

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

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

APPLICATION OF NEARBURG EXPLORATION CASE NO. 15441
COMPANY, LLC, SRO2, LLC AND SRO3,
LLC FOR AN ACCOUNTING AND LIMITATION
ON RECOVERY OF WELL COSTS, AND FOR
CANCELLATION OF APPLICATION FOR
PERMIT TO DRILL, EDDY COUNTY,
NEW MEXICO.

Consolidated with

APPLICATION OF COG OPERATING, LLC CASE NO. 15481
FOR A NONSTANDARD SPACING AND
PRORATION UNIT AND COMPULSORY POOLING,
EDDY COUNTY, NEW MEXICO.

APPLICATION OF COG OPERATING, LLC CASE NO. 15482
FOR A NONSTANDARD SPACING AND
PRORATION UNIT AND COMPULSORY POOLING,
EDDY COUNTY, NEW MEXICO.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

February 28, 2017

Volume 1 of 2

Santa Fe, New Mexico

BEFORE: DAVID R. CATANACH, CHAIRPERSON
PATRICK PADILLA, COMMISSIONER
DR. ROBERT S. BALCH, COMMISSIONER
GABRIEL WADE, ESQ.

1 This matter came on for hearing before the
2 New Mexico Oil Conservation Commission on Tuesday,
3 February 28, 2017, at the New Mexico Energy, Minerals
4 and Natural Resources Department, Wendell Chino
5 Building, 1220 South St. Francis Drive, Porter Hall,
6 Room 102, Santa Fe, New Mexico.
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1	INDEX	
2		PAGE
3	Case Numbers 15441, 15481 and 15482 Called	6
4	Opening Statement by Mr. Hall	7
5	Opening Statement by Mr. Feldewert	16
6	The Applicants' Case-in-Chief:	
7	Witnesses:	
8	William Randy Howard:	
9	Direct Examination by Mr. Harper	53
	Cross-Examination by Mr. Feldewert	158
10	Cross-Examination by Commissioner Padilla	234
	Cross-Examination by Chairman Catanach	246
11	Redirect Examination by Mr. Harper	250
	Recross Examination by Mr. Feldewert	257
12		
13	Recess	263
14	Certificate of Court Reporter	264
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	EXHIBITS OFFERED AND ADMITTED	
2		PAGE
3	Nearburg Exploration Co., LLC Exhibit	
4	Numbers 1 through 11, 13 through 23, 25 through	
	31, 36, 41, 42, 66, 67	158
5	Nearburg Exploration Co., LLC Exhibit Number 65	110
6	Nearburg Exploration Co., LLC Exhibit	
7	Numbers 68	260
8	COG Operating, LLC Exhibit Numbers 2 and 14	158
9	COG Operating, LLC Exhibit Numbers 1 through 17C,	
10	18 through 24, 30	261
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 (9:06 a.m.)

2 CHAIRMAN CATANACH: I'll call Case Number
3 15441, the application of Nearburg Exploration Company,
4 LLC; SRO2, LLC; and SRO3, LLC for an accounting and
5 limitation on recovery of well costs, and for
6 cancellation of application for permit to drill, Eddy
7 County, New Mexico.

8 We're consolidating all these cases,
9 Mr. Hall?

10 MR. HALL: Yes.

11 CHAIRMAN CATANACH: At this time I'll call
12 Case Number 15481, the application of COG Operating, LLC
13 for a nonstandard spacing and proration unit and
14 compulsory pooling, Eddy County, New Mexico, and
15 finally, Case Number 15482, the application of COG
16 Operating, LLC for a nonstandard spacing and proration
17 unit and compulsory pooling, Eddy County, New Mexico.

18 At this time I will call for appearances in
19 these cases.

20 MR. HALL: Mr. Chairman, Commissioners,
21 Scott Hall and Sharon Shaheen, from Montgomery &
22 Andrews, Santa Fe, appearing on behalf of the Nearburg
23 Exploration Company; SRO2, LLC; and SRO3, LLC.

24 Appearing with us today are David Harper
25 and Sally Dahlstrom from the Dallas office of

1 Haynes & Boone.

2 MR. FELDEWERT: Mr. Chairman, Members of
3 the Commission, Michael Feldewert, with the Santa Fe
4 Office of Holland & Hart, appearing on behalf of COG
5 Operating, LLC. We have one witness here today.

6 CHAIRMAN CATANACH: Mr. Hall, can I get you
7 to spell Sharon's last name?

8 MR. HALL: S-H-A-H-E-E-N.

9 CHAIRMAN CATANACH: One more time.

10 MR. HALL: S-H-A-H-E-E-N.

11 CHAIRMAN CATANACH: She's also an attorney?

12 MR. HALL: Yes.

13 CHAIRMAN CATANACH: Okay. Would the
14 parties like opening statements in the case, or do you
15 want to just move on to --

16 MR. HALL: We'll give you some brief
17 opening statements.

18 CHAIRMAN CATANACH: All right.

19 OPENING STATEMENT

20 MR. HALL: So we're here today to provide
21 you with some background surrounding the creation and
22 subsequent termination of the SRO State Exploratory
23 Unit. It's a 3800 -- I'm sorry -- 8300-acre unit in
24 Eddy County, about 25 South, Range 28 East, comprised of
25 all state leases. The unit was approved by the Division

1 pursuant to its order, R-13136, on June 12th, 2009, and
2 subsequently approved by the State Land Commissioner.

3 The unit was originally operated by Marbob
4 Energy and subsequently acquired by COG Operating. COG
5 operated the unit for several years. It determined that
6 it would be in the best interest of unit operations to
7 terminate the unit because the unit had an onerous
8 continuous development clause. So COG asked all of the
9 interest owners to agree to voluntary termination of the
10 unit. That occurred in 2014, March 1st, 2014.

11 When that occurred, that act had several
12 consequences, and as a result, the unit acreage formerly
13 dedicated to the unit and several of the wells fell out
14 of regulatory compliance. That's what we're asking the
15 Commission to address here today.

16 By way of background, my client,
17 Nearburg -- I'll refer to them as Nearburg, sometimes
18 N-E-X, NEX -- owned a state lease comprised of the west
19 half of Section 20. The lease had been term assigned
20 previously to Marbob, and Marbob contributed the lease
21 to the unit. The term of the term assignment was for
22 the duration of the unit itself, and when the unit
23 terminated, the lease reverted back to Nearburg. And I
24 don't think the parties dispute that. I don't think the
25 parties dispute title to Section 20 at all. That began

1 a series of events that we're here to have the
2 Commission address.

3 And we'll present you proof of several
4 matters concerning the acts and omissions of COG, which
5 we believe you can put as findings in the order that
6 result from this proceeding.

7 While the term assignment was in effect, it
8 had several requirements that the operator deliver well
9 data to Nearburg on an ongoing basis. The proof that
10 we're going to present to you today will establish that
11 COG failed to honor that well data requirement mostly.
12 They complied with it for only a limited number of
13 wells.

14 You will hear about an operating agreement
15 that formerly applied to the unit. There were
16 requirements for well proposals and well data and well
17 access under that agreement as well. You will hear that
18 COG never honored the operating agreement as to Nearburg
19 and Nearburg's interest in Section 20.

20 So when the unit was terminated and Section
21 20 came out of the unit, it turns out that a unit well
22 had been previously drilled on the west half of Section
23 20. It's called the SRO -- was called the SRO State
24 Unit Well 16H. It's an Avalon well, and it's -- a
25 160-acre project area is dedicated to it, located

1 entirely in Section 20. That's one of the problems the
2 Commission will have to address today.

3 When the unit terminated, the termination
4 also resulted in the abolishment of the exploratory --
5 the State Exploratory Unit project area while the unit
6 was in effect, the project area -- the entire unit area
7 under the Division's rules. As the consequence of unit
8 termination, intended or not, that project area was
9 abolished. As a result, there were several wells and
10 several individual project areas that became
11 disassociated and unpermitted. Some of them were
12 unconsolidated, and some of them lacked communitization
13 agreements on them.

14 You will hear proof that when the term
15 assignment in Section 20 reverted to Nearburg, it was
16 never replaced. And you will hear that after unit
17 termination, COG drilled -- permitted and then drilled
18 wells into Nearburg's lease in Section 20 without
19 consent of Nearburg and in violation of the Division's
20 rules. And under circumstances like that, we do not
21 think that COG can demonstrate that they had good faith
22 to drill either of those wells or that it had any sort
23 of claim to title to drill those wells.

24 You will hear that after those wells were
25 drilled, COG concealed their existence from Nearburg.

1 You will hear that COG failed to consolidate the
2 resulting nonstandard proration unit that should have
3 been dedicated to the well in violation of the
4 Division's rules. You will hear that COG failed to
5 consolidate the acreage dedicated to those wells either
6 by voluntary agreement or by compulsory pooling. You
7 will hear that COG failed to obtain any authorization at
8 all to authorize it to recover well costs or expenses.
9 You will hear that COG failed to apply for or notify
10 offsetting interest owners or the interest owners in the
11 resulting nonstandard proration units that are dedicated
12 to the two wells. They are the SRO State Com 43H and
13 the SRO State Com 44H.

14 You will hear that as a result of the
15 acreage coming out of the unit, the well -- the wells --
16 the acreage were out of compliance in a number of other
17 ways. COG had attempted to establish conflicting
18 project areas in violation of the Division rules. COG
19 had drilled a well into a project area that had a
20 preexisting well on it. That is prohibited under the
21 Division's rules.

22 Since the wells were produced, they've
23 been -- I'm sorry. Since the wells were completed in
24 2015, they have been produced nearly every day with no
25 accounting to Nearburg at all. That results in an

1 ongoing violation of Nearburg's correlative rights.

2 You will hear that there was an effort to
3 obtain Nearburg's signature on a communitization
4 agreement to try to cure the regulatory noncompliance
5 and to also prevent the termination of Nearburg's lease
6 by the State Land Office, because it lacked any sort of
7 communitization agreement. You will hear that the
8 communitization agreement that Nearburg signed was depth
9 limited, and then you will hear that the communitization
10 agreement that COG provided to the Land Commissioner for
11 approval was not depth limited. It was not the
12 agreement signed by Nearburg.

13 So all of these instances of noncompliance,
14 I think, are framed by some specific rules, and I've
15 outlined them to you. If you would turn to our exhibit
16 notebook, our first one, under Tab 19, I can briefly run
17 through those for you.

18 The first rule I've highlighted for you
19 there is under Part 14 having to do with obtaining
20 drilling permits for wells. And if you will look at
21 19.15.14.8, it says that "an operator shall not file an
22 application for a permit to drill or commence drilling
23 operations without the consent of one lessee or interest
24 owner at the proposed bottom-hole location or obtaining
25 a compulsory pooling order."

1 If you will turn to Part 15 that we've
2 highlighted for you there, that portion of 19.15.15.11
3 under the Division's well spacing and location acreage
4 dedication rules having to do with nonstandard spacing
5 units, and it's the accepted procedures for operators to
6 apply for and obtain approvals after notification for
7 nonstandard units. But there was a prohibition there
8 against producing a well until that is accomplished.

9 If you will turn to Part 16, which has to
10 do with the Division's drilling and production
11 regulations, and we've highlighted the definition for
12 project area for you there. And then on the second page
13 of that, there are various -- states that a project area
14 may be -- one of them being a project area that is
15 coterminous with the State Exploratory Unit. In 2011, I
16 believe it was, the Division adopted its rules
17 addressing horizontal drilling. And, again, the
18 Division had repeated in its rules some regulatory
19 tripwires that have really evolved through several cases
20 that have come out of the Division and the Commission
21 over the years. But, again, it repeats the requirement
22 that -- repeats the embargo against filing an
23 application for drilling a well without consent or
24 without obtaining the compulsory pooling order.

25 And at 19.15.16.15C, you will see the

1 regulatory framework for drilling subsequent wells in
2 project areas where there was a preexisting well. It
3 prohibits it without agreement of the parties in that
4 project area or subsequent to voluntary agreement or
5 hearing an order by the Division.

6 Then on the next page, 19.15.16.15F, there
7 is the clear requirement that the operator of a
8 horizontal well consolidate all of the interests in the
9 project area before the Division will approve a C-104
10 request for allowable and authorization to transport.

11 So we think that's the regulatory framework
12 for the proceeding for you here today. At the end of
13 the proceeding, on our close, we're going to suggest
14 several remedies. We're going to ask the Commission to
15 do what it can to bring this situation back into
16 regulatory compliance. You will hear testimony that the
17 ownership throughout Section 20 is depth limited and
18 owned at different depths by Nearburg Exploration
19 Company, SRO2 and SRO3. What we will ask the Division
20 to do is look at each of the project areas for three
21 wells that touch on Nearburg's lease in Section 20.

22 First there will be the SRO 16H, the Avalon
23 well. Then we'll turn to the 43H and 44H. Those two
24 wells are completed in the 2nd Bone Spring. And what we
25 will ask you to do there is look at the way those wells

1 are permitted now, the drilling permits. The C-101s and
2 C-102s have designated the entire vertical extent of the
3 Bone Spring Formation as the project area.

4 What we will do, we think -- it's a way to
5 partly remedy the noncompliance. We will ask that the
6 Commission agree to vertically contract the project area
7 for each of those three wells to the specific producing
8 formation. We will then ask that the Division -- the
9 Commission -- excuse me -- approve nonstandard units for
10 the three wells. With separate vertical-contracted
11 project areas, we think that will go a long way to fix
12 the problem that you have with the 16H well and the 43H
13 well that right now have project areas that are in
14 conflict and in violation of the Division rules.

15 Because the 16H well is located entirely on
16 Nearburg's lease, we're going to ask that the Commission
17 enter an order removing COG as operator of that well and
18 designate Nearburg as operator. And we will tell you
19 that Nearburg will attempt to negotiate contract
20 operations for COG to remain on site and operate that
21 well for it.

22 We're going to ask you to cancel an APD
23 that's been filed also on Section 20 for the SRO State
24 Com 69H well. That well has not been drilled, but the
25 drilling permit still persists, and we think it should

1 be canceled. And if the Commission is to grant COG's
2 applications to remedy the state of nonconsolidation by
3 forced pooling the acreage in Section 17 with Section
4 20, we're going to ask that it be done under terms that
5 are just and reasonable in accordance with the pooling
6 statutes.

7 We're going to ask you to require COG to
8 render an accounting and payment to Nearburg for all of
9 the production from the three wells that are
10 attributable to its acreage. We're going to ask that
11 COG not recover any risk penalty for the 43 and 44H, and
12 we're going to ask that under these circumstances -- the
13 proof we're going to lay out for you -- that COG not
14 recover well costs for any portion of the cost
15 attributable to Nearburg's acreage. And we'll ask that
16 if a pooling order is to be entered, that it authorize
17 recovery of monthly operating expenses and overhead
18 prospectively, and we think that's just and reasonable
19 under these circumstances.

20 So that concludes my opening statement.

21 I'll turn it over to Mr. Feldewert.

22 OPENING STATEMENT

23 MR. FELDEWERT: Mr. Chairman, members of
24 the Commission, I know you were busy yesterday and
25 probably didn't get a chance to look at some of this, so

1 I have a little more extensive opening statement.

2 But the first thing I would invite you to
3 do is turn to our Exhibit 32 and pull out this timeline.
4 And I would suggest that you keep this in front of you
5 as you go through the exhibits here today, because as
6 you listen to the evidence and go through the exhibits,
7 which you're going to find is a chronology that can be
8 very confusing, it is also very important.

9 And what you'll find is I've presented you
10 a timeline that has the blue line across the middle that
11 basically takes from you 2009 when this unit was put
12 together all the way through November of -- December of
13 2015 when Nearburg filed its complaint in district court
14 asking, among other things, the district court to
15 declare that they are now subject to an operating
16 agreement that covers their acreage.

17 In this blue line, you'll see various
18 events that took place. Okay? On top of this blue line
19 in green are the actions taken by COG through the
20 conference period of time in chronologic order, and down
21 at the bottom of this timeline in red or orange, however
22 you view it, you'll see that those are Nearburg's
23 actions taken during this timeline. So I'm going to go
24 through some of this now, and I'm going to go through
25 some of this to give you a bit of --

1 The second thing I'd like to do -- if I may
2 approach, there are a couple of housekeeping matters I
3 need to do related to our pre-hearing statement.

4 Do you have a copy of the Division's order
5 below, or would it be helpful?

6 CHAIRMAN CATANACH: Which order?

7 MR. FELDEWERT: The Division's order below.

8 CHAIRMAN CATANACH: I have a copy of it. I
9 don't know --

10 MR. FELDEWERT: May I approach?

11 MR. WADE: If you're going to be referring
12 to it.

13 MR. FELDEWERT: Make it easy.

14 CHAIRMAN CATANACH: Florene says it's in
15 the books, so we do have it.

16 It's in the general book?

17 MS. DAVIDSON: (Indicating.)

18 MR. FELDEWERT: Then I have a pre-hearing
19 statement because there are a couple of things I need to
20 make note of with respect to Attachment A, in light of
21 the conversations that Mr. Hall --

22 MR. WADE: Mr. Feldewert, can I get a copy
23 of that, please?

24 MR. FELDEWERT: With respect to the
25 pre-hearing statement, you will see I have provided you

1 with Attachment A that gave you a red line of where we
2 stood on our statement of facts and what we were able to
3 agree upon and not agree upon at the time that our
4 pre-hearing statement was filed. I need to inform you,
5 though, there have been some changes to that that
6 Mr. Hall has identified to me over the weekend. I think
7 I have notes on them. I'm not sure, and I'm
8 double-checking.

9 But here's what I know for sure, and that
10 is on page 2 of that Exhibit A, Statement of Facts, what
11 was going to be Fact Number 8, you can cross that out
12 because they have now informed me they're not going to
13 read that statement.

14 On page 3 of this Statement of Facts, there
15 was a Fact 19, about halfway -- or a little over halfway
16 down, pursuant to Article 8. That -- they have informed
17 me they're not going to agree to that statement, so you
18 need to cross that out.

19 Then on page 7, second-to-the-last, there
20 was a paragraph 48, again from 2009 to July of 2015. So
21 it was going to be paragraph 48, at the bottom of page
22 7. I've been informed that's now disputed as well, so
23 that needs to be struck.

24 And then finally on page 8, the last page,
25 there was a Fact 52, and I've been informed, despite the

1 red lines there, that fact is also now disputed, so we
2 need to cross that out.

3 So that's how I understand things sit now.
4 We are double-checking and, hopefully we'll get updated.

5 MR. WADE: What were the first two numbers?

6 MR. HALL: Can I interject something here,
7 if you'll allow me, Mr. Feldewert?

8 I think referring to that red-line copy of
9 the stipulation might be confusing to the Commission. I
10 developed two more versions of stipulations since that
11 one was provided to you, and I think that it more
12 closely represents the agreement of the parties. It has
13 an additional provision in there that Mr. Feldewert
14 wanted that is not reflected in the red-line copy. We
15 had a brief email exchange last night about trying to
16 get this finalized and in front of you, and we simply
17 ran out of time. Mr. Feldewert hasn't had a chance to
18 look at it.

19 What I suggest we do is I can give you
20 copies of this, and at a break, Mr. Feldewert can look
21 at this version. And if it's agreeable -- I think
22 they'll find it agreeable -- we can sign it, and it can
23 become part of the record. So that's what I'm
24 suggesting.

25 MR. FELDEWERT: I don't know what time

1 limit we had, but I'm happy to look at it. We certainly
2 didn't get a chance to look at it before this hearing.
3 But I did feel like I need to let you know that on
4 Attachment A, there have been some changes that they
5 just informed me of over the weekend or since this was
6 filed, and that's what I went through here today. I
7 think I accurately represented that, but I guess
8 Mr. Hall will let me know if I didn't.

9 To answer your question, the first of the
10 two was the one that was on page 2, what had been Fact 8
11 is now disputed, up there at the top. And then what was
12 on page 3, what had been Fact 19, they tell me is
13 disputed as well.

14 So, I mean, it wasn't a futile effort. We
15 got some facts agreed upon, and I'd suggest that you can
16 take a look at that, either this or Mr. Hall and I have
17 a chance before or after the hearing to work on the
18 stipulated facts. So you'll get a chance to review them
19 at your leisure.

20 So what I'd like to do then is -- since you
21 have that out, I think it's helpful to -- at least Facts
22 1 through 6 are helpful to review quickly because it
23 gives you a good background here. And in the meantime,
24 if you have our exhibit book, I can give you a picture
25 that kind of goes with this, because I know pictures are

1 always helpful. It's our Exhibit 15. So you have the
2 timeline out in front of you, give you room to work with
3 the exhibit book, and our Exhibit 25 is a picture of
4 what we're talking about here. And we'll talk about all
5 this.

6 If you look at the Statement of Facts, 1
7 through 6, I mean, COG is the operator of record for
8 three horizontal wells that are located in this acreage
9 at issue here today. We have the 16H, which Mr. Hall
10 just talked about, that was drilled in the west half of
11 the west half of Section 20, so down on the bottom of 25
12 on the left-hand side. And that was drilled by COG way
13 back in March of 2011, and COG has been operating that
14 well since that time.

15 Then on Exhibit 25, you'll see the path for
16 the surface-hole locations for both the 43H and the 44H
17 wells. The surface-hole locations are at the top of
18 these two tracts up there in what is the Yates lease, in
19 the west half of Section 17. And the bottom-hole
20 locations for these wells, the 43H and the 44H, are
21 located on the Nearburg state lease, which is the west
22 half of Section 20. The 43H was drilled in August of
23 2014, and the 44H was drilled in October of 2014.

24 When the 16H was drilled back in 2011, but
25 before the 43 and 44H wells were drilled, the west half

1 of Section 20 was part of the unit. Okay? And then as
2 Mr. Hall pointed out, the unit terminated in March of
3 2001. And as I think he also pointed out, COG is the
4 successor operator both for the unit and now the unit
5 operating agreement which did survive the termination of
6 the unit.

7 So this kind of gives you the background
8 and kind of the lay of the land as we sit here today as
9 we move then through the rest of the exhibits today and
10 the evidence. But with this background -- and I gave
11 you the overview because I heard a lot stuff from
12 Mr. Hall today that was new to me. Okay? Because when
13 you go to the order, it describes the relief they
14 requested in their application, and that is on page 2 of
15 that order.

16 So when you look at page 2 of that order,
17 there is specific relief they set forth in their
18 application, and it's aptly described in the Division's
19 order on page 2, paragraph nine. And the first thing
20 they ask the Court -- the Commission to do is to declare
21 that COG did not have the right to drill the 43H and 44H
22 wells. That's their first request for relief.

23 Their second request for relief is to
24 declare that COG violated various Division rules when
25 they permitted the 43H and 44H wells.

1 The third request for relief is they ask
2 you to require an accounting to Nearburg for the amounts
3 that have been received for these wells, as they say,
4 without securing a voluntary or compulsory pooling of
5 the project area dedicated to the wells. Now, the
6 Division pointed out below that the Commission doesn't
7 have the authority to request an accounting unless a
8 pooling order has been entered, and we agree with that.
9 And if there is a pooling order that is entered, yes,
10 you do have the ability to require an accounting.

11 Their third [sic] request for relief was to
12 cancel the drilling permit for the 69H well. That well
13 has not been drilled.

14 And the final request for relief -- the
15 best one -- is granting, quote, unquote, "appropriate
16 relief" with respect to the 16H. That's the one that's
17 drilled on the west half-west of half of their acreage.
18 Drilled back in 2011. And if you look at their
19 application, they say "appropriate relief," and it may
20 include removal of COG as operator. "May."

21 The Division pointed out below in its
22 order. They dismissed that request for relief. And
23 Mr. Wade's going to be busy here today. He can tell you
24 the parties dismissed a claim in the hearing below, and
25 now suddenly on an appeal can now resurrect the claim.

1 It has been dismissed. So I don't know where they're
2 going with that.

3 And as the Division found below, the
4 Division does not have -- the Commission does not have,
5 neither does the Division, jurisdiction to grant all of
6 this relief because the remedies require a contractual
7 examination of the parties' contractual rights. You
8 have to interpret contract language. In the course of
9 dealing with performance -- determine their legal rights
10 and fashion appropriate legal remedy. As the Commission
11 has found and as the Division noted below, that is
12 exclusively within the province of the Court, and we
13 have this complaint on file with the district court
14 seeking that type of relief.

15 So you can't determine, for example,
16 whether COG had a contractual right to drill. That is
17 something the district court is going to have to sort
18 out -- order the contractual remedy of a county. You
19 can order it in connection with a pooling order but not
20 under contract. But you can't remove -- if it's still
21 resurrected. I don't see how it is. But you can't
22 remove a party operator of a well that was drilled back
23 in 2011 because that requires an examination of the
24 parties' contractual rights and a determination of the
25 parties' rights under the operating agreement.

1 So these issues, if they continue to pursue
2 them, will get sorted out in lawsuits initiated in the
3 filing of their complaint.

4 But I have, for example, in our exhibit
5 book, an example of the type of relief they were seeking
6 in those lawsuits. It's our Exhibit Number 6. And as
7 you see in the timeline here, that lawsuit was filed in
8 December of 2015. And one of the things they ask for in
9 their complaint, they ask the Court to declare -- and
10 I'm on the second page of our Exhibit 6. First off,
11 their complaint was over 200 pages. That's why I didn't
12 put it in our book. And they ask for various types of
13 relief. One of them they ask for is for the Court to
14 declare they are not subject to the operating agreement,
15 the operating agreement that survived the termination of
16 the unit. That's what they're asking for.

17 Now, the issue of whether the company
18 violated Division rules in permitting and drilling these
19 wells, that's within your jurisdiction, and that's what
20 this case is all about. And as the Division found
21 below, the question is -- and Mr. Hall alluded to
22 this -- is did COG have a good-faith belief at the time
23 that they permitted and drilled these wells that they
24 were authorized to operate on Nearburg's lease. That's
25 what this case is all about. And the evidence is going

1 to show you that they had numerous bases for good faith.

2 And I'm going to get a little more specific
3 because we're at the beginning of this case. It starts
4 with the ratification form that they signed back in
5 2009. So if you look at the timeline, go all the way
6 over on the left-hand side. Okay? If you keep this out
7 and if you look at our Exhibit Number 2. Exhibit Number
8 2 is the submission by Marbob to the State Land Office
9 in connection with the formation of this unit, and they
10 added Nearburg's state lease to the unit later. It was
11 a subsequent joinder of the unit agreement.

12 The ratification I'm talking about is on
13 the fourth page of this exhibit, executed in 2009 when
14 Nearburg still held its working interest. How do we
15 know that? Because our Exhibit Number 1 reflects -- and
16 keep your finger here. Our Exhibit Number 1 reflects
17 that the term assignment with Marbob, which they alluded
18 to, in which they signed their working interest and paid
19 them override, that was signed in August of 2009, two
20 months later. Okay? So they signed this document that
21 is entitled "Ratification and Joinder of Unit Agreement,
22 the Unit Operating Agreement," and they do so in 2009,
23 and they do so when they held their working interest.

24 And we know that because if you look at
25 this Exhibit B that's referenced on here, Exhibit B,

1 "Schedule of Ownership," the next page has columns that
2 has the working interest owner, the working interest
3 decimal. If you flip all the way to the back, the
4 Exhibit B that was attached to this ratification, if you
5 go to the second-to-the-last page of this Exhibit B, it
6 shows their 320-acre State Lease B 7450 and their 100
7 percent working interest in this lease. And then the
8 last page shows the unit working interest, and it
9 includes the working interest in Nearburg's state lease.
10 So they signed this ratification and joinder.

11 And this is a form -- Mr. Padilla will
12 notice. This is a form promulgated by the State Land
13 Office. And it's the only form they have for the
14 purpose that's set forth in this title, and it has been
15 used across the state for a lot of years. It's the same
16 form they had then, and it's the same form they have
17 now, if you look at our Exhibit Number 3. I went and
18 pulled the Division's -- went to the State Land Office
19 Web site, and it's the same form that Nearburg signed
20 back in 2009. The only change you'll see is that the
21 language in there, "form approved behalf of the
22 Secretary of Interior" is not in those forms because it
23 doesn't apply. But this is the same form that has been
24 used for a long time promulgated by the State Land
25 Office for the purpose that is set forth in the title.

1 Now, Nearburg is going to tell you, as they
2 are telling the courts, that this State Land Office
3 document doesn't do what it says. Okay? They had, I
4 guess, some lawyers look at it, and they looked at the
5 body of this form, and they say, Well, that's not
6 sufficient to subscribe to the operating agreement -- to
7 subscribe their interest to the operating agreement. I
8 think that's a little surprising, okay, because this is
9 the form that's been used by the State Land Office for a
10 long time, and a lot of operators have relied on this
11 form for a long time. And if the Court or you-all
12 somehow determine it doesn't do what the title says it
13 does, it's going to have some consequences across the
14 state. But that's what they're suggesting. They're
15 suggesting when we signed this form in 2009, it didn't
16 subscribe to working interest in the lease.

17 But getting back to the issue before you,
18 okay, COG inherits this. We weren't even around in '09.
19 We inherited this from Marbob. The question to you is:
20 Did COG believe in good faith that this document that is
21 promulgated by the State Land Office does what the title
22 says it does, subscribe their working interest to the
23 operating agreement? Or I guess the converse is: Did
24 they act in bad faith relying upon this document?
25 That's the question for you. So that's the first basis

1 for the good-faith belief that they were authorized to
2 operate.

3 The second basis for the good-faith belief
4 that they were authorized to operate is in this same
5 exhibit. Again, this unit was put together by Marbob.
6 They had knowledge -- they apparently had discussions
7 with Nearburg about what was going on and what they were
8 doing, so they should have known what Nearburg intended
9 by signing this ratification. So what does Marbob tell
10 the State Land Office when they submitted to the State
11 Land Office? That's the second page of this exhibit.

12 If we look at the second page of this
13 exhibit, they tell the State Land Office in July of
14 2009, second paragraph, Chesapeake and Nearburg have
15 both subscribed to the unit operating agreement. That's
16 what they tell the State Land Office. So when COG
17 inherits this file in 2010 or a year later and proceeded
18 to develop Nearburg's lease, did they have any reason to
19 believe that what Marbob told the State Land Office was
20 not correct? No. That's the second aspect of why they
21 had a good-faith belief they were authorized to operate
22 on the Nearburg state lease.

23 The third basis relates to paragraph two of
24 the unit agreement, not the unit operating agreement,
25 the unit agreement. Why am I talking about this? Look

1 at Ms. Bailey's letter in which she approved the
2 acceptance of the Nearburg state lease into the unit
3 agreement. She says that -- and I'm on the second
4 paragraph on the first page of Exhibit Number 2. She
5 says, "In accordance with Article 22 of the unit
6 agreement, the Commissioner of Public Lands approves the
7 subsequent joinder ratifications of Chesapeake and
8 Nearburg" -- so Chesapeake and Nearburg had signed
9 that -- "to the SRO State Exploratory Unit," in
10 accordance with paragraph [sic] 22. Now remember, at
11 this time they still have their working interest in
12 their state lease.

13 So what does paragraph 22 of the unit
14 agreement say? Mr. Padilla knows. But what's it tell
15 you? If you go to Exhibit Number 5 and go to the last
16 page of Exhibit Number 5, this is the unit agreement.
17 Not the unit operating agreement, the unit agreement.
18 And this is the paragraph Ms. Bailey's referring to, and
19 it deals with what she was dealing with, subsequent
20 joinder of the state lease. And you can read the first
21 sentence. Start with the first sentence and read
22 through it. And what I'm focusing on, obviously, is the
23 second clause. It says "and if," "and if" --
24 mandatory -- "such owner is also a working interest
25 owner, by subscribing to the operating agreement

1 providing for the allocation of cost of exploration,
2 development, and operation." So by virtue of paragraph
3 22 alone -- and when you subscribe your state lease to
4 the unit and you are a working interest owner, you are
5 required to subscribe to the operating agreement. Makes
6 sense. Everybody has to operate under the same
7 agreement.

8 So when COG inherits this file in 2010, do
9 they have any reason to believe that their state lease
10 is -- the working interest in that state lease does not
11 subscribe to the operating agreement? And that goes
12 directly to the good-faith question.

13 The fourth basis -- and we're still on the
14 documents in 2009. The fourth basis for their
15 good-faith belief is let's look at the operating
16 agreement. Now, again, COG inherits this. Okay? And
17 they don't inherit it until late 2010, after all this is
18 put together. And when you look at this operating
19 agreement, it covers the entire Bone Spring Formation.
20 We don't have any depth-severance issues Mr. Hall
21 alluded to. It covers the entire Bone Spring.

