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KANSAS

By: David E. Pierce†

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I. THE OIL AND GAS LEASE

Oil and gas lease issues received considerable attention from Kansas courts during the past year. The most surprising ruling concerned the "free gas" clause.

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A. *The "Free Gas" Clause Surprise*

From a lessee's perspective, the most shocking decision during the 2010–2011 time frame is *Schell v. OXY USA, Inc.* where the court held a "free gas" clause required the lessee to provide its lessors with "usable" free gas.[1] The case was filed as a class action comprised of "[a]ll surface owners of Kansas land burdened by oil and gas leases held or operated by OXY USA, Inc., which contain a free gas clause."[2] OXY had sent letters to its free gas users alerting them that the wells supplying free gas in the Hugoton Gas Field were declining in pressure to such an extent that the available gas supply may be disrupted in the future. OXY also alerted its free gas users that some of its wells were beginning to generate high levels of hydrogen sulfide. OXY "'strongly encourage[d] [plaintiffs] to convert [their] residence[s] to an alternative energy source as soon as possible.'"[3]

The *Schell* case demonstrates the sort of conflicts that can arise in a gas field in decline where prudent operational choices to maximize continuing production from the field may, of necessity, conflict with the ability to continue providing free gas to a surface owner. In *Schell*, however, the court addressed the intermediate question of which party–surface owner or lessee–must incur additional costs to provide free gas when it is still available, albeit at a pressure or quality that will require the expenditure of money to make it "usable" as it is produced at the wellhead.[4] This intermediate question, OXY contended, was clearly addressed by the terms of its oil and gas leases.

One of the free gas clauses interpreted by the court provides:

> [L]essor to have gas free of charge from any gas well on the leased premises for stoves and inside lights in the principal dwelling house on said land by making his own connections with the well, the use of such gas to be at the lessor's sole risk and expense.[5]

OXY contended that the express terms of this clause imposed the "sole risk and expense" associated with taking free gas on the lessor, not the lessee.[6]

1. Schell v. OXY USA, Inc., No. 07-1258-JTM, 2011 WL 4553091 (D. Kan. Sept. 29, 2011). Disclosure Note: The author served as an expert witness for OXY USA Inc. at the class certification stage of this case.

2. *Id.* at *3 (quoting Schell v. OXY USA, Inc., No. 07-1258-JTM, 2009 WL 2355792, at *6 (D. Kan. July 29, 2009)). In Kansas the right to free gas is a covenant that runs with the surface estate. Jackson v. Farmer, 594 P.2d 177, 182 (Kan. 1979).

3. *Id.* at *2 (quoting Dkt. No. 87, Exs. G & H).

4. *Id.* at *5 (noting that "OXY does not dispute that it must continue to provide plaintiffs free gas for the duration of the leases. The dispute in this case is whether, based on the language of the leases, OXY must bear the cost of making the gas useable to the surface owners at the well or whether plaintiffs must bear that cost.").

5. *Id.* at *8 (quoting Dkt. No. 92, Exs. A–C).

6. *Id.* at *5 ("Defendants contend the plaintiffs are entitled only to free gas as it emerges from the well, whatever its condition.").

In all cases, the gas was taken at or near the wellhead in the field where the gas was extracted. One of the "risks" associated with gas in the field is geology–the gas may have a low heating value, may contain liquid hydrocarbon components that make it more difficult to use, may contain hydrogen sulfide, or may be at such a pressure that compression is required, which can interfere with taking free gas from the well. The court acknowledged these realities but nevertheless held that the express terms of the lease, which stated that gas can be used for "stoves and inside lights in the principal dwelling," obligated the lessee to deliver gas to the lessor that is "usable."[7] In the court's view, "usable" meant usable for residential purposes.[8]

