

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

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APPLICATION OF NEARBURG EXPLORATION COMPANY,  
SRO2 LLC AND SRO3 LLC FOR AN ACCOUNTING AND  
LIMITATION ON RECOVERY OF WELLS COSTS, AND  
FOR CANCELLATION OF APPLICATION FOR PERMIT  
TO DRILL, EDDY COUNTY, NEW MEXICO.

CASE NO. 15441 (de novo)

APPLICATION OF COG OPERATING LLC  
FOR A NON-STANDARD SPACING AND  
PRORATION UNIT AND COMPULSORY POOLING,  
EDDY COUNTY, NEW MEXICO.

CASE No. 15481 (de novo)

APPLICATION OF COG OPERATING LLC  
FOR A NON-STANDARD SPACING AND  
PRORATION UNIT AND COMPULSORY POOLING,  
EDDY COUNTY, NEW MEXICO.

CASE No. 15482 (de novo)

**COG's PRE-HEARING STATEMENT AND COPIES OF EXHIBITS**

COG Operating, LLC, ("COG"), submits this Pre-Hearing Statement along with copies of the exhibits that it proposes to offer into evidence at the hearing before the Oil Conservation Commission.

**APPEARANCES**

**APPLICANT IN CASE NO. 15441**

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SRO2 LLC, And SRO3

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**APPLICANT IN CASE NOS.**  
**15481 & 15482**

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**COG'S STATEMENT OF THE CASE**

**Background and the Relief Sought under the Filed Applications**

COG is the operator of record for the following horizontal wells located in Township 26 South, Range 28 East, NMPM, in Eddy County, New Mexico:

- The SRO State 16H (API No. 30-015-38071) dedicated to the W/2 W/2 of Section 20 drilled by COG on March 4, 2011 ("the 16H well");
- SRO State Com Well No. 043H (API No. 30-015-41141) dedicated to the W/2 W/2 of Sections 17 and 20 drilled by COG on August 8, 2014 ("the 43H Well"); and
- SRO State Com Well No. 044H (API No. 30-015-41142) dedicated to the E/2 W/2 of Sections 17 and 20 ("the 44H Well") drilled by COG on October 10, 2014.

*See* COG Exs. 7-9. The surface hole locations for the 43H and 44H wells are located on the W/2 of Section 17, a state lease (V-7470) in which Yates Petroleum Corporation is the lessee of record. The 16H well and the bottom hole locations for the 43H and the 44H wells are located in the W/2 of Section 20, a state lease (V-7450) in which Nearburg Exploration Company is the lessee of record. At the time the 16H well was drilled and the 43H and 44H wells were permitted, the lands in Sections 17 and 20 were part of a voluntary unit established under that Unit Agreement for the Development and Operation of the SRO State Exploratory Unit dated May 8th, 2009. *See* COG Ex. 5. The SRO Unit terminated effective March 1, 2014, but the Unit

Operating Agreement remains in effect for the contract area, which includes the W/2 of Sections 17 and 20. *See* COG Ex. 4 at p. 16, Article XIII, pp. 22 and 29.

On November 24, 2015, Nearburg Exploration Company, SRO2 LLC and SRO3 LLC (collectively “NEX”) filed a Complaint in Santa Fe County State District Court requesting, among other relief, that the Court declare NEX is “not subject to the Operating Agreement” that lists the W/2 of Section 20 as part of the contract area and to declare that no other voluntary agreement authorizes COG to operate on the acreage in the W/2 of Section 20. *See* COG Exhibit 6.<sup>1</sup> At the same time, NEX filed its Application with the Division under Case No. 15441, seeking the following relief:

- A. To declare COG “did not have the right to drill” the 43H and 44H wells (Application at paragraph A);
- B. To determine COG violated Division rules when it filed the C-101s and C-102s for the 43H and 44H wells (Application at paragraph B);
- C. To declare that “COG is required to account and pay to NEX the amount to which it is entitled in the absence of pooling and that COG is prohibited from recovering well costs or expenses from the time of first production” for the 43H and 44H wells (Application at paragraph C);
- D. To cancel the drilling permit for the SRO State Com 069H well (Application at paragraph D); and
- E. To provide “appropriate relief” regarding the 16H well that “may include designating Nearburg Producing Company as operator of the well” (Application at paragraph E).

