

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 COMMISSION FOR  
6 THE PURPOSE OF CONSIDERING:

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

Consolidated with

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

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

22 REPORTER'S TRANSCRIPT OF PROCEEDINGS

23 COMMISSIONER HEARING

24 February 28, 2017

25 Volume 1 of 2

Santa Fe, New Mexico

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

1                   This matter came on for hearing before the  
2 New Mexico Oil Conservation Commission on Tuesday,  
3 February 28, 2017, at the New Mexico Energy, Minerals  
4 and Natural Resources Department, Wendell Chino  
5 Building, 1220 South St. Francis Drive, Porter Hall,  
6 Room 102, Santa Fe, New Mexico.  
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1 (9:06 a.m.)

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

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

10 MR. HALL: Yes.

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

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

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

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

1 Haynes & Boone.

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

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

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

9 CHAIRMAN CATANACH: One more time.

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

11 CHAIRMAN CATANACH: She's also an attorney?

12 MR. HALL: Yes.

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

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

18 CHAIRMAN CATANACH: All right.

19 OPENING STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ongoing violation of Nearburg's correlative rights.

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

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

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

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

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

25           And at 19.15.16.15C, you will see the

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

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

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

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

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

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

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

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

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

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

20           So that concludes my opening statement.

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

22                           OPENING STATEMENT

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

1 I have a little more extensive opening statement.

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

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

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

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

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

6           CHAIRMAN CATANACH: Which order?

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

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

10          MR. FELDEWERT: May I approach?

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

13          MR. FELDEWERT: Make it easy.

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

16          It's in the general book?

17          MS. DAVIDSON: (Indicating.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 assignment with Marbob.

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

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

20                   So by five bases good-faith belief.

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

25                   What did COG do? Look at our Exhibit

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

10 Right, Randy?

11 MR. HOWARD: (Indicating.)

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

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

1 think it's important.

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

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

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

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

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

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

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

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

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

1 at will under the contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 court.

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

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

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

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

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

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

1 order.

2 Any questions?

3 CHAIRMAN CATANACH: No.

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

6 (Laughter.)

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

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

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

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

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

25 MR. HARPER: We call Randy Howard as our

1 first witness.

2 WILLIAM RANDY HOWARD,  
3 after having been first duly sworn under oath, was  
4 questioned and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. HARPER:

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

9 A. William Randall Howard.

10 Q. Where do you live, sir?

11 A. In Midland, Texas.

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

13 A. I work for Nearburg Producing Company, Nearburg  
14 Exploration Company, SRO2, LLC and SRO3, LLC as the land  
15 manager.

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

18 A. That's correct.

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

21 A. Yes.

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

1 A. Yes.

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

4 A. I am.

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

7 A. Yes.

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

10 A. Yes.

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

16 A. No.

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

19 A. No.

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

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

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

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

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

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

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

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

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

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

23 A. I believe that's Yates.

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

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

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

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

7           Q.    Where is the 43 and 44H?

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

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

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

13          Q.    And how did that come about?

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

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

18          A.    Yes.

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

22          A.    Correct.

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

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

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

6           A.     Yes.

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

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

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

17          A.     Yes.

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

25          A.     I do.

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

3 A. No.

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

6 A. Marbob.

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

10 A. Yes.

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

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

13 Q. Now --

14 MR. FELDEWERT: Did you say 2009?

15 THE WITNESS: Was it '10?

16 MR. FELDEWERT: (Indicating.)

17 THE WITNESS: Sorry.

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

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

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

25 A. Okay.

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

3 A. Yes.

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

8 A. Yes, I do see that.

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

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

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

15 A. Yes.

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

20 A. That's correct.

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

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

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

3 A. Yes.

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

6 A. Correct.

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

9 A. Yes.

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

12 A. Yes.

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

15 A. Correct.

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

18 A. Yes.

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

21 A. Yes.

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

24 A. Yes.

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

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

3 A. Yes.

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

6 A. Yes.

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

9 A. Yes.

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

12 A. Yes.

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

15 A. Yes.

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

18 A. Yes.

19 Q. And when do you understand it terminated?

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

22 Q. COG requested termination of the unit?

23 A. Yes.

24 Q. Do you understand why?

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

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

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

4 A. No.

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

8 A. Yes.

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

12 A. Yes.

13 Q. Why is that?

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

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

24 A. Yes, I do.

25 Q. It does not refer there to the operating

1 agreement, does it?

2 A. It does not.

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

6 A. Yes.

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

10 A. Correct.

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

17 A. I do.

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

22 A. Yes.

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

1 A. Yes.

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

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

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

7 A. Yes.

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

11 A. Yes, I do.

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

14 A. Yes.

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

18 A. Yes.

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

21 A. It does, yes.

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

25 A. Yes, there is.

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

4 A. Yes.

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

7 A. Yes.

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

11 A. Yes.

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

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

16 Q. Before they happened?

17 A. Yes.

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

24 A. Yes.

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

1           A.     That's correct.

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

6           A.     Yes.

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

10          A.     Correct.

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

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

16          Q.     Before commencement; is that right?

17          A.     That's correct.

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

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

1 information.

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

3 A. We had no knowledge of it.

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

6 A. No, sir.

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

9 A. Yes.

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

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

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

24 A. Yes.

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

1 here about the voluntary termination here in a second.

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

6 A. Yes.

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

8 A. Yes.

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

11 A. No.

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

15 A. Yes.

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

19 A. I do.

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

23 A. Yes.

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

1 for voluntary termination --

2 A. Yes.

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

5 A. Yes.

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

10 A. That's correct.

11 Q. At the request of COG?

12 A. Yes.

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

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

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

21 A. No.

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

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

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

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

7 A. Yes.

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

10 A. Yes.

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

14 A. Yes.

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

17 A. Yes.

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

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

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

23 A. Yes.

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

1 A. No.

2 Q. Why not?

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

5 Q. This was after the unit terminated?

6 A. Yes.

7 Q. After the term assignment terminated --

8 A. Yes.

9 Q. -- right?

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

12 A. No.

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

16 A. No.

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

19 A. No.

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

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

4           A.    Yes.

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

6           A.    Yes.

7           Q.    You're not informed of this?

8           A.    No.

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

11          A.    Yes. Yes.

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

14          A.    I am.

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

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

19          Q.    Yes, Exhibit 10.

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

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

22          A.    Keeping me on my toes.

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

25          A.    Okay. I'm there.

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

3 A. Yes.

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

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

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

10 A. Yes.

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

17 A. Yes.

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

20 A. I don't believe so.

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

23 A. Correct.

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

1 9th or so?

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

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

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

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

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

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

16 A. I did.

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

19 A. I did.

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

22 A. I did.

23 Q. If you look at Exhibit 12 --

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

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

4           Q.    And Kimberly what?

5           A.    Crandell.

6           Q.    And what was her position?

7           A.    She was a land assistant for me.

8           Q.    And you were on the speakerphone?

9           A.    Yes.

10          Q.    And you were in her office?

11          A.    Correct.

12          Q.    And she was with you?

13          A.    She was.

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

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

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

25                   THE WITNESS:  Correct.

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

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

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

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

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

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

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

25                   MR. WADE: From all these emails.

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

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

5                   MR. FELDEWERT: Right.

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

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

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

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

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

16                   MR. HARPER: Okay. Thank you.

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

20           A.     Yes.

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

24           A.     Yes.

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

1 expired?

2 A. Yes.

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

5 A. Yes.

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

8 A. Yes.

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

11 A. Correct.

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

15 A. Yes.

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

18 A. No.

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

24 A. Yes.

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

1 about what the status is; is that right?

2 A. Correct.

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

6 A. Yes.

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

9 A. Yes.

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

12 A. Yes.

13 Q. And went into production about that time?

14 A. Yes.

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

18 A. No.

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

21 A. No.

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

24 A. No.

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

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

3 A. Correct.

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

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

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

11 A. 40 acres.

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

15 A. No.

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

17 A. No.

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

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

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

1 CHAIRMAN CATANACH: Thank you.

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

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

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

10 A. No.

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

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

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

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

20 A. That they did not.

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

23 MR. FELDEWERT: Same objection.

24 MR. HARPER: I'll rephrase.

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

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

3 A. We didn't.

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

6 A. No.

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

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

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

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

15 MR. WADE: Did you say 20?

16 MR. HARPER: 20. Yes, sir.

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

21 A. Yes.

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

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

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

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

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

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

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

13 A. Yes.

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

15 A. Correct.

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

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

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

22 A. I do.

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

1 A. Correct.

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

4 A. Yes.

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

7 A. Yes.

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

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

14 CHAIRMAN CATANACH: Go ahead.

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

19 A. Yes.

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

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

5 A. Yes.

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

10 A. Yes.

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

13 A. Yes.

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

18 A. Correct.

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

23 A. No.

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

1 A. Correct.

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

4 A. Two days before, yes.

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

8 A. No.

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

12 A. Yes.

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

21 A. Yes.

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

24 A. Yes.

25 Q. The one that had expired?

1 A. Correct.

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

4 A. Yes.

5 Q. Did you have that meeting?

6 A. Yes.

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

9 A. They were drilling.

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

13 A. No.

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

16 A. No.

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

22 A. Yes.

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

25 A. Correct.

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

3 A. Yes.

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

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

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

18 A. No.

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

21 A. Other issues with other operating agreements.

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

24 A. Yes.

25 Q. Not just this unit, these wells?

1 A. Correct.

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

8 A. Yes.

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

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

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

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

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

20 A. Yes.

21 Q. Why did you say that?

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

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

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

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

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

9 A. Sure.

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

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

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

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

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

25 A. Absolutely.

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

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

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

11 A. I did not.

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

14 A. Absolutely.

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

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

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

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

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

25 MR. HARPER: Sure.

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

4 MR. FELDEWERT: Objection.

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

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

9 A. Yes.

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

13 A. Yes.

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

18 A. Okay. I'm in 26.

19 Q. You're in 26.

20 A. And what's the highlighted portion?

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

24 A. Yes.

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

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

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

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

7 A. Yes.

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

11 A. Yes.

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

14 A. Yes.

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

17 A. Correct, a couple of hours.

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

21 A. Yes.

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

1 A. Yes.

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

4 A. Yes.

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

11 A. Yes.

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

14 A. Yes.

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

16 A. Yes.

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

18 A. No.

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

22 A. Yes.

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

25 A. Yes.

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

6 A. Correct.

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

10 A. Correct.

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

15 A. Yes.

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

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

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

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

3 A. I do.

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

6 A. No.

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

10 A. No.

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

16 A. Yes.

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

20 A. Yes.

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

1 A. Yes.

2 Q. He sent it?

3 A. He did.

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

6 A. Yes.

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

13 A. Yes.

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

17 A. Yes.

18 Q. Is this somehow related to that?

19 A. It is.

20 Q. You're still asking for that?

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

23 Q. And why do you want that?

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

1 Q. He still hadn't sent it?

2 A. He has not.

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

4 A. Of wells, no.

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

8 A. Yes. Uh-huh.

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

11 A. Yes.

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

16 A. I do.

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

22 A. Yes.

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

24 A. No.

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

1 A. No.

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

4 A. No, sir.

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

9 A. Yes.

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

14 A. Yes.

15 Q. -- "Loss of Title."

16 A. Yes.

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

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

4 A. I do.

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

7 A. Yes.

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

11 A. Yes.

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

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

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

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

23 CHAIRMAN CATANACH: I'll allow it.

24 THE WITNESS: Allow?

25 CHAIRMAN CATANACH: Go ahead.

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

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

9 THE WITNESS: Okay.

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

15 A. I do.

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

18 A. They are not.

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

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

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

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

5 A. I do.

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

22 A. I do.

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

1 notice of a well being drilled?

2 A. Yes.

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

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

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

11 A. No.

12 Q. -- 43 or 44H?

13 A. No.

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

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

18 CHAIRMAN CATANACH: Hold on.

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

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

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

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

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

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

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

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

1 MR. HARPER: Yes, sir.

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

4 CHAIRMAN CATANACH: Okay. You may proceed.

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

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

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

11 A. Yes.

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

15 A. I do.

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

19 A. Yes.

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

23 A. Yes.

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

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

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

5 A. Yes.

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

7 A. I do not.

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

11 A. Yes.

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

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

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

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

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

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

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

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

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

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

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

15 A. Yes.

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

18 A. Correct.

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

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

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

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

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

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

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

18                  THE WITNESS: Yes, by our Dallas office.

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

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

4 COMMISSIONER BALCH: Who is S-T?

5 THE WITNESS: S-T?

6 COMMISSIONER BALCH: Input here has S-T.

7 THE WITNESS: Sheri Thomas.

8 COMMISSIONER BALCH: Last update is L-P.

9 THE WITNESS: Linda Parker.

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

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

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

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

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

25 CHAIRMAN CATANACH: Okay. On advice of

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

5 MR. HARPER: Okay.

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

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

14 A. Yes.

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

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

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

22 A. Yes.

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

25 A. I do.

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

3 A. Yes.

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

6 A. No.

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

9 A. 50 percent.

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

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

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

14 A. As far as I know, yes.

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

17 A. Yes.

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

21 A. Yes.

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

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

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

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

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

7 A. Yes.

8 Q. And how did you prepare that list?

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

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

12 A. No.

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

15 A. No.

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

19 A. No.

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

24 A. Yes.

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

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

4 A. Yes.

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

8 A. Yes.

9 Q. That you also didn't know?

10 A. Correct.

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

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

17 Q. Did he send you a list back?

18 A. Never.

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

22 A. Yes.

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

25 A. Yes.

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

3 A. Yes.

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

10 A. Yes.

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

13 A. Correct.

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

19 A. Yes.

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

22 A. Correct.

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

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

6 A. I do.

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

9 A. Yes.

10 Q. -- in his email?

11 A. Yes.

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

14 A. Correct.

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

20 A. Correct.

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

25 A. I do.

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

3 A. That's correct.

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

7 A. Yes, sir.

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

16 A. Correct.

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

20 A. Yes.

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

23 A. We did not.

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

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

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

9           A.     Correct.

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

11          A.     Correct.

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

15          A.     I do.

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

17          A.     They are not.

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

20          A.     Yes.

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

24          A.     I do.

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

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

4 A. Yes.

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

9 A. Yes.

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

13 A. I do.

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

18 A. Yes.

19 Q. Now, that was Exhibit 22.

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

23 A. Yes.

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

1 right?

2 A. Yes.

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

12 A. I do.

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

15 MR. HARPER: We added that chart.

16 COMMISSIONER PADILLA: Is that supplement  
17 21?

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

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

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

24 MR. HALL: Yes.

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

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

3 A. Yes.

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

6 A. Yes.

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

9 A. Correct.

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

11 A. No, it's not.

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

15 A. No.

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

18 A. No.

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

23 A. Yes.

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

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

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

5                   MR. HALL: We won't finish.

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

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

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

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

13                   MR. HALL: Mr. Harper.

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

25                   But the issue before you is did COG have a

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

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

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

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

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

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

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

9 MR. HALL: Yes.

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

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

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

16 MR. HALL: Yes.

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

19 MR. HARPER: (Indicating.)

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

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

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

2 CHAIRMAN CATANACH: Understood. Okay.

3 MR. FELDEWERT: Okay.

4 MR. HARPER: May I proceed?

5 CHAIRMAN CATANACH: Yes, sir.

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

10 A. Yes.

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

18 A. Yes.

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

22 A. Yes.

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

1 A. No.

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

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

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

10 CHAIRMAN CATANACH: I'll allow that.

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

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

17 A. No.

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

20 A. No.

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

23 A. No.

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

1 A. No.

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

4 A. No.

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

7 A. No.

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

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

14 A. Yes.

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

17 A. Yes.

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

22 A. Yes, there is.

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

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

4 A. Yes.

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

7 A. Correct.

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

10 A. Yes.

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

14 A. Correct.

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

18 A. Correct.

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

21 A. Yes.

22 Q. What was your reaction?

23 A. I was surprised.

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

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

9 A. No.

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

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

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

18 A. Yes.

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

22 A. It was in discussion, yes.

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

1 A. I do.

2 Q. Is that a new issue?

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

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

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

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

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

14 A. (Indicating.)

15 Q. What does this refer to?

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

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

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

24 Q. And then discuss the override, right?

25 A. Correct.

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

3 A. No.

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

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

7 Q. Okay. What happened at that meeting?

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

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

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

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

22 A. We still didn't, no.

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

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

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

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

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

9 A. Yes.

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

12 A. Correct.

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

15 A. Yes.

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

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

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

25 A. Yes.

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

4 A. Correct.

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

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

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

11 A. Yes, he does.

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

16 A. I do.

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

20 A. Yes.

21 Q. Who is Tim Spear?

22 A. Tim Spear is an engineer at Nearburg.

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

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

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

5           A.    None of us at Nearburg knew.

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

9           A.    Yes.

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

12          A.    Correct.

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

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

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

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

25          Q.    Once you got the two wells?

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

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

4 A. Yes.

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

7 A. Correct.

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

10 A. Correct.

11 Q. Were these documents sent to Nearburg?

12 A. No.

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

15 A. No.

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

18 A. No.

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

21 A. No.

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

25 A. Yes.

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

4 A. Correct.

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

7 A. No.

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

10 A. No.

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

13 A. No.

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

16 A. No.

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

19 A. No.

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

24 A. I do.

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

1 COG?

2 A. Yes.

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

5 A. Correct.

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

16 A. I do.

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

20 A. I do.

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

25 A. Yes.

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

6 A. Yes.

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

10 A. Yes.

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

15 A. Yes, I do.

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

18 A. Yes.

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

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

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

24 A. Absolutely.

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

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

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

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

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

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

15 A. Which exhibit again?

16 Q. 15.

17 A. 15.

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

20 A. Yes.

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

24 A. Yes.

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

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

4 A. Yes.

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

8 A. Yes.

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

12 A. Correct.

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

16 A. Correct.

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

19 A. I do.

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

22 A. Correct.

23 Q. And then you say, "Any execution of" these Comm  
24 "Agreements would not extend or ratify the Term  
25 Assignment and Nearburg would not waive any rights held

1 by it as owner and holder of the lease. Nearburg would  
2 consider executing the Agreements merely to comply with  
3 the State of New Mexico Land Office requirements, but  
4 Nearburg would specifically reserve all rights relating  
5 to this situation." Do you see that?