The court's analysis turned what has been consistently held to be a "quantity" restriction into a "quality" obligation. The "stoves and inside lights in the principal dwelling" language is a limitation on what the gas can be used for and therefore a quantity limitation. The "quality" issue was clearly addressed by the simple fact that the gas was being delivered to the surface owner at or very near the wellhead in its as-produced condition. The court misapplied the "sole risk and expense" language by holding it only applied *after* the gas was put into a usable condition.[9] Because the surface owner is taking gas as it emerges from the wellhead, the major purpose of the "sole risk and expense" language is to ensure the lessee is not responsible for the non-residential quality of the gas. Equally important, if the choice becomes one of continuing the economic production of gas from the well over being able to provide free gas, that too is one of the fundamental "risks" associated with the free gas clause. The court took a fundamentally different view: "Interpreting the lease to require OXY only to provide gas, whether it is useable or not, would frustrate the entire purpose of the free gas clause."[10] The court, in order to provide the surface owner with an unimpeded supply of residential quality gas, chose instead to "frustrate the entire purpose" of the oil and gas lease.

The court's holding functionally makes every Kansas gas producer providing free gas a public utility with a continuing duty to serve its "customers" in the field with the same quality gas one would expect within a city from their local gas distribution utility. The court ignores the context of the oil and gas lease contract and elevates the obligation to provide free gas to a new tail-wags-dog status. The court places providing free gas to a severed surface owner in a superior position over that of the lessor mineral owners who–if put to the choice–would select maximizing production over incidental free gas

7. *Id.* at *7–8 (finding "the leases here providing for 'free gas' are ambiguous as to what quality of gas plaintiffs are entitled to receive" and that such ambiguities "should be construed in favor of the lessor and against the lessee.").

8. *Id.* at *8.

9. *Id.*

10. *Id.*

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rights. The court avoids this choice by imposing the obligation on the lessee to provide "usable" gas at lessee expense. Whether the lessee deducts this post-production expense before calculating royalty, the obligation will most likely have a profound effect on the lessor mineral owners. For example, a prudent lessee, in determining whether to institute a program that will enhance production from a well, will certainly consider what it will cost to maintain the surface owner's newfound free gas rights. These additional costs may cause the prudent lessee to rightfully forego production-enhancing improvements that they would otherwise pursue.

In its attempt for equity by providing surface owners with a continuing supply of free gas, the court created an inherent conflict between the free gas clause and the underlying purpose of the oil and gas lease, which is to maximize production of oil and gas for the lessor and lessee. Prior to the *Schell* decision, a reasonable interpretation of a free gas clause would be that a surface owner was only entitled to gas as it emerged from the well as an incidental benefit of the oil and gas development process. The free gas user assumed the risk associated with the condition of the gas and the risk that it may not be practical at some future date to provide free gas while continuing to extract the remaining gas resource from a dying reservoir.

B. *Is the Kansas "Conservation Fee" a "Production" Cost? Yes.*

Kansas, like many states, imposes a tax on the production of oil and gas to help fund the state's oil and gas conservation agency. It is called a "conservation fee" and is levied on the "operator" of the well,[11] which is defined as "a person who is responsible for the physical operation and control of a well . . . ."[12] The Kansas Supreme Court, in *Hockett v. Trees Oil Co.*, held that because Hockett, as the lessor/royalty owner, could not be an "operator," the burden of the tax fell solely on the lessee/operator.[13] The Court rejected the lessee's argument that the oil and gas lease contemplated the lessor would share in a proportionate part of the tax, noting that the tax was not enacted until forty-five years after the lease was signed.[14] Responding to the lessee's argument that the tax was a deductible post-production cost, the Court held "the conservation fee is more akin to a production cost."[15] Although the production purchaser is used to collect and remit the tax to the state, the amount of the tax will have to be added back into the net proceeds the producer receives to calculate the proper royalty.

11. Act of Apr. 13, 2011, ch. 53, 2011 Kan. Sess. Laws, sec. 20 (amending KAN. STAT. ANN. § 55-176).
12. KAN. STAT. ANN. § 55-150(e) (2005).
13. Hockett v. Trees Oil Co., 251 P.3d 65, 70 (Kan. 2011).
14. *Id.* at 71–72.
15. *Id.* at 72.

