

1 STATE OF NEW MEXICO  
2 ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT  
3 OIL CONSERVATION COMMISSION  
4 STATE LAND OFFICE BUILDING  
5 SANTA FE, NEW MEXICO

6 18 May 1989

7 COMMISSION HEARING

8 IN THE MATTER OF:

9 Application of the Oil Conservation Division to consider amendments to Division Rules 8, 312, 313, and 711 to require appropriate measures be taken to prevent loss of migratory waterfowl resulting from contact with oily waste in oil field operations. CASE 9672

10 BEFORE: William J. Lemay, Chairman  
11 Erling Brostuen, Commissioner  
12 William M. Humphries, Commissioner

13 TRANSCRIPT OF HEARING

14 A P P E A R A N C E S

15 For the Division: Bridget Jacober  
16 Attorney at Law  
17 State Land Office Bldg.  
18 Santa Fe, New Mexico  
19  
20  
21  
22  
23  
24  
25

## I N D E X

## STATEMENT BY MR. SPEAR

6

## TOM M. LANE

Direct Examination by Ms. Jacober

9

Questions by Mr. Chavez

19

## JOE E. KING

Direct Examination by Ms. Jacober

20

Questions by Gary Stevens

31

Questions by Mr. Humphries

32

Questions by Mr. Brostuen

37

Questions by Mr. Lemay

38

Questions by Mr. Hubert

40

Questions by Mr. Lane

41

## DAVID G. BOYER

Direct Examination by Ms. Jacober

43

Questions by Mr. Spear

56

Redirect Examination by Ms. Jacober

60

Questions By Ray Miller

61

Questions by Mr. Brostuen

62

Redirect Examination by Ms. Jacober

64

## I N D E X Cont'd

Questions by Mr. Humphries	66
Questions by Mr. Lemay	67
STATEMENT BY MR. SPEAR	71
STATEMENT BY MR. KING	73
STATEMENT BY MR. SEXTON	74
STATEMENT BY MR. HUMPHRIES	75
TOM M. LANE RECALLED	
Redirect Examination by Ms. Jacober	78
STATEMENT BY DAN GIRAND	80
STATEMENT BY JERRY SILLERUD	86

## E X H I B I T S

Division Exhibit One, Docket	
Division Exhibit Two, Application	
Division Exhibit Three, Letter	53
Division Exhibit Four, Letter	53
Division Exhibit Five, Memo	
Division Exhibit Six, Agenda	

## E X H I B I T S Cont'd

1		
2		
3	Division Exhibit Seven, List	
4	Division Exhibit Eight, Minutes	
5	Division Exhibit Nine, List	
6	Division Exhibit Ten, Memorandum	22
7	Division Exhibit Eleven, Committee Report	23
8	Division Exhibit Twelve, Letter	24
9	Division Exhibit Thirteen, Letter	
10	Division Exhibit Fourteen, Letter	25
11	Division Exhibit Fifteen, Memorandum	24
12	Division Exhibit Sixteen, Comments	46
13	Division Exhibit Seventeen, Comments	46
14	Division Exhibit Eighteen, Comments	46
15	Division Exhibit Nineteen, Comments	46
16	Division Exhibit Twenty, Comments	46
17	Division Exhibit Twenty One, Comments	46
18	Division Exhibit Twenty Two, Comments	46
19	Division Exhibit Twenty Three, Comments	46
20	Division Exhibit Twenty Four, Comments	46
21	Division Exhibit Twenty Five, Comments	46
22	Division Exhibit Twenty Six, Comments	46
23	Division Exhibit Twenty Seven, House Bill	
24	Division Exhibit Twenty Eight, OCD Proposal	28
25	Division Exhibit Twenty Nine, Briefing Book	18

1 MR. LEMAY: This is the Oil  
2 Conservation Commission. My name is Bill Lemay. At my  
3 left is Commissioner Brostuen, on my right, Commissioner  
4 Humphries. We are the Commission and we're here to hear  
5 Case Number 9672, the application of the Oil Conservation  
6 Division to consider amendments to Division Rules 8, 312,  
7 313 and 711, to require appropriate measures be taken to  
8 prevent loss of migratory water fowl resulting from con-  
9 tact with oily waste in oil field operations.

10 This case was misadvertised  
11 and 711 was a typo on that, it was 7111 in the ad, so the  
12 case will be readvertised with corrections for the June  
13 15th hearing.

14 At this time I would like to  
15 call for appearances in Case 9672.

16 MS. JACOB: Appearing for  
17 the Oil Conservation Division is Bridget Jacober. I have  
18 three witnesses, Tom Lane, Joe King and Dave Boyer.

19 I've handed to you each a set  
20 of the exhibits that we would ask that you take administra-  
21 tive notice of and include in the administrative record.

22 MR. LEMAY: Thank you, Ms.  
23 Jacober.

24 Additional appearances in Case  
25 9672.

1                               At the conclusion of the test-  
2 imony what we will do is take statements in this case, so  
3 those of you that don't want to give direct testimony can  
4 put statements into the record.

5                               At this time will the witnes-  
6 ses stand?

7  
8                               (Witnesses sworn.)  
9

10                              MR. LEMAY: Thank you.

11                              Prior to beginning I think  
12 Mike Spear with the Federal Fish and Wildlife Service would  
13 like to say a few words because the problem initially came  
14 to our attention because of he and his staff's efforts.

15                              MR. SPEAR: Good morning. My  
16 name is Michael J. Spear. I'm Regional Director of the U.  
17 S. Fish and Wildlife Service in the southwestern region  
18 with offices located in Albuquerque.

19                              A serious problem regarding  
20 the loss of migratory birds due to their contact with oil  
21 and oil byproducts has been identified. In this generally  
22 arid area any sludge pits, oil pits, brine pits, open  
23 tanks, et cetera become invitations to migratory birds and  
24 other wildlife where they can become contaminated and sub-  
25 sequently die.

1                   Although some estimates of  
2 annual losses are as high as 450,000, we conservatively es-  
3 timate the losses of 100,000 ducks per year in the appro-  
4 ximately 120,000 square mile area of eastern New Mexico,  
5 west Texas, Texas Panhandle, western Oklahoma, southeast  
6 Colorado and southwest Kansas.

7                   The Migratory Bird Treaty Act,  
8 a treaty between the United States, Great Britain on behalf  
9 of Canada, and Mexico, provides for the international pro-  
10 tection, management and enhancement of migratory bird re-  
11 sources.

12                   As a result the death of even  
13 one migratory bird, intentional or not, unless authorized  
14 by the Fish and Wildlife Service, is a criminal act and a  
15 violation of the law carrying with it a potential fine of  
16 \$10,000.

17                   We have elected, however, to  
18 avoid court action and media coverage at this time; rather  
19 we are seeking a spirit of cooperation where State and Fed-  
20 eral agencies, industry and private interests work together  
21 to resolve the issue. The process is working well at this  
22 time, particularly in New Mexico. I commend the Oil and  
23 Gas Division, the Fish and Game Department, and BLM and  
24 industry for this achievement.

25                   Although we are already seeing

1 some improvements for the benefit of wildlife, there is a  
2 lot more to do.

3 We submitted comments and sug-  
4 gestions regarding the proposed rule revisions in early  
5 April. Basically we made some editorial comments and sug-  
6 gested that all reference to the statements "or deemed non-  
7 hazardous" be eliminated. Our rationale is that this lan-  
8 guage is too general and would permit the continued losses  
9 of migratory birds and other wildlife because someone  
10 simply "deemed" the facilities non-hazardous.

11 There are several deterrence  
12 methods available, flagging, scarecrows, exploders, grid  
13 wires, audio broadcasts, netting, and others; however, it  
14 appears only netting and screening are dependable.

15 Thus you are right on target  
16 on the proposed rules by requiring netting on tanks and  
17 pits. We suggest, however, that the words "below grade" be  
18 eliminated from the proposed rules in view of the fact that  
19 open tanks are hazardous to wildlife, particularly raptors,  
20 and some smaller migratory birds regardless of the grade or  
21 level of the tank.

22 Several other states, such as  
23 California, have virtually eliminated wildlife losses in  
24 oil pits and tanks by first of all eliminating as many  
25 tanks as possible and secondly, netting the remaining pits



1 and open tanks.

2 We respectfully request your  
3 continuing efforts which will result in resolving the  
4 problem by October 1 of '89. My staff and I are available  
5 to work further with you and to assist wherever possible.

6 And again in closing I want to  
7 compliment the effort to date, the very diligent effort to  
8 go right to the regulatory process, involvement of the oil  
9 industry, as far as the Fish and Wildlife Service is con-  
10 cerned, we are very pleased with the response in New Mexico  
11 and will continue assisting in any way we can.

12 Thank you, Mr. Chairman.

13 MR. LEMAY: Thank you, Mr.  
14 Spear.

15 Ms. Jacober, you may proceed.

16 MS. JACOBER: The OCD will  
17 call its first witness, Tom Lane.

18  
19 THOMAS LANE,  
20 being called as a witness and being duly sworn upon his  
21 oath, testified as follows, to-wit:

22  
23 DIRECT EXAMINATION

24 BY MS. JACOBER:

25 Q Mr. Lane, would you please state your

1 name for the record?

2 A Yes. It's Thomas M. Lane.

3 Q And your employment capacity?

4 A I am a Special Agent with Law Enforce-  
5 ment with the U. S. Fish and Wildlife Service.

6 Q And your training.

7 A I was originally a Georgia Conservation  
8 Officer stationed in Savannah, Georgia.

9 I received training there in the laws of  
10 Georgia, conservation laws, game and fish laws.

11 I then went to work for the U. S. Fish  
12 and Wildlife Service and I received training at the Federal  
13 Law Enforcement Training Center in Georgia where I received  
14 twelve weeks of training in Federal law enforcement and an  
15 additional six weeks of training in conservation law en-  
16 forcement.

17 Q And you have testified before in admin-  
18 istrative hearings in State and Federal courts?

19 A Yes, I have.

20 Q And your credentials were accepted and  
21 made a matter of record in those hearings?

22 A Yes, they were.

23 Q You were qualified at that time as a  
24 Special Agent or a Federal Game Warden?

25 A Yes, I was.

1 MS. JACOBBER: Are the witness'  
2 qualifications acceptable?

3 MR. LEMAY: His qualifications  
4 are acceptable.

5 Q Mr. Lane, what are your responsibili-  
6 ties concerning migratory birds?

7 A Well, the Migratory Bird Treaty Act sets  
8 up rules and regulations for how the birds can be, as far  
9 as their protection. I am charged with enforcing the  
10 Migratory Bird Treaty Act and any regulations which have  
11 been promulgated based on that Act.

12 Q Can you briefly describe the Act?

13 A The Act itself was designed to protect  
14 certain migratory birds which don't recognize state or  
15 national boundaries. They do migrate from jurisdiction to  
16 jurisdiction and as such they needed to be protected  
17 throughout their range, and that's the general purpose of  
18 the Migratory Bird Treaty Act.

19 Q Have you determined that a problem  
20 exists with migratory birds contacting the oil (unclear)?

21 A Yes.

22 Q Have you determined that that problem  
23 exists in New Mexico?

24 A Yes, it does.

25 Q Can you briefly describe the problem?

1           A           What I have found in my investigation,  
2 and by no means is it scientific, it's just strictly a law  
3 enforcement activity, I have found that throughout New  
4 Mexico in areas where oil and gas have been produced, as  
5 well as refined, that there are associated with those wells  
6 and production facilities pits or tanks or ponds which  
7 contain generally a produced water or waste water from the  
8 production facilities, and on these -- these ponds and pits  
9 and sumps I found a quantity of oil varying from a thin  
10 film to a thick sludge, and when a bird comes in contact  
11 with this thick oil or even the thin film of oil, the oil  
12 coats their feathers and they will eventually die from that  
13 coating.

