

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

4 IN THE MATTER OF THE HEARING CALLED
5 BY THE OIL CONSERVATION DIVISION FOR
6 THE PURPOSE OF CONSIDERING:

7 APPLICATION OF COG OPERATING, LLC CASE NO. 15607
8 FOR A NONSTANDARD SPACING AND
9 PRORATION UNIT AND COMPULSORY POOLING,
10 EDDY COUNTY, NEW MEXICO.

11 REPORTER'S TRANSCRIPT OF PROCEEDINGS

12 EXAMINER HEARING

13 January 5, 2017

14 Santa Fe, New Mexico

15 BEFORE: MICHAEL McMILLAN, CHIEF EXAMINER
16 WILLIAM V. JONES, TECHNICAL EXAMINER
17 DAVID K. BROOKS, LEGAL EXAMINER

18 This matter came on for hearing before the
19 New Mexico Oil Conservation Division, Michael McMillan,
20 Chief Examiner, William V. Jones, Technical Examiner,
21 and David K. Brooks, Legal Examiner, on Thursday,
22 January 5, 2017, at the New Mexico Energy, Minerals and
23 Natural Resources Department, Wendell Chino Building,
24 1220 South St. Francis Drive, Porter Hall, Room 102,
25 Santa Fe, New Mexico.

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1 (9:57 a.m.)

2 EXAMINER McMILLAN: So the next case that
3 we will hear shall be Case Number 15607, application of
4 COG Operating, LLC for nonstandard spacing and a
5 proration unit and a compulsory pooling Eddy County, New
6 Mexico.

7 Call for appearances.

8 MS. KESSLER: Mr. Examiner, Jordan Kessler,
9 from the Santa Fe office of Holland & Hart, on behalf of
10 the Applicant.

11 EXAMINER McMILLAN: Any other appearances?

12 MR. PADILLA: Mr. Examiner, Ernest L.
13 Padilla, Santa Fe, New Mexico, for a number of Fowlkes
14 individuals that are listed in our pre-hearing
15 statement. And I'm also entering an appearance on
16 behalf of Beacon E&P, LLC of Denver who has leased the
17 properties or the minerals from my Fowlkes clients.

18 MS. SHAHEEN: Sharon Shaheen and Scott
19 Hall, from Santa Fe, New Mexico, on behalf of
20 Mr. Patrick Fowlkes.

21 EXAMINER McMILLAN: Okay. I guess you'd
22 like to have opening statements?

23 MS. KESSLER: I'm not going to have an
24 opening statement, Mr. Examiner. I do have two
25 witnesses today.

1 MR. PADILLA: Mr. Examiner, the only thing
2 I have to say is that right now the oil and gas leases
3 that were issued by my clients, Beacon E&P Company, LLC,
4 have not been recorded of record. Two of the leases are
5 being finalized today. So I expect that in terms of --

6 (Conference phone ringing; pause in
7 proceedings, 9:58 a.m. to 9:59 a.m.)

8 EXAMINER McMILLAN: Please proceed.

9 MR. PADILLA: Well, I think leases have not
10 been recorded. But I think in terms of the application
11 for compulsory pooling, it's going to affect some of the
12 Fowlkes -- clients -- my clients. The application is no
13 longer or will not be applicable because Beacon has
14 already communicated with Concho or COG to participate
15 in the well.

16 MS. KESSLER: If I could just briefly
17 respond to that, Mr. Examiners?

18 It's clear that COG was contacted by Beacon
19 yesterday. We understand that there are some leases
20 that have been made or in the process of being
21 finalized. None of that is of record. So notice and a
22 copy of the pooling application was correctly provided
23 to the parties of record at this point. We are
24 proceeding with pooling. The Fowlkes entities that
25 Mr. Padilla represents, with the understanding there is

1 an agreement reached with the lessee, the pooling
2 application order will not apply to that entity.

3 EXAMINER BROOKS: So I understand the
4 situation, Concho is the Applicant for pooling. Your
5 clients are unleased mineral owners -- were unleased
6 mineral -- are unleased mineral owners of record who
7 have been duly noticed of this proceeding and who are
8 actually leased, but the lease is not of record, and
9 they want to participate. And there is an agreement
10 between Concho and the lessee that they will be allowed
11 to participate if they can reach an appropriate -- what
12 is the agreement?

13 MS. KESSLER: I would say that there is --
14 there is no written agreement at this point between
15 Beacon and between Concho. If Beacon wants to
16 participate, that's great.

17 MR. PADILLA: My understanding is that
18 there is a meeting sometime next week to finalize --

19 EXAMINER BROOKS: Well, of course, a
20 compulsory pooling order pools all interests and
21 whatever they may be. So it's just a question of
22 notice. You are not required to notice somebody who
23 is -- whose interest is not of record. But, of course,
24 they may be bound -- by virtue of your entry of
25 appearance, the lessee will be bound -- well, no.

1 You're appearing for the mineral owners, not the
2 lessees; is that right?

3 MR. PADILLA: I am also appearing -- we
4 entered an appearance for the lessee yesterday. I don't
5 see a conflict there because --

6 EXAMINER BROOKS: So you're appearing for
7 both the lessee and mineral owners?

8 MR. PADILLA: Yes, I am.

9 EXAMINER BROOKS: And by virtue of your
10 appearance, the lessee would be bound by the order in
11 any case, so we don't need to bother with that issue.

12 MR. PADILLA: That's correct.

13 EXAMINER BROOKS: You can negotiate
14 afterwards if you have --

15 MR. PADILLA: That's exactly right.

16 EXAMINER BROOKS: That seems acceptable to
17 me.

18 MR. PADILLA: We don't have any witnesses.

19 EXAMINER BROOKS: Let's figure how much
20 Mr. Hall and his clients fit into this case.

21 MS. SHAHEEN: Mr. Examiner, we represent
22 Mr. Patrick Fowlkes, who is also an unleased mineral
23 owner. And I don't need to make an opening statement.
24 I plan to make a short closing statement. But briefly,
25 Mr. Fowlkes' position is that COG did not make a

1 diligent good-faith effort to negotiate a voluntary
2 agreement. We'll be asking that the application be
3 denied at this time.

4 EXAMINER JONES: Can I clarify,
5 Mr. Padilla? You said you represented multiple parties,
6 including Beacon E&P; is that correct?

7 MR. PADILLA: That is correct.

8 EXAMINER JONES: Okay. So Beacon E&P is
9 the one you were talking about before. You weren't
10 talking about the multiple parties that had already
11 decided to participate; is that correct?

12 MR. PADILLA: No. Beacon has decided that
13 they want to participate, but that agreement between COG
14 and Beacon is still in the works.

15 EXAMINER BROOKS: Is there a -- is there an
16 entry of appearance on record that identifies all the
17 parties you're appearing for?

18 MR. PADILLA: Yes.

19 EXAMINER BROOKS: Okay. Then I don't think
20 it's necessary --

21 MR. PADILLA: There are about 14, I think.

22 EXAMINER BROOKS: I don't think it's
23 necessary to bring them into the record if it's already
24 in the record of the case.

25 MR. PADILLA: Right.

1 EXAMINER BROOKS: Very well.

2 MS. KESSLER: Two witnesses today,
3 Mr. Examiners.

4 EXAMINER McMILLAN: If the witnesses will
5 stand up and be sworn in at this time?

6 MS. SHAHEEN: Mr. Examiner, we also have
7 one witness today.

8 EXAMINER McMILLAN: Okay. Let's get all
9 the witnesses sworn in.

10 (Mr. Godwin, Mr. Zollinger and Mr. Fowlkes
11 sworn.)

12 MS. KESSLER: I'll call my first witness.

13 EXAMINER McMILLAN: Please proceed.

14 PATRICK R. GODWIN,
15 after having been first duly sworn under oath, was
16 questioned and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. KESSLER:

19 Q. Please state your name for the record and tell
20 the Examiners by whom you're employed and in what
21 capacity?

22 A. My name is Patrick Godwin. I'm a senior
23 landman for Concho Resources.

24 EXAMINER BROOKS: Excuse me. What is the
25 case number for this?

1 EXAMINER JONES: 15607.

2 EXAMINER BROOKS: 15607.

3 EXAMINER JONES: Can you state your name,
4 again?

5 THE WITNESS: Patrick Godwin, senior
6 landman for Concho Resources.

7 Q. (BY MS. KESSLER) Have you previously testified
8 before the Division, Mr. Godwin?

9 A. I have.

10 Q. And were your credentials as a petroleum
11 landman accepted and made a matter of record?

12 A. They were.

13 Q. Are you familiar with the application filed in
14 this case?

15 A. I am.

16 Q. And are you familiar with the status of the
17 lands in the subject area?

18 A. I am.

19 MS. KESSLER: Mr. Examiners, I would tender
20 Mr. Godwin as an expert witness in petroleum land
21 matters.

22 EXAMINER McMILLAN: Any objections?

23 MR. PADILLA: No objection.

24 MS. SHAHEEN: No objection.

25 EXAMINER McMILLAN: So qualified.

1 Q. (BY MS. KESSLER) Mr. Godwin, can you please
2 turn to COG Exhibit 1 and identify this exhibit?

3 A. This exhibit is a plat showing the proposed
4 project area for the Graham Nash Federal Com 7H well
5 consisting of the east half-west half of Section 28, the
6 northeast of the northwest quarter of Section 33 and
7 Lot 2, Section 33, Township 26 South, 28 East.

8 Q. Does COG seek to create a nonstandard
9 223.77-acre spacing and proration unit comprised of that
10 acreage?

11 A. We do.

12 Q. And do you seek to pool the uncommitted
13 interest owners in the Bone Spring Formation?

14 A. We do.

15 Q. Do you seek to dedicate this spacing unit to
16 the Graham Nash Federal Com #7H well?

17 A. Yes.

18 Q. Has an APD been approved for this well?

19 A. It has.

20 Q. Is the API number reflected on the C-102?

21 A. Yes, it is.

22 Q. And has the Division designated a pool for this
23 area?

24 A. They have, the Bone Spring.

25 Q. And that would be Pool Code 30215?

1 A. Yes.

2 Q. What is the character of these lands?

3 A. They are both -- or they are fee, state and
4 federal lands.

5 Q. And is the pool governed by Division statewide
6 rules for oil pools?

7 A. Yes, it is.

8 Q. So 330 setbacks, correct?

9 A. Yes.

10 Q. Are there any depth severances within this
11 pool?

12 A. Not with this pool, no.

13 Q. What is Exhibit 2?

14 A. Exhibit 2 is an outline of the ownership on a
15 tract-by-tract basis, and if you flip to page 2 of
16 Exhibit 2, it is a unit summary showing the ownership in
17 the project area.

18 Q. The parties that you seek to pool are
19 highlighted in bold; is that correct?

20 A. That is correct.

21 Q. And are these both working interest owners and
22 unleased mineral owners?

23 A. They are.

24 Q. Is Exhibit 3 a copy of the well-proposal letter
25 that was sent to all of the interest owners?

1 A. Yes, it is.

2 Q. On what date was this letter sent?

3 A. On October 6th, 2016.

4 Q. Did the well-proposal letter also include an
5 AFE?

6 A. It did.

7 Q. Are the costs reflected on the AFE consistent
8 with what COG has incurred in drilling similar
9 horizontal wells in the area?

10 A. Yes, they are.

11 Q. What additional efforts did you undertake to
12 reach an agreement of the parties that you seek to pool?

13 A. We've had multiple -- reached out to them
14 multiple times via phone and email, both the working
15 owners and the leased interest owners, to try to come to
16 an agreement.

17 Q. Is Exhibit 4 a summary of communications
18 between you and various Fowlkes individuals?

19 A. Yes, it is.

20 Q. With respect to Patrick Fowlkes, can you please
21 summarize your communications?

22 A. We initially sent an offer to Mr. Fowlkes in
23 August, August 18th of 2016, covering lands both within
24 the project area and outside of the project area.
25 October 6th, we sent him a well proposal that included

1 an AFE for the Graham Nash Fed Com 7H, and throughout
2 this time we've had email correspondence back and forth
3 with Mr. Fowlkes. On October 31st, we sent Mr. Fowlkes
4 another lease offer because our initial offer had
5 expired. November 7th, we sent Mr. Fowlkes a proposed
6 operating agreement covering the lands. And then on
7 December 16th, we sent Mr. Fowlkes a third lease offer,
8 as our second lease offer had since expired as well.

9 Q. Did Mr. Fowlkes ever make a counteroffer?

10 A. There was no specific counteroffer.

11 Q. And COG proposed the well under an operating
12 agreement, correct?

13 A. Yes, we did.

14 Q. Have you been able to reach an agreement with
15 Patrick Fowlkes?

16 A. No, we have not.

17 Q. And you sent him a well-proposal letter, an
18 operating agreement and three lease offers; is that
19 correct?

20 A. That is correct.

21 Q. Will you continue to negotiate with
22 Mr. Fowlkes?

23 A. Yes, we will.

24 Q. And if you reach an agreement with him, will
25 that agreement supersede the terms of the pooling

1 agreement?

2 A. Yes.

3 Q. Did COG also voluntarily file some releases of
4 prior leases with certain of the Fowlkes individuals?

5 A. Yes, we did.

6 Q. At this point have releases been filed for all
7 of the Fowlkes individuals?

8 A. Yes. They've all been processed by Eddy
9 County.

10 Q. In your opinion, have you made a good-faith
11 effort to reach an agreement with Patrick Fowlkes?

12 A. Yes.

13 Q. Have you estimated overhead and administrative
14 costs while drilling and producing the wells?

15 A. We have. It is 7,000 a month while drilling
16 and 700 a month while producing.

17 Q. Are those costs in line with what other
18 operators in the area are charging for similar wells?

19 A. They are.

20 Q. Do you ask that administrative and overhead
21 costs be incorporated into any order?

22 A. We do.

23 Q. With respect to any uncommitted interest
24 owners, do you request that the Division impose a 200
25 percent risk penalty?

1 A. Yes, we do.

2 Q. And did COG identify offset operators or
3 lessees of record?

4 A. Yes, we did.

5 Q. Is Exhibit 5 an affidavit prepared by my office
6 with attached letters providing notice of this hearing
7 to the parties that you seek to pool and the offset
8 operators or lessees of record?

