

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

APPLICATION OF THE NEW MEXICO OIL CONSERVATION DIVISION TO AMEND RULES OF THE COMMISSION CONCERNING THE DRILLING, SPACING, AND OPERATION OF HORIZONTAL WELLS AND RELATED MATTERS BY AMENDING VARIOUS SECTIONS OF RULES 19.15.2, 19.15.4, 19.15.14, 19.15.15, AND 19.15.16 NMAC; STATEWIDE. CASE NO 15957

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

Volume 4 of 4

April 20, 2018

Santa Fe, New Mexico

BEFORE: HEATHER RILEY, CHAIRWOMAN
ED MARTIN, COMMISSIONER
DR. ROBERT S. BALCH, COMMISSIONER
BILL BRANCARD, ESQ.

This matter came on for hearing before the New Mexico Oil Conservation Commission on Tuesday, April 17 through Friday, April 20, 2018, at the New Mexico Energy, Minerals and Natural Resources Department, Wendell Chino Building, 1220 South St. Francis Drive, Porter Hall, Room 102, Santa Fe, New Mexico.

REPORTED BY: Mary C. Hankins, CCR, RPR
New Mexico CCR #20
Paul Baca Professional Court Reporters
500 4th Street, Northwest, Suite 105
Albuquerque, New Mexico 87102
(505) 843-9241

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

FOR APPLICANT NEW MEXICO OIL CONSERVATION DIVISION
(NMOCD):

CHERYL L. BADA, ESQ.
NEW MEXICO ENERGY, MINERALS AND NATURAL RESOURCES
DEPARTMENT
OFFICE OF GENERAL COUNSEL
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
(505) 476-3214
cheryl.bada@state.nm.us

FOR NEW MEXICO OIL & GAS ASSOCIATION (NMOGA):

MICHAEL H. FELDEWERT, ESQ.
HOLLAND & HART, LLP
110 North Guadalupe, Suite 1
Santa Fe, New Mexico 87501
(505) 988-4421
mfeldewert@hollandhart.com

FOR MARATHON OIL PERMIAN, LLC:

JENNIFER L. BRADFUTE, ESQ.
EARL E. DeBRINE, JR., ESQ.
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 4th Street, Northwest, Suite 1000
Albuquerque, New Mexico 87102
(505) 848-1800
jlb@modrall.com
edebrine@modrall.com

ALSO PRESENT: Florene Davidson
Patrick Fort, Esq.

1	INDEX	
2		PAGE
3	Friday, April 20, 2018	
4	Case Number 15957 Resumes	4
5	David K. Brooks (Recalled):	
6	Recross Examination by Chairwoman Riley	4, 10, 15
7	Recross Examination by Commissioner Martin	9, 10, 11
8		
9	Recross Examination by Mr. Brancard	9, 26
10	Redirect Examination by Ms. Bada	22, 28
11	Recross Examination by Commissioner Balch	27
12	Recross Examination by Mr. Feldewert	30
13	Continued Open-Session Deliberations	36
14	Proceedings conclude	150
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 (9:59 a.m.)

2 CHAIRWOMAN RILEY: All right. Let's go
3 ahead and get started.

4 And we'd like to call back Mr. Brooks.

5 DAVID K. BROOKS,
6 after having been previously sworn under oath, was
7 questioned and testified as follows:

8 RECROSS EXAMINATION

9 BY CHAIRWOMAN RILEY:

10 Q. Mr. Brooks, we had a question yesterday during
11 deliberation, and this was under Paragraph 9 on
12 multilateral horizontal wells -- I'm sorry -- 10,
13 "Unitized areas," of 19.15.16.

14 A. This is 16.7 or 16.15?

15 MR. BRANCARD: 15.

16 MS. BADA: Page 14.

17 CHAIRWOMAN RILEY: Second paragraph from
18 the top, under B.

19 THE WITNESS: Okay.

20 Q. (BY CHAIRWOMAN RILEY) My understanding of that
21 is that that paragraph was the OCD proposed language and
22 then NMOGA had struck it out. So what -- can you give
23 me the history behind this one and why OCD wants it in?

24 A. Well, I'm a little confused because this is
25 Paragraph B of number (11) or -- no -- number (10).

1 COMMISSIONER MARTIN: (10)(b).

2 THE WITNESS: Okay. I can give you that.

3 We proposed to treat -- in the work group,
4 to treat areas of common ownership as the equivalent
5 unitized areas, even though there is no unit agreement.
6 Now, we did not put in a definition of "area common
7 ownership." There is a definition in the OCD rules that
8 has to do with downhole commingling -- or no, surface
9 commingling, and it's in another part of the rules which
10 are not up for consideration in this proceeding.

11 Our intention, I think, was to define them
12 basically the same way as they're defined for downhole
13 commingling purposes, although the rules of construction
14 apply to administrative rules if a definition is in one
15 part of the rules that applies to the other rules and
16 doesn't apply to other rules. So possibly we should
17 copy that definition. We didn't even really consider it
18 because we already had enough words in the rule.

19 But anyway, the consequence of that rule is
20 that if you have a contiguous area in which the United
21 States of America owns the minerals subject to a lease
22 or more than one lease and those leases are the same
23 royalty rate and all the overrides, if any, that there
24 are on those leases also apply to both leases or all
25 leases, if you have more than two, and the overrides

1 belong to their original owners and the lease belongs to
2 the person who originally leased it or to the company
3 the landman is working for when he leased it. And you
4 get all that together, you have an area of common
5 ownership because the working interest is -- the royalty
6 interest is United States of America, 12-1/2 percent.
7 The override is the original override, whatever his
8 percentage is, and the lessee owns all the rest of it.
9 And they're all common throughout this area, except that
10 you've got two federal leases. And they're the same
11 royalty, so you can treat it as uniform ownership, but
12 they're different leases.

13 Now, Mr. Glover, who represented BLM on the
14 committee, said, "We don't want to treat those as" --
15 "we don't want to treat that as an area of mutual" --
16 "as an area of common ownership if we have two leases
17 unless we have a com agreement on it and then it's
18 governed by the com agreement." Of course, a
19 communitized unit is a unitized unit by the definition.
20 So it gets the same treatment from this proposed rule as
21 if it were an area of common ownership.

22 But the BLM doesn't want us -- the BLM said
23 they don't want us calling it an area of common
24 ownership if it's two federal leases unless it's
25 communitized. We said, "Okay." And we said, "Okay."

1 Let's take that" -- well, no, that wasn't in here. We
2 just said (a) -- (10)(a), at that time, in areas of
3 common ownership without the exception for federal
4 leases.

5 I believe the exception for federal leases
6 was brought in later at Mr. Glover's request. NMOGA
7 proposed to delete it, their reasoning being it didn't
8 belong in the OCD rules because it wasn't OCD policy.
9 The BLM could have whatever policy, but they didn't want
10 it as a ghost, coming in as a policy still in effect if
11 the BLM changed their policy. Well, there was some --
12 we could see some cogency to that because there are a
13 few of those in our rules, but at the same time, we had
14 told Mr. Glover that we would not make it an area of
15 common ownership. So we did not readily concede to
16 that.

17 And because, Madam Director, you are also
18 on the Commission and will be making the final decision,
19 we wanted somewhere else to go to get instruction on
20 this, so we went to Secretary McQueen and asked him if
21 we were on sound ground in declining to accept this
22 proposed revision and he said yes.

23 Q. (BY CHAIRWOMAN RILEY) He agreed with keeping
24 that in?

25 A. My understanding was he instructed us that if

1 we felt it should stay in, we were okay to leave it in.
2 He did not instruct us to approve NMOGA's requested
3 change.

4 Q. I can see both sides of that argument. One is
5 that it's putting the State in a position of making
6 decisions on what is a federal issue, but then the flip
7 side of that would be that if we have something in here
8 that calls it out as a uniform ownership, we could have
9 a conflict -- potentially conflict with the operators on
10 the federal side --

11 A. Yes, ma'am. That was the thinking --

12 Q. -- thinking they're okay because we said it's
13 okay.

14 A. Well, no, I wouldn't make that argument. But
15 then I'm from Texas, and we tried succession, and it
16 didn't work very well.

17 CHAIRWOMAN RILEY: Do you have any
18 questions for Mr. Brooks on this?

19 COMMISSIONER BALCH: I think that was
20 clarifying. Thank you.

21 COMMISSIONER MARTIN: I have a question.

22

23

24

25

1 CROSS-EXAMINATION

2 BY COMMISSIONER MARTIN:

3 Q. What are the ramifications for this rule if we
4 deleted it?

5 A. If the BLM was to approve an area and sign off
6 on a com agreement and everybody else in the unitized
7 unit signed off on the com agreement -- and I actually
8 think they're a little more zealous in bringing that
9 about than y'all are --

10 Q. I agree.

11 A. -- then it would be a unitized area. And the
12 setbacks and the spacing rules that don't apply in the
13 unitized area would not apply. If the BLM, for whatever
14 reason, did not unitize the area, those two leases --
15 then the rules would apply if it were not a unitized
16 area.

17 RECROSS EXAMINATION

18 BY MR. BRANCARD:

19 Q. That's if we keep the exception in?

20 A. If we keep the exception.

21 Q. I thought the question was if we delete the
22 exception.

23 A. Well, if we delete the exception and it becomes
24 an area of common ownership but -- it's a little hard
25 for me to see exactly what the results would be because

1 the setbacks and the spacing rules that don't apply in
2 areas of common ownership would not apply, but, of
3 course, the BLM could control where you put the wells
4 because they process the APDs. So I'm not sure what the
5 result would be.

6 RE CROSS EXAMINATION

7 BY COMMISSIONER MARTIN:

8 Q. I guess I don't quite see the point in putting
9 it in. And maybe it's because the land office --

10 A. I believe the land office views com agreements
11 somewhat differently, although this proposed rule, with
12 the exception of this provision -- if it stays in, this
13 proposed rule treats state and federal coms the same
14 way.

15 Q. I agree. And I think that that's why I would
16 favor deletion.

17 RE CROSS EXAMINATION

18 BY CHAIRWOMAN RILEY:

19 Q. The federal government doesn't have setbacks.

20 A. No. I believe they do not. They can impose
21 any requirements they want to, but I'm not aware that
22 they do have any setback requirements.

23 Q. Yeah. And they're going to require a com
24 agreement?

25 A. Probably, yes.

1 Q. So as far as distribution of royalties --
2 although the scenario you describe is all the same
3 anyway --

4 A. I would assume they would require a com
5 agreement that follows any wells that went across the
6 line dividing the two leases. They would not for a well
7 that's just on one or two adjacent federal leases that
8 were contiguous -- if they didn't choose to communitize.

9 RE CROSS EXAMINATION

10 BY COMMISSIONER MARTIN:

11 Q. There is nothing in this rule that would allow
12 us to do that anyway, right?

13 A. Yes. You could have an area of common
14 ownership, but it doesn't make any difference whether
15 it's an area of common ownership or not unless you
16 want -- unless you want an exemption from the rules that
17 an area of common ownership is exempt from. If you
18 drill all your wells within the setbacks for one of the
19 tracts in the area and you don't want to -- you don't
20 want to do that -- any of the spacing requirements that
21 are accepted, which are very limited, then you don't
22 need -- it doesn't matter whether it's an area of common
23 ownership or not.

24 COMMISSIONER MARTIN: We didn't talk about
25 this, but is it possible at this point to call somebody

1 from industry and ask them -- or NMOGA, rather, and ask
2 them why they prefer these?

3 CHAIRWOMAN RILEY: Is that okay?

4 COMMISSIONER BALCH: I believe the party to
5 ask is in the room.

6 CHAIRWOMAN RILEY: I'd like to hear that.

7 MR. FELDEWERT: Or I can make a comment.
8 It's entirely up to you. I just conferred with
9 Mr. Foppiano. Here's the concern -- now, again, we did
10 not -- weren't involved in any discussions with
11 Mr. Glover. I don't know what he said. They're not
12 here, so I don't know.

13 But what you're doing here would be -- is
14 creating a complete prohibition that prevents you from
15 treating an area of common ownership if it includes two
16 federal leases. So it could be a circumstance now where
17 we have an area of two federal leases and have some
18 other acreage involved that is all common ownership, and
19 so you want to start your development plan and plan your
20 development as an area of common ownership. Okay?

21 This says even if you have common ownership
22 with all the working interests, all the royalty, all the
23 override and those federal leases have the same royalty
24 rates, okay, it says I can't treat and develop this area
25 as common ownership until I have a communitization

1 agreement from the Feds. Okay?

2 Now, my initial development of this area of
3 common ownership may not trigger communitization
4 agreements because the initial wells may not involve
5 both federal leases. And it's my understanding that
6 you're not going to get a communitization agreement
7 until you actually have a well that is planned that's
8 going to go across both federal leases. So I think
9 that's the concern.

10 CHAIRWOMAN RILEY: So the scenario would be
11 that they want to bring that lateral closer to,
12 potentially, the section line --

13 MR. FELDEWERT: So maybe --

14 CHAIRWOMAN RILEY: -- however that lease is
15 setting up, but they don't want us --

16 MR. FELDEWERT: Yeah. So maybe I'm just
17 involved in one of them. So maybe I've got acreage
18 that's got five different leases, okay, all common
19 ownership, two of which are federal, and maybe my
20 initial development only involves one of those federal
21 leases. I would not be able to treat, under this
22 prohibition, even if you had common ownership all across
23 the -- I wouldn't be able to treat that second lease as
24 part of the area of common ownership because of this
25 prohibition.

1 COMMISSIONER BALCH: So it is NMOGA's
2 position, then, in that case of multiple federal leases,
3 that the BLM would take care of the issue?

4 MR. FELDEWERT: That's our -- I mean, to me
5 it's a federal issue. And I guess the concern is -- you
6 know, you always think about what are the ramifications
7 of doing things, right? And I guess we could all sit
8 here probably for an hour and come up with a number of
9 different scenarios. But it seems to me we ought to be
10 cautious about prohibiting something where it's a purely
11 federal issue because the Feds are going to control
12 that.

13 CHAIRWOMAN RILEY: Well, I mean, they would
14 have the opportunity at the APD level to say no. But I
15 don't know what they would say no to because they don't
16 have setbacks.

17 MR. FELDEWERT: Because what I'm thinking
18 about if you get this area of common ownership and you
19 want to start your development plan, you want to figure
20 out your surface facilities that you can use, number
21 one, to accommodate that large area of development, and
22 then you're going to start developing your wells. Okay?
23 And I guess my point is your initial phase may not
24 include that second federal lease, which means you're
25 not going to have a communitization agreement. You may

1 not get that communitization agreement until phase two,
2 which then would prevent me, by this provision, from
3 treating this as an area of common ownership.

4 CHAIRWOMAN RILEY: I'm comfortable removing
5 it.

6 COMMISSIONER MARTIN: I am, too.

7 COMMISSIONER BALCH: I am as well.

8 We had another question for Mr. Brooks,
9 didn't we?

10 CHAIRWOMAN RILEY: Yeah.

11 RECROSS EXAMINATION

12 BY CHAIRWOMAN RILEY:

13 Q. So, Mr. Brooks, (11)(b), same page --

14 A. Yes, ma'am.

15 Q. -- and actually (b)(i), I have in my notes that
16 the OCD did not concur with the changes that NMOGA made,
17 but I just wanted to confirm that.

18 A. I don't have NMOGA's -- maybe I do.

19 COMMISSIONER MARTIN: I'm sorry. Where are
20 you at?

21 CHAIRWOMAN RILEY: I'm on page 14,
22 (11)(b)(i).

23 THE WITNESS: We do concur with NMOGA's
24 proposed changes upon the condition that (11)(e) is
25 clarified to be sure that as -- well, as related to a

1 well that requires consent -- or requires notice and
2 there is an opportunity to protest, pursuant to 11(b) --
3 the procedures of (11)(d) -- and I'm sorry. That was
4 (e). And (c) was struck -- (d) -- original (d) was
5 struck before it ever got to press. So that is
6 (7)(d) -- (11)(d).

7 The provisions of (11)(d) refer to
8 19.15.15.12 for the procedural requirements for notice
9 and opportunity to protest, but 19.15.15.12 contains a
10 different -- another provision which says something
11 about a different operator being the proponent.

12 We want to make clear -- and I don't think
13 NMOGA disagrees -- that if you're drilling a horizontal
14 well in an existing -- that is wholly in an existing
15 horizontal well and you, the operator, choose to have
16 that well not an infill -- you have that right under the
17 rule. But if you do that, then you have to give notice
18 to all working interest owners in both proposed
19 horizontal spacing units and give them an opportunity to
20 protest. Well, we have no problem with making the
21 procedures of 19.15.15.12 apply to that. We agree to
22 that, although that wasn't what we originally proposed.

23 But we want to make sure that that applies
24 even if the person proposing to do is the unit
25 operator, the operator of that spacing unit, which we

1 think will normally be the case. We do not want to
2 limit it to a proposal made by some other operator. And
3 I don't think that was the intent, and I don't think
4 NMOGA objects to what we want in that regard. I think
5 it's just the fact that 19.15.15.12 is in effect,
6 incorporated by reference that made us concerned about
7 it, realizing that these rules are to stand the test of
8 time

9 CHAIRWOMAN RILEY: Mr. Feldewert?

10 MR. FELDEWERT: So, Madam Chair, members of
11 the Commission, if I look at the recommended changes,
12 numbers (6) and (7) -- first off, we totally --
13 absolutely agree with what Mr. Brooks said. I mean, the
14 notice needs to go out to operators and working interest
15 owners. And it seems to me that the suggestion in
16 paragraphs 6 and 7 of the additional recommended changes
17 to the OCD proposed rules that was provided to the
18 Commission, that that makes it very clear, the interests
19 to which those notice provisions apply to, particularly
20 if you keep it within the paragraphs (i) and (ii),
21 because you've got (b)(i) and (b)(ii).

22 COMMISSIONER BALCH: I think this is where
23 we got to yesterday in our discussions.

24 MS. BADA: I have one comment. It's not
25 the interest notice that is the concern, not notice be

1 given. It's the -- I think that's referring back to
2 the --

3 COMMISSIONER BALCH: Do we have a fresh
4 draft?

5 MR. BRANCARD: Now, this is already
6 renumbered to a certain extent, so some of the
7 discussions about the numbering aren't going to -- I had
8 to jump ahead and started cleaning that up.

9 MR. FELDEWERT: That's fun.

10 MR. BRANCARD: So it would be (B)(9) now as
11 opposed to A(11). And what I did was, instead of doing
12 what -- I was trying to sort of go with the discussion
13 yesterday. And rather than add this provision to (i)
14 and (ii), I created a (iii) and said that these notice
15 provisions apply to (i) and (ii).

16 COMMISSIONER BALCH: The notice provision
17 in Statute 19.15.15.12 shall apply; notice is required
18 pursuant to items one or two, Subparagraph -- that's
19 what we discussed.

20 MR. BRANCARD: And as NMOGA proposed, it
21 eliminates (d), formerly (e).

22 CHAIRWOMAN RILEY: I think it fixed it.

23 MR. BRANCARD: I think so.

24 CHAIRWOMAN RILEY: I feel like we solved
25 that yesterday.

1 MR. BRANCARD: We were referring to the
2 notice procedure in 12B, how you give notice as opposed
3 to who gives notice.

4 THE WITNESS: That's our intention.

5 MS. BADA: This is the problem. If you'll
6 look at 12B, it reads, "An operator who intends to
7 operate a well in a spacing or proration unit containing
8 an existing well or wells operated by another
9 operator...." That's the concern. It's who is giving
10 the notice, not who is getting the notice. This is not
11 making the existing operator provide notice. That's
12 only if another operator is proposing.

13 MR. BRANCARD: So your concern is if you
14 have a subsequent well in a unit that has the same
15 operator?

16 MS. BADA: Right, that that notice
17 provision doesn't clearly state the same operator is
18 required to give notice, because 12B talks about new
19 operator drilling a well in a unit --

20 MR. BRANCARD: Well, presumably, you have
21 the same operator. That operator is going to consent to
22 this, and if there is consent, you don't need to do --

23 MS. BADA: But it's who is giving the
24 notice, and that requires another operator to give the
25 notice if they're going to propose the well. It doesn't

1 require the same operator to. It just needs to have
2 some clarity that that applies for the same operator.
3 B12 does not do that. B12 applies if you have two
4 different operators.

5 MR. BRANCARD: Well, I think we're okay
6 because it says the "notice procedures shall apply" as
7 opposed to "notice requirements." If it was the notice
8 requirement, then the notice requirement would say this
9 only applies in this situation. But we're just looking
10 at the section on procedures, and the procedures in
11 there are pretty clear about who you give notice to. I
12 think we're okay.

