Yes, sir, I do.

7 Q. Let's turn to the first page there, where the
8 "witnesseth" part is. Okay?

9 A. Uh-huh.

10 Q. And the very first part says: "The parties,
11 either jointly or singularly, have an interest in and to
12 certain real property located in Hidalgo County, New
13 Mexico, which property, for the purposes of this
14 Agreement, will be identified as follows: The Property
15 comprises about 15 acres" -- and it gives a legal
16 description -- "tract of land situated in the Northwest
17 quarter of the Northeast quarter of Section 7, Township
18 25 South, Range 19 West in Hidalgo County." It says:
19 "Whereas, AmeriCulture owns the surface and minerals in
20 and to this property." Okay? Now, that is the property
21 that is subject to this agreement, yes?

22 A. Yes, sir.

23 Q. And you guys aren't building on that property,
24 are you?

25 A. That's correct.

1 Q. So do you believe that this contract places a
2 requirement on Los Lobos to provide heat to AmeriCulture
3 for projects that Los Lobos builds on property other
4 than the 15 acres described in this Joint Facility
5 Operating Agreement?

6 A. If I could clarify. As you said, we're not
7 building on AmeriCulture's property on this 15 acres in
8 question. We're not conducting any aspect of our
9 proposed test on that same parcel of land. Once we
10 operate a power plant, we'll engage and know well
11 activities on that land.

12 So I'm still unsure sure where you're going
13 with the question. I'm not trying to be belligerent. I
14 just you don't understand what you're getting at.

15 Q. Okay. That's no problem. I'm just trying to
16 understand your company's position and your testimony
17 when it comes to this agreement. Okay? Because
18 yesterday --

19 A. Yes, sir.

20 Q. -- you kind of had short testimony. It was
21 like 17-and-a-half minutes. And in that testimony, you
22 quoted -- you referenced this agreement, and you cited
23 this paragraph, "bravo three," as you referred to it.

24 A. I did.

25 Q. And I'm just trying to understand what your

1 company's position is and what your testimony -- the
2 point you're trying to make. Okay?

3 A. Okay.

4 Q. So maybe we could start there. What's your
5 company's position concerning this Joint Facility
6 Operating Agreement?

7 A. My company's position is this: If, during the
8 course of our activities, whether it's the proposed
9 test, whether it's the operation of the power plant
10 itself, if during the course of those activities, we
11 impair the hot water capability of AmeriCulture, then we
12 will provide that in kind. We will replace the effluent
13 heat that's been somehow miraculously displaced from the
14 AmeriCulture process. We would replace that in kind as
15 an alternative.

16 Q. Doesn't it [sic] say that anywhere in this
17 contract for a project built not on the 15 acres, does
18 it?

19 MS. HENRIE: Objection. I think this is
20 calling for a legal opinion at this point in time. The
21 question to the witness was: What is your company's
22 position? That's the question.

23 MR. LAKINS: Right. That's my next
24 question. I asked him, It doesn't say that in here
25 anywhere, does it?

1 MS. HENRIE: You're now asking him to
2 interpret the contract.

3 MR. LAKINS: Well, based on his 20-plus
4 years of experience, he should be able to tell me if it
5 says something in this contract or not.

6 MS. HENRIE: As his attorney, I would like
7 to ask these questions, because you're asking my witness
8 for a legal interpretation of the contract. He's been
9 advised as to what this contract says, and you're now
10 asking him what the grounds of that advice is, and I'm
11 not sure that he knows.

12 MR. LAKINS: Well, there's a pending
13 objection.

14 CHAIRPERSON BAILEY: I'll sustain the
15 objection.

16 Q. (BY MR. LAKINS) Let's turn to Exhibit 8. Now,
17 when you spoke about this affidavit yesterday -- I have
18 very little notes on that. But could you basically tell
19 me, what's the purpose of this affidavit?

20 A. You want me to basically re-testify what I said
21 yesterday?

22 Q. Yes.

23 A. Sure. This is a signed and sworn document by
24 the CEO of our company, Nicholas Goodman, that states
25 that Cyrq, Raser, Los Lobos does not intend now, nor

1 does it intend in the future, to build a water-cooled
2 cooling tower as part of our power plant that we're
3 going to construct.

4 Q. There was at one point in time; isn't that
5 correct?

6 A. Yes, sir. It was contemplated. It certainly
7 was.

8 Q. That design -- were you familiar when the
9 design changed, how that came about?

10 A. Well, I will say I've read and re-read the
11 testimonies from 2008 and 2009, and this was something
12 that was certainly in the testimony. When exactly the
13 company made the switch from the decision to go
14 water-cooled versus air-cooled, I -- I'm struggling to
15 even think if it was during my time since August. I
16 honestly -- I don't recall being involved in those
17 conversations. It wasn't my decision one way or the
18 other, I would say.

19 Q. Sure. It was before your watch?

20 A. To my recollection, yes, sir.

21 Q. Okay. Well, in your experience in civil
22 engineering, you know that design plans change --

23 A. Certainly.

24 Q. -- based on all kinds of different reasons,
25 right?

1 A. Correct.

2 Q. And you're aware that Los Lobos had one design,
3 yes?

4 A. Yes.

5 Q. And it changed that design?

6 A. Yes.

7 Q. And it's possible, isn't it, that the design
8 could change again?

9 A. It's possible. I don't think, at this point,
10 it's likely. As I said yesterday, we're in the process
11 now of selling these assets, or at least seeking a buyer
12 for these assets. So we've actively engaged in doing
13 that.

14 Q. But that paragraph three that you're focusing
15 on, it does not say in there that Cyrq will not?

16 A. It does not.

17 Q. It just says, at this point in time, they don't
18 plan to, they don't intend to, they don't expect to?

19 A. That's correct.

20 Q. And they may have not planned to change the
21 design and not intended to change the design or expected
22 to change the design before they actually changed the
23 design in the past. Would you agree with that?

24 A. Yes. I would also -- if I could also comment.
25 As I said, I wasn't part of the decision to change or

1 when to change, but I am in the conversation. The
2 biggest reason that I understand we made the change was,
3 there was certainly a considerable -- I'm not sure
4 outcry is the right word, but there was some concern in
5 the community about water rights. And it's been
6 explained to me that this decision was made mostly in
7 efforts to the civic commentary about water rights.

8 So I think it was -- I think it was a very
9 noble gesture on the part of the company, because it is
10 not the most efficient way to do this power plant, but
11 it is certainly workable. But I would say that making
12 that decision probably was of a detriment to the nature
13 of the design and to the operating efficiency of the
14 plant.

15 Q. Now, you were there when the pump test was
16 done?

17 A. No, sir, I was not.

18 Q. You weren't there?

19 A. No, sir.

20 Q. Do you know -- are you familiar -- you're
21 familiar with the pump test results?

22 MS. HENRIE: I object. I don't believe I
23 asked the witness anything about the pump test on my
24 examination of him.

25 MR. LAKINS: You asked him about the

1 discharge permit and the G-112 applications and also
2 water rights under the Joint Facility Operating
3 Agreement.

4 MS. HENRIE: There are no water rights in
5 the operating agreement.

6 MR. LAKINS: Excuse me. Not water, but the
7 rights under -- okay.

8 Q. (BY MR. LAKINS) Well, you're familiar with the
9 discharge permit?

10 A. Yes, sir.

11 Q. Do you know if the pump test was conducted
12 under the discharge permit?

13 A. I don't factually know the answer to that
14 question.

15 Q. Does the discharge permit -- well, let's turn
16 to the discharge permit. That would be our Exhibit
17 Number 6.

18 A. Yes, sir.

19 Q. Now, as the site manager down there in Animas,
20 the boss in Animas, tell me, is it your company's
21 position that this discharge permit does or does not
22 apply to the proposed activities that you are proposing
23 to conduct and you're asking this Commission to approve?

24 A. Yes, sir.

25 Q. Does it apply?

1 A. Yes, sir.

2 Q. Would you also agree that under this discharge
3 permit, Well 55-7 is not permitted?

4 A. It is not listed as one of the wells, that's
5 correct.

6 Q. So could you explain to me why -- let me
7 rephrase that question. Could you explain to me how
8 you're going to perform an activity under the discharge
9 permit for injection into a well that's not covered
10 under the discharge permit?