9 A. Yes, it is.

10 Q. And is 6 an affidavit -- Exhibit 6 an Affidavit
11 of Publication in Eddy County providing notice of this
12 hearing?

13 A. Yes, it is.

14 Q. Were Exhibits 1 through 4 prepared by you or
15 compiled under your direction and supervision?

16 A. They were.

17 MS. KESSLER: Mr. Examiners, I move
18 admission of Exhibits 1 through 6, which includes my two
19 affidavits.

20 EXAMINER McMILLAN: Any objection?

21 MR. PADILLA: No objection.

22 MS. SHAHEEN: No objection.

23 EXAMINER McMILLAN: Exhibits 1 through 6
24 may now be accepted as part of the record.

25 (COG Operating, LLC Exhibit Numbers 1

1 through 6 are offered and admitted into
2 evidence.)

3 MS. KESSLER: Pass the witness.

4 MR. HALL: If you'll give us a minute,
5 Mr. Examiner, we'll distribute our exhibits.

6 CROSS-EXAMINATION

7 BY MS. SHAHEEN:

8 Q. Mr. Godwin, if you could please take a look at
9 Mr. Fowlkes Exhibit Number 1. Can you identify this
10 document?

11 A. This looks to be the -- or the lease offer that
12 was sent on October 18th, 2016.

13 Q. And was anything else included with this lease
14 offer?

15 A. I do not believe so.

16 Q. Did you provide him a copy of the lease that
17 you were proposing?

18 A. I didn't specifically send this offer. It was
19 sent by Aaron Myers.

20 Q. And do you know whether Mr. Myers provided the
21 lease?

22 A. I do not believe he did.

23 Q. Why not?

24 A. I do not know the answer to that.

25 Q. Did anyone explain to Mr. Fowlkes in August of

1 2016 what the lease terms would be?

2 A. I do not know the answer to that.

3 Q. Turning to Exhibit Number 2, can you identify
4 this document?

5 A. This is the well proposal that was sent out on
6 October 6th, 2016 for the Graham Nash Federal Com 7H.

7 Q. And what was included with this letter?

8 A. A plat and an AFE.

9 Q. And did you include an operating agreement at
10 that time?

11 A. Not at the time. We referenced it in the
12 letter, then followed up with that on November 7th.

13 Q. And that would have been approximately how long
14 before the application was filed?

15 A. I'm not sure of the exact date the application
16 was filed.

17 Q. If I represented to you that the application
18 was filed on November 15th, how much time did you
19 precede by providing the operating agreement to
20 Mr. Fowlkes?

21 A. I would say eight days.

22 Q. Why did COG wait until only a week before the
23 application was filed to provide Mr. Fowlkes with an
24 operating agreement?

25 A. We put the agreement together, and that was --

1 once we had everything finalized, we were able to send
2 it out. There was no specific strategy to that. That's
3 just how long it took us to get everything ready to go
4 out to the parties.

5 Q. And why was this -- the first actual offer with
6 proposed terms, why was it for a working interest
7 participation instead of a lease?

8 A. We felt we had already offered a lease offer on
9 the first, Exhibit 1.

10 Q. And did you correspond with Mr. Fowlkes about
11 the first lease offer?

12 A. I don't think with Mr. Fowlkes specifically. I
13 was not working this at the time. It was Aaron Myers.
14 I can't specifically answer that question.

15 Q. Do you know whether Mr. Myers ever spoke with
16 Mr. Fowlkes?

17 A. I do not know specifically, no.

18 Q. Taking a look now at Exhibit Number 3, can you
19 identify this document, please?

20 A. This is another lease offer that was sent out
21 on October 31st of 2016.

22 Q. And what was the difference between this lease
23 offer and the first lease offer?

24 A. This was sent at my direction, and it also
25 included an oil and gas lease attached to the offer.

1 Q. So this is the first time you proposed lease
2 terms to Mr. Fowlkes, correct?

3 A. Me specifically, yes.

4 Q. Is it the first time that COG proposed lease
5 terms to Mr. Fowlkes?

6 A. A specific oil and gas lease, yes.

7 Q. Do you know whether this lease offer differed
8 from the first lease offer?

9 A. Monetarily, no.

10 Q. And why did it differ?

11 A. There was an oil and gas lease attached.

12 Q. Was there any difference in the terms that were
13 being proposed?

14 A. I believe the initial offer was valid 30 days
15 from receipt, and this offer was valid until December
16 1st of 2016.

17 Q. So it was essentially the same offer you made
18 the first time, correct?

19 A. Correct.

20 Q. When you submitted a working interest proposal
21 to Mr. Fowlkes, did you consider the authority of
22 Mr. Fowlkes to participate as a working interest owner?

23 A. We did not. We sent it out to all uncommitted
24 interests within the project area.

25 Q. When COG considers contributing its acreage to

1 an outside-operated project, what analysis do you
2 undergo?

3 MS. KESSLER: Objection, Mr. Examiners. I
4 would think that would be outside of the scope of
5 Mr. Godwin's knowledge.

6 Q. (BY MS. SHAHEEN) If you know.

7 EXAMINER BROOKS: Well, I do believe that's
8 a valid objection, so I would suggest we sustain.

9 EXAMINER McMILLAN: Sustained.

10 THE WITNESS: I'm not sure of the specific
11 evaluations.

12 EXAMINER BROOKS: I'm sorry. We sustained
13 the objection so don't answer.

14 THE WITNESS: Oh, I'm sorry. Got it.

15 Q. (BY MS. SHAHEEN) Do you know whether COG
16 conducts its analysis of outside-operated projects where
17 it decides to participate?

18 MS. KESSLER: Objection, Mr. Examiner.
19 Same thing.

20 EXAMINER BROOKS: I don't think what COG
21 does is relevant, so that was really my basis of
22 sustaining the objection. So I'll sustain the objection
23 to this line of questioning.

24 EXAMINER McMILLAN: It's sustained.

25 Q. (BY MS. SHAHEEN) Did you explain to Mr. Fowlkes

1 how much it would cost him to participate in the well?

2 A. I did not.

3 Q. Did you -- do you think that would have been
4 important information for Mr. Fowlkes to have?

5 A. I do.

6 Q. Do you recall any correspondence -- subsequent
7 correspondence that you may have had with Mr. Fowlkes
8 about the working interest proposal?

9 A. There were numerous email correspondence back
10 and forth throughout the timeline we're discussing.

11 Q. And were there any emails specifically about
12 the working interest proposal?

13 A. There were no -- there were no specific
14 questions on the working interest proposal.

15 Q. Did you ever reach out to Mr. Fowlkes to talk
16 to him about the working interest proposal?

17 A. Other than our letter, not specifically.

18 Q. Turning to Exhibit Number 4, can you identify
19 this document, please?

20 A. This looks to be the oil and gas lease that was
21 attached to our offer that we just spoke about.

22 Q. Taking a look at paragraph seven, if you could
23 just take a minute or two to read that over.

24 A. Okay.

25 Q. Can you explain to us what this provision is?

1 A. It states, "The Lessee shall have free use of
2 oil, gas and water from said land, except water from
3 Lessor's wells...for all operations hereunder, and the
4 royalty shall be computed after deducting any" costs of
5 use. "Lessee shall have the right at any time during or
6 after the expiration of this Lease to remove all
7 property and fixtures placed by Lessee on said land,
8 including the right to draw and remove all casing."

9 Q. Is there any time limitation on removing
10 property from the lease land?

11 A. There does not appear to be, no.

12 Q. So COG would retain the right to remove any
13 property that it asserts belongs to COG for perpetuity?

14 A. That looks to be how it reads, yes.

15 Q. Looking at paragraph ten, if you want to take a
16 minute to look at that.

17 A. (Witness complies.)

18 Okay.

19 Q. And what does this provision provide?

20 A. It provides --

21 MS. KESSLER: Mr. Examiners, I'm just going
22 to object here and say that walking through all of the
23 provisions of the lease is not relevant because the Oil
24 Conservation Division does not have jurisdiction to
25 examine the terms of the lease. This is a private

1 contract between two entities.

2 EXAMINER BROOKS: Well, I think the
3 reasonableness of the -- so far of the issue, so I would
4 overrule that objection.

5 EXAMINER McMILLAN: Objection overruled.

6 THE WITNESS: This provision states, Lessor
7 hereby warrants and agrees to defend the title to said
8 land." And it also discusses that if the lessee owns
9 the less interest in oil and gas, then the entire
10 undivided fee simple estate -- that the royalties be
11 proportionately reduced.

12 Q. (BY MS. SHAHEEN) Do you know whether there was
13 a previous lease with COG with respect to these lands?

14 A. Yes, there was.

15 Q. And do you know how this provision compared to
16 the previous lease?

17 A. Not off the top of my head, no.

18 Q. Looking at paragraph 12 -- this is in the
19 addendum if you want to take a minute to look at that
20 first paragraph there.

21 A. Okay.

22 Q. And this language here reads that the "Lessor
23 and Lessee acknowledge that the lands described in this
24 Lease are presently subject to that certain Oil and Gas
25 Lease dated" in 2008, and then another lease dated in

1 2013, correct?

2 A. That is correct.

3 Q. And do you know, at the time that you provided
4 this lease to Mr. Fowlkes, whether those leases had, in
5 fact, expired?

6 A. I believe they had expired.

7 Q. In effect, this language indicates that this
8 was a topic, correct?

9 A. That is correct.

10 Q. Do you recall any communications with
11 Mr. Fowlkes about his objection to a top lease?

12 A. Not specifically, no.

13 Q. You don't recall any -- any emails from
14 Mr. Fowlkes?

15 A. There may have been an email, but I don't
16 remember the specifics of it, no.

17 Q. Did you offer to revise the lease form in any
18 manner to accommodate Mr. Fowlkes' concerns about some
19 of these lease provisions?

20 A. I was not aware of any specific concerns of the
21 lease form. There were no red lines or any
22 correspondence of that nature sent over.

23 Q. Let's turn to Exhibit 11.

24 EXAMINER BROOKS: Concho's or yours?

25 MS. SHAHEEN: I'm sorry.

1 Q. (BY MS. SHAHEEN) This would be Exhibit 9,
2 Mr. Fowlkes' Exhibit 9. If you want to take a minute to
3 look through that, feel free to do so.

4 A. (Witness complies.)

5 Okay.

6 Q. Turning in to the exhibit about page 4, it's an
7 email dated November 15, at 1:01 p.m. In the second
8 paragraph from the bottom, Mr. Fowlkes indicates to you
9 here that he would like to come to an agreement very
10 similar to the previous lease, correct?

11 A. That is correct.

12 Q. And so you could infer from this statement that
13 he was not comfortable with the provisions of the lease
14 that you had provided to him, correct?

15 MS. KESSLER: Mr. Examiner, I'm also going
16 to object here as to relevance. There is nothing in the
17 Oil and Gas Act, there is nothing in any Division
18 regulation, there is nothing in any Division order
19 saying that unleased mineral interest owners need to be
20 offered a lease.

21 Now, Concho has proposed an operating
22 agreement. Concho has obviously had a number of
23 negotiations about the lease, but that lease never
24 needed to be offered. So the fact that we're going into
25 terms of the lease, the fact that we're going into any

1 offer information is not relevant to what Concho
2 negotiated in good faith regarding the operating
3 agreement.

4 EXAMINER BROOKS: You're quite right about
5 the Oil and Gas Act. But in the numerous orders that
6 have been issued, including many of them that antedate
7 my tenure with the Division, which is getting to be
8 fairly long, that indicate -- that state the lessee does
9 have an obligation to negotiate in good faith for a
10 lease with an unleased mineral owner, I recommend the
11 objection be overruled.

12 EXAMINER McMILLAN: Objection overruled.

13 THE WITNESS: Would you repeat the
14 question, please?

15 Q. (BY MS. SHAHEEN) With respect to the second
16 paragraph from the bottom of the page, which is the
17 fourth unnumbered page, the email of November 15th, at
18 1:01, and my question now is whether you responded to
19 Mr. Fowlkes -- actually, I think what I had asked is
20 whether you could infer from his statement that he was
21 not -- he did not accept some of the terms of the lease
22 COG had proposed.

23 A. It would look that way, yes. In that same
24 paragraph, he requests that Concho file a release of his
25 acreage, which we did.

1 Q. And did you, in response to this, propose any
2 revisions to the lease that had been provided to him?

3 A. We did in our offer in December, yes.

4 Q. So it was until -- it was a month later, after
5 this hearing had been continued, that you submitted
6 another lease offer to Mr. Fowlkes?

7 A. That is correct.

8 Q. And were the terms of the lease different in
9 the lease offer in December?

10 A. Yes, they were.

11 Q. And how were they different?

12 A. I believe the special working language in
13 paragraph, I believe, seven was different, and the
14 addendum was removed. Paragraph 12 was not included.

15 Q. Taking a look at Exhibit 6, can you identify
16 this document?

17 A. This is the proposal that was sent on December
18 15th, 2016.

19 Q. And if you go to the second page of Exhibit 6,
20 you'll see an oil and gas lease, correct?

21 A. That is correct.

22 Q. And that is the same Producers 88 form lease?

23 A. It's a similar form. It is not the exact form.

24 Q. It's not the exact form? Can you point out the
25 differences between this form and the previous form?

1 A. The lands covered only include the tract shown
2 in Section 28, and in paragraph ten, we have added "by,
3 through or under" language to the warranty provision in
4 an effort to work with some concerns as to that
5 provision from other parties.

6 Q. Can you point out where in paragraph ten?

7 A. The second line. The first sentence.

8 EXAMINER BROOKS: What exhibit are you
9 looking at?

10 THE WITNESS: Their Exhibit 6.

11 Q. (BY MS. SHAHEEN) So paragraph ten still
12 requires the lessor to warrant and defend the title,
13 correct?

14 A. Correct.

15 Q. Is there any other difference between the lease
16 that was offered on December 15th, after the hearing was
17 continued, and the previous two?

18 A. There was no top lease language included in
19 this lease.

20 Q. And is that because it was limited to the
21 spacing units?

22 A. That was our updated offer.

23 Q. And the updated offer was limited to the
24 spacing unit at issue in this proceeding, correct?

25 A. Correct.

1 Q. So there would be no need for a top lease here?

2 A. And the lease had expired.

3 Q. And when did the lease expire?

4 A. I believe late September. I don't know the
5 exact date.

6 Q. So the lease expired before -- actually, would
7 it surprise you that the lease expired prior to the
8 first lease offer?