13 COMMISSIONER BALCH: I've got a small
14 procedural issue. I have every other page.

15 MR. BRANCARD: Oh, no.

16 CHAIRWOMAN RILEY: I have every other page.

17 COMMISSIONER MARTIN: I have every page.

18 CHAIRWOMAN RILEY: Whose copy has every
19 page?

20 MR. BRANCARD: I think I have the original
21 copy.

22 COMMISSIONER BALCH: Whoever went to
23 photocopy them didn't hit the right button or something.

24 MS. DAVIDSON: Yeah. I thought I copied
25 everything.

1 MR. BRANCARD: We needed double-sided
2 copies, is the problem.

3 CHAIRWOMAN RILEY: You want to take a quick
4 break, and I'll run up and get copies? Let's take a --

5 MR. BRANCARD: I already have notations on
6 there, but go ahead.

7 (Laughter.)

8 CHAIRWOMAN RILEY: How many copies do we
9 need?

10 COMMISSIONER BALCH: Just for the
11 Commission.

12 CHAIRWOMAN RILEY: Okay. I'll be right
13 back.

14 (Recess, 10:27 a.m. to 10:37 a.m.)

15 MR. BRANCARD: Any more questions for
16 Mr. Brooks, or can we go back into deliberation?

17 CHAIRWOMAN RILEY: I think the other
18 question or topic that we wanted him for is allowables,
19 right?

20 COMMISSIONER BALCH: Actually, I believe I
21 heard some voice from ether [sic] yesterday mentioning
22 they could give us that discussion of allowables.

23 THE WITNESS: Well, I did volunteer to
24 explain how allowables -- I basically don't know
25 anything about allowables, but I did write the provision

1 in the --

2 COMMISSIONER BALCH: In understanding a
3 discussion about allowables, I would welcome additional
4 information.

5 THE WITNESS: Okay. You want to ask me a
6 question or let me say whatever I want to say?

7 COMMISSIONER MARTIN: Ask him a question.

8 REDIRECT EXAMINATION

9 BY MS. BADA:

10 Q. Can you explain the issue we were talking about
11 with the nonmarginal unit?

12 A. Yes. I think that Mr. Harvey Yates was
13 somewhat confused, but there is a reading that can be
14 problematic in that sense. I've got to find it.
15 Probably the best way is to go back to the old numbers
16 because this is one I think hasn't changed.

17 Q. (Indicating.)

18 A. Oh, thank you. Thank you. Cheryl is on the
19 spot. She got me to the right exact page.

20 The work group's decision on allowables was
21 that that allowables should not apply to horizontal
22 wells. In other words, horizontal wells should be
23 allowed unrestricted production.

24 And the second determination that the work
25 group made was in the interest of fairness, if

1 horizontal wells are going to have unlimited -- or going
2 to be allowed unlimited production, then vertical wells
3 that are in the same pool should also be allowed so the
4 horizontal wells don't use up all the allowable for the
5 pool and the vertical wells don't get their share.

6 Even though it was hotly debated whether or
7 not the horizontals would actually -- there was any
8 probability that the horizontals would actually do that
9 because people who are very knowledgeable about them
10 argued that the horizontals would actually expand the
11 production by more than they would take so that they
12 would not -- even though they were producing over their
13 allowables, the total pool production would not -- the
14 total pool production available would not be reduced.

15 What we came up with was the statement
16 that, in (C)(1): "If any nonmarginal proration unit
17 exists in the same pool as a horizontal oil, the
18 Division shall assign to each oil well located in the
19 unit" -- "in the unit." And what's meant there --
20 perhaps it should say "that" unit. It was intended to
21 mean the nonmarginal unit. "An allowable equal to its
22 productive capacity." I'm reading from the draft before
23 NMOGA -- NMOGA changed the word "production capacity" to
24 something else, which was all right with me because I
25 don't know the right words to use. But, of course, the

1 reason we said nonmarginal proration unit is that a
2 marginal proration unit would not be restricted unless
3 it was a gas-oil ratio.

4 And we put another provision at the end of
5 that sentence that production of gas or oil from any
6 horizontal oil wells shall not be limited by limiting
7 gas-oil ratio as provided in Subsection A." We do not
8 extend that clarification to -- to oil wells in
9 nonmarginal spacing units because we were not, I think,
10 really focused on that.

11 And while the people in the work group had
12 a feeling what the situation was with gassy horizontal
13 wells, they really didn't have a feeling about what
14 might arise with gassy vertical wells some places in the
15 state. So that's the way it came out.

16 Now, the marginal oil unit is not going to
17 have an allowable anyway. It's going to be able to
18 produce its total production because that's what a
19 marginal unit is. A marginal unit is a unit that cannot
20 produce its top -- the total amount it can produce is
21 less than its top unit allowable.

22 Now, I would add one reason why I
23 approached -- there is another reason down here about --
24 okay. I think I saw this yesterday. Yes. It's at the
25 end of the second sentence at (C)(1). It says: "In

1 effect, a nonmarginal unit should be" allowed -- "an
2 allowable equal to its productive capacity unless the
3 division determines after notice and hearing that a
4 reduced allowable must be assigned to the nonmarginal
5 unit to prevent waste."

6 Now, I recommended that language because
7 Section 70-2-16 of the Oil and Gas Act provides that if
8 it is necessary to reduce production in a pool -- if it
9 is necessary to reduce production in a pool to prevent
10 waste, then the Division shall -- or "the Commission
11 shall," mandatory language, "prorate and allocate
12 production from that pool in such a manner that will
13 basically accomplish that end without violating
14 correlative rights." And I thought, to avoid a possible
15 challenge to this proposed provision on the ground that
16 it maintains some sort of violation of 70-2-16, since it
17 was adopted without any evidence, that in any particular
18 pool or in all pools, it was not necessary for a
19 vertical well to prevent waste. If we had that
20 provision in there, that would be at least developing
21 our hat [sic] to what the legislature said under certain
22 conditions we must do.

23 So that is the reasoning why -- that is the
24 explanation of how that provision got to be written the
25 way it is, bearing in mind that I have no knowledge of

1 the technical aspects of proration.

2 MR. BRANCARD: Questions for this witness?

3 CHAIRWOMAN RILEY: Okay.

4 RECROSS EXAMINATION

5 BY MR. BRANCARD:

6 Q. The provision that allows the Division to
7 determine, as provided in the statute, that a reduced
8 allowable can be assigned is only limited to the
9 existing nonmarginal unit as opposed to horizontal unit?

10 COMMISSIONER BALCH: Every well should have
11 the option in the case of potential formation damage or
12 waste of casing head gas to have some allowable put on
13 it. I think it would be rare, but -- and I think this
14 is one of the objections from Jalapeno, was that it only
15 applied to those nonmarginal --

16 THE WITNESS: And the reason I wrote it
17 that way was because it was my understanding that the
18 NMOGA evidence was going to demonstrate that you cannot
19 restrict horizontal well production without causing
20 waste. Having now heard the NMOGA evidence, I do
21 believe it is probably subject to that interpretation.

22 And if you have an obligation to -- well,
23 the definition of correlative rights is to allow each
24 owner the amount they can produce without waste. If the
25 horizontals can't be restricted without causing waste,

1 then if it becomes necessary to restrict, you're going
2 to have to restrict the verticals because we know that
3 it has always been assumed that they can be restricted
4 under most circumstances without causing waste. We do
5 not have any evidence on that subject one way or the
6 other in this proceeding.

7 RECROSS EXAMINATION

8 BY COMMISSIONER BALCH:

9 Q. And that leads a little bit to something that's
10 a challenge for me and that is that all of the
11 testimony -- or the bulk of the testimony was towards
12 these unconventional shale wells. But there is still a
13 potential that you'll drill a conventional horizontal,
14 which could certainly have an impact on -- it may not
15 follow the same rules as far as allowables, formation
16 damage, flow through matrix, things like that. So you
17 have the potential in that -- right now it's 10 percent
18 of the cases where your horizontals are not a shale
19 well, but they're out there. And they're not
20 particularly well addressed by -- by the testimony that
21 was presented to us.

22 A. Yes, sir.

23 Q. So we have to make a one-size-fits-everything,
24 not just for the shale wells.

25 A. Given it was an educated guess and --

1 Q. So it may be that you would never find a case
2 in that shale horizontal well where you would want to
3 place an allowable for any reason. I'm just concerned
4 about singling out one class of wells, especially when
5 there is the case where you may have a horizontal
6 nonshale well, a conventional well, where it may be
7 appropriate to have an allowable of some sort.

8 A. Based on what I know about the subject, which
9 is very little, I would agree.

10 Q. Well, I guess we'll have to deliberate a little
11 more. Thank you for the additional information.

12 A. Thank you.

13 COMMISSIONER BALCH: Do you have any other
14 questions for Mr. Brooks?

15 CHAIRWOMAN RILEY: I don't.
16 Mr. Martin?

17 COMMISSIONER MARTIN: I don't.

18 COMMISSIONER BALCH: Nope.

19 MS. BADA: I have one, if I may be allowed
20 to ask it.

21 MR. BRANCARD: Yeah.

22 COMMISSIONER BALCH: Redirect, yeah.

23 REDIRECT EXAMINATION

24 BY MS. BADA:

25 Q. Can you refer to (5)(a)?

1 A. (5)(a) under the old numbers?

2 Q. Yes, (5)(a) under the old numbers, page 12.

3 Can you clarify your understanding of
4 "lessee" and "working interest owner"?

5 A. Well, I believe Mr. Brancard has suggested that
6 this provision -- it's not (5)(a). It's A5.

7 Q. A(5)(a).

8 A. A(5)(a). It's been renumbered. I believe it's
9 been moved into new A, but I was a little unclear as to
10 what was moved where.

11 MR. BRANCARD: This is new (A)(1).

12 THE WITNESS: Okay. I thought it had been
13 moved to the new A.

14 The provision is the one that restricts the
15 filing of -- the filing of an APD or the commencement of
16 a well until the horizontal well operator has certain
17 consent. It said -- as we originally submitted it, it
18 said, "As received with consent of at least one lessee
19 or owner of each tract." Then NMOGA proposed that we
20 put "or owner of" -- changed it to "one lessee or
21 unleased mineral interest," which I thought was a good
22 change to the extent that "owner" has a definition in
23 the horizontal -- in the general definitions and also in
24 the Oil and Gas Act, which didn't really fit in this
25 context very well, so I agreed to it.

1 I then got to thinking about the fact that
2 "lessee" is undefined and it has, in the Oil and Gas Act
3 or regulation or rules -- and it has a different meaning
4 in the State Land Office world than it does in ours, and
5 I, therefore, thought that it should say -- it should
6 give a clearer usage.

7 Now, you, Mr. Brancard, suggested yesterday
8 that the term "working interest owner" should be used in
9 lieu of -- in lieu of "lessee" or "unleased mineral
10 owner" because that covers both. I agree it does. And
11 that's precise language given the leasehold -- given
12 the -- that is precise language given the definitions in
13 the OCD's definitions. However, the phrase "mineral
14 interest" is very often used, particularly by title
15 lawyers in a different sense, which could be confusing.
16 And for that reason, I would like to see it say "without
17 the consent of at least one working interest owner or
18 owner of another mineral interest."

19 I've said my say, and that's all I have to
20 say.

21 CHAIRWOMAN RILEY: Mr. Feldewert, did you
22 want to --

23 RE CROSS EXAMINATION

24 BY MR. FELDEWERT:

25 Q. Yeah. I think we do not -- it sounds like, as

1 I understand, what you're considering is rather than
2 saying "one lessee," that you're substituting that with
3 "working interest owner," which is a defined term. And
4 then -- that's no problem. But we do think you need to
5 keep the "or" with the second part. And that is
6 "unleased mineral interest," and I think we testified it
7 should say "owner" after that. I agree with that,
8 probably with "owner of an operating interest under an
9 oil and gas lease." So I do think you need the second
10 clause, saying "unleased mineral interest owner."

11 A. I do not disagree.

12 MR. BRANCARD: I mean, these things ripple
13 through the regulations because this section was in the
14 original rulings.

15 MR. FELDEWERT: Yeah.

16 MR. BRANCARD: And it's based on another
17 provision that we have up in front of us, which is
18 19.15.14.8 -- okay? -- which also uses the same
19 terminology here. So that's in front of us, so we could
20 change that, too, to make both sections consistent. I
21 frankly like -- if we have terms that are defined, I
22 frankly like using them because then we're not debating
23 whether using a different phrase means exactly what
24 another phrase means.

25 THE WITNESS: Well, I agree that "mineral

1 interest owners," as defined in the OCD rules, means
2 exactly what we want to have there. I just -- it took
3 me 50 years to learn a different meaning of mineral
4 interest owner. You don't unlearn something that
5 easily.

6 MR. BRANCARD: I guess the question is
7 whether we're going to change -- whether we should
8 change both sections to be consistent.

9 CHAIRWOMAN RILEY: I'm concerned with why
10 is it in two sections?

11 MR. BRANCARD: Well, 14 is the generic
12 section on drilling permits. Okay? And so this section
13 is more specific for horizontal wells because it talks
14 about the interests in the completed interval. So it's
15 more specific as to what -- whose consent you have to
16 get for a horizontal well, where Section 14 says: This
17 is the general one, but then it says "also." And we're
18 changing that to say for a horizontal well, you have to
19 comply with the other section. So that's the whole --
20 one of the whole tricks in this whole rulemaking, is we
21 have sort of generic provisions for applications for
22 drill for oil, well spacing, and we have to make sure
23 the more specific provisions work with the more general
24 provisions.

25 CHAIRWOMAN RILEY: Okay. Well, I think it

1 should be consistent.

2 MR. BRANCARD: We can discuss this in
3 deliberations.

4 Do you have a position on this,
5 Mr. Feldewert?

6 MR. FELDEWERT: I agree they should be
7 consistent, and I think that will work.

8 And then we had one more on the allowable
9 section, if I may.

10 CHAIRWOMAN RILEY: Uh-huh.

11 MR. FELDEWERT: If you look at 17 -- page
12 17 for the allowable provision, (C)(1), I can offer, I
13 guess, two things. Number one, the intent of the
14 committee was to treat horizontal wells and vertical
15 wells in the same pool equally, so if there was no -- if
16 there was an opportunity to produce at productive
17 capacity for horizontal wells to apply to vertical wells
18 in the same pool. Okay? So that's number one.

19 And then number two, I understand what
20 Mr. Brooks was trying to get to with that last clause,
21 and I understand Dr. Balch's concern. But it seems to
22 me -- and I think what we're talking about is that what
23 we're dealing with here with horizontal wells today is
24 the vast majority are in what you call unconventional
25 reservoirs, which can be difficult to define, I will

1 tell you, but you can try if you want to.

2 It seems to me that if you took Mr. Brooks'
3 phrase that he added there, "unless the division
4 determines after notice of hearing," if you put it at
5 the beginning of that section and rather than saying,
6 "unless the division determines that a reduced allowable
7 must be assigned to the nonmarginal unit," what you can
8 say there is, "unless the division determines after
9 notice of hearing an allowable must be assigned to a
10 pool," and put that at the beginning, that allows you to
11 create special pool rules in circumstances where there
12 is concern that drilling horizontal wells in that
13 particular pool would create an issue.

14 COMMISSIONER BALCH: Such as the case that
15 it's a conventional horizontal.

16 MR. FELDEWERT: Yes.

17 And I don't know whether -- you know, I
18 don't know that's always the case, but I suppose there
19 could be. I understand what Mr. Brooks is trying to do.
20 It makes sense to me. You need that flexibility. So it
21 seems to me if you had that caveat at the beginning,
22 that this could work for everybody, vertical and
23 horizontal wells.

24 The last point is on productive capacity,
25 in our proposed change, and the amount of oil that each

1 well can produce. There are two reasons for that. The
2 language that you put in there is consistent with the
3 language you see in the second line, where it also says,
4 "the amount of oil that the horizontal well can
5 produce," number one.

6 And number two, the thought was somebody
7 reading that may have some question about what
8 "productive capacity" means. So we just thought that it
9 made sense to track the language that you had in the
10 initial sentence.

11 CHAIRWOMAN RILEY: Anything else while we
12 have this gentleman answering questions?

13 Anything?

14 COMMISSIONER MARTIN: No.

15 CHAIRWOMAN RILEY: Dr. Balch, anything?

16 COMMISSIONER BALCH: I'm still digesting
17 that language a little bit. Like, under new (D)(1), the
18 oil allowable to gas-oil ratios -- "unless the division
19 determines after notice of hearing that a reduced
20 allowable must be assigned to a pool, the division shall
21 assign to a horizontal well an oil pool and an oil well
22 equalling the amount of the horizontal well can produce.
23 If any nonmarginal proration unit exists in the same
24 pool's a horizontal well, the division shall assign to
25 each oil well in the unit an allowable equal to

1 productive capacity," something like that.

2 MR. FELDEWERT: Yes.

3 COMMISSIONER BALCH: I think that would
4 actually fix my concern, possibly even Mr. Yates'.

5 CHAIRWOMAN RILEY: I know.

6 MR. FELDEWERT: I'm not sure I can agree
7 with that. Just kidding.

8 COMMISSIONER BALCH: Calls for speculation.

9 CHAIRWOMAN RILEY: All right?

10 MR. BRANCARD: Are we ready to return back
11 to deliberation and release Mr. Brooks again?

12 CONTINUED OPEN-SESSION DELIBERATIONS

13 MR. BRANCARD: As per the Commission's
14 instructions last night, I have drafted a new version of
15 the rules. This is, unfortunately, a smaller font
16 because it's a font -- this is what it would look like
17 if it were going to the Records Center, so it's closer
18 to a final version. What I tried to do is any changes,
19 I highlighted them in yellow.

20 COMMISSIONER BALCH: There were a number of
21 changes we accepted. Those are also included,
22 highlighted in yellow, right?

23 MR. BRANCARD: Yeah. So the changes -- the
24 changes from NMOGA's proposal -- NMOGA's amendments that
25 you accepted --

1 COMMISSIONER BALCH: Any change from the
2 original OCD Exhibit 2 is in yellow?

3 MR. BRANCARD: Yes. Yes, which includes
4 some typos. I didn't highlight the cross-reference
5 changes.

6 So do you want to go through those?

7 COMMISSIONER BALCH: I think we had a
8 couple of bigger issues that we wanted to discuss as
9 well. I might propose that we go through -- quickly go
10 through the changes that were made yesterday, but then
11 this might be a time to look through Jalapeno's
12 pre-hearing statement, cross it over to what we have and
13 then perhaps have a final discussion on those other
14 issues.

15 MR. BRANCARD: Right. The issues I have
16 listed from yesterday that we tabled were the allowable,
17 which we started getting into. I think Dr. Balch wanted
18 discussion on setbacks, the 100-foot, and then the
19 infill horizontal well. And so you'll see that in those
20 sections, I have made no changes to the draft. And so
21 those are still up for discussions, including -- I did
22 not include the NMOGA changes in that section.

23 CHAIRWOMAN RILEY: Well, why don't we do
24 that. Let's take a few minutes to look at what we did
25 fix and then do a deep dive on the issues.

1 MR. BRANCARD: So Rule 2, I just had one --
2 there was just one change of NMOGA in there on the
3 "affected persons" definition.

4 Ready to move on to Rule 4? Those changes
5 are not entirely from NMOGA amendments -- pre-hearing
6 amendments.

7 CHAIRWOMAN RILEY: That's good.

8 COMMISSIONER BALCH: I don't see any yellow
9 highlighting in there.

10 MR. BRANCARD: Rule 4?

11 COMMISSIONER BALCH: Actually, I'm not sure
12 I see Rule 4.

13 CHAIRWOMAN RILEY: It's page 1 --

14 MR. BRANCARD: 19.15.4.

15 CHAIRWOMAN RILEY: -- of the second
16 section.

17 MR. BRANCARD: It was ten pages of Rule 2,
18 19.15.2 and then three pages of 19.15.4.

19 COMMISSIONER BALCH: 4.12. Okay.

20 MR. BRANCARD: Yes.

21 Mr. Martin, do you have -- are you
22 following along?

23 COMMISSIONER MARTIN: I do. Yes, I am.

24 CHAIRWOMAN RILEY: Draft A looks good.

25 B looks good.

1 3 has, in parentheses, paragraph five
2 instead of paragraph six, but is that because of your
3 numbering?