22 So if I'm an operator, I've just succeeded
23 to this issue, and I'm going to look at the operating
24 agreement. The first place I'm going to go to to
25 ascertain whether this state lease subscribes to the

1 operating agreement is Exhibit A. So when I go to
2 Exhibit A on page 22 -- I've paginated this for you so
3 it's easy to get through. So when you go to Exhibit A
4 on page 22, it gives you the contract area. And it
5 says -- I'm sorry. Exhibit 4, page 22. And you can see
6 it tells whoever is looking at this that all of Section
7 20, which includes their state lease in the west half,
8 is part of the contract area. Then it really helps to
9 go to the bottom down here, and you see "Oil and Gas
10 Leases Subject to the Agreement, See
11 Attached...A-1." You go to the next page. It gives you
12 nice columns. This identifies the lessee of record. It
13 identifies the working interest owners, working interest
14 decimals.

15 If you flip all the way back to page 29,
16 you're going to see a couple of things, while we're
17 here. Number one, you're going to see the west half of
18 Section 17 -- it's that Yates lease I talked to you
19 about -- as subscribed to this operating agreement
20 within the contract area. You're also going to see the
21 west half of Section 20, Nearburg state lease, working
22 interest owner, Nearburg, 100 percent committed to the
23 contract area, all the working interests.

24 Then you go to page 30, Exhibit A-1. This
25 is a recapitulation. So what does it tell you?

1 Mr. Hall alluded how big this unit is, 8,320 acres. It
2 has the unit working interest. The unit working
3 interest is within the contract area. It includes the
4 working interest in Nearburg's state lease, as included
5 within the contract area. And then it shows, because
6 this is a recapitulation of a Marbob term assignment,
7 that a couple of things happened. Nearburg holds an
8 overriding interest. They're not a cost-bearing
9 interest anymore under that term assignment and that
10 their working interest -- and this is important --
11 working interest in that state lease had been assigned
12 to all the other nonoperators. Okay?

13 So I'm Concho or I'm anybody else, and I
14 come in and I look at these documents in 2009. And it
15 tells me that the working interest in the Nearburg state
16 lease is committed to the contract area under this
17 operating agreement. So what's their response? Their
18 response is, We didn't physically sign the unit
19 agreement. And it's true.

20 Let's go to page 18. There's our signature
21 lines for all the parties we just saw on the attachment.
22 Okay? Now, you can go through here and you're going to
23 see there is no signature on this by Nearburg Production
24 Company. They didn't physically sign it. But there are
25 four other nonoperators that also didn't physically sign

1 it, Yates Petroleum, Yates Drilling, MYCO Industries,
2 Abo Petroleum. The working interest owners in Section
3 17 -- the west half of Section 17, where the surface
4 holes for these wells are located, 43 and 44H. They
5 didn't physically sign the operating agreement. What
6 did they sign? Look at page 19. They signed the same
7 State Land Office form that Nearburg signed, the form
8 that's promulgated, according to the title, to
9 effectuate the ratification and joinder of the unit
10 agreement and unit operating agreement. That's how they
11 subscribed to the operating agreement.

12 So looking at this again, would COG or
13 anyone, as a successor operator, understand that the
14 working interest in the Nearburg state lease is
15 committed to the unit agreement -- to the unit operating
16 agreement? Yes, they would, just like the Yates lease
17 is committed to the contract area in the unit operating
18 agreement by virtue of the State Land Office form.

19 So that's what the 2009 documents show, way
20 over here on the left-hand side of our timeline. Okay?
21 Four bases right there just with the documents.

22 Fifth basis, whether we had good faith that
23 we were authorized to operate. Since 2009, not
24 surprising, the operators under this operating agreement
25 and all the nonoperators have acted as if the working

1 interest in that Nearburg state lease is committed to
2 the operating agreement. There have been numerous wells
3 drilled within that contract area, that acreage that we
4 just saw. All of those parties shared in the cost of
5 those wells and expenses of those wells, including the
6 working interest of the Nearburg state lease, shared in
7 the cost and in the expenses of the wells in that
8 contract area.

9 Not only that, but they developed the
10 Nearburg state lease. Look at our timeline. March 4th,
11 2011, way over here on the left-hand side, it's the
12 second entry on top. You see where COG acquires
13 Marbob's interest? They become the operator of record.
14 March 4th, 2011, COG drills the 16H well on Nearburg's
15 state lease. Okay? Developed the Nearburg state lease
16 under the operating agreement, and that well is solely
17 on the Nearburg state lease. And COG has been operating
18 that well under the operating agreement ever since it
19 was drilled back in 2011, over three years before the
20 43H and the 44H wells were drilled.

21 And the nonoperators, including the working
22 interests in the Nearburg state lease, have shared in
23 the cost and expenses of this development. And
24 Nearburg, throughout this time, has received an
25 overriding royalty interest pursuant to their term

1 assignment with Marbob.

2 When COG permitted the 43 and the 44H wells
3 in February of 2013, the surface hole was on the Yates
4 lease committed to the operating agreement within the
5 contract area. The bottom hole is on the Nearburg lease
6 committed to the operating agreement within the contract
7 area. And COG permits that well as the operator under
8 the operating agreement.

9 So looking at this evidence, when COG
10 proceeded to drill these permitted wells in 2014, why
11 would it not believe in good faith that it was
12 authorized to operate on Nearburg's lease? They were
13 drilling on acreage that was -- that they were already
14 operating where the 16H is located, under the operating
15 agreement. They were drilling wells they had already
16 permitted under the operating agreement, and they were
17 drilling on acreage that the file that they inherited
18 clearly indicates that the work interest is subscribed
19 to the operating agreement.

20 So by five bases good-faith belief.

21 I've got one more for you. Okay? Number
22 6: Before drilling these wells, the unit terminated.
23 Look at the termination point on this timeline. On
24 March 1st, 2014, the SRO Unit terminates.

25 What did COG do? Look at our Exhibit

1 Number 10. This is an email string. And this is why I
2 say keep this in front of you, because it's important to
3 know the chronology. This email string takes place just
4 after the unit termination, and you'll see various
5 people on here. This is a Kathie Croft -- Craft. She's
6 a division analyst, worked for Nearburg. There was Ken
7 Dixon. He's a land manager over at Nearburg. There was
8 Randy Howard. He was a landman at that time, I think,
9 in 2014.

10 Right, Randy?

11 MR. HOWARD: (Indicating.)

12 MR. FELDEWERT: He was a landman in 2014.
13 Then there is Brent Sawyer from COG. And if you go back
14 here to -- it all starts here on the third page of this
15 exhibit, and you'll see that they are discussing here on
16 March 20th, 2014 the new Division order for the 16H.
17 Well, why do we need a new Division order? Well, the
18 unit terminated, right? So we've got to deal with the
19 state royalty in the interest of the parties. So now
20 you've got to read through all the Division orders. So
21 they're talking about the Division order for the 16H
22 that was drilled back in 2011.

23 I want you to take your time now. I want
24 you to read this email page, and go all the way up.
25 Follow it all the way up to the top of page 2 because I

1 think it's important.

2 (Commission reading, 10:00 a.m. to 10:01
3 a.m.)

4 MR. FELDEWERT: So we've all been living
5 with this case over a year. You-all are seeing it for
6 the first time. The nice thing about documents is they
7 don't lie; they don't forget. Okay? So what is going
8 on here? As you just saw, if we start at the last page
9 of this exhibit, dealing with a new Division order for
10 the 16H. The issue that's come up is that it would
11 appear that override had been overpaid because it was
12 calculated on gross acres instead of net acres. And
13 they're talking about that in the body of this email on
14 page 3.

15 What's important here is during that
16 discussion, what does COG tell Nearburg's team over
17 there? It's reflected on the last page in the second
18 paragraph, about the last sentence. They tell them, "By
19 terminating the unit voluntarily, the undrilled
20 proration units are all held by production by existing
21 wells, not subject to the CDC or expiration, but can be
22 drilled at will subject to the JOA already in place,"
23 the operating agreement we just went through. They're
24 telling them here, back right after the unit terminated,
25 that they can drill the acreage, including the acreage

1 of the 16H located there, because they're talking about
2 that Division order that it can be drilled as well under
3 the operating agreement.

4 The next day, next page over, this is the
5 day after that email, and it's copied to the entire
6 Nearburg team over there, the analyst, their land
7 manager and their landman. And Mr. Sawyer tells them on
8 March 24th -- 21st, and this is at the top of page 2.
9 And this is what's important, top of page 2, "I believe
10 the most pressing issue is that the term assignment from
11 Nearburg to Marbob is effective until the SRO Unit is
12 dissolved so technically it has expired. However, we
13 are moving forward on the assumption it was intended to
14 keep the assignment in the overriding royalty" --
15 they're talking about the Marbob assignment and the
16 overriding royalty interest -- "effective until all the
17 wells in (or formerly in) the unit are plugged, so we
18 will need to paper that up. However, if that assumption
19 is incorrect please let me know since it affects the
20 work the title lawyer is doing on the updated opinions
21 for the wells."

22 So where are we on our timeline? We're
23 right here on March 20th, 2014, after the 43H wells have
24 been permitted -- after the 43H and 44H wells have been
25 permitted, before they were drilled. And they've told

1 Nearburg, Term assignment has technically expired. COG
2 is going to continue to develop the acreage in the
3 contract area at will under the operating agreement.
4 What's oil at this time? Was it \$100 a barrel? Okay?
5 People are drilling. COG is assuming that Nearburg
6 desires the term assignment and their overriding royalty
7 interest, as reflected in that 16A Division order,
8 across the contract area to continue. That's the
9 benefit of their override. They tell them, We assume
10 you want that to continue; tell us if that's not
11 correct.

12 Now, what happens? There is no subsequent
13 email from Nearburg. You're not going to see any
14 subsequent email from Nearburg stating they disagreed
15 with this approach. Instead -- we can move a little
16 more quickly now -- COG Exhibit Number 11. What does
17 Nearburg do? They send Concho, COG, the bill, the
18 annual lease payment bill for their state lease. And
19 it's paid by COG, paid by COG as operator of the
20 contract area. They send them that bill, and COG pays
21 for it.

22 The second thing that happens is COG sends
23 to Nearburg, Exhibit Number 12, a communitization
24 agreement for the 43H well, noting what they said in
25 March, We're going to continue to develop this acreage

1 at will under the contract.

2 Exhibit 12A. What happens after they get
3 the comm agreement? There is some discussion back and
4 forth. We have an email chain. So this is August 27th,
5 2014. It's from -- August 22nd -- Kimberly Crandell --
6 she's with Nearburg -- to Kelly Fuchik. She's with COG.
7 Copied to Randy Howard there. He was a land manager at
8 this time, at least a landman -- community term
9 assignment. And Ms. Crandell writes back to Ms. Fuchik
10 and says, "Any updates as far as Nearburg's interest in
11 this well," the 43H well? Any updates on their
12 interest? And they respond back by saying, "We're
13 looking at this. The term assignment affects multiple
14 wells so they are being addressed all at the same time."
15 What are they addressing? We just saw it in the prior
16 email. Their overriding royalty interest. There is
17 still debate whether they were overpaid and what that
18 percentage should be under the agreement. That's what
19 they're doing after this 43H comm agreement is sent to
20 them.

21 Then we get to Exhibit 13. And just to
22 orient you to the last page of this exhibit, it's those
23 March emails that we looked at earlier that you took
24 time to read. Now, this is a continuation of that email
25 string. And you can read it at your leisure, but it

1 goes from March to September of 2014. And, again, as
2 you can see, they're addressing the 16H Division order,
3 and they're addressing still the proper percentage of
4 the override in that Division order. It is during this
5 time frame that the 43H and 44H wells are drilled, just
6 as they said they were going to do in those March
7 letters, on the assumption that they wanted to proceed
8 with the overriding royalty interest.

9 And what's important here is while this is
10 going on, if you look at the third page of this exhibit,
11 there is an email from Kathie Croft -- Craft at Nearburg
12 to Brent Sawyer at COG dealing with the 16H Division
13 order -- look at our timeline -- dated May of 2014
14 before the 43H and the 44H wells were drilled. And she
15 says, "Just curious what's going on so far as the SRO
16 Unit is concerned. Guess I'll get the Division order
17 for the 16H signed and returned to you so we can get
18 paid, right or wrong." Okay? They're saying we're
19 going to sign that Division order that says we get an
20 overriding royalty interest, despite the fact that there
21 is still a debate over what the percentage is under that
22 overriding royalty interest.

23 And then if you go to 13A, they never sent
24 the Division order because they wanted to wait for the
25 title opinions to determine the proper percentage of

1 their override. If you look at this 13A at the bottom,
2 again, Kathie Craft is with Nearburg. She's
3 corresponding internally with Carol Smith and Rue
4 Landon. They're both with Nearburg. They're talking
5 about the SRO Units Numbers 16H and 61H. 61H is in the
6 contract area, and so is the 16H. And you can read
7 that.

8 So this is at a time after the merge [sic].
9 This is after they received the communitization
10 agreement for the 43H, and this is about the time that
11 they're drilling the 43H well. And you see there is
12 still this issue over the overpayment of the overriding
13 royalty interest. And she quite -- she said candidly,
14 We don't want to return it because we don't want to set
15 a precedent. I'm looking at the second paragraph, last
16 line. "We don't want to return same setting a
17 precedence that we agree with our smaller overriding
18 royalty interest." They want to keep that issue afloat
19 as to what the proper percentage should be of the
20 overriding royalty interest.

21 But here's what's important. We just went
22 through this whole thing. What is the evidence here
23 these documents show you at the time the 43H and 44H
24 wells were drilled? Okay? COG had informed Nearburg
25 that the TA had expired and that the acreage that's

1 going to drill that well into the operating agreement,
2 and they were assuming Nearburg intended to proceed with
3 their overriding royalty interest. And at this time,
4 COG is operating the 16H on their acreage under the
5 operating agreement without objection even though the
6 unit is terminated. And the 43H and the 44H wells have
7 been permitted for over a year without any objection
8 from Nearburg.

9 And you're not going to see any email or
10 letter from Nearburg telling COG that it should stop
11 operating the 16H until way over here, in July of 2015,
12 on the right-hand side of this timeline. And you're not
13 going to see an email or a letter from Nearburg stating
14 that the operating agreement doesn't apply to their
15 acreage until way over here, in July 2015, seven months
16 after the wells were drilled. And you're not going to
17 see an email or a letter from Nearburg saying that they
18 did not want to proceed with their overriding royalty
19 interest until over here, in May of 2015, months after
20 the wells were drilled.

21 Here's what they're going to point out to
22 you: Well, after the unit terminated, Concho didn't
23 send us -- in July and August of 2014, they didn't send
24 us an AFE -- a well proposal under the operating
25 agreement. They didn't send an AFE. They didn't send

1 us a casing point election. That's true.

2 But why would COG send them information as
3 a working interest when Nearburg's actions and
4 communications clearly indicated that they had agreed
5 with the approach of continuing with their overriding
6 royalty interest, a non-cost-bearing interest? You
7 wouldn't send them an AFE and require them to sign it
8 and pay their share of costs if everybody understood
9 they wanted to proceed with the overriding royalty
10 interest. If you tell me you desire to proceed with an
11 overriding royalty interest and we're at the point of
12 continuing to develop that acreage, I'm not going to
13 send you an AFE. You've indicated to me you want to
14 continue with overriding royalty interest. So that's
15 why they didn't send an AFE or a well proposal. That's
16 why.

17 Now, the next thing you're going to see is
18 it documents all the efforts from March to April of 2015
19 to paper up a new term assignment. And what's -- you're
20 also going to see here is that even as late as November
21 of 2014 -- let's go to that. That's Exhibit 15. Now,
22 this is from Randy Howard, who is now the land manager,
23 to Brent Sawyer, and he's copied to John Turro, who was
24 in a meeting with him, along with Aaron Myers, who was
25 also in the meeting between the two companies, to

1 discuss papering up that term assignment. Here's what
2 he says, "We are, however, agreeable to your changes to
3 the term assignment of Oil and Gas Lease covering the
4 west half of Section 20.... I assume this will actually
5 be an Amendment or Correction to Term Assignment of Oil
6 and Gas Lease.

7 "Also, we would still like to see COG's
8 calculations on a well by well basis for our overriding
9 royalty interest in the wells included on the lands
10 subject to" -- what? -- "the SRO Operating Agreement."
11 We still have the debate over what their override is.
12 They want to see how this is going to be calculated once
13 they see a corrected term assignment. But there is no
14 debate that they want to continue with the term
15 assignment, and there is no debate that the operating
16 agreement covers the lands. This is November of 2014,
17 months after the wells were drilled.

18 So these emails continue. You're going to
19 see all the way through until May of 2015. You can take
20 a look at the timeline. They suddenly change their
21 position. In May of 2015, they start asking for
22 information about their working interest. But even as
23 late as May of 2015, seen months after these wells were
24 drilled, they still represent that COG is the operator
25 of their lease because they execute and deliver

1 communitization agreements. Those communitization
2 agreements were filed with the State Land Office. And
3 those are Exhibits 26 and 27. Just look at one of them.

4 Let's just look at 26. They're delivered
5 for the purpose of filing with the State Land Office,
6 and they are dated July 1st, 2014. Why is that
7 important? Look at our timeline. That's before the 43H
8 and the 44H wells were drilled. And each of these
9 communitization agreements covered the spacing unit and
10 proration unit for the 43H and the 44H well, the Yates
11 lease and the Nearburg lease. And what do they say in
12 paragraph eight? We're filing with the State Land
13 Office. We're telling COG, we're telling the world --
14 I'm on paragraph eight of either of one of these comm
15 agreements. "COG Operating LLC shall be the Operator of
16 said communitized area and all matters of operation
17 shall be determined and performed by COG Operating LLC."

18 So as late as May of 2015, they're still
19 telling COG that they're the operator of their lease.
20 And COG is still operating the 16H on their lease, and
21 Nearburg's being paid throughout this time frame an
22 overriding royalty interest. And nowhere does Nearburg
23 suggest that the operating agreement doesn't apply to
24 their acreage. In fact, they signed communitization
25 agreements that reflect that it does.

1 It is not until July of 2015, a year after
2 the 43H and the 44H were drilled and three years after
3 the 16H were drilled -- and we can see what they say in
4 July of 2015. This is our Exhibit 30. They say, months
5 after these wells were drilled, that by completing --
6 drilling, completing and producing the 43H and 44H
7 wells, you've committed mineral trespass. First time
8 we've seen that. And then they say, in July of 2015,
9 the offer to extend the term assignment is not
10 acceptable. They've completely changed their tune, and
11 then they follow this up with filing a complaint in
12 district court in December of 2015 where they ask the
13 district court to declare they're not subject to this
14 operating agreement that we just went through. And then
15 they file this application before the Division, so here
16 we are.

17 They can proceed to district court and try
18 to pursue these theories if they want to, and they can
19 try to get the Court to declare that that State Land
20 Office form doesn't do what it says it does and try to
21 get a court to declare that they're not subject to the
22 operating agreements like this history and that they
23 never agreed to extend the term assignment. Good luck.
24 They can try to undo the comm agreements that they
25 signed back in May. They can do all that in district

1 court.

2 But the question before you is whether
3 there is any basis to suggest that COG violated Division
4 rules when it filed these APDs for the 43H well and when
5 they drilled these wells on Nearburg's acreage. And the
6 documents that they inherited from Marbob, the
7 communication between the parties, their course of
8 conduct establishes that COG had more than a good-faith
9 belief they had a right to drill the 16H on their
10 acreage, to file APDs, to permit the 43H and the 44H and
11 to drill those wells in 2014.

12 And you will not find a single letter or an
13 email from Nearburg before these wells were drilled or
14 thereafter until we get to May and July of 2015
15 informing COG anything other than what is said in the
16 2009 operating agreement and all that correspondence and
17 what is said in the communitization agreements that they
18 signed in 2015. And that is that COG is the authorized
19 operator of the working interest in that Nearburg state
20 lease.

21 So we ask that the Commission deny their
22 application, and then we ask you to do the regulatory
23 compliance that's now necessary, because now that they
24 have repudiated the operating agreement and now that
25 they have suggested there is no agreement governing, the

1 Oil and Gas Act does require us to now seek a pooling
2 order with the Commission that matches these
3 communitization agreements. Because you've either got
4 to have a voluntary agreement or you've got to have a
5 pooling order because you've got to have something that
6 governs the operations of these wells and this spacing
7 unit.

8 And since they have now repudiated the 2009
9 operating agreement, a pooling order must be issued so
10 that this acreage is consolidated as required and as --
11 consolidate the acreage that's covered by the comm
12 agreement, naming COG as the operator of the comm
13 agreements and then to govern the operations of the well
14 and the spacing unit. And yes, pursuant to that, you
15 can order an accounting. But we're not asking for a
16 risk penalty. And once they get that pooling order,
17 they can challenge the well costs if they want to. They
18 can elect to participate or not participate.

19 But it's needed now because they've now
20 repudiated the operating agreement. And that pooling
21 order will be effective until the Court confirms that an
22 agreement does cover their lease, and once that happens,
23 then the pooling order goes away. But now we've got a
24 gap. They've clearly repudiated that it doesn't apply,
25 so that's why we filed the application for a pooling

1 order.

2 Any questions?

3 CHAIRMAN CATANACH: No.

4 Thank you, gentlemen. I'm glad those
5 opening statements were brief.

6 (Laughter.)

7 MR. HALL: Mr. Chairman, I have a request.
8 I'd like to distribute to you and counsel the last
9 version of the stipulation. It's a clean version. And
10 I ask that you refer to it rather than the red-line
11 copy. I think the red-line copy is confusing and does
12 not represent the agreement of the parties. I think
13 this does. Mr. Feldewert and I will continue to work on
14 the stipulation, get it in shape and file it with you.
15 I think you'll be find it's going to be helpful to you
16 when you deliberate. You don't have to go back and
17 forth to the record to decide what was agreed to and
18 what was not. You'll have one document of that.

19 CHAIRMAN CATANACH: All right. Let's go
20 ahead and take a ten-minute break here.

21 (Recess 10:23 a.m. to 10:43 a.m.)

22 CHAIRMAN CATANACH: We'll call the hearing
23 back to order. Let's turn it over to Mr. Hall.

24 MR. HALL: And I'll defer to Mr. Harper.

25 MR. HARPER: We call Randy Howard as our

1 first witness.

2 WILLIAM RANDY HOWARD,

3 after having been first duly sworn under oath, was

4 questioned and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. HARPER:

7 Q. Mr. Howard, would you state your full name,
8 please?

9 A. William Randall Howard.

10 Q. Where do you live, sir?

11 A. In Midland, Texas.

12 Q. And who do you work for, sir?

13 A. I work for Nearburg Producing Company, Nearburg
14 Exploration Company, SR02, LLC and SR03, LLC as the land
15 manager.

16 Q. And that includes the Applicants in this
17 matter; is that right?

18 A. That's correct.

19 Q. Okay. And if we refer to Nearburg, you
20 understand we're referring to the Applicants?

21 A. Yes.

22 Q. Have you previously testified before either the
23 Division or the Commission or one of its examiners and
24 had your credentials accepted and made a matter of
25 record?

1 A. Yes.

2 Q. Are you familiar with the application that's at
3 issue in this case?

4 A. I am.

5 Q. Are you familiar the lands and the wells that
6 are the subject of the application?

7 A. Yes.

8 Q. Did Mr. Hall, in his opening, accurately
9 summarize what Nearburg is seeking in the application?

10 A. Yes.

11 Q. You heard in COG's opening a number of things,
12 but let me just ask you this before we get started. Did
13 you ever -- were you ever told or was Nearburg ever told
14 that the applications had been filed for the 43H and the
15 44H to drill on Nearburg's lease?

16 A. No.

17 Q. And were you ever -- were you ever told those
18 wells, in fact, had been drilled?

19 A. No.

20 Q. Let me ask you to open up your exhibit book to
21 Exhibit 1.

22 MR. HARPER: I know the Commission has
23 multiple exhibit books there. There should be a Volume
24 1 of 2. And I'll warn you in advance that we're largely
25 going to be in that volume, but from time to time, we

1 may go to Volume 2, and we may even look at COG's
2 exhibits at a time or two. So I'll try to keep that to
3 a minimum, but just to warn the Commission that we may
4 move from book to book on occasion.

5 Q. (BY MR. HARPER) Mr. Howard, what is Exhibit 1?

6 A. It's a map of the unit area for the SRO unit
7 agreement.

8 Q. Okay. And what's the yellow-shaded area?

9 A. The yellow-shaded area of Section 20 is the
10 Nearburg lease.

11 Q. Okay. And we've been talking today about the
12 16H, the 43H and the 44H. Can you try to identify those
13 wells on this exhibit, Exhibit 1?

14 A. Yes. In the west half of Section 20, the west
15 half of the west half is the 16H well, which is a
16 mile-long horizontal entirely in Section 20. Moving
17 from that towards the east, the next well is the 43H,
18 which is a two-mile-long horizontal across the west half
19 of the west half of 17 and 20. And then the 44H is the
20 well that runs two miles from the west half of Section
21 17 into the west half of Section 20.

22 Q. And do you understand whose lease is 17?

23 A. I believe that's Yates.

24 Q. Now, if you turn to Exhibit 1A, can you tell us
25 what Exhibit 1A is?

1 A. It identifies where the Bone Spring and Avalon
2 are, the wells that are in question, and it identifies
3 the 1st Bone, Avalon, 2nd Bone and 3rd Bone.

4 Q. Okay. Where is the 16H drilled?

5 A. The 16H is the completed well in the Avalon
6 Shale.

7 Q. Where is the 43 and 44H?

8 A. They're both in the 2nd Bone Spring.

9 Q. What lands did Nearburg contribute to the SRO
10 Unit?

11 A. The west half of Section 20 of 26 South, 28
12 East.

13 Q. And how did that come about?

14 A. They did a term assignment with Marbob, and
15 Marbob contributed the acreage to the SRO Unit.

16 Q. If you turn to Exhibit 2 in your book, is
17 Exhibit 2 the term assignment?

18 A. Yes.

19 Q. And if you look at the second page, you see
20 that its effective date is July 1st, 2009; is that
21 right?

22 A. Correct.

23 Q. And what -- what did -- what consideration did
24 Nearburg receive for contributing its lands pursuant to
25 this term assignment?

1 A. They retained an override equal to a difference
2 between 25 percent in existing burdens in all wells
3 within the SRO agreement.

4 Q. And that's described here in the term
5 assignment?

6 A. Yes.

7 Q. And how long was the term assignment to last
8 according to this agreement?

9 A. Until such time as the unit agreement was
10 terminated.

11 Q. And you see that on the first page of the term
12 assignment, the last full paragraph. It says, "The
13 rights and interests assigned hereby shall be limited to
14 a term commencing on the effective date hereof and
15 extending so long thereafter as the Lease remains
16 subject to the Unit Agreement." Do you see that?

17 A. Yes.

18 Q. And there is similar language on the last -- on
19 the second page, the second full paragraph, the page
20 with the signatures. And it says, "The Subject
21 Interests and Assignor's reserved overriding royalty
22 interest shall, during the term of the Assignment and
23 not thereafter, be subject to the terms and provisions
24 of that certain unit agreement." Do you see that?

25 A. I do.

1 Q. Was there a conveyance to anyone other than
2 Marbob under this term assignment?

3 A. No.

4 Q. Who do you understand was the original operator
5 of the unit?

6 A. Marbob.

7 Q. And is it your understanding that eventually
8 COG became -- succeeded to them as the operator one way
9 or the other?

10 A. Yes.

11 Q. And do you know about when that was?

12 A. I believe it was in October of 2009.

13 Q. Now --

14 MR. FELDEWERT: Did you say 2009?

15 THE WITNESS: Was it '10?

16 MR. FELDEWERT: (Indicating.)

17 THE WITNESS: Sorry.

18 Q. (BY MR. HARPER) You think it was in 2010?

19 A. Apparently that's what it was. I confused my
20 dates a little bit.

21 Q. Now, Mr. Feldewert referred to COG's Exhibit 2.
22 Let me get you a copy of COG's Exhibit 2 in front of you
23 real quick. I'm just going to refer to the first page
24 of that.

25 A. Okay.

1 Q. Do you see that this is a letter from the
2 Commissioner of Public Lands to Marbob?

3 A. Yes.

4 Q. And do you see that in the second paragraph
5 that the letter indicates that Nearburg will be
6 committed to the unit agreement effective August 1st,
7 2009. Do you see that?

8 A. Yes, I do see that.

9 Q. And that's your understanding of when Nearburg
10 became associated with the unit, committed to the unit?

11 A. To the unit agreement, right, not the JOA.

12 Q. Okay. And, now, at that date, we had already
13 looked and saw that the term assignment became effective
14 on July 1st, right?

15 A. Yes.

16 Q. Okay. So on July 1st, the term assignment was
17 effective, and on August 1st, the -- you became
18 effective -- became subject to the unit agreement; is
19 that right?

20 A. That's correct.

21 Q. Now, let's look at Exhibit -- starting with
22 Exhibit 3. We're going to look at 3, 4, 5 and 6, so
23 we're back in Nearburg's exhibit volume.

24 Starting with Exhibit 3 -- and these are
25 various filings related to the wells at issues. Exhibit

1 3, Mr. Howard, those are filings related to 43H; is that
2 right?

3 A. Yes.

4 Q. Okay. And the first page is the C-101 for the
5 43H dated February 21st, 2013; is that right?

6 A. Correct.

7 Q. And then the second page is a C-102 for the
8 same well dated March 5th, 2015; is that right?

9 A. Yes.

10 Q. And if you turn to Exhibit 4, you have filings
11 related to the 44H; is that correct?

12 A. Yes.

13 Q. And the first page is a C-101 dated February
14 21st, 2013, right?

15 A. Correct.

16 Q. And the second page is a C-102 dated March 9th,
17 2015?

18 A. Yes.

19 Q. If you look at Exhibit 5, that's the C-102 --
20 these are for the 16H, right?

21 A. Yes.

22 Q. And the first page is a C-102 dated March 13th,
23 2014, correct?

24 A. Yes.

25 Q. And the second page is a C-102 for the 16H that

1 has an operator's certification of January 25th, 2011;
2 is that right?

3 A. Yes.

4 Q. And then Exhibit 6 are filings related to the
5 59H, correct?

6 A. Yes.

7 Q. And the first page is a C-101 that's dated May
8 5th, 2015; is that right?

9 A. Yes.

10 Q. And the C-102, the next page, is also dated May
11 5th, 2015; is that right?

12 A. Yes.

13 Q. Let me ask you: The 16H, that lateral is
14 located entirely within Nearburg's lease, correct?

15 A. Yes.

16 Q. Now, what is your understanding of when -- is
17 it your understanding that the unit terminated?

18 A. Yes.

19 Q. And when do you understand it terminated?

20 A. It's my understanding that it terminated March
21 the 1st, 2014 when COG terminated it.

22 Q. COG requested termination of the unit?

23 A. Yes.

24 Q. Do you understand why?

25 A. My understanding was that they had reasons, but

1 I'm not sure that I know what they were.

2 Q. Is it your understanding that Nearburg was a
3 party to the operating agreement for the unit?

4 A. No.

5 Q. Let me ask you to look at Exhibit 7. Is
6 Exhibit 7 a ratification document that was signed by
7 Nearburg?

8 A. Yes.

9 Q. Is it customary in the industry for override
10 owners to provide ratifications for a unit agreement
11 even though there is annual [sic] operating rights?

12 A. Yes.

13 Q. Why is that?

14 A. Because the -- well, we were still the lessee
15 of record for the lease, and I think we also -- as an
16 overriding royalty interest owner, I believe we are --
17 required to execute the agreement -- term agreement.

18 Q. And you see that the language in the body of
19 the ratification says, the last two lines, "The
20 undersigned hereby expressly ratifies, approves and
21 adopts said Unit Agreement as fully as though the
22 undersigned had executed the original agreement." Do
23 you see that?

24 A. Yes, I do.

25 Q. It does not refer there to the operating

1 agreement, does it?

2 A. It does not.

3 Q. Now, if you'll turn to Exhibit 8, Exhibit 8 is
4 a letter dated May 28th, 2009, from the Commissioner of
5 Public Lands to Marbob; is that right?

6 A. Yes.

7 Q. And if you look at that, this is indicating
8 preliminary approval of the unit we've been talking
9 about; is that right?