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<sup>1</sup> The Agreements repudiated by NEX include: (a) the Operating Agreement that lists the W/2 of Section 20 as part of the contract area and under which the 16H, the 43H and the 44H wells have been drilled (*see* COG Ex. 4 at pgs. 22 and 29); (b) the “Ratification And Joinder Of Unit Agreement And Unit Operating Agreement” executed by Nearburg as a working interest owner in June of 2009 and approved by the State Land Office in July of 2009 (*see* COG Ex. 2); (c) the agreement to extend a Term Assignment providing Nearburg with an overriding royalty interest, rather than a working interest, in the contract area after termination of the SRO Unit (*see* COG Exs. 1, 10-19A), and (d) the Communitization Agreements signed by NEX on May 20, 2015, stating in bolded type that COG is the operator of the spacing and proration units dedicated to the 43H and 44H wells with an effective date prior to the drilling of these wells (*see* COG Exs. 18, 18A, 26, 27).

With the exception of the relief sought under paragraphs B and D above, these requests mirror the relief sought under the Complaint NEX contemporaneously filed in the First Judicial District Court.<sup>2</sup>

In response to NEX's repudiation of any agreement authorizing COG to operate on the W/2 of Section 20, COG filed applications to pool NEX's interests in the spacing and proration units dedicated to the 43H and 44H wells. Case No. 15481 contains the pooling application for the acreage dedicated to the 43H well, while Case No. 15482 contains the pooling application for acreage dedicated to the 44H well.

#### **The Dismissals and Resolution Under Division Order R-14187**

At the May 4, 2016, hearing, NEX informed the Division that it no longer sought removal of COG as operator of the 16H well producing from the Nearburg's lease and suggested no other "appropriate relief;" accordingly the relief sought under Paragraph E of NEX's Application has been dismissed. See Order R-14187 at p. 9, ¶¶ (49)-(51). With respect to the "accounting" sought under Paragraph C of NEX's Application, the Division properly determined it lacked authority to order an accounting except pursuant to the exercise of its compulsory pooling power. See R-14187 at p. 8, ¶¶ (40)-(41). With respect to the remaining requests for relief under NEX's Application, the Division correctly concluded that Commission precedent limited jurisdiction to whether COG "(a) [had] a good faith belief that it had permission to drill the proposed well; (b) from a person whom the operator in good faith believes owns a valid subsisting working interest

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<sup>2</sup> See Complaint filed in *Nearburg Exploration Company, L.L.C., SRO2 LLC, and SRO3 LLC v. COG Operating LLC, CV-2015-0254* at page 11 (Count 1, trespass alleging no right to drill); page 13, at ¶ 65 (Count Two, seeking an accounting without credit for any costs of development or production); page 14 (Count Four, seeking an accounting); page 14 at ¶ 77 (seeking a declaration COG "was no longer entitled to drill the Wells" and that NEX is "not subject to the Operating Agreement" governing the subject area).

in the drillsite.” See Order R-14187 at p. 5, ¶(25), citing Order R-11700-B at pg. 5, ¶27 and ¶28 (*Tmbr/Sharp* cases).

The Division then reviewed the facts presented at the May 2016 hearing and found the following:

(27) The evidence indicates that COG did have the requisite good faith belief that it was the duly authorized operator of the W/2 of Section 20 on the dates when it commenced drilling the 43H Well and the 44H Well. COG could, in good faith, have believed, and apparently did believe, that the SLO-prescribed form of Ratification of the Unit Agreement, executed by Nearburg [COG Exhibit 3], was effective to ratify the Unit Operating Agreement.

(28) COG could also have apparently believed, based on email correspondence, that Nearburg, who owned the underlying title, had authorized it to “mov[e] forward on the assumption that it was intended to keep the [Term] assignment effective” [COG Exhibit 10, at page 2]. In view of the continued exchange of emails evidencing intention on the part of both parties to renew the term assignment, and the absence of other evidence of bad faith, the Division concludes that COG believed, in good faith, that it had permission to develop this property assuming Nearburg would remain a royalty owner only.