4 MR. BRANCARD: Yes.

5 CHAIRWOMAN RILEY: So we're going to get to
6 19.17.8. We know we've got to make those changes to be
7 consistent with changes later.

8 COMMISSIONER BALCH: "Owner or lessee
9 consent required"?

10 CHAIRWOMAN RILEY: "Working interest
11 owner." Changed it to 45 days. So that's good.

12 I don't remember these changes, but --

13 MR. BRANCARD: That is actually Rule 15.
14 We made it clearer. And this was probably NMOGA's
15 additions in the horizontal well provisions, that
16 unorthodox well location has to go through the process,
17 unorthodox well locations in general. So this is
18 actually the process for unorthodox well locations. So
19 this then cross-references back to the horizontal well
20 rule to see that these procedures apply to horizontal
21 well rules also, which the horizontal well also says.
22 Just you get all the cross-references working there.

23 CHAIRWOMAN RILEY: Okay.

24 MR. BRANCARD: So any questions for 14?
25 We'll come back to 14, then, for the "mineral interest

1 owner" language. We can change it.

2 15. Any questions?

3 COMMISSIONER BALCH: I think it's almost
4 the next thing to discuss. I think it is the next thing
5 to discuss.

6 MR. BRANCARD: So on Rule 16, the
7 definitions -- NMOGA changes were made, but a number of
8 those changes were sort of removals of new proposed
9 language clauses. They were initially proposed, and
10 then they proposed to remove. So you don't see them on
11 here because they disappeared.

12 CHAIRWOMAN RILEY: Nothing highlighted?

13 MR. BRANCARD: Nothing to cross out. It
14 was really just going to be confusing to what we
15 submitted to the Records Center.

16 But elsewhere, where everything is new
17 language, I did show the crossouts. So some of these
18 are kickoff point, lateral, phrases added to the end of
19 it that got removed.

20 CHAIRWOMAN RILEY: "Directional survey is
21 required." That's good. We got that in there.

22 MR. BRANCARD: All right. Horizontal well
23 rules. So these were four different provisions
24 elsewhere in the rules that got moved up into this
25 general provisions. I should change the second 3 to 4.

1 And I kind of sort of guessed on the order that would be
2 appropriate, some of which you-all had mentioned.

3 COMMISSIONER BALCH: Subject to our
4 discussions on the horizontals.

5 CHAIRWOMAN RILEY: So then does A needs to
6 say "at least one working owner or unleased mineral
7 owner," right?

8 MR. BRANCARD: Right. That is where you
9 would make that change.

10 COMMISSIONER BALCH: I think that ordering
11 is actually all right.

12 CHAIRWOMAN RILEY: Okay.

13 MR. BRANCARD: Right. As Commissioner
14 Balch pointed out, number 2 on the (A)(2) is still up
15 for discussion because it's part of the infill well
16 discussion.

17 COMMISSIONER BALCH: We may go back and
18 look at it again.

19 CHAIRWOMAN RILEY: Striking of D, was that
20 extra tract -- or those other tracts?

21 MR. BRANCARD: Right.

22 So (B)(6), that was language you asked me
23 to come up with to sort of send people to the right
24 federal or state agency, and you wanted it for state,
25 federal or tribal lands. And it references back to your

1 expanded definition of "affected persons," which has two
2 subparagraphs that deal specifically with federal and
3 tribal and state agencies.

4 COMMISSIONER BALCH: That's a good way to
5 do it, point back.

6 CHAIRWOMAN RILEY: Uh-huh.

7 COMMISSIONER BALCH: On (7), I think we
8 need to put an "an" instead of "a," "set in an
9 existing." Never mind. I was reading the "existing"
10 for some reason.

11 CHAIRWOMAN RILEY: My brain tripped over
12 that, too. I had to read it twice.

13 COMMISSIONER BALCH: I think we probably
14 need to discuss the issues of infills and multilaterals
15 a little bit more.

16 I think A, B -- after hearing the
17 additional testimony of Mr. Brooks and the discussion
18 that ensued, with follow-up from Cheryl Bada and
19 Mr. Feldewert, it seems like the best thing to do is
20 remove that B and allow for any federal issue if it
21 comes up. That was your original conclusion, wasn't it?

22 COMMISSIONER MARTIN: Yes.

23 COMMISSIONER BALCH: I would concur with
24 that at this point.

25 MR. BRANCARD: For stylistic purposes, I

1 think I would just make that 8 without an A.

2 COMMISSIONER BALCH: 8A, with no B.

3 MR. BRANCARD: So 9(b)(i), (ii), those were
4 changes processed by NMOGA. And the (iii) is simply the
5 D or E moved up.

6 CHAIRWOMAN RILEY: This is where we were
7 when we realized we didn't have any pages and I left.
8 And you had just said that the notice procedures should
9 clean that up for the concern that the Division has
10 because they were worried about who was to notice.

11 COMMISSIONER BALCH: I think it does
12 essentially what the three parties had agreed to and the
13 additional recommended changes. We just put small
14 Section 3, (iii), instead of adding a notice provision
15 to each of 1 and 2. So it does the same thing. I like
16 it better this way. It's less repetition.

17 CHAIRWOMAN RILEY: Setbacks for discussion.

18 MR. BRANCARD: So unorthodox well
19 locations. I sort of redid (C)(5) and (C)(6) there
20 based on the discussion yesterday that there seemed to
21 be a fourth category of unorthodox well location that
22 was created in 6. So I moved that into 5. So there is
23 now four categories.

24 COMMISSIONER BALCH: Previously unorthodox
25 well that is unorthodox in a different way.

1 MR. BRANCARD: Right. Unorthodox squared,
2 I guess. So then the 6 turned into just an approval of
3 unorthodox well locations and focused on the approval
4 process. The first sentence, NMOGA had proposed to
5 delete. The second sentence seemed repetitious. And so
6 I just added, I believe, NMOGA's sentence, which sort of
7 said: This is how you apply for approval; you use the
8 unorthodox well location process. Okay?

9 What I added -- and the last sentence I
10 added was because I felt we needed to make it a little
11 clear, because when you -- when you just -- when you
12 find out it's an orthodox [sic] well is at different
13 points in the process. So (5)(a) occurs when you apply
14 and you want approval with your application. And so I
15 said, for that, you need to get that approval before you
16 drill the well. But B, C and D are unorthodox locations
17 which you find out after you've drilled the well, so,
18 therefore, you have to get the approval before you
19 produce the well, which that language is already in
20 there. I'm just trying to make it clear that it's a
21 different part of the process for each of those steps.

22 COMMISSIONER BALCH: And unorthodox well is
23 an unorthodox that needs separate approval.

24 We were looking at Section D, number 1,
25 "Allowables." We probably -- I think there is a pretty

1 good suggested change to that that would fix the
2 language, but we may want to have that debate before we
3 can make that an official change, in case there is more
4 in the allowables that needs to be talked about.

5 MR. BRANCARD: Under E, these were changes
6 that were in the pre-hearing amendments -- well, (E)(1)
7 was post-hearing, but -- I guess (E)(3) also
8 post-hearing, "date of adoption" as opposed to --

9 COMMISSIONER BALCH: I think all the other
10 matters look fine.

11 CHAIRWOMAN RILEY: I suggest we take a
12 break and then start our deep dive. Does that sound
13 good?

14 COMMISSIONER MARTIN: Sure.

15 COMMISSIONER BALCH: Sure.

16 CHAIRWOMAN RILEY: How about back here at
17 quarter till?

18 (Recess, 11:31 a.m. to 11:46 a.m.)

19 CHAIRWOMAN RILEY: Let's get this part
20 started, and then when our brains are smoking, we can go
21 have lunch.

22 COMMISSIONER BALCH: I guess we can work
23 through Jalapeno's list, cross-referencing with the
24 newest version we have and make sure we can address all
25 their issues one way or another.

1 I believe the testimony indicated that --
2 maybe it was your discretion, Mr. Brancard, that
3 indicated for item number two, Rule 19.15.16.15A(1)
4 refers to Section 70-2-12-10 -- violated that. You seem
5 to disagree with that.

6 CHAIRWOMAN RILEY: Where are you?

7 COMMISSIONER BALCH: It's going to be the
8 new --

9 MR. BRANCARD: We looked at one yesterday.
10 So yes. The issue with -- it comes up in a
11 number of these concerns. I think it sort of gets
12 reiterated about the Commission's authority, which we
13 discussed yesterday, about do these create -- create
14 these spacing units -- that the unit is supposed to be
15 established during the process of the application rather
16 than the unit being a fixed size of tract that would be
17 established by a rule. Their argument is focused on the
18 Commission's authority to adopt rules and the long list
19 of items that you're required to adopt rules. And the
20 one they focus on is "the commission shall make rules to
21 fix the spacing of wells." And so --

22 COMMISSIONER BALCH: So in this case, we
23 are fixing the spacing of wells.

24 MR. BRANCARD: You're creating a process to
25 do that. So I don't think that -- in my view, there is

1 nothing in that language that requires you to have a set
2 acreage amount for and spacing unit. And that's their
3 interpretation of it. In that rule, it talks about the
4 spacing of wells. So that's what you're doing. It goes
5 along with the other section, Section 17 in the rules.
6 You know, we sort of -- which uses the phrases, you
7 know, "spacing" and "proration units" kind of
8 interchangeably, but basically defines a proration unit
9 as the area that can be efficiently and economically
10 drained and developed by one well. And that has -- the
11 Commission -- the long-standing view is that's what the
12 spacing unit is, the area -- that's what you're trying
13 to figure out here, what can be efficiently drained by
14 one well.

15 For vertical wells, the 40 acres was sort
16 of the default for that, but a horizontal is --
17 obviously there is a lot of specifics to that well and
18 that pool and the resources looking at it. So for each
19 horizontal well, you're looking at what is that area
20 that can be efficiently and economically drained by that
21 well.

22 COMMISSIONER BALCH: So that takes care of
23 number 2. And how many other subsections do you think
24 that applies to?

25 MR. BRANCARD: Well, a number of these. I

1 mean, you can look at more specifically the issue they
2 raised.

3 COMMISSIONER MARTIN: 3 is one.

4 MR. BRANCARD: I think 3 has more to do
5 with setbacks.

6 COMMISSIONER BALCH: Although I guess the
7 question is --

8 COMMISSIONER MARTIN: So same basic
9 premise.

10 MR. BRANCARD: Yeah. I mean, the concern
11 is -- with 3, the concern is including additional tracts
12 in the unit.

13 COMMISSIONER BALCH: I think that may
14 really come back to the infill discussion that we need
15 to have at some point.

16 COMMISSIONER MARTIN: I don't think that's
17 what this covers. He's still talking about individual
18 wells, like oblique wells or cattywampus wells, as
19 Mr. Brooks said, even though it doesn't -- the
20 diagonals -- the diagonal, including that other section
21 is not penetrated. I think that's what he's talking
22 about here, the 40 acres.

23 MR. BRANCARD: Right, because it's within
24 the 330.

25 COMMISSIONER MARTIN: Because of the 330.

1 Again, he gets back to the spacing and creation
2 argument.

3 COMMISSIONER BALCH: Which sounds like we
4 have the ability to do.

5 COMMISSIONER MARTIN: Yeah.

6 COMMISSIONER BALCH: Okay.

7 MR. BRANCARD: I mean, a lot of the concern
8 relates to the section you worked on yesterday, which is
9 creating a unit that is overlapping with an existing
10 unit or, you know, coming later in with another unit on
11 top of the unit you already have. And you have a whole
12 process for that in that section that we discussed.

13 COMMISSIONER MARTIN: Yeah.

14 MR. BRANCARD: That relates to not only
15 horizontal with vertical wells because you can come in
16 and drill in that unit, and it's the same sort of who
17 you have to notice, who you have to get consent from, is
18 all in there.

19 COMMISSIONER BALCH: Correlative rights is
20 kind of a basic issue for a lot of these, the impact of
21 the new rules on correlative rights, according to
22 Jalapeno.

23 So on number 4, it's talking about the
24 fourth quarter section being mandatorily included. I
25 think we actually eliminated that section.

1 MR. BRANCARD: That's right. We did, yes.
2 So that one goes away because you've deleted that
3 provision.

4 COMMISSIONER BALCH: So we talked quite a
5 bit about the issue that's raised by Jalapeno, comment
6 number five, and the basic result was sure, they could
7 drill with the permission of only one --

8 CHAIRWOMAN RILEY: But they can't produce.

9 COMMISSIONER BALCH: -- party, but they
10 can't produce it, so in that case, the well,
11 particularly -- I know that Mr. Feldewert really wanted
12 us to think of this as an unconventional drilling rule.
13 In the case of those wells that you don't complete them,
14 they don't produce at all, period. Nothing.

15 COMMISSIONER MARTIN: Right.

16 COMMISSIONER BALCH: So no completion in an
17 unconventional resource can sit open hole for years
18 sometimes before they go in and actually complete the
19 well.

20 CHAIRWOMAN RILEY: Yeah. I think it's a
21 nonissue.

22 MR. BRANCARD: Yeah. And this (A)(5) is
23 now that language that's moved to (A)(1), which, as we
24 discussed earlier, is the same -- parallels the language
25 in the permit -- the APD rule, Rule 14. And I noticed

1 it has the same statement that says "before you apply to
2 drill or commence drilling, you must do the following."
3 So that's not something new, concept, that was added in
4 this rule. That's part of the basic requirement for any
5 application to drill.

6 COMMISSIONER MARTIN: That procedure hasn't
7 changed any.

8 MR. BRANCARD: Right. The only thing that
9 has changed is who you get consent from in a horizontal
10 well because you're dealing with the completed interval
11 concept.

12 COMMISSIONER BALCH: Well, that section
13 just really has to do with filing the APD.

14 MR. BRANCARD: Right.

15 COMMISSIONER BALCH: So filing the APD does
16 not mean you're going to drill a well or start drilling
17 a well at any particular time. The APD has to be
18 approved.

19 MR. BRANCARD: And my sense is that the
20 goal of that section is to make sure that an operator
21 has moved far enough along before they come to the
22 agency with an application, so they're serious enough
23 that they've actually gotten the consent of someone, you
24 know.

25 COMMISSIONER BALCH: I don't know what the

1 percentage is now, but there's always been a certain
2 amount of APDs that are filed and that are never
3 followed up on.

4 COMMISSIONER MARTIN: I think it's a fairly
5 high percent that are just canceled at the end of two
6 years.

7 COMMISSIONER BALCH: Right.

8 And I think that actually having the
9 ability to get that APD filed starts to trigger the
10 notice and things like that earlier in the process. I
11 think it's a good thing, to allow that process to start
12 earlier.

13 CHAIRWOMAN RILEY: The second paragraph
14 goes into the risk penalty, which is kind of something
15 related to the first paragraph of that number five.

16 COMMISSIONER MARTIN: This thing he has
17 about the force pooling rule should not come into play
18 in this rule, I don't think.

19 COMMISSIONER BALCH: The force pooling rule
20 is not asked to be changed here. We're just passing
21 through that section of the code, the rule.

22 COMMISSIONER MARTIN: Right.

23 COMMISSIONER BALCH: Having said that, I
24 think that there are a couple of issues that we'll need
25 to discuss in regards to that, particularly the -- when

1 we start to talk about noticing and infill drilling on
2 the horizontal, infill of potentially multilaterals if
3 the horizontal -- for the entire depth of all the
4 laterals you're going to be drilling. And that is the
5 case that Marathon brought up, where they want to drill
6 six wells at once and then zipper frac them. Right?

7 So the concern that Jalapeno presented was
8 that they don't have an opportunity to come in -- after
9 the first well proves itself, into the remaining wells
10 in that -- in that drilling pattern. And I think the
11 primary concern there was that then you're stuck either
12 choosing, up at the beginning, paying several million
13 dollars to be involved in this large development, or you
14 have the case where you don't have an option to go in
15 later and join in as part of a voluntary agreement. But
16 I suspect that you could always form a voluntary
17 agreement even after you've been force pooled, right?

18 MR. BRANCARD: That's the way -- that's the
19 rule we read yesterday. If you go back to the other
20 parties and offer an agreement and they don't agree, you
21 have the original pooling order to fall back on.

22 COMMISSIONER BALCH: And the concern
23 that -- and I know we're not talking about risk or
24 assignment of risk penalties and we're not talking about
25 forced pooling in general, but I would say that the risk

1 associated with drilling six wells at once -- I mean,
2 that risk has already been calculated by the operator.
3 They think it's less than drilling one and seeing what
4 happens. So I think there is a point that Jalapeno has.
5 Unfortunately, it's not in front of us today to address
6 that issue.

7 MR. BRANCARD: Well, and the Commission --
8 you weren't here, but at the end of the Matador-Jalapeno
9 case, they did request the Division look into that rule
10 on risk penalties, see whether changes can be made.

11 It would seem to me you could craft a
12 compulsory pooling order if you knew infills wells -- if
13 it were to say, okay, the first well is 200 percent, but
14 after that --

15 COMMISSIONER BALCH: After that, it's
16 something less because, yeah, our other knowledge
17 already tells us it's lesser risk. I think previous
18 cases of shale wells, they are more safe than normal
19 wildcatting, in general.

20 COMMISSIONER MARTIN: Having said that --

21 COMMISSIONER BALCH: But that's still not
22 in front of us today.

23 COMMISSIONER MARTIN: It's not in front of
24 us today. And whatever you set the penalty at, there
25 are certainly people that just don't like to be force

1 pooled.

2 COMMISSIONER BALCH: You know, I've kind of
3 anecdotally -- the parties, the larger ones, tend to be
4 representative in these hearings and rulemaking
5 procedures. And kind of the consensus is that they
6 don't like it when they don't do it and don't like it
7 when its being done to them.

8 MR. BRANCARD: As with much of life.

9 (Laughter.)

10 COMMISSIONER BALCH: And there are no
11 statistics. I couldn't find a consensus from small
12 operators that I've talked to that force pooling is
13 always bad, for example.

14 CHAIRWOMAN RILEY: Because they may need it
15 at some point, too.

16 COMMISSIONER BALCH: Uh-huh.

17 MR. BRANCARD: Okay. Back to the subject.

18 COMMISSIONER BALCH: Well, I think it has
19 to be part of the infill discussion. Even though it's
20 not in front of us today, we need to understand the
21 ramifications of passing through the force pool on the
22 infills and the multilaterals.

23 CHAIRWOMAN RILEY: The concern I have -- I
24 wasn't clear on -- is if they go to hearing on
25 compulsory pooling, is it on that first well that is --

1 if they haven't drilled it yet -- so by the language
2 change -- one APD is filed. I'm guessing that would be
3 the well that has the compulsory pooling order. But if
4 you're drilling and completing all at the same time,
5 where in the process do they get to come in and join --

6 COMMISSIONER BALCH: Seems to me doing them
7 all at once, they're simultaneous -- they're basically
8 making a simultaneous pooling order. So absolutely, it
9 removes the ability to see how the first well performs
10 before you join in the next ones. However, it's not
11 like you don't have a chance to go to that hearing and
12 say --

13 COMMISSIONER MARTIN: Absolutely.

14 COMMISSIONER BALCH: -- "Hey, I'm going to
15 be force pooled into those six wells, and those other
16 five are lower risk."

17 COMMISSIONER MARTIN: They have the
18 opportunity to do that under the current system.

19 COMMISSIONER BALCH: Now, the argument
20 would be that kind of historically, those force pooling
21 orders come into the Division and they're just
22 automatically stamped with a --

23 COMMISSIONER MARTIN: And that was kind of
24 his contention throughout this, that OCD considers the
25 200 percent automatic, and by definition, it's really

1 not, but it's a practice to request it.

2 COMMISSIONER BALCH: And the practice may
3 change with some of these horizontal developments.

4 COMMISSIONER MARTIN: Yeah.

5 COMMISSIONER BALCH: In fact, it ought to.
6 That's why we, as a Commission -- I know that you two
7 weren't on the Commission when we heard that case, but
8 it did revert back to the Division to look at whether
9 the penalty ought to be examined in the case of these
10 unconventional horizontals. I don't know if that's
11 preceded at all, but it was recommended.

12 COMMISSIONER MARTIN: Okay.

13 COMMISSIONER BALCH: So I guess the
14 question for me is: Do you end up losing the ability to
15 appeal on these second, third, fourth, fifth and six
16 wells in the infill or multilateral case, or is it the
17 fact that you're just going to have to fight them all at
18 once, as a bundle? And the argument that Jalapeno made
19 was it makes them upfront have to invest in all the
20 wells or not invest in all the wells.