14           Q           And you've found birds that have been  
15 killed by this contact in New Mexico?

16           A           Yes, I have.

17           Q           And where did you find them?

18           A           I found them in virtually any pit asso-  
19 ciated with oil production that has any oil on the surface.  
20 If the oil is exposed, the potential is there for the bird  
21 to be caught in it. I find them in the fiberglass tanks at  
22 the well sites; the open pits at the well sites. I find  
23 them in water disposal facilities which have a surface of  
24 oil on the water.

25           Q           You've made investigative trips to

1 southeast New Mexico?

2 A Yes, I have.

3 Q Can you describe those trips?

4 A Normally they consist of a 3 to 4-day  
5 trip to the southeastern corner of New Mexico. I will go  
6 into the oil fields in that area, I look for pits or tanks  
7 or anything associated with the production of oil where  
8 there is exposed oil on the surface where birds and other  
9 animals can get into the pits or tanks, and I then look  
10 through the sludge around the shoreline if it's a pit or a  
11 pond; inside the tank if it's a tank, and any lumps or  
12 suspicious-looking particles, I say particles, any suspi-  
13 cious-looking item in the pit or the tank, I will pull it  
14 out and examine it. Very often I find that the birds ap-  
15 pear just to be another lump of oil in the pit and once I  
16 break open the lump I find it is a bird or some other type  
17 of small animal.

18 Q How many trips have you made to south-  
19 east New Mexico?

20 A I've probably made in the neighborhood  
21 of 10 to 12 trips down, specifically for examining these  
22 pits.

23 I have also been on 1 or 3 other trips  
24 for other matters and as part of that have examined pits  
25 and tanks.

1           Q           In what time period have you made these  
2 trips?

3           A           I began in May of 1988 and my last trip  
4 down was in April of '89.

5           Q           Can you estimate the number of birds or  
6 water fowl that you've found?

7           A           I've found, that I have collected, 694  
8 birds or bird parts from separately identifiable birds.

9           Q           Is there any --

10          A           Excuse me, I have found others that I  
11 have not collected and it would range, probably, in 100 to  
12 150 more birds.

13          Q           Did anyone from the OCD staff accompany  
14 you on any of these?

15          A           Yes, I've been accompanied by Jerry  
16 Sexton and Mike Williams from the Artesia and Hobbs Office.

17          Q           Have you made any investigating efforts  
18 in the northwest?

19          A           I've made one trip to the northwest,  
20 just strictly as an initial look at the area. I was with  
21 Frank Chavez, also with the OCD, and he showed me the basic  
22 water disposal sites, as well as a few of the individual  
23 well sites in that area.

24          Q           And how long was your trip to the Farm-  
25 ington area?

1           A           It was a 1-day trip.

2           Q           And when was that, if you remember?

3           A           That would have been, I believe it was  
4 two weeks ago; last week, I believe it was, last week.

5           Q           And did you find any birds that had had  
6 contact with oil waste?

7           A           Yes, we did. We found a duck in a water  
8 disposal site. There were probably other birds in the site  
9 but we couldn't reach them to pull them out to find out if  
10 they were birds or just another lump.

11          Q           Have you found that migratory birds are  
12 in danger of oil field facilities that are in the work  
13 process when there's a great deal of activity around them?

14          A           Generally if there's a great deal of ac-  
15 tivity around the specific site where the oil is exposed to  
16 the birds, there is, you know, virtually no evidence that I  
17 have found that it's a problem.

18                   It's when it's an isolated area or an  
19 area where very little activity is that I find most of the  
20 birds.

21          Q           Have you found there is any danger to  
22 migratory water fowl from fiberglass tanks?

23          A           Yes, I have. There are -- there have  
24 been ducks found in these tanks. I have found them myself,  
25 as well as over in Texas Rob Lee has found them. He's our

1 agent in Lubbock, Texas.

2 We have found ducks in fiberglass tanks  
3 but it's not the area where we generally find them. Usu-  
4 ally it's the open pits where we find the ducks.

5 Q What solutions do you propose to eli-  
6 minate the dangers to migratory water fowl?

7 A The solution which seems to be most  
8 effective that I have witnessed is the screening of the  
9 pits. Anything less than that is -- it tends to still be a  
10 problem, although I understand from other areas there are  
11 successfully using flags and lights and noise producing  
12 devices.

13 The -- as far as my personal experience,  
14 the screening is the most effective.

15 Q Would there be some, aside from the  
16 drilling that you discussed as probably not hazardous,  
17 could there be other facilities that are not hazardous to  
18 migratory water fowl?

19 A What I've found in general, and like I  
20 say, it's been strictly a non-scientific review on my part,  
21 investigation on my part, it is virtually any oil exposed  
22 to birds getting into them is potentially a problem.

23 I have examined many pits, many tanks,  
24 many ponds, which have oil on them but I found no birds in  
25 them, but I've found in other areas very similar set-ups



1 and I find birds in those areas, in those ponds, yes.

2 Q If you eliminate the oil then you've  
3 eliminated the problem.

4 A I think the oil is -- is the problem  
5 because that's what's killing the birds, whether it be  
6 through just a thin coating on their feathers or whether  
7 they be totally oiled up. That's -- that's the major  
8 problem. If the oil were not present on the ponds and pits  
9 and tanks, I don't think we would see a problem.

10 Q And it's your opinion that it's any open  
11 water not just above ground or below ground.

12 A That's correct. Any time there is an  
13 open area that the birds can get into. I've found large  
14 metal tanks which were originally totally enclosed which  
15 have had holes from rust deterioration coming to the top of  
16 it, birds will get in through those holes in the top. I've  
17 seen them as small as 4 or 5 inches across and found birds  
18 in the oil in the tank itself.

19 Q Did you prepare a briefing book for your  
20 presentation on December 15th, 1988 to the Commission?

21 A It was prepared by Jim Hubert of the  
22 Fish and Wildlife Service.

23 Q And do you have that with you?

24 A Yes, I do.

25 Q And will you check that to make sure

1 that's a correct copy?

2 A Yes, it is.

3 MS. JACOBBER: The OCD would  
4 tender the briefing book prepared by the U. S. Fish and  
5 Game Department as Exhibit Number Twenty-nine. It's not  
6 too repetitive.

7 MR. LEMAY: Without objection  
8 that will be admitted into the evidence. Is that the book  
9 there?

10 MS. JACOBBER: Uh-huh.

11 Q Mr. Lane, do you have anything that  
12 you'd like to add about the (not clearly audible)?

13 A Well, as I said, I've only just barely  
14 started in the northwest. I have heard from many sources  
15 that there is no -- there is no problem or not a serious  
16 problem in the northwest. I still have reservations about  
17 that. The one brief tour we did showed that there is some  
18 difference in how the wells and well sites themselves are  
19 made up. Very often there's no open -- open oil or water  
20 exposed to the wildlife and would not present a problem in  
21 that respect, but I have also found areas which are iden-  
22 tical to what I find in southeastern New Mexico, where they  
23 do have water being disposed of on the surface and on the  
24 surface of that water is an oily residue, very often very  
25 thick, an inch to 2 inches thick in some cases. The prob-

1 lems up there, like I say, have been reported as minor  
2 compared to the southeast but as yet I can't determine  
3 whether that's true or not.

4 MS. JACOBBER: I have no fur-  
5 ther questions of this witness.

6 MR. LEMAY: Thank you, Ms.  
7 Jacobber.

8 Are there additional questions  
9 of the witness?

10 I'm sorry, yes, Mr. Chavez.

11

12 QUESTIONS BY MR. CHAVEZ:

13 Q Mr. Lane, are there areas where wildlife  
14 may benefit from water in pits?

15 A I'm sorry?

16 Q Are there areas where the wildlife may  
17 benefit from the pit water?

18 A As far as I can tell there are some  
19 areas where it's a fresh water or more fresh water being  
20 produced in relation to the drilling, and the production of  
21 the oil. That would be a benefit to the wildlife as long  
22 as it's not oiled or any oil that's collected is removed  
23 from the surface.

24 If the oil is present on the water, then  
25 it's not going to be of benefit, it's going to be a hazard.

1 MR. LEMAY: Are there any  
2 other questions of Mr. Lane?

3 Thank you, Mr. Lane, you may  
4 be excused.

5 You may call your next wit-  
6 ness, Ms. Jacober.

7 MS. JACOBER: OCD calls as  
8 its next witness Joe King.

9 Mr. Chairman, we will not be  
10 qualifying Mr. King as an expert. He'll be testifying as an  
11 industry witness.

12  
13 JOE KING,  
14 being called as a witness and being duly sworn upon his  
15 oath, testified as follows, to-wit:

16  
17 DIRECT EXAMINATION

18 BY MS. JACOBER:

19 Q Mr. King, would you please state your  
20 name for the record?

21 A Joe E. King.

22 Q And your employment capacity?

23 A I am the District Manager for Texaco in  
24 Hobbs, New Mexico.

25 Q And how long have you held that posi-

1 tion?

2 A 4-1/2 years.

3 Q And has your area of work been (not  
4 clearly understood) of the oil industry in the past?

5 A That's one of the areas that my district  
6 covers.

7 Q How long have you been in the oil in-  
8 dustry?

9 A 32 years.

10 Q Would you please describe your work  
11 (unclear)?

12 A I've served as -- in various engineering  
13 capacities. I have been both field engineer, reservoir  
14 engineer, managing engineer. I have served as Engineering  
15 Manager with Getty Oil Company in the western United  
16 States, Bakersfield, California, in which the environmen-  
17 tal, engineering environmental responsibility was part of  
18 my duties.

19 I've been an area manager in Mobile,  
20 Alabama, associated with the Mobile Bay problems environ-  
21 mentally.

22 I've had rather broad experience in  
23 drilling, production, and reservoir engineering.

24 Q So you're both familiar with the indus-  
25 try economies and also with field work?

1           A           Yes, I am.

2           Q           Did you chair the industry committee  
3 formed to correct the problems of migratory birds landing  
4 on well waste?

5           A           I chaired that committee as an advisory  
6 committee to Mr. LeMay.

7           Q           Could you briefly describe how that com-  
8 mittee came to be formed?

9           A           Sure. Briefly, it came about as the  
10 initial presentation of Mr. Lane with Fish and Wildlife,  
11 that there was a potential problem in New Mexico of loss of  
12 birds.

13                   Mr. LeMay called for a meeting with  
14 industry in attendance to hear the problem and decided to  
15 try and form an industry advisory committee to -- to make  
16 some recommendations regarding what might be done to alle-  
17 viate the problem.

18           Q           And what was your charge as a committee?  
19 Could you turn to Exhibit Ten, please?

20           A           Basically the original charge to the  
21 committee by Mr. LeMay asked that the committee make recom-  
22 mendations to solve the following problems: Small pits,  
23 emergency pits, open top tanks, large BS pits and sediment  
24 pits, drilling, any additional problem that the committee  
25 feels is a problem with migratory birds in the oil field

1 and the role that industry would recommend that ODC (sic)  
2 play in its solution. That's basically the charge to the  
3 committee.

4 Q Have you fulfilled that charge?

5 A I hope so.

6 Q What did you do to investigate solutions  
7 to the migratory waterfowl problem?

8 A We had an initial committee meeting  
9 which is summarized in what would be my Exhibit Two. It's  
10 the meeting of January 11th.

11 Q Exhibit Eleven?

12 A We had an initial organizational meeting  
13 where we were again briefed by Mr. Lane and Mr. LeMay again  
14 went through the charge to the committee. We had a lengthy  
15 discussion of potential problems. We -- we formed commit-  
16 tee assignments to investigate the rules that were in ef-  
17 fect in California and Colorado, as well as the BLM prac-  
18 tice regarding protection of the migratory treaty birds,  
19 and we -- we set out a timetable to review these -- these  
20 rules and regulations. We accepted the fact that there was  
21 an apparent problem and that we were very fortunate to have  
22 the Fish and Wildlife Department take the attitude that  
23 they would work with industry and the OCD before applying  
24 major regulation pressure. That was the thing, the general  
25 comment of the committee at that meeting.