6 A. Yes.

7 Q. And that's what you told them on May 28th; is  
8 that right?

9 A. Yes.

10 Q. And you made it clear that you -- that Nearburg  
11 was reserving all of its -- would reserve all of its  
12 rights; is that correct?

13 A. Yes.

14 Q. Now, then a couple of weeks later, about 12 or  
15 13 days later, if you turn to the next exhibit, Exhibit  
16 16, you sent another -- that's another letter that you  
17 sent to Mr. Myers on June 10th, 2015, right --

18 A. Yes.

19 Q. -- Exhibit 16?

20 And, again, you're talking about the  
21 communitization agreements of 43 and 44H, right? You  
22 reference --

23 A. Yes.

24 Q. And you remind him, first paragraph, of the May  
25 28th, a letter, right?

1 A. Correct.

2 Q. You say again in that next paragraph, "The Term  
3 Assignment has expired by its own terms and has not been  
4 extended." Do you see that?

5 A. Correct.

6 Q. Then you say -- you say, "COG" -- in the next  
7 paragraph, the last sentence, "COG has agreed to amend  
8 the Communitization Agreements on the above wells to be  
9 restricted to the 2nd Bone Spring interval as Nearburg  
10 proposed." Do you see that?

11 A. Yes.

12 Q. And then your next sentence, Nearburg requests  
13 it be provided with a list of information. Do you see  
14 that --

15 A. Yes.

16 Q. -- number of items?

17 A. Uh-huh.

18 Q. And the next page, you say, "Please acknowledge  
19 as provided below that Nearburg's execution and delivery  
20 of the enclosed Agreements does not extend or ratify the  
21 Term Assignment and Nearburg does not waive any rights  
22 held by it as owner and holder of the Lease and that  
23 Nearburg specifically reserves all rights relating to  
24 this situation." Do you see that?

25 A. I do.

1 Q. And Mr. Myers, in fact, signed at the bottom;  
2 is that correct?

3 A. He did.

4 Q. And had Nearburg previously received or revised  
5 communitization agreements from COG with the change in  
6 the interval?

7 A. I believe by this time we had.

8 Q. And then if you look at Tabs A and B here to  
9 this exhibit, are these the communitization agreements  
10 that you provided on June 10th, copies of them?

11 A. Yes.

12 Q. And the first one at Tab A is for 43H?

13 A. Correct.

14 Q. And the one at Tab B is for 44H; is that right?

15 A. That's right.

16 Q. And on the front, do you see in bold it covers  
17 the 2nd Bone Spring interval? Do you see that?

18 A. I do.

19 Q. And these were delivered with your letter on  
20 June 10th?

21 A. Yes. They were -- actually, he came to my  
22 office, and I hand-delivered them to him. He signed  
23 them and took them with him.

24 Q. Now, I notice -- if you turn into this on page  
25 5, is that your signature?

1 A. Yes, that's my signature.

2 Q. Okay. And the next page has an acknowledgment.  
3 Do you see that?

4 A. I do.

5 Q. But that acknowledgement says "May 20th." Can  
6 you explain why that says "May 20th" up there instead of  
7 some date like June 10th?

8 A. When the original documents had come over to  
9 our offices, I had signed them and had them notarized at  
10 that point in time and was waiting for approval from our  
11 group. And when we changed the -- to limit the depths  
12 that were included, we just exchanged the first page.

13 Q. You didn't re-execute them?

14 A. No.

15 Q. You just switched the pages?

16 A. Correct. That was done with Aaron.

17 Q. Now, why were you still asking for the data  
18 that's asked for in this letter? If you go back to the  
19 letter of Exhibit 16, you asked for a number of items of  
20 information. Why were you asking for that?

21 A. Because we still hadn't received it.

22 MR. FELDEWERT: Hold on a minute. You're  
23 asking him about the June 20th letter?

24 MR. HARPER: Right.

25 MR. FELDEWERT: Did you ask if they were

1 evaluating our working interest in the wells? Is that  
2 what you asked him about?

3 MR. HARPER: No. I just asked him why he  
4 asked for it.

5 THE WITNESS: I'm sorry?

6 Q. (BY MR. HARPER) Why did you ask for the  
7 information in the June 10th letter?

8 A. Because we still hadn't received it.

9 Q. Why did you sign these communitization  
10 agreements?

11 A. We did so under duress in an effort to keep  
12 from losing a lease that we had, and we reserved all the  
13 rights we had in doing so.

14 Q. And if you look at the timeline on June 10th,  
15 2015, the blue box at the bottom of the page, it says  
16 "COG signs letter of agreement." Do you see that?

17 A. I do.

18 Q. Now, let's turn to Exhibit 17. Exhibit 17 has  
19 a slip sheet in the middle, but there are two documents,  
20 a Correction Assignment and a Bill of Sale. One  
21 references SRO2 in the body and one, SRO3. Can you  
22 explain what these two documents are?

23 A. These are Corrections Assignments, Bill of Sale  
24 between Nearburg Exploration Company. One of them is  
25 for SRO2, and one is for SRO3. And it was in an effort

1 to keep those depths, the 2nd Bone Spring and the 3rd  
2 Bone Spring, to these separate entities.

3 Q. Is it your understanding that the 2nd Bone  
4 Spring is assigned to SRO2?

5 A. Yes.

6 Q. And the 3rd to SRO3?

7 A. That's correct.

8 Q. Now, you had -- had there been any discussion  
9 with COG about COG providing copies of recorded  
10 communitization agreements that you had provided that we  
11 looked at a minute ago, 16A and B?

12 A. Yes.

13 Q. And what did they tell you they would do?

14 A. They would give us copies when they were  
15 recorded.

16 Q. Let me ask you to look at Exhibit 18. And  
17 there is a cover sheet from the Land Office, Certificate  
18 of Approval. Do you see that?

19 A. Yes.

20 Q. And then you'll see a communitization agreement  
21 for 43H, and then if you turn a few pages in, you'll see  
22 another Certificate of Approval and a communitization  
23 for 44H. Do you see that?

24 A. Yes.

25 Q. Is the front page of -- well, are these the

1 communitization agreements that you provided back to  
2 COG?

3 A. No.

4 Q. What's different?

5 A. The formation is described in these as the  
6 higher Bone Spring Formation, and the ones we gave them  
7 was limited.

8 Q. These are not the ones that you provided back?

9 A. They are not.

10 CHAIRMAN CATANACH: Can you tell us  
11 where -- I'm sorry -- where that -- you're referring to?

12 THE WITNESS: Yes. Where I'm talking about  
13 the formation itself?

14 CHAIRMAN CATANACH: Yeah.

15 THE WITNESS: Okay. In the communitization  
16 agreement, it's on the fourth paragraph, starts out  
17 "Whereas, said leases," and then the Bone Spring is in  
18 bold. Do you see it?

19 CHAIRMAN CATANACH: Thank you.

20 Q. (BY MR. HARPER) And the ones you provided said  
21 "2nd Bone Spring"; is that right?

22 A. With an additional description to define the  
23 2nd Bone Spring.

24 Q. And you see both of these have a Certificate of  
25 Approval from the State Land Office, is that right, on

1 the front of each one of these communitization  
2 agreements?

3 A. Yes.

4 Q. Has Nearburg asked the State Land Office to  
5 revoke those approvals?

6 A. Yes.

7 Q. Do you know if the original agreements even  
8 exist anymore?

9 A. I don't.

10 Q. The 43H and 44H began production sometime  
11 around the first of March 2015; is that right?

12 A. Yes.

13 Q. And to your knowledge, have they remained in  
14 continuous production since that time?

15 A. As far as I know, yes.

16 Q. Has COG provided Nearburg with Division orders  
17 for the 43H and the 44H?

18 A. Not to my knowledge.

19 Q. Do you know if COG has remitted to Nearburg any  
20 of the proceeds from the sale of production from the 43H  
21 or the 44H?

22 A. Not to my knowledge.

23 Q. Let's look at Exhibit 30. I see two letters in  
24 Exhibit 30. One is dated July 31st, 2015. Do you see  
25 that letter?

1 A. I do.

2 Q. What's that letter?

3 A. It's a termination of SRO State Unit and  
4 payment of overrides. It's a letter from Emily Sharp  
5 with Nearburg talking about payment we received for some  
6 overrides.

7 Q. Is this letter returning some override  
8 payments?

9 A. Yes. And it further requests that no future  
10 payments of these overrides be sent to Nearburg.

11 Q. And why was that?

12 A. Because we didn't feel like we were entitled to  
13 them.

14 Q. Because the term assignment had expired?

15 A. Yes.

16 Q. There is another letter there dated August  
17 17th, 2015. Do you see that?

18 A. I do.

19 Q. That's a letter from Duane Davis at Nearburg to  
20 COG; is that right?

21 A. Yes.

22 Q. Okay. And does that letter revoke Division  
23 orders for a number of wells as referenced in the  
24 reference line?

25 A. It does.

1 Q. What is your understanding of why that was  
2 done?

3 A. We no longer agreed that the Division orders  
4 were -- to be accurate.

5 Q. Does Nearburg have any agreement with COG that  
6 would allow for the recovery of well costs, overhead  
7 charges for nonconsent penalties out of production for  
8 the 43H, 44H or 16H?

9 A. No.

10 Q. Is there any order issued by the Division that  
11 authorizes COG to receive overhead charges, risk charges  
12 and penalties?

13 A. Not that I'm aware of.

14 Q. Was Nearburg offered the opportunity to  
15 participate in the business decision of whether or not  
16 to build -- to drill the 43 or 44H?

17 A. No.

18 Q. If COG says that it thought the term assignment  
19 was still in force, did they comply with its terms in  
20 providing information?

21 A. No.

22 Q. And if COG says that a joint operating  
23 agreement applied to Nearburg's interests, Section 20,  
24 did COG provide the notice required -- notices required  
25 in that operating agreement?

1           A.    No.

2           Q.    Let me ask you to look at Exhibit 35A.  This is  
3 an email that I think another version is in COG's  
4 exhibits.  It was discussed in opening.  This is an  
5 email from -- this is an email of March 21st, 2014 from  
6 Brent Sawyer, Kathie Craft, and it copies Ken Dixon and  
7 you; is that right?

8           A.    Yes.

9           Q.    And in the middle of the second paragraph, he  
10 says, "I believe the most pressing issue is that the  
11 term assignment from Nearburg to Marbob is effective  
12 until the SRO Unit is dissolved so technically it is  
13 expired."  Do you see that?

14          A.    I do.

15          Q.    "However, we are moving forward on the  
16 assumption that it was intended to keep the assignment  
17 and the override effective until all the wells in (or  
18 formerly in) the unit are plugged, so we will need to  
19 paper that up.  However, if that assumption is incorrect  
20 please let me know since it will affect the work the  
21 title lawyer is doing on the updated opinions for the  
22 wells."  Do you see that?

23          A.    I do.

24          Q.    Does he tell you in this email that they're  
25 drilling wells on your lease?

1 A. No, he does not.

2 Q. Does he tell you that he's planning to drill  
3 wells on your lease?

4 A. No.

5 Q. Does he say that if this assumption is  
6 incorrect, let him know because it will affect the title  
7 work?

8 A. No.

9 Q. Well, isn't that what he says in the last  
10 sentence?

11 A. Well, he says title work is what it's going to  
12 affect. Yes.

13 Q. Now, do you follow up and have continuing  
14 discussions with him after this?

15 A. Yes. I believe that still this was kind of  
16 Ken's baby to a certain extent, and I think he replied,  
17 I think, that same day to that email.

18 Q. And you talked -- you worked with them and you  
19 talked with them --

20 A. Yes.

21 Q. -- about some of these issues?

22 A. Yes.

23 Q. We've been through a lot of communications and  
24 meetings that you've had with them?

25 A. There's been a whole lot of them, yes.

1 Q. And until you got to that April 22nd email, he  
2 didn't tell you about 43 or 44H?

3 A. That it was permitted, drilled or anything, no.

4 Q. Is Nearburg requesting that COG be required to  
5 account for and pay Nearburg's share of production for  
6 the 43 and 44H and 16H wells?

7 A. Yes.

8 Q. In your opinion, if the lands in Section 20 are  
9 consolidated with those in Section 17 by a compulsory  
10 pooling order, would it be just and reasonable under  
11 these circumstances to allow COG to recover from  
12 Nearburg for its share of the well costs for the 43H and  
13 44H?

14 A. No.

15 Q. Would you think a risk penalty would be  
16 reasonable?

17 A. No.

18 Q. Mr. Howard, is there a connection in your mind  
19 between good faith and compliance with the joint  
20 operating agreement?

21 A. Sure.

22 Q. Is there a connection in your mind between good  
23 faith and complying with the provisions in the term  
24 assignment to get notice?

25 A. Yes.

1 Q. Is there a connection in your mind between good  
2 faith and you telling COG in July of 2014 that the term  
3 assignment expired and that operations shouldn't take  
4 place on your lease?

5 A. Yes.

6 Q. And refusing to sign a comm agreement at that  
7 time?

8 A. Yes.

9 Q. In your mind, is there a connection between  
10 good faith and complying with the title opinions that  
11 COG received?

12 A. Yes.

13 Q. In your mind, is there a connection between  
14 good faith and being open and honest?

15 A. Absolutely.

16 Q. Do you think COG was open and honest with you  
17 about the 43H and 44H in your dealings with them?

18 A. Absolutely not.

19 Q. Would you have any concerns about telling  
20 somebody what was going on in their lease if you had a  
21 good-faith belief that you had the right to do what you  
22 were doing?

23 A. I would say something, if that's what you're  
24 asking.

25 MR. HARPER: We've gone over a number of

1 exhibits, and we would offer -- we're going to offer a  
2 number of these exhibits because they're either business  
3 records, they're filings with the State Land Office or  
4 the Division or emails between the parties. They're  
5 Exhibits 1 through 31, I guess excluding the affidavit,  
6 which I don't remember the number of that right off the  
7 top of my head. We can get it. And then 31 is the  
8 timeline, and then Exhibits 36, 41, 42 --

9 CHAIRMAN CATANACH: I'm sorry. Say those  
10 again, please.

11 MR. HARPER: 1 through 31, excluding the  
12 affidavit --

13 CHAIRMAN CATANACH: Got that.

14 MR. HARPER: -- 36, 41, 42, 66, 67. And  
15 we'll also offer, which I'm sure won't come with any  
16 objections, COG Exhibits 2 and 14.

17 MR. FELDEWERT: I have to look back.

18 CHAIRMAN CATANACH: I figured.

19 MR. FELDEWERT: No objection to 67.

20 MR. HARPER: We'll also offer 65. Sorry.  
21 We talked about that.

22 MR. FELDEWERT: We maintain our objection  
23 on 65.

24 Maintain our objection on Exhibit 20. The  
25 title opinion has nothing to do with the issue today.

1 MR. WADE: 20?

2 MR. FELDEWERT: 20, and the related  
3 exhibit, which is 23.

4 CHAIRMAN CATANACH: I'm sorry. 23?

5 MR. FELDEWERT: Yeah, the title opinion of  
6 the different township areas, 20 and 23. So we maintain  
7 our objection.

8 Exhibit 24, are you offering that?

9 MR. HARPER: It's in the list, but I didn't  
10 talk about it, so it doesn't matter.

11 MR. FELDEWERT: And beyond that, I do not  
12 have an objection.

13 MR. WADE: So Mr. Feldewert, aside from the  
14 objections already raised, does not have any further  
15 objection.

16 Did we decide on 24, though?

17 MR. HARPER: We'll withdraw 24.

18 MR. WADE: 24 is withdrawn.

19 CHAIRMAN CATANACH: So 65 was the one that  
20 we were going to review, and I think we were going to  
21 admit it.

22 MR. HALL: I believe that was the ruling,  
23 Gabe.

24 CHAIRMAN CATANACH: We were going to give  
25 it as much weight that we thought it deserved --

1 MR. WADE: Correct.

2 CHAIRMAN CATANACH: -- given the  
3 circumstances.

4 So 65 will be admitted.

5 20, I thought we did admit. That was the  
6 title opinion.

7 MR. WADE: 23 related to it.

8 COMMISSIONER PADILLA: I don't think we  
9 made a decision on it.

10 CHAIRMAN CATANACH: I think 23 has  
11 information in it that's relevant to the case, so I  
12 believe that that should be admitted. 23, I think, is  
13 also related to -- has some information that may be  
14 helpful to the Commission, so I would recommend  
15 admitting 23 also.

16 So what other ones do we have a pending  
17 objection to, Mr. Feldewert? 65, 20 and 23 are the ones  
18 I have.

19 MR. FELDEWERT: Correct.

20 CHAIRMAN CATANACH: Is that it?

21 MR. FELDEWERT: That's it.

22 CHAIRMAN CATANACH: Let's see if I can get  
23 it right. Exhibits 1 through 31, excluding Exhibit  
24 Number 12, which is the affidavit will be admitted.

25 MR. WADE: And 24.

1 COMMISSIONER BALCH: And 24.

2 CHAIRMAN CATANACH: And 24. Thank you.

3 And I'm sorry. Were there no further  
4 objections to Exhibits 2 and 14?

5 MR. HARPER: Those are COG exhibits.

6 MR. FELDEWERT: Oh. No.

7 Thank you.

8 CHAIRMAN CATANACH: You sure?

9 MR. FELDEWERT: Well, I can take a look at  
10 them, you know.

11 MR. HARPER: I can object to them later  
12 when you're --

13 CHAIRMAN CATANACH: Are you trying to enter  
14 those as evidence?

15 MR. HARPER: Yes.

16 CHAIRMAN CATANACH: Okay. So COG Exhibits  
17 2 and 14 will be admitted. And let's see if I have the  
18 other numbers right: 36, 41, 42, 66 and 67.