C. *Must the Lessee Add Back Severance Taxes Attributable to Helium? No.*

The lessor in *Hockett v. Trees Oil Co.* also argued that the severance taxes paid by the lessee were improper because an unspecified part of the tax paid was attributed to the helium content of the gas stream—and helium is not subject to the severance tax.[16] The Court noted that the lessor "does not challenge that the severance tax applies to royalty owners."[17] This is understandable since the statutes impose the severance tax on all owners,[18] "including a royalty owner."[19] However, the tax is based on the value of the gas at the wellhead, not at a downstream location following extraction and processing of the helium. The Court observed that the Kansas Department of Revenue, in a 1998 Revenue Ruling, held that "since helium is a component of natural gas and is measured as part of the full volume of gas as it is severed, helium contributes to the gross value of gas at the wellhead, making helium subject to the severance tax."[20] Under these circumstances, the lessor's petition failed to state a viable claim against its lessee.[21]

D. *The Kansas "Paying Quantities" Analysis*

Prior Kansas cases have suggested that when determining whether a lease continues to produce in "paying quantities," certain "costs" can be attributed to the lessee's operations even though they were not in fact paid or contracted for as a legal obligation. The foundational case on the subject is *Reese Enterprises, Inc. v. Lawson*, where the Court noted the practical problem of dealing with a lessee who "came to the trial prepared to testify about everything except operating expenses."[22] To counter this tactic, or reality of how the lessee conducts its business, the Court armed the lessor with the ability to come into court and demonstrate what the lessee *should have spent* to operate the lease as a prudent operator by ruling that:

> [T]he lessee is held accountable for the production of the lease as a prudent operator working for the common advantage of both the lessor and the lessee. All direct costs encountered, whether paid or

16. *Id.* at 68 ("[H]e believes there is no statutorily imposed severance tax on the helium component of the extracted gaseous product.").

17. *Id.*

18. KAN. STAT. ANN. § 79-4217 (Supp. 2009) (imposing an 8% excise tax on the severance and production of oil and gas on "all persons within the term 'producer' . . . in proportion to their respective beneficial interest in the . . . oil or gas severed.").

19. *Id.* § 79-4216(i) (defining "producer" under the tax).

20. *Hockett*, 251 P.3d at 69.

21. Disclosure Note: Although not involved in the *Hockett* case, the author is involved in other litigation, as a consultant or designated expert, retained by producers defending against similar helium severance tax and other royalty claims.

22. Reese Enters., Inc. v. Lawson, 553 P.2d 885, 898 (Kan. 1976).

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accrued, in operating the lease as a prudent operator are taken into account.[23]

The Court in *Reese* considered many items of expenses the lessee and the trial court failed to consider. For example, a mileage charge for driving to and from the lease and the cost of complying with statutory obligations to plug at least fifteen abandoned wellbores on the leased land plus the associated obligation to level and restore the well sites following abandonment.[24] Once the Court attributed these expenses to the prudent operation of the lease, total expenses exceeded the revenue during the defined accounting period so the lease had automatically terminated for failure to produce in paying quantities.[25]

The court in *Wrestler v. Colt* faced similar issues where the lessee's evasive statement of costs resulted in an $11 profit over its declared operating expenses.[26] Holding the lease had terminated, the court observed the lessee's calculations failed to assign amounts to "taxes, license and permit fees, maintenance and repair of roads, entrances and gates, and other expenses described by Colt as 'little items.'"[27] The court also found that no costs had been allocated to plugging any of the forty-nine non-producing wells located on the lease.[28]

The most recent case addressing these paying quantity issues is *Claiborne v. Galemore*.[29] Like the *Reese* and *Wrestler* cases, the lessor sought to present evidence as to what it would have actually cost a prudent operator to operate the lease at issue. The lessee's calculations indicated the lease had a $17,046.05 profit.[30] Once the lessor, through expert testimony, attributed travel, labor, and plugging expenses to the operation, it added an additional $27,300 in expenses to the operation resulting in a $10,253.95 loss and a terminated lease.[31]

The Kansas approach to paying quantities behooves lessees to maintain good records and take the opportunity to allocate costs, as would a prudent operator. For example, regarding plugging costs and other expenditures that arguably should be amortized, a court would be more likely to accept the lessee's accounting if it is maintained as