11 MS. HENRIE: I need to object again. This
12 is agency determination, as to what it takes to permit a
13 discharge. In addition, the agency has weighed in on
14 this. I think we're now asking for a legal opinion as
15 to whether the agency's determination is legally
16 accurate or correct. This is beyond what this witness
17 is really able to answer.

18 MR. BROOKS: Madam Chair, the Division
19 joins in the objection.

20 MR. LAKINS: I'll withdraw the question.

21 Q. (BY MR. LAKINS) Now, Mr. Smiley, one thing that
22 you talked about yesterday was that you're leasing the
23 water rights --

24 A. Yes, that's correct.

25 Q. -- from the Rudigers?

1 A. Correct.

2 MR. LAKINS: Madam Chair, the issue of the
3 water rights that Los Lobos is leasing essentially came
4 up in this witness' testimony yesterday afternoon, and I
5 would like to explore that a little bit. And I have an
6 exhibit, which is the permit that they're operating
7 under. I'd like to introduce it as Exhibit 19.

8 MS. HENRIE: And I'd like to know the
9 relevance of this to this.

10 MR. LAKINS: Well, you opened the door on
11 that. It's a water permit, and it's relevant to what
12 you're planning on doing, because there's a water right
13 that you brought up.

14 MS. HENRIE: And I believe we brought it up
15 because the agency had asked some questions -- I can't
16 remember which witness. But there were some questions
17 about the water lease and evaporative losses, and that's
18 why it was brought up. I still don't understand the
19 relevance to this proceeding or your case.

20 CHAIRPERSON BAILEY: For what purpose do
21 you want to bring in this exhibit, because this body has
22 no jurisdiction over water rights?

23 MR. LAKINS: No, ma'am. I agree, and I'm
24 not trying to go down that path.

25 The purpose that I would like to introduce

1 this exhibit is to make this document part of the
2 record, primarily with an affidavit from the project
3 director of Lightning Dock that pertains to the exact
4 parameters of this project, that is spelled out in an
5 affidavit of 2012, which the project director spells out
6 the parameters of this proposed project, which are far
7 in excess of anything that has been presented thus far
8 in this hearing. Basically, it's an affidavit
9 demonstrating that what the proposed project is is far
10 in excess of anything that we've been told thus far.

11 MS. HENRIE: Madam Chair, if we go down
12 this path, what the witness will testify to is that
13 we -- and I think we've already talked about this. When
14 we decide how many water rights to lease at the
15 beginning of the year, we have to do some sort of
16 estimate, and we want to aim high, so we're not having
17 to go back into the process of negotiating the lease a
18 second time in the middle of the year when you've got a
19 rig on site or something else.

20 So I'm not sure that what he is offering to
21 tender answers the question of what the scope of the
22 project really is or what the scope of the test really
23 is. It was the scope of our maximum possible use of
24 water rights. And if it's 2012, that was last year,
25 when our drilling operations intended to be a lot more

1 than they actually turned out to be during the course of
2 the year. So, again, I'm not sure that this affidavit
3 has any relevance to this proceeding.

4 MR. LAKINS: I believe it has extreme
5 relevance to this proceeding. It's not about water
6 rights. This affidavit isn't about water rights. It's
7 about the scope of the contemplated project and the
8 future of this project, and I would like to make this
9 document part of the record for purposes of
10 demonstrating the grand scope of what this company
11 actually intends to do, which is far in excess of what
12 has been presented thus far in this hearing, Madam
13 Chair.

14 CHAIRPERSON BAILEY: You're holding up a
15 document. Is that an exhibit that's already been
16 tendered, or is that part of the exhibit you would like
17 to tender?

18 MR. LAKINS: This is part of the exhibit I
19 would like to tender. This is a document I got off of
20 the State Engineer's Web site last night after I was --
21 after I had learned of the lease, I went to the State
22 Engineer's Web site to verify the water rights
23 information that had been testified to yesterday. And
24 this affidavit was a part of the permit application made
25 by Lightning Dock, Los Lobos last year.

1 For purposes of the record, it is an offer
2 of proof. Lightning Dock has, in an affidavit, said
3 that their intention is to drill many more wells and
4 that they envision a 15-megawatt project.

5 MS. HENRIE: Would you, as part of your
6 offer of proof, let us know the date of that affidavit?

7 MR. LAKINS: April 3rd, 2012.

8 Q. (BY MR. LAKINS) Now, in the discharge permit,
9 Mr. Smiley --

10 A. Yes.

11 Q. -- you talked about the triggers. And would
12 you point out to me where that paragraph was?

13 A. It was page 8, letter iii, what I discussed
14 yesterday.

15 Q. Have you guys implemented a groundwater
16 monitoring program?

17 A. No.

18 Q. Are you monitoring static water levels for
19 monitoring locations at least quarterly?

20 A. No.

21 Q. Are you assessing any groundwater flow
22 direction for gradient [sic] at your facility?

23 A. No, since we're not operating the plant.

24 Q. Have you provided a written statement of
25 whether the water resource in the Animas Valley is or is

1 not adequate to sustain state production on the
2 geothermal resource within 60 days of this?

3 A. We filed -- for the first time, we filed an
4 annual report, in 20- -- well, it was January, as I
5 recall, this year. I don't recall off the top of my
6 head if that statement was actually included in there or
7 not. I don't remember. I'm sorry, but I don't have
8 access to that document right now.

9 MR. LAKINS: Pass the witness.

10 MR. BROOKS: No questions.

11 CHAIRPERSON BAILEY: Mr. Warnell?

12 COMMISSIONER WARNELL: Yes, I have a
13 question of Mr. Smiley. Just bear with me.

14 CROSS-EXAMINATION

15 BY COMMISSIONER WARNELL:

16 Q. So the cooling towers that we've spoken about
17 several times over the last two days, they are
18 physically on site?

19 A. The components that would make up the cooling
20 tower, yes, sir, are staged at our location and have
21 been -- if I may. They have been for some time.

22 Q. You say you're in the process of selling those
23 assets?

24 A. We're in the process of seeking a buyer. We
25 want to get rid of these things. We have not been

1 successful -- well, I will say that we haven't finalized
2 it. We've had somebody who's asked about it, but it
3 hasn't --

4 Q. I'm concerned about illegal dumping. I don't
5 know if you were here yesterday when we were looking at
6 one of the maps over there.

7 A. I remember, sir. Yesterday we referenced the
8 junk that's being salvaged by our neighbor, not by us
9 and not by AmeriCulture. But there is quite a bit of
10 salvageable assets on the property, yes, sir. On their
11 property, not ours.

12 Q. If I zero in and look at that, I see a lot of
13 tires and stuff over there.

14 A. Yes, I agree.

15 Q. You can ask someone at the Land Office about
16 tires.

17 Who would be responsible for cleaning that
18 up?

19 A. I don't know the lease agreements or land
20 agreements, but to my knowledge, it's owned by the
21 Rosette/Burgett Rose Farm operation, or what's left of
22 it. They're the ones doing the salvaging.

23 Q. How long has that salvaging been taking place?

24 A. I've been there since August, and that was one
25 of the first things that I saw; who in world is doing

1 this? But it's not us; it's not AmeriCulture.

2 Q. Do you see anybody out there doing anything?

3 A. Yes, sir. From time to time, you see laborers
4 out there. There are people who are -- I won't say
5 necessarily rapidly, but there are people are out there
6 and who are processing it. Sometimes they have sellers
7 come out -- or potential buyers, I guess I should say.

8 Q. Thank you. That's all.

9 CHAIRPERSON BAILEY: Commissioner Balch?

10 COMMISSIONER BALCH: I don't have many
11 questions.

12 CROSS-EXAMINATION

13 BY COMMISSIONER BALCH:

14 Q. Good morning, Mr. Smiley.

15 A. Good morning.

16 Q. Thank you for your service.

17 A. My pleasure, my privilege.

18 Q. Following up on Mr. Lakins' questions about the
19 monitoring, we need a critical portion of -- to go ahead
20 and establish baseline data.

21 A. Yes.

22 Q. Has that baseline data been established?

23 A. No, but we are just about to implement our
24 first activity. Within the discharge permit, there is
25 an unformatted -- I'm sorry, unreferenced footnote, the

1 very last page of it, and that requires us to do a
2 baseline water-table depth sampling prior to the
3 irrigation season, which is part of our discharge
4 permit. It says the 30th of April, so what we intend to
5 do sometime during the month of April is actually do
6 that first baseline attempt.