21 COMMISSIONER MARTIN: That's true whether
22 you talk about six wells or one.

23 COMMISSIONER BALCH: True.

24 I think the argument was you might get
25 \$350,000 to invest in one, and if you have six, then you

1 have several million dollars. So it's economies of
2 scale for the operators or the leaseholders or the
3 royalty interest owners or whatever term we want to
4 describe that.

5 CHAIRWOMAN RILEY: So what takes priority
6 in our charge? Is it correlative rights or prevention
7 of waste?

8 COMMISSIONER BALCH: I think they're kind
9 of equal.

10 CHAIRWOMAN RILEY: Because I can see how
11 it's a prevention of waste to do it that way --

12 COMMISSIONER BALCH: Absolutely.

13 CHAIRWOMAN RILEY: -- economically to
14 produce that.

15 COMMISSIONER BALCH: I think we, as a
16 commission, if we're trying to adopt a horizontal rule
17 that is designed for the 21st century, then we have to
18 consider these factory mining techniques that people are
19 doing in other parts of the country. We don't want to
20 disallow that. And that was a proposal, that we
21 basically disallow that because of these -- but those
22 similar correlative rights issues must exist everywhere
23 else.

24 CHAIRWOMAN RILEY: Uh-huh.

25 MR. BRANCARD: Yeah. I mean, those are --

1 those are both statutory duties of the Commission.

2 Those are the core of statutory duties.

3 COMMISSIONER BALCH: There are two big
4 things, and then there is a whole laundry list of other
5 things like protection of the environment.

6 MR. BRANCARD: Right. That were added on
7 over the years. But this 1935 law started with prevent
8 waste and protect correlative rights.

9 COMMISSIONER BALCH: So it's not a -- it's
10 an "and." They are both equally important.

11 MR. BRANCARD: I mean, that's what you've
12 been trying to do this whole hearing, is balance those
13 two. We've had a lot argument for prevention of waste
14 from the operators, and Jalapeno is more concerned with
15 the protection of correlative rights.

16 COMMISSIONER BALCH: But really we have to
17 be equally protective of both of those concerns. So the
18 only thing we have to do is really be careful to make
19 sure that the same level of protection that already
20 exists is included in the new rule in regards to
21 correlative rights.

22 COMMISSIONER MARTIN: I think that's true.
23 I think the same level of protection does exist in this
24 room.

25 COMMISSIONER BALCH: Well, it does. It's

1 perhaps unfortunate for the smaller operators that the
2 economies of scale are so much different.

3 COMMISSIONER MARTIN: It comes down to a
4 business decision of whoever the operator is.

5 CHAIRWOMAN RILEY: Because they're still
6 afforded the right and the opportunity to participate.

7 COMMISSIONER MARTIN: Right. Right.

8 CHAIRWOMAN RILEY: It's a decision on their
9 part.

10 COMMISSIONER BALCH: Not being a lawyer,
11 but having the right and not being able to exercise the
12 right sometimes ends up being equated as not having the
13 right.

14 MR. BRANCARD: Well, yeah. It's like when
15 you get your insurance policy on your house and it's 30
16 pages long and how many things you're going to question
17 State Farm about all these provisions that requiring
18 every other homeowner to do. You know, it's always that
19 sort of imbalance in a lot of transactions out there.
20 But they didn't make agreement.

21 COMMISSIONER BALCH: However, ultimately,
22 there is the ability to go to the force pool hearing and
23 ask for a reduced risk. There is the ability to -- if
24 you don't like the agreement and you feel like your
25 correlative rights have been -- have been stepped on or

1 your production has been stolen from you or taken, as
2 Mr. Yates like to say, then you do have the recourse
3 that he's already using in the Matador case --

4 COMMISSIONER MARTIN: Yes.

5 COMMISSIONER BALCH: -- of taking it to
6 district court.

7 MR. BRANCARD: But it's sort of surprising
8 to me that if there are people who are being force
9 pooled who are not taking advantage of the Division
10 hearings, given the Commission's order in the Matador
11 case, which clearly sets out a whole process for looking
12 at will you end up with something less than 200 percent.
13 And I think anybody who would challenge a 200 percent
14 risk penalty, they could pull out the Matador order and
15 say, "Based on that, I should at least get 125 or
16 something, you know."

17 COMMISSIONER BALCH: Yeah. I mean, we're
18 not talking about that case in particular, but the idea
19 there was that the drilling risk is similar, but once
20 you start to add more wells, your surface costs go down.
21 So you don't have the risk associated with putting in
22 surface equipment that you don't need because you
23 already know that you're going to need it. You can
24 predict that you're going to need it. So I think we
25 reduce the risk on that side.

1 MR. BRANCARD: And that was not an infill
2 well.

3 COMMISSIONER BALCH: It was more or less a
4 rank wildcat 45 miles to the nearest comparable.

5 COMMISSIONER MARTIN: And the operator has
6 an opportunity to come in and make that point in that
7 case, that the risk is less on the second, third wells.

8 COMMISSIONER BALCH: Well, except for in
9 the case where all the wells are drilled at once. So
10 you would have to make that argument during the single
11 force pool hearing you have on the entire development.

12 COMMISSIONER MARTIN: I don't think you can
13 protect everybody, and I don't think that -- I think
14 somebody at some point has to say that the company has
15 an option to come in or not come in. If they choose not
16 to come in for whatever reason, then that's okay, as
17 long as we have afforded them the opportunity.

18 COMMISSIONER BALCH: I mean, you can kind
19 of look at it the other way, too, especially when you
20 think of it in the concept that these reservoirs are
21 essentially being created by these large-scale
22 multistage fractures. And if you have an offset tract
23 in that pool which is defined as one of these horizons
24 that are never going to produce without that kind of
25 reservoir generation, then are you really having

1 something taken from you that you --

2 COMMISSIONER MARTIN: I agree.

3 COMMISSIONER BALCH: -- can't do on a
4 vertical scale?

5 COMMISSIONER MARTIN: That's a good point.

6 COMMISSIONER BALCH: And there's -- roughly
7 85 percent of all the wells in the Permian Basin are
8 still there.

9 COMMISSIONER MARTIN: Yeah.

10 COMMISSIONER BALCH: You have a right to
11 produce it, but it doesn't necessarily mean you have the
12 ability to.

13 COMMISSIONER MARTIN: Correct.

14 CHAIRWOMAN RILEY: And I think that those
15 two, Marathon's point in closing of this is the -- you
16 know, the technical advances that we've made are what's
17 allowing us to even be produced in the first place. So
18 you can't restrict the new technology with these --

19 COMMISSIONER BALCH: Well, I thought it was
20 worth discussing, and it is a concern that was raised by
21 a party.

22 COMMISSIONER MARTIN: I agree.

23 COMMISSIONER BALCH: So I think it's
24 important to discuss everybody's concern.

25 CHAIRWOMAN RILEY: Uh-huh.

1 COMMISSIONER BALCH: But really we're not
2 addressing risk or the force pooling in this rulemaking.

3 MR. BRANCARD: And luckily for you,
4 Mr. Feldewert is not in the room to jump up and down to
5 your discussion.

6 (Laughter.)

7 COMMISSIONER BALCH: He's probably banging
8 his forehead.

9 I don't think there is anything we can do
10 about 5 except take note of it. And we have a
11 discussion now on the record about some of
12 ramifications, even though there is nothing we can do
13 about it.

14 In 6, they're arguing that there will not
15 be any nonstandard spacing units --

16 COMMISSIONER MARTIN: That's what he's
17 saying.

18 COMMISSIONER BALCH: I'm not sure I follow
19 that logic.

20 COMMISSIONER MARTIN: I sure [sic] agree
21 with it.

22 MR. BRANCARD: That goes back to the
23 original argument, which is he's saying we don't really
24 have a standard horizontal spacing unit because we
25 haven't attached an acreage or configuration requirement

1 for that. So, therefore, if you don't have a standard,
2 you can't have a nonstandard. I think that's the way I
3 understood it.

4 COMMISSIONER MARTIN: And I think he did
5 that to establish a rule of what is standard and -- a
6 definition of standard and what is nonstandard.

7 COMMISSIONER BALCH: He calls it an
8 oxymoron, but I think it is more of semantics.

9 COMMISSIONER MARTIN: Right.

10 COMMISSIONER BALCH: You do have a
11 horizontal spacing unit, which I suppose it would be
12 considered standard, and there is a definition
13 associated with that. If you go away from that, then
14 you're unorthodox.

15 COMMISSIONER MARTIN: Right.

16 COMMISSIONER BALCH: And that's where --
17 where you have a nonstandard spacing unit. So I think
18 it's there by fiat [sic]. Is that the right usage of
19 that word?

20 MR. BRANCARD: It's interesting because we
21 refer to a standard spacing unit for a vertical rule,
22 but the regulations never refer to it as standard. It
23 just sort of says this is the unit, and then it talks
24 about a nonstandard. Here you actually define standard,
25 and you go to great -- the proposal is sort of fairly

1 detailed about what it takes to qualify as a standard
2 spacing unit.

3 COMMISSIONER BALCH: I think there is a
4 pretty clear distinction between what is standard and
5 what is not standard in the rule --

6 COMMISSIONER MARTIN: I agree.

7 COMMISSIONER BALCH: -- as proposed.

8 MR. BRANCARD: And really the difference
9 between standard and nonstandard is a process
10 distinction, right?

11 COMMISSIONER BALCH: Yeah.

12 MR. BRANCARD: They're all spacing units
13 and, therefore, they all have to meet what the
14 definition of a spacing unit is. It's just that some,
15 because they fit within a clearly understood type of
16 regime that we're comfortable with, get sort of a faster
17 track to approval than the one who want to take a
18 variation on it and try to do things that are not within
19 what we consider standard, and, therefore, they have to
20 go through more process to get approval.

21 COMMISSIONER BALCH: It's pretty similar to
22 a pool with 40-acre spacing. You can put in APDs as
23 often as you want for additional wells that fit in those
24 40 acres. If you want to go to a 20-acre spacing, then
25 you have to go through a process for an infill well or

1 something like that.

2 I guess I fail to see that there is -- I
3 think there is a clear definition of what these
4 horizontal spacing units are meant to be.

5 COMMISSIONER MARTIN: I agree.

6 CHAIRWOMAN RILEY: I agree.

7 COMMISSIONER BALCH: So 7 is where we're
8 talking about subsequent wells and horizontal spacing
9 units, and I think that the argument we're hearing from
10 Jalapeno here is that every well should be individually
11 accepted by all interested parties. It seems to be a
12 little bit inefficient. One of the reasons for a
13 horizontal spacing unit is to define an area that can be
14 developed, and I'm not sure what would be different in a
15 subsequent hearing on involvement or communitization or
16 force pooling. I guess the force pooling option would
17 be the things that comes in -- a second chance to come
18 up with an agreement.

19 CHAIRWOMAN RILEY: Well, doesn't that go
20 back to it's the operator's choice of whether or not to
21 define another spacing unit for a subsequent well or to
22 go through an infill process? And so if they are going
23 to go the first route for having it be assigned to a
24 spacing unit, then they have to go through that process.

25 COMMISSIONER BALCH: The distinction is now

1 we have these infill wells where we can -- we're not
2 doing it. Some operator could define the spacing unit.
3 As long as the infill well fits completely within that
4 horizontal and vertical boundary of that spacing unit,
5 then you would be able to skip that notice thing
6 because -- I think the logic is that the notice thing
7 has already been done --

8 COMMISSIONER MARTIN: Yeah.

9 CHAIRWOMAN RILEY: Yeah.

10 COMMISSIONER BALCH: -- and the agreements
11 have already been formed for that unit. I'm not sure
12 what you gain by renoticing and reaffirming, basically,
13 that joint operating agreement or force pool for the
14 second well in the same horizontal spacing.

15 COMMISSIONER MARTIN: Or the third, fourth.
16 It's just an added burden and unnecessary.

17 COMMISSIONER BALCH: But I think that --
18 well, I don't want to put the words into Jalapeno's
19 witness' mouth, but the argument that was made yesterday
20 was they wanted to have the ability to evaluate each
21 well and then decide to go into the next one kind of in
22 a sequence --

23 COMMISSIONER MARTIN: Right.

24 COMMISSIONER BALCH: -- which is at odds
25 with the ability to do this factory mining, the more

1 technologically advanced zipper frac completions, things
2 like that, that you get to drill all your wells and then
3 you do all your fracs.

4 COMMISSIONER MARTIN: Correct.

5 COMMISSIONER BALCH: So it's the same sort
6 of distinction between -- so I guess my question is
7 this: If we do one versus the other, are we adversely
8 impacting the correlative rights of the mineral royalty
9 interest owner?

10 COMMISSIONER MARTIN: Not without some
11 recourse.

12 COMMISSIONER BALCH: Well, there is
13 certainly recourse.

14 CHAIRWOMAN RILEY: I think it's the same
15 conclusion that we had over (A)(12).

16 COMMISSIONER MARTIN: Right.

17 MR. BRANCARD: Well, 7 deals with the
18 subsequent wells, which is now Subsection 9, where
19 you're largely following a process you already have for
20 multiple wells in a spacing unit. So there is really
21 nothing new here --

22 COMMISSIONER MARTIN: Right.

23 MR. BRANCARD: -- in that regard. You
24 either get consent, or you have to provide notice.

25 You know, 8 deals with more -- you start to

1 get into the infill question, what I think you're
2 referring to, Commissioner Balch.

3 COMMISSIONER BALCH: Okay. Well, let's
4 talk about 8.

5 And I think 7 -- I think we've already
6 discussed that, in particular the part where its
7 preventing the taking of behind-the-pipe reserves of
8 vertical wells without just compensation. I think if
9 there is no way for you to get that resource, then it's
10 not actually a resource. It's just potential.

11 CHAIRWOMAN RILEY: And there is nothing
12 precluding them from doing the same development, propose
13 a well and do the same thing.

14 MR. BRANCARD: 8 is actually the one where
15 Mr. Yates went on in detail talking about that issue.
16 And he was saying that he changed his mind from the
17 pre-hearing statement. The pre-hearing statement had
18 that whole revision to this section, and when he
19 testified, he said to delete it.

20 COMMISSIONER BALCH: Right.

21 MR. BRANCARD: And his concern -- and I
22 think the Chair, in my opinion, correctly responded
23 to -- is a misinterpretation of that section, which I
24 think -- I mean, I think that section basically gets you
25 back into nothing less than you had before, right? He

1 was sort of reading, you know, 13.10 and 11 as saying
 2 you're stuck with whatever risk charge is in the pool,
 3 in the first well. Right? And clearly 13.10 and 11
 4 says, No, you have to come back to that operator with a
 5 new proposal if they're nonconsent. They get an
 6 opportunity to consent for the second well or third
 7 well.

8 COMMISSIONER MARTIN: One of his -- run it
 9 through -- the premise is that the OCD rubber-stamps 200
 10 percent. I don't think -- I don't think that's the
 11 case.

12 COMMISSIONER BALCH: Well, maybe it was the
 13 case for approval of conventional developer. I would
 14 certainly hope that they would look at the changes in
 15 technology and understand the risks are -- maybe in some
 16 cases, they could be higher because of the
 17 infrastructure causing things to have a different impact
 18 on it, but the reality is, it's different. I don't know
 19 if it's worse or better.

20 COMMISSIONER MARTIN: Right.

21 COMMISSIONER BALCH: And probably, therein,
 22 should be looked at. But it's beyond the scope of this
 23 hearing and what's been presented to us today --

24 COMMISSIONER MARTIN: I agree.

25 COMMISSIONER BALCH: -- to assign or even

1 really describe how risk should be assigned. That's
2 part of a whole different pool rule.

3 COMMISSIONER MARTIN: I agree.

4 COMMISSIONER BALCH: Is that correct,
5 Mr. Brancard?

6 MR. BRANCARD: Yes. I mean -- I mean, you
7 could change the rules for a horizontal well, but at
8 this point, you're sort of following the same rule, you
9 know, that's already in -- already in the rules for
10 infill wells and what the process for notifying another
11 operator -- other working interest owners and giving
12 them a chance to negotiate or participate in a JOA even
13 if they hadn't in the first place.

14 I mean, I think, you know, in the language
15 that Mr. Yates proposed -- I'm sorry -- that Jalapeno
16 proposed in its pre-hearing statement, which wasn't
17 argued at the hearing, it's sort of trying to switch it
18 so that you not only have to offer a JOA, but you have
19 to go -- if you want a risk penalty on the second well,
20 you have to go back to hearing to get that risk penalty.
21 And that's a very different process than what we have
22 for the existing infill wells.

23 COMMISSIONER BALCH: Yeah. Well, I don't
24 think we can do anything about it realistically in this
25 hearing. Maybe we can just encourage OCD to take a look

1 of those risk penalties for these kind of horizontal
2 developments.

3 COMMISSIONER MARTIN: I think that's a good
4 idea. That's something that should be encouraged.

5 MR. BRANCARD: And 9 is also all about risk
6 penalties.

7 COMMISSIONER MARTIN: Right.

8 COMMISSIONER BALCH: So in 10, I don't
9 think it really authorizes the drilling of wells. It
10 just authorizes the permit, right, the APD?

11 CHAIRWOMAN RILEY: 13 is about protests.

12 COMMISSIONER BALCH: Right.

13 CHAIRWOMAN RILEY: Right? Is that what
14 you're reading?

15 COMMISSIONER BALCH: Yeah. So the
16 argument -- Jalapeno's argument here is that the person
17 drilling the well should prove that it's not going to
18 impair correlative rights a priori [sic]. Instead, it's
19 the other way around, which anything is happening in
20 this ruling, where it's the protestor that has to prove
21 that they've been impaired. In practice, what is the
22 real standard?

23 MR. BRANCARD: Well, in general, anybody
24 protesting any kind of application bears the burden of
25 presenting why.

1 CHAIRWOMAN RILEY: Because ahead of it,
2 you're setting out the rules that the Commission is
3 saying --

4 COMMISSIONER BALCH: You have to show there
5 are damages or will be damaged by --

6 MR. BRANCARD: Otherwise, the applicant is
7 in the process of having to prove a negative.

8 COMMISSIONER MARTIN: Right.

9 COMMISSIONER BALCH: Right.

10 MR. BRANCARD: Which is challenging.

11 COMMISSIONER BALCH: Or some would say
12 impossible.

13 MR. BRANCARD: The landscape may be
14 shifting. There was a court decision a month or two
15 months ago in Pennsylvania where a Pennsylvanian
16 appellate court said that the -- what do you call it
17 when you steal other people's oil -- rule of capture
18 doesn't necessarily apply to horizontal -- to fracking,
19 because fracking is different than normal kinds of
20 drilling where, you know, in the well -- you know, the
21 oil is just kind of drained. Fracking, you're sending
22 something into somebody else's property, looks more like
23 a trespass, and, therefore, you know, the court said,
24 "We're not assuming the rule of capture here; you may
25 have an argument for trespass, for fracking." If that

1 catches on, that will be a big deal.

2 COMMISSIONER BALCH: But regardless, the
3 current operating paradigm for us right now in
4 New Mexico is if you're injured, you have to show that
5 you're injured.

6 MR. BRANCARD: Right.

7 COMMISSIONER BALCH: So I don't think we
8 can really do anything about 10. It argues the opposite
9 case.

10 Now we come to setbacks. I think it's
11 pretty well -- clearly demonstrated by the evidence that
12 was given to us, particularly from Mr. King's testimony,
13 very enlightening, that in these kinds of shale
14 developments, you're not going to be getting a lot of
15 matrix-based production. Basically, you're creating the
16 porosity and permeability with your fractures.

17 CHAIRWOMAN RILEY: Uh-huh.

18 COMMISSIONER BALCH: In that scenario, I
19 don't know that any setback is really needed beyond some
20 minimal to make sure that you're within a reasonable
21 margin of error.

22 The problem is this: The rule does not
23 specify these kinds of shale wells. They specify all
24 horizontal wells. This would include a horizontal well
25 that's drilled in the Strawn or Atoka or up in the

1 northeast and even unconventional tight sand where you
2 are basically having a matrix -- kind of a flow to your
3 well. And even though -- I really like that Mr. King
4 gave several different examples, a San Andres example,
5 an Atoka and Strawn example, a Barnett example, a
6 Wolfcamp example and got those into the record. And
7 that really shows that those fractures only go in that
8 direction of the -- the orthogonal to the stress
9 direction.

10 The problem is if you put that 100 offset
11 in one of these conventional horizontal wells, what is
12 the impact on the neighboring producer then where you do
13 have the ability to flow from the matrix?

14 And I know that the direction right now is
15 to go to -- for this kind of development, it is going to
16 be probably for the next decade or two, barring another
17 change in circumstance, that this is the kind of
18 development that will be the most common, but it's not
19 the only kind of development used in horizontal wells.
20 That's the problem.