10 A. Correct.

11 Q. And one of the things that the Commissioner
12 asks for says, "When submitting your agreement for final
13 approval, please submit the following," and then if you
14 look down on number three, it says, "All ratifications
15 from the Lessees of Record and Working Interest Owners."
16 Do you see that?

17 A. I do.

18 Q. So is it your understanding that the
19 ratification we looked at, Exhibit 7, was something that
20 the Commissioner, now looking at this letter, had
21 requested?

22 A. Yes.

23 Q. If you go back to Exhibit 2, the term
24 assignment, there is an Exhibit A. Do you see Exhibit A
25 on the third page of the document?

1 A. Yes.

2 Q. What is -- what is Exhibit A?

3 A. Exhibit A is the well-information requirements
4 that are attached to the term assignment.

5 Q. And this is information that is supposed to be
6 provided to Nearburg pursuant to the term assignment?

7 A. Yes.

8 Q. Let's look at some of these requirements.
9 First it says operator agrees to furnish Nearburg the
10 information requested herein. Do you see that?

11 A. Yes, I do.

12 Q. And then item A is drilling and mud-logger
13 reports. Do you see that?

14 A. Yes.

15 Q. And that would provide information of what's
16 going on in terms of drilling activity. And this would
17 be in the entire unit; is that right?

18 A. Yes.

19 Q. And that would be -- the sentence says
20 specifically who to send it to, Nearburg; is that right?

21 A. It does, yes.

22 Q. And then Section B talks about well data, and
23 there is a long list of well data to be provided; is
24 that right?

25 A. Yes, there is.

1 Q. Item number one, a "copy of survey plats,
2 permit to drill, and other regulatory forms and letters
3 filed with any government agencies." Do you see that?

4 A. Yes.

5 Q. That would be like the C-101s and C-102s that
6 we looked at a few minutes ago?

7 A. Yes.

8 Q. Item number two, under well data, "copy of the
9 drilling and completion procedures 48 hours prior to
10 commencement of operation." That's what it says?

11 A. Yes.

12 Q. What would that tell Nearburg if you got that
13 information?

14 A. We would be aware of any drilling plans that
15 were involved in the SRO Unit.

16 Q. Before they happened?

17 A. Yes.

18 Q. And then there are a number of other things.
19 As you get down to number 15 on that list on the next
20 page, it says, "One (1) copy of all title opinions,
21 governmental OCD examiner and commission hearing order
22 and curative instruments covering the spacing unit for
23 the well should be sent to Nearburg." Do you see that?

24 A. Yes.

25 Q. So you would get title opinions; is that right?

1 A. That's correct.

2 Q. And then item C on this Exhibit A,
3 "Notification," it says, "Nearburg should receive
4 24-hour notice of the following events," including
5 spudding, right?

6 A. Yes.

7 Q. Okay. So there are multiple provisions in this
8 Exhibit A to get notice of spudding of a well; is that
9 right?

10 A. Correct.

11 Q. And if you look down at item number F, "Well
12 Prognosis," what is that item?

13 A. "Well/completion prognosis specifying in
14 reasonable detail the procedure of work for the proposed
15 operation."

16 Q. Before commencement; is that right?

17 A. That's correct.

18 Q. Now, what's your understanding of what -- what
19 well data was provided along these lines by COG to
20 Nearburg about any of the wells in the unit?

21 A. Well, my understanding was we were provided
22 some of the information set out in Exhibit 4 for some of
23 the wells, more specifically the Avalon wells, but no
24 information at all for any wells other than -- for the
25 Delaware or for the 2nd Bone Spring, we didn't get any

1 information.

2 Q. You didn't get notice that wells were drilled?

3 A. We had no knowledge of it.

4 Q. And you didn't get C-101s or C-102s when they
5 were filed?

6 A. No, sir.

7 Q. And your understanding is you should have
8 gotten that for the 43H and the 44H; is that right?

9 A. Yes.

10 Q. Now, I'd ask, Mr. Howard, if you would get
11 Exhibit 31, which is the timeline that we have in our
12 books. Could you just take that out because I'm going
13 to refer to it.

14 MR. HARPER: And I might ask the
15 Commissioners, you might just take that out of the book
16 for now and be able to refer to that. At least as I
17 talk to Mr. Howard, we will refer to some of the dates
18 in this timeline as we look at some exhibits.

19 Q. (BY MR. HARPER) So, for example, Mr. Howard, we
20 already looked at the original APDs filed for the 43 and
21 44H back in October of 2014, which is in that blue box
22 on the timeline, the first entry on the left; is that
23 right?

24 A. Yes.

25 Q. And we're going to get -- we're going to talk

1 here about the voluntary termination here in a second.

2 So if you look at Exhibits 3 and 4 again
3 just briefly in our book, you'll see that in February of
4 2013, these original C-101s were filed in the 43H and
5 the 44H on February 21st, 2013; is that right?

6 A. Yes.

7 Q. Okay. And that was before the unit terminated?

8 A. Yes.

9 Q. Did Nearburg get any notice that these were
10 filed?

11 A. No.

12 Q. Now, let's look at Exhibit 9. Exhibit 9 is the
13 request for voluntary termination of the unit; is that
14 right, sir?

15 A. Yes.

16 Q. Okay. And the letter at the top is dated
17 October 16th, 2013, so about that time, this process for
18 terminating the unit started. Do you see that?

19 A. I do.

20 Q. And it then -- but the effective date of
21 termination is to be March 1st, 2014, as we've talked
22 about, right?

23 A. Yes.

24 Q. So on our timeline, you can see the blue box at
25 the bottom, the very second blue box, that the request

1 for voluntary termination --

2 A. Yes.

3 Q. -- is begun, and then March 1st, 2014, the red
4 box at the top, the unit terminates, right?

5 A. Yes.

6 Q. And if you look at all these terminations, if
7 you flip back to the very last page of Exhibit 9, you
8 signed on behalf of Nearburg on October 22nd, 2013; is
9 that right?

10 A. That's correct.

11 Q. At the request of COG?

12 A. Yes.

13 Q. When the unit terminated, what's your
14 understanding of what happened to the term assignment?

15 A. The term assignment was terminated, and the
16 acreage reverted back to Nearburg.

17 Q. And when the unit terminated, was any of that
18 well data that we talked about from the term assignment,
19 was it being continued to be sent or was anything being
20 sent after that unit termination date?

21 A. No.

22 Q. When the unit terminated on March 1st of 2014,
23 what's your understanding as to what happened to Section
24 20 in relation to the unit area?

25 A. Well, it was no longer subject to the unit

1 agreement, and it fell out of the project area of the
2 joint operating agreement and reverted back to Nearburg.

3 Q. Now, if you look at -- let's look at Exhibits
4 28 and 29 in this book. 28 is a C-102, with a
5 certification signed on March 6th of 2014 for the 43H;
6 is that right?

7 A. Yes.

8 Q. Okay. And the consolidation code over kind of
9 in the middle is blank; is that right?

10 A. Yes.

11 Q. And then on the next exhibit, Exhibit 29, there
12 is a C-102 for the 44H on March 6th of 2014 as well,
13 right?

14 A. Yes.

15 Q. Also with a blank consolidation code; is that
16 right?

17 A. Yes.

18 Q. This is, I guess, five days after the unit
19 terminated on March 1st?

20 A. On March 1st. So it's five -- six days, yeah.

21 Q. And these C-102s have an operator
22 certification, right?

23 A. Yes.

24 Q. Okay. Do you believe those certifications to
25 be correct?

1 A. No.

2 Q. Why not?

3 A. Because I don't believe that they had the right
4 to drill to the bottom-hole location.

5 Q. This was after the unit terminated?

6 A. Yes.

7 Q. After the term assignment terminated --

8 A. Yes.

9 Q. -- right?

10 Were these two documents sent to you or
11 anybody at Nearburg?

12 A. No.

13 Q. In your understanding, was there any agreement
14 with Nearburg at this point in time that would allow COG
15 to drill on or under land covered by the lease?

16 A. No.

17 Q. And did you have knowledge in any form or
18 fashion that these C-102s had been filed?

19 A. No.

20 Q. Let's look at Exhibit 36, which is in the next
21 book, I think, and this is an email chain of what's
22 going on at COG at the time, Exhibit 36. And you'll see
23 on May 7th, a little bit later, a couple of months after
24 these C-102s have been filed in March, there is an email
25 from Aaron Myers to Brent Sawyer that says, "Brent, just

1 tried to give you a call...I need to get an opinion
2 rendered on the SRO State Unit #43H prior to spud (July
3 26, 2014)." Do you see that?

4 A. Yes.

5 Q. Now, this is all inside COG, right?

6 A. Yes.

7 Q. You're not informed of this?

8 A. No.

9 Q. And so Mr. Myers is saying, Let's get a title
10 opinion for the 43H, right?

11 A. Yes. Yes.

12 Q. Let's go back to the other exhibit book,
13 Nearburg's Exhibit 10. Are you with me?

14 A. I am.

15 Q. It's a July 9th, 2014 letter to Concho, to
16 Concho's Kelly Fuchik, that this letter says is the land
17 coordinator at COG. Do you see that?

18 A. I thought I was with you. You said 10?

19 Q. Yes, Exhibit 10.

20 A. I'm in the wrong book. Sorry.

21 Q. See, that's why I -- that's why I --

22 A. Keeping me on my toes.

23 Q. That's right. I keep you awake. I make you
24 change books every now and then.

25 A. Okay. I'm there.

1 Q. A July 9th, 2014 letter from Kelly Fuchik at
2 COG to Mr. Dixon at Nearburg, right?

3 A. Yes.

4 Q. And Mr. Dixon worked at Nearburg; is that
5 right?

6 A. Yes. He was the land manager at that point in
7 time.

8 Q. Okay. And this letter ultimately came to your
9 attention, too; is that right?

10 A. Yes.

11 Q. So Ms. Fuchik sends a letter and says,
12 "Enclosed please find one executed original and three
13 attached signature pages of the above referenced
14 Communitization Agreement," and is referring to a well,
15 43H, that appears to be planned on Section 17 and
16 Section 20, right?

17 A. Yes.

18 Q. Okay. And, again, had you had any dealings
19 with Ms. Fuchik before this?

20 A. I don't believe so.

21 Q. Okay. But this letter got routed to you to do
22 something with?

23 A. Correct.

24 Q. Okay. What did you do -- when you saw this
25 letter, did you see it right about that time, on July

1 9th or so?

2 A. Probably the 9th of 10th. Maybe the 10th.

3 Q. And what did you do in response to seeing this
4 letter?

5 A. Reviewed our files and gave Mr. Fuchik a call.

6 Q. What did you tell her in the phone call?

7 A. I told her that according to our records, the
8 term assignment had expired when they canceled the unit
9 agreement and that I didn't think they had the right to
10 come in and drill this well across our minerals and
11 asked, you know, how they were going to be able to do
12 that if we weren't going to sign. So she said she would
13 look into it and get back to us.

14 Q. So you told her you weren't going to sign the
15 communitization agreement?

16 A. I did.

17 Q. Did you tell her the term assignment had
18 expired?

19 A. I did.

20 Q. Did you tell her you didn't believe they had
21 the right to operate on your lease?

22 A. I did.

23 Q. If you look at Exhibit 12 --

24 So let me ask you this: Was anybody else
25 on the phone call other than you?

1 A. Yes. I was actually in somebody else's office,
2 Kimberly, who worked with me. We called on her phone,
3 on speakerphone.

4 Q. And Kimberly what?

5 A. Crandell.

6 Q. And what was her position?

7 A. She was a land assistant for me.

8 Q. And you were on the speakerphone?

9 A. Yes.

10 Q. And you were in her office?

11 A. Correct.

12 Q. And she was with you?

13 A. She was.

14 Q. Okay. And tell us what Exhibit 12 is.

15 MR. FELDEWERT: Object. I'm going to
16 object to Exhibit 12 on the grounds that it's an
17 affidavit reportedly by Ms. Crandell. It's clearly
18 hearsay because it's being offered, apparently, for the
19 truth of the matter asserted. We don't have an
20 opportunity to cross-examine Ms. Crandell, so we object
21 to this affidavit. And this was not introduced at a
22 Division level. This is something new.

23 MR. WADE: She's no longer with the
24 company?

25 THE WITNESS: Correct.

1 MR. WADE: And this just essentially
2 reiterates your testimony?

3 MR. FELDEWERT: No. It actually
4 complicates it, but it's still hearsay.

5 CHAIRMAN CATANACH: Do you have a response
6 to that objection?

7 MR. HARPER: Well, the affidavit's been
8 provided for a long period of time. The witness could
9 have been deposed before by counsel for COG. I'm happy
10 to just ask a couple of questions about it, and we can
11 move on. The witness has testified about this matter.

12 MR. FELDEWERT: No, he has not. He's
13 testified about what his version of the events are of
14 the phone call. He has not testified about this
15 affidavit. And Ms. Crandell's not here. Apparently,
16 she's available. He said we could have taken her
17 deposition. I don't know why they didn't bring her
18 today.

19 MR. WADE: Well, that objection could be
20 used across the board. My feeling is it's going to
21 be -- a lot of evidence is going to rely on hearsay or
22 at least there's the potential.

23 COMMISSIONER BALCH: From all these emails?
24 Is that what you're talking about?

25 MR. WADE: From all these emails.

1 MR. FELDEWERT: The emails aren't hearsay.
2 It's a business record. This is the affidavit.

3 MR. WADE: Well, I haven't heard any
4 objections yet.

5 MR. FELDEWERT: Right.

6 MR. WADE: What questions were you
7 intending to ask of him, questions of the witness?

8 MR. HARPER: I'll just ask him about
9 statements in the affidavit and ask him if they're true
10 or not.

11 MR. FELDEWERT: Well, how can he ask
12 questions --

13 MR. WADE: He would not be able to.

14 CHAIRMAN CATANACH: I believe that we're
15 not going to allow this to be admitted at this time.

16 MR. HARPER: Okay. Thank you.

17 Q. (BY MR. HARPER) Mr. Howard, let me ask you
18 this: You did tell -- Ms. Crandell was with you when
19 you made the phone call to Ms. Fuchik; is that right?

20 A. Yes.

21 Q. And you did, on that phone call, tell
22 Ms. Fuchik that you weren't going to sign the
23 communitization agreement for the 43H?

24 A. Yes.

25 Q. And you told her that the term assignment had

1 expired?

2 A. Yes.

3 Q. Let me refer you to -- so this phone call took
4 place around July 10th; is that right?

5 A. Yes.

6 Q. Now, if you look at the timeline as to 43H, the
7 43H was spud on August 2nd, 2014; is that right?

8 A. Yes.

9 Q. And it wasn't completed until February of 2015,
10 right?

11 A. Correct.

12 Q. And do you believe it went to production
13 shortly after the -- shortly after that, in late
14 February, early March of 2015?

15 A. Yes.

16 Q. Any notice provided to Nearburg or you that the
17 43H had been spud?

18 A. No.

19 Q. Let's go back to one exhibit, Exhibit 11.
20 After your phone call on July 10th of 2014 with
21 Ms. Crandell there on the phone with Ms. Fuchik,
22 Ms. Crandell sent the term assignment on to Ms. Fuchik,
23 is that right, on August 22nd, 2014?

24 A. Yes.

25 Q. And then there is some follow-up back and forth

1 about what the status is; is that right?

2 A. Correct.

3 Q. Now, if you look back at your timeline again,
4 as we proceed throughout 2014, now on October 10th,
5 2014, COG spuds the 44H; is that right?

6 A. Yes.

7 Q. Okay. And that's reflected there in the
8 timeline about that well, right?

9 A. Yes.

10 Q. Okay. And that well was completed sometime in
11 early March of 2015?

12 A. Yes.

13 Q. And went into production about that time?

14 A. Yes.

15 Q. Before the 44H well was spud, did Nearburg
16 receive any notice that it was going to be spud or had
17 been spud?

18 A. No.

19 Q. Had you executed any communitization agreement
20 about the 44H on or about that time?

21 A. No.

22 Q. Had you even been sent a communitization
23 agreement about the 44H before that well was spud?

24 A. No.

25 Q. And we talked about the 43H a minute ago, but

1 no communitization agreement was signed as to that well
2 either before that well was spud either; is that right?

3 A. Correct.

4 Q. Let me direct your attention to Exhibit 19.
5 Those are some of the rules that Mr. Hall referred to
6 earlier in his opening.

7 MR. HARPER: We'd ask the Commission to
8 take administrative notice of those rules.

9 Q. (BY MR. HARPER) Mr. Howard, what is the well
10 spacing in the Hay Hollow-Bone Spring pool?

11 A. 40 acres.

12 Q. Did COG ever notify Nearburg that it was
13 proposing a nonstandard spacing and proration unit on
14 Nearburg's acreage in Section 20?

15 A. No.

16 Q. Did it get Nearburg's consent to do that?

17 A. No.

18 Q. Did COG consolidate the lands in Section 20
19 with the lands in Section 17 before they drilled and
20 completed the 43H?

21 MR. FELDEWERT: I'll object to the form of
22 the question. It calls for a legal conclusion,
23 including interpretation of the operating agreement.

24 MR. HARPER: Let me -- I'll revise the
25 question.

1 CHAIRMAN CATANACH: Thank you.

2 Q. (BY MR. HARPER) Is it your understanding
3 that -- can you tell us what your understanding is as to
4 whether or not COG consolidated the lands in Section 20
5 and Section 17 before they drilled and completed the 43H
6 and 44H?

7 A. It's my understanding that they did not.

8 Q. Did COG ever solicit a farm-out of Nearburg's
9 interest in Section 20?

10 A. No.

11 Q. Did they get -- did COG get Nearburg's consent
12 for drilling the 43H or the 44H?

13 MR. FELDEWERT: I object to the form of the
14 question. Again, it calls for an interpretation of the
15 operating agreement.

16 MR. HARPER: I'll rephrase the question.

17 Q. (BY MR. HARPER) What is your understanding as
18 to whether or not COG got Nearburg's consent before
19 drilling the 43H and the 44H?

20 A. That they did not.

21 Q. Did Nearburg consent to the project area for
22 the 43H or 44H?

23 MR. FELDEWERT: Same objection.

24 MR. HARPER: I'll rephrase.

25 Q. (BY MR. HARPER) What's your understanding as to

1 whether or not Nearburg consented to the project area
2 before the 43H and the 44H were drilled?

3 A. We didn't.

4 Q. Did COG obtain a compulsory pooling order
5 before the 43H or the 44H were drilled?

6 A. No.

7 Q. Is it your understanding that COG knew that
8 Sections 17 and 20 required consolidation in the fall of
9 2014?

10 MR. FELDEWERT: Object to the form of the
11 question. He's asking for the -- of COG in 2014.

12 MR. HARPER: Let me just refer to an
13 exhibit.

14 Q. (BY MR. HARPER) Mr. Howard, turn to Exhibit 20.

15 MR. WADE: Did you say 20?

16 MR. HARPER: 20. Yes, sir.

17 Q. (BY MR. HARPER) Is it Exhibit 20 a portion of a
18 title opinion dated October 8th, 2014 that was
19 provided -- that reflects on its face that was provided
20 to COG?

21 A. Yes.

22 Q. And if you'll turn to the second page of the
23 title opinion.

24 MR. FELDEWERT: Mr. Examiner --
25 Mr. Chairman, at this point I'm going to object. In

1 looking at this title opinion, Exhibit 20, it has
2 nothing to do with the acre at issue here. In fact,
3 it's not even in the same township.

4 MR. HARPER: I'll tie it together. I'll
5 tie it together.

6 MR. FELDEWERT: It has absolutely nothing
7 to do with this acreage.

8 CHAIRMAN CATANACH: I'll let him proceed
9 and see how it's tied.

10 Q. (BY MR. HARPER) Mr. Howard, let's turn to
11 Exhibit 23. Is Exhibit 23 an email from Brent Sawyer to
12 you on January 27th, 2015?

13 A. Yes.

14 Q. And Mr. Sawyer works for Concho, right?

15 A. Correct.

16 Q. What's your understanding of what he does at
17 Concho?

18 A. Well, it says here that he's a land specialist,
19 so I'm assuming just land work.

20 Q. Okay. And he says the subject of the email is
21 "2nd SRO opinion." Do you see that?

22 A. I do.

23 Q. Okay. It says, "Randy, as always, enjoyed
24 seeing you and John and here is that other SRO opinion
25 we talked about." Right?

1 A. Correct.

2 Q. You turn the page. And is this an opinion
3 dated October 8th, 2014?

4 A. Yes.

5 Q. And is it the same date of the opinion back at
6 Exhibit 20?

7 A. Yes.

8 MR. FELDEWERT: This still involves the
9 same acre, so my objection holds. It has nothing to do
10 with the acreage at issue. It's not even in the same
11 township.

12 MR. HARPER: The substance of the opinion
13 addressed the term assignment and the text refers to it.

14 CHAIRMAN CATANACH: Go ahead.

15 Q. (BY MR. HARPER) So if you look back at Exhibit
16 20, the highlighted language on the second page talks
17 about the term assignment from Nearburg to Marbob; is
18 that right?

19 A. Yes.

20 Q. And it says at the bottom of the page in the
21 highlighted text, "Because the SRO State Exploratory
22 Unit was voluntarily terminated effective March 1, 2014,
23 it appears that the primary term of the Term Assignment
24 is now expired and the interests assigned thereunder in
25 all of the Subject Lands except Tracts 7 and 8, which

1 comprise the spacing unit for the SRO State Unit Com
2 #11H Well, have reverted back to Nearburg Exploration
3 Company, L.L.C. We have reported title accordingly."
4 Do you see that?

5 A. Yes.

6 Q. Okay. So is it your understanding that as of
7 October 8th, COG had a title opinion in its files that
8 the term assignment had expired and the interest had
9 reverted to Nearburg?

10 A. Yes.

11 Q. And Mr. Sawyer sent you an October 8th title
12 opinion, but it wasn't until January 27 of 2015?

13 A. Yes.

14 Q. And your understanding was that if there were
15 title opinions that related to your interest under the
16 term assignment, you were supposed to get them promptly;
17 is that right?

18 A. Correct.

19 Q. And in October of 2014, did anybody at COG tell
20 you or Nearburg that they had a title opinion that told
21 them that the term assignment had expired and that the
22 interest had reverted?

23 A. No.

24 Q. Now, if you look back at our timeline, on
25 October 10th of 2014 is when the 44H was spud, right?

1 A. Correct.

2 Q. But COG had a title opinion on October 8th that
3 the term assignment had expired?

4 A. Two days before, yes.

5 Q. Does COG seek a voluntary agreement pooling
6 Nearburg's interest dedicated to the spacing and
7 proration unit for the 43H?

8 A. No.

9 Q. Let's look at COG Exhibit 14. Now we see
10 you've been having some dealings with Mr. Sawyer back
11 and forth; is that right?

12 A. Yes.

13 Q. And on October 14th of 2014, he sends you an
14 email -- you sent him an email -- excuse me -- and you
15 say, "Brent, I assume you still plan on coming to
16 Nearburg's office tomorrow around 2:00 p.m. We would
17 like to also visit you with about the attached
18 assignment while you are here, and I wanted to give you
19 a heads-up in that regard." And you tell him who is
20 going to be there, right?

21 A. Yes.

22 Q. And you're talking about the term assignment;
23 is that right?

24 A. Yes.

25 Q. The one that had expired?

1 A. Correct.

2 Q. Okay. And you were going to have a meeting the
3 next day, I guess, October 15th?

4 A. Yes.

5 Q. Did you have that meeting?

6 A. Yes.

7 Q. On October 15th, 2014, both the 43H and the 44H
8 had been drilled?

9 A. They were drilling.

10 Q. Okay. And when you sat down at that meeting
11 October 15th, did they tell you that those wells had
12 been spud?

13 A. No.

14 Q. Did they tell you anything about those wells,
15 what was going on as to those wells?

16 A. No.

17 Q. We'll go back to our exhibit book, Exhibit 25,
18 and we heard about this email, the first email here, a
19 little bit in the opening by -- it might have been COG's
20 version of it, but this is an email dated November 3rd,
21 2014 from you to Mr. Sawyer; is that right?

22 A. Yes.

23 Q. And now you've had the meeting on October 15th
24 that we just talked about?

25 A. Correct.

1 Q. Okay. And one of the things you talked about
2 at that meeting was the term assignment?

3 A. Yes.

4 Q. And what in general did he want to -- did he
5 communicate that he wanted to be done with respect to
6 the term assignment or wanted to talk to you about the
7 term assignment?

8 A. They wanted to talk about amending or
9 correcting it to have the duration of the term
10 assignment last with the -- with the length of the SRO
11 operating agreement as opposed to the unit agreement as
12 originally prepared.

13 Q. Okay. Your email first says, "Nearburg
14 regretfully must advise COG that it prefers to remain
15 subject to the original JOA(s)." Now, does that
16 sentence have anything to do with the operating
17 agreement that we were talking about in this proceeding?

18 A. No.

19 Q. Okay. We're talking about other operating
20 agreements?

21 A. Other issues with other operating agreements.

22 Q. You have other dealings with COG; is that
23 right?

24 A. Yes.

25 Q. Not just this unit, these wells?

1 A. Correct.

2 Q. So then you go on in your email and say, "We
3 are, however, agreeable to your changes to the Term
4 Assignment of Oil and Gas Lease covering the west half
5 of Section 20. I assume this will actually be an
6 Amendment or Correction to Term Assignment of Oil and
7 Gas Lease." That's what you say?

8 A. Yes.

9 Q. You're not looking at a document at that point
10 in time, right?

11 A. My recollection is we were talking about some
12 of the wording in the term assignment.

13 Q. Yeah. That you might -- that you might
14 generate a document?

15 A. That we were trying to create, yes.

16 Q. And then you go on and say, "We would still
17 like to see COG's calculations on a well by well basis
18 of our override...in wells included on the lands subject
19 to the SRO Operating Agreement," right?

20 A. Yes.

21 Q. Why did you say that?

22 A. I was still trying to get a handle on what
23 wells included and what our interest was. There was
24 some difference of opinion on what our overrides were
25 when the unit agreement was in place, and we were still

1 trying to figure that all out. And then I was trying to
2 get a handle on what wells were out there because it was
3 fairly new to the area that I was working.

4 Q. Did you know about the 43H or the 44H being
5 spud at this point?

6 A. I wish I had, but no, I did not.

7 Q. If you got a well-by-well chart, you would
8 see -- you would see those wells?

9 A. Sure.

10 Q. At this point in time, you didn't know what you
11 didn't know?

12 A. I did not. And I was trying to help by putting
13 things together for them, listing the wells.

14 Q. Okay. And what importance, if any, was this
15 calculation chart to you in terms of talking about a new
16 term assignment?

17 A. I had to decide what the facts were, what the
18 wells were and what our override was so that I could
19 turn that information over to the right departments for
20 them to decide do we want to continue with an override
21 that's opposed by COG, or do we want to take our working
22 interest since the term assignment had terminated.

23 Q. You wanted to see what all the wells were so
24 you could do an evaluation?

25 A. Absolutely.

1 Q. Now, when you sent this email, what impact did
2 it have with -- with -- was there any impact on you when
3 you sent this email from the fact that you didn't --
4 that there were no wells on the Nearburg -- the Nearburg
5 lease as far as you knew other than the 16H.

6 A. Knowing what I knew at the time -- I mean, I
7 was still trying to get all the facts straight. So I'm
8 not really sure I understand what the question is.

9 Q. When you sent this email, you didn't know about
10 the 43H and the 44H?

11 A. I did not.

12 Q. Do you think if you had known about those, that
13 would have been important information to you?

14 A. Absolutely.

15 Q. Do you think, from your perspective, if --
16 if Mr. Sawyer thought that COG had a good-faith right to
17 drill, would he have told you about those wells?

18 MR. FELDEWERT: Object. Calls for
19 speculation.

20 MR. HARPER: I'm asking him what he thinks.

21 MR. FELDEWERT: No. You asked him what he
22 thought Sawyer would think.

23 MR. WADE: That was the way it seemed to be
24 phrased. Can you rephrase it?

25 MR. HARPER: Sure.

1 Q. (BY MR. HARPER) Do you think that someone would
2 tell you that they had drilled wells if they were
3 operating in good faith?

4 MR. FELDEWERT: Objection.

5 MR. WADE: It's calling for speculation.

6 Q. (BY MR. HARPER) Would you tell somebody that
7 you had drilled wells on their land if you were
8 operating in good faith?

9 A. Yes.

10 Q. Let's look at Exhibit 26. You see here these
11 are emails back and forth from you and Mr. Sawyer; is
12 that right?

13 A. Yes.

14 Q. Let me direct your attention to the one that's
15 highlighted on the back page from you to Mr. Sawyer,
16 November 3rd, 2013. This is continuing on the email we
17 just looked at in Exhibit 25, right?

18 A. Okay. I'm in 26.

19 Q. You're in 26.

20 A. And what's the highlighted portion?

21 Q. Well, if you turn the page -- let's get
22 oriented. Exhibit 25, your email with him on November
23 3rd, right?

24 A. Yes.

25 MR. FELDEWERT: You're on the second page

1 of Exhibit 25 or 26? I'm sorry.

2 MR. HARPER: I'm just trying to get
3 oriented.

4 Q. (BY MR. HARPER) On the first page of Exhibit
5 25, you're emailing with Mr. Sawyer on the morning of
6 November 3rd?

7 A. Yes.

8 Q. Okay. Exhibit 26, if you look at the second
9 page, there is that same email that's in Exhibit 25,
10 right?

11 A. Yes.

12 Q. Okay. He responds back at the bottom of the
13 first page of Exhibit 26; is that right?

14 A. Yes.

15 Q. And he says -- this is a little later the same
16 day -- a little later that morning, correct?

17 A. Correct, a couple of hours.

18 Q. "Randy, I was thinking a replacement might be
19 the right thing to do on the TA...." That's term
20 assignment, right?

21 A. Yes.

22 Q. "But there are definitely a few different ways
23 to skin that cat. Once I get the form drafted, I'll run
24 it by Aaron and then send it to you for final review."
25 Do you see that?

1 A. Yes.

2 Q. So he's indicating that the document's going to
3 get prepared; is that right?

4 A. Yes.

5 Q. And then the bottom sentence there in that
6 email, he says, "Also, we are still waiting on the
7 opinion(s) for the SRO Operating Agreement wells which
8 calculate everything on a well by well basis. When we
9 get those I'll be sure to get you copies." Do you see
10 that?

11 A. Yes.

12 Q. So he's saying he's waiting on some title
13 opinions?

14 A. Yes.

15 Q. Now, he had that October 8th one, right?

16 A. Yes.

17 Q. But you didn't have that one yet?

18 A. No.

19 Q. Let's turn to Exhibit 27. At the bottom of the
20 first page of Exhibit 27, do you see an email from
21 Mr. Sawyer to you dated November 18, 2013, right?

22 A. Yes.

23 Q. And he is sending you now a form of a new term
24 assignment; is that right?

25 A. Yes.

1 Q. Okay. And he says, "This correction will be to
2 tie the term of the assignment to the Unit Operating
3 Agreement (which will persist as long as any contributed
4 leases persist), instead of to the Unit Agreement
5 (already voluntarily dissolved)." Right?

6 A. Correct.

7 Q. And then if you look a few pages in, you'll see
8 the unexecuted form of the term assignment that he sent
9 over; is that right?

10 A. Correct.

11 Q. The other thing that he says in his email, he
12 says, "I think everything should be acceptable except
13 there are probably some changes to the well information
14 requirements on 'Exhibit A.'" Do you see that?

15 A. Yes.

16 Q. Do you remember some discussion about COG
17 wanting some changes to the -- to the well information
18 requirements?

19 A. I don't think they were real happy with the
20 well information requirements.

21 Q. Now, if you look at your email, at the top of
22 the page, back to him a few days later on November 21st,
23 you say to Mr. Sawyer, "Brent, I'm working on this, but
24 have hit a snag myself. It appears Nearburg never
25 received a copy of the SRO Unit Operating Agreement. Is

1 there any way you could have someone scan a copy and
2 forward it to my attention?" Do you see that email?

3 A. I do.

4 Q. And from -- to your knowledge, did Nearburg
5 have a copy of the operating agreement?

6 A. No.

7 Q. By the way, is this term assignment that is
8 attached -- no new term assignment was ever executed,
9 right?

10 A. No.

11 Q. Let's look at Exhibit 41, and this is a
12 continuation of some of these emails. Let's go to the
13 last page of Exhibit 41 just to get oriented. There is
14 the email on November 18th, where he sends the new form
15 of term assignment, right?