7 And then what we have programmed out over
8 the next, I would say, weeks and months is to establish
9 baselines at our injection points, at our production
10 points and so forth. So we are in the process now of
11 getting into that point.

12 Q. With part of that baseline data being a pump
13 test?

14 A. Yes.

15 Q. Things like that?

16 A. Mostly sampling for water-table depth, yes, and
17 chemistry.

18 Q. And so several samples have been pulled from --

19 A. They have been, yes.

20 Q. So there is a design plan for establishing the
21 baseline and then the program once operational?

22 A. Absolutely. Yes, sir.

23 Q. The Joint Facility Operating Agreement -- there
24 seems to be some, perhaps, differences of interpretation
25 about where this agreement applies to. I notice on

1 the -- one of the maps -- I believe it's at the end of
2 Exhibit 3. Actually, it's attached to Los Lobos Exhibit
3 A1, the G-112 application. In the back of it, there is
4 a map. I see an outline of the federal lease, which
5 does not increase --

6 A. I'm sorry, where are you? I'm sorry. I
7 haven't found where you're referencing.

8 Q. It's at the end of Exhibit 2.

9 A. Oh, 2. Okay.

10 Q. There's a map attached to the G-112
11 applications.

12 A. Yes.

13 Q. I see the federal lease does not include the
14 AmeriCulture quarter-quarter section that's referenced
15 in the joint operating agreement.

16 A. Are you talking about the area shaded in
17 purple?

18 Q. Right.

19 A. I'm sorry, your question was what?

20 Q. So the federal lease that you're operating
21 under does not include AmeriCulture's location? The
22 joint operating agreement does refer to that
23 quarter-quarter quarter section that's highlighted in
24 pink on this map?

25 A. You know, I'm not --

1 Q. It's described as "a tract of land, Northwest
2 quarter of the Northeast quarter of Section 7." To me,
3 that looks like the pink area on this map, is what is
4 being described as the tract of land in Exhibit 9.

5 A. Sir, I honestly don't know the answer to that
6 question. I don't know. I'm sorry. I've not paid
7 attention to those aspects of the lease. It's just not
8 been part of my purview.

9 Q. You're not familiar with the New Mexico land
10 system?

11 A. Afraid not.

12 Q. Well, anyway, your federal lease does not
13 contain, I don't think, AmeriCulture's surface area and
14 mineral rights, so the joint operating agreement is to
15 obtain mineral rights underneath their facility?

16 A. I would agree, yes, sir.

17 Q. And it is your understanding, I believe, from
18 cross-examination and direct testimony yesterday, that
19 if your operations impair their ability to get the heat
20 apparently from the AC State Number -- is that 2?

21 A. Oh, I'm sorry. Yes, sir. I follow you.

22 Q. -- AC State 1, where they're drawing their
23 heated water for their operation from -- if your
24 drilling program, geothermal project or your pump
25 testing, such as what is being proposed for this test,

1 for this permit application, impairs their ability to
2 get sufficient heat from there, that Los Lobos would
3 supply that heat to them?

4 A. Yes, sir. That's what --

5 Q. That's your interpretation?

6 A. Yes, sir.

7 Q. That's the interpretation of Los Lobos?

8 A. That's the interpretation of Los Lobos. That's
9 what we intend to do.

10 Q. Thank you. That's all I have.

11 CHAIRPERSON BAILEY: And I have no
12 questions.

13 Do you have redirect?

14 MS. HENRIE: Yes, Madam Chair, a couple of
15 questions. I'll try to clarify the map that Dr. Balch
16 was asking about.

17 REDIRECT EXAMINATION

18 BY MS. HENRIE:

19 Q. Mr. Smiley, if you go back to the map on
20 Exhibit 2 --

21 A. Yes.

22 Q. -- and where the pink is, that's identified as
23 the --

24 A. State lease.

25 Q. -- state lease?

1 A. Yes.

2 Q. Are you familiar -- is AmeriCulture's
3 greenhouse on the state lease?

4 A. I don't know. That's why I was confused. I
5 don't know where the demarcation --

6 Q. Let me maybe use the bigger map. So the
7 AmeriCulture state wells are on the state
8 quarter-quarter section, right? That's why they're
9 called state wells, right?

10 A. Okay.

11 Q. So if that quarter-quarter section is -- that
12 would be --

13 A. That would be the state lease.

14 Q. That would be the state lease, correct?

15 A. From what you're saying, yes.

16 Q. And what is privately owned fee would include
17 the greenhouses, correct?

18 A. I don't understand --

19 (The court reporter requested Mr. Smiley
20 speak louder.)

21 A. I didn't understand what she was saying.
22 Privately owned fee --

23 Q. The surface -- the surface that is owned
24 privately by AmeriCulture, that is subject to the joint
25 operating agreement?

1 A. That's correct, ma'am.

2 Q. Is the greenhouse area not the state land area?

3 A. Apparently not.

4 Q. I'm having a hard time clarifying the record
5 here (laughter).

6 MS. HENRIE: Apparently the witness doesn't
7 know.

8 A. I don't know, obviously.

9 Q. (BY MS. HENRIE) I do have a question I think
10 you know the answer to.

11 A. Good.

12 Q. Are you familiar with Well 63-7?

13 A. I am.

14 Q. You were there when it was drilled?

15 A. That's when I first came on.

16 MR. LAKINS: Objection. This is beyond the
17 scope of cross. This is opening up a whole new line of
18 questioning. It is inappropriate.

19 MS. HENRIE: Let me ask the next question
20 and see if the objection still stands.

21 Q. (BY MS. HENRIE) Is 63-7 included on the
22 discharge permit?

23 A. No.

24 Q. To your knowledge, was 63-7 properly --

25 A. To my knowledge.

1 MS. HENRIE: That's all on redirect.

2 Charles, that's all I have.

3 MR. LAKINS: Nothing.

4 MS. HENRIE: That's all I have, Madam

5 Chair.

6 CHAIRPERSON BAILEY: The witness may be

7 excused.

8 MS. HENRIE: And I would move the

9 exhibit -- move the admission of Exhibits -- I believe 5

10 through 9 have not been admitted.

11 MR. LAKINS: No objection.

12 CHAIRPERSON BAILEY: They are admitted.

13 (Los Lobos Exhibit Numbers 5 through 9

14 were offered and admitted into evidence.)

15 MS. HENRIE: My next witness is Roger

16 Peery, please.

17 ROGER PEERY,

18 after having been first duly sworn under oath, was

19 questioned and testified as follows:

20 DIRECT EXAMINATION

21 BY MS. HENRIE:

22 Q. Please state your name for the record.

23 A. Roger Peery.

24 Q. Where are you employed and in what capacity?

25 A. I'm employed at John Shomaker & Associates.

1 I'm the CEO of the company, and I'm also the principal
2 hydrogeologist.

3 Q. Could you summarize your education and
4 employment background?

5 A. I have a Bachelor's in Geology from the
6 University of New Mexico. From 1987 to 1992, I earned a
7 Master's in Water Resources also from the University of
8 New Mexico. I've been with John Shomaker & Associates
9 for approximately 25 years now, and that's been my
10 primary place of employment since I graduated.

11 Q. Are you familiar with the Los Lobos project?

12 A. Yes, I am.

13 Q. Are you familiar with well testing that's taken
14 place, at least some of the well testing that's taken
15 place, in connection with the Los Lobos project?

16 A. Yes, I am.

17 Q. And in your career, how many pump tests have
18 you conducted?

19 A. Either personally or under my direct
20 supervision, hundreds.

21 Q. And how many of those pump tests have been
22 permitted by any state agency?

23 A. One.

24 Q. Can you tell me why that one was permitted?

25 A. There was no official reason given by the

1 New Mexico Office of the State Engineer regarding why
2 they permitted -- they wanted a permit for this
3 particular test. However, it's a very controversial
4 project, and my opinion is that the Office of the State
5 Engineer wanted some -- I don't know -- maybe some
6 political cover or something like that if this project
7 moved forward.

8 Q. Mr. Peery, I believe your office prepared
9 Exhibit 7.

10 A. That's correct.

11 Q. Would you agree with Mr. Janney's testimony
12 from yesterday that basically what this diagram shows is
13 that the water in the project area is all the same
14 water?