Order R-14187 at p. 6. As a result of these findings, the Division found no violation of Division rules when COG drilled the 43H and 44H wells, nor when COG permitted the 69H well. *Id.* at ¶(33) and ¶(47).<sup>3</sup>

The Division also denied COG’s pooling applications for the spacing and proration units dedicated to the 43H and 44H wells on the grounds that it “does not have jurisdiction to construe contacts or determine their validity.” Order R-14187 at p. 10, ¶(59). While the Division certainly lacks authority to determine the parties’ rights under contacts, that lack of authority is not a proper basis for denying pooling. Indeed, the Division routinely pools acreage subject to contract or title disputes with the normal caveat that “[t]he operator of the well and the Unit shall notify the Division in writing of the subsequent voluntary agreement of parties subject to the compulsory pooling provisions of this order.” See, e.g., Order R-14145 at p. 5, ¶(17). In this

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<sup>3</sup> COG permitted the 69H well (API No. 30-015-43093) on May 5, 2015. This well has not been drilled.

case, there is no debate that COG has authority to operate on the W/2 of Section 17 where the surface holes for the 43H and 44H wells are located.<sup>4</sup> Further, NEX has never objected to COG's operation of the 16H well located on the W/2 of Section 20 and further noted at the Division hearing it was not seeking to remove COG as the operator of that well completed in the same pool as the 43H and 44H wells. It was not until July of 2015, almost a year after the 43H and 44H wells were drilled, that NEX first informed COG that it repudiated the Operating Agreement and no longer desired to extend the Term Assignment providing NEX with an overriding royalty interest in the contract area. *See* COG Exs. 24 and 30. Now that NEX has formalized its position by filing its Complaint in district court and its Application with the Division – over two years after these wells were permitted -- a pooling order must issue that conforms with the Communitization Agreements signed by NEX and approved by the State Land Office. *See* COG Exs. 26 and 27. Indeed, Sections 70-2-17(C) and 70-2-18(A) of the Oil and Gas Act, when read together, require an operator to obtain pooling orders on “just and reasonable” terms that are “effective from first production” for spacing and proration units dedicated to wells that have been “drilled” once an owner takes the position it is no longer subject to a voluntary agreement combining the acreage. That pooling order then remains in effect until a voluntary agreement is reached or confirmed.

**COG'S PROPOSED EVIDENCE**

<b>WITNESS Name and Expertise</b>	<b>ESTIMATED TIME</b>	<b>EXHIBITS</b>
Ryan Owen Petroleum Landman	30 minutes	Approximately 8

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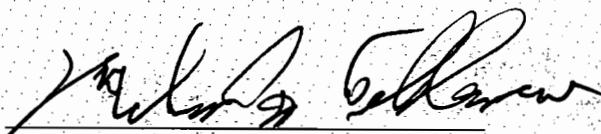
<sup>4</sup> Yates Petroleum, which holds the state lease covering the W/2 of Section 17, has not repudiated the Operating Agreement which it and the other Yates Entities subscribed to using the same Ratification form as that executed by Nearburg in 2009. *See* COG Ex. 4 at p. 19; Ex. 2 at p. 4.

**PROCEDURAL MATTERS**

Pursuant to the instructions from the Commission, the parties have engaged in efforts to agree upon a Statement of Undisputed Facts to shorten the hearing time necessary to present these consolidated matters on de novo appeal. The efforts to date are contained on Attachment A hereto, which identifies the accepted facts in normal type and redlines the remaining areas of disagreement as to certain proposed facts. COG will demonstrate at the hearing that the redlined proposed facts are likewise fully supported by the Exhibits filed with the Commission.

Respectfully submitted,

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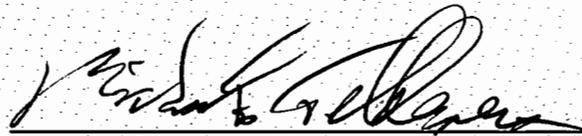
**CERTIFICATE OF SERVICE**

I hereby certify that on February 21, 2017, I served a copy of the foregoing document to the following counsel of record via electronic mail:

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## **STATEMENT OF UNDISPUTED FACTS FOR COMMISSION PROCEEDING**

1. COG is the operator of record for the following horizontal wells in Township 26 South, Range 28 East, NMPM, in Eddy County, New Mexico:

- The SRO State 16H (API No. 30-015-38071) dedicated to the W/2 W/2 of Section 20 drilled by COG on March 4, 2011 (“the 16H well”);
- SRO State Com Well No. 043H (API No. 30-015-41141) dedicated to the W/2 W/2 of Sections 17 and 20 drilled by COG on August 8, 2014 (“the 43H Well”); and
- SRO State Com Well No. 044H (API No. 30-015-41142) dedicated to the E/2 W/2 of Sections 17 and 20 (“the 44H Well”) drilled by COG on October 10, 2014.