19 MR. HARPER: And 65, which you already  
20 ruled on.

21 CHAIRMAN CATANACH: 65, we already ruled  
22 on.

23 Is that the complete list?

24 MR. HARPER: Yes, sir.

25 CHAIRMAN CATANACH: Those exhibits will be

1 admitted.

2 (Nearburg Exploration Co., LLC Exhibit  
3 Numbers 1 through 11, 13 through 23, 25  
4 through 31, 36, 41, 42, 66 and 67, and  
5 COG Exhibit Numbers 2 and 14 are offered  
6 and admitted into evidence.)

7 CHAIRMAN CATANACH: I think that takes care  
8 of that.

9 MR. HARPER: With that, we'll pass the  
10 witness.

11 CHAIRMAN CATANACH: Mr. Feldewert,  
12 cross-examination?

13 CROSS-EXAMINATION

14 BY MR. FELDEWERT:

15 Q. Mr. Howard, do me a favor and go to our exhibit  
16 book.

17 A. (Witness complies.)

18 Q. And now I want you to take our exhibit book  
19 and -- hopefully I can go through this in a  
20 chronological fashion that's easy to follow.

21 I'll point you towards what's marked as a  
22 COG Number 1. And you can confirm for me, can you not,  
23 that this term assignment with Marbob was not executed  
24 by any party until -- the earliest was August 24th,  
25 2009; is that right?

1           A.     That's correct.

2           Q.     And then -- so then this Exhibit Number 1, this  
3 term assignment, was signed by the parties after the  
4 documents were signed that's comprised of Exhibit Number  
5 2, correct?

6           A.     Correct.

7           Q.     All right. And I think you agreed with me at  
8 the last hearing that if COG understood that the  
9 Nearburg working interest in the state lease had been  
10 committed to the operating agreement, then it has a  
11 voluntary agreement to move forward and develop the  
12 acreage as the operator, correct?

13          A.     I don't know that I can agree with that.

14          Q.     Didn't you agree with that at the last hearing?

15          A.     I don't remember the last hearing, exactly what  
16 I said. Maybe if you said it again, I can tell you for  
17 sure.

18          Q.     Mr. Howard, didn't you agree with me at the  
19 last hearing that if COG understood that Nearburg's  
20 lease had been committed to the operating agreement, the  
21 working interests in that lease, then it would have a  
22 voluntary agreement allowing it to move forward to  
23 develop and operate the lease, correct?

24          A.     Right.

25          Q.     Okay.

1 A. At that point in time, yeah.

2 Q. You wouldn't need a pooling order?

3 A. No, not at that point in time.

4 Q. And if COG understood at the time that it moved  
5 forward with developing that lease that Nearburg's  
6 desire was to proceed with an overriding royalty -- so  
7 that's what they understood -- do you agree with me that  
8 they wouldn't send your company a well proposal?

9 A. If that's what they understood.

10 Q. And they wouldn't send an AFE?

11 A. If that's what they understood.

12 Q. And they wouldn't send an election to  
13 participate?

14 A. If that's what they understood.

15 Q. Okay. Now, let's start, then, on our timeline  
16 to the left, and let's take a look at the ratification  
17 that I alluded to earlier, which is the fourth page in.

18 CHAIRMAN CATANACH: On Exhibit 2,  
19 Mr. Feldewert?

20 MR. FELDEWERT: Exhibit 2, yes, sir.

21 Q. (BY MR. FELDEWERT) Now, I know we have a debate  
22 on what this State Land Office form does, but there is  
23 another page there that was signed on June 26, 2009 by  
24 Terry Gant, correct?

25 A. That is correct.

1 Q. And he was the Midland manager at that time?

2 A. That's my understanding.

3 Q. And it reflects that when he signed it, it had  
4 an attachment, Exhibit B?

5 A. Yes.

6 Q. And in this exhibit, we have an attachment  
7 Exhibit B, correct?

8 A. You do.

9 Q. All right. And he, at the time, Mr. Howard,  
10 was fully authorized to execute this ratification; isn't  
11 that correct?

12 A. Yes.

13 Q. And I think you testified earlier that he was  
14 very knowledgeable about unit agreements and unit  
15 operating agreements?

16 A. I believe he is.

17 Q. And, in fact, he signed this ratification  
18 without making any changes to the document itself?

19 A. I don't know that.

20 Q. Do you see any strikeouts on this document he  
21 signed?

22 A. I do not.

23 Q. In other words, you didn't strike out, for  
24 example, the phrase "Unit Operating Agreement" up there  
25 in the top?

1 A. No.

2 Q. And if I turn to what's been marked as COG  
3 Exhibit Number 3, you agreed with me at the last hearing  
4 that this is a correct copy of the form that has  
5 appeared at the State Land Office Web site for quite  
6 some time, correct?

7 A. I believe it has.

8 Q. All right. And, in fact, this is the same type  
9 of form that was signed by Nearburg back in 2009?

10 A. It appears to be, yes.

11 Q. So this document that they signed back in 2009,  
12 that Mr. Gant signed, this was not drafted by Marbob?

13 A. I don't know. You mean the form itself? No, I  
14 don't think.

15 Q. And it wasn't drafted by Mr. Gant?

16 A. I don't believe so, no.

17 Q. And if I looked at this unit operating -- this  
18 ratification that he signed -- and you see here in the  
19 third line down, it talks about the Commissioner of  
20 Public Lands, and then it says, "And in consideration of  
21 the execution or ratification by other working interest  
22 owners of the contemporary Unit Operating Agreement...."  
23 Do you see that?

24 A. I do.

25 Q. This indicates, and I think you agreed with me

1 at the last hearing, that there are two ways to  
2 subscribe to operating agreement, right, either by  
3 execution or by ratification?

4 A. Yeah. We didn't do that here, but that's  
5 correct.

6 Q. Okay. And the only form that the State Land  
7 Office had promulgated at this time for this -- I'll  
8 call it the ratification option -- is the state form  
9 that Mr. Gant signed, correct?

10 A. Yes.

11 Q. All right. Now -- now, you were not working  
12 for the company at the time that Mr. Gant signed this  
13 ratification?

14 A. No.

15 Q. And Mr. Gant's not here today?

16 A. He is not.

17 Q. And so we, neither you nor I, know what  
18 Mr. Grant intended when he signed this ratification, do  
19 we?

20 A. I believe he was intending to the ratify the  
21 unit agreement.

22 Q. But you've never had a conversation with him  
23 about this?

24 A. The files -- I mean, yes, I think that's what  
25 he was trying to do.

1 Q. But you have not visited with him about this?

2 A. I have not talked with him directly about this.

3 Q. So you have no idea what Mr. Gant thought when  
4 he signed this ratification?

5 A. I came to my own conclusion of what he thought.

6 Q. Okay. And other people looking at this, would  
7 you agree with me, might come to a different conclusion?

8 A. They might.

9 Q. Now, the Marbob transmittal letter that was  
10 sent to the State Land Office, the second page --

11 MR. WADE: Which exhibit is this?

12 MR. FELDEWERT: I'm sorry. Exhibit Number  
13 2, second page. I'm still within the same exhibit. I'm  
14 on the second page.

15 Q. (BY MR. FELDEWERT) This was sent a month after  
16 your company signed the ratification form, correct?

17 A. In July of '09, yes.

18 Q. And it was sent before anybody had signed the  
19 Marbob term assignment, correct?

20 A. Yes.

21 Q. And Mr. Duncan here says, "Chesapeake and  
22 Nearburg have both subscribed to the Unit Operating  
23 Agreement." Do you see that?

24 A. I see where it says that, yes.

25 Q. And he included within this letter the

1 ratifications in Exhibit B that we just looked at. I'm  
2 sorry. Stay on page 2. And you see the first  
3 paragraph?

4 A. Yes.

5 Q. We see the ratifications, and we see Exhibit B?

6 A. Yes.

7 Q. Okay. Now, Concho was not involved in getting  
8 the acreage subscribed for the unit agreement. That was  
9 Marbob, right?

10 A. Correct.

11 Q. And you were not involved at this time. You've  
12 got no personal knowledge of what occurred at this time,  
13 correct?

14 A. Correct.

15 Q. And so you and I and everybody else sitting  
16 here today, I think you'll agree with me, that we have  
17 to rely on what these documents purport to say about  
18 these events; is that correct?

19 A. Yes.

20 Q. All right. And then if I go to the Commission  
21 approval letter, do you see Ms. Bailey references the  
22 fact that this was approved in accordance with Article  
23 22 of the unit agreement?

24 MR. WADE: Where are we?

25 MR. FELDEWERT: I'm sorry. First page of

1 Exhibit 2.

2 THE WITNESS: Yes.

3 Q. (BY MR. FELDEWERT) And you'll see that she  
4 references the fact -- and I'm in the first paragraph --  
5 that her office had received Marbob's July 13th, 2009  
6 letter?

7 A. Yes.

8 Q. And also included with the letter was the  
9 ratifications signed by Chesapeake and Nearburg, right?

10 A. Committing their interest to the SRO State  
11 Exploratory Unit Agreement, how it finishes.

12 Q. And then she says that they approve it in  
13 accordance with Article 22 of the unit agreement?

14 A. I see that.

15 Q. Okay. So as of July 22nd, 2009, they approve  
16 it in accordance with Article 22 of the unit agreement?

17 A. Not exactly, I don't think.

18 Q. Okay.

19 A. I think it says effective August 1st of 2009.

20 Q. But it's approved in accordance with Article 22  
21 of the unit agreement?

22 A. Right.

23 Q. All right. And I've been through Article 22 of  
24 the unit agreement with the Examiners already. But that  
25 is reflected -- the unit agreement is reflected in

1 Exhibit Number 5; is that right?

2 A. I can't really see that first page, but I'm  
3 assuming -- yes. It's the unit agreement.

4 Q. And then Article 22 shows up, and we've been  
5 through this. I went through it, and I don't think we  
6 need to do it again, on the last page of that exhibit?

7 A. Right.

8 Q. Okay. And then, Mr. Howard, I believe Exhibit  
9 Number 4 -- COG Exhibit Number 4 is a copy of the  
10 operating agreement that is in both your exhibit book  
11 and ours?

12 A. Yes.

13 Q. So there is no debate that this is the  
14 operating agreement for the SRO State Exploratory Unit,  
15 right --

16 A. Yes.

17 Q. -- the one we've been talking about?

18 A. Yes.

19 Q. And you would agree with me that if I look at  
20 page 22 -- you and I are looking at this today. That  
21 does show Section 20 as being within the contract area?

22 A. Yes. Along with other lands, correct.

23 Q. And take a look at Exhibit A-1 to ascertain  
24 what leases are subject to this agreement. Do you see  
25 that?

1 A. I do.

2 Q. Okay. And if we turn to the next page, we see  
3 the columns that are involved with Exhibit A-1, and if  
4 we go to page 29, we see Nearburg's lease --

5 A. Yes.

6 Q. -- right?

7 A. Yes.

8 Q. And I also see -- we also see the Yates lease  
9 in Section -- west half of Section 23 [sic] is listed on  
10 that same page.

11 A. Right above it, yes.

12 Q. As being subscribed to the operating agreement?

13 A. Right.

14 Q. And then if I go to page 30, we see the comm on  
15 there that's called the "Unit Working Interest." Do you  
16 see that?

17 A. Yes.

18 Q. And this is kind of -- maybe I missed this the  
19 first time through. I thought your counsel asked you a  
20 question about whether Nearburg is listed there or not  
21 and you said no. But under that unit working interest,  
22 the Nearburg working interest in that state lease is  
23 included under the unit working interest, correct?

24 A. The Nearburg lease is included, yes.

25 Q. And Nearburg is listed under the unit working

1 interest?

2 A. I don't believe that reflects it correctly on  
3 this, myself.

4 Q. That's your belief?

5 A. Well, I mean, it says right here who the -- who  
6 the working interest owners are on Exhibit A. These are  
7 the leases that are attached. That's how I read this.

8 Q. This shows that Nearburg holds -- at this point  
9 in time, when this operating agreement is put into the  
10 file, that Nearburg holds an overriding royalty interest  
11 because you had now executed your term assignment with  
12 Marbob?

13 A. Correct.

14 Q. So if you hold an overriding royalty interest,  
15 they wouldn't list you on the page of the working  
16 interest owners, correct?

17 A. Because we're not a working interest owner,  
18 right.

19 Q. Correct.

20 But your working interest -- and this is  
21 important. Your working interest in that state lease,  
22 when looking at page 30, indicates that it is subscribed  
23 to the operating agreement. One could read it that way?

24 A. One could.

25 Q. Okay. It also shows that the working interest

1 in the Yates lease is committed to the operating  
2 agreement?

3 A. Yes.

4 Q. All right. And you've seen these signature  
5 pages before in this operating agreement starting on  
6 page 18?

7 A. The signatures?

8 Q. Yes.

9 A. On page 18, I see, yeah.

10 Q. Okay. And the Yates entities never physically  
11 signed the operating agreement, right, Mr. Howard?

12 A. Not on this page, no.

13 Q. On any page?

14 A. Well, I mean, you asked me to look at this  
15 page, and they did not sign this page.

16 Q. If you look at page 19, if you look at page 20,  
17 if you look at page 21, there is no signature by Yates  
18 Petroleum physically signing the operating agreement,  
19 right?

20 A. That's correct.

21 Q. There is no physical signature by Yates  
22 Drilling?

23 A. Correct.

24 Q. There is no physical signature by MYCO?

25 A. Correct.

1 Q. Or Abo?

2 A. Correct.

3 Q. In fact, what we see down on page 19 is the  
4 same ratification form that your company signed in 2009?

5 A. Yes.

6 Q. Now, you agreed with me, I believe, at the last  
7 hearing, Mr. Howard, that this operating agreement  
8 governs the operations on the contract area?

9 A. Correct.

10 Q. And that you and I have to rely on what these  
11 documents say about what leases and what type working  
12 interest is committed to the contract area?

13 A. Correct.

14 Q. And isn't it true, Mr. Howard, that since 2009,  
15 the operator under this operating agreement, first  
16 Marbob and then COG, and the nonoperators in this  
17 contract area treated that working interest in the west  
18 half of Section 20 as committed to the operating  
19 agreement?

20 A. I don't know. I would assume that they did,  
21 but I don't know.

22 Q. You don't have any reason to believe otherwise?

23 A. I don't. But I don't have any reason to  
24 believe it.

25 Q. And that the parties paid their costs and

1 expenses of development for the contract area pursuant  
2 to this operating agreement?

3 A. I believe Concho would know that, yes.

4 Q. Including the development of the Nearburg lease  
5 in the 16H well?

6 A. Sure.

7 Q. And now here we are and, if I'm understanding,  
8 you're aware, Mr. Howard, that six years later, in  
9 December of 2015, your company has filed a complaint in  
10 district court asking the district court to declare that  
11 the working interests in your state lease is not subject  
12 to the operating agreement.

13 A. That's the way I understand it, yes.

14 Q. Now, I want to talk a little bit about the 16H  
15 well. That is completed solely on your state lease?

16 A. Correct.

17 Q. And it was drilled and has been operated since  
18 2011 under this operating agreement?

19 A. Correct.

20 Q. And you've been fully aware of that well?

21 A. Yes.

22 Q. The entire period of time?

23 A. We were aware the well was drilled, and we are  
24 aware it's still there.

25 Q. Signed Division orders for it?

1 A. I don't believe so.

2 Q. Initially?

3 A. I don't believe so.

4 Q. Okay. Did you receive overriding royalty  
5 interest payments?

6 A. I don't believe so.

7 Q. Did you receive overriding royalty interest  
8 payments for wells in the contract area?

9 A. Yes.

10 Q. And I believe you testified that at the time  
11 this well was drilled by Concho under this operating  
12 agreement, they were authorized to operate on your  
13 lease?

14 A. Sure.

15 Q. Pursuant to this operating agreement?

16 A. Yes.

17 Q. Because there is no other agreement that  
18 controls the operations of the 16H? This is the only  
19 one?

20 A. That's the only one I'm aware of.

21 Q. Now, your counsel made some reference to  
22 various exhibits associated with the 16H, but what he  
23 didn't give you is the 16H well file. Okay? So let's  
24 go to COG Exhibit Number 8. This is the well file for  
25 the 16H. And it does reflect, does it not, Mr. Howard,

1 that -- if we go four pages in on Exhibit Number 8 --

2 CHAIRMAN CATANACH: I'm sorry,  
3 Mr. Feldewert, COG's Exhibit Number 8?

4 MR. FELDEWERT: Yes. I'm sorry.

5 CHAIRMAN CATANACH: It looks like it  
6 references 43H.

7 MR. FELDEWERT: Sorry. Exhibit Number 7.

8 Q. (BY MR. FELDEWERT) If I go five pages in, it  
9 shows that this well was spud on March 4th, 2011; is  
10 that correct?

11 A. Where am I seeing that?

12 Q. So I'm looking at the C-103.

13 A. I'm on the C-102. Five pages is the C-102.

14 Q. Six pages. I'm sorry.

15 A. Spud, 3/4/2011.

16 Q. All right. Now, I want you to keep this  
17 exhibit open, and I want you to turn to Nearburg's  
18 Exhibit Number 5. Okay. Now, I made a note here that  
19 this was filed on March 13th, 2014, in Exhibit Number 5.

20 A. Yes.

21 Q. And if I look at my timeline, that is shortly  
22 after the SRO Unit terminates. That's why we have to  
23 keep all of this chronologically intact, correct? So  
24 it's filed shortly after the unit terminates.