16 A. Yes.

17 Q. If you turn the page, we see your email at the
18 bottom of the page asking for the operating agreement,
19 right?

20 A. Yes.

21 Q. And then at the top of the second page of
22 Exhibit 41, you send an email to Mr. Sawyer and you say,
23 "The way I read the Correction Term Assignment, Nearburg
24 would own an overriding royalty as allocated under the
25 JOA." Now you have the JOA, right?

1 A. Yes.

2 Q. He sent it?

3 A. He did.

4 Q. And then you say, "The JOA states precisely
5 what Nearburg owns," right?

6 A. Yes.

7 Q. And you say, "Please confirm how COG plans to
8 allocate per the JOA and not pay based on the interest
9 set out therein. We are not trying to complicate
10 matters, but feel we need to stipulate exactly what we
11 own, or will own, after executing the Corrected Term
12 Assignment," something to that effect, right?

13 A. Yes.

14 Q. Okay. And so you're still -- you had asked
15 before -- we saw an email before where you're asking for
16 a well-by-well calculation, right?

17 A. Yes.

18 Q. Is this somehow related to that?

19 A. It is.

20 Q. You're still asking for that?

21 A. I'm still trying to get a list of the wells and
22 the calculations, yes.

23 Q. And why do you want that?

24 A. So that I can make an educated decision on what
25 we want to do to move forward.

1 Q. He still hadn't sent it?

2 A. He has not.

3 Q. He hasn't even sent you a list?

4 A. Of wells, no.

5 Q. Now, the first page of Exhibit 41, he goes
6 through a calculation, right? He sends an email back
7 and goes through a calculation, right?

8 A. Yes. Uh-huh.

9 Q. And then you email him back on November 25th,
10 2014, which must be right around Thanksgiving, right?

11 A. Yes.

12 Q. And you say, "Brent, it sounds like we are in
13 agreement in that this is a mess that we are going to
14 have to try to fix despite the fact that neither of us
15 had anything to do with creating it." Do you see that?

16 A. I do.

17 Q. "That said, I hope you have a Happy
18 Thanksgiving as well. Let's touch base after the
19 turkey's been put away and see if we can reach some sort
20 of agreement that suits both sides." That's what you
21 say?

22 A. Yes.

23 Q. You haven't worked anything out yet?

24 A. No.

25 Q. You haven't agreed to a new term assignment?

1 A. No.

2 Q. Any mention in these emails of the 43H and the
3 44H that have been spud?

4 A. No, sir.

5 Q. Let's look a minute at that joint operating
6 agreement that he sent over, Exhibit 42. This is what
7 you had just received somewhere in that November 2014
8 time frame, right?

9 A. Yes.

10 Q. Let me just point out a few things in this
11 agreement for you to look at. If you turn to page 3 of
12 the agreement, it's Bates-numbered 2172 at the bottom.
13 Do you see that, Bates 2172 --

14 A. Yes.

15 Q. -- "Loss of Title."

16 A. Yes.

17 Q. It says, "Failure of Title. Should any oil and
18 gas interest or lease, or interest therein, be lost
19 through failure of title, which loss results in a
20 reduction of interest from that shown on Exhibit 'A,'
21 the party contributing the affected lease or interest
22 shall have (90) days from final determination of title
23 failure to acquire a new lease or other instrument
24 curing the entirety of the title failure, which
25 acquisition will not be subject to Article VIII.B, and

1 failing to do so, this agreement, nevertheless, shall
2 continue in force as to all remaining oil and gas leases
3 and interests." Do you see that?

4 A. I do.

5 Q. You understood that the term assignment expired
6 on March 1st, 2014?

7 A. Yes.

8 Q. Okay. And we looked earlier at the title
9 opinion of October 8th, 2014, telling COG that the term
10 assignment had terminated and title reverted?

11 A. Yes.

12 Q. What's your understanding of this provision?

13 A. That the acreage would contract. It talks
14 about Exhibit A and the party contributing the affected
15 lease.

16 MR. FELDEWERT: Object to the testimony,
17 trying to testify as to the legal effect of the term
18 assignment and whether that qualifies as a loss of title
19 pursuant to the JOA. That's a legal question. First
20 I've heard --

21 MR. HARPER: His understanding. He's a
22 landman, and I asked him his understanding.

23 CHAIRMAN CATANACH: I'll allow it.

24 THE WITNESS: Allow?

25 CHAIRMAN CATANACH: Go ahead.

1 THE WITNESS: So Exhibit A shows the people
2 that contributed the interest in the unit, and they have
3 90 days. So it's been -- from when this lease was lost,
4 our lease was lost, they have 90 days to acquire a new
5 lease from term assignment, and Exhibit A, of course,
6 doesn't show Nearburg because we didn't contribute the
7 acreage.

8 MR. HALL: Let's let them catch up.

9 THE WITNESS: Okay.

10 Q. (BY MR. HARPER) Mr. Howard, if you're looking
11 at Exhibit A, Exhibit A has the list, in Roman numeral
12 II on page 2189, of the working interest percentages and
13 addresses of the parties for notice purposes. Do you
14 see that?

15 A. I do.

16 Q. And in the listed parties there, is Nearburg
17 listed as a party?

18 A. They are not.

19 Q. And in section III, "Oil and Gas Leases Subject
20 to This Agreement," and there is Exhibit A-1. There is
21 a long list there. And is Nearburg listed in Exhibit
22 A-1 on page 2196?

23 A. 2196? Yes. It shows Nearburg on 26 of A-1.

24 Q. By the way, let's turn one page, 2197, and
25 you'll see there the recapitulation. And there is a

1 calculation of the unit working interest originally up
2 there. It had Nearburg listed, but then there is a box
3 that says "Nearburg TA'd," term assigned, and then
4 Nearburg's not listed. Do you see that in that box?

5 A. I do.

6 Q. Let's go back to the body of the joint
7 operating agreement. We're still on Exhibit 42. I want
8 to point out something else here on page 5 of the
9 agreement, page 2174 at the bottom. There is B,
10 "Subsequent Operations." It says, "Proposed Operations"
11 there, and "Should any party hereto desire to drill any
12 well on the Contract Area other than the well provided
13 for in Article VI.A, or to rework, deepen or plug back a
14 dry hole drilled at the joint expense of all parties or
15 a well jointly owned by all the parties and not then
16 producing in paying quantities, the party desiring to
17 drill, rework, deepen or plug back such a well shall
18 give the other parties written notice of the proposed
19 operation, specifying the work to be performed, the
20 location, proposed depth, objective formation and the
21 estimated cost of the operation." Do you see that?

22 A. I do.

23 Q. So is it your understanding that if you're a
24 party -- if you're a party to the joint operating
25 agreement, a working interest owner, you're going to get

1 notice of a well being drilled?

2 A. Yes.

3 Q. As far as you know, did COG ever provide any
4 such notice pursuant to the joint operating agreement to
5 Nearburg about any wells?

6 A. No, but we weren't a party. So --

7 Q. Did you get provided notice -- you heard in
8 opening that they're relying on the joint operating
9 agreement as one of their bases for being able to
10 proceed. Did they send an AFE for the --

11 A. No.

12 Q. -- 43 or 44H?

13 A. No.

14 Q. Let's flip back to Exhibit 65 in this same
15 notebook. What is Exhibit 65?

16 A. This is a contract data sheet from Nearburg's
17 computer system in BOLO.

18 CHAIRMAN CATANACH: Hold on.

19 COMMISSIONER BALCH: We're missing Exhibit
20 65.

21 MR. WADE: We received a supplemental as
22 well, right?

23 MR. HARPER: Yes. There are additional
24 exhibits. I apologize that they're not in the books
25 yet.

1 MR. FELDEWERT: Mr. Chairman, I do have an
2 objection to this exhibit, when you-all have it in front
3 of you.

4 CHAIRMAN CATANACH: What's your objection,
5 Mr. Feldewert?

6 MR. FELDEWERT: I'm looking at -- I mean,
7 we have not seen this before. It was not utilized in
8 the hearing below. And we got this over the weekend
9 like you-all did, but you'll see it dated, contract data
10 sheet, 2/22 of 2017, up in the left-hand corner. This
11 is certainly after they filed their complaint in
12 district court. And it also indicates at the back that
13 it was last updated apparently -- I'm looking at the
14 last page -- on 5/19/2016. That's when they decided to
15 change their -- about how they wanted to proceed in
16 this. My point is we don't have a version that it was
17 in effect within their system, apparently, at the time
18 that all of these events were occurring. So I don't see
19 the relevancy of this document given that they can't
20 represent that it reflects what was in their system at
21 the time that these events were occurring.

22 MR. HARPER: I'd say that goes to weight,
23 and let me lay a foundation.

24 MR. WADE: Are you going to discuss how
25 this document's event generated?

1 MR. HARPER: Yes, sir.

2 MR. WADE: Yeah. Okay. I think if we hear
3 some of that information, it could help decide.

4 CHAIRMAN CATANACH: Okay. You may proceed.

5 Q. (BY MR. HARPER) Mr. Howard, first of all, what
6 is Exhibit 65?

7 A. It's a contract data sheet that is printed out
8 of BOLO system, Nearburg's system for tracking.

9 Q. It's a system that the company uses to track
10 contracts?

11 A. Yes.

12 Q. Let me ask you to turn to the last page of this
13 exhibit. Do you see an input date there of November
14 24th, 2013?

15 A. I do.

16 Q. And we looked at some emails earlier where you
17 had asked for the joint operating agreement; is that
18 right?

19 A. Yes.

20 Q. And is that -- is that when the agreement was
21 received from -- the joint operating agreement was
22 received, on or about November 24th, 2014?

23 A. Yes.

24 Q. Okay. And do you know what the date on the
25 front page of the document is, February 22nd, 2017?

1 A. I would assume that's the date it was printed.

2 Q. Let me ask you a couple of things about -- the
3 purpose of this document is for you to have information
4 in your system about a contract; is that right?

5 A. Yes.

6 Q. And you don't input this, do you?

7 A. I do not.

8 Q. Okay. But at the front page of the data sheet
9 is the contract name, and it includes the word
10 "expired"; is that right?

11 A. Yes.

12 MR. FELDEWERT: Let me object at this point
13 in time because he has not established that this sheet
14 said that these events were occurring. Mr. Howard
15 apparently has no knowledge as to when the information
16 on here was inputted, nor does anybody else in this
17 room.

18 MR. WADE: By looking at the document,
19 would you have that knowledge? Is there any indication
20 on the document when -- when information is input?

21 THE WITNESS: Yes, the last page. "Input,
22 11/24/14." It's the date it's put into our system.

23 MR. FELDEWERT: If I may? May I question
24 the witness?

25 Well, let me step back. We also have a

1 "last update date of 5/19/16," which is after all these
2 events are taking place.

3 MR. WADE: By looking at this document, do
4 you think that all the information that can be found in
5 this document was input on the two dates that we see on
6 page 5?

7 COMMISSIONER PADILLA: Is there any other
8 way to track changes?

9 COMMISSIONER BALCH: There is not a
10 complete revision history. That's what we're asking.

11 THE WITNESS: I don't believe there is a
12 way to track changes if there are any changes.

13 Q. (BY MR. HARPER) Let me ask the witness this:
14 It says "last update date, May 19th, 2016," right?

15 A. Yes.

16 Q. And in your understanding, there hasn't been
17 any changes to this document since than date, right?

18 A. Correct.

19 MR. FELDEWERT: Well, that's fine, but we
20 don't know what input was done on May 19th, 2016, which
21 is after they decided to change their tune about this
22 operating agreement and what's been going on. So we
23 have no way of tracking as to when the various aspects
24 of this contract data sheet were inputted and what was
25 modified or when.

1 MR. HARPER: My response would be that goes
2 to weight, not admissibility.

3 MR. WADE: And the information you would be
4 asking your witness about, is that the highlighted
5 portion on page 2?

6 MR. HARPER: Yes, the two highlighted
7 sections. And I certainly am happy to ask him if he
8 knows when that was input, and then the Commission can
9 give whatever weight, if any, is appropriate.

10 MR. WADE: Well, let's ask -- let's just
11 ask. The highlighted portion on page 2, do you know
12 when that information was input and who input that
13 information?

14 THE WITNESS: Whenever they first did the
15 sys- -- whenever they put it in the system.

16 MR. WADE: So that would have been the 2014
17 date?

18 THE WITNESS: Yes, by our Dallas office.

19 MR. FELDEWERT: I will object to that
20 question because he just testified that he did not do
21 the inputting and is not knowledgeable about the input.
22 I know they'd like to suggest that this was inputted at
23 the beginning, but there is absolutely no evidence of
24 that. And clearly -- clearly there were changes that
25 were made to this input data sheet at a convenient time

1 of May 19th, 2016. And he cannot say and no one else in
2 this room can say when they were inputted. First of
3 all, he testified he has no knowledge.

4 COMMISSIONER BALCH: Who is S-T?

5 THE WITNESS: S-T?

6 COMMISSIONER BALCH: Input here has S-T.

7 THE WITNESS: Sheri Thomas.

8 COMMISSIONER BALCH: Last update is L-P.

9 THE WITNESS: Linda Parker.

10 COMMISSIONER BALCH: They're not available
11 today?

12 THE WITNESS: They're not here today, no.

13 MR. HARPER: My other response would be
14 this is a business record kept in the ordinary course of
15 business, and it's admissible. And these issues go to
16 weight, not admissibility.

17 MR. FELDEWERT: Well, it goes to the
18 authenticity as to what this record reflected at the
19 time these events were occurring. And we do not know
20 what this record reflected at the time these events were
21 occurring, and he cannot testify to that.

22 MR. HARPER: He can testify to a business
23 record, which makes it admissible. Those are issues for
24 cross-examination. It goes to weight.

25 CHAIRMAN CATANACH: Okay. On advice of

1 legal counsel, we'll go ahead and admit this exhibit
2 into evidence, and we will make our own determination as
3 to how much weight we will give that in our
4 consideration.

5 MR. HARPER: Okay.

6 (Nearburg Exploration Co., LLC Exhibit
7 Number 65 admitted into evidence.)

8 Q. (BY MR. HARPER) Mr. Howard, let me just direct
9 your attention to the first page of Exhibit 65. The
10 contract name is the Cottonwood Draw North JOA, and then
11 it refers to the SRO wells. This is the data sheet for
12 the -- for the operating agreement that we've been
13 talking about, right?

14 A. Yes.

15 Q. And it says "expired" on this data sheet,
16 right?

17 A. On the status, it says "expired," yes.

18 Q. Okay. And then under Remarks on the second
19 page, the data sheet reflects that the contract and the
20 term -- contract terminated is NEX. That's Nearburg,
21 right?

22 A. Yes.

23 Q. Was not a working interest party to that and
24 never executed as such. Do you see that?

25 A. I do.

1 Q. Is that consistent with your understanding back
2 at the time when you got the agreement?

3 A. Yes.

4 Q. To your knowledge, was there any immediate need
5 to drill the 43H and 44H wells?

6 A. No.

7 Q. What percentage of the project areas for the
8 43H and 44H are comprised of Nearburg lease acreage?

9 A. 50 percent.

10 Q. Was Nearburg's lease held by production by the
11 16H?

12 A. To the best of my knowledge, yes.

13 Q. Is the 16H still producing as far as you know?

14 A. As far as I know, yes.

15 Q. Let's look at Exhibit 13. Is Exhibit 13 an
16 email you sent to Mr. Sawyer on January 8th, 2015?

17 A. Yes.

18 Q. And you say, "Brent, as promised, please find
19 attached my updated spreadsheet for the SRO Unit Wells."
20 That's what you say, right?

21 A. Yes.

22 Q. Okay. Why did you send him this?

23 A. Again, I'm still trying to get a list of all
24 the wells and the interest that we would have in these
25 wells.

1 Q. Because you're talking about possibly a new
2 term assignment?

3 A. Right. We're trying to decide what we're going
4 to do and get all the facts straight.

5 Q. And attached to this e-mail is a list of wells;
6 is that right?

7 A. Yes.

8 Q. And how did you prepare that list?

9 A. I went into Drilling Info and pulled up all the
10 wells that I could find related to the SRO Unit.

11 Q. Is the 43H or the 44H on this list?

12 A. No.

13 Q. Did you know about the 43H or 44H at this point
14 in time?

15 A. No.

16 Q. When you sent this to Mr. Sawyer, did he
17 communicate to you in any way, Hey, you need to know
18 about the 43H and 44H?

19 A. No.

20 Q. And if you look back at our timeline, you'll
21 see some things that we talked about. You'll see the
22 white boxes up at the top. We talked earlier about the
23 October 8th title opinion, right?

24 A. Yes.

25 Q. Okay. And then here on January 8th, 2015,

1 there is a reference that COG's aware that Nearburg
2 doesn't know about the 43H and 44. And that's referring
3 to this email, right?

4 A. Yes.

5 Q. Today, do you know that there were even other
6 wells that were not on this list that had been drilled
7 at that point in time?

8 A. Yes.

9 Q. That you also didn't know?

10 A. Correct.

11 Q. Why is it that -- do you know why you were
12 unable to find the 43H and 44H at that point?

13 A. My thought is that when I pulled this out of
14 Drilling Info at this point in time, which was January
15 of 2015, that the wells had not been input into the
16 Drilling Info system.

17 Q. Did he send you a list back?

18 A. Never.

19 Q. Let's turn to Exhibits 21 and 22. If you look
20 at the bottom of the first page of Exhibit 21, there is
21 an email from Mr. Sawyer to you. Do you see that?

22 A. Yes.

23 Q. That's the information on the Bone Spring, on
24 the first page?

25 A. Yes.

1 Q. Then his email is the top page of the second
2 page of Exhibit 21?

3 A. Yes.

4 Q. "Randy, one of the phantom SRO opinions finally
5 came in late last week. I've not had a chance to review
6 it in detail, but requirement E on page 20 is the one
7 we've been working on. Thanks. Brent." Right? And if
8 you look at Exhibit 22, is this an excerpt from that
9 title opinion that he sent to you on January 19th?

10 A. Yes.

11 Q. This is another title opinion that COG
12 obtained; is that right?

13 A. Correct.

14 Q. Let's look at some of the things that are
15 referenced in this title opinion. So we're in Exhibit
16 22, item number 24 at the bottom of what's numbered page
17 19 of the title opinion. It's talking about the term
18 assignment, right?

19 A. Yes.

20 Q. And it says it was for a term commensurate with
21 the unit agreement, right?

22 A. Correct.

23 Q. And then on the next page, there is a
24 highlighted section, and it says, "The term of this Term
25 Assignment is clearly expired, as the SRO State

1 Exploratory Unit was terminated effective March 1st,
2 2014. Pursuant to our discussions with you, we
3 understand you consider this Term Assignment as being in
4 full force and effect. In this regard, we have the
5 following requirement." Do you see that?

6 A. I do.

7 Q. Okay. And in his email, he had referenced a
8 Requirement E. Do you remember that --

9 A. Yes.

10 Q. -- in his email?

11 A. Yes.

12 Q. And Requirement E is "obtain an Amendment to
13 this Term Assignment executed by Nearburg," correct?

14 A. Correct.

15 Q. It says, "In the event that you are unable to
16 secure the amendment or the calculation of the override
17 is different from how it is reported herein, resubmit
18 this matter for our review, and we reserve further
19 possible requirement." Correct?

20 A. Correct.

21 Q. And there is Requirement F, "If you have not
22 already done so, note in your lease file the extensive
23 reporting requirements under Exhibit A to the Term
24 Assignment and comply with same." Do you see that?

25 A. I do.

1 Q. And as you said earlier today, you weren't
2 getting that information, right?

3 A. That's correct.

4 Q. If you turn the page of this exhibit, page 22
5 talks again about the SRO agreement and termination,
6 right.

7 A. Yes, sir.

8 Q. And in talking about that, if you turn the
9 page, it's talking about the termination date of March
10 1st, 2014. So now you're on page 23. It says, "This
11 Request recites that in conjunction with the approval of
12 voluntary termination, the parties sought the approval
13 of communitization agreements which were enclosed with
14 the Request, each made effective March 1st, 2014."
15 Right?

16 A. Correct.

17 Q. According to this letter, there were
18 communitization agreements that were obtained for a
19 number of people back at that time, right?

20 A. Yes.

21 Q. It lists some people there. You didn't get a
22 communitization agreement back at that time, did you?

23 A. We did not.

24 Q. And then there is a highlighted portion right
25 before paragraph D that says, "As the SRO Unit was

1 terminated, communitization agreements are necessary for
2 those leases with wells within the Unit boundaries with
3 project areas that include more than one lease. We
4 refer you to Section VII, paragraph E for a discussion
5 of these Communitization Agreements."

6 Nearburg didn't enter into any
7 communitization agreements before the 43H and 44H were
8 drilled, right?

9 A. Correct.

10 Q. Didn't even get one for 44H?

11 A. Correct.

12 Q. If you turn the page again, there is a listing
13 on page 24 of the parties to the operating agreement.
14 Do you see that?

15 A. I do.

16 Q. Nearburg's not on that list, right?

17 A. They are not.

18 Q. The next page there is a discussion about 16H.
19 Do you see that?

20 A. Yes.

21 Q. Turn to the next page of the exhibit, page 33,
22 and it talks about overlapping project areas. Do you
23 see that?

24 A. I do.

25 Q. And one of the wells, it says there is a

1 proposed project area for 43H. It says those need to be
2 communitized. Do you see that part with the first arrow
3 to the side?

4 A. Yes.

5 Q. "We understand there is no agreement that deals
6 with the allocation of production from these wells which
7 is necessary to properly allocate production from same."
8 Do you see that?

9 A. Yes.

10 Q. And there are more discussions in the next area
11 about the need for communitization agreements and
12 correcting overlapping project areas. Do you see that?

13 A. I do.

14 Q. Turn to the next page. It has a Requirement M.
15 And there is -- Requirement M amends the communitization
16 agreements so there are not overlapping areas; is that
17 right?

18 A. Yes.

19 Q. Now, that was Exhibit 22.

20 Exhibit 21 is the email -- has the email
21 where he sent to you -- sent you that title opinion,
22 right?

23 A. Yes.

24 Q. And after he sends you that title opinion, you
25 send him another email on January 20th, 2015; is that

1 right?

2 A. Yes.

3 Q. Okay. And you say, "If I understand the logic
4 in the new title opinion, Nearburg would have
5 a" specific override "in any wells in the SRO State
6 Exploratory Unit Operating Agreement, proportionately
7 reduced if the well path wasn't completely within the
8 Unit lands. Attached is my spreadsheet which uses the
9 calculation of the new title opinion. Nearburg's
10 override in each well is set out in the column
11 highlighted in blue." Do you see that?

12 A. I do.

13 Q. So if you turn to the last page of this
14 exhibit --

15 MR. HARPER: We added that chart.

16 COMMISSIONER PADILLA: Is that supplement
17 21?

18 MR. HARPER: At the back of 21. It may be
19 something that was provided as a supplement. It's the
20 chart.

21 MR. HALL: It should have come over in that
22 packet earlier. I think it's in there.

23 MR. WADE: Do you want to use this one?

24 MR. HALL: Yes.

25 Q. (BY MR. HARPER) Mr. Howard, are you looking at

1 the chart that's attached to your email, Exhibit 21 --
2 as part of Exhibit 21?

3 A. Yes.

4 Q. And that's the chart that you sent over on
5 January 20th to Mr. Sawyer?

6 A. Yes.

7 Q. So this is still your list of the wells that
8 you know about in the unit -- the former unit?

9 A. Correct.

10 Q. Okay. Is the 43H or 44H on your list?

11 A. No, it's not.

12 Q. Did Mr. Sawyer communicate to you in any way on
13 or after January 20th or about that time that your list
14 was incomplete?

15 A. No.

16 Q. Did he tell you about the 43H or the 44H on or
17 about this time?

18 A. No.

19 Q. We already looked at these exhibits earlier a
20 little out of sequence, but a little later that month,
21 Exhibit 23, you get the October 8th title opinion, later
22 in January; is that right?

23 A. Yes.

24 MR. HARPER: I don't know what the
25 Commission's desire is about lunch or break or whatever.

1 CHAIRMAN CATANACH: How much longer do you
2 have on direct?

3 MR. HARPER: I don't want to -- I'm going
4 to say --

5 MR. HALL: We won't finish.

6 MR. HARPER: Yeah. It could be an hour.
7 It could be 45 minutes, something in that range.

8 CHAIRMAN CATANACH: All right. Let's go
9 ahead and break for lunch; 1:30 return.

10 (Recess 12:19 p.m. to 1:32 p.m.)

11 CHAIRMAN CATANACH: Go back on the record
12 at this time and turn it back over to --

13 MR. HALL: Mr. Harper.

14 MR. FELDEWERT: Mr. Chairman, members of
15 the Commission, before we do that, I would like to make
16 a motion for the Commission to consider, and it relates
17 to what has basically gone on over the last hour and
18 what I suspect will continue for the rest of the day and
19 into tomorrow. And that is that the parties are now
20 focusing -- or at least Nearburg is focusing on, if you
21 look on the timeline, what occurred after these wells
22 were permitted and drilled. Okay? We spent a long time
23 dealing with what occurred after and why they eventually
24 did not sign a corrected term assignment.

25 But the issue before you is did COG have a

1 good-faith belief at the time they permitted and drilled
2 these wells that they were authorized to operate on this
3 lease? And I don't see how what occurred months after,
4 into November 2014, you know, two, three or four months
5 after these wells were permitted and drilled, I don't
6 really see how that's relevant to the issues before you,
7 and that is the good-faith belief at the time they
8 permitted and drilled these wells, whether they thought
9 they were authorized to operate under a Nearburg lease.

10 So we can spend the rest of the afternoon
11 and tomorrow going over this history all the way up
12 through 2015, but I submit to you that that's not really
13 relevant to the issue that's before you.

14 CHAIRMAN CATANACH: Would you guys like to
15 address that?

16 MR. HALL: Yeah. I don't know why this is
17 in a form of a motion at this time. This is something
18 that's been laid out in our pre-hearing statements. I
19 think Mr. Feldewert has misstated the standard. It's a
20 good-faith belief in a claim to title. And I'll give
21 you, at the conclusion of our case, all of the prior
22 orders from the Division and Commission that speak to
23 that standard.

24 And bear in mind that this goes back to the
25 point in time when the term assignment was about to

1 expire and then did expire, and then they continued to
2 operate anyway and drill and produce the wells. And, in
3 fact, that created a violation of correlative rights at
4 the time, which it continues to this day. So it all
5 relates.

6 CHAIRMAN CATANACH: Let me ask you this:
7 Is this witness going to take us up to that time, to the
8 end of that time period 2015 or so?

9 MR. HALL: Yes.

10 CHAIRMAN CATANACH: And how many witnesses
11 do you have?

12 MR. HALL: We're going to have an engineer.
13 We may have one more witness in addition to that.

14 CHAIRMAN CATANACH: So is this witness
15 basically going to cover the land and title issues?

16 MR. HALL: Yes.

17 CHAIRMAN CATANACH: And you've got about 45
18 minutes or an hour more on direct?

19 MR. HARPER: (Indicating.)

20 CHAIRMAN CATANACH: I say we proceed with
21 this witness.

22 MR. FELDEWERT: Okay. All I'm pointing out
23 is look at the time frame -- look at our timeline and
24 what time frame we're in, and is it really relevant.
25 And if we're going to do all that, then I'll

1 cross-examine him on it, and it's going to take time.

2 CHAIRMAN CATANACH: Understood. Okay.

3 MR. FELDEWERT: Okay.

4 MR. HARPER: May I proceed?

5 CHAIRMAN CATANACH: Yes, sir.

6 Q. (BY MR. HARPER) Mr. Howard, when you were
7 dealing with Mr. Sawyer and Mr. Myers, did you
8 understand that they had authority to deal with you on
9 the issues you were dealing with them about?

10 A. Yes.

11 Q. Let's look at Exhibits 3 and 4 as we continue
12 on our chronology here. Exhibits 3 and 4 relate to
13 wells 43H and 44H, but let me direct your attention to
14 the second page of the exhibit. Do you see the second
15 page of Exhibit 3? It's the C-102 for 43H, and it's
16 filed on -- the operator certification is on March 5th,
17 2015. Do you see that?

18 A. Yes.

19 Q. Okay. And on Exhibit 4, on March 9th, for the
20 44H, the operator -- there is an operator certification
21 on that C-102 for that well. Do you see that?

22 A. Yes.

23 Q. And so as we -- as we get to March 2015, were
24 these documents, these C-102s, for either one of these
25 wells sent to Nearburg?

1 A. No.

2 Q. In your understanding, was there an agreement
3 with Nearburg at the time that would allow COG to drill
4 on Nearburg's lease?

5 MR. FELDEWERT: Object to the form of the
6 question. It requires him to interpret the operating
7 agreement.

8 MR. HARPER: Again, he's a landman, and I
9 asked him his understanding.

10 CHAIRMAN CATANACH: I'll allow that.

11 THE WITNESS: Can you repeat the question,
12 please?

13 Q. (BY MR. HARPER) I can try. At the time that
14 these C-102s for 43H and 44H were filed, in your
15 understanding, was there an agreement with Nearburg that
16 would allow COG to drill on Nearburg's lease?

17 A. No.

18 Q. Was there a communitization agreement for any
19 of these wells at that point in time?

20 A. No.

21 Q. Had you agreed to nonstandard spacing at that
22 time?

23 A. No.

24 Q. Had you agreed to pay any expenses with regard
25 to these wells?

1 A. No.

2 Q. Do you believe that the certification is
3 correct on these?

4 A. No.

5 Q. Was there a voluntary pooling agreement with
6 COG at that time?

7 A. No.

8 Q. Let's go to Exhibit 14. We're in March.

9 And let me just direct your attention back
10 to our timeline. We went over those C-102s there at the
11 bottom. See those blue boxes at the bottom of the
12 timeline? Do you see those, 3/6/2014 and the one for
13 the 43H and the 44H?

14 A. Yes.

15 Q. Now, let's look at Exhibit 14. Mr. Sawyer
16 sends you an email dated April 22nd; is that right?

17 A. Yes.

18 Q. And he says, "I just finished putting together
19 the attached list of the things we would like to discuss
20 at our meeting on Friday." And there is an attached
21 list, right?

22 A. Yes, there is.

23 Q. Okay. And then he says, "One issue that we
24 need to get resolved as soon as possible is the
25 communitization agreements for the...43H and 44H." And

1 he's attached them; is that correct? I don't think
2 they're on this exhibit, but he did attach them; is that
3 right.

4 A. Yes.

5 Q. So you're planning on having a meeting later
6 that week, correct?

7 A. Correct.

8 Q. And in the attachment, he asks you -- the first
9 item is comm agreements, right?

10 A. Yes.

11 Q. And he references 43H and 44H, and the
12 notations there reflect that they're located both in
13 Section 15 and Section 20, right?

14 A. Correct.

15 Q. Okay. And then for 43H, it says it was spud on
16 October 10th, 2014, and 44H was spud on August 2nd,
17 2014, right?

18 A. Correct.

19 Q. Was this the first time that you became aware
20 that those wells had been spud?

21 A. Yes.

22 Q. What was your reaction?

23 A. I was surprised.

24 Q. It goes on under that section, under
25 communitization agreements. He says, "One of our

1 regulatory employees who works in Santa Fe met with
2 someone from the NMOCD who said that the Commissioner is
3 very seriously considering suing the operator of several
4 wells which have overdue comm. agreements. These two
5 wells are some of the ones being considered, so it is
6 crucial that we get these executed and approved as soon
7 as possible." Had you ever heard anything to that
8 effect before?

9 A. No.

10 Q. What was your -- what was your reaction when
11 you heard -- when you read that on the attachment to
12 this email?

13 A. Again, surprised. Confused, I guess, more than
14 anything else.

15 Q. The next item on this list is "SRO," and he
16 says, "Correct term of assignment...." And they're
17 talking about the term assignment; is that right?

18 A. Yes.

19 Q. Okay. Number one, "Correct term to the
20 expiration of the SRO Unit Operating Agreement...."
21 That's something you-all had been talking about?

22 A. It was in discussion, yes.

23 Q. Okay. Number two, "Correct assignees to
24 include the other working interest owners....." Do you
25 see that?

1 A. I do.

2 Q. Is that a new issue?

3 A. I don't know that this is the first time that
4 came up, but I had told them previously I wasn't
5 concerned about it because the assignment was -- the
6 term assignment was strictly between Nearburg and
7 Marbob, so it wasn't a concern of mine.