2. The surface hole locations for the 43H and 44H wells are located on the W/2 of Section 17, a state lease (V-7470) in which Yates Petroleum Corporation is the lessee of record.

3. The 16H well and the bottom hole locations for the 43H and the 44H wells are located in the W/2 of Section 20, a state lease (V-7450) in which Nearburg Exploration Company (“Nearburg”) is the lessee of record.

4. When the 16H wells was drilled, but before the 43H and 44H wells were drilled, the lands in Sections 17 and 20 were part of a voluntary unit established under that Unit Agreement for the Development and Operation of the SRO State Exploratory Unit dated May 8th, 2009. COG Ex. 5.

5. The SRO State Exploratory Unit became effective on June 29, 2009. COG Ex. 5.

6. COG is the successor operator to Marbob Energy Corporation (“Marbob”), the named operator under an Operating Agreement for the SRO State Exploratory Unit dated May 8, 2009.

7. On June 26, 2009, at the request of Marbob, Nearburg executed a form promulgated by the State Land Office entitled “Ratification And Joinder Of Unit Agreement And Unit Operating Agreement” (hereinafter the “Ratification”) NEX Ex. 10.

~~8. At the time Nearburg executed the Ratification it held all of the working interest in the W/2 of Section 20. COG Exs. 1 and 2.~~

~~9. On July 13, 2009, Marbob submitted to the State Land Office Ratifications executed by Nearburg and Chesapeake Exploration along with a “revised ‘Exhibit B’ to the Unit Agreement.” COG Ex. 2 at p. 2.~~

10.8. Marbob's On July 13, 2009, Marbob submitted a letter to the State Land Office that represented the following:

“Chesapeake and Nearburg have both subscribed to the Unit Operating Agreement and will pay their proportionate share of the expenses associated with drilling the SRO State Unit #1H well.”

COG Ex. 2 at p. 2.

11.9. By letter dated July 22, 2009, the State Land Office recognized that it received the “subsequent joinder ratifications from Chesapeake Exploration LP and Nearburg Exploration Company committing their interests to the SRO State Exploratory Unit Agreement.” The Commissioner further stated “In accordance with Article 22 of the unit agreement, the Commissioner of Public Lands approves the subsequent joinder ratifications of Chesapeake Exploration LP and Nearburg Exploration Company to the SRO State Exploratory Unit Agreement. Tracts Nos. 23, 25 and 26 will be committed to this unit agreement effective August 1, 2009.” COG Ex. 2. Nearburg was not copied on the July 22, 2009 letter.

12.10. Article 22 of the SRO State Unit Agreement states:

SUBSEQUENT JOINDER: Any oil or gas interest in lands within the unit....may be committed hereto by the owner or owners of such rights.....and if such owner is also a working interest owner, by subscribing to the operating agreement providing for the allocation of costs of exploration, development and operation.

COG Ex. 5 at ¶ 22.

~~13. Yates Petroleum Corporation, Yates Drilling Company, Myco Industries, Inc. and Abo Petroleum Corporation (“Yates Entities”) committed their working interest in the W/2 of Section 17 to the Operating Agreement by execution of the same Ratification form as that executed by Nearburg. COG Exhibit 4 (Operating Agreement) at p. 19.~~

14.11. On August 24, 2009, Nearburg executed a “Term Assignment” conveying its working interest in the W/2 of Section 20 to Marbob and retaining for Nearburg an overriding royalty interest effective July 1, 2009. *See* COG Ex. 1.

15.12. The ~~Nearburg-Marbob~~ Term Assignment provides that it continues in force so long as the SRO Unit remained in effect. *See* COG Ex. 1.