15 MR. LAKINS: Objection. This is
16 duplicative testimony of Mr. Janney.

17 Q. (BY MS. HENRIE) Mr. Peery, your office prepared
18 the Piper diagram; is that correct?

19 A. That's correct.

20 Q. So it's your exhibit?

21 A. That's correct.

22 MR. LAKINS: Mr. Janney testified to this
23 before, this exact PowerPoint presentation. This is
24 duplicative testimony.

25 CHAIRPERSON BAILEY: Are you laying a

1 foundation for something?

2 MS. HENRIE: I wanted to just simply
3 confirm that Mr. Peery, who prepared this exhibit, is
4 interpreting it -- I wanted to ask him how he
5 interpreted it. So that was the foundation. That was
6 all of my foundation.

7 CHAIRPERSON BAILEY: Objection overruled.

8 MS. HENRIE: Let me try to rephrase the
9 question, please.

10 Q. (BY MS. HENRIE) Mr. Peery, what do you
11 interpret Exhibit 7 to say?

12 A. My interpretation of Exhibit 7 is --

13 MR. LAKINS: I'm going to object to that
14 because that's not a foundational question. That's
15 duplicative testimony.

16 CHAIRPERSON BAILEY: We will allow it.

17 A. Thank you.

18 My interpretation of this diagram is that
19 it indicates that the shallow water in nearby AC State
20 Well 1 and the Rosette State Well 3 are of the same
21 water quality as the deeper wells found in the Los Lobos
22 wells, particularly 63-7, the 45-7, the 55-7 and the
23 53-7. So, essentially, the shallow and the deep water
24 are all essentially the same quality.

25 MS. HENRIE: No more questions for

1 Mr. Peery.

2 CHAIRPERSON BAILEY: Do you have
3 cross-examination?

4 MR. LAKINS: Yes, Madam Chair.

5 CROSS-EXAMINATION

6 BY MR. LAKINS:

7 Q. Mr. Peery, what is a pump test?

8 A. Well, a pump test is actually the testing of a
9 pump. The pumping test is the testing of a well.

10 Q. Okay. Well, what was -- because you said
11 you've been involved in hundreds of pump tests.

12 A. Pumping test would be the correct term.

13 A pumping test has to do with pulling water
14 out of a well, whether it's under natural flow of an
15 artesian pressure or through a pump. Even though it's
16 not a pump in the natural flow to the well, it's just
17 referred to as a pumping test or a flow test. Or moving
18 water from a well by various means such as a pump, or
19 airlifting water from a well, some fashion to remove
20 water from a well.

21 And during that time, data is collected in
22 the well, if possible, that the water is being removed
23 from. And if observation wells or other wells in the
24 area are available, to the extent that access can be
25 attained, data is collected from those in terms of the

1 water level in the well during -- water level in the
2 wells during the pumping of the well, or subsequent to
3 the pumping, the recovery of water levels, also.

4 Q. Are you familiar with the test that was done in
5 2012?

6 A. Yes, I am.

7 Q. Was that a pumping test?

8 A. Yes.

9 Q. Because what you just described doesn't include
10 injection. Okay?

11 A. No. Pumping --

12 Q. Is injection -- is injection different than the
13 pumping test?

14 A. Yeah. The pumping test has to do with the
15 removal of water from the well. The injection is the
16 reinstallation of the water back into the formation
17 through another well. So if you're pumping the well,
18 you pull all that water out. You can stuff it back into
19 the ground; you inject it into the ground. Not all
20 pumping tests have a reinjection component.

21 Q. This one did.

22 A. Yes, it did.

23 Q. Were you involved in the design of that 2012
24 pumping injection?

25 A. No, I was not.

1 Q. Now, you heard Mr. Shomaker yesterday testify
2 that as part of that pumping and injection test there
3 was a tracer?

4 A. Yes, I heard him testify to that.

5 Q. Is it normal to use tracer as part of a pumping
6 test?

7 A. Tracers are used during some pumping tests.

8 Q. Have you had experience doing that yourself?

9 A. On a few occasions.

10 Q. What's the goal?

11 A. The goal is to collect more data to see how the
12 water is moving in the aquifer or aquifers that you
13 might be investigating.

14 Q. What is the interest of Los Lobos in this
15 aquifer as it relates to the proposed pumping from 45-7
16 and injecting into 53-7 and 55-7?

17 MS. HENRIE: I have to object. This goes
18 beyond the scope of what I asked this witness.

19 MR. LAKINS: He's talked about pumping
20 tests, his expertise in pumping tests; and I believe
21 that he's spoken to his familiarity with the pumping and
22 injection test that was done, and I think it's
23 allowable.

24 I don't think it's beyond the scope of what
25 you asked him at all.

1 MS. HENRIE: Madam Chair, I asked him about
2 the past, not about the future.

3 MR. LAKINS: That's what I'm -- sorry.

4 CHAIRPERSON BAILEY: He can respond if he
5 has information.

6 A. Could you repeat the question?

7 Q. (BY MR. LAKINS) Sure. You talked about when
8 you do a pumping test and use a tracer. Let me back up,
9 so we can do this again.

10 Why do you use tracer in a pumping test?

11 A. As I previously stated, it's another method to
12 help quantify and qualify where the water's moving from
13 and to.

14 Q. Now, as far as where the water's moving from
15 and moving to in this instance, this project that's
16 being contemplated here, what is your understanding of
17 what the interest in that reservoir is when it concerns
18 Wells 45-7, 53-7 and 55-7?

19 A. I'm really not sure I understand the question.

20 Q. All right. Let me try it this way. Would it
21 be fair to say that for the purposes of this pumping
22 injection test, what you really want to know more than
23 anything is the connectivity between the proposed
24 production well and the proposed injection wells?

25 A. Well, I don't think that that's the total

1 objective of the test, but that's certainly an aspect of
2 the test.

3 Q. Isn't that a pretty important aspect to know,
4 if the water you're pulling out and injecting is
5 basically making a loop?

6 A. That is part of the test, but this is also --
7 this test will also have some components related to the
8 water temperature as well, and so that is another aspect
9 of the test. So it's the hydraulic aspect in terms of
10 how the water's moving through the system in addition to
11 the thermal aspects.

12 Q. Maybe you can help me understand one thing,
13 because I -- nobody yet seems to be able to answer this.
14 This is -- down here at 45-7 is the proposed production
15 well (indicating). 53-7 and 55-7 are the proposed
16 injection wells, yes?

17 A. That's correct.

18 Q. It's established that the general flow of the
19 shallow groundwater is essentially north to south,
20 southeast, northeast, northwest, but essentially that
21 way (indicating). And when this pumping injection test
22 was done, tracer dye was injected way up here
23 (indicating). To me, that just -- I don't know. Just
24 from a common-sense perspective, I just can't understand
25 why you'd put tracer dye way up here (indicating) when

1 this project -- to me, this seems to be the critical
2 question. Do you have any opinion as to why tracer dye
3 would be injected way up here (indicating)?

4 A. As I previously stated, I wasn't involved with
5 the design of that test.

6 Q. Based on your years of experience and hundreds
7 of pumping tests that you've done and being --

8 MS. HENRIE: I have to object. I did not
9 qualify this witness as an expert, and so I don't think
10 it's appropriate to ask him his opinion. He's here as a
11 fact witness, and we're moving beyond the scope of what
12 he came here to do.

13 MR. LAKINS: Well, he's testified as the
14 principal geologist for this project, and he is
15 extremely familiar with the Los Lobos project.

16 MS. HENRIE: You've asked him his opinion.

17 MR. LAKINS: Well, I'm asking him another
18 question.

19 CHAIRPERSON BAILEY: Given his background,
20 he can respond if he knows.

21 MR. LAKINS: Could you read back the
22 question, please?

23 A. I would like to state that I did not represent
24 myself as the principal geologist or hydrogeologist for
25 this project. I need to clarify that.

1 Q. Okay. Because that's what I wrote down.

2 A. I am a principal hydrogeologist at John
3 Shomaker & Associates.

4 Q. And you're familiar with the Los Lobos project?

5 A. That's correct.

6 Q. But you're not familiar enough with the Los
7 Lobos project to answer that question?

8 A. I stated previously, I did not design that
9 pumping test.

10 Q. But you're familiar with the project?

11 A. Correct.

12 Q. And based on your familiarity with the project
13 and the use of tracer in the past, could you give me an
14 opinion as to why you would put --

15 MS. HENRIE: Objection.

16 MR. LAKINS: I haven't asked the question.

17 Q. (BY MR. LAKINS) Could you give me an opinion as
18 to why tracer dye would have been injected up here
19 (indicating)?