25 A. This C-102 in our book, yes, is dated 3/13/14,

1 just after the SRO Unit terminates.

2 Q. And if I look at the second page of your  
3 exhibit, Exhibit Number 5 --

4 A. Okay.

5 Q. -- it shows the well name as "SRO Unit 16H"?

6 A. I see that.

7 Q. Okay. And the first page of this exhibit,  
8 which is what you-all noted, it changes the well name  
9 from the SRO Unit 16H to the SRO State 16H.

10 A. I see that.

11 Q. So this well has been drilled and permitted for  
12 quite some time. All they're doing here is changing the  
13 name of the well; is that correct?

14 A. That's what it looks like.

15 Q. All right. Then if I go to the well file for  
16 the 43H and the 44H --

17 A. Where do I go for that?

18 CHAIRMAN CATANACH: 8.

19 Q. (BY MR. FELDEWERT) Let's go to COG Exhibit 8.  
20 And you'll agree with me that COG Exhibit 8 is the well  
21 file for the 43H, and COG Exhibit 9 is the well file for  
22 the 44H?

23 A. Yes.

24 Q. And both of these wells were permitted by COG  
25 in February of 2013?

1 A. February 26th, 2013.

2 Q. Okay. And at the time these were permitted,  
3 COG is already operating the 16H on the Nearburg lease?

4 A. Yes.

5 Q. And doing so under the operating agreement?

6 A. Yes.

7 Q. And you'd agree with me at the hearing below  
8 that when COG filed and permitted these wells, they were  
9 authorized to operate on the Nearburg lease?

10 A. Yes.

11 Q. And they were authorized to operate pursuant to  
12 the operating agreement?

13 A. Yes.

14 Q. All right. Now, let's go -- let's keep this  
15 here. We can look at 8 or 9. Really doesn't matter.  
16 Keep 8 or 9. And let's take a look at a couple of the  
17 filings that you-all made note of. And the first is  
18 Nearburg Exhibit Number 3, and you made note of the  
19 filing on March 5th of 2015 of the 43H C-102, correct?

20 A. Yes.

21 Q. What you didn't note is that what they were  
22 doing here is the "As Drilled" C-102, right?

23 A. I don't know the difference, to be honest with  
24 you.

25 Q. Look at the top. Look at the top, right-hand

1 corner. See where it says "As Drilled"?

2 A. I may not be looking at the right page. The  
3 C-102 revised August 1st, 2011? Is that the one you're  
4 looking at?

5 Q. Nearburg Exhibit Number 3.

6 A. Yup.

7 Q. Second page.

8 A. Yup.

9 Q. The one you-all referenced --

10 A. Yes.

11 Q. -- as being in March of 2015.

12 A. Right.

13 Q. That's the "As Drilled" C-102.

14 A. Oh, "As Drilled" down in parentheses. I see  
15 that.

16 Q. Do you see that?

17 A. Yes.

18 Q. Okay. And it also, then, notes that this is no  
19 longer a unit well, but a State Com well.

20 A. I see that.

21 Q. So all they're doing here is again refiling the  
22 C-102 to show as drilled and effectuating a name change.

23 A. Okay.

24 Q. Same way with Exhibit Number 4 with respect to  
25 the 44H, correct, Mr. Howard? You see the same thing.

1 A. Okay.

2 Q. So these wells were already permitted. They're  
3 just changing the well name given the fact that the SRO  
4 Unit had terminated?

5 A. Right.

6 Q. So if I'm looking at our timeline here in 2014  
7 when the unit terminates, this is when, now, Nearburg  
8 the working interest reverts back to Nearburg?

9 A. Correct.

10 Q. Under the Marbob term assignment?

11 A. That's correct.

12 Q. Okay. And we then have what's been marked as  
13 COG Exhibit Number 10, and that's that email exchange  
14 that I went through earlier with the Commission,  
15 starting at -- first off, let me ask this so we have  
16 this for the record. This email chain is related to the  
17 Division order for the 16H?

18 A. I'm sorry? Say it again.

19 Q. This email chain relates to the Division order  
20 for the 16H?

21 A. Yes.

22 Q. And that Division order reflected an overriding  
23 royalty interest for your company?

24 A. That's correct.

25 Q. Am I correct that Ms. Craft was a division

1 analyst at Nearburg?

2 A. Was and is, yes.

3 Q. And that Ken Dixon was the land manager at the  
4 time?

5 A. He was.

6 Q. And you were copied on this email. What was  
7 your position?

8 A. I was the land -- I think I was senior landman  
9 at that time.

10 Q. And it does reflect, does it not, that the  
11 concern or -- it would appear that the Marbob overriding  
12 royalty interest had been overpaid?

13 A. There was some concern over the override.

14 Q. That's reflected on the last page of this  
15 exhibit, which the Commission previously reviewed,  
16 right? I'll represent to you that's what it is.

17 A. Okay.

18 Q. And I'll point you to -- you'll see here that  
19 Mr. Sawyer, on March 20th, 2014, shortly after Nearburg  
20 backed into its working interest, he communicates to  
21 your team that by terminating the unit voluntarily, the  
22 undrilled proration units are all held by production by  
23 existing wells, not subject to CDC or expiration, but  
24 can be drilled at will subject to the JOA already in  
25 place?

1 A. I see that, yes.

2 Q. And you understood, did you not, Mr. Howard,  
3 that the JOA already in place was indeed the operating  
4 agreement we just reviewed?

5 A. The JOA was in place to our interest.

6 Q. But he's saying -- but my question is: You  
7 recognize that the JOA that he references in connection  
8 with the Division order is the operating agreement we  
9 already -- we just reviewed?

10 A. Yeah. I think I need to clear up something on  
11 this one, because I think what's happening here is  
12 this -- if I remember how this all unfolded and I'm  
13 pretty sure I remember it correctly --

14 Q. Mr. Howard, here's the thing. I want to get  
15 through these exhibits. Okay? And I know you remember  
16 some things and you don't remember others, but the nice  
17 thing about these emails is they don't lie.

18 A. Okay.

19 Q. So your counsel can ask you what you try to  
20 remember later --

21 A. All right.

22 Q. -- but I want to get through these. Okay?

23 A. Okay.

24 Q. Now, the next day, then, there is another email  
25 between your team and Mr. Sawyer that's reflected on the

1 top of page 2, and we've all read that before. And he's  
2 telling you -- now, this is in March 2014 that the term  
3 assignment had technically terminated.

4 A. Yes.

5 Q. Okay. So let's put that in perspective. All  
6 these title opinions that you-all went through later in  
7 2015, talking about the term assignment had terminated,  
8 Concho had already communicated that to you right  
9 after -- so everybody knew that. Then he says that they  
10 want to proceed -- proceed on the assumption that you  
11 wanted to keep your overriding royalty interest, in  
12 fact?

13 A. That's what he said.

14 Q. Do you remember receiving that?

15 A. That's what he said.

16 Q. Okay. And you received that, correct?

17 A. Yes.

18 Q. You saw that?

19 A. I saw that.

20 Q. And that was right after the term assignment  
21 terminated --

22 A. Yes.

23 Q. -- technically terminated?

24 A. Yes.

25 Q. And then he says that it will affect the work

1 the title lawyer is doing on the updated opinions on the  
2 wells.

3 A. Is there a question?

4 Q. So, Mr. Howard, nobody got back to Mr. Sawyer  
5 and said that assumption was incorrect, did they?

6 A. We got back to him immediately and said we have  
7 to look at it.

8 Q. So I'm looking at the next page. You're  
9 referring to the March 21st email that was sent at 10:31  
10 a.m.?

11 A. Yes. Within -- within an hour or so of getting  
12 the other one, right.

13 Q. And Mr. Dixon, he's your land manager?

14 A. He was my boss then.

15 Q. He was your boss?

16 A. Yes.

17 Q. "Brent, just like you, I'm real busy right now  
18 and I won't have any time to talk to you about this  
19 until next Wednesday. I'll give you a call Wednesday  
20 morning. Thank you for your patience." There is no  
21 communication in there that he disagrees with the  
22 assumption, right?

23 A. No, there is not.

24 Q. In fact, is there any communication before May  
25 28th of 2015, over a year later, of any disagreement

1 over the assumption that you intended to proceed as an  
2 overriding royalty interest?

3 A. Over their assumption.

4 Q. Anything in writing from Nearburg that that  
5 assumption was incorrect?

6 A. Only the fact that we're saying we needed all  
7 the information before we can move forward.

8 Q. Did you disagree with the assumption that you  
9 wanted to maintain your overriding royalty?

10 A. We would entertain the idea of changing the  
11 comm agreement for an override in the wells once we got  
12 the information we'd requested.

13 Q. And throughout that entire period of time, they  
14 were sent?

15 A. Sent to lock boxes, correct.

16 Q. And all the wells in the contract area were  
17 subject to the operating agreement?

18 A. The ones that were getting paid, I'm assuming  
19 we were getting -- we were getting money in our lockbox,  
20 correct, until such time that we had that stopped.

21 Q. And, in fact, after -- isn't it true,  
22 Mr. Howard, that after COG communicated this  
23 understanding with your company, that your company then  
24 sent the bill for the -- for your lease to Concho for  
25 payment?

1 A. I'm not really sure what you're talking about.

2 Q. Turn to COG Exhibit Number 11.

3 A. (Witness complies.)

4 Q. This is two pages. Go to the second page. And  
5 you'll see that it's "payment for lease," and it goes  
6 on, "VO 7450." That's the Nearburg state lease in the  
7 west half of Section 17?

8 A. Yes.

9 Q. In fact, you guys call that your Cottonwood  
10 Draw North area?

11 A. Correct.

12 Q. And it reflects, then, that you sent invoices  
13 to COG for that lease payment sometime between May and  
14 July, right?

15 A. That's what it looks like. This is not handled  
16 in our office, so I've never really seen it before.

17 Q. And that it was paid by -- according to this  
18 notation, it was paid by COG?

19 A. That's what it looks like it, yes.

20 Q. But this is indeed, Mr. Howard, an invoice from  
21 your company to COG?

22 A. Well, again, I don't do the invoices, so I have  
23 to look at it for a second. And I know you're in a  
24 hurry, so hang on (reading).

25 This does look like an invoice from us to

1 COG, yes.

2 Q. All right. Then we -- then to stay in  
3 chronologic order here, I then go back to -- go over to  
4 Exhibit Number 13, COG Number 13, and to orient us, if  
5 we go to the last page, we see that that starts with the  
6 March 20th emails we just went through, right?

7 A. Yes.

8 Q. Okay. And, of course, we had the email. We  
9 had the discussion here about drilling at will, and  
10 we're still discussing the 16H Division order.

11 And on the second page -- second-to-the-  
12 last page, page 3 of this exhibit, we see an email at  
13 the top there from Kathie Craft. She's at your office,  
14 correct?

15 A. She's -- yes.

16 Q. To Brent Sawyer, the guy that communicated  
17 starting in March?

18 A. Correct.

19 Q. And she tells him that they're going to go  
20 ahead and sign and return the 16H Division order?

21 A. Yes. That's what it says.

22 Q. And that Division order was for an overriding  
23 royalty interest?

24 A. That's correct.

25 Q. This was three months after the term assignment

1 had expired?

2 A. Yes. Can I add something, or I'm not supposed  
3 to add anything else?

4 MR. HALL: You can answer the question.

5 THE WITNESS: I mean, I'm trying to answer  
6 the question. He's going down the wrong road. This is  
7 for production prior to the SRO Unit expiring.

8 Q. (BY MR. FELDEWERT) She says she's going to sign  
9 the Division order for the 16H?

10 A. Yes. Yes, because we still have not been paid  
11 for the 16H, and they're still trying to fix the 16H  
12 problem.

13 Q. Right. Before you sign that Division order?

14 A. Right. For production prior to the SRO Unit  
15 being terminated.

16 Q. Does it say that anywhere here in --

17 A. No, sir. I know that.

18 Q. It does not.

19 A. I know that.

20 Q. And if I go to 13A, she indicates, does she  
21 not, that she does not want to send back that Division  
22 order and set a precedent that they would agree to a  
23 smaller overriding royalty interest?

24 A. Right.

25 Q. All right. Then in the midst of all this is

1 when you get this communitization agreement for the 43H  
2 well?

3 A. Yes.

4 Q. I'm sorry. And that's reflected on Exhibit  
5 Number 12?

6 A. 12? Yes.

7 Q. And this is sent months after the March  
8 communications between COG and Nearburg?

9 A. Yes.

10 Q. Still trying to work out the overriding royalty  
11 interest percentage?

12 A. Yes.

13 Q. After you had already invoiced COG for your  
14 lease payment?

15 A. Yes.

16 Q. After telling COG we're going to sign that 16H  
17 Division order?

18 A. I didn't say that, but our company talked about  
19 it, yes.

20 Q. Clarification.

21 And you suggest today that in response to  
22 this letter, you called Ms. Fuchik?

23 A. I do.

24 Q. And what number did you call her at?

25 A. At her office.

1 Q. So if I'm looking at this letter, you called  
2 her at this (432) 688-6646 number?

3 A. I don't remember.

4 Q. Is there any other number that you had?

5 A. I don't remember. I mean, I just know I called  
6 and she answered, so I knew I had the right number.

7 Q. So you called her office?

8 A. I called the number that I had at that point in  
9 time, and I don't know if we got it off this letter or  
10 some other way.

11 Q. But you called her office? That's my question.

12 A. I believe so.

13 Q. And you continued to call her on or around July  
14 10th?

15 A. Correct.

16 Q. And you called her from a speakerphone in a  
17 Nearburg office?

18 A. Yes.

19 Q. And do you have any doubt that you called her  
20 around July 9th?

21 A. No.

22 Q. And you don't have any doubt that you called  
23 her at her office?

24 A. Yes.

25 Q. No doubt?

1           A.    I do have a -- I'm not positive where she was.  
2 I called the number. She answered. Was she in her  
3 office? Was she on her cell phone? I don't know. I  
4 mean, you're asking me a question I can't answer. I  
5 didn't ask her where she was.

6           Q.    Did you have her cell phone number, Mr. Howard?

7           A.    I don't know.

8           Q.    Why would you have her cell phone number?

9           A.    I don't know. I'm a landman. I do that  
10 (laughter).

11          Q.    Okay. If we look at this, she gives you a  
12 number here on this letter. If you were going to call  
13 her back, you would call that number, wouldn't you?

14          A.    I might call that number, or I might look into  
15 the PBLA book and find out what number she might be  
16 reached at, and I might call a number from that.

17          Q.    And there's no doubt you called from a Nearburg  
18 office?

19          A.    Absolutely no doubt.

20          Q.    All right. Then I want to move on to Exhibit  
21 12A.

22          A.    Okay.

23          Q.    Because what I find odd about this, Mr. Howard,  
24 is that I see nothing in any email, in any letter to COG  
25 suggesting that a phone call was made to Ms. Fuchik on

1 this 43H comm in July. There is no written -- there's  
2 no email, no letter associated with that, correct?

3 A. Not that I'm aware of.

4 Q. Okay. And don't you find it odd that if you  
5 indeed made a phone call and communicated something like  
6 that to them, in light of all the correspondence that  
7 went on between the parties, that you would have  
8 documented that in an email or a letter to COG?

9 A. In hindsight, I would, yes. At the point in  
10 time, no, I did not write down every phone call that I  
11 made. I still don't do that.

12 Q. And if I look at 12A, which is a correspondence  
13 between Nearburg to Ms. Fuchik supposedly after you made  
14 this call, there is absolutely no mention in there of  
15 any such phone call.

16 A. Okay.

17 Q. And there is no mention in there of any  
18 suggestion that you called them and told COG that they  
19 could not -- that they were not authorized to operate on  
20 your lease.

21 A. I can't help that.

22 Q. We see nothing to that effect?

23 A. I can't help that.

24 Q. And we don't see any communication between your  
25 company and COG to suggest that they were not authorized

1 to operate on Nearburg's lease?

2 A. We didn't know they were operating on our  
3 lease.

4 Q. They were operating the 16H on your lease at  
5 this time, Mr. Howard, right?

6 A. True. You are correct.

7 Q. Okay. And you didn't call them and you didn't  
8 send an email or letter to them saying they were not  
9 authorized to operate on your lease?

10 A. That's correct. Not at that point in time, we  
11 didn't.

12 Q. And even in this e-mail about the 43H comm,  
13 there is nothing in there to suggest that you made a  
14 phone call to Ms. Fuchik and told COG that they were not  
15 authorized to operate on your lease?

16 A. True.

17 Q. Now, the parties meet, then, in October of  
18 2014, if I'm following my timeline correctly,  
19 Mr. Howard. Do you remember that meeting?

20 A. Yes, I do.

21 Q. And the purpose of that meeting was to discuss  
22 the amendments to extend the Marbob term assignments?

23 A. The possibility of signing something, yes.

24 Q. And don't you discuss the amendments to that  
25 term assignment?

1 A. Yes.

2 Q. And there were two representatives there from  
3 your -- from Nearburg, right, yourself and Mr. Turro?

4 A. John Turro works for me.

5 Q. He's a landman?

6 A. Yes.

7 Q. And Brent Sawyer was there for COG?

8 A. Right.

9 Q. And isn't it true, Mr. Howard, that you  
10 discussed specific language to extend the term  
11 assignment?

12 A. We did talk about some of that, yes.

13 Q. And that meeting took place when?

14 A. When or where?

15 Q. When.

16 A. October 10th, I believe was the date.

17 Q. At your offices?

18 A. Yes, in our offices.

19 Q. And the next communication following that  
20 meeting is what's marked as COG Exhibit 15.

21 A. Okay.

22 Q. And this is the email where you communicate to  
23 Mr. Sawyer, copying Mr. Turro, where you state, "We are,  
24 however, agreeable to your changes to the Term  
25 Assignment of the Oil and Gas Lease covering the west

1 half of Section 20"?