21 COMMISSIONER MARTIN: I agree with what
22 you're saying, but then you run into the problem of
23 trying to define what conventional reservoirs are and
24 what are not conventional.

25 COMMISSIONER BALCH: Absolutely.

1 So a few years ago, your typecast up in the
2 San Juan was called unconventional. Who knows what they
3 call it now? But regardless, the mechanisms of
4 production of that resource are different in the kind of
5 wells that are most common right now. And I think it's
6 still not -- I think it was 80-some percent of these
7 horizontal wells are in that kind of a shale resource.
8 Well, that leaves ten-plus percent that are not. And
9 they may or may not be impacted by some of the
10 assumptions that went into the -- to the writing of this
11 rule that are assuming that everything is going to be a
12 shale-type resources.

13 I wanted to raise that as a cautionary
14 point. I want to make sure we understand the
15 ramifications of that, and, if necessary, I want to make
16 sure we capture somehow that there is a difference and
17 it may need to be treated slightly differently. How to
18 do that, I have no idea.

19 COMMISSIONER MARTIN: I don't know either.
20 That was going to be my next question.

21 MR. BRANCARD: Your focus, though, is on
22 the second setback rule, right?

23 COMMISSIONER BALCH: 100-foot setback, the
24 330. That's what -- that's what everybody already has.

25 MR. BRANCARD: Right.

1 COMMISSIONER BALCH: Obviously, you want to
2 reduce that in a setback reservoir that you're creating,
3 because if you're leaving that setback area in between
4 the two sections or two blocks or whatever, that area
5 will probably never be accessed. So you do want to
6 avoid that. I did do some calculations. It's on the
7 order of what was given to us in the testimony, a
8 difference of 10 percent of your overall area, which
9 could potentially be left stranded, and that would be
10 waste. So you do want to avoid that.

11 My concern is if you're drilling a
12 conventional horizontal well and you have a 100-foot
13 setback on both sides, that may be -- there may be more
14 likely to be communication between those two wells, and
15 that's where you start to run into the problem of our
16 other concern, which is the correlative rights.

17 CHAIRWOMAN RILEY: But absent any testimony
18 about that, what do we do?

19 MR. BRANCARD: Well, we have Mr. Yates.

20 COMMISSIONER BALCH: Mr. Yates has
21 testified about it.

22 MR. BRANCARD: His point is pretty strong.

23 CHAIRWOMAN RILEY: We didn't get any
24 technical testimony about the conventional and what the
25 effect on that would be.

1 COMMISSIONER BALCH: It certainly was not
2 given to us by the proponents.

3 I think if I were to try to figure a way
4 out, I would do as Mr. Martin said. How do you tell
5 that these things are different? And maybe you have a
6 different standard for those two things. But that's a
7 challenge.

8 MR. BRANCARD: We can give it a try.

9 COMMISSIONER BALCH: Okay.

10 MR. BRANCARD: We have the provisions,
11 "first and last take point," "no closer than." And you
12 could add to that. Just like we have these provisions
13 in other parts of this rule, we could say, "Unless the
14 division determines after notice and hearing a greater
15 distance" -- and we could cap it at 330, 660, as
16 required by the geologic conditions.

17 COMMISSIONER BALCH: That would be -- that
18 would probably be the easiest way to do it.

19 MR. BRANCARD: I mean, the Division can't
20 just do it. They would have to go to hearing, and the
21 operator would be able to respond.

22 COMMISSIONER BALCH: Then someone like
23 Jalapeno, if they felt like they were in danger of
24 losing their correlative rights, they could come in and
25 argue for a larger setback.

1 MR. BRANCARD: We have to think about that.

2 COMMISSIONER MARTIN: Yeah. Let's do think
3 about that.

4 CHAIRWOMAN RILEY: Because they would --
5 they get notice of that.

6 COMMISSIONER BALCH: That's right. That's
7 a horizontal spacing unit by the operator. How would
8 they get notice?

9 CHAIRWOMAN RILEY: They wouldn't know.

10 MR. BRANCARD: They get an APD, and
11 suddenly a horizontal well turns into a more traditional
12 oil and gas field as opposed to a shale field. And the
13 Division can see that and go, "Whoa, I haven't seen that
14 before."

15 CHAIRWOMAN RILEY: It would put the burden
16 on the Division.

17 MR. BRANCARD: We get a lot of that these
18 days, "Whoa, I haven't seen that before." Horizontal
19 disposal wells, you know, we've gotten the application.

20 COMMISSIONER BALCH: That could happen. I
21 think it's a little bit complicated. It's something we
22 have to think about. And the mere fact that we're here
23 today, six years after having put forth a horizontal
24 rule, trying to fix it because conditions have changed
25 indicate that -- you want to try and anticipate as far

1 as forward as you can. It may be impossible to do that
2 completely, especially in a field where technology
3 changes so rapidly.

4 But there are pretty simple scenarios that
5 I can imagine where suddenly you're making as many San
6 Juan gas wells as you are Wolfcamp wells in the Permian,
7 and that would just be doubling the price of natural
8 gas. It suddenly becomes economic. People go up there
9 and start those drilling operations again, and because
10 of the changes in horizontal technology, they're most
11 likely going to use those kinds of wells and those kind
12 of fracture jobs. And we want to make sure you don't
13 end up with a scenario where we've done something
14 completely unintended with the rule.

15 COMMISSIONER MARTIN: The fix is one of
16 those kinds of things that falls in the category that it
17 sounds good when you're talking about in this context,
18 but the implementation by the districts could be a
19 different story. So I guess we should think about that
20 before we do it.

21 MR. BRANCARD: That's why I said "notice
22 and hearing." It couldn't be done by a district.

23 CHAIRWOMAN RILEY: It would be up to the
24 district to identify it --

25 MR. BRANCARD: Yeah.

1 CHAIRWOMAN RILEY: -- which ones fall into
2 that category.

3 COMMISSIONER BALCH: Who would be impacted
4 or potentially impacted.

5 CHAIRWOMAN RILEY: Uh-huh.

6 COMMISSIONER BALCH: You know, I rather got
7 from Mr. Yates' testimony that he thought that all wells
8 should have a much lower setback. I think they actually
9 said that.

10 COMMISSIONER MARTIN: I think he did.

11 COMMISSIONER BALCH: Not just horizontal
12 wells. Vertical wells, too. So maybe the size of the
13 setback is not the issue, just the fact that it's not
14 uniformly applied.

15 MR. BRANCARD: Or it's uniformly applied
16 with the geology, you know. In other words, you want to
17 drill a -- what I understood him to say is that if you
18 want to drill a vertical well into the shale, you should
19 be treated the same way as a horizontal well in the
20 shale.

21 COMMISSIONER BALCH: But, similarly, if
22 you're -- say you're in the San Juan and you have a
23 large acreage position and you're drilling horizontals
24 there and you intersect a large number of natural
25 fractures to give you the best gas production, that's

1 wonderful for you. But if you are an offset landowner,
2 you could access that resource with a vertical well
3 legitimately. Whereas, I think in the case of the
4 shale, you're not going to legitimately be able to
5 access that resource with the technology the way we have
6 it today, the way we understand it today. That could
7 change, too. But then you do run into a potential case
8 of a correlative rights violation.

9 I think the distinction really is that the
10 shale has a res- -- there is no reservoir unless you do
11 this fracking. So it's much harder to impair that right
12 in that pool or formation.

13 COMMISSIONER MARTIN: Right.

14 COMMISSIONER BALCH: But certainly even
15 within those, you can find examples where -- you know,
16 we call them shales, these oils. They're not really
17 shales. They're just very tight rock. Typically,
18 they're lenses within the real shale rock, which are
19 more silty. So there is still potential that there
20 might be a sweet spot at the edge of the field owned by
21 a smaller operator that might be able to get at some of
22 that resource. It becomes much less common of a
23 scenario than a conventional -- a conventional --
24 offsetting a conventional vertical to a conventional
25 horizontal, whatever conventional means.

1 COMMISSIONER MARTIN: Right.

2 COMMISSIONER BALCH: And that's really
3 where the problem comes.

4 It seems like from the testimony that we
5 had, that there was some discussion within the working
6 group about defining what an unconventional was, and
7 they never got anywhere in a couple of years. So I'm
8 not sure we can solve it in 15 minutes, although
9 something like what Mr. Brancard proposed might be a nod
10 in the right direction. It still becomes: How do you
11 notice? Is there something we can point at somewhere
12 else in the -- in the rules that we can use as a pointer
13 for that? The OCD identifies something and then
14 notice --

15 MR. BRANCARD: Well, I mean --

16 COMMISSIONER BALCH: -- or even then
17 requires notice?

18 MR. BRANCARD: This is a rule about a well,
19 so what I'm assuming is that this would be a decision on
20 a well-by-well basis and that the notice would be to
21 whoever the applicant --

22 COMMISSIONER BALCH: Except for the case
23 where you're creating a horizontal unit, there's really
24 no notice, right?

25 MR. BRANCARD: Well, I mean, if you wanted

1 to change the setback, you know, the Division would have
2 to go to hearing, basically.

3 CHAIRWOMAN RILEY: How do you trigger that?

4 COMMISSIONER BALCH: Change in the setback
5 was --

6 CHAIRWOMAN RILEY: But imagine an operator
7 submits: Let's go to the northwest. You've got someone
8 who submits an application for a gas well. And so then
9 it would need to be the district that gets that and
10 says, "Okay, but we think that you may need to have a
11 little greater distance on your heel and toe." And so
12 somehow you have to be able to go back to the operator,
13 the district does, and say, "We want you to go through
14 notice and notice the offsets and make sure they don't
15 have a problem with this." And then they could have the
16 20 days. And if they don't contest it, then it just
17 goes on. If they do, then set it for a hearing. But
18 how to write that, because it would be -- unless you
19 define it in here, for the operator to determine, it's
20 going to have to be something the district says we might
21 need. I see it happening more in the northwest.

22 COMMISSIONER BALCH: That's probably the
23 most likely scenario. I think there is one rig out
24 there of 70 in the state --

25 CHAIRWOMAN RILEY: Yeah.

1 COMMISSIONER BALCH: -- right now. It's
2 been that way for a long time. But that's because of
3 the economics in natural gas, which could change.

4 CHAIRWOMAN RILEY: There are different
5 players up there now. You've got -- you know, the big
6 operators have left, and you've got private-equity
7 companies there, so who knows what their economic model
8 is. It could change.

9 COMMISSIONER BALCH: Well, demand is
10 gradually catching up to supply in natural gas. So at
11 some point, you hit that tipping point and very
12 immediately your price goes up dramatically as soon as
13 you don't have quite enough.

14 CHAIRWOMAN RILEY: Would that scenario
15 happen in the southeast?

16 COMMISSIONER BALCH: It could. So I think
17 the best example of that -- and this is where an offset
18 producer would be concerned. I think I gave an example
19 of a case we had a couple years ago and they were --
20 they were looking at Drinkard-Blinebry-Tubb, taking a
21 larger section of generally unproductive or
22 less-productive rocks. And when they put in these large
23 fracture jobs, then suddenly it becomes an economic
24 reservoir. In a sense, you're still creating a
25 reservoir, but you are offset to other conventional

1 reservoirs where you could produce those formations
2 separately. So I think absolutely, there is a case.
3 It's probably more likely to occur in the southeast than
4 in the northwest because you're generally going after
5 oil.

6 CHAIRWOMAN RILEY: Well, we've got to -- to
7 do this, we've got to give clear guidance to our
8 districts so they have something to stand on if they
9 require it.

10 COMMISSIONER BALCH: I don't know what the
11 right answer is, whether it's take it as it is or to
12 modify it somehow or just acknowledge it, but this is a
13 potential issue. I think it's the most important thing
14 that Jalapeno brought up.

15 COMMISSIONER MARTIN: It's depending on
16 what the solution comes out to be.

17 (Laughter.)

18 COMMISSIONER BALCH: I think it's a
19 slippery slope to try to define what is conventional and
20 what is not conventional.

21 COMMISSIONER MARTIN: I think he's got a
22 legitimate complaint -- legitimate point on this one.

23 COMMISSIONER BALCH: I think so, too. That
24 10 to 15 percent of wells that are not chasing the shale
25 resources, they will behave differently than the ones

1 that are being -- having these reservoirs created in
2 them through the fractures.

3 Now, whether the 330, or whatever the
4 existing offset is, is already conservative, I have no
5 clue. But that wasn't brought before us. That wasn't
6 giving us a question. So what we have is your existing
7 well, which is 330s in all direction, and the proposed
8 one, which is -- first take and last point is 100.

9 COMMISSIONER MARTIN: I like the 330
10 because it's consistent with what we've always had. Any
11 number you pick is going to be kind of hard to --

12 COMMISSIONER BALCH: Well, I mean, that's
13 one way we could go. We can keep all the offsets. The
14 problem there is you really don't run into a substantial
15 amount of unaccessed resource in the shale plays where
16 you have waste. And you could -- you could address that
17 by basically making all the horizontal spacing units
18 come in for an application, or you could somehow try and
19 codify it so they can do that systematically. I think
20 that would be better in those scenarios.

21 CHAIRWOMAN RILEY: Yeah. We're trying to
22 reduce hurdles.

23 COMMISSIONER BALCH: Absolutely.

24 COMMISSIONER MARTIN: I think 330 is a good
25 balance when you're talking about balancing correlative

1 rights.

2 COMMISSIONER BALCH: It's on the order of
3 10 percent waste -- 10 percent reservoir that you're not
4 going to create. That's a huge amount of waste.

5 COMMISSIONER MARTIN: I think the infill --

6 COMMISSIONER BALCH: That's the difference
7 between 330 and 100.

8 COMMISSIONER MARTIN: I think that those
9 lost reserves in one well will be captured by somebody
10 else, some of them, by either an infill well or somebody
11 else's well.

12 CHAIRWOMAN RILEY: On the ends? The heel
13 and toe?

14 COMMISSIONER MARTIN: I'm talking about the
15 330 still.

16 COMMISSIONER BALCH: Oh, on the sides,
17 yeah. The sides is no problem. I think there is
18 nothing to argue for changing that. My only concern is
19 whether 100 is too small for a conventional horizontal
20 well --

21 COMMISSIONER MARTIN: It's possible.

22 COMMISSIONER BALCH: -- on the first and
23 last take points.

24 COMMISSIONER MARTIN: We had lot of
25 testimony that said 100 was appropriate in the shales.

1 COMMISSIONER BALCH: Absolutely, and
2 probably even conservative.

3 COMMISSIONER MARTIN: So now we back around
4 to defining unconventional reservoir, or we leave it up
5 to the subjectivity of the districts and where the
6 geology is supposed to be exact science -- interpretive,
7 in my opinion.

8 COMMISSIONER BALCH: So you're saying let
9 the Division office say whether it's conventional or
10 unconventional?

11 COMMISSIONER MARTIN: I think that's what
12 Bill is saying. That was a suggestion.

13 COMMISSIONER BALCH: And certainly they
14 have a feel for what --

15 COMMISSIONER MARTIN: I agree.

16 COMMISSIONER BALCH: -- is being developed.
17 It still keeps it out of the Santa Fe office.

18 CHAIRWOMAN RILEY: Well -- okay. So if it
19 goes to hearing, it wouldn't keep it out of the Santa Fe
20 office.

21 MR. BRANCARD: Right.

22 CHAIRWOMAN RILEY: But could we put
23 language in there that it's a self-determination, and
24 the operator, to avoid hearing, can make their setback
25 330 for the heel and toe if they think they are in a

1 more conventional play?

2 COMMISSIONER BALCH: Well, I think that
3 they would hopefully design their play to avoid an
4 issue.

5 CHAIRWOMAN RILEY: See what I'm saying? If
6 they wanted to avoid having to go to notice and hearing,
7 they can assume the 330 setback on the heel and toe. If
8 not, they can apply for it with the 100-foot, but then
9 the district can review and go back to the operator and
10 say, "No, we require notice to offsets."

11 COMMISSIONER BALCH: Even a standard
12 horizontal spacing unit is going to be reviewed at some
13 point, right, at the Division level or at the
14 district-office level, or is that all Santa Fe?

15 COMMISSIONER MARTIN: No. That would be
16 district.

17 CHAIRWOMAN RILEY: District.

18 COMMISSIONER BALCH: Okay. So even the
19 standard ones with a 100-foot setback are going to be
20 looked at by the district office. But they may, at that
21 point -- there -- there has to be a determination made
22 by them that, wait, this is -- this is actually
23 conventional. If you want 100, you need to go to
24 hearing, otherwise, 330.

25 COMMISSIONER MARTIN: And do you want to

1 put that in the rule?

2 COMMISSIONER BALCH: And how do you put
3 that in the rule if you want to put that in the rule? I
4 think it's great the way it's written now for the
5 unconventional. The problem is there is a gray area on
6 the edges with the conventional horizontals. It's not
7 like there is one of them. It's more than 10 percent
8 right now.

9 Shall we think about it over lunch?

10 CHAIRWOMAN RILEY: Yeah. Maybe a little
11 food will --

12 COMMISSIONER MARTIN: Sure couldn't hurt.

13 CHAIRWOMAN RILEY: -- clear our brain.

14 MR. BRANCARD: Do you want to finish up
15 Jalapeno's comments and see if there is anything else we
16 need to --

17 COMMISSIONER BALCH: I think 11, 12 both
18 are setbacks, and then 13 is transitional rules --
19 transitional provisions. And they're claiming here,
20 without notice, we're retroactively creating all of
21 these horizontal spacing units and that's a violation of
22 unconstitutional ex post facto adjudication. I know
23 that plenty of times in rules, we've gone back and
24 retroactively changed things. We got rid of 10,000 Pit
25 Rule applications, for example.

1 MR. BRANCARD: Yeah. I mean, my
2 understanding is, the previous horizontal wells have
3 gone -- have largely been classified as nonstandard
4 spacing units or project areas or whatever. So they've
5 already gone through a process. So it's not like these
6 were like unapproved wells that we're now approving.
7 We're just saying, going forward, they're going to be
8 classified differently. But all the previous wells went
9 through a process, and the spacing units and proration
10 units went through a process of review and approval.

11 COMMISSIONER BALCH: Yeah, I guess I don't
12 see an issue. I think there has already been an
13 opportunity in each of those cases to do that. In fact,
14 the opposite is the case now. You can basically ex post
15 facto everybody and renegotiate everything if you don't
16 have that shift to the new version of the rule, the new
17 definitions. So after the fact, you're going to make
18 everybody who has already operated a well go back and
19 renegotiate everything.

20 CHAIRWOMAN RILEY: Yeah.

21 COMMISSIONER BALCH: I don't think you can
22 do that.

23 CHAIRWOMAN RILEY: I agree.

24 COMMISSIONER BALCH: All right. So we'll
25 have a nice lunch and think about setbacks.

1 COMMISSIONER MARTIN: What time you want us
2 back here?

3 CHAIRWOMAN RILEY: It is now 1:00 -- or
4 five till. So 2:00? Is that enough time for everybody?

5 COMMISSIONER BALCH: 2:00 should be good.

6 (Recess, 12:55 p.m. to 2:12 p.m.)

7 CHAIRWOMAN RILEY: What's the potential
8 that we're going to see drilling of the conventional --
9 I mean, I know I kind of asked that.

10 COMMISSIONER BALCH: 10 to 15 percent of
11 the horizontals that are --

12 CHAIRWOMAN RILEY: Oh, this year? That's
13 the 10 percent you quoted?

14 COMMISSIONER BALCH: Yeah, potential.

15 CHAIRWOMAN RILEY: 10 percent actually
16 happened?

17 COMMISSIONER BALCH: Somewhere between 80,
18 85 percent of the horizontals were unconventional, so
19 the assumption is the remainders are conventional.

20 MR. BRANCARD: Whatever that means.

21 CHAIRWOMAN RILEY: How hard do you think it
22 was to try to define conventional?

23 COMMISSIONER BALCH: It was mostly actually
24 not. It was diverted every time that I brought this up.

25 CHAIRWOMAN RILEY: Nobody wanted to?

1 COMMISSIONER BALCH: Back to the idea that
2 most of the wells have -- so we should make the rule fit
3 these.

4 I guess my question is: If you leave the
5 100-foot setback for all horizontal wells, whether
6 they're unconventional or not, what is the recourse for
7 an offset operator?