9 A. Yes.

10 Q. It would surprise you?

11 A. Yes.

12 The one in August?

13 Q. Yes.

14 A. Yes.

15 Q. Why did you wait until after this hearing had
16 been continued before offering Mr. Fowlkes a lease on
17 the lands that were at issue in this proceeding?

18 A. We were still trying to get a mutual agreement
19 done with uncommitted interests.

20 Q. And had you reached out to Mr. Fowlkes
21 subsequent to his e-mails that we were looking at in
22 Exhibit 11?

23 A. Mr. Fowlkes sent numerous questions --

24 Q. Excuse me. Exhibit 9, for the record.

25 A. There are multiple correspondence with

1 Mr. Fowlkes back and forth asking questions that were
2 addressed as to wells drilled and other things of that
3 nature.

4 Q. Can you take a look at Exhibit 9 and show me
5 any correspondence that you provided to Mr. Fowlkes
6 specifically addressing his concerns about the lease
7 terms -- about the lease terms?

8 A. There's not any specific answers, no.

9 Q. And did the bonus payment differ in this third
10 offer?

11 A. It did.

12 Q. What was the bonus payment in the third offer?

13 A. \$1,600 per acre.

14 Q. What was the bonus-payment offer in the first
15 offer and the second offer?

16 A. \$1,500 per acre.

17 Q. What was the basis for determining the amount
18 to be offered?

19 A. Concho factors in numerous things when
20 evaluating offers, including royalty rates, primary
21 terms, ability to develop, available undeveloped zones
22 and commodity prices. It's a combination of all of
23 those things.

24 Q. Is there anything in particular that leads you
25 to believe the bonus payment of \$1,500 was a reasonable

1 offer?

2 A. All of those factors, yes.

3 Q. Why was it necessary for COG to make voluntary
4 participation contingent on acquiring 1,640 acres in the
5 first lease offer?

6 A. That was an offer set to offer the Fowlkes on
7 their entire position. We offered their entire position
8 in addition to the project area.

9 Q. Did you explain to Mr. Fowlkes, when you made
10 the first three -- the three lease offers -- excuse
11 me -- the first two lease offers, that a compulsory
12 pooling application would be filed if a voluntary
13 agreement was not reached within a certain period of
14 time?

15 A. I believe that was mentioned in an email, yes.

16 Q. Can you identify that email?

17 A. No, I can't.

18 Q. So you don't know for certain that you ever
19 mentioned to Mr. Fowlkes that there would be a
20 compulsory pooling filed for the 7H to when the lease
21 offer was made?

22 A. No.

23 Q. To your knowledge, when is the first time that
24 Mr. Fowlkes knew that there would be a compulsory
25 pooling application filed?

1 A. I assume when he received notice.

2 Q. When he received notice that the application
3 had been filed?

4 A. (Indicating.)

5 Q. Do you think it would have been important to
6 Mr. Fowlkes to know when he was provided the lease offer
7 that he would be force pooled if he did not reach a
8 voluntary agreement with COG?

9 A. Yes.

10 Q. Did COG inform him of that at the time it made
11 the lease offers?

12 A. No.

13 MS. SHAHEEN: Pass the witness.

14 MS. KESSLER: If I could just ask a few
15 more questions, unless you would like to ask questions
16 first.

17 EXAMINER BROOKS: Well, I'm going to ask
18 questions, but I'm glad for you to ask them first or if
19 you would prefer to wait until after the Examiners ask
20 their questions. There is no rule on that at the OCD,
21 but it seems appropriate to me because you may want to
22 follow up on something the Examiners raise.

23 So I'll turn it over to you. Do you want
24 to ask questions?

25 EXAMINER McMILLAN: You proceed.

1 EXAMINER BROOKS: Okay.

2 CROSS-EXAMINATION

3 BY EXAMINER BROOKS:

4 Q. Ms. --

5 EXAMINER BROOKS: I'm sorry. I forgot your
6 name.

7 MS. SHAHEEN: Shaheen.

8 EXAMINER BROOKS: Shaheen.

9 Q. (BY EXAMINER BROOKS) Ms. Shaheen asked you a
10 question and just to clarify the record -- and it's
11 Exhibit 6, the Respondent's Exhibit -- the Respondent's
12 Exhibit 6, not Concho's.

13 EXAMINER BROOKS: I've got too many files
14 on this case. Is this it?

15 EXAMINER McMILLAN: No.

16 EXAMINER BROOKS: Wrong file. Oh, I
17 believe it's over here. Yeah, yeah. And I put
18 something else in it.

19 Okay. I'm sorry I'm disorganized.

20 MS. SHAHEEN: I have an extra copy if that
21 would be helpful.

22 EXAMINER BROOKS: No, that's okay. I'm
23 going to find it here.

24 Q. (BY EXAMINER BROOKS) Exhibit Number 4 -- I
25 would like to call your attention to Exhibit Number 4

1 and Number 6 of the Fowlkes exhibits. There was a
2 question -- there were two questions asked about
3 paragraph ten concerning warranty. And the first one
4 was on Exhibit 4. That is -- lawyers and landmen know
5 these things, but not everybody else does. That is what
6 we would call in the trade a general warranty clause,
7 right?

8 A. That's correct.

9 Q. And in this tract -- by my rough calculation
10 over here, the lands described in this lease are a total
11 of 1,600 acres or somewhere in that range?

12 A. That's correct.

13 Q. So from a legal standpoint, is it not true --
14 is it not your understanding -- because you're not a
15 lawyer. You haven't been qualified to testify as a
16 lawyer, so whether you are one or not --

17 A. I'm not.

18 Q. -- I don't know. But anyway, is it your
19 understanding that if a lessor signs a clause like
20 paragraph ten in Exhibit 4, that they would be liable to
21 return the money paid for the lease unless they own that
22 entire -- 100 percent interest in the entire 1,600
23 acres, the money or a portion -- or a large portion
24 thereof?

25 A. If they don't own --

1 Q. If they don't own the entire 1,600 acres.

2 A. Right, but the second part of that paragraph
3 covers.

4 Q. Well, the second part of the paragraph relates
5 to proration of what they get.

6 A. Right.

7 Q. But I also want to -- you said, in response
8 to -- when you were talking about paragraph ten of
9 Exhibit 6 -- which is different, right --

10 A. Correct.

11 Q. -- you said, in response to a leading question
12 from counsel for Fowlkes, that it still warrantied title
13 to the property. Well, that's not really technically
14 accurate, is it?

15 A. It's only by, through or under lessor.

16 Q. So, in effect, they're not warrantied that they
17 own the property -- that they own the property; they
18 shouldn't take title to the property that they haven't
19 previously deeded that property to someone else?

20 A. That is correct.

21 Q. Okay. I just wanted to get that clear for the
22 record.

23 Now, over what period of time did these
24 negotiations with Mr. Fowlkes take place?

25 A. They originated in August.

1 Q. August of 2016?

2 A. Yes, sir.

3 Q. Okay. And when did -- when was the last
4 activity?

5 A. The letter -- an offer was sent December 16th.

6 Q. Okay. And that would have been Exhibit 6?

7 A. Yes, sir.

8 Q. Or was that -- when was the -- when was the
9 offer to participate?

10 A. That was --

11 Q. Working.

12 A. -- October 7th.

13 Q. Okay. Thank you. That's all I have.

14 EXAMINER McMILLAN: I have nothing to add.
15 Your redirect, I guess.

16 REDIRECT EXAMINATION

17 BY MS. KESSLER:

18 Q. Just a couple of questions, Mr. Godwin.

19 It looks like approximately five months --
20 four-and-a-half to five months of communication with
21 Mr. Fowlkes. Were there material changes to the lease
22 offer made between the second lease offer and the final
23 lease offer?

24 A. No, there were not.

25 Q. But there was a change in terms, correct?

1 A. Yes, that's correct.

2 Q. And those were in response to Mr. Fowlkes'
3 concerns?

4 A. And other members of the family's concerns,
5 also.

6 Q. Did Mr. Fowlkes ever make a counteroffer?

7 A. Not specifically, no.

8 MS. KESSLER: Nothing further.

9 EXAMINER McMILLAN: Before we go any
10 further, Exhibits 1 through 6 by Patrick Fowlkes would
11 have to be accepted as part of the record; is that
12 correct?

13 MR. HALL: I think we can tender all of our
14 exhibits at the conclusion of our direct examination of
15 the witness. It gets us to the same place.

16 EXAMINER McMILLAN: Well, but let's -- but
17 the way I'm going to do it -- I'd like to have -- since
18 we discussed Exhibits 1 through 6, would there be
19 objections to making those right now as part of the
20 record?

21 MR. HALL: We don't object.

22 MS. KESSLER: We don't object.

23 MR. PADILLA: No objection.

24 EXAMINER McMILLAN: Okay. Exhibits 1
25 through 6 may now be accepted as part of the record.

1 (Patrick Fowlkes Exhibit Numbers 1 through
2 6 are offered and admitted into evidence.)

3 MS. SHAHEEN: Mr. Examiner, may I ask just
4 a couple more questions of Mr. Godwin?

5 EXAMINER BROOKS: I don't see any harm.

6 EXAMINER McMILLAN: Okay. Please proceed.

7 RECROSS EXAMINATION

8 BY MS. SHAHEEN:

9 Q. Mr. Godwin, the operating agreement, did it
10 have a depth limitation?

11 A. It did not. I don't believe it did.

12 MS. KESSLER: Mr. Examiner, I believe the
13 scope of this is outside what we talked about in our
14 original direct.

15 EXAMINER BROOKS: Well, I'll have to agree
16 with that. If you want to not go there, I guess you
17 have that right. So I'll sustain the objection.

18 MS. SHAHEEN: It was part of an offer to
19 participate, so it would be our position it would be
20 relevant.

21 EXAMINER BROOKS: Is this one of the
22 exhibits that's in evidence? Is it an exhibit that
23 is --

24 MS. SHAHEEN: The operating agreement. I
25 didn't include it as an exhibit, although, actually,

1 Exhibit -- let's see. It's part of the working interest
2 offer proposal, so that would be Exhibit 2.

3 EXAMINER BROOKS: I think you can ask about
4 it, because if it's to clarify something that's already
5 been admitted into evidence, and your exhibits were
6 already admitted into evidence just a minute ago,
7 so --

8 MS. KESSLER: I don't believe the operating
9 agreement is part of --

10 MS. SHAHEEN: No. You're correct. The
11 operating agreement is not, but if you take a look at
12 Exhibit 2, the cover letter to the working interest
13 proposal identifies a depth limitation.

14 EXAMINER BROOKS: Okay. I believe that --
15 that being true, I believe that's a valid subject to --
16 that may be gone into. I'll overrule the objection.

17 Q. (BY MS. SHAHEEN) Can you describe the depth
18 limitation that's described in Exhibit Number 2?

19 A. Where it refers to testing the Bone Spring --
20 2nd Bone Spring Formation? Is that what you're
21 referring to?

22 Q. Yes.

23 And was the December lease offer -- was
24 that lease offer depth limited?

25 A. It was not.

1 MS. SHAHEEN: Thank you, Mr. Examiner.

2 MR. PADILLA: Mr. Examiner, I have a couple
3 of questions.

4 EXAMINER McMILLAN: Okay. Please proceed.

5 CROSS-EXAMINATION

6 BY MR. PADILLA:

7 Q. Mr. Godwin, have you received any
8 communications from Beacon E&P?

9 A. I received an email from them yesterday, and we
10 also had a phone conversation.

11 Q. And do you have any doubt -- well, do you have
12 any plans to meet with Beacon?

13 A. Yes. We plan to work with them to hopefully
14 come to a mutual agreement.

15 MR. PADILLA: Okay. I have no further
16 questions.

17 EXAMINER JONES: And I should ask a
18 question.

19 EXAMINER McMILLAN: Please proceed.

20 CROSS-EXAMINATION

21 BY EXAMINER JONES:

22 Q. Mr. Godwin, Aaron Myers, does he work with your
23 team or --

24 A. He did at the time, yes.

25 Q. He did at the time?

1 A. Yes.

2 Q. Does he work for you, or does he --

3 A. No. We both work for Concho. We're
4 counterparts.

5 Q. So you talk together?

6 A. Yes.

7 Q. And you've talked about this case?

8 A. Yes.

9 Q. Thank you.

10 EXAMINER BROOKS: Nothing further from me.

11 EXAMINER McMILLAN: Thank you.

12 MS. KESSLER: We'll call our next witness.

13 EXAMINER McMILLAN: Please proceed.

14 HENRY ZOLLINGER,

15 after having been previously sworn under oath, was
16 questioned and testified as follows:

17 DIRECT EXAMINATION

18 BY MS. KESSLER:

19 Q. Please state your name for the record and tell
20 the Examiners by whom you're employed and in what
21 capacity.

22 A. Henry Zollinger. I work for COG Operating, LLC
23 in the capacity of geologic teammate.

24 Q. Have you previously testified before the
25 Division?

1 A. Yes.

2 Q. Were your credentials as a petroleum geologist
3 accepted and made a matter of record?

4 A. They were.

5 Q. Are you familiar with the application filed in
6 this case?

7 A. Yes.

8 Q. And have you conducted a geologic study of the
9 lands that are the subject of this application?

10 A. I have.

11 MS. KESSLER: Mr. Examiners, I would tender
12 Mr. Zollinger as an expert in petroleum geology.

13 EXAMINER McMILLAN: Any objections?

14 MR. PADILLA: No.

15 MS. SHAHEEN: No objections.

16 EXAMINER McMILLAN: So qualified.

17 Q. (BY MS. KESSLER) Mr. Zollinger, please turn to
18 Exhibit 7. Identify this exhibit and walk us through
19 it.

20 A. This is a locator map for the proposed
21 wellbore, which is in the triple-dashed line, for the
22 Graham Nash Federal Com 7H. The surface-hole location
23 is denoted by the square north of Section 28. The
24 orange dots and lines represent producing 2nd Bone
25 Spring Sand wells in the area, and the acreage for COG

1 that is relevant to this case is colored yellow.

2 Q. What is Exhibit 8?

3 A. Exhibit 8 is a subsea structure map on the top
4 of the 2nd Bone Spring Sand. What you can see from this
5 map is the dip is fairly uniform, with 50-foot contours.
6 There is not a lot of variation within the dip along
7 those contours. It does not show any faults, pinch-outs
8 or geologic impediments to drilling horizontal wells.