2 A. Yes.

3 Q. "I assume this will actually be an Amendment or  
4 Correction to the Term Assignment of Oil and Gas Lease"?

5 A. Correct.

6 Q. "Also, we would like to see COG's calculations  
7 on a well by well basis for our overriding royalty  
8 interest in the wells...."?

9 A. Right.

10 Q. "Included on the lands subject to the SRO  
11 Operating Agreement"?

12 A. Yes.

13 Q. Now, you were saying here, Mr. Howard, that you  
14 are agreeable to their changes to the form of the  
15 corrections to the term assignment?

16 A. That's what I was saying.

17 Q. And your boss at this time was Duane Davis?

18 A. Yes.

19 Q. And you had authority to make this commitment  
20 on behalf of Nearburg, didn't you?

21 A. I did.

22 Q. Nothing in this email, Mr. Howard, informs COG  
23 that the operating agreement is not applicable to  
24 Nearburg's lease; is that right?

25 A. I don't see it referenced in there.

1 Q. And nothing in this email suggests that COG is  
2 not authorized to operate on Nearburg's lease?

3 A. I don't see that either.

4 Q. In fact, at this time COG is operating the 16H  
5 on your lease?

6 A. They are, and the 43H and the 44H.

7 Q. Correct.

8 Then let me ask you, Mr. Howard. You  
9 suggest you didn't know anything about the 43 and 44H  
10 wells. Why would that have been important to you at  
11 that time? What would you have done? If you had known  
12 about the 43H and 44H wells, as you say you didn't, what  
13 would you have done?

14 A. That's a very good question. I'm glad you  
15 asked it. That would have given us the opportunity to  
16 decide what we wanted to do. Once we saw that the 43H  
17 and 44H were drilled on our land, we would know more  
18 about what was happening in the area. If we would have  
19 had all the evidence, all the discussion of what's going  
20 on, that would give us the opportunity to make an  
21 educated decision as to what we wanted to do.

22 Q. And what you wanted to do -- the question is  
23 whether you would proceed with your working interest or  
24 whether you would proceed with your overriding royalty  
25 interest?

1 A. That's correct.

2 Q. Okay. That's what would be important to you?

3 A. Absolutely.

4 Q. All right. Now, we have Exhibit Number 16.

5 And this is where they actually send you a -- COG sends  
6 you a form of corrected term assignment.

7 A. Right.

8 Q. And this contained the language that you said  
9 was agreeable two weeks earlier, correct?

10 A. I think this is some of the language we were  
11 discussing, yes. The highlighted, you're talking about?

12 Q. No. Didn't you testify earlier that this  
13 correction of term assignment contained the language  
14 that was agreeable to you?

15 A. Yes.

16 Q. And it was in the form that was agreeable to  
17 you?

18 MR. HARPER: Objection. Misstates  
19 testimony.

20 Q. (BY MR. FELDEWERT) Was this in a form that was  
21 agreeable to you as well?

22 A. The form itself was -- some of the discussion  
23 that the form was agreeable, but we had not agreed on if  
24 we were going to sign until we got all the information.

25 Q. Okay. But you testified further that the

1 language was agreeable to you?

2 A. Some of the language was agreeable doesn't mean  
3 we're willing to sign the assignment.

4 Q. I understand. I'm just trying to get to  
5 the mechanics here. I understand you had some  
6 hesitation about signing it. But the form and the  
7 language that was presented is what you had previously  
8 found agreeable?

9 A. Right.

10 Q. Now, you received this on November 18, 2014?

11 A. Yes.

12 Q. And then you had some discussions with your  
13 boss about whether you should sign this or not, correct?

14 A. I did.

15 Q. If I go to what's been marked as COG 16A, this  
16 contains emails between you and your boss, Duane Davis?

17 A. Yes, it does.

18 Q. And it starts at the bottom of the second page,  
19 and it notes there that you had been working with COG on  
20 a term assignment?

21 A. We had been, yes.

22 Q. And that in your opinion, you were better off  
23 continuing with the term assignment than to have a  
24 working interest in the west half of Section 20?

25 A. Based on the information I had available to me,

1 yes.

2 Q. In fact, your exact words were, "My initial  
3 research leads me to believe we are better off with a  
4 overriding royalty interest under all wells on lands  
5 subject to the SRO Unit Operating Agreement than we  
6 would be to have 100 percent of the working interest  
7 under the west half of Section 20 only." Right?

8 A. Correct.

9 Q. Okay. And you then proceed to have this  
10 conversation with your boss, Duane Davis, and you  
11 understood from these emails that it was okay to proceed  
12 with the corrected term assignment; isn't that right?

13 A. I wanted to make sure that we were still okay  
14 to move forward if we were going to be doing an override  
15 instead of a working interest, yes, which is why I  
16 brought it up in this email, just to make sure.

17 Q. And your boss, Duane Davis, the next page, on  
18 November 24th, 2014, you say to him, "I take it from  
19 your response that you are okay with me moving forward  
20 with executing the attached..." -- corrected term  
21 assignment?

22 A. Yes.

23 Q. "After replacing the Well Information  
24 Requirements with an updated version"?

25 A. Right.

1 Q. And eventually you did send updated well  
2 information requirements for including a corrected term  
3 assignment?

4 A. I did.

5 Q. Now, nothing in your -- this discussion with  
6 your boss here in November of 2014 indicates that this  
7 acreage is not subject to the operating agreement?

8 A. I don't think it does.

9 Q. And nothing in this email with your boss, this  
10 internal email, indicates that COG was not authorized to  
11 operate on Nearburg's lease?

12 A. I think you're correct.

13 Q. And, in fact, nothing in here says that COG  
14 should be removed as the operator of the 16H?

15 A. No, it doesn't.

16 Q. And, in fact, this entire time, COG is  
17 operating the 16H?

18 A. My understanding, yes.

19 Q. Under the operating agreement?

20 A. It's my understanding.

21 Q. Then if I go to COG Exhibit 17, you point out  
22 to Mr. Sawyer -- or as you've already testified, you  
23 received the operating agreement?

24 A. Right.

25 Q. And Mr. Sawyer is corresponding with you on

1 November 24th. He says, "When we spoke in our meeting a  
2 few weeks ago...." He's talking about the October  
3 meeting, right?

4 A. Where are you reading from now?

5 Q. Middle of the first page of this exhibit.

6 A. From Brent?

7 Q. Yes.

8 A. Okay.

9 Q. You see the gray line there?

10 A. Oh, "when we spoke." Yeah, I see it.

11 Q. "SRO correction term assignment"?

12 A. Right.

13 Q. He says, "Here you go!" So he's sending you  
14 the operating agreement?

15 A. Right.

16 Q. And then he says, "Also, seems I forgot to  
17 mention that the body of the form is the one you have  
18 seen before."

19 A. Right.

20 Q. "When we spoke in our meeting a few weeks ago  
21 you said it was okay."

22 A. Right.

23 Q. So at that meeting, he actually had provided  
24 you a form with actual --

25 A. We were looking at a different form, right.

1 Q. And you said a couple weeks ago that was okay,  
2 that it was consistent --

3 A. The form --

4 Q. -- with what you had --

5 A. The form looked fine at that point in time,  
6 yes.

7 Q. And immediately upon receiving this operating  
8 agreement, Mr. Howard, you then sent it to your team to  
9 input into your system?

10 A. Correct.

11 Q. And that's reflected in Exhibit 17A?

12 A. Yes.

13 Q. And that Exhibit 65 that you-all brought here  
14 today indicates that contract was actually inputted into  
15 your system on November 24th, 2014?

16 A. Correct.

17 Q. Okay. And if I look at that Exhibit 65 and --  
18 let's take a look at that. If I start at the top, it's  
19 talking about your Cottonwood Draw North area.

20 A. Right.

21 Q. It has a contract date of 5/8/09?

22 A. Yes.

23 Q. Effective date of 5/8/09?

24 A. Right.

25 Q. And the expiration date is blank?

1 A. Correct.

2 Q. And then it goes on to name the parties to that  
3 operating agreement that you inputted into your system.  
4 Do you see that?

5 A. I see that.

6 Q. And one of the parties you list as a  
7 nonoperator is Nearburg Exploration Company?

8 A. Right.

9 Q. And this goes on to talk about the contract  
10 area description, right?

11 A. Yes.

12 Q. It includes the Section 20 where your lease is  
13 located?

14 A. Correct.

15 Q. When you received this operating agreement from  
16 COG, did you at any point in time before May of 2015,  
17 six months later, suggest to them or tell them that you  
18 thought the operating agreement did not apply to your  
19 acreage?

20 A. I don't believe I did.

21 Q. Let's go back to our Exhibit 17. You say to  
22 Mr. Sawyer on November 25th, "The way I read the  
23 Correction Term Assignment, Nearburg would own an  
24 overriding royalty as allocated under the Joint  
25 Operating Agreement." Do you see that?

1 A. Yes.

2 Q. And you actually note that the "Joint Operating  
3 Agreement states Nearburg owns," and there is a number  
4 there.

5 A. Right.

6 Q. That matches the number on Exhibit 30 -- on  
7 page 30 of the operating agreement file?

8 A. Correct.

9 Q. Okay. Then you say, "Please confirm how COG  
10 plans to operate [sic] per the JOA" -- how "to allocate  
11 per the Joint Operating Agreement"?

12 A. Right.

13 Q. You say, "Feel we need to stipulate exactly  
14 what we own, or will own, after executing the Corrected  
15 Term Assignment"?

16 A. Correct.

17 Q. That's what you tell them on November 25th,  
18 2014?

19 A. Yes.

20 Q. And isn't, Mr. Howard, at this time, the issue  
21 exactly what we saw under Exhibit 13 and 13A, how that  
22 overriding royalty interest was going to be calculated?

23 A. You're talking about your 13 and 13A?

24 Q. Whether it's going to be done on gross acres or  
25 net acres?

1           A.    We're trying to figure out what the heck is  
2 what out there, is what we're trying to do, because  
3 there are different overrides and different wells, and  
4 different numbers are being presented by Concho.  So  
5 yeah, it's an ongoing problem.

6           Q.    Ongoing issue?

7           A.    Yes.  Absolutely.

8           Q.    So at the end of 2014, you're still telling COG  
9 that you want -- that you desire to continue with an  
10 overriding royalty interest?

11          A.    No.

12          Q.    You're still receiving overriding royalty  
13 interest payments?

14          A.    In a lockbox, I'm assuming.

15          Q.    You don't know that?

16          A.    I don't know that.

17          Q.    But you're receiving them?

18          A.    (Indicating.)

19          Q.    And COG, at the end of 2014, is still operating  
20 the 16H on your lease without any objection?

21          A.    As far as I know, yes.

22          Q.    Under the operating agreement?

23          A.    If that's a question, yes.

24          Q.    And there is absolutely no emails or letters  
25 suggesting that the operating agreement does not govern

1 Nearburg's lease?

2 A. No.

3 Q. And then in early January, you tried to have a  
4 meeting, but that was canceled. Remember that?

5 A. No, not offhand. We had several cancels and  
6 re-dos, so I don't know.

7 Q. Isn't it true, Mr. Howard, that there was  
8 supposed to be a meeting in early January, but it was  
9 canceled because you wanted to wait to get the title  
10 opinions to know exactly what your override would be?

11 A. Is that noted someplace in here where I could  
12 look at it to refresh my memory? I'm not trying to  
13 dodge the question. I just don't want to tell you  
14 something I'm not sure of.

15 Q. You don't recall that?

16 A. No, sir, not offhand.

17 Q. Let's turn to what's been marked as Nearburg's  
18 Exhibit Number 60.

19 A. 60?

20 Q. 60, 6-0.

21 A. Yes, I see this.

22 Q. Does that refresh your recollection?

23 A. I mean, it says that we did this, so I'm sure  
24 that's what happened.

25 Q. It says, "Just spoke with Randy Howard over at

1 Nearburg. We are going to postpone getting together  
2 until we finally get all those SRO opinions in, since  
3 until that happens there really isn't much to talk  
4 about."

5 A. Right.

6 Q. You were trying to figure out what your  
7 overriding royalty interest is going to be?

8 A. Right, so we can figure out what we're going to  
9 do.

10 Q. Gotcha.

11 Then he says to Mr. Myers -- down there in  
12 paragraph three, Mr. Sawyer says, "I think we have  
13 agreed on the form of the SRO correction term  
14 assignment...." Do you see that?

15 A. I do.

16 Q. It goes on to say, "But we need the opinions to  
17 figure out how (or if) we want to handle the" -- "handle  
18 the incorrect calculation of their overriding royalty  
19 interest in the former unit area."

20 A. I see it says that, yes.

21 Q. That's what you're waiting on?

22 A. That's what Brent says.

23 Q. Do you have any reason to disagree with that?

24 A. I can't. He's not here.

25 Q. Okay. All right. Then I want to -- this is

1 January, now, of 2015. So this is months after the  
2 well's drilled, and you get a title opinion.

3 A. Okay.

4 Q. You get a January title opinion that was  
5 forwarded to you by COG.

6 A. Okay.

7 Q. Is that right?

8 A. I think that's correct.

9 Q. And if I go to that title opinion, I believe  
10 that's Nearburg's Exhibit 22. Now we can put this in  
11 perspective now that we've gone through the timeline up  
12 until now.

13 A. Okay.

14 Q. So this is received by you through Concho after  
15 the November -- I'll call them the "we are agreeable  
16 emails."

17 A. Okay.

18 Q. Right?

19 A. All right.

20 Q. And if I go to page 20 of this title opinion,  
21 which is page 3 of the exhibit, this confirms, does it  
22 not, what COG understood after the March and November  
23 emails where it says in the second paragraph, "The term  
24 of this Term Assignment has clearly expired, as the SRO  
25 State Exploratory Unit was terminated effective March 1,

1 2014." Now, these are the title attorneys talking to  
2 COG, right?

3 A. Yes.

4 Q. "Pursuant to our discussions with you, we  
5 understand you consider this Term Assignment as being in  
6 full force and effect. In that regard, we have the  
7 following requirement." And one of them is to obtain an  
8 amendment to the term assignment?

9 A. Yes.

10 Q. That's exactly what you guys had been working  
11 on for the last three months?

12 A. We had been trying to get there, but we just  
13 hadn't got there.

14 Q. Okay. Then it goes over on page 23, second  
15 full paragraph. "You have advised us that the SRO State  
16 Exploratory Unit Operating Agreement remains in full  
17 force and effect. We confirm that Article 13 provides  
18 for its term to be for as long as there is a well  
19 capable of producing," et cetera. Do you see that?

20 A. I'm sorry. You're saying the second full  
21 paragraph on page 23?

22 Q. Yeah.

23 A. Okay. I see that.

24 Q. Then we go to page 24, and there is a list  
25 there of the parties as set forth in the agreement as

1 follows. Do you see that?

2 A. Yes.

3 Q. Okay. Now, this is after the title attorneys  
4 have been informed that based on COG's discussions with  
5 Nearburg, they understand the term assignment is in  
6 effect. And if indeed that's the case, you wouldn't  
7 list Nearburg here, would you?

8 MR. HARPER: Objection. Calls for  
9 speculation.

10 THE WITNESS: I wouldn't know.

11 CHAIRMAN CATANACH: I'll ask that  
12 differently.

13 Q. (BY MR. FELDEWERT) So, Mr. Howard, you seem to  
14 make a big issue here that Nearburg is not listed on  
15 this list here?

16 A. They're not listed there.

17 Q. Isn't it perhaps because COG had told their  
18 title attorneys that you desired to continue with your  
19 term assignment?

20 MR. WADE: That is speculative.

21 Q. (BY MR. FELDEWERT) So, Mr. Howard -- but we do  
22 know that at the time this was issued, COG's title  
23 attorneys had been informed by COG that they understood  
24 the term assignment was going to be -- was in effect?

25 A. I don't know what they told their attorneys.

1 Q. Okay. We just saw that on the prior page.

2 The other thing about this title opinion  
3 that you went through is -- on page 33, and you'll see  
4 that in the third paragraph, it references the State Com  
5 43H well in the west half of the west half of Section 17  
6 and in the west half-west half of Section 20. Do you  
7 see that?

8 A. I do.

9 Q. Did you notice that when you looked at this  
10 title opinion?

11 A. I can't say that I did one way or the other.

12 Q. So here's at least a title opinion that was  
13 sent to you at your request that you looked at that  
14 informs you as early as January 2015 that the 43H well  
15 is out there and points out that you need to amend the  
16 communitization agreements to include the 43H, and  
17 that's exactly what then Concho tried to do.

18 A. The way I read it, it says the "proposed  
19 project area." So I'm assuming it's not really -- which  
20 is an area they were proposing. That's how I read that.

21 Q. And it says, "For the 43H well, the west  
22 half-west half of Section 17 and the west half-west half  
23 of Section 20," right?

24 A. That's what it says.

25 Q. And that the two state leases must be

1 communitized?

2 A. Correct.

3 Q. Okay. And then subsequently, COG then sends  
4 you, again, the communitization agreement to get the  
5 leases communitized?

6 A. We did get a comm agreement for the 43H twice.

7 Q. Okay. And, in fact, then, in April, there is a  
8 meeting to discuss these very issues?

9 A. In April of?

10 Q. 2015.

11 A. To discuss which issues?

12 Q. The agenda with the -- and as well as the  
13 communitization agreement. Do you remember that? We  
14 went through that?

15 A. Yes. Yes.

16 Q. Let's go to COG 18.

17 CHAIRMAN CATANACH: Can we stop there and  
18 take a break?

19 MR. FELDEWERT: (Indicating.)

20 CHAIRMAN CATANACH: Thank you.

21 (Recess 3:29 p.m. to 3:51 p.m.)

22 CHAIRMAN CATANACH: We'll go back on the  
23 record and back over to you, Mr. Feldewert.

24 Q. (BY MR. FELDEWERT) Mr. Howard, would you go to  
25 Nearburg -- I'm sorry -- COG's Exhibit Number 9. This

1 is the well file for the 44H well.