8 CHAIRWOMAN RILEY: There isn't unless we
9 put one in.

10 MR. BRANCARD: Well, there is the protest
11 section, but they have to show --

12 COMMISSIONER BALCH: But if they don't know
13 about it, how can they protest?

14 COMMISSIONER MARTIN: Well, the APDs are
15 public record. If somebody wanted to, they could know
16 about it.

17 COMMISSIONER BALCH: Sure. That would take
18 a concerted effort, to monitor all the production that's
19 happening around you.

20 COMMISSIONER MARTIN: Sure.

21 COMMISSIONER BALCH: I imagine companies do
22 that anyway.

23 COMMISSIONER MARTIN: Some companies do.

24 COMMISSIONER BALCH: I think the real
25 distinction is between the matrix flow production and

1 nonmatrix flow production. I can actually see where the
2 330 feet comes from for unconventional horizontals,
3 although I have no idea where the original 330-feet
4 setbacks came from.

5 COMMISSIONER MARTIN: You need to call
6 Mr. Brooks back.

7 COMMISSIONER BALCH: He may not even have
8 been around long enough.

9 COMMISSIONER MARTIN: I know.

10 COMMISSIONER BALCH: Do you have a proposed
11 piece of language maybe?

12 MR. BRANCARD: I just have that language
13 you mentioned this morning.

14 CHAIRWOMAN RILEY: Could you restate it?

15 MR. BRANCARD: So it would be on the
16 setback, which is now C(1)(b), which refers to the 100,
17 330. And so it says that it's 100, 330, and you add to
18 that sentence "unless the Division determines after
19 notice and hearing that." And you could say either "a
20 greater distance" or you could say "a distance not to
21 exceed 330 for oil, 660 for gas is required by the
22 geologic conditions."

23 COMMISSIONER BALCH: "A greater distance
24 less than 330 for oil or 660 for gas is needed for the
25 prevention of" --

1 MR. BRANCARD: It seems like you wouldn't
2 want to give the Division --

3 COMMISSIONER BALCH: Unlimited latitude.

4 MR. BRANCARD: Yeah. You could do a
5 setback longer on the end, and you have -- because we're
6 not -- we're not adding this to the first paragraph,
7 which is the 330.

8 COMMISSIONER BALCH: I mean, I think anyone
9 drilling a horizontal well is going to try to optimize
10 the length within their lease, because once you're in
11 the horizontal section, the drilling is relatively
12 inexpensive compared to the overall cost of the well.
13 The incremental could get cheaper and cheaper the
14 further you go. That's one of the reasons they want
15 these very long wells. The other reason is because of
16 the waste in between, which is something that the 100
17 offset is supposed to be trying to address. I think it
18 does very well for these horizontal shale wells. So
19 it's pick your waste, right? But one's a waste issue,
20 and the other one is potentially correlative rights.

21 MR. BRANCARD: Right. It's that balance
22 you're trying to achieve.

23 COMMISSIONER BALCH: And generally I have
24 no problem with doing that as long as we can make sure
25 that somewhere in the statute there is a recourse that

1 is not dependent upon an unusual effort on the part of
2 the operator to find out that they're potentially in
3 jeopardy, such as monitoring all APDs or something like
4 that. The only other way to do it is to try and create
5 two categories of wells, and that's where the D comes
6 in.

7 CHAIRWOMAN RILEY: Uh-huh.

8 COMMISSIONER BALCH: And the only way
9 potentially out of that -- well, there are plenty of
10 ways out of that. One way out of that might be to allow
11 that determination to be made at the Division level --
12 I'm sorry -- at the district office level, whether an
13 application needs to be kicked into the other queue
14 because they have a 100-foot setback and they're not
15 clearly an unconventional-type shale well. I don't
16 know.

17 There are tons of options. The record's
18 not closed yet. We could always call for additional
19 testimony on that as well at a later date.

20 COMMISSIONER MARTIN: That's kind of my
21 concern. I don't remember hearing any questions or
22 testimony about 100-foot setbacks in conventional
23 reservoirs.

24 COMMISSIONER BALCH: I think every witness
25 I asked them the same question.

1 COMMISSIONER MARTIN: And the response was
2 generally?

3 COMMISSIONER BALCH: Most of the wells are
4 going to be unconventional horizontals. And that's what
5 we're targeting.

6 CHAIRWOMAN RILEY: I'd be curious to know
7 if this got discussed during committee --

8 COMMISSIONER BALCH: I have no idea.

9 CHAIRWOMAN RILEY: -- and if they were
10 banging their head against the wall like we are.

11 COMMISSIONER BALCH: In the past, we have
12 re-opened the hearing for very specific testimony, with
13 the purpose of trying to limit it from opening the whole
14 thing back open again. So that is a possibility. It's
15 maybe not even the most desirable possibility, but there
16 is that if we really feel like there is not enough
17 evidence to decide one way or another.

18 CHAIRWOMAN RILEY: And we do what we did
19 last night with Mr. Brooks and call the NMOGA witness
20 back for questioning in closed deliberations?

21 MR. BRANCARD: You've gone pretty far into
22 the deliberation at this point, so I don't know -- last
23 night we basically had all the parties here so notice
24 was a lot easier to do.

25 COMMISSIONER MARTIN: I think most of the

1 witnesses you're talking about have gone out of town,
2 back home.

3 COMMISSIONER BALCH: And I'm not sure that
4 those are the witnesses that need to be presented for
5 that part of it anyway. We need someone to talk to the
6 impact of offsets in conventional horizontal wells
7 because we're being asked to apply a rule that will
8 cover those, as well as the conventionals.

9 CHAIRWOMAN RILEY: So who would be the
10 witness?

11 COMMISSIONER BALCH: I don't know. I'm not
12 saying we necessarily need to go to that step, but
13 that's something that's been done in the past when we
14 felt like we didn't have enough information.

15 MR. BRANCARD: Well, you never have perfect
16 information. And, I mean, a rulemaking is broad that
17 covers so many topics. It's hard to have a significant
18 amount of information about every topic. I would say,
19 though, for this point, we had an entire witness who
20 that's really what his entire testimony focused on, the
21 last witness.

22 COMMISSIONER BALCH: Mr. King. But his
23 testimony was restricted to these horizontal wells where
24 you're creating your reservoir, and you don't have
25 matrix flow. And that was a distinction that was made,

1 at least in my cross-examination of him. So he did
2 provide slides that we would be able to use in our
3 deliberations that showed that those frac wings were --
4 were largely in that orthogonal stress direction for a
5 variety of formations, conventional and unconventional.
6 That's great. The problem is: What happens when you
7 have flow from your matrix as part of your production?

8 CHAIRWOMAN RILEY: Can we use that
9 terminology about a matrix?

10 COMMISSIONER BALCH: Matrix-based flow or
11 nonmatrix-based flow?

12 CHAIRWOMAN RILEY: Uh-huh. Is that more
13 intuitive than conventional versus nonconventional and
14 us not having defined that in -- because I keep going
15 back to -- I really like what Bill's put here, except
16 for the fact that how do we get to notice? Because the
17 only way that you know to notice is if the rule tells
18 you to notice, unless, like we talked earlier, the
19 district geologist sees the C-102 -- that APD
20 application and the C-102, looks at where it's going,
21 what formation it's going to and makes a determination
22 at that point that it could be a matrix-flow well. And
23 then they, prior to approving an APD, say, "Hey, this
24 one, you know, pursuant to this rule, you would need to
25 notice the offsets. But I think we have to put that in

1 there, because otherwise there is no way to know when
2 notice happens. Unless it's a nonstandard --

3 MR. BRANCARD: Right. The notice is going
4 to be the exception to the rule, right?

5 COMMISSIONER BALCH: Uh-huh.

6 MR. BRANCARD: I mean, the rule is anything
7 100 foot or greater that falls --

8 CHAIRWOMAN RILEY: Uh-huh.

9 MR. BRANCARD: Okay? So based on --
10 because the section right after it says the district
11 office, you know, is going to review and grant a permit
12 for each well, assuming it meets these requirements. So
13 there's your review by the district office. And so it
14 would be the district office having to sort of pull this
15 out of the queue and say, "I'm not ready to grant a
16 permit for this well because it's now drilling into a
17 total different geologic layer than what we're
18 accustomed to here.

19 COMMISSIONER BALCH: So that will then
20 trigger the -- that would take you out of the standard
21 horizontal spacing unit and put you into a nonstandard
22 or unorthodox.

23 MR. BRANCARD: No. No.

24 COMMISSIONER MARTIN: I don't think so.

25 MR. BRANCARD: The location -- the location

1 is fine. It's just that if you want to force a
 2 different setback for this well, now the Division has to
 3 take an affirmative step of providing notice to the
 4 operator, formal notice, and an opportunity for a
 5 hearing to discuss this. I mean, the Division can't
 6 just say, "Nope, sorry, 250 feet." They have a whole
 7 burden to get there. I'm not saying I've written this
 8 perfect. I'm on the fly here making this up, too.

9 COMMISSIONER MARTIN: The operator has the
 10 option to either accept that, decrease that back or
 11 appeal to the Division and have a hearing take place.

12 COMMISSIONER BALCH: It's really just about
 13 notice to the offsets. They might look at it and say,
 14 "That's fine."

15 COMMISSIONER MARTIN: Yeah.

16 CHAIRWOMAN RILEY: I think you would
 17 reference back to the unorthodox location notice
 18 requirements.

19 COMMISSIONER BALCH: So if you added
 20 another section -- we have four items right now that
 21 trigger unorthodox -- one of them might be less than 330
 22 offset in a matrix formation. I don't know. You're
 23 starting to get pretty fine grain there.

24 COMMISSIONER MARTIN: I don't -- I don't --
 25 I don't see the point -- or I don't agree with the point

1 that making it more than 100 feet makes it unorthodox.
2 It's less restrict- -- or more protective than what we
3 have now. I don't think that makes it unorthodox as
4 opposed to unorthodox right at 100 feet. Is that true
5 or not true?

6 MR. BRANCARD: I agree.

7 COMMISSIONER BALCH: We're trying to make
8 100 feet the new orthodox, basically --

9 COMMISSIONER MARTIN: Right.

10 COMMISSIONER BALCH: -- the new accepted
11 standard for first and last take point.

12 COMMISSIONER MARTIN: So what I'm saying is
13 the district proposing something greater than 100 feet
14 does not automatically -- automatically classify the
15 well as unorthodox.

16 CHAIRWOMAN RILEY: No.

17 MR. BRANCARD: Nor an applicant coming in
18 saying, "I'm going to, on my own, do a 200-foot
19 setback."

20 COMMISSIONER BALCH: No, that's fine.

21 COMMISSIONER MARTIN: That would be fine.

22 COMMISSIONER BALCH: And anything you do
23 within the spacing unit or unitized area, they can do
24 whatever they want, which I think is also good for
25 optimizing -- optimizing access to the most productive

1 area.

2 COMMISSIONER MARTIN: Basically can't go
3 less than 100 or less than 330.

4 COMMISSIONER BALCH: Right.

5 CHAIRWOMAN RILEY: So I'm seeing a
6 different way to do this. One would be -- in this
7 scenario where we -- where we require notice, I was
8 thinking of it as the operator who is proposing it would
9 have to notice the offset just like in an unorthodox
10 location. But maybe it's different in that if the
11 district reviews it and decides it's in a matrix-flowing
12 formation, that they can require the 330 setback or the
13 660. They can go back to those traditional setbacks
14 that are required on the lateral, and then if the
15 operator that's proposing it doesn't agree with that,
16 then they can request the hearing. That puts the burden
17 all back on the operator instead of the offset.

18 COMMISSIONER BALCH: Which I think is the
19 idea.

20 CHAIRWOMAN RILEY: Yeah.

21 COMMISSIONER BALCH: Try and let these
22 things become very routine.

23 CHAIRWOMAN RILEY: So the district can make
24 that call if they think it ought to be a 330.

25 COMMISSIONER MARTIN: Well, if you say that

1 85 percent are drilled in unconventional reservoirs,
2 that is kind of routine. It might make that 100 percent
3 routine.

4 COMMISSIONER BALCH: Sure. But I can
5 guarantee you your one stack play horizontal that you're
6 doing in three years as a small operator is just as
7 important to you as the 50 you're drilling as OXY are to
8 you and the correlative rights.

9 CHAIRWOMAN RILEY: I'm liking that idea.

10 COMMISSIONER BALCH: I think as long as
11 there's a way for there to at least be a discussion in
12 the case of a matrix-flow horizontal well about the
13 length of that first and last take point within that
14 bracket of 100 to 330 feet, as long as there is some way
15 for the offset operator to find out about it and then do
16 something about it.

17 CHAIRWOMAN RILEY: But if you do it the
18 second way, the offset operator -- it isn't really
19 relevant unless the operator that's just been told, "No,
20 you need to go to 330, then he would have to go to --

21 COMMISSIONER BALCH: Yeah.

22 CHAIRWOMAN RILEY: Are we agreeing?

23 COMMISSIONER BALCH: I think we agree the
24 problem is how do you get there with the language?

25 CHAIRWOMAN RILEY: I think that the

1 language, then, is -- let's see. Let me go back to
2 my -- can you tell me where this is because I've lost
3 it?

4 MR. BRANCARD: (C)(1).

5 COMMISSIONER BALCH: "Setbacks."

6 MR. BRANCARD: I guess that's the other
7 option, then. Maybe I'm not understanding what you-all
8 are talking about. You're talking about notice, right?
9 So notice to the offset operator?

10 CHAIRWOMAN RILEY: Uh-huh. Uh-huh.

11 MR. BRANCARD: So to say in (1)(b), you
12 know, "provided that," you know, "any first or last take
13 point that is less than 330 for an oil well, 660 for a
14 gas well, shall" -- you know, "the operator shall
15 provide notice to the adjoining working interest owner,"
16 because that's who you're -- well --

17 COMMISSIONER MARTIN: That makes the well
18 unorthodox. If you're proposing something less than 330
19 or 660, that makes the well unorthodox.

20 COMMISSIONER BALCH: Well, it doesn't make
21 it unorthodox. We're basically adding that we're
22 requiring notice and -- in the proposed rule, but we're
23 still leaving it in the hands of the operator to set up
24 the unit. It's just a matter of whether or not somebody
25 would take it up to a hearing level.

1 CHAIRWOMAN RILEY: That makes notice
2 required on every single well.

3 COMMISSIONER BALCH: Maybe it does.

4 CHAIRWOMAN RILEY: If we go to 100 feet --

5 COMMISSIONER BALCH: There are already a
6 lot of cases where they have to notice anyway.

7 COMMISSIONER MARTIN: Don't the rules for
8 an unorthodox well require notice anyway? So if you
9 make it unorthodox, it requires notice.

10 CHAIRWOMAN RILEY: Right. But the
11 impediment with 100 feet was to create an orthodox
12 distance for these wells at 100 [sic] feet, right?

13 COMMISSIONER MARTIN: We're coming back to
14 having to define conventional and nonconventional
15 reservoirs. I don't know how you're going to get that
16 language in there.

17 COMMISSIONER BALCH: That's certainly -- if
18 we can do it, that's the cleanest way to do it.

19 CHAIRWOMAN RILEY: What?

20 COMMISSIONER BALCH: If you just create two
21 categories of horizontal wells with different sets of
22 offsets that are considered orthodox.

23 COMMISSIONER MARTIN: If you say it
24 requires notice on all 100-foot setbacks -- on all
25 horizontal wells with 100-foot setbacks, that's all

1 horizontal wells. If it's less, you break out the wells
2 into type, conventional and nonconventional. Then you
3 have a problem defining those terms.

4 COMMISSIONER BALCH: If we define two
5 paragraphs with those terms, one conventional and one
6 unconventional, is it possible to leave that
7 determination to the discretion of the Division or the
8 district office or the operator themselves?

9 COMMISSIONER MARTIN: I like the 100 feet
10 as it is, without --

11 COMMISSIONER BALCH: For any well?

12 COMMISSIONER MARTIN: But I would not
13 object to the discretion of the district offices coming
14 into play, if that's what everybody wants. If they deem
15 the reservoir conventional and they want to question
16 that 100-foot setback, they should be able to do that.
17 We should write that in the rule. Not be too specific
18 but if you want the districts to have an option for
19 that. That's my second favorable choice -- second-most
20 favorable choice.

21 COMMISSIONER BALCH: So your favorite thing
22 is to keep the 100-foot and not worry about it.

23 COMMISSIONER MARTIN: And the only reason I
24 don't like the second choice is because consistency kind
25 of goes by the wayside. There is nothing magic about

1 that Lea County, Eddy County line that changes the
2 geology underneath that. That's my main concern.

3 COMMISSIONER BALCH: Well, the real
4 difference is more northwest-southeast or the Northwest
5 Shelf, Delaware Basin. I mean, when you change the
6 geologic province --

7 COMMISSIONER MARTIN: There are a lot of
8 conventional wells in the southeast, too.

9 COMMISSIONER BALCH: There are a ton of
10 conventional reservoirs. Now, if we could just figure
11 out a way to develop them for less than \$25 a barrel of
12 oil, then they'll do them, as well as the
13 unconventionals.

14 COMMISSIONER MARTIN: Right.

15 COMMISSIONER BALCH: That's what I'm
16 saying. This rule eventually will -- already does and
17 will continue to apply to scenarios where you don't have
18 that nonmatrix flow. I'm just concerned if we leave it
19 as a -- your first-case scenario or we leave it as 100
20 for all of them, that we don't open up the door for the
21 rule being challenged on the basis of correlative rights
22 for those conventional horizontals. Maybe you can talk
23 me out of that.

24 MR. BRANCARD: My suggestion is we tackle
25 the rest of the rule, then talk about this.

1 CHAIRWOMAN RILEY: Aren't we done?

2 COMMISSIONER BALCH: I think we're mostly
3 done. There was allowables, but I think the
4 allowables --

5 MR. BRANCARD: We haven't dealt with the
6 infill wells.

7 I mean, are we done with allowables, you
8 think?

9 COMMISSIONER BALCH: I think with oil
10 allowables, if you move -- if you look at (D)(1) --

11 MR. BRANCARD: The language that
12 Mr. Feldewert suggested?

13 COMMISSIONER BALCH: Yeah. I've actually
14 got something. It would start out with: "Unless the
15 Division determines after notice and hearing that a
16 reduced allowable must be assigned to the four [sic]
17 formation to prevent waste," then everything else,
18 excluding that language.

19 CHAIRWOMAN RILEY: I think we should apply
20 the principle of "Who Wants To Be A Millionaire," ask
21 for a lifeline or ask the audience or -- what was the
22 other one?

23 (Laughter.)

24 MR. BRANCARD: There are a variety of ways
25 to tackle this. Now, I'm suggesting that we finish up

1 the other issues to determine if there is anything else
2 that we can't come to a resolution on. Okay? And so --
3 because one option is to, you know, approve the rule
4 either with all the changes -- all the issues dealt with
5 or almost all the issues dealt with and have that get
6 filed and move forward, and then, you know, possibly
7 request a second rulemaking to deal with this issue,
8 where the parties can come with their ideas, not just us
9 trying to come up with the answer here, you know, that
10 there may be other ways to deal with this. I don't know
11 how pool orders fit into this, you know.

12 COMMISSIONER MARTIN: What is option two?

13 MR. BRANCARD: Yeah.

14 COMMISSIONER MARTIN: What is option two?

15 MR. BRANCARD: Well, Dr. Balch is talking
16 about the possibility of re-opening the hearing,
17 specifically -- so we're not filing -- we're finishing
18 this rulemaking. We're re-opening the hearing again to
19 allow for further testimony on this issue.

20 COMMISSIONER BALCH: That's with all due
21 notice to all parties, waiting another 30 days at least.

22 MR. BRANCARD: At least.

23 COMMISSIONER BALCH: And then have another
24 round of testimony, with parties making appearances and
25 so on.

1 COMMISSIONER MARTIN: Of those two, I
2 prefer option two.

3 COMMISSIONER BALCH: Was that option two,
4 or was that --

5 COMMISSIONER MARTIN: Option two was
6 re-open this hearing --

7 COMMISSIONER BALCH: Get some more
8 information.

9 COMMISSIONER MARTIN: -- rather than start
10 a whole new rulemaking procedure.

11 COMMISSIONER BALCH: I agree, since it's
12 already still open. That's simpler.

13 MR. BRANCARD: Sort of (laughter). I mean,
14 with the new rulemaking statute, it becomes almost like
15 starting a new rulemaking.

16 CHAIRWOMAN RILEY: We'd have to start over
17 with everything?

18 MR. BRANCARD: We'd have to do a whole new
19 round of notice with all those notice deadlines,
20 which -- I mean, it may just add like another month on
21 to -- because we have to post it with the New Mexico
22 Registrar.