9 Q. And you mentioned there is not much dip in this
10 section?

11 A. Correct.

12 Q. What is Exhibit 9?

13 A. Exhibit 9 is the same map as the previous two
14 exhibits without the subsea structure map. The green
15 line denotes three wells, which make up the cross
16 section for the following Exhibit 10.

17 Q. Is this acreage along the Texas border?

18 A. Yes, it is.

19 Q. And you use three wells to put together the
20 cross section, which is the following exhibit, correct?

21 A. That is correct.

22 Q. And do you consider these wells to be
23 representative of wells in the area?

24 A. Yes, I do.

25 Q. If we can look at Exhibit 10, would you please

1 identify this exhibit?

2 A. This is a three-well cross section mentioned in
3 the previous exhibit. The orange lines that are on
4 here, the bottom orange line is our datum. So this is a
5 stratigraphic cross section flattened on the base of the
6 2nd Bone Spring Sand. The top orange line is the top of
7 the 2nd Bone Spring Sand as we have it mapped. As you
8 can see through these three wells, the stratigraphy does
9 not change a lot, and the thickness remains fairly
10 constant.

11 Q. Based on your geologic study of this area, have
12 you identified any geologic hazards to drilling a
13 mile-and-a-half horizontal well?

14 A. I have not.

15 Q. And in your opinion, do you believe that the
16 tract can be efficiently and economically developed by a
17 horizontal well?

18 A. Yes.

19 Q. Do you believe each tract in the nonstandard
20 spacing unit will contribute more or less equally to
21 production from the well?

22 A. Yes.

23 Q. And will the completed interval for the well
24 comply with the Division's horizontal well rules?

25 A. Yes.

1 Q. So 330 setbacks will apply?

2 A. That is correct.

3 Q. In your opinion, will the granting of COG's
4 application be in the best interest of conservation, for
5 the prevention of waste and the protection of
6 correlative rights?

7 A. Yes.

8 MS. KESSLER: Mr. Examiners, I move
9 admission of Exhibits 7 through 10.

10 MR. PADILLA: No objection.

11 MS. SHAHEEN: No objection.

12 EXAMINER McMILLAN: Exhibits 7 through 10
13 may now be accepted as part of the record.

14 (COG Operating, LLC Exhibit Numbers 7
15 through 10 are offered and admitted into
16 evidence.)

17 CROSS-EXAMINATION

18 BY EXAMINER McMILLAN:

19 Q. Okay. I've got a question for you on Exhibit
20 7.

21 A. Yes, sir.

22 Q. I guess you've got some wells in Texas and
23 whatever is east of Section 5?

24 A. Yes, sir.

25 Q. What are the setbacks in there; do you know?

1 A. I believe they're 200 from the state line.
2 They're in the Sandbar field -- Sandbar-Bone Spring
3 field. I should actually make a slight correction.
4 That's from the north and south of those wellbores.
5 East and west, the setbacks are 330 feet, just like in
6 New Mexico, to the leaselines.

7 Q. Okay. So my question is on Exhibit 10. Do you
8 expect one -- do you expect to have one lateral through
9 that whole interval, or do you think you have the
10 possibility of having multilaterals in that interval?

11 A. The plan now is for one lateral in the 2nd Bone
12 Spring Sand to develop this proration unit.

13 EXAMINER McMILLAN: Go ahead.

14 EXAMINER JONES: Okay.

15 CROSS-EXAMINATION

16 BY EXAMINER JONES:

17 Q. So one lateral in the Bone Spring right now,
18 but you're pooling -- you're pooling the spacing unit in
19 this pool, so --

20 A. Yes.

21 Q. -- you could potentially propose subsequent
22 wells and then propose those on their own costs?

23 A. Potentially, yes.

24 Q. Okay. Potentially?

25 A. Potentially. There are no plans at this time

1 for that.

2 Q. Where would you drill if you had some money?

3 A. If I had my own money?

4 Q. Well, yeah. I feel for you there. I
5 understand that one.

6 (Laughter.)

7 A. Within the Bone Spring.

8 Q. Would it be uphole in the 1st Bone Spring or
9 the Avalon or the Leonard or --

10 A. Right now, I believe the 2nd Bone Spring is our
11 best target. If I had to spend more money right now, it
12 would not be in the other formations on this proration
13 unit.

14 Q. Okay. I don't have any other questions.

15 CROSS-EXAMINATION

16 BY EXAMINER BROOKS:

17 Q. What is the drilling schedule for this well?

18 A. The drilling schedule is currently slated for a
19 February 13th spud on this well.

20 Q. Thank you.

21 EXAMINER JONES: Hmm.

22 CROSS-EXAMINATION

23 BY MS. SHAHEEN:

24 Q. Do you have a drilling permit for the 7H?

25 A. Yes, ma'am.

1 Q. When did you receive that?

2 A. I'm not sure.

3 Q. If you could take a look at your Exhibit 1.

4 A. I don't see the date this was administered on
5 Exhibit 1.

6 Q. This well was previously the subject of another
7 compulsory pooling application. Do you recall that,
8 Case Number 15292?

9 A. I wasn't party to that case. I understand
10 there was a case previously for this proration unit, but
11 I was not part of it.

12 Q. If you take a look at Exhibits 7 and 8 --
13 that's Mr. Fowlkes' Exhibits 7 and 8 -- this may refresh
14 your memory.

15 A. Okay.

16 Q. This application actually -- excuse me. This
17 case number, 15291, is a related case to Case Number
18 15292, and you previously testified in Case Number
19 15291, which is --

20 A. No, ma'am, I did not. That would be
21 Mr. Bergman, B-E-R-G-M-A-N.

22 Q. Can you tell me the other productive wells that
23 you have in Section 28?

24 A. In Section 28 or in the proration unit that's
25 in question?

1 Q. In Section 28.

2 A. There is a wellbore -- I'm unfamiliar with the
3 name, another Graham Nash well, which is a lay-down in
4 the north half-north half, which is drilled in the
5 Avalon Formation of the Bone Spring, and then there are
6 two 2nd Bone Spring laterals, mile and a half, on either
7 side of this wellbore which we're pooling today.

8 Q. And they're all productive, correct?

9 A. Yes, ma'am.

10 Q. Have any other wells been drilled in or through
11 Section 28?

12 A. I don't believe so.

13 Q. And the 7H, that -- let me make it clear. That
14 has not been drilled?

15 A. It has not been drilled, no.

16 Q. Are there any wells that have been drilled in
17 Section 28 that are not productive?

18 A. Not that I'm aware of.

19 Q. What about the 13H? Has that well been
20 drilled?

21 A. Which one is that? No. No, no. That one has
22 not been drilled.

23 Q. Has it been permitted?

24 A. Yes.

25 Q. Do you have plans to drill it?

1 A. As the 13H, no.

2 Q. What is the target Bone Spring interval here?

3 A. For which wellbore?

4 Q. For the 7H.

5 A. For the 7H, it would be the 2nd Bone Spring.

6 Q. And does COG agree to limit the vertical extent
7 of the compulsory pooling order to that interval?

8 A. To the Bone Spring Formation, yes. To the 2nd
9 Bone Spring, we're not pooling -- we're pooling -- we're
10 pooling the pool of the 2nd Bone Spring.

11 Q. And the operating agreement is limited to the
12 2nd Bone Spring?

13 A. For this wellbore, yes.

14 Q. But you're seeking force pooling for the entire
15 Bone Spring even though the operating agreement is only
16 for the 2nd Bone Spring and the working interest is only
17 for the 2nd Bone Spring?

18 A. I believe that's how this works.

19 Q. Have you communicated any plans to the unleased
20 minerals owners for the development of other depths at
21 this time?

22 A. Have I? I have not.

23 Q. Has COG?

24 A. I'm not aware of any, no.

25 Q. Thank you.

1 EXAMINER McMILLAN: Let's take a ten-minute
2 break, and we'll come back.

3 (Recess 10:57 a.m. to 11:06 a.m.)

4 EXAMINER McMILLAN: I'd like to call the
5 hearing back to order.

6 For the record, we will convene for lunch
7 at 11:40. So proceed.

8 EXAMINER BROOKS: You mean unconvene.

9 EXAMINER McMILLAN: Yeah. Unconvene. Good
10 thing I ain't a lawyer.

11 Proceed.

12 MS. KESSLER: Mr. Examiner, one follow-up
13 question for Mr. Zollinger.

14 REDIRECT EXAMINATION

15 BY MS. KESSLER:

16 Q. If we could go to Fowlkes Exhibit 2,
17 Mr. Zollinger. Was the operating agreement limited in
18 depth to the 2nd Bone Spring?

19 A. I do not believe so. I believe it was limited
20 to the Bone Spring Formation.

21 MS. KESSLER: Okay. That's all I have.

22 RECROSS EXAMINATION

23 BY MS. SHAHEEN:

24 Q. If I could just follow up on Exhibit Number 2,
25 the first paragraph. COG proposed here to set the 2nd

1 Bone Spring Sand Formation, correct?

2 A. Yes, ma'am.

3 Q. And then are you saying that the form operating
4 agreement that was subsequently proposed only a week
5 before the application was filed was not limited to the
6 2nd Bone Spring as it was represented here?

7 A. In this paragraph, I don't see anything that
8 says that it's limited to the Bone Spring Formation,
9 just that this well will be tested in the 2nd Bone
10 Spring Formation.

11 MS. SHAHEEN: Mr. Examiner, we would
12 propose to supplement the record with a copy of the
13 operating agreement, since it's been discussed here
14 today.

15 MS. KESSLER: I believe that the exhibits
16 have already been entered into the record, and I don't
17 see the need to do that.

18 EXAMINER BROOKS: Well, I don't see
19 where -- I think it's relevant to the proceedings, so I
20 would recommend that we grant the request.

21 EXAMINER McMILLAN: Okay. Please.

22 MS. KESSLER: Do you have a copy?

23 MS. SHAHEEN: I have a copy somewhere that
24 I can locate.

25 MS. KESSLER: I would just say if it's

1 going to be supplemented to include the operating
2 agreement, that we should have a copy of the operating
3 agreement in the record.

4 EXAMINER BROOKS: Well, certainly a copy
5 should be provided to all counsel and -- to the court
6 reporter and all counsel and to the Division.

7 MS. SHAHEEN: I can give you a copy now.
8 For some reason, I do have one copy.

9 EXAMINER BROOKS: Well, yeah. You may give
10 it to -- give it to Ms. Kessler to look at. Other than
11 that, I don't think we'll need to keep your copy. I
12 think we need you to produce us copies for everybody.

13 MS. SHAHEEN: We're happy to do that.
14 We'll mark this as Exhibit 12 and provide it to
15 Ms. Kessler.

16 EXAMINER BROOKS: Yeah.

17 MR. HALL: We can tender this one into the
18 record.

19 EXAMINER BROOKS: Okay. If there is any
20 question about it, we'll have to establish that, in
21 fact, it is the operating agreement in question.
22 Hopefully there won't be an issue.

23 (P. Fowlkes Exhibit Number 12 marked.)

24 MS. KESSLER: If I could just have --

25 EXAMINER BROOKS: You may.

1 REDIRECT EXAMINATION

2 BY MS. KESSLER:

3 Q. Mr. Zollinger, if you could just look at
4 Exhibit A to the operating agreement, and could you read
5 from there any depth limitations?

6 A. It states "None."

7 EXAMINER BROOKS: Thank you.

8 MS. KESSLER: Thank you.

9 RECROSS EXAMINATION

10 BY MS. SHAHEEN:

11 Q. Mr. Zollinger, with respect to the provision
12 regarding the initial well, is there a depth limitation
13 there?

14 A. I do not see one. I see a statement stating
15 that the initial well will test -- will be drilled to a
16 depth sufficient to test the 2nd Bone Spring Sand
17 Formation.

18 Q. Thank you.

19 MS. SHAHEEN: We would offer the admission
20 of Exhibit 11.

21 MS. KESSLER: No objection.

22 EXAMINER McMILLAN: Exhibit 11 may now be
23 accepted part of the record.

24 MS. SHAHEEN: Excuse me. Exhibit 12.

25 EXAMINER McMILLAN: Exhibit 12 may now be

1 accepted as part of the record.

2 (P. Fowlkes Exhibit Number 12 is offered
3 and admitted into evidence.)

4 EXAMINER McMILLAN: Go ahead.

5 EXAMINER BROOKS: I don't have anything.
6 Everybody is sitting looking at everybody
7 else.

8 EXAMINER McMILLAN: No questions.

9 EXAMINER JONES: Could it go to the court
10 reporter or --

11 EXAMINER BROOKS: Well, the exhibit is
12 admitted, and we need to distribute it to everybody. I
13 think that if you will undertake to furnish a copy to
14 the Division and to each counsel present and to the
15 court reporter, that can be taken care of. If you will
16 visit with the court reporter at the end of the
17 proceedings and work out the details, that will be
18 great.

19 MS. SHAHEEN: We're happy to do that.

20 MR. HALL: We have no further questions of
21 this witness.

22 EXAMINER BROOKS: Good. Would the witness
23 step down?

24 THE WITNESS: Thank you.

25 MS. KESSLER: That concludes my

1 examination.

2 MS. SHAHEEN: I would call Mr. Fowlkes,
3 please.

4 And I'm assuming that all of the exhibits
5 are there and in an order that you can find them. You
6 might want to take a minute to make sure they're all
7 there.

8 PATRICK K. FOWLKES,
9 after having been previously sworn under oath, was
10 questioned and testified as follows:

11 DIRECT EXAMINATION

12 BY MS. SHAHEEN:

13 Q. Would you state your name for the record?

14 A. It's Patrick Kelley Fowlkes.

15 Q. And where do you reside?

16 A. I live in Marfa, Texas.

17 Q. What is your profession?

18 A. I'm in the ranching business and real estate
19 brokerage business as well.

20 Q. Do you work in the oil and gas business?

21 A. No, ma'am.

22 Q. Have you ever worked in the oil and gas
23 business?

24 A. No, ma'am.

25 Q. On whose behalf are you offering testimony

1 today?