2 A. Okay.

3 Q. And I recall when you were under examination,  
4 we had noted that COG had not filled in the  
5 consolidation code on the forms where they were changing  
6 the well name and noting the as-drilled location.  
7 Remember that?

8 A. Right. Yes, sir.

9 Q. If I look at COG's Number 9 or 8, either one of  
10 them, when they initially permitted these wells in 2013,  
11 there was no -- anything in the consolidation code,  
12 correct?

13 A. Correct.

14 Q. So when these wells were permitted, the party  
15 never filled out the consolidation code?

16 A. Are you saying, Do they never fill out?

17 Q. They had not --

18 A. Okay.

19 Q. -- from the get-go.

20 A. Okay.

21 Q. So there is nothing nefarious about that?

22 A. I don't know.

23 Q. All right. So let's go to COG Exhibit 18.  
24 This is your email from Mr. Sawyer to yourself?

25 A. Right.

1 Q. In which, prior to the meeting, he's  
2 transmitting to you once again the communitization  
3 agreement for the 43H and also one for the 44H?

4 A. Yes.

5 Q. And then there is an agenda with that on the  
6 second page of Exhibit 18?

7 A. Correct.

8 Q. And it notes that you're going to talk about  
9 the comm agreements, right?

10 A. Yes.

11 Q. And then under the SRO category, it talks about  
12 the corrected term of assignment for the west half of  
13 Section 20?

14 A. Yes.

15 Q. All right. And part of the agenda, according  
16 to the A3, is that the well information requirements  
17 need review?

18 A. Right.

19 Q. And that -- and then it looks like you're close  
20 to a resolution here on the overriding royalty interest;  
21 does it not?

22 A. It appeared to be according to Brent, yes.

23 Q. And so then you have your meeting and you  
24 discuss the comm agreements?

25 A. Yes.

1 Q. And what I note after this meeting,  
2 Mr. Howard, is the absence of any outrage or surprise in  
3 the email correspondence internally or externally about  
4 the drilling of these wells.

5 A. Okay.

6 Q. I didn't see anything like that in the  
7 following email. So if I look, for example, at Exhibit  
8 18A, this is after your -- I'm on my timeline. This is  
9 just before your April 22nd meeting.

10 A. Right.

11 Q. I'm sorry. Just before your April meeting.

12 A. Right.

13 Q. After you had already received the  
14 communitization agreements, right?

15 A. This is correct, yes.

16 Q. Okay. And it's an email from you to Linda  
17 Parker. Who is Linda Parker?

18 A. She's the land administrator in the Dallas  
19 office for Nearburg.

20 Q. Why are you corresponding with her about these  
21 comm agreements?

22 A. I'm asking her opinion on it.

23 Q. Okay. And you note that you and John will be  
24 meeting with COG on Friday?

25 A. Yes.

1 Q. And one issue that they're asking us -- and you  
2 note that they're asking to execute the attached comm  
3 agreements?

4 A. Correct.

5 Q. And you say to her, "At first glance I don't  
6 see why we would object to executing, but I would  
7 appreciate your feedback."

8 A. And I did, yes.

9 Q. You don't express to her, for example, that  
10 there is -- that you had told Ms. Fuchik in a telephone  
11 call they were not authorized to operate? There is  
12 nothing in there?

13 A. No.

14 Q. There is no suggestion in there -- in this  
15 email that COG is not authorized to operate on that  
16 acreage?

17 A. No.

18 Q. And there is no suggestion in here that the 43H  
19 and 44H were improperly drilled?

20 A. No.

21 Q. You don't say anything to that extent?

22 A. No.

23 Q. And then if I look at 18B -- and this is  
24 shortly before your meeting.

25 A. Yes.

1 Q. Right after you have the comm agreements?

2 A. Yes.

3 Q. And you're piggybacking -- if I look at the  
4 second page, you're piggybacking on the email approval  
5 that you had previously received from Duane Davis to go  
6 forward with the term assignment?

7 A. Correct.

8 Q. Okay. And I'm down to the bottom of the first  
9 page, and you're saying to your boss, Duane Davis --  
10 you're saying, "In reviewing my emails, it appears you  
11 are okay with Nearburg keeping an overriding royalty  
12 interest as opposed to a working interest. However, I'm  
13 not sure I actually received your approval of the  
14 attached assignment. Please let me know if you are okay  
15 with the form."

16 A. Yes.

17 Q. So you're getting his approval before this  
18 meeting to execute the corrected term assignment, right?

19 A. I'm asking him if he's okay with it, yes.

20 Q. And you mention nothing to him about any  
21 outrage over the drilling of the 43H or the 44H?

22 A. Correct.

23 Q. You mention nothing to him about surprise.

24 A. Okay.

25 Q. And you mention nothing about having any

1 concern about COG Operating on Nearburg's acreage,  
2 right?

3 A. Correct.

4 Q. And you mention nothing to your boss or you  
5 don't make any suggestion to your boss that COG is not  
6 authorized to operate the 16H or the 43H or the 44H?

7 A. Correct.

8 Q. And, in fact, your boss, Duane Davis, also  
9 doesn't have any outrage to that?

10 A. Correct.

11 Q. Because he says in response, "Just to refresh  
12 my memory, did Mark K or Tim S look into this to be sure  
13 the overriding royalty interest is a better way to go?  
14 On the assignment...." Now, he's talking about the  
15 corrected assignment, right?

16 A. Yes.

17 Q. "I just added almost L.L.C. to Nearburg's  
18 name." So he's actually correcting the signature block?

19 A. Correct.

20 Q. "Otherwise, I am okay"?

21 A. Yes. That's what he says.

22 Q. Right?

23 A. Yes.

24 Q. This is all before your meeting?

25 A. Correct.

1 Q. So we don't have any outrage or surprise  
2 suggested before your meeting with COG about the  
3 drilling of the 43 or 44H?

4 A. Right.

5 Q. We have no suggestion that they're not  
6 authorized to operate on Nearburg's lease?

7 A. Okay.

8 Q. And, in fact, you know they're operating the  
9 16H, the 43H and the 44H?

10 A. As per the memo, yes.

11 Q. And even after your April meeting -- I'm  
12 looking at my timeline -- April 2015, there is no  
13 suggestion to COG that you were surprised about the 43H  
14 or 44H wells?

15 A. You're looking at your timeline?

16 Q. Yeah. Well, your meeting was April 24th. And  
17 the emails that you have, correspondence that you had  
18 with COG after that meeting express no surprise about  
19 the 43 or 44H wells.

20 A. Okay.

21 Q. It expresses no outrage about them being  
22 drilled, right?

23 A. Okay.

24 Q. Let's go to Exhibit 19. This is April 24th,  
25 2015, and to you from Aaron Myers at Concho. John

1 Turro, he works with you; he was at the meeting also,  
2 right?

3 A. Correct.

4 Q. "We enjoyed visiting with you two this morning.  
5 Thanks again for coming by our office:

6 "Attached is the spreadsheet we discussed  
7 this morning. I have added the 43H & 44H wells pursuant  
8 to our discussion." So then we have your spreadsheet  
9 attached to this exhibit. And if I go to that  
10 spreadsheet, Mr. Howard, you've added the 43H and the  
11 44H?

12 A. Yes.

13 Q. And you have a column over there that says,  
14 "NEX overriding royalty interest." Do you see that?

15 A. I do.

16 Q. You only have an overriding royalty interest in  
17 these wells if you agree to execute the corrected term  
18 assignment; isn't that correct?

19 A. Correct.

20 Q. And here in this email, the day -- the very  
21 afternoon after your meeting, there is no expression of  
22 surprise about these wells. There is no suggestion that  
23 you had contacted Kelly Fuchik in July and told her by  
24 telephone that they were not authorized to operate.  
25 There is no suggestion in your email immediately

1 following that meeting that they are not authorized to  
2 operate on Nearburg's acreage, is there?

3 A. No.

4 Q. Then if I go to 19A, the second thing you do  
5 after that April meeting is you say, "In light of this  
6 morning's meeting, I have attached our most updated Well  
7 Information Requirements." Do you see that?

8 A. I do.

9 Q. That was pursuant to the agenda.

10 And, Mr. Howard, you wouldn't send your  
11 updated well information requirements unless you were  
12 agreeable to signing the corrected term assignment?

13 A. That's incorrect.

14 Q. Okay. But did you indicate to them in here by  
15 sending these updated well information requirements that  
16 you desired these to be attached to any corrected term  
17 assignment?

18 A. As I recall, this was to give -- to make sure  
19 they had the right -- COG had the right information --  
20 sending us well information because we still weren't  
21 getting well information.

22 Q. If you executed the corrected term assignment?

23 A. No. For the wells that were in the SRO Unit.

24 Q. But, Mr. Howard, didn't you change the well  
25 information requirements?

1           A.    This is a newer version, the most recent  
2 version of all the contact information for well  
3 information that we gave to Concho because they --

4           Q.    This would be -- and you added requirements to  
5 the well information requirements? I'm sorry. You  
6 added requirements; did you not?

7           A.    In this (indicating)?

8           Q.    Yeah.

9           A.    No. This is our form that we send out  
10 currently, at this point in time. This is a current  
11 version of a well information requirement sheet that we  
12 send out for any outside-operated wells.

13          Q.    But this is different than the well information  
14 requirements that was attached to the Marbob term  
15 assignment?

16          A.    Yes.

17          Q.    It has new requirements in it?

18          A.    True.

19          Q.    All right. And you expected this to apply to  
20 the wells drilled and after the Marbob TA expired?

21          A.    I was giving them the information they  
22 requested to make sure they had the right contact  
23 information on a newer version. The old version was  
24 from -- between Nearburg and Marbob, and there was some  
25 concern that maybe they didn't have the right

1 information for the delivery of the well information.

2 Q. But this would apply to wells drilled before  
3 and after the unit had terminated?

4 A. Any information for the wells in the SRO Unit,  
5 yes.

6 Q. Okay. Including the 43H and the 44H?

7 A. Yes.

8 Q. And you expected this to be in effect?

9 A. No.

10 Q. No, you didn't expect this to be in effect?

11 A. No. I'm sorry. It gives updated  
12 information -- contact information. That's the only  
13 reason I sent it was to give them a complete updated  
14 spreadsheet. This is our form. It has new information.  
15 If you go through the list of people, there are no  
16 contacts.

17 Q. But if I go to the second page of your new well  
18 information requirements --

19 A. Right.

20 Q. -- there is now paragraphs F and G, correct?

21 A. Right.

22 Q. Those are new?

23 A. They're part of what is associated with our  
24 well information requirements. This was --

25 Q. You're right. Let me be specific.

1 A. Okay. Please do.

2 Q. That information in F and G was not part of the  
3 well information requirement attached to the Marbob term  
4 assignment?

5 A. That's correct.

6 Q. These are new requirements to be adhered to  
7 under a corrected term assignment?

8 A. No.

9 Q. Okay. Do you think these applied without a  
10 corrected term assignment?

11 A. No. It's all part of a form. It wasn't -- we  
12 weren't asking for this additional information. It was  
13 a form to update the contact information for the people  
14 that were supposed to get information on existing wells.

15 Q. What about F and G?

16 A. What about F and G? I don't know what you  
17 mean.

18 Q. Did you expect that Concho was supposed to  
19 comply with F and G?

20 A. No. That wasn't the reason for sending this  
21 over.

22 Q. Okay. Now, at the time that you -- you sent  
23 that out in April of 2015. And then I believe that in  
24 May -- on May 20th, you finally signed the CAs that --  
25 the communitization agreements that had been provided?

1           A.    I executed them then, yes.

2           Q.    And, in fact, you signed the communitization  
3 agreements that would have been provided at the April  
4 2nd meeting?

5           A.    I used that signature page to sign, correct.

6           Q.    And the communitization agreement that you  
7 signed on May 20th, both of those communitization  
8 agreements were dated prior to the drilling of the 43H  
9 and the 44H?

10          A.    That's correct.

11          Q.    And both of those communitization agreements  
12 that you signed confirm that COG was the operator of the  
13 acreage?

14          A.    That's correct.

15          Q.    And after you signed it, upper management told  
16 you not to provide it yet to COG.

17          A.    We were still talking, and they said we had to  
18 make some changes.

19          Q.    In fact, the only change that you wanted was to  
20 to change the interval under those CAs, communitization  
21 agreements, from the Bone Spring to the 2nd Bone Spring  
22 interval?

23          A.    No.

24          Q.    That was the only change you requested?

25          A.    That was the only change we requested to the

1 actual comm agreements, but there were other  
2 stipulations with us signing those comm agreements.

3 Q. But there was no other agreement amendment to  
4 the communitization agreement?

5 A. No.

6 Q. There was no change to the effective date?

7 A. No.

8 Q. There was no change to the paragraphs that  
9 designated COG as operator of the acreage?

10 A. No.

11 Q. Okay. At the time that you signed these and --  
12 actually, when you submitted them to Concho, isn't it  
13 true that you were -- it was unclear whether the  
14 Commissioner of Public Lands would actually accept a  
15 communitization agreement that had only part of the Bone  
16 Spring as the communitized interval?

17 A. I can't agree with that.

18 Q. Isn't it true -- didn't you testify,  
19 Mr. Howard, that you heard John Turro had talked to the  
20 State Land Office?

21 A. I remember him talking to them, yes.

22 Q. And didn't you testify that after his  
23 conversation, it was not clear if the Commissioner would  
24 approve that limitation in the communitization  
25 agreement?

1           A.    I don't remember it quite that way, but -- I  
2 thought what they said was that we could send them in  
3 that way. They may not recognize them limited to those  
4 zones, but they would accept them, is the way I kind of  
5 remember that happening.

6           Q.    Say that again.

7           A.    I don't know that I can say it the exact same  
8 way, but I'll try. As I recall, they said that we could  
9 send them in with a limitation, but it didn't  
10 necessarily mean that they would recognize those  
11 changes.

12          Q.    Exactly.

13                    It was unclear whether the Commissioner of  
14 Public Lands would recognize the changes even if the  
15 parties agreed to it?

16          A.    Right. That's kind of my understanding.

17          Q.    Okay. Then we have Exhibit 22. You've seen  
18 this before? This is your May 28th letter to Concho.

19          A.    May 28th letter? Yes.

20          Q.    And you state here -- and correct me if I'm  
21 wrong, Mr. Howard, but you state here in writing that --  
22 end of the second paragraph, "Nearburg is not aware of  
23 any operating agreement related to the wells or any  
24 other arrangement which would grant COG the right to  
25 drill the wells with the acreage covered by the lease."

1 A. Yes.

2 Q. Did you forget about receiving the operating  
3 agreement in November of 2014?

4 A. No.

5 Q. Did you forget that you had inputted that  
6 operating agreement into your system?

7 A. No.

8 Q. And that you had inputted that operating  
9 agreement into your system to cover this acreage?

10 A. It was just for reference purposes.

11 Q. And did you inform COG in this letter that you  
12 believe the operating agreement that you had  
13 submitted -- put into your records, that you were of the  
14 opinion that it did not apply?

15 A. That's what I said right here, I thought.

16 Q. You said you're not aware of any.

17 A. That's correct.

18 Q. But they had sent you an operating agreement.

19 A. It didn't affect the 43H and the 44H.

20 Q. Covered that acreage.

21 A. No longer.

22 Q. Okay. So this is the first time, Mr. Howard,  
23 that you have suggested, at least as you read this, to  
24 COG in writing that the operating agreement did not  
25 cover your acreage?

1           A.    This may be the first time that it is put in  
2 writing.  That's correct.

3           Q.    And then even after this letter -- if I go to  
4 Exhibit 23, this is the document under which you then  
5 provide the executed communitization agreements to COG  
6 for filing?

7           A.    Correct.

8           Q.    And in this letter, you ask Concho, then, for  
9 the first time, to provide you -- and I'm looking at the  
10 last paragraph, first page.  You ask them to provide  
11 information so you can now evaluate your working  
12 interest in the wells.  Do you see that?

13          A.    In the first paragraph?

14          Q.    The first page, bottom part.  You say, "In an  
15 effort to further evaluate our working interest in the  
16 Wells, Nearburg requests it be provided with the  
17 following...information for the Wells."  Do you see  
18 that?

19          A.    I do.

20          Q.    This is the first time you've given any kind of  
21 list like this to COG?

22          A.    I don't -- I mean, we've been asking for  
23 information for a long time.

24          Q.    You were asking them for information about how  
25 to calculate your overriding royalty interest

1 percentage?

2 A. In all the wells.

3 Q. On all the wells.

4 But in this case, Mr. Howard, this is the  
5 first time that you ask specific information in relation  
6 to some kind of a working interest in the wells?

7 A. Okay.

8 Q. Is that -- I haven't seen any other  
9 correspondence requesting this type of information, have  
10 you?

11 A. Not that I recall.

12 Q. And nothing in this letter, that you sent after  
13 signing the communitization agreements, states that COG  
14 is not authorized to operate the 16H or the 43H or the  
15 44H wells?

16 A. I'd ask you to say that one again, please.

17 Q. Nothing in this letter informs COG that they  
18 are not authorized to operate the 16H, the 43H or the  
19 44H wells on your lease?

20 A. Well, I would say it does kind of get at that  
21 in the second paragraph, when it talks about the term  
22 assignment expired. I think it is implying that there  
23 is no longer any way they can be out there. They don't  
24 have any rights on the lands anymore.

25 Q. Mr. Howard, there is nothing in this letter

1 stated to tell Concho or COG Operating that you disagree  
2 with what was stated in paragraph eight of the  
3 communitization agreements that you provided with this  
4 letter?

5 A. Okay. I can agree with that.

6 Q. Okay. You can agree with that?

7 A. Yes.

8 Q. Because that's what you testified to  
9 previously.

10 Okay. All right. And at the time you  
11 provided these communitization agreements, Mr. Howard,  
12 you knew that they would be filed with the State Land  
13 Office, correct?