16.13. In October 2010, COG succeeded Marbob as the Operator under the Operating Agreement.

17.14. In 2012, COG drilled and completed the 16H Well on the Nearburg lease in the W/2 W/2 of Section 20.

18.15. Before its expiration, the ~~Marbob~~ Term Assignment contained reporting and notification requirements for the Unit Operator to provide to Nearburg with respect to all wells drilled on the Subject Interests or on lands covered by the Unit Agreement (“Well Information Requirements”), including:

- Copy of the drilling and completion procedures 48 hours prior to the commencement of operation.
- Copy of survey plats, permit to drill, and other regulatory forms and letters filed with any governmental agencies.
- One (1) copy each of all title opinions, governmental OCD examiner and commission hearing orders and curative instruments covering the spacing unit.
- Nearburg should receive 24-hour notice of the following events: spudding, wireline logging, open hole testing, coring, or plugging of the well.
- Prior to any operation, Operator shall furnish to Nearburg, a well completion prognosis specifying in reasonable detail the procedure of work for the proposed operation. Such prognosis shall be sent to Nearburg not later than 48 hours prior to commencement of any such operation.

COG Ex. 1, Term Assignment, Exhibit A.

19.16. In February 2013, COG filed and the Division approved drilling permits for the 43H and 44H wells on the Yates and the Nearburg leases in the W/2 of Sections 17 and 20. COG left the consolidation code on the drilling permits blank for both wells. COG Ex. 8 and 9.

20.17. On March 1, 2014, the SRO Unit terminated with the voluntary agreement of COG, the other working interest owners, the State Land Office, and Nearburg. COG Ex. 11; NEX Ex. 11.

21.18. The ~~Marbob~~ Term Assignment states: “The Subject Interests and Assignor’s reserved overriding royalty interest shall, during the term of this Assignment and not thereafter, be subject to the terms and provisions of that certain Unit Agreement for the Development and Operation of the SRO Unit Area, Eddy County, New Mexico.” COG Ex. 1, page 2.

22.19. Pursuant to Article XIII, the SRO Unit Operating Agreement remained in effect for ~~the contract area~~ despite termination of the SRO Unit.

23.20. On March 6, 2014, five days after the voluntary termination of the Unit and the ~~Marbob~~ Term Assignment, COG filed new C-102 Well Location and Acreage Dedication Plats pursuant to the conditions of approval on a previously filed Form C-103 that changed the well names for the 043H and 044H wells. COG left the consolidation code blank for both wells and signed the certification on the C-102 Well Location and Acreage Dedication Plats that it had the right to drill on the lands where the wells were located. COG Ex. 8 and 9.

24.21. In late March 2014, COG informed Nearburg of its opinion that, with respect to Nearburg’s state lease in the W/2 of Section 20:

- That the Operating Agreement remained in effect and that the contract area “can be drilled at will subject to the JOA already in place”; and
- “I believe that the most pressing issue is that the term assignment from Nearburg to Marbob is effective until the SRO Unit is dissolved so technically it has expired. However, we are moving forward on the assumption that it was intended to keep the assignment and the ORR effective until all the wells in (or formerly in) the unit are plugged, so we will need to paper that up. However, if that assumption is incorrect please let me know since it will affect the work the title lawyer is doing on the updated opinions for the wells.”

COG Ex. 10 at pages 2-3.

25-22. In June of 2014, Nearburg sent an invoice to COG for payment of the annual lease rental for the Nearburg State Lease VO-7450.

26-23. On July 9, 2014, COG provided Nearburg with a proposed communitization agreement for the previously permitted 43H well. COG Ex. 12.

27-24. On August 2, 2014, COG spud the 43H well.

28-25. The 43H well was completed on February 25, 2015 and began producing on March 1, 2015.

29-26. Nearburg did not execute or return a communitization agreement for the 43H well prior to COG drilling or completing the well.

30-27. An October 8, 2014, title opinion for the SRO State Unit Com 38H, 39H and 40H wells in Section 34, T-25-S, R-28-E states:

Because the SRO State Exploratory Unit was voluntarily terminated effective March 1, 2014, it appears that the primary term of the Term Assignment is now expired and the interests assigned thereunder in all of the Subject Lands except Tracts 7 and 8, which comprise the spacing unit for the SRO State Unit Com #11H Well, have reverted back to Nearburg Exploration Company, L.L.C. We have reported title accordingly.

COG provided Nearburg with the October 8, 2014, Title Opinion on January 27, 2015. NEX Ex. 24.

31-28. On October 10, 2014, COG spud the 44H well.

32-29. The 44H well was completed on March 4, 2015 and began producing on March 5, 2015.

33-30. Nearburg did not execute or return a communitization agreement for the 44H well prior to COG drilling or completing the well.