2 A. On behalf of myself.

3 Q. And what is the purpose of your testimony
4 today?

5 A. To advocate for my mineral interests in the
6 compulsory pooling of the Graham Nash 7H.

7 Q. Are you familiar with the application filed in
8 this case?

9 A. Yes, ma'am.

10 Q. Can you describe your interest in the lands
11 that are the subject of this application?

12 A. I believe it's a half percent, possibly.

13 Q. Approximately, correct?

14 A. Approximately, more or less.

15 Q. Can you describe the lease history that's
16 related to this particular acreage?

17 A. There was an OGX lease made in 2008, I believe,
18 and then another lease with COG made in, I believe,
19 January of 2013.

20 Q. And the lands that were the subject of the
21 initial lease offer, those lands were covered by the two
22 leases; is that correct?

23 A. Yes, ma'am, I believe so. The 11 sections
24 were.

25 Q. And to your knowledge, when did those leases

1 expire?

2 A. I anticipated that they expired roundabout when
3 the initial lease offer letter was proposed or
4 September, give or take some time.

5 EXAMINER BROOKS: Mr. Examiner, did you --

6 EXAMINER McMILLAN: Yeah. What kind of
7 witness is he -- is he going to be? Is he an expert
8 witness?

9 MS. SHAHEEN: No, no. He's a fact witness.

10 MR. HALL: He's going to opine -- he's --
11 under New Mexico law, he may opine as to the value of
12 his own property.

13 EXAMINER BROOKS: That's correct.

14 EXAMINER McMILLAN: I just want to make
15 sure.

16 EXAMINER BROOKS: He need not be qualified
17 as an expert if he's not going to testify as an expert.

18 EXAMINER McMILLAN: Okay.

19 Q. (BY MS. SHAHEEN) And in your opinion, did COG
20 make a good-faith effort to obtain a voluntary agreement
21 with you with respect to your interest in the lands that
22 are the subject of this application?

23 MS. KESSLER: Objection, Mr. Examiner.
24 This would be an opinion -- opinion question -- opinion
25 answer, and he has not been qualified as an expert. So

1 he can't evaluate good faith. Within the Oil
2 Conservation Division, he has not been qualified as an
3 expert, so he may not offer his opinion.

4 EXAMINER BROOKS: Well, I think also it's
5 kind of asking the witness to make -- give an opinion as
6 to another person's state of mind, so I will sustain the
7 objection.

8 MS. SHAHEEN: Mr. Examiner, I would submit
9 that a good faith -- question of good faith is a fact
10 question, and there should be evidence allowed to
11 support whether there's been good faith.

12 EXAMINER BROOKS: Well, in this
13 proceeding, I think -- in these proceedings, I think you
14 have a point. I'll reverse my ruling. I don't like to
15 do that very often, but once in a while I do.

16 MS. KESSLER: Mr. Examiner, I would
17 resubmit that good faith here is a legal question.

18 EXAMINER BROOKS: Well, I think -- I think
19 you're right, but I still think that his opinion is
20 relevant to the determination at issue.

21 Q. (BY MS. SHAHEEN) So I'll ask the question
22 again. In your opinion, as the participant in the
23 negotiations, did COG make a good-faith effort to obtain
24 a voluntary agreement with you with respect to your
25 interest in the lands that are the subject of this

1 application?

2 A. Well, in regards to the letter that was offered
3 August 18th, 2016 by Aaron Myers, there was not a lease
4 proposal attached to it, so I really didn't know what
5 terms I would be negotiating on this particular lease.
6 It was just a legal description and a monetary amount
7 per acre. And so without the contract, there was no
8 deal as far as I was concerned.

9 Q. And you're speaking about Exhibit 1; is that
10 correct?

11 A. Yes, ma'am.

12 Q. Your Exhibit 1?

13 A. Yes, ma'am.

14 Q. Was this the first communication that you had
15 from Concho regarding these lands?

16 A. Yes, ma'am, it was.

17 Q. And did they inform you at that time that they
18 were planning to drill the 7H?

19 A. No, ma'am.

20 Q. Did they inform you that these specific lands
21 that are the subject of this proceeding would be force
22 pooled?

23 A. No, ma'am.

24 Q. And so you didn't consider this one-page letter
25 without lease terms to be a valid offer to voluntary

1 pooling your interest?

2 A. No. There were no terms to negotiate on the
3 deal, so I didn't consider it a valid offer.

4 Q. And what acreage was included in that lease
5 offer, just to be clear?

6 A. The 11 sections in Township 26 South, Range 28
7 East, and Township 26 South, Range 29 East NMPM.

8 Q. Well, it wasn't limited to the acreage at issue
9 here?

10 A. No.

11 Q. Did the letter identify any particular depths?

12 A. No, ma'am.

13 Q. Do you think it was reasonable to have to
14 commit all of your acreage by lease in order to have a
15 voluntary agreement for the well proposed in this
16 proceeding?

17 A. No, not at all.

18 Q. Did you have any further communications with
19 Concho about the August 18th lease offer?

20 A. I believe I spoke to Aaron Myers via telephone
21 when he was still in that particular part of the Concho
22 land office, and he just explained to me that -- you
23 know, the difficulties of Concho -- or that Concho was
24 having, that continuously drilling with a 180-day
25 drilling clause that was in the previous leases. And I

1 understood that. So I thought he was going to present
2 terms, and I never received those until about 74 days
3 later.

4 Q. So you spoke with him after you received the
5 initial lease offer, but you still had not received the
6 lease terms?

7 A. No, ma'am. And then it was transferred to
8 Patrick Godwin after that.

9 Q. Let's turn to Exhibit 2. And this is your
10 Exhibit 2. And we looked at this document previously
11 with Mr. Godwin, I believe. Can you identify it for us
12 as well?

13 A. Yes, ma'am.

14 Q. And tell us what it is.

15 A. It's the well proposal of the Graham Nash 7H,
16 an AFE, plus the \$6 million-plus.

17 Q. And what's the date of this proposal?

18 A. October 6th, 2016.

19 Q. What were your thoughts when you received this
20 working interest proposal?

21 A. I was still waiting on the terms of the initial
22 offer, and then I received a working interest. I
23 thought we were going to negotiate a lease, and I
24 received a working interest proposal.

25 Q. Was the working interest proposal limited to

1 the spacing unit for the well proposed here, the 7H?

2 A. The working interest proposal? Yes.

3 Q. Was it depth limited?

4 A. I don't believe so.

5 Q. If you take a look at that first paragraph of
6 Exhibit 2, does it refer to a specific formation?

7 A. The 2nd Bone Spring Sand Formation.

8 Q. Did you receive an operating agreement when you
9 received this working interest proposal?

10 A. No, ma'am. It was strictly the AFE. The
11 operating agreement came later.

12 Q. How much later?

13 A. It seemed like possibly November 7th, if I'm
14 correct. I'm not sure, but --

15 Q. We'll take a look at that letter.

16 Did the October 6th letter give you a
17 deadline for responding to their proposal?

18 A. I don't believe so. I believe the operating
19 agreement did, though.

20 Q. So you had no -- you were not aware of any
21 deadline to respond to this working interest proposal?

22 A. Yes, ma'am. Like I said, you know, I just
23 really didn't want to participate in a working interest
24 situation, so I was still waiting on my terms from the
25 initial offer.

1 Q. And did the letter with the working interest
2 proposal, did it give you a -- did it indicate the
3 proportional amount that you would need to pay to
4 participate in the well?

5 A. No, ma'am.

6 Q. Did the AFE identify the amount that you
7 yourself --

8 A. No. It just stated the total amount or total
9 costs of the well.

10 Q. Did the letter inform you that you would be
11 force pooled if you did not respond?

12 A. No, ma'am.

13 Q. Have you ever participated in a well that's
14 being force pooled?

15 A. No, I sure haven't.

16 Q. Did you subsequently talk to anyone at Concho
17 about the working interest proposal?

18 A. I wrote Patrick Godwin an email that basically,
19 I believe, none of my other family members wanted to
20 participate in a working interest and I was in agreement
21 with them and that I continued to want to negotiate
22 terms or, you know, work out a deal with Concho or COG.

23 Q. And what was -- what was Concho's response?

24 A. There really wasn't much response to those
25 emails. It seemed like it was pretty much you're in a

1 working interest deal or take the Producers 88 on its
2 terms.

3 Q. Did you consider this working interest proposal
4 to be a valid offer to voluntarily pool your interest?

5 A. No.

6 Q. Why not?

7 A. I just would have preferred to work out a lease
8 really.

9 Q. And did you inform Concho of that?

10 A. Yes, ma'am. Repetitively, you know, I told
11 them -- or told Patrick Godwin that I was interested in
12 working out a deal with them.

13 Q. Did you think it was reasonable for COG to
14 expect you to participate as a working interest owner?

15 A. No, ma'am.

16 Q. Let's turn to Exhibit 3. Again, I think we
17 previously discussed this with Mr. Godwin, but could you
18 identify it for us again?

19 A. This is just basically the same offer that was
20 made August 18th, 2016 from Concho, and at this time, it
21 had the terms along with it, the lease. The proposal
22 came with this offer at the same bonus and the same
23 legal description.

24 Q. So that included all of your minerals in 11
25 different sections, correct?

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

2 Q. To lease those was how much?

3 A. \$1,500 an acre.

4 Q. How did the October 31st lease proposal differ
5 from the August lease proposal?

6 A. The terms were with it. The lease proposal
7 came with it the Producers 88.

8 Q. So to your understanding, there was no
9 difference between the first lease proposal and the
10 second lease proposal; is that correct?

11 A. Yes, ma'am.

12 Q. The second lease proposal was not limited to
13 the spacing unit proposed here today, is it?

14 A. No. It was an attempt to acquire the entire
15 acreage.

16 Q. And was it depth limited in any way?

17 A. I don't believe so.

18 Q. If you'll turn to Exhibit 4, this is the form
19 lease that was provided to you on October 31st, correct?

20 A. Yes, ma'am.

21 Q. Were there any terms in this lease that you
22 considered unreasonable?

23 A. Just the fact that the lease was made subject
24 to the prior OGX and COG lease. I believe the 365-day
25 drilling clause warranting title as well would be

1 something that you would want to tweak.

2 Q. And did you discuss this lease proposal with
3 anyone from Concho?

4 A. Yes, ma'am. I just basically reached out to
5 Patrick Godwin that it would be ideal to get something
6 similar -- what was similarly negotiated with COG back
7 in 2013.

8 Q. And did they respond to you?

9 A. Somewhat. But it just seemed like it was just
10 a wall where you were going to have to take the
11 Producers 88 or be in the working interest.

12 Q. So it was your understanding that it was a
13 take-it-or-leave-it deal?

14 A. Yes, ma'am. And another point I'd like to
15 point out as far as the legal description, it doesn't
16 have Section 21 on there, so there's an acreage
17 differentiation. I don't know if 21's held by
18 production, but I wouldn't want to be in another
19 clerical error forced pooling, you know, negotiation
20 again due to the fact that that section was left off.

21 Q. So the lease offer on Exhibit Number 3 included
22 Section 21?

23 A. That's correct.

24 Q. But the lease that was submitted to you -- the
25 proposed lease did not include Section 21?

1 A. Yes, ma'am. And the gross mineral acreage
2 seems to be off as well, or there is a variation there.
3 I think -- I think there should be 1,600 acres or so,
4 and I think it amounts to what is Section 21, is what it
5 is, to make up the difference.

6 Q. So when you reached out to Concho about this
7 lease, did they offer to revise the terms of the lease
8 at that time?

9 A. No. I made multiple communications with
10 Patrick Godwin. I thought we would come to a point
11 where we would be able to negotiate a deal, but it
12 just -- he reached out to me to give him a call and
13 whatnot, but I didn't see that it would be any point in
14 that just because it seemed like it was just, you know,
15 take it or leave it; take the one deal, or you'll be in
16 a working interest or a forced pool. But I continue to
17 try to work with him because, you know, I wanted to get
18 to a point where we make an amenable deal.

19 Q. And, in fact, you didn't receive a revised
20 lease proposal until after the hearing in this matter
21 had been continued; is that correct?

22 A. Yes, ma'am, on the one section, 28. And it was
23 just difficult without an addendum on that as well, and
24 I just was thinking I'd be up here every quarter in a
25 compulsory force pooling on the remainder of the acreage

1 if I just look a lease on one particular section like
2 that. So that was something I didn't want to do.

3 Q. Let's turn to Exhibit 5. And can you describe
4 this document for us?

5 A. It's the operating agreement.

6 Q. Is Exhibit Number 5 itself the operating
7 agreement?

8 A. No. It's just a letter -- letter that the
9 operating agreement came with.

10 Q. And do you recall when you received this
11 letter?

12 A. November 7th, 2016.

13 Q. That's the date of the letter, correct?

14 A. Yes, ma'am, the letter, so more or less give or
15 take a few days. It takes a while to get out there to
16 me, so somewhere around -- around the 9th, 10th or so,
17 the 11th or so.

18 Q. And the application for this proceeding wasn't
19 filed until the 15th, correct?

20 A. Yes, ma'am. That is correct.

21 Q. So this letter with the operating agreement
22 didn't go out until a week before the application was
23 filed; is that correct?

24 A. Yes, ma'am.

25 Q. What was your impression of the operating

1 agreement?

2 A. It was just a large inundated stack of
3 documents that I'm pretty unfamiliar with. And like I
4 said, I thought it was ideal to continue to try to
5 advocate and work with Patrick Godwin to make a deal.

6 Q. To make a lease deal?

7 A. Yes, ma'am.

8 Q. Were there additional terms in the proposed
9 operating agreement that appeared to have been inserted
10 by Concho?

11 A. I wouldn't know for certain on that.

12 Q. Did you discuss the operating agreement with
13 anyone?

14 A. I did with Patrick Godwin as far as that one
15 email, that I just told him -- not the particular
16 operating agreement but just the working interest
17 proposal, that it was just something I really wasn't
18 capable of doing or interested.

19 Q. If you had been interested in participating as
20 a working interest owner, would you have needed more
21 time after you received the operating agreement to --

22 A. I'm not an expert, but I would think so.

23 Q. About how much time would you think would be
24 reasonable for you to digest that operating agreement?

25 A. Several weeks.

1 Q. If you'll turn to Exhibit 9, can you describe
2 what is contained in Exhibit 9 for us?

3 A. It's just an email correspondence that I was
4 having with Patrick Godwin -- or had with Pat Godwin,
5 just because it seemed like we weren't getting anywhere
6 with negotiating the lease. It seemed like it was the
7 Producers 88 or the working interest. So being that the
8 leases had expired, I thought it would be best to get
9 the acreage released. That way we could basically start
10 negotiating in good faith at arm's length again, at that
11 point is what I hoped for.