23. *Id.*
24. *Id.* at 899.
25. *Id.*
26. Wrestler v. Colt, 644 P.2d 1342, 1346 (Kan. Ct. App. 1982).
27. *Id.*
28. *Id.* at 1347.
29. Claiborne v. Galemore, No. 103,163, 2010 WL 5490736, at *1 (Kan. Ct. App. Dec. 23, 2010).
30. *Id.* at *3.
31. *Id.* at *2 (noting that Noland, the lessee's expert, testified that "a prudent operator would have devoted a minimum of 2 hours per day, 7 days a week, to operate the lease, and this did not include the time necessary to travel to and from the lease."). The court relied upon this statement to reject the lessee's estimate of 3.5 hours per week to operate the lease and accepted Noland's testimony that a prudent operator would spend 14 hours per week on the lease. The court also added in travel time and travel expenses. *Id.* at *3.

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part of its ordinary business practices. Certainly, if a prudent operator invests to improve a road, gate, or other facilities, and the improvement is reasonably believed to last for longer than one year, for example three years, a current allocation of one-third of the expense—instead of the entire expense—would most likely be accepted by a court. Similarly, if there are a large number of unplugged wells on the lease for which the lessee is the responsible party, negotiating a plugging schedule with the Kansas Corporation Commission can allow the lessee to spread plugging costs over a longer period of time; an immediate and "current" obligation might be made into a proportionate obligation over several years. These are the sorts of actions a prudent operator, nursing along a marginal lease, would take. However, for lessees who decide to play hide-and-seek with their operating expenses, they run the real risk, as in *Claiborne*, that even greater expenses could be attributed to them by an expert witness testifying as to what a prudent operator would have done.

E. *Court Discusses Common-Lessee Issue Regarding Drainage Claim*

The "common-lessee" issue arises when A enters into an oil and gas lease with X and X also enters into a lease with B who owns adjoining land. Under the rule of capture, development of the A/X leased land may indirectly compete with development of the B/X leased land. In this situation, X is a "common-lessee" of A and B.[32] Some courts have imposed greater duties on X in such cases to provide greater protection to A, and to B.[33] The Texas Supreme Court has rejected imposing any greater duty on X.[34] In Texas, if A complains about drainage to the B/X tract, X's duty is to do the things a prudent operator would do if they owned only the A/X lease.[35]

In *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co.*, A (Kansas City Royalty) under the A/X lease argued that the burden of proof to establish drainage and the burden of proof that a prudent operator would protect against drainage should both shift to X (Thoroughbred) because X owned the lease (B/X) on the allegedly draining

32. This "common-lessee" relationship does not arise out of any sort of sinister plan to gang-up on A or B. Instead, X legitimately wants to control as much acreage around the areas it plans to drill so it can realize the maximum benefit from its undertaking.

33. *See* 5 Eugene Kuntz, A Treatise on the Law of Oil and Gas § 61.1, at 154–56 (1991).

34. Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 569 (Tex. 1981) (holding "Amoco's status as a common lessee does not affect its liability to the Alexanders."). After surveying the various approaches to the common-lessee issue, the court concluded its opinion stating: "In drainage cases, Texas courts place upon the lessor the burden to prove that substantial drainage has occurred and that an offset well would produce oil or gas in paying quantities." *Id.* at 572.

35. *Id.* at 570 ("Amoco owed the Alexanders the duty to do whatever a reasonably prudent operator would do if the Alexanders were its only lessor in the field.").

property.[36] The court did not address the issue directly but instead affirms the trial court's finding that A failed to establish that any drainage was occurring.[37] Indirectly, however, the court effectively held that the burden of proof to establish drainage did not shift to X. The court held the lessor must first carry the burden that drainage is in fact taking place.[38] Once that is proven, some courts have been willing to shift the burden of proof to X to prove that although drainage was taking place, a prudent operator under the facts would not take action to respond to the drainage.[39] This is a significant ruling because both sides presented expert testimony that was in direct conflict on the drainage issue.[40] The placement of the burden of proof in that situation may determine the outcome.