34-31. COG did not provide any of the Well Information Requirements attached to the ~~Marbob~~ Term Assignment to Nearburg before drilling the 43H and 44H wells. Specifically, COG did not provide a “copy of survey plats, permit to drill, and other regulatory forms and letters filed with any governmental agencies.” COG Ex. 1, Term Assignment, Exhibit “A.”

35-32. On October 15, 2014, Nearburg and COG met to discuss the ~~Marbob~~ Term Assignment.

36-33. On November 3, 2014, Nearburg sent COG an email stating the following with respect to the Marbob Term Assignment:

- “We are, however, agreeable to your changes to the Term Assignment of the Oil and Gas Lease covering the W/2 of Section 20-26S-28E. I assume this will actually be an Amendment or Correction to Term Assignment of Oil and Gas Lease.”
- “Also, we would still like to see COG’s calculations on a well by well basis for our ORRI in the wells included on the lands subject to the SRO Operating Agreement.”

COG Ex. 15.

37-34. On November 18, 2014, COG provided Nearburg with a “Correction Term Assignment.” COG Ex. 16.

38-35. On November 25, 2014, Nearburg responds to the Corrected Term Assignment with a series of emails stating:

- “The way I read the Correction Term Assignment, Nearburg would own an overriding royalty as allocated under the JOA...Please confirm how COG plans to allocate per the JOA and not pay based on the interest set out therein. We are not trying to complicate matters, but feel we need to stipulate exactly what we own, or will own, after executing the Corr. Term Asgmt.” COG Ex. 17.
- “Let’s touch base after the turkey’s been put away and see if we can reach some sort of agreement that suits both sides.” NEX Ex. 23

39-36. On March 9 and March 12, 2015, COG filed “As Drilled” C-102 Well Location and Acreage Dedication Plat for the 43H and the 44H wells. COG left the consolidation codes blank and signed the certification that “this organization either owns a working interest or unleased mineral interest in the land including the proposed bottom hole location or has a right to drill this well at this location.” NEX Exs. 4, 6.

40.37. On April 22, 2015, COG in advance of a planned meeting, provided Nearburg with communitization agreements for the spacing units dedicated to the 43H and 44H wells and an agenda for the meeting. COG Ex. 18.

41.38. On the morning of April 24, 2015, COG and Nearburg met to discuss COG's proposed communitization agreements, an amendment to the Term Assignment, and data on the SRO Unit wells, including the 43H and 44H wells. COG Ex. 19. Immediately following that meeting, Nearburg sent the following documents via email to COG:

- A spreadsheet of the SRO Unit wells showing the "NEX ORRI" and identifying wells for which Nearburg was missing well information.
- "Our most updated Well Information Requirements" to replace the statement attached to the ~~Marbob~~ Term Assignment. COG Ex. 19.

42.39. Nearburg again requested well information on the SRO Unit Wells on May 5, 2015, particularly the 43H and 44H wells. COG delivered information related to the 43H and 44H wells on May 6, 2015. COG Ex. 20.

43.40. On May 14, 2015, COG forwarded Nearburg an email from the State Land Office where it "threatens to expire the leases involved with the well and charge the operator double the value of oil/gas removed from the well" if the proper communitization agreements were not filed. NEX Ex. 56.

44.41. On May 20, 2015, Nearburg, as the lessee of record for the W/2 of Section 17, executed two Communitization Agreements for the spacing units dedicated to the 43H and the 44H wells. See COG Exhibits 26 and 27.

- ~~Both Communitization Agreements have an effective date that precedes the drilling of the 43H and the 44H wells.~~
- ~~Both Communitization Agreements name COG as Operator of the acreage dedicated to the 43H and the 44H, stating in bolded type:~~

~~**COG Operating LLC shall be the Operator of said communitized area and all matters of operation shall be determined and performed by COG Operating LLC.**~~

~~Id. at ¶18.~~

45.42. On May 28, 2015, Nearburg sent COG a letter stating:

- "The Term Assignment has expired by its own terms and has not been extended. We would request that you inform us as to the source of the COG's authority to drill the Wells utilizing the acreage covered by the Lease. Nearburg is not aware of any Operating Agreement related to the Wells or any

other arrangement which would grant COG the right to drill the Wells with the acreage covered by the Lease.”