12 Q. So if you turn to the first email, November
13 14th, 2016, the last two sentences -- or actually the
14 last sentence here, "It would appear that rather than a
15 'Top Lease,' a new lease should be taken," you mention
16 that "both leases have expired by their terms, and would
17 no longer be in full force or effect." When you talked
18 about the top lease to Mr. Godwin, did you get a
19 response from him about making any changes?

20 A. No. It just seemed like things got quiet when
21 you tried to -- basically tried to negotiate or amend
22 the -- you know the original top lease offer. There
23 just wasn't much response. He would reach out and say
24 to visit with him or call him by phone, but with the
25 emails being quiet, I just didn't know if I was going to

1 get anywhere by giving him a call.

2 Q. And if you turn to the fourth page here in
3 Exhibit 9, seems to be a long email here. It represents
4 a good chronology of what has occurred in this process.
5 Taking a look at the second paragraph from the bottom of
6 the page --

7 A. The second paragraph?

8 Q. Second paragraph from the bottom.

9 A. Yes, ma'am.

10 Q. And what do you tell Mr. Godwin here?

11 A. I just state that it would be ideal "to come to
12 an agreement very similar to the one negotiated at arm's
13 length with OGX in [sic] July 10th, 2008, and the prior
14 lease with COG, April 3rd [sic], 2013. These prior
15 leases were what I had grown accustomed to in dealing
16 with COG Operating, LLC. Or release the acreage
17 following protocol of the above referenced leases with
18 the County Clerk, Eddy County, New Mexico."

19 Q. In the following paragraph, you discuss the
20 fact that there are numerous depths that are at issue in
21 this lease, correct?

22 A. Yes, ma'am.

23 Q. And did Mr. Godwin respond to this email?

24 A. No, ma'am.

25 Q. Did he provide you with a revised lease in

1 light of your explanation to him in this email?

2 A. No, ma'am. It's -- no. The only revised lease
3 would have been the one that came on December 15th for
4 the one section, 28.

5 Q. And then the date of this email is November
6 15th, correct?

7 A. Yes, ma'am.

8 Q. And that's the same date that the application
9 was filed, correct?

10 A. Yes, ma'am.

11 Q. Did Mr. Godwin inform you that they had filed
12 or were filing that day an application to force pool
13 your interest in Section 28?

14 A. No, ma'am.

15 Q. Take a look at the following pages. And these
16 are a series of emails from you to Mr. Godwin on
17 November 25th, November 29th and December 2nd, correct?

18 A. Yes, ma'am. And that was just all to get him
19 to expedite the releases of the Eddy County clerk in
20 Eddy County, New Mexico.

21 Q. And with respect to those emails of November
22 29th, 25th and December 2nd, it looks like you sent him
23 some information or some links to information. What was
24 your intent in sending these emails to Mr. Godwin?

25 A. Just to try to advocate to make a deal that,

1 you know, there are not many opportunities like the
2 1,600 acres coming open, and, you know, we weren't
3 irrational as far as bonus or -- just try to make a
4 lease with good terms and that there is value there.
5 And I know COG has a tremendous amount of acreage, and
6 they have difficulty trying to hold it all. But just
7 to -- you know, it appears like the Midland Basin is
8 bought off, and, you know, there's operators looking in
9 the Delaware, and so there was some value there.

10 Q. So this information that you were providing to
11 Mr. Godwin would support your position that the bonus
12 payment that had been offered, \$1,500, was not in
13 accordance with market rates? Would you agree?

14 A. Yes, ma'am. And it would appear like it's
15 become a hot play, and I wouldn't think \$1,500 would
16 suffice.

17 Q. And did you receive a response from Mr. Godwin
18 to any of these emails that you can recall?

19 A. No, ma'am, not at all. I mean, he would
20 respond when I'd ask him about particular wells, if
21 they've been drilled or whatnot. Just with the
22 permitting and whatnot, it's difficult to figure out if
23 wells have been drilled, and he was always very cordial
24 and that. But other than that, the only response I
25 received was, you know, the Section 28 lease.

1 Q. And let's turn to Exhibit 6. And Exhibit 6 is
2 the December lease offer; is that correct?

3 A. Let me try to find it.

4 I haven't found it, but go ahead.

5 Q. I have an extra copy of it here.

6 MS. SHAHEEN: If I may?

7 EXAMINER McMILLAN: You may.

8 Q. (BY MS. SHAHEEN) This was the December lease
9 offer that occurred after the hearing had been
10 continued, correct?

11 A. Yes, ma'am.

12 Q. What was the bonus payments offer here?

13 A. It was 1,600, 100 more than the initial offer
14 for 1,500 on the whole.

15 Q. And was that -- was that -- did you consider
16 that to be a reasonable offer?

17 A. I could see the reasoning behind it as far as
18 to put the Section 28 in the compulsory unit, but as far
19 as I was concerned, I didn't want to piecemeal my
20 acreage and basically end up in compulsory pooling
21 hearings over and over again here in Santa Fe, you know,
22 every quarter if I took this lease. Because what was I
23 going to do as far as the remainder?

24 Q. And was this the offer depth limited?

25 A. I don't believe so.

1 Q. And what were the proposed lease terms?

2 A. It was a Producers 88 without an addendum
3 attached.

4 Q. Did you notice any differences other than the
5 lack of the addendum between the first lease offer and
6 the October 31st and this lease offer?

7 A. Just the fact that the addendum wasn't
8 attached. And preferably it would be ideal to get a
9 harmonious lease where you have a lease proposal and an
10 addendum that are comparable.

11 Q. Did Mr. Godwin inform you that he had -- COG
12 had made any changes to the lease proposal?

13 A. No, ma'am.

14 Q. Did you receive any communications from
15 Mr. Godwin other than this one-page letter in the
16 proposal?

17 A. Yes, ma'am, some recently about particular
18 wells were drilled. He responded to those, and, you
19 know -- and so he would respond to those.

20 Q. So you haven't talked to him about continuing
21 to negotiate a lease?

22 A. That would be ideal, but, you know, I haven't
23 communicated with him.

24 Q. What do you believe is a reasonable rate for
25 bonus payments in this area right now?

1 MS. KESSLER: Objection. I don't believe
2 that this is within the knowledge of the fact witness.

3 EXAMINER BROOKS: Well, it talks about his
4 value of his own property, so I will over overrule the
5 objection.

6 THE WITNESS: You know, you have various
7 sections -- for example, acreage in the BLM leases, I
8 think those leases, you know, were a record this year.
9 I don't know if those have been completed due to the
10 fact that the environmentalists were kind of giving some
11 problems there. I don't believe that -- I mean, it's
12 only sales or lease bonuses that you can really find out
13 there, and you can't necessarily value the acreage on
14 that. There have been 19 wells drilled. Those state
15 leases are wide open. I believe they get a ten-year
16 lease term on those, a 12-and-a-half net royalty
17 interest, so they're pretty proprietary over those for a
18 long period of time.

19 I believe east of Malaga, MRC Permian, they
20 paid 18,000, 23,000 and maybe 15,000 on some smaller
21 tracts there on that lease option. Like I stated, with
22 a quarter royalty, you know, various depths already
23 held, certain depths open --

24 Q. (BY MS. SHAHEEN) If you take a look at Exhibit
25 10 --

1 EXAMINER BROOKS: Excuse me, Mr. Examiner.
2 I believe it's time for us to unconvene.

3 EXAMINER McMILLAN: Unconvene. We're
4 coming back at 1:30.

5 EXAMINER BROOKS: 1:30.

6 (Recess 11:40 a.m. to 1:29 p.m.)

7 (Examiner Jones not present.)

8 EXAMINER McMILLAN: I'd like to call back
9 Case Number 15607. I believe Mr. Fowlkes was our
10 witness.

11 Please proceed.

12 Q. (BY MS. SHAHEEN) When we left, we were talking
13 about the BLM sale -- the recent BLM sale. Do you
14 remember your testimony earlier today?

15 A. Yes, ma'am.

16 Q. And I would direct you to Exhibit 10. Can you
17 identify this document for us?

18 A. Yes, ma'am.

19 Q. And what is it?

20 A. It's the recent BLM auction, I believe held the
21 first of September in Roswell. I believe it was
22 supposed to be held in Santa Fe, but it was in Roswell.

23 Q. And when you were testifying earlier about
24 BLM's sales, can you point out those particular sales
25 that you believe are similar to the acreage at issue

1 here?

2 A. The only ones that would be in the proximity of
3 my particular acreage would be two, three and four, by
4 MRC Permian or Matador.

5 Q. And what was the bid per acre in those three
6 leases?

7 A. 16,000, 23-, and 18- on 79.92 acres, 160 acres
8 and 40 acres.

9 Q. And remind us now the original -- the initial
10 offer from COG for your acreage was how much?

11 A. 1,500 an acre.

12 Q. And the latest lease offer for your acreage
13 from COG was how much?

14 A. 1,600.

15 Q. Did you recently receive a lease offer from a
16 third party for this same acreage?

17 A. Yes, ma'am. That's correct.

18 Q. Take a look at Exhibit 11, please. And what is
19 Exhibit 11?

20 A. It's the lease offer from the entity Beacon,
21 and I received that email from an uncle. On Tuesday was
22 the first time I'd seen it before.

23 Q. And this lease offer was tendered to you as
24 well as your uncle; is that correct?

25 A. Yes, ma'am. That's correct.

1 Q. And if you look down, there is a chart at the
2 bottom of the page. I believe your name is in row
3 number eight; is that correct?

4 A. Yes, ma'am.

5 Q. And if you look across the row that has your
6 name, it identifies a number of acreage that's
7 apparently open to all depths and then a cost, and then
8 an amount of acreage open in the Wolfcamp and then the
9 cost.

10 A. That's correct.

11 Q. Is that the proposed bonus payment on your
12 acreage?

13 A. Yes, ma'am. That's correct.

14 Q. And have you done the math on that? Can you
15 tell us what that is per acre?

16 A. The Wolfcamp up here should be \$3,000 an acre,
17 and then the all depths would be 3,500.

18 Q. So it's about twice what Concho has offered you
19 for your acreage; is that correct?

20 A. Yes, ma'am. That's correct.

21 Q. Are there any other indicators to you about the
22 current value of bonus payment for your acreage?

23 A. Just going off the BLM auction sales, of the
24 state land sales, everything appears to be -- you know,
25 as far as the state and BLM appears to be getting

1 higher. It doesn't appear like there are many leases
2 that are coming open. Most acreage is exchanging from
3 operator to operator. And in those deals you have
4 stock, you know, wells, production all coupled in, so
5 you can't say that your value per acre is that. But it
6 appears that it's more valuable than \$1,500 an acre, I
7 would think.

8 Q. And in closing, Mr. Fowlkes, can you tell me
9 what you're asking the Division to do today?

10 A. To deny the application of pooling of my
11 interest in the Graham Nash 7H or limit it to the Bone
12 Spring -- 2nd Bone Spring.

13 MS. SHAHEEN: And I have no further
14 questions at this time.

15 I would like to move to enter Exhibits 9,
16 10 and 11.

17 EXAMINER McMILLAN: Objections?

18 MS. KESSLER: No objection.

19 MR. PADILLA: No objection.

20 EXAMINER McMILLAN: Exhibits 9, 10 and 11
21 by Mr. Fowlkes may now be accepted as part of the
22 record.

23 (P. Fowlkes Exhibit Numbers 9, 10 and 11
24 are offered and admitted into evidence.)

25 EXAMINER McMILLAN: Cross-examination?

1 MS. KESSLER: Were you going to ask
2 questions first, or should I --

3 EXAMINER BROOKS: No.

4 MS. KESSLER: Okay.

5 CROSS-EXAMINATION

6 BY MS. KESSLER:

7 Q. Mr. Fowlkes, I would first like to ask you --
8 you mentioned earlier that some of the terms of the
9 various proposals were confusing to you; there was a lot
10 of language. Can you tell me specifically what you were
11 talking about?

12 A. Well, possibly not in New Mexico, but anytime
13 in Texas when you receive a Producers 88, it's to throw
14 up a red flag. I believe making the lease subject to
15 the OGX and COG lease, as well the warranty of title, I
16 believe this lease -- you know, the lease prior that I
17 did with COG in 2013 had a 180-day drilling clause.
18 This one had a 365. So there are some issues I would
19 like to properly iron out and, you know, make a fair
20 deal.

21 Q. At what point did you engage counsel?

22 A. When -- when I received notice that there was
23 going to be forced pooling is when I finally engaged
24 counsel because it appeared that I wasn't getting
25 anywhere with negotiations.

1 Q. So even though there were terms that you
2 thought were confusing and various agreements and
3 proposals, you didn't reach out to counsel and --

4 MS. SHAHEEN: Objection.

5 EXAMINER BROOKS: It's cross-examination.
6 Overrule the objection.

7 MS. SHAHEEN: To the extent that they're
8 seeking privileged information, I would object.

9 EXAMINER BROOKS: Well, whether or not a
10 person consulted with counsel is not privileged. And so
11 what they may have said to counsel in the process of
12 consulting them or what specific issues they may have
13 consulted them about would be privileged, but just
14 whether or not someone retained counsel or consulted
15 counsel for a general matter is not privileged.

16 Q. (BY MS. KESSLER) So there were a number of
17 issues that you found confusing but didn't reach out to
18 counsel prior to the force pooling hearing?

19 MS. SHAHEEN: Objection.

20 EXAMINER BROOKS: Overruled.

21 MS. SHAHEEN: I believe why he sought
22 counsel, at the time he sought counsel, would be
23 privileged.

24 EXAMINER BROOKS: Well, I didn't understand
25 the question to ask for that.

1 MS. KESSLER: I don't believe it did.

2 EXAMINER BROOKS: Okay. I'll overrule the
3 objection.

4 Q. (BY MS. KESSLER) Mr. Fowlkes, if we could turn
5 to a letter dated October 31st, it looks like it's your
6 Exhibit 3. And that is the lease offer -- the second
7 lease offer that was made by Concho, and it contained an
8 oil and gas lease -- I'm sorry.