20 MS. HENRIE: Again, objection. Questioning
21 his professional opinion is beyond the scope of a fact
22 witness.

23 MR. LAKINS: He's testified that he's --
24 he's the one who is familiar with the project, that he's
25 familiar with the project from a geology and hydrology

1 standpoint.

2 MS. HENRIE: He has not testified -- first
3 of all, his involvement with the project was in 2012.
4 He did not design the test. And as far as the tests
5 going forward, I'm not sure he's even been involved in
6 that either, in the design of those tests. So asking
7 him about these tests is wholly outside the scope of
8 what he's able to testify to as a fact witness.

9 CHAIRPERSON BAILEY: If he is -- if he
10 knows, he can answer. If it's an opinion, the objection
11 is sustained.

12 A. As I stated, I don't know -- I did not design
13 the pumping test that you're talking about, so I can't
14 presume to know why the person that designed that test
15 put tracer in that well.

16 Q. (BY MR. LAKINS) Okay. Tell me what you've done
17 as far as designing any projects moving forward,
18 particularly as it applies to the pending applications.

19 A. I haven't been involved with the design of the
20 proposed tests.

21 Q. Are you familiar with the proposed tests under
22 the G-112 applications pending before this Commission?

23 A. Yes.

24 Q. Can you explain to me the extent of your
25 knowledge about that?

1 A. The extent of my knowledge is that they'll be
2 pumping the 45-7 well and injecting into the 53-7 and
3 the 55-7. That's about the extent of my knowledge at
4 this point.

5 Q. What do you know is the purpose of that?

6 A. To gain more hydraulic information on the site
7 with regard to what will happen to mounding or drawdown
8 as the test occurs and, presumably, to get more thermal
9 data.

10 Q. How long will that take?

11 A. Well, I think you heard Dr. Shomaker testify
12 yesterday that during the 2011 test --

13 MR. LAKINS: I ask that you please don't
14 tell the witness the answer to the question, Mr. Janney.

15 MR. JANNEY: Thank you.

16 Q. (BY MR. LAKINS) The 2012 test?

17 A. The 2012 test. Near the end of that period,
18 the wells had essentially reached an equilibrium state.
19 And so the thought is that running a longer test will
20 give additional data and then allow the equilibrium
21 state to be determined.

22 Q. Do you have an idea as to what the length of
23 that longer test would be?

24 A. I believe the proposed test is 30 days.

25 Q. So as I understand it, the purpose of the test

1 is to give information about the Lightning Dock
2 Geothermal Reservoir?

3 A. Well, I think I've stated a couple of times
4 previously that the intent of the test would be to gain
5 additional hydraulic information on the system, and
6 thermal information.

7 Q. Thermal?

8 A. Heat of the water.

9 Q. Explain to me what your understanding of the
10 objective of the test is and how it relates to gaining
11 information about thermal.

12 A. I am not a geothermal reservoir expert and
13 don't know exactly what would be done in terms of the
14 monitoring of that aspect of the test. I am a
15 hydrogeologist, and the hydraulic portion is what my
16 expertise would be in.

17 Q. Now, turning to your Exhibit 7 that you
18 testified to, none of those six wells that were tested
19 were actually AmeriCulture's wells, correct?

20 A. Certainly, yes. AmeriCulture State Well 1 is
21 indicated by the red circle, and it is in here; in fact,
22 there are multiple data points in this plot from that
23 well.

24 Q. But you didn't test -- you don't have any
25 information on this chart regarding their domestic well

1 A-444?

2 A. No. I haven't been provided any information on
3 that well.

4 Q. And you didn't get any information from
5 AmeriCulture's A-45-A either, did you?

6 A. I did not have any information on that well
7 either.

8 Q. So you don't know for sure if the water quality
9 in AmeriCulture's wells are the same or different, then?

10 A. No. But I think it can be presumed that if the
11 wells are located within the geothermal area, the water
12 quality would be very similar.

13 Q. And if you were provided information that
14 showed the water quality was different -- let me back
15 up.

16 What do you mean by water quality?

17 A. The general chemistry, major cations and anions
18 and other constituents that are found in this water.

19 Q. And there's lots of chemistry in this water,
20 isn't there?

21 A. Well, there are various parameters in there,
22 certainly, yes.

23 Q. There's a lot of chemicals -- or excuse me --
24 chemistry that you find in any given water?

25 A. Yes. There are various parameters [sic] in a

1 water, sure.

2 Q. And if you were provided information showing
3 that the general chemistry out of AmeriCulture's Well
4 A-444 was different than the general chemistry that you
5 have plotted on your Exhibit 7, what would that tell
6 you?

7 A. Well, it depends. First, I'd have to know who
8 collected the sample; how that sample was collected;
9 what lab analyzed it; what qualifications that lab had,
10 the quality assurance, quality-control plan for that
11 lab. Actually, some familiarity with it would be good.
12 One also would have to look at the cations and anions,
13 the balance to make sure that the water quality appears
14 to be good. And then just one sample may not be enough
15 to really assess that. It would probably be good to
16 have several samples to compare with, or at least -- so
17 given all of that, I don't know what it would tell me.

18 MR. LAKINS: Pass the witness.

19 CHAIRPERSON BAILEY: Mr. Brooks?

20 MR. BROOKS: Thank you.

21 CROSS-EXAMINATION

22 BY MR. BROOKS:

23 Q. Mr. Peery, the questions I'm going to ask you
24 are somewhat like those I asked Dr. Shomaker. So there
25 may be a degree of repetition here, but I want to be

1 sure I know what the answers -- what the answers from
2 Los Lobos are.

3 A. Yes, sir.

4 Q. You are familiar with the tests that have been
5 taken -- the pumping tests that have been conducted for
6 this reservoir by Los Lobos or under its auspices?

7 A. Yes, sir.

8 Q. Are you also familiar with what the State
9 Engineer's office would generally be expected to require
10 in order to make an assessment as to whether or not a
11 proposed activity is going to adversely affect existing
12 water rights?

13 A. Yes, sir. I'm familiar with that.

14 Q. Have the tests necessary to give the
15 information the State Engineer will want, have those
16 tests been done?

17 A. Well, I think the test that was done in 2012 is
18 certainly a good start, and the State Engineer should be
19 able to make a determination based on the wealth of
20 information provided therein.

21 Q. So you think the State Engineer could make a
22 determination based on what's already been done?

23 A. I think they could. And certainly if they're
24 like other scientists, myself included, that more data
25 is always better, but I think they would be happy with

1 what's been collected so far.

2 Q. Now, the tests that you are proposing to do,
3 that was the reason for this particular -- or the
4 immediate spur for this particular injection
5 application. Those are not for State Engineer purposes,
6 correct?

7 A. I don't know the answer to that question.

8 Q. Okay. Very good. That's fine.

9 But if the State Engineer's office requires
10 further testing in order to make an opinion -- give an
11 opinion as contemplated by the statute, Section
12 71-5-2.5 -- 2.1, I believe it is, the New Mexico
13 statute, would Los Lobos do that?

14 A. Well, let me first say that I am not the
15 representative for Los Lobos with regard to that, but,
16 also, I have never worked for a client that refused to
17 give the engineer any information. So I'd be shocked if
18 they didn't give the State Engineer the --

19 Q. Well, that may not have been a very
20 well-phrased question.

21 Thank you. That's all.

22 CHAIRPERSON BAILEY: Mr. Warnell?

23 CROSS-EXAMINATION

24 BY COMMISSIONER WARNELL:

25 Q. Mr. Peery, you talked about pump tests --

1 pumping tests and tracer tests.

2 A. Yes, sir.

3 Q. So on the pumping tests, they don't normally --
4 you wouldn't normally run tracer with a pumping test,
5 would you?

6 A. Well, not with the work that our firm normally
7 does. A lot of what we do is water resource development
8 related to municipal supply or -- for instance, for the
9 Interstate Stream Commission augmentation wells for the
10 Pecos and things of that nature. So it's not as common
11 in our industry.