- In an effort to comply with the SLO’s request, Nearburg would consider executing the communitization agreements; however, Nearburg explicitly stated that the agreements should be limited to the “2nd Bone Spring interval and that “any execution of the Agreements would not extend or ratify the Term Assignment and Nearburg would not waive any rights held by it as owner and holder of the Lease. Nearburg would consider executing the Agreements merely to comply with the State of New Mexico Land Office requirements, but Nearburg would specifically reserve all rights relating to this situation.” NEX Ex. 14.

46-43. On June 2, 2015, COG forwarded ~~revised replacement pages for the~~ communitization agreements that limited the communitized interval to the “2nd Bone Spring interval” as s requested by Nearburg. NEX ~~Ex. 14~~, June 2, 2015 email between Aaron Myers and Randy Howard.

47-44. By a letter agreement dated June 10, 2015, Nearburg provided COG with the executed Communitization Agreements for filing with the State Land Office, requested specific well information to “to further evaluate our working interest in the Wells” and requested that it be provided “going forward” expense and revenue information “provided to other working interest owners in the Wells.” Under this letter agreement, COG expressly recognized that “Nearburg’s execution and delivery of the enclosed Agreements does not extend or ratify the Term Assignment and Nearburg does not waive any rights held by it as owner and holder of the Lease and that Nearburg specifically reserves all rights relating to this situation.” NEX Ex. 15.

48-45. On June 23, 2015, COG filed communitization agreements with the State Land Office that ~~incorrectly identified but failed to include the revised page limiting~~ the communitized interval to the “2nd Bone Spring” rather than as the entire “Bone Spring Formation” rather than the “2nd Bone Spring interval.”- NEX Ex. 49 and 50.

49-46. On July 2, 2015, the State Land Office approved the communitization agreements filed by COG and they were recorded in Eddy County. COG Exs. 26 and 27.

50-47. By letter dated July 14, 2015, Nearburg informed COG that with the termination of the SRO Unit, COG’s contractual obligation to pay Nearburg an overriding royalty interest in the SRO wells terminated, but that Nearburg had continued to receive payments from COG. Nearburg enclosed a check to reimburse COG for the overpayments it received after the SRO Unit terminated and requested that no future payments of these overrides be sent to Nearburg. COG Ex. 24.

51-48. From 2009 through July of 2015, the parties to the Operating Agreement distributed income and paid expenses for the contract area on the basis that the working interest in the Nearburg lease covering the W/2 of Section 20 was committed to the Operating Agreement and that Nearburg held an overriding royalty interest.

52.49. On July 20, 2015, Nearburg informs COG by email that “[t]he July 13 offer of COG to extend the Term Assignment is not acceptable” and that by virtue of drilling the 43H and 44H wells COG has “committed mineral trespass and converted Nearburg hydrocarbons.”

53.50. On August 17, 2015, NEX sent a letter to COG revoking Division Orders for SRO Unit wells crediting an overriding royalty interest to Nearburg.

54.51. On November 24, 2015, Nearburg filed a Complaint in Santa Fe County State District Court requesting, among other relief, that the Court declare Nearburg is “not subject to the Operating Agreement” and that no voluntary agreement authorizes COG to develop the acreage in the W/2 of Section 20. COG Exhibit 6.

55.52. By letter dated December 30, 2015, COG informed the State Land Office that the first page of the filed Communitization Agreements for the 43H and 44H wells contained a “clerical error,” that the parties intended to limit the agreements to the “2nd Bone Spring interval” and submitted substitute pages to the State Land Office to correct the clerical error. COG Ex. 28.

56. State Land Office records reflect that the state has disbursed royalty payments for the 43H and 44H wells pursuant to the Communitization Agreements and that no funds are suspended.

57.53. The 43H and 44H wells are completed in the Second Bone Spring interval of the Hay Hollow; Bone Spring Pool (30215), an oil pool subject to the Division’s statewide rules.

58.54. The acreage dedicated to the 43H and 44H wells consists of eight (8) adjacent quarter-quarter sections for each well.

59.55. No structural or geologic impediments exist for the Second Bone Spring interval in the subject area and the dedicated acreage is suitable for development by horizontal wells. COG Ex. 31.

60.56. The Second Bone Spring interval is continuous across Sections 17 and 20, and all quarter-quarter sections within the dedicated non-standard spacing and proration units are productive. COG Ex. 32.

61.57. The E/2 of Sections 17 and 20 have likewise been developed with two-mile standup horizontal wells completed in the Second Bone Spring interval of the Hay Hollow; Bone Spring Pool.