8 Q. But this is referring to the assignment being
9 not just to COG, for example; is that right?

10 A. Well, I guess it has to do with the new one.

11 MR. FELDEWERT: Objection. Can we let the
12 witness testify about what this is?

13 Q. (BY MR. HARPER) What was it?

14 A. (Indicating.)

15 Q. What does this refer to?

16 A. They're talking about correcting the assignee
17 for the term assignment. I'm assuming here they're
18 talking for the new term assignment.

19 Q. And then item number three, "Exhibit A to
20 assignment, well information requirements, needs
21 review." What does that refer to?

22 A. I believe they were wanting to change some
23 things on the well requirement list.

24 Q. And then discuss the override, right?

25 A. Correct.

1 Q. Okay. No new term assignment was ever entered,
2 right?

3 A. No.

4 Q. Now, you did meet -- you did have a meeting
5 after that?

6 A. We did meet in our offices, yes.

7 Q. Okay. What happened at that meeting?

8 A. We went through -- started off on the
9 discussion of the exhibit that they had, and I expressed
10 concern over the comm agreements and the fact that we
11 hadn't heard about them before for the SRO 43 and 44H
12 wells and discussed how we were going to handle it going
13 forward, and we needed to get, again, all the
14 information together so we could decide what we were
15 going to do to move forward.

16 Q. And when you say all the information, what are
17 you referring to?

18 A. All the wells that were drilled, the overrides
19 that we were going to have if we agreed to go ahead and
20 go the term assignment the way that it was.

21 Q. You still didn't have that information?

22 A. We still didn't, no.

23 Q. Did you ultimately get some of that
24 information?

25 A. Ultimately, yes, we did get some.

1 Q. When was the first time you got some
2 information on these wells?

3 A. It would have been after this meeting. I
4 think, within a short time period, we started getting --
5 some started funneling in, but I'm not sure when we got
6 it in.

7 Q. Let's look at COG's Exhibit 20, an email from
8 Aaron Myers to you on May 6, 2015.

9 A. Yes.

10 Q. And he references some files for the SRO 44
11 being too big, right?

12 A. Correct.

13 Q. He said he's going to put them on a thumb drive
14 and bring them to your office; is that right?

15 A. Yes.

16 Q. Is this the first time you got information on
17 the 43 and 44H?

18 A. He may have already sent the 43 information. I
19 can't tell by looking at this, but it was around the
20 same time. But yeah, the 44 was on a thumb drive. I
21 can't remember when the 43 came over.

22 Q. Now, let's look -- there had been -- there had
23 been discussion for some period of time whether or not
24 there would be a new term assignment; is that right?

25 A. Yes.

1 Q. And the email we just looked at, Exhibit 14,
2 lists a number of issues that were going to be discussed
3 about that, right?

4 A. Correct.

5 Q. Okay. And let's look now at Exhibit 66 --
6 Nearburg Exhibit 66. What's Exhibit 66?

7 A. This is an email from Tim Spear, dated April
8 23rd, 2015, to Michael Griffin, myself, Duane Davis and
9 Bill Elton regarding the SRO Unit.

10 Q. And he attaches a bubble map; is that right?

11 A. Yes, he does.

12 Q. And he says, "COG has drilled and completed two
13 two-mile horizontals running through the western half of
14 Sections 17 and 20, both completed in March." Do you
15 see that?

16 A. I do.

17 Q. It lists April 23rd, one day after you got the
18 email from -- the April 22nd email with the attachment
19 that referred to these two wells, right?

20 A. Yes.

21 Q. Who is Tim Spear?

22 A. Tim Spear is an engineer at Nearburg.

23 Q. Okay. Now, did Mr. Spear do any analysis of
24 the issue about consideration of a term assignment or
25 the working interest with respect to Section 20?

1 A. Yes. He was looking at what we should do to
2 move forward.

3 Q. And before this time, you didn't know about 43
4 and 44H?

5 A. None of us at Nearburg knew.

6 Q. So turn, if you would, to Exhibit 67. This is
7 another email from Mr. Spear. He copies you, is that
8 right?

9 A. Yes.

10 Q. On Friday, the 24th, two days after you get the
11 email notifying you about 43 and 44H, right?

12 A. Correct.

13 Q. And -- well, read what he says.

14 A. "Had a miscalculation due to the interest I was
15 using. If the unit were fully developed, the two-mile
16 laterals having an EUR of 500 MBOs, each" -- "the net to
17 the overriding royalty would be 54 MBO. This is still
18 significantly less than we would get for the 100 percent
19 working interest in one net well that we would have."

20 Q. So what's your understanding of Mr. Spear's
21 conclusion about override versus working interest?

22 A. My understanding is his conclusion is we would
23 be a lot better off with a working interest than an
24 override.

25 Q. Once you got the two wells?

1 A. Once we knew about those two wells, right.

2 Q. Let me direction your attention to Exhibit 6.
3 Is Exhibit 6 two filings related to the 69H well?

4 A. Yes.

5 Q. The first page is the C-101 for 69H filed on
6 May 5th, 2015?

7 A. Correct.

8 Q. And the second page is the C-102, also filed on
9 May 5th?

10 A. Correct.

11 Q. Were these documents sent to Nearburg?

12 A. No.

13 Q. And were you notified of this proposed well in
14 any way?

15 A. No.

16 Q. Was there a voluntary pooling agreement with
17 COG at this time?

18 A. No.

19 Q. Do you believe the certification is correct on
20 the C-102?

21 A. No.

22 Q. If you look at the timeline, you'll see a blue
23 box for May 5th, 2015, when the filings are made. Do
24 you see that?

25 A. Yes.

1 Q. And there is a yellow box right on the top
2 about the matters that we talked about earlier when you
3 first learned about 43 and 44H, right?

4 A. Correct.

5 Q. In your understanding, did COG have the right
6 to get a drilling permit for 69H?

7 A. No.

8 Q. And in your understanding, did they have any
9 right to drill 69H?

10 A. No.

11 Q. Did they send you any information required by
12 the term assignment related to 69H?

13 A. No.

14 Q. Or any information under the joint operating
15 agreement for the 69H?

16 A. No.

17 Q. Or send you a proposed communitization
18 agreement for the 69H?

19 A. No.

20 Q. Let's look at Exhibit 49. And if you start at
21 the back, the last page, there is an email from an
22 employee at the Land Office to Savannah Haller. Do you
23 see that?

24 A. I do.

25 Q. Do you understand that Ms. Haller works for

1 COG?

2 A. Yes.

3 Q. And this email ends up getting forwarded to
4 you; is that right?

5 A. Correct.

6 Q. Let's read what is forwarded. It says, "I have
7 a few Concho wells to follow up on that need comm
8 agreements, hoping you can spare a moment to look these
9 over for me. Also, the State Land Commissioner, Aubrey
10 Dunn, has issued a new letter for companies that have
11 wells in production without Comm Agreements on file,
12 which actually threatens to expire the leases involved
13 with the well and charge the operator DOUBLE" -- in all
14 caps -- "the value of all oil/gas removed from the
15 well." Do you see that?

16 A. I do.

17 Q. And it references, "These are the wells I'm
18 needing Comms for of COG." It lists 43 and 44H. Do you
19 see that?

20 A. I do.

21 Q. And then if you turn the page, you'll see that
22 Ms. Haller sends an email back and copies a number of
23 people, including you at your email address at Nearburg,
24 right?

25 A. Yes.

1 Q. And she says, The comm agreements for the 43
2 and 44H are currently in the works. "All parties have
3 executed both of these Comms except for Nearburg. I
4 have copied Nearburg on this email to make sure they are
5 aware of the situation." Do you see that?

6 A. Yes.

7 Q. And then the first email on this page, you ask
8 Ms. Haller for all the information related to this, is
9 that right, on May 20th?

10 A. Yes.

11 Q. So you had heard back in the April 22nd email
12 that there was some issue about -- some concern, right,
13 about litigation or something or a lawsuit about no comm
14 agreements. Do you remember that?

15 A. Yes, I do.

16 Q. Now you get this email that says the lease
17 might be terminated; is that right?

18 A. Yes.

19 Q. Okay. What was your reaction to this -- to
20 seeing this, being notified about this?

21 A. I was fearful we could lose our lease.

22 Q. Did that have any impact on what Nearburg did
23 in the coming days and weeks?

24 A. Absolutely.

25 Q. And if you look at the timeline, you're

1 referred to May 20th when you're told about the possible
2 cancellation of the lease. Actually, I guess, it's the
3 13th, right? The 20th is the email on the front page,
4 but you get forwarded the email on the 14th.

5 A. Looks like the 13th is when they sent it to me.

6 Q. Now, after you learned about this, did Nearburg
7 try to take action and try to revolve this situation in
8 some way?

9 A. Well, we again tried to figure out what was
10 going on. We had just found out there were two wells on
11 us. Now we were hearing we may lose our lease. So we
12 had some concerns, and we tried to figure out what we
13 could do to stop that from happening.

14 Q. Let me direct your attention to Exhibit 15.

15 A. Which exhibit again?

16 Q. 15.

17 A. 15.

18 Q. Is this a letter that was sent under your
19 signature on May 28th, 2015 to Aaron Myers at COG?

20 A. Yes.

21 Q. And it says a number of things, that this is
22 related to the situation that we're talking about,
23 including the comm agreements, right?

24 A. Yes.

25 Q. And in that first -- the second main paragraph

1 on the first page, you say, "The Term Assignment has
2 expired by its own terms and has not been extended." Do
3 you see that?

4 A. Yes.

5 Q. You say, "We would request that you inform us
6 as to the source of COG's authority to drill the Wells
7 utilizing the acreage covered by the Lease." Right?

8 A. Yes.

9 Q. And you note in the next paragraph that you've
10 been copied on emails about the possible termination,
11 right?

12 A. Correct.

13 Q. And on the next page, you say that you would
14 consider signing some form of comm agreement; is that
15 right?

16 A. Correct.

17 Q. But the formation would need to be changed to
18 the 2nd Bone interval. Do you see that?

19 A. I do.

20 Q. You want all the communications with the
21 office -- the Land Office, right?

22 A. Correct.

23 Q. And then you say, "Any execution of" these Comm
24 "Agreements would not extend or ratify the Term
25 Assignment and Nearburg would not waive any rights held

1 by it as owner and holder of the lease. Nearburg would
2 consider executing the Agreements merely to comply with
3 the State of New Mexico Land Office requirements, but
4 Nearburg would specifically reserve all rights relating
5 to this situation." Do you see that?

6 A. Yes.

7 Q. And that's what you told them on May 28th; is
8 that right?

9 A. Yes.

10 Q. And you made it clear that you -- that Nearburg
11 was reserving all of its -- would reserve all of its
12 rights; is that correct?

13 A. Yes.

14 Q. Now, then a couple of weeks later, about 12 or
15 13 days later, if you turn to the next exhibit, Exhibit
16 16, you sent another -- that's another letter that you
17 sent to Mr. Myers on June 10th, 2015, right --

18 A. Yes.

19 Q. -- Exhibit 16?

20 And, again, you're talking about the
21 communitization agreements of 43 and 44H, right? You
22 reference --

23 A. Yes.

24 Q. And you remind him, first paragraph, of the May
25 28th, a letter, right?

1 A. Correct.

2 Q. You say again in that next paragraph, "The Term
3 Assignment has expired by its own terms and has not been
4 extended." Do you see that?

5 A. Correct.

6 Q. Then you say -- you say, "COG" -- in the next
7 paragraph, the last sentence, "COG has agreed to amend
8 the Communitization Agreements on the above wells to be
9 restricted to the 2nd Bone Spring interval as Nearburg
10 proposed." Do you see that?

11 A. Yes.

12 Q. And then your next sentence, Nearburg requests
13 it be provided with a list of information. Do you see
14 that --

15 A. Yes.

16 Q. -- number of items?

17 A. Uh-huh.

18 Q. And the next page, you say, "Please acknowledge
19 as provided below that Nearburg's execution and delivery
20 of the enclosed Agreements does not extend or ratify the
21 Term Assignment and Nearburg does not waive any rights
22 held by it as owner and holder of the Lease and that
23 Nearburg specifically reserves all rights relating to
24 this situation." Do you see that?

25 A. I do.

1 Q. And Mr. Myers, in fact, signed at the bottom;
2 is that correct?

3 A. He did.

4 Q. And had Nearburg previously received or revised
5 communitization agreements from COG with the change in
6 the interval?

7 A. I believe by this time we had.

8 Q. And then if you look at Tabs A and B here to
9 this exhibit, are these the communitization agreements
10 that you provided on June 10th, copies of them?

11 A. Yes.

12 Q. And the first one at Tab A is for 43H?

13 A. Correct.

14 Q. And the one at Tab B is for 44H; is that right?

15 A. That's right.

16 Q. And on the front, do you see in bold it covers
17 the 2nd Bone Spring interval? Do you see that?

18 A. I do.

19 Q. And these were delivered with your letter on
20 June 10th?

21 A. Yes. They were -- actually, he came to my
22 office, and I hand-delivered them to him. He signed
23 them and took them with him.

24 Q. Now, I notice -- if you turn into this on page
25 5, is that your signature?

1 A. Yes, that's my signature.

2 Q. Okay. And the next page has an acknowledgment.
3 Do you see that?

4 A. I do.

5 Q. But that acknowledgement says "May 20th." Can
6 you explain why that says "May 20th" up there instead of
7 some date like June 10th?

8 A. When the original documents had come over to
9 our offices, I had signed them and had them notarized at
10 that point in time and was waiting for approval from our
11 group. And when we changed the -- to limit the depths
12 that were included, we just exchanged the first page.

13 Q. You didn't re-execute them?

14 A. No.

15 Q. You just switched the pages?

16 A. Correct. That was done with Aaron.

17 Q. Now, why were you still asking for the data
18 that's asked for in this letter? If you go back to the
19 letter of Exhibit 16, you asked for a number of items of
20 information. Why were you asking for that?

21 A. Because we still hadn't received it.

22 MR. FELDEWERT: Hold on a minute. You're
23 asking him about the June 20th letter?

24 MR. HARPER: Right.

25 MR. FELDEWERT: Did you ask if they were

1 evaluating our working interest in the wells? Is that
2 what you asked him about?

3 MR. HARPER: No. I just asked him why he
4 asked for it.

5 THE WITNESS: I'm sorry?

6 Q. (BY MR. HARPER) Why did you ask for the
7 information in the June 10th letter?

8 A. Because we still hadn't received it.

9 Q. Why did you sign these communitization
10 agreements?

11 A. We did so under duress in an effort to keep
12 from losing a lease that we had, and we reserved all the
13 rights we had in doing so.

14 Q. And if you look at the timeline on June 10th,
15 2015, the blue box at the bottom of the page, it says
16 "COG signs letter of agreement." Do you see that?

17 A. I do.

18 Q. Now, let's turn to Exhibit 17. Exhibit 17 has
19 a slip sheet in the middle, but there are two documents,
20 a Correction Assignment and a Bill of Sale. One
21 references SRO2 in the body and one, SRO3. Can you
22 explain what these two documents are?

23 A. These are Corrections Assignments, Bill of Sale
24 between Nearburg Exploration Company. One of them is
25 for SRO2, and one is for SRO3. And it was in an effort

1 to keep those depths, the 2nd Bone Spring and the 3rd
2 Bone Spring, to these separate entities.

3 Q. Is it your understanding that the 2nd Bone
4 Spring is assigned to SRO2?

5 A. Yes.

6 Q. And the 3rd to SRO3?

7 A. That's correct.

8 Q. Now, you had -- had there been any discussion
9 with COG about COG providing copies of recorded
10 communitization agreements that you had provided that we
11 looked at a minute ago, 16A and B?

12 A. Yes.

13 Q. And what did they tell you they would do?

14 A. They would give us copies when they were
15 recorded.

16 Q. Let me ask you to look at Exhibit 18. And
17 there is a cover sheet from the Land Office, Certificate
18 of Approval. Do you see that?

19 A. Yes.

20 Q. And then you'll see a communitization agreement
21 for 43H, and then if you turn a few pages in, you'll see
22 another Certificate of Approval and a communitization
23 for 44H. Do you see that?

24 A. Yes.

25 Q. Is the front page of -- well, are these the

1 communitization agreements that you provided back to
2 COG?

3 A. No.

4 Q. What's different?

5 A. The formation is described in these as the
6 higher Bone Spring Formation, and the ones we gave them
7 was limited.

8 Q. These are not the ones that you provided back?

9 A. They are not.

10 CHAIRMAN CATANACH: Can you tell us
11 where -- I'm sorry -- where that -- you're referring to?

12 THE WITNESS: Yes. Where I'm talking about
13 the formation itself?

14 CHAIRMAN CATANACH: Yeah.

15 THE WITNESS: Okay. In the communitization
16 agreement, it's on the fourth paragraph, starts out
17 "Whereas, said leases," and then the Bone Spring is in
18 bold. Do you see it?

19 CHAIRMAN CATANACH: Thank you.

20 Q. (BY MR. HARPER) And the ones you provided said
21 "2nd Bone Spring"; is that right?

22 A. With an additional description to define the
23 2nd Bone Spring.

24 Q. And you see both of these have a Certificate of
25 Approval from the State Land Office, is that right, on

1 the front of each one of these communitization
2 agreements?

3 A. Yes.

4 Q. Has Nearburg asked the State Land Office to
5 revoke those approvals?

6 A. Yes.

7 Q. Do you know if the original agreements even
8 exist anymore?

9 A. I don't.

10 Q. The 43H and 44H began production sometime
11 around the first of March 2015; is that right?

12 A. Yes.

13 Q. And to your knowledge, have they remained in
14 continuous production since that time?

15 A. As far as I know, yes.

16 Q. Has COG provided Nearburg with Division orders
17 for the 43H and the 44H?

18 A. Not to my knowledge.

19 Q. Do you know if COG has remitted to Nearburg any
20 of the proceeds from the sale of production from the 43H
21 or the 44H?

22 A. Not to my knowledge.

23 Q. Let's look at Exhibit 30. I see two letters in
24 Exhibit 30. One is dated July 31st, 2015. Do you see
25 that letter?

1 A. I do.

2 Q. What's that letter?

3 A. It's a termination of SRO State Unit and
4 payment of overrides. It's a letter from Emily Sharp
5 with Nearburg talking about payment we received for some
6 overrides.

7 Q. Is this letter returning some override
8 payments?

9 A. Yes. And it further requests that no future
10 payments of these overrides be sent to Nearburg.

11 Q. And why was that?

12 A. Because we didn't feel like we were entitled to
13 them.

14 Q. Because the term assignment had expired?

15 A. Yes.

16 Q. There is another letter there dated August
17 17th, 2015. Do you see that?

18 A. I do.

19 Q. That's a letter from Duane Davis at Nearburg to
20 COG; is that right?

21 A. Yes.

22 Q. Okay. And does that letter revoke Division
23 orders for a number of wells as referenced in the
24 reference line?

25 A. It does.

1 Q. What is your understanding of why that was
2 done?

3 A. We no longer agreed that the Division orders
4 were -- to be accurate.

5 Q. Does Nearburg have any agreement with COG that
6 would allow for the recovery of well costs, overhead
7 charges for nonconsent penalties out of production for
8 the 43H, 44H or 16H?

9 A. No.

10 Q. Is there any order issued by the Division that
11 authorizes COG to receive overhead charges, risk charges
12 and penalties?

13 A. Not that I'm aware of.

14 Q. Was Nearburg offered the opportunity to
15 participate in the business decision of whether or not
16 to build -- to drill the 43 or 44H?

17 A. No.

18 Q. If COG says that it thought the term assignment
19 was still in force, did they comply with its terms in
20 providing information?

21 A. No.

22 Q. And if COG says that a joint operating
23 agreement applied to Nearburg's interests, Section 20,
24 did COG provide the notice required -- notices required
25 in that operating agreement?

1 A. No.

2 Q. Let me ask you to look at Exhibit 35A. This is
3 an email that I think another version is in COG's
4 exhibits. It was discussed in opening. This is an
5 email from -- this is an email of March 21st, 2014 from
6 Brent Sawyer, Kathie Craft, and it copies Ken Dixon and
7 you; is that right?

8 A. Yes.

9 Q. And in the middle of the second paragraph, he
10 says, "I believe the most pressing issue is that the
11 term assignment from Nearburg to Marbob is effective
12 until the SRO Unit is dissolved so technically it is
13 expired." Do you see that?

14 A. I do.

15 Q. "However, we are moving forward on the
16 assumption that it was intended to keep the assignment
17 and the override effective until all the wells in (or
18 formerly in) the unit are plugged, so we will need to
19 paper that up. However, if that assumption is incorrect
20 please let me know since it will affect the work the
21 title lawyer is doing on the updated opinions for the
22 wells." Do you see that?

23 A. I do.

24 Q. Does he tell you in this email that they're
25 drilling wells on your lease?

1 A. No, he does not.

2 Q. Does he tell you that he's planning to drill
3 wells on your lease?

4 A. No.

5 Q. Does he say that if this assumption is
6 incorrect, let him know because it will affect the title
7 work?

8 A. No.

9 Q. Well, isn't that what he says in the last
10 sentence?

11 A. Well, he says title work is what it's going to
12 affect. Yes.

13 Q. Now, do you follow up and have continuing
14 discussions with him after this?

15 A. Yes. I believe that still this was kind of
16 Ken's baby to a certain extent, and I think he replied,
17 I think, that same day to that email.

18 Q. And you talked -- you worked with them and you
19 talked with them --

20 A. Yes.

21 Q. -- about some of these issues?

22 A. Yes.

23 Q. We've been through a lot of communications and
24 meetings that you've had with them?

25 A. There's been a whole lot of them, yes.

1 Q. And until you got to that April 22nd email, he
2 didn't tell you about 43 or 44H?

3 A. That it was permitted, drilled or anything, no.

4 Q. Is Nearburg requesting that COG be required to
5 account for and pay Nearburg's share of production for
6 the 43 and 44H and 16H wells?

7 A. Yes.

8 Q. In your opinion, if the lands in Section 20 are
9 consolidated with those in Section 17 by a compulsory
10 pooling order, would it be just and reasonable under
11 these circumstances to allow COG to recover from
12 Nearburg for its share of the well costs for the 43H and
13 44H?

14 A. No.

15 Q. Would you think a risk penalty would be
16 reasonable?

17 A. No.

18 Q. Mr. Howard, is there a connection in your mind
19 between good faith and compliance with the joint
20 operating agreement?

21 A. Sure.

22 Q. Is there a connection in your mind between good
23 faith and complying with the provisions in the term
24 assignment to get notice?

25 A. Yes.

1 Q. Is there a connection in your mind between good
2 faith and you telling COG in July of 2014 that the term
3 assignment expired and that operations shouldn't take
4 place on your lease?

5 A. Yes.

6 Q. And refusing to sign a comm agreement at that
7 time?

8 A. Yes.

9 Q. In your mind, is there a connection between
10 good faith and complying with the title opinions that
11 COG received?

12 A. Yes.

13 Q. In your mind, is there a connection between
14 good faith and being open and honest?

15 A. Absolutely.

16 Q. Do you think COG was open and honest with you
17 about the 43H and 44H in your dealings with them?

18 A. Absolutely not.

19 Q. Would you have any concerns about telling
20 somebody what was going on in their lease if you had a
21 good-faith belief that you had the right to do what you
22 were doing?

23 A. I would say something, if that's what you're
24 asking.

25 MR. HARPER: We've gone over a number of

1 exhibits, and we would offer -- we're going to offer a
 2 number of these exhibits because they're either business
 3 records, they're filings with the State Land Office or
 4 the Division or emails between the parties. They're
 5 Exhibits 1 through 31, I guess excluding the affidavit,
 6 which I don't remember the number of that right off the
 7 top of my head. We can get it. And then 31 is the
 8 timeline, and then Exhibits 36, 41, 42 --

9 CHAIRMAN CATANACH: I'm sorry. Say those
 10 again, please.

11 MR. HARPER: 1 through 31, excluding the
 12 affidavit --

13 CHAIRMAN CATANACH: Got that.

14 MR. HARPER: -- 36, 41, 42, 66, 67. And
 15 we'll also offer, which I'm sure won't come with any
 16 objections, COG Exhibits 2 and 14.

17 MR. FELDEWERT: I have to look back.

18 CHAIRMAN CATANACH: I figured.

19 MR. FELDEWERT: No objection to 67.

20 MR. HARPER: We'll also offer 65. Sorry.
 21 We talked about that.

22 MR. FELDEWERT: We maintain our objection
 23 on 65.

24 Maintain our objection on Exhibit 20. The
 25 title opinion has nothing to do with the issue today.

1 MR. WADE: 20?

2 MR. FELDEWERT: 20, and the related
3 exhibit, which is 23.

4 CHAIRMAN CATANACH: I'm sorry. 23?

5 MR. FELDEWERT: Yeah, the title opinion of
6 the different township areas, 20 and 23. So we maintain
7 our objection.

8 Exhibit 24, are you offering that?

9 MR. HARPER: It's in the list, but I didn't
10 talk about it, so it doesn't matter.

11 MR. FELDEWERT: And beyond that, I do not
12 have an objection.

13 MR. WADE: So Mr. Feldewert, aside from the
14 objections already raised, does not have any further
15 objection.

16 Did we decide on 24, though?

17 MR. HARPER: We'll withdraw 24.

18 MR. WADE: 24 is withdrawn.

19 CHAIRMAN CATANACH: So 65 was the one that
20 we were going to review, and I think we were going to
21 admit it.

22 MR. HALL: I believe that was the ruling,
23 Gabe.

24 CHAIRMAN CATANACH: We were going to give
25 it as much weight that we thought it deserved --

1 MR. WADE: Correct.

2 CHAIRMAN CATANACH: -- given the
3 circumstances.

4 So 65 will be admitted.

5 20, I thought we did admit. That was the
6 title opinion.

7 MR. WADE: 23 related to it.

8 COMMISSIONER PADILLA: I don't think we
9 made a decision on it.

10 CHAIRMAN CATANACH: I think 23 has
11 information in it that's relevant to the case, so I
12 believe that that should be admitted. 23, I think, is
13 also related to -- has some information that may be
14 helpful to the Commission, so I would recommend
15 admitting 23 also.

16 So what other ones do we have a pending
17 objection to, Mr. Feldewert? 65, 20 and 23 are the ones
18 I have.

19 MR. FELDEWERT: Correct.

20 CHAIRMAN CATANACH: Is that it?

21 MR. FELDEWERT: That's it.

22 CHAIRMAN CATANACH: Let's see if I can get
23 it right. Exhibits 1 through 31, excluding Exhibit
24 Number 12, which is the affidavit will be admitted.

25 MR. WADE: And 24.

1 COMMISSIONER BALCH: And 24.

2 CHAIRMAN CATANACH: And 24. Thank you.

3 And I'm sorry. Were there no further
4 objections to Exhibits 2 and 14?

5 MR. HARPER: Those are COG exhibits.

6 MR. FELDEWERT: Oh. No.

7 Thank you.

8 CHAIRMAN CATANACH: You sure?

9 MR. FELDEWERT: Well, I can take a look at
10 them, you know.

11 MR. HARPER: I can object to them later
12 when you're --

13 CHAIRMAN CATANACH: Are you trying to enter
14 those as evidence?

15 MR. HARPER: Yes.

16 CHAIRMAN CATANACH: Okay. So COG Exhibits
17 2 and 14 will be admitted. And let's see if I have the
18 other numbers right: 36, 41, 42, 66 and 67.

19 MR. HARPER: And 65, which you already
20 ruled on.

21 CHAIRMAN CATANACH: 65, we already ruled
22 on.

23 Is that the complete list?

24 MR. HARPER: Yes, sir.

25 CHAIRMAN CATANACH: Those exhibits will be

1 admitted.

2 (Nearburg Exploration Co., LLC Exhibit
3 Numbers 1 through 11, 13 through 23, 25
4 through 31, 36, 41, 42, 66 and 67, and
5 COG Exhibit Numbers 2 and 14 are offered
6 and admitted into evidence.)

7 CHAIRMAN CATANACH: I think that takes care
8 of that.

9 MR. HARPER: With that, we'll pass the
10 witness.

11 CHAIRMAN CATANACH: Mr. Feldewert,
12 cross-examination?

13 CROSS-EXAMINATION

14 BY MR. FELDEWERT:

15 Q. Mr. Howard, do me a favor and go to our exhibit
16 book.

17 A. (Witness complies.)

18 Q. And now I want you to take our exhibit book
19 and -- hopefully I can go through this in a
20 chronological fashion that's easy to follow.

21 I'll point you towards what's marked as a
22 COG Number 1. And you can confirm for me, can you not,
23 that this term assignment with Marbob was not executed
24 by any party until -- the earliest was August 24th,
25 2009; is that right?

1 A. That's correct.

2 Q. And then -- so then this Exhibit Number 1, this
3 term assignment, was signed by the parties after the
4 documents were signed that's comprised of Exhibit Number
5 2, correct?

6 A. Correct.

7 Q. All right. And I think you agreed with me at
8 the last hearing that if COG understood that the
9 Nearburg working interest in the state lease had been
10 committed to the operating agreement, then it has a
11 voluntary agreement to move forward and develop the
12 acreage as the operator, correct?

13 A. I don't know that I can agree with that.

14 Q. Didn't you agree with that at the last hearing?

15 A. I don't remember the last hearing, exactly what
16 I said. Maybe if you said it again, I can tell you for
17 sure.

18 Q. Mr. Howard, didn't you agree with me at the
19 last hearing that if COG understood that Nearburg's
20 lease had been committed to the operating agreement, the
21 working interests in that lease, then it would have a
22 voluntary agreement allowing it to move forward to
23 develop and operate the lease, correct?

24 A. Right.

25 Q. Okay.

1 A. At that point in time, yeah.

2 Q. You wouldn't need a pooling order?

3 A. No, not at that point in time.

4 Q. And if COG understood at the time that it moved
5 forward with developing that lease that Nearburg's
6 desire was to proceed with an overriding royalty -- so
7 that's what they understood -- do you agree with me that
8 they wouldn't send your company a well proposal?

9 A. If that's what they understood.

10 Q. And they wouldn't send an AFE?

11 A. If that's what they understood.

12 Q. And they wouldn't send an election to
13 participate?

14 A. If that's what they understood.

15 Q. Okay. Now, let's start, then, on our timeline
16 to the left, and let's take a look at the ratification
17 that I alluded to earlier, which is the fourth page in.

18 CHAIRMAN CATANACH: On Exhibit 2,
19 Mr. Feldewert?

20 MR. FELDEWERT: Exhibit 2, yes, sir.

21 Q. (BY MR. FELDEWERT) Now, I know we have a debate
22 on what this State Land Office form does, but there is
23 another page there that was signed on June 26, 2009 by
24 Terry Gant, correct?

25 A. That is correct.

1 Q. And he was the Midland manager at that time?

2 A. That's my understanding.

3 Q. And it reflects that when he signed it, it had
4 an attachment, Exhibit B?

5 A. Yes.

6 Q. And in this exhibit, we have an attachment
7 Exhibit B, correct?

8 A. You do.

9 Q. All right. And he, at the time, Mr. Howard,
10 was fully authorized to execute this ratification; isn't
11 that correct?

12 A. Yes.

13 Q. And I think you testified earlier that he was
14 very knowledgeable about unit agreements and unit
15 operating agreements?

16 A. I believe he is.

17 Q. And, in fact, he signed this ratification
18 without making any changes to the document itself?

19 A. I don't know that.

20 Q. Do you see any strikeouts on this document he
21 signed?

22 A. I do not.

23 Q. In other words, you didn't strike out, for
24 example, the phrase "Unit Operating Agreement" up there
25 in the top?

1 A. No.

2 Q. And if I turn to what's been marked as COG
3 Exhibit Number 3, you agreed with me at the last hearing
4 that this is a correct copy of the form that has
5 appeared at the State Land Office Web site for quite
6 some time, correct?

7 A. I believe it has.

8 Q. All right. And, in fact, this is the same type
9 of form that was signed by Nearburg back in 2009?

10 A. It appears to be, yes.

11 Q. So this document that they signed back in 2009,
12 that Mr. Gant signed, this was not drafted by Marbob?

13 A. I don't know. You mean the form itself? No, I
14 don't think.

15 Q. And it wasn't drafted by Mr. Gant?

16 A. I don't believe so, no.

17 Q. And if I looked at this unit operating -- this
18 ratification that he signed -- and you see here in the
19 third line down, it talks about the Commissioner of
20 Public Lands, and then it says, "And in consideration of
21 the execution or ratification by other working interest
22 owners of the contemporary Unit Operating Agreement...."
23 Do you see that?