12 However, based on my conversations with
13 Mr. De Rocher, who testified yesterday, it's quite
14 common in the -- in the geothermal business to look at
15 how water moves from the reservoir, so they can maximum
16 their production of heat.

17 Q. So in a pumping test, you're pumping water out
18 of a reservoir to the surface?

19 A. Yes. You pump it out to the surface.

20 Q. And what are you doing with that water once it
21 gets to the surface?

22 A. In most cases, water is simply discharged to
23 the ground surface. However, in this case, since
24 they're going to have a close-looped system, where 100
25 percent of the water they pump is going to go back into

1 the ground during operation, they're reinjecting to see
2 how that will react.

3 Q. So to do a tracer test means you have to have
4 some reinjection system?

5 A. Yes. That's the best way to do it, because
6 you're putting that water in as you create a circulating
7 system to see how it moves through. That's the better
8 way to do it.

9 Q. And normally when a pumping test is done, the
10 operator just decides to do that; lets the proper
11 agencies know that he's doing that. But is there any
12 requirement that he gets permission or approval to do
13 that?

14 A. I don't know the answer to that. For the
15 injection?

16 Q. No, just for the pumping test.

17 A. Oh, for the pumping test. No, there is
18 generally no requirement to the State Engineer's office
19 for a pumping test. I think, in fact, it would
20 overwhelm them with paperwork. When you consider the
21 number of domestic wells and municipal wells that are
22 drilled, it would overwhelm them. They're just
23 routinely done. It's very uncommon to have the State
24 Engineer permit something like that.

25 Q. Would you say the same thing about a tracer

1 test? Is that pretty much a routine thing that just
2 happens in day-to-day operations?

3 A. A tracer test isn't as routine as a pumping
4 test. Pumping tests are much more routine.

5 Q. Okay. That's all I have.

6 CHAIRPERSON BAILEY: Mr. Balch?

7 CROSS-EXAMINATION

8 BY COMMISSIONER BALCH:

9 Q. Are you familiar with the wells around this
10 project area?

11 A. I'm familiar mostly with the wells that were
12 monitored during the pumping and injection tests, would
13 be the greatest area I'm familiar with.

14 Q. Well, going back to Figure 2, again, the permit
15 application, that figure right there in the back, there
16 is a tabulated number of wells, seven or eight of them.
17 I'm trying to figure out which well Mr. Lakins was
18 referring to, GS or GC-44. Do you think that might be
19 what is labeled number 12 on this map?

20 A. I don't know. I also looked at this figure
21 yesterday during someone else's testimony and couldn't
22 ascertain which well he was talking about either.

23 Q. All right. On Figure -- in Exhibit 7, the
24 figure of the Piper plot, are all of these wells thermal
25 wells?

1 A. Yes, either the shallow thermal or the deep
2 thermal.

3 Q. That's all my questions. Thank you.

4 A. Thank you.

5 CHAIRPERSON BAILEY: I don't have any
6 questions.

7 THE WITNESS: Thank you.

8 MS. HENRIE: We don't have any more
9 questions for this witness, Madam Chair.

10 CHAIRPERSON BAILEY: You may be excused.

11 MS. HENRIE: Madam Chair, one of the
12 witnesses from yesterday, Mr. De Rocher, on reflection,
13 realized that he had said something incorrect to the
14 Commission and wanted to correct the record. If I may
15 recall him, and I brought an exhibit as well to help
16 with that correction, if you will allow it.

17 CHAIRPERSON BAILEY: Yes, fine.

18 MS. HENRIE: Call Mr. De Rocher.

19 CHAIRPERSON BAILEY: You are still under
20 oath, sir.

21 TED DE ROCHER,
22 after having been previously sworn under oath, was
23 recalled and questioned and testified as follows:

24 MS. HENRIE: If there is no objection, I
25 would like to show the Commission this chart in

1 connection with the witness' testimony and enter it as
2 Exhibit 10.

3 MR. LAKINS: Before it's entered, I'd like
4 to hear the testimony.

5 CHAIRPERSON BAILEY: (Indicating.)

6 THE WITNESS: Fair enough.

7 REDIRECT EXAMINATION

8 BY MS. HENRIE:

9 Q. Mr. De Rocher, you have expressed an intention
10 to correct something that you said in yesterday's
11 testimony.

12 A. Oh, yes. Actually, this is when I was
13 discussing the -- I talked about there is a variety of
14 volumes required to heat up the pump to generate one
15 megawatt of power net, which is the difference between
16 what you pull out, generate through the power plant and
17 then minus the load -- the electrical load required to
18 run the pumps and the power plant. And I said the rule
19 of thumb is roughly 1,500 gallons per megawatt. And the
20 Commissioner, properly, was trying to ask me: Was that
21 250? And I misspoke, and I said, No, it was at 290 to
22 305, I think was the answer. The rule of thumb,
23 according to the chart, is around the 240- to 250-degree
24 Fahrenheit range. And that's all I was trying to do.

25 But I had this chart that I had generated

1 years ago at another community meeting to also educate
2 the audience a little more, to show the relationship
3 between temperatures and generation, and that was useful
4 information. Because I get asked quite a bit when I'm
5 at community meetings, Hey, I have a 220-degree well on
6 my property, how much -- you know, how much power can I
7 generate? So this is just a neat, kind of, chart to
8 use.

9 MS. HENRIE: That was my only question.

10 I would like to move, again, to enter
11 Exhibit 10 as an exhibit.

12 MR. LAKINS: No objection.

13 CHAIRPERSON BAILEY: Do you have any
14 questions?

15 MR. LAKINS: No, ma'am.

16 MR. BROOKS: No questions.

17 RECROSS EXAMINATION

18 BY COMMISSIONER BALCH:

19 Q. I can look back at Figure 10 to answer my
20 question, but since you're sitting there --

21 A. Sure.

22 Q. So the water temperature for the deep
23 geothermal at this site, you said yesterday, was around
24 300 degrees?

25 A. I think the data I saw from the most recent

1 well was about -- I think it said it was 305. But I
2 actually haven't gone through the data from the older
3 pump test to know what the other wells were. So I just
4 know from, like I said, what came from the most recent
5 run.

6 Q. So on the charted figure -- or Exhibit 10 --

7 A. Right.

8 Q. -- what would the -- what kind of numbers --

9 A. That would be around 500, a little bit below
10 500. But, again, these are sustained temperatures. I
11 mean, just because you have an initial temperature in
12 the well doesn't mean that balances out once things hit
13 equilibrium.

14 Q. But at 300 you would need around 500 gallons
15 per minute?

16 A. Roughly, per megawatt minute.

17 COMMISSIONER BALCH: Are we going to be
18 able to have copies of Exhibit 10?

19 MS. HENRIE: May I approach?

20 CHAIRPERSON BAILEY: Yes, please do.

21 And Exhibit 10 is admitted into the record.

22 (Los Lobos Exhibit Number 10 was offered
23 and admitted into evidence.)

24 COMMISSIONER BALCH: Thank you.

25 THE WITNESS: Sure. No problem. Is that

1 it?

2 CHAIRPERSON BAILEY: Now that we have
3 Exhibit 10, do you have any other questions?

4 COMMISSIONER BALCH: I asked my questions.
5 He answered it. Thank you.

6 THE WITNESS: You're welcome.

7 CHAIRPERSON BAILEY: You may be excused.
8 Do you have any other witnesses?

9 MS. HENRIE: No, Madam Chair, no other
10 witnesses.

11 I do have an announcement. Our team will
12 be available to resume this hearing any day and time
13 except Wednesday.

14 CHAIRPERSON BAILEY: Obviously, we will not
15 be able to complete your case, Mr. Lakins, this morning,
16 so we might as well discuss now next week's calendar.
17 Are all parties available Monday at 9:00?

18 MR. LAKINS: Monday at 9:00? No, ma'am,
19 I'm not.

20 (Discussion off the record.)

21 CHAIRPERSON BAILEY: Okay. Then Porter
22 Hall is available on Tuesday. We'll continue this case
23 after we are done this morning until Tuesday, 9:00, in
24 Porter Hall.

25 All right. Mr. Lakins, are you ready?

1 MR. LAKINS: No, not before a break.

2 CHAIRPERSON BAILEY: All right. We'll take
3 ten.

4 (Break taken, 9:22 a.m. to 9:31 a.m.)