9 The oil and gas lease is a separate
10 exhibit. It's Exhibit 4. Now, it looks like there are
11 a couple of pages -- three pages of this lease. What
12 I'd like to do is ask you what about this lease you
13 thought was confusing. What problem did you have
14 specifically -- specifically what problems do you have
15 with this lease?

16 A. Just 12, I mean, where it was subject to the
17 OGX lease and the prior COG lease, that this was very
18 apparent it was a top lease. So, I mean, I really don't
19 know that you have to go much further than that.

20 EXAMINER BROOKS: Which paragraph are
21 you --

22 THE WITNESS: 12.

23 EXAMINER BROOKS: Where is 12?

24 THE WITNESS: On the addendum page.

25 EXAMINER BROOKS: Oh, I was going to say

1 there wasn't a 12. Okay. Go ahead.

2 Q. (BY MS. KESSLER) So you mentioned you have a
3 problem with the fact that this was a top lease. Did
4 you communicate that to Patrick Godwin?

5 A. Yes, ma'am. And I asked him -- or told him it
6 would be ideal to do a lease that was similar to the one
7 that was done in 2013.

8 Q. Okay. What other problems did you have with
9 this lease? Was that the only problem you had?

10 A. The warranty of title; I believe the 365-day
11 drilling clause, which would -- to be honest with you
12 now, that would be fine.

13 Q. With respect to the warranty of title, did you
14 communicate that to Mr. Godwin?

15 A. No, ma'am.

16 Q. You never communicated to him that you had an
17 issue with that particular clause?

18 A. No, but it wasn't -- we didn't warrant title in
19 the 2013 lease, so that's why I was basically advocating
20 to do something similar to the 2013 lease.

21 Q. Why didn't -- if you had this problem with this
22 lease, why didn't you communicate that to Mr. Godwin?

23 A. It was expressed to him when I told him that we
24 should do a lease like we did in 2013 in my email, and
25 basically -- it was very adamant that it was just kind

1 of accept this lease or be a working interest.

2 Q. So I guess I'm not understanding here. You
3 think that you have this very specific problem with the
4 warranty clause. You emailed him, Mr. Godwin, that you
5 wanted to use a prior lease?

6 A. Yes.

7 Q. Was it ever clear in your email that
8 specifically the warranty issue was a problem?

9 A. No.

10 Q. What about the 365-day drilling clause? I'm
11 sorry.

12 A. Did I express that? No.

13 Q. Okay. Why not?

14 A. Because on its face, it appeared like the offer
15 and the terms of the lease weren't something that I was
16 willing to accept, so it was kind of a moot point. I
17 just -- it was just very difficult to negotiate, you
18 know. Many emails of, you know, just kind of ghosting
19 for a period of time. And I was trying to negotiate on
20 the deal. We would have been leased a long time ago if
21 the proper terms and, you know, a fair bonus would have
22 been offered, but that wasn't the case.

23 Q. So what I'm trying to do is have you tell me
24 exactly what the proper terms are, the terms you had
25 with a problem with, and make sure we can isolate those

1 issues. So was there anything else in -- this lease
2 that was sent on October 31st, I believe, in Exhibit 4,
3 is there anything else that you have a problem with?

4 A. I believe about the proprietor or the
5 property -- Sharon Shaheen pointed one out, and I --

6 MS. SHAHEEN: I would caution you not to
7 reveal any information that we've -- our communications.

8 MS. KESSLER: I would state that he waived
9 that privilege since he started talking about it.

10 MS. SHAHEEN: I will --

11 EXAMINER BROOKS: I will sustain that
12 objection.

13 Q. (BY MS. KESSLER) Any other problems with this,
14 Mr. Fowlkes?

15 A. Just the fact that it would have been ideal to
16 have the lease form on the Producers 88 if that was
17 going to be used harmonious with the addendum. I'm not
18 for certain how things work in New Mexico, but that's
19 kind of the way things are done -- or attempted to be
20 done in Texas, where a lease and the addendum are
21 harmonious and you add various clauses.

22 Q. What do you mean by harmonious?

23 A. Just where they both say the same thing.

24 Q. How do they not?

25 MS. SHAHEEN: I would object on the basis

1 that she's basically asking him to give a legal
2 conclusion as to the import of the terms of the lease,
3 and he's not a lawyer.

4 EXAMINER BROOKS: Well, I didn't understand
5 it. I would overrule the objection with the instruction
6 that the witness answer only as to his perception. He's
7 not, obviously, qualified to have an opinion as to a
8 legal effect, but he apparently has a perception of what
9 he thought it would be.

10 THE WITNESS: I would think that basically
11 if you were looking at a lease like this, that's when I
12 would engage legal counsel to hash out the various terms
13 and make the alterations that were necessary to get the
14 lease where, you know, I wanted it to be. And so --

15 Q. (BY MS. KESSLER) I'm just trying to determine,
16 again, what specific problems you had with this lease.
17 And you said that it wasn't harmonious with the
18 addendum, and I'm trying to figure out what that means.

19 MS. SHAHEEN: Asked and answered.

20 EXAMINER BROOKS: Well, no. It was asked,
21 but it wasn't answered, so I'll overrule the objection.

22 Q. (BY MS. KESSLER) If you could answer the
23 question about how the lease and the addendum are not
24 harmonious in your perception.

25 A. Like I stated that if it was subject to the

1 prior OGX lease and the COG lease -- the date that it
2 commences, I believe -- the lease had already expired at
3 this juncture when I was offered this lease -- or the
4 prior leases had already expired as to their terms and
5 just certain acreage, and I believe that the
6 commencement date starts August 1st, 2017. And that
7 would be on the entire acreage. You know, basically,
8 I'm receiving a top lease when the lease has already
9 expired.

10 Q. So there was issue with the top lease, which
11 we've talked about?

12 A. Yes. And the acreage had expired I believe at
13 the point when I received the lease. Because this lease
14 was received October 30th, and from my understanding,
15 the acreage -- or the leases -- the OGX lease and COG
16 lease had expired September 30th or roundabout September
17 or so. I wouldn't necessarily think I'd be negotiating
18 the top lease. It would be more like a lease I'd
19 previously negotiated in 2013.

20 Q. And you did communicate your concerns about the
21 to lease to Mr. --

22 A. Godwin.

23 Q. -- Godwin?

24 A. Yes, ma'am.

25 Q. Anything else? Any other problems with this

1 lease?

2 A. Just felt like making some alterations and have
3 legal counsel revise it.

4 Q. So the problems we talked about. Anybody else?

5 A. Not that I can identify, but I'm not an expert
6 or a lawyer.

7 Q. Okay. So let's look, then, at the lease offer
8 on December 15th. Now, I understand that you
9 communicated to Mr. Godwin there was a problem with the
10 top lease. I'm sorry. Do you have that in front of
11 you, Exhibit --

12 A. I'm trying to find it.

13 Q. It's Exhibit 6?

14 A. 6? Yes. Okay.

15 Q. You mentioned that with the prior lease, you
16 had a problem with the fact that it was a top lease, and
17 you communicated that to Mr. Godwin. Was that removed
18 from this lease?

19 A. Yes, that's correct.

20 Q. So that concern was addressed? No problem?

21 A. Yes, ma'am.

22 Q. The warranty of title issue, that was
23 communicated to Mr. Godwin or no? I believe you --

24 A. Not by myself. I think it was possibly --
25 possibly one of my other family members expressed that

1 to Mr. Godwin.

2 Q. But you didn't personally?

3 A. No. It wouldn't have been me.

4 Q. And the warranty-of-title issue was changed in
5 the second lease that was offered to you, correct?

6 A. I believe so.

7 Q. So that request -- that concern related to
8 warranty of title was communicated to Mr. Godwin and
9 resolved by the second --

10 A. Yes.

11 Q. -- or third lease, I suppose?

12 You said the 365-day drilling-clause issue
13 was not communicated to Mr. Godwin?

14 A. No, not in any email communication or whatnot
15 that I had.

16 Q. And the lease form and addendum being
17 harmonious, that was not communicated to Mr. Godwin,
18 correct?

19 A. No. I just expressed that it could be similar
20 to the leases that were done prior, the 2013 lease, once
21 again.

22 Q. So the issues that you did raise to Mr. Godwin
23 were addressed by the second -- by the third lease,
24 correct?

25 A. Yes, for the singular section, Section 28.

1 That is correct.

2 Q. Okay. Did you ever tell Mr. Godwin that you
3 wanted to lease your entire acreage?

4 A. That's what they have been making the attempt
5 to do the entire time. As far as the offer that
6 commenced from August 18th, 2016, it was for the entire
7 acreage.

8 Q. Well, let's look back at --

9 EXAMINER BROOKS: It's 4.

10 MS. KESSLER: 4?

11 Q. (BY MS. KESSLER) I'm looking at Exhibit 3 and
12 Exhibit 4, and those are a lease offer -- those two
13 exhibits are a lease offer covering a great deal of
14 land, correct?

15 A. Yes, ma'am.

16 Q. Your entire position?

17 A. My entire position, all depths, I believe.

18 Q. Okay. So they had -- Concho had, in fact, made
19 an offer related to your entire position and a
20 subsequent offer related to only a portion of your
21 position?

22 A. To the singular section, I believe, in the
23 Graham Nash compulsory pooling.

24 Q. Okay. Did you ever communicate to Concho that
25 you wanted your entire position leased?

1 A. I just expressed to Patrick Godwin that it
2 would be ideal to make a lease on the entire position on
3 terms and a fair bonus, what I've been advocating for
4 all along, but it just seemed like it was difficult to
5 get that done.

6 Q. Can you point to any communication where you
7 told Patrick Godwin that you wanted to lease the entire
8 acreage?

9 A. No. I didn't state that, that I wanted to
10 lease the entire acreage. I just said a lease could be
11 made, which my interpretation of what a lease meant and
12 what he was trying to lease was the entire acreage all
13 along from the beginning.

14 Q. I would like you to look next at Exhibit 9,
15 which is a series of emails between you and Patrick
16 Godwin.

17 A. I've got it.

18 Q. So the way I read this is that the second page
19 of this exhibit is Patrick's email initially to you,
20 right? It's not in a successive time frame, so it's a
21 little confusing to me. But it looks like the second
22 page -- you initially emailed Patrick on Monday, the
23 14th, at 2:07. He responded to you on the 14th at 2:11,
24 and then finally you responded to him that day at 3:21.
25 That's the sequence, right?

1 A. I believe so.

2 Q. So it looks like you asked a question Monday at
3 2:07 about some permitting issues, and it looks like he
4 responded back to you to please call him so he can
5 address your questions and concerns.

6 A. Okay.

7 Q. And then at 3:21, you responded to him. Did
8 you ever -- did you ever give him a call?

9 A. No. I had spoken to Aaron Myers on the phone,
10 but Patrick Godwin, I hadn't.

11 Q. Did you ever give him your phone number?

12 A. No.

13 Q. And it looks like the content of your email on
14 the 14th is related to this top lease issue; is that
15 right?

16 A. It pertained to the top lease and the fact
17 that, in my opinion, which it turns out to be the case,
18 that the lease had expired several months prior when we
19 were working, you know, on a top lease. I don't believe
20 that the new lease would have been a top lease. It
21 would have been a lease similar to what was done in
22 2013.

23 Q. Okay. But we've already established that the
24 third lease that was offered did correct this top lease
25 issue.

1 A. Yes, ma'am.

2 Q. So this concern was responded to?

3 A. Yes, ma'am.

4 Q. Now I'm looking at some email on the 15th.
5 Again, this is a little confusing in terms of the
6 timeline here, but it looks like -- we're on the third
7 page. So it looks like Patrick Godwin emailed you on
8 November 15th at 9:50. Nope. I'm wrong. You emailed
9 Patrick Godwin. I'm not seeing any content in that
10 email. And then he emailed you back about 30 minutes
11 later; is that right? Does that look right? I'm just
12 trying to get my timeline right here. So you emailed
13 him at 9:20. He emailed you right back at 9:50.

14 A. Yes. And I was questioning him about the
15 particular emails. Is that the email?

16 Q. I think that's right. There is no content to
17 the email that's been submitted as part of your
18 exhibits, but looks like timingwise, he emailed you
19 right back.

20 A. And that was all working on as far as the fact
21 that the lease had expired on his terms and the depth
22 severance clause kicked in and, you know, the lease with
23 the 180-day drilling clause ran out. So I felt like the
24 next move was to get those minerals released or those
25 acreage released and stuff. I was trying to advocate to

1 him that, you know, what well and whatnot, and it
2 appeared to me that several wells might possibly have
3 been drilled or were permitted for, so I was asking
4 questions about it.

5 Q. Okay. And it looks like -- you're right. You
6 did email him back that afternoon. That's the next
7 page, which is going to be page 4. You emailed Patrick
8 Godwin at 1:00 on November 15th.

9 A. Yes.

10 Q. And it looks like there's information about you
11 finally receiving the terms, you say, for the initial
12 lease, and then it says that it would be ideal if you
13 did -- let's see. I'm looking at paragraph -- one, two,
14 three, four, five -- six, and it says, second sentence,
15 "These prior leases were what I had grown accustomed
16 to." And it says, "Or release the acreage following
17 protocol of the above referenced leases with the County
18 Clerk, Eddy County." That's what you were referring to
19 as leases?

20 A. Yes, ma'am. Being that we were at November
21 15th, 2016 and the leases both expired in September, I
22 was still trying to advocate to get those releases
23 filed. And I'm not sure of the particular date the
24 releases were filed, but it was many months after
25 September when they were filed.

1 Q. But those leases were released, correct?

2 A. Yes, ma'am, eventually so.

3 Q. So it looks like this was a concern that you
4 had, about releases, that you expressed to Patrick
5 Godwin and that he complied with; is that correct?

6 A. Yes, ma'am. And from that paragraph, it very
7 well states that I'm still trying to make a deal with
8 him, you know.

9 Q. Okay. Looking at the next paragraph -- again,
10 this is going to be -- looks like a top lease issue,
11 which was resolved. And then you say something about
12 "that would hold these minerals in perpetuity seems
13 foolish to me." Am I correct in saying that in the
14 third lease that was offered, there was a Pugh Clause;
15 is that -- or I'm sorry. In the second lease, there was
16 a Pugh Clause; is that correct?