Although Kansas appellate courts have not addressed the common-lessee issue,[41] the Kansas Supreme Court has already aligned itself with Texas in adopting a "single-lease" analysis. Although labeled the "independent-duty principle" in Kansas,[42] it is the equivalent of the Texas single-lease analysis. Under either test, the inquiry is what a hypothetical prudent operator would do if they owned only one lease–the lease at issue (the A/X lease).[43] This makes X's ownership of the B/X lease irrelevant because X's duties to A cannot be impacted, either favorably or unfavorably, by the fact that X also has a lease with B or any other mineral owner. The truly objective nature of the prudent operator standard can operate once the single-lease or independent-duty analysis is applied to an implied covenant issue.

36. Thoroughbred Assocs. v. Kan. City Royalty Co., 248 P.3d 758, 770 (Kan. Ct. App. 2011), *pet. for rev. filed* Mar. 11, 2011.

37. *Id.* at 771 ("Here, Kansas City failed in its proof of the necessary predicate–that drainage was occurring at all.").

38. *Id.* at 770–71.

39. *See* Seacat v. Mesa Petroleum Co., 561 F. Supp. 98, 104 (D. Kan. 1983) (holding that in a common-lessee situation, once the lessor establishes that substantial drainage is taking place, the burden of proof will shift to the lessee to show that it acted as a prudent operator would have under the circumstances).

40. *Thoroughbred*, 248 P.3d at 771 ("The trial court heard an array of experts and received a squall, if not a blizzard, of documents on the drainage issue. The testimony and the paper from each side presented starkly contrasting pictures, one depicting drainage and the other not.").

41. However, in *Culbertson v. Iola Portland Cement Co.*, 125 P. 81, 83 (Kan. 1912), the court seemed to adopt a strict liability approach to drainage by a common lessee. Subsequent cases have applied, without comment, a traditional prudent operator analysis to resolve drainage issues. *See* 1 DAVID E. PIERCE, KANSAS OIL AND GAS HANDBOOK § 10.90, at 10-21 to 10-22 (1986).

42. Smith v. Amoco Prod. Co., 31 P.3d 255, 272 (Kan. 2001).

43. *See* David E. Pierce, *Exploring the Jurisprudential Underpinnings of the Implied Covenant to Market*, 48 ROCKY MTN. MIN. L. INST. 10-1, 10-13 to 10-14 (2002).

II. Basic Property Issues: Notice to Mineral Cotenants When Partition is Sought

The Kansas Supreme Court, in *McGinty v. Hoosier*, refused to revisit an otherwise void judgment by ignoring basic cotenancy law and adopting a rule that a cotenant can obtain partition by sale of its individual undivided interest without attempting to join all the cotenants.[44] The Court noted: "The owners of the remaining 50% of the mineral interest were not personally served in the action, were apparently not served by publication notice, and did not participate in the action partitioning the subject tract."[45] But the Court upheld the judgment in partition because the party seeking partition did not purport to sell the 50% interest of the non-joined mineral interest owners.[46] The Court applied an indispensable party analysis and found that the other cotenants need not have been joined because the Court could not perceive how their property interests would be "adversely affected by the judgment partitioning the named parties' property interests."[47]

The Court's holding failed to recognize many important rights the non-joined parties gave up by not having an opportunity to participate in the partition action. First, they lost an opportunity to argue that partition of any sort should not be granted because it would be, under the facts, oppressive.[48] Second, they were denied their right to argue that partition in kind should be pursued instead of partition by sale.[49] Third, their rights to acquire the property at its appraised value or to bid and acquire the entire property at the partition sale were taken away.[50] Fourth, had the entire mineral interest been sold as a unit to one bidder, it may have been bought at a higher price. At the most fundamental level, the Court failed to recognize that all cotenants had valuable rights in all the property–as cotenants.