1                   There also was set a follow-up field  
2 trip in which Mr. Lane again was going to meet in Artesia  
3 with members of the industry to discuss things as to what  
4 could be done on large pits. He and Mr. Williams hosted  
5 that field trip for a short meeting, so a number of our  
6 members attended that.

7                   All of this was to gather background  
8 information so that we could make a proposal to fulfill the  
9 charge to the committee given by Mr. LeMay.

10                  Q           Will you turn to Exhibit Number Fifteen?

11                  A           That's my Exhibit Three?

12                  Q           Exhibit Fifteen --

13                  A           Here it is. Yes.

14                  Q           When you say that you contacted other  
15 states, an example of the response that you got would be  
16 the response from Colorado.

17                  A           Yes, that is -- that is part of the ex-  
18 ample. Mr. Mitchell, who was contacting Colorado, Wyoming,  
19 had personal phone conversations with -- with his contacts  
20 in the regulatory agencies in those states, also.

21                  Q           Okay, and turning to Exhibit Twelve,  
22 which is the page just before that, you requested informa-  
23 tion from OCD staff Dave Boyer concerning which rules  
24 needed amendment, is that correct?

25                  A           Yes, that was one of the committee as-



1 signments, the January 11th. Mr. Boyer was to review the  
2 OCD -- the New Mexico OCD rules that would be applicable to  
3 the migratory bird problem.

4 Q Turning to Exhibit Number Fifteen, --

5 A Well, I'm close, I found Fourteen. Here  
6 we are.

7 Q That is a memo from Bill LeMay to all  
8 operators concerning the proposed rule revisions. Looking  
9 at that attachment, are those the proposed rule revisions  
10 that your committee promulgated?

11 A There's part of it, I felt that the  
12 letter of transmittal that we transmitted those rules,  
13 would be a significant part of that, too.

14 Q And that -- will you turn to Exhibit  
15 Fourteen.

16 A Is that -- yes, that's the letter of  
17 transmittal. I consider that part of those recommenda-  
18 tions.

19 Q Could you describe your proposal in  
20 general terms?

21 A Yes. Maybe we should address the  
22 drilling pit issue first. We had a very lengthy discussion  
23 at the last and final meeting, Mr. Lane again was there,  
24 Mr. Sexton, regarding any potential hazard from the drill-  
25 ing operation, the drilling pits, and it was the general

1 consensus that these facilities were nonhazardous to the  
2 birds under the Migratory Treaty Act, and for that reason  
3 we recommended that drilling pits be totally eliminated  
4 from any pit requirements in the forthcoming rule revision.

5 So we felt that there was a great deal  
6 of evidence that there just was no harm to the birds in the  
7 Treaty Act from the drilling pits, they should be exempt,  
8 and that is our recommendation contained in the letter of  
9 transmittal.

10 Then next we reviewed the rules that Mr.  
11 Boyer recommended as having application to the migratory  
12 bird problem and the committee felt that a amendment to  
13 these rules would adequately protect the birds under the  
14 treaty and in general our recommendations, and they are  
15 contained in detail in your Exhibit Fifteen, our recommen-  
16 dations were that -- that pits would be screened or netted,  
17 rendered nonhazardous or deemed to be nonhazardous, and the  
18 reason that we used the term "deemed to be nonhazardous" is  
19 that we felt that the OCD should have maximum flexibility  
20 within rules being proposed to -- to confirm that here were  
21 certain facilities that were just not hazardous to the  
22 birds under the Treaty Act.

23 Q What such facility would be a drilling  
24 pit?

25 A We, at this point we considered the

1 drilling pit a moot issue. Yes, we definitely did consi-  
2 der them nonhazardous but we felt that they didn't need to  
3 be deemed nonhazardous, they were nonhazardous and would be  
4 considered outside of the containment of these rules in the  
5 position of our committee. They just did not pose a hazard  
6 to the birds.

7 That was the committee's recommendation.

8 Now, other facilities that might be  
9 deemed nonhazardous we felt needed to be done at as low a  
10 level within the OCD as practical. It should be done gen-  
11 erally on the petition of operators that felt their faci-  
12 lities were nonhazardous and that this should be a flexi-  
13 bility within the rules. There are numerous examples of  
14 facilities that are nonhazardous. Mr. Lane gave one re-  
15 cently of fresh water that's used for stock water that  
16 comes from oil field operations.

17 So we wanted a flexible set of rules.

18 Rendering nonhazardous, we felt, was  
19 another actual action taken by operators that the Commis-  
20 sion could approve that was a different level of activity  
21 than deeming nonhazardous. There are large bodies of water  
22 which facility operators might have to skim any oil that  
23 might reach them or use an approved dispersant, something  
24 such as that, that would render them nonhazardous. There  
25 are -- there are many acts such as that in the oil field

1 that should be within the scope of the OCD to recognize as  
2 not requiring screening or netting. So that was the intent  
3 of the advisory committee, is that certain -- that the OCD  
4 should have the mechanism to recognize certain facilities  
5 are rendered nonhazardous and certain facilities are  
6 purely, they just are nonhazardous. They don't have to be  
7 rendered that way, they are that way, and any effective set  
8 of rules and regulations that are going to protect the  
9 birds of the Treaty Act should have this kind of flexibi-  
10 lity. That's our committee's recommendation.

11 Q Would you turn to Exhibit Twenty-eight,  
12 which is the last exhibit of yours on this?

13 A Yes, I have it.

14 Q And that is the proposed changes projec-  
15 ted by OCD, is that correct?

16 A Yes.

17 Q And have you read this before?

18 A Yes, I've read it very recently.

19 Q And do you believe that the rewording  
20 that was done by OCD to emphasize the industry proposal and  
21 then the industry comment meets your committee's objective  
22 in providing flexibility to industry for facilities that  
23 are -- have either been rendered nonhazardous or are inher-  
24 ently nonhazardous?

25 A I think in general it does. I

1 particularly like our language of "rendered nonhazardous"  
2 better than the language contained herein, but I'm very,  
3 very favorably impressed by the -- by the determination  
4 that District Supervisor would have authority in this  
5 matter. I think that's a very, very positive step.  
6 Nothing could be more harmful to the project than to re-  
7 quire extensive formal hearings to -- to determine which  
8 facilities did not require netting, for instance, that  
9 would be a very negative step toward the solution of the  
10 problem. I do feel that our language of rendering non-  
11 hazardous is better, but I think this in general would  
12 achieve the same goal.

13 Q And the OCD's proposal also meets your  
14 goal that drilling pits should be exempt because under  
15 OCD's proposal an exception can be granted by showing that  
16 they're not hazardous.

17 A I don't think that it -- I think this  
18 goes a step beyond what we intended. I think we intended  
19 more or less a statement if required, a statement to the  
20 effect that drilling pits are not hazardous to -- or not  
21 covered by the rules regarding the migratory birds, but --

22 Q But this result would be the same. You  
23 could achieve the same result in not having to do that or  
24 screen drilling pits by achieving an exception from your  
25 District Supervisor, is that correct?

1           A           Yes, I think the achievement could be  
2 the same. It would be more onerous to industry.

3           Q           It could be more onerous with the  
4 submittal of a letter to the District Supervisor and then  
5 an area --

6           A           Possibly if the implementation regula-  
7 tions went that far. I would hope they would not. I would  
8 hope that -- that everyone would basically realize that the  
9 drilling operations just do not pose a hazard to these  
10 birds and some general statement would, hopefully, encom-  
11 pass that.

12          Q           So it's your opinion that OCD's proposed  
13 rules are reasonable (not clearly understood).

14          A           Yes, I consider them reasonable.

15          Q           Would you like to add anything to your  
16 testimony?

17          A           I still like our language better.

18                       MS. JACOB: I have no fur-  
19 ther questions.

20                       MR. LEMAY: Thank you, Ms.  
21 Jacober.

22                       Additional questions of the  
23 witness?

24                       Yes.

25                       MR. STEVENS: My name is Gary

1 Stevens. I'm representing the U. S. Bureau of Land Manage-  
2 ment today.

3

4 QUESTIONS BY MR. STEVENS:

5 Q Mr. King, you expressed several times  
6 during your testimony that the drilling operations, drill-  
7 ing pits did not pose a threat, you used the word hazardous  
8 but if you'll excuse me, I heard nowhere in your testimony  
9 as to why. Being as a drilling pit contains many other  
10 things besides pure water, chemicals in some cases, lubri-  
11 cants of some sort, why would that not be hazardous?

12 A Well, it's such a large -- and I should  
13 have included the workover pits, emergency workover pits in  
14 this same category as that was considered a part of our  
15 drilling pit category.

16 The level of activity is very high  
17 around these pits. There's -- even when drilling opera-  
18 tions go down, there are watchmen on site, there's  
19 equipment everywhere, it's -- it's not the kind of pit that  
20 attracts birds in my experience, and that seems to be the  
21 general experience of everyone during our committee discus-  
22 sions. I don't think there was a single instance that any-  
23 body could recall of a bird having been lost in a drilling  
24 pit. I certainly have never seen one in my 32 years. I've  
25 been around a great many and they don't contain grass

1 around them or they -- it's just not attractive to them in  
2 my experience.

3 MR. LEMAY: Does that answer  
4 your question, Mr. Stevens?

5 MR. STEVENS: Yes, it did. I  
6 suspected that might be the answer. I just didn't hear the  
7 testimony.

8 MR. LEMAY: Additional  
9 questions of the witness?

10 Commissioner Humphries.

11  
12 QUESTIONS BY MR. HUMPHRIES:

13 Q Joe, I can't draw the distinction that  
14 you're suggesting you'd like better. Are you saying that  
15 you like the word "otherwise" -- the phrase "otherwise  
16 deemed nonhazardous" versus I don't know exactly how the  
17 Commission worded it, "an exception may be granted by the  
18 District Supervisor upon showing either an alternative  
19 method to protect migratory birds, or showing that the  
20 facility is nonhazardous to migratory birds"? What's the  
21 distinction? I'm not getting it.

22 A Let's take a specific example. There  
23 are a great number of compressor blowdowns, small depres-  
24 sions that could be called pits. They don't contain liquid  
25 but during compressor maintenance operations the compressor



1 lubricant may be blown into these pits. It's in all of  
2 them. Whenever for any reason water reaches one of these  
3 pits it's generally removed, the water is removed. Such a  
4 facility is nonhazardous -- I mean it's been rendered  
5 nonhazardous by removing of the fluid.

6 Now I realize and the committee real-  
7 izes that operators that would petition for facilities to  
8 be rendered nonhazardous or deemed nonhazardous in our  
9 terms, I admit that the current language is better than  
10 "deemed nonhazardous". We didn't to a good -- a good job  
11 of choosing words there.

12 But an operator that would take that  
13 approach does so at his own risk. The enforcement of the  
14 Federal Migratory Treaty Act is up to Fish and Wildlife and  
15 should they find a dead bird in one of these facilities  
16 that had been deemed, that operator did that at his own  
17 risk and even though the Commission might agree with it, we  
18 all accept the fact that that is an at risk position being  
19 petitioned by an operator due to the fact that the OCD  
20 might approve that does not change that at all.

21 But there are a number of facilities  
22 that will be rendered nonhazardous that should not have to  
23 -- to go for an exception per se.

24 Q Would it not be logical then if the  
25 District Supervisor would grant such a --

1           A           I think it is logical that he would,  
2 surely. I hope so.

3           Q           So is there another distinction then  
4 that we should draw or that's the -- you kept indicating  
5 you preferred your language to the suggested language from  
6 the Division.

7           A           Well my view of how that language might  
8 take place is that an operator might in his permit appli-  
9 cation or in this letter to the District Director describ-  
10 ing his facilities, or whatever, state that this action  
11 renders this nonhazardous and it would be basically -- that  
12 would be, for example, the water disposal system where any  
13 carryover oil into one of those large ponds which are going  
14 to be skimmed by the oil mop, for instance, that would be  
15 the operator's action rendering this facility nonhazardous,  
16 and there should be a provision to do that and I felt like  
17 that our language is -- gave more of that responsibility to  
18 the operator and less of the responsibility to the OCD in  
19 determining the exceptions.