14 A. I thought they would be, but they weren't.

15 Q. You knew they would be recorded?

16 A. I thought that they would, but I never got a  
17 recorded copy.

18 Q. And you knew they would inform the public that  
19 COG is the operator of Nearburg's acreage?

20 A. Yes.

21 Q. Now, you stated that COG never attempted to  
22 email your company a copy of the filed communitization  
23 agreements. Is that your testimony?

24 A. I never received a recorded copy.

25 Q. Are you aware that COG did send its

1 communitization agreements to Nearburg after they were  
2 filed?

3 A. No.

4 MR. FELDEWERT: May I approach?

5 CHAIRMAN CATANACH: Yes.

6 Q. (BY MR. FELDEWERT) Mr. Howard, I've handed you  
7 what I've marked as COG Number 33. This reflects, does  
8 it not, that on August 28th, Concho sent recorded copies  
9 for your files to Nearburg Exploration?

10 A. That's what it says.

11 MR. HARPER: Can I ask, Counsel, if this  
12 document has ever been produced in discovery and in all  
13 the matters ongoing between the parties?

14 MR. FELDEWERT: You're asking the wrong  
15 person.

16 MR. HARPER: Okay.

17 Q. (BY MR. FELDEWERT) It was sent to your Dallas  
18 office?

19 A. That's what it says, a P.O. box.

20 Q. Now, the next thing that happens after you sent  
21 these communitization agreements for filing is,  
22 Mr. Howard, the company decides, then, that it's going  
23 to revoke all of its signed Division orders for  
24 overriding royalty interests, correct?

25 A. Correct.

1 Q. And that's reflected in COG Exhibit 24 and COG  
2 Exhibit -- I'm sorry -- COG Exhibit 24, which is two  
3 letters?

4 A. Yes.

5 Q. And that's the first time that you've informed  
6 COG that you no longer desire to proceed with an  
7 overriding royalty interest under a corrected term  
8 assignment?

9 A. In writing, yes, that I'm aware of.

10 Q. And so isn't it true that from -- and I'm  
11 looking at my timeline here. From March of 2014, when  
12 the SRO terminated, until we'll say when you revoked the  
13 Division order in July or August of 2015, during that  
14 entire period of time, Nearburg received overriding  
15 royalty interest payments as if the term assignment had  
16 been extended; is that correct?

17 A. I would say it looks like we received money in  
18 a lockbox.

19 Q. Your overriding royalty interest payments?

20 A. Right, overrides.

21 Q. And then on July -- then if I look at COG  
22 Exhibit Number 30, which is now July 20th, 2015, this is  
23 after you've already signed the communitization  
24 agreements and sent them to COG for filing. You state  
25 suddenly on July 2015 that the company has committed

1 mineral trespass. Do you see that?

2 A. Yes.

3 Q. This is the first time you've stated that to  
4 COG?

5 A. No.

6 Q. When was the first time?

7 A. I believe in my meeting with Aaron, the time  
8 before this ever came about. This is the first time I  
9 think it was ever in writing.

10 Q. First time in writing?

11 A. I think so.

12 Q. What meeting with Aaron?

13 A. When he came by to pick up the comm agreements.

14 Q. Even though you had signed the comm agreements  
15 that said COG was the operator of your acreage? Your  
16 testimony is you told him that they were in mineral  
17 trespass?

18 A. I said, What are we going to do about these two  
19 wells that on our lease in mineral trespass. Yes.

20 Q. But you gave him the comm agreements to file  
21 for those same wells --

22 A. Yes, we did.

23 Q. -- stating that COG is the operator?

24 A. Yes, we did.

25 Q. You didn't cross that language out?

1 A. No, we didn't.

2 Q. Then you tell COG on July 20th that the offer  
3 to extend the term assignment is not acceptable?

4 A. Correct.

5 Q. And then you-all go off and file your complaint  
6 in district court?

7 A. That's correct.

8 Q. So, Mr. Howard, your change of heart here comes  
9 after COG had operated the 16H on your lease, according  
10 to my timeline, for over four years?

11 A. Correct.

12 Q. Under the operating agreement?

13 A. Correct.

14 Q. And it's two years after the 43H and the 44H  
15 wells were permitted on your lease?

16 A. That's correct.

17 Q. Under the operating agreement?

18 A. Says Concho.

19 Q. Concho. Under the operating agreement?

20 A. Right.

21 Q. And it was over a year after they had told you  
22 in March that the term assignment had expired?

23 A. Right.

24 Q. And that they were proceeding to drill under  
25 the operating agreement at will?

1 A. Right.

2 Q. And that they assumed that the company desired  
3 to continue with an overriding royalty interest?

4 A. That's correct.

5 Q. And prior to May 28th of 2015, there is not a  
6 single piece of written communication from Nearburg to  
7 COG even suggesting that the operating agreement does  
8 not apply to your lease?

9 A. I think that's correct.

10 Q. And there is not a single piece of written  
11 communication prior to May 28th of -- or, actually,  
12 prior to July 20th of 2015, stating that the company  
13 does not desire to continue with an overriding royalty  
14 interest under a corrected term assignment?

15 A. It was still in negotiation.

16 MR. FELDEWERT: That's all I've got.

17 CROSS-EXAMINATION

18 BY COMMISSIONER PADILLA:

19 Q. Good afternoon, Mr. Howard.

20 A. Good afternoon.

21 Q. Thank you for your time.

22 I have some questions. I'm going to kind  
23 of jump around in my notes here, but I'll try to keep  
24 them, I guess, logically oriented and to follow your  
25 testimony.

1                   One thing that struck me early on was your  
2 requirements -- your reporting requirements. And I  
3 can't help but notice that those look oddly similar to  
4 regulatory reporting requirements for an operator as far  
5 as your overall issue. Why does Nearburg require that?

6           A. For -- you mean, it was attached to the term  
7 assignment?

8           Q. Right. Right.

9           A. Well, I think we wanted to know what was going  
10 on in the area. If I can explain kind of what happened,  
11 this was originally a deal that Marbob put together for  
12 the development of the Avalon. It was something that  
13 Nearburg, my understanding, never wanted to participate  
14 in the development of the Avalon. That's all they were  
15 going after at that point in time. But there was  
16 concern that they may be doing additional work, and we  
17 wanted to know everything, get all the information  
18 together in case we wanted to do something else in the  
19 area because we had other acreage in the area.

20           Q. So that requirement list was not specific to --  
21 or was not a general thing that Nearburg sends out as  
22 part of the JOAs that was specific to --

23           A. I believe it was more specific to this case.

24           Q. Okay. Because of the Avalon target?

25           A. Right. And because of the fact that we had

1 agreed to keep just an override in all these wells. We  
2 wanted -- we did want as much information as possible,  
3 which, you know, information is key. Of course that was  
4 part of the negotiation in the early process.

5 Q. Sure.

6 The consolidation codes that we talked  
7 about earlier on the C-102 --

8 A. Yes, sir.

9 Q. -- did the OCD ever tell you that those were a  
10 requirement, or any other reporting agency?

11 A. No, sir.

12 Q. Because I know that depending on the land  
13 status, they ask for an agreement under the New Mexico  
14 Consolidation Code. I'm just wondering if you know a  
15 reason or detriment to those not being included.

16 A. I don't file the regulatory information. I  
17 don't know what the purpose is for that block. All I  
18 was doing was answering my attorney's questions. It  
19 didn't mean anything to me.

20 Q. Sure.

21 So was the letter of July 9th in which COG  
22 talked about the comm -- July 9th, 2014, where COG talks  
23 about a comm agreement requirement for the 43H, was that  
24 the first time you became aware of the 43H?

25 A. The first time I was aware of the 43H was when

1 I talked with Kelly Fuchik. When we get a letter  
2 from -- that's the letter you're talking about?

3 Q. That's what I'm talking about. Sorry. I don't  
4 have the exhibit number.

5 A. Yeah. That's the first I had heard of it, yes.

6 Q. I am a little curious as to why that well never  
7 reappears in the next couple of months' worth of  
8 correspondence with COG if it was such an inflammatory  
9 point, which I take it from your testimony it has been.

10 A. Yes, sir.

11 Q. And I won't go to the -- the affidavit, but can  
12 you tell us why or give us any kind of indication as to  
13 why that never resurfaces shortly thereafter if it's a  
14 point of contention?

15 A. From our side?

16 Q. Yeah. I assume that's why you're up there.

17 A. Yes. We were under the impression that when we  
18 objected, that it stopped, anything happening with the  
19 43H. And, in fact, they sent us an email saying they'd  
20 get back to us. So it was my assumption they were not  
21 going to drill the 43H, and it was stopped in its  
22 tracks. I know they were blowing and going back then,  
23 and I just took it that it was one of those things where  
24 they said, Wait a minute; let's put this one on the back  
25 burner where we can get all this ironed out, because

1 they never did come back to us with anything else about  
2 the 43H.

3 Q. But that one was permitted when the unit was  
4 still in effect?

5 A. But we didn't know that.

6 Q. Right.

7 And were you not getting any data from  
8 Concho as far as what was going on out there --

9 A. We only got --

10 Q. -- pursuant to your requirements as outlined in  
11 the Marbob agreement?

12 A. All we got information on were the Avalon  
13 wells. We didn't get any information whatsoever on the  
14 2nd Bone Spring wells, including the 43H and the 44H  
15 wells that were drilled across our acreage. Nothing.

16 Q. Okay. Why would you pay a rental statement for  
17 -- or send a rental invoice for an agreement you didn't  
18 recognize anymore to Concho?

19 A. This is the one that they brought up, the  
20 rental that was paid?

21 Q. This is COG Exhibit 11.

22 A. Yeah. I wasn't aware -- it's not handled by  
23 me. I didn't approve it. I didn't pay it, and I don't  
24 know why it was paid.

25 Q. Or why it was sent to Concho?

1           A.    I mean, it was -- it was -- what we do is we  
2 pay these rentals in advance if we're the lessee of  
3 record --

4           Q.    Sure.

5           A.    -- and then we bill whoever is currently in  
6 charge of that, responsible for that.  And, you know, I  
7 can only assume that what happened was every year it  
8 came through, every year we paid it, and every year it  
9 was billed.  It was an accounting issue, but, again,  
10 handled in the Dallas office.  So I don't know.

11          Q.    Even though the unit terminated, sometimes it's  
12 business as normal just because of bureaucratic  
13 procedures?

14          A.    You get an invoice, you pay it.

15          Q.    Right.  Right.

16          A.    So we paid it every time, and then we just send  
17 off to them to reimburse us.

18          Q.    So in your mind, speaking purely for  
19 yourself --

20          A.    Yes.

21          Q.    -- when was this -- when did you consider this  
22 agreement null and void, because there is kind of that  
23 same trajectory where these things are carried forward  
24 according to a lot of the correspondence.  When would  
25 you say, Now this is done; you're in trespass?

1           A.     The actual date the term assignment expired?

2           Q.     Is that what you consider the date that the  
3 operating agreement also expired?

4           A.     As to our acreage, yes.

5           Q.     So why were you still corresponding with Concho  
6 about development and continuing the override and all  
7 those sorts of things?

8           A.     They had presented that to us as a deal to keep  
9 things going forward. Here's what we did: We canceled  
10 the unit. We didn't realize all those things that  
11 happened when we did that. It was our bad. We're  
12 trying to correct that. What we want you to do is agree  
13 to extend this term assignment, and we're going to be so  
14 kind that we're going to let you keep an override in all  
15 the SRO wells just like the unit agreement is still in  
16 place, although it is not. And if you'll agree to do  
17 that, we will give you the override, and you can sign a  
18 new term assignment extending the period -- well, the  
19 length of the term assignment. That's what they  
20 presented to us, and we were trying to figure out if  
21 that was a good idea.

22                     To me at the time, it sounded great because  
23 I didn't have all the well information. What you don't  
24 have, you don't know. And they were supposed to be  
25 providing this information to us, which would have

1 definitely changed the way we would have handled what we  
2 were doing. I thought we were making the best deal  
3 possible.

4 Q. So did you eventually get enough well  
5 information to make your decision?

6 A. Yes.

7 Q. And what point was that?

8 A. After April 15th -- after April 22nd, whatever  
9 it was, of 2015. I think it was in May, whenever we  
10 finally started getting some information on the wells.  
11 I mean, there was some mention of the 43 and 44H, but  
12 still, we had no idea what kind of wells we were talking  
13 about, the volume of the production, the depths they  
14 were producing from or anything else.

15 Q. You saw that comm agreement in the middle of  
16 the summer of 2014. No one was kind of curious? Nobody  
17 went on the OCD Web site to see if there was a well out  
18 there?

19 A. Well, it's interesting, because if you go on  
20 the OCD Web site, the wells don't show up in our  
21 section. They only show up in the section they're  
22 drilled on, which was not our section. So we had no way  
23 of even checking on the OCD. You could go in and look  
24 up the 43 and 44H and then dig that information out once  
25 you find out the wells are out there.

1 Q. But you had the comm agreement.

2 A. Once we had the comm agreement, we were able to  
3 do that, yes. And I think the first time we tried to  
4 get well information, it was not being reported.

5 Q. But didn't you have the comm agreement in July  
6 of 2014 at least for review purposes?

7 A. For the -- yes, to drill the 43H? Right. The  
8 one that we talked to Ms. Fuchik about?

9 Q. Right.

10 A. Right. But it was a non-issue to us. They  
11 were proposing a communitization agreement for a well  
12 that as far as we knew had never happened. They came to  
13 us and said, We want you to sign a comm agreement. We  
14 said, No; you don't have these lands anymore. And they  
15 said, Okay, we'll get back to you. And so I was on to  
16 other work.

17 Q. Did you tell them that, though?

18 A. Yes.

19 Q. "No, you don't have these wells anymore"?

20 A. Yes. They had already told us. They already  
21 knew. This girl didn't know it, but --

22 Q. Uh-huh.

23 A. -- but yes, we told them.

24 Q. So you never took the comm agreement, out of  
25 curiosity, and punched in the data on OCD online?

1           A.     Just to go in and pull the well up by the name  
2 of the well or anything else? No, I didn't.

3           Q.     Okay. Did Nearburg have any communication with  
4 the Land Office regarding the status of that lease? I  
5 know you relied on what Concho was saying, but did --

6           A.     When we first got wind that the State was  
7 talking about possibly canceling our lease, we did  
8 everything we could to try to keep that lease in effect.  
9 And the best way we could think of to do that was to try  
10 to work somehow with Concho to get that done. We wanted  
11 to not lose our lease. There was some discussion about  
12 getting in touch with the state office, but I don't  
13 think we did at that point in time.

14          Q.     Okay.

15          A.     We should have, but we didn't.

16          Q.     Yeah. Just for future reference, there are  
17 multiple administrative remedies for things like that.

18                   Okay. So in your opinion, what was the  
19 determining factor that made Nearburg decide that this  
20 was no longer a valid agreement and they wanted to  
21 pursue other options on their lease?

22          A.     Well, again, the term assignments to us expired  
23 when the unit agreement expired.

24          Q.     But when it expired, you were still  
25 considering --

1 A. Right.

2 Q. -- extending -- I mean, what made you change  
3 your mind?

4 A. At that point in time when we got all the well  
5 information and realized what was going on in the area  
6 is when we made our decision. And it was presented to  
7 Concho the entire time, and it was a long time, a long  
8 drawn out time of canceled meetings and everything else  
9 that went on of us trying to get information together to  
10 make that decision. And they knew -- the two landmen  
11 that I was working with knew from day one to the last  
12 minute when we said, We're done, we're not going to do  
13 this, that everything was contingent on getting all the  
14 well information that we were supposed to have been  
15 provided before so we could make an educated decision on  
16 what we wanted to do. And once we finally got that, it  
17 was real easy to make our decision.

18 Q. So I'm just wondering why you wouldn't  
19 entertain one avenue much more so than another, on paper  
20 anyway, when Concho wasn't giving you what you wanted?

21 A. You don't know what you don't know.

22 Q. Right.

23 A. What I thought was hey, we're going to --

24 Q. Why not say, Full stop; we're not doing  
25 anything until you give us the data; we don't know which

1 way to go?

2 A. You mean don't continue talking with them or  
3 something?

4 Q. Well, it seemed like you had already really  
5 kind of gone down the path. And some of your analysts  
6 had looked at, you know, options, maybe not Tim or Mark  
7 or whoever your boss wanted to look at them --

8 A. Right.

9 Q. -- but there had been some internal analyses  
10 done indicating that an override might be the way to go  
11 on this.

12 A. Yeah. And that was really early on. And as  
13 soon as -- in that April 2015 period, as soon as we  
14 realized what was going on, we were pretty certain then  
15 we didn't want to do anything, but we still wanted well  
16 information so we could make our decision.

17 Q. And my last question is: Why would you approve  
18 those comm agreements if you were at the same time in  
19 the same month alleging trespass?

20 A. Under duress. We didn't want to lose the  
21 lease, which is what Concho told us in their emails and  
22 in an email forwarded from the State. So we were  
23 thinking we had two wells drilled on a lease that we  
24 didn't know were drilled, production that we didn't have  
25 any idea about, and now we're going to lose the lease on

1 top of all that. So the only option we thought we had  
2 at the time was to stipulate and agree to sign the comm  
3 agreements with those stipulations in place. And that's  
4 why we did it. That's the only -- we did it completely  
5 under duress. And as soon as it was -- as soon as it  
6 was done, they acted like well, we were going to be  
7 doing it and it was effective July 1st and it was not a  
8 problem, but there was a problem.