24 A. I do.

25 Q. This indicates, and I think you agreed with me

1 at the last hearing, that there are two ways to
2 subscribe to operating agreement, right, either by
3 execution or by ratification?

4 A. Yeah. We didn't do that here, but that's
5 correct.

6 Q. Okay. And the only form that the State Land
7 Office had promulgated at this time for this -- I'll
8 call it the ratification option -- is the state form
9 that Mr. Gant signed, correct?

10 A. Yes.

11 Q. All right. Now -- now, you were not working
12 for the company at the time that Mr. Gant signed this
13 ratification?

14 A. No.

15 Q. And Mr. Gant's not here today?

16 A. He is not.

17 Q. And so we, neither you nor I, know what
18 Mr. Grant intended when he signed this ratification, do
19 we?

20 A. I believe he was intending to the ratify the
21 unit agreement.

22 Q. But you've never had a conversation with him
23 about this?

24 A. The files -- I mean, yes, I think that's what
25 he was trying to do.

1 Q. But you have not visited with him about this?

2 A. I have not talked with him directly about this.

3 Q. So you have no idea what Mr. Gant thought when
4 he signed this ratification?

5 A. I came to my own conclusion of what he thought.

6 Q. Okay. And other people looking at this, would
7 you agree with me, might come to a different conclusion?

8 A. They might.

9 Q. Now, the Marbob transmittal letter that was
10 sent to the State Land Office, the second page --

11 MR. WADE: Which exhibit is this?

12 MR. FELDEWERT: I'm sorry. Exhibit Number
13 2, second page. I'm still within the same exhibit. I'm
14 on the second page.

15 Q. (BY MR. FELDEWERT) This was sent a month after
16 your company signed the ratification form, correct?

17 A. In July of '09, yes.

18 Q. And it was sent before anybody had signed the
19 Marbob term assignment, correct?

20 A. Yes.

21 Q. And Mr. Duncan here says, "Chesapeake and
22 Nearburg have both subscribed to the Unit Operating
23 Agreement." Do you see that?

24 A. I see where it says that, yes.

25 Q. And he included within this letter the

1 ratifications in Exhibit B that we just looked at. I'm
2 sorry. Stay on page 2. And you see the first
3 paragraph?

4 A. Yes.

5 Q. We see the ratifications, and we see Exhibit B?

6 A. Yes.

7 Q. Okay. Now, Concho was not involved in getting
8 the acreage subscribed for the unit agreement. That was
9 Marbob, right?

10 A. Correct.

11 Q. And you were not involved at this time. You've
12 got no personal knowledge of what occurred at this time,
13 correct?

14 A. Correct.

15 Q. And so you and I and everybody else sitting
16 here today, I think you'll agree with me, that we have
17 to rely on what these documents purport to say about
18 these events; is that correct?

19 A. Yes.

20 Q. All right. And then if I go to the Commission
21 approval letter, do you see Ms. Bailey references the
22 fact that this was approved in accordance with Article
23 22 of the unit agreement?

24 MR. WADE: Where are we?

25 MR. FELDEWERT: I'm sorry. First page of

1 Exhibit 2.

2 THE WITNESS: Yes.

3 Q. (BY MR. FELDEWERT) And you'll see that she
4 references the fact -- and I'm in the first paragraph --
5 that her office had received Marbob's July 13th, 2009
6 letter?

7 A. Yes.

8 Q. And also included with the letter was the
9 ratifications signed by Chesapeake and Nearburg, right?

10 A. Committing their interest to the SRO State
11 Exploratory Unit Agreement, how it finishes.

12 Q. And then she says that they approve it in
13 accordance with Article 22 of the unit agreement?

14 A. I see that.

15 Q. Okay. So as of July 22nd, 2009, they approve
16 it in accordance with Article 22 of the unit agreement?

17 A. Not exactly, I don't think.

18 Q. Okay.

19 A. I think it says effective August 1st of 2009.

20 Q. But it's approved in accordance with Article 22
21 of the unit agreement?

22 A. Right.

23 Q. All right. And I've been through Article 22 of
24 the unit agreement with the Examiners already. But that
25 is reflected -- the unit agreement is reflected in

1 Exhibit Number 5; is that right?

2 A. I can't really see that first page, but I'm
3 assuming -- yes. It's the unit agreement.

4 Q. And then Article 22 shows up, and we've been
5 through this. I went through it, and I don't think we
6 need to do it again, on the last page of that exhibit?

7 A. Right.

8 Q. Okay. And then, Mr. Howard, I believe Exhibit
9 Number 4 -- COG Exhibit Number 4 is a copy of the
10 operating agreement that is in both your exhibit book
11 and ours?

12 A. Yes.

13 Q. So there is no debate that this is the
14 operating agreement for the SRO State Exploratory Unit,
15 right --

16 A. Yes.

17 Q. -- the one we've been talking about?

18 A. Yes.

19 Q. And you would agree with me that if I look at
20 page 22 -- you and I are looking at this today. That
21 does show Section 20 as being within the contract area?

22 A. Yes. Along with other lands, correct.

23 Q. And take a look at Exhibit A-1 to ascertain
24 what leases are subject to this agreement. Do you see
25 that?

1 A. I do.

2 Q. Okay. And if we turn to the next page, we see
3 the columns that are involved with Exhibit A-1, and if
4 we go to page 29, we see Nearburg's lease --

5 A. Yes.

6 Q. -- right?

7 A. Yes.

8 Q. And I also see -- we also see the Yates lease
9 in Section -- west half of Section 23 [sic] is listed on
10 that same page.

11 A. Right above it, yes.

12 Q. As being subscribed to the operating agreement?

13 A. Right.

14 Q. And then if I go to page 30, we see the comm on
15 there that's called the "Unit Working Interest." Do you
16 see that?

17 A. Yes.

18 Q. And this is kind of -- maybe I missed this the
19 first time through. I thought your counsel asked you a
20 question about whether Nearburg is listed there or not
21 and you said no. But under that unit working interest,
22 the Nearburg working interest in that state lease is
23 included under the unit working interest, correct?

24 A. The Nearburg lease is included, yes.

25 Q. And Nearburg is listed under the unit working

1 interest?

2 A. I don't believe that reflects it correctly on
3 this, myself.

4 Q. That's your belief?

5 A. Well, I mean, it says right here who the -- who
6 the working interest owners are on Exhibit A. These are
7 the leases that are attached. That's how I read this.

8 Q. This shows that Nearburg holds -- at this point
9 in time, when this operating agreement is put into the
10 file, that Nearburg holds an overriding royalty interest
11 because you had now executed your term assignment with
12 Marbob?

13 A. Correct.

14 Q. So if you hold an overriding royalty interest,
15 they wouldn't list you on the page of the working
16 interest owners, correct?

17 A. Because we're not a working interest owner,
18 right.

19 Q. Correct.

20 But your working interest -- and this is
21 important. Your working interest in that state lease,
22 when looking at page 30, indicates that it is subscribed
23 to the operating agreement. One could read it that way?

24 A. One could.

25 Q. Okay. It also shows that the working interest

1 in the Yates lease is committed to the operating
2 agreement?

3 A. Yes.

4 Q. All right. And you've seen these signature
5 pages before in this operating agreement starting on
6 page 18?

7 A. The signatures?

8 Q. Yes.

9 A. On page 18, I see, yeah.

10 Q. Okay. And the Yates entities never physically
11 signed the operating agreement, right, Mr. Howard?

12 A. Not on this page, no.

13 Q. On any page?

14 A. Well, I mean, you asked me to look at this
15 page, and they did not sign this page.

16 Q. If you look at page 19, if you look at page 20,
17 if you look at page 21, there is no signature by Yates
18 Petroleum physically signing the operating agreement,
19 right?

20 A. That's correct.

21 Q. There is no physical signature by Yates
22 Drilling?

23 A. Correct.

24 Q. There is no physical signature by MYCO?

25 A. Correct.

1 Q. Or Abo?

2 A. Correct.

3 Q. In fact, what we see down on page 19 is the
4 same ratification form that your company signed in 2009?

5 A. Yes.

6 Q. Now, you agreed with me, I believe, at the last
7 hearing, Mr. Howard, that this operating agreement
8 governs the operations on the contract area?

9 A. Correct.

10 Q. And that you and I have to rely on what these
11 documents say about what leases and what type working
12 interest is committed to the contract area?

13 A. Correct.

14 Q. And isn't it true, Mr. Howard, that since 2009,
15 the operator under this operating agreement, first
16 Marbob and then COG, and the nonoperators in this
17 contract area treated that working interest in the west
18 half of Section 20 as committed to the operating
19 agreement?

20 A. I don't know. I would assume that they did,
21 but I don't know.

22 Q. You don't have any reason to believe otherwise?

23 A. I don't. But I don't have any reason to
24 believe it.

25 Q. And that the parties paid their costs and

1 expenses of development for the contract area pursuant
2 to this operating agreement?

3 A. I believe Concho would know that, yes.

4 Q. Including the development of the Nearburg lease
5 in the 16H well?

6 A. Sure.

7 Q. And now here we are and, if I'm understanding,
8 you're aware, Mr. Howard, that six years later, in
9 December of 2015, your company has filed a complaint in
10 district court asking the district court to declare that
11 the working interests in your state lease is not subject
12 to the operating agreement.

13 A. That's the way I understand it, yes.

14 Q. Now, I want to talk a little bit about the 16H
15 well. That is completed solely on your state lease?

16 A. Correct.

17 Q. And it was drilled and has been operated since
18 2011 under this operating agreement?

19 A. Correct.

20 Q. And you've been fully aware of that well?

21 A. Yes.

22 Q. The entire period of time?

23 A. We were aware the well was drilled, and we are
24 aware it's still there.

25 Q. Signed Division orders for it?

1 A. I don't believe so.

2 Q. Initially?

3 A. I don't believe so.

4 Q. Okay. Did you receive overriding royalty
5 interest payments?

6 A. I don't believe so.

7 Q. Did you receive overriding royalty interest
8 payments for wells in the contract area?

9 A. Yes.

10 Q. And I believe you testified that at the time
11 this well was drilled by Concho under this operating
12 agreement, they were authorized to operate on your
13 lease?

14 A. Sure.

15 Q. Pursuant to this operating agreement?

16 A. Yes.

17 Q. Because there is no other agreement that
18 controls the operations of the 16H? This is the only
19 one?

20 A. That's the only one I'm aware of.

21 Q. Now, your counsel made some reference to
22 various exhibits associated with the 16H, but what he
23 didn't give you is the 16H well file. Okay? So let's
24 go to COG Exhibit Number 8. This is the well file for
25 the 16H. And it does reflect, does it not, Mr. Howard,

1 that -- if we go four pages in on Exhibit Number 8 --

2 CHAIRMAN CATANACH: I'm sorry,
3 Mr. Feldewert, COG's Exhibit Number 8?

4 MR. FELDEWERT: Yes. I'm sorry.

5 CHAIRMAN CATANACH: It looks like it
6 references 43H.

7 MR. FELDEWERT: Sorry. Exhibit Number 7.

8 Q. (BY MR. FELDEWERT) If I go five pages in, it
9 shows that this well was spud on March 4th, 2011; is
10 that correct?

11 A. Where am I seeing that?

12 Q. So I'm looking at the C-103.

13 A. I'm on the C-102. Five pages is the C-102.

14 Q. Six pages. I'm sorry.

15 A. Spud, 3/4/2011.

16 Q. All right. Now, I want you to keep this
17 exhibit open, and I want you to turn to Nearburg's
18 Exhibit Number 5. Okay. Now, I made a note here that
19 this was filed on March 13th, 2014, in Exhibit Number 5.

20 A. Yes.

21 Q. And if I look at my timeline, that is shortly
22 after the SRO Unit terminates. That's why we have to
23 keep all of this chronologically intact, correct? So
24 it's filed shortly after the unit terminates.

25 A. This C-102 in our book, yes, is dated 3/13/14,

1 just after the SRO Unit terminates.

2 Q. And if I look at the second page of your
3 exhibit, Exhibit Number 5 --

4 A. Okay.

5 Q. -- it shows the well name as "SRO Unit 16H"?

6 A. I see that.

7 Q. Okay. And the first page of this exhibit,
8 which is what you-all noted, it changes the well name
9 from the SRO Unit 16H to the SRO State 16H.

10 A. I see that.

11 Q. So this well has been drilled and permitted for
12 quite some time. All they're doing here is changing the
13 name of the well; is that correct?

14 A. That's what it looks like.

15 Q. All right. Then if I go to the well file for
16 the 43H and the 44H --

17 A. Where do I go for that?

18 CHAIRMAN CATANACH: 8.

19 Q. (BY MR. FELDEWERT) Let's go to COG Exhibit 8.
20 And you'll agree with me that COG Exhibit 8 is the well
21 file for the 43H, and COG Exhibit 9 is the well file for
22 the 44H?

23 A. Yes.

24 Q. And both of these wells were permitted by COG
25 in February of 2013?

1 A. February 26th, 2013.

2 Q. Okay. And at the time these were permitted,
3 COG is already operating the 16H on the Nearburg lease?

4 A. Yes.

5 Q. And doing so under the operating agreement?

6 A. Yes.

7 Q. And you'd agree with me at the hearing below
8 that when COG filed and permitted these wells, they were
9 authorized to operate on the Nearburg lease?

10 A. Yes.

11 Q. And they were authorized to operate pursuant to
12 the operating agreement?

13 A. Yes.

14 Q. All right. Now, let's go -- let's keep this
15 here. We can look at 8 or 9. Really doesn't matter.
16 Keep 8 or 9. And let's take a look at a couple of the
17 filings that you-all made note of. And the first is
18 Nearburg Exhibit Number 3, and you made note of the
19 filing on March 5th of 2015 of the 43H C-102, correct?

20 A. Yes.

21 Q. What you didn't note is that what they were
22 doing here is the "As Drilled" C-102, right?

23 A. I don't know the difference, to be honest with
24 you.

25 Q. Look at the top. Look at the top, right-hand

1 corner. See where it says "As Drilled"?

2 A. I may not be looking at the right page. The
3 C-102 revised August 1st, 2011? Is that the one you're
4 looking at?

5 Q. Nearburg Exhibit Number 3.

6 A. Yup.

7 Q. Second page.

8 A. Yup.

9 Q. The one you-all referenced --

10 A. Yes.

11 Q. -- as being in March of 2015.

12 A. Right.

13 Q. That's the "As Drilled" C-102.

14 A. Oh, "As Drilled" down in parentheses. I see
15 that.

16 Q. Do you see that?

17 A. Yes.

18 Q. Okay. And it also, then, notes that this is no
19 longer a unit well, but a State Com well.

20 A. I see that.

21 Q. So all they're doing here is again refiling the
22 C-102 to show as drilled and effectuating a name change.

23 A. Okay.

24 Q. Same way with Exhibit Number 4 with respect to
25 the 44H, correct, Mr. Howard? You see the same thing.

1 A. Okay.

2 Q. So these wells were already permitted. They're
3 just changing the well name given the fact that the SRO
4 Unit had terminated?

5 A. Right.

6 Q. So if I'm looking at our timeline here in 2014
7 when the unit terminates, this is when, now, Nearburg
8 the working interest reverts back to Nearburg?

9 A. Correct.

10 Q. Under the Marbob term assignment?

11 A. That's correct.

12 Q. Okay. And we then have what's been marked as
13 COG Exhibit Number 10, and that's that email exchange
14 that I went through earlier with the Commission,
15 starting at -- first off, let me ask this so we have
16 this for the record. This email chain is related to the
17 Division order for the 16H?

18 A. I'm sorry? Say it again.

19 Q. This email chain relates to the Division order
20 for the 16H?

21 A. Yes.

22 Q. And that Division order reflected an overriding
23 royalty interest for your company?

24 A. That's correct.

25 Q. Am I correct that Ms. Craft was a division

1 analyst at Nearburg?

2 A. Was and is, yes.

3 Q. And that Ken Dixon was the land manager at the
4 time?

5 A. He was.

6 Q. And you were copied on this email. What was
7 your position?

8 A. I was the land -- I think I was senior landman
9 at that time.

10 Q. And it does reflect, does it not, that the
11 concern or -- it would appear that the Marbob overriding
12 royalty interest had been overpaid?

13 A. There was some concern over the override.

14 Q. That's reflected on the last page of this
15 exhibit, which the Commission previously reviewed,
16 right? I'll represent to you that's what it is.

17 A. Okay.

18 Q. And I'll point you to -- you'll see here that
19 Mr. Sawyer, on March 20th, 2014, shortly after Nearburg
20 backed into its working interest, he communicates to
21 your team that by terminating the unit voluntarily, the
22 undrilled proration units are all held by production by
23 existing wells, not subject to CDC or expiration, but
24 can be drilled at will subject to the JOA already in
25 place?

1 A. I see that, yes.

2 Q. And you understood, did you not, Mr. Howard,
3 that the JOA already in place was indeed the operating
4 agreement we just reviewed?

5 A. The JOA was in place to our interest.

6 Q. But he's saying -- but my question is: You
7 recognize that the JOA that he references in connection
8 with the Division order is the operating agreement we
9 already -- we just reviewed?

10 A. Yeah. I think I need to clear up something on
11 this one, because I think what's happening here is
12 this -- if I remember how this all unfolded and I'm
13 pretty sure I remember it correctly --

14 Q. Mr. Howard, here's the thing. I want to get
15 through these exhibits. Okay? And I know you remember
16 some things and you don't remember others, but the nice
17 thing about these emails is they don't lie.

18 A. Okay.

19 Q. So your counsel can ask you what you try to
20 remember later --

21 A. All right.

22 Q. -- but I want to get through these. Okay?

23 A. Okay.

24 Q. Now, the next day, then, there is another email
25 between your team and Mr. Sawyer that's reflected on the

1 top of page 2, and we've all read that before. And he's
2 telling you -- now, this is in March 2014 that the term
3 assignment had technically terminated.

4 A. Yes.

5 Q. Okay. So let's put that in perspective. All
6 these title opinions that you-all went through later in
7 2015, talking about the term assignment had terminated,
8 Concho had already communicated that to you right
9 after -- so everybody knew that. Then he says that they
10 want to proceed -- proceed on the assumption that you
11 wanted to keep your overriding royalty interest, in
12 fact?

13 A. That's what he said.

14 Q. Do you remember receiving that?

15 A. That's what he said.

16 Q. Okay. And you received that, correct?

17 A. Yes.

18 Q. You saw that?

19 A. I saw that.

20 Q. And that was right after the term assignment
21 terminated --

22 A. Yes.

23 Q. -- technically terminated?

24 A. Yes.

25 Q. And then he says that it will affect the work

1 the title lawyer is doing on the updated opinions on the
2 wells.

3 A. Is there a question?

4 Q. So, Mr. Howard, nobody got back to Mr. Sawyer
5 and said that assumption was incorrect, did they?

6 A. We got back to him immediately and said we have
7 to look at it.

8 Q. So I'm looking at the next page. You're
9 referring to the March 21st email that was sent at 10:31
10 a.m.?

11 A. Yes. Within -- within an hour or so of getting
12 the other one, right.

13 Q. And Mr. Dixon, he's your land manager?

14 A. He was my boss then.

15 Q. He was your boss?

16 A. Yes.

17 Q. "Brent, just like you, I'm real busy right now
18 and I won't have any time to talk to you about this
19 until next Wednesday. I'll give you a call Wednesday
20 morning. Thank you for your patience." There is no
21 communication in there that he disagrees with the
22 assumption, right?

23 A. No, there is not.

24 Q. In fact, is there any communication before May
25 28th of 2015, over a year later, of any disagreement

1 over the assumption that you intended to proceed as an
2 overriding royalty interest?

3 A. Over their assumption.

4 Q. Anything in writing from Nearburg that that
5 assumption was incorrect?

6 A. Only the fact that we're saying we needed all
7 the information before we can move forward.

8 Q. Did you disagree with the assumption that you
9 wanted to maintain your overriding royalty?

10 A. We would entertain the idea of changing the
11 comm agreement for an override in the wells once we got
12 the information we'd requested.

13 Q. And throughout that entire period of time, they
14 were sent?

15 A. Sent to lock boxes, correct.

16 Q. And all the wells in the contract area were
17 subject to the operating agreement?

18 A. The ones that were getting paid, I'm assuming
19 we were getting -- we were getting money in our lockbox,
20 correct, until such time that we had that stopped.

21 Q. And, in fact, after -- isn't it true,
22 Mr. Howard, that after COG communicated this
23 understanding with your company, that your company then
24 sent the bill for the -- for your lease to Concho for
25 payment?

1 A. I'm not really sure what you're talking about.

2 Q. Turn to COG Exhibit Number 11.

3 A. (Witness complies.)

4 Q. This is two pages. Go to the second page. And
5 you'll see that it's "payment for lease," and it goes
6 on, "VO 7450." That's the Nearburg state lease in the
7 west half of Section 17?

8 A. Yes.

9 Q. In fact, you guys call that your Cottonwood
10 Draw North area?

11 A. Correct.

12 Q. And it reflects, then, that you sent invoices
13 to COG for that lease payment sometime between May and
14 July, right?

15 A. That's what it looks like. This is not handled
16 in our office, so I've never really seen it before.

17 Q. And that it was paid by -- according to this
18 notation, it was paid by COG?

19 A. That's what it looks like it, yes.

20 Q. But this is indeed, Mr. Howard, an invoice from
21 your company to COG?

22 A. Well, again, I don't do the invoices, so I have
23 to look at it for a second. And I know you're in a
24 hurry, so hang on (reading).

25 This does look like an invoice from us to

1 COG, yes.

2 Q. All right. Then we -- then to stay in
3 chronologic order here, I then go back to -- go over to
4 Exhibit Number 13, COG Number 13, and to orient us, if
5 we go to the last page, we see that that starts with the
6 March 20th emails we just went through, right?

7 A. Yes.

8 Q. Okay. And, of course, we had the email. We
9 had the discussion here about drilling at will, and
10 we're still discussing the 16H Division order.

11 And on the second page -- second-to-the-
12 last page, page 3 of this exhibit, we see an email at
13 the top there from Kathie Craft. She's at your office,
14 correct?

15 A. She's -- yes.

16 Q. To Brent Sawyer, the guy that communicated
17 starting in March?

18 A. Correct.

19 Q. And she tells him that they're going to go
20 ahead and sign and return the 16H Division order?

21 A. Yes. That's what it says.

22 Q. And that Division order was for an overriding
23 royalty interest?

24 A. That's correct.

25 Q. This was three months after the term assignment

1 had expired?

2 A. Yes. Can I add something, or I'm not supposed
3 to add anything else?

4 MR. HALL: You can answer the question.

5 THE WITNESS: I mean, I'm trying to answer
6 the question. He's going down the wrong road. This is
7 for production prior to the SRO Unit expiring.

8 Q. (BY MR. FELDEWERT) She says she's going to sign
9 the Division order for the 16H?

10 A. Yes. Yes, because we still have not been paid
11 for the 16H, and they're still trying to fix the 16H
12 problem.

13 Q. Right. Before you sign that Division order?

14 A. Right. For production prior to the SRO Unit
15 being terminated.

16 Q. Does it say that anywhere here in --

17 A. No, sir. I know that.

18 Q. It does not.

19 A. I know that.

20 Q. And if I go to 13A, she indicates, does she
21 not, that she does not want to send back that Division
22 order and set a precedent that they would agree to a
23 smaller overriding royalty interest?

24 A. Right.

25 Q. All right. Then in the midst of all this is

1 when you get this communitization agreement for the 43H
2 well?

3 A. Yes.

4 Q. I'm sorry. And that's reflected on Exhibit
5 Number 12?

6 A. 12? Yes.

7 Q. And this is sent months after the March
8 communications between COG and Nearburg?

9 A. Yes.

10 Q. Still trying to work out the overriding royalty
11 interest percentage?

12 A. Yes.

13 Q. After you had already invoiced COG for your
14 lease payment?

15 A. Yes.

16 Q. After telling COG we're going to sign that 16H
17 Division order?

18 A. I didn't say that, but our company talked about
19 it, yes.

20 Q. Clarification.

21 And you suggest today that in response to
22 this letter, you called Ms. Fuchik?

23 A. I do.

24 Q. And what number did you call her at?

25 A. At her office.

1 Q. So if I'm looking at this letter, you called
2 her at this (432) 688-6646 number?

3 A. I don't remember.

4 Q. Is there any other number that you had?

5 A. I don't remember. I mean, I just know I called
6 and she answered, so I knew I had the right number.

7 Q. So you called her office?

8 A. I called the number that I had at that point in
9 time, and I don't know if we got it off this letter or
10 some other way.

11 Q. But you called her office? That's my question.

12 A. I believe so.

13 Q. And you continued to call her on or around July
14 10th?

15 A. Correct.

16 Q. And you called her from a speakerphone in a
17 Nearburg office?

18 A. Yes.

19 Q. And do you have any doubt that you called her
20 around July 9th?

21 A. No.

22 Q. And you don't have any doubt that you called
23 her at her office?

24 A. Yes.

25 Q. No doubt?

1 A. I do have a -- I'm not positive where she was.
2 I called the number. She answered. Was she in her
3 office? Was she on her cell phone? I don't know. I
4 mean, you're asking me a question I can't answer. I
5 didn't ask her where she was.

6 Q. Did you have her cell phone number, Mr. Howard?

7 A. I don't know.

8 Q. Why would you have her cell phone number?

9 A. I don't know. I'm a landman. I do that
10 (laughter).

11 Q. Okay. If we look at this, she gives you a
12 number here on this letter. If you were going to call
13 her back, you would call that number, wouldn't you?

14 A. I might call that number, or I might look into
15 the PBLA book and find out what number she might be
16 reached at, and I might call a number from that.

17 Q. And there's no doubt you called from a Nearburg
18 office?

19 A. Absolutely no doubt.

20 Q. All right. Then I want to move on to Exhibit
21 12A.

22 A. Okay.

23 Q. Because what I find odd about this, Mr. Howard,
24 is that I see nothing in any email, in any letter to COG
25 suggesting that a phone call was made to Ms. Fuchik on

1 this 43H comm in July. There is no written -- there's
2 no email, no letter associated with that, correct?

3 A. Not that I'm aware of.

4 Q. Okay. And don't you find it odd that if you
5 indeed made a phone call and communicated something like
6 that to them, in light of all the correspondence that
7 went on between the parties, that you would have
8 documented that in an email or a letter to COG?

9 A. In hindsight, I would, yes. At the point in
10 time, no, I did not write down every phone call that I
11 made. I still don't do that.

12 Q. And if I look at 12A, which is a correspondence
13 between Nearburg to Ms. Fuchik supposedly after you made
14 this call, there is absolutely no mention in there of
15 any such phone call.

16 A. Okay.

17 Q. And there is no mention in there of any
18 suggestion that you called them and told COG that they
19 could not -- that they were not authorized to operate on
20 your lease.

21 A. I can't help that.

22 Q. We see nothing to that effect?

23 A. I can't help that.

24 Q. And we don't see any communication between your
25 company and COG to suggest that they were not authorized

1 to operate on Nearburg's lease?

2 A. We didn't know they were operating on our
3 lease.

4 Q. They were operating the 16H on your lease at
5 this time, Mr. Howard, right?

6 A. True. You are correct.

7 Q. Okay. And you didn't call them and you didn't
8 send an email or letter to them saying they were not
9 authorized to operate on your lease?

10 A. That's correct. Not at that point in time, we
11 didn't.

12 Q. And even in this e-mail about the 43H comm,
13 there is nothing in there to suggest that you made a
14 phone call to Ms. Fuchik and told COG that they were not
15 authorized to operate on your lease?

16 A. True.

17 Q. Now, the parties meet, then, in October of
18 2014, if I'm following my timeline correctly,
19 Mr. Howard. Do you remember that meeting?

20 A. Yes, I do.

21 Q. And the purpose of that meeting was to discuss
22 the amendments to extend the Marbob term assignments?

23 A. The possibility of signing something, yes.

24 Q. And don't you discuss the amendments to that
25 term assignment?

1 A. Yes.

2 Q. And there were two representatives there from
3 your -- from Nearburg, right, yourself and Mr. Turro?

4 A. John Turro works for me.

5 Q. He's a landman?

6 A. Yes.

7 Q. And Brent Sawyer was there for COG?

8 A. Right.

9 Q. And isn't it true, Mr. Howard, that you
10 discussed specific language to extend the term
11 assignment?

12 A. We did talk about some of that, yes.

13 Q. And that meeting took place when?

14 A. When or where?

15 Q. When.

16 A. October 10th, I believe was the date.

17 Q. At your offices?

18 A. Yes, in our offices.

19 Q. And the next communication following that
20 meeting is what's marked as COG Exhibit 15.

21 A. Okay.

22 Q. And this is the email where you communicate to
23 Mr. Sawyer, copying Mr. Turro, where you state, "We are,
24 however, agreeable to your changes to the Term
25 Assignment of the Oil and Gas Lease covering the west

1 half of Section 20"?

2 A. Yes.

3 Q. "I assume this will actually be an Amendment or
4 Correction to the Term Assignment of Oil and Gas Lease"?

5 A. Correct.

6 Q. "Also, we would like to see COG's calculations
7 on a well by well basis for our overriding royalty
8 interest in the wells...."?

9 A. Right.

10 Q. "Included on the lands subject to the SRO
11 Operating Agreement"?

12 A. Yes.

13 Q. Now, you were saying here, Mr. Howard, that you
14 are agreeable to their changes to the form of the
15 corrections to the term assignment?

16 A. That's what I was saying.

17 Q. And your boss at this time was Duane Davis?

18 A. Yes.

19 Q. And you had authority to make this commitment
20 on behalf of Nearburg, didn't you?

21 A. I did.

22 Q. Nothing in this email, Mr. Howard, informs COG
23 that the operating agreement is not applicable to
24 Nearburg's lease; is that right?

25 A. I don't see it referenced in there.

1 Q. And nothing in this email suggests that COG is
2 not authorized to operate on Nearburg's lease?

3 A. I don't see that either.

4 Q. In fact, at this time COG is operating the 16H
5 on your lease?

6 A. They are, and the 43H and the 44H.

7 Q. Correct.

8 Then let me ask you, Mr. Howard. You
9 suggest you didn't know anything about the 43 and 44H
10 wells. Why would that have been important to you at
11 that time? What would you have done? If you had known
12 about the 43H and 44H wells, as you say you didn't, what
13 would you have done?

14 A. That's a very good question. I'm glad you
15 asked it. That would have given us the opportunity to
16 decide what we wanted to do. Once we saw that the 43H
17 and 44H were drilled on our land, we would know more
18 about what was happening in the area. If we would have
19 had all the evidence, all the discussion of what's going
20 on, that would give us the opportunity to make an
21 educated decision as to what we wanted to do.

22 Q. And what you wanted to do -- the question is
23 whether you would proceed with your working interest or
24 whether you would proceed with your overriding royalty
25 interest?

1 A. That's correct.

2 Q. Okay. That's what would be important to you?

3 A. Absolutely.

4 Q. All right. Now, we have Exhibit Number 16.

5 And this is where they actually send you a -- COG sends
6 you a form of corrected term assignment.

7 A. Right.

8 Q. And this contained the language that you said
9 was agreeable two weeks earlier, correct?

10 A. I think this is some of the language we were
11 discussing, yes. The highlighted, you're talking about?

12 Q. No. Didn't you testify earlier that this
13 correction of term assignment contained the language
14 that was agreeable to you?

15 A. Yes.

16 Q. And it was in the form that was agreeable to
17 you?

18 MR. HARPER: Objection. Misstates
19 testimony.

20 Q. (BY MR. FELDEWERT) Was this in a form that was
21 agreeable to you as well?

22 A. The form itself was -- some of the discussion
23 that the form was agreeable, but we had not agreed on if
24 we were going to sign until we got all the information.

25 Q. Okay. But you testified further that the

1 language was agreeable to you?

2 A. Some of the language was agreeable doesn't mean
3 we're willing to sign the assignment.

4 Q. I understand. I'm just trying to get to
5 the mechanics here. I understand you had some
6 hesitation about signing it. But the form and the
7 language that was presented is what you had previously
8 found agreeable?

9 A. Right.

10 Q. Now, you received this on November 18, 2014?

11 A. Yes.

12 Q. And then you had some discussions with your
13 boss about whether you should sign this or not, correct?

14 A. I did.

15 Q. If I go to what's been marked as COG 16A, this
16 contains emails between you and your boss, Duane Davis?

17 A. Yes, it does.

18 Q. And it starts at the bottom of the second page,
19 and it notes there that you had been working with COG on
20 a term assignment?