III. Statutory Issues

A. *Statutes Regarding Timely Payment of Production Proceeds*

In 1991, the Kansas Legislature passed statutes to encourage the timely distribution of production proceeds by providing for statutory interest and a means by which interest can be collected, including a provision for the discretionary award of attorney fees to the prevailing party.[51] The statutes are odd in that they do not purport to impose liability for a failure to timely distribute production proceeds to the

44. *See* McGinty v. Hoosier, 239 P.3d 843 (Kan. 2010).
45. *Id.* at 847.
46. *Id.* at 852.
47. *Id.*
48. *See* Kan. Stat. Ann. § 60-1003(d) (2005).
49. *See id.* § 60-1003(c).
50. *See id.* § 60-1003(c)(4).
51. Kan. Stat. Ann. §§ 55-1614 to 55-1619 (2005).

owners. Instead, they impose liability for a failure to pay interest associated with a failure to timely distribute production proceeds. The distinction is important because the Court in *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co.* imposed $97,878 in attorney fees relying upon K.S.A. § 55-1617, which allows a court to grant the "prevailing party" attorney fees "in a proceeding brought pursuant to this act."[52]

The opinion seems to indicate that fees were recoverable because Thoroughbred refused to distribute production proceeds attributable to Kansas City Royalty; the production proceeds payable were dependent, in part, on how the court ruled on various lease interpretation issues. Nowhere, however, in the "act" to which § 55-1617 speaks is there any liability imposed on a lessee or other entity for a failure to timely distribute production proceeds. The only way liability can accrue is for a failure to pay "interest on any payment."[53] Logically, this would suggest that there must be some demand for payment of a stated sum of money as "interest," followed by a refusal to pay, before § 55-1617 is triggered. This would also explain why the Kansas statutes do not provide for any excuse for legitimate title disputes. Presumably, the dispute must be resolved followed by a demand for interest in the event the party seeking interest prevails on the underlying title dispute.

These statutes have only been mentioned tangentially by the court in *Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc.*, where the overriding royalty owner argued it would be entitled to attorney fees if it prevailed on its underlying claim that its overriding royalty continued in effect.[54] In the Kansas Supreme Court's opinion, it noted that the proper statutory basis for interest was K.S.A. § 55-1614 *et seq.*, but then, without comment, stated: "The trial court's ruling that attorney fees should not be allowed is affirmed."[55] The Court may have been concluding that until the legitimate dispute was resolved regarding the continued validity of the overriding royalty, no production revenues could be paid, and therefore no interest would be due until the Court entered its order.

The court in the *Thoroughbred* case assumed a failure to pay production proceeds gives rise to potential liability for attorney fees if the litigant failed to prevail on its underlying claim. The court held, "Under K.S.A. 55-1617, a trial court, acting in its 'discretion,' may award reasonable attorney fees to the prevailing party in a payment

52. Thoroughbred Assocs. v. Kan. City Royalty Co., 248 P.3d 758, 773 (Kan. Ct. App. 2011), *pet. for rev. filed* Mar. 11, 2011; *see also* § 55-1617.

53. *Id.* § 55-1615.

54. Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc., 969 P.2d 906, 913 (Kan. Ct. App. 1998), *rev'd*, 1 P.3d 909 (Kan. 2000) (reversing in regard to the continuing burden created by overriding royalty).

55. Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc., 1 P.3d 909, 921 (Kan. 2000).

dispute."[56] This conclusion does not appear to be supported by the express terms of the statute. Liability for attorney fees arises out of a failure to pay "interest" on an amount due, and a failure to pay assumes a prior demand for interest that is rejected or disregarded.

B. *Rights in Gas Migrating Beyond Boundaries of Gas Storage Facility*

Through the years, Kansas has had many cases addressing rights in gas that has been captured, transported from the field where produced, injected into an underground storage facility, and migrated beyond the boundaries of the facility into nearby lands.[57] The problem may go unnoticed until someone outside the storage facility drills a productive gas well on their land. Suddenly the focus becomes whether the well, although beyond the certificated boundaries of the storage facility, is nevertheless producing gas that has been injected into the storage facility. The Kansas common law solution to this problem was simple: the landowner obtained title to any gas produced from a well properly bottomed on its land, including any migrating storage gas.[58] This common law solution was changed by statute in 1993 when the Kansas Legislature passed a statute stating that gas injected into an underground storage facility is personal property. This personal property belongs to the owner of the injected gas while within the storage facility boundaries.[59] But if the gas migrates outside the storage facility boundaries, the ownership becomes qualified: to retain ownership, the injector must prove that, by a preponderance of the evidence, the gas being produced by the questioned well is storage gas.[60]

Although the statutory response to the migrating gas problem was drafted and sponsored by gas storage operators, the jurisprudence to date has not been kind to those operators.[61] After years of unsuccessful attempts to use the stored-gas statutes to protect its Cunningham Storage Field from producing gas wells it suspected were impacting its gas storage operations, Northern Natural Gas Company resorted to condemnation under the Natural Gas Act of 1938 ("NGA"). The

56. *Thoroughbred Assocs.*, 248 P.3d at 773.