20                       I liked it better but I don't disagree  
21 that the language as written by the current proposal could  
22 have the same effect. I think it would just be more  
23 onerous on industry.

24           Q           You already answered one of my ques-  
25 tions. I was going to ask you what you mean (not clearly

1 understood), and taking the gentleman from BLM's question  
2 one step further, I believe the proposed recommendation or  
3 rules from the Division staff answered the question but  
4 you can comment on it. What about just after termination  
5 of drilling? There is no activity around there but you  
6 still have the pit.

7 A Unless it's an unusual condition where a  
8 pit might last for a year, for some long time, normally  
9 this is a short term activity before you have achieved  
10 enough evaporation, certainly in southeast New Mexico, that  
11 you're ready to close the pit. It still doesn't contain  
12 grass around it. It's still not an attractive place for  
13 the birds. I've not see them on it, Commissioners, on one.

14 Q Does the language suggested in Rule  
15 105-B meet with your approval?

16 A I don't necessarily feel that all of the  
17 oil removal, you know, is a requirement. I think that  
18 there will be oil, oil saturated sediments that may -- may  
19 bleed some oil, drops of oil for some time. These things,  
20 too, are not -- in a drilling pit would not be a hazard un-  
21 less, you know, unless it was a long life occasion where  
22 you had no evaporation and then the pit stayed there long  
23 enough to get grass around it. I don't think there's any-  
24 one that's seen dead birds in drilling pits, and I don't  
25 know precisely why that is but in our committee discussions

1 nobody had. I agree that the, you know, any large floating  
2 oil on there would -- would -- we would normally remove  
3 that anyway. That's common practice in the industry. We  
4 get them with a vacuum truck, take the oil off a pit. You  
5 do that generally when you get it on it.

6                   So, but the requirement that oil must be  
7 removed, if that was to be interpreted as 100 percent, I  
8 think that would be an impossibility and I think that the  
9 -- that it is not a hazard to the birds in the Treaty Act.  
10 I don't know of anyone, like I say, that has ever seen a  
11 dead bird in a drilling pit other than one that -- where  
12 you had no evaporation and it lasted a long time, then it  
13 might be, but I still don't know of that every happening.

14                   I think that in general 105-B adequately  
15 exempts pits.

16           Q           I know you're not the right person to  
17 ask as you've already stated you're not familiar with that  
18 area, but has anybody objected -- maybe I need -- maybe I  
19 should ask the Fish and Wildlife people, is anybody aware  
20 of the coal seam pits being --

21           A           I'm -- Mr. -- I have heard brief discus-  
22 sions from -- from members of the BLM within Farmington to  
23 the effect that it is a high bicarbonate type of water  
24 being produced and that it does have some potential harm to  
25 growing plants, et cetera. I don't know any more than that

1 about it personally.

2 MR. LEMAY: Commissioner  
3 Brostuen?

4 MR. BROSTUEN: Commissioner  
5 Humphries asked most of my questions.

6  
7 QUESTIONS BY MR. BROSTUEN:

8 Q Just out of curiosity, how does Texaco  
9 generally leave a drilling pit open prior to closure after  
10 the drilling operation is concluded?

11 A As soon as it's dried up. We have a --  
12 my operations are southeast New Mexico.

13 Q Uh-huh.

14 A The Four Corners area is not within my  
15 district. We have high evaporation rates. As soon as it's  
16 dry enough to get in there, we do it.

17 Q Is it common practice to run drill stem  
18 tests on those wells in southeast New Mexico, your  
19 practice?

20 A We run them occasionally, yes.

21 Q And oil does get on the surface there on  
22 the pits as a result of DST's?

23 A Not as a result of the DST. We -- we  
24 maintain -- we contain the fluids from a DST.

25 Q I see.

1           A           What oil gets on the pits normally is  
2 when you drill an oil bearing formation and it comes with  
3 the bit. We have a small emergency pit that we try to flow  
4 the fluids from a drill stem test in. I think we almost  
5 never get any oil on a pit from a DST.

6           Q           I see. The reason I asked the question  
7 is that essentially even one molecule -- a film of oil one  
8 molecule thick will prevent evaporation and your -- so if  
9 the oil isn't going -- if the water isn't evaporating, it  
10 probably is going some place else off the bottom, raising  
11 those questions.

12          A           In general, that one molecule you're re-  
13 ferring to is a whole lot more volatile than the water so a  
14 little bit of wave action and your one molecule of hydro-  
15 carbon with a vapor pressure of much less than the normal  
16 atmospheric condition on the water, it evaporates quicker  
17 than staying out of the water.

18                               MR. BROSTUEN: I think that's  
19 all the questions I have.

20

21       QUESTIONS BY MR. LEMAY:

22          Q           Just a quick question, Mr. King. Has  
23 Texaco done anything within this period of time from the  
24 first meeting? Have you netted any tanks or anything of  
25 that nature in the field?

1           A           Yes. We've -- we've netted, both in  
2 west Texas and some in New Mexico, we've netted some of our  
3 pits already. We've closed some that we'd intended to  
4 close. We just speeded up; installed a steel -- steel  
5 overflow emergency tanks that had planned to do gradually.  
6 We -- we moved those time schedules up.

7                       We're going to net all our pits that --  
8 that are small enough.

9           Q           Do you have any -- any figures for the  
10 Commission in terms of average cost to net an open fiber-  
11 glass tank (unclear)?

12           A           One of my area superintendents estimated  
13 that this would cost less than \$200. I'm not sure whether  
14 he was intending to do that with a fine wire mesh or rather  
15 he was talking about polypropylene netting, but that was  
16 the first numbers that I've received and I have not seen  
17 actually actual invoices for the actual (unclear).

18           Q           And in regard to Commissioner Brostuen's  
19 question, generally on a drill stem test if you know you  
20 have a stream of oil, do you reverse that stream or do you  
21 (not clearly audible) leave it open on a drill stem test?

22           A           We reverse ours generally and we don't  
23 do (unclear). Sometimes you have to pull the string, as  
24 you know, but we try to -- we try to trap that in our  
25 cellar and get it into the little emergency pits.

1           Q           One other possible source on an active  
2 drilling operation I guess would be oil based muds. Do you  
3 use those very often?

4           A           Not often. We use the invert systems to  
5 drill in the Morrow.

6                       That -- that would be another source.  
7 We try to keep those within our steel pits because, as you  
8 know, you rent them. You turn the -- you turn the invert  
9 mud system back to whoever you rented it from, at least  
10 that's the way we do it, and so we don't want to lose it  
11 what goes over generally would be the coating of the --  
12 would be the invert coating on the drill pit.

13                      MR. LEMAY: Additional ques-  
14 tions of the witness?

15                      Yes, sir.

16  
17 QUESTIONS BY MR. HUBERT:

18           Q           Mr. King, if these new rules were  
19 adopted, what would be your best estimate as to how many  
20 sets of (not clearly understood)?

21           A           I don't know. Just in the near vicinity  
22 of Hobbs I can think of 10 or 12 that are absolutely, I  
23 mean there's a large tar pit, oil recovery facility that's  
24 final affluent is in effect an asphalt. A bluebird can  
25 land on it and fly off it. It's not floating on a pit of



1 water, it's just basically an asphalt, but it's very large  
2 and it's a affluent that must be disposed of and it's under  
3 an authorized disposal and it's got lights around it and a  
4 lot of activity and as far as I know there has never been a  
5 bird of any kind killed in it.

6 That would be -- I know, I just -- as  
7 far as what the total number is, I don't think it would be  
8 large, but I can't assess it.

9 In the Texaco operation I bet we would  
10 not have a half a dozen including New Mexico and west  
11 Texas.

12 MR. LEMAY: Any additional  
13 questions?

14 MR. LANE: One quickly if I  
15 may.

16 MR. LEMAY: Yes, sir.

17  
18 QUESTIONS BY MR. LANE:

19 Q Joe, I'd like to call your attention to  
20 the ruling proposed by the OCD and the wording: "To pro-  
21 tect migratory birds all exposed pits (lined or unlined),  
22 and open tanks shall be either kept free of oil or screened  
23 or netted or covered." And specifically, "kept free of  
24 oil". Do you in your experience or have you ever run  
25 across a oil disposal site that was "kept free of oil"?

1           A           100 percent, I don't recall. I've seen  
2 some that I -- that in the final -- the final effluent goes  
3 into a large body of water that -- that I have not seen oil  
4 on, and I would expect that there might be some that (not  
5 clearly understood) but I've seen a salt water disposal  
6 system where the final effluent went into a large pond that  
7 did not have any. I've seen those that did, too.

8           Q           Are these going to be the exceptions or  
9 the rule, those that don't have oil?

10          A           I expect that they -- that if no action  
11 was taken to remove the oil, that would be the exception.  
12 I would expect under these positions where operators judi-  
13 ciously attempted to prevent oil conditions in the large  
14 ponds that were the last stage of their operations, I  
15 would expect that if we discussed this five years from now  
16 that would be the rule. There would be no oil. It's quite  
17 easy to render that nonhazardous, I think.

18                               MR. LEMAY: Additional ques-  
19 tions of the witness? If not, he may be excused. Thank  
20 you, Mr. King.

21                               Let's take a fifteen minute  
22 break. We'll reconvene at 10:20.

23

24

(Thereupon a recess was taken.)

25

1 MR. LEMAY: We shall resume.

2 Ms. Jacober?

3 MS. JACOBER: OCD would call  
4 as its last witness Mr. Dave Boyer.

5  
6 DAVID G. BOYER,  
7 being called as a witness and being duly sworn upon his  
8 oath, testified as follows, to-wit:

9  
10 DIRECT EXAMINATION

11 BY MS. JACOBER:

12 Q Mr. Boyer, would you please state your  
13 name for the record?

14 A My name is David G. Boyer.

15 Q And your employment with?

16 A I'm an Environmental Bureau Chief with  
17 the New Mexico Oil Conservation Division and by profession  
18 I'm a hydrogeologist.

19 Q Have you previously testified before the  
20 Oil Conservation Commission and had your credentials ac-  
21 cepted?

22 A Yes, I have.

23 Q And made a matter of record?

24 A Yes, I have.

25 Q Were you qualified at that time as the

1 Environmental Bureau Chief for the New Mexico Oil Conser-  
2 vation Commission and as a hydrogeologist?

3 A Yes, I was.

4 MS. JACOB: Are the wit-  
5 ness' qualifications acceptable?

6 MR. LEMAY: They're acceptable  
7 without objection.

8 Q As Environmental Bureau Chief were you  
9 assigned the task of investigating whether there were  
10 problems with migratory waterfowl's contact with oil waste?

11 A Yes, I was.

12 Q Did you determine that there was a prob-  
13 lem?

14 A Yes, I have seen that there is a  
15 problem.

16 Q Can you describe the problem?

17 A In -- during my travels as Environmen-  
18 tal Bureau Chief and my work as a hydrogeologist here in  
19 New Mexico, both before I joined the Commission or the  
20 Division and since I have joined the Commission, Division,  
21 I have seen a problem in several areas including the  
22 Monument, New Mexico area and the Roswell, New Mexico area,  
23 and most recently in the Farmington area.

24 Q Would you explain what your investiga-  
25 tive efforts were and what you found?

1           A           Well, the -- the biggest -- the inves-  
2           tigative efforts were as a by-product of my other activi-  
3           ties, mainly groundwater protection.

4                       The -- what I found was that there was  
5           -- where there was oil on some of these pits there was a  
6           potential and it was actually observed by me that they had  
7           dead birds.

8           Q           Have you found it difficult to identify  
9           damaged waterfowl?

10          A           Yes, especially when there's a lot of  
11          oil. The oil tends to make a clump and that gathers dirt  
12          and other oil and it almost looks more like a piece of de-  
13          bris, floating debris, more so than a waterfowl.

14          Q           So statements by members of the industry  
15          that there is no damage to waterfowl maybe because of an  
16          inability to identify the waterfowl, not the absence of  
17          damage to that fowl? Is that right?