21 A. We had been, yes.

22 Q. And that in your opinion, you were better off
23 continuing with the term assignment than to have a
24 working interest in the west half of Section 20?

25 A. Based on the information I had available to me,

1 yes.

2 Q. In fact, your exact words were, "My initial
3 research leads me to believe we are better off with a
4 overriding royalty interest under all wells on lands
5 subject to the SRO Unit Operating Agreement than we
6 would be to have 100 percent of the working interest
7 under the west half of Section 20 only." Right?

8 A. Correct.

9 Q. Okay. And you then proceed to have this
10 conversation with your boss, Duane Davis, and you
11 understood from these emails that it was okay to proceed
12 with the corrected term assignment; isn't that right?

13 A. I wanted to make sure that we were still okay
14 to move forward if we were going to be doing an override
15 instead of a working interest, yes, which is why I
16 brought it up in this email, just to make sure.

17 Q. And your boss, Duane Davis, the next page, on
18 November 24th, 2014, you say to him, "I take it from
19 your response that you are okay with me moving forward
20 with executing the attached..." -- corrected term
21 assignment?

22 A. Yes.

23 Q. "After replacing the Well Information
24 Requirements with an updated version"?

25 A. Right.

1 Q. And eventually you did send updated well
2 information requirements for including a corrected term
3 assignment?

4 A. I did.

5 Q. Now, nothing in your -- this discussion with
6 your boss here in November of 2014 indicates that this
7 acreage is not subject to the operating agreement?

8 A. I don't think it does.

9 Q. And nothing in this email with your boss, this
10 internal email, indicates that COG was not authorized to
11 operate on Nearburg's lease?

12 A. I think you're correct.

13 Q. And, in fact, nothing in here says that COG
14 should be removed as the operator of the 16H?

15 A. No, it doesn't.

16 Q. And, in fact, this entire time, COG is
17 Operating the 16H?

18 A. My understanding, yes.

19 Q. Under the operating agreement?

20 A. It's my understanding.

21 Q. Then if I go to COG Exhibit 17, you point out
22 to Mr. Sawyer -- or as you've already testified, you
23 received the operating agreement?

24 A. Right.

25 Q. And Mr. Sawyer is corresponding with you on

1 November 24th. He says, "When we spoke in our meeting a
2 few weeks ago...." He's talking about the October
3 meeting, right?

4 A. Where are you reading from now?

5 Q. Middle of the first page of this exhibit.

6 A. From Brent?

7 Q. Yes.

8 A. Okay.

9 Q. You see the gray line there?

10 A. Oh, "when we spoke." Yeah, I see it.

11 Q. "SRO correction term assignment"?

12 A. Right.

13 Q. He says, "Here you go!" So he's sending you
14 the operating agreement?

15 A. Right.

16 Q. And then he says, "Also, seems I forgot to
17 mention that the body of the form is the one you have
18 seen before."

19 A. Right.

20 Q. "When we spoke in our meeting a few weeks ago
21 you said it was okay."

22 A. Right.

23 Q. So at that meeting, he actually had provided
24 you a form with actual --

25 A. We were looking at a different form, right.

1 Q. And you said a couple weeks ago that was okay,
2 that it was consistent --

3 A. The form --

4 Q. -- with what you had --

5 A. The form looked fine at that point in time,
6 yes.

7 Q. And immediately upon receiving this operating
8 agreement, Mr. Howard, you then sent it to your team to
9 input into your system?

10 A. Correct.

11 Q. And that's reflected in Exhibit 17A?

12 A. Yes.

13 Q. And that Exhibit 65 that you-all brought here
14 today indicates that contract was actually inputted into
15 your system on November 24th, 2014?

16 A. Correct.

17 Q. Okay. And if I look at that Exhibit 65 and --
18 let's take a look at that. If I start at the top, it's
19 talking about your Cottonwood Draw North area.

20 A. Right.

21 Q. It has a contract date of 5/8/09?

22 A. Yes.

23 Q. Effective date of 5/8/09?

24 A. Right.

25 Q. And the expiration date is blank?

1 A. Correct.

2 Q. And then it goes on to name the parties to that
3 operating agreement that you inputted into your system.
4 Do you see that?

5 A. I see that.

6 Q. And one of the parties you list as a
7 nonoperator is Nearburg Exploration Company?

8 A. Right.

9 Q. And this goes on to talk about the contract
10 area description, right?

11 A. Yes.

12 Q. It includes the Section 20 where your lease is
13 located?

14 A. Correct.

15 Q. When you received this operating agreement from
16 COG, did you at any point in time before May of 2015,
17 six months later, suggest to them or tell them that you
18 thought the operating agreement did not apply to your
19 acreage?

20 A. I don't believe I did.

21 Q. Let's go back to our Exhibit 17. You say to
22 Mr. Sawyer on November 25th, "The way I read the
23 Correction Term Assignment, Nearburg would own an
24 overriding royalty as allocated under the Joint
25 Operating Agreement." Do you see that?

1 A. Yes.

2 Q. And you actually note that the "Joint Operating
3 Agreement states Nearburg owns," and there is a number
4 there.

5 A. Right.

6 Q. That matches the number on Exhibit 30 -- on
7 page 30 of the operating agreement file?

8 A. Correct.

9 Q. Okay. Then you say, "Please confirm how COG
10 plans to operate [sic] per the JOA" -- how "to allocate
11 per the Joint Operating Agreement"?

12 A. Right.

13 Q. You say, "Feel we need to stipulate exactly
14 what we own, or will own, after executing the Corrected
15 Term Assignment"?

16 A. Correct.

17 Q. That's what you tell them on November 25th,
18 2014?

19 A. Yes.

20 Q. And isn't, Mr. Howard, at this time, the issue
21 exactly what we saw under Exhibit 13 and 13A, how that
22 overriding royalty interest was going to be calculated?

23 A. You're talking about your 13 and 13A?

24 Q. Whether it's going to be done on gross acres or
25 net acres?

1 A. We're trying to figure out what the heck is
2 what out there, is what we're trying to do, because
3 there are different overrides and different wells, and
4 different numbers are being presented by Concho. So
5 yeah, it's an ongoing problem.

6 Q. Ongoing issue?

7 A. Yes. Absolutely.

8 Q. So at the end of 2014, you're still telling COG
9 that you want -- that you desire to continue with an
10 overriding royalty interest?

11 A. No.

12 Q. You're still receiving overriding royalty
13 interest payments?

14 A. In a lockbox, I'm assuming.

15 Q. You don't know that?

16 A. I don't know that.

17 Q. But you're receiving them?

18 A. (Indicating.)

19 Q. And COG, at the end of 2014, is still operating
20 the 16H on your lease without any objection?

21 A. As far as I know, yes.

22 Q. Under the operating agreement?

23 A. If that's a question, yes.

24 Q. And there is absolutely no emails or letters
25 suggesting that the operating agreement does not govern

1 Nearburg's lease?

2 A. No.

3 Q. And then in early January, you tried to have a
4 meeting, but that was canceled. Remember that?

5 A. No, not offhand. We had several cancels and
6 re-dos, so I don't know.

7 Q. Isn't it true, Mr. Howard, that there was
8 supposed to be a meeting in early January, but it was
9 canceled because you wanted to wait to get the title
10 opinions to know exactly what your override would be?

11 A. Is that noted someplace in here where I could
12 look at it to refresh my memory? I'm not trying to
13 dodge the question. I just don't want to tell you
14 something I'm not sure of.

15 Q. You don't recall that?

16 A. No, sir, not offhand.

17 Q. Let's turn to what's been marked as Nearburg's
18 Exhibit Number 60.

19 A. 60?

20 Q. 60, 6-0.

21 A. Yes, I see this.

22 Q. Does that refresh your recollection?

23 A. I mean, it says that we did this, so I'm sure
24 that's what happened.

25 Q. It says, "Just spoke with Randy Howard over at

1 Nearburg. We are going to postpone getting together
2 until we finally get all those SRO opinions in, since
3 until that happens there really isn't much to talk
4 about."

5 A. Right.

6 Q. You were trying to figure out what your
7 overriding royalty interest is going to be?

8 A. Right, so we can figure out what we're going to
9 do.

10 Q. Gotcha.

11 Then he says to Mr. Myers -- down there in
12 paragraph three, Mr. Sawyer says, "I think we have
13 agreed on the form of the SRO correction term
14 assignment...." Do you see that?

15 A. I do.

16 Q. It goes on to say, "But we need the opinions to
17 figure out how (or if) we want to handle the" -- "handle
18 the incorrect calculation of their overriding royalty
19 interest in the former unit area."

20 A. I see it says that, yes.

21 Q. That's what you're waiting on?

22 A. That's what Brent says.

23 Q. Do you have any reason to disagree with that?

24 A. I can't. He's not here.

25 Q. Okay. All right. Then I want to -- this is

1 January, now, of 2015. So this is months after the
2 well's drilled, and you get a title opinion.

3 A. Okay.

4 Q. You get a January title opinion that was
5 forwarded to you by COG.

6 A. Okay.

7 Q. Is that right?

8 A. I think that's correct.

9 Q. And if I go to that title opinion, I believe
10 that's Nearburg's Exhibit 22. Now we can put this in
11 perspective now that we've gone through the timeline up
12 until now.

13 A. Okay.

14 Q. So this is received by you through Concho after
15 the November -- I'll call them the "we are agreeable
16 emails."

17 A. Okay.

18 Q. Right?

19 A. All right.

20 Q. And if I go to page 20 of this title opinion,
21 which is page 3 of the exhibit, this confirms, does it
22 not, what COG understood after the March and November
23 emails where it says in the second paragraph, "The term
24 of this Term Assignment has clearly expired, as the SRO
25 State Exploratory Unit was terminated effective March 1,

1 2014." Now, these are the title attorneys talking to
2 COG, right?

3 A. Yes.

4 Q. "Pursuant to our discussions with you, we
5 understand you consider this Term Assignment as being in
6 full force and effect. In that regard, we have the
7 following requirement." And one of them is to obtain an
8 amendment to the term assignment?

9 A. Yes.

10 Q. That's exactly what you guys had been working
11 on for the last three months?

12 A. We had been trying to get there, but we just
13 hadn't got there.

14 Q. Okay. Then it goes over on page 23, second
15 full paragraph. "You have advised us that the SRO State
16 Exploratory Unit Operating Agreement remains in full
17 force and effect. We confirm that Article 13 provides
18 for its term to be for as long as there is a well
19 capable of producing," et cetera. Do you see that?

20 A. I'm sorry. You're saying the second full
21 paragraph on page 23?

22 Q. Yeah.

23 A. Okay. I see that.

24 Q. Then we go to page 24, and there is a list
25 there of the parties as set forth in the agreement as

1 follows. Do you see that?

2 A. Yes.

3 Q. Okay. Now, this is after the title attorneys
4 have been informed that based on COG's discussions with
5 Nearburg, they understand the term assignment is in
6 effect. And if indeed that's the case, you wouldn't
7 list Nearburg here, would you?

8 MR. HARPER: Objection. Calls for
9 speculation.

10 THE WITNESS: I wouldn't know.

11 CHAIRMAN CATANACH: I'll ask that
12 differently.

13 Q. (BY MR. FELDEWERT) So, Mr. Howard, you seem to
14 make a big issue here that Nearburg is not listed on
15 this list here?

16 A. They're not listed there.

17 Q. Isn't it perhaps because COG had told their
18 title attorneys that you desired to continue with your
19 term assignment?

20 MR. WADE: That is speculative.

21 Q. (BY MR. FELDEWERT) So, Mr. Howard -- but we do
22 know that at the time this was issued, COG's title
23 attorneys had been informed by COG that they understood
24 the term assignment was going to be -- was in effect?

25 A. I don't know what they told their attorneys.

1 Q. Okay. We just saw that on the prior page.

2 The other thing about this title opinion
3 that you went through is -- on page 33, and you'll see
4 that in the third paragraph, it references the State Com
5 43H well in the west half of the west half of Section 17
6 and in the west half-west half of Section 20. Do you
7 see that?

8 A. I do.

9 Q. Did you notice that when you looked at this
10 title opinion?

11 A. I can't say that I did one way or the other.

12 Q. So here's at least a title opinion that was
13 sent to you at your request that you looked at that
14 informs you as early as January 2015 that the 43H well
15 is out there and points out that you need to amend the
16 communitization agreements to include the 43H, and
17 that's exactly what then Concho tried to do.

18 A. The way I read it, it says the "proposed
19 project area." So I'm assuming it's not really -- which
20 is an area they were proposing. That's how I read that.

21 Q. And it says, "For the 43H well, the west
22 half-west half of Section 17 and the west half-west half
23 of Section 20," right?

24 A. That's what it says.

25 Q. And that the two state leases must be

1 communitized?

2 A. Correct.

3 Q. Okay. And then subsequently, COG then sends
4 you, again, the communitization agreement to get the
5 leases communitized?

6 A. We did get a comm agreement for the 43H twice.

7 Q. Okay. And, in fact, then, in April, there is a
8 meeting to discuss these very issues?

9 A. In April of?

10 Q. 2015.

11 A. To discuss which issues?

12 Q. The agenda with the -- and as well as the
13 communitization agreement. Do you remember that? We
14 went through that?

15 A. Yes. Yes.

16 Q. Let's go to COG 18.

17 CHAIRMAN CATANACH: Can we stop there and
18 take a break?

19 MR. FELDEWERT: (Indicating.)

20 CHAIRMAN CATANACH: Thank you.

21 (Recess 3:29 p.m. to 3:51 p.m.)

22 CHAIRMAN CATANACH: We'll go back on the
23 record and back over to you, Mr. Feldewert.

24 Q. (BY MR. FELDEWERT) Mr. Howard, would you go to
25 Nearburg -- I'm sorry -- COG's Exhibit Number 9. This

1 is the well file for the 44H well.

2 A. Okay.

3 Q. And I recall when you were under examination,
4 we had noted that COG had not filled in the
5 consolidation code on the forms where they were changing
6 the well name and noting the as-drilled location.
7 Remember that?

8 A. Right. Yes, sir.

9 Q. If I look at COG's Number 9 or 8, either one of
10 them, when they initially permitted these wells in 2013,
11 there was no -- anything in the consolidation code,
12 correct?

13 A. Correct.

14 Q. So when these wells were permitted, the party
15 never filled out the consolidation code?

16 A. Are you saying, Do they never fill out?

17 Q. They had not --

18 A. Okay.

19 Q. -- from the get-go.

20 A. Okay.

21 Q. So there is nothing nefarious about that?

22 A. I don't know.

23 Q. All right. So let's go to COG Exhibit 18.
24 This is your email from Mr. Sawyer to yourself?

25 A. Right.

1 Q. In which, prior to the meeting, he's
2 transmitting to you once again the communitization
3 agreement for the 43H and also one for the 44H?

4 A. Yes.

5 Q. And then there is an agenda with that on the
6 second page of Exhibit 18?

7 A. Correct.

8 Q. And it notes that you're going to talk about
9 the comm agreements, right?

10 A. Yes.

11 Q. And then under the SRO category, it talks about
12 the corrected term of assignment for the west half of
13 Section 20?

14 A. Yes.

15 Q. All right. And part of the agenda, according
16 to the A3, is that the well information requirements
17 need review?

18 A. Right.

19 Q. And that -- and then it looks like you're close
20 to a resolution here on the overriding royalty interest;
21 does it not?

22 A. It appeared to be according to Brent, yes.

23 Q. And so then you have your meeting and you
24 discuss the comm agreements?

25 A. Yes.

1 Q. And what I note after this meeting,
2 Mr. Howard, is the absence of any outrage or surprise in
3 the email correspondence internally or externally about
4 the drilling of these wells.

5 A. Okay.

6 Q. I didn't see anything like that in the
7 following email. So if I look, for example, at Exhibit
8 18A, this is after your -- I'm on my timeline. This is
9 just before your April 22nd meeting.

10 A. Right.

11 Q. I'm sorry. Just before your April meeting.

12 A. Right.

13 Q. After you had already received the
14 communitization agreements, right?

15 A. This is correct, yes.

16 Q. Okay. And it's an email from you to Linda
17 Parker. Who is Linda Parker?

18 A. She's the land administrator in the Dallas
19 office for Nearburg.

20 Q. Why are you corresponding with her about these
21 comm agreements?

22 A. I'm asking her opinion on it.

23 Q. Okay. And you note that you and John will be
24 meeting with COG on Friday?

25 A. Yes.

1 Q. And one issue that they're asking us -- and you
2 note that they're asking to execute the attached comm
3 agreements?

4 A. Correct.

5 Q. And you say to her, "At first glance I don't
6 see why we would object to executing, but I would
7 appreciate your feedback."

8 A. And I did, yes.

9 Q. You don't express to her, for example, that
10 there is -- that you had told Ms. Fuchik in a telephone
11 call they were not authorized to operate? There is
12 nothing in there?

13 A. No.

14 Q. There is no suggestion in there -- in this
15 email that COG is not authorized to operate on that
16 acreage?

17 A. No.

18 Q. And there is no suggestion in here that the 43H
19 and 44H were improperly drilled?

20 A. No.

21 Q. You don't say anything to that extent?

22 A. No.

23 Q. And then if I look at 18B -- and this is
24 shortly before your meeting.

25 A. Yes.

1 Q. Right after you have the comm agreements?

2 A. Yes.

3 Q. And you're piggybacking -- if I look at the
4 second page, you're piggybacking on the email approval
5 that you had previously received from Duane Davis to go
6 forward with the term assignment?

7 A. Correct.

8 Q. Okay. And I'm down to the bottom of the first
9 page, and you're saying to your boss, Duane Davis --
10 you're saying, "In reviewing my emails, it appears you
11 are okay with Nearburg keeping an overriding royalty
12 interest as opposed to a working interest. However, I'm
13 not sure I actually received your approval of the
14 attached assignment. Please let me know if you are okay
15 with the form."

16 A. Yes.

17 Q. So you're getting his approval before this
18 meeting to execute the corrected term assignment, right?

19 A. I'm asking him if he's okay with it, yes.

20 Q. And you mention nothing to him about any
21 outrage over the drilling of the 43H or the 44H?

22 A. Correct.

23 Q. You mention nothing to him about surprise.

24 A. Okay.

25 Q. And you mention nothing about having any

1 concern about COG Operating on Nearburg's acreage,
2 right?

3 A. Correct.

4 Q. And you mention nothing to your boss or you
5 don't make any suggestion to your boss that COG is not
6 authorized to operate the 16H or the 43H or the 44H?

7 A. Correct.

8 Q. And, in fact, your boss, Duane Davis, also
9 doesn't have any outrage to that?

10 A. Correct.

11 Q. Because he says in response, "Just to refresh
12 my memory, did Mark K or Tim S look into this to be sure
13 the overriding royalty interest is a better way to go?
14 On the assignment...." Now, he's talking about the
15 corrected assignment, right?

16 A. Yes.

17 Q. "I just added almost L.L.C. to Nearburg's
18 name." So he's actually correcting the signature block?

19 A. Correct.

20 Q. "Otherwise, I am okay"?

21 A. Yes. That's what he says.

22 Q. Right?

23 A. Yes.

24 Q. This is all before your meeting?

25 A. Correct.

1 Q. So we don't have any outrage or surprise
2 suggested before your meeting with COG about the
3 drilling of the 43 or 44H?

4 A. Right.

5 Q. We have no suggestion that they're not
6 authorized to operate on Nearburg's lease?

7 A. Okay.

8 Q. And, in fact, you know they're operating the
9 16H, the 43H and the 44H?

10 A. As per the memo, yes.

11 Q. And even after your April meeting -- I'm
12 looking at my timeline -- April 2015, there is no
13 suggestion to COG that you were surprised about the 43H
14 or 44H wells?

15 A. You're looking at your timeline?

16 Q. Yeah. Well, your meeting was April 24th. And
17 the emails that you have, correspondence that you had
18 with COG after that meeting express no surprise about
19 the 43 or 44H wells.

20 A. Okay.

21 Q. It expresses no outrage about them being
22 drilled, right?

23 A. Okay.

24 Q. Let's go to Exhibit 19. This is April 24th,
25 2015, and to you from Aaron Myers at Concho. John

1 Turro, he works with you; he was at the meeting also,
2 right?

3 A. Correct.

4 Q. "We enjoyed visiting with you two this morning.
5 Thanks again for coming by our office:

6 "Attached is the spreadsheet we discussed
7 this morning. I have added the 43H & 44H wells pursuant
8 to our discussion." So then we have your spreadsheet
9 attached to this exhibit. And if I go to that
10 spreadsheet, Mr. Howard, you've added the 43H and the
11 44H?

12 A. Yes.

13 Q. And you have a column over there that says,
14 "NEX overriding royalty interest." Do you see that?

15 A. I do.

16 Q. You only have an overriding royalty interest in
17 these wells if you agree to execute the corrected term
18 assignment; isn't that correct?

19 A. Correct.

20 Q. And here in this email, the day -- the very
21 afternoon after your meeting, there is no expression of
22 surprise about these wells. There is no suggestion that
23 you had contacted Kelly Fuchik in July and told her by
24 telephone that they were not authorized to operate.
25 There is no suggestion in your email immediately

1 following that meeting that they are not authorized to
2 operate on Nearburg's acreage, is there?

3 A. No.

4 Q. Then if I go to 19A, the second thing you do
5 after that April meeting is you say, "In light of this
6 morning's meeting, I have attached our most updated Well
7 Information Requirements." Do you see that?

8 A. I do.

9 Q. That was pursuant to the agenda.

10 And, Mr. Howard, you wouldn't send your
11 updated well information requirements unless you were
12 agreeable to signing the corrected term assignment?

13 A. That's incorrect.

14 Q. Okay. But did you indicate to them in here by
15 sending these updated well information requirements that
16 you desired these to be attached to any corrected term
17 assignment?

18 A. As I recall, this was to give -- to make sure
19 they had the right -- COG had the right information --
20 sending us well information because we still weren't
21 getting well information.

22 Q. If you executed the corrected term assignment?

23 A. No. For the wells that were in the SRO Unit.

24 Q. But, Mr. Howard, didn't you change the well
25 information requirements?

1 A. This is a newer version, the most recent
2 version of all the contact information for well
3 information that we gave to Concho because they --

4 Q. This would be -- and you added requirements to
5 the well information requirements? I'm sorry. You
6 added requirements; did you not?

7 A. In this (indicating)?

8 Q. Yeah.

9 A. No. This is our form that we send out
10 currently, at this point in time. This is a current
11 version of a well information requirement sheet that we
12 send out for any outside-operated wells.

13 Q. But this is different than the well information
14 requirements that was attached to the Marbob term
15 assignment?

16 A. Yes.

17 Q. It has new requirements in it?

18 A. True.

19 Q. All right. And you expected this to apply to
20 the wells drilled and after the Marbob TA expired?

21 A. I was giving them the information they
22 requested to make sure they had the right contact
23 information on a newer version. The old version was
24 from -- between Nearburg and Marbob, and there was some
25 concern that maybe they didn't have the right

1 information for the delivery of the well information.

2 Q. But this would apply to wells drilled before
3 and after the unit had terminated?

4 A. Any information for the wells in the SRO Unit,
5 yes.

6 Q. Okay. Including the 43H and the 44H?

7 A. Yes.

8 Q. And you expected this to be in effect?

9 A. No.

10 Q. No, you didn't expect this to be in effect?

11 A. No. I'm sorry. It gives updated
12 information -- contact information. That's the only
13 reason I sent it was to give them a complete updated
14 spreadsheet. This is our form. It has new information.
15 If you go through the list of people, there are no
16 contacts.

17 Q. But if I go to the second page of your new well
18 information requirements --

19 A. Right.

20 Q. -- there is now paragraphs F and G, correct?

21 A. Right.

22 Q. Those are new?

23 A. They're part of what is associated with our
24 well information requirements. This was --

25 Q. You're right. Let me be specific.

1 A. Okay. Please do.

2 Q. That information in F and G was not part of the
3 well information requirement attached to the Marbob term
4 assignment?

5 A. That's correct.

6 Q. These are new requirements to be adhered to
7 under a corrected term assignment?

8 A. No.

9 Q. Okay. Do you think these applied without a
10 corrected term assignment?

11 A. No. It's all part of a form. It wasn't -- we
12 weren't asking for this additional information. It was
13 a form to update the contact information for the people
14 that were supposed to get information on existing wells.

15 Q. What about F and G?

16 A. What about F and G? I don't know what you
17 mean.

18 Q. Did you expect that Concho was supposed to
19 comply with F and G?

20 A. No. That wasn't the reason for sending this
21 over.

22 Q. Okay. Now, at the time that you -- you sent
23 that out in April of 2015. And then I believe that in
24 May -- on May 20th, you finally signed the CAs that --
25 the communitization agreements that had been provided?

1 A. I executed them then, yes.

2 Q. And, in fact, you signed the communitization
3 agreements that would have been provided at the April
4 2nd meeting?

5 A. I used that signature page to sign, correct.

6 Q. And the communitization agreement that you
7 signed on May 20th, both of those communitization
8 agreements were dated prior to the drilling of the 43H
9 and the 44H?

10 A. That's correct.

11 Q. And both of those communitization agreements
12 that you signed confirm that COG was the operator of the
13 acreage?

14 A. That's correct.

15 Q. And after you signed it, upper management told
16 you not to provide it yet to COG.

17 A. We were still talking, and they said we had to
18 make some changes.

19 Q. In fact, the only change that you wanted was to
20 to change the interval under those CAs, communitization
21 agreements, from the Bone Spring to the 2nd Bone Spring
22 interval?

23 A. No.

24 Q. That was the only change you requested?

25 A. That was the only change we requested to the

1 actual comm agreements, but there were other
2 stipulations with us signing those comm agreements.

3 Q. But there was no other agreement amendment to
4 the communitization agreement?

5 A. No.

6 Q. There was no change to the effective date?

7 A. No.

8 Q. There was no change to the paragraphs that
9 designated COG as operator of the acreage?

10 A. No.

11 Q. Okay. At the time that you signed these and --
12 actually, when you submitted them to Concho, isn't it
13 true that you were -- it was unclear whether the
14 Commissioner of Public Lands would actually accept a
15 communitization agreement that had only part of the Bone
16 Spring as the communitized interval?

17 A. I can't agree with that.

18 Q. Isn't it true -- didn't you testify,
19 Mr. Howard, that you heard John Turro had talked to the
20 State Land Office?

21 A. I remember him talking to them, yes.

22 Q. And didn't you testify that after his
23 conversation, it was not clear if the Commissioner would
24 approve that limitation in the communitization
25 agreement?

1 A. I don't remember it quite that way, but -- I
2 thought what they said was that we could send them in
3 that way. They may not recognize them limited to those
4 zones, but they would accept them, is the way I kind of
5 remember that happening.

6 Q. Say that again.

7 A. I don't know that I can say it the exact same
8 way, but I'll try. As I recall, they said that we could
9 send them in with a limitation, but it didn't
10 necessarily mean that they would recognize those
11 changes.

12 Q. Exactly.

13 It was unclear whether the Commissioner of
14 Public Lands would recognize the changes even if the
15 parties agreed to it?

16 A. Right. That's kind of my understanding.

17 Q. Okay. Then we have Exhibit 22. You've seen
18 this before? This is your May 28th letter to Concho.

19 A. May 28th letter? Yes.

20 Q. And you state here -- and correct me if I'm
21 wrong, Mr. Howard, but you state here in writing that --
22 end of the second paragraph, "Nearburg is not aware of
23 any operating agreement related to the wells or any
24 other arrangement which would grant COG the right to
25 drill the wells with the acreage covered by the lease."

1 A. Yes.

2 Q. Did you forget about receiving the operating
3 agreement in November of 2014?

4 A. No.

5 Q. Did you forget that you had inputted that
6 operating agreement into your system?

7 A. No.

8 Q. And that you had inputted that operating
9 agreement into your system to cover this acreage?

10 A. It was just for reference purposes.

11 Q. And did you inform COG in this letter that you
12 believe the operating agreement that you had
13 submitted -- put into your records, that you were of the
14 opinion that it did not apply?

15 A. That's what I said right here, I thought.

16 Q. You said you're not aware of any.

17 A. That's correct.

18 Q. But they had sent you an operating agreement.

19 A. It didn't affect the 43H and the 44H.

20 Q. Covered that acreage.

21 A. No longer.

22 Q. Okay. So this is the first time, Mr. Howard,
23 that you have suggested, at least as you read this, to
24 COG in writing that the operating agreement did not
25 cover your acreage?

1 A. This may be the first time that it is put in
2 writing. That's correct.

3 Q. And then even after this letter -- if I go to
4 Exhibit 23, this is the document under which you then
5 provide the executed communitization agreements to COG
6 for filing?

7 A. Correct.

8 Q. And in this letter, you ask Concho, then, for
9 the first time, to provide you -- and I'm looking at the
10 last paragraph, first page. You ask them to provide
11 information so you can now evaluate your working
12 interest in the wells. Do you see that?

13 A. In the first paragraph?

14 Q. The first page, bottom part. You say, "In an
15 effort to further evaluate our working interest in the
16 Wells, Nearburg requests it be provided with the
17 following...information for the Wells." Do you see
18 that?

19 A. I do.

20 Q. This is the first time you've given any kind of
21 list like this to COG?

22 A. I don't -- I mean, we've been asking for
23 information for a long time.

24 Q. You were asking them for information about how
25 to calculate your overriding royalty interest

1 percentage?

2 A. In all the wells.

3 Q. On all the wells.

4 But in this case, Mr. Howard, this is the
5 first time that you ask specific information in relation
6 to some kind of a working interest in the wells?

7 A. Okay.

8 Q. Is that -- I haven't seen any other
9 correspondence requesting this type of information, have
10 you?

11 A. Not that I recall.

12 Q. And nothing in this letter, that you sent after
13 signing the communitization agreements, states that COG
14 is not authorized to operate the 16H or the 43H or the
15 44H wells?

16 A. I'd ask you to say that one again, please.

17 Q. Nothing in this letter informs COG that they
18 are not authorized to operate the 16H, the 43H or the
19 44H wells on your lease?

20 A. Well, I would say it does kind of get at that
21 in the second paragraph, when it talks about the term
22 assignment expired. I think it is implying that there
23 is no longer any way they can be out there. They don't
24 have any rights on the lands anymore.

25 Q. Mr. Howard, there is nothing in this letter

1 stated to tell Concho or COG Operating that you disagree
2 with what was stated in paragraph eight of the
3 communitization agreements that you provided with this
4 letter?

5 A. Okay. I can agree with that.

6 Q. Okay. You can agree with that?

7 A. Yes.

8 Q. Because that's what you testified to
9 previously.

10 Okay. All right. And at the time you
11 provided these communitization agreements, Mr. Howard,
12 you knew that they would be filed with the State Land
13 Office, correct?

14 A. I thought they would be, but they weren't.

15 Q. You knew they would be recorded?

16 A. I thought that they would, but I never got a
17 recorded copy.

18 Q. And you knew they would inform the public that
19 COG is the operator of Nearburg's acreage?

20 A. Yes.

21 Q. Now, you stated that COG never attempted to
22 email your company a copy of the filed communitization
23 agreements. Is that your testimony?

24 A. I never received a recorded copy.

25 Q. Are you aware that COG did send its

1 communitization agreements to Nearburg after they were
2 filed?

3 A. No.

4 MR. FELDEWERT: May I approach?

5 CHAIRMAN CATANACH: Yes.

6 Q. (BY MR. FELDEWERT) Mr. Howard, I've handed you
7 what I've marked as COG Number 33. This reflects, does
8 it not, that on August 28th, Concho sent recorded copies
9 for your files to Nearburg Exploration?

10 A. That's what it says.

11 MR. HARPER: Can I ask, Counsel, if this
12 document has ever been produced in discovery and in all
13 the matters ongoing between the parties?

14 MR. FELDEWERT: You're asking the wrong
15 person.

16 MR. HARPER: Okay.

17 Q. (BY MR. FELDEWERT) It was sent to your Dallas
18 office?

19 A. That's what it says, a P.O. box.

20 Q. Now, the next thing that happens after you sent
21 these communitization agreements for filing is,
22 Mr. Howard, the company decides, then, that it's going
23 to revoke all of its signed Division orders for
24 overriding royalty interests, correct?

25 A. Correct.

1 Q. And that's reflected in COG Exhibit 24 and COG
2 Exhibit -- I'm sorry -- COG Exhibit 24, which is two
3 letters?

4 A. Yes.

5 Q. And that's the first time that you've informed
6 COG that you no longer desire to proceed with an
7 overriding royalty interest under a corrected term
8 assignment?