5 CHAIRPERSON BAILEY: Mr. Lakins, are you
6 ready to call your next witness?

7 MR. LAKINS: Almost. Okay. Just give me a
8 moment.

9 Call Damon Seawright.

10 DAMON E. SEAWRIGHT, Ph.D.

11 after having been first duly sworn under oath, was
12 questioned and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. LAKINS:

15 Q. Good morning, Mr. Seawright. Would you state
16 your name for the record, please?

17 A. Damon Seawright.

18 Q. Mr. Seawright, could you describe for me your
19 education?

20 A. I received my Bachelor of Science degree and
21 subsequently my doctorate degree at the University of
22 Washington School of Fisheries.

23 Q. You said you have a doctorate?

24 A. I have a Ph.D. in fishery science, and my
25 specialty is aquaculture.

1 Q. Could you speak up just a little bit?

2 A. Is this mike hot?

3 CHAIRPERSON BAILEY: All of the mikes are
4 hot.

5 Q. (BY MR. LAKINS) Talk louder.

6 A. I've got a Ph.D. from the University of
7 Washington, School of Fisheries. The Ph.D. was in
8 fishery science, and my specialty and the emphasis of my
9 doctoral research was aquaculture.

10 Q. What is aquaculture?

11 A. Aquaculture is the controlled cultivation of
12 aquatic animals for human benefit.

13 Q. What does that mean in English?

14 A. Growing fish or growing other aquatic animals,
15 and in most cases for food purposes.

16 Q. What did you do for your Ph.D. course of study?

17 A. For the Ph.D., my area of research dealt with
18 the integration of aquaculture and recirculating
19 systems. These are high-tech systems that employ an
20 adaptation of municipal wastewater treatment fish
21 culture. Basically, it allows us to use a lot less
22 water and accomplish the same thing with fish at higher
23 densities.

24 My dissertation research dealt with the
25 integration of those types of systems with the

1 hydroponic cultivation of plants and the optimization of
2 that interface. That disci- -- that combined discipline
3 is referred to as aquaponics.

4 Q. When did you obtain your Ph.D.?

5 A. 1995.

6 Q. And have you put your learning to practical
7 application?

8 A. Certainly. Beginning in 1990, I began working
9 at a variety of aquaculture facilities when I had time
10 in between my educational activities. And at the end of
11 my Ph.D., at about the time I became -- I successfully
12 defended my dissertation, I -- we founded AmeriCulture
13 and relocated to Animas, New Mexico to begin
14 AmeriCulture.

15 Q. Where did you start AmeriCulture?

16 A. AmeriCulture was started -- has always been in
17 Animas, New Mexico. The company itself was incorporated
18 in 1994. We did not actually begin operations there
19 until the 2nd of August 1995.

20 Q. What do you do?

21 A. AmeriCulture does two primary things, has two
22 products that it produces themselves. The first, which
23 represents a lesser contribution to our sales, is adult
24 fish. But we are primarily a producer -- a hatchery
25 producer of high-performance Nile tilapia fingerlings

1 for resale to growers throughout the world.

2 And we are the only -- AmeriCulture is the
3 only disease-free hatchery, that we are aware of, in the
4 Western Hemisphere, and we have the largest production
5 facility among tilapia hatcheries in the United States.
6 We are the only certified supplier of tilapia
7 fingerlings for the Nation of Canada. We are certainly
8 the largest in the United States. We ship to Israel,
9 Venezuela, Mexico, all over the world. We're shipping
10 tonight to the United Kingdom.

11 Q. What does it take to be recognized as the only
12 disease-free hatchery in the Western Hemisphere?

13 A. A great deal of sacrifices. I was schooled in
14 Washington, and I dragged my pregnant wife down to
15 Animas, New Mexico 17 years ago.

16 And in order to remain disease-free, you
17 have to remain isolated from all sources of risk, and
18 that's contaminated water, contaminated personnel,
19 contaminated fish. The fact that there are no natural
20 bodies of water in the region is very important for us
21 in order to maintain that disease-free status. In fact,
22 it is our niche in the market. The recirculating
23 systems which represent the bulk of the buyers that buy
24 our product, these pathogens will rapidly amplify in
25 their systems, so they need very clean fish going in.

1 Q. Now, you also said that you're the only
2 certified supplier to Canada. What does that mean?

3 A. That's correct. Canada is very protective of
4 their -- both their natural fisheries and their
5 aquaculture fisheries. The most common aquaculture
6 species is salmon. In Canada, they're highly protective
7 of that. There are a list of pathogens of significant
8 concern to that industry, and you have to become
9 certified free of those. It involves external
10 parasites, bacterial pathogens and viral pathogens, and
11 we are certified free of all those particular pathogens.

12 And aside from the very few producers that
13 produce their own fish or those that obtain them
14 illegally, we supply every buyer of tilapia in the
15 Nation of Canada.

16 Q. If your company went out of business, how would
17 that affect the supply to Canada?

18 A. Oh, it would terminate the supply to all of the
19 customers that buy from us. It would be devastating.
20 The single largest producer in all of Canada is totally
21 reliant upon us. It would be devastating to the tilapia
22 market of Canada if we were taken out, and that could
23 very well have occurred during the aftermath of the
24 tracer study, which I'm sure we'll cover in detail
25 later.

1 Q. Mr. Seawright, I want you to back up a bit in
2 time. I want to switch to your involvement with Los
3 Lobos. Okay?

4 A. (Indicating.)

5 Q. The first thing I would like you to address is
6 all of the public comment that was made yesterday.
7 Okay?

8 A. Uh-huh.

9 Q. And is it your opinion that the public comments
10 that were made yesterday were reflective of the entire
11 sentiment in your area?

12 A. Certainly not.

13 Q. Explain that, please.

14 A. Well, I probably run in a different crowd than
15 Kacie Peterson does, but I'll give you a very plain
16 example. It was the most recent diversionary --
17 nonconsumptive diversionary permit applied for by Cyrq,
18 and it was responded to by more than 60 protests
19 locally. And that proceeding is still active, just in a
20 stay. But that's highly reflective, in my experience,
21 of the local sentiment. There is a deep-seated concern
22 about the interactions between the production and
23 injection scheme that has been presented by Cyrq and its
24 interaction in a very active agriculture area.

25 Now, of course, we're very close. We're

1 about a third of a mile from the proposed project site.

2 But not much further than that to the south is a very
3 large pecan farmer, and he is deeply concerned. And he,
4 of course, was one of those 60-plus protestants and has
5 worked with us in opposing that application.

6 So just in nutshell, I'd say certainly what
7 we heard yesterday is not at all representative of
8 the -- what I would say is the mean sentiment of the
9 area.

10 Q. I want to ask you about one thing that kind of
11 popped into my mind, and that was that you had not
12 protested the well application. Do you recall that from
13 yesterday?

14 A. I do. And you're probably referring to the
15 statement that we did not protest the use of Well 45-7
16 as the injection well.

17 Q. Did you or did you not?

18 A. Well, we didn't get a protest in within the
19 20-day time limit. However --

20 Q. Okay. Your failure to do that, was that a
21 conscious decision on your part, to not protest that
22 Well 45-7 application?

23 A. No, it was not a conscious decision. It was
24 our intent.

25 Q. What happened?

1 A. Well, a combination of the fact that I work
2 80-plus hours a week at AmeriCulture and the application
3 protest is required within 20 calendar days. I
4 understood that we had 20 business days, and that's what
5 happened. By the time that I expressed my intent to
6 protest, in my discussions with David Brooks and Carl
7 Chavez in the Oil Conversation Division, we missed the
8 cutoff date.

9 Mr. Brooks' advice -- well, I won't say
10 advice. He did -- he made a statement that I could
11 submit comments at that point, despite the fact that the
12 closure had occurred for the protest period.

13 Q. Did you do that?

14 A. I certainly did.

15 Q. Now, what I'm putting up on the screen here is
16 not an exhibit but a visual aid for representative
17 purposes. Is this the letter that you wrote?

18 A. That is the letter I wrote in response to my
19 conversation with Mr. Brooks.

20 Q. Could you kind of run down -- you don't have to
21 read it verbatim, but could you kind of run down what
22 your comments were in the, essentially, informal
23 protest, if we could call it that, concerning Well 45-7?