18          A           It is difficult to identify waterfowl.

19          Q           Have you considered possible solutions  
20          for the waterfowl problem?

21          A           Yes.

22          Q           Have you read the industry tentative  
23          proposal which is Exhibit Fifteen in this case?

24          A           Yes, I have.

25          Q           And have you read the comments submit-

1   ted in response to that proposal which are Exhibits Sixteen  
2   to Twenty-six?

3 A Yes, I have.

4 Q After analyzing the Committee's proposed  
5 rules and Industry comments, did you arrive at a synthesis  
6 of the ideas and which you reflected in the OCD's proposal,  
7 which is Exhibit Twenty-eight?

8 A Yes, I did.

9 Q And is it your testimony that the OCD's  
10 proposal is essentially the same as the industry's but  
11 worded so that it meets administrative and regulatory  
12 standards?

13 A Yes.

14 Q Can you state the overall reasons for  
15 the OCD enhancements to industry's proposal?

16                   A                   Yes, I can. There were seven industry  
17 comments that I looked at from operators and there was also  
18 a comment from the State Game and Fish, and also comments  
19 from the other Oil Conservation Division staff.

There were three major categories of the  
comments.

Number one is what is meant by the words "deemed to be nonhazardous" and what is meant by "rendered nonhazardous".

25 The second comment related to who had

1 the responsibility to make those determinations that some-  
2 thing is nonhazardous.

3 And the third -- excuse me, before I go  
4 into the third one, there was some disagreement as to  
5 whether the operator or the Oil Conservation Division or  
6 the Fish and Wildlife Service could make that determina-  
7 tion.

8 And the third point that the comment was  
9 made was that there was no reference to the drilling and  
10 workover pits in the proposed rules, even though they were  
11 addressed in the cover letter that Mr. King read.

12 Q Can you explain how the OCD proposal ad-  
13 dresses these comments?

14 A Yes, I can. The Oil Conservation Divi-  
15 sion with their proposed revisions went to the idea of  
16 removal of the oil and as the operator did not remove the  
17 oil, screened or netted or otherwise covered pits, but if  
18 the operator believes an alternative method is available,  
19 he can make a showing and that showing would be to the  
20 District Supervisor, that the alternative method is effec-  
21 tive.

22 The Oil Conservation Division has Dis-  
23 trict Supervisors and the District Supervisors have exper-  
24 tise in oilfield practices, procedures and activities and  
25 they can judge whether the alternative is likely to succeed

1 or not.

2           The procedure that we've adopted or  
3 proposed for adoption, eliminates the vagueness with re-  
4 spect to the question of what is nonhazardous and he makes  
5 the determination of what is nonhazardous.

6           We also had some other points that --  
7 that we addressed in the rule, the proposed rule, and one  
8 is that the -- one of the commenters made a suggestion that  
9 there was no difference between an open tank, whether it  
10 was above grade or below grade, if it's open, it's open,  
11 and available for migratory fowl to land on.

12           So we made a suggestion that this rule  
13 was just going to apply to low grade tanks, we suggested  
14 that it apply to all open tanks.

15           Our proposal also avoided any direct re-  
16 ference to the Migratory Bird Treaty Act, as that was -- as  
17 it is referenced in the industry proposal, and the reason  
18 that we wanted to avoid the reference that we are enforcing  
19 a Federal law, and in this case we are not. Our Division  
20 will implement a State rule in response to a problem that  
21 is being demonstrated here in this hearing today, and it  
22 would be the OCD that would be enforcing the State rule and  
23 it's the Fish and Wildlife Service's responsibility to --  
24 to, they desire, to enforce the Migratory Bird Treaty Act.  
25 And again our response is because this matter has been



1 brought to our attention and we believe that rules with the  
2 suggestions that we have also made as enhancement to them  
3 will alleviate the problem.

4           One of the other things I also did as  
5 part of this was that to avoid any confusion by mixing the  
6 language of the proposal with existing language in the  
7 present rules, I did some separation and codification of  
8 the rules and I separated them into separate sections so  
9 that they can be easily identified and will stand out in  
10 a future reading by an operator.

11           And the last thing which I did as part  
12 of this review, is we also had comments on whether tempo-  
13 rary pits, which only temporarily contain the fluids would  
14 be covered under the proposed new rules, and I felt that  
15 there needed to be some -- some clarification, so I pro-  
16 posed a new section to Rule 105. I must state up front  
17 that I agree with the comments that have been made. I do  
18 not believe that there is a problem with this pits when  
19 there is activity on-going, the presence of humans, move-  
20 ment, loud noise, all companies have this type of activity  
21 and it does not make it attractive to birds to land on  
22 those types of pits; however, if oil is present in the pit  
23 that's where the activity ceases and before the pit is  
24 closed or empty it will be an open hazard to the birds in my  
25 opinion. In some cases the closure could be up to as much

1 as six months after cessation of activity. So I feel that  
2 the oil, if there is oil in those pits after the activity  
3 ceases, then it needs to be -- needs to be removed if the  
4 pits are going to be left unattended and there's not going  
5 to be any human activity for a very extended length of  
6 time.

7 And that, that -- those were essential-  
8 ly the changes that we -- that we propose to enhance the  
9 proposal that the industry gave us.

10 Q Turning to the language of your rules,  
11 is it your opinion that the term "will protect migratory  
12 birds" or showing that the facility is nonhazardous -- not  
13 hazardous to migratory birds, is equivalent to rendering  
14 the facility nonhazardous?

15 A Yes.

16 Q If you were to use, for example, an oil  
17 mop to render a facility nonhazardous, that would fall  
18 within the phrase of showing the facility is not hazardous,  
19 is that correct?

20 A Yes.

21 Q And the OCD proposal left in the Dis-  
22 trict Supervisor's discretion to evaluate a showing that  
23 an alternative method will protect the migratory birds or a  
24 showing that the facility is not hazardous to the migratory  
25 birds, is that correct?

1           A           That is correct.

2           Q           And it's your understanding that the  
3 District Supervisors will promulgate a set of guidelines  
4 and circulate it to industry upon which to make a discre-  
5 tionary judgment?

6           A           Yes, I understand that, that they will  
7 do that.

8           Q           And that the way that that judgment will  
9 be triggered is by an application to the District Super-  
10 visor, a visit to the site, and then, if appropriate, a  
11 permit?

12          A           Yes, and that could be as simple as as  
13 formal request, a letter or something like that. It  
14 doesn't have to be a formal form unless the industry  
15 chooses to provide and feels that that type of procedure is  
16 necessary; it could be very informal and it would be put  
17 into the file of the applicant.

18          Q           And in your opinion that's not an  
19 onerous process, is it?

20          A           No, especially since it's at the level  
21 of the District Supervisor where the operator can have  
22 direct contact with both the supervisor and the super-  
23 visor's staff.

24          Q           And the concept that a permit will be  
25 issued will protect the operator as well as help the admin-

1       istration of these rules, is that correct?

2                   A           Yes, it will certainly -- it will cer-  
3       tainly make a determination of who has -- who has come in  
4       to the supervisor and who received this approval.

5                   Q           Would you please turn to Exhibits  
6       Twenty-two and Exhibit Twenty-four and Exhibit Twenty-six.

7                   A           Twenty-two, Twenty-four and Twenty-six.

8                   Q           These are the comments filed by the --  
9       Twenty-two is the comment filed by the U. S. Department of  
10      Interior, Fish and Wildlife.

11                               Exhibit Twenty-four is the comment filed  
12      by New Mexico Department of Game and Fish.

13                               And Exhibit Twenty-six is the comment  
14      filed by the U. S. Department BLM.

15                               And you will note that those comments  
16      suggest that all other wildlife be included in the OCD  
17      rule, not just migratory birds, is that correct?

18                   A           Yes, that's correct.

19                   Q           And OCD did not include the phrase "all  
20      other wildlife" because it was beyond the scope of the  
21      activity requested originally by the U. S. Department of  
22      Interior, is that correct?

23                   A           Yes, the charge was to protect migratory  
24      birds.

25                   Q           Would you turn to Exhibits Three and

1 Four?

2 Exhibit Three is a letter of November  
3 4th to Dr. Tom Bahr from Mr. Spear and that describes the  
4 problem which Mr. Spear requests Dr. Bahr investigate, is  
5 that correct?

6 A Yes, it does.

7 Q And Exhibit Four is the letter from Com-  
8 missioner Humphries to Mike Spear also defining the prob-  
9 lem that the Commission will proceed to investigate, is  
10 that correct?

11 A Yes.

12 Q So it would be your opinion that to go  
13 beyond the concept of migratory waterfowl by those words  
14 would be beyond the original charge of this proceeding.

15 A Yes, I agree.

16 Q Would you describe the statutory author-  
17 ity which vests in the OCD the power to make these rules?

18 A Yes. There is a current provision in  
19 our rules right now, that's Rule No. 310, that provides for  
20 keeping oil off of -- off of pits. It's a waste of the  
21 resource, a waste of the well, and we are charged as part  
22 of our statutory authority to prevent waste. That's number  
23 one.

24 Number two, there was recently enacted  
25 by the Legislature this past spring, winter and spring,

1 related to our rule that allows the Oil Conservation Divi-  
2 sion to regulate the disposal of waste to protect public  
3 health and the environment, and a rule with respect to  
4 protection of -- a rule with respect to keeping oil off the  
5 pits to protect migratory waterfowl would, in my opinion,  
6 fall under this new statutory authority we've been given.

7 Q And that statutory authority is included  
8 in the exhibit which is Twenty-seven?

9 A Yes, it is.

10 Q Mr. Boyer, you heard one of the panel  
11 request information about coal seam drilling activity. Can  
12 you describe your knowledge of that and the effect it would  
13 have on migratory waterfowl?

14 A That drilling and activity should have  
15 very little effect on migratory waterfowl because there are  
16 no liquid hydrocarbons associated with either the produc-  
17 tion of the gas or the waste fluids. There would be no --  
18 there would be no hazard from the oil aspect of it unless  
19 there was commingling of that water with other water from  
20 formations that contain liquid hydrocarbons if that water  
21 was commingled in a surface disposal pond, for example,  
22 then it possibly could be a hazard, but there is no oil  
23 hazard from the coal seam gas.

24 Q And it's your testimony that pits which  
25 do not retain oil are not hazardous to migratory waterfowl

1 --

2 A That's correct.

3 Q -- is that correct? Therefore if an  
4 operator were to show that his facility did not have oil on  
5 it, it would not be hazardous -- he would be granted an  
6 exception that it would not be hazardous to migratory  
7 waterfowl.

8 A That's correct.

9 Q So there are two methods in our proposed  
10 rules to -- for an operator when he has an oil free faci-  
11 lity to avoid netting or otherwise screening the facility,  
12 is that correct?

13 A If I understand the question, yes. If  
14 he's free of oil, that 's enough in itself to render it  
15 nonhazardous, and then if there's some oil on it that he  
16 feels there's an alternative method of preventing birds  
17 from landing on that pit, and some of them have been de-  
18 scribed earlier, then that would accomplish the same thing.

19 Q Or if it's free of oil -- well, strike  
20 that, please.

21 Do you have anything else you'd like to  
22 add about the OCD matters that have been testified in this  
23 hearing?

24 A No.

25 MS. JACOB: I have no other

1 questions.

2 MR. LEMAY: Thank you. Do you  
3 want to introduce these exhibits into the record?

4 MS. JACOB: Yes. We'd like  
5 for you to take administrative notice of the Exhibits One  
6 through Twenty-eight and then Twenty-nine was introduced  
7 earlier.

8 MR. LEMAY: Is there any ob-  
9 jection to election of these exhibits into the record? If  
10 not, they are into the record.