9 A. In writing, yes, that I'm aware of.

10 Q. And so isn't it true that from -- and I'm
11 looking at my timeline here. From March of 2014, when
12 the SRO terminated, until we'll say when you revoked the
13 Division order in July or August of 2015, during that
14 entire period of time, Nearburg received overriding
15 royalty interest payments as if the term assignment had
16 been extended; is that correct?

17 A. I would say it looks like we received money in
18 a lockbox.

19 Q. Your overriding royalty interest payments?

20 A. Right, overrides.

21 Q. And then on July -- then if I look at COG
22 Exhibit Number 30, which is now July 20th, 2015, this is
23 after you've already signed the communitization
24 agreements and sent them to COG for filing. You state
25 suddenly on July 2015 that the company has committed

1 mineral trespass. Do you see that?

2 A. Yes.

3 Q. This is the first time you've stated that to
4 COG?

5 A. No.

6 Q. When was the first time?

7 A. I believe in my meeting with Aaron, the time
8 before this ever came about. This is the first time I
9 think it was ever in writing.

10 Q. First time in writing?

11 A. I think so.

12 Q. What meeting with Aaron?

13 A. When he came by to pick up the comm agreements.

14 Q. Even though you had signed the comm agreements
15 that said COG was the operator of your acreage? Your
16 testimony is you told him that they were in mineral
17 trespass?

18 A. I said, What are we going to do about these two
19 wells that on our lease in mineral trespass. Yes.

20 Q. But you gave him the comm agreements to file
21 for those same wells --

22 A. Yes, we did.

23 Q. -- stating that COG is the operator?

24 A. Yes, we did.

25 Q. You didn't cross that language out?

1 A. No, we didn't.

2 Q. Then you tell COG on July 20th that the offer
3 to extend the term assignment is not acceptable?

4 A. Correct.

5 Q. And then you-all go off and file your complaint
6 in district court?

7 A. That's correct.

8 Q. So, Mr. Howard, your change of heart here comes
9 after COG had operated the 16H on your lease, according
10 to my timeline, for over four years?

11 A. Correct.

12 Q. Under the operating agreement?

13 A. Correct.

14 Q. And it's two years after the 43H and the 44H
15 wells were permitted on your lease?

16 A. That's correct.

17 Q. Under the operating agreement?

18 A. Says Concho.

19 Q. Concho. Under the operating agreement?

20 A. Right.

21 Q. And it was over a year after they had told you
22 in March that the term assignment had expired?

23 A. Right.

24 Q. And that they were proceeding to drill under
25 the operating agreement at will?

1 A. Right.

2 Q. And that they assumed that the company desired
3 to continue with an overriding royalty interest?

4 A. That's correct.

5 Q. And prior to May 28th of 2015, there is not a
6 single piece of written communication from Nearburg to
7 COG even suggesting that the operating agreement does
8 not apply to your lease?

9 A. I think that's correct.

10 Q. And there is not a single piece of written
11 communication prior to May 28th of -- or, actually,
12 prior to July 20th of 2015, stating that the company
13 does not desire to continue with an overriding royalty
14 interest under a corrected term assignment?

15 A. It was still in negotiation.

16 MR. FELDEWERT: That's all I've got.

17 CROSS-EXAMINATION

18 BY COMMISSIONER PADILLA:

19 Q. Good afternoon, Mr. Howard.

20 A. Good afternoon.

21 Q. Thank you for your time.

22 I have some questions. I'm going to kind
23 of jump around in my notes here, but I'll try to keep
24 them, I guess, logically oriented and to follow your
25 testimony.

1 One thing that struck me early on was your
2 requirements -- your reporting requirements. And I
3 can't help but notice that those look oddly similar to
4 regulatory reporting requirements for an operator as far
5 as your overall issue. Why does Nearburg require that?

6 A. For -- you mean, it was attached to the term
7 assignment?

8 Q. Right. Right.

9 A. Well, I think we wanted to know what was going
10 on in the area. If I can explain kind of what happened,
11 this was originally a deal that Marbob put together for
12 the development of the Avalon. It was something that
13 Nearburg, my understanding, never wanted to participate
14 in the development of the Avalon. That's all they were
15 going after at that point in time. But there was
16 concern that they may be doing additional work, and we
17 wanted to know everything, get all the information
18 together in case we wanted to do something else in the
19 area because we had other acreage in the area.

20 Q. So that requirement list was not specific to --
21 or was not a general thing that Nearburg sends out as
22 part of the JOAs that was specific to --

23 A. I believe it was more specific to this case.

24 Q. Okay. Because of the Avalon target?

25 A. Right. And because of the fact that we had

1 agreed to keep just an override in all these wells. We
2 wanted -- we did want as much information as possible,
3 which, you know, information is key. Of course that was
4 part of the negotiation in the early process.

5 Q. Sure.

6 The consolidation codes that we talked
7 about earlier on the C-102 --

8 A. Yes, sir.

9 Q. -- did the OCD ever tell you that those were a
10 requirement, or any other reporting agency?

11 A. No, sir.

12 Q. Because I know that depending on the land
13 status, they ask for an agreement under the New Mexico
14 Consolidation Code. I'm just wondering if you know a
15 reason or detriment to those not being included.

16 A. I don't file the regulatory information. I
17 don't know what the purpose is for that block. All I
18 was doing was answering my attorney's questions. It
19 didn't mean anything to me.

20 Q. Sure.

21 So was the letter of July 9th in which COG
22 talked about the comm -- July 9th, 2014, where COG talks
23 about a comm agreement requirement for the 43H, was that
24 the first time you became aware of the 43H?

25 A. The first time I was aware of the 43H was when

1 I talked with Kelly Fuchik. When we get a letter
2 from -- that's the letter you're talking about?

3 Q. That's what I'm talking about. Sorry. I don't
4 have the exhibit number.

5 A. Yeah. That's the first I had heard of it, yes.

6 Q. I am a little curious as to why that well never
7 reappears in the next couple of months' worth of
8 correspondence with COG if it was such an inflammatory
9 point, which I take it from your testimony it has been.

10 A. Yes, sir.

11 Q. And I won't go to the -- the affidavit, but can
12 you tell us why or give us any kind of indication as to
13 why that never resurfaces shortly thereafter if it's a
14 point of contention?

15 A. From our side?

16 Q. Yeah. I assume that's why you're up there.

17 A. Yes. We were under the impression that when we
18 objected, that it stopped, anything happening with the
19 43H. And, in fact, they sent us an email saying they'd
20 get back to us. So it was my assumption they were not
21 going to drill the 43H, and it was stopped in its
22 tracks. I know they were blowing and going back then,
23 and I just took it that it was one of those things where
24 they said, Wait a minute; let's put this one on the back
25 burner where we can get all this ironed out, because

1 they never did come back to us with anything else about
2 the 43H.

3 Q. But that one was permitted when the unit was
4 still in effect?

5 A. But we didn't know that.

6 Q. Right.

7 And were you not getting any data from
8 Concho as far as what was going on out there --

9 A. We only got --

10 Q. -- pursuant to your requirements as outlined in
11 the Marbob agreement?

12 A. All we got information on were the Avalon
13 wells. We didn't get any information whatsoever on the
14 2nd Bone Spring wells, including the 43H and the 44H
15 wells that were drilled across our acreage. Nothing.

16 Q. Okay. Why would you pay a rental statement for
17 -- or send a rental invoice for an agreement you didn't
18 recognize anymore to Concho?

19 A. This is the one that they brought up, the
20 rental that was paid?

21 Q. This is COG Exhibit 11.

22 A. Yeah. I wasn't aware -- it's not handled by
23 me. I didn't approve it. I didn't pay it, and I don't
24 know why it was paid.

25 Q. Or why it was sent to Concho?

1 A. I mean, it was -- it was -- what we do is we
2 pay these rentals in advance if we're the lessee of
3 record --

4 Q. Sure.

5 A. -- and then we bill whoever is currently in
6 charge of that, responsible for that. And, you know, I
7 can only assume that what happened was every year it
8 came through, every year we paid it, and every year it
9 was billed. It was an accounting issue, but, again,
10 handled in the Dallas office. So I don't know.

11 Q. Even though the unit terminated, sometimes it's
12 business as normal just because of bureaucratic
13 procedures?

14 A. You get an invoice, you pay it.

15 Q. Right. Right.

16 A. So we paid it every time, and then we just send
17 off to them to reimburse us.

18 Q. So in your mind, speaking purely for
19 yourself --

20 A. Yes.

21 Q. -- when was this -- when did you consider this
22 agreement null and void, because there is kind of that
23 same trajectory where these things are carried forward
24 according to a lot of the correspondence. When would
25 you say, Now this is done; you're in trespass?

1 A. The actual date the term assignment expired?

2 Q. Is that what you consider the date that the
3 operating agreement also expired?

4 A. As to our acreage, yes.

5 Q. So why were you still corresponding with Concho
6 about development and continuing the override and all
7 those sorts of things?

8 A. They had presented that to us as a deal to keep
9 things going forward. Here's what we did: We canceled
10 the unit. We didn't realize all those things that
11 happened when we did that. It was our bad. We're
12 trying to correct that. What we want you to do is agree
13 to extend this term assignment, and we're going to be so
14 kind that we're going to let you keep an override in all
15 the SRO wells just like the unit agreement is still in
16 place, although it is not. And if you'll agree to do
17 that, we will give you the override, and you can sign a
18 new term assignment extending the period -- well, the
19 length of the term assignment. That's what they
20 presented to us, and we were trying to figure out if
21 that was a good idea.

22 To me at the time, it sounded great because
23 I didn't have all the well information. What you don't
24 have, you don't know. And they were supposed to be
25 providing this information to us, which would have

1 definitely changed the way we would have handled what we
2 were doing. I thought we were making the best deal
3 possible.

4 Q. So did you eventually get enough well
5 information to make your decision?

6 A. Yes.

7 Q. And what point was that?

8 A. After April 15th -- after April 22nd, whatever
9 it was, of 2015. I think it was in May, whenever we
10 finally started getting some information on the wells.
11 I mean, there was some mention of the 43 and 44H, but
12 still, we had no idea what kind of wells we were talking
13 about, the volume of the production, the depths they
14 were producing from or anything else.

15 Q. You saw that comm agreement in the middle of
16 the summer of 2014. No one was kind of curious? Nobody
17 went on the OCD Web site to see if there was a well out
18 there?

19 A. Well, it's interesting, because if you go on
20 the OCD Web site, the wells don't show up in our
21 section. They only show up in the section they're
22 drilled on, which was not our section. So we had no way
23 of even checking on the OCD. You could go in and look
24 up the 43 and 44H and then dig that information out once
25 you find out the wells are out there.

1 Q. But you had the comm agreement.

2 A. Once we had the comm agreement, we were able to
3 do that, yes. And I think the first time we tried to
4 get well information, it was not being reported.

5 Q. But didn't you have the comm agreement in July
6 of 2014 at least for review purposes?

7 A. For the -- yes, to drill the 43H? Right. The
8 one that we talked to Ms. Fuchik about?

9 Q. Right.

10 A. Right. But it was a non-issue to us. They
11 were proposing a communitization agreement for a well
12 that as far as we knew had never happened. They came to
13 us and said, We want you to sign a comm agreement. We
14 said, No; you don't have these lands anymore. And they
15 said, Okay, we'll get back to you. And so I was on to
16 other work.

17 Q. Did you tell them that, though?

18 A. Yes.

19 Q. "No, you don't have these wells anymore"?

20 A. Yes. They had already told us. They already
21 knew. This girl didn't know it, but --

22 Q. Uh-huh.

23 A. -- but yes, we told them.

24 Q. So you never took the comm agreement, out of
25 curiosity, and punched in the data on OCD online?

1 A. Just to go in and pull the well up by the name
2 of the well or anything else? No, I didn't.

3 Q. Okay. Did Nearburg have any communication with
4 the Land Office regarding the status of that lease? I
5 know you relied on what Concho was saying, but did --

6 A. When we first got wind that the State was
7 talking about possibly canceling our lease, we did
8 everything we could to try to keep that lease in effect.
9 And the best way we could think of to do that was to try
10 to work somehow with Concho to get that done. We wanted
11 to not lose our lease. There was some discussion about
12 getting in touch with the state office, but I don't
13 think we did at that point in time.

14 Q. Okay.

15 A. We should have, but we didn't.

16 Q. Yeah. Just for future reference, there are
17 multiple administrative remedies for things like that.

18 Okay. So in your opinion, what was the
19 determining factor that made Nearburg decide that this
20 was no longer a valid agreement and they wanted to
21 pursue other options on their lease?

22 A. Well, again, the term assignments to us expired
23 when the unit agreement expired.

24 Q. But when it expired, you were still
25 considering --

1 A. Right.

2 Q. -- extending -- I mean, what made you change
3 your mind?

4 A. At that point in time when we got all the well
5 information and realized what was going on in the area
6 is when we made our decision. And it was presented to
7 Concho the entire time, and it was a long time, a long
8 drawn out time of canceled meetings and everything else
9 that went on of us trying to get information together to
10 make that decision. And they knew -- the two landmen
11 that I was working with knew from day one to the last
12 minute when we said, We're done, we're not going to do
13 this, that everything was contingent on getting all the
14 well information that we were supposed to have been
15 provided before so we could make an educated decision on
16 what we wanted to do. And once we finally got that, it
17 was real easy to make our decision.

18 Q. So I'm just wondering why you wouldn't
19 entertain one avenue much more so than another, on paper
20 anyway, when Concho wasn't giving you what you wanted?

21 A. You don't know what you don't know.

22 Q. Right.

23 A. What I thought was hey, we're going to --

24 Q. Why not say, Full stop; we're not doing
25 anything until you give us the data; we don't know which

1 way to go?

2 A. You mean don't continue talking with them or
3 something?

4 Q. Well, it seemed like you had already really
5 kind of gone down the path. And some of your analysts
6 had looked at, you know, options, maybe not Tim or Mark
7 or whoever your boss wanted to look at them --

8 A. Right.

9 Q. -- but there had been some internal analyses
10 done indicating that an override might be the way to go
11 on this.

12 A. Yeah. And that was really early on. And as
13 soon as -- in that April 2015 period, as soon as we
14 realized what was going on, we were pretty certain then
15 we didn't want to do anything, but we still wanted well
16 information so we could make our decision.

17 Q. And my last question is: Why would you approve
18 those comm agreements if you were at the same time in
19 the same month alleging trespass?

20 A. Under duress. We didn't want to lose the
21 lease, which is what Concho told us in their emails and
22 in an email forwarded from the State. So we were
23 thinking we had two wells drilled on a lease that we
24 didn't know were drilled, production that we didn't have
25 any idea about, and now we're going to lose the lease on

1 top of all that. So the only option we thought we had
2 at the time was to stipulate and agree to sign the comm
3 agreements with those stipulations in place. And that's
4 why we did it. That's the only -- we did it completely
5 under duress. And as soon as it was -- as soon as it
6 was done, they acted like well, we were going to be
7 doing it and it was effective July 1st and it was not a
8 problem, but there was a problem.

9 Q. Thank you.

10 A. Thank you.

11 CHAIRMAN CATANACH: Just a couple,
12 Mr. Howard.

13 CROSS-EXAMINATION

14 BY CHAIRMAN CATANACH:

15 Q. So once the SRO Unit was terminated, that
16 terminated the term agreement?

17 A. Yes, sir.

18 Q. Okay. At that point you became -- you became a
19 working interest owner again or -- or you re-acquired
20 your lease, in effect, right?

21 A. What we're arguing today or discussing today is
22 we think -- we never signed the unit agreement -- the
23 operating agreement, and so we weren't a party to the
24 operating agreement. And so under the loss of title in
25 the operating agreement, when that term assignment

1 expired, the acreage that was contributed by COG, or
2 Marbob before, fell out of the unit, and they had 90
3 days to get an agreement put in place to put the acreage
4 back into the unit or to the JOA, and they didn't do
5 that. And by the terms of the JOA, that acreage fell
6 out of the contract area.

7 Q. So the operating agreement was still in effect
8 as to certain parties within the old unit?

9 A. I think so, yes. I think it still is today.

10 Q. But not as to your interest?

11 A. I don't believe it is.

12 Q. So at that point, once that terminated and COG
13 was -- the 16H had already been drilled at that point,
14 right?

15 A. It was a problem.

16 Q. And that was operated by COG?

17 A. That's correct.

18 Q. Well, I mean, at that time -- why wasn't the
19 problem fixed at that time? I mean, that's when the
20 problem all came to a head or initially developed?

21 A. Right. When we first realized what had
22 happened, the 16H was a well that was sometime
23 producing, sometime not producing, an Avalon well that
24 we wanted nothing to do with at the time. I don't know
25 if we want anything to do with it still today. But it

1 was an Avalon well that was drilled by them, and when
2 they canceled the unit agreement, the question is whose
3 well is it?

4 I don't know that we wanted the well at
5 that point in time, if we had any desire to take the
6 well back if it was our well. Because do we want a
7 plugging liability on a well that was shut in and barely
8 producing most of the time? I don't think we did, but I
9 don't know because we didn't have all the information we
10 needed from them. So it was really then just a
11 fact-finding adventure to see what was going on, to try
12 to get all of our ducks in a row to figure out what we
13 wanted to do and move forward.

14 Q. So at that point, you made a decision to let
15 Concho operate the well?

16 A. We didn't stop them from operating, correct.
17 And, you know, I mean, they were the operator of record
18 as far as you guys were concerned anyway. So, I mean,
19 at that point in time, it was not as big an issue as
20 maybe other people thought it was.

21 Q. So is that the point where basically the
22 negotiation started between Nearburg and Concho, at that
23 point?

24 A. When the term assignment expired?

25 Q. Right.

1 A. Yes. That's when it first started.

2 Q. And it lasted until -- until -- I guess until
3 you finally got all the information you needed?

4 A. (Indicating.)

5 Q. How long a period was that?

6 A. I think it was a year and a half or something,
7 wasn't it? I'm not sure how long it was. It seemed
8 like forever. But --

9 Q. And let me ask you this. What date did you
10 finally get all the information you needed?

11 A. I want to say it was in May of 2015, something
12 like that. It's when I wrote my letter -- when we sent
13 our letter saying we were not going to do a term
14 assignment. I think by that time, we had enough
15 information, although I still don't know if we had
16 everything.

17 Q. Okay. And during that period of time, you were
18 still getting paid as to your royalty interest; is that
19 correct?

20 A. On some wells, correct.

21 Q. On the 16 --

22 A. I don't believe, as we sit here today, that we
23 ever received revenue on the 16H. I think that the
24 interest in question -- and I'm talking all the way back
25 when the SRO Unit was in place, when we were actually

1 entitled to an override, I don't think that we've ever
2 received any revenue for the 16H because there was a
3 dispute over what the override really was. We didn't
4 sign the Division orders because we weren't in agreement
5 with what the interest was they said we had. That's my
6 understanding.

7 Q. And as to the 43 and 44, do you believe you've
8 received payment for that?

9 A. To my knowledge, we've never received any money
10 on that well.

11 Q. I think that's all I have.

12 CHAIRMAN CATANACH: Anything further? Any
13 redirect?

14 MR. HARPER: Yeah, a little follow-up.

15 REDIRECT EXAMINATION

16 BY MR. HARPER:

17 Q. Mr. Howard, I'm just going to try to follow my
18 notes, so I may not be as organized as I normally might
19 want to be.

20 But you were asked about a number of C-101s
21 and C-102s. And those were, for example, ones that were
22 Exhibits 3 and 4, Nearburg Exhibits 3 and 4, that
23 reference as-drilled language?

24 A. Yes.

25 Q. And you weren't sent any of these, right?

1 A. No.

2 Q. Including the one that says "As Drilled," which
3 would indicate that a well had, in fact, been drilled?

4 A. Correct.

5 Q. You were asked about COG Exhibit 11, which was
6 the bill for the lease. Remember that?

7 A. Yes.

8 Q. Let me ask you to look at Nearburg Exhibit 68.

9 MR. HALL: If may I approach? You don't
10 have that exhibit yet. We'll supplement.

11 MR. FELDEWERT: This is which one? Exhibit
12 68?

13 MR. HALL: I'm sorry, Mike.

14 MR. FELDEWERT: I don't think I have
15 Exhibit 68.

16 Q. (BY MR. HARPER) See it, Mr. Howard, Exhibit 68?

17 A. Yes.

18 Q. And do you see there is a reference there --
19 there is an email on the first page from Carolyn McIver
20 to Mindy Conde. Do you see that?

21 A. I do.

22 Q. Who is Carolyn McIver?

23 A. She's in our Dallas office in JIB.

24 Q. And in the second paragraph, it says, "The
25 credit of net \$320.00 on the May JIB against our

1 prospect P1050 Cottonwood Draw North is reversing the
2 May 2014 rental charge in which COG paid on their check
3 #37682 dated July 2014 - thus credit is due COG. We
4 discovered that COG did not have an interest in these
5 leases." Do you see that?

6 A. I do.

7 Q. Does that indicate to you that the rental
8 payment was returned?

9 A. Yes.

10 MR. FELDEWERT: This is which email? The
11 July 14th, 2015?

12 MR. HARPER: Correct.

13 Q. (BY MR. HARPER) You were asked a number of
14 questions about the term assignment and the discussions
15 that you had with folks at COG about a new term
16 assignment. Did you ever agree to a new term
17 assignment?

18 A. No.

19 Q. Did you ever say we're going to sign a new
20 version of the term assignment?

21 A. No.

22 Q. You testified earlier that you were asking for
23 a list of wells -- well information to be able to make a
24 determination. Do you remember that testimony?

25 A. I do.

1 Q. Okay. And we looked at Nearburg Exhibit 14,
2 which is when -- which is the April 22nd email, which
3 references the 43H and the 44H and that they had been
4 spud back in 2014.

5 MR. FELDEWERT: 14? Which exhibit?

6 MR. HARPER: Nearburg Exhibit 14.

7 THE WITNESS: Okay.

8 Q. (BY MR. HARPER) And you'd been asking for a
9 list of wells for a long time, right?

10 A. Yes.

11 Q. And you see that the discussion under the comm
12 agreements on the second page of Exhibit 14 talks about
13 an issue with the Commissioner about getting overdue
14 comm agreements, right?

15 A. Yes.

16 Q. So it wasn't until the Commissioner was
17 concerned about these comm agreements that you found out
18 about 43 and 44H?

19 A. That they had been drilled and completed, yes.

20 Q. You were asked on cross-examination about
21 Exhibits 18A and 18B, COG Exhibits 18A and 18B.

22 A. Yes.

23 Q. All right. And because there is an internal
24 dialogue about what was the best thing to do, you know,
25 agree to the new term assignment or keeping your working

1 interest, right?

2 A. You're in 18A --

3 Q. 18A.

4 A. -- of theirs? Concho's?

5 Q. Concho's Exhibits 18A and 18B.

6 A. Okay.

7 Q. And there is a discussion about whether or
8 not -- what to do, right?

9 A. Yes.

10 Q. And you continue to try to talk to people
11 within the company about what's the right thing to do --

12 A. Yes.

13 Q. -- is that right?

14 A. Yes.

15 Q. And at some point in time, there's
16 consideration that might be the best thing to do, is
17 that right --

18 A. Yes --

19 Q. -- to keep the override?

20 A. Yes.

21 Q. But, for example, on 18B, in the middle of the
22 second page, you said at one point in time, in November
23 of 2014, "Duane, I take it from your response that you
24 are okay with me moving forward...." do you see that on
25 the second page of 18B?

1 A. I do.

2 Q. And then Mr. Davis asked again, "Well, let's
3 take a look at this." Right?

4 MR. FELDEWERT: Where are you at,
5 Counselor?

6 CHAIRMAN CATANACH: 18B?

7 MR. HARPER: 18B.

8 Q. (BY MR. HARPER) The email of November 24th,
9 2014, 8:25 a.m., Randy Howard to Duane Davis. "Duane, I
10 take it from your response that you are okay with me
11 moving forward...." do you see that?

12 A. Yes.

13 Q. The next email, 8:48 a.m., Duane Davis to Emily
14 Sharp, Randy Howard, "Emily, please have someone take a
15 look at this." Right?

16 A. Yes.

17 Q. Still not decided, right?

18 A. That's correct.

19 MR. FELDEWERT: Object to the leading
20 questions here.

21 Q. (BY MR. HARPER) Was it decided?

22 A. Not at this point in time, it wasn't.

23 Q. Now, the first page of this email on 18B, the
24 unhighlighted portion, Bill Elton to Randy Howard, among
25 others, "I think Tim/Mark should weigh in on this also."

1 Do you see that?

2 A. I do.

3 Q. April 23rd, the day after you get the April
4 22nd email, right?

5 A. Yes.

6 Q. And then you send an email that says, "Tim is
7 looking." Right?

8 A. Yes.

9 Q. Send an email, "Tim is looking." Who is Tim?

10 A. Tim is the engineer, Tim Spear.

11 Q. Tim Spear.

12 And we looked earlier at Exhibit 67. Do
13 you have Exhibit 67?

14 A. I'm trying to get there.

15 Okay.

16 Q. And there is Spear's conclusion, right?

17 A. Yes.

18 Q. Okay. And what is Mr. Spear's conclusion?

19 A. That it would be better to keep a working
20 interest than an override.

21 Q. Once you knew about these wells that had been
22 drilled?

23 A. Correct.

24 Q. You also talked about the loss of title
25 provision in Exhibit 42, the joint operating agreement?

1 A. Yes.

2 Q. And what's your understanding of that?

3 MR. FELDEWERT: Objection. He's already
4 been asked and answered.

5 MR. WADE: Do you want to hear the answer?

6 CHAIRMAN CATANACH: Go ahead and answer.

7 THE WITNESS: That when the term assignment
8 expired, the acreage fell out of the joint operating
9 agreement contract area and that there was 90 days that
10 Concho had to get something else in place to put the
11 acreage back into the JOA. Failing to do that, the
12 acreage falls out and the JOA lands contract, and it's a
13 joint loss.

14 Q. (BY MR. HARPER) How long -- under your
15 understanding, how long would they have to cure with a
16 March 1st, 2014 termination of the term assignment in
17 the unit?

18 A. Well, 90 days from March 1st.

19 MR. HARPER: All right. Pass the witness.

20 RE CROSS EXAMINATION

21 BY MR. FELDEWERT:

22 Q. Mr. Howard, I want to look at Exhibit 68, the
23 one they just gave to us.

24 CHAIRMAN CATANACH: Cross on that exhibit.

25 MR. FELDEWERT: Not on the other testimony?

1 CHAIRMAN CATANACH: No, sir.

2 Q. (BY MR. FELDEWERT) This is dated July 14th,
3 2015?

4 A. The one from Carolyn McIver is dated July, yes.

5 Q. This is after you had already communicated to
6 COG you were repudiating the operating agreement?

7 A. Yes.

8 Q. And prior to May 28th, at no point in time did
9 you inform COG, by email or letter, that you believed
10 that the operating agreement did not apply?

11 A. I don't recall.

12 Q. Okay. And you didn't inform COG that you
13 believed that there had been a loss of title that needed
14 to be corrected?

15 A. I don't think so.

16 Q. And you didn't inform COG that you didn't want
17 them to -- that they were not authorized to operate the
18 16H well?

19 A. No.

20 Q. And you didn't ask for any information about
21 the 16H well?

22 A. I'm sorry. I didn't hear all that.

23 Q. You didn't ask for any production information
24 about the 16H well?

25 A. I believe we did ask for information about the

1 16H well, too.

2 Q. When?

3 A. Several times, I think.

4 Q. Did you ask them for that information shortly
5 after the unit terminated?

6 A. I don't know.

7 Q. At the time when you were conceding and
8 allowing COG to continue to operate the 16H well?

9 A. We continued to ask for information, yes.

10 Q. And you testified that you just didn't want --
11 at that time you didn't want the responsibility for the
12 16H well, so you were fine with COG continuing to
13 operate it?

14 MR. HARPER: Objection. Misstates
15 testimony.

16 Q. (BY MR. FELDEWERT) Isn't that what you said?
17 You said you didn't want an Avalon well.

18 A. I wasn't sure that we would want an Avalon
19 well, I think is what I said.

20 Q. And so you made no suggestion to COG that they
21 were not authorized to operate that well under the
22 operating agreement after the unit terminated?

23 A. No.

24 MR. FELDEWERT: That's all the questions I
25 have.

1 CHAIRMAN CATANACH: Thank you.

2 MR. HARPER: I would offer Exhibit 68.

3 MR. FELDEWERT: I have no objection, and I
4 do need to offer my exhibits into evidence as well.

5 CHAIRMAN CATANACH: Exhibit 68 will be
6 admitted.

7 (Nearburg Exploration Co., LLC Exhibit
8 Number 68 is offered and admitted into
9 evidence.)

10 MR. FELDEWERT: So then, Mr. Examiner, I
11 would offer into evidence COG Exhibits 1 through 25,
12 Exhibit 30 --

13 MR. WADE: 30?

14 MR. FELDEWERT: COG Exhibit 30.

15 CHAIRMAN CATANACH: Any objection?

16 MR. HARPER: One moment.

17 MR. FELDEWERT: I'm sorry. I misspoke. It
18 should be COG Exhibits 1 through 24 and then Exhibit 30.

19 MR. HALL: Mr. Chairman, COG didn't offer
20 or discuss Exhibits 14, 20 or 21 or 24.

21 MR. FELDEWERT: 14?

22 MR. HALL: I'm sorry. Apparently, he did
23 discuss 14.

24 MR. FELDEWERT: 21's one of your exhibits,
25 and we did discuss Exhibit 24.

1 MR. HARPER: So your offer is 1 through 24?

2 MR. FELDEWERT: And 30.

3 MR. HARPER: And 30?

4 MR. FELDEWERT: Yes.

5 (Discussion between parties off the
6 record.)

7 MR. FELDEWERT: So everything except 17D;
8 is that right?

9 MR. HARPER: Yes, sir.

10 CHAIRMAN CATANACH: COG Exhibits 1 through
11 24, with the exception of 17D, and COG Exhibit 30 will
12 be admitted.

13 (COG Operating, LLC Exhibit Numbers 1
14 through 17C, 18 through 24 and 30 are
15 offered and admitted into evidence.)

16 CHAIRMAN CATANACH: Is there anything
17 further of this witness?

18 MR. HARPER: Nothing further.

19 CHAIRMAN CATANACH: Mr. Howard, you may
20 finally be excused.

21 THE WITNESS: Thank you.

22 CHAIRMAN CATANACH: So, gentlemen, is this
23 a good stopping point? What do we have, two witnesses?

24 MR. HALL: It is a good stopping point. I
25 have another engineering witness. We may call an

1 additional witness from COG in our case.

2 CHAIRMAN CATANACH: So one witness, and you
3 may call a COG witness?

4 MR. FELDEWERT: Who would that be?

5 MR. HALL: It would be the landman,
6 Mr. Owen.

7 MR. FELDEWERT: We're going to call
8 Mr. Owen. We're going to call him as part of our case.

9 CHAIRMAN CATANACH: So you've got two
10 witnesses, basically?

11 MR. HALL: Two witnesses, yes, total, yes.

12 CHAIRMAN CATANACH: What's your direct on
13 the engineer?

14 MR. HALL: It's probably 20, 25 minutes on
15 direct.

16 CHAIRMAN CATANACH: What do you think,
17 Mr. Feldewert? What's your direct on your witness?

18 MR. FELDEWERT: 30 minutes.

19 CHAIRMAN CATANACH: Oh, nice.

20 MR. FELDEWERT: And then we may -- we do
21 have -- yes, we do have one more witness. She'll be
22 short.

23 MR. HALL: Who is that?

24 MR. FELDEWERT: Ms. Davis.

25 MR. HALL: Say again.

1 MR. FELDEWERT: Ms. Davis.

2 MR. HALL: First name?

3 MR. FELDEWERT: Elizabeth. She'll be a
4 rebuttal witness.

5 CHAIRMAN CATANACH: So we have --

6 COMMISSIONER BALCH: So we have 20, 25 and
7 short.

8 MR. FELDEWERT: Correct.

9 CHAIRMAN CATANACH: So that's what? About
10 five hours?

11 (Laughter.)

12 CHAIRMAN CATANACH: Why don't we go ahead
13 and adjourn, and we'll reconvene at 8:30 tomorrow
14 morning?

15 (Recess 5:01 p.m.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

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