24 A. Sure. The one that I recall, short of the
25 reading the entirety of that, is that it was our

1 understanding that the legislation that resulted from
2 House Bill 201 was going --

3 Q. Now, that's New Mexico Statute 71-5-2.1 that
4 Mr. Brooks was questioning Mr. Shomaker about?

5 A. I presume. I'm not familiar with the actual
6 statute number, but I assume that's the one.

7 Q. Okay. Okay. Please continue.

8 A. That requires that water be produced from and
9 returned to the same resource. The initial samples --
10 sample that was listed on the Oil Conversation Division
11 Web site indicated fresh water in Well 45-7 and a
12 low-fluorite level.

13 Well 55-7 chemistry -- it's a 27-year-old
14 well, and this particular application involved, as we
15 understood, the pumping of Well 55-7 injection into
16 45-7. We knew from a long history of water quality
17 analyses in Well 55-7, the fluorite content of that was
18 much higher. And by pumping from 55-7 into 45-7
19 certainly would have resulted in an exceedance of
20 background of 45-7 according to the original 45-7
21 standard.

22 Q. Okay. Hold on. Back up just a little bit.
23 You had mentioned sampling that was on the OCD Web site
24 and previous samples.

25 A. Uh-huh.

1 Q. Tell me about these previous samples.

2 A. There may be more. However, my understanding
3 is that there have been three samples collected under
4 differing conditions for Well 45-7. The initial well
5 sample indicated fresh water. When I say fresh water,
6 the TDS was less than 600 milligrams-per-liter TDS,
7 which is slightly better than our fresh water, our fresh
8 cold water that we use as part of the water supply for
9 our aquaculture facility. The subsequent water samples
10 showed much higher TDS levels. So a significant change
11 occurred between those sampling events.

12 But I based this letter based on the
13 initial sampling. In fact, I didn't become aware of the
14 subsequent samples until Mr. Janney's response to this
15 letter.

16 Q. And before we get to that, did you have other
17 concerns about this 45-7, which you set out in the
18 letter?

19 A. Oh, yeah. You know, any freshwater well -- the
20 whole concept of contaminating a previously untapped,
21 largely low TDS, potential supply of usable water with
22 salinated geothermal water, high fluoride content is
23 environmentally offensive to me.

24 Q. Now, you mentioned the response that you got
25 from Mr. Janney.

1 A. Yes.

2 Q. What I'm showing you is the GTHT-0001. This is
3 the response letter that you received from Mr. Janney?

4 A. It is.

5 Q. So talk me through what you just said, that you
6 learned from Mr. Janney's response to the letter?

7 A. It's been some time since I've read that
8 letter, so I haven't committed its basic elements to
9 memory. In reality, it was a highly technical response,
10 so it was clearly out of my area of expertise. So this
11 is where I deferred the content of the response largely
12 to Jim Witcher, our geothermal hydrologist. I, of
13 course, read the response.

14 Q. And, of course, he'll talk about that.

15 So is it fair to say, then, as far as Well
16 45-7 went, you didn't just totally acquiesce and agree
17 to the permitting of that well?

18 A. No. I actually intended on submitting a
19 protest immediately, and just with my schedule, it just
20 slipped through the cracks. And as far as the 20-day
21 calender versus the 20-day business day understanding
22 that I had, I just missed the opportunity.

23 MR. LAKINS: I'm going to go to the next
24 slide here, considering it's nine minutes until 9:00,
25 Madam Chair.

1 CHAIRPERSON BAILEY: Until 10:00.

2 MR. LAKINS: Excuse me. Until 10:00. We
3 basically have nine minutes. I want to just jump around
4 here a little bit.

5 Q. (BY MR. LAKINS) Let's talk about the impact on
6 the tracer test on you.

7 MS. HENRIE: Madam Chair, here's where my
8 objections start, because this slide is titled
9 Contamination -- "Water Contamination." And the
10 characterizations on this path of discussion about water
11 contamination leading to the tracer test, I have -- (A)
12 I'm not sure that it's relevant, but (B), I think it's
13 meant to inflame the Commission; it's meant to make my
14 client look like a bad corporate actor.

15 And I have to ask, if Rhodamine is within
16 any of the contaminants in the Water Quality Control
17 Commission's list. It's not. And to characterize,
18 certainly, an unfortunate situation involving Rhodamine
19 now as contamination, I think it's only meant to inflame
20 the Commission. And I just need to express my concerns
21 and object to that characterization.

22 And it's also not relevant to issues that
23 are the focus of this hearing, which is the water rights
24 and whether there is different chemistry, natural
25 chemistry, that is going to be causing the water -- the

1 water to exceed any of those water-quality standards.
2 And this is past. It's unfortunate. It shouldn't have
3 happened, I will say that. But they are calling it
4 water contamination only to inflame the Commission. So
5 I have to object.

6 MR. BROOKS: Madam Chair, we concur that
7 the tracer test is irrelevant to this proceeding. Of
8 course, we also acknowledge that considerable testimony
9 about it has come in without any objection.

10 MR. LAKINS: Considering that there has
11 been considerable testimony about the tracer test, Your
12 Honor, Madam Chair, the door is open on that.

13 Similarly, the impacts of the tracer test
14 go directly to NMAC 19.14.26.8(B), which has to do with
15 sealing off strata. That section says: "All waters of
16 present or probable" -- "present or probable future
17 value for domestic, commercial, agricultural or stock
18 purposes shall be confined to their respective strata
19 and shall be adequately protected by methods approved by
20 the Division."

21 What we have here is agriculture, and what
22 we have here is the impact of the tracer test that was
23 done on my client. It's extremely relevant to show
24 whether or not the NMAC has been complied with. It goes
25 to show whether or not this Commission needs to consider

1 appropriate language in any permit that may be issued to
2 address what has happened to ensure that it doesn't
3 happen again and that the NMAC dead-on point applicable
4 section is recognized by the Commission.

5 And we believe it's not just attempting to
6 inflame but to show actual impairment of the use of our
7 water rights, which is one thing that the State Engineer
8 opinion should take into account, as well as the
9 existing impairment of our geothermal right and how it
10 damaged our use of a geothermal resource already. All
11 of that's on the table here. So I would contend that
12 this is a completely appropriate line of questioning to
13 go into.

14 MR. BROOKS: Madam Chair, may I ask you to
15 ask Mr. Lakins to repeat the citation on the regulation
16 that he cited?

17 MR. LAKINS: NMAC 19.14.26.8(B), which is
18 the sealing off of strata.

19 MR. BROOKS: Thank you.

20 MS. HENRIE: Madam Chair, the question of
21 the past -- sealing off the strata in past versus what's
22 actually on the table now, those are separate questions,
23 I believe.

24 Again, Rhodamine is an EPA-approved tracer.
25 And at a minimum, I think that presenting these slides

1 do not portray a legal conclusion that Rhodamine dye is
2 contamination.

3 I think it's -- if this evidence is going
4 to be presented, about the impairment of water rights
5 and so forth, I think it can be done without
6 exaggeration and without jumping to conclusions like
7 contamination.

8 CHAIRPERSON BAILEY: Counsel?

9 MS. BADA: I would allow it.

10 CHAIRPERSON BAILEY: We will allow it.

11 MR. LAKINS: Considering the time now, Your
12 Honor, and this line of questioning will take more than
13 five minutes, could we stop and let me resume here when
14 we reconvene Tuesday morning?

15 CHAIRPERSON BAILEY: Yes. We will continue
16 this case until Tuesday, in Porter Hall, at 9:00.

17 Is there any other business before the
18 Commission this morning?

19 Then we are in recess and will continue on
20 Tuesday.

21 (The proceedings recessed, 9:58 a.m.)

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1 STATE OF NEW MEXICO

2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

5 I, MARY C. HANKINS, New Mexico Certified

6 Court Reporter No. 20, and Registered Professional

7 Reporter, do hereby certify that I reported the

8 foregoing proceedings in stenographic shorthand and that

9 the foregoing pages are a true and correct transcript of

10 those proceedings that were reduced to printed form by

11 me to the best of my ability.

12 I FURTHER CERTIFY that the Reporter's

13 Record of the proceedings truly and accurately reflects

14 the exhibits, if any, offered by the respective parties.

15 I FURTHER CERTIFY that I am neither

16 employed by nor related to any of the parties or

17 attorneys in this case and that I have no interest in

18 the final disposition of this case.

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