57. *See* Jacob L. Porter, Note, *Underground Fences and Storage Gas Migration: K.S.A. Section 55-1210 and Legislating Property Rights to Injected Natural Gas*, 50 WASHBURN L. J. 177 (2010).

58. *See* Anderson v. Beech Aircraft Corp., 699 P.2d 1023, 1031 (Kan. 1985), *superseded by statute*, Act of Apr. 5, 1993, ch. 102, 1993 Kan. Sess. Laws 294, *as recognized in* N. Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 217 P.3d 966, 974-76 (Kan. 2009) (per curiam). The *Anderson* Court noted that Texas follows a different rule that recognizes the gas storage facility owner's continuing rights in the migrating gas as personal property. *Id.* at 1030-31 (citing Lone Star Gas Co. v. Murchison, 353 S.W.2d 870, 879 (Tex. 1962)).

59. KAN. STAT. ANN. § 55-1210 (2005).

60. *Id.* § 55-1210(c) (2005).

61. Porter, *supra* note 57, at 178, 185-89.

Federal Energy Regulatory Commission ("FERC") granted Northern certificates of public convenience and necessity to develop and operate the Cunningham underground gas storage facility. The FERC's certificating authority comes from the NGA.

In *Northern Natural Gas Co. v. Approximately 9117.53 Acres in Pratt, Kingman, and Reno Counties, Kansas*, Northern sought an order confirming that it had complied with all conditions established by the FERC-issued certificate to proceed with condemnation.[62] The major dispute was whether Northern was required by the NGA to engage in "good faith negotiations" as a condition to proceeding with condemnation.[63] The court noted a split in authority on the issue but chose to follow what it characterized as the majority rule: that the NGA required Northern to make an offer of compensation without any additional requirement that it engage in negotiations regarding the offer.[64]

The court in *Northern Natural Gas Co. v. L.D. Drilling, Inc.* had previously granted an injunction ordering gas well operators within Northern's proposed expansion area to cease producing their wells pending completion of condemnation proceedings.[65] Northern sought the injunction, asserting that the continued operation of wells within the proposed condemnation area constituted a nuisance by adversely impacting the integrity of the Cunningham facility. Northern argued that continuing to produce water and gas from the wells would aggravate migration of storage gas beyond an underground fault structure that had previously served to contain the gas within the certificated facilities. The court found Northern would likely prevail on the merits of its nuisance claim and that an injunction was necessary to avoid irreparable harm to Northern's gas storage operations at the Cunningham facility.

IV. Conclusion

High oil prices bring new development, which triggers new "oil and gas law" issues to resolve. With the advent of horizontal drilling in the Mississippi Lime Formation in Kansas[66] and the payment of large bonuses previously unheard of in the state, everyone will be looking for "opportunities." In the oil and gas law context, "opportunity" means finding a potential legal problem others have overlooked. Perhaps that lease entered into in 1945 really has not been producing in paying

62. N. Natural Gas Co. v. Approx. 9117.53 Acres, 781 F. Supp. 2d 1155, 1156-57 (D. Kan. 2011).

63. *Id.* at 1160.

64. *Id.* at 1160–62.

65. N. Natural Gas Co. v. L.D. Drilling, Inc., 759 F. Supp. 2d 1282, 1283–84 (D. Kan. 2010).

66. Rod Walton, *River of Opportunity*, TULSA WORLD, Sept. 24, 2011, at E1, *available at* http://www.tulsaworld.com/business/article.aspx?subjectid=49&articleid=20110924_49_e1_cutlin919814.

quantities throughout the past sixty years. Oil and gas law develops most rapidly as the industry undergoes its inevitable boom-bust cycles. When the boom is on, no potential fly-in-the-ointment goes unnoticed. Therefore, we can anticipate another collection of interesting cases when we meet again next year.