11 Additional -- some questions  
12 of Mr. Boyer?

13 Yes, sir, Mr. Spear.

14  
15 QUESTIONS BY MR. SPEAR:

16 Q Mr. Boyer?

17 A Boyer.

18 Q Mr. Boyer, I would like to follow up on  
19 an issue that's just been raised on the point of kept free  
20 of oil. In the earlier discussion the point was made that  
21 it is not impossible but difficult and at least currently  
22 relatively rare that a pit is free with oil, (unclear) in  
23 terms of pits; therefor, it would appear not to be too many  
24 of those situations out there and I've been talking to  
25 people and I get a sense that there's two different inter-



1     pretations of the way this rule would work, and I'd like  
2     your understanding.

3                     One interpretation would be that if an  
4     operator saw a pit he thought was keeping free of oil he  
5     would not need an exception. He would not need to go to  
6     the District Supervisor to get an exception.

7                     Another interpretation I've heard is  
8     that if something is not screened, netted or covered, that  
9     it will need an exception.

10                    Which one of those is your understanding  
11    of the way it would work?

12                    A             My understanding would be the former.  
13    In other words, that if the operator keeps it free of oil  
14    he doesn't to go to the District Supervisor. There is no  
15    action that needs to be taken by the District Supervisor or  
16    further action by the operator if he keeps it free of oil.

17                    Now, I agree with you that in some cases  
18    you have some sloppy -- you may have some sloppy housekeep-  
19    ing procedures. In that particular case the District or my  
20    own group when we go out to a location and see that, we  
21    will notify the operator that he must keep those pits free  
22    of oil. If he continued to not do so, then there would be  
23    an alternative. Number one, one alternative could be some  
24    requirement that he go in and say if you can't keep that  
25    pit free of oil, you have to have some sort of alternative

1 type of action taken, whether it be screening, netting,  
2 covering, or something else.

3                   You know, certainly if there's a con-  
4 tinuing violation then the Division under its own enforce-  
5 ment authority would be able to move ahead in that area.

6                   I will say that -- that, again, it is --  
7 if a operator of a surface disposal facility is judicious  
8 with his procedures as we approve them to be, then there  
9 should not be a problem. Those facilities should have  
10 skimmer pits that contain the oils and those skimmer pits  
11 should be -- should have some sort of protection for the  
12 migratory birds, and then he'd have some sort of under flow  
13 drain or cycling system that could remove the water that is  
14 free of oil into the heater or evaporation pits.

15                   Now, again, the operator, if we go out  
16 and inspect them for other things, we may be there for  
17 fresh water protection, groundwater protection, but when we  
18 see any, this type of a thing, we can point it out that  
19 they have to keep those -- that oil off of those ponds, and  
20 it's mainly a housekeeping thing and it's the responsibil-  
21 ity of the operator to do so and we permit them to do just  
22 that, keep the oil off the ponds.

23                   Q           Did you consider that just leaving the  
24 language out of the rule where we say kept free of oil and  
25 simply say that if they have a situation kept free of oil,

1 why don't they simply get the exception ruling from the  
2 District Supervisor. This simply means you're doing a good  
3 job and you don't have to net it. Let the District Super-  
4 visor make a consistent determination for all type opera-  
5 tions that this is in fact free of oil. It doesn't appear  
6 to me that we have a whole lot of these situations from my  
7 hearing; that you know, it wouldn't be a big burden.

8           A           I would -- I would say from my exper-  
9 ience that -- that -- and it's the standard practice in the  
10 Division, is that the operator is given a set of rules to  
11 keep and to operate by and we either go out and find a  
12 violation of that rule or he comes in for an exception.

13                   My own personal recommendation would be  
14 that he be given -- the operator be given the charge to  
15 keep it free of oil and if there is a problem with that as  
16 a result of either a District or a Santa Fe inspection,  
17 then the operator would have to be subject -- he would be  
18 subject to enforcement action or he would have to, you  
19 know, do something else.

20                   This is not to say that we are going to  
21 be slack in this. It's just that -- it's just that the  
22 rule is very clear as proposed, that it be kept free of oil  
23 and that is the intent of the rule, which would be like any  
24 other rule that they have to follow. If they have trouble  
25 following it consistently, then the Division would need to

1 take other action. I would not recommend that the Division  
2 try to go out and get everybody that had an open pit to  
3 come in and get a -- and make a showing.

4 MR. LEMAY: Ms. Jacober.

6 REDIRECT EXAMINATION

7 BY MS. JACOBER:

8 Q Mr. Boyer, the proposed amendments to  
9 the rules incorporate the sanctions already authorized by  
10 Statute 70-2-31, is that correct?

11 A Excuse me, if you'd read it --

12 MR. LEMAY: Refer to which --

13 Q Okay.

14 MR. LEMAY: -- the section  
15 there.

16 Q 70-2-31 is composed of sanctions or  
17 violations of the Oil and Gas Act and rules and regulations  
18 promulgated thereunder.

19 A Yes, that's correct.

20 Q So that these rules would -- would also  
21 include those things?

22 A Yes, that's correct.

23 Q Therefore we did not seek additional  
24 sanctions and rules.

25 A Yes, that is correct.

1 MS. JACOBBER: I have no other  
2 questions of this witness but I would to recall Tom Lane.

3 MR. LEMAY: Pardon?

4 MS. JACOBBER: But at some  
5 point I'd like to recall Tom Lane.

6 MR. LEMAY: Yes, sir.

7 MR. MILLER: I'm Ray Miller.  
8 I work for the Marbob Energy Corporation of Artesia, New  
9 Mexico.

10

11 QUESTIONS BY MR. MILLER:

12 Q Mr. Boyer, you entered into the record  
13 the fact that you have personal knowledge of migratory  
14 birds killed. You've also in your testimony, there again,  
15 a feeling that you have difficulties (not clearly under-  
16 stood) activity. Do you specifically have personal know-  
17 ledge of migratory birds killed in drilling pits and will  
18 you identify the specifics and what time and where you  
19 found these birds?

20 A I have. I have observed oil on drilling  
21 pits after cessation of activity. I have not observed any  
22 migratory birds or other birds in those pits.

23 MR. LEMAY: Is that all, Mr.  
24 Miller?

25 MR. MILLER: Yes.

1 MR. LEMAY: Additional ques-  
2 tions of the witness?

3 MR. BROSTUEN: I've got one.

4 MR. LEMAY: Commissioner  
5 Brostuen.

6  
7 QUESTIONS BY MR. BROSTUEN:

8 Q This is kind of a follow up to Mr.  
9 Spear's question. As I read Rule 8-B, to protect migra-  
10 tory birds all exposed pits, ponds, lined or unlined, and  
11 open tanks, shall be either kept free of oil or screened,  
12 netted or covered. That's the first sentence.

13 Then an exception to screening, netting  
14 or covering the facility may be granted by the District  
15 Supervisor upon a showing that either an alternative method  
16 will protect migratory birds, or a showing that the faci-  
17 lity is not hazardous to migratory birds.

18 I'm assuming that by -- by showing that  
19 there is no oil in the pits, that is the -- that is the ex-  
20 ception, that is the reason for the exception, and I guess  
21 I -- unless I misunderstood you, Mr. Boyer, your -- it was  
22 my understanding from what your testimony was that if a pit  
23 if free of oil the operator does not have to come in to --  
24 or come to the OCD and ask for an exemption.

25 A That -- that was my -- yes, that was my

1 --

2 Q It seems to me that the (unclear) would  
3 sure specifically requires an exception if -- if the pit is  
4 not -- or tank -- is not screened, netted or covered.

5 MS. JACOB: Mr.  
6 Commissioner, I have a follow-up question that might help  
7 the witness.

8 A I -- let me -- I -- I -- at first glance  
9 I disagree with the Commissioner's interpretation. I feel  
10 that it is a step process here and that is that, number  
11 one, is sort of decision, number one, is the pit free of  
12 oil? And yes, and if the answer if yes, there's no further  
13 action necessary and if the answer is no, then they have to  
14 screen -- then the question is do they need to screen, net  
15 or cover it? And then the answer to that would be yes,  
16 unless they come in and make a showing of some type.

17 That would be -- that would be my --  
18 that was my intention when I -- when we drafted this.

19 Q I see.

20 A No further action needed if it was kept  
21 free of oil.

22 Q How many inspectors are there in the --  
23 in, say, the southeastern part of the state?

24 A I believe there is 5 or 6 field inspec-  
25 tors in Hobbs and 2 or 3 in Artesia, and Mr. Williams and

1 Mr. Sexton can give you those numbers specifically.

2 Q The question I'm getting to and rather  
3 going roundabouts ways, what is the frequency of inspection  
4 of the -- of the facilities in that area? Do you have  
5 any knowledge of that?

6 A I have no direct knowledge as to what  
7 their schedule is.

8 Q Perhaps somebody else.

9 MR. BROSTUEN: That's all I  
10 have.

11 MR. LEMAY: Do you want one  
12 redirect and a follow-up?

13 Fine. Ms. Jacober.

14  
15 REDIRECT EXAMINATION

16 BY MS. JACOBER:

17 Q Mr. Boyer, isn't it true that there may  
18 be instances when a facility has oil on it but is nonethe-  
19 less nonhazardous to migratory birds either because the  
20 migratory birds are not in that area or there's too much  
21 activity around the facility or some other circumstances  
22 which we may not be aware of at this level but the District  
23 Supervisor is?

24 A Yes, that's correct.

25 Q So that is the reason for these people



1 having two contacts.

**2** A Yes.

3 MR. BROSTUEN: If I might ask  
4 a question. It's my understanding from a question that you  
5 asked relating to whether or not a situation was hazardous  
6 or not was related to the absence of oil on water and Mr.  
7 -- I believe one of the witnesses testified that that is  
8 true, that was one of the conditions for it not being  
9 hazardous, and it seems to me that that Rule 8-B speaks to  
10 that, and it would appear to me that as written it would  
11 require an exception for (unclear).

12 MS. JACOBBER: There was some  
13 logic to it.

14 MR. BROSTUEN: Okay, and that  
15 was -- the only reason for my question was a response --  
16 was because of a question asked by you of one of the wit-  
17 nesses, so --

MS. JACOB: I believe the Department of the Interior is going to submit a detailed commentary on Mr. Spear's line of questioning if you have more questions.

**22** MR. BROSTUEN: Thank you.

23 MS. JACOB: I have no more  
24 questions of this witness.

25 MR. LEMAY: Commissioner

1 Humphries.

2  
3 QUESTIONS BY MR. HUMPHRIES:

4 Q Mr. Boyer, talking about the coal seam  
5 production I wasn't so much interested in the possibility  
6 of oil being on the pit or the high pH of the produced  
7 water as I was the blowout of solid particles of coal and  
8 that fine dust that covers the whole pit.

9 Is there a possibility that the mix of  
10 oil and -- or coal and water creates the same type of hy-  
11 drocarbon effect that oil would have on the bird on the  
12 surface?

13 A I can't answer that. I have not seen --  
14 I have not seen a slurry that stays in solution that --  
15 that much and I can't respond to whether that is or not. I  
16 would think not but I can't give you anything other than  
17 that.

18 Q It would seem to me that at least that  
19 question should be dealt with and answered because if  
20 you've watched them complete one of those wells and have a  
21 big compressor set up on it, what they're blowing out is --  
22 after they've gotten the water to come, is they're blowing  
23 out constant mist of coal dust and it covers the entire pit  
24 and surrounding berm and pit, so there's a question there  
25 that I'd suspect would need to be answered and this speci-

1       fic case is much different from most drilling operations.

2               A               Yes, but I -- I cannot answer that.

3               Q               Okay. I would suggest that at least it  
4       be considered as a temporary directive of the Director to  
5       do something to deal with this specific on-going develop-  
6       ment process right now.

7                               MR. HUMPHRIES: No other  
8       questions.

9                               MR. LEMAY: Are there addi-  
10      tional questions of the witness?

11

12      QUESTIONS BY MR. LEMAY:

13               Q               Mr. Boyer, just a, I guess as a final  
14      attempt to clarify some of the confusion, we're talking  
15      about deeming a facility nonhazardous; we're talking about  
16      is the facility hazardous unless otherwise rendered non-  
17      hazardous by the operator or the OCD or could you just ex-  
18      plain that a little more, how that -- how you visualize  
19      those rules working that way?