23 CHAIRWOMAN RILEY: Would we only discuss
24 that one?

25 MR. BRANCARD: You can make it as narrow as

1 you want.

2 CHAIRWOMAN RILEY: I wouldn't want to
3 re-open everything we've dealt with.

4 COMMISSIONER MARTIN: Nor would I.

5 COMMISSIONER BALCH: No. I think
6 everything else has been dealt with satisfactorily.

7 So then I think we're aware that
8 Mr. Brancard can finish everything up, and then we see
9 if we can make a determination if we can resolve the
10 setback issue or not with the data that has already been
11 provided.

12 MR. BRANCARD: And I may have a second
13 issue.

14 CHAIRWOMAN RILEY: What?

15 MR. BRANCARD: The infill wells. Okay?
16 While I'm sitting here going through, looking at our
17 rules, we already have, it turns out, a definition of
18 "infill well" in our rules, under the compulsory pooling
19 rule, which defines an infill well as "a well that has
20 been drilled pursuant to a compulsory pooling order, has
21 been completed," "an existing well drilled pursuant
22 to" -- unfortunately -- and we do this in our rules
23 sometimes. We have definitions scattered through our
24 rules and sometimes we say "as used in this part, this
25 means this." This section doesn't say that. So we have

1 to sort of somehow make -- if you want to change how
2 infill horizontal well rules are defined, I think we
3 have to be cognizant of the fact that it's designed
4 differently under the compulsory pool statute -- rule.
5 Sorry. And that may be fine if we just sort of make it
6 clear that we're distinguishing the definition.

7 CHAIRWOMAN RILEY: But since we refer back
8 to this rule, because we go back to 19.15.13.10 and 11
9 in our -- I think our infill well -- wouldn't we have
10 conflicting definitions of "infill"?

11 MR. BRANCARD: To a certain extent. I
12 mean, the definition that we're looking at is "infill
13 horizontal well." Okay? So it's a little more
14 specific. And this definition says it only applies to
15 this part of the rule. So I just want to make you aware
16 that the Commission has defined infill well maybe once
17 in the pool rules.

18 COMMISSIONER BALCH: And it deals with the
19 force pooling differently?

20 MR. BRANCARD: Right. So that's -- you
21 know, I think there was a discussion about -- there is a
22 whole infill well provision in the compulsory pooling
23 rule about how you do infill wells under a compulsory
24 pooling order. So this is going to treat infill wells
25 differently in terms of drilling.

1 CHAIRWOMAN RILEY: You know what? I'm not
2 sure we didn't pick up that change. Did we leave it out
3 on purpose?

4 MR. BRANCARD: That's why I wanted to get
5 back to that, because I didn't make any changes to
6 "infill horizontal well" because I thought we hadn't
7 concluded that discussion.

8 CHAIRWOMAN RILEY: Okay.

9 MR. BRANCARD: Not that it -- I didn't
10 reject those changes. I just didn't make them.

11 COMMISSIONER BALCH: Let's try and see if
12 we can settle allowables, then we can talk about
13 infills. I think those are the two other outstanding
14 issues, right?

15 So if we change the language in (B)(1), as
16 we discussed earlier, then I would feel pretty
17 comfortable with allowables, seeing how it's removing
18 allowables in a good number of cases. And moving
19 that "unless the Division determines after notice and
20 hearing" part to the front makes that apply equally to
21 the horizontals and the impacted nonmarginal vertical
22 wells.

23 COMMISSIONER BALCH: Are you wordsmithing
24 that out, Mr. Brancard?

25 MR. BRANCARD: Yeah. So I'm simply copying

1 what's later in that provision, except replacing
2 "nonmarginal unit" with "pool." Is that correct?

3 COMMISSIONER BALCH: "Pool or formation,"
4 maybe.

5 MR. BRANCARD: I think allowables are
6 assigned to pools.

7 COMMISSIONER BALCH: It has to be "pool."

8 MR. BRANCARD: And that's the way the first
9 sentence reads.

10 COMMISSIONER BALCH: So: unless the
11 division determines after notice and hearing that a
12 reduced allowable must be assigned to a pool, the
13 division shall assign to the horizontal well when an oil
14 pool -- of the oil well can produce the nonmarginal
15 proration unit exists in the same pool as a horizontal
16 well. The Division shall assign to each oil well
17 located in the unit the allowable -- for its productive
18 capacity." And then "production of oil or gas from any
19 horizontal oil well shall not be limited by -- gas-oil
20 ratio as provided in Subsection 19.15.20.13 NMAC."

21 MR. BRANCARD: So I'm trying to think. Do
22 we want to eliminate "unless the Division determines"
23 from the second sentence?

24 COMMISSIONER BALCH: Yes. You want to move
25 that to the top, the beginning of that paragraph, with a

1 couple of words changed. Take out the "nonmarginal unit
2 to prevent waste" to a "pool to prevent waste."

3 Essentially, when we were looking at
4 allowables and the existing allowable language, the only
5 part I liked about it was that there was some protection
6 from waste or particular casing head gas or formation
7 damage. And in the majority cases, that is not going to
8 apply, but there may be some circumstances at some point
9 that it may need to be addressed.

10 Basically, that gas comes up --- comes from
11 the Gallup production, actually, because there's not
12 going to be fracs flaring for months before they can
13 produce the gas.

14 CHAIRWOMAN RILEY: They're really able to
15 get those cleaned up pretty quickly. But what happens
16 is they'll end up with communication, and so then a well
17 already on production -- gas flaring. And that happens
18 pretty frequently. But they're able to get them cleaned
19 out pretty quickly.

20 COMMISSIONER BALCH: Yeah. I don't know if
21 that's a good example or not. But there are cases where
22 there may be a reason to put an allowable on a pool,
23 horizontal or otherwise. As long as it's not
24 artificial, as it is right now, then I'm happy with it,
25 as long as -- there has to be some reasoning in hearing

1 and discussion about it.

2 CHAIRWOMAN RILEY: I'm good with that.

3 COMMISSIONER BALCH: No more arbitrary
4 depth-bracket charges.

5 CHAIRWOMAN RILEY: Yeah.

6 MR. BRANCARD: So NMOGA also had the change
7 to remove -- in the second sentence, it says: "Its
8 productive capacity to the amount of oil that each well
9 can produce."

10 COMMISSIONER BALCH: That just changes it
11 to be somewhere to the horizontal language.

12 MR. BRANCARD: Yeah.

13 COMMISSIONER BALCH: Yeah. That's fine.

14 So with a language change like that, I'm
15 pretty happy with it. I think we can be done with
16 allowables.

17 CHAIRWOMAN RILEY: Sorry. I'm taking a
18 stab at the --

19 MR. BRANCARD: Okay. If we're done with
20 allowables, I have two things to talk about. One is
21 just to clarify then the whole provision about you can't
22 apply for an APD unless you've gotten consent, which
23 appears both in 16.15A(1) and 16.14A -- 14A(1). We
24 wanted to change "lessee" to "working interest owner,"
25 or do we want to leave it as "lessee"?

1 COMMISSIONER MARTIN: I'm okay with
2 "lessee."

3 COMMISSIONER BALCH: I'm not sure if I have
4 expertise enough in that area to make the distinction,
5 if someone wants to explain it to me --

6 MR. BRANCARD: Well, "working interest
7 owner" is a defined term. "Lessee" is not. I'm pretty
8 sure it's not.

9 COMMISSIONER BALCH: In general, if we can
10 point to a defined term, that's good.

11 MR. BRANCARD: "Working interest owner" is
12 defined as "owner of an operating interest under an oil
13 and gas lease who has the exclusive rights to exploit
14 the oil and gas minerals. Working interests are
15 cost-bearing."

16 COMMISSIONER MARTIN: Okay. I mean, to me
17 that infers it's a lessee, in my mind.

18 MR. BRANCARD: Yeah. Right.

19 COMMISSIONER BALCH: As long as we can
20 follow the definition back.

21 CHAIRWOMAN RILEY: I have a language
22 proposal for setbacks. You guys want to hear it?

23 COMMISSIONER BALCH: Sure.

24 CHAIRWOMAN RILEY: "Setbacks," (1)(b).
25 "The first and last take point of a horizontal well

1 shall be no closer than 100 feet an oil well within a
2 nonflowing matrix reservoir or 330 feet within a gas
3 well matrix reservoir in the horizontal plane to any
4 outer boundary of the horizontal spacing."

5 And then paragraph two: The district
6 office to approve -- the appropriate division office may
7 grant the permit for a horizontal well provided every
8 point in the well's completed interval complies with the
9 setback requirements described above or located at an
10 unorthodox well location the division has approved and
11 add to the district -- propose well flowing matrix
12 reservoir. Then it will be considered an unorthodox
13 well location and subject to (C)(6) -- approval of
14 unorthodox well location.

15 COMMISSIONER BALCH: So I think to adopt
16 that, we'll need to add two definitions, "matrix flowing
17 reservoir" or "non-" --

18 COMMISSIONER MARTIN: If you leave the last
19 sentence, you cannot change the other ones. You don't
20 need those other references.

21 CHAIRWOMAN RILEY: "Determination of the
22 district"?

23 COMMISSIONER MARTIN: "Nonflowing
24 reservoir" or "matrix flowing reservoir."

25 CHAIRWOMAN RILEY: Would you, though, since

1 you're saying that the district can determine that? "At
2 the discretion"?

3 COMMISSIONER BALCH: Somebody has to make a
4 value judgment at some point, which is probably why
5 people are, I think, wrestling with this issue of how do
6 you define conventional or nonconventional. But I think
7 it's pretty clear in the case of -- for the setbacks,
8 that we're looking at reservoirs where the matrix is
9 predominantly flowing oil.

10 CHAIRWOMAN RILEY: Right.

11 COMMISSIONER BALCH: So we could come up
12 with those two definitions and then have language like
13 you've proposed and then that would segregate the two.

14 CHAIRWOMAN RILEY: Can you define those
15 two?

16 COMMISSIONER BALCH: I might be able to do
17 a little -- a little research and look for the common
18 terms related to those concepts in the literature. I'm
19 not sure if we really need to.

20 COMMISSIONER MARTIN: I think the districts
21 would appreciate that because if they don't have a
22 codified definition of oil matrix reservoir, they're
23 going to have a problem with that. I mean, what do they
24 use to determine that? Even though it's a commonly used
25 term to the extent of --

1 CHAIRWOMAN RILEY: Okay.

2 COMMISSIONER BALCH: Next question is: Is
3 it too big a step to do that without seeking additional
4 input?

5 CHAIRWOMAN RILEY: Yeah. If we can't leave
6 it vague like this, then I think we need to come back.

7 MR. BRANCARD: So with infill, we were
8 looking at two sections. One is the definition of
9 "infill horizontal well." There is a proposed change in
10 front of us.

11 The other is, I guess, (A)(2), which is the
12 whole issue of horizontal wells and whether they require
13 a spacing unit or not, one for every well or copy the
14 one from the parent well.

15 COMMISSIONER BALCH: Which would still be
16 its own distinct well, which would just be identical to
17 another one.

18 MR. BRANCARD: The way it's worded now,
19 (A)(2), it seems to indicate that an infill horizontal
20 well doesn't get a spacing unit, which doesn't really
21 make sense.

22 COMMISSIONER MARTIN: It gets a spacing
23 unit, but it coincides with the existing spacing unit.

24 MR. BRANCARD: Well, I think that's the way
25 we interpret it, but that's not what it says here.

1 COMMISSIONER MARTIN: I think that's what
2 we want it to say.

3 MR. BRANCARD: Okay. And relevant to that
4 is the provision on multilateral well, which is (B)(7),
5 which is more explicit about what you're talking about,
6 Commissioner Martin, where it talks about that every
7 lateral gets a separate horizontal spacing unit "except
8 those laterals that are located entirely within the
9 boundary of an existing spacing unit, may be dedicated
10 to the same horizontal" --

11 COMMISSIONER MARTIN: Okay. You've already
12 got "lies within" -- "lies completely within," words to
13 that effect. If you want to add something to that to
14 make -- I think the intent is the same. They both are
15 to be treated the same as far as spacing.

16 MR. BRANCARD: Then the other issue is the
17 amendment that would expand the definition of horizontal
18 infill horizontal well to include not only those that
19 are drilled and completed but those that are simply
20 proposed in a separate application.

21 COMMISSIONER MARTIN: All right.

22 MR. BRANCARD: So for (A)(2), it reads:
23 "Each horizontal well shall be dedicated to a standard
24 horizontal spacing unit or an approved nonstandard,
25 except for infill horizontal wells and multilateral

1 horizontal wells described as a type of multilateral
2 horizontal well."

3 COMMISSIONER MARTIN: Okay.

4 MR. BRANCARD: And we can add to that
5 "which may be dedicated to an existing spacing unit."

6 COMMISSIONER MARTIN: Okay.

7 MR. BRANCARD: All right. Let me revise
8 that. So it depends on whether you go along with the
9 definition -- proposed definition of the proposed
10 horizontal well.

11 COMMISSIONER MARTIN: I agree with the one
12 that exists right now.

13 MR. BRANCARD: So: "Infill horizontal well
14 would include an infill well that has a proposed well
15 that goes along with the proposed well."

16 COMMISSIONER MARTIN: (Indicating.)

17 CHAIRWOMAN RILEY: Not just a drilled well.

18 COMMISSIONER MARTIN: Right.

19 MR. BRANCARD: If so, then I would amend
20 the rules I just gave you to say "which may be dedicated
21 to an existing or proposed spacing" unit.

22 COMMISSIONER MARTIN: Okay. Makes sense.

23 COMMISSIONER BALCH: There you go. Makes
24 it much more consistent with the way we described the
25 multicompletion scenario.

1 MR. BRANCARD: So are we okay with the
2 "infill horizontal well" definition?

3 COMMISSIONER MARTIN: I am.

4 CHAIRWOMAN RILEY: I am.

5 COMMISSIONER BALCH: By default, as long as
6 every -- every well is going to end up having its own
7 spacing unit. It doesn't matter if the spacing unit is
8 borrowed from another well.

9 COMMISSIONER MARTIN: Right.

10 COMMISSIONER BALCH: You're still going to
11 have a defined spacing unit.

12 COMMISSIONER MARTIN: Right.

13 MR. BRANCARD: But the key is having --
14 that you've created an infill well when the other well
15 hasn't been drilled yet. Is everybody okay with that?
16 That's a big change. It's a change.

17 COMMISSIONER MARTIN: (Indicating.)

18 COMMISSIONER BALCH: We don't want to
19 exclude that family of technologies from developing in
20 New Mexico or make it more difficult than it needs to
21 be.

22 We discussed a little earlier about the
23 correlative rights issues with that and the force
24 pooling implications because of the Jalapeno's brief,
25 and I think we pretty much included that there is still

1 an opportunity for a potentially affected party to
2 observe it and then that there was another possibility
3 that the Division may not assign --

4 MR. BRANCARD: I'm not sure how -- you
5 know, how it's going to work with the compulsory -- if
6 you have to go to a compulsory pooling order for a well
7 and then to want to do an infill well. You may be able
8 to get your spacing units and all that lined up. But
9 under the compulsory pooling rule, you can't do an
10 infill well until you've completed the first well. So I
11 don't -- I don't know that the proponents here have
12 gained as much as they thought they had, assuming they
13 have -- you know, if they can do JOAs or get consent of
14 everybody, you know.

15 COMMISSIONER BALCH: Certainly in that
16 situation, it's a larger motivation to get that JOA.

17 MR. BRANCARD: Right.

18 COMMISSIONER BALCH: There are states
19 around us -- and I won't name them; it starts with a T
20 and ends with an S -- that don't have force pooling, and
21 they still manage to drill wells.

22 MR. BRANCARD: Yeah.

23 COMMISSIONER BALCH: A lot of wells.

24 MR. BRANCARD: Yeah.

25 COMMISSIONER BALCH: But I think if you're

1 going to do that kind of development, you're working a
2 larger area. You're going to have to come up with a
3 unit agreement or something each prior to doing this.
4 You're probably not going to do it as a simple
5 horizontal spacing unit. Could. But I think you
6 need -- you're looking at a larger development that
7 would be encompassed by a single well's horizontal
8 spacing unit.

9 MR. BRANCARD: Any other issues or changes
10 that anyone else wants to look at?

11 COMMISSIONER MARTIN: I don't have any.

12 MR. BRANCARD: The parties didn't like my
13 C-102 suggestion for a standard horizontal spacing unit.

14 COMMISSIONER BALCH: Since we've addressed
15 infills and we have not included any of the proposed
16 language changes, do we need to go back and look at
17 those now that we modified that slightly?

18 MR. BRANCARD: Via the horizontal well
19 change? Yeah. Now is the time to look at that.

20 COMMISSIONER BALCH: There were two sets of
21 changes. There was the NMOGA-inspired changes and then
22 the joint proponent set of changes, additional
23 recommended.

24 MR. BRANCARD: So the definition of "infill
25 horizontal well," NMOGA didn't initially propose to

1 amend, but then it got on the second set of proposed
2 changes. That's the one that now refers to horizontal
3 well, the completed interval, located within the
4 horizontal spacing unit, "dedicated to a previously
5 drilled or proposed" -- those are the new words --
6 "horizontal wells will be completed in the same pool or
7 formation that is designated by the operator on the form
8 C-102 as an infill horizontal well. For purposes of
9 this definition, proposed means that an APD has been
10 submitted to a regulatory agency."

11 COMMISSIONER BALCH: I think I'm all right
12 with that.

13 COMMISSIONER MARTIN: I am, too.

14 CHAIRWOMAN RILEY: Uh-huh. I'm good with
15 it.

16 MR. BRANCARD: APD is a defined term, and
17 it means application for -- it does not indicate that
18 it's the one that goes to OCD. It's just generally.

19 COMMISSIONER BALCH: BLM or wherever it
20 ends up.

21 So I think we also had old A(8) -- 15A(8).

22 MR. BRANCARD: So A(8) is now A(2), and
23 that's the one which I offered the language to be added
24 to the end of that, "which may be dedicated to an
25 existing or proposed spacing unit." I guess it should

1 say "horizontal spacing unit."

2 COMMISSIONER BALCH: "Horizontal spacing
3 unit."

4 I think that's everything except for the
5 issue with the 100-foot first and last take point.

6 COMMISSIONER MARTIN: Anything else?

7 CHAIRWOMAN RILEY: No. I don't have
8 anything else. I feel bad can't land the plane on
9 the -- but I don't know how to do it.

10 COMMISSIONER BALCH: Well, I did a quick
11 survey, and the petroleum handbook has a lot of
12 variability in the definition of "unconventionals." The
13 problem with unconventionals is it could be coalbed
14 methane. It can be tight gas. It can be shale. It can
15 be shale oil. It can be shale gas. It can be --

16 COMMISSIONER MARTIN: What about flowing
17 matrix?

18 COMMISSIONER BALCH: I couldn't find
19 anything in that term. Now, that term was brought up
20 within the context of this hearing as being a
21 distinctive difference between these two types of
22 reservoirs or at least could be inferred to be taken as
23 the difference of two types of reservoirs. Kind of the
24 fundamental concept is you have to create the reservoir
25 in this new kind of development, where the old kind of

1 development, you're either trying to intersect existing
2 natural fractures or increase your drainage area.

3 COMMISSIONER MARTIN: Right.

4 COMMISSIONER BALCH: But the drainage is
5 still at least capable or possible from the matrix. So
6 you start to look at unconventional shale.

7 You know, starting with the Barnett, a lot
8 of new terminology came into our business, things like
9 non-Darcy flow. When you're starting to look at that --
10 oh, one of those words that starts with a C-O-N. I'm
11 drawing a mind blank on it. Diffusion. I'm sorry.
12 Yeah. We never thought about diffusion as a process to
13 move gas around in a reservoir until the Barnett Shale.
14 So we had to come up with new mechanisms to explain how
15 the resource came from the matrix into the, quote,
16 unquote, "reservoir," which is a fracture matrix you've
17 generated yourself. It doesn't necessarily apply to an
18 oil case.

19 You do remember seeing the examples from
20 Mr. King's testimony about the very torturous paths that
21 the well would have to take along those fractures.

22 So we could cook something up possibly and
23 justifiably. The question is -- I think there are two
24 questions. First of all, what's the impact of just
25 leaving it as proposed? Does that leave a significant

1 gap in the regulation? Can we fix it with the
2 information we have, such that a gap like that would be
3 closed? And third, do we need to get additional
4 testimony in order to make that distinction?