9 Q. Thank you.

10 A. Thank you.

11 CHAIRMAN CATANACH: Just a couple,  
12 Mr. Howard.

13 CROSS-EXAMINATION

14 BY CHAIRMAN CATANACH:

15 Q. So once the SRO Unit was terminated, that  
16 terminated the term agreement?

17 A. Yes, sir.

18 Q. Okay. At that point you became -- you became a  
19 working interest owner again or -- or you re-acquired  
20 your lease, in effect, right?

21 A. What we're arguing today or discussing today is  
22 we think -- we never signed the unit agreement -- the  
23 operating agreement, and so we weren't a party to the  
24 operating agreement. And so under the loss of title in  
25 the operating agreement, when that term assignment

1 expired, the acreage that was contributed by COG, or  
2 Marbob before, fell out of the unit, and they had 90  
3 days to get an agreement put in place to put the acreage  
4 back into the unit or to the JOA, and they didn't do  
5 that. And by the terms of the JOA, that acreage fell  
6 out of the contract area.

7 Q. So the operating agreement was still in effect  
8 as to certain parties within the old unit?

9 A. I think so, yes. I think it still is today.

10 Q. But not as to your interest?

11 A. I don't believe it is.

12 Q. So at that point, once that terminated and COG  
13 was -- the 16H had already been drilled at that point,  
14 right?

15 A. It was a problem.

16 Q. And that was operated by COG?

17 A. That's correct.

18 Q. Well, I mean, at that time -- why wasn't the  
19 problem fixed at that time? I mean, that's when the  
20 problem all came to a head or initially developed?

21 A. Right. When we first realized what had  
22 happened, the 16H was a well that was sometime  
23 producing, sometime not producing, an Avalon well that  
24 we wanted nothing to do with at the time. I don't know  
25 if we want anything to do with it still today. But it

1 was an Avalon well that was drilled by them, and when  
2 they canceled the unit agreement, the question is whose  
3 well is it?

4 I don't know that we wanted the well at  
5 that point in time, if we had any desire to take the  
6 well back if it was our well. Because do we want a  
7 plugging liability on a well that was shut in and barely  
8 producing most of the time? I don't think we did, but I  
9 don't know because we didn't have all the information we  
10 needed from them. So it was really then just a  
11 fact-finding adventure to see what was going on, to try  
12 to get all of our ducks in a row to figure out what we  
13 wanted to do and move forward.

14 Q. So at that point, you made a decision to let  
15 Concho operate the well?

16 A. We didn't stop them from operating, correct.  
17 And, you know, I mean, they were the operator of record  
18 as far as you guys were concerned anyway. So, I mean,  
19 at that point in time, it was not as big an issue as  
20 maybe other people thought it was.

21 Q. So is that the point where basically the  
22 negotiation started between Nearburg and Concho, at that  
23 point?

24 A. When the term assignment expired?

25 Q. Right.

1 A. Yes. That's when it first started.

2 Q. And it lasted until -- until -- I guess until  
3 you finally got all the information you needed?

4 A. (Indicating.)

5 Q. How long a period was that?

6 A. I think it was a year and a half or something,  
7 wasn't it? I'm not sure how long it was. It seemed  
8 like forever. But --

9 Q. And let me ask you this. What date did you  
10 finally get all the information you needed?

11 A. I want to say it was in May of 2015, something  
12 like that. It's when I wrote my letter -- when we sent  
13 our letter saying we were not going to do a term  
14 assignment. I think by that time, we had enough  
15 information, although I still don't know if we had  
16 everything.

17 Q. Okay. And during that period of time, you were  
18 still getting paid as to your royalty interest; is that  
19 correct?

20 A. On some wells, correct.

21 Q. On the 16 --

22 A. I don't believe, as we sit here today, that we  
23 ever received revenue on the 16H. I think that the  
24 interest in question -- and I'm talking all the way back  
25 when the SRO Unit was in place, when we were actually

1 entitled to an override, I don't think that we've ever  
2 received any revenue for the 16H because there was a  
3 dispute over what the override really was. We didn't  
4 sign the Division orders because we weren't in agreement  
5 with what the interest was they said we had. That's my  
6 understanding.

7 Q. And as to the 43 and 44, do you believe you've  
8 received payment for that?

9 A. To my knowledge, we've never received any money  
10 on that well.

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

12 CHAIRMAN CATANACH: Anything further? Any  
13 redirect?

14 MR. HARPER: Yeah, a little follow-up.

15 REDIRECT EXAMINATION

16 BY MR. HARPER:

17 Q. Mr. Howard, I'm just going to try to follow my  
18 notes, so I may not be as organized as I normally might  
19 want to be.

20 But you were asked about a number of C-101s  
21 and C-102s. And those were, for example, ones that were  
22 Exhibits 3 and 4, Nearburg Exhibits 3 and 4, that  
23 reference as-drilled language?

24 A. Yes.

25 Q. And you weren't sent any of these, right?

1 A. No.

2 Q. Including the one that says "As Drilled," which  
3 would indicate that a well had, in fact, been drilled?

4 A. Correct.

5 Q. You were asked about COG Exhibit 11, which was  
6 the bill for the lease. Remember that?

7 A. Yes.

8 Q. Let me ask you to look at Nearburg Exhibit 68.

9 MR. HALL: If may I approach? You don't  
10 have that exhibit yet. We'll supplement.

11 MR. FELDEWERT: This is which one? Exhibit  
12 68?

13 MR. HALL: I'm sorry, Mike.

14 MR. FELDEWERT: I don't think I have  
15 Exhibit 68.

16 Q. (BY MR. HARPER) See it, Mr. Howard, Exhibit 68?

17 A. Yes.

18 Q. And do you see there is a reference there --  
19 there is an email on the first page from Carolyn McIver  
20 to Mindy Conde. Do you see that?

21 A. I do.

22 Q. Who is Carolyn McIver?

23 A. She's in our Dallas office in JIB.

24 Q. And in the second paragraph, it says, "The  
25 credit of net \$320.00 on the May JIB against our

1 prospect P1050 Cottonwood Draw North is reversing the  
2 May 2014 rental charge in which COG paid on their check  
3 #37682 dated July 2014 - thus credit is due COG. We  
4 discovered that COG did not have an interest in these  
5 leases." Do you see that?

6 A. I do.

7 Q. Does that indicate to you that the rental  
8 payment was returned?

9 A. Yes.

10 MR. FELDEWERT: This is which email? The  
11 July 14th, 2015?

12 MR. HARPER: Correct.

13 Q. (BY MR. HARPER) You were asked a number of  
14 questions about the term assignment and the discussions  
15 that you had with folks at COG about a new term  
16 assignment. Did you ever agree to a new term  
17 assignment?

18 A. No.

19 Q. Did you ever say we're going to sign a new  
20 version of the term assignment?

21 A. No.

22 Q. You testified earlier that you were asking for  
23 a list of wells -- well information to be able to make a  
24 determination. Do you remember that testimony?

25 A. I do.

1 Q. Okay. And we looked at Nearburg Exhibit 14,  
2 which is when -- which is the April 22nd email, which  
3 references the 43H and the 44H and that they had been  
4 spud back in 2014.

5 MR. FELDEWERT: 14? Which exhibit?

6 MR. HARPER: Nearburg Exhibit 14.

7 THE WITNESS: Okay.

8 Q. (BY MR. HARPER) And you'd been asking for a  
9 list of wells for a long time, right?

10 A. Yes.

11 Q. And you see that the discussion under the comm  
12 agreements on the second page of Exhibit 14 talks about  
13 an issue with the Commissioner about getting overdue  
14 comm agreements, right?

15 A. Yes.

16 Q. So it wasn't until the Commissioner was  
17 concerned about these comm agreements that you found out  
18 about 43 and 44H?

19 A. That they had been drilled and completed, yes.

20 Q. You were asked on cross-examination about  
21 Exhibits 18A and 18B, COG Exhibits 18A and 18B.

22 A. Yes.

23 Q. All right. And because there is an internal  
24 dialogue about what was the best thing to do, you know,  
25 agree to the new term assignment or keeping your working

1 interest, right?

2 A. You're in 18A --

3 Q. 18A.

4 A. -- of theirs? Concho's?

5 Q. Concho's Exhibits 18A and 18B.

6 A. Okay.

7 Q. And there is a discussion about whether or  
8 not -- what to do, right?

9 A. Yes.

10 Q. And you continue to try to talk to people  
11 within the company about what's the right thing to do --

12 A. Yes.

13 Q. -- is that right?

14 A. Yes.

15 Q. And at some point in time, there's  
16 consideration that might be the best thing to do, is  
17 that right --

18 A. Yes --

19 Q. -- to keep the override?

20 A. Yes.

21 Q. But, for example, on 18B, in the middle of the  
22 second page, you said at one point in time, in November  
23 of 2014, "Duane, I take it from your response that you  
24 are okay with me moving forward...." do you see that on  
25 the second page of 18B?

1 A. I do.

2 Q. And then Mr. Davis asked again, "Well, let's  
3 take a look at this." Right?

4 MR. FELDEWERT: Where are you at,  
5 Counselor?

6 CHAIRMAN CATANACH: 18B?

7 MR. HARPER: 18B.

8 Q. (BY MR. HARPER) The email of November 24th,  
9 2014, 8:25 a.m., Randy Howard to Duane Davis. "Duane, I  
10 take it from your response that you are okay with me  
11 moving forward...." do you see that?

12 A. Yes.

13 Q. The next email, 8:48 a.m., Duane Davis to Emily  
14 Sharp, Randy Howard, "Emily, please have someone take a  
15 look at this." Right?

16 A. Yes.

17 Q. Still not decided, right?

18 A. That's correct.

19 MR. FELDEWERT: Object to the leading  
20 questions here.

21 Q. (BY MR. HARPER) Was it decided?

22 A. Not at this point in time, it wasn't.

23 Q. Now, the first page of this email on 18B, the  
24 unhighlighted portion, Bill Elton to Randy Howard, among  
25 others, "I think Tim/Mark should weigh in on this also."

1 Do you see that?

2 A. I do.

3 Q. April 23rd, the day after you get the April  
4 22nd email, right?

5 A. Yes.

6 Q. And then you send an email that says, "Tim is  
7 looking." Right?

8 A. Yes.

9 Q. Send an email, "Tim is looking." Who is Tim?

10 A. Tim is the engineer, Tim Spear.

11 Q. Tim Spear.

12 And we looked earlier at Exhibit 67. Do  
13 you have Exhibit 67?

14 A. I'm trying to get there.

15 Okay.

16 Q. And there is Spear's conclusion, right?

17 A. Yes.

18 Q. Okay. And what is Mr. Spear's conclusion?

19 A. That it would be better to keep a working  
20 interest than an override.

21 Q. Once you knew about these wells that had been  
22 drilled?

23 A. Correct.

24 Q. You also talked about the loss of title  
25 provision in Exhibit 42, the joint operating agreement?

1 A. Yes.

2 Q. And what's your understanding of that?

3 MR. FELDEWERT: Objection. He's already  
4 been asked and answered.

5 MR. WADE: Do you want to hear the answer?

6 CHAIRMAN CATANACH: Go ahead and answer.

7 THE WITNESS: That when the term assignment  
8 expired, the acreage fell out of the joint operating  
9 agreement contract area and that there was 90 days that  
10 Concho had to get something else in place to put the  
11 acreage back into the JOA. Failing to do that, the  
12 acreage falls out and the JOA lands contract, and it's a  
13 joint loss.

14 Q. (BY MR. HARPER) How long -- under your  
15 understanding, how long would they have to cure with a  
16 March 1st, 2014 termination of the term assignment in  
17 the unit?

18 A. Well, 90 days from March 1st.

19 MR. HARPER: All right. Pass the witness.

20 RECROSS EXAMINATION

21 BY MR. FELDEWERT:

22 Q. Mr. Howard, I want to look at Exhibit 68, the  
23 one they just gave to us.

24 CHAIRMAN CATANACH: Cross on that exhibit.

25 MR. FELDEWERT: Not on the other testimony?

1 CHAIRMAN CATANACH: No, sir.

2 Q. (BY MR. FELDEWERT) This is dated July 14th,  
3 2015?

4 A. The one from Carolyn McIver is dated July, yes.

5 Q. This is after you had already communicated to  
6 COG you were repudiating the operating agreement?

7 A. Yes.

8 Q. And prior to May 28th, at no point in time did  
9 you inform COG, by email or letter, that you believed  
10 that the operating agreement did not apply?

11 A. I don't recall.

12 Q. Okay. And you didn't inform COG that you  
13 believed that there had been a loss of title that needed  
14 to be corrected?

15 A. I don't think so.

16 Q. And you didn't inform COG that you didn't want  
17 them to -- that they were not authorized to operate the  
18 16H well?

19 A. No.

20 Q. And you didn't ask for any information about  
21 the 16H well?

22 A. I'm sorry. I didn't hear all that.

23 Q. You didn't ask for any production information  
24 about the 16H well?

25 A. I believe we did ask for information about the

1 16H well, too.

2 Q. When?

3 A. Several times, I think.

4 Q. Did you ask them for that information shortly  
5 after the unit terminated?

6 A. I don't know.

7 Q. At the time when you were conceding and  
8 allowing COG to continue to operate the 16H well?

9 A. We continued to ask for information, yes.

10 Q. And you testified that you just didn't want --  
11 at that time you didn't want the responsibility for the  
12 16H well, so you were fine with COG continuing to  
13 operate it?

14 MR. HARPER: Objection. Misstates  
15 testimony.

16 Q. (BY MR. FELDEWERT) Isn't that what you said?  
17 You said you didn't want an Avalon well.

18 A. I wasn't sure that we would want an Avalon  
19 well, I think is what I said.

20 Q. And so you made no suggestion to COG that they  
21 were not authorized to operate that well under the  
22 operating agreement after the unit terminated?

23 A. No.

24 MR. FELDEWERT: That's all the questions I  
25 have.

1 CHAIRMAN CATANACH: Thank you.

2 MR. HARPER: I would offer Exhibit 68.

3 MR. FELDEWERT: I have no objection, and I  
4 do need to offer my exhibits into evidence as well.

5 CHAIRMAN CATANACH: Exhibit 68 will be  
6 admitted.

7 (Nearburg Exploration Co., LLC Exhibit  
8 Number 68 is offered and admitted into  
9 evidence.)

10 MR. FELDEWERT: So then, Mr. Examiner, I  
11 would offer into evidence COG Exhibits 1 through 25,  
12 Exhibit 30 --

13 MR. WADE: 30?

14 MR. FELDEWERT: COG Exhibit 30.

15 CHAIRMAN CATANACH: Any objection?

16 MR. HARPER: One moment.

17 MR. FELDEWERT: I'm sorry. I misspoke. It  
18 should be COG Exhibits 1 through 24 and then Exhibit 30.

19 MR. HALL: Mr. Chairman, COG didn't offer  
20 or discuss Exhibits 14, 20 or 21 or 24.

21 MR. FELDEWERT: 14?

22 MR. HALL: I'm sorry. Apparently, he did  
23 discuss 14.

24 MR. FELDEWERT: 21's one of your exhibits,  
25 and we did discuss Exhibit 24.

1 MR. HARPER: So your offer is 1 through 24?

2 MR. FELDEWERT: And 30.

3 MR. HARPER: And 30?

4 MR. FELDEWERT: Yes.

5 (Discussion between parties off the  
6 record.)

7 MR. FELDEWERT: So everything except 17D;  
8 is that right?

9 MR. HARPER: Yes, sir.

10 CHAIRMAN CATANACH: COG Exhibits 1 through  
11 24, with the exception of 17D, and COG Exhibit 30 will  
12 be admitted.

13 (COG Operating, LLC Exhibit Numbers 1  
14 through 17C, 18 through 24 and 30 are  
15 offered and admitted into evidence.)

16 CHAIRMAN CATANACH: Is there anything  
17 further of this witness?

18 MR. HARPER: Nothing further.

19 CHAIRMAN CATANACH: Mr. Howard, you may  
20 finally be excused.

21 THE WITNESS: Thank you.

22 CHAIRMAN CATANACH: So, gentlemen, is this  
23 a good stopping point? What do we have, two witnesses?

24 MR. HALL: It is a good stopping point. I  
25 have another engineering witness. We may call an

1 additional witness from COG in our case.

2 CHAIRMAN CATANACH: So one witness, and you  
3 may call a COG witness?

4 MR. FELDEWERT: Who would that be?

5 MR. HALL: It would be the landman,  
6 Mr. Owen.

7 MR. FELDEWERT: We're going to call  
8 Mr. Owen. We're going to call him as part of our case.

9 CHAIRMAN CATANACH: So you've got two  
10 witnesses, basically?

11 MR. HALL: Two witnesses, yes, total, yes.

12 CHAIRMAN CATANACH: What's your direct on  
13 the engineer?

14 MR. HALL: It's probably 20, 25 minutes on  
15 direct.

16 CHAIRMAN CATANACH: What do you think,  
17 Mr. Feldewert? What's your direct on your witness?

18 MR. FELDEWERT: 30 minutes.

19 CHAIRMAN CATANACH: Oh, nice.

20 MR. FELDEWERT: And then we may -- we do  
21 have -- yes, we do have one more witness. She'll be  
22 short.

23 MR. HALL: Who is that?

24 MR. FELDEWERT: Ms. Davis.

25 MR. HALL: Say again.

1 MR. FELDEWERT: Ms. Davis.

2 MR. HALL: First name?

3 MR. FELDEWERT: Elizabeth. She'll be a  
4 rebuttal witness.

5 CHAIRMAN CATANACH: So we have --

6 COMMISSIONER BALCH: So we have 20, 25 and  
7 short.

8 MR. FELDEWERT: Correct.

9 CHAIRMAN CATANACH: So that's what? About  
10 five hours?

11 (Laughter.)

12 CHAIRMAN CATANACH: Why don't we go ahead  
13 and adjourn, and we'll reconvene at 8:30 tomorrow  
14 morning?

15 (Recess 5:01 p.m.)

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1 STATE OF NEW MEXICO  
2 COUNTY OF BERNALILLO

3

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