17 A. I believe so. I didn't -- it was evident that
18 it was a top lease, so I didn't have legal counsel. I
19 didn't spend excessive time on it. You know, it just
20 kind of -- it was what it was on its face, so I just
21 didn't feel like there was --

22 Q. But that would not be a correct statement, to
23 say that the minerals were held in perpetuity when there
24 was a Pugh Clause?

25 A. Correct. Yes.

1 MS. SHAHEEN: Objection, legal conclusion,
2 foundation.

3 EXAMINER BROOKS: Overruled.

4 Q. (BY MS. KESSLER) I'm looking at an email on
5 November 25th.

6 MS. SHAHEEN: Mr. Examiner, I would --

7 MR. HALL: It's okay.

8 Q. (BY MS. KESSLER) I'm looking at an email on
9 November 25th from you to Patrick Godwin. The only
10 request I see here is related to the release that needed
11 to be filed that you were asking to have filed?

12 A. Yes, ma'am. Just because basically we're now
13 coming to a deal where the next chain of events seemed
14 to advocate for the fact that the acreage needed to be
15 released, just because, once again, it expired in
16 September and finally, I believe in November sometime,
17 we got the release.

18 Q. And I know I'm just beating a dead horse, but
19 that release was filed, correct?

20 A. Yes, ma'am.

21 Q. Communicated to Patrick Godwin and --

22 A. Yes, ma'am, finally released.

23 Q. I'm looking at an email on November 29th that
24 you sent to Patrick Godwin. You sent him two different
25 articles. Now, you mentioned earlier in testimony that

1 you intended to communicate something about making a
2 deal with these emails, but there is no body, there is
3 no text; you didn't write anything to Patrick Godwin?

4 A. Yes, ma'am.

5 Q. Just sent him the links?

6 A. Sent him the links. You know, sometimes it's
7 best not to say anything at all, kind of -- we were at
8 that point. You know, I tried and worked on the deal a
9 very long time and have other issues going on, so, you
10 know, it didn't seem like we were getting anywhere with
11 that.

12 Q. Same thing. It looks like the next page,
13 later, November 29th, you sent him a link, and the third
14 page, it looks like you sent him a quotation about --
15 probably from --

16 A. From the Oil and Gas Investor.

17 Q. Did you ever communicate to Mr. Godwin any sort
18 of counteroffer?

19 A. The only way I would have extended a
20 counteroffer would be the way I presented the fact,
21 that, you know, if we could do a lease like we had
22 prior.

23 Q. And I'm sorry. I'm not being specific here. I
24 mean in terms of a bonus payment. He offered you a
25 certain amount. Did you ever say, No, I want this?

1 A. No. It just seemed like that was the deal,
2 just take it or leave it. Much like you state in your
3 lease on Section 28, he went up \$100 an acre. So I
4 guess that was adding the extra care right there to get
5 me to sign on that Section 28 lease.

6 Q. Go through my notes, but I think that's all
7 I've got.

8 Let's look one last time at the final lease
9 that COG sent you, that third lease, Exhibit 9. Nope.
10 That's not Exhibit 9.

11 Exhibit 6. If this lease had been for your
12 entire acreage position, would you have accepted it?

13 A. I would have preferred an addendum with, you
14 know, specific clauses in it.

15 Q. What specific clauses?

16 A. Modified Pugh, you know, various clauses.
17 Like, once again, I'm not an attorney. It would be
18 something that you would have to work through an
19 attorney to put together.

20 Q. Okay.

21 A. But just, you know, leases to protect your
22 interest in the situation. I mean, there are so many
23 versions of the Producers 88.

24 MS. KESSLER: Okay. That concludes my
25 examination.

1 EXAMINER BROOKS: I don't really think I
2 have any questions of the witness at this point. I was
3 trying to think of maybe one.

4 CROSS-EXAMINATION

5 BY EXAMINER BROOKS:

6 Q. Oh, well, I'll go ahead and try and ask this.
7 This exhibit -- I think it's Number 8. That's the
8 emails; is that correct?

9 A. Yes, sir.

10 MS. SHAHEEN: Number 9.

11 EXAMINER BROOKS: 9. That's right. 8 is
12 this other.

13 Q. (BY EXAMINER BROOKS) Okay. Does that
14 constitute all the communications that you had with
15 Mr. Godwin that you want us to consider?

16 A. Yes, sir, I believe so. I sent him some more,
17 you know, questioning about the Graham Nash 7H, if it
18 had been drilled or whatnot, but this pretty much covers
19 what's in this.

20 Q. It covers all the communications to you that
21 you want us to consider?

22 A. Yes, sir.

23 Q. Except for the lease and so forth? That's
24 also --

25 A. (Indicating.)

1 Q. You never talked to him on the telephone?

2 A. No, sir. My only communication was with Aaron
3 Myers.

4 Q. Yeah. And he got out of the matter at some
5 date?

6 A. Yes, sir. It seemed early on. I guess he
7 changed within the department or maybe a different area.
8 I'm not for certain where he went.

9 Q. I think that's all I have.

10 MS. SHAHEEN: I have a couple of cleanup
11 questions, if I may.

12 EXAMINER BROOKS: Do you want to ask
13 anything?

14 EXAMINER McMILLAN: I don't have any
15 questions.

16 EXAMINER BROOKS: Go ahead.

17 RECROSS EXAMINATION

18 BY MS. SHAHEEN:

19 Q. Ms. Kessler communicated your concerns about
20 the 365-day development clause to Mr. Godwin.

21 A. Yes, ma'am.

22 Q. Did you discuss that clause with Mr. Myers?

23 A. No.

24 Q. Do you recall Mr. Myers --

25 A. Oh, yes, ma'am, I did. Basically, Mr. Myers

1 expressed to me in the beginning that COG was just
2 having difficulty with the 180-day drilling clause,
3 keeping up with drilling all those wells there. For
4 example, I believe they have a 13H, possibly. There's
5 possibly the 5H, and on the 13H, a couple of -- a
6 cluster of proposed wells. So, you know, I could
7 understand how this could become a problem, and I
8 believe I might have expressed to him that I understood
9 that fact, how it would be difficult to hold all that
10 acreage and drill all the wells that, you know, need to
11 be drilled to hold this lease.

12 Q. So you had spoken with Mr. Myers by telephone?
13 He had your phone number?

14 A. Yes, ma'am.

15 Q. And Mr. Godwin could have gotten your phone
16 number from Mr. Myers, correct?

17 MS. KESSLER: Objection.

18 THE WITNESS: Yes, ma'am. You would think
19 so.

20 EXAMINER BROOKS: I'm sorry. Did you have
21 an objection?

22 MS. KESSLER: I did have an objection to
23 something.

24 EXAMINER BROOKS: What was the objection?

25 MS. KESSLER: That would not be within his

1 knowledge. It's speculation.

2 EXAMINER BROOKS: Since he gave an answer,
3 I'll let the record stand.

4 Q. (BY MS. SHAHEEN) Ms. Kessler also asked you if
5 you informed Mr. Godwin that you wanted to lease the
6 entire acreage. I understand your testimony and your
7 communications to Mr. Godwin to imply or it's implicit
8 in those communications of leasing the entire -- if you
9 could come to satisfactory agreement; is that correct?

10 A. Yes, ma'am. That's correct. And that's the
11 reason behind not taking the Section 28 lease. It was
12 presented December 15th.

13 Q. And the other reason was that you didn't want
14 to be in the position of having to come up here and have
15 each of your other pieces of acreage pooled -- force
16 pooled in the future; is that correct?

17 A. Yes, ma'am. If they were to be drilled, it
18 appeared I would have to be up here pretty often without
19 having the lease that wouldn't cover the entire lease --
20 or acreage.

21 Q. And you were concerned with the fact there was
22 no depth limitation; is that correct?

23 A. Yes, ma'am.

24 Q. And did you express that to Mr. Godwin in your
25 email of November 15th, 2016? This is the fourth page

1 into Exhibit 9.

2 A. In which paragraph?

3 Q. Well, you refer to the multiple zones in the
4 last paragraph.

5 A. Yes, ma'am.

6 Q. And I believe -- yeah. There was a reference
7 to perpetuity that Ms. Kessler referenced. I have to
8 admit that I didn't see it in here when you were
9 testifying about it earlier. But my understanding of
10 this, Mr. Fowlkes, is that yes, you had a concern about
11 all of these depths being tied up in this one lease; is
12 that correct?

13 A. Yes, ma'am.

14 Q. Did you ever get any response from Mr. Godwin
15 with respect to the depth limitation?

16 A. No, ma'am.

17 Q. Even in the December 15th lease offer, was
18 there a depth limitation?

19 A. No, ma'am. I don't believe so.

20 Q. Have you checked to see if the 7H has an
21 approved drilling permit?

22 A. The only wells that I've seen have approved
23 drilling permit would be the 5H, the 13H. And I've
24 checked recently, but I don't believe the 7H -- on the
25 OCD online Web site has a permit. I think that the 5H

1 had an APD and supposedly hasn't been drilled either.

2 MS. SHAHEEN: I have no further questions.

3 EXAMINER BROOKS: Any follow-up?

4 MS. KESSLER: (Indicating.)

5 EXAMINER BROOKS: Okay. The witness may
6 stand down.

7 Did I understand you were going to make
8 closing statement?

9 MS. KESSLER: As Applicant, I would reserve
10 my right to make it second.

11 EXAMINER McMILLAN: Okay.

12 Go ahead.

13 We don't operate under rigid procedural
14 rules, which means I won't limit you to rebuttal. Go
15 ahead.

16 CLOSING ARGUMENT

17 MS. SHAHEEN: I believe, Mr. Examiner, you
18 referred to this law previously, but under Section
19 70-2-18A, the Applicant must attempt to negotiate a
20 voluntary agreement with the other interest owners. And
21 subsequent Division cases have clarified that obligation
22 of good-faith negotiations. An operator must show that
23 they have made a diligent and a good-faith effort to
24 negotiate a voluntary agreement before the compulsory
25 pooling application may be filed.

1 EXAMINER BROOKS: I think it's questionable
2 whether 70-2-18 actually says that, but there is no
3 doubt the -- and the Division has said it on various
4 occasions.

5 MS. SHAHEEN: There are a couple orders,
6 R-13155, and then R-13165 provides some additional
7 clarification. But it seems --

8 EXAMINER BROOKS: Could you give me those
9 again?

10 MS. SHAHEEN: Yes.

11 EXAMINER BROOKS: What were those numbers?

12 MS. SHAHEEN: R-13155 and 13165.

13 EXAMINER BROOKS: I wrote an order myself
14 that said that, but I don't know -- I don't remember the
15 number of it, and Division orders are really hard to
16 find.

17 MS. SHAHEEN: I think it's also important
18 to note that the pooling statute contemplates
19 participation in that particular spacing unit. Whereas,
20 here we have Concho trying to lease for an unreasonable
21 bonus payment several sections, 11 sections, well beyond
22 what is needed for this particular well, and to make
23 that contingent is abusive with a landowner. The
24 obligation is on the operator to negotiate in good
25 faith. I don't think that trying to impose the

1 obligation on the landowner is in accordance with the
2 statute or the previous orders.

3 The operating agreement wasn't provided
4 until a week before the application was filed. That's
5 contrary to Order R-13155, which states that the
6 operating agreement should be provided 30 days prior to
7 filing of the application.

8 We, therefore, ask the Division to deny the
9 application at this time, which would allow the parties
10 to continue to negotiate and a reach voluntary
11 agreement.

12 EXAMINER BROOKS: Thank you.

13 Ms. Kessler.

14 CLOSING ARGUMENT

15 MS. KESSLER: Mr. Examiners, Concho has
16 been negotiating this case and this potential lease
17 agreement since -- I believe it was August or September.
18 That's between four and five months. As you've heard,
19 there were multiple leases sent. There was a
20 well-proposal letter sent. COG was not aware until
21 today of what Mr. Fowlkes' objections were to that
22 lease.

23 As Mr. Fowlkes himself just testified,
24 there were several issues that he did raise with
25 Mr. Godwin, and those issues were addressed in the

1 following lease. As I think the emails from between
2 Mr. Fowlkes and Mr. Godwin show, Mr. Godwin immediately
3 responded within, I think, an hour to each of the emails
4 that Mr. Fowlkes sent him. He asked for -- Mr. Godwin
5 asked Mr. Fowlkes to give him a call. He never did. We
6 think that it's a two-way street here. And I think that
7 COG is not prepared to anticipate every single problem
8 that a lessee or lessor could have, and I don't think
9 that that's their obligation under any Division order
10 that I'm aware of. COG provided him adequate
11 information, asked him a number of times to follow up
12 with them, and it just never happened.

13 So, Mr. Examiners, I would ask this
14 application be taken under advisement. I would submit
15 that good-faith communications did occur, and that
16 evidence has been presented today.

17 EXAMINER BROOKS: Thank you.

18 Mr. Examiner?

19 EXAMINER McMILLAN: I just want to make
20 sure we're clear on something. Exhibits 7 through 11
21 for Patrick Fowlkes have been accepted as part of the
22 record, right?

23 MS. SHAHEEN: We only moved for admission
24 of 1 through 6 and 9 through 12. 7 and 8 were not --

25 EXAMINER BROOKS: You don't want to tender

1 7 and 8?

2 MS. SHAHEEN: That's correct.

3 EXAMINER BROOKS: The record will so
4 reflect.

5 (P. Fowlkes Exhibit Numbers 1 through 6 and
6 9 through 12 are offered and admitted into
7 evidence.)

8 EXAMINER McMILLAN: All right. Case Number
9 15607 shall be taken under advisement.

10 Thank you.

11 Let's take a five-minute break.

12 (Case Number 15607 concludes, 2:14 p.m.)

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1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

5 I, MARY C. HANKINS, Certified Court
6 Reporter, New Mexico Certified Court Reporter No. 20,
7 and Registered Professional Reporter, do hereby certify
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10 a true and correct transcript of those proceedings that
11 were reduced to printed form by me to the best of my
12 ability.

13 I FURTHER CERTIFY that the Reporter's
14 Record of the proceedings truly and accurately reflects
15 the exhibits, if any, offered by the respective parties.

16 I FURTHER CERTIFY that I am neither
17 employed by nor related to any of the parties or
18 attorneys in this case and that I have no interest in
19 the final disposition of this case.

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