5 So the first question really is the first
6 question. What's the real impact of leaving the
7 100-foot offset for all horizontal wells, 100 first and
8 last take points? The implication is somebody may come
9 in and feel that their acreage has been drained because
10 you now have a first take point 100 feet away from their
11 property line instead of the 330 feet, which is in the
12 existing rule, or 660 for gas. So is it an issue? Is
13 that likely to come up?

14 COMMISSIONER MARTIN: I'm not so sure it is
15 an issue, but that's -- I mean, I'm kind of for leaving
16 the 200 feet out. I'm not sure it's an issue based
17 on -- based on what we heard.

18 CHAIRWOMAN RILEY: I'm not sure it is
19 either.

20 The other thing to do is look at the heel
21 and the toe. So it's like one -- one place rather than
22 the whole lateral length of all those stages and
23 clusters of perforation. We're talking about just the
24 one at the end. How impactful is that going to be for
25 those end points? And your -- I was just thinking that

1 we've really got a 200-foot buffer, theoretically,
2 because both sides of the fence.

3 COMMISSIONER BALCH: Or more likely 430, if
4 you're dealing with an offset, a conventional operator,
5 and for some reason you're in an unconventional pool
6 that could also be produced conventionally. Don't rule
7 out that somebody will figure out how to do that.

8 COMMISSIONER MARTIN: I think my position
9 is if we don't know if we're damaging or we're hurting
10 anybody's correlative rights by leaving the 100, we're
11 being more arbitrary than we would be otherwise if we
12 change it.

13 COMMISSIONER BALCH: We had a lot of
14 testimony given to us that 100 was much more
15 reasonable, convincing evidence for me at least for
16 these nonmatrix-flow type reservoirs.

17 COMMISSIONER MARTIN: Right.

18 COMMISSIONER BALCH: Unfortunately, we
19 couldn't get testimony on the other direction.

20 COMMISSIONER MARTIN: Right.

21 COMMISSIONER BALCH: Although the one piece
22 of information -- maybe we need to double-check this in
23 the record. But it sounded like the Jalapeno witness
24 was inclined to just reduce the offsets for everybody.
25 So I think that there is -- not speaking for all oil

1 producers everywhere, but when I do simulation studies
2 on production, you're not reaching out as far as the
3 reservoir as you might think to get that production.

4 COMMISSIONER MARTIN: Right. That's been
5 my -- that's what I've read, too.

6 COMMISSIONER BALCH: So there is, in my
7 mind, a justification to reduce from 330 anyway, which
8 is -- I'm not sure what the implications are for
9 reducing that heel and toe for offset conventional oil
10 or gas wells.

11 CHAIRWOMAN RILEY: Would it be
12 appropriate -- I know they're using a lot of times up in
13 the northwest -- they've had very strange Gallup flow
14 pools that are right next to each other, and one might
15 have a 790-foot setback, then another 160, and all over
16 the board as these units. The language in there said
17 330, but you will not oppose your neighbor if he comes
18 in and wants to drill next to you at 330 even though he
19 is in a 790 or whatever. So should we put anything in
20 there about that that says if an offset operators wants
21 to drill at 100?

22 COMMISSIONER BALCH: No matter what,
23 whether a horizontal or not. Now the question is: Can
24 we do that? It's similar in concept to what we're doing
25 with the allowables. Basically, we're saying, "Hey,

1 you've got this horizontal well in there, then boom,
2 your allowables go away."

3 CHAIRWOMAN RILEY: Uh-huh.

4 COMMISSIONER BALCH: You're allowed to
5 compete for that resource on an equal footing.

6 So would it be possible to do exactly that,
7 Bill? Just say "offset" -- "offset nonmarginal vertical
8 well production adjacent to one of these 100-foot
9 offsets is allowed to be drilled within 100 feet as
10 well, have a similar offset"? Or does that mess around
11 too much with other parts of the rules?

12 MR. BRANCARD: Yeah, because now we're
13 dealing with other rules.

14 COMMISSIONER MARTIN: I think that's all
15 mainly position. It seems kind of fair to the vertical
16 well operator. So that would solve that problem.

17 COMMISSIONER BALCH: It would.

18 COMMISSIONER MARTIN: I think that's --

19 COMMISSIONER BALCH: Well, they want some
20 kind of fair level of competition, now keeping in mind
21 they're apples --

22 COMMISSIONER MARTIN: I agree.

23 COMMISSIONER BALCH: -- and bowling balls.

24 COMMISSIONER MARTIN: I agree. I take that
25 into consideration when I consider the Jalapeno brief.

1 But --

2 COMMISSIONER BALCH: But, in general, we
3 need to make sure that everybody has the ability to
4 compete on equal footing for those resources.

5 And I think I noticed in my testimony --
6 are we taking -- is this taking us in a step towards
7 right of capture?

8 MR. BRANCARD: Well, capture is a common
9 law concept. It's not -- I mean, ours is correlative
10 rights. That's what we do.

11 COMMISSIONER BALCH: So what part of that
12 belongs to that --

13 COMMISSIONER MARTIN: The rule of capture
14 exists in New Mexico. Right.

15 MR. BRANCARD: Yeah. And it's sort of a
16 limitation of a claim of trespass, basically, which is
17 another common law claim. You're trespassing. You're
18 stealing my oil. Well, rule of capture. You can defend
19 yourself that way. But those are not part of the
20 statutory direction the Commission has. Our goal is
21 waste and correlative rights.

22 COMMISSIONER BALCH: So it really comes
23 into correlative rights --

24 MR. BRANCARD: Uh-huh.

25 COMMISSIONER BALCH: -- for us.

1 So there are really only two things you can
2 do if you're an offset operator or if you desire to be
3 an offset operator, which I think was Jalapeno's
4 position --

5 COMMISSIONER MARTIN: Right.

6 COMMISSIONER BALCH: -- is you want to be
7 able to compete at the same level. So if they have a
8 100-foot offset, then you get a 100-foot offset. If
9 they get an unlimited allowable, you get an unlimited
10 allowable.

11 COMMISSIONER MARTIN: I like the current
12 suggestion. Rather than modify -- that way we leave the
13 rule as is and add something to the vertical well -- a
14 fair shot.

15 COMMISSIONER BALCH: The second recourse is
16 litigation after the fact. You make a claim that
17 someone has stolen your oil, and you take it to court.

18 COMMISSIONER MARTIN: Right.

19 MR. BRANCARD: Well, or we have the -- they
20 have the ability to protest here, which relates to
21 impairing someone else's rights.

22 COMMISSIONER BALCH: So in this case, if we
23 leave it the way it's written, you don't put additional
24 notice requirements in for matrix flow and nonmatrix
25 flow or whatever we can't define. Then the recourse

1 comes down to after-the-fact observations -- protesting
2 the well application, which you may or may not get
3 notice, or after the fact making an observation that you
4 think your resource is being taken. But there is still
5 recourse. It's just -- whether it's sufficient.

6 MR. BRANCARD: So to throw out something
7 that is totally different -- I have no idea how special
8 pool orders work. Okay? However, if you go to the
9 normal provision about oil-well acreage and
10 well-location requirements, each of the sentences in
11 here includes the phrase "unless otherwise provided in
12 the special pool orders." So I don't know if you have
13 pool orders for these conventional pools. It could
14 provide a limitation -- it could provide a different
15 setback.

16 COMMISSIONER MARTIN: For existing pools?

17 COMMISSIONER BALCH: Well, if you're
18 creating a Wolfcamp pool, which I guess there is already
19 an A, B, C, right, and D in some places?

20 MR. BRANCARD: I don't know how these pools
21 intersect with these existing pool orders. That's a
22 good question.

23 CHAIRWOMAN RILEY: You either have
24 statewide spacing and setbacks, or you have special pool
25 orders, and it calls for an end order. And in that

1 case -- and that's what I was referring to. In these
2 special pool orders, they've actually said, "Okay, you
3 can go to 330 feet, but you will not oppose your
4 neighbor when they come to you for the same setback."

5 COMMISSIONER BALCH: That is gas wells,
6 which is normally 660.

7 CHAIRWOMAN RILEY: Well, no. I mean up in
8 the northwest.

9 COMMISSIONER BALCH: The Gallup.

10 CHAIRWOMAN RILEY: Uh-huh.

11 MR. BRANCARD: I mean, we do have -- I find
12 this to be the most amazing rule the Commission has ever
13 adopted, Rule 19.15.2. It says: The division or
14 commission may issue orders including division or
15 commission special pool orders when required, and the
16 order shall prevail against rules if in conflict.

17 COMMISSIONER BALCH: That's a nice bailout.
18 So if you're, after the fact, wanting to
19 develop your small tract next to the huge horizontal
20 developer --

21 COMMISSIONER MARTIN: With a vertical well.

22 COMMISSIONER BALCH: With a -- well, it
23 doesn't matter, vertical or horizontal. I guess it
24 would have to be vertical in this case.

25 -- and they've got the 100-foot offset

1 right up to the -- 100-foot to the property line, when
2 you're doing that APD, you could apply for a closer
3 offset.

4 COMMISSIONER MARTIN: A what?

5 COMMISSIONER BALCH: Could you apply for a
6 closer offset?

7 CHAIRWOMAN RILEY: Closer than what?

8 COMMISSIONER BALCH: Closer than 330.

9 Because you would be stuck with the 330 rule while your
10 neighboring horizontal is at 100-foot first take point.
11 So in that case, that operator coming in with that well
12 permit, can they request a smaller offset?

13 CHAIRWOMAN RILEY: Yes.

14 COMMISSIONER BALCH: Does it take a special
15 hearing?

16 CHAIRWOMAN RILEY: No. It's
17 administrative.

18 COMMISSIONER BALCH: So it would be
19 administrative.

20 MR. BRANCARD: It would be an unorthodox
21 well.

22 CHAIRWOMAN RILEY: It would be an
23 unorthodox well.

24 COMMISSIONER BALCH: So that operator does
25 have the recourse to ask for a smaller offset?

1 CHAIRWOMAN RILEY: Uh-huh. But they're
2 supposed to notice their offset who can object if they
3 want to. So --

4 COMMISSIONER BALCH: Sure. Well, that's
5 fair.

6 But if the horizontal operators that
7 presented testimony here on this rulemaking are
8 believing what they say, they would -- they would say
9 100 feet is just fine; you're not going to get within --
10 you're not going to get within our area because of the
11 way this is developed. It does become more of a gray
12 area when we've had unconventional horizontal wells.
13 But maybe we just have to let those cases play through
14 that way --

15 CHAIRWOMAN RILEY: Uh-huh.

16 COMMISSIONER BALCH: -- let it settle out
17 that way. As long as there is recourse, I think we can
18 protect correlative rights.

19 CHAIRWOMAN RILEY: You bring up a really
20 good point? There is nothing stopping them going --
21 yes, they might have to go through an administrative
22 process to get there. And part of their justification
23 in their application can be, "I have a horizontal well
24 that's up to 100 feet of my spacing unit."

25 COMMISSIONER BALCH: So that would be there

1 prior to -- that would be their new development
2 protection. Now, the protection on their existing well,
3 if somebody -- this is the other case that the Jalapeno
4 witness said, "You could put a horizontal oil well
5 anywhere in New Mexico if you wanted to, and it would
6 reach anywhere in the state." It might be hard to reach
7 across -- but I think the idea that you could use this
8 as some kind of a tool, I suppose, a very expensive
9 tool, to access people's minerals would be -- seems a
10 little bit extraordinary to me. I was going somewhere
11 there, and I lost track of it.

12 CHAIRWOMAN RILEY: Were you trying to bring
13 up the point that for existing vertical development --

14 COMMISSIONER BALCH: Yes.

15 CHAIRWOMAN RILEY: -- you have a horizontal
16 well that comes up to within 100 feet of that spacing
17 unit?

18 COMMISSIONER BALCH: And then suddenly
19 they're making the argument that they're taking their
20 resource because they're closer to the unit boundary
21 than they are. Then they have the recourse of making
22 that claim, that they have experienced a loss, and they
23 would have to demonstrate evidence to prove that.

24 CHAIRWOMAN RILEY: Right. But that's back
25 to the point that the 100-foot is an appropriate -- or

1 are you talking about a conventional well or --

2 COMMISSIONER BALCH: I think we're talking
3 conventionals. Somebody would be less likely to make
4 the argument on an unconventional I think, mainly
5 because it's going to be very hard to produce that
6 resource vertically anyway. It's not impossible. You
7 might be able to do it. You might figure something out.
8 Maybe you have an existing well that goes through all of
9 the Wolfcamp, and you just go back in and put in 100
10 frac stages and a whole bunch of proppant on a
11 horizontal well. Maybe you would do that. I don't
12 know. It's theoretically possible.

13 But I think the main thing is you have a
14 protection for your new development because you can
15 apply for the same offset as an offset operator. And
16 then the other protection is if they are taking your oil
17 from being too close, then you have the recourse of
18 litigating it.

19 COMMISSIONER MARTIN: But it's incumbent
20 upon the offset operator to ascertain that or find out
21 about it on its own without notice.

22 COMMISSIONER BALCH: Well, I think in that
23 case -- say you have an existing well in the Blinbry,
24 and somebody drilled an offset Blinbry-Tubb-Drinkard
25 vertical -- you know, large vertical extent horizontal

1 well and you see an impact on your production, then you
2 would have a valid claim that they've taken some of your
3 production.

4 CHAIRWOMAN RILEY: Or -- or you gain.

5 COMMISSIONER BALCH: They might not have --

6 CHAIRWOMAN RILEY: Yeah. But that happens,
7 too.

8 COMMISSIONER BALCH: Yeah. And I think as
9 long as you have recourse, I don't think it matters so
10 much.

11 I would have liked to see a little more
12 testimony on the impact of 100-foot first and last take
13 points on conventional horizontals. I think I could see
14 a way to leaving it in the way it's written,
15 essentially. There is enough protections still
16 remaining on the correlative rights.

17 COMMISSIONER MARTIN: I'm good.

18 CHAIRWOMAN RILEY: I'm good, too.

19 MR. BRANCARD: So we circled all the way
20 back to the beginning.

21 CHAIRWOMAN RILEY: We did.

22 COMMISSIONER BALCH: I just said I wanted
23 to have a discussion about it.

24 CHAIRWOMAN RILEY: We did. We had a robust
25 discussion. That is good.

1 MR. BRANCARD: So we're okay with -- now,
2 remember, we're not going to adopt the rule at this
3 point.

4 CHAIRWOMAN RILEY: What do we do next?

5 MR. BRANCARD: What we do next is, based on
6 the rule that you're preliminarily okay with right now,
7 you direct someone -- hopefully not me, but probably
8 me -- to draft an order adopting the rule. And once you
9 adopt the order, then -- you have to do that at another
10 meeting. (A) You have to the adopt the order, but that
11 also gives you a chance, if you want it, to talk some
12 more about specific points in the rule to do that.

13 COMMISSIONER BALCH: Lawfully except to
14 talk about the order.

15 MR. BRANCARD: And then it's not final then
16 either, because once you adopt the order, everybody in
17 the world has 20 days to ask you for a rehearing.

18 COMMISSIONER MARTIN: Do we consider the
19 order at the next regular Commission hearing?

20 CHAIRWOMAN RILEY: Regular or special? On
21 the 22nd or --

22 COMMISSIONER BALCH: I mean, you could put
23 it into a special one, but you have to notice that as
24 part of that.

25 MS. DAVIDSON: Right. We have the May 22nd

1 special one.

2 MR. BRANCARD: We have 22nd and May 24th.

3 CHAIRWOMAN RILEY: That's that motion. Is
4 it too late to notice that one?

5 MS. DAVIDSON: Does it have to be noticed
6 if it's continued from today?

7 MR. BRANCARD: No. This would just be an
8 agenda. This would not be -- a hearing of record --

9 COMMISSIONER BALCH: "Final action may be
10 taken on."

11 MR. BRANCARD: Right.

12 MS. DAVIDSON: On May 22nd?

13 COMMISSIONER BALCH: Or the 24th, whichever
14 one works. Or maybe to be safe, put it on both in case
15 we're not quite ready.

16 MR. BRANCARD: Yeah. There will probably
17 be time on the 22nd.

18 CHAIRWOMAN RILEY: Yeah. It's just that
19 motion.

20 MR. BRANCARD: I think the rulemaking on
21 the 24th may take the whole day.

22 COMMISSIONER BALCH: So in the interim, if
23 you or somebody very much like you would be able to
24 possibly produce another draft of the rule --

25 MR. BRANCARD: Right.

1 COMMISSIONER BALCH: -- we can look at that
2 individually and comment on it back to you, but we can't
3 communicate with each other about changes.

4 MR. BRANCARD: Correct.

5 COMMISSIONER BALCH: That would be
6 deliberation.

7 MR. BRANCARD: Right.

8 COMMISSIONER BALCH: And that has to be
9 done in open session.

10 CHAIRWOMAN RILEY: Okay.

11 COMMISSIONER BALCH: So we can do that, and
12 that may bring up issues that we want to talk about
13 again on that May 22nd meeting.

14 COMMISSIONER MARTIN: And you or someone
15 just like you would prepare the order concurrently with
16 that? Is that the way it works?

17 MR. BRANCARD: Yes.

18 COMMISSIONER BALCH: Maybe another tweak or
19 two in there, but once -- once we're all happy with the
20 rule the way it's written and then once we're happy with
21 the order the way it's written, it becomes a lot -- it's
22 routine and timing after that.

23 MR. BRANCARD: Uh-huh.

24 COMMISSIONER BALCH: Don't necessarily have
25 to sign on the 22nd, but signing it becomes much easier

1 once we adopt it, I think.

2 MR. BRANCARD: Right. We need to get it
3 adopted to trigger the rehearing period in the statute.
4 If nobody asks for rehearing, then we have 15 days to
5 file it. After that 20-day period, if someone asks for
6 a rehearing, you have ten days to decide whether to have
7 a rehearing.

8 COMMISSIONER MARTIN: Okay.

9 MR. BRANCARD: For rulemaking, the
10 rehearing period is actually kind of useful. They
11 specifically kept it in the statute because that
12 basically allows people to come back and say, "Whoa, you
13 have a typo here or a mistake there."

14 COMMISSIONER BALCH: Your 100 turned into a
15 1,000-foot offset.

16 (Laughter.)

17 MR. BRANCARD: Yeah. "Are you sure you
18 want to say this," you know. So that's -- because
19 otherwise -- which happened to us once before, where
20 somebody asked for -- years ago, we didn't have a delay
21 in the filing, and we once filed a rule before the
22 rehearing period ended, and somebody came in with a
23 legitimate reason to rehear the rule and, "Sorry, we
24 already filed it; too late (laughter). So by statute,
25 we're not allowed to do that. They changed the statute

1 to prevent us from doing that.

2 COMMISSIONER BALCH: The "to protect you
3 from yourself" rule.

4 MR. BRANCARD: Exactly.

5 CHAIRWOMAN RILEY: So to close this, are
6 there any other matters to deliberate on?

7 COMMISSIONER BALCH: I think we can close
8 testimony, right?

9 MR. BRANCARD: Yes.

10 COMMISSIONER BALCH: We can close the
11 record.

12 CHAIRWOMAN RILEY: All right. So I
13 officially close the record.

14 And do I need to assign any of those
15 projects, or are you assuming responsibility for those?

16 MR. BRANCARD: You just assigned it right
17 now, I guess.

18 CHAIRWOMAN RILEY: Okay. Mr. Brancard,
19 would you please incorporate all the changes we've
20 discussed today into the rule and then also prepare a
21 draft of the order?

22 MR. BRANCARD: Yes.

23 COMMISSIONER BALCH: Do you want assistance
24 with the order from any of the other parties?

25 MR. BRANCARD: Yeah. I'll contact the

1 other parties.

2 CHAIRWOMAN RILEY: You delegate as
3 appropriate.

4 MR. BRANCARD: Uh-huh.

5 CHAIRWOMAN RILEY: I believe we can adjourn
6 this rulemaking hearing.

7 COMMISSIONER BALCH: So moved.

8 CHAIRWOMAN RILEY: Do I have a motion?

9 COMMISSIONER BALCH: So moved.

10 COMMISSIONER MARTIN: I second.

11 CHAIRWOMAN RILEY: All right. Meeting
12 adjourned.

13 (The proceedings conclude, 3:45 p.m.)

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

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

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

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

20 DATED THIS 13th day of May 2018.

21

22

23 MARY C. HANKINS, CCR, RPR
24 Certified Court Reporter
New Mexico CCR No. 20
Date of CCR Expiration: 12/31/2018
Paul Baca Professional Court Reporters

25