20               A               Again my visualization of how this would  
21      work is that it is the operator's responsibility to keep  
22      the pit that he's looking at free of oil and again it may  
23      be worded rather vaguely in the interpretation that Mr.  
24      Brostuen has, but it is my, again, feeling that the  
25      District Supervisors would only become involved when there

1 is oil on a pit and its operator does not wish to screen,  
2 net or otherwise cover it.

3 That was my interpretation of -- of the  
4 charge. The operator keeps it free of oil, like he does a  
5 lot of other things under our rules and however, if he  
6 wants an exception to that because he considers it non-  
7 hazardous itself, or he figures that there's some other way  
8 to render it nonhazardous, then it goes to the District  
9 Supervisor.

10 And I hope I have clarified our intent a  
11 little bit, at least my intent.

12 Q Well, I think it's important because it  
13 seems to be a critical element, whether the deeming not,  
14 whether you apply to the OCD for an exception and the ex-  
15 ception would be where there was oil on the facility that  
16 we would consider it nonhazardous and the OCD, the District  
17 Supervisor would examine the facility with a proposed al-  
18 ternative method and provide some -- some guidelines there  
19 or the permitting process would, in essence, give an excep-  
20 tion to -- to these rules? Is that the way you would  
21 visualize it?

22 A The permitting process would give an ex-  
23 ception to the requirement to screen or net or cover it and  
24 again if we have a -- there are a lot of pits out there  
25 that have the potential to have oil on them. If we re-

1 quired, the OCD required that each operator who had a pit  
2 that had a potential to have oil on them come to OCD and  
3 make an individual showing for each one of those pits, I  
4 think it would be difficult staff-wise for both the Oil  
5 Conservation Division and the industry to comply.

6 If, on the other hand, the operator was  
7 just given a charge to keep the oil off and again in some  
8 of these surface disposal operations there are a series of  
9 pits that shouldn't have any oil on them as part of the  
10 permit that they've been given already, or if there's a pit  
11 out there that has somewhat, sort of an individual well  
12 site, that again having -- maybe a well doesn't produce  
13 liquid hydrocarbons or the separator works, or something  
14 along that line, so there'd be very little likelihood of  
15 being oil on that particular pit. If he keeps that off,  
16 he's -- he's done with his responsibilities. If -- if he  
17 wishes to, instead of keeping the oil off, or he is having  
18 having trouble or finds that he has a very large pit and he  
19 needs to cover it with a large surface area and he feels  
20 that there might be some other alternative to screening or  
21 netting, then he can go to the District Supervisor for that  
22 type of operation and that might be flagging or some thing  
23 along that line.

24 Or if, in the instance of a pit being  
25 located in the middle of an oil refinery, for example,

1 where there's activity involved and the noise and such,  
2 that could be a showing that the birds would not likely  
3 land there and therefore this by itself would be non-  
4 hazardous.

5 I hope maybe I've clarified that a  
6 little bit. That was our intent and I'm sure the Commis-  
7 sion will, you know, maybe wish to re-examine that point in  
8 their deliberations.

9 Q How would you visualize, then, open  
10 fiberglass tanks? Would there -- would there be a presump-  
11 tion of oil on those tanks or a presumption of non-oil that  
12 would be kept clear, clean, as an example of this? The  
13 pits I can understand. Maybe in some of the other facili-  
14 ties where is the presumption?

15 A In my opinion the presumption would be  
16 that the tanks would be free of oil because they'd have  
17 separators, they'd have other types of equipment at the  
18 facilities.

19 The -- if the tanks were free of oil,  
20 as some tanks up in the northwest as part of the vulnerable  
21 area investigation that were free of oil. If those tanks  
22 are free of oil, kept free of oil, then they should not be  
23 subject to going in and making a showing.

24 Maybe it ought to be looked at from the  
25 standpoint of -- of whether a pool is oil producing or

1 whether it's likely just to have oil as a part of natural  
2 gas, for example. I would make the presumption that the  
3 tanks would -- should be kept free of oil and that they  
4 need to be covered or given an exception to the covering if  
5 they can be kept free of oil.

6 I may be missing the fine points but  
7 that's -- that's my interpretation.

8 MR. LEMAY: Thank you. This  
9 is something that seems to be a topic of misunderstanding.

10 Yes, Mr. Spear.

11 MR. SPEAR: I hate to belabor  
12 this but I think we're really at a central point at issue  
13 in this, the central presumption.

14 As we got into this issue in  
15 both New Mexico and Texas, one of the things we found is  
16 that if rules were followed strictly and literally, very  
17 closely, much of the problem we have out there with migra-  
18 tory birds would not be there, and it's certainly the  
19 intent of the Commissions in New Mexico and Texas to not  
20 have this problem and they didn't want to have oily waste  
21 in them, but we get to one of really small amounts of oil  
22 and the difficulties of keeping this oil out of tanks and  
23 out of pits through various accidents or incidents, I might  
24 say, that have come along or other situations, and then  
25 secondly, enforcement situation simply does not allow

1 people in the State to make frequent visits and so there's  
2 been an assumption that these things would be free and that  
3 that isn't the problem.

4 We've gotten so close here in  
5 this rule, I think we should just cap it off if you get rid  
6 of that phrase "kept free of oil" and require that if some-  
7 body is keeping something free, they simply get an acknow-  
8 ledgement from the District Supervisor that that practice  
9 is keeping it free. That gives us an equal standard across  
10 all of the operations because it's (not clearly understood)  
11 and then you can create an incentive to go towards removal  
12 of pits (not clearly understood) that I think is generally  
13 happening in the industry.

14 So I think the confusion in  
15 some of the discussion we've had here today is exactly re-  
16 presentative of some of the problems that come from the  
17 field of the difference between theory of the way it's  
18 supposed to work and the practice out in the real world,  
19 and there's no doubt in my mind that operators intend to  
20 keep things free of oil but it takes so very little we have  
21 the problem.

22 So I would make the suggestion  
23 and recommendation that the discussion is representative of  
24 the problem.

25 MR. LEMAY: Thank you, Mr.



1     Spear.

2                     Yes, sir, Mr. King.

3                     MR. KING:     Speaking as Joe  
4     King, Texaco, might I inject that this is a key point, the  
5     operators have a unique knowledge regarding the likelihood  
6     of carryover, even these very small wells. As Mr. Boyer  
7     says, if you produce condensate in a gas operation there is  
8     almost no chance for coating an open fiberglass tank; a  
9     very small one because the condensate breaks so clean. On  
10    the other hand, if it's a very heavy oil it's almost impos-  
11   sible to get a complete, 100 percent break.

12                    I think that if we follow the  
13    recommendation that the operators will keep it clean of oil  
14    and not require an exception, that time will probably prove  
15    that that's been very effective and has eliminated a great  
16    deal of follow-up inspection and paperwork, et cetera. I  
17    believe that you'll find that we will essentially eliminate  
18    the harm to the birds, that operators are going to be on a  
19    whole very responsible and they're going to be very know-  
20   ledgeable about the fluids they're producing and to give  
21   them the benefit of the doubt, so to speak, or to say go  
22   ahead and keep it clean, if you keep it clean we assume  
23   that meets the requirement. Let them have that chance and  
24   let's see what happens. I don't believe that we will find  
25   under the test of time, that we've done any harm to these

1 birds. Again, speaking from Texaco, I know some of our  
2 operations, low fiberglass tanks, are for sure going to  
3 carry some heavy oil with them. Well, we're going to net  
4 them. I have other tanks that are basically gas producing  
5 operations that we're not going to carry oil in them and  
6 they might not need to be netted. I -- I feel that action  
7 on the part of the Commission here could give -- give the  
8 operators a chance to get their open top tanks clean of oil  
9 will work and I would recommend it.

10 MR. LEMAY: Thank you, Mr.  
11 King.

12 Additional comments? Yes,  
13 sir, Mr. Sexton.

14 For the record will you ident-  
15 ify yourself?

16 MR. SEXTON: Jerry Sexton,  
17 District I Supervisor.

18 I'm not sure I don't agree  
19 with Mr. Spear. I don't look for us to have that many in  
20 southeast New Mexico. When we go giving options to each  
21 company it's very hard for us to administer a rule and the  
22 northwest may have some different blowdown (unclear) that  
23 may be exempt over large areas, but I'm hopeful that we  
24 won't have that large a number. I find that what I have  
25 visualized right now is a short one-page deal that the com-

1 panies send in and we'll inspect it, and as far as in-  
2 specting-wise, although we don't have many, we get  
3 throughout the county, so it's not that hard to pick up  
4 what I would say the exceptions. and say we agree with you,  
5 you've got the facilities in good order (not clearly un-  
6 derstood.)

7 I'm not sure whether -- it  
8 doesn't seem to me like it's that big a problem to get a  
9 one-page exemption. We do it for a (unclear) gas and (not  
10 clearly understood) inspected and I would feel better that  
11 we're doing our job if we did exempt things instead of  
12 giving the companies their option. I haven't seen the op-  
13 tion that's worked that good.

14 MR. LEMAY: Thank you, Mr.  
15 Sexton.

16 Commissioner Humphries.

17 MR. HUMPHRIES: I find myself  
18 in the rare position of agreeing with Joe King. I think  
19 that Fish and Wildlife has pointed out the problem. They  
20 have the enforcement ability and steps have been taken and  
21 I think the proposed language is clear to me. I don't see  
22 that it's quite as elaborate and decision free that you do  
23 either this or this. It seems to me that it is very clear  
24 that, number one, initially the law compels them to keep  
25 the oil off. If that case is not consistent with a fail

1 safe operation which in the real world is not too likely to  
2 happen, then they have to be kept free or screened or  
3 netted, and at that point I think it's a little bit un-  
4 likely and inappropriate to say that we deem them to be  
5 guilty before they have the opportunity to prove that they  
6 don't need it.

7                               So I'm less inclined to go  
8 along with the idea that, lacking anything else, they have  
9 to get the exception as opposed to apply for an exception  
10 under circumstances where they think it's necessary, be-  
11 cause again, in the end, Fish and Wildlife still has the  
12 law and the treaty that compel them to take criminal pro-  
13 ceedings against those people. So there's a burden of  
14 responsibility on Fish and Wildlife; there's a burden of  
15 responsibility on industry; and there's a burden of respon-  
16 sibility on the Division that should be approximately  
17 equally shared.

18                               I think that in the end Fish  
19 and Wildlife has some solutions that can help beyond the  
20 criminal side and that's in your Wildlife Research Unit,  
21 but I still think that you can spend some effort and time  
22 on this and develop some lower cost high tech solutions,  
23 because some of these tanks are going to become too large  
24 and too unwieldy to physically withstand that at this time.  
25 One good thunderstorm and the nets are going to (unclear)

1 in Texas.

2 So I suspect that if Fish and  
3 Wildlife will carry forth the attitude that they have so  
4 far that they will try to help solve this problem as op-  
5 posed to prosecute, that that research can contribute to  
6 some additional kinds of solutions that aren't just physi-  
7 cally placing nets over them.

8 MR. LEMAY: Thank you, Com-  
9 missioner Humphries.

10 MR. BROSTUEN: I've got a  
11 couple questions of Ms. Jacober.

12 I asked the question earlier  
13 about the frequency of inspection. I'd like to also, if  
14 you can't give me the information now I'd appreciate you  
15 supply it to the Commission. The number of facilities in  
16 the southeastern part of the state that we're primarily  
17 talking about and the frequency of inspections.

18 MR. LEMAY: Yes, sir, Mr.  
19 Girand.

20 MR. GIRAND: I'd like to read  
21 some comments into the record from --

22 MR. LEMAY: I think that's a  
23 good point, but we're getting a little bit -- I'd like to  
24 excuse the witness and then -- then let's do that, because  
25 -- are there any questions of -- additional questions of

1 Mr. Boyer and then we'll go to comments?

2 MS. JACOB: I have no addi-  
3 tional questions of Mr. Boyer but I need to call Mr. Lane  
4 back for one more.

5 MR. LEMAY: Okay. Are there  
6 additional questions of Mr. Boyer?

7 If not, he may be excused.

8 And, Mr. Lane, would you like  
9 to come back just for a brief set of questions?

10  
11 THOMAS LANE,  
12 being recalled as a witness and remaining under oath,  
13 testified as follows, to-wit:

14  
15 REDIRECT EXAMINATION

16 BY MS. JACOB:

17 Q Mr. Lane, during the break did you have  
18 a chance to talk with Mike Williams, District Supervisor?

19 A Yes, I did.

20 Q And did he describe Yates Petroleum's  
21 efforts to replace all of their existing pits with fiber-  
22 glass tanks?

23 A Yes, he did.

24 Q Can you describe that for the Commis-  
25 sion?

1           A           He stated to me that Yates Petroleum was  
2 in the process of closing all their earthen pits and re-  
3 placing those pits with a closed top fiberglass tank  
4 equipped with leak detection system, vents and the like.

5           Q           Are you supportive of that?

6           A           Yes, I am.

7           Q           But you understand that that, that  
8 Yates cannot accomplish replacement of all of its pits by  
9 October, 1989, is that right?

10          A           That's correct.

11          Q           And what is the agreement that you have  
12 suggested to Mr. Williams that you would have with Yates?

13          A           We talked with Mr. Spear, who is the  
14 Regional Director for Fish and Wildlife Service in charge  
15 of New Mexico, and it would not be beneficial to any party  
16 to hinder their changing of the system from a, basically a  
17 pit system to a tank system. We would encourage them to  
18 change over to the tanks, the closed top tanks, and as long  
19 as their efforts were legitimate forward moving efforts, no  
20 unnecessary delay in the -- the closing of the pits and the  
21 opening of the fiberglass tanks, we would not be interested  
22 in - in pursuing any criminal activity on their part invol-  
23 ved with the taking of the birds.

24                       We would like to encourage them wherever  
25 possible to eliminate the pits and unless there is undue

1 delay in closing the pits and re-establishing the tanks, we  
2 would not be pursuing any criminal prosecution.

3 Q And this would be your position towards  
4 any other company in the industry who was proceeding in a  
5 similar manner, is that correct?

6 A As long as there's no undue delay.

7 MS. JACOB: I have no fur-  
8 ther questions.

9 MR. LEMAY: Thank you. Any  
10 additional questions?

11 Thank you, Mr. Lane.

12 Are there any other witnesses?  
13 Well, at this point I think we -- we will take some com-  
14 ments and statements into the record.

15 Mr. Girand?

16 MR. GIRAND: I'll bring a copy  
17 up.

18 MR. HUMPHRIES: I would be  
19 happy to stipulate I can read and you don't need to read  
20 it.

21 MR. GIRAND: They're not too  
22 long, Commissioner.

23 MR. HUMPHRIES: Oh, okay.

24 MR. GIRAND: I can't hold  
25 forth.



1 First I'll thank the Commis-  
2 sion for allowing us to make these comments.

3 My name is Dan Girand and I'm  
4 the Chairman of the Public Lands Committee. Tommy Roberts,  
5 who is the president of Independent Petroleum Association  
6 of New Mexico, couldn't be here and asked if I'd read these  
7 comments to you instead.

8 The Association, as I'm sure  
9 most of you know, is comprised of more than 450 independent  
10 oil and gas operators owning interests in properties  
11 located in the State of New Mexico.

12 And I would like to take this  
13 opportunity to state the position of the IP New Mexico with  
14 respect to the adoption of any rules regarding the protec-  
15 tion of birds covered under the Migratory Bird Treaty Act.

16 The information that's avail-  
17 able to IPA indicates that there has been some documenta-  
18 tion of isolated incidents of damage to bird life caused by  
19 oily waste in open pits around production areas. However,  
20 the information we have is that there has been no documen-  
21 tation of incidents of damage to bird life in some other  
22 parts of the state where oil and gas production is preva-  
23 lent. If this information is accurate, then it would ap-  
24 pear that the adoption of statewide rules requiring screen-  
25 ing, netting, or other means of protection is unreasonable

1 and unwarranted. The problem has not yet been documented  
2 as a statewide problem and proposal to adopt a statewide  
3 rule requiring netting, screening or other methods would  
4 have to be characterized as regulatory excess.

5 Now this observation is not in  
6 anyway intended to minimize the seriousness of harm to bird  
7 life; however, it is extremely important that any proposal  
8 to prevent such harm be reasonably related to the kind and  
9 magnitude of harm which has been documented.

10 If it can be agreed that the  
11 adoption of a statewide rule requiring netting or screening  
12 is not appropriate, then the next question would be whether  
13 a rule should be adopted which will be applied on a geo-  
14 graphically selective basis. It is the position of IPA New  
15 Mexico that the adoption of a rule applied on geographic-  
16 ally selected basis is also inappropriate under the circum-  
17 stances.

18 Again, the information avail-  
19 able to IP New Mexico indicates that there has been a lack  
20 of documentation evidencing a pattern of harm or damage to  
21 bird life over an extended period of time as a result of  
22 any oil and gas production activity.

23 Given that lack of evidence,  
24 an attempt to apply a rule requiring netting or screening  
25 on a geographically selective basis would necessarily be

1 arbitrary and subject to regulatory abuse.

2 IPA is not urging the Conser-  
3 vation Division to overlook documented incidents of damage  
4 to bird life resulting from oil and gas production activi-  
5 ties. Any loss of bird life is a serious problem and  
6 serious attention should be given to that problem; however,  
7 it is not -- it is not necessary to show the proper concern  
8 for the problem by implementing a rule or regulation that  
9 is overly broad and not reasonably related to the problem  
10 as it has been documented.

11 A neighboring state has  
12 already taken an initial step in an effort to resolve this  
13 problem. Texas Railroad Commission issued a notice to  
14 operators in that state and advised them of the problem and  
15 cautioned them to conduct their operations accordingly. We  
16 think this is a reasonable way to initially address the  
17 problem. If this approach is found to be ineffective, then  
18 it may be necessary to attempt to resolve the problem  
19 through some other means.

20 In conclusion, IPA New Mexico  
21 asks that you use regulatory restraint in addressing the  
22 problem of damage to bird life resulting from oil and gas  
23 production. The available documented evidence warrants  
24 that restraint. Any regulation ultimately adopted should  
25 provide the operator an opportunity to assume the business

1 risk of not adequately equipping his facilities, the  
2 business risk to be assumed would be the imposition of a  
3 monetary penalty in connection with the production of con-  
4 clusive evidence that the damage to bird life has result-  
5 ed from oil and gas production activities. In other words,  
6 compliance with specific netting or screening requirements  
7 should not be mandated.

8 We thank you for the oppor-  
9 tunity to be heard.

10 MR. LEMAY: Thank you, Mr.  
11 Girand.

12 MR. GIRAND: If I might make  
13 another -- change hats. As Dan Girand from Harvey Yates  
14 Company, we would be extremely concerned about any netting  
15 of drilling pits. We agree, and I think that Fish and  
16 Wildlife people agree, there is no problems with that type  
17 situation.

18 I might comment that these  
19 don't last long as a rule; well, we all wish we had more  
20 oil on the drilling pits, but we don't, and that's not the  
21 common thing, unfortunately.

22 So there's not oil there very  
23 much and what's there is usually, unless there's something  
24 else, pits are cleaned up, broken out, just as soon as they  
25 dry up, as soon as possible. I think that's more of an

1 industry standard than anything else (unclear).

2 In our case we don't use oil  
3 to drill so we don't have that problem.

4 We -- we're concerned that  
5 with the rules you're putting an operator in the position  
6 of having to outrule a negative, and you know that's impos-  
7 sible, by saying you have to prove that there's nothing  
8 wrong.

9 Also I might just comment,  
10 you've heard some testimony on prices and what we've been  
11 able to obtain so far, for an independent operator who  
12 doesn't have crews that he can send out, materials are  
13 going to run somewhere around \$50 or \$60. You have to  
14 realize that the oil patch, you're talking an hour to two  
15 hours drive from any home base to get to where he's going  
16 to do his work. Experience has showed us between \$200 and  
17 \$400 labor in addition to the price; depends on how good a  
18 negotiator you are.

19 You're looking at half a day  
20 to net and then go on to the next one, so maybe two a day  
21 is what you'd expect. We're not a large company. We have  
22 probably 100 of these and all I'm talking about is fiber-  
23 glass tanks that might have to be netted. Therefore you  
24 can see the expense is considerable as far as costs are  
25 concerned. Thank you.

1 MR. LEMAY: Thank you, Mr.  
2 Girand.

3 Additional comments or state-  
4 ments?

5 Yes, sir.

6 MR. SILLERUD: Mr. Chairman,  
7 I'm Jerry Sillerud with OXY USA of Midland, and OXY was  
8 represented and participated in these (unclear) meetings  
9 and (not clearly audible) new revisions.

10 I'd just like to say for the  
11 record that we concur with the recommended revisions sup-  
12 port them now.

13 MR. LEMAY: Thank you, sir.

14 Additional comments, state-  
15 ments for the record?

16 Since the staff of OCD has  
17 just recently prepared this alternative to the industry  
18 recommendations and you all have not had a chance to study  
19 it, is there anyone who -- I plan to leave the record open  
20 for at least two weeks. Is there anyone that would like to  
21 have this revisited, we'll say, in a month and provide more  
22 testimony on it, or would the two week commenting period be  
23 sufficient?

24 I will assume the two-week  
25 comment period will be sufficient unless I see other

1 evidence that it's not.

2 With that in mind, we will  
3 leave the record open for two additional weeks on which to  
4 receive comments on the (unclear) that the staff has pre-  
5 sented here.

6 There are copies in the back  
7 of the room and I suggest you take those on the way out and  
8 look at them.

9 With that we shall leave the  
10 record open for two weeks and then take the case under  
11 advisement.

12 Thank you very much.

13  
14 (Hearing concluded.)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## C E R T I F I C A T E

I, SALLY W. BOYD, C. S. R. DO HEREBY  
CERTIFY that the foregoing Transcript of Hearing before the  
Oil Conservation Division (Commission) was reported by me;  
that the said transcript is a full, true and correct record  
of the hearing, prepared by me to the best of my ability.

Sally W. Boyd CSR



## NEW MEXICO OIL CONSERVATION COMMISSION

## COMMISSION HEARING

SANTA FE, NEW MEXICOHearing Date MAY 18, 1989 Time: 9:00 A.M.

NAME	REPRESENTING	LOCATION
Jim Collier	Amoco	Houston
JERRY SILLERUD	Oxy USA	MIDLAND
Raye Miller	Marbob Energy Corp	Artesia
GARY STEPHENS	BUREAU OF LAND MANAGEMENT	Albuquerque
MIKE SPEAR	U.S. FISH + WILDLIFE SERVICES	"
Joe King	Texaco	Hobbs
Jim Hubert	U.S. Fish + Wildlife	Albuq.
Dan Girard	HECO	Roswell
BYRON DONALDSON	N.M. GAME & FISH	SANTA FE
Bob Huber	Byram	Santa Fe
<del>Mike Wilkins</del>	OCD	Artesia
Eddie Gray	OCD HHS	Hobbs
Johnny Robinson	OCD	Artesia
Dave Boyer	OCD SK.	SE
ROGER ANDERSON	OCD	S.F
David Englert	OCD	S.F
John Sproul	El Paso Nat. Gas	El Paso TX
Alvin Baca	IPRA NM	Santa Fe, NM

## NEW MEXICO OIL CONSERVATION COMMISSION

COMMISSION HEARINGSANTA FE, NEW MEXICOHearing Date MAY 18, 1989 Time: 9:00 A.M.

NAME	REPRESENTING	LOCATION
Armando Lopez	BCM	Roswell, NM
Tom LANE	US Fish & Wildlife Ser.